



THE ROMANIAN LEGAL FRAMEWORK ON ILLICIT ENRICHMENT

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EXECUTIVE SUMMARY¹

Research conducted along the last twenty years has shown a strong relationship between weak democracies and corruption. Corruption lowers tax revenues, increases government operating costs, increases government spending for wages and reduces spending on operations and maintenance. Corruption also diminishes public trust in government institutions, which is a crucial factor in the transition to democracy.

When ratifying the United Convention against Corruption (UNCAC)², Romania agreed to seriously consider criminalizing illicit enrichment. Illicit enrichment is defined as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. The international obligation contracted by Romania consists of making “*a genuine effort to see whether [illicit enrichment] would be compatible with [its] legal system*”.³ This report aims to contribute to such an effort, offering a comprehensive analysis of the crime, its constitutional and human rights limitations and different alternatives to deal with *unexplained wealth* compatible with the current Romanian legal framework, including the recently created National Integrity Agency.

The following report is divided into 5 interrelated sections. After a brief introduction and discussion of Romania’s historical background in establishing a democracy and enumerating constitutional restraints in order to help prevent abuses of power, section B discusses the basic international legal framework surrounding illicit enrichment. The section details recent developments in the area of criminal law for prosecuting and/or preventing crimes of greed. It also contains an analysis of the recent developments regarding the legal burdens of proof required to prosecute such crimes including the actual reversing of the burden in some countries, and the legislative approach of requiring proof of knowledge of an illicit origin rather than the predicate offense, itself. An examination of how other countries have approached the prosecution of such crimes and implemented new legal tools and strategies is also in this section. Laws in France, Australia, Austria, Italy, Germany, Hungary, the Netherlands, Poland, Switzerland, the United Kingdom, and the United States are described.

¹ The methodology applied included desktop research of legal sources (see Bibliography), and field interviews (Bucharest, April 2007). Comments should be sent to the author at gjorge@udesa.edu.ar, to ABA-CEELI at office@abaceeli.ro.

² The UNCAC, Doc. A/58/422, was adopted by the General Assembly of the United Nations on 31 October 2003 at United Nations Headquarters in New York. It was opened to all States for signature from 9 to 11 December 2003 in Merida, Mexico, when Romania signed it. Romania ratified the UNCAC on November 2, 2004 by passing law 365/2004 (Official Journal no. 903/5.10.2004). The UNCAC entered into force on December 14, 2005.

³ United Nations Office for Drugs and Crime, “Legislative Guide of the United Nations Convention against Corruption”, Vienna, 2006; http://www.unodc.org/unodc/crime_convention_corruption_guide.html

Section C provides an in-depth discussion of the Romanian legal framework for controlling the unexplained wealth of public officials. A brief history of the issue with relation to illicit enrichment under the Communist regime and the Constitutional presumption of legally acquired property is included in this section. Section C continues with a discussion of law 115/1996 and the beginning of public accountability in Romania with the creation of a financial disclosure system obligating certain categories of public officials to declare their assets.

It is noted that, despite the potential benefits in the system created by Law 115/1996, the law has not worked with any consistency since it was adopted. Section C of this report, thus, delves into the bill sent by the Government in June 2006 which was designed to create a routine system of control and disclosure of assets, conflicts of interests and incompatibilities, and administered by an autonomous, technical body empowered with investigative powers (the National Integrity Agency). This was an important opportunity to strengthen Romanian horizontal accountability. Unfortunately, as this report demonstrates, Law 144/2007, as it was passed by the Senate and, notwithstanding some amendments immediately introduced by a recent Government Emergency Ordinance, weakened this important opportunity.

Section C.4. includes an in-depth analysis of the strengths and weaknesses of the National Integrity Agency. It concludes that, while Law 144/2007 created a centralized agency as well as a certain degree of independence for this agency, some provisions generate legitimate questions about ANI's future independence. Specifically, there exist serious concerns with the term lengths of ANI authorities, and with who is responsible for the designation of the authorities. Concerns also exist regarding the opening of investigations since the law far from encourages citizens to provide useful information. On the contrary, there are many disincentives to filing a complaint with ANI. In addition, the President of ANI maintains the monopoly of the decision, with a lack of objective criteria to limit his/her discretion. Moreover, notifications (or claims), can be filed by an *interested* natural or legal person which seems to request some kind of standing or justification to be entitled to submit the notification or claim.

Confidential complaints are prevented since the law mandates notifications be dated and signed which may run counter to the purpose of international standards for protection of witnesses, victims and reporting persons, such as article 33 of the UN Convention against Corruption. In addition, the provision does not contemplate whistle-blowing protection for claimants. Investigations have also been severely limited. Inspectors' lack of subpoena powers, their inability to request search warrants, and the fact that it is impossible to appoint an expert witness all contribute to the weakening of ANI's potential success.

Section D of this report includes an analysis of 3 different challenges to which the offence of illicit enrichment may be subject in the Romanian legal framework. First, the Constitutional presumption of legality of acquirement of property which includes an analysis and discussion of recent case law in Romania concerning Article 44.8 of the Constitution; second, the presumption of innocence, with special regard to the reversing of the burden of proof in which the criminal legal systems in both the U.S. and the U.K. and relevant ECHR jurisprudence are discussed in comparison with the system in Romania; and finally, the right to silence, with specific emphasis on the right to remain silent and the right not to produce evidence.

An analysis of illicit enrichment with respect to the United Nations Convention Against Corruption is provided in section E. This discussion demonstrates that neither the presumption of “legally acquired property” in the Romanian Constitution, nor the human rights safeguards of the presumption of innocence, nor the right to silence are absolute rights. On the contrary, inroads into these rights have been permitted subject to specific limitations.

The Report concludes that, subject to the previously discussed conditions, the current Romanian legal framework has no technical limitations for establishing a criminal offense of illicit enrichment. However, there are serious institutional concerns regarding the effectiveness of such a legal device. Rather, it is recommended that the Romanian legal system improve its framework and gain experience in the practice of controlling unexplained wealth in the administrative sphere before advancing to the criminal law area.

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A. INTRODUCTION: DEMOCRACY, ACCOUNTABILITY AND HIGH LEVEL CORRUPTION

1. The post communist era inaugurated the “third wave” of democratization in Eastern and Central European countries. During the transition, these countries adopted in their Constitutions characteristic features of most constitutional democracies. On the one hand, a parliamentary system in which the majority rule applies, with a stable, competitive electoral system and institutionalized political parties that aim at ensuring power alternation; on the other, constitutional restraints aimed at controlling the exercise of power and preventing abuses from the majority in government: separation of powers, checks and balances, judicial control, bill of rights and limits to constitutional amendments.
2. The 1991 Romanian Constitution was not an exception to this trend, defining Romania as a republic in which the State shall be organized under the basic principles of the division and balance of powers - legislative, executive, and judicial (article 1) - and adopting majority rule by stating that the national sovereignty shall reside within the Romanian people, exercised by means of their representative bodies, which is a result of free, periodical and fair elections, as well as by referendum (article 2). The basic institutional framework consists of a president popularly elected acting as a head of State and commander in chief of the armed forces, a government politically responsible before the parliament, and a constitutional court as the guarantor for the supremacy of the Constitution with strong powers to adjudicate the constitutionality of laws, both before and after their promulgation. Concerning the limits to constitutional amendments to prevent past abuses, article 152 states the impossibility to review, among other issues, the republican form of government, the independence of justice, and the political pluralism. Article 152 also forbids the suppression of the citizen’s fundamental rights and freedoms, or of the safeguards thereof.
3. Research conducted along the last twenty years has shown a strong relationship between weak democracies and corruption. On the one hand, systematic corruption threatens democracy and governance by weakening political institutions and mass participation,

and by delaying and distorting the economic development needed to sustain democracy.⁴ Corruption affects the composition of government spending. There is solid evidence showing that corrupt governments display predatory behavior in deciding how to distribute government expenditures. Specifically, the data shows corruption to be negatively related to education and health expenditures. Countries with higher corruption tend to have lower levels of social spending, regardless of their level of development. Corruption lowers tax revenues, increases government operating costs, increases government spending for wages and reduces spending on operations and maintenance. In addition, corruption often biases a government towards spending on higher education and tertiary health care (rather than basic education and primary health care).⁵

4. Furthermore, by reducing the capacity of the government, corruption also diminishes public trust in government institutions, which is a crucial factor in the transition to democracy. The proposition is that corruption destroys people's trust in government and other institutions, affecting lowest income groups which are more dependent on government services for assistance in basic needs, and least likely to be able to pay bribes.⁶ Lack of trust has economic consequences: when people perceive that the social system is untrustworthy and inequitable, this can affect incentives to engage in productive activities.⁷
5. Electoral processes, although enabling political alternation, are not enough to control corruption and to make representatives and public officials accountable. Susan Rose Ackerman, commenting on countries like Poland and Hungary, stated, "*...during the first decade of transition, little emphasis was given to broader issues of popular control and government accountability outside the electoral process [...] the costs are not primarily economic. Rather there is an*

⁴ In a study of 83 countries, Johnston compares Transparency International's Corruption Perception Index with an index of political competitiveness and finds that well-institutionalized and decisive political competition is correlated with lower levels of corruption. Cfr. Johnston, M., "Corruption and Democracy. Threats to development, opportunities for reform", Colgate University, Department of Political Science, 2000. These results were confirmed, even when controlling for GDP and examining the relationship over time. Diagnostic surveys of corruption in Bosnia - Herzegovina, Ghana, Honduras, Indonesia and Latvia report that government institutions with the highest levels of corruption tend to provide lower quality services. The converse is also true: in Romania, as the survey shows, state sector entities with better systems of public administration tend to have lower levels of corruption.

⁵ Mauro, Paolo, "The Effects of Corruption on Growth and Public Expenditure", in Arnold Heidenheimer and Michael Johnston (comps.), *Political Corruption*, Transaction, New Jersey, 2005, p. 339-353.

⁶ Rose-Ackerman 2001 at 26, Susan, "Trust, Honesty and Corruption: Reflections on the State Building Process." *European Journal of Sociology* 42:27-71, 2001, at 26, noting that this is especially the case in the former Soviet Union.

⁷ See Zak, Paul and Stephen Knack, "Trust and Growth." IRIS Center Working Paper No. 219, . 1998. Also Knack, "Governance and Growth: Measurement and Evidence." IRIS Center, Forum Series on the Role of Institutions in Promoting Growth, 2002.

*increased risk of popular disengagement from political life based on disillusionment and distrust of the State and its officials”.*⁸

6. Corruption seems to be an important explanation for popular disengagement in Romania. The Transparency International Global Corruption Barometer shows that, despite several anticorruption efforts, the three branches of government were considered the most corrupt institutions in 2004/2006 period. Anecdotic accounts and interviews revealed citizens' growing impression that Parliament is used as a safe haven for people wishing to evade justice by acquiring a public position from which to negotiate with impunity. This impression is strengthened by the fact that individuals had contributed large sums of money to the political parties in order to be adopted as a candidate. The reputation of politicians has been further harmed by the tendency of a great many to migrate from party to party. This party migration suggests that personal ambition took precedence over programs, ideology or principles. It also encourages the view that parties have become a loose combination of ambitious individuals keen to capture the State for their own advantage.⁹
7. A state captured is defined as one that permits the illegal influence of individuals, elite firms and conglomerates to shape the formation of laws, policies, and regulations.¹⁰ This is one of the most pervasive forms of high level corruption. Other forms of high level corruption, e.g. “interest grouping bidding”, are less pervasive because they are non-systematic and because they develop in contexts of strong political and economic competition. “State captured” types of high level corruption, by contrast, describe a “high corruption equilibrium” that threaten the foundations of democracy. A captured state does not flourish anywhere. The strength of civil society, independent courts and press, as well as the general capacity of an institution, play important roles when explaining this phenomenon.
8. Since the end of communism, the degree of high level corruption appears to have been evolving in Romania. A situation where many old power-holders remained in power and exercised this power by resorting to old practices characterized the first years after the revolution. This situation also coincided with a high degree of diversion of public resources for private use. There was little or no civic engagement with politics because of

⁸ Susan Rose Ackerman, *From Election to Democracy, Building Accountable Government in Hungary and Poland*, Cambridge University Press, 2005, page 2.

⁹ Interviews of the author. See also Gallagher, Tom, *Theft of a Nation, Romania since Communism*, Hurst&Company, London, 2005, page 246.

¹⁰ Kauffman, “Seize the state”

a lack of civic tradition in society. During this time period, there was no real control of the patrimony of public officials, and no law was ever passed by Parliament to restrict the financial activities of its members. Innovative legislation against corruption was nonexistent and the judiciary did not enjoy real independence to judge even obvious cases that could be handled with traditional anticorruption tools.

9. In the second half of the 1990s, the political spectrum appeared to be more competitive, the civil society was more active and the electorate, more sophisticated. There was a slow emergence of an independent press, which did not exist before 1989, and which campaigned against corruption and started exposing collusion between leading political figures and the newly-wealthy that had prospered through allegedly illegal means. Some NGOs also began to play a more active role in promoting an independent media, monitoring elections and encouraging the respect for human rights. However, these transformations have not had a huge impact on anticorruption policy. The society remained fragmented and vested interests continued to challenge attempts of reform. The new elite holding power remained unaccountable to the society, though more competitive than in the past. Debates about shaping democracy started to take place and there was no shortage of official anti-corruption proclamations and campaigns, though they were often used to threaten dissidents or rivals, rather than to pursue reform as such. Power sharing was not taking place only inside a closed oligarchy like before, but was characterized by what some called “the algorithm principle”: many thousands of positions were assigned on the basis of the electoral strength of the ruling parties. Through this mechanism, negotiations between members of the elite were the substitute for weak institutions. Political parties had demonstrated inconsistency with their own ideologies and displayed shallow roots. The parties often embodied contending elite followings rather than representing major segments of society. Judicial magistrates continued to be weak and lacked independence. Anticorruption legislation, such as law 115/96, was more directed to support rhetoric than to make public officials more accountable.
10. It was only after 2000, when negotiations with the UE and the NATO became more serious, that Romania started to pay real attention to foreign pressures for reforms in the area of corruption. It is said that international constraints are not always unwelcome by politicians when there is no other possibility of reforming as a consequence of lack of internal incentives. Romania seems to be an example of this. Many official reports refer to the need of compliance because of EU conditions. Under this “carrot and stick”

approach, the government passed new laws about corruption-related offences and created specialized anticorruption agencies: first, the National Anti-Corruption Prosecutor's Office and then, the National Anticorruption Directorate. The Romanian government also introduced specialized investigative techniques to prosecute corruption offences¹¹ and, more recently, improved its performance of convictions.¹²

11. Such welcomed reforms, nonetheless, appear to have had different impacts on Romania's citizens. An examination of surveys directed to the private sector reveals that corruption seems to have diminished in the last 5 years. A comparison between World Bank Enterprises Survey shows that bribes as a share of annual sales have been reported as decreasing as much as 400% between 2002 and 2005; unofficial payments to obtain government contracts appears to have reduced to a half; payments to deal with courts seems to have diminished by a third and payments to deal with customs and imports have decreased by more than half.¹³
12. The same perceptions, however, are not reflected in surveys directed at the ordinary citizen. Transparency International Global Barometer did not change much in the last three years, showing a steady frustration with recent anticorruption efforts.¹⁴
13. The ostensible and visible enrichment of citizens participating in politics and in the allocation of public resources is a plausible explanation for those divergent perceptions about anticorruption efforts. Ordinary Romanian people do not believe that the constitutional equal protection clause, which explicitly states that no one is above the law (article 16.2), is fully applied.
14. Accountability is one of the pillars of a democracy. Anybody who receives a mandate from the people or occupies a public position, must be held responsible for his acts or failures to act, especially when the allocation of public resources (e.g. business permits, concessions to exploit public utilities or public services, decisions affecting market competition), or the use of taxpayers' money (e.g. public procurement, subsidies, privatizations, tax breaks) are at stake. Despite the fact that in the last five years there have been many anticorruption efforts, Romanians do not feel that it is working.

¹¹ Law 78/2000. Modified by GEO 43/2002, Law 521/2004, GEO 124/2005; Law 508/2004. Modified by GEO 7/2005.

¹² According to official statistics, between September 1, 2006 and March 15, 2007, 195 defendants were indicted, 47 non-final conviction decisions issued and 33 final conviction decisions issued. Data collected in several interviews, on file with the author.

¹³ Data constructed using the BEEPS interactive dataset of the World Bank, available at: <http://www.worldbank.org/governance/beeps>, included as Table 3 (BEEPS Romania 2005), below.

¹⁴ Indexes available at <http://www.transparency.org>, included as Table 1 and Table 2, Below

15. Making public officials accountable and responsible for what they do is a complex problem that may be addressed by different strategies. Legal tools addressing “illicit enrichment” may have an important political impact in building a democracy conceived as a system of collective self-government exercised by the sovereign people through their elected representatives and public officials.

B. CURBING ACQUISITIVE CRIMES: A NEW PARADIGM IN CRIMINAL LAW

16. Understanding the legal framework on anticorruption, in general, and on illicit enrichment, in particular, requires a short introduction about some recent global developments introduced in the area of criminal law for curbing acquisitive crimes.
17. In the last two decades, a quiet revolution has taken place in criminal law and in the law enforcement theory. Since the eighteenth century, criminal law has been governed by a relatively steady paradigm centered at determining under what conditions the State would be able to deprive a human being of his fundamental right of personal freedom. Absolute (retribution) and relative (general prevention, social re-integration, norm stabilization) theories of punishment justification provide, under this paradigm, different answers to the scope and goals of criminal law.
18. In the area of acquisitive crimes (crimes that generate profits), however, there has been a gradual shifting from the traditional theory towards a new “profit-oriented” paradigm of criminal law.¹⁵ This social control policy is no longer focused on the restriction of personal freedom, but rather on the confiscation of ill-gotten gains. This new concept has been permeating the traditional paradigm, forcing the review of several traditional interpretations.
19. The most palpable tool of this new paradigm is the concept of “money laundering”, that is, the process by which proceeds of illegal activities are concealed, enabling control and access to these assets, and providing a legitimate cover for the origin of the income.
20. The idea was originally designed by American policy makers aiming at reducing, in a pragmatic way, the illicit drug market. Given the parallel liberalization of financial markets, it was rapidly understood that such a policy could not be efficient without reaching all financial centers. The idea was internationalized in the 1988 United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances

¹⁵ The term was coined by Stessens, Guy, *Money Laundering. A New International Law Enforcement Model*, Cambridge University Press, Cambridge, 2002

(hereinafter the Vienna Convention).¹⁶ Article 5 of the Vienna Convention set the agenda on confiscation issues and requires State Parties to confiscate proceeds of drug trafficking as well as to internationally cooperate to that end. Article 5.7 recommends State Parties “*consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.*”

21. The paradigm rapidly expanded to other areas. Thus, attacking criminal profits after they have been earned became a central objective of many criminal law systems aiming at reducing any type of acquisitive crime. The underlying theory is quite straightforward: increasing the effectiveness of legal instruments to detect, seize and confiscate ill-gotten gains will reduce the motivation for engaging in these criminal activities. When connected to criminal organizations, it will also reduce the operative capital for continuing its illegal activities.
22. In the area of the Organization of Economic and Cooperation for Development (OECD), the spread reached to the area of “serious crimes” first, which each member was free to define, when in 1996 the Financial Action Task Force (hereinafter FATF) reviewed its 40 Recommendations against Money Laundering and recommended its members expand the predicate offences from drug trafficking to “serious crimes” (Recommendation 1). In 2003, a second revision of the 40 Recommendations again asked FATF Members to extend the range of predicate offences “*with a view to including the widest range of predicate offences*” (Recommendation 1).¹⁷
23. In the United Nations context, the paradigm was extended to the area of transnational organized crime, when the United Convention against Transnational Organized Crime¹⁸ (hereinafter, the Palermo Convention), covered “organized crime activities” as including belonging to an organized group, corruption, obstruction of justice, money laundering and specific protocols on trafficking in persons, arms, organs and migrants. The Palermo Convention, in line with the FATF Recommendations of 2003, requires State Parties to apply money laundering offences to “*the widest range of predicate offences*”. After requiring State Parties to ensure confiscation of instrumentalities, objects and proceeds of any crime covered by the Convention, Article 12.7 recommends that State Parties “*consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other*

¹⁶ Romania adhered to the Vienna Convention on January 21, 1993, without reservations.

