

The fight against corruption – The Problem Child of the Carpathians



Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

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I. Foreword

The "fight against corruption" has been a subject on the Romanian public agenda for many years already (especially post 2005). Romania's accession to the European Union (EU) on January 1, 2007 did not lower interest in the topic whatsoever. On the contrary: post accession, the fight against corruption has been a major concern for the mass-media, political world, business community, legal professions and for the local and international civil society to an unprecedented extent. For example, this is what *The Economist* had to say on the fight against corruption in the new EU member states, on May 22, 2008:

"For corrupt officials in Central and Eastern Europe, life has seldom been better. Joining the European Union has produced temptingly large puddles of public money to steal. And the region's anti-corruption outfits are proving toothless, sidelined or simply embattled. The biggest problems are in Romania and Bulgaria, the EU's two newest members, whose apparent inability (or disinclination) to deal with high-level corruption has led to increasingly acerbic public warnings from Brussels."¹

In an article published by *The Herald Tribune* mid-May, *Reuters* resident chief correspondent for Romania, *Justyna Pawlak*, writes the following on the manifest opposition in the country to combating top-level corruption:

"Corruption is a day-to-day concern in Romania."²

It is, indeed, a concern for the entire country and for all its citizens. The latest *Transparency International* (TI) Global Corruption Barometer published in 2007 confirms it. The report looks into the extent to which corruption affects everyday life of the regular public. For that purpose, *TI* polled members of the general public about their opinion on corruption. The key-inquiries were the extent to which people believed corruption existed in public institutions, their respective experiences of petty corruption and their outlook on corruption in Romania.³ Those polls put Romania and a few other countries to the top of the standings in terms of bribe demands: 33% of the respondents having paid bribe for access to various public services. Expectations that corruption would worsen in the following three years amounted to 36% of the interviewed, as against the 34% of the citizens polled who expected a change for the better.⁴ The September 2007 Corruption Perception Index (IPC)

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¹ *The Economist*, Corruption in Eastern Europe: Talking of Virtue, Counting the Spoons, May 22, 2008. (underscoring by author) . Furthermore, we can read in *The Economist*: "But other countries have done badly too. 'Before accession, governments were under close scrutiny. Now the fight against corruption is not a priority', comments Dragu Kos, president of GRECO, an anti-corruption outfit affiliated to the Council of Europe, a human-rights organization. 'The Europeanization of political elites was largely taken for granted', says Alina Mungiu-Pippidi, a Berlin-based Romanian academic."

² "In Romania, high-level corruption resists reform", *Justyna Pawlak*, May 13, 2008. The original quotation is: "Corruption is a day-to-day concern in Romania." The list of critical mass-media features and of 'policy papers' on the subject of the recent years could be easily continued.

³ See *2007 Barometrul Global al Coruptiei*, December 6, 2007, available at http://www.transparency.org.ro/politici_si_studii/indici/bgc/2007/index.html.

⁴ See page 21, page 23.

Konrad-Adenauer-Stiftung e.V.

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prepared by *TI* and assessing the level of corruption appraised by the public places Romania on the last slot among all the EU member states.⁵

In the report he had written for the European Commission in November 2007, Belgian prosecutor *Willem de Pauw*, an old observer of justice reforms and corruption fighting in Romania, depicted a gloomy picture of the development of fighting corruption in this country. In the conclusions of the report we read the following:

"Instead of progress in the fight against high level corruption, Romania is presently regressing, on all fronts, in the fight against corruption. Many of the measures that were presented, before Accession, to be instrumental in the fight against corruption, have been deliberately blunted by Parliament or the Government immediately after Accession, while other factors have been instrumental in repulsing ongoing attempts to address high level corruption. (...) If the Romanian anti-corruption effort keeps evaporating at the present pace, in an estimated six months time Romania will be back where it was in 2003."⁶

At a first glance it seems that things are not good in terms of fighting corruption in Romania. The current report intends to subject this negative image to a critical analysis. The framework to be used in this context will be that of the benchmarks set by the European Commission for Romania within the co-operation and verification mechanism. The following questions will be used for guidance:

- What are the political and legal tools available in Romania for the fight against corruption?
- How do these tools function in practice?
- And, last but not least, what is the forecast: what are the main obstacles and what are the real chances to combat corruption?

II. Fight Against Corruption in Romania and the Co-operation and Verification Mechanism

When joining the European Union on the January 1, 2007, both Bulgaria and Romania still had notable deficits in the areas of justice reform and fight against corruption and organized crime. For that reason, the European Commission issued a special decision establishing a mechanism for co-operation and verification of the progress made by the two countries in the area.⁷ Bulgaria and Romania are the first member states whose reforms are being scrutinized by the Commission even after their accession to the EU.⁸ The introduction of the

⁵ The Corruption Perception Index for Romania is 3.7 on a scale from 1 to 10. See 2007 Corruption Perception Index Regional Highlights: EU and Western Europe, as well as the *Transparency International Romania* press release of September 26, 2007 - "EU accession gives hopes of normalization Romania now needs to confirm."

⁶ *W. de Pauw*, Expert Report on the Fight Against Corruption/Cooperation and Verification Mechanism, Bucharest, November 12-15, 2007. The report was published on July 3, 2008 to the online edition of *The Economist* - "The European Union conceals Romania's backsliding on corruption."

⁷ The so-called "mechanism for co-operation and verification of progress". The Romanian Minister of Justice, *Catalin Predoiu*, after a meeting with EU Justice Commissioner *Jacques Barrot*, in early June this year, stated that *Barrot* had noted that the reporting procedure on justice was not only a means of control, but a procedure of co-operation too.

⁸ In an interview for the *Frankfurter Allgemeine Zeitung* of the June 4, 2008, Romanian President *Traian Basescu* answered the question whether Romania was a second-class member state as follows: "Naturally, I could never admit to such thing. Just look at our economic growth. Is a country with 8% economic growth a second-class state?" (*F.A.Z.*, 04.06.2008, no. 128/page 5).

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co-operation and verification mechanism was accounted for by the European Commission as follows:

"The decision to continue assessing Bulgaria and Romania shows the EU's commitment to see the two countries develop the effective administrative and judicial systems they need to deliver on the obligations of membership as well as enjoying the benefits. Progress on judicial reform, corruption and organized crime will allow Bulgarians and Romanians to enjoy their full rights as EU citizens."⁹

The benchmarks to be addressed by Romania, by which progress in the areas of judicial reform and the fight against corruption could be assessed by the Commission as part of the mechanism for co-operation and verification since January 1, 2007, stem from the remaining issues identified in its final monitoring report on the preparedness of Bulgaria and Romania for EU membership of September 26, 2006.¹⁰ In Romania's case, the Commission established a set of four benchmarks by which progress in the areas of judicial reform and the fight against corruption could be assessed. Three of the four benchmarks are directly targeted at deferring corruption. They are:

Benchmark 2: Establishing an Integrity Agency

Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.

Benchmark 3: Fight against High-Level Corruption

Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.

Benchmark 4: Fight against Corruption in the Local Government

Take further measures to prevent and fight against corruption, in particular within the local government.

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Benchmark 1 – Ensure a more transparent and efficient judicial process¹¹ – is only indirectly linked to the fight against corruption. This is the reason why we chose not to address it in this report.

⁹ http://ec.europa.eu/dgs/secretariat_general/cvm/index_en.htm.

¹⁰ The European Commission, Brussels, 26.09.2006, COM (2006), 549 final.

¹¹ Benchmark no. 1: "Ensure a more transparent and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes."

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III. Benchmark 2: The Establishment of an Integrity Agency – Effective Tool in Preventing and Fighting Corruption in the Public Sector?

As mentioned above, this benchmark stipulates the establishment of a National Integrity Agency able to investigate the assets, incompatibilities and possible conflicts of interest of elected officials, civil servants and public office holders. It is also to take the necessary measures in order to enforce dissuasive sanctions. The Agency was initially designed as a key outfit to prevent and fight corruption in the public sector. The progress made by Romania with respect to this benchmark over time is questionable.

Benchmark 2 is only partly met through the establishment of the National Integrity Agency (ANI). The Agency has started its activity in December 2007. On April 15, 2008, the Senate appointed *Catalin Macovei* – then a prosecutor with the National Anti-corruption Directorate – as President of ANI. The Vice-president position has been vacant to this day. So far 42 out of the total 110 integrity inspectors have started working¹². As many as 100 employees are currently working with ANI. By the end of May 2008, ANI had already initiated 40 inspections, most of them based on information from the mass media. Before the local elections held in Romania in the first half of June 2008, more than 60,000 wealth and interest statements were submitted to the Integrity Agency by candidates for local public administration posts¹³. But since every such statement is six pages long, the 50 inspectors were understandably overwhelmed.

Understaffing and inadequate equipment are not the only challenges facing the Integrity Agency. The very law that regulates the activity of the Agency poses problems for the ANI president and others. The current ANI Act of March 18, 2008 was harshly criticized by observers in the country and abroad. The main criticism is that the Agency will likely remain “a toothless tiger”, primarily because of the latest modifications which have deprived the National Integrity of its due legitimacy. In order to understand what this criticism is based on, one needs to take a look at the history of this normative act.

