

CORRUPTION AND ANTI-CORRUPTION IN THE JUSTICE SYSTEM

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Cristi Danilet is 34 years old and has been a judge since 1998. Since 2003, he has been a member of a number of different organisations defending the independence of the justice system and promoting the integrity of judges: *The Association of Magistrates of Romania* (member of the Steering Committee of the Cluj branch 2003 – 2004), *The Society for Justice* (founding member since 2005, President since 2009), *Transparency International Romania* (member since 2004, elected on the Steering Committee in 2007) and *The National Union of Judges of Romania* (member since 2008).

The author has been a member of the working group put together by the Superior Council of Magistracy in 2006 and assigned the task of preparing a '*Profile of the Magistrate in the Romanian Legal System*'. He has co-authored the work '*Pressure factors and conflicts of interests in the justice system. A Handbook for Judges*' (The Society for Justice, Konrad Adenauer Stiftung, 2007). From 2005 to 2007 Cristi Danilet served as a member of the Council of Europe European Commission for the Efficiency of Justice. There, he translated the relevant recommendations of the Committee of Ministers, which were compiled into the composition '*Effectiveness and Fairness of Justice – European Standards*' (The Romanian Institute for Human Rights, 2008), also available on the website of the Council of Europe: www.coe.int/cepej. In March 2007 Cristi Danilet represented Romania on the meeting of experts from the UN member states who contributed to the preparation of the paper '*Commentary on the Bangalore Principles of Judicial Conduct*', which represents the most important code of ethics ever developed.

Aspects of this study have been the subject of presentations Cristi Danilet has made during various events: the international symposium 'Professional Ethics and Culture: A Multidisciplinary Approach', held by the Faculty of History and Philosophy of the Babes-Bolyai University in Cluj-Napoca, on the 5-6 October 2007; an extracurricular conference intended for an audience consisting of first-year students organised at the National Institute of Magistracy on the 9 October 2007; the address given at the Autumn School within the project '*Journalists' Network for the Defence of Human Rights*', organised by the League for the Defence of Human Rights – the Cluj branch in partnership with the Cluj Association of Journalism Professionals, held in Baisoara, County of Cluj, on 19-20 October 2007; the address given within the training programme for journalists '*Media and Justice – In Search of Dialogue*', organised by Freedom House Romania in Sinaia, on the 22 – 24 of February 2008. A summary presentation of this study was initially published by the League for the Defence of Human Rights – the Cluj branch in the 'October – December 2007 Newsletter', to be subsequently detailed in Copoeru, Ion and Nicoleta Szabo (coordinators) comps. '*Etica și cultura profesională*' (*Professional Ethics and Culture*), Cluj-Napoca: Editura Casa Cărții de Știință, 2008, 218-255.

In the area of judicial corruption and anti-corruption, the author received an award from the National Institute of Magistracy for his essay 'Corruption Seen from Within', in October 2008. He has also attended a training programme on 'Building judicial integrity' organised by the CEELI Institute in Prague, in November 2008.

Numerous analyses on corruption, the independence of the judiciary, and the reform of the justice system can be found on the author's blog, at <http://cristidanile.wordpress.com>.

Cristi Danileț

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MOTTO: 'Every man invested with power is apt to abuse it'
(Montesquieu)

*Our thanks go to Prof. Dr. Ion Copoeru from the Faculty of
Philosophy of the Babes-Bolyai University of Cluj-Napoca,
on whose original idea this book is based.*

List of Acronyms

ANI	- National Integrity Agency
ANP	- National Prison Administration
CCJE	- Consultative Council of European Judges
ECHR	- European Court of Human Rights
ECEJ	- European Commission for the Efficiency of Justice
CoE	- Council of Europe
SCM	- Superior Council of Magistracy
DGA	- Anti-corruption Directorate General
DGPA	- Directorate General for Anti-corruption Protection
NAD	- National Anti-corruption Directorate
GRECO	- Group of States against Corruption
HCCJ	- High Court of Cassation and Justice
MAI	- Ministry of Administration and Interior
MJ	- Ministry of Justice
UN	- United Nations Organisation
SIPA	- Independent Protection and Anti-corruption Service
SRI	- Romanian Intelligence Service
TI	- Transparency International
TI-RO	- Transparency International Romania
EU	- European Union
UNDP	- United Nations Development Programme
UNODC	- United Nations Office on Drugs and Crime

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Preface

Corruption has been an extensively used concept over the last few years in Romania and elsewhere, with an effective fight against the phenomenon considered a prerequisite for the very existence of the rule of law, as well as an indicator of good governance. Integrity in the public system, corruption and the fight against corruption are all phrases that now stand for a whole range of behaviours that have made room for themselves in the common vocabulary of politicians, NGOs, mass-media or the general public, whose sensitivity towards the phenomenon has grown considerably. The fact is greatly due to the European Union monitoring with a view to Romania's integration in key areas of the justice system in a broad sense. The prevalence of the topic in the monitoring conducted by the European Commission is very clearly highlighted by the fact that two of the four benchmarks were concerned with the fight against corruption, both at a top and at a local level. On the other hand, corruption has been more and more defined as an issue affecting the entire society, transgressing sectors believed to be vulnerable and making a transnational impact.