¹⁷ Romania is an active member of MONYVAL.

¹⁸ The Palermo Convention entered into force in 29 September 2003, in accordance with article 38. Romania ratified the Palermo Convention on December 4, 2002, without reservations.

property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.”

24. The entry into force of the United Nations Convention against Corruption (UNCAC) in December 2005 reaffirmed the validity of the paradigm and its full extension to the anticorruption arena. The UNCAC is fully embedded with the ideas of the “profit oriented” paradigm of criminal law. For effectively combating corruption, it requires:

- the establishment of a comprehensive system to prevent money laundering (articles 14 and 52),
- criminalization of money laundering (article 23),
- the establishment of liability of legal persons for participation in the offences established in accordance with the UNCAC (article 26),
- the interpretation clause establishing that “*knowledge, intent or purpose required as an element of an offence established in accordance with the Convention may be inferred from objective factual circumstances*” (article 28),
- requires seizure and confiscation of the objects, instrumentalities and proceeds of crime (article 31),
- requires the establishment of special investigative techniques to effectively combat corruption (article 50), and
- establishes an innovative whole Chapter for internationally detecting, seizing, confiscating and returning proceeds from corruption to its country of origin (Chapter V), which is explicitly invoked as one of the main purposes of the treaty (article 1.b)) as well as one of its “fundamental principles” (art. 51).

When requiring confiscation of the instrumentalities and proceeds of crimes covered by the Convention, UNCAC also recommends that State Parties “*consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation*” (article 31.8).

B.1. REVERSAL OF THE BURDEN OF PROOF REGARDING THE CRIMINAL ORIGINS OF THE PROCEEDS OF CRIME

25. As stated before, the eruption of the “profit oriented” paradigm in criminal law forced the review of several traditional interpretations. Since the main purpose is to deprive offenders of ill-gotten gains, many jurisdictions introduced legal techniques that are

- intended to make it possible to demonstrate the criminal origin of the proceeds and consequently to order its confiscation.
26. Most techniques somehow affect either the traditional standard of proof in criminal matters by replacing “beyond any reasonable doubt” with “a balance of probabilities”, or they affect the burden of proof, which is placed on the defendant regarding the criminal origins of the proceeds of crime.
 27. Usually, these techniques have been developed in statutes criminalizing money laundering. Nonetheless, the comparison with illicit enrichment is quite *a propos* since both offences share a common element in their structure: in both cases, there is a “predicate offence”, a previous crime which the Prosecution is not obliged to prove.
 28. In the case of money laundering, the illicitness of the conduct is usually structured around a transaction executed with knowledge that the assets involved were the proceeds of a predicate offence. The question is what is needed to prove knowledge of the “illicit origin” of the proceeds.
 29. Most civil law countries have resorted to indirect methods of proof, requiring the prosecution not to prove that the assets in question stem from a specific criminal offense or a specific type of crime, but rather that the money does not stem from legal income: salaries, inheritance, a loan, a gift, a prize, etc. The Spanish Supreme Court, for instance, has set up a long-standing doctrine accepting that several (more than one), closely related, consistent and non contradictory indications [*“indicios”*] are constitutionally sufficient evidence to prove, beyond reasonable doubt that the assets in question have an illicit origin. Given the fact that this method of evidence is “deductive”, the suitability and reasonability of the deduction is subject to review.¹⁹
 30. In practical terms, this is a “net worth” analysis supported by a standard of knowledge requiring that the offender “ought to have known but disregarded” its illegal origin (*dolus eventualis*). In these cases, an unusual increase of the assets, notoriously anomalous money transactions, inexistence of commercial legal activities that justify those unusual or anomalous movements, the possession of large amounts of cash money, all usually accompanied by unlikely explanations, are enough evidence to satisfy a criminal standard of conviction.
 31. Following the same trend, France has more recently introduced in its criminal code several offences allowing the reversal of the burden of proof as a central element of the

¹⁹ See, among many others, SST de 2-10-2004, by Justice Granados Perez, SST 1-3-2005, by Justice Berdugo, SST de 14-9-2005, by Justice Monterde, .STS de 19-1-2005 , by Justice Giménez García.

crime.²⁰ The structure of the following offences is very similar to those of illicit enrichment:

- i. Article 225-6, paragraph 3 of the Criminal Code, against profiting from prostitution businesses, criminalizes any person “*being unable to account for an income compatible with one's lifestyle while living with a person habitually engaged in prostitution or while entertaining a habitual relationship with one or more persons engaging in prostitution.*”
 - ii. Article 225-12-5, paragraph 4 of the criminal code, against exploitation of begging, punishes “*The fact of being unable to account for an income compatible with one's lifestyle while in practice influencing the behavior of one or more persons who practice begging, or being in a constant relationship with him or them, is assimilated to the exploitation of begging.*”
 - iii. Article 321, paragraph 6 of the criminal code penalizes: “*The inability of a person in authority over a minor living with him who habitually commits felonies or misdemeanors against the property of others to justify the income corresponding to his lifestyle is punished by five years' imprisonment and a fine of € 375,000. The fine may exceed € 375,000 to extend to half the value of the goods handled.*”
 - iv. Article 450-2-1, on participation of a criminal organization, states: “*The inability by a person to justify an income corresponding to his way of life, while being habitually in contact with persons engaged in activities set out under article 450-1, is punished by five years' imprisonment and a fine of € 75,000.*”
32. In the case of confiscation of proceeds of crime, the move was even stronger, as most jurisdictions have accepted that once the prosecution established a *prima facie* case of the illicit origin of the proceeds, the burden shifts to the defense to prove the contrary.
33. Taking into account that most European jurisdictions have adopted such principle with regards to offences related to organized crime, the Council of Europe issued its Framework Decision 2005/212/HA on Confiscation of Crime-Related Proceeds, Instrumentalities and Properties which aims “to ensure that all Member States have effective rules governing the confiscation of proceeds from crime, *inter alia*, in relation to

²⁰ Though we were not able to find case law supporting the application of these offences, the GRECO Group stated that: “Regarding the apportionment of the burden of proof, courts have the power to **deduce** the illicit nature of assets from the manner in which they were acquired. According to the French authorities, this option is used in judicial practice without causing any difficulties”, Cfr. GRECO Group, Evaluation Report on France, Second Evaluation Round, Strasbourg, 2 December 2004, para. 14.

the onus of proof regarding the source of assets held by a person convicted of an offence related to organized crime”²¹.

34. The decision requires Member States to extend their powers of confiscation in cases of money laundering, and several forms of trafficking –migrants, human beings, currency, drugs, illegal sexual services- in order to enable confiscation in several alternative situations. According to Article 3.2.c), Member States are encouraged to enable confiscation ***“where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of the convicted person”***.²²
35. The trend is not exclusively European, but rather part of the global transformation of the method to design effective tools to curb serious crimes. Some examples follows:
- Australia allows both a civil (lower) standard of proof for confiscation and a shifting of the burden to the defendant for proving the origin of the assets liable to confiscation regarding offences detailed in the Proceeds of Crime Act. In addition, the proceeds in question should not be necessarily linked to the facts of the case.
 - In Austria, the onus of proof may be partially reversed where there have been repeated commissions of crimes over a period of time or where prosecution proves that a person is a member of a criminal organization. The proceeds in question do not have to be linked to the facts of the case.
 - In Italy, section 12 *series* of Legislative Decree 306 of 8 June 1992, provides for drug trafficking and organized crime offences. The onus of proving that the assets are legitimate is placed on the defendant if the prosecution establishes that the assets are not commensurate with the defendant’s income or economic resources. In that case, it applies to the defendant’s total patrimony, and not just to those assets which are the proceeds of the offence of which he is convicted. In the course of the preliminary investigation, such assets may be placed under sequestration orders on the same grounds (section 321 CCP: preventive seizure).
 - In Germany, section 73d of the Criminal Code on confiscation requires assets to be forfeited "where there are grounds to believe that the objects were used for or obtained through unlawful acts." According to the Federal Supreme Court, though

²¹ Cfr Council Framework Decision 2005/212/HA of 24 February 2005, paragraph 10.

²² *Ibidem*, Article 3.2. c).

these provisions do not reduce the burden of proof and require an exhaustive gathering and examination of the evidence, they dispense the prosecution from establishing “the specific details” (cf. BGHSt 40, 373; BGH NStZ 2000, 137).

- In Hungary, Act No. IV of 1978, amending the Criminal Code on confiscation issues, establishes in 77/B§(4) a reversal of the burden of proof with respect to all property acquired during the life of a criminal organization. The defendant has to prove that the organization has no control over such assets or that they have legal origin.
- The Netherlands modified its criminal code, article 36, allowing a partial reversal of the burden of proof with regard to the illicit origin of the proceeds of several crimes. In addition to allowing confiscation of the proceeds of the crime for which the offender has been convicted, the provision also allows confiscation of assets “which are probably derived from other criminal activities.” In order to trigger this provision, the prosecution must raise the probability of the existence of proceeds obtained from similar offences or from offences for which it is also possible to impose the highest amount of fine, even if the accused has not been charged with these offences. The Dutch Supreme Court held that the provision is compatible with the presumption of innocence of Article 6(2) of the European Convention on Human Rights. The most important factor considered by the Dutch Supreme Court upon reaching this conclusion was the fact that *“once a presumption of criminal origin of proceeds has been established by the prosecution, the defense can always reverse the presumption. A mere denial will not be sufficient, however. Once the criminal origin of the proceeds has been made probable, the burden to rebut - not simply to deny - this presumption lies with the defense. The presumption does not, however, operate automatically but has to be established by the prosecution by demonstrating that the criminal origin of the proceeds, though not proven, is probable.”*²³
- The Polish Penal Code incorporated article 45 § 2 which reverses the burden of proving the origin of the proceeds of crime. The rule presumes that any property or interest of value the offender received or gained, even indirectly, during or after the commission of the offence, before the final judgment, is deemed to be derived from the offence. The accused person must prove otherwise. Poland has also developed a

²³ Cfr. Stessens, Guy, Money Laundering, A new International Enforcement Model, Cambridge, 2000, page 72.

jurisprudence which accepts that circumstantial evidence (i.e. single facts) can lead to drawing upon inferences with regard to the element of the crime.

- Switzerland introduced a provision which states that if a person is charged with supporting or participating in a criminal organization (defined as only requiring 2 individuals) the Court is under the duty to order the confiscation of all assets belonging to that person. Article 59 (3) of the Swiss Criminal Code lays down a legal presumption holding that a criminal organization yields power over all assets belonging to its members. The Swiss Supreme Court held that the presumption was constitutional and respectful of the presumption of innocence because the defendant can always rebut the presumption by demonstrating either that the assets are not under control of the criminal organization or, as is often the case of low ranking members, that the assets have legal origin.²⁴
- The United Kingdom offers drastic powers to order the confiscation of the proceeds of crime that were initially developed in relation with proceeds of drug trafficking and rapidly extended to all profitable crimes. According to the Criminal Justice Act and the Proceeds of Crime Act of 2002, while the burden of proof basically remains on the prosecution, most decisions are taken under the balance of probabilities standard of proof, as for example, to prove that the defendant has a “criminal lifestyle” from which he has benefited, or whether he has only benefited from a particular offence. In addition, the law establishes several presumptions from which the prosecution benefits. For instance, any property transferred to the defendant a number of years before the conviction (varying with the offence charged) is a benefit derived from its criminal lifestyle, as well as any expenditure.
- In the United States, both criminal and civil confiscation procedures are allowed. In the case of criminal confiscation procedures, the standard of proof for confiscation is that which is appropriate to a sentencing hearing, i.e., the preponderance of evidence. In civil forfeiture procedures, once the prosecution shows that there is *probable cause* to bring the proceedings, then the burden shifts to the defendant to show that he or she did not know that the property was acquired illegally or did not consent to the use of property in an illegal manner.

²⁴ Swiss Supreme Court, Judgment of August 27, 1996, in *La Semaine Judiciaire* (1997), 1, cit by Stessens, G. op. cit, at 74.

36. The preceding sample, which includes countries of very different legal traditions, shows that most countries have resorted to new legal tools and strategies to control most types of acquisitive crimes. In some cases, the reversal of the burden of proof operates with regard to an element of the offence (France, Italy); in others, the same is conditioned on the fact that a “criminal organization” is at stake; still others apply the reversal only with regard to the criminal origin of the proceeds for the purposes of their confiscation; and in some cases, the reversal of the burden of proof is the consequence of the setting of an evidentiary presumption.
37. Those provisions have been a reaction to specific policy problems. In passing the aforementioned criminal legislation, France, for example, was worried about the ineffectiveness of the results of its drug control policy which basically punished poor street dealers and could not reach those profiting from drug trafficking. Then, the French parliament extended the idea to other illegal markets, such as exploitation of begging, prostitution or organized groups of thefts. In contrast, Switzerland passed its money laundering statutes and rules on criminal organizations not because Swiss was suffering from violent crimes within its territory, but rather, because its financial center and its banking secrecy rules were misused to hide the fortunes of criminal groups. Italy passed the cited laws to deal with its mafia-type organized groups. Such legal tools have been upheld by domestic Constitutional Courts.

C. THE ROMANIAN LEGAL FRAMEWORK FOR CONTROLLING UNEXPLAINED WEALTH OF PUBLIC OFFICIALS

38. In this section we will describe the evolution of Romanian legal instruments aimed at dealing with unexplained wealth of public officials. We start by summarizing the principles that informed Law 18/1968, a system applicable not only to public officials but rather to any Romanian citizen that was in force from 1968 to 1996. This law was tacitly derogated, however, when Romania enacted the constitution of 1991, which included a presumption of legality for the acquisition of assets. We will then describe the current regime of Law 115/1996, which formally abrogated Law 18/1968. In contrast to Law 18/1968, the new framework only targets public officials. We conclude by describing of Control of Assets provided by the Bill of the National Integrity Agency.

C.1. ILLICIT ENRICHMENT UNDER THE COMMUNIST REGIME

39. During the communist regime, law 18/1968 was enacted for controlling “*the origin of any individual’s assets*” (article 1), regardless whether or not he/she was a public official. Where data existed that demonstrated a clear disproportion between the value of anybody’s goods and his/her income, control was mandatory and exercised retrospectively, covering any asset acquired since the beginning of the regime. The legal regime was contrary to several well-established human rights safeguards.
40. First, “*if data or clues*” shows “*clear disproportion*” between assets and income, the burden of proof was totally reversed. The person under investigation was given a 10 days period to file a statement to justify the origin of his/her assets. As stated in article 2, “*By justifying the provenience of the goods it is meant the obligation of the individual in cause to prove the licit character of the means used for acquiring or developing his wealth*”. The law did not establish any clear evidentiary threshold upon which the Commission was able to call for an explanation. On the contrary, the law asked for an explanation immediately after the complaint was presented before the Commission. Several anecdotic accounts recalled that this was indeed the actual practice.²⁵ As we will see in the next section, both the presumption of innocence and the right to silence requires that for any interference be allowed the State must show at least “*a prima facie case*”, that is, consistent evidence combined with legitimate inferences that may lead to the belief that the contravention occurred.
41. Second, according to article 5, lack of justification as well as partial omissions was presumed to be unjustified.²⁶ Though some provisions pointed out to some measures of compulsory “*evidence gathering*”,²⁷ in practice, those cases were equated to automatic sanctioning. Therefore, neither the Commission, as a *fact finder*, was obliged to “find the truth”, nor the Court, as a *fact trier*, was able to assess the evidence with the basic impartiality required by human rights treaties.
42. Third, the structure of the infraction was constructed as the omission to justify. As we will see in next section, the fact that the defendant is in the best position to give an explanation may ground a provision asking for an explanation. However, this does not

²⁵ Interviews conducted by the consultant.

²⁶ Law 18-1968, article 5: “The provenience of the assets of the individual who refuses to present the statement referred in the previous paragraph, as well as of the assets which were omitted to be declared in the statement, is considered unjustified, until the opposite is proved.”

²⁷ Article 6 provides that “*The commission calls any person who might give useful relations for clearing up the provenience of the individual’s goods. Those who, after 1 January 1962, have acquired goods from the individual in cause will be obligatorily heard. If the individual is married, the Commission will also hear the other spouse, for providing details concerning the acquired goods...*”

mean that the only valid explanation should come from the person under investigation. On the contrary, there should be enough room for a reasonable explanation provided either by the fact finder or a third person.

43. Fourth, though the procedure was of a civil nature²⁸ and some characteristics resembled an “*in rem* forfeiture system” (for example, the fact that it may be continued against inheritors, but only against the assets acquired by inheritance), unjustified wealth was sanctioned with an 80% tax, which due to its severity, may be regarded, and surely perceived by the community, as a regime of punishment.
44. Fifth, the procedure of investigation was not public (article 6), seriously affecting basic due process safeguards.

C.2. CONSTITUTIONAL PRESUMPTION OF LEGAL ACQUIREMENT OF PROPERTY

45. After reestablishing the democratic rule, the Constitution of 1991 reenacted the right to private property (former article 41, current article 44), with several traditional safeguards: equal protection by the law irrespective of the owner, and the right of just compensation, paid in advance, in cases of public utility takings. It also included a specific, unique, safeguard which reads: “*Legally acquired assets shall not be confiscated. Legality of acquirement shall be presumed.*” To our knowledge, this provision is unique in the sense that it does not recognize antecedents in any other foreign constitution. We will analyze the meaning, scope and limitations this provision poses to the offense of illicit enrichment in section E.1.

C.3. THE BEGINNING OF PUBLIC ACCOUNTABILITY: THE REGIME OF LAW 115/1996

46. Law 115/1996 formally abrogated Law 18/1968. The main first difference between both regimes is that while Law 18/1968 targets the entire Romanian population, the system enacted under law 115/1996 aims at controlling illicit wealth of certain categories of public officials of all three branches of the central government and local governments,

²⁸ The composition of the Commission of Investigation and the Court of Trial, the fact that the procedure may be continued against inheritors (article 17), the provision establishing that rules of civil procedure applied by default with regards, e.g. to the standard of evidence- point to that direction.

including elected officials, political appointees, judges and high ranked civil servants with management positions (article 2).²⁹

47. The officials reached by the Act are bound to submit financial disclosure forms in writing, including the assets of their spouses and children under support, after appointment or election (article 3 (2))³⁰ and on the conclusion of their mandate or on cessation of the activity (article 6 (1)). No updates are required during the exercise of the public function, except for the civil servants and the persons with management positions, who are required to fill an additional disclosure form once every 4 years (article 6 (3)).
48. The second important difference with respect to law 18/1968, is the creation of a financial disclosure system, obligating certain categories of public officials to declare their assets, and those from their spouses and children under support. The reception of financial disclosure forms is decentralized. Public Officials submit them to the public organization where they perform their activities or which issued their appointment.
49. The duty for public officials to submit their financial situation in advance is part of a substantive foundation of the rule of law, as it is the requirement to justify public decisions and to act according to the principle of impartiality. Similarly to cases in which the right of free speech prevails over the right to privacy of public officials in order to enhance the public debate, the requirement to submit in advance the financial situation is balanced with the goal of having honest and accountable officials.
50. Financial and interest disclosure systems constitute a highly useful device for detecting conflicts of interest and for tracking illicit enrichment. Their primary purpose is not punitive.³¹ Rather, the purpose is to bolster citizens' confidence in their government. Full disclosure will put to rest many rumors and in that sense, asset declaration systems protect honest officials.
51. From the enforcement point of view, asset disclosure systems also lessen the threat to civil liberties and abuse of enforcement tools that can result from an aggressive campaign

²⁹ The scope of public officials listed in Article 2 was broadened by the amendment of article 3 (1) of Law 78/2000 on preventing, discovering and sanctioning of the corruption acts. Later, Government Emergency Ordinance 24/2004, ratified by Law 601/2004, included in that list candidates running for President, Parliament Member, County or Local Councilor, or Mayor.

