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National Corruption Report 2007
April 2006 – April 2007

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List of Abbreviations

AEP – the Permanent Electoral Authority [in Romanian: *Autoritatea Electorală Permanentă*]

AML – Anti-Money Laundering

ANFP – the National Agency of Civil Servants [in Romanian: *Agenţia Naţională a Funcţionarilor Publici*]

ANI – the National Integrity Agency [in Romanian: *Agenţia Naţională de Integritate*]

ANRMAP – the National Authority for Regulating and Monitoring Public Procurement [in Romanian: *Autoritatea Naţională pentru Reglementarea şi Monitorizarea Achiziţiilor Publice*]

CNSC – the National Council for the Resolution of Contestations [in Romanian: *Consiliul Naţional de Soluţionare a Contestaţiilor*]

CSM – the Superior Council of the Magistracy [in Romanian: *Consiliul Superior al Magistraturii*]

DGA – The General Anticorruption Department [in Romanian: *Direcţia Generală Anticorupţie*]

DGFP – the General Direction of Public Finance [in Romanian: *Direcţia Generală a Finanţelor Publice*]

DNA – the National Anticorruption Department [in Romanian: *Dirercţia Naţională Anticorupţie*]

ECHR – European Court of Human Rights

GRECO – Group of States against Corruption

ONPCSB – the National Office for Preventing and Combating Money Laundering [in Romanian: *Oficiul Naţional pentru Prevenirea şi Combaterea Spălării Banilor*]

UCVAP – the Unit for Coordinating and Verifying Public Procurement [in Romanian: *Unitatea pentru Coordonarea şi Verificarea Achiziţiilor Publice*]

OUG – Government Emergency Ordinance [in Romanian: *Ordonanţă de Urgenţă*]

Introduction

This report will not provide an exhaustive account of how corruption or anti-corruption activities have developed over the period April 2006 – April 2007. This will be more of a critical exposition of positive and negative issues and will provide starting points and potential solutions to amend a number of public policies that have had weak outputs.

The first section – **Legislative Developments** – dwells on a number of modifications in the country's legislative framework expected to have a major impact on the mechanisms of sanctioning, combating and preventing corruption.

We begin by analysing at length the legislative developments relevant for sanctioning corruption, which have certainly been the most numerous and controversial issues over the past year.

Among the modifications brought by Law 278/2006 to the Penal Code currently in force, we note the introduction of *the penal responsibility of legal persons*, *the extended definition of victims in cases of abuse in service by limitation of rights* and *the criminalization of conflicts of interest*. On this last point, TI-Romania draws attention to the almost insurmountable difficulties of producing evidence for a conflict of interest offence, which will render the new penal legislation virtually inapplicable. At the same time, we note a number of serious inconsistencies in the relevant administrative law (Law no. 161/2003).

Also on the subject of the legal provisions for sanctioning corruption, the report takes up the recent modification of Law no. 78/2000, through which granting non-performing credit by lending institutions is de-criminalized as a corruption offence. We believe that the former legal situation, which in fact equalled a bank's commercial risk with a criminal risk, represented an instance of over-regulation, which has been remedied by the recent legal developments.

The past year saw the modification not only of the Penal Code, but also of the Code of Penal Procedures, in regard to which TI-Romania expresses its grave concern. *The possibilities offered to prosecutors to intercept correspondence and tap telephones* for 48 hours without an order from a judge infringe on the right to privacy and the right to defence, thus presenting opportunities for serious human rights violations.

Insofar as legislation for combating and preventing corruption is concerned, the report discusses legislative developments in the field of *pubic administration and civil service reform*. First, we note the introduction of a new legal institution – *the ethics councillor* – which, unfortunately, lacks autonomy and effectiveness, principally due to the position's appointment procedures and its lack of access to mechanisms for remedying violations of ethical behaviour. Under the same heading, the report discusses the *new law on the statute of parliamentary civil servants,* noting with disappointment that, while it carefully and closely emulates the legal provisions applicable to regular civil servants, it systematically avoids instituting real guarantees for the protection and independence of the employees subject to its regime.

Finally, TI-Romania notes with satisfaction the recent amendments brought to the law on *free access to information of public interest*, by which the sphere of its application has been enlarged to cover the activity of national companies functioning under state authority.

The second section of this report – **Institutional Developments** – looks at the institutions which play key roles in preventing, combating, and sanctioning corruption.

In the area of sanctioning corruption, we focus on reviewing the activity of the *National Anticorruption Department (DNA)* and the *General Anticorruption Direction (DGA)* of the Ministry of Administration and Internal Affairs. Although, over the past year, the Romanian press has abounded with accounts of high-level corruption investigations undertaken by the DNA, TI-

Romania stresses once again the importance of obtaining concrete results and notes, in this regard, that high-level corruption trials conclude much too often with suspended sentences. The report also notes the severe undermining of the DGA's authority with the change of its management on 6 March 2007, following an incorrectly and abusively executed performance review by the Ministry's internal control body. In this way, officials in the Ministry acted on conflicts of interest through intermediaries, thus creating a dangerous precedent by which *those who are investigated may exercise control over the investigators*.

Moving on to institutions involved in combating and preventing corruption, the report notes the significant developments within the national Financial Intelligence Unit (i.e.: the *National Office for Preventing and Combating Money Laundering*[1]), the *Chamber of Accounts* and the *institutions of the public procurement system*.

The *fight against money laundering* still suffers from deficiencies in implementing the relevant legislation, the control activities and especially identifying and reporting suspicious transactions. However, recent legislative developments brought significant improvements by obliging reporting entities to develop internal procedures for combating money laundering and terrorism financing. Also, economic agents previously not subject to monitoring by regulatory bodies must now report to ONPCSB. On a less optimistic note, TI-Romania stresses the importance of intensifying efforts to align domestic legislation with the European Union's Third Money Laundering Directive[2], an obligation incurred by Romania as a member state in the European Union.

Regarding the *Court of Accounts*, we note the late alignment of secondary legislation (i.e. OUG no. 43/2006) to the modifications brought by the 2003 Constitution. The new legislation confirms the Court's statute as a supreme audit institution and removes its jurisdictional powers. It also removes the immunity of the Court's members and allows more room for the Court Plenum to manoeuvre, allowing it to decide on the structures, activity and selection of the institution's departments.

The revision of legal provisions concerning *public procurement* gave rise to an overhauling reform of the institutional infrastructure engaged in coordinating, controlling and monitoring public contracts. The changes are, for the most part, beneficial. With the establishment, in 2005, of the National Authority for Regulating and Monitoring Public Procurement (ANRMAP) premises were established for a clear and unitary public policy in the field, thus fulfilling an essential precondition for integrity in public procurement. The National Council for the Resolution of Contestations[3] benefits, by comparison with its predecessor, the Council of Competition, from more expertise and increased legal guarantees for avoiding conflicts of interests. Finally, the new structure within the Ministry of Finance tasked with verifying the procedural correctness of the public procurement process[4] allows for the early discovery of illegalities; however, lacking prerogatives to correct them, its role in preventing corruption in public procurement is unreasonably limited.

Also in the section dedicated to institutional developments, we analyse the state of two institutions with key roles in establishing and preserving ethical standards for the public sector – the *National Agency for Civil Servants* (ANFP) and the *Superior Council of the Magistracy* (CSM). The developments over the past year show that neither has made significant progress, so that the civil service, as well as the magistracy, continue to be particularly vulnerable in the county's integrity framework.

In connection to ANFP we wish to particularly point out the institution's incapacity to monitor comprehensively the application of civil service legislation, especially the Code of

[1] Henceforth referred to as ONPCSB.

[2] **Directive 2005/60/CE of the European Parliament and the Council** on preventing the utilization of the financial system for money laundering and the financing of terrorism.

[3] In Romanian: *Consiliul National pentru Solutionarea Contestatiilor*. Henceforth referred to as CNSC.

[4] The Unit for Coordination and Verification of Public Acquisitions. In Romanian: *Unitatea pentru Coordonarea si Verificarea Achizitiilor Publice*. Henceforth referred to as UCVAP.

Conduct for Civil Servants. This robs decision-makers of an accurate account of the ethical environment in the civil service, thus rendering an impact assessment of the relevant public policy and its subsequent correction almost impossible. More importantly, however, ANFP is powerless to impose solutions in breaches of the Code of Conduct, even though it does have significant prerogatives in investigating such instances. TI-Romania believes that this deficiency should not lead to an elimination of ANFP's power of inquiry, but should rather be addressed by strengthening its institutional capacity.

In regard to the CSM, the report distinctly shows that the institution continues to be the object of criticism in regard to its efficiency, credibility and – most importantly – internal integrity standards, from both outside and inside the judiciary. A recent TI-Romania study[5] shows that the magistrates' trust in CSM's ability to act as a guarantor of their independence has drastically decreased since 2005, by almost 17%.

The final section of this report (**Public Policy Developments**) deals with the developments in anticorruption policy over the course of the past year.

The new framework for political party and electoral campaign financing (Law no. 334/2006) represents a significant progress in the field, especially in political parties' obligation to declare their incomes and expenses, the stricter regime of donations and campaign contributions, as well as the simpler and fairer algorithm for the allocation of state subsidies to political parties.

Despite all of this, there are also important weaknesses of the new law. One such shortcoming is taking away control prerogatives from the Chamber of Accounts and granting them to the Permanent Electoral Authority (AEP). From the point of view of expertise and administrative capacity, but also for reasons of integrity, this modification of the institutional framework is not appropriate. Another important aspect is the new stipulation according to which the control authority is enabled to perform verifications not only annually, but also upon receipt of notifications from any interested persons or through its own initiative. This new, more flexible formula is certainly a gain, but the requirement to produce evidence, which conditions the notification of AEP, is liable to reduce severely the exercise of this mechanism.

Moving on, the present report analyses a series of legislative developments with a crucial impact on public integrity in local government. The first of these is *the new law on local public finances* (Law no. 273/2006), which changed the framework for distributing equalisation grants to local governments, thus ensuring an objective and uniform application of the principles governing the entire process by eliminating political interference from county councils.

Secondly, the recent modification of Law no. 215/2001 on local public administration introduces *the office of public administrator* for local councils, county councils and associations for inter-municipal development. The creation of this public position aims to enhance efficiency and professionalism in public service management, but does so without instituting guarantees against abuse of public power, lack of integrity or corruption. More specifically, the only law imposing standards of integrity and conduct for public administrators is the Code of Conduct for Contractual Personnel (Law no. 477/2004), which we believe to be insufficient.

A third crucial development for public integrity at the local level is *the penalization of political migration*, through Law no. 249/2006. Unfortunately, this law was declared unconstitutional on grounds of retroactivity. The fact that such a crucial policy initiative, which would have stimulated more responsible behaviour by the political class, was defeated by inadvertencies in the legal text is regrettable, but at the same time is symptomatic of Romania's current legislative inflation and Parliament's disregard for quality standards in legislative technique.

[5] Transparency International Romania. 2006. *Studiul privind perceptia magistratilor asupra independentei sistemului judiciar [Study on the magistrates' perception of the independence of the judiciary]*. Bucharest, available online at http://www.transparency.org.ro/files/File/Independenta%20Justitiei%202006.pdf.

Finally, *de-politicising the office of the prefect*, by way of OUG no. 179/2006 and the series of subsequent exams in the first months of 2006, represented a late, although welcome start of a much-awaited reform. However, the Executive's approach (i.e. the prefects in office at the time resigned form their respective political parties and joined the civil service as high level civil servants) severely reduced the effectiveness and credibility of this reform.

As for the *new guidelines for conflict of interest prevention in the public health system*, TI-Romania welcomes their introduction, but wishes to point out the necessity of taking decisive action against the most serious problem in the field, namely the widespread petty corruption.

A key issue on the public agenda and a crucially important public policy for corruption prevention, *the establishment of the National Integrity Agency* at the beginning of May 2007, is saluted by Transparency International Romania, although the measure was belated and adopted under the pressure of the European Union's safeguard clause. Because the timing of the law establishing the ANI is outside the monitoring period for this report, we present a detailed analysis of the document in Annex 1, along with the set of anticorruption public policy principles dedicated to the National Integrity Agency (Annex 2) drafted by TI-Romania in 2006.

The period analysed by the present report was marked by numerous legislative, institutional and public policy evolutions in the field of anticorruption, which took effect against a background of both latent and overt political upheavals. One consequence has been the creation of a powerful link between reforms and their initiators, which raises doubts regarding their self-sustainability. For the immediate future, Romania needs to focus more on durable systemic change and to prove that progress in the fight against corruption is prompted not so much by international pressure but by an act of domestic will.

I. Legislative Developments

1. Modification of the legal dispositions in penal law

1.1. Modifications of the Penal Code

Through Law no. 278/2006, the Penal Code in force was subject to a series of modifications including; the institution of provisions allowing for the penal responsibility of legal persons, the extension of the definition of victims in cases of abuse in service through limiting of rights, and the criminalization of conflicts of interest.

Thus, art. 19^1 of the Penal Code states that "legal persons, with the exception of the state, the public authorities and the public institutions who carry out activities which may not be the object of the private sector, bear penal responsibility for infractions committed in their activity or in the interest or the name of the legal persons, if the act was committed according to a form of legal guilt foreseen by penal law. Penal responsibility of a legal person does not exclude the penal responsibility of a physical person who has contributed, in any way, to the committing of the same infraction".