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Genesis of the ANI Act

Drafting and reaching political consensus on a law to regulate the establishment of the Integrity Agency may be described as “hard birth”. The establishment of ANI was put off for several years, among others because of disagreements over the institution entitled to control the Agency, i.e. over the scope of its authority, the powers of its inspectors and, more importantly, over how far inspections should be allowed to go, and also over the rights and obligations of the individuals subject to inspection. The Romanian government passed the law drafted by the Justice Minister at that time, *Monica Macovei*, and forwarded this draft law to Parliament¹⁴. Another year passed until the Senate, the decision-making

¹² Of these, after having successfully passed selection procedures, 25 new inspectors were sworn in on June 18, 2008.

¹³ Mediafax, 04.06.2008: “Romanian Integrity Agency to Check 60,000 Wealth, Interest Statements.” The NIA Act requires candidates to such positions to submit income and interest statements to the Integrity Agency.

¹⁴ The Government of Romania passed the draft law on July 5, 2006, further to mediation by President of Romania *Traian Basescu*. The draft law was tabled to Parliament on July 27, 2006.

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parliamentary body, endorsed the Law on the establishment, organization and functioning of the National Integrity Agency (the ANI Act), on May 9, 2007¹⁵. Under pressures from *Macovei's* successor as a minister, *Tudor Chiuariu* (PNL), at the end of May 2007, the Government of Romania amended the ANI Act, under an emergency ordinance, and tightened it in certain respects, adding provisions intended to ensure a rapid set-up of ANI (i.e. by laying down deadlines)¹⁶. This laid the groundwork for setting up the Agency. To justify the amendments, *Chiuariu* stated at the time that the changes operated under the emergency ordinance had been made further to consultations with the European Union. The text of the ANI Act as amended under the emergency ordinance is regarded as clearly stricter. According to *Chiuariu*, these modifications were necessary, because only through tight checks on politicians' assets and conduct might a clean political environment be created¹⁷. On March 18, 2008, the Senate of Romania endorsed the May 2007 government ordinance that amended the ANI Act (no. 144/April 21, 2008), thus bringing the legislative process to a close.

ANI's Areas of Competence

Under the current law, the Integrity Agency is empowered to check the wealth statements of elected officials, civil servants and public office holders, and to investigate incompatibilities and conflicts of interest. As regards wealth statements, ANI is entitled to check the assets that the individuals in question have acquired during their term in office in a public institution or as public office holders¹⁸. The category of individuals required to declare their incomes is very broad. It includes, among others, the President of the state, presidential advisers and state advisers, deputies and senators, government members, members of the Superior Council of Magistracy¹⁹, judges, prosecutors, assistant-magistrates, judicial assistants, Constitutional Court judges, the Ombudsman, and presidents, vice-presidents, secretaries and treasurers of trade union federations and confederations²⁰. Wealth statements are updated on an annual basis, by a specific deadline²¹. The wealth to be declared includes real estate (land, buildings, homes) and other assets, financial assets, claims, bonds, equity in trade companies, other profit-generating assets (where they exceed 10,000.- EUR) as well as the goods and services that the respective individuals have received free of charge during their term in office.

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¹⁵ Just weeks after the restructuring of the Government of Romania in the spring of 2007, further to which Justice Minister *Macovei* was removed from office.

¹⁶ The chief amendment concerns the threshold for the difference between the wealth gained and incomes earned during a term in office, which entitles the Agency to initiate checks. The threshold was lowered, under the emergency ordinance, from 20,000.- EUR to 10,000.- EUR. See Law 144/May 25, 2007, Art 4, paragraph 4, as against Art 4, paragraph 4 in Law No. 144/April 21, 2008.

¹⁷ *Nine O'Clock*, 29.05.07, page 3: "The Minister of Justice, *Tudor Chiuariu*, on Monday stated that a more rigorous control over assets and conduct of politicians would create a cleaner political environment, so he pleaded for rendering the NIA Law much stricter by suggesting the Government to amend it to make it more effective."

¹⁸ See Art 1, paragraph 1, ANI Act.

¹⁹ A body whose constitutional role is to guarantee the independence of the judiciary.

²⁰ See Art 39 in the ANI Act, which lists all these positions. There are more than 35 categories of officials required to submit wealth statements.

²¹ See Art 42, paragraph 2, ANI Act.

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

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Where an integrity inspector finds that there is a difference of more than 10,000.- EUR between the wealth accrued while holding a public office and the incomes earned during the same period, the inspector shall check whether this difference can be justified²². If the conclusion is reached that this difference cannot be accounted for, the inspector shall notify relevant courts, which are to decide on the portion of the wealth that will be confiscated. Where an inspector finds a breach of fiscal legislation, they are to notify the relevant fiscal authority²³. Where there is evidence that a criminal offence has been committed, an inspector shall put off checks and notify relevant criminal authorities. Throughout the inspection procedure, the Integrity Agency is entitled to request documents and information needed for drawing up a report, from all public institutions and authorities, as well as from other public and private entities²⁴. Inspectors are entitled to carry out more in-depth analyses to clarify inconsistencies between the declared and the actual value, but only with the consent of the persons in question²⁵. In addition, the Integrity Agency is entitled to check incompatibilities and conflicts of interest.

Current ANI Act Evaluation

According to the Romanian daily newspaper *Cotidianul*, in March 2008, the Romanian Justice Minister, *Catalin Predoiu*, expressed satisfaction with the promulgation of the ANI Act. "I believe," *Predoiu* said, "that this is an extremely important political signal, in the sense that the political class as a whole seeks to put an end to the period when the activities of the agency were stuck, to bring these activities to a normal level and to create a constitutional framework for the agency to be able to function."²⁶

Predoiu's assessment is accurate if we think of the heated debates on the ANI Act and the successive amendments to the law over time. But as regards the contents of the law, the verdict is less optimistic. We have already mentioned the criticism of this law, according to which the Agency is a "toothless tiger" or "an institution without legitimacy." In a conference organized by the German-Romanian Jurist Association and the Konrad-Adenauer-Stiftung's Rule of Law Program South East Europe on economic and judicial developments in Romania following the EU accession²⁷, *Gunther Krichbaum* (CDU), chairman of the Committee on the Affairs of the European Union in the German Parliament (Bundestag), who is very familiar with the state of affairs in Romania, stated that the

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²² "[The inspector] shall check whether the evident difference is justified," article 4, paragraph 3a, ANI Law.

²³ Article 4 paragraph 3 b), ANI Act.

²⁴ Article 5, ANI Act.

²⁵ See Article 7 paragraph. 1, ANI Law: "An integrity inspector may order, with the consent of the person under scrutiny, that an expert analysis be carried out in view of clarifying inconsistencies between the declared value and the actual value of the assets mentioned in the wealth statement."

²⁶ "I believe it is an extremely important political signal, in the sense that the political class as a whole seeks to render the Agency operational, to normalize its activity and to create the constitutional framework for the Agency to function." (*Cotidianul*, ANI passed in Parliament, 19.03.2008)

²⁷ Conference entitled *Economic and judicial developments in post-accession Romania*, June 20, 2008, German Parliament (Bundestag), Berlin.

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

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establishment of the Integrity Agency may be regarded as a positive development. But *Krichbaum* concluded that the ANI Act had been weakened, which he finds regrettable.

The current form of the ANI Act has departed from previous versions in several important respects. These amendments do have notable effects on the activity and independence of the Integrity Agency, whose efficiency as a key instrument in preventing and fighting corruption in the public sector may be limited. These amendments primarily refer to the Parliament's ability to control and influence the Agency, which the current law allows for to a greater extent²⁸.

Parliament's Controls and Levers of Influence over ANI: Limitation of the Agency's Independence

According to the *Macovei* draft law, the Integrity Agency was intended as an institution free from any political control and influence. But this criterion is no longer met. It is true that under the current law, ANI is still "an autonomous administrative authority," which enjoys operational independence²⁹. But the Integrity Agency is subject to parliamentary control. It is no longer protected from political influence. As compared to the version in effect last year, latest amendments have extended the means to influence the Agency.

In detail: the ANI Act, in its May 2007 form, was already vulnerable to criticism regarding a limitation of independence by allowing for political control. The criticism primarily referred to the powers given to the Senate in this context. Under article 18 in the ANI Act, the Senate of Romania appoints the President and Vice-President of the Agency. Their discharge is regulated by articles 24 and 25. According to article 25, paragraph 1, in one of the cases mentioned in Article 24, the Senate may dismiss the President or Vice-President of the Agency, at the proposal of the National Integrity Council, most of whose members are appointed on political criteria.