From the standpoint of the vulnerability to corruption and of its social impact, the justice system remains one of the most sensitive and visible areas in this respect. The need to develop and implement a set of adequate corruption-combating policies in the justice system has become increasingly imperative and starts from justice-seekers, to whom a fair judicial system is a fundamental right, and to magistrates and other *categories* in the system that are more and more exposed to public criticism. Despite the many studies and strategies initiated by public and non-governmental organisations, the subject is still far from exhausted especially in what concerns the concrete strategies or policies designed to ensure integrity and independence of the system. From this point of view, 'Corruption and anti-corruption in the justice system' written by Judge Cristi Danilet presents an inside view on the phenomenon, on existing tools for fighting corruption and on the options for the prevention and sanction of unacceptable conduct.

The Rule of Law Program South-East Europe (RLP SEE) of the Konrad Adenauer Foundation has cooperated with Judge Cristi Danilet within various justice integrity and independence programmes, these being also two fundamental themes of the work undertaken by RLP SEE both in Romania and in other countries in the region. Our collaboration for this publication was therefore not accidental. On the one hand, it completes the range of actions taken by RLP SEE *for the purpose of making specialists working to reform the justice system aware of the importance of combating corruption, for sound chances of justice reform and for the smooth functioning of the society in general*. On the other hand, the publication of this volume is an important part of the efforts RLP SEE is making together with its partners in the region to identify individuals who could become a part of the reform of the justice system and to implement the best strategies and programmes for the consolidation of the integrity of the justice system and of the rule of law in general.

This volume is therefore an invitation to dialogue for both specialists and political decision-makers, as well as to the general public, which is equally affected by the public debate on combating corruption and on reforming the justice system. Judge Danilet's book describes the most common practices through which corruption manifests itself through the justice system in a broad

sense, thus working as a guidebook for people who wish to identify and understand the diverse forms corruption can take. At the same time, it is an attempt at systematising existing international, regional and local corruption-combating tools in order to derive the best solutions to integrity shortcomings in the Romanian judiciary. We hope this publication will become a useful tool not only to judges, prosecutors or court staff, but also to the rest of the professional categories operating in the public system.

The intention of this publication, and the debate it may generate alongside other *similar initiatives*, is to contribute to the creation of a critical mass conducive to the development of appropriate justice corruption combating policies and by that to the consolidation of a transparent, effective, impartial judicial system, which is one of the main aims of the Rule of Law Program South-East Europe.

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Foreword

Justice is the vertebral column of any democratic society. The rule of law and the acceptance of its values and principles entail the confidence in justice. For citizens' confidence in the system to exist, justice system professionals must be able to offer credibility. They must have irreproachable behaviour and exemplary professional conduct. Starting from these particular requirements, in this study we have analysed judicial integrity and how it may be impaired by corruption. The aim of this undertaking is to achieve a faithful measurement of corruption in the Romanian justice system in order to take an appropriate position on the more and more relevant allegations which not always have a substantiated basis.

It is true that corruption can be found in any country, at any level of its public and private organisations. However, its meaning is often too little known both to the general public and even to some law professionals; in fact, the same applies to other extensively used notions like 'professionalism', 'integrity', 'deontology', 'public service' or 'public interest'. The word 'corruption', for example, is not defined in the local legislation on the judicial organisation, in the status of the judge/prosecutor, in the statute of auxiliary and associated staff, or in the deontological codes of such professional categories. A search for the word 'integrity' (only moral integrity, of course, not physical or mental integrity) only returns three citations in a mere enumeration of words in the aforementioned normative acts. The Magistrates Evaluation Regulations foresee, without detailing, that integrity is to be appreciated 'based on the observance of conduct standards, disciplinary sanctions enforced and impartiality'.

Generally, upon admission to a legal profession and during a professional's career, the only two things that are evaluated are one's capability to memorise legal notions, many of which do not even come up in our work, and, in the best situation, logical thinking. Not enough ways are developed to measure one's strength of character, verticality, and resistance to pressure; not enough ways and methods of recognising and deterring abuse are cultivated. In addition, a lack of elementary management and communication skills leads to the perpetuation of a state of indifference or non-involvement by the members of a team within their organisations. The insufficient dissemination of information to the public on how the justice system is organised and works often leads to lost confidence and to an artificial spread of corruption.

In such a context, we intend to address a sensitive topic – *corruption in the justice system*. It is sensitive because there should be no corruption in the justice system as long as *the system is a part of the legal and institutional mechanism that is supposed to combat it*. On the other hand, convictions of judges, prosecutors, lawyers, court clerks or judicial police workers in recent years indicate we do not yet have enough methods of preventing and fighting corruption in the system. The treated subject is also sensitive because the staff in the justice system finds it difficult to talk about corruption, since the system has not yet developed a strong anti-corruption attitude. Nonetheless, there are enough studies, reports, statistics and even adjudicated cases for us to be able to make an informed opinion on corruption in the justice system. We have chosen to speak about '*the justice system*' because this work comprises not only magistrates, but also the judicial police, lawyers, clerks, executors, public notaries, liquidators, experts, integrity inspectors, so on and so forth. It is also

sensitive because the Romanian society often easily levels corruption allegations against civil servants and magistrates even in situations where the issue is simply an organisational malfunction or incompetence of the public agent.