The adoption of this legislative measure falls within a series of steps taken toward fulfilling the agreements assumed by Romania following the first round of GRECO evaluations in 2002, which have been instituted to complete the public policy gaps or improve the general regulatory framework in the domain. The final point – harmonizing the Code of Penal Procedures with the provisions of the Penal Code in the area of the penal responsibility of legal persons – was dealt with by adopting Law no. 278/2006 which institutes the legal responsibility of legal persons at the level of material rights, correlated with the corresponding dispositions from procedural law, instituted through Law no. 356/2006, which modified the Code of Penal Procedures.

From the perspective of corruption infractions, the norms concerning the penal responsibility of legal persons are only important in cases of bribe-giving and trafficking of influence. In the other corruption offences, the perpetrator is qualified, be it a civil servant or a clerk or official of some kind, implying that the respective party must be a physical person.

The same law extends the applicability of art. 247 concerning abuse in service through limitation of rights. In its previous form, the law indicated that the victim of this infraction could only be a citizen, that is, a physical person and a Romanian citizen. According to the new regulations, the victim may be any person. The interpretation of this text in light of the principle "where the law does not distinguish, neither shall we distinguish", results in the fact that a civil servant may be accused of an abuse in service through limitation of rights in any situation in which the perpetrator limits the use or exercise of a right or creates a situation of inferiority for a physical person, i.e. Romanian citizen, foreign citizen, or stateless person, or also in the case of a legal person, having Romanian or foreign nationality. According to these observations, the new text has a much wider sphere of applicability.

This regulation comes at a moment when such situations are being encountered much more regularly, a situation that may spring from Romania's new status as a member state of the European Union. Within the EU context, the free circulation of people is essential. In light of this situation, the enlargement of the coverage of spheres of vulnerable persons was necessary, because in penal cases the law may not be legally applied through analogy or extension of the provisions of a legal text.

The new text is also more complete in its coverage of categories of protected persons, leaving no one in a position where their rights may be legally limited.

The infraction of "abuse in service through limitation of rights," under its new regulation, also becomes a corruption infraction in so far as, according to art. 13^2 of Law no. 78/2000[6], the civil servant has obtained for his or herself, or for another, an advantage (of public goods or otherwise), and therefore would fall within the jurisdiction of the DNA.

Another important modification envisions the criminalization of conflicts of interest. According to the new art. 253^1, a conflict of interest is constituted in "the act of a civil servant which, in the exercise of their job function, fulfils an act or participates in making a decision through which he or she, directly or indirectly, achieves a material benefit for themselves, their spouse, a relative or associate up to and inclusive of the second degree, or for another person with whom they are of have been in a commercial or labour relationship in the previous five years, or on whose behalf they have benefited or currently benefit from services or income of any nature. The preceding provisions are not applicable in the case of emitting, approving or adopting laws."

The criminalization of conflicts of interest as an infraction raises serious problems of applicability, especially in the aspect of providing evidence. Demonstrating all the constitutive elements of the infraction will be particularly problematic, leading in the end to the impossibility of applying this legal text. The conflict of interest, by nature, is a legal concept that belongs to the stage of preventing and combating corruption, and not to the stage of sanctioning.

Beyond the problems of providing evidence of these infractions, the new text raises serious internal conflicts among pieces of legislation. The conflict of interest is defined, at the administrative level, by art. 70 and the following from Law no. 161/2003, as being the situation in which a person exercising public authority, or holding a public function, has an interest of a pecuniary nature, for themselves, their spouse, or for a relative of the first degree, which may influence the objective fulfilment of their responsibilities according to the Constitution and other legal texts.

Interpreting the two regulations on the subject indicates that, paradoxically, the sphere of applicability for penal sanctions is much wider than that for administrative sanctions, which are much less drastic. In a coherent legal system, this sort of legislative disaccord is inadmissible, especially in this situation in which both texts are simultaneously applicable.

The resulting possible situations are amusing, to say the least. For example: an action by a civil servant which produces a benefit for a second degree relative, in this case a brother, may mean a punishment of 6 months to 5 years in prison for that civil servant, in this case because the example pertains to penal regulation of conflicts of interest. Applying Law 161/2003 in the same situation, the result is that the situation does not legally constitute a conflict of interest, meaning that the administrative acts deemed to be carried out in a conflict of interest are not annulled, which would have been provided for under the administrative law.

From this flow even more grave consequences. Applying the provisions of the penal law leads to a situation in which the act executed by the civil servant accused of a conflict of interest may not be annulled, for lack of any special provisions, except through a civil action, which would then depend on the finalization of the criminal case. This leads to an extreme delay in the resolution of obviously prejudicial situations to both public and private interests. In the situation in which a third party is also prejudiced by the offending act, restoring the previous situation will be extremely difficult to accomplish, which will make for considerable premises for a violation of the right to an equitable process foreseen by art. 6 of the European Convention on Human Rights, under the aspect on respecting a reasonable term for resolving cases.

Another problem raised by this regulation is that in relation to material competences of the prosecutor which investigates the files connected to the conflict of interest. Because the

[6] As it was introduced by Law no. 521/2004

conflict of interest is intrinsically connected to acts of corruption, it is natural that these cases be investigated by the National Anticorruption Department. However, the DNA's competency is determined by the infractions listed in Law no. 78/2000, which does not also include any mention of conflicts of interest in the sphere of acts of corruption. As a result of this, the cases presently fall within the competence of prosecutors at courts of justice, or other competent prosecutors as a function of the person and act investigated in the respective case.

1.2. Modifications to the Code for Penal Procedures

The recent modifications to the Code of Penal Procedures through Law no. 356/2006 represent, in fact, serious violations of human rights, including the right to privacy and the right to defence, with serious consequences for the democratic evolution of the country.

The possibilities offered to prosecutors to intercept correspondence and tap telephones for 48 hours without an order from a judge seem unacceptable. This situation is made even graver considering that the justification offered for such restrictions to the right to privacy, and therefore a violation of art. 8 of the European Convention on Human Rights, is that it is a necessary measure for the effectiveness of the fight against corruption, organized crime and terrorism.

Reaching these objectives should be done without abdicating the principles of the rule of law of a functioning democracy based on respect for human rights.

In the same way, the encroachment on the lawyer-client relationship through the interception of telephone calls is unacceptable. The specific confidentiality of this relationship is essential for guaranteeing the right to defence, guaranteed by article 6 of the European Convention on Human Rights.

The Romanian Information Service's continuing practice of using recorded telephone conversations in cases under investigation by the prosecutor is another violation of the right of the accused to privacy, defence, and, implicitly, to due and equitable process.

The justification of the existence of the recording devices at the RIS can not be a valid argument for their participation in such measures on behalf of the prosecutor. The encroachment of the secret services – be it only through the simple act of recording – in the activity of the prosecutor, and therefore in the activity of the judicial authorities, is inadmissible.

Beyond the violations of human rights indicated here, these legislative decisions also impede justice reform, which should focus on strengthening the role of the judge, and making the judge responsible for justice. This responsibility would implicitly contribute to increasing the population's faith in the judiciary, whereas the regulations that have been passed lead to an undermining of the judge's position. It is obligatory that the fight against criminality of any kind be carried out with respect for democratic norms and human rights.

1.3. The modification of Law no. 78/2000, through the decriminalization of illegally according credit as an act of corruption

At the beginning of April 2007, Law no. 69/2007 entered force, which modifies Law no. 78/2000 concerning the combating of corruption and infractions assimilated or in connection to corruption. Through the new regulation, according illegal credit is decriminalized as a corruption offence, while the modified text keeps, however, according illegal subsidies, misdirecting subsidies and using subsidies in another scope besides that for which they were accorded. All those remain criminal corruption offences.

From a technical, legislative perspective, criminalizing the obtaining of non-performing credit was impertinent. This effectively transformed commercial banking risk into a penal risk, which constituted an overregulation in the name of fighting corruption.

The rationale of this modification resided in the fact that granting credit is done on the basis of a civil or commercial contract between the bank and the client, but violating this must not be considered an act of corruption. Criminally punishing acts connected to non-performing or fraudulent credit is possible in so far as an infraction in service can be constituted on the part of the employee or a manager at the bank. In this context, the beneficiary of the credit may be pursed on penal grounds as accessories to the infraction, applying the provisions on the plurality of perpetrators.

The hypothesis that the scope of this modification was to eliminate criminal liability for certain important persons, by decriminalizing the offences with which they have been charged by anticorruption prosecutors, lacks a legal foundation. In those particular situations in which the decriminalization profits the accused, but the social danger presented by the acts committed is incontestable, then the penal legal technique will be to reform and re-qualify these offences in so far as they form the constitutive elements of other infractions.

Where there are acts of corruption, but the relationship with the active agent (the corruptor) can no longer established, then criminal charges can be pursued according to the acts foreseen by article 132 of Law no. 521/2004. This states that the infractions of "abuse in service against public interest," "abuse in service against the interest of other persons" and "abuse in service through limiting rights" are corruption offences if the civil servant obtained an advantage for themselves or another person through the respective action.

The regulations mentioned must be interpreted and applied in light of article 147 of the Penal Code in force, which establishes the understanding and extent of the term of *functionary* as being *any person who permanently or temporary exercises, with any title, indifferent as to how this was invested, a duty of any nature, remunerated or not, in the service of a unit which concerns public authority, public institutions, institutions or other legal persons of public interest, administration, use or exploitation of public goods or property, services of public interest, as well as goods of any kind which are of public interest, as well as any employee which exercises a duty in the service of any other legal person besides those foreseen above.*

Therefore, a legislative act should not be repudiated because of particular and isolated effects which it may produce for certain persons, but should be understood through the prism of current social rationales in a functional market economy, of which Romania was certified as fulfilling the qualifications in 2004.

1.4. The new Penal Code proposal

The proposed Penal Code released by the Ministry of Justice in 2007 is fundamentally different from the newly published Penal Code, whose entrance in force has been delayed *sine die*. This new legal project returns to the structure of the penal Code in force, eliminating the distinction between crimes and felonies and lowering the age of penal responsibility to 13 years. A series of the newly introduced infractions express the reaction to social needs confronting Romanian society right now. In the end, this project also presents major technical legislative deficiencies and contradictions to established legal principles, such as *nullum crimen sine lege, nulla poena sine lege* or those referring to the respect of fundamental rights and liberties.

From the perspective of this project's implications for measures pertaining to the fight against corruption and its associated instruments, we would note the following key issues:

a) The chapter referring to corruption infractions and infractions in service is not significantly different in the draft law from the law in force. The newly added criminalization of "purchasing of influence" is retained in this project, as well as the "conflict of interest" infraction, despite their unrealistic characters.

It should be observed that the applicability of classic corruption infractions has been strengthened both for acts committed in the public sector and in the private; those committed in the latter generally classified as typical offences, while those in the former automatically classified as aggravated offences because of the social danger.

At the same time, the new regulation does not incorporate the provisions of Law no. 78/2000 concerning the "abuse in service with benefits for one's self or for others" which constitutes a regression in legislative terms.

b) The infraction of money laundering is incorporated directly into this penal code project; therefore with its eventual adoption the infraction will no longer be criminalized by a special law, but actually through the general penal code. The new regulation also sets aside the overlapping regulations on concealment, eliminating let. C of article 23 from the present regulation[7], as well as the divergent sections which prevented a defendant from being charged with both a predicate offence (from which the proceeds come) and the crime of money laundering. The text incorporates international approaches in this area, permitting retaining the infraction of money laundering also in cases when it is know that the illicit proceeds have come from crime, however there is not sufficient evidence to prove the predicate offence.

c) The criminalization of "incorrect representation" comes in contradiction to the nature of the obligation assumed by a lawyer, which is one of diligence but not of results. However, in these conditions, it would be possible to criminally sanction lawyers who, although they put forth the necessary diligence, did not win the case for which they were hired. This type of approach is unjustified, considering that situations of this type may be resolved through civil means, except in cases where some form of malpractice may be demonstrated which may lead to criminal sanctioning.

d) In terms of infractions related to professional conduct, we consider that the new penal code strengthens these terms in relation to malpractice with especially grave effects. Such a solution may be possible starting from proposed vision of the civil servant. In the new regulation, civil servants are assimilated with "physical persons who exercise a profession of public interest for which a special degree of public authority is necessary and which is controlled by the public authorities."

Therefore, according to this understanding, all sorts of free professional categories could be categorized as civil servants, such as: public notaries, judicial executors, technical judiciary or extra-judiciary experts, lawyers, doctors, psychologists, etc. The criminalization of malpractice will lead to a rewriting of the special laws regulating the organization and functioning of the mentioned free professional categories, considering that the actual legislation is non-unitary, incomplete, and unsystematic.

e) Another important aspect is that connected to the highly diffuse regulation on usury. This project criminalizes the offence under Chapter VII: *Infractions against public safety, Chapter 4: Infractions concerning the regime established for other activities regulated by law* under the name of "usury committed as speculation with money". This counts in giving money with interest, as a profession, by an unauthorized person. In the same chapter, the penal code also criminalizes the unlawful practice of a profession or any profession for which the law requires authorization.

The same project criminalizes, in Title II: *Infractions against public goods, Chapter 3: Infractions against public goods through disregarding of trust,* "the action of the creditor, who profits from a monetary loan through the clear state of vulnerability of the debtor as a result of: age, state of health, infirmity, or the debtor's dependant relationship in relation to the creditor, constituting or transmitting through this a real right to value that is clearly disproportionate to the service provided for the creditor or another."