³⁰ The forms were included in an Annex to the Law 115/1996. Forms were amended to include more rigid and comprehensive financial-economic data, and including certain activities to control conflicts of interests, by Government Decision 506/2003 and later on, by Government Emergency Ordinance 14/2005.

³¹ Rick Messick, Income & Asset Disclosure Requirements for Public Officials: How to Establish and Maintain an Effective Disclosure Program, April 2006, published in:

<http://www.ethicsworld.org/publicsectorgovernance/bestpracticesbygovernments.php#incomeandassetdisclosure>

to root out corruption. Bribery and public embezzlement are difficult crimes to prove, and police and prosecutors often must turn to wiretapping, eavesdropping, sting operations, and other techniques that can easily be abused. The filing of a false declaration is a much easier case to make. Likewise, a net worth financial analysis over a patrimony is more difficult than a formal offence but much less intrusive than a regular and routine use of “special investigative techniques”.

52. Asset disclosure systems help enforcement agencies build a more solid case, allowing them to gather additional evidence, and therefore, avoiding and/or postponing the need to rely exclusively on the explanations from the questioned official. As a step forward, Law 115/1996 does not place the burden of proof on the investigated public official. Rather, article 13 establishes that they **may** produce proofs for defense before the investigating commission, or **may** request the producing of these proofs by the commission, and submit a statement showing the income obtained and the origin of his/her wealth. The law does not create a duty to justify the legal origin of the goods, or that he/she will face a consequence for remaining silent. The evidential burden of building a solid case, mainly falls on the Investigation Commissions and on whomever filed the investigation request (prosecutors, the public official who was publicly blamed with regard to the origin of his/her wealth, and any citizen). Article 11 establishes that the investigation request shall compulsorily include the proofs³² on which it is based and the sources from which these may be requested, or it shall be accompanied by the proving documents.
53. If, after producing the proofs, there is a conclusion that the acquisition of certain determined goods or part of them is not justified, the Court of Appeals shall decide either the confiscation of the unjustified goods or parts, or the payment of an amount of money, equal to the value of the goods, established by the instance on the basis of an expert appraisal. In the case of the obligation to pay the equivalent value of the goods, the instance shall also establish the term of payment (article 18). The revenue authority is in charge of the execution of the confiscation and the auction sale.
54. This marks a third important departure from the system of Law 18/1968. In the old system, “unexplained wealth” was subject to a specific tax equal to 80% of the value of the unexplained wealth. The conceptual difference between taxing and imposing a

³² Contrary to what a literal reading of the law suggests, in the past, Romanian Courts have required a very high standard to admit “proofs” as valid evidence to initiate proceedings. Such obstacles to the initiation of investigations conspire against the objectives of the law.

penalty –whether criminal or administrative- is of the most importance, especially in consolidating democracies where tax systems are based on voluntary declarations. In the context of “enterprise crime” or “market based crimes”³³ some have advocated “taxing” proceeds of crime as preferable to criminalizing money laundering, arguing that tax laws have historically provided for fines, forfeitures, penalties, and means of seizing wealth by legitimate reversals of the burden of proof. The theory is that if the objective is to attack the motives and the capital of organized crime, then it makes no difference whether the money is carted off by asset forfeiture proceedings or the tax code. When it goes to corruption, nonetheless, there is an important institutional dimension at stake which encourage using proper anti-corruption devices in order to send appropriate institutional messages. In short, while using the tax laws may be practical, it treats corrupt activities as if they were any other legitimate economic activity. In transition democracies, drawing such a line is indispensable for institutional reasons.

55. In addition to confiscation, public officials whose wealth has been declared totally or in part unjustified by an irrevocable judgment, shall be dismissed or revoked, as the case may be, from the position held.³⁴ If the public official is a deputy or a senator, he/she shall be considered incompatible. Additionally, the public official that files financial disclosure forms that do not correspond to the truth commits the crime of making a false declaration and is punishable according to the Penal Code.
56. The system created by Law 115/1996 did not work with any consistency since it was created. Important improvements were made when disclosure forms became public and available online in 2003, and the civil society started pushing for compliance.
57. In addition to the fact that Law 115/1996 did not promote a system for routinely comparing the evolution of asset declarations, article 11 requires that complaints be accompanied by evidence supporting the case. The combination of both weaknesses made the system totally ineffective.

³³ Enterprise crimes consist of traffic of illegal goods and services such as drugs, human beings, sexual services, illegal arms trading, see Naylor, T. ,“Follow the money methods in crime control policy”, in *Wages of Crime*, Cornell University Press, 2002, 247-286.

³⁴ Some interviewees expressed doubts about the constitutionality of this provision with regard to high rank officials with specific constitutional stability such as the President, Prime Minister, Parliamentarians, and Judges.

C.4. CONTROL OF ASSETS UNDER THE NATIONAL INTEGRITY AGENCY³⁵

58. Modern political science emphasizes the need to strengthen institutional frameworks to make governments more accountable not only with respect to their performance in terms of results, but also in relation to the processes applied and the fairness in their decisions. As Guillermo O'Donnell points out,³⁶ there is a contradiction when we expect from representatives and public officials compliance with public ends such as the enjoyment of economic and social rights or the solution to collective action problems. On the other hand, there are worries in providing such officials with excessive authority and the monopoly of the use of force to make decisions in order to comply with those public ends. The “accountability dilemma” explains that, if there is excessive control, nothing is done, and if control is too weak, actions are taken, but illegally.
59. Additional checks on political power other than electoral processes (vertical accountability) must be taken towards an accountable and robust democracy. In O'Donnell's terms, “horizontal accountability” can be strengthened by creating special state agencies (e.g. audit offices, ombudsmen, *conseils d'Etat*, prosecutor offices), that are legally enabled and empowered, and factually willing and able, to take actions that span from routine oversight to criminal sanctions or impeachment in relation to actions or omissions taken by other state agencies that may be qualified as unlawful. The advantages of such agencies are that they can be proactive, invoking professional criteria rather than political or partisan ones. In addition, because of their professionalism and ongoing activities, these agencies can analyze complex public policy issues.
60. The Romanian legal framework includes some agencies of this type (e.g. the Advocate of the People, the Court of Audit, the Financial Intelligence Unit, National Anticorruption Directorate).
61. With this understanding, the bill sent by the Government in June 2006 to create a routine system of control and disclosure of assets, conflicts of interests and incompatibilities and administered by an autonomous, technical body empowered with investigative powers (the National Integrity Agency), was an important opportunity to

³⁵ This subsection is based on the Law 144 of May 25, 2007 on the establishment, organization and functioning of the National Integrity Agency, amended and supplemented by the Government of Romania through an Emergency Ordinance.

³⁶ O'Donnell, Guillermo, Horizontal Accountability in New Democracies, in Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies*, Boulder, CO., publisher Lynne Rienner.

strengthen Romanian horizontal accountability. Unfortunately, Law 144/2007, as it was passed by the Senate weakened this important opportunity, notwithstanding some amendments immediately introduced by a recent Government Emergency Ordinance.

62. By contrast to the Investigations Commissions of Law 115/1996, the newly enacted Law 144/2007 creates the National Integrity Agency (ANI), a centralized, administrative body, with at least a formal technical profile, and a National Integrity Council (NIC) acting as a representative body under Parliamentary authority exercised by the Senate (art. 33). A centralized agency has many advantages. Among them:

- Develops expertise, data and techniques, as against other oversight bodies that might have other assigned duties.
- Having jurisdiction over national and local public officials of the three branches, it will develop equal treatment for all public officials and avoid the coexistence of different, competent, systems.
- It may save money to the taxpayers.
- A single agency is easier to monitor by both the National Integrity Council and civil society organizations (CSO's).

63. Such advantages depend, however, on the degree of independence of the Agency in question. In this respect, Law 144/2007 provides some specific safeguards: the Agency will have operational independence. Consequently, ANI's authorities and the integrity inspectors shall not request nor receive orders on the verification procedure from any public authority, institution or person (article 14). Moreover, the removal of ANI's authorities is only admissible under justified cause (article 24).

64. Nonetheless, some provisions generate legitimate questions about ANI's future independence. First, ANI authorities will be appointed for a 4 year term, rather than 3 years, as the original Bill provided. Second, the institution responsible for the designation of ANI Authorities will be the Senate, rather than the President, as provided by the original Bill.

65. Regarding the duration of the mandate, the 4 year term of ANI's authorities is coincidentally the same as the Senators' mandate (article 60 (1) of the Constitution). Moreover, though the NIC (which is in charge of organizing the selection procedure) will be integrated by representatives of different branches of Government, it will depend on the Senate. Such a system precludes any possibility of having ANI's authorities appointed by a Senate of different political compositions which, therefore, increases the

chances of ANI appointments being subject to political negotiations relevant to the moment of appointment rather than to a long term policy of control of assets.

66. By the same token, depending on the Senate will make such appointments much more dependent of present political negotiations. In a parliamentary democracy, the Chief of State is somehow more distant from the rest of the Government and from daily politics. In this regard, the Romanian President is banned from being a member of any political party, or from performing any other public or private office (article 84 (1) of the Constitution).
67. Thus, the key issue for ANI's success will be in an impartial and transparent selection procedure. As an implementing recommendation for the organization of the selection procedure, the NIC may consider making public the names and professional backgrounds of the candidates in order to receive supports or objections from different civil society organizations and the citizenry. This is especially the case with regard to the candidate's expertise, and the requirement of not having been a member of a political party, group or alliance for the past 3 years (article 18 (1) d of the Law). The Law foresees only a formal control, through a written statement on a candidate's own responsibility authenticated by a public notary. Allowing a public debate to create consensus among different stakeholders will provide ANI officials the minimum legitimacy needed to exercise their authority.
68. It is also recommended that the examinations be graded under anonymity, providing the candidates some password to individualize them, and some safeguard to avoid leaks of the written tests to the candidates (in some contest rules, it is foreseen the drafting of three different tests, and on the day of the examination, one is randomly selected and distributed to the examinees).
69. The purpose of the National Integrity Agency is to organize a routine system for analyzing asset disclosure declarations, as a starting point for investigations of "unjustified wealth" of public officials, verification of conflicts of interests and incompatibility situations. It is well known that, given the consensual and secret nature of corrupt deals, a policy for reducing corruption needs the opening of specific channels for getting information to conduct investigations. Some provisions of Law 144/2007 are directly against such principle and, therefore, raise serious doubts with respect to the effectiveness of complying with ANI's main objective.

70. The first concern is referred to the opening of the investigations. The law far from encourages citizens to provide useful information. On the contrary, there are many disincentives to filing a complaint with ANI.
71. Investigations may be started through notifications or *ex officio*. With respect to the latter possibility, article 3 (2) of the Law establishes that the *ex officio* proceedings “*shall be carried out pursuant a written report of notification, drawn up by the President of the Agency*”. Therefore, the President of ANI, in addition to the doubts raised concerning his/her independence, maintains the monopoly of the decision, with a lack of objective criteria to limit his/her discretion.³⁷
72. Moreover, notifications (or claims), according to article 3 (1), can be filed by an *interested* natural or legal person. The word *interested* seems to request from the claimant some kind of standing or justification to be entitled to submit the notification or claim. Therefore, there may be some room for an internal, even informal, policy to reject claims under a “lack of interest” ground.³⁸
73. Additionally, article 3 (4) of the law prevents confidential complaints by establishing that notifications shall be dated and signed, which may run counter the purpose of article 33 of the UN Convention against Corruption on protection of reporting persons. In addition, the provision does not contemplate the possibility for claimants to enter into a whistle-blowing protection program as it was foreseen in article 4 of the bill sent by the Government on June 5, 2006. On the contrary, according to Article 3 (3) claimants are requested to include in their notifications the evidence and information the claim is based on, as well as the sources where these can be requested. The circle is completed by criminal sanctions foreseen in article 50 (2) against a person who makes “*untrue statements*” or “*produces or devises deceitful evidence*” in a notification as this provision may deter citizens from filing well intended complaints.
74. The combination of such provisions will drastically reduce ANI’s ability to initiate meaningful proceedings and open the door for using ANI as a highly politically-influenced agency.

³⁷ The Bill sent by the Government in 2006 left in the hands of the various inspectors the possibility of starting *ex officio* investigations.

³⁸ This requisite was not included in the draft bill sent by the Government to Parliament on June 5, 2006. Article 4 stated that the Agency may be notified by *any person*... to open an investigation.

75. In addition to the limitations to open a procedure, the legal tools on which ANI inspectors count to make their investigations are not very promising once a procedure has been started.
76. First, article 8 severely limits the scope of the procedure by establishing that it “*shall not exceed the limits of the notification*”. If this provision is interpreted literally, it will kill the effectiveness of ANI before its creation. In investigating unjustified wealth, a complaint often provides only “the tip of the iceberg”, something that calls for attention, usually something that is “visible”. The purpose of the investigation is precisely to uncover those assets that are not visible for an ordinary citizen interested in living in a more accountable democracy.
77. Second, inspectors’ lack of subpoena powers to call other persons to provide testimony or useful information, or to request the judge to issue search warrants to conduct “investigations in the field” which severely weaken ANI’s potential effectiveness.³⁹ Furthermore, it is not possible to appoint an expert witness to issue a report without the consent of the verified person (article 7 (1) of the Law 144/2007).⁴⁰ Consequently, investigatory powers from inspectors are limited to request from “all public institutions and authorities involved, as well as to other public or private legal persons, the documents and information necessary for the drawing up of the ascertaining report” (article 5). Some doubts remain if the quoted article 5 allows the possibility of requesting data or information of financial, fiscal, banking, personal, confidential or classified nature, after the control procedure has been started, because this issue was excluded from the bill sent by the Government to the Parliament. Finally, preliminary inquiries were reduced from 60 to 30 days.
78. With such limited powers, inspectors bear the burden of building a solid case during the 30 days preliminary inquiry, for which they only count with the financial disclosure forms and some investigative powers. Verified inconsistencies lead to the opening of a verification procedure in which the inspector bears the burden of proof, and must notify the persons under investigation, giving him/her full access to the documents in the file, and allowing the person to be represented by a lawyer. The investigator must also supply any justifying information deemed necessary (article 4).

³⁹ Articles 4 (4) and 7 of the draft bill sent by the Government to Parliament on June 5, 2006 provided for those possibilities.

⁴⁰ The consent of the verified person was not requested in the bill sent by the Government in June 5, 2006.

79. In short, by making it difficult to start meaningful investigations, by restricting inspectors' investigative powers and by elevating the standard of proof for concluding a case, Law 144/2007 dissipated a precious opportunity for increasing the accountability of high ranking officials.
80. In addition to the aforementioned serious drawbacks, Law 144/2007 does not repeal the prior regime of Law 115/1996, as was the intention of the bill submitted by the Government to the Parliament in June 2006. On the contrary, article 54 of Law 144/2007 establishes that the new regime "*shall be completed with the provisions of law 115/1996*". In article 60 of the new regime there is a list of articles of Law 115/1996 that are expressly repealed, and article 61 amends some articles of the prior regime.
81. The coexistence of both regimes will bring interpreting confusions every time a provision of the prior regime that was not expressly repealed conflicts with the wording of a provision of Law 144/2007. For example, article 8 of the new regime limits the scope of verification to the facts of the notification, but article 10 of Law 115/1996 (which is not expressly repealed by article 60 of Law 144/2007) establishes the possibility to extend the investigation to the spouse of the person subject to control and to other valuable goods that make the object of the declaration. Another example may arise with respect to the moment until when an investigating procedure can be opened. Law 144/2007 is silent in this regard, but article 28 (3) of Law 115/1996 (which was not expressly repealed) establishes that the request to open investigations can be made within a maximum of 5 years from the date of ending the mandate or of removal from position.
82. If the verification procedure concludes obvious differences between what was declared or acquired and what legal income allows, inspectors shall notify the competent court in order to establish the part of the assets or of the specific good unjustifiably acquired, and requesting the confiscation thereof.
83. "*Unexplained wealth*" bears three different legal consequences: 1) forfeiture equivalent to the amount of "unexplained assets", administered by impartial and independent Courts; 2) disciplinary sanctions, administered by the body to which the official is accountable, which can decide the removal, dismissal or discharge (in addition, those removed or relieved, cannot exercise a public office or dignity for 3 years); and 3) the communication to the relevant fiscal bodies (article 48 (1). Moreover, the report ascertaining the unjustified nature of the goods shall be published on ANI's webpage.

84. Additional criminal sanctions are related to the submission of statements of assets and conflicts of interests which do not correspond to reality, constituting the offence of forged statement.

D. CONSTITUTIONAL AND HUMAN RIGHTS LIMITATIONS TO ILLICIT ENRICHMENT IN ROMANIA

85. According to Article 20 of the Romanian Constitution, constitutional rights and liberties shall be interpreted in accordance with international Human Rights treaties of which Romania is a party. In addition, when regulations of Human Rights treaties are more favorable than Romanian domestic legislation, international norms take precedence over domestic law. Therefore, the Constitution and the Human Rights treaties of which Romania is party are here considered as norms of equal (highest rank) hierarchy. In this section we will analyze whether the Constitution and the international Human Rights treaties of which Romania is party, prevent Romania from enacting an offence of illicit enrichment.
86. In this chapter we will analyze 3 different challenges to which the offence of illicit enrichment may be subject in the Romanian legal framework. First, the Constitutional presumption of legality of acquirement of property; second, the presumption of innocence, with special regard to the reversing of the burden of proof and finally, the right to silence, with specific emphasis on the right not to produce evidence.

D.1. THE CONSTITUTIONAL SAFEGUARDS OF THE RIGHT OF PROPERTY

87. In this section we will try to shed some light about the nature and scope of the provision of the Constitutional presumption of article 44.8. We will first recall a parliamentary debate that took place upon a motion to eliminate that presumption, and will then analyze the case law developed around the provision both in the Constitutional Court and in the High Court of Cassation and Justice.

D.1.a. The Parliamentary debate on the elimination of Article 44.8

88. The legislative debate was surrounded by the allegedly pernicious effects created by Law 18/1968, which was still in force and, as described before, created a legal and strong presumption of illicitness over all Romanian citizens, in addition to being misused under

the communist regime in an allegedly abusive fashion. Those legislators in favor of enacting the presumption, thus, stated that it will reinforce the presumption of innocence. Deputy Ionescu, for example, stated: “*For someone without a legal training, this text could be easily translated as follows: every citizen of this country is presumed innocent. If it is proved with evidence that one is guilty, then one is to have assets confiscated, may be sent to prison, may bear the consequences of the law. This seems to be the normal way to proceed in a democratic society, contrary to the feeling of constant suspicion we lived under during the former regime, when we were all presumed guilty and when we all had to be ready to prove that we were in fact innocent.*”

89. A similar explanation was given by Deputy Mihai Constantinescu: “*If this text will be eliminated a state of legal instability would be created, as based on a suspicion, a presumption, which is not a proof, one can lose an asset, even though it was not proved beyond doubt that it was illegally acquired*’.

90. Those in favor of eliminating the clause argued, on the one hand, that it will serve as a safe haven for those who were representatives of the power in the old regime and, on the other, that it will make ineffective any future law reversing the burden of proof with respect of the illicit assets. Deputy Petre Ninosu, from the National Salvation Front, who actually raised the motion, argued: “*If the legality of the acquirement of assets is not eliminated, then it means that we allow all those who have acquired assets illicitly to enjoy a true amnesty for their deeds. So there would be no accountability and no possibility for confiscation.*”

91. The clause survived both the 1991 and the 2003 constitutional revisions, though after the last reform the same text became current article 44.8. A thorough analysis of case law developed around the presumption shows that neither extreme position was right.