This paper deals with the subject in four distinct parts, looking at general matters of corruption that are relevant to the justice system, modalities and means of corrupting system workers, available international instruments *in the field* and the main anti-corruption methods or policies applicable in the justice system.

The objective of this study – more sociological than legal – is to take a systemic approach by evaluating the integrity of the Romanian justice system at an institutional and individual level. Naturally, the study is not only valid for Romania, although most concrete references will be to this country. The outcome of this research is not intended to be a generalisation, but to take into consideration selected situations gathered from official records and personal experience.

The author

PART I

GENERAL NOTIONS ON CORRUPTION

The prevention and combating of corruption in the justice system is a priority objective in system reform, in the broader context of the national level fight against the phenomenon. Justice corruption may harm the most important social values, considering the fact that the legal system is designed exactly to ensure the supremacy of the law which entails, among other things, the prosecution and bringing to justice of corruption offences.

Legitimacy is crucial to the functioning of justice. This particular characteristic comes from the public's understanding of the way in which the justice system is organised, from the trust people have in the competence of magistrates¹ and other system workers, as well as from the knowledge of the rules upon which the system works and from the acceptance of the authority of court judgements. Apart from the legal safeguards of professionalism, workers in the justice system are also required to have a specific moral aptitude and a certain conduct.

1. The three 'I'-s

Anyone involved in litigation which is brought before a state justice forum expects a fair resolution. For that to happen, apart from accessible procedures, the judge, prosecutor, police officer, and other figures must be professional, must act objectively and must be neutral. These are all aspects pertaining to impartiality as a moral value which, in turn, is built upon independence and sourced from integrity. This is why, for those operating in our system – magistrates or regular staff – the rule of law presupposes the presence of the three 'I'-s: Impartiality, Independence and Integrity.

Impartiality is the supreme value, entailing, both as conditions and safeguards, the two other notions. Impartiality is a moral value; it pertains to someone's inner self and, to the public agent of justice, means analysing facts based on the applicable law in a well-balanced manner, without prejudice and predilection regarding the case with which they are dealing, and without acting in any way that would favour the interests of any of the parties².

¹ Magistrates, in Romanian legal system, are both judges and prosecutors.

² See Cristi Danilet, 'Independence and Impartiality of Justice – International Standards' in Horatiu Dumbrava, Dana Cigan, Cristi Danilet, 'Pressure Factors and Conflicts of

The impartiality of justice workers is guaranteed by their regime of incompatibilities and restrictions, respectively conflicts of interests. To magistrates, even appearance is a stand-alone value: it is not enough for the one making the decision to be impartial, he or she also needs to be seen as impartial by justice seekers.

Independence is an external characteristic and means that public agents are capable of processing cases without being influenced in any way, either by the other State powers, or by their hierarchic superiors, stakeholders or economic interest groups. In the case of magistrates, independence derives from their status and relations with the executive and legislative power. Independence is safeguarded by law for judges, prosecutors, lawyers and civil servants, irrespective of the organisation for which they work.

Integrity is an inner characteristic meaning a person acts in accordance with specific principles and values, making no compromises, neither at work and nor in one's private life. It means an honest, good-faith, correct and industrious discharging of work duties. In fact, integrity manifests itself in the performance of judicial acts with objectiveness³, in full equality, meeting statutory terms, *all for a complete legality* of the act. In justice, integrity is a lot more than a virtue – it is a necessity.

Integrity is analysed from two different points of view: 'rule of law', where integrity regards the professionalism of the public agent (inner integrity); and 'democracy', where integrity regards the responsibility, the justice system and its institutions have towards the public in order to gain public confidence (integrity from an external point of view)⁴. It is, however, clear that both positions finally point to the same thing: individual integrity of the public agent. When the value degrades, things deteriorate into what we call corruption.

Corruption erodes all three values that encompass the pillars of a healthy justice system. A judge who accepts payment to make a favourable decision will become subordinated to the individual or group of interests who pay the bribe. When a judge is subordinated to someone else, we can no longer speak of independence, which affects the very independence of justice as a system. By buying a court decision, the justice seeker obtains it in an incorrect way and, by that, the requirement of equal treatment before the law ceases to be met, rendering the judge partial. By giving in to such influences, a judge loses moral stature and verticality.

³ Interest in the Judiciary. A Guidebook for Judges', edited by Societatea pentru Justitie and Konrad-Adenauer-Stiftung, 2007, p. 22, available in English at www.kas.de/rspsoe.

⁴ Some authors say impartiality itself, alongside deontology, is one aspect of integrity. In agreement with the idea, we are not going to treat the matter of impartiality here, as it is the subject of a stand-alone study (see Horatiu Dumbrava et al., op.cit, p. 22-25).

⁴ Jonathan Soeharno, 'Is judicial integrity a norm? An Inquiry into the concept of judicial integrity in England and the Netherlands', in Utrecht Law Review, vol. 3, issue 1, June 2007, at: www.utrechtlawreview.org.