In reply to criticism against the May 2007 form of the ANI Act, the former Romanian Justice Minister *Tudor Chiuariu* stated that ANI was an autonomous administrative authority and that in no respect was it subordinated to the Senate. As regards its activities, the Integrity Agency was said to be independent and by no means under political control. The provision according to which the Senate appoints the President and Vice-President of the Agency was claimed to be only a formal requirement, of no consequence whatsoever. The selection was

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²⁸ There are also other aspects on which the current ANI Act differs from the initial bill drafted by former Justice Minister *Macovei*, which restrict the jurisdiction of the Agency with respect to checks on conflicts of interest and incompatibilities. Worth mentioning in this context is, for instance, the abrogation of an article which stipulated an incompatibility between the MP status and that of a practicing lawyer. In its September 26, 2006 monitoring report, the European Commission criticizes attempts by Parliament to weaken the ANI Act. The report reads, "In the Parliament there have been some attempts to reduce the effectiveness of the proposed National Integrity Agency during the passage of the Draft Law through Parliament, which Romania committed to adopt in the national Strategy and Action Plan against corruption." Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, Brussels, 26.9.2006, COM(2006) 549 final, page 38

²⁹ See Article 12, paragraph 1, ANI Law: "The National Integrity Agency is hereby established, as an autonomous administrative authority, with juridical independence, with national jurisdiction, as a single structure based in the city of Bucharest."

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

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July 9, 2008

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to be an open procedure. The President and Vice-President were reportedly to be dismissed only where an external audit procedure had proved their managerial incompetence.³⁰

But this line of reasoning is no longer valid in light of the latest amendments of the law. According to the May 2007 law, the President and Vice-President of ANI were to be dismissed for flawed management provided that the National Integrity Council established this from the conclusions of an independent external audit yearly report³¹. However, according to the current text, the external audit report is no longer the key criterion in assessing the managerial performance of the ANI President or Vice-President. Article 25, paragraph 2 in the new law stipulates that this decision shall be made by a five-member commission. Its members shall be selected by the National Integrity Council, at the proposal of its President. The conclusions of the commission's evaluation shall be presented to the Council, and then forwarded to the Senate.³²

This amendment to the law may dramatically affect the independence of the Integrity Agency, in particular of its President and Vice-President. The National Integrity Council (CNI), which appoints the members of the evaluation commission, is a representative body under parliamentary control: its members are appointed by the Senate. CNI comprises, among others, one representative of the parliamentary groups in the Senate and of the national minorities group in the Chamber of Deputies, one representative of the Justice Ministry and one representative of the Ministry for Finances, representatives of the National Union of Romanian County Councils, of the Association of Municipalities in Romania, of the Association of Towns in Romania, of the Association of Communes in Romania, one representative of senior civil servants, etc³³. The only representative of the civil society, *Codru Vrabie* (who also represents TI-Romania) also works as an adviser to the Chamber of Deputies Speaker, *Bogdan Olteanu* (PNL). A number of Romanian and foreign observers have criticized this, and argued that the two positions were incompatible.

In short, the following inferences may be made with respect to the amendment of provisions regarding the National Integrity Council: the Senate of Romania is now in a position to wield significant political influence on the activity of the National Integrity Agency, via the CNI. The new evaluation commission mentioned in Art 25, paragraph 2 in the ANI Act, as well as the newly instated requirement for the ANI President to submit quarterly reports on Agency activities to the Integrity Council³⁴, supplement the external

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³⁰ *BBC Romania*, May 28, 2007.

³¹ Article 25, paragraph 2, old text: "(2) The situation mentioned in Article 24 (b) shall be acknowledged by the National Integrity Council, if it is indicated by the conclusions of an independent external audit annual report, drawn up in conformity with the provisions of this law."

³² Article 25, paragraph 2, old text: "(2) The situation mentioned in Article 24 (b) shall be acknowledged by a commission made up of five members appointed by the Council, at the proposal of the president of the Council, which, drawing on the memorandums and reports submitted by the Agency, evaluates the managerial capacity of Agency functions. The conclusions of the evaluation commission shall be presented to the Council and forwarded to the Senate by the Council president." See also Art 14, 15, and 16 on procedural provisions for the president of the National Integrity Council, May 6, 2008 ("Regulations for the organization of meetings of the National Integrity Agency").

³³ For the membership of the National Integrity Council, see Art 34 in ANI Act.

³⁴ See Article 27, paragraph 1 (e), ANI Act: the president "ensures the publication of an annual Agency work report and of the independent external audit report on the Agency web page."

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evaluation of the activity of ANI and provide the Integrity Council, and implicitly the Senate, with enhanced means to control and influence ANI.³⁵ Critics view these amendments as an additional signal that Romania lacks the political willingness to earnestly fight corruption in the public sector.

Constitutional Court Decision of April 16, 2008: Is ANI Losing Some of Its Powers Again?

This suspicion is confirmed by recent developments in terms of jurisdiction, which may in effect lead to a further weakening of the position of the Integrity Agency. On April 16, 2008, the Romanian Constitutional Court passed a ruling with respect to asset checks, more specifically to the legal ceilings for the confiscation of assets that cannot be accounted for.³⁶

This ruling was passed under the following circumstances: on March 18, 2008, several members of the Chamber of Deputies, mostly from the Liberal-Democratic Party (PD-L), requested the Constitutional Court to analyze the constitutionality of a draft law intended to amend the law on the declaration and inspection of the assets of public office holders, magistrates and civil servants (Law no. 115/1996). The draft law provided for the confiscation of unjustified assets. The PD-L deputies argued, in their notification, that the Constitution works on the assumption that assets have been acquired by lawful means (Article 44, paragraphs 8 and 9)³⁷, and "in case of unjustified incomes, these may not necessarily have been illegally acquired, because the person in question may have failed to present the lawful source of their acquisition out of mere negligence", and as such confiscation of the respective assets would be a disproportionate measure compared to the alleged "negligence".³⁸ According to the PD-L deputies, only unlawfully acquired wealth may be confiscated, whereas unjustified assets cannot.³⁹ To substantiate the request to the Constitutional Court, the Vice President of PD-L, *Theodor Stolojan*, stated that deputies wanted a Court ruling in order to prevent subsequent attempts to dismiss the law as unconstitutional during future lawsuits.⁴⁰ The Constitutional Court ruled that the draft law provision regarding the confiscation of unjustified assets was unconstitutional.⁴¹

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³⁵ Worth mentioning is that the Integrity Council is bound to present Senate with an annual report on ANI activities.

³⁶ See ruling no. 453 of April 16, 2008, published in the Official Journal of Romania, no. 374 of May 16, 2008.

³⁷ Article 44, paragraph 8 in the Constitution of Romania stipulates, "Assets which have been lawfully acquired cannot be confiscated. The lawful nature of the assets is presumed." Article 44, paragraph 9, stipulates, "Goods intended for, used in or generated by offences or misdemeanor may only be confiscated in conformity with the law."

³⁸ *Cotidianul*, April 16, 2008, online edition http://www.cotidianul.ro/pd_l_a_obtinut_liber_la_averile_nejustificate-43715.html

³⁹ *Cronica Română*, April 17, 2008, online edition <http://www.cronicaromana.ro/index.php?art=83626>

⁴⁰ *Ziare*, online edition <http://www.Ziare.com>

⁴¹ See ruling no. 453 of April 16, 2008, published in the Official Journal of Romania, no. 374 of May 16, 2008.

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**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

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The Constitutional Court ruling triggered vigorous criticism among both politicians and the mass media, with respect to its impact on the future activities of ANI, which have to be seen against the background of the ANI Act provisions according to which assets may be confiscated – other than in conformity with the Criminal Code – even when the source of those assets, or its lawfulness, cannot be clarified. Senator *Peter Eckstein-Kovacs*, a member of the Legal Committee in the Senate and former Chairman of this committee, stated that the ruling of the Constitutional Court would have a negative impact on the activity of ANI:

“If we go back to the idea that ANI checks illegal incomes, we might as well dismantle it, because such an institution would be pointless. We have modified the entire law on the organization and functioning of this institution, to adjust it to prior CCR rulings, which stipulated that unjustified assets may be confiscated. If Court judges change their decision, this will severely impact not only the Parliament, but also the justice system reform.”⁴²

During parliamentary debates on the current ANI Act, *Eckstein-Kovacs* resigned as chairman of the Legal Committee in the Senate. The reason for the decision was that his party, the Democratic Union of Ethnic Hungarians in Romania (UDMR) did not support his views on the Integrity Agency. *Eckstein-Kovacs* lobbied for an Agency which should be free to release information on the wealth of Romanian officials.

According to information in diplomatic circles, the Speaker of the Chamber of Deputies, *Bogdan Olteanu*, reportedly commented that precisely the assets which cannot be accounted for (which is the case with many public office holders) would be protected from ANI checks thanks to this Constitutional Court ruling. The ANI president, *Catalin Macovei*, also expressed concerns regarding the Constitutional Court verdict. The Romanian mass media dubbed this decision "the death sentence of the National Integrity Agency"⁴³ and predicted the dismantling of ANI.⁴⁴

Future will tell whether and to what extent the new amendments to the law and the Constitutional Court ruling will impact the efficiency of ANI. The Integrity Agency is a unique instrument for controlling assets, incompatibilities and possible conflicts of interest. No other country in the world has an institution similar to ANI in terms of investigating illegally acquired assets. As such, there are no best practice models to facilitate the activity of the Agency during the difficult initial stage. The success of the Agency will depend, among others, on the extent to which the Agency and its president will be able to resist political influence.