D.1.b. Case law developed around Article 44.8 of the Constitution.

92. On September 3, 1996, the Constitutional Court ruled against a proposal to replace the presumed licit character of acquirement of property by a clause reading “*the wealth whose licit acquirement cannot be proven shall be confiscated.*” The Court stated that the presumption of lawfulness “*is based on the general principle according to which any legal act or fact is licit **until proven different**, imposing, in what concerns the wealth of a person, that the illicit acquirement **should be proven.***” The proposal was rejected because it amounted to “*revers[ing] the burden of proof concerning the licit character of the wealth, as it provides that the wealth whose licit acquirement cannot be proven shall be confiscated.*”

93. Nonetheless, the Court stressed that the fact that the presumption of art 44.8 does not impede the investigations of the illicit character of wealth acquirement, was “*the reason for which, during the debates of the Constitutional Assembly, during the meeting on 9 October 1991, the amendment to remove the provision on the presumption of licit acquirement of wealth was overruled, as it was upheld only by the votes of 14 parliamentarians, as results from the Official Monitor of Romania, Part II, No. 29 / 11 October 1991.*”⁴¹
94. In 1997, the Constitutional Court rejected a challenge to article 15 of Law 32/1968, establishing seizure of assets resulting from a misdemeanor. The claim was raised by a private company. The Court reaffirmed the position that “*this presumption is based on the general principle , according to which **any juridical act or fact is legal until proven otherwise, thus requiring, in the case of assets belonging to natural persons or legal entities, that their illegal acquirement be proved.***”⁴² The reasoning was straightforward: the claimant was proven to commit a contravention that amounts to a misdemeanor. Under Article 44.8, assets obtained through offences or contraventions may be subjected to confiscation according to the law. The procedure for confiscating the assets was the result of the procedure against the company, which was conducted according to the law. Therefore, there was not a violation.
95. In 1998⁴³ and again 2001⁴⁴ the Constitutional Court reversed two decisions relating to the imposition of penalties for delaying tax duties. In both cases, tax payers claimed that “delays” were neither offences nor misdemeanor and that the severity of the penalties amounted to a seizure. In both cases, apart from due taxes, delays were punished with “double of the found differences” or “100% of amount that needs to be retained”. The Court found both cases identical. The reasoning was that such severe penalties amounted to seizure, but seizure was not supported by the commission of a misdemeanor. Interestingly enough for our purposes, the Constitutional Court *obiter dictum* that a similar penalty of 20% would not amount to a “seizure”. The Court pointed out that the severity of a penalty not attached to an offence or to a misdemeanor would not pass constitutional muster.

⁴¹ Constitutional Court, Decision of September 3, 1996.

⁴² Constitutional Court, Decision 267. June 18, 1997.

⁴³ Constitutional Court, Decision 97 of July 9, 1998, on constitutionality objections to provisions of Article 18 of Law 87/1994 on Fighting Tax Evasion.

⁴⁴ Constitutional Court Decision 101 of April 10, 2001, on constitutionality objections to provisions of Article 6, paragraph (3) of Government Decree No. 83/1998 on Taxation of Revenues Obtained in Romania by non-resident Natural Persons and Legal Entities.

96. The abovementioned cases are not strictly related to the presumption of art 44.8 but rather to the safeguard of 44.9, establishing that confiscation is possible as a consequence of offences or misdemeanors. Nonetheless, they appear to give an interesting context to that particular safeguard to the right of property, which is that the Government is not free to impose disproportionate penalties for violations that do not amount to misdemeanors or offences. In that sense, Art. 44.9 would be protecting Romanian citizens against excessive and disproportionate penalties.
97. With regard to public officials and the constitutionality of the asset disclosure system of Law 115/1996, the High Court of Cassation and Justice, in a decision of July 1, 2004, stated that “[***The presumption instated by the Constitution, in close relationship to the guarantees for the right to own private property, will cease to function only as exclusively provided under the law, namely only when there is clear evidence that some or all the assets belonging to an individual under Constitutional protection have been acquired in an illicit manner. In the case of dignitaries, public servants, and other individuals in positions of authority, the legal framework where there is no longer a presumption of legitimacy of personal assets, as well as the procedure for an investigation into the source of such assets, is rigorously regulated under Law #115 of 28 October 1996, in close correlation with their obligation under the law to disclose their assets.***”⁴⁵
98. The case is illuminating in some important aspects. First, the Court affirms that the constitutional presumption “*cease[s] to function*” when there are legal grounds for starting a controlling procedure, that is, in the language of Art. 7 of law 115/1996, when there are “*obvious differences*” between what has been declared and what was acquired during the exercise of public functions which allows for subjecting the wealth to control. The presumption will then “cease to function” once there is a “*prima facie case*” against the public servant under investigation, which emerges from “obvious differences”, between what was declared and what was actually in his/her patrimony.
99. Second, the Court affirmed that, once the presumption ceases to function, the proceeding “*allow [for] reversing the burden of proof*”. In the concrete case, the complaint was filed by the County Brasov Police Inspectorate without much evidence. The individual was asked to produce evidence before the Commission got a “*prima facie case*”. The Court affirms: “*the proceedings show without a doubt that the County Brasov Police Inspectorate, that filed for the investigation originally, failed to comply with its legal procedural obligations..., in the sense that it failed*

⁴⁵ High Court of Cassation and Justice, Civil Section D, Case # 3574/2002, Decision #4952 adopted in Public Session of July 1st, 2004.

to produce or even mention the existence of evidence needed to reverse the burden of proof.” Law 115/1996 might be subjected to criticism for placing the burden of making a case on the complainant, rather than on the Investigative Commission. Nonetheless, in protecting the individual right to be presumed innocent, the Court affirmed that the reversal of the burden of proof was only admissible once there was evidence pointing out to the violation, in accordance with article 1, 7 and 11 of law 115/1996.

100. Third, the Court overturned the sentence on grounds of the violation of the right of defense, not the presumption of innocence. In the case, evidence presented by the individual subjected to control aiming at justifying the origin of the assets that had not been timely declared was entirely excluded by the Commission, first, and by the Court at trial. Such removal, the Court stated *“is a violation of a defendant’s right to defend himself as established in Art. 13 of the law. Also, it was unacceptable in this case to ignore Art. 7 of Law 115-96 according to which, in justifying acquired assets, one can show legitimate income included in the asset declaration as well as any other legitimate ways to have acquired those assets.”*

101. The matter was considered by the Constitutional Court only very recently. In 2006, the Constitutional Court rejected a direct challenge raised by the Ombudsman, aimed at declaring unconstitutional articles 14 (1) b) and c); 18, 28 paragraph (1), 32, 33 and 35 of law 115/1996.⁴⁶ The Ombudsman argued that the language of the law was confusing, unclear and incompatible with the language of the Constitution and the Civil and Criminal procedural codes. The Court rejected the claim, arguing that the language was *“sufficiently precise and clear”* and that despite lack of absolute precision that might generate enforcement problems, *“it remains the task of judges, in the course of their work, to decide on the interpretation and enforcement of certain legal provisions.”*

102. The decision does not illuminate the scope of the constitutional provision. Nonetheless, it serves as a basis to support the constitutionality of the regime of forfeiture established under article 18 of law 18/1996

103. More recently, on March 29, 2007, the Constitutional Court was even more clear on the constitutionality of the system of control of assets established by Law 115/1996.⁴⁷ Instead of departing from the narrow point of view of the single provision of art. 44.8, the Constitutional Court took the view that the general principle is that all citizens are obliged *“to observe the Constitution and the law in any action implying the acquirement of assets. The Government has the obligation to establish appropriate systems to control and ensure compliance with the*

⁴⁶ Constitutional Court, Decision 599-2006, Official Journal No. 839 of October 11, 2006.

⁴⁷ Constitutional Court decision No. 321, March 29, 2007. The Official Journal of Romania, No 330/16 V. 2007, Part I.

law of all the citizens, so that the legal order established does not remain a simple project but becomes a reality.”

104. In analyzing the constitutionality of the procedure against Article 44.8 of the Constitution, the Court took the view that, when “***obvious differences*** are found between the assets disclosed upon appointment and the assets acquired during the term, **and** there is ***certain evidence*** that some assets or values could not be obtained from the legal sources earned by the person in question or in any other legal way”, the presumption ceases to operate in order to leave room for the initiation of an investigation. The Court highlights the fact that these 2 requisites - “*obvious differences*” plus “*certain evidence*” - are “the premises of initiating control of assets.” In other words, these requirements satisfy a *prima facie* case for launching an investigation. Moreover, the Court expressly rejected the argument that such a *prima facie* case constitutes a “presumption of illegality”, as was argued by the appellant.

105. The Court went even further when analyzing the constitutionality of the sanction of forfeiture against Article 44.9 of the Constitution, which states: “*Any goods intended for, used or resulting from a criminal or minor offence may be confiscated only in accordance with the provisions of the law.*” The Court rejected the argument that forfeiture was limited to crimes or misdemeanors. The Court states that “*the constitutional norm does not exclude seizure of assets on which a court has decided that they were obtained illegally. An analysis of paragraphs (8) and (9) of Article 44 of the Constitution, suggests that such cases of seizure may exist, besides the seizure of assets intended to, used for or resulting from offences or misdemeanors*”.

106. The Court accepts a colloquial meaning of the term illicit and accepts that there are areas of illicitness outside the context of criminal law and misdemeanors. The Court took the view that if a court of law declares that assets were not legally obtained, following the procedure of control of assets, confiscation is constitutional.

D.1.c. Findings on the presumption of legality of acquirement of property

107. After the analysis of the case law, we can conclude that the presumption established in Article 44.8 of the Constitution:

- is a general safeguard that aims at protecting the property of all Romanian citizens from improper Governmental interferences;
- has been used by Courts to limit excessive penalties that amounted to seizures when they were not attached to offences or misdemeanors;
- does not prevent investigating the origin of illicit wealth of public officials;

- in the case of public servants, ceases to function once the conditions stipulated in the regime of “control of assets” (currently Law 115/1996) for launching a procedure of control of wealth are met. Such conditions must consist of “clear evidence” that there is a disproportion between what has been declared or acquired and legal income.
- Once the condition of a “prima facie case” is met, the presumption is rebutted and the way for a legitimate inroad with the right to be presumed innocent, by reversing the burden of proof, is open.

D.2. THE PRESUMPTION OF INNOCENCE

108. The “*presumption of innocence*” is established in the Romanian Constitution, art. 23 (11): “*Any person shall be presumed innocent until found guilty by a final decision of the Court*”. The European Convention on Human Rights and Fundamental Freedoms (ECHR), article 6(2) uses the following formulation: “*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*”⁴⁸ The constitutional formulation is repeated in the Code of Criminal Procedure, article 52(1). A slightly different formulation appears in the same Code, article 66 (1): “*The accused person or the defendant benefits from the presumption of innocence and is not obliged to prove his/her innocence.*”

109. It has been internationally recognized that the presumption of innocence comprises a number of rights and safeguards, which includes:

- An accused person must be treated as not having committed any offence until the State, through the prosecuting authorities, adduces sufficient evidence to satisfy an independent and impartial tribunal that he is guilty.⁴⁹
- Accordingly, “*members of a court should not start with the preconceived idea that the accused has committed the offence charged.*”⁵⁰

⁴⁸ The right is also recognized by other International Conventions on Human Rights to which Romania is a party, e.g., Universal Declaration of Human Rights, Art. 11 para 1; International Covenant on Civil and Political Rights, Art. 14 para 2. Other regional instruments also recognize the right: Inter American Convention on Human Rights, Art. 8 para 2, African Chart of Human and Peoples Rights, Art. 7 para 1.

⁴⁹ In *Minelli v. Switzerland* (A62 (1983) para 38), the ECHR stated that “*The presumption of innocence will be violated if, without the accused having previously been proved guilty according to law and [...] without his having had the opportunity of exercising his rights of defense, a judicial decision concerning him reflects an opinion that he is guilty*”. Public authorities have, nonetheless, the right to inform the public about investigations and suspicion of guilt (*Krause v. Switzerland* N° 7986/77, 13DR 73 (1978)). However, suspicion should not be a declaration of the accused’s guilt, and the authorities must show discretion and circumspection when making public statements (*Allenet de Ribemont v. France* A 308 (1995) paras. 37, 41).

⁵⁰ See *Barberà, Messegué and Jabardo v. Spain*, A146 (1989) para 77.

- An accused person should not be detained in pre-trial custody unless there are overriding reasons. And, if detained in pre-trial custody, he should benefit from detention conditions consistent with his presumed innocence.
- The burden of proving his guilt is on the State and any doubt should benefit the accused.

110. Though the presumption of innocence can only benefit a person who is “*subject to a criminal charge*”⁵¹, it is worth noting that the concept of *criminal charge* is, for the ECHR, an *autonomous concept*, that is, a concept that, eventually, the ECHR will assess not only by looking at whether or not the provision defining the offence belongs, in the domestic legal system, to the criminal law, but also by considering “*the nature of the offence*” and “*the degree of severity of the penalty risked*.”⁵² In other words, notwithstanding that the domestic law establishes a procedure under its administrative regulations, the ECHR may “re-classify” the procedure as amounting to a “criminal charge”, depending on the nature of the proceeding, fault and sanction.

111. Similarly, whether a “*penalty*” is or is not a “*criminal penalty*” (whose application will attach all the safeguards of the criminal procedure, including the presumption of innocence) will be eventually assessed by the EHRC independent of its classification of the domestic law. “*The Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a penalty within the meaning of [article 7].*”⁵³

112. Taking that into account, and notwithstanding the fact that Romania has chosen to classify both Law 115/1996 and the procedure of control of assets included in the Bill of the National Integrity Agency, in the administrative sphere, we will in principle try both procedures as if they were criminal. That will maintain a legally sound analysis and prevent, in any event, constitutional or human rights challenges.

D.2.a. Legitimate inroads in the presumption of innocence

113. Generally speaking, the prosecution must prove the accused person’s guilt beyond reasonable doubt. The ECHR held in that respect that “*the burden of proof is on the*

⁵¹ See *X v. FRG* N° 4483/70 – application held inadmissible.

⁵² See *Öztürk v. Germany* judgment of 21 February 1984, Series A no. 73, p. 18, para. 50; *Demicoli v. Malta* judgment of 27 August 1991, Series A no. 210, pp. 15-17, paras. 31-34).

⁵³ See *Welch v. UK*, N° 17440/90, para. 27 (1995).

*prosecution and any doubt should benefit the accused. It also follows that it is for the prosecution [...] to adduce sufficient evidence to convict him.”*⁵⁴

114. Such abstract formulation is nonetheless far from being absolute. From the ECHR caselaw, one can identify at least three situations where the burden of proof does not rest wholly on the prosecution: (a) strict liability offences, (b) when a confiscation order is issued and (c) offences where the burden of proof is reversed. We will summarize the first two situations and analyze more deeply the case of offences that legally reverse the burden of proof, which is the case of illicit enrichment.

115. **Strict liability offences** are offences for which *mens rea* (or "guilty mind") does not have to be proven in relation to one or more elements comprising the *actus reus* (or "guilty act") although some form of knowledge (intention, recklessness or actual knowledge) may be required in relation to other elements of the crime. The liability is said to be strict because defendants will be convicted even though they were genuinely ignorant of one or more factors that made their acts or omissions criminal. Strict liability offences are permitted even though the State is exempt from proving that the accused had "*a guilty intention*" (*mens rea*). Most criminal law systems resort to strict liability offences. Some countries restrict them to misdemeanors. Other countries to the satisfaction that the wording leaves room for the right of the defense. Others allow strict liability offences only if, through strict liability, a legislature is not stripping the Courts from a genuine power of assessing the facts. In *Salabiaku v. France*, the ECHR stated that, "*in principle, the Contracting States may, under certain conditions, penalize a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States.*"⁵⁵ These are not cases of reversal or shifting of the burden of proof, but rather cases where the prosecution is not obliged to prove the subjective part showing will and knowledge over all objective elements of the crime.

116. A slightly different case is that of **regulatory offences**. In these cases usually once the prosecution has proven the existence of **a duty**, the accused has a reverse burden to prove that he had complied with that duty. Examples of regulatory offences that admit a reversal or a shifting of the burden of proof vary from country to country, and can not be classified according to its "moral disvalue". They range from driving over the speed

⁵⁴ See *Barberà, Messegue and Jabardo v. Spain*, A146 para 77 (1989).

⁵⁵ *Salabiaku v. France* A 141-A para 27 (1988).

limit, to hunting without permission, passing through a toll gate without paying the toll, carrying a concealed weapon, to shooting in a public place.

117. When issuing **confiscation orders**, being against an accused or a third party, there may be a reversal of the burden of proof with regard to the assets that are the proceeds of crime. We have already drawn several examples of domestic legislation of confiscation procedures that followed a criminal conviction.⁵⁶ In these cases, once the prosecution shows that the assets are of illegal origin on a balance of probabilities, the burden is shifted to the defendants or to the owner of the assets. The ECHR found these procedures compatible with Article 6 of the Convention provided that any recovery of assets is reasonable, proportionate and open to challenge in court.⁵⁷
118. Finally, with regard to **offences that partially reverse the burden of proof**, which is the case of illicit enrichment, the ECHR recalled that “*presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law...It requires State to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense.*”⁵⁸ The interpretation of such paragraph has differed in domestic Courts and authorized doctrine.
119. **Common law jurisdictions** have interpreted the above mentioned paragraph as authorizing a “proportionality” test. The English House of Lords, for example, took the view that, after *Salabiaku*, inroads into the presumption of innocence may be subject to a proportionality test. In *R. v Lambert*, Lord Steyn affirmed: “*...in a constitutional democracy limited inroads on presumption of innocence may be justified. The approach to be adopted was stated by the European Court of Human Rights in Salabiaku v France (1988)... It follows that a legislative interference with the presumption of innocence requires **justification** and must not be **greater than is necessary**. The principle of **proportionality** must be observed.*”⁵⁹
120. The Canadian Supreme Court took a similar view. In *r. v. Chaulk*, the Court drew a two prong test: “1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right of freedom; it must [be] related to concerns which are pressing and substantial in a free and democratic

⁵⁶ See above, section B.1. and the cases of Australia, Austria, France, Italy, Poland, Switzerland, the United Kingdom, the United States.

⁵⁷ *Welch v. UK* N° 17440/90 (9 February 1995), *Philips v. UK* N° 41087/98, (5 July 2001).

⁵⁸ *Salabiaku v. France* A 141-A para 28 (1988).

⁵⁹ *R. v Lambert* (2001) All ER 577-672, para 34:

<http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd010705/regina-1.htm>

society before it can be characterized as sufficiently important. 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must: (a) be “rationally connected” to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right in question “as little as possible”, and (c) be such that their effects on the limitations of rights and freedoms are proportional to the objective.”⁶⁰

121. A similar approach was adopted by the South African Supreme Court, *In re S. v. Coetzee*, where the expected advantage for the prosecution was balanced against the presumption of innocence.⁶¹

122. Some authors have criticized that interpretation on the grounds that the presumption of innocence, unlike other human rights, such as the right of privacy (ECHR, art 8), the freedom of thought, conscience and religion (ECHR art. 9) or the right to freedom of expression (ECHR art 10), does not accept proportional interferences. This means that, “*in assessing whether a presumption of law or fact is compatible with the presumption of innocence, Courts should not look to the interests in respect of which this presumption has been called into being, but should only investigate whether the law reasonably allows the accused to rebut this presumption.*”⁶²

123. A second objection to using a proportionality test is that, if the meaning of “*what is at stake*” in *Salabiaku* is that of authorizing a proportionality test, presumption of facts will prevail only with respect to misdemeanors. In the words of the South African Supreme Court, “*There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book... Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be*

⁶⁰ Canadian Supreme Court, 62 CCC, 193, 216-217, cit in Wilsher, Dan, “Inexplicable Wealth and illicit enrichment of public officials: A model draft that respects human rights in corruption cases”, *Journal of Crime, Law and Social Change*, Springer Netherlands, Vol 45, Issue 1, February 2006.