The importance of integrity, as well as the ways of building and keeping it in the justice system, forms the central subject of this study. As for justice independence and impartiality, they will be addressed only to the extent to which they may be affected by corruption deeds.

2. What is corruption?

The term 'corruption' is therefore directly connected to the one of 'integrity'. The concept of public agent 'integrity' is introduced and upheld by the 2003 UN Convention against Corruption, also ratified by Romania⁵. Key articles from the Convention stipulate:

Article 5(1) Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anticorruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

Article 8(1) In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system. (2) In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.

Article 11(1) Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary. (2) Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

Integral conduct, among other things, translates into fair and incorrupt behaviour. Generally, the use of the word 'corruption' is connected to terms like 'bribe' or 'payoff'. In reality, corruption goes further than paying or taking a bribe, which forms just a part of the phenomenon of corruption.

In the following lines we shall indicate what people mean by corruption, what its meaning is according to dictionaries and international regulations, after which we shall dwell upon the definition that, in our view, is relevant to this study which focuses on judicial corruption.

⁵ 'UN Convention against Corruption' (also known as the Mérida Convention) was adopted by General Assembly Resolution no. 58/4 on 31 October 2003, and entered into force on 14 December 2005. It was signed by Romania on 9 December 2003 and ratified by the Romanian Parliament by Law. No. 365 of 15 September 2004, published in the Official Journal of Romania no. 903 of 05 October 2004.

2.1. Public opinion

Corruption is a sort of ‘seismograph’ measuring and evaluating the state of legality and morality in a society⁶. Nevertheless, a certain lack of clarity with regard to the meaning of corruption makes its perception seem removed and not always be real.

A 2004 poll of the Romanian population generated numerous meanings and definitions that respondents attribute to corruption. Twenty-three per cent identified corruption as illegal doings by individuals in conflict with the law; 26.3% gave the notion a statutory connotation, including the paying of and taking of bribes, illegal gratuities, and abuse of power; 10% defined corruption as an immoral deed; and 4.4% saw corruption as a way of becoming rich by illicit ways. The respondents identified politicians, people in positions of power and control, justice and police workers as categories that are mostly associated with corruption⁷.

A 2008 poll suggests that the majority of the population (up to 92.3%) believes that both paying of bribes to and the taking of bribes from civil servants or police workers qualify as corruption. Asking competent advice from someone you know who is a civil servant or offering a bunch of flowers to a doctor in order to thank him were not regarded as corrupt deeds by the majority of respondents (up to 87.6%)⁸. Anyway, the citizens tend to make the pecuniary component of corruption an absolute one, neglecting mutual services which are, in fact, an indirect source of income. On the other hand, we cannot help noticing that individuals often generalise and exaggerate the magnitude of the phenomenon they believe to be corruption. This occurs sometimes even to justify their own behaviour, taking for granted the fact that, without resorting to corruption, they will never be able to materialise their legitimate rights and interests. For example, there is a generalised perception in Romanian society that one cannot receive medical care without bribing the doctor, that one cannot obtain an authorisation from administrative bodies without paying a bribe, and that one cannot win a court action without corrupting the judge.

2.2. Dictionary definition

The word ‘corruption’ comes from the Latin word ‘corrumpere’, meaning ‘to break’ or ‘to destroy’. Obviously, a corrupt deed destroys or breaks the law, duties and moral norms.

⁶ See Dan Banciu, ‘Sociologie juridica’, Lumina Lex Publishing House, Bucharest, 2007, p. 244.

⁷ Survey taken in July-August 2004 including 1,189 respondents from all counties. Details in Dan Banciu, op. cit., p. 246.

⁸ Opinion poll seeking to measure the public perception of the phenomenon of corruption, taken in December 2007 by the Anti-corruption Directorate General together with Totem Communication, available at www.mai-dga.ro.

Generally, no available dictionary definition insists on the legal aspect of corruption. In the *Explanatory Dictionary of the Romanian Language (DEX)*, the definition of corruption takes a social and moral dimension, as it stands for 'deviation from morality, honesty, duty; lechery, depravation'⁹. In that respect, the term is used in the definition of 'sexual corruption' as the crime through which obscene action is taken towards a minor. On the other hand, 'bribe' – *mita* in Romanian (from the Slavic word 'mito') means money or goods received from someone or given to someone in return for that person's benevolence and to make him/her discharge a work duty or commit an illegality in the favour of the one who pays the bribe or offers the goods¹⁰.

The *Merriam-Webster Dictionary* defines corruption as 'impairment of integrity, virtue, or moral principle; inducement to wrong by improper or unlawful means (as bribery)'¹¹. *Le Petit Robert* reduces the definition of corruption to bribery: 'Corruption is the use of condemnable means (bribe, grease, takings) for the purpose of influencing the action of an official against his or her duties or conscience'¹². The *Black's Law Dictionary* gives a broader legal definition of corruption, as well as one that is closer to the meaning we shall adopt in this work: 'an act done with intent to give some advantages inconsistent with official duty and the rights of others. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to the duty and the rights of others'¹³.