IV. Benchmark 3: the Fight against High-Level Corruption – the Nation’s Problem Child

Benchmark 3, regarding the fight against high-level corruption, is the benchmark that has recently been in the focus of public attention. Observers and experts, in the country as well

⁴² *Cronica Romana*, 17.04.2008, online issue.

⁴³ *Ziua*, 17.04.2008, online issue.

⁴⁴ *The Diplomat*, 17.04.2008, online issue.

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as abroad, agree that Romania's efforts to fight high-level corruption have so far been inadequate. In its February 2008 interim report on the progress made by Romania, under the co-operation and verification mechanism on the justice system reform and fight against corruption, the European Commission concluded:

"In its first year of EU membership, Romania has continued to make efforts to remedy weaknesses that would otherwise prevent an effective application of EU laws, policies and programs. However, in key areas such as the fight against high-level corruption, convincing results have not yet been demonstrated."⁴⁵

Catalin Predoiu, the Romanian Justice Minister, told the public radio station in early June 2008 that this evaluation had good grounds: both experts and political circles in Europe apparently felt that in the post-accession period, Romania made little progress in the fight against high-level corruption. "I will not shy from saying that this perception is largely well-grounded," *Predoiu* stated.⁴⁶

The question to be answered below is what "facts" *Predoiu* had in mind when making this statement. The negative perception on the fight against high-level corruption is largely based on the following developments of the past few months.

The Endless Scandal of the Prosecutions

In Romania, scandals regarding the prosecution of former and serving ministers on suspicions of political corruption have been in the focus of attention of all constitutional bodies, the mass media, civil society organizations and international observers ever since last year. Just days before the publication of the European Commission's eagerly awaited interim report in February 2008, the scandal was rehashed and it divided political parties. Prosecutors with the National Anti-corruption Directorate in the Public Ministry (DNA) asked President *Traian Basescu* to approve the prosecution. President *Basescu* agreed, and forwarded the documents made available to him (the written request of the Prosecutor's Office and excerpts from files) to the then interim Justice Minister, *Teodor Viorel Melescanu* (PNL). In a first stage, the latter declined returning the documents and the President's written approval to the Prosecutor's Office, thus adding fuel to a long-standing conflict between the Presidency and the Government⁴⁷.

Melescanu's attitude gave rise to criticism both in the country and abroad. However, in spite of his initial attitude, at the end of January, he forwarded the President's approval for the

⁴⁵ Commission of the European Communities, Brussels, 14.02.08, COM (2008) 62 final, page 8.

⁴⁶ "*Catalin Predoiu*, the Justice Minister, has stated yesterday for the public radio station that there is a perception within the ranks of experts, as well as within the political circles in Europe, that far too little has been done in recent months in Romania in what concerns the fight against high level corruption. 'I can say without hesitation that his perception is mostly covered by facts' *Predoiu* has stated, quoted by *Rompres.*" *Nine O'Clock*, June 6-8, 2008, page 2. "The Justice Minister has stated nevertheless that significant efforts are made, but that the evaluation has to be extended beyond the important dossiers, namely in the area in which the prosecutors have obtained notable success."

⁴⁷ *Melescanu* had argued that he should have been presented with the investigation file as a whole, instead of just excerpts. In reply, *Basescu* publicly accused *Melescanu* of abuse of authority and threatened to suspend him from office for this attitude. One of those who supported *Basescu* was the president of the Liberal-Democratic Party (PD-L) *Emil Boc*. In a press conference, he said the interim Justice Minister had no right to "act as both a censor and a filter." He also backed the President's view that with his attitude, *Melescanu* only tried to postpone the inevitable, i.e. the prosecution.

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**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

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files to the DNA and to the Directorate for Organized Crime and Terrorism Investigation (DIICOT). Quite diplomatically, *Melescanu* stated in a press conference that he had no intention to censor or interfere with the course of the investigation. He claimed he had complied with the law throughout the process and that not for one second had he intended to defer the commencement of prosecution. He also denied any future responsibility for the outcome of the criminal proceedings. Nonetheless, the path to the prosecution of the eight former and serving ministers remained closed.

Parliament's Approval: Yes or No?

Hardly had the presidential documents and file copies been forwarded, that a new dispute emerged, on whether or not Parliament was to pass an official opinion on the commencement of prosecution in cases where the former/serving ministers were also Members of Parliament.

Parliamentary Approval: the Pros

Speakers of the two Chambers of the Parliament – *Bogdan Olteanu* (National Liberal Party - PNL) and *Nicolae Vacaroiu* (Social Democratic Party – PSD) – argued in favor of the parliamentary approval, an opinion supported by the PSD, the PNL, and the Conservative Party (PC). This position came hardly as a surprise: four former ministers, of the ones in the "list of eight", are members of these parties and currently work as Members of Parliament. They are as follows: the former PSD-President, *Adrian Nastase*, Prime Minister of Romania between 2000 and 2004; the former Transport Minister and PSD-Vice President, *Miron Mitrea*; the former Economy Minister, *Codrut Seres*, currently also the Vice President of PC, and the incumbent Labor Minister, *Paul Pacurar* (PNL).

- The former premier *Adrian Nastase* is suspected of bribe taking, influence peddling and undue participation in the forgery of private documents related to the offence of influence peddling, so-called *Zambaccian* case (according to the name of the street on which the real estate is located).
- The PSD vice-president *Miron Mitrea* is also suspected of bribe taking, of prompting forgery of official documents directly related to the said corruption offence, and fraud directly related to the same corruption offence.
- Vice-president of the Conservative Party (PC), *Codrut Seres*, is under DIICOT investigation in two separate cases, with his prosecution requested in both cases. The former Minister of Economy is accused, in a first case (the cases of the so-called strategic privatizations) of treason through disclosure of classified information and establishment of an organized crime group which carried out concerted operations to disclose economic secrets. In a second file, *Seres* is accused of having undermined the national economy and having supported an organized crime group, along with several individuals with decision-making powers in SC Hidroelectrica SA.
- Labor Minister *Paul Pacurar* (PNL) is suspected of bribe giving in a case of the discretionary award of a contract by a state-owned coal mining company in Gorj County to a company held by his son. In exchange for the award of the respective

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**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

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contract by the PNL Gorj President, *Dan Ilie Morega*, *Pacuraru* has reportedly appointed a person chosen by *Morega* as chief of the County Labor Inspectorate.

All these cases concern misdeeds perpetrated while in a ministerial position, *i.e.* in public office.

Parliamentary Approval: the Cons

Prosecutor General of Romania, *Laura Codruta Kovesi*, has officially expressed disagreement with an approval by Parliament. She argued that an approval of the Parliament would not be required even where serving Members of Parliament were probed into. The General Prosecutor's Office was, she stated, a lawful institution able to complete its tasks without the intervention of other public institutions. *Kovesi* was supported by the Chief Prosecutor of the DNA, *Daniel Morar*. *Morar* relied on a ruling passed by the Constitutional Court last November. The Constitutional Court dismissed provisions in the Ministerial Liability Law as unconstitutional, on grounds that "constitutional regulations regarding the legislative procedure have been breached, namely the constitutional principle of the bicameralism of the Parliament of Romania", and the competences assigned to the two Chambers under the Constitution.

What Does the Constitution Stipulate in This Respect?

The provision that regulates the immunity of government members is Article 109 of the 2003 Constitution of Romania. Paragraph 2 of this article stipulates that "only the Chamber of Deputies, Senate and President of Romania are entitled to request the prosecution of members of the government, for criminal offences perpetrated while in office". Under Paragraph 3, both liabilities and the penalties applicable to government members may be regulated in a law on ministerial liability.

The Constitution has no additional explicit provisions regarding procedures for the prosecution of former or serving ministers. The Constitution does not detail on how preliminary procedures must be carried out or on how the President and the two parliamentary Chambers are to exercise their competences and attributions related to the commencement of prosecution. Nor does the Constitution dwell upon Parliament's right to vote against the request of the President and thus to hinder the initiation of criminal prosecution.

What is, however, clear according to Article 109 of the Constitution is that this provision regulates the ministerial immunity with regard to acts that they committed while in office. The Constitution of Romania does, however, include a provision which regulates the parliamentary immunity. It is Article 72, paragraph 2:

"Deputies and senators may be prosecuted and brought to justice for offences which are not related to the votes or political views expressed while in office, but they cannot be subject to domiciliary search, taken into custody or arrested without the consent of the Chamber of which they are members, after their hearing. The Prosecutor's Office of the High Court of Cassation and Justice alone is entitled to initiate the prosecution and indictment. The High Court of Cassation and Justice shall have jurisdiction on these cases."

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**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

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July 9, 2008

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If this constitutional provision is to be interpreted literally, the commencement of prosecution of Parliament members does not require the approval of the Chamber of which the respective official is a member. In this context, the constitutional provision is clear: approval is only required for search, remanding to Police custody and arrest. Neither does Article 72 regulate the parliamentary approval in cases which refer to acts committed by Ministers while exercising their ministerial mandate.

The Constitutional Court of Romania in its March 10, 2008 ruling, answered the question whether the Parliament was bound to pass an opinion, for the prosecution of former (serving) ministers to be initiated, where the respective ministers are also members of the Parliament, positively – despite the clear wording of Articles 109 and 72, respectively.