⁶¹ South African Supreme Court, “*S. v. Coetzee and others*”, (CCT 50795) 1997 (4) BCLR 437.

⁶² Stessens, Guy, “Money Laundering”, op cit., at 70.

*put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.”*⁶³

124. Based on these two objections, some authors interpreted *Salabiaku* as conditioning interferences into the presumption of innocence only on two factors: 1) whether the presumption of law or facts does not operate automatically and 2) whether it is open to the defense to rebut the presumptions. If both conditions are satisfied, the presumption will be, under *Salabiaku*, valid.⁶⁴
125. The right of defense is maintained as long as the presumption in question remains *iuris tantum*, or rebuttable. That possibility may not only emerge from the law itself, but may be developed from case law, as a matter of jurisprudence. This was the case in *Salabiaku*, where the ECHR affirmed that rebuttability “*is not to be found in the express wording of the Custom Code, but has evolved from the case-law of the courts in a way which moderates the irrebuttable nature previously attributed by some academic writers to the presumption...*”.
126. This was even clearer in the decision adopted in *re Pham Hoang v. France*, where the ECHR stated: “*As was pointed out in the Salabiaku..., Article 6 (art. 6) requires Contracting States to confine presumptions of fact or of law provided for in their criminal law within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense...Mr. Pham Hoang was not, in fact, deprived of all means of defending himself; ...he could try to demonstrate that he had ‘acted from necessity or as a result of unavoidable mistake’... The presumption of his responsibility was not an irrebuttable one. The Court of Appeal found that he had not claimed to have acted from necessity and that the circumstances did not allow him to raise a defense of unavoidable mistake either.*”⁶⁵
127. In the context of illicit enrichment, the presumed fact is that the difference between the real patrimony and the legal income originated in acts of corruption committed while exercising public functions. Such presumption should never be automatic and must be open to challenge by the person subject to investigation. The person should be able to use ample means of evidence or to offer a reasonable explanation about the origin of his/her wealth.

⁶³ South African Constitutional Court in *State v Coetzee* [1997] 2 LRC 593, para 220 at 677.

⁶⁴ Stessens, op. cit., at 71. See also, Nardell, G., “Presumed innocence, proportionality and the Privy Council” IQR (1994) 223-8.

⁶⁵ *Pham Hoang v. France*, (*Application no. 13191/87*), Judgment of 25 September 1992, para 34

128. The second requirement emerging from *Salabiaku* is that presumptions of facts should not operate automatically. The reason is that, were that to be the case, national legislatures would use presumptions as a means of stripping the Courts of their inherent power of assessing the evidence presented at trial.
129. This is very important in the context of illicit enrichment. As we will see, in many legislations the “presumption of facts” remains in the shadows and the offence is drafted as the omission of complying with the duty of justifying. That would be an “automatic” presumption that would strip the Courts of its power of assessing the evidence. Moreover, as we will see when analyzing how to draft the offence, those presumptions may open the door for abuses and miscarriages of justice. In the ECHR words, that situation “*could not be reconciled with the object and purpose of article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law.*”⁶⁶
130. The requirement under analysis flowed from a long ago doctrine developed in common law jurisdictions. Revisiting such doctrine and stressing the differences in American and English laws, will illuminate our debate.

D.2.a.1. Presumptions of facts and law in American criminal law

131. The US Supreme Court affirmed that “*inferences and presumptions are a staple of our adversary system of fact-finding. It is often necessary for the trier of fact to determine the existence of an element of the crime - that is, an ‘ultimate’ or ‘elemental’ fact - from the existence of one or more ‘evidentiary’ or ‘basic’ facts... **The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finder’s freedom to assess the evidence independently.***”⁶⁷
132. American criminal law admits permissive and mandatory presumptions. A permissive presumption is the more common device, allowing, but not requiring, a trier of facts to infer the elemental fact based on other evidence adduced by the prosecutor. A mandatory presumption requires a trier of fact to accept the existence of an element of a

⁶⁶ *Salabiaku v. France* A 141-A para 28 (1988).

⁶⁷ *Allen v. US*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777.

crime from one or more evidentiary or basic facts even if the presumption is the sole evidence of the element in question.⁶⁸

133. A permissive presumption has been held compatible with the presumption of innocence so long as there is a rational connection between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is “*more likely than not to flow from*” the former.⁶⁹ The connection must not be arbitrary according to the test of the “common experience”. The US Supreme Court has held that “*where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them,*”⁷⁰ then the presumption is unconstitutional. In the context of illicit enrichment, for a permissive presumption to be compatible with the presumption of innocence, the possession of funds disproportionate to the official's income would have to be *more likely than not* a result of corrupt behavior, *according to the circumstances of life as we know them*. It is obvious that the test of the “common experience” differs from jurisdiction to jurisdiction. In contexts of high level and systematic corruption, it might be the case that “unexplained wealth” originated in “corrupt behavior” than not (or than in countries that not suffer from systematic high level corruption).

134. Mandatory presumptions, on the other hand, have to satisfy a more stringent “**reasonable doubt**” standard because they leave no discretion to the Court. The Court must find the elemental fact to exist if the prosecutor proves the existence of the basic or evidentiary fact. There could be no reasonable doubt that the elemental fact did not flow from the basic or evidentiary fact. The same stringent test applies to permissive presumptions if no evidence other than the disproportion was available and the Court was to rely solely on the presumption.⁷¹

135. In the United States, as such sharp distinctions apply only to criminal offences, Congress usually resorts to civil liability, which does not trigger the same constitutional protections that criminal penalties do. The US law recognizes statutory presumptions that shift **the burden of production** and sometimes the burden of persuasion from the plaintiff to the defendant. These shifts have been upheld by the courts.⁷²

⁶⁸ Allen, cit, at 157-160.

⁶⁹ Leary, 395 U.S. at 36; see also Allen, 442 U.S. at 157.

⁷⁰ Tot v. US, 319 US 463 (1943), at 467-468.

⁷¹ See Jack B. Weinstein & Margaret A. Berger, “Weinstein's Evidence Manual”, P5.04 (198Federal Evidence § 303.05 (2d ed. 1997).

⁷² See, e.g., United States v. Banco Cafetero Panama, 797 F.2d 1154, 1160 (2d Cir. 1986) (Once the Government showed suspicion that property was drug related, the burden shifted to the defendant to show that the proceeds from bank accounts were not traceable to drug transactions).

D.2.a.2. Presumptions of facts and law in English criminal law

136. English Courts have been much more permissive towards the use of statutory presumptions in criminal law. English Courts have long distinguished between presumptions that impose **legal** burdens from presumptions that impose **evidentiary** burdens on the defendant. A **legal** burden of proof requires the defense to prove, normally on the balance of probabilities that she falls within the particular defense or exception. An **evidentiary** burden of proof, on the contrary, requires the defense to produce *sufficient evidence* to raise the issue of whether she falls within the defense or the exception. In this latter case, the burden of proof remains all the time on the prosecution which, once such evidence is produced, must prove beyond reasonable doubt that the accused did not fall within the defense or the exception. “Sufficient evidence” to raise the issue means evidence that, if believed, and on the most favorable view, could be taken to support the defense.
137. Though **legal burdens** have been admitted as compatible with the presumption of innocence by English Courts, after the enactment of the Human Rights Act of 1998, the trend has been to rely on imposing evidentiary burdens on the defendant as they have been found “more compatible” with the presumption of innocence. In *R v. Lambert*, Lord Steyn held that, as a rule, the imposition of an evidentiary burden was much more compatible with the European Convention on Human Rights than transferring a legal burden, the rationale being that “*where the object was to require the defendant to give an explanation after proof of basic facts, that could be achieved by imposing an evidential burden.*” As explained before, the House of Lords subjected the interference with the presumption of innocence to a three prong test, holding that any interference must be **rational**, **necessary** and **proportionate** in a democratic society.⁷³

D.2.1.c. The role of circumstantial evidence in the civil law tradition

138. Legal systems belonging to a civil-law or Roman tradition are not familiar with a detailed framework for admitting “presumptions” in criminal law. Rather, civil law countries are more familiar with the concepts of “direct” and “indirect” evidence. A framework for accepting circumstantial evidence beyond reasonable doubt has been

⁷³ Cit. in Wilsher, Dan, “Inexplicable Wealth and illicit enrichment of public officials: A model draft that respects human rights in corruption cases”, *Journal of Crime, Law and Social Change*, Springer Netherlands, Vol 45, Issue 1, February 2006.

developed in several European countries in the last decade, mainly for dealing with the relatively new crime of money laundering.

139. Today, there is a solid jurisprudence with respect to the appraising of the circumstantial evidence. Countries recognizing the principle of “*free appraising of evidence*”, or “*intime conviction*”, for appraising the evidence - for instance, Spain, France, Germany, Italy, Romania⁷⁴ - allow both direct and circumstantial (or indirect) proofs to be equally valid and effective to confirm a criminal conviction.
140. Circumstantial evidence is defined as suspicions grounded in some kind of objective data that reasonably allows inferring that a crime was, or is going to be, committed (See, for instance, Spanish High Court, cases SSTC 49/99 and 166/99).
141. With some variations, the Courts of the mentioned countries have upheld convictions based on circumstantial evidence, but only when the evidence meets all the following conditions:
1. Circumstantial evidence must be plural, i.e., more than two or three depending on the country
 2. Must be credited by direct proofs
 3. Must be closely related among them
 4. Must be coincidentally incriminating
 5. Between the circumstantial evidence and the facts that need to be proven, it must be a precise and direct link, with conformity to the rules of the logic, the experience and the human criteria.

D.2.1.d. The Romanian legal framework

142. Both Law 115/1996 as well as the recently enacted Law 144 chose not to burden the person under investigation with any legal or evidentiary burden. In other words, the Romanian legislator did not resort to any explicit presumption of facts.
143. Article 23 (1) of the bill sent by the Government tried to impose an **evidentiary burden** of proof to the person under investigation, by establishing that: “*If, from data or grounds contained in the file, it results that between the estate declared or acquired and the estate which could be acquired with the incomes legally obtained there are obvious differences, **the person in***

⁷⁴ The Romanian criminal procedural code, in article 63 establishes a similar standard: “*Any fact or factor contributory to determining the reality or absence of an offence, to identifying the perpetrator or uncovering the circumstances necessary for the fair handling of the case shall be considered evidence. The value of the evidence shall not be determined in advance. The criminal investigation body or the court shall appraise the value and truth of each piece of evidence, after examining all the evidence served*”.

question has the obligation to submit, within 20 days from the inspector's request, evidence to reasonably justify his/her estate." However, this provision did not survive the debate in Parliament.

144. As we will see when discussing models for drafting offences of illicit enrichment, such technique may airbrush the main purpose of the system, which is to curb corruption. First, it does not send an explicit message to society saying that unexplained wealth is presumed to come from corrupt deals (which is certainly the case). Second, because such a technique tends to create interpretations of the offence of illicit enrichment as an "omission to justify" the unexplained wealth, which also sends an incorrect message. To sentence a person on charges of illicit enrichment, the Judge or the Jury must believe that the origin of the unexplained portion of assets comes from acts of corruption. To the contrary, a judge or jury, believing that the origin is not a corrupt deal, will create distortions regarding the purpose of the offence which is the legal good that the offence tries to protect. This may therefore undermine the legitimacy of the offence or violation.

D.3. PRIVILEGE AGAINST SELF-INCRIMINATION

145. The privilege against self-incrimination is made up of the right to silence or the right to remain silent and the right not to be compelled to produce inculpatory evidence. The maxim *nemo tenetur prodere seipsum* ("no person is to be compelled to accuse himself") applies. According to ECHR case law, although not specifically mentioned in the ECHR, the privilege against self-incrimination is a generally recognized international standard which lies "*at the heart of the notion of a fair procedure.*"⁷⁵

146. The right protects the accused against *improper* compulsion by the authorities, reducing the risk of miscarriages of justice and embodying the "equality of arms" principle. In principle, the prosecution must prove its case without resort to evidence obtained through coercion or oppression. Any compulsion to produce incriminating evidence becomes an infringement of the right of silence.

⁷⁵ *Heaney and McGuinness v. Ireland* N°. 34720/97 (21 December 2000)

D.3.a. The right to silence

147. The right to silence applies from police questioning and until the final Court decision. The accused should have the right not to testify and the right not to disclose the nature of his defense before trial.
148. All European countries recognize the right to remain silent during the investigative phase when being interviewed by police or an investigating judge. There is also an obligation to advise him of his right to remain silent. The way in which the accused is made aware of the right differs and, in some countries, evidence obtained where the obligation had not been met might be regarded as inadmissible. In others, the failure to advise an accused of his rights might constitute an offence or a ground of appeal against conviction.
149. However, all States, and ECHR unanimously recognize that right is not absolute. The leading case on the subject is *Murray v UK*⁷⁶, where the ECHR clearly stated: “*On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. Wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative.*”⁷⁷
150. The Court goes on to state: “*it cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him. In particular, as the Government has pointed out, established international standards in this area, while providing for the right to silence and the privilege against self-incrimination, are silent on this point.*”
151. The ECHR went on to establish the conditions under which drawing inferences from the silence of an accused person is valid:
152. First, inferences should only be drawn after the prosecution has made out a *prima facie* case. A *prima facie* case was defined as “*a case consisting of direct evidence which, if believed and combined with legitimate inferences based upon it, could lead a properly directed jury to be satisfied beyond reasonable doubt that each of the essential elements of the offence is proved.*”

⁷⁶ *Murray v. UK*, N° 18731/91 (8 February 1996).

⁷⁷ *Ibidem*, para. 47

153. If there is not *prima facie* case, then inferences are invalid: “*The question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused ‘calls’ for an explanation which the accused ought to be in a position to give that a failure to give any explanation ‘may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty’.*”
154. Second, only common sense inferences are permissible. Here, the test of “common experience” applies *where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them.*
155. The judge then has *discretion* to draw inferences. In other words, grounded in the principle of impartiality in the same way it applied to the presumption of innocence, the legislatures can not oblige Courts to draw inferences from the silence of the accused. On the contrary, the Court should remain free to assess the evidence presented by the prosecution and evaluate it in accordance with the legal rules for appraising criminal evidence (beyond reasonable doubt, *intime conviction* or “free appraising”). For example, if the Court believes that the accused person did not understand the warning that inferences may be drawn from his or her silence, they can not draw inferences.
156. The ECHR concluded that, if there was a *prima facie* case and the burden of proof remained on the prosecution, adverse inferences could be drawn from a failure to declare. The prosecution evidence must be sufficiently strong to require an answer. If the evidence “calls” for an explanation which the defendant ought to be in a position to give, then a failure to do so “*may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.*” Conversely, if the prosecution’s case has so little evidential value that it calls for no answer, a failure to provide one could not justify an inference of guilt. The ECHR points out that the drawing of reasonable inferences from the behavior of the accused does not have the effect of shifting the burden of proof to the defense so as to infringe that aspect of the principle of the presumption of innocence.
157. The ECHR has not ruled on whether the right applies to legal persons. The European Court of Justice (ECJ) has held that a legal person has no absolute right to remain silent. Legal persons must answer factual questions, but may not be compelled to admit to an infringement.⁷⁸

⁷⁸ *Orkem v. Commission*, Case 374/87, ECR 3283, paras 34-35

D.3.b. The right not to produce evidence

158. In defining the scope of the right not to produce evidence, the ECHR distinguished between material “*compulsorily acquired*” and that which exists independently of the suspect’s will: “*the right not to incriminate oneself is primarily concerned...with respecting the will of an accused person to remain silent. As commonly understood...it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, acquired pursuant to warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.*”⁷⁹
159. Presumptions of law that impose evidentiary burdens have been held acceptable under Article 6. Orders issued to produce documentation, as well as search warrants, have been considered valid as long as they avoid general requests being used to justify “*fishing expeditions*”, where a vague suspicion only exists. The production of documents may be requested of legal persons as well.⁸⁰
160. On that basis, many High Courts have concluded that “*it is acceptable to use mandatory or permissive presumptions as to compel a defendant to give an account of their conduct to the Court upon proof of certain basic facts.*”⁸¹

E. THE OFFENCE OF ILLICIT ENRICHMENT

161. The precedent chapter set up the general context for analyzing the offence of illicit enrichment. This section is devoted to analyze the Romanian constitutional framework for introducing such an offence. The analysis is preceded by an explanation of the international obligation regarding the crime and the reasons for criminalization.

⁷⁹ *Saunders v United Kingdom* (N° 19187/91).

⁸⁰ *Mannesmannröhren-Werke v. Commission*, Case T-112/98, ECR 729, para 65; Opinion of AG in Case C-301/04 P, *Commission v. SGL*.

⁸¹ In England, House of Lords, *R. v. Downey* (1992) 90 DLR (4th) 499 and *R. v. Lambert*, cit. In Canada, Supreme Court of Canada, *S. v. Manamela* (2000) 5 LRC 65, SA Con. Ct., cit in Wilsher, Dan, “Inexplicable Wealth and illicit enrichment of public officials: A model draft that respects human rights in corruption cases”, *Journal of Crime, Law and Social Change*, Springer Netherlands, Vol 45, Issue 1, February 2006.

E.1. ILLICIT ENRICHMENT IN THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

162. The UNCAC recommends State Parties to adopt the offense of illicit enrichment, in the following terms:

Article 20 Illicit Enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

163. The UNCAC has three different kinds of obligations. For mandatory provisions, the UNCAC uses “each State Party shall adopt”. In these cases, State parties are required, within the limits established in the Convention to adopt the mandatory provision. For entirely optional provisions the UNCAC employs the term “may adopt”. Somehow in the middle of these extreme options, the UNCAC also contains “obligations to consider”, characterized by the term “shall consider adopting” or “shall endeavor”.⁸² To fulfill these intermediate obligations, “*States are urged to consider adopting*” the measure in question and “*to make a genuine effort to see whether it would be compatible with their legal system.*”⁸³

164. The way in which countries comply with this type of obligation varies according to traditions of public consultation and to the measure in question. For less important measures, a report of the Government may fulfill the effort. For more substantive measures, such as criminalization in general, at least a debate among the representatives of popular sovereignty is expected. When it pertains to criminalization of corruption, nonetheless, it is worth keeping in mind that the targets of such legislation are the representatives of the popular sovereignty. Irrespective of the country and its level of corruption, “self-restraining measures” usually suffer from lack of impartiality and as a consequence, of legitimacy. In other words, when those deciding the adoption of a measure are the measure’s primary target, the fairness and sincerity of the debate is likely to be undermined. The main effect is that, no matter the decision adopted, it will lack legitimacy because it was adopted by those that will be affected by the measure.

⁸² See UNODC, “Legislative Guide of the United Nations Convention against Corruption”, 2005, par. 12, page 4, available at

⁸³ Ibidem.

165. Thus, in making a “*genuine effort*” to decide whether or not to criminalize acts of corruption, countries are generally advised to resort to measures other than the traditional parliamentary debates. Examples range from parliamentary hearings of experts, to public hearings with broad civil society representatives and expert reports circulating among the legal community, to more ample forms of consultations such as general referendums.
166. In Romania, the debate about criminalizing illicit enrichment did not go public. The drafters of the law of the National Integrity Agency did a meaningful assessment about possible constitutional limitations of such an offence and concluded that a robust mechanism for assessing the accuracy of public officials’ asset disclosure was a first need. The project has been in Parliament since June 2006. The Chambers of Deputies introduced several amendments. News agencies then reported that the Senate was trying to return to the project originally sent by the Government. Most recently, the new Ministry of Justice sent new amendments, apparently aimed at including “forfeiture” measures. The debate about criminalization, nonetheless, has not yet taken place.