2.3. International regulations

a. The most widely recognised definition of corruption is the one given by the World Bank: '*corruption is the illegal use of public resources for personal gain*'¹⁴. A similar definition of corruption comes from Transparency International: '*corruption is the abuse of entrusted power for personal gain*'¹⁵. The latter definition encompasses more

⁹ Romanian Academy, 'Dicționarul Explicativ al Limbii Romane /Explanatory Dictionary of the Romanian Language' 2nd edition, Univers Encyclopedic Publishing House, Bucharest, 1996.

¹⁰ Romanian Academy, 'Micul Dictionar Academic / Little Academic Dictionary', volume I, Univers Encyclopedic Publishing House, Bucharest, 2001.

¹¹ Available online at www.m-w.com.

¹² 'Le Nouveau Petit Robert: dictionnaire alphabetique et analogique de la langue française' / texte remanié et amplifié sous la direction de Josette Rey/Debove et Alain Rey. – Nouv. Ed. / de Paul Robert. – Paris: Dictionnaire Le Robert, 2003. Also see the definition made available by the National Centre of Textual and Lexical Resources of France, at www.cnrtl.fr/lexicographie/corruption.

¹³ Black's Law Dictionary /ed. Bryan A. Garner. – 7th ed. – St. Paul: West Group, 1999.

¹⁴ 'Helping Countries Combat Corruption: The Role of the World Bank', The International Bank of Reconstruction and Development/World Bank, Sept. 1997, p. 19.

¹⁵ In 'Business Principles for Countering Bribery' (2002), TI defines corruption in business matters as: 'the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal or a breach of trust'. The definition refers not only to private sector transactions, but also to the corruption of public agents for

than public power since corruption may always manifest itself in the private sector. It means not only financial benefits, but also gratuities of all kinds, including immaterial ones like political or professional ambitions, promotions or premiums.

b. The UN, in its 'Code of Conduct for Law Enforcement Officials (1979)¹⁶', shows that 'While the definition of corruption must be subject to national law, it should be understood to *encompass the commission or omission of an act in the performance of or in connection with one's duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these*' (Art. 7, point b).

In the 'Global Programme against Corruption' (1999), the UN states that '*the essence of the corruption phenomenon is the abuse of power committed for the purpose of deriving a direct or indirect personal gain, for oneself or for another person, in the public or private sector*', in fact, borrowing the definition given by the aforementioned organisations. In its strategy 'Fighting Corruption to Improve Governance' (1998), the UN Development Programme defines corruption as '*the misuse of public power office or authority for private benefit – through bribery, extortion, influence peddling, nepotism, fraud, speed money¹⁷ or embezzlement*'.

The most important universal instrument in the field under scrutiny here, the UN Convention against Corruption (2003), does not provide a definition for corruption, based on the assumption that the concept changes continuously and that, by its nature, it includes multiple approaches. The convention takes a descriptive approach covering varied forms of corruption that exist at present, while also offering a framework for forms of corruption that may still emerge in the future. The States Parties to the Convention shall criminalise the following offences: bribery, influence peddling, abuse of functions, illicit enrichment (including in the private sector), laundering of proceeds of crime, concealment, obstruction of justice. The convention also obliges the states to establish liability of legal persons, as well as to criminalise participation and attempt.

c. The International Monetary Fund defines corruption as '*the abuse of Public authority or trust for private benefit*'¹⁸.

the purpose of such transactions. See Transparency International's 'Business Principles for Countering Bribery', available at http://www.transparency.org/global_priorities/private_sector/business_principles.

¹⁶ 'Code of Conduct for Law Enforcement Officials', adopted by Resolution 36/169 of the 17th of December 1979. The term 'law enforcement officials' includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. Available at www2.ohcr.org/English/law/codeofconduct.htm.

¹⁷ Money paid to expedite various bureaucratic procedures.

¹⁸ The IMF's 'Approach to Promoting Good Governance and Combating Corruption – A Guide', 2005, at <http://www.imf.org/external/np/gov/guide/eng/index.htm>.

d. The INTERPOL Group of Experts on Corruption defines it as '*any course of action or failure to act by individuals or organisations, public or private, in violation of law or trust for profit or gain*'¹⁹.

Strictly referring to police forces, on its '*Global standards to combat corruption in police forces/services*', INTERPOL defines corruption as: the solicitation or acceptance, whether directly or indirectly, by a police officer or other employee of a police force/service of any money, article of value, gift, favour, promise, reward or advantage, whether for himself/herself or for any person, group or entity, in return for any act or omission already done or omitted or to be done or omitted in the future or in connection with the performance of any function of or connected with policing, the offering or granting, whether directly or indirectly, to a police officer or other employee of a police force/service of any money, article of value, gift, favour, promise, reward or advantage for the police officer or other employee or for any person, group or entity in return for any act or omission already done or omitted or to be done or omitted in the future in or in connection with the performance of any function of or connected with policing, any act or omission in the discharge of duties by a police officer or other employee of a police force/service which may improperly expose any person to a charge or conviction for a criminal offence or may improperly assist in a person not being charged with or being acquitted of a criminal offence, the unauthorized dissemination of confidential or restricted police information whether for reward or otherwise, any act or omission in the discharge of duties by a police officer or other employee of a police force/service for the purpose of obtaining any money, article of value, gift, favour, promise, reward or advantage for himself/herself or any other person, group or entity, any act or omission which constitutes corruption under a law of the Member State, participation as a principal, co-principal, initiator, instigator, accomplice, accessory before the fact, accessory after the fact, conspirator or in any other manner in the commission or attempted commission of any act referred to above.

e. In the Explanatory Memorandum of the Report of the PACE Committee on Economic Affairs and Development prior to the adoption by the Parliamentary Assembly of Council of Europe of Resolution 1214 (2000) on the 'Role of Parliaments in Fighting Corruption', corruption is defined as *the use and abuse of public power for private gain*²⁰.