[7] Law no. 656/2002 for preventing and sanctioning money laundering, as well as instituting measures for preventing and combating the financing of acts of terrorism, with later modifications and completions

All of the indicated texts refer to the complex phenomenon of usury, demonstrating the need for a more detailed regulation specifically about usury, conceived as a unique offence with multiple aggravated forms.

Beyond these points we have approached, this new Penal Code proposal retains the same difficulty that has plagued its predecessors: the lack of a corresponding Code of Penal Procedures which permits the coherent application of the Penal Code.

Regardless of the variation of the Penal Code that will enter force and be applied, it is absolutely necessary that this be accompanied by a corresponding Code of Penal Procedures.

2. Modification of Law no. 7/2004 on the civil servants' code of conduct

Along with the modifications to the civil servants' statute, the applicable legal regime for civil servants has also suffered changes in an administrative sense with regard to the code of conduct. Law no. 50/2007 establishes a new legal institution: the ethics councillor. This person will be a civil servant named by the manager of the respective public authority or public institution, whose function will be limited to consultation and assistance for civil servants in the area of conduct and to monitoring the application of the code of conduct within the framework of the respective state entity. The reports issued by this post will be submitted first to the manager of the respective institution and only after receiving approval from this manager will they be communicated on to the civil servant's corps and the National Agency of Civil Servants.

The primary difficulties with regard to these regulations are in regard to the discretionary character of the make-up of this new institution and in the lack of any efficient means for remediation of any violations that it may report. The naming of the ethics councillor is within the power of the manager of the respective state institution, without any objective selection criteria provided, nor a transparent or competitive selection procedure. Beyond this, the reports assembled by this councillor are subject to the approval of the manager which appointed the councillor. In this context, the monitoring of the respective institution's application of the norms of conduct is only truly clear in a statistical sense, because the ethics councillor does not have the power to notify the disciplinary committee of the situations he or she may identify. The only way in which the reports by the ethics councillor may lead to a disciplinary committee investigation is through its own initiative, or at the request of the manager of the institution.

Another deficiency of the law is that it refers only to the code of conduct for civil servants and not to other contracted personnel. It is common knowledge that the two codes contain symmetrically equivalent instructions for both categories of personnel, and that both carry out similar activities within the framework of public institutions and authorities. These situations, in fact, will make the application of Law no. 50/2007 almost impossible in the provisions on monitoring the application of the civil servants' code of conduct, because of the difficulties in precisely delimiting the violations committed by civil servants and those committed by the contractual personnel.

A similar measure, for instituting an ethics councillor would have been much more welcome if it had been regulated in a similar manner for both categories of personnel, in order to ensure that the law would be applied as efficiently as possible at the institutional level and not merely among individuals representing a particular professional category.

Along with these provisions, the law expressly states that this code of conduct does not represent a basis for derogations from the obligations to furnish information of public interest and from the right of civil servants to make complaints on the basis of Law no. 571/2004 concerning the protection of whistleblowers. The previous remarks referring to the necessity of a unitary regulation both for civil servants and contracted personnel in public institutions and authorities are also applicable in this case.

3. Law no. 7/2006 on the statute of parliamentarian civil servants

In January 2006, Law no. 7/2006 was adopted, regulating the rights, obligations and the statute of persons employed within the framework of the special structures of the Romanian Parliament, legally called: *parliamentary civil servants*. Such an initiative could offer some significant improvements considering that, presently, there are several non-uniform, and even many times discriminatory, regulations regarding public sector employees. However, the final form of this law does nothing but accentuate the unjust differences already existing in the system, and creates a professional category which, although subject to rigors similar to those applied to the rest of the civil servants' corps, does not benefit from the same guarantees and protections from political pressure.

In the areas of *recruiting and dismissing, and career management* of parliamentary civil servants, decision-making power is allocated exclusively to the Permanent Office and the general secretaries of the Chamber of Deputies and the Senate, respectively. This allows for all organizational norms and execution of competitions or exams for parliamentary civil servants posts, as well as procedures for resolving contestations, to be approved by the Permanent Office at the request of the general secretaries of the two chambers of Parliament. The criteria for evaluating individual professional activities, as well as the corresponding methodology are established in the same way. The situation is the same in the case of competitions and exams for promotions. Although parliamentary civil servants have the right to continuing professional education, Law no. 7/2006 does not accord real guarantees for realizing this; nor does it foresee a particular number of hours, or a minimum level of financing for carrying out continuing professional education courses – these are carried out according to an annual program approved by the Permanent Office of each chamber of Parliament. Finally – regarding parliamentary civil servants' disciplinary responsibility – the law foresees a disciplinary committee which is gravely lacking in autonomy and authority, considering that its constitution, composure, functions, methods of complaint, and work procedures are all established by the Permanent Office of each Chamber of Parliament.

Another aspect of this law that demands explanation is the fact that, although the functions of *general secretary and adjunct general secretary* "correspond" to the typical categories of high-level civil servants, the selection procedures differ radically. While high-level civil servants are selected on the basis of an examination before a specially constituted committee, the general secretaries and adjunct general secretaries are named by the Chamber of Deputies and the Senate, according to their own rules; in other words: through a procedure that admits a maximum degree of discretion on the part of political conditions. This impropriety is even graver considering that, as mentioned above, the general secretary writes practically all proposals concerning the careers of parliamentary civil servants – proposals which are then submitted for the approval of the Permanent Office of the two Chambers.

Based on this description, we conclude that Law no. 7/2006 carefully and closely emulates the provisions of the Statute on civil servants and its connected legislation, systematically avoiding, however, instituting any real guarantees for the protection and independence of the employees subject to this regime.

Not least of all, the delays in the application of Law no. 7/2006 should be mentioned, along with the legislative instability created by this – motivated by the existence of preferential advantages and rights for parliamentary civil servants, including budgetary restrictions, the Government suspended the law in February 2006, through an emergency ordinance, until 31 December 2006, inclusively. Approximately five months later, Parliament rejected the emergency ordinance suspending Law no. 7/2006 through Law no. 271/2006.

4. Government Decision no. 341/2007 on entering high-level civil service, career management and mobility of civil servants

In April of this year, Government Decision no. 341/2007 on entering high-level civil service, career management and mobility of civil servants, which, both through the legislation's technique and through conceptual flaws in the law, creates a discriminatory regime between various public functions in the category of "high-level" civil servants and presents a serious risk of politicizing the public administration.

This Government Decision creates a new public post in the category of high-level civil servants – that of governmental inspector – attempting at the same time to redefine and clarify the selection process, mobility and career management of all high-level civil servants. We consider that these two objectives can not be achieved within the same legal act, because public functions' attributes and responsibilities – including the position of the governmental inspector – can not be established except through a law, as is done with the other categories of high-level public servants, whose attributes are established through special laws.

The provisions for the entrance competition for entering the category of high-level civil servants are applied, inexplicably, only for governmental inspector positions – that is, Art. 7 provides that, "entering the category of high-level public servant is done through a national competition organized according to the law, for a vacant public position of governmental inspector." Art. 11, similarly, states that, "persons participating in the competition are named a vacant public position of governmental inspector, through the decision of the prime minister (…)". We consider that these provisions deviate from a normal and equitable system, in which those who have participated in the national competition may be named to any public position of high-level civil servant.

Another deficiency of this law is the association of the institution of "entering a public post" with a means of career mobility. More precisely, Section 3-a of Chapter V "Mobility in the category of high level civil servants" provides that, for the public posts of Secretary General of the Government, Adjunct Secretary General of the Government, Secretary General and Adjunct Secretary General in ministries and other special organs of the central public administration, mobility may be carried out by the specific conditions or procedures (established by the director of the respective public authority/institution and approved by the National Agency for Civil Servants) within the framework of a contest for occupying the respective vacant posts. This Government Decision leads, thus, to a contradiction of Law no. 188/1999, which expressly provides a limited number of means for realizing career mobility: delegation, detachment, or transfer. These presuppose an existing employment relationship with the civil servant who is moved, but the introduction of these competition procedures has to do with beginning a new employment relationship by offering a competition.

The provisions discussed above create a discriminatory regime between the posts of Secretary General and Adjunct Secretary General in the central public administration and the other posts in the category of high-level civil servant, in the sense that filling those two posts prompts the institution of certain specific conditions and procedures, making the process much more difficult. The level of specialization required for such a post surely justifies the existence of certain specific conditions and procedures, but not the creation of discriminatory mechanisms. We consider that such a situation is the direct result of the unique national contest for recruiting high-level civil servants, which does not easily permit correspondence between the demands of a specific post and the profile of the candidates. This deficiency could be eliminated through the institution of a more flexible formula in which the competition is especially organized exclusively for occupying a singly vacant high-level civil servant post.

Finally, along with the discriminatory regime created by Government Decision 341/2007, the excessive laxity of the conditions in which the mobility of civil servants is carried out should also be mentioned. This legal text provides for the following reasons for which civil servants

may be mobilized: (a) improving the efficiency of public authorities or institutions, (b) in public interest, and (c) in the interest of the civil servant. Although mobilization in the interest of the civil servant requires the existence of a vacant public post and the approval of the person competent to appoint the candidate to the position, for mobilization in public interest there is no need for a vacant post and can be done on an individual basis. The act only requires an administrative act by the person competent to appoint the civil servant to the position, or a mobilization plan approved by the Government. More importantly, mobilization in public interest may not be refused by the high-level civil servant being moved, except in the case of "solidly justified reservations and the approval of the prime minister" (Art. 47). If we combine this with the fact that mobilization may be done once a year (Art. 27 (3)), we find that this can easily become an instrument for undermining civil servants' stability in their posts and can be used to exercise political pressure over a high-level civil servant. Because the change of post and even the location of the new position can be rearranged relatively easily and frequently, this creates a gap permitting the politicization of the public administration at the high level, thus representing a vulnerability for this pillar of the national integrity system.

4. Free access to information of public interest

The year 2006 brought two important legislative modifications concerning Law no. 544/2001. Through these, the sphere of application for the law was increased in such a way that it now addresses not only public institutions and authorities that use or administer public financial resources and state-owned firms, but it also covers national companies under the authority of a central or local public authority and of which the Romanian state or an administrative territory of the state is a majority stockholder. This increase in the scope of the law is an important support for ensuring transparency in the activity of all entities representing the public interest, while being at the same time an important instrument for preventing corruption and other unethical activity.

The same law, Law no. 371/2006, also modifies art. 12, paragraph (1), section c, which states that the only information exempted from free public access is that which concerns commercial and financial activities which could lead to negative effects on the principle of fair competition, or those that may endanger rights to intellectual or industrial property.

Along with these modifications, Law no. 380/2006 makes more explicit the sphere of application of the legal provisions concerning free access to information, expressly stating that any contracting authority has the obligation to put public acquisitions contracts at the disposition of any interested person. This legal measure comes as a result of a long held practice in public administration of adding secrecy clauses to public acquisitions contracts. The adoption of this law should now be complimented with new regulations on the process of attributing public acquisitions contracts.

In terms of the technical aspects of the legislation: both modifications raise serious question marks. Both Law 371 and Law 380 were adopted by the Chamber of Deputies, in its quality as the deciding chamber, on 5 October 2006. In this context, there remains a question of why the changes were not contained in a single modification law. The existence of two laws modifying the same issue does nothing but burden the application process and continues Romania's already significant legislative inflation.

II. Institutional Developments

1. The National Anticorruption Department

Through Law no. 54/2006 for the approval of OUG no. 134/2005 for modification and completion of OUG no. 43/2002 concerning the National Anticorruption Prosecutors' Office. A series of institutional adjustments were introduced which can be summarized as the following:

- Transformation of the *National Anticorruption Department*, into an autonomous structure, in *The National Anticorruption Department* from the framework of the Prosecutors' office to alongside the High Court of Cassation and Justice;
- Transformation of the DNA into a second level budgetary department, but with a budget that is clearly distinguished within the budget of the Prosecutors' office alongside the High Court of Cassation and Justice;
- The subordination of the chief DNA prosecutor to the General Prosecutor at the High Court of Cassation and Justice.

The parliamentary debates and consultations between the political parties and the president occasioned by Law no. 54/2006 brought another possible modification concerning the DNA to the public agenda, which, however, was not integrated into the text of the law – a change in the procedures for naming the chief prosecutor of the DNA. More precisely, this change foresaw the delegation of this competence exclusively to the Superior Council of Magistracy (editor's note: according to the actual procedure in force, the naming is done by the President of Romania at the proposal of the Ministry of Justice, with consultation from the CSM).

The modifications brought by the law approving OUG no. 134/2005 are not of a nature to significantly affect the independence of this institution. Even in light of this, however, it deserves to be mentioned that the representatives of the legislative authority previously demonstrated once again their resistance to any change – already characteristic of this institutional pillar – and their lack of political will to sustain the fight against corruption when the Senate initially voted on 9 February 2006 to reject OUG no. 134/2005. The senators' gesture exhibits not only a lack of responsibility, but also a lack of proper interest and perspective on Romania's priorities for European Union integration. In fact, by rejecting this draft law they have effectively removed from the DNA the competence to investigate acts of grand corruption just when the institution had begun to demonstrate some efficiency. The negative signal this sent to the authorities in Brussels was not ignored[8].

However, beyond the political signals, there remains the problem of the DNA's performance in investigating cases of grand corruption. In the *National Corruption Report 2006*, TI-Romania stated that the true test of the DNA's efficiency would be the cases of grand corruption sent to court[9]. It should also be mentioned that recent judicial practice has been to grant a high percentage of suspended sentences in high-level corruption convictions. This contributes to a lack of effectiveness in the threat of criminal penalties and reduces that practical consequence of a corruption conviction to a mere mention in the official criminal history of those convicted.