E.2. REASONS FOR INCRIMINATING “ILLICIT ENRICHMENT”

167. The offence of illicit enrichment, or “unexplained wealth” as it is called in some jurisdictions, is a legal device that aims at overcoming the difficulties of meeting the burden of proof in corruption-related offenses.
168. For the sake of analyzing the problem of evidence gathering in corruption cases, one can classify corruption offenses in terms of bribery-type offences and embezzlement-type offences. While the first group refers to a secret agreement between two or more participants, the second group includes frauds with public funds. Both groups have several, yet different, difficulties in terms of evidence gathering.
169. Bribery-type offences are consensual crimes - that is, both bribe giver and bribe taker agreed in committing the offence. As the transfers of property are voluntary, there are no “concrete” victims. While the victim is the society in general, the lack of concrete victims defies the traditional law enforcement paradigm of starting investigation upon victim’s complaints. A bribe agreement may be as subtle as consisting in a gesture or in an exchange of understood words without moral value. It is highly likely that it will occur in private, without witnesses, documents or any other means of evidence. Successful prosecutions are mostly caught *red-handed* and they usually depend on one unsatisfied party of the corrupt agreement willing to cooperate with the prosecution: a private party did not want to be

extorted, a public official did not want to be corrupted or a third party was left out of the agreement. Success is therefore dependent on disagreements among the involved participants. Considering this situation, the UNCAC requires the adoption of some special investigative techniques, such as undercover operations, electronic surveillance, international control delivery, etc (article 50). Romania has already adopted many of these techniques in law 78/2000, Chapter IV, Section 2. Nonetheless, evidence gathering in these cases is dependant on cooperation of one of the parties of the corrupt agreement. Otherwise, proving the case is almost impossible and impunity is likely to prevail.

170. In the case of embezzlement of public funds, problems for evidence gathering came from two different factors. First, regulations over access to public funds are usually not highly transparent and scrupulously organized, permitting manipulation. Second, high rank officials are usually able to hide or destroy evidence. In addition, low rank public officials that may be witnessing the situation are very likely to fear retaliation ranging from labor conditions to physical threats. Acknowledging these scenarios, the UNCAC requires enhancing transparency in the public administration (Article 10) and facilitating public access to information (articles 10 and 13). Of equal importance, UNCAC also encourages States' parties to suspend, reassign or remove public officials accused of corruption offences (article 30.6), requires a longer statute of limitations for corruption offences in order to be able to start prosecutions after alternation of power (article 29), requires criminalization of obstruction of justice (article 25) and mandates specific protection of witnesses, experts and victims (article 32) as a means to prevent retaliation and intimidation.
171. To overcome such difficulties, some jurisdictions - usually under social pressures to curb ostentatious impunity - have resorted to the offense of illicit enrichment to punish (in some cases in a very successful fashion) significant increases in public officials' wealth that can not be reasonably explained in relation to his or her lawful income.
172. At first glance, the structure of the offence seems to be difficult to reconcile with traditional interpretations of the presumption of innocence and the right not to self-incriminate. Generally speaking, the requirement to explain the origin of the unjustified wealth is sometimes seen as either shifting the burden of proof to the defendant or as "compelling" her/him to self-incriminate, or both.

E.3. A CONSTITUTIONAL FRAMEWORK FOR ILLICIT ENRICHMENT IN THE ROMANIAN LEGAL FRAMEWORK

E.3.a. Compatibility with international standards

173. The analysis provided in section E. shows that neither the presumption of “legally acquired property” in the Romanian Constitution, nor the human rights safeguards of the presumption of innocence and the right to silence are absolute rights. On the contrary, inroads into these rights have been permitted subject to specific limitations
174. With regard to the presumption of “legally acquired assets”, Romanian Courts have been clear in pointing out that the presumption “ceases to function” once there is “*clear evidence*” (a “*prima facie case*” in the language of the ECHR) that assets have been illicitly acquired. The High Court of Cassation and Justice explicitly affirmed that a *prima facie case* is the condition “for reversing the burden of proof.”
175. With regard to the presumption of innocence, we have learned how States have developed several legal devices, in both the common law and the civil law legal system that allow establishing presumptions of law which, as long as the defense can rebut them and the Court remains free to assess the evidence adduced by the prosecution, has been considered valid. In common law systems, presumptions may impose either “legal” or “evidentiary” burdens, the latter considered less intrusive than the former. In civil law jurisdictions, the admission of “circumstantial” evidence, under the condition of being plural, coherent, non contradictory and pointing to the same direction, has been permitted as a device to infer an element of the offence.
176. With regard to the right to silence, adverse inferences from the accused’s silence can be drawn if the prosecution has a *prima facie case*, the inferences are discretionary to the Court, and they are “common sense” inferences, meaning that they pass the test of being “more likely than not”.
177. The Romanian legal framework, as described in section C above, is composed of a system of asset disclosure and a procedure for control of assets that, when a disproportionate difference between what a public official has declared or acquired and his/her legal income is shown, a procedure of control of assets may be started.
178. Neither the system of Law 115/1996 nor the system of Law 144/2007 provides any obligation for the owner of the assets under control to produce evidence. On the contrary, under both systems, he/she “may” produce evidence. Given the fact that the preliminary inquiry showing the disproportion constitutes a *prima facie case*, his or her

silence allows drawing adverse inferences, even if they are not written down in the statute. As recalled by the ECHR in *Murray*, “the courts in a considerable number of countries where evidence is freely assessed may have regard to all relevant circumstances, including the manner in which the accused has behaved or has conducted his defense, when evaluating the evidence in the case... Nor can it be said, against this background, that the drawing of reasonable inferences from the applicant's behavior had the effect of shifting the burden of proof from the prosecution to the defense so as to infringe the principle of the presumption of innocence.”⁸⁴

179. In addition, neither system creates a criminal offence of illicit enrichment, but rather, establishes “administrative” violations. They, nonetheless, impose forfeiture of the assets that, because no reasonable explanation was found, are deemed to be proceeds of corruption acts.⁸⁵
180. It is therefore precise to analyze whether the imposed forfeiture amounts to a “penalty”, in the European sense.
181. In *Welch v. UK*, the ECHR took the view that forfeiture sanctions may be either of preventive or of punitive nature, according to several conditions, which need to be considered together.
182. Whether the Court has discretion to fix the amount of the forfeiture; whether forfeiture is directed against “profits” (actual enrichment) or against “proceeds” (enrichment plus expenses and costs) of certain behavior; and whether the law provides for imprisonment in default of payment are all elements to be considered when classifying a sanction as preventative (reparative) or punitive.⁸⁶
183. In delineating the above mentioned standards, the ECHR analyzed an English rule establishing an automatic confiscation of “all property acquired 6 years before an offence connected to drug trafficking”. The presumption that all such property was the product of drug trafficking activities was considered a criminal sanction, even when it was set up as an administrative procedure, because the Courts were able to fix the amount considering some personal characteristics of the offender, the confiscation not only covered “profits” but rather all “proceeds” and there was a sanction of imprisonment by default.

⁸⁴ *Murray v UK*, cit. at 54.

⁸⁵ The term proceeds of corruption is used instead of “unjustified” or “inexplicable” wealth, because this is what these regimes are assuming. Though implicitly, the law is not presuming that the assets were originated in kidnappings, armed robbery or other crimes. Neither is the law punishing the person for refusing to give an explanation, though, as we will see, some commentators appear to feel comfortable with that interpretation.

⁸⁶ *Welch v. UK* (1995), para 33.

184. In Romania, the sanction of confiscating unexplained assets as a consequence of lack of better explanations of its origin appears to be a preventive measure. First, the Court has no discretion to fix the amount subject to forfeiture, as it only can be “the unjustified” difference which will emerge from the evidence of the Inspector’s findings. Second, the unjustified difference may correspond both with the idea of “proceeds” and with the idea of “profit”, because it largely depends on how the case is developed, what evidence is collected and whether the person under investigation decides to provide evidence or not. Finally, no provision for imprisonment by default, as a substitution of lack of payment of the confiscation order, is provided.
185. Not being a “criminal sanction”, in the European sense, will favor broad interpretations as to what Courts may consider to be justified or unjustified when faced with irrational or uncertain explanations.

E.3.b. Is there a need of creating an offence of illicit enrichment in Romania?

186. Technically speaking, there is nothing in the Romanian legal framework preventing the Parliament from enacting a crime of illicit enrichment. Neither the safeguards surrounding the right of property (Articles 44.8 and 9 of the Constitution), the presumption of innocence or the right to remain silent constitute absolute obstacles to a criminal offence of illicit enrichment, provided that such an offence respects the limits explained in section E of this report.
187. As to the question whether Romania “needs” to create an offence of illicit enrichment, I have two strong concerns against passing such an offence in the current institutional context.
188. First, I think that, in the current institutional context, such an offence will undermine the legitimacy of ANI and will in the best case remain in the books and in the worst be used as a weapon against political opponents.
189. To date, the main obstacle of Romanian legal framework in controlling illicit enrichment is not the lack of an offence but rather the lack of an efficient procedure for detecting illicit enrichment. The original Bill of ANI was intended to be a turning point in that respect.
190. However, all the advances envisioned by the original drafters did not survive the Parliamentary debate. ANI was deprived of the most important tools for acquiring efficient results. Law 144/2007 shows that there is not enough political will to conduct meaningful investigations. Rather, law 144/2007 opened the door for political manipulations in the controlling of wealth of public officials. There are many disincentives for citizen and civil

society participation and, even when investigations may start, there are also many rules providing discretionary “exits” for politically negotiated solutions. In that context, my opinion is that a criminal offence will only increase the risks of using ANI as a weapon against political opponents.

191. A second concern against creating an offence is that, in my view, the most appropriate sanction for acts of corruption are those that deprive offenders from their profits. As shown in Chapter 2, that is the world-wide trend to curb acquisitive crimes. When a sanction for corruption does not deprive the offender from the loot, a cost-benefit analysis comparing the prison term against the fortune that the offender will enjoy after release generates the opinion that justice has not been done.⁸⁷
192. Of course, as already explained, nothing in the Romanian legal framework prevents the creation of an offence of illicit enrichment which “presumes” that the “unjustified wealth” was originated in corrupt acts that cannot be proven.
193. In that case, the procedures of control of assets conducted by ANI will serve as the beginning of the investigation. A DNA prosecutor will then need to gather evidence, probably circumstantial evidence, to reinforce the idea that the inexplicable wealth comes from corrupt acts.
194. An intermediate approach might be to subject the intervention of the criminal law to a certain, intolerable, degree of disproportion between justified and unjustified wealth. In that case, there will be three degrees of disproportion. The lower degree will be of officials falling in the exception of 2% or Euro 10.000, a threshold aiming at preventing that the avatars of a largely cash based economy lead to miscarriages of justice. The intermediate degree will be the “administrative” or “contraventional”, reserved for differences exceeding the exception but not falling under “high profile” cases. Finally, a criminal offence in which forfeiture will be accompanied by prison terms, reserved for cases where the disproportion is outrageous or other serious damage to the public good has been infringed (e.g. environmental damage or deterioration of the health or educational system).

⁸⁷ Several of the conducted interviews highlighted the indignation and impotence of the Romanian ordinary citizen confronted with cases of offenders of corruption that, after serving the sentence, enjoy the fruits of their crimes. Moreover, press headlines usually emphasize such cost-benefit analysis, showing that a couple of years in prison may be very rewarding in economic terms.

E.3.c. Approaches for drafting the offense

195. In drafting the offence of illicit enrichment, lawmakers may adopt two different approaches. They can define the forbidden conduct as an omission or as an action.
196. In the first case, the forbidden conduct consists of the lack of justification by the public official of his/her unexplained wealth. As it is the case of the Hong Kong and the Argentine laws, the request of justification is considered a duty, as if it were a legal or persuasive burden, in which the public official has to prove the legal origin of his/her wealth.
197. The problem with this approach is that the punishment is imposed following a formal infringement.⁸⁸ The liability is imposed upon proof of two basic facts: being a public official and possessing disproportionate wealth. This method of drafting omits *mens rea* (the need to prove a guilty state of mind) altogether. In other words, this is not a crime of corruption as such but rather penalizes a public official for excess wealth *per se*.
198. It also seems to be the case of Hong Kong, which considers someone guilty when they cannot provide a “*satisfactory explanation*” to the court as to how he/she was able to maintain a high standard of living or how certain property came under his/her control.
199. Setting the crime as an omission can also imply some miscarriage of justice. Assume, for example, that a public official exercises his/her duty of justification disclosing that the unexplained wealth was originated by an embezzlement crime. Does such justification suffice for avoiding conviction on illicit enrichment?⁸⁹ Assume, moreover, that a public official borrowed a friend’s bank account because he had to get paid for a job he did, and does not want to tell his wife. When the public official is required to justify the origin of the money, he chooses to remain silent. During the trial, his friend testifies that the money belongs to him. Technically speaking, the public official omitted to render the justification. Was the crime committed? Such examples show that the omission approach is inadmissible if the legal burden to justify is not exercised, and a third person demonstrates the legality of the wealth.
200. The use of a presumption of law imposing burdens of producing evidence appears to be more suitable. First, illicit enrichment is clearly defined as a corruption crime and not

⁸⁸ Dan Wilsher, “Inexplicable wealth and illicit enrichment of public officials: a model draft that respects human rights in corruption cases”, *Journal of Crime, Law and Social Change*, publisher Springer Netherlands, Volume 45, number 1, February 2006.

⁸⁹ Sancinetti, Marcelo A., “El Delito de Enriquecimiento Ilícito de Funcionario Público –art. 268 (2) C.P., Publisher Ad Hoc, Buenos Aires, 2nd. edition, 2000.

as “inexplicable wealth” *per se*. Thus the offence consists of two elements: knowingly receiving corrupt funds (*mens rea*) and the fact of possessing proceeds of corruption (*actus rea*).

201. Countries that take the presumption of law approach may either place on the public officials an evidential burden, or warn the accused person that inferences may be drawn from his silence. The way this kind of legal framework should work consists of three stages:
- 1) The prosecutor has to build a solid *prima facie case* concerning the unexplained wealth of the public official.
 - 2) Only then, the burden turns to the public official, who, if there is an evidential burden must simply tender sufficient evidence to raise a reasonable doubt as to the issue in question; and if there is not a compelled burden (as in the current framework of Law 144/2007) should be warned that inferences might be drawn from his silence.
 - 3) Once this has been done, the prosecution must either disprove that evidence beyond reasonable doubt or build his case beyond reasonable doubt.
202. For a presumption to be valid under human rights standards, the relevant questions are:
- Whether the defense has ample means to rebut it.
 - Whether the presumption does not tie the judge’s hands, in the sense of narrowing his/her independence while analyzing the evidence produced by both parties, or to make inferences from the silence of the public official when the explanation of the unexplained wealth appears from other source.
203. If a proportionality test is to be used, notwithstanding the reasons against given above, necessity and proportionality must be shown.
204. The presumption would be necessary to combat corruption for several reasons. First, as already pointed out, being a consensual crime committed by powerful individuals, there are serious problems in obtaining evidence. Second, the source of wealth of a person is largely within the defendant’s knowledge, and it is difficult for the prosecution to establish a correlation between wealth and specific transactions. Third, in the absence of the presumption, the prosecution would require wider powers of investigation over the defendant’s financial affairs because the defendant would be free to remain silent without

being convicted. Fourth, even where direct evidence of the *actus reus* is obtained, the *mens rea* may be hard to prove where an official claims that they thought the payment was a gift.⁹⁰

205. What a presumption imposing an **evidentiary burden of production** requires from the defendant is not an explanation of the “nature” of a series of transactions but rather evidence of the transactions themselves. That information is in the knowledge of the accused person. In those cases, **the legal burden of proof remains all the time on the prosecution**, who still will need to prove beyond reasonable doubt that such evidence does not explain the legal origin of the wealth. On the contrary, if the evidence produced by the defendant raises a reasonable doubt, he/she will benefit from the presumption of innocence.
206. Finally, a presumption imposing a burden of production of evidence must be proportionate. This test, which requires an assessment of “what it is at stake” explains that while countries that do not suffer from pervasive high level corruption may consider that adopting a criminal offence of illicit enrichment is “disproportioned” to their realities, countries suffering pervasive corruption may adopt the offence of illicit enrichment precisely aiming at diminishing the threats that pervasive corruption pose to the rule of law and the constitutional democracy. As pointed out by the South African Supreme Court: “*We acknowledge that ours is an open and democratic society facing many challenges with limited means, and that it is in this setting that the question of proportionality must be determined.*” In a country with high level and systematic corruption, a presumption imposing an evidentiary burden of proof does appear as a proportionate means to increase democratic accountability and curb systematic corruption.
207. We have already seen that countries such as France, Switzerland and Italy have resorted to similar legal tools to reduce the drug market, organized crime and mafia groups, respectively.
208. If necessary, additional safeguards may be also added to the picture. For example, in a largely cash-based economy as the Romanian economy, a threshold for assessing “disproportion” may be established, as already provided by Law 144/2007, as amended: “*As an exception from provisions of para. (1), in case of differences is not exceeding 2% of the acquired, but no more than the equivalent in RON of 10,000 euros, calculated on the date of the inspector’s request, the person in question shall not be forced to submit any evidence on the assets’ extent and proof.*”

⁹⁰ The UK and Singapore legislations laid down specific presumptions saying that where a government official is shown to have received an advantage from a person seeking a government contract, it is presumed to have been conferred corruptly. Cfr., Dan Wilsher, “Inexplicable wealth and illicit enrichment of public officials: a model draft that respects human rights in corruption cases”, Journal of Crime, Law and Social Change, publisher Springer Netherlands, Volume 45, number 1, February 2006.

F. APPENDIX A: OTHER COUNTRIES' EXPERIENCES WITH THE OFFENSE OF ILLICIT ENRICHMENT

209. This appendix analyzes two different experiences with the crime of illicit enrichment, Hong Kong and Argentina, from which it is possible to draw some useful lessons for the Romanian debate.

F.1. HONG KONG

210. During the 1960's and early 70's, corruption within the Royal Hong Kong Police went through a rampant situation. Illegal conducts included drug trafficking, gambling, sex exploitation and bribery in relation to traffic violations. Policemen were "syndicated", that is to say, a whole group of officers was involved in the collection and distribution of money. Public outcry claimed for immediate changes. In 1973, British Governor Mr. MacLehose announced the replacement of an internal Anticorruption Department by an Independent Commission Against Corruption composed of a three-tier approach: increasing costs of corruption exercised through an Operations Department, restructuring government bureaucracies to reduce opportunities of corruption, exercised by the Corruption Prevention Department, and changing people's attitudes about corruption, exercised the Community Relations Department.⁹¹

211. Particularly with respect to illicit enrichment control, in 1948, a prevention of Corruption Ordinance allowed authorities to investigate a suspect's "bank account, share account, or purchase account... to corroborate the charge of a specific corrupt transaction." In 1959, this power was enlarged. A Magistrate could examine a government official's "standard of living" and "control pecuniary resources", and if these were deemed beyond his or her "official involvements", the official could be dismissed. In 1971 the Government passed a Prevention of Bribery ordinance, reversing the burden of proof in cases of unexplained wealth: "In any proceedings against a person for an offence under this Ordinance the burden of providing a defense of lawful authority or reasonable excuse shall lie upon the

⁹¹ The history of the ICAC is well described in Klitgaard, Robert, *Controlling Corruption*, Chapter 4, *Graft Busters: When and How to Set Up an Anticorruption Agency*.

accused.” These changes had an immediate effect on the Police Force: within a year, 295 police officers, including 2 superintendents and 26 inspectors, took early retirement or resigned.⁹² Other statistics show that in 25 years of the existence of the offence, about 50 cases have been prosecuted.⁹³

212. Currently, illicit enrichment is drafted in Chapter 201, Section 10, of the Prevention of Bribery Ordinance (PBO), as follows:⁹⁴

(1) Any person who, being or having been a prescribed officer-

(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or

(b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

(2) Where a court is satisfied in proceedings for an offence under subsection (1)(b) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such resources or property shall, in the absence of evidence to the contrary, be presumed to have been in the control of the accused.