The Multidisciplinary Group on Corruption set up by the Committee of Ministers of the Council of Europe in 1994 adopted the following provisional definition of corruption: '*corruption as dealt with by the Council of Europe's GMC is bribery and any other behaviour in relation to persons entrusted with responsibilities in the public or private sector, which violates the duties that follow from their status as a public official, private employee, independent agent or other relationship of*

¹⁹ The INTERPOL Group of Experts on Corruption, at <http://www.interpol.int/public/corruption/igec/default.asp>.

²⁰ Doc. No. 8652 of 18 February 2000, prepared by the Committee on Economic Affairs and Development of the Parliamentary Assembly of the Council of Europe, point. II.I.4, at <http://assembly.coe.int//Mainf.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc00/EDOC8652.HTM>.

that kind and is aimed at obtaining undue advantages of any kind for themselves or for others'. (point 27 of the 'Explanatory Report of the Civil Law Convention on Corruption'²¹).

Later on, the Civil Law Convention on Corruption would elaborate that 'corruption' means 'requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof' (art. 2). The 'Criminal Law Convention on Corruption' details corruption as being 'active bribery of public officials²², passive bribery of public officials (including the state's obligation to establish as criminal offences under the domestic law such conduct involving any holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party), [and] trading in influence'.

f. EU, in the final Communication (2003) 317 from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy against Corruption' adopts the definition of corruption used by the UN Global Programme against Corruption: '*abuse of power for private gain*'. The Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (1997)²³ defines passive corruption and active corruption by officials²⁴.

2.4. National regulations

a. The National Anti-corruption Strategy for 2005 – 2007²⁵ defines acts of corruption as those *actions that affect the universal and balanced distribution of goods for the purpose of making profit for individuals or groups of individuals*. The national strategy for the prevention and countering of corruption in vulnerable sectors and in the local public administration for the period from 2008 – 2010²⁶ is

²¹ Report available at: <http://conventions.coe.int/treaty/EN/Reports/Html/174.htm>.

²² 'public official' shall be understood by reference to the definition of 'official', 'public officer', 'mayor', 'minister' or 'judge' in the national law of the State in which the person in question performs that function and as applied in its criminal law; the Convention also refers to foreign public officials.

²³ The 'Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union' adopted by the European Council, was published in the Official Journal C 195 of 25 June 1997, available at: <http://europa.eu/scadplus/leg.en/lvb/133027.htm>.

²⁴ For the purposes of the Convention, 'public official' shall be understood by reference to the definition of 'official', 'public officer', 'mayor', 'minister' or 'judge' in the national law of the State in which the person in question performs that function and as applied in its criminal law.

²⁵ Also named SNA II, approved by Government Decision no. 231/2005, published in the Official Journal of Romania no. 272 of 01 April 2005.

²⁶ Published in the Official Journal of Romania no. 514 of 08 June 2008.

only limited to reminding of the Transparency International and previous National Anti-corruption Strategy definitions.

In the laws regulating the legal professions I have found a relevant stipulation only in Law no. 360/2002 on the Status of the Police Worker which, at article 2, reads: '*The authority of the function may not be exerted in one's personal interest*'.

b. While giving no definition of corruption, the Romanian Criminal Code does criminalise selected acts falling into this category in its chapter on work or work-related crimes: conflict of interests, bribe-taking and bribe-giving, accepting illegal gratuities and influence peddling (art. 253¹-257). In our opinion, in order to observe international standards, the chapter should also include offences such as unjust repression, illegal arrest and abusive investigation, attempt at inducing deceitful testimony or favouring the offender.

c. A definition with immediate applicability is the one in Law no.78/2000 on the prevention, uncovering and punishment of the acts of corruption²⁷: the *use of function, competences of tasks received in order to obtain money, goods or other undue benefits for oneself or for another person*. The law operates with four categories of crimes relevant to legal sector workers: corruption offences (other than those stipulated at art. 254-257 of the Criminal Code, such as, buying influence and bribing a foreign official or an international public organisation), offences assimilated to corruption, offences directly related to corruption and offences against the financial interests of the European Communities.

In terms of judicial corruption, the law says, *inter alia*, that its provisions apply to public officials serving within public authorities and institutions, regardless of the procedure of appointment (art. 1, letter a); people with functions of control (art. 1, letter c); people with functions of identifying or punishing infringements or criminal offences; the offences covered by art. 254-257 of the Criminal Code have harsher punishments (art. 7); and holders of judicial office or officials of any international court whose jurisdiction is accepted by Romania (art. 8¹).