[8] In the European Commission's *Monitoring Report* from May 2006 it points out that a negative aspect in the context of anticorruption efforts is the fact that "in February 2006 the Senate tried to hinder the DNA from investigating certain members of Parliament. There have been attempts in the Senate to change the procedures for selection and termination of high-level prosecutors. This would effectively undermine the responsibility of the system and diminish the operational capacity of the DNA" (p. 8)

[9] NCR 2006, p. 9.

2. The General Anticorruption Department in the Ministry of Administration and Internal Affairs

Established through Law no. 161/2005 as a specialized structure for preventing and combating corruption among the personnel of the Ministry of Administration and Internal Affairs, and only becoming operational in October 2005 through emergency ordinance OUG no. 120/2005, the DGA had a promising start in cleaning up a system that has been constantly perceived by the public as gravely afflicted by corruption[10].

In the DGA's progress report January-April 2006, the only such report released publicly and available on the DGA website, the department reports that it investigated 94 people for bribe-taking, 34 for bribe-giving, and 20 for trafficking of personal interest. This report also mentioned that 18 people had been investigated in custody, 19 had been arrested preventatively, and 38 had been caught in the act.

Since that time, however, the department has not published another report on its activities. On top of this lack of further information, the DGA's authority was severely undermined through the change of its management on 6 March 2007, following an incorrectly and abusively executed performance review by the Ministry's internal control body. The review was carried out without the knowledge of the Strategic Committee of the DGA, although the law in force foresaw that all monitoring and evaluation activity were exclusively the competence of this forum. Because the General Director of the DGA is a magistrate, any evaluation of the director's activities falls within the competence of the CSM; in the name of the institution to which the magistrate is assigned at the time. The law foresees an independent mechanism if this is requested by the Minister.

Through this review process, mentioned above, Ministry of Administration and Internal Affairs representatives ignored the provisions of the United Nations Convention against Corruption, ratified by Romania in 2004, and which expressly requires diligence in avoiding conflicts of interest through intermediaries. But, the officials of the Ministry who were assigned as representatives in the Review Commission also had cases being processed before the DGA at the same time – a fact confirmed by the recently resigned director.

Strictly from the point of view of the institution's evolution, the events at the DGA constitute a grave precedent: creating mechanisms by which those who are investigated may exercise control of the investigators. Additionally, this marks a significant regression in the application of anticorruption public policy, in practice, discouraging any activity combating corruption in the MAI.

3. Department for the Prevention and Investigation of Corruption and Fraud of the Ministry of Defence

A Department for the Prevention and Investigation of Corruption and Fraud was recently established within the framework of the Ministry of Defence, led by a magistrate who has competence over specialized structures for the prevention and investigation of acts of corruption, under the direct coordination of the military prosecutors within the framework of the National Anticorruption Department. The usefulness and performance of the new anticorruption structure remain to be seen, but the risk of creating institutional parallelisms is

[10] *The Global Corruption Barometer*, an annual opinion poll by Transparency International, indicating that, in the 2004-2006 period, the police were perceived in Romania as been a corrupt institution – on a scale of 1 to 5 , where 1 means not corrupt whatsoever and 5 means extremely corrupt, the Romanian police received an average score of 3.7

important to note. This repetition of functions can only hamper the activity of the anticorruption prosecutors, and the new body also risks replicating some of the defensive reactions previously seen to the DGA – the army being an institution that is at least as resistant to change as the police.

4. The National Office for Preventing and Combating Money Laundering

In the area of the fight against money laundering, there still remain certain deficiencies in the effective implementation control of anti-money laundering regulations, especially in terms of public awareness, reporting of suspicious transactions, and supervising activity. The principle obstacles to this are connected, on the one hand, to opposition on the part of some reporting entities such as lawyers and notaries – invoking their responsibility of confidentiality in relation to their clients – and real estate agencies and casinos. On the other hand, the very high volume of reports which must be processed without the necessary technology presents a serious obstacle.

From a legislative perspective, several modifications to the anti-money laundering framework in Romania were implemented by Law no. 36/2006 for the approval of emergency ordinance OUG no. 135/2005. This modified the regime for information in connection to notifications received, allowing these to be processed and used under the legal regime for "confidential information" rather than the "service secret" regime.

Through the reformulation of art 14 paragraph (1^1) of Law no. 656/2002, the obligation for the management of reporting entities to develop internal policies and procedures for compliance with anti-money laundering and terrorism financing provisions has also become obligatory. Managers are also required to ensure higher standards are met in the hiring of personnel and their programs for continuing education of employees. The imperative character of these measures derives from the necessity of effective implementation of the measures for prevention of money laundering and improving the quality of suspicious transaction reports.

Another especially important modification to the AML legal framework is the remediation of the reporting responsibility of economic agents without a regulatory organism. That is, according to art 17 of the Law[11] mentioned above: "for the persons who are not subject to the prudential supervision of a regulatory authority, all supervisory, verification and control attributes will be fulfilled by the AML Office."

Following these legislative modifications, the secondary legislation for the implementation of the improved law on prevention of money laundering was adopted. These were passed in Decision 496/2006, by the Plenum of the Office for Preventing and Combating Money Laundering. The norms concerning prevention and combating money laundering and financing of acts of terror, and the standards for client identification and internal control for reporting entities not subject to supervision by another authority which were adopted through this decision are similar to those established for authorities exercising prudential supervisions. (i.e.: in the case of Norm 3/2003 of the National Bank of Romania, Regulation 11/2005 of the National Securities Commission, and Order 3128/2005 of the Supervisory Commission for Insurers) This similarity ensures a coherent and unitary framework for monitoring and control, facilitating ONPCSB's information processing activity.

In order to increase the effectiveness of the law's implementation, along with the sanctions already foreseen, the modified law hardens the sanctioning regime for legal persons. It should also be mentioned that, with the entrance into force of the modified Penal Code, legal persons are also held criminally responsible for money laundering infractions.

[11] Law no. 65672002 with later modifications.

Presently, the efforts to fully implement the legislation in force must be continued, along with the harmonization of these with the provisions on politically exposed persons of the European Union's Third Money Laundering Directive. This is an obligation for Romania, as an EU member state, and must be fulfilled by the second half of December 2007.

From an institutional point of view, the AML Office has realized a new regulation on organization and functioning, adopted in May 2006. This, although not greatly different from the previous, expresses the legislative modifications that occurred in the period from 2002-2006 and revises the Office's organizational structure in order to respond to existing needs and challenges.

5. The Court of Accounts

The year 2006 brought important modifications for the Court of Accounts, from a legislative point of view. The statute of the Court was just constitutionally modified in 2003, all contrary legal provisions on the Court's organization being tacitly annulled according to article 154 of the Constitution, which states in paragraph (1) that "the laws and all other legal acts remain in force, in so far as these do not contradict the present Constitution."

Following the changes of 2003, a new law was necessary to establish an internal regulatory framework for the Court, in accord with the new Constitution. Although a draft law was introduced for debate in the Senate starting in November 2005, the regulation was not ultimately passed until the lack was mentioned in the European Commission's Monitoring Report of 16 May 2006.

The Romanian Government adopted in June emergency ordinance OUG no. 43/2006 which reformed the institution of the Court of Accounts starting from the modifications to the statute instituted through the Constitutional revisions in 2003.

The new regulation agrees with the Court's statute as the supreme audit institution in Romania, and attributes its former jurisdictional attributes to the court system. The new audit procedures must be foreseen in the audit standards, established in accordance with generally accepted international audit standards. The adoption of these standards is in the competence of the Court's Plenum.

The selection of the account councillors[12], however, remains in the authority of Parliament, carried out in joint session of the two chambers. The account councillors are department directors at the Court, which the law no longer enumerates, but leaves them in the authority of the Plenum, which approves the structure, activity and selection of the departments. This less rigid regulation allows the Court's Plenum to adapt its structure to existing needs and to better adjust itself to the demands of Romania's accession to the EU.

One third of the members of the Plenum of the Court of Accounts are renewed every three years, alternately. The maximum duration of a mandate on the Plenum is nine years, and may not be renewed, unlike the previous situation in which the mandate was six years and could be renewed. The mandate of the President is three years and may be renewed once.

At the same time, the members of the Court of Accounts do not enjoy immunity, as they did under the previous law. According to the new regulation, the request of the General Prosecutor and approval of the Permanent Offices of the two chambers of Parliament is no longer necessary for investigating, retaining, arresting or criminally charging the members.

The Court's competence was also restrained by the elimination of state-owned firms and autonomous state monopolies from its purview.

Although the regulations justify their existence, they present serious problems to the legislative process. As a result, immediately after the ordinance was published the Ombudsman

[12] In Romanian: *consilieri de conturi*.

petitioned the Constitutional Court on the basis of possible unconstitutionality, invoking that fact that the regulation violates article 115 of the constitution, paragraphs (4), (5) and (6). Following analysis, the Court admitted an exception, stating that emergency ordinance OUG no. 43/2006 is unconstitutional because of the following:

- through its role, the Court is part of the fundamental institutions of the state, its regulations being regulated by organic law according to article 73, paragraph (3), letter (i);
- an emergency ordinance may not affect the regime of fundamental state institutions;
- the only legislative authority of the state is Parliament, and the exercise of these attributes by the Government is done on the basis of legislative delegation, the overstepping of which is an impermissible intrusion into the legislature's competencies and a violation of the principle of the separation of state powers.

The Constitutional Court's decision, no. 544/2006, was published in the Official Monitor on 30 June 200. In view of the provisions of paragraph (1) of article 147 of the Constitution, according to which: "dispositions of laws and ordinances in force, as well as those in regulations, which are found unconstitutional, will have their effects remediated within 45 days of the publication of the Constitutional Court's decision" and the fact that in this interval Parliament did not assume responsibility for the adoption of an organic law reforming the institution of the Court of Accounts. Presently, then, the Court of Accounts continues to be regulated by Law no. 94/1992, with its later modifications. Absurdly, however, in September 2006 the Chamber of Deputies adopted a law approving this ordinance through tacit approval procedure – the project being forwarded to the Senate. All this occurred more than two months from the moment that the Constitutional Court's decision irrevocable entered force.

6. The institutions with attributes of coordination and control in the public procurement system

The necessary of Romania's alignment with the standards of the common European market have led to radical modification of the legislation on contracts for public acquisitions, concession and public-private partnerships, through the adoption of emergency ordinance *OUG no. 34/2006 concerning the attribution of public acquisitions contracts, contracts for concessions on public works, and contracts for concession of services.* The new regulatory framework has occasioned a change of the institutional infrastructure employed to coordinate, control, and monitor contracts on public money, bringing about a clarification of the attributes and responsibilities of those involved in the process as well as an institutional simplification.

In 2005, the *National Authority for Regulating and Monitoring of Public Procurement* was established (ANRMAP) through the reorganization of two departments within the Ministry of Finance and the Ministry of Transport, Construction and Tourism, respectively. The ANRMAP was made an independent organism whose principle scope is to coordinate the public policies on public acquisitions and to ensure the uniform application of the legislation in this area. The establishment of the ANRMAP meets a key pre-requisite for creating the conditions for integrity in public acquisitions: the existence of a unitary public policy both at the conceptual level and at the implementation level.

In 2006, through emergency ordinance OUG no. 34/2006, the *National Council for Resolution of Contestations (CNSC)* was established as an administrative-jurisdictional organism which functions alongside the ANRMAP, specialized exclusively in resolving contestations in public acquisitions contracts. This is a positive evolution considering that in the previous regulation in this domain – emergency ordinance *OUG no. 60/2001 concerning public acquisitions* –

placed the resolution of contestations in the authority of the Competition Council, which carries out a much wider activity of protecting and stimulating competition on the market, in order to promote the interests of the consumer. Thus, in its present form, the public acquisitions system benefits, through the CNSC, from a more specialized expertise, as well as from more solid legal guarantees avoiding conflicts of interest[13].

Also in 2006, the *Unit for Coordination and Verification of Public Acquisitions (UCVAP)* was established within the Ministry of Finance, with subordinate structures within the territorial General Departments for Public Finances. This organism is meant to verify the procedural aspects of the public acquisitions process after publication of the announcement of participation and until the signing of the contract. The establishment of this unit is another positive evolution because it also makes possible the discovery of irregularities in the incipient stages of the public acquisitions process, territory not covered by the contestations sent to the CNSC by economic operators.

Even with all of this, the UCVAP lacks the prerogative to dispose of correctional measures in the discovery of possible irregularities. In a concrete sense, the UCVAP's notice has only a consultative character, being sent to the respective contracting authorities, the hierarchic superior of the contracting authority, and to the ANRMAP. The contracting authority enjoys discretion in the decisions it makes vis-à-vis the notice from the UCVAP: it may suspend the attribution process; modify or revoke elements of the contract; make corrections; or continue with the public acquisitions contract, contract for concession of public works or contract for concession of services[14]. We consider that such incapacity on the part of the UCVAP leaves this structure lacking exactly the essential leverage needed to exercise an active role in preventing corruption in public acquisitions.

7. The National Agency of Civil Servants

The National Agency for Civil Servants (ANFP) is a key institution in Romania's national integrity system, being the guarantor of the stability, professionalism and political neutrality of the civil servants corps, as well as the principle administrator for the respect of codes of conduct and ethical standards in the public administration. Despite its essential role, the ANFP remains a weak institution both from the perspective of institutional capacity, and from the perspective of its legal prerogatives, leaving the civil service a rather delicate sector in efforts to increase public integrity.