The two parliamentary Chambers requested that this question should be clarified by the Constitutional Court⁴⁸. They argued that their right to decide on the removal of parliamentary immunity had been breached. The petitioners expressed similar views to that of the Legal Committee chair and PNL Vice President *Norica Nicolai* who, in response to the disputes early this year, had stated that both the Constitution and the Ministerial Liability Act (Law no. 115/1999) stipulated that the assent of the Parliament was required. The Justice Ministry and the Superior Council of Magistracy (CSM) shared this view.

The Constitutional Court stated, in the motivation of its ruling, that cases should be considered on an individual basis. Where the request to prosecute refers to a former member of the Government who is currently a member of the Parliament, the relevant Chamber should decide on the immunity. In such cases, the request to remove the immunity should only be submitted to the relevant parliamentary Chamber. However, where the request refers to other members of the Government, the Prosecutor's Office shall file the request with the President. Therefore, the power to advise the commencement of prosecution is assigned to separate bodies, depending on each specific case. The MP status is of particular interest⁴⁹. The power to advise the initiation of prosecution depends on the status of the person under investigation. In principle, the Court argued against the literal, explicit meaning of Article 72, paragraph 2 in the Constitution. The immunity of government members should not be handled differently from the parliamentary immunity. The special

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⁴⁸ Further to disputes early this year, the PNL vice-president and currently chair of the Senate's Legal Committee *Norica Nicolai*, and MP *Dan Radu Rusanu* (PNL) asked the Government of Romania to invite the Constitutional Court to clarify whether the commencement of prosecution requires the assent of the parliamentary Chamber of which the respective individuals are members. They both believed that both the Constitution and the Ministerial Accountability Act (Law no. 115/1999) stipulate such a request for assent.

⁴⁹ Dissenting opinions (judges *Cochinescu* and *Zegrean*): the judges' dissenting opinion refers to the fact that a limitation of the right to request prosecution is neither indicated by the Constitution, nor in line with existing jurisprudence. As against primarily systematic arguments, they mentioned that these are necessary when interpreting a piece of legislation only in such cases where the intended meaning is not sufficiently clear and several interpretations are possible. But this is not necessarily the case with Article 109, paragraph 2 in the Constitution. The intended meaning is unambiguous and unquestionable, they believe. The criminal relevance of this provision should be taken into account. It includes the removal of a hindrance to prosecution. This is why very strict requirements must be attached to this provision. In this view, the text is explicit, and any limitation on the intended meaning would be outside the text. The equal powers of the three bodies as regards the commencement of prosecution is claimed to have already been laid down by the Constitutional Court in its ruling no. 1.133/2007. A reference to paragraph 1 and the systematic argument related to this paragraph, namely that political liability is so closely tied to criminal liability, that competence over them is affiliated, is not very convincing: two separate cases have been regulated instead. A bias made possible through the General Prosecutor's Office should not be taken into consideration when investigating competence.

Konrad-Adenauer-Stiftung e.V.

power of parliamentarians should also be applicable to those individuals who concurrently hold governmental positions.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

The Constitutional Court ruling was heavily criticized, e.g. by the chairman of the CSU group in the European Parliament, *Markus Ferber*, who stated in an interview to *Deutsche Welle*:

July 9, 2008

"The Constitutional Court ruled that Parliament needs to approve the initiation of prosecution of high-level politicians. I believe this is a mistaken view on the parliamentary immunity, which should not apply to cases of corruption. In fact, it is an advantage for the suspects to prove their innocence, if they are not guilty."⁵⁰

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The Nastase Case – A Litmus Test for Romania

To date, the decision on whether the four ministers and former ministers who are currently parliamentarians may or may not be prosecuted on corruption charges, rests with the Chamber of Deputies and the Senate respectively. So far, none of the two Chambers has made a decision on the matter. The likelihood of *Nastase* sidestepping the prosecution once again increased last week. The Legal Committee in the Chamber of Deputies recommended that the Plenum should not approve the initiation of prosecution on suspicion of corruption. The recommendation of the Legal Committee triggered vigorous replies in Romania. Several non-governmental organizations, including *Transparency International Romania* and *The Initiative for Clean Justice* (IJC), a program carried out by several Romanian NGOs, as well as the *National Union of Judges of Romania* (UNJR), expressed serious concerns in their respective news releases. The main criticism against the recommendation of the Legal Committee was that the Committee acted as an "alternative court of justice", as a special court. This is because in its explanation, the Committee made comments about the substantive issues and about "procedural flaws", which it had no competence to discuss.

The IJC news release reads that the Legal Committee recommendation enables parliamentarians to turn into judges and the Legal Committee into a special court of justice:

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"With such measures, the Parliament of Romania obstructs criminal investigations and secures absolute and perpetual impunity to the political class as a whole. We warn that such actions undermine the functioning of the rule of law and severely undercut citizens' confidence in key public institutions. Such actions may also entail the application of safeguard measures on the justice system, with critical consequences for Romania."⁵¹

The recommendation that the Chamber of Deputies should not approve the removal of parliamentary immunity also triggered criticism among foreign observers. Thus, in the aforementioned conference on economic and judicial developments in Romania, German MP *Krichbaum* described the *Nastase* case as "a litmus test for the fight against corruption in Romania", and commented on the decision of the Legal Committee:

⁵⁰ Interview to *Deutsche Welle* – "Markus Ferber accuses authorities in Bucharest," available at <http://www.dw-world.de/dw/article/0,2144,3454089,00.html>.

⁵¹ News release issued by the Initiative for a Clean Justice System (IJC) on June 23, 2008, available at <http://fh.eurolobby.ro/freedom/>. Other news releases are available at: UNJR – www.unjr.ro ; Transparency International Romania – www.transparency.org.ro.

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

WWW.KAS.DE

"I want to be very open about it and say that I do not understand the decision of the Legal Committee of the Chamber of Deputies to advise against the starting of criminal proceedings in the *Nastase* case. We regard the *Nastase* case as a litmus test for a credible fight against high-level corruption. I don't think there is a more visible representative of this ill-fated area, which is why we would like an independent criminal investigation, without political meddling, in which a guilty or not guilty verdict is reached exclusively on strictly judicial criteria, according to the rule of law."⁵²

On June 24, 2008, deputies took a vote in a plenary meeting. Because of a "lack of quorum" a decision on allowing/disallowing prosecution could not be made⁵³. The vote will be rescheduled. The assumption of PD-L Deputy *Petre Ungureanu* thus proved realistic: the MP expressed his belief that a decision before the parliamentary recess (which started on July 1, 2008) was unlikely. He added that a decision would probably not be made this autumn either, because Parliament members would be busy with the general election. Meanwhile, according to *Ungureanu*, *Nastase* and *Mitrea* may be free to run for any office, including for President, if they so choose and no one could prevent them⁵⁴.

President *Basescu* asked the Chamber of Deputies to organize a special parliamentary sitting, with a view to deciding on the *Nastase* and *Mitrea* cases. The political class replied that the constitutional powers of the President do not include that of soliciting Parliament to convene in special sitting. Premier *Tariceanu* also supported the idea of a special parliamentary sitting. But there is no information at this point on whether this will be held during the parliamentary recess, when exactly it will be held and whether a decision will be made on the aforesaid cases. In the *Pacurar* and *Seres* cases as well, the Senate is yet to make a final decision on whether they should be prosecuted or not. The Legal Committee of the Senate is currently working on a report on which the recommendation to the Senate will be based. The report is to be finalized by mid-August. The Legal Committee heard *Pacurar* and *Seres* in early July. The Legal Committee Chair, *Norica Nicolai*, stated that after the report was finalized, the Senate might convene in special session. *Nicolai* also said that "the Committee will make a clear-cut recommendation to the Senate".⁵⁵

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Recent Positive Developments on "Combating High-Level Corruption"

In the beginning of June 2008, there were also positive developments related to the "fight against high-level corruption". According to a June 9 news release of the National Anti-corruption Directorate, DNA prosecutors filed complaint with the High Court of Cassation and Justice of Romania, in three suspected high-level corruption cases. The complaints concerned the former Minister of Agriculture and Rural Development, *Decebal Traian Remes* (a minister between April–October, 2007), *Ioan Avram Muresan* (the Minister of Agriculture

⁵² The author attended the conference. The statement was also quoted in a news report by the Romanian news agency *NewsIn*, on June 20, 2008.

⁵³ According to *Cotidianul*, quorum was in fact met. See http://www.cotidianul.ro/frauda_grosolana_in_parlament_pentru_mitrea_si_nastase-49971.html

⁵⁴ See news story on *Hotnews.ro*: <http://www.hotnews.ro/stiri-esential-3227786-intreabaeuropenii-daca-scapa-n>

⁵⁵ *NewsIn*, quoted by the *Realitatea TV* channel on June 4, 2008, www.realitatea.net, http://www.realitatea.net/paul-pacurar-va-fi-audiat-in-senat-dupa-turul-ii-al-legerilor-locale_293747.html, of June 17, 2008.