213. As it is clearly drafted, paragraph of Section 10 creates a statutory presumption of unexplained wealth, placing the burden of proof on the accused public official to provide a “satisfactory explanation” of his standard of living or how he acquired his/her pecuniary resources or property. The same comment can be made with respect to people that are close to the accused and hold resources or property that cannot prove the legal acquirement (paragraph 2).

214. The sanctions foreseen for the conviction of offences under Section 10 are a fine of \$1000000 and imprisonment for 10 years (Chapter 201 of the Prevention of Bribery Ordinance, Section 12 Penalties for Offences). In addition to the penalty imposed, the Court may order the confiscation of any pecuniary resources or property that was (a) found at the trial to be in the convicted person’s control; and (b) of an amount or value not exceeding the amount or value of pecuniary resources or property the acquisition of which was not

⁹² Klitgaard, Robert, *supra* note 1, page 105.

⁹³ de Speville, Bertrand, *Reversing the onus of proof: Is it compatible with respect for Human Rights Norms*”, presented at the 8th International Anti-Corruption Conference, published in:

[www1.transparency.org/iacc/8th_iacc/papers/despeville.html](http://www.transparency.org/iacc/8th_iacc/papers/despeville.html)

⁹⁴ www.icac.org.hk/eng

explained by the convicted person to the satisfaction of the court (Chapter 201 of the Prevention of Bribery Ordinance, Section 12 AA Confiscation of Assets).

215. Hong Kong inherited the legal system based in English common law. In 1991, it was incorporated to the domestic legislation the provisions of the Covenant on Civil and Political Rights that includes among its provisions the right of “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law.”

216. Such provision was argued to challenge the legality of the presumption of section 10 of the PBO by Hui-Kin Hong, a former senior surveyor from the Buildings and Lands Department. In the case⁹⁵, the Court of Appeal emphasized the importance of striking a right balance between the presumption of innocence and the need of society to combat corruption, and noted that the prosecution was not simply required by the provision to prove that expenditure was greater than income. The Court made clear that the Government is under an obligation to establish:

1. the amount of pecuniary resources and other assets in the accused's control at the charge date;
2. the accused's total official emoluments up to the same date; and
3. a disproportion between (a) and (b) i.e. the acquisition of the total assets under the accused's control could not reasonably, in all the circumstances, have been afforded out of the total official emoluments up to that date. In other words, the disproportion must be sufficiently significant as to call out for an explanation.

217. The Court of Appeal noted the evidential difficulty in proving that a Government servant had solicited or accepted a bribe. The primary facts on which the accused's explanation would be based, such as the existence of any capital or income of his, independent of his official emoluments, would be peculiarly within his own knowledge. The standard was described as the mere balance of probabilities.

218. The Court was then asked to decide whether the factual matters on which the accused bases his explanation might reasonably account for the incommensurate standard of living. The tribunal's answer was that once the expenditure had reached a threshold level of

⁹⁵ Attorney General v. Hui Kin-Hong [1995] 1 HKCLR 227

incommensurateness or disparity, the smaller the disproportion, the easier it would be to give an explanation.⁹⁶

219. The ruling quoted a prior Privy Council's decision⁹⁷ in which, similar to the adoption of the actual malice doctrine in free speech cases,⁹⁸ it was highlighted the balancing between individual rights and the wider needs of society to combat corruption, upholding certain limitation of rights by accepting the reversal of the burden of proof in issues where compelling public interests were involved.

220. From the case law and legislation summarized, it is possible to describe the operation of the offence, in which the first move towards an accusation belongs to the prosecutor.⁹⁹ In practice, they are the ones who have to produce evidence with respect to the disproportion of the public official's standard of living, or the assets or properties that he/she hold, in comparison to the official salaries. With this preliminary evidence, the accused may produce evidence to dispute the prosecutor findings, or to provide a satisfactory explanation concerning the disproportion of the assets or properties.

221. At the end of the trial, the accused cannot be convicted, unless:

- the prosecution has proven the matters of disproportion beyond reasonable doubt, and
- any explanation he/she might give as to the incommensurateness or disproportion is found by the judge or jury not to be, on the balance of probabilities, a satisfactory one.

F.2. ARGENTINA

222. In the American continent, the 1996 Inter-American Convention Against Corruption (IACAC) includes in article IX a specific provision for illicit enrichment that establishes:

Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense a

⁹⁶ Fung, Daniel R, "Anti-Corruption and Human Rights Protection: Hong Kong's Jurisprudential Experience", paper presented at the 8th International Anti-Corruption Conference, published in:

www1.transparency.org/iacc/8th_iacc/papers/fung.html

⁹⁷ Attorney General v. Lee Kwong-Kut (1993) AC 951.

⁹⁸ In *New York Times v. Sullivan* (376 U.S. 254 (1964)), the U.S. Supreme Court adopted the actual malice doctrine, which implied a reversal of the burden of proof: the doctrine prohibits public officials from recovering damages for defamatory publications, unless he/she proves that the statement was made with "actual malice", that is, with knowledge that it was false, or with reckless disregard of whether it was false or not.

⁹⁹ Ian McWalters, SC, "Prosecuting Corruption cases", paper presented at the Anti-Corruption Conference, organized by the Commonwealth Secretariat & Chatham House, London, 24-25 April 2006.

significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.

Among those State Parties that have established illicit enrichment as an offense, such offense shall be considered an act of corruption for the purposes of this Convention.

Any State Party that has not established illicit enrichment as an offense shall, insofar as its laws permit, provide assistance and cooperation with respect to this offense as provided in this Convention.

223. Several Latin American countries include in their domestic legislation the offense of illicit enrichment (e.g. Argentina, Ecuador, El Salvador, Paraguay, Perú, Venezuela).

224. On the contrary, Canada and the United States made express reservations to the IACAC stating that adopting illicit enrichment would imply constitutional conflicts especially because it implies the reversal of the burden of proof.¹⁰⁰

225. Particularly in Argentina, the offense was included in article 268 (2) of the criminal code in the year 1964 (the first bills can be tracked down to the 1930's), with a wording that raises objections with respect to the constitutional principles of the presumption of innocence and the right to remain silent.

226. After being amended in December 1999 by the Law on Public Ethics n° 25.188, the said article establishes:

Whoever duly required, does not justify the origin of a personal appreciable patrimonial enrichment or that from a third party in order to conceal it, occurred after the appointment in a public post or a public employment, and up to two years after leaving public office, will be punished with reclusion or a prison term from two to six years, and a fine between 50% and 100% of the value of the enrichment and absolute disqualification for life to occupy public office.

It would be understood that enrichment existed, not only when the patrimony was increased with money, things or assets, but also when debts or obligations affecting it were cancelled.

¹⁰⁰ **Reservation of Canada:** Article IX provides that the obligation of a Stated Party to establish the offence of illicit enrichment shall be "Subject to its Constitution and the fundamental principles of its legal system". As the offence contemplated by Article IX would be contrary to the presumption of innocence guaranteed by Canada's Constitution, Canada will not implement Article IX, as provided for by this provision.

Reservation of United States of America: The United States of America intends to assist and cooperate with other States Parties pursuant to paragraph 3 of Article IX of the Convention to the extent permitted by its domestic law. The United States recognizes the importance of combating improper financial gains by public officials, and has criminal statutes to deter or punish such conduct. These statutes obligate senior-level officials in the federal government to file truthful financial disclosure statements, subject to criminal penalties. They also permit prosecution of federal public officials who evade taxes on wealth that is acquired illicitly. The offense of illicit enrichment as set forth in Article IX of the Convention, however, places the burden of proof on the defendant, which is inconsistent with the United States constitution and fundamental principles of the United States legal system. Therefore, the United States understands that it is not obligated to establish a new criminal offense of illicit enrichment under Article IX of the Convention.

Source: <http://www.oas.org/juridico/english/Sigs/b-58.html>

The person cooperating to conceal the enrichment will be punished with the same sanction as the author of the crime.

227. In addition, it is worth mentioning that in the Constitutional Reform in 1994, in article 36, a paragraph was included which established: *“He who, procuring personal enrichment incurs in serious fraudulent offense against the State, will be considered attempting against the democratic system and shall be disqualified to hold public office for the term specified by law.”*

228. As it was said before, Argentina included this offense in 1964 by law 16.648. By that time, it was thought that by sanctioning the unjustified wealth it would be easy to resolve the administrative dishonesty, and therefore, the community would recover its trust in democracy at the same time that the reputation of the honest public officials would be protected. Some legal scholars from that time argued that those public officials who opposed could not do it on legal or moral grounds, implying that they have second intentions concerning their own impunity.¹⁰¹

229. During the Legislative debates, a Representative asked a well known legal scholar if the sanction of the bill would not imply the reversal of the principle that criminal acts cannot be presumed. According to the transcripts of that time, the scholar denied that possibility, arguing that crimes are committed by action and by omission. And added: *“We are fed up with being unable to prove in the country concrete acts that are reflected in notorious cases of enrichment. So, it is licit to impose on a public official a duty, and if it is not complied with, to punish him. How am I going to prove the bribery of a public official if he had the power in his hands when he enriched himself? So, there are certain duties; the duties of probity.”*¹⁰²

230. Representative Llaver, trying to minimize the constitutional challenges of the wording of article 268 (2), defended the bill on these grounds: *“What the bill wants, summarizing, is to oblige the public official to justify his enrichment. I don’t see how the right of defense is affected when somebody inquires a current or former public official to justify the origin of the assets with which he increased his patrimony, if the public official has been honest, and the enrichment comes from sources other than the wrongful exercise of his public functions. I don’t see where is the moral affection to the public official that faces a claim of this nature.”*¹⁰³

¹⁰¹ Sancinetti, Marcelo A., *El Delito de Enriquecimiento Ilícito de Funcionario Público – art. 268 (2) C.P.*, publisher Ad Hoc, Buenos Aires, 2000, 2nd. Edition, Chapter 2 El Problema Político-Criminal y el riesgo de la “autodignificación indirecta”, pages 17-22.

¹⁰² The dialogue between Representative Saturnino Bilbao and Professor Ricardo Núñez is reproduced in Sancinetti, Marcelo A., *supra* note 11, page 36. (consultant’s translation).

¹⁰³ The transcripts are reproduced in Sancinetti, Marcelo A., *supra* note 11, page 47 (consultant’s translation).

231. As it can be inferred from this brief summary, a technical discussion of the constitutional challenges to the wording of the offense was left aside, allowing “moral” arguments, to prevail in favor of democracy and against corruption.
232. Since its adoption, until year 1999, nearly 10 cases of illicit enrichment were decided by different law courts in the country.¹⁰⁴ The creation of the Anticorruption Office, an administrative agency with investigatory powers, along with a system of public financial disclosure forms raised that figure dramatically in the last years.
233. By reviewing the financial disclosure forms, between years 1999 and 2003, the Anticorruption Office opened 76 cases of illicit enrichment. Nineteen (19) of them were reported to the judiciary, 22 were dismissed and 35 were still under investigation. Between the years 2004 and 2006, 136 additional cases were under investigation.¹⁰⁵
234. In general, the case law rejected the constitutional challenges against the wording of the illicit enrichment offense. Only one Court of Appeals from a province decided that the offense was unconstitutional, but the decision was overturned by the local High Court.
235. The offense punishes “*whoever duly required, does not justify the origin of a personal appreciable patrimonial enrichment or that from a third party in order to conceal it*”. The jurisprudence concluded that there is no reversal of the burden of proof, because prosecutors and/or investigative judges are the ones that must assess the “appreciable enrichment” of the suspected public official by gathering objective elements, from independent sources with respect to any personal intervention of the accused, that demonstrate the patrimonial increase largely exceeding the public official’s income.¹⁰⁶ Particularly, in the *Alsogaray* case¹⁰⁷, those independent sources consulted by the prosecutors were testimonies from journalists who wrote press articles describing the high standard of living of Mrs. Alsogaray, financial disclosure forms from the former public official, reports requested from the taxation agency, the real estate public registry, the public vehicles registry, the national immigration agency that registers the entrances and exits from the country, and different banking institutions and credit card issuers.

¹⁰⁴ Sosa, Omar and Portocarrero, Elpidio, “*El delito de enriquecimiento ilícito de funcionario público (art. 268 (2), C.P.) en la jurisprudencia*”, published in *Teoría y Práctica del Delito de Enriquecimiento Ilícito de Funcionario Público*, Publisher Ad Hoc, Buenos Aires, 2005.

¹⁰⁵ See the Anticorruption Office Annual Reports at <http://www.anticorrupcion.gov.ar/gestion.asp>

¹⁰⁶ Cases “Guglielminetti, Raúl A.”, Criminal Appeals Court, Chamber IV, October 4, 1999; “Pico, José Manuel”, Criminal Oral Tribunal N° 29, from May 8, 2000; “Alsogaray, María Julia”, Federal Criminal Oral Tribunal N° 4, May 31, 2004.

¹⁰⁷ María Julia Alsogaray is a former Secretary of State for the protection of the environment and natural resources.

236. The case law points out that the offense does not punish the action of getting richer; what is punished is the lack of justification of the origin of the enrichment. Therefore, the law does not reverse the presumption of innocence; it imposes a duty of justification sanctioning the non compliance.¹⁰⁸ The tribunal in the *Alsogaray* case went further stating that, “*the principle of innocence is not affected because nothing is presumed; rather, what it is proved is the existence of a patrimonial increase and that it was not justified.*”

¹⁰⁸ Case “Vallone, José A.”, National Criminal Court, Chamber 1, June 11, 1998, vote from the tribunal majority.

G. APPENDIX B. OBSERVATIONS FOR IMPLEMENTING LAW 144/2007

G.1. THE NATIONAL INTEGRITY COUNCIL (NIC)

237. The NIC will act as a representative body under Parliamentary authority exercised by the Senate, with a non-permanent activity, representing the different branches of Government.

Article 36 of the Law states:

Art. 36. (1) The term of the Council's members is for 3 years, renewable once.

(2) The mandate of the Council's members shall cease when the new members are designated, taking into account the provisions of paragraph (1).

(3) In the case of persons provided in art. 33 paragraph (1) let. a) – f), the term of a member shall also cease when losing the quality they have been designated for. In this case, a new member shall be designated, according to article 33.

(3*) Art. 36 para. 3 shall apply accordingly to substitute members.

(4) Between the 90th and the 30th day before the mandate of the Council expires, the new members for the Council shall be designated.

238. Concerning paragraph 3, the wording does not make clear that the new member appointed will complete the rest of the 3 years mandate of the predecessor (therefore, it should not be a complete new mandate).

239. On the same issue, these political bodies with representatives from different origin may face some changes if government majorities change. To avoid political interferences with respect to the replacement foreseen in paragraph 3, the implementing legislation should make clear that the new member should be from the same sector or political party as the ceased member, in order to complete the 3 year mandate. Only after the expiration of the 3 year period, a member belonging to the new political majority could be appointed.

G.2. PUBLIC OFFICIALS OBLIGED TO DISCLOSE THEIR ASSETS

240. Article 39 of the Law enumerates a long list of public officials with the obligation to disclose their assets, including high elected and political appointees, judges, national and local authorities.

241. Some of those categories may be somewhat vague, and depending on the interpretation, the number of public officials bound to file the forms can be broadened or shortened. For example: Article 39, paragraph 29, "[p]ersons with leading and control positions, as well as

public servants including those with a special status, who carry out their activity within all the central or local public authorities or, as the case may be, within all public institutions;”

242. The implementing legislation may include a provision empowering the President of the Agency to adopt Resolutions interpreting the precise meaning of those categories. Sometimes, shortening the number of public officials may be convenient to make a more thorough control (depending on the number of the staff Agency). It may happen, as well, that some category of public officials do not fall precisely in some categories, so it may be beneficial if the Agency can interpret the provisions to include those officials in one of the categories.

243. Other key categories of public officials that may not be clearly mentioned in article 39, although they may fall in some of the “open” categories, are those responsible for issuing administrative permits, public procurement officers, officials from audit institutions, military officials and officials from the security forces, advisors of Government members, state secretaries, and state sub-secretaries. Including advisors may be important to control conflicts of interests since they are usually experts coming from the private sector.

G.3. THE ROLE OF THE HUMAN RESOURCES DEPARTMENT

244. Articles 9 to 11 of the Law regulate the duties of the people in charge of ensuring the implementation of the legal provisions on the declaration of assets and declarations of interests. These officials will have to, among other duties, receive the declaration of assets and of interests from the public officials listed in article 39 and send to the Agency certified copies.

245. The bill that was sent to Parliament by the Government established the option to appoint these officials from the human resources department of each public Agency. The option was technically better, because people from the human resources department usually enjoy permanent positions, and they know the duties of the public positions in order to determine if a given person falls under one of the open categories of public officials of article 39.

246. The implementing legislation should be clear in including among the duties of the people appointed, the obligation of making the lists with the names, positions and working addresses (and keeping them updated) of those public officials that fall in the categories of article 39.

247. It may happen that some people, although they are not public officials, may perform public functions as contractors or service providers (this comment is also relevant for conflicts of interest controls). The list of article 39 should cover those who perform public

functions in key areas (see article 2 a ii) of the UN Convention Against Corruption that defines Public Function).

248. Other duties of those people in charge of the administrative control that deserve a comment, is article 10 g) of the Law, that establishes the *“obligation to post on the website, if there is one, or on the poster board, the name and the position of the persons who don’t submit the declarations of assets and of interests within maximum 15 days after the legal submission deadline expires, data that shall be communicated to the Agency”*.

249. Implementing legislation should foresee the publication of the list of people who did not comply with their obligation on the ANI’s website as well. These lists must be updated periodically, because the effect of publicity is that public officials, who are blacklisted, comply immediately. The system should be accurate, mistakes can cost political and credibility problems, because the honor of public officials is at stake if they are listed as non complying.

250. Article 10 h) provides as a duty of the people in charge of collecting the financial disclosure forms:

“h) to provide consultancy on the content, and application of legal provisions, regarding assets declaration and verification, conflicts of interests and incompatibilities, by drawing up points of view upon the request of the persons who have the legal obligation to submit declarations.”

251. Having an advisory service for borderline situations in which public officials have doubts, or may want to be covered by a technical opinion before taking a decision, is highly recommendable. The law 144/2007 did not establish the ANI as the one in charge of issuing these opinions. This was not a good solution, mainly for two reasons:

- a) Being the oversight body, ANI would have received a sort of administrative case law and therefore, apply the same criteria to similar situations.
- b) The Agency would have been in a more independent situation to give the advice than the persons in charge of this duty in the different public entities, especially if the one consulting is a political appointee.

G.4. THE LACK OF A NEW DISCLOSURE OF ASSETS FORM

252. Law 144/2007 does not contemplate in an Annex, Disclosure of Assets Forms and for the verification of conflicts of interests and incompatibilities. Article 41 (2) opted for using the template for wealth and interest statements approved by GEO 14/2005 of the prior regime of law 115/1996.

253. Usually, public officials simply hide their assets, registering them in the name of an unrelated person.¹⁰⁹ The forms should include other people's property that is enjoyed by the public official. In order to provide a solution for this "hidden asset problem", financial disclosure forms should include boxes where the public official must disclose property that, although is not registered in his/her name, they enjoy or benefit from its use (e.g. rentals or borrowed property, donations or legacies made to third persons other than the spouse or minor children, timeshares in vacation resorts that public officials may enjoy without being the shareholders).

G.5. THE DISCLOSURE OF THE VALUE OF THE REAL ESTATE PROPERTIES

254. Usually forms require the disclosure of the taxation value of lands and buildings. For an assessment of the unjustified property, it is recommended to request in the forms the value of the acquisition, since taxation values may vary with the passage of time.