2.5 What is not corruption?²⁸

a. Tip. It is customary for clients to tip providers of certain liberal services like taxi drivers, waiters, barbers, etc., showing they appreciate the quality of the service. While such providers could abuse the favourable custom, it is not corruption.

²⁷ The law was published in the Official Journal no. 219 of 18 May 2000 and subsequently amended. The previous regulation was included in Law no. 83/1992 establishing an expedited legal proceedings in the case of specific corruption criminal offences.

²⁸ Excerpt from the materials of the national campaign 'Do not pay bribe!' (2004). See www.nudaspaga.ro.

b. Administrative abuse. The situation where a civil servant or official abuses office to the detriment of someone's interests, without pursuing personal benefits is not corruption but abuse against individual interest. Only abuses committed for the purpose of satisfying personal interests are corruption. The legal punishment for corruption is penal (imprisonment) and may attract the loss of civil rights, whereas the legal punishment for administrative abuse is also administrative (warning, payouts, suspension from office, etc.)

c. Negligence. The situation where a civil servant or official neglects his work duties, affecting the interests of another person, without pursuing a personal benefit, is not corruption but neglect or administrative incapacity. Only those acts of neglect that are committed for the purpose of satisfying personal interests constitute corruption. The legal punishment for negligence is also administrative.

d. Miscarriage of justice. If a jurisdictional act performed by a prosecutor or judge is wrong or illegal, legal remedies can reverse the juridical error. Such errors may not be considered corruption as long as they were not committed for the purpose of obtaining a personal gain. The exercise of functions in ill faith, where the act is not criminalised, is a disciplinary violation in the case of magistrates, judges and prosecutors (art. 99, letter h of Law no. 303/2004 on the status of judges and prosecutors).

e. Incompetence. The situation where civil servants or officials hold positions for which they are not qualified and where they are unable to discharge their duties – meaning tasks according to the requirements of competence and professionalism – is the result of incompetence and not of corruption. Failure in discharging one's duties because of incompetence is not corruption (as result of a concealed interest) or abuse (as a result of ill faith). The legal punishment for corruption is penal, whereas for incompetence it is administrative.

f. Conflict of interests. Not every conflict of interests is the consequence of corruption. While corruption entails an action, a conflict of interests is a situation where the commission of illegality is only potential. The connection between the two legal notions will be thoroughly addressed in Part IV of this book.

3. The judicial system and corruption

In the context of this study, we treat corruption in an interdisciplinary manner rather than purely from a criminal point of view. As seen above, **corruption** is the *abuse of power for the purpose of obtaining personal gain*. We prefer this broad definition, which easily adjusts to instances of incorrect conduct by justice workers or of staff involved in decisions auxiliary to the justice system. This definition includes material gain or benefits of any other nature derived from corruption. The definition encompasses both public officials (like

magistrates) and private officials (like lawyers or notaries public), because what corruption affects is the public interest of the professional carriage of acts, measures and decisions in the legal field.

Adjusting this definition to the justice system, we can define **judicial corruption** any act through which workers in the justice system are negatively influenced that affects the impartiality of judicial proceedings for the purpose of obtaining an illegitimate benefit for themselves or other persons.

There are two types of such negative influences upon justice:

The first regards improper influences affecting the independence of justice as a system and/or the independence of judges as individuals – *pressure factors* acting on justice. Here we may include, but are not limited to, political intervention in the recruitment and appointment of judges, negative influences on judges' salaries, and influencing the allocation of cases or of judges to the various cases. The analysis of safeguards that combat such factors and that intend to protect the functional independence of the system and the individual independence of the judge (i.e., life tenure, existence of a judicial council, etc.), falls outside the scope of this paper.

The second type of inappropriate influences on the fairness of legal proceedings refers to the violation of ethical conduct by officials of the justice system or to 'buying' their benevolence – *lack of integrity*. This aspect will be analysed in the next sections, together with the sectors where judicial corruption will most likely occur, its manifestations, its causes, as well as methods of prevention and deterrence.

PART II

WEAKNESSES IN THE JUSTICE SYSTEM

Certain official papers made public by the Superior Council of Magistracy (SCM) and statements by the president of the country and by the justice minister describe judicial corruption as a phenomenon.

'The SCM is determined to strengthen, in the future as well, its role as a disciplinary council, and is fully aware of its responsibilities. The SCM reaffirms its will to penalise magistrate misconduct and to take measures, in line with its competences, so as to *eliminate the corruption phenomenon from the Romanian judicial system*'.²⁹

'I've heard of *corrupt judges*, I've heard of *corrupt prosecutors*, I have seen them personally. I've seen them in courts, and in public occasions. And these facts strengthened my belief that a judge is just as independent and free as he/she wants to be'.³⁰

'Justice in Romania will begin to work normally as soon as the activity of prosecutors' offices is reflected in court rulings (...) This is about both the quality of prosecution, and the extent to which a judge is free to pass a ruling. Unfortunately, we still have a *high corruption level in the judicial system*'.³¹ I stand by my previous statement that the judicial system does not work and that *there is a high level of corruption*. I do not mean to offend anybody. I am certain that there are a lot of honest judges who enforce the law; however, claiming that *there is corruption in the country, but there is no corruption in the judicial system*, is an error.³²