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

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in 1996–2000)⁵⁶ and businessman *Gheorghe Ciorba*. According to the Prosecutor's Office, businessman *Ciorba* allegedly gave 15,000 EUR and food products (sausages and 100 liters of palinka) worth 450 EUR, to *Remes*, via *Ioan Avram Muresan*, in exchange for the award of public contracts. Because of the products used as bribe, the *Remes* case is known as the "Sausage and Palinka Affair".

Prosecutors made *Remes* a suspect in a corruption case on October 7, 2007. Because suspicions of criminal offences concerned the period in which *Remes* was a minister, according to the Constitution a request had to be filed by the Chamber of Deputies, the Senate or the President of Romania, for prosecution to be possible⁵⁷. In January 2008, President *Basescu* signed the request pursuant to which anti-corruption prosecutors prosecuted *Remes*.

At the end of June, DNA prosecutors also prosecuted Adrian *Nastase* in a separate file (the *Quality Trophy* affair), in which *Nastase* is accused of money laundering in relation to the financing of his 2004 electoral campaign. In this case, *Nastase* is not investigated in his capacity as a (then) Prime Minister, but as President of PSD, which is why DNA prosecutors did not need the approval of the Parliament to commence prosecution.

Nastase claimed that the new criminal case was the result of an order given by President *Basescu* to the DNA chief prosecutor, *Daniel Morar*⁵⁸.

The European Commission made positive assessments of the National Anti-corruption Directorate in its past reports. The September 2006 monitoring report on the state of preparedness for EU membership of Romania and Bulgaria reads as follows:

"The quantity and quality of non-partisan investigations into allegations of high-level corruption have continued to increase. [...] The qualitative improvement of DNA's investigations has continued as is demonstrated by the reopening of cases which had been closed under the previous management team and by the launch of new investigations into long-standing public procurement scandals."⁵⁹

The February 2008 interim report mentions, with respect to DNA:

"The work of the National Anti-corruption Directorate (DNA) shows a positive track record over the past six months."⁶⁰

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⁵⁶ *Muresan* was ousted from the party further to this corruption scandal.

⁵⁷ See Article 102, paragraph 2 in the Constitution of Romania: "It is exclusively the Chamber of Deputies, Senate and President of Romania which are entitled to request the prosecution of government members for misdeeds perpetrated while in office. Where prosecution has been requested, the President of Romania may order that the official be suspended from office. The indictment of a government member entails their suspension from office. The High Court of Cassation and Justice has jurisdiction over the lawsuits."

⁵⁸ See *Hotnews.ro*, June 24, 2008.

⁵⁹ Monitoring report on the state of preparedness for EU membership of Romania and Bulgaria, Brussels, 26.9.2006 COM (2006) 549 final, page 40.

⁶⁰ Interim report from the Commission to the European Parliament and Council, Brussels, 14.2.2008, COM (2008) 62 final/2, page 5.

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

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But in Romania the efforts made by DNA are not necessarily viewed with friendly eyes. The President of Romania *Basescu* admits that the activity of the corruption prosecution authority is adequate. He has recently made a public statement according to which prosecutors made significant efforts to resolve important cases involving politicians⁶¹. But as of recently, the National Anti-corruption Directorate has been heavily attacked and criticized by representatives of civil society. And problems went beyond mere criticism. Indeed, last year serious attempts were made at weakening DNA and its inquiries into high-level corruption cases. The measures and actions targeting the DNA during the term in office of the former Justice Minister *Chiuariu* generated concern in the country and abroad, and triggered vigorous criticism. Such measures and actions included: *Chiuariu's* May 2007 request to dismiss the deputy chief of DNA; the adoption of several ordinances regarding the organizing of the justice system and the attempts to merge the DNA into the Directorate for Organized Crime and Terrorism Investigation (DIICOT). Other criticized measures include controversial amendments of the Code of Criminal Procedures, with negative effects on fighting corruption, including high-level corruption, and the dismantling of the "Cotroceni Commission" under an Emergency Ordinance⁶². In 2006 as well there had been disquieting developments. The European Commission's September 2006 monitoring report reads:

"In the Parliament there has also been an attempt to change the nomination procedure for both the General Prosecutor of Romania and the Head of the National Anti-Corruption Directorate, which would bring additional legal and institutional uncertainty to the anti-corruption framework. The reforms led by the Ministry of Justice and DNA need to be complemented by sustained efforts from all other executive agencies, the legislature and the judiciary."⁶³

The term in office of the DNA chief prosecutor *Daniel Morar* comes to an end on August 12, 2008, and that of his deputy in September. The leadership of the institution is important for the activity of DNA. It is not certain at this point whether the terms in office of the two prosecutors will be extended. A decision on the matter is eagerly awaited in Bucharest, particularly considering the key role that DNA plays in investigating high-level corruption cases. Institutional and personal continuity is vital in this case.

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The Role Judges Play in Fighting High-Level Corruption

Without doubt, there are several reasons for Romania's inadequate progress in fighting high-level corruption. Beside the aspects mentioned above, worth mentioning, among others, there is the mindset of many Romanian judges and justice system staff as regards corruption in general and the application of dissuasive measures against high-level corruption in particular. The European Commission has acknowledged this as a possible hindrance to efficiently fighting corruption. That is why in its June 2007 progress report, it concluded, with respect to benchmark 3, that corruption charges were brought against a

⁶¹ "Although prosecutors have put up a lot of work trying to solve important cases that involve politicians, various decisions of the Constitutional Court or Parliament have put off the completion of such inquiries.", in *Nine O' Clock*, June 4, 2008, online issue.

⁶² The Commission in Cotroceni was a special commission of the Presidential Administration, which would put together a file, other than the one drawn up by prosecutors, and would advise on the initiation or non-initiation of prosecution of government members.

⁶³ Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, Brussels, 26.9.2006 COM (2006) 549 final, page 40.

Konrad-Adenauer-Stiftung e.V.

number of influential public personalities. But rigor in prosecution was not reflected by judicial decisions:

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

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"Data provided on sentencing show that penalties on average are not dissuasive and a very high number of suspensions of these penalties in cases of high-level corruption. The rationale for these suspensions, including awareness and attitudes among the judiciary towards dissuasive sentences of cases of high level corruption needs to be clarified. This undermines recent progress in investigation and affects negatively public perception of the political commitment to tackle corruption."⁶⁴

The Rule of Law Program South East Europe of the Konrad-Adenauer-Stiftung (RLP SEE), jointly with American Bar Association Central European and Eurasian Law Initiative – Romanian Office (ABA/CEELI), sought to contribute to the clarification of these aspects. To this end, in November 2007, RLP SEE and ABA/CEELI Romania organized a workshop for Romanian judges, entitled "High-level Corruption and Judicial Sanctions". All participants were criminal law judges, who had faced high-level corruption cases. Their answers to a question regarding the reasons for which sentences in high-level corruption trials are either short time sentences, or "suspended sentences," were tale-telling. Judges explained, among others, that corruption - including high-level corruption - was not an imminent threat to society. As such, corruption could not be punished as drastically as the offences that pose a threat to society would. Other judges warned on the inconsistency between the call for sentences in corruption cases and the fact that judges themselves are forced to practice corruption in their daily life (i.e. in the public healthcare system, where healthcare services are rarely given to patients who do not pay bribe).⁶⁵

These statements point to two aspects. On the one hand there is the general dilemma regarding the fight against corruption: unless corruption is acknowledged as a socially damaging behavior and a threat for the community, it cannot be efficiently countered. On the other hand, corruption is a systemic phenomenon, which affects society as a whole. Corruption – whether high or low-level – can only be effectively tackled if it is consistently approached at all levels. This is why Benchmark 4, i.e. fighting corruption in the local government, is so important. This aspect will be discussed below.

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Reform of the Penal Law and of the Code of Penal Procedures

Criminal Law and Criminal Procedural Law play a decisive role in fighting corruption. The criminal law and criminal procedural law reforms over the past few months require special mention: the Criminal Code (CP) and the Criminal Procedural Code (CPC) of Romania should be re-written. Efforts made to this end have showed a good track record over the past few months.⁶⁶ A report issued by the Romanian Justice Ministry this spring on Romania's

⁶⁴ See Report from the Commission to the European Parliament and the Council on Romania's progress on accompanying measures following accession, Brussels, 27.06.2007, COM (2007) 378 final, pp. 17-18.

⁶⁵ The findings of the conference are summarized in a detailed report by ABA-CEELI Romania, which may be accessed, together with the workshop documentation, in English, on the RSP SOE home page at http://www.kas.de/proj/home/events/103/1/year-2007/month11/veranstaltung_id-28191/index.html

⁶⁶ The drafts of the new Criminal Code and Code of Criminal Procedure have been posted for public policy debate on the Justice Ministry web page, since April 14, 2008. After publication in the Official Journal on June 12, 2008 (Monitorul Oficial 440), the vote on the new bill on the new Criminal Code was deferred, under an emergency ordinance, from the initial September 2008 deadline to September 2009. The goal was to ensure that the new Criminal Code does not take effect before a new Code of Criminal Procedure is in place.