G.6. THE PAPER FORMAT IN THE ADMINISTRATION OF THE ASSET DISCLOSURE SYSTEM

255. The system to file the disclosure forms is based on paper format. One of the problems is related to article 10 c) of the Law, where it is established that persons in charge of receiving the financial disclosure forms will provide consultancy for filling in the templates correctly and in due time.

256. The problem is that mistakes are made, or blanks are left in the templates or forms, so it will take the dedication of a large number of agents to routinely verify whether the public official had filled in all of the required "boxes" contained in the forms. Therefore, to minimize errors, it is recommended that software be implemented that provides a user-friendly electronic form.

257. A user friendly electronic form would also free a lot of space to stock thousands of paper forms. Moreover, the information system also can be designed to raise red flags concerning the evolution of the assets of public officials, and make specific searches (for example: make

¹⁰⁹ Rick Messick, Income & Asset Disclosure Requirements for Public Officials: How to Establish and Maintain an Effective Disclosure Program, April 2006, published in <http://www.ethicsworld.org/publicsectorgovernance/bestpracticesbygovernments.php#incomeandassetdisclosure>

a cut among the public officials that disclose more than XXX RON), and maybe cross reference with other public data bases.

G.7. CONFLICTS OF INTERESTS AND INCOMPATIBILITIES

258. The Law 144/2007 opted to establish no definition of conflict of interests, and instead, ANI is established as the oversight body to control conflicts of interests from other regulations. Indeed, in article 41 (3) it is established that the disclosure of interests shall comprise functions and activities, pursuant to provisions of law 161/2003 on measures to ensure transparency in exercising public dignities, public positions and in the business community, on preventing and sanctioning corruption, Government Emergency Ordinance 14/2005, approved by Law 158/2005.
259. The Bill submitted into consideration to the Parliament by the Government in June 2006 included chapters on conflicts of interest and on incompatibilities that, although they were not as strong as international standards require, were an important starting point in building a culture of control in these areas.
260. A democratic system demands that public officials justify their actions and decisions and provide the reasons supporting them. The process of providing reasons for a public or political decision is connected to the idea of fairness in the exercise of public office, whether appointed or elected.
261. As the OECD Guidelines for Managing Conflicts of Interest in the Public Service state in paragraph 1 of the Preface, “[s]erving the public interest is the fundamental mission of governments and public institutions. Citizens expect individual public officials to perform their duties with integrity, in a fair and unbiased way. Governments are increasingly expected to ensure that public officials do not allow their private interests and affiliations to compromise official decision-making and public management. In an increasingly demanding society, inadequately managed conflicts of interest on the part of public officials have the potential to weaken citizens’ trust in public institutions.”¹¹⁰
262. Most of all, under a constitutional democracy, we expect the public interest to prevail over the particular claims and demands from citizens, parties, interest groups, and public officials themselves, whether elected or appointed.

¹¹⁰ Recommendation of the OECD Council on Guidelines for Managing Conflict of Interest in the Public Service, approved in June 2003, which can be found at the OECD Public Management Committee www.oecd.org.

263. The expectations of fairness and impartiality do not preclude the notion that the public decision-making process can take into consideration the particular interests at stake. Rather, it points to the importance of reaching the decision from a standpoint that is reasonably distant from competing particular interests, while at the same time providing acceptable reasons to support it.
264. Why is the problem of conflicts of interest a pressing issue for a democratic system? First, it has an impact on basic resource allocation. Biased and unfair decisions of public officials affect the market. They produce incorrect information concealing the reasons behind the decision-making process, thus contributing to market imperfection and the inefficient allocation of resources.
265. Second, decisions made in a situation of conflicts of interest erode the credibility and trustworthiness of government's actions. In the long run, a malfunctioning public administration can increase a country's risk rating, deterring both local and foreign investment.
266. Third, conflicts of interest also undermine the proper functioning of democracy and the rule of law. They weaken the ideal of fairness and impartiality. Objectivity in decision-making is replaced by tailor-made decisions that suit privileged necessities. Citizens perceive that public officials are serving themselves or a particular interest, rather than the public good.
267. Fourth, this situation enhances the reciprocal distrust between society and public officials. This cycle affects the performance of public institutions and blocks the advancement of the public good.
268. An adequate strategy to prevent conflicts of interest requires three basic components. First, it is necessary to define a legal framework with standards and rules that help identify, prevent and solve conflicting situations. Second, a procedure or system of financial disclosure forms to collect and process the information related to the private interests of public officials has to be implemented. Finally, the third component implies the enforcement of rules for conflict of interest.
269. Such compelling reasons did not however seem to have been considered important by the Romanian parliament when debating and passing Law 144/2007, which basically eliminated all provisions regarding conflicts of interests and incompatibilities from the original Bill drafted by the Government.

H. TABLES

TABLE 1: PERCEPTION OF CORRUPTION IN ROMANIA 2006

Assessment of Government's fight against corruption	Very effective	Effective	Not effective	Does not fight at all	Does not fight but actually encourages	NA
2006	0%	16%	39%	19%	11%	15%

Source: TI Barometer

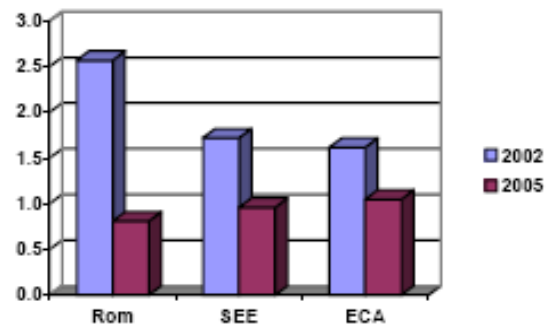
Table II: Perception of Corruption in Romania by sector

Corruption Perception in different sectors *	Political parties	Parliament	Private sector	Police	Judiciary	Media	Tax revenue	Medical services	Education	Military	Utilities	Registry and permits	NGO's	Religious Bodies
2006	4.1	4.0	4.0	3.6	3.9	2.9	2.2	3.8	3.2	2.5	2.3	2.8	2.9	2.3
2005	3.8	3.6	3.4	3.6	3.7	2.7	2.4	3.6	2.9	2.4	2.5	2.9	2.5	2.1
2004	4.2	4.0	3.7	3.8	4.1	2.6	2.9	3.9	3.3	2.4	2.5	3.4	2.7	2.2

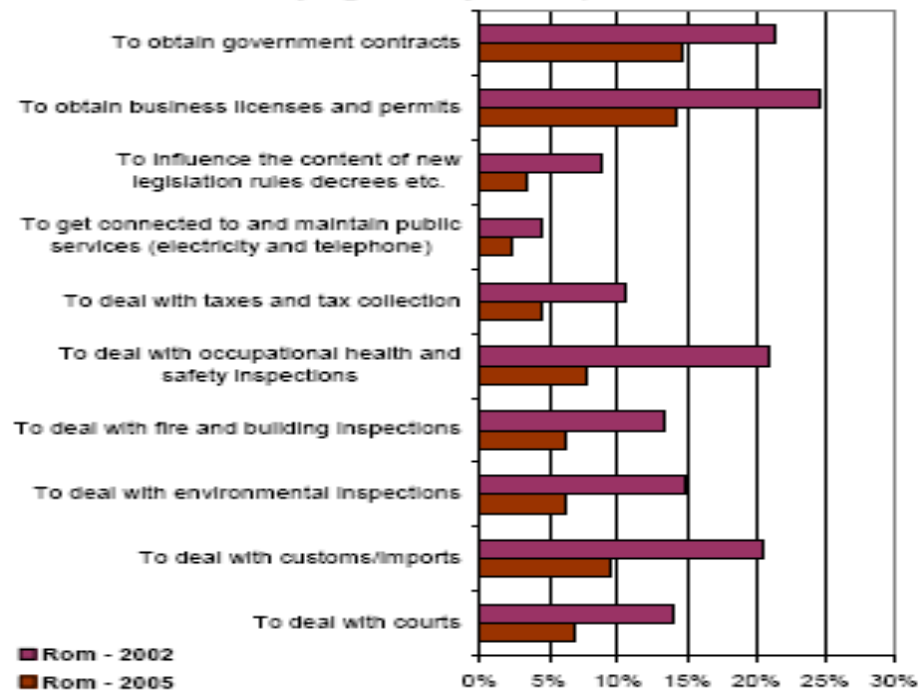
* Being 1 not all corrupt and 5 extremely corrupt.

Source: TI Barometer

Bribe Tax
Bribes as a share of annual sales



Unofficial Payments in Sectors—Over Time
Percent of firms saying bribery is frequent



Source: World Bank BEEPS Data Set

I. BIBLIOGRAPHY

Romanian legislation

- 1) Constitution of Romania
 - Law 429/2003.
- 2) Criminal Code
 - Law 278/2006
 - GEO 60/2006.
- 3) Criminal Procedures Code
 - Law 356/2006
 - Decree 60/2006.
- 4) Public Internal Audit
 - Law 672/2002, as amended by Decree 37/2004.
- 5) External Audit
 - Law 77/2002.
- 6) Money Laundering
 - Law 656/2002. Modified by Law 230/2005, Law 36/2006, Law 405/2006
 - Government Decision 531/2006 (Functioning of the National Office for the Prevention and Control of Money Laundering) and Annex
 - Working procedures on supervision, verification and control activities developed to cover natural/legal persons provided in the art. 8 of the Law 656/2002.
- 7) Statute of Civil Servants
 - Law 188/1999. Modified by Law 161/2003
 - Law 477/2004.
- 8) Code for Magistrates (Judges and Prosecutors)
 - SCM Decision 328/2005.
- 9) Witness Protection
 - Law 682/2002. Modified by GEO 157/2005.
- 10) Preventing, discovering and sanctioning corruption acts
 - Law 78/2000. Modified by GEO 43/2002, Law 521/2004, GEO 124/2005
 - Law 508/2004. Modified by GEO 7/2005.
- 11) Declaration and control of the wealth of dignitaries, magistrates, civil servants and of certain persons with management positions
 - Law 115/1996. Modified by GEO 24/2004 as amended by Law 601/2004, GEO 14/2005.
- 12) Ethics Code for Civil Servants
 - Law 7/2004.

- 13) Acceptance of Gifts and Conflicts of Interests for all Categories of Public Officials
 - Law 251/2004
 - Law 161/2003. Modified by Law 114/2004, Law 171/2004 and GEO 31/2006.
- 14) National Integrity Agency
 - Bill (Ministry of Justice), June 5th 2006
 - Law 144/2007. Modified by GEO 49/2007.
- 15) Personal Data and Private Life
 - Law 506/2004. Modified by Law 272/2006 and Law 506/2004.
- 16) Free Access to Information of Public Interest
 - Law 544/2001. Modified by Law 371/2006 and Law 380/2006.
- 17) National Anticorruption Prosecutors' Office
 - GEO 43/2002. Modified by GEO 134/2005.
- 18) Prevention of Organized Crime
 - Law 39/2003.
- 19) Mutual Judicial International Assistance in Criminal Cases
 - Law 302/2004.
- 20) Establishment, Organization and Functioning of the Legislative Council
 - Law 73/1993.

International Treaties

- 1) United Nations Convention against Transnational Organized Crime.
- 2) United Nations Convention against Corruption.
- 3) Legislative Guide for the Implementation of the United Nations Convention Against Corruption.
- 4) Technical Guide for the Implementation of the United Nations Convention Against Corruption (unpublished – on file with the author).
- 5) United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.
- 6) Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS n° 141).
- 7) Directive 2005/60/EC of the European Parliament and of the Council, 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

Case Law

SST de 2-10-2004, by Justice Granados Perez, SST 1-3-2005, by Justice Berdugo, SST de 14-9-2005, by Justice Monterde, .STS de 19-1-2005 , by Justice Giménez García.

Swiss Supreme Court, Judgment of August 27, 1996

Constitutional Court of Romania, Decision of September 3, 1996.

Constitutional Court of Romania, Decision 267, June 18, 1997.

Constitutional Court of Romania, Decision 97 of July 9, 1998, on constitutionality objections to provisions of Article 18 of Law 87/1994 on Fighting Tax Evasion.

Constitutional Court of Romania, Decision 101 of April 10, 2001, on constitutionality objections to provisions of Article 6, paragraph (3) of Government Decree No. 83/1998 on Taxation of Revenues Obtained in Romania by non-resident Natural Persons and Legal Entities.

Romanian High Court of Cassation and Justice, Civil Section D, Case # 3574/2002, Decision #4952 adopted in Public Session of July 1st, 2004.

Constitutional Court, Decision 599/2006, Official Journal No. 839 of October 11, 2006.

Constitutional Court decision No. 321, March 29, 2007, Official Journal of Romania, No. 330/16 V. 2007, Part I.

Minelli v. Switzerland A62 (1983) ECHR.

Krause v. Switzerland N° 7986/77, 13DR 73 (1978)).

Alenet de Ribemont v. France A 308 (1995).

Barberà, Messegue and Jabardo v. Spain, A146 (1989) para 77.

X v. FRG N° 4483/70.

Öztürk v. Germany, Judgment of 21 February 1984, Series A no. 73, p. 18, para. 50; *Demicoli v. Malta* judgment of 27 August 1991, Series A no. 210, pp. 15-17, paras. 31-34).

Welch v. UK, N° 17440/90, para. 27 (1995).

Philips v. UK N° 41087/98, (5 July 2001).

Salabiaku v. France A 141-A (1988).

R. v Lambert (2001) All ER 577-672.

Canadian Supreme Court, 62 CCC, 193, 216'217, cit. in Wilsher, Dan, "Inexplicable Wealth and illicit enrichment of public officials: A model draft that respects human rights in corruption cases", Journal of Crime, Law and Social Change, Springer Netherlands, Vol 45, Issue 1, February 2006.

South African Supreme Court, "*S. v. Coetzee and others*", (CCT 50795) 1997 (4) BCLR 437.

Pham Hoang v. France, (*Application no. 1319/87*), Judgment of 25 September 1992.

Allen v. US, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777.

Leary, 395 U.S.

Tot v. US, 319 US 463 (1943).

United States v. Banco Cafetero Panama, 797 F.2d 1154, 1160 (2d Cir. 1986).

Heaney and McGuinness v. Ireland N°. 34720/97 (21 December 2000).

Murray v. UK, N° 18731/91 (8 February 1996).

Orkem v. Commission, Case 374/87, ECR 3283.

Saunders v. United Kingdom (N° 19187/91).

Mannesmannröhren-Werke v. Commission, Case T-112/98, ECR 729.

Commission v. SGL, Case C-301/04 P.

R. v. Downey (1992) 90 DLR (4th) 499, England, House of Lords.

S. v. Manamela (2000) 5 LRC 65, SA Con. Ct., Supreme Court of Canada, cit in Wilsher, Dan, "Inexplicable Wealth and illicit enrichment of public officials: A model draft that respects human rights in corruption cases", Journal of Crime, Law and Social Change, Springer Netherlands, Vol 45, Issue 1, February 2006.

Attorney General v. Hui Kin-Hong [1995] 1 HKCLR 227

Attorney General v. Lee Kwong-Kut (1993) AC 951.

New York Times v. Sullivan (376 U.S. 254 (1964)), U.S. Supreme Court.

"Guglielminetti, Raúl A.", Criminal Appeals Court, Chamber IV, October 4, 1999.

"Pico, José Manuel", Criminal Oral Tribunal N° 29, from May 8, 2000.

"Alsogaray, María Julia", Federal Criminal Oral Tribunal N° 4, May 31, 2004.

"Vallone, José A.", National Criminal Court, Chamber 1, June 11, 1998.

Reports

- 1) Anticorruption Office Annual Reports at <http://www.anticorruption.gov.ar/gestion.asp>.
- 2) Commission of the European Communities, *Monitoring Report on the State of preparedness for EU membership of Bulgaria and Romania*, Brussels, 26/09/2006.
- 3) De Pauw, W., "Report on Corruption and Money Laundering", *Third Peer Review Romania*, March 2006.
- 4) GRECO, *Evaluation Report on Romania*, 2nd Evaluation Round, Strasbourg, 14 October 2005.
- 5) FATF, *Evaluation of Laws and Systems in FATF Members Dealing with Asset Confiscation and Provisional Measures*, 19 June 1997, <http://www.fatf-gafi.org/dataoecd/32/48/34047135.pdf>
- 6) National Anticorruption Directorate of Romania, *Report Regarding the Activity of the National Anticorruption Directorate*, 2006.

Papers

- 1) Commission of the European Communities, "Green Paper. The Presumption of Innocence", Brussels 26/4/2006.
- 2) De Speville, Bertrand, "Reversing the Onus of Proof: it is Compatible with Respect for Human Rights Norms", 8TH International Anticorruption Conference.
- 3) Klitgaard, Robert, Controlling Corruption, Chapter 4, Graft Busters: When and How to Set Up an Anticorruption Agency
- 4) Knack, "Governance and Growth: Measurement and Evidence." IRIS Center, Forum Series on the Role of Institutions in Promoting Growth, 2002.
- 5) Mauro, Paolo, "The Effects of Corruption on Growth and Public Expenditure", in Arnold Heidenheimer and Michael Johnston (comps.), *Political Corruption, Transaction*, New Jersey, 2005.
- 6) Mc Walters, Ian, *Prosecuting Corruption Cases*, presented in the Commonwealth Secretariat & Chatham House Anticorruption Conference – The United Nations Convention Against Corruption. Implementation & Enforcement: Meeting the Challenges, London, 24-25 April 2006.
- 7) O'Donnell, Guillermo, Horizontal Accountability in New Democracies, in Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies*, Boulder, CO., publisher Lynne Rienner.
- 8) Rose-Ackerman, Susan, "Trust, Honesty and Corruption: Reflections on the State Building Process." *European Journal of Sociology* 42:27-71, 2001.
- 9) Stolpe, Oliver, Meeting the Burden of Proof in Corruption-Related Legal Proceedings (unpublished - on file with the author).

- 10) Tadros, Victor and Tierney, Stephen, "The Presumption of Innocence and the Human Rights Act2, *The Modern Law Review*, Blackwell Publishing, Oxford, 2004.
- 11) Wilsher, Dan, "Inexplicable Wealth and Illicit Enrichment of Public Officials: a Model draft that respects Human Rights in Corruption Cases", *Crime, Law and Social Change*, London, 2006.
- 12) Zak, Paul and Stephen Knack, "Trust and Growth." IRIS Center Working Paper No. 219, 1998.

Books

- 1) Bruzzone, Gustavo y Gullco, Hernán (coords), *Teoría y Práctica del Delito de Enriquecimiento Ilícito de Funcionario Público*, Ad Hoc, Buenos Aires, 2005.
- 2) Gallagher, Tom, *Theft of a Nation. Romania since Communism*, Hurst & Company, London, 2005.
- 3) Johnston, Michael, *Syndromes of Corruption. Wealth, Power and Democracy*, Cambridge University Press, New York, 2005.
- 4) Rose-Ackerman, Susan, *From Elections to Democracy. Building Accountable Government in Hungary and Poland*, Cambridge University Press, New York, 2005.
- 5) Sancinetti, Marcelo, *El Delito de Enriquecimiento Ilícito de Funcionario Público. Un Tipo Penal Violatorio del Estado de Derecho*, Ad Hoc, Buenos Aires, 2000.
- 6) Stessens, Guy, *Money Laundering. A New International Law Enforcement Model*, Cambridge University Press, Cambridge, 2002.

Other

- 1) TI Barometer.
- 2) Guillermo Jorge, U4.
- 3) Interviews conducted on field trip in Bucharest, April 2007.
- 4) Oficina Anticorrupción, Declaraciones Juradas de Funcionarios Públicos, Serie: Estrategias para la Transparencia. Authors: Ing. Nicolás Gómez; Lic. Mariano Fernández Landoni. Publisher ed. Gráfica Laf S.R.L., Bs.As., 2004.
The complete text can be downloaded from www.anticorruptcion.gov.ar