We would particularly draw attention to deficits in the monitoring and application of the legislation relevant to the civil service, especially the Code of Conduct for civil servants (Law no. 7/2004). These gaps are largely a result of reporting problems on the part of both central and local public authorities and institutions – reports tending to be incomplete, incorrect, or completely lacking, which frustrates the monthly centralization of reports[15]. Under the

[13] See Art 264 al OUG 34/2006.

[14] See Art 17 (1) from the Application norms of OUG 30/2006 concerning the functioning and verification of the procedural aspects in the process of attributing public acquisitions contracts.

[15] For more details on the difficulties monitored by the ANFP and the deficiencies in report, see the National Agency for Civil Servants. 2006. *Report on development of monitoring instruments for implementing Law no. 7/2004 concerning the code of conduct for civil servants, disciplinary procedures, the regime on conflicts of interests, and on incompatibilities."*. Bucharest, available online at: http://www.anfp-map.ro/strategii_rapoarte_studii.php?sectiune=Rapoarte&view=23
An eloquent example of the dynamic of report is available in *Trimestrial report I/2006 concerning analysis of the monitoring system implemented at the level of the Service for Coordination of Methodology, Monitoring, and Evaluation, as well as implementation, monitoring and evaluation of the respect for the provisions of the Code of Conduct for civil servants, of the regime on incompatibilities, and of the regime on conflicts of interest* of the ANFP, where the situation in the first three months of 2006 is presented:

- « January–14 authorities or public institutions were reported, of which: 2 ministries, 1 central public institution, 8 prefectures, 2 county councils, and 1 local council.

conditions, those making decisions affecting the public administration have no way to benefit from an accurate image of the ethical environment in the public administration, which makes evaluating the impact of public policy almost impossible, let along correcting and improving those policies.

More worrying, however, is the incapacity of the ANFP to impose solutions following monitoring control of ethical violations by civil servants in public authorities and institutions. TI-Romania noted this difficulty in 2005, showing that, although the ANFP has the competency of investigating possible violations to the Code of Conduct through Law no. 7/2004, the fact that it may not impose solutions on an institution, but merely may recommend a course of action in light of the control, then leads to a situation in which the respective institution applies the ANFP recommendations only if the guilt for ethical violations may be laid exclusively on the civil servant[16]. This, in connection with the state of non-application of many legal provisions for the protection of whistleblowers, leads to serious vulnerabilities for civil servants, leaving them lacking real guarantees against constraints and pressure exercised by their superiors.

A recent ANFP report confirms the deficiencies mentioned above, stating, "the recommendations formulated by the Agency are not followed by institutions, probably as a result of the fact that their provisions are not obligatory and ignoring the recommendations is not sanctioned by law."[17]. The solution to the proposed public policy for ANFP is that investigative activity be attributed exclusively to the disciplinary commissions, which "may lead to concrete results, formalized and foreseen by law" (p.8).

We consider that such a modification would not be opportune from many perspectives. First of all, the disciplinary commissions, as in the ANFP, may not impose, but only *propose* to the manager of the public institution a disciplinary sanction for the civil servant guilty of a disciplinary infraction. As a result, the elimination of the investigative competencies of the ANFP does not contribute whatsoever to the reduction of civil servants' vulnerability to abuse. Secondly, the legal framework in force permits simultaneous notices to the disciplinary commission and to the ANFP, thus increasing the chances that the unethical behaviour will be reported, and eventually punished. Certainly, there exists a degree of institutional parallelism and inherent redundancy in the functions of the two structures; however, we do not consider that the best solution is to eliminate the investigative competencies of the ANFP, but, rather, to systemize and enlarge this capacity. More precisely, we would propose that, following the model of SCM, the solutions put forth by the ANFP following its control should be obligatory for the relevant public institutions.

8. Superior Council of Magistracy

Within the context of the ongoing, vast reform of the Romanian justice system, the role of the Superior Council of Magistracy as the direct guarantor of the independence of the justice system is uniquely important. Even in light of this, the institution continues to be the target of numerous criticisms of its efficiency and credibility, as well as the standards of integrity that it

- February - 10 authorities or public institutions were reported, of which: 2 ministries, 2 central public institutions, 3 prefectures, 3 county councils.
- March – 1 ministry » (p. 4).

[16] For a detailed analysis see Transparency International Romania. 2005. *Romania: the National Integrity System.* Bucharest, available online at: http://www.transparency.org.ro/files/File/NIS%20%20REPORT_final.pdf

[17] ANFP. 2006. *Report on development of monitoring instruments for implementing Law no. 7/2004 concerning the code of conduct for civil servants, disciplinary procedures, the regime on conflicts of interests, and on incompatibilities".* Bucharest, p. 8

promotes – criticisms both from the European Commission[18], and from the Minister of Justice and other independent experts[19].

That data analyzed by Transparency International Romania in the course of the second edition of the *Study on the perceptions of magistrates on the independence of the judicial system*, launched in December 2006, confirm the deficiencies mentioned above and show that they translate into weakened credibility for the CSM among magistrates. As the study demonstrated, in 2006 only 43% of magistrates considered that the CSM has the capacity to guarantee their independence, compared to 60% who responded the same in 2005. Additionally, the satisfaction of magistrates with the CSM has demonstrated a decreasing trend, the number of magistrates indicating they are satisfied with the institution being 51% in 2006 – 10% less that in the preceding year.

Beyond the elements of perception, there are concrete problems connected to the performance of the institution. We would draw attention to the fact that the Judiciary Inspection activity of the CSM remains modest. In the course of 2006, 3,700 inspection projects were recorded, the majority of which were the result of complaints petitioning for inspection. Out of these, only 59 were officially disposed of concerning the aspects noted in the mass-media, 27 of these being from the inspection Service for judges and 32 from the inspection Service for prosecutors[20].

It is also important to note that the majority of complaints are rejected by the judiciary inspection service and not by the corresponding disciplinary commissions, contrary to the legal regulations which grant the capacity to reject cases strictly to the commissions.

[18] *The Monitoring Report of the European Commission from May 2006* brings attention, among other things, to the fact that, of the 14 elected members of the SCM, 8 continue to work on a part time basis, which leads to inefficiency on the part of the institution. Additionally, *the Report* shows that six of the SCM members continue to confront potential conflicts of interest, considering that they still retain their management positions in courts or prosecutors' offices.

[19] In this sense the *Independent report on the judicial system in Romania*, written in 2006 by the foundation "The Society for Justice", in which there was a detailed criticism of the SCM, the principle conclusions being: the SCM's weak capacity to eliminate conflicts of interest and unethical situations within its interior; the SCM's inefficiency, caused, partially, by the lack of the permanent activity of some of its members; the pronouncement of some decisions contrary to the law; the undermining of the autonomy of the courts by excessive centralization by the SCM of decisions on courts' organization and functioning; communication deficiencies between the SCM and magistrates; excessive bureaucracy, along with the perpetuation of mistakes and inadvertencies in internal management, etc.

[20] According to the report on the activity of the Superior Council of Magistracy in 2006, published 19 March 2007. For further details: http://www.csm1909.ro/csm/linkuri/19_03_2007__9024_ro.doc

III. Public policy developments

1. The control of political party and electoral campaign financing

The new legislation on political party and electoral campaign financing (Law no. 334/2006) has brought significant improvements in the field.

Among the most important ones is *enlarging the political parties' obligation to declare their incomes and expenses* – as elements of novelty, the new law stipulates that income coming from party members' contributions, as well as other sources, must be published in Romania' Official Gazette, Part I. The reporting format for electoral campaign expenses has become much more strict, mostly owing to the new definition of „propaganda materials" (taken to mean various types of materials on written, video or audio support)[21].

Another positive development brought by Law 334/2006 is *the introduction of supplementary clarifications and rigours in what regards the regime of donations and inheritances, as well as the contributions for electoral campaigns*. Regarding donations and *inheritances*, the maximum admissible value remained unchanged, but, as a novelty, it now also applies for donations coming from legal or physical persons who are controlled directly or indirectly by another person or group of persons, physical or legal – in this way, it will be more difficult to exceed the upper limit by using intermediaries. It is also noteworthy that price deductions of over 20% from the initial value of goods/services are now assimilated to donations. Finally, political parties are forbidden to receive donations from companies with debts to the state budget.

Regarding campaign contributions, another new restriction disallows financing a political party from a company which has operated with public funds (Article 52(1))

Another positive element introduced by the new law is *the changing of the algorithm by which state subsidies are allocated to political parties* (75% are allocated in respect to the number of votes obtained in parliamentary elections, and the remaining 25% in respect to the votes received in local elections). According to the system for allocation state subsidies formerly in place (established by Law 43/2003) that sums were distributed in line with the number of parliamentary seats a party had obtained. There was a subsequent three-step system of reallocation for remaining sums. The present regulation is simpler, fairer and more competitive. On the other hand, state subsidies for running electoral campaigns were eliminated.

Despite all of this, there are also important weaknesses in the new Law no. 334/2006.

The public authority enabled to control political party and campaign financing is no longer the Chamber of Accounts, but the Permanent Electoral Authority (AEP). In terms of expertise and administrative capacity, this modification of the institutional framework is not appropriate. The Chamber of Accounts is a body specialized in audit-type activities, whose institutional capacity and know-how have improved significantly in recent years; what is more, the Chamber of Accounts benefits from the necessary physical infrastructure (i.e. its county offices) to undertake the control of political party finance. A simple comparison clearly demonstrates that the AEP does not benefit from the same advantages in undertaking the control of political party finance. In terms of expertise, it seems relevant that Law no. 344/2006 stipulates the creation of a new department for "controlling political party and campaign finance" within the AEP. As for territorial infrastructure, it is notable that the legislation currently in force provides for the establishment an AEP bureau in each development region – however, up until now only one such structure was set up in Valcea county.

[21] It is of note that the previous regulation (Law no. 43/2003) established the obligation to report to the Chamber of Accounts only the "printed electoral posters" – Article 20(2).

In what regards the integrity and impartiality of the control process, the AEP does not present the same guarantees as the Chamber of Accounts. Thus, the AEP staff is composed of parliamentary civil servants, who, although subject to an incompatibilities and conflict of interest regime comparable to that of regular civil servants, do not benefit from the same guarantees of stability in office and protection against political pressures[22].

A final aspect to be analysed here is the new stipulation according to which the control authority is enabled to perform verifications not only annually, but also upon receipt of notifications from any interested persons or through its own initiative. This new more flexible formula is certainly a gain, but the rigours, which condition the notification of AEP, are liable to severely reduce the exercise of this mechanism. It is important to note that the person who files a notification is obliged to bring evidence supporting his/her claims – evidence which will certainly be difficult to produce. The asset control commissions within the Courts of Appeal set up by Law 115/1996 represent a precedent that clearly shows how conditioning a notification upon producing evidence can be a very inefficient procedure, if not counter-productive.

Also in connection to notifying AEP, Article 36(2) of the Law stipulates that using this mechanism by making "false statements in regard to the infringement of the legal provisions on political party financing constitutes a felony and is punishable by incarceration from 1 to 3 years". Lacking a clear definition of the phrase "false statements", these provisions leave room for abuse and certainly discourage persons who may notify AEP on potential illegalities.

Finally, another negative aspect is that although the new law substantially increases the upper limit for the value of electoral campaign spending, it does not make any progress in sanctioning violations – the fines for exceeding the upper limit vary between 5 000 RON and 25 000 RON, which is far less than the value of a political party's incomes.

However, irrespective of the pluses and minuses in the new law, the Government's position is extremely worrying, as it has repeatedly and clearly eluded its application. Emergency Ordinance 1/2007 has postponed the entry into force of the legal provisions concerning state subsidies and the control activity undertaken by the Permanent Electoral Authority, from January 1st 2007 to July 1st 2007 – that is, precisely after the elections for the European Parliament. Through Emergency Ordinance 8/2007 the provisions on allocation of state subsidies were suspended until December 31st 2007. These hesitations and delays demonstrate once again the lack of political will in preventing corruption and the incapacity of political parties to fulfil their due part in the county's anticorruption efforts.

2. Decentralization and pro-integrity policies in local public administration

Although one cannot yet speak of a coherent and autonomous public policy for fighting corruption in the Romanian local government, the last year saw a series of legislative developments that have a major impact on integrity at the local level. Thus, we will analyse them as a package, distributed on four coordinates:

- Aspects related to the allocation and administration of local public finances (section 2.3.1.);
- Aspects related to the modification of the law on local public administration (section 2.3.2);
- The penalization of "political migration" (section 2.3.3);
- The de-politicising of the office of the prefect (section 2.3.4.).

[22] This aspect is discussed at length in the "Legislative Developments" section of this report.

2.1. The allocation and administration of local public finances

The new law on local public finances (Law no. 273/2006) changed the framework for distributing equalisation grants to local governments, thus ensuring the premises for objectivity and uniform application of the principles governing the entire process, by eliminating the political interference of country councils.

Previously the field was regulated by OUG no. 24/2003, which stipulated that the allocation of equalisation funds be made by county councils. The county offices of the Ministry of Public Finance[23] would offer technical assistance to county councils, which would afterwards decide on the allocation of equalization sums within a Consultative Commission, made up of mayors, representatives of associations of local authorities, prefects and the directors of the DGFPs. The allocation was actually done by way of a County Council decision, after the results of the discussions within the Consultative Commission were also analysed by the budget commission of the county council. As a result, the process of allocating equalization sums to local governments was essentially one of political negotiation between the county and municipal authorities, with a large margin for discretion and arbitrary decisions on behalf of the county councils representatives[24].