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

WWW.KAS.DE

progress on the four benchmarks, mentions positive changes in the new CPC with respect to the fight against corruption. Adding to these is, among others, the fact that judges will no longer be permitted to return criminal case files to prosecutors, for investigations to be restarted. Under the new CPC, the lawfulness of complaints is to be checked in the pre-trial stage, by a so-called Preliminary Chamber, which is to establish the lawfulness and soundness of the evidence.⁶⁷ Upon presenting the report, Justice Minister *Predoiu* described this modification of the law as an efficient tool in anti-corruption proceedings.⁶⁸

Considering the importance of criminal law and criminal procedural law in fighting corruption, it comes as no surprise that the amendments to the current Code of Criminal Procedure and the Criminal Code, as operated in the autumn of 2007, triggered criticism both domestically and abroad. Those amendments were proposed by the Government of Romania under an emergency ordinance, and enacted by the Chamber of Deputies in October 2007. The amendments stipulated major changes in provisions concerning the preliminary criminal investigation, the prosecution and the substantive criminal law. Adding to these were, among others, the six-month deadline for completion of preliminary criminal investigations; the banning of searches, interceptions or video and audio recordings without the notification of the suspect; the rating of frauds below 9 million EUR as misdemeanor punishable by five-year imprisonment at most; and the amendment operated under Government Ordinance no. 47, of August 28, 2007, according to which Prosecutor's Offices were no longer entitled to request information from tax authorities in order to evaluate damages.

The critics of the criminal law amendment included, apart from civil society representatives, the Ambassador of the USA to Bucharest, *Nicholas Taubman*. He voiced concern with the fact that the new provisions might have a negative impact on the independence of prosecutors, which may jeopardize the fight against corruption in Romania.⁶⁹ Moreover, the amendments were criticized for their possible impact on the investigations carried out jointly with other Member States with a view to fighting terrorism and cross-border crime. President *Basescu* would not promulgate the law on the modification of the Criminal Code and the Criminal Procedure Code, and returned it to the Senate for review. This was a well-grounded decision, as indicated by a comprehensive analysis of the amendments to the CP and CpP, released this April by *Societatea Academica Româna* (SAR). SAR has assessed the state of affairs as follows:

"Just one year after its EU accession, Romania is faced with unprecedented attacks against the Code of Criminal Procedure, which is the underlying cornerstone of the national framework of fight against crime. If the draft which is now being debated in Parliament becomes law, Romania will become Europe's safe-heaven for criminals bringing anxiety

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⁶⁷ Elements of progress from the report addressing the benchmarks in the area of judicial reform and fight against corruption, p. 22.

⁶⁸ See "Judicial reform, seen from within", in *Nine O'Clock*, May 19, 2008, p. 3.

⁶⁹ See news story on HotNews.ro, "US Embassy Worried of Changes to Romanian Penal Code," available at <http://english.hotnews.ro/stiri-archive-1750133-embassy-worried-changes-romanianpenal-code.htm>

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

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among other EU members in our days, when crime has become essentially trans-border.⁷⁰

On March 19, 2008, the Senate enacted a modified version of the Government Emergency Ordinance no. 60/2006 that amends the Criminal Code and of Criminal Procedure Code. As compared to the version returned by the President, the Senate's version is substantially improved. For example, the six-month deadline for investigation completion was removed, and so was the ban on interceptions before prosecution. Also, the threshold for an offence to qualify as an offence with aggravated consequences was drastically lowered, from 30 million lei to 1 million lei. Nonetheless, the current text contains provisions which may generate already foreseen practical difficulties.⁷¹

Lack of Political Will: Major Cause of Insufficient Dissuasion of Corruption?

The above indicate that the success of Romania's fight against corruption depends, to an overwhelming extent, on the will of political decision-makers. This is particularly the case as regards the fight against high-level corruption. The European Commission highlighted this in reports drawn up both before, and after Romania's accession to the European Union, and reiterated that political will was one of the prerequisites for a successful judicial reform and fight against corruption. The formal meeting of the benchmarks would not be enough. The monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, released in September 2006, reads:

"There needs to be a clear political willingness of all political actors to demonstrate the sustainability and irreversibility of the recent positive progress in the fight against corruption."⁷²

"All political actors need to demonstrate their commitment to a serious and effective fight against corruption and ensure that no one is perceived to be above the law."⁷³

The June 2007 report on Romania's progress on accompanying measures following accession stated:

"It is important to see these benchmarks as representing more than a checklist of individual actions that can be ticked off one by one. They are all interlinked. Progress on one has an impact on others. Each benchmark is a building block in the construction of an independent, impartial judicial and administrative system. Creating and sustaining such a system is a long term process. It involves fundamental changes of a systemic dimension."⁷⁴

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⁷⁰ <http://www.sar.org.ro/files/Policy%20memo%2030.pdf>, SAR Report on "Romania – the Weak Link in the European Crime Countering System," April 16, 2008

⁷¹ For details, see idem.

⁷² Communication from the Commission - Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, Brussels, 26.9.2006 COM (2006) 549 final, page 40.

⁷³ Idem, page 41.

⁷⁴ Report from the Commission to the European Parliament and Council on Romania's progress on accompanying measures following accession, Brussels, 27.06.2007, COM (2007) 378 final, pages 4-5.

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

WWW.KAS.DE

And with respect to the needed political commitment, the Commission stated, in the same report:

"Deeply rooted problems, notably corruption require the irreversible establishment and effective functioning of sustainable structures at investigative and enforcement level capable of sending strong dissuasive signals. In addition, the structural changes which are needed impact on the society at large and require a step change which goes much beyond the mere fulfillment of the benchmarks. This requires a strong long term commitment by Romania and can only be successful if the strict separation of the executive, legislative and judicial power is respected and if stable political conditions and commitment are in place."⁷⁵

"A continued political commitment to the reform of the judiciary and the fight against corruption is essential."⁷⁶

State of Play - 2008

In early June, *Traian Basescu* made a new negative statement about Romanian politicians:

"Although prosecutors have worked hard and finalized high-profile files, certain decisions by the Constitutional Court and Parliament have put off the prosecution of politicians, although the instruction to prosecute a large number of politicians has been given by the President of Romania himself."⁷⁷

The Romanian anti-corruption expert, *Laura Stefan*, a former director with the Justice Ministry⁷⁸, during the term in office of former Minister *Macovei*, has summarized the hindrances to fighting high-level corruption: "In Romania there is no law, but only power", *Stefan* said⁷⁹.

The question to be answered at this stage is whether there is any way out of the current situation, and which would that way be. In early June, in an interview to *Frankfurter Allgemeine Zeitung*, President *Basescu* answered a question on whether the problem can only be solved through the full replacement of the political class:

"I always encourage Romanians not to vote for the political class of the transition period. Of course, I am a member of this class myself. I haven't fallen from the sky."⁸⁰

This year Romanians have two opportunities to bring the discontent with the current situation to an end, by means of voting: local elections were held in June around the

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⁷⁵ Idem, page 6.

⁷⁶ Idem, page 23.

⁷⁷ Interview to *Deutsche Welle*, at <http://www.dwworld.de/dw/article/0,2144,3380838,00.html>

⁷⁸ Director of the Directorate on relations with the Public Ministry and prevention of Crime and Corruption

⁷⁹ See "In Romania, high-level corruption resists reform", by Justyna Pawlak, in *The Herald Tribune*, 14.05.2008.

⁸⁰ Interview to *F.A.Z.*, June 4, 2008, no. 128, page 5.

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

WWW.KAS.DE

country. In November, a new Parliament is elected. But *Basescu's* advice, to remove the current political class through voting, is not expected to be taken. "Corruption" was not an issue approached in the local elections, and it is unlikely to play a role in the general election. Political analysts in Bucharest say most Romanians' discontent with corruption is only declarative. The issue is not a negative criterion for electoral selection. Nothing is expected to change in this context in the short term.

V. Benchmark no. 4: Prevent and Fight Against Corruption, in Particular Within the Local Government.

With respect to Benchmark 4, which refers to fighting corruption in the local government and which has garnered less attention than Benchmark 3, the following aspect is worth mentioning⁸¹: in the aforementioned interview to FAZ, asked whether he would like a tough report from Brussels regarding the corruption in Romania, *Basescu* answered:

"Mind you, I am criticizing high-level corruption. Otherwise, public institutions are functioning. I only have a problem with the political class."⁸²

Are we to understand from this answer that in terms of fighting local corruption, all problems have been solved? Unfortunately not. In order to address weaknesses at a local-government level, in early June the Government of Romania approved the 2008-2010 National Anti-corruption Strategy for the Local Public Administration and relevant action plans designed to bring local administration closer to citizens and to address vulnerability to corruption in those areas perceived by the public as being sensitive, e.g. public order, healthcare, education, tax and local administration.⁸³ The Government intended this as a response to the criticism in the European Commission's June 2007 report, which said:

"However, a comprehensive local anti-corruption strategy based on risk assessments targeting most vulnerable sectors and local administration is missing. The dissemination of successful pilot-activities has not been reported."⁸⁴

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The primary goal of the new anti-corruption strategy is to bring the administration closer to citizens and to have it provide high-quality public services, which meet citizens' expectations and needs and are in line with European standards. The strategy also aims to ensure that these services are not corrupt and abusive. Key areas in fighting corruption in the local administration are, in particular, the sectors vulnerable to corruption: public order, education, healthcare, finances and local administration.

The anti-corruption strategy includes five aspects:

⁸¹ For these, see the February 2007 interim report, page 6.

⁸² Interview in *F.A.Z.* on June 4, 2008, no. 128, page 5.

⁸³ The national strategy against corruption in the local government is a part of the overall national anti-corruption system. It is updated and republished every two years.

⁸⁴ See Memo/07/262 of the European Commission on June 27, 2007, "Report from the Commission to the European Parliament and the Council on Romania's progress on accompanying measures following accession".

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

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- Raising public awareness on corruption and its risks.
- Simplifying administrative procedures.
- Implementing specific measures to fight local-government corruption.
- Enhancing the efficiency of local institutions.
- A continued analysis of corruption and its public perception.

The key issue at this stage is whether and to what extent this anti-corruption strategy will be implemented.

The Romanian Prime Minister, *Calin Popescu Tariceanu*, stated with regard to the adoption of the anti-corruption strategy:

"A reliable and democratic administration is the most important criterion for all European Union Member States." The topmost priority of the Government of Romania would be to implement an in-depth and credible reform of public administration."⁸⁵

A number of projects have been initiated in Romania in recent years to fight corruption at a local administration level. These include the so-called "anti-corruption green-line" and the National Integrity Centre (CNA). The "anti-corruption green-line" was established two years ago. It enables citizens to report corruption cases to the General Anti-corruption Directorate (GAD), of the Interior Ministry.⁸⁶ Last year, 256 of all calls were forwarded to prosecutor's offices. Citizens may also submit petitions related to corruption cases to GAD. Since its inception, more than 3,000 petitions have been sent to both central and local GAD units. This toll-free helpline, initially designed as a general anti-corruption call-in line, may now be accessed by all citizens who have questions on the activity of the Interior Ministry. In an interim report this February, the European Commission stated, in reference to the extension of this concept:

"To which degree these changes will still allow for a partnership with Civil Society and continue to provide a service on the follow-up of corruption signals could not be established."

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The National Integrity Centre was opened in February 2007. The purpose of this centre should be to draw up analyses and half-year reports on developments in the fight against corruption. CNA is also mandated to support relevant institutions in efficiently preventing and fighting corruption.

Whether or not the Centre will fulfill this mission is yet to be seen.⁸⁷

⁸⁵ Quoted from "Government oks anti-corruption strategy for local administration", *Nine O'Clock*, June 5, 2008, page 11.

⁸⁶ The General Anti-corruption Directorate (GAD) was established in 2005 under Law no. 161/2005 as a special outfit within the Interior Ministry. The goal of GAD is to prevent and fight corruption among Ministry staff.

⁸⁷ See critical comments by the European Commission in the June 2007 report, page 20: "Concerns remain as to the continuing political support for important high-profile projects, such as the National Integrity Centre."

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

WWW.KAS.DE

VI. Conclusions

In a study conducted by *Stiftung Wissenschaft und Politik (SWP)*, of October 2005, the political scientist and expert on Romanian matters *Anneli Ute Gabanyi* analyzed whether or not Romania should join the European Union on the agreed date of January 1, 2007 or a year later, on January 1, 2008. *Gabanyi* was drawing the following conclusion, at the time:

"Romania still has (...) a lot to do to convince the European Commission of the seriousness of its efforts in fighting against corruption. The fact that the phenomenon could not be combated with satisfactory results in older member states either and - especially - in the countries that joined in 2004, does not change the situation at all."⁸⁸

As shown in the analysis above, the statement was almost as applicable then as it is now, two years post accession.

On the other hand, nobody can deny the headway made in Romania with the fight against corruption over the past few years. It is understandable that improvements cannot happen overnight. The worrying fact is, nonetheless, that these efforts of effective fight against corruption in Romania have been hampered in the last years by the fact that justice and the law are often more tools that help corruption rather than a means of effective deterrence of it. Former Justice Minister *Monica Macovei* calls this phenomenon "corruption through law". At a conference held by the *New Europe College Romania* in May 2008, she exemplified the trends in connection with the framework legislations regulating public procurement and privatization, with the insolvency law and political party financing laws being weakened. Laws are being massively influenced by personal or political interests of politicians. They prove lack of accountability towards their own voters. *Macovei* thinks Romania is being faced with a *contradictio in terminis*. As means of fight against corruption, the European commission requires, inter alia, the adoption of anti-corruption legislation. However, laws are created by politicians who are said to be corrupt, therefore the law is in their hands. It is little probable that they would adopt laws to their own detriment. It is mainly up to the will of Romanian politicians, primarily members of Parliament, whether or not corruption - especially high-level corruption - will be effectively combated in the future.

On July 23, this year, the European Commission is expected to present its report on the progress of reform in the Romanian justice sector and the fight against corruption. The report will indicate the conclusions - if any - the Commission will draw based on Romania's circumstances regarding the fight against high-level corruption. In its monitoring report on the state of preparedness for EU membership of Bulgaria and Romania of September 26th, 2006, the Commission says:

"Should either country fail to address the benchmarks adequately, the Commission will apply the safeguard measures of the Accession Treaty. They lead to the suspension of the current Member States' obligation to recognize those judgments and execute warrants issued by either

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⁸⁸ Also see the article in *The Economist*, June 2008.

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

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country's courts or prosecutors falling under the principle of mutual recognition."⁸⁹

So far the Commission has not considered taking the safeguard measure. The President of Romania, *Traian Basescu*, in an interview granted to the *Deutsche Welle* TV channel, said he doubted that, in its forthcoming report, the European Commission would recommend the application of penalties against Romania. He thinks a warning from the Commission would be welcome, but he continues to explain:

"Not necessarily because Romanian institutions are incapable of fighting corruption. They have actually become especially effective when it comes to fighting against drug trafficking or trafficking in human beings. We watch criminal gangs being dismantled every day on the television."⁹⁰

And asked by a journalist from the *Frankfurter Allgemeine Zeitung* about his expectations of the EC report due on July 23, 2008, *Basescu* answered:

"It will not be a negative report, but the Commission will not state that the Romanian justice system is perfect either. We still fall behind the EU standards. The prosecutors have indicted eight former ministers, but certain constitutional barriers somehow manage to stall these steps."⁹¹

According to the mass-media, the same opinion is shared by the Romanian minister of justice as well. After a meeting with in-coming EU Justice Commissioner *Jacques Barrot*, in early June, this year, he reportedly stated:

"It is too soon to say what the Report will look like. We should expect a report that is very true to reality. I also think that we should expect a

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⁸⁹ Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, Brussels, 26.9.2006, COM (2006) 549 FINAL, page 11. The legal basis for the adoption of safeguard measures is the "Protocol concerning the conditions and arrangements for admission of the republic of Bulgaria and Romania to the European Union" of June the 21, 2005. At articles 36, 37 and 38, the protocol describes the details of the safeguard clauses. Three types of safeguard measures can be identified: economic, for the internal market and for JAI (Justice and Home Affairs). In the area of justice reform and the fight against corruption, article 38 is crucial. It stipulates special safeguard clauses in the area of justice and home affairs. **Article 38**, paragraph 1 reads as follows: "If there are serious shortcomings or any imminent risks of such shortcomings in Bulgaria or Romania in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the Treaty on European Union and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the Treaty establishing the European Community, and European laws and framework laws adopted on the basis of Sections 3 and 4 of Chapter IV of Title III of Part III of the Constitution, the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative and after consulting the Member States, adopt European regulations or decisions establishing appropriate measures and specify the conditions and modalities under which these measures are put into effect." Paragraph 2 stipulates: "These measures may take the form of temporary suspension of the application of relevant provisions and decisions in the relations between Bulgaria or Romania and any other Member State or Member States, without prejudice to the continuation of close judicial cooperation. [...] Measures shall be proportional and priority shall be given to measures which least disturb the functioning of the internal market and, where appropriate, to the application of the existing sectoral safeguard mechanisms. Such safeguard The measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the shortcomings are remedied. They may however be applied beyond the period specified in the first paragraph as long as these shortcomings persist. In response to progress made by the new Member State concerned in rectifying the identified shortcomings, the Commission may adapt the measures as appropriate after consulting the Member States. The Commission shall inform the Council in good time before revoking the European regulations and decisions establishing the safeguard measures, and it shall take duly into account any observations of the Council in this respect."

⁹⁰ Quotation of on-line version of *Nine O'Clock*, June 4, 2006: "Not necessarily because Romanian institutions are incapable of fighting corruption, they have actually become extremely efficient, if you take a look at the fight against drug and human trafficking, and we see criminal groups dismantled every day on TV."

⁹¹ Interview to *F.A.Z* of June 4, 2008, no. 128, page 5.

Konrad-Adenauer-Stiftung e.V.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

DR. STEFANIE RICARDA ROOS

July 9, 2008

WWW.KAS.DE/RSPSOE

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report that will capture both the positive and the negative aspects of justice reform.⁹²

Whether or not Mr. *Predoiu's* expectations are correct is yet to be seen in a few weeks' time.

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⁹² *Nine O'Clock*, June 9, 2008, page 3.