These shortcomings were largely eliminated by the new Law no. 273/2006. Thus, 80% of the sums for local budget equalization are distributed by a decision of the DGFP director, according to a clear and transparent formula, while the remaining 20% is allocated by a decision of the County Council, exclusively for supporting local development programmes.

Another positive development brought by Law 273/2006 is the introduction of a series of stipulations conducive to a more responsible use of public funds by local authorities. More precisely, the law contains distinct chapters on the insolvency of local governments (with two components – the financial crisis and the insolvency) in case of incapacity of the local government to pay its financial obligations and salaries. Moreover, the law stimulates the responsibility and fiscal effort of local governments by introducing the obligation to present annually an analysis of the extent of own revenue collection, eventually showing the factors which have lead to potential failure, as well as the proposed redress measures.

2.2. The modification of the law on local public administration

Law no. 286/2006 for the modification and completion of Law no 215/2001 on local public administration introduces the office of public administrator for local councils, county councils and associations for inter-municipal development. The public administrator performs – based on a management contract – a series of attributions concerning the coordination of the technical staff of the local/ county councils, or the coordination of local public services. The mayor can delegate the public administrator his/her prerogatives of first-order budget unit. This legislative novelty aims to enhance efficiency and professionalism in public service management – an objective which is undoubtedly desirable, but which must be attained while instilling guarantees against the abuse of public power, the lack of integrity and corruption.

It is precisely these aspects that the lawmaker has neglected. The public administrator is not a civil servant – in fact, the criteria and procedure for his/her appointment, as well as his/her contractual responsibilities are decided by the local/ county council, the only restriction being that the appointment has to follow a competitive procedure. Under these circumstances, one observes the lack of legal provisions covering the complexity of attributions and responsibilities

[23] In Romanian: *Direcţia Generală a Finanţelor Publice judeţene*. Henceforth referred to as DGFP.

[24] For a detailed analysis of the equalization policy established by OUG 45/2003, see the Institute of Public Policy. 2005. *Politica de echilibrare a bugetelor locale în Romania – impactul aplicării OUG no. 45/2003 ["Local Budgets Equalization Policy in Romania – the impact of applying OUG no. 45/2003"]*. Bucharest.

specific of the post of public administrator – in fact, the only law imposing standards of integrity and conduct for this position is the Code of Conduct for Contractual Personnel (Law no. 477/2004), which is insufficient.

2.3. The penalization of "political migration"

The penalization of political migration, through Law no 249/2006 for the modification and completion of Law no. 393/2004 on the Statute of local elected officials, represents a step forward in what regards the stimulation of responsible behaviour of the political class and ensuring respect for the electoral options of local communities. Unfortunately, Constitutional Court Decision no. 61/2007 has declared the law unconstitutional on grounds of retroactive application. There exists now a legislative proposal to be discussed by the Chamber of Deputies attempting to reinstall the penalization of political migration at the local level (Pl-x no. 54/2007).

2.4. The de-politicising of the office of the prefect

De-politicising the office of the prefect, by way of OUG no. 179/2006 and the series of subsequent exams in the first months of 2006, represents a much-awaited reform, a constant hot topic of debate on the public agenda and the object of repeated requests from the European Commission. However, it did not translate into a change of personnel (i.e.: replacing the prefects, appointed on political criteria, with high-ranking civil servants), but into a change of status (i.e.: the prefects currently in office renounced their membership in political parties and entered the civil service corps, thus preserving their public office). This approach severely reduced the effectiveness and credibility of depoliticising the office of the prefect.

3. The pro-integrity public policy in the national health system

Through *Law no. 95/2006 on the reform in the field of health services* a series of regulations were introduced with regard to conflicts of interests and incompatibilities for the personnel in public hospitals and state health insurance institutions. While commending the progress achieved in this way, it should be mentioned that the year 2006 saw no initiative for fighting the petty corruption in the public health system, an issue identified by the European Commission's Comprehensive Monitoring Report of May 2006 as a serious cause of concern.

IV. Illustrative cases for national integrity system vulnerabilities

NOTE!

The present section lays out a series of selected profile situations which exemplify the vulnerabilities in the Romanian National Integrity System. The presentation of the cases in this section is based exclusively on the written media coverage in Romania in the period from April 2006 – April 2007.

1. Administrative aberrations

Saint Iosif Cathedral

Another "hot" situation that is illustrative of the administrative irregularities is the construction of a 19-storey bloc of flats directly next to the Catholic Saint Iosif Cathedral in Bucharest. The Roman Catholic Archdiocese went to court to request the revocation of the construction authorization citing that the project, called "Cathedral Plaza" will affect the structural integrity of the cathedral, which is 130 years old, and will ruin the entire architectural style of that zone of Bucharest. The advice of the local administration – to change the location of "Cathedral Plaza" – has been rejected as unrealistic by the construction firm and the Roman Catholic Church. In January of this year, during pronouncements on receiving the Romanian ambassador's accreditation to the Holy See, Pope Benedict XVI expressed his concern with the situation regarding the Saint Iosif Cathedral, pointing out that this cathedral represents an important edifice of Romania's historic patrimony.

Sources:
„Marş pentru catedrala catolică", Ionut Baiaş, Hotnews, 26 April 2006
„Reportaj BBC în România: şantiere, poluare sonoră şi viitorul mămăligii", Oana Lungescu, BBC, 01 May 2006
„Primarul Videanu decide pe pământul altora", Mirela Corlatan, Cotidianul, 29 May 2006
„Papa Benedict afuriseşte construcţia de lângă catedrala Sfântul Iosif", Cronica Română, 22 January 2007

Basarab passage

Execution of the project to build the Basarab subterranean passage has been marked by the commission of a series of illegalities and abuses on the part of the authorities. At the initiation of the public procurement procedures for the construction, the Bucharest Municipality Mayor's Office did not yet hold all of the necessary authorizations and approvals demanded by the law in force at that time (OUG 60/2001), lacking both the environmental approval, and the construction authorization. These two acts were acquired after the public procurement process was started, thus being able to substantially modify the demands originally included in the public bid's contract conditions. This is even more important considering these permits were issued improperly. The construction authorization was not based on a property title demonstrating the state's ownership of the land in question or of the constructions in the affected zone that would need to be demolished to make way for the new project. The project's environmental impact study, on the basis of which the environmental permit was issued, was executed improperly, failing to respect the provisions of Minister of Environment and Water Management Order no. 863/2002.

Considering the opposition to the project of the owners in the area and the Mayor's Office's lack of a property title for the land on which it intended to construct the passage, the Bucharest Municipality General Council chose, in an extraordinary session, to award the needed title on the basis of the Basarab Passage's public utility, and to allow the expropriation of the needed land. The land owners refused the Mayor's Office's expropriation offers, considering the sums far too small to provide real compensation, and have gone to court to resolve the matter.

Sources[25]*:*

„Pasajul Basarab: urbaniştii zic că-i bal, cetăţenii – că-i spital", Săptămâna Financiară, 16 January 2006

„Lucrarea 'Pasajul Basarab', câştigata de firme străine cu laptopuri multe si angajaţi puţini", Răzvan Popa, Maria Manoliu, Gândul, 16 June 2006

„Încep exproprierile pentru Pasajul Basarab", V.T., Hotnews, 6 July 2006

2. Purchasing of employee housing by staff at the Ministry of Defence and the Ministry of Administration and Interior

In first months of 2007, a series of revelations appeared in the press alleging that employees of the Ministry of Administration and Interior (MAI) living in residential apartments owned and used by the Ministry as employee housing, purchased these apartments despite the fact that they also owned other houses or apartments. This is in violation of the legislation governing such transfers of employee housing. In order for the purchases to be made, these employees made notarized personal declarations in which they stated they did not own any other domicile, or that those which they do own do not meet minimal conditions for decent living space. The General Anticorruption Department, which is a section of the MAI, verified these cases and send four files to the Prosecutor. In parallel, the former Minister of Administration and Interior ordered, in March 2007, the creation of a commission for verifying all employee domicile sales to Ministry employees. The Commission will present a report on its findings within 90 days.

A similar situation also took place in the Ministry of Defence, where a number of employees were able to acquire the employee housing in which they were living at prices up to five times below market value, and committing the above-mentioned violations of the law. The Minister of Defence ordered, following requests from the DNA, that the Department for Preventing and Investigating Corruption and Fraud at the Ministry of Defence review the manner in which these employee housing domiciles were sold to the employees living in them.

Sources:

„Sergiu Medar şi generalii asaltează la sfert de preţ casele Armatei", Selia Dumitrescu, Oana Crăciun, Cotidianul, 19 February 2007

„Săracul Medar: 'Ce trebuia să fac? Să-mi vând vilele?'", Selia Dumitrescu, Oana Crăciun, Cotidianul, 20 February 2007

"Protejatul lui Blaga a primit şi el cadou un apartament", Georgeta Ghidovăţ, Cotidianul, 12 March 2007

"Noi verificări în cazul vânzărilor de locuinţa de serviciu de la MAI", Dragoş Comache, Hotnews, 13 March 2007

"Şeful Poliţiei: delict imobiliar cu premeditare", Georgeta Ghidovăţ, George Lăcătuş, Cotidianul, 14 March 2007

3. Disadvantageous state contracts

[25] See also the series of the press releases from the organizations *TERRA Mileniul III* and *Centrul de Resurse Juridice*, at www.terraiii.ngo.ro.

The "wise guys" affair in the energy sector

The security of the national energy system has been endangered in the wake of several damaging contracts made between 11 firms and Hidroelectrica, the cheapest electric energy producer in Romania – contracts through which energy was delivered to these firms preferentially and at below market rates. Prosecutors at the General Prosecutor have charged nine people in the "Energy" case, showing that the directors of the National Energy Regulatory Authority and Hidroelectrica may have used their positions to organize a group of conspirators whose make-up may account for most of the organizational chart of SC Hidroelectrica SA. According to prosecutors, the actions of this group affected the capacity of the national energy system to function securely, the maximum risk to the system's integrity being in 2003, when Romania experienced a period of drought. In drought conditions, the authorities at Hidroelectrica should have invoked the *force majeure* clause and stopped furnishing electricity on the free market in order to conserve water resources in the accumulation basins. In fact, Hidroelectrica continued to deliver cheap energy to the *"wise guys"* firms, in greater quantities than the existing resources permitted.

The preferential contracts with the *"wise guys"* are valid through 2014. The firms are continuing to profit from the deals, with the price paid for 1MWh being, according to some estimates in the press, one half of the market price.

The scandal in the energy sector is not limited only to the contracts at Hidroelectrica and the period of PSD government – according to the findings of a Ministry of Economy control, which appeared in the press: in the 2004-2005 period (therefore during the DA alliance government) several contracts disadvantageous to the state were made between private market traders and thermal power stations in Turceni and Rovinari. In 2005, 72.25 percent of the energy produced in Rovinari, and 68.9 percent of that produced in Turceni, went to private companies, paying prices below production costs based on contracts signed through direct negotiations avoiding the energy commodity exchange. Penal charges are currently before the DNA and General Prosecutor in both cases.

Sources:

„Clauzele de aur ale băieţilor deştepţi", România Liberă, 20 February 2007

„Termocentralele Rovinari şi Turceni au vândut 70% din producţie direct băieţilor deştepţi", Robert Veress, Gândul, 24 March 2007

„Cine si cum a pus mina pe curentul ieftin al Romaniei", Mihai Nicut, Cotidianul, 26 March 2007

„Cât ne costă pe an 'băieţii deştepţi'", Mihai Nicut, Cotidianul, 29 March 2007

„Hidra electrica intra la apa", Marius Iosef, Evenimentul Zilei, 12 April 2007

„Turbina de făcut bani a 'băieţilor deştepţi'", Marius Iosef, Evenimentul Zilei, 14 April 2007

„Contractele portocalii ale lui Bogdan Buzaianu", Marius Iosef, Narcis Iordache, Evenimentul Zilei, 16 April 2007

The Frigates Affair

Another prominent example of a disadvantageous contract for the Romanian state, which also carries suspicions of corruption, is the so-called *"frigates affair"*, in which, at the beginning of 2003 Romania acquired two frigates second-hand from the biggest European arms producer, Britain's BAE Systems (the price paid by Romania was, according to some press reports, 116 million pounds sterling). The contract provided for a "100 percent offset": the British side was required to provide compensation through direct deliveries, participation in privatisation and investments, a value equivalent to the sum paid for the frigates' modernization. In 2004, after the payment to BAE Systems was made and the modernization of one of the frigates was almost finished, the British negotiators refused the majority of the Romanian side's offers, which should have covered approximately 80% of the value of the modernisation works. Although Romanian officials demonstrated their dissatisfaction at that time, the contract was not cancelled, leading to

damages on the part of the Romanian government of tens of millions of euros. Prosecutors from the National Anticorruption Department (DNA) are investigating the legality of the frigates' acquisition from Great Britain.

The arms company BAE Systems is not facing its first investigation for suspicions of corrupt practices – it is presently being investigated in Britain by the Serious Fraud Office (SFO) and the British Ministry of Defence in the wake of suspicions of corruption in connection with the furnishing of an air traffic control system to Tanzania.

Sources:

„Anglia a „uitat" să ne compenseze fregatele", Mihai Duta, Andrei Badin, Adevărul, 12 June 2006

„Noi suspiciuni de corupţie legate de BAE Systems", M.C., Hotnews, 13 November 2006

4. Irregularities in public procurement

The contracts for the construction of the Bucharest-Ploieşti highway

According to a recent Government Control Corps report put before the DNA, significant irregularities occurred in a public bid for constructing the Moara Vlăsiei – Ploieşti section of the Bucharest – Ploieşti highway. The allegations indicated that in order to facilitate the participation of Romanian firms in the highway's construction, the authorities modified the contract conditions during the bid's execution, which is not permitted by law. Speculations exist in the press that the success of Romanian firms in the bid is a result of the publicly expressed position of the Romanian President, that "it would be good if Romanian firms would also win contracts."

Sources:

„Berceanu a ascultat de Băsescu: banii de autostradă, la ai noştri", Doru Cireaşă, Cotidianul, 17 September 2006

„Bucuresti-Ploieşti continuă demn seria autostrazilor de lux", Doru Cireaşă, Cotidianul, 02 October 2006

„Nereguli în industria energetică, la autostrada Bucureşti-Braşov, RAAPPS şi AVAS", L.P., Hotnews, 16 March 2007

„Autostrada lui Berceanu va fi începută de procurori", Mihaela Radu, Doru Cireaşă, Cotidianul, 17 March 2007

Contracts for disinfections for combating the avian flu epidemic

The press also brought attention to notable cases that illustrate the way in which crisis situations are used as a justification for avoiding public procurement procedures that are normally used to ensure a higher level of transparency.

In the context of the discovery of the H5 virus in Romania, and of the necessity of quarantining the outbreaks of avian flu, the state closed a number of contracts in which the press have signalled a series of irregularities. A notable case is that of work done to build disinfection stations for vehicles. This contract was awarded through direct assurance by the National Roads Authority to firm completely unknown to the other companies in the field, despite the fact that the contract conditions and terms for a public bid had already been prepared previously, which would have allowed for a transparent, public contracting procedure.

In October 2005 the National Road Authority again awarded another contract for vehicle disinfection stations in identical fashion to a Romanian firm, which, one month before signing this contract had only one employee. The verifications carried out at the beginning of 2006 by the Ministry of Transport's Control Corps found grave irregularities in the fulfilment of contractual obligations, which led to the cessation of the final payments to this firm.

Sources:

„Aviara s-a îngrăşat pe o afacere de familie", George Lacatus, Bogdan Pacurar, Cristian Stoichici, Cristian Stanescu, Andrei Luca Popescu, Cotidianul, 19 May 2006
„Corbii aviarei miros noi contracte", George Lăcătuş, Cotidianul, 21 May 2006
„Dezinfecţia maşinilor, din nou fără licitaţie", George Lăcătuş, Cotidianul, 24 May 2006

5. Exemptions of certain state firms from obligatory fiscal payments

Through emergency ordinance *OUG 128/2006 concerning measures diminishing budgetary arrears*, 34 national firms and commercial state firms, the majority of which are in the energy sector, were exempted from paying their fiscal obligations. The official motivation for the move is the major economic and social importance of these economic agents, which, at the moment of the ordinance's adoption, were all entering a state of bankruptcy – their bank accounts blocked by fiscal authorities, and forced to repay large volumes of accumulated debt to the state budget. The lack of previous consultations, along with the lack of transparency of the Ordinance (which does not declare the precise value of the arrears which will be exempted from collection) provoked the protest of the Parliamentary commission members, lofting accusations of both "dirty deals", and unjustified economic disadvantaging of firms operating in the same domain which had well-performing management and had paid all their debts to the state budget.

Sources

„Datorii de un miliard de euro şterse de stat", Dragoş Draghici, Emilia Sercan, Evenimentul Zilei, 8 March 2007

Conclusions

1. TI-Romania considers that the anticorruption measures adopted during the past year were marked by political conflicts between public institutions and by conflicting public messages, which lead to their inefficient implementation.

2. Regarding citizens' perception of corruption, there were no significant changes, showing that petty corruption is still a vulnerability of the National Integrity System. **The weakest domains are the same as last year: the public health-care system, the education system, as well as public administration.**

3. Public policies are still not efficient in what regards preventing and fighting against corruption in public administration. Vulnerable points are represented by the inefficiency of disciplinary mechanisms destined for civil servants and magistrates, the lack of sanctions for conflict of interests and the poor application of the law on whistleblower protection.

4. The adoption of the law establishing the National Integrity Agency, as an integrated mechanism for verifying wealth declarations and controlling conflicts of interest, represents a crucially important measure for corruption prevention in the public sector. TI-Romania considers that, in the adopted form of the law, the law responds to the basic principles for an anticorruption public policy dedicated to the ANI, which the organization drafted in 2006. With all of this, this radical variations in the position of Romania's political class in regard to the Agency demands some kind of explanation, considering that following debates in the Chamber of Deputies in October 2006 the ANI became an institution lacking any real control and put in a situation of applying a diluted material law, nullifying the entire rationale for its existence.

We consider that the adoption of the law establishing the National Integrity Agency in its actual form represents, however, only the first step in fulfilling the responsibility Romania assumed in the European Union accession process. Therefore, the officials in Bucharest must make every effort to ensure the institution is now established and operated according to the highest standards. At the same time, we express our hope that the adoption of this law does not simply represent a political trophy for the present administration, but a real engagement in preventing and combating corruption on the part of the political class, without which the success of this public policy is improbable.

5. TI-Romania draws attention to the fact that the National Anticorruption Department (DNA) has not acquired relevant convictions in high-level corruption trials and in those cases in which convictions have been obtained, **the recent judicial practice has been to grant a high percentage of suspended sentences, effectively lessening the impact of any penal consequences for corruption. The most visible corruption cases are still dealt with in the press rather than the court of law.**

6. Viewing the present context, in which several political changes are envisaged, TI-Romania expresses its concern towards future anti-corruption reforms and the sustainability of political commitments, considering that at present they are strongly linked with their respective initiators. TI-Romania draws attention to the fact that, as long

as public policy will be associated to persons and not to institutions, and as long as it will be subject to conjuncture changes, it is predestined to failure. **TI-Romania finds that such an approach strongly discredits the anticorruption message, which in turn will affect citizens' trust in the efficiency of the legal instruments introduced during the accession process.**

7. TI-Romania stresses that the attainment of EU membership is not the finishing line for implementation of reforms, but a crossroads at which they need to be approached in an integrated manner, considering the status assumed by Romania and the resulting obligations. Being a European state should oblige Romania to have a consistent attitude in ensuring the rule of law and fighting corruption. Thus, it is very important to focus all the efforts in this direction and not only on avoiding the activation of the safeguard clause. **Romania must prove that progress in the fight against corruption is not conditioned by international monitoring, but represents a genuine autonomous act of national will.**

NOTE!

Transparency International Romania would like to express its particular concern in light of a series of evolutions that have occurred outside the monitoring period for this report.

On 8 May 2007, the Minister of Justice submitted to the Superior Council of the Magistracy a proposal to dismiss the Section II Chief at the National Anticorruption Department without any previous analysis of the prosecutor's activity and in the absence of any preliminary discussion with the magistrate in question. We consider that, in these conditions, the debates on the dismissal proposal can be nothing but irrelevant and subjective. This gesture may constitute a damaging practice in the manner in which the Superior Council of the Magistracy exercises its responsibility to guarantee the independence of judicial power and show that anticorruption efforts have begun to be considered as a far less important by the authorities in Bucharest after European Union accession.

On 9 May 2007, the Romanian Senate adopted the law establishing the National Integrity Agency, a long-awaited measure both domestically and internationally. Transparency International Romania appreciates that the form adopted by the Senate responds to the key principles of anticorruption public policy and can be correctly and efficiently implemented through the new institution. A detailed analysis of this law is presented in Annex 1 of this report.

In light of these events, Transparency International Romania publicly reacted in two press releases, which are also included in the annexes to this report.[26].

[26] See Annex 3.

Annex 1: The National Integrity Agency

Although the measure is a belated result of pressure from the threat of the European Union safeguard clause, the Romanian Senate adopted on 9 May 2007 the law on the establishment, organizing, and functioning of the National Integrity Agency. However, this does not represent the complete fulfilment of the commitment assumed in the European Union accession process. The authorities in Bucharest to ensure that the Agency is now effectively established and operational as an integrated mechanism for verifying wealth declarations and controlling conflicts of interest with respect for the highest standards.

As a consequence of its mission, TI-Romania put its expertise in this area at the disposal of the Minister of Justice, regardless of political orientation, and contributed in summer 2004 to creating the original draft law envisioning an organization to prevent and oversee corruption risks. In September 2004, the law was adopted by the Chamber of Deputies and sent to the Senate, and over the course of 2005, 2006 and 2007 TI-Romania has continued to offer technical support to the Ministry of Justice for drafting the law establishing a National Integrity Agency.

In July 2006 the Government approved a draft law, which was subsequently sent to the Parliament for debate and approval. This draft law has incurred numerous amendments before eventually being adopted by the Chamber of Deputies. Through the amendments proposed by the commissions in the Chamber of Deputies the Agency lost the mechanisms of effective control and would have had diluted and insignificant legal provisions, which invalidate the very reasons for the Agency's existence. At the same time, a significant part of the revised law articles do not respect key principles of the public policy which have grounded the draft law when it was sent to the Parliament.

TI-Romania has repeatedly brought attention to that fact that, through procedural omissions and exploiting loopholes in the wording of the law's text, it would be possible to do away with the evidence and results of the Agency's control. Because the courts are obliged to judge including on the basis of ECHR jurisprudence, these risks may have direct consequences on the possibilities for preventing and sanctioning corruption.

In light of the numerous shortcomings identified in the law's contents in the course of the legislative process, we appreciate that the form adopted by the Senate responds, in large part, to the key principles of anticorruption public policy and can be correctly and efficiently implemented through the National Integrity Agency. These key principles for the Agency were created and promoted by TI-Romania in 2006, as a result of the numerous modifications this law suffered in the debate process.[27]

In this way, the form of the law adopted does respect the minimum requirements for an effective institutional framework, the Agency being an autonomous administrative jurisdiction. However, the National Integrity Council, the representative organism for the National Integrity Agency, is placed under parliamentary control exercised by the Senate. In our estimation, this fact may have an impact on the independence and impartiality of the Council's decisions insofar as the National Integrity Council can affect the naming and dismissing of managers at the Agency.

The Agency's work is based on an obligatory reporting component in which the Agency received certain information officially, as set forth by the law, at the risk of sanctions against managers in the case of any refusal to provide information. Later, where it deems necessary, the Agency may request further information it requires, on the basis of art. 5, from all public

[27] For a detailed description, see Annex 2 "Basic principles for an anticorruption public policy in the form of a National Integrity Agency".

institutions and authorities, as well as from other public or private sector legal persons, who are then obligate to provide the Agency with all the information they have.

The acts and decisions of the Agency are jurisdictional and obligatory in nature and are executed if uncontested by the investigated person in the administrative and fiscal section of the appropriate Appeals Court within 15 days of their communication. The Agency's acts and decisions are applied at the close of the 15-day contestation period, or in the case of a contestation, they are applied after the conflict has been resolved in a court of law in favour of the Agency. The resolution of contestations is carried out according to the provisions of Law no. 554/2004 on administrative contestations, complemented by provisions from the Civil Procedures Code. However, in a departure from these laws to shorten the contestation process, the typical preliminary procedure, which involves a direct recourse appealing the act to the originating institution in question, is no longer obligatory in the case of the National Integrity Agency.

Once the Agency's act has become definitive, it is transmitted to the administrative bodies responsible for applying administrative sanctions or ordering dismissals, as well as to the competent fiscal organs. On the basis of the present law[28], the Agency is not directly empowered to order the dismissal of any persons found in a state of incompatibility or guilty of acting in a conflict of interest.

If the ANI law does not present obvious gaps in the area of procedural rights, in the area of material rights the law makes no progress in the face of the legislation already in force in the approach to the three aspects subjected to the Agency's control:

a) In this area, the norms concerning the definition of *conflict of interest* refer to the provisions of Law no. 161/2003, which limits personal interest to the sphere of material interest for one's self, spouse or first-degree kin. In this way, neither conflicts of interest of material character through intermediaries, nor the provisions sanctioned through art. 253^1 of the Penal Code presently in force are included in the Agency's legal definition. The Penal Code's definition would expand this field to include situations in which material benefit is accrued to a second-degree relative or associate, or to any other person with whom the official in question had commercial or work relations in the previous five years, or on whose behalf the official benefits or has benefited from services or income of any nature. For further commentary on the inadvertences between the provisions of administrative and penal law, see Subchapter 1.1 of Section 1, "Legislative Developments" in the present report.

The applicable sanctions for non respect for the conflict of interest provisions consist in two categories: the absolute nullification of the act carried out in the conflict of interest by a court of law at the request of the Agency, and the resignation or dismissal of the person who violated the law.

b) The regulation of *incompatibilities* also remains a reiteration of the law in force, Law no. 161/2003, to which the present law refers. A considerable drawback to the present law is that it does not refer to the existence of incompatibility situations between mandates as dignitary and practice as a lawyer, notary or jurist. TI-Romania requested, as a public policy standard, that incompatibilities be covered by a unique regulatory regime in order to be applicable to all categories of public official, with the exception of local elected officials, in order to ensure that proportionality exists between decision-making capacity and the risks of unethical behaviour.

However, neither one of these two controlled aspects targets "lack of diligence in avoiding conflicts of interest and incompatibilities", although this incrimination seems necessary.

c) In the area of wealth control, the law targets illicit evolutions in wealth for persons hold public positions or managing financial and material public resources, from the moment those people begin their mandate to its end. The construction of this policy in the law is grafted to legal principles guaranteeing that the subjects of the law are not *a priori* suspected of bad faith,

[28] Special and exceptional Organic Law

although if the law has been violated then there are efficient and effective mechanisms for taking appropriate action. At the same time, the law is constructed in such a way that a proper investigation may not allow any departure from the principle of the presumption of licitness of any wealth or any reversal of the burden of proof; any such departure leading to the eventual annulling of all results of the investigation, according to Romanian law.

A shortcoming in the provisions on wealth control refers to the excessively high "obvious differences" in wealth which must exist in order to justify the notification of the competent court, the fiscal organs or the penal investigatory bodies: According to art. 4, paragraph (4), an "obvious difference" will be understood as a difference of more than 10% between the subject's actual wealth and their earned income, but not to be less that the equivalent in lei of 20.000 EUR. The institution of such a high value leads to the creation of an important category of potentially illicit income which unjustifiably escapes investigation and punishment, effectively diminishing the effectiveness and impact of the National Integrity Agency's activity.

A positive aspect introduced in the law is the extension of the rational sphere of applicability of persons subject to the obligation of declaring their assets and interests. We appreciate the reiteration of the obligation to publish asset declarations on the institutions' websites and the institution of the obligation to publish declarations on the Agency's site, this being of a nature to increase transparency and acting as an efficient mechanism for affirming the public character of the declarations. This eliminates the possibility of evading this law by having limited technical capacity at the institution in which the declarations are relevant.

In light of these considerations, TI-Romania expresses its hope that this gesture of the political parties, demonstrated through the unanimous adoption of the NIA law, does not represent merely a political trophy for the present administration, but a real engagement in preventing and combating corruption.

Annex 2: Basic principles for an anticorruption public policy in the form of a National Integrity Agency

Background elements:

- At the European level, there is no unitary model of public policy for the control of conflicts of interest, incompatibilities and wealth verification, the domain being assigned to "Internal Affairs" in which each state establishes its own legal mechanisms and institutions;
- In the absence of a predominant European model, any public policy option must start from a needs analysis;
- TI-Romania draws attention to the fact that Romania is still subject to a monitoring process in its application of the provisions of the Accession Treaty to the EU, concerning the safeguard clauses;
- The lack of such an instrument in the general landscape of legislative measures concerns internal affairs, justice and the fight against corruption will influence the country analyses evaluating this sector and implicitly country scores given by the investment community;
- At the moment, Romania has covered only two of the three stages of anticorruption policy. In the domain of sanctioning corruption, there is specific legislation and the institution of the National Anticorruption Department. In the area of combating corruption, there is legislation and the specific institutions for administrative policing.[29]. However, no regulation or institutional structure exists for preventing corruption, leading to a lack of efficiency;
- The public debate must begin from the principle that no one owns the absolute truth and that the final beneficiary is the citizen.

The legislation for any anticorruption public policy must be centred on two essential pillars: material law (the norms which regulate desirable legal and moral behaviour) and the norms of procedural law (the norms which regulate the institution and application procedures). On the basis of these pillars, institutional practices which ensure efficiency and effectiveness can be constructed.

Transparency International Romania proposes approaching the debates on the two legislative pillars of corruption prevention.

1. Material law

Corruption prevention, in our perspective, means securing public decisions from any pressure or subverting factors which could affect their integrity. As a result, public decisions must be protected from any conflict of interest and the deciding person must be prevented from exercising his or her function in a state of incompatibility. From the perspective of wealth control, this should refer to the development of wealth in the period of an official's mandate and foresee viable sanctions.

[29] Inspecţii, corpuri de control, alte jurisdicţii administrative cu atribuţii directe sau indirecte în combaterea abuzurilor şi a corupţiei.

The principles of material law must address public functions and management of public decisions, and not categories of persons, in order for the law as an instrument of corruption prevention to represent a guarantee of public integrity. The public integrity which citizens, the business environment, and Romania's international partners demand must generate legislative mechanisms and avoid limiting persons' rights. Even if the public policy requires certain restrictions, these are effects and not the source of corruption prevention public policy.

a) *Preventing conflicts of interest – basic principles*

- The norms on conflicts of interest must statutorily forbid making or participating in making decisions when a personal interest appears;
- Personal interest must be defined as benefit for one's self or for another person, and must not be limited only to strictly material benefit;
- In situations dealing with the interests of a legal person, these provisions are extended to also include the direct constituents of the legal person;
- The legal framework should respond to the need to regulate situations of conflicts of interest through intermediaries, when the interest is material benefit in nature;
- The sphere of application of the provisions of the law should cover all public sector entities, and all entities functioning closely connected to public authorities and institutions;
- The applicable sanctions for non-respect of conflict of interest provisions consist in two parts: the absolute nullification of the act carried out in a conflict of interest and the dismissal of the person which violated the law. The only exception to the sanction of nullification applies to decisions taken in forums for collective deliberation.
- The dismissal procedures may be established by the public institutions, by ANI, or by other entities by case.

b) *The regulation of incompatibilities – basic principles*

- Incompatibilities should established by law in a unitary framework for dignitaries, civil servants, and magistrates, and public firm managers/managers of autonomous administrations /managers of firms of public interest, providing that for the other categories of personnel covered by the public budget by established separately as a function of public interest which the law protects in each sector;
- The minimum standard for the first category of person is total incompatibility with any function, remunerated or unremunerated, with the exception of university faculty positions which do not include administrative responsibilities. This minimal standard starts with the specific nature of the position's activity on the basis protected by law (ex. Minister, civil servant, judge);
- The incompatibilities for the second category of personnel may be established through subsequent and secondary laws which will be established by legislators.

c) *Wealth control – basic principles*

- Wealth control must monitor the development of a person's wealth during the period in which they occupy a particular public post or manage public financial or

material resources. In this way, the establishment of the specific categories of persons to whom the law's provisions apply must be based no the protection of public interest and not on the type of category according to different grades of "privileges"[30];

- Wealth control, and especially the capacity to sanction the persons who are found to have unjustified wealth in the course of their occupation of a public position, must be in full accord with the provisions of art. 44.8 and 44.9 of the Constitution;
- The public policy on controlling wealth must establish a T0 from which any procedural element of development analysis may be reported, the most feasible recommendation is the moment in which the global income tax is applied to a person's income;
- The public policy must also institute a T1 moment in which the official must concretely declare their actual assets (fiscal, in terms of wealth or property, as a function of the solutions and options laid out in the legislation), which can be classified as a breach of art. 44.9 of the Constitution if the person fails to submit a declaration or submits a false declaration. In the absence of this basic principle in the text of the law, then any sanctions will be impossible to apply, either because they constitute a reversal of the burden of proof, or because there would exist no basis for material sanctions.
- Element T2 of the public policy is the moment in which an investigation is deemed necessary and begun;
- The wealth declaration serves as the basic document in the investigation of wealth development, although the public policy should also foresee comparative analytical elements between the official, taxed income and the active or passive, individual or family property, precisely to provide a base of evidence on the part of the state;
- The construction of the public policy must have clear principles guaranteeing that the objects of the law are not *a priori* considered to have acted in bad faith, but that in the case of a violation of the legal provisions in question, there are efficient and effective mechanisms for taking action, without recourses to legal "engineering" counter to the spirit and intention of the law.

2. Procedural Law

a) *The National Integrity Agency*

- The institution must be an instrument specific to the area of preventing corruption, even if its contents also include authority in sanctioning;
- The Agency should be a powerful institution, which has the capacity to prevent corruption through securing public decisions from any possible vitiating influences. Such an institution must have the capacity to monitor and sanction conflicts of interest and incompatibilities which may affect the adoption of a public decision and verify the development of personal wealth of those exercising the prerogatives of public power.
- The minimal demands for the institutional framework are that it be an autonomous administrative jurisdiction which presents reports to Parliament,

[30] A se vedea dezbaterea despre necesitatea sau inutilitatea controlului averilor prelaţilor.

however the mechanisms for naming and dismissing managers must ensure the independence and impartiality of decisions;

- The Agency must have access to all public databases in all domains which it considers necessary (banking, personal evidence, labour, fiscal system, registry of commerce, etc.)
- The public authorities and institutions have the obligation to put all the data and information at the Agency disposition which it needs, at risk of sanctions punishing managers' refusal;
- The Agency's work is based on an obligatory reporting component in which the Agency received certain information officially, as set forth by the law, at the risk of sanctions against managers in the case of any refusal to provide information;
- The acts and decisions of the Agency have a jurisdictional and obligatory character and are executed if they are not attacked within the legal term by the interested parties or by public institutions before an independent court[31];

b) *Principles for legal procedures*

- A lack of diligence in preventing conflicts of interest and incompatibilities should also be defined as a punishable offence in the case of the discovery of such a problem
- The Agency must be able to order, on the basis of the present law[32], the dismissal of any person found to be in a state of incompatibility or guilty of a conflict of interest in the sense of the present law.
- Special constitutional norms for naming and dismissing certain categories of officials are an exception to this. Although the law must apply the Agency's overview to these categories of persons, the Agency must observe all special procedures in ordering dismissals. Refusal to begin the dismissal procedures on the part of another institution may lead to sanctions through repeated fines to the institution or in some cases to the dignitary responsible.
- Wealth investigation may not allow any departure from the principle of the presumption of licitness of any wealth or any reversal of the burden of proof. Any such departure would lead to the eventual annulling of all results of the investigation.

[31] The competent court in administrative contentions.
[32] Special and exceptional Organic Law.

Annex 3: Press Releases

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FOR IMMEDIATE RELEASE

PRESS RELEASE

Transparency International Romania protests the way in which public prosecutor Mr. Doru Tulus has been removed from his function as Chief of Section II of the National Anticorruption Department (DNA).

Transparency International Romania considers that the removal of a magistrate from his or her position may not be discussed without a previous analysis and a discussion with the magistrate in question.

As a result, Transparency International Romania considers that the procedure for appointing and dismissing the heads of the Prosecutors Office of the High Court of Justice and Cassation is a discretionary instrument in the hands of the executive powers. In this way, the Government and the President may interfere in the judicial branch.

We draw attention to the fact that this gesture may be damaging to the Superior Council of the Magistracy's (SCM) mandate to guarantee the independence of the judicial system. Questioning a magistrate's activity without requesting any sort of preliminary analysis is an irrelevant and subjective control method. This gesture demonstrates that the authorities in Bucharest have begun to consider anticorruption efforts as far less important following the European Commission's monitoring report from September 2006. From the point of view of anticorruption public policy, this sets a discouraging precedent against efforts to fight corruption, because they may be countered by mechanisms through which those under investigation can exercise control over their investigators.

An analysis of the DNA's activity would contribution to improving investigative instruments and to accelerating high-level corruption investigations, and would have been opportune for identifying why Romania has managed only to begin several investigations into high-level corruption, rather than achieve final results in combating the phenomenon. Only in these circumstances would we consider it acceptable to make decisions about a magistrate's career – on the basis of objective information and with concrete identification of individual responsibility. In the absence of such an analysis, any magistrate employed in a management position at the General Prosecutor's Office may be punished for legislative or procedural shortcomings, which makes the process of evaluating the performance of the managers of these institutions highly arbitrary.

Transparency International requests that the interim president of Romania, Mr. Nicolae Vacaroiu, not release the decree dismissing Mr. Tulus from his position, since, in consideration of the shortcomings presented above, the proposal of the Ministry of Justice' and the advice of the SCM (positive or negative) are baseless.

In view of the fact that the discussions on the proposals have been delayed, we encourage the SCM to give its advice, whether negative or positive, on the basis of an analysis furnished by those who have initiated the dismissal procedures. Transparency International Romania also requests that the Ministry of Justice, in the spirit of transparency, make public its arguments for proposing Mr. Doru Tulus' dismissal from his position at the DNA.

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FOR IMMEDIATE RELEASE

PRESS RELEASE

Transparency International Romania would like to express its satisfaction at the Senate's adoption of the law establishing the National Integrity Agency, although the measure is a belated result of pressure from the threat of the European Union safeguard clause.

As a consequence of its mission, TI-Romania put its expertise in this area at the disposal of the Minister of Justice, regardless of political orientation, and contributed in summer 2004 to creating the original draft law envisioning an organization to prevent and oversee corruption risks. In September 2004, the law was adopted by the Chamber of Deputies and sent to the Senate, and over the course of 2005, 2006 and 2007 TI-Romania has continued to offer technical support to the Ministry of Justice for drafting the law establishing a National Integrity Agency.

The adoption of this law represents a satisfying and important success in a field which has been an import focus of TI-Romania's advocacy. We also salute the gesture of the political parties demonstrated through law's unanimous adoption.

TI-Romania appreciates that the form adopted by the Senate responds to the key principles of anticorruption public policy and can be correctly and efficiently implemented through the National Integrity Agency. These key principles for the Agency were created and promoted by TI-Romania in 2006, as a result of the numerous modifications this law suffered in the debate process. TI-Romania now hopes that its adoption does not simply represent a political trophy for the present administration, but a real engagement in preventing and combating corruption.

In view of the continuing possibility of activation of the safeguard clause, TI-Romania would like to draw attention to the fact that the adoption of the National Integrity Agency does not represent a complete fulfilment of the commitment assumed. With this in mind, we encourage the authorities in Bucharest to ensure that the Agency is now effectively established with respect for the highest standards.