'We must declare war on all *professional networks that leech onto the judicial system*. And by this I mean lawyers, notaries, magistrates, or even IT workers in courts.'³³

Such statements are only based on occasional experiences with corruption in the judicial system, or merely on the perception of the authors of these statements. But an accurate analysis of the scope of corruption and the vulnerable areas in the judicial system requires a comparative assessment and corroboration of studies and opinion polls on corruption based on the perception and experience of both court users and court personnel. It also requires an analysis of official data on the criminal and disciplinary investigations into the personnel in the

²⁹ SCM news release, December 9, 2008, at www.csm1909.ro.

³⁰ Address by the president of Romania, Traian Băsescu, in a meeting with young magistrates graduating from the National Institute of Magistracy, Cotroceni Palace, January 29, 2009 at www.presidency.ro.

³¹ Statement by the president of Romania, on February 20, 2006, upon the presentation of the prosecutors' activity report, quoted by HotNews news agency, at www.hotnews.ro.

³² News release issued by the presidential administration on March 9, 2006, regarding the statements of the president in the plenary meeting of the SCM, www.presidency.ro.

³³ Statement by Justice Minister, Cătălin Predoiu, in the plenary meeting of the SCM on January 8, 2009, at www.realitatea.net.

system. This is precisely what we will do below, in order to construct a comprehensive assessment of judicial corruption.

1. Public confidence in the judicial system

Romanians' confidence in public institutions is low, and corruption is viewed as an endemic phenomenon. Concerning the judicial system, its integrity sustains its credibility which, in turn, fuels people's confidence in the judiciary. Therefore, it is public approval that accords legitimacy to the judicial system.

Statistically, over the past decade, public confidence in the Romanian judicial system has fluctuated between 20% and 28%. The table below includes the findings from the most recent statistics on public institutions and the judicial personnel:

<i>STUDIES CATEGORIES</i>	Public Opinion Barometer 2007 ³⁴	Gallup 2008 ³⁵	Eurobaro- meter 2007 ³⁶	Eurobaro- meter 2008 ³⁷
Church	--	84	77	--
Army	--	65	68	--
Mass-media	--	56	61 (TV-radio) 53 (print)	--
Police	--	38	36	--
Judiciary	20	20	26	25
Political parties	22	--	11	14
Parliament	17	--	17	19
Notaries	--	42	--	--
Police personnel	--	29	--	--
Lawyers	--	28	--	--
Judges	--	28	--	--
Prosecutors	--	26	--	--
Judicial personnel	--	25	--	--
Court Enforcement Officers	--	23	--	--

Table 1: Romanians' confidence in public institutions (in percentage points)

³⁴ The 1998-2007 Public Opinion Barometer was carried out by the Soros Foundation. The sociological research looked at Romanians' perception of the political leaders who represent them and in areas such as the judiciary. The report was published on December 6, 2007 at www.soros.ro.

³⁵ Opinion poll financed by the World Bank Project for Justice Reform, commissioned by the SCM and carried out by Gallup Romania, posted online on January 25, 2008 on the HotNews website at <http://tinyurl.com/csmgallup>.

³⁶ European Commission, *Eurobarometer – Public Opinion in the European Union, Autumn 2007*, released on January 30, 2008, available at http://ec.europa.eu/public_opinion/archives/eb/eb68/eb68_ro_exec.pdf.

³⁷ European Commission, *Eurobarometer – Public Opinion in the European Union, Autumn 2008*, released on January 20, 2009, available at http://ec.europa.eu/romania/documents/information/eb70_ro_exec.pdf.

Confidence in public institutions is primarily built on the *perceived* fairness of services and integrity of personnel. In forming this perception, people rely on their own experiences related to corruption or on outside reports on corruption. Below are data from opinion polls that highlight, where possible, citizens' experience, perception and reaction relevant to corruption in the judicial system.

2. Judicial corruption in opinion polls

Undoubtedly, perceptions are often based on the corruption experience of people who come into contact with public institutions. Yet we believe that an image as accurate as possible can only be provided by specialised measurement instruments, provided that on-site findings are interpreted in a professional manner.

The table below comprises a selection of the findings from the most relevant surveys conducted over the last few years, most of them including data on the judicial corruption perception:

Corruption among:	WB 2001 ³⁸	TI 2007 ³⁹	TI 2008 ⁴⁰	Gallup 2008 ⁴¹			AID 2008 ⁴²	GAD 2008 ⁴³
				Court clerks interviewed	Lawyers interviewed	Citizens interviewed		
Judges								
-perception	50	-	-	7	47	63	-	-
-experience		-	-	-	-	-	40	-
Bribe given	22	10	8	-	-	-	13	11,4
Bribe requested	16	11	-	-	-	-	-	-
Prosecutors (perception)	-	-	-	8	60	60	40	
Police personnel								
-perception	40	-	-	20	78	60	-	10
-experience	-	-	-	-	-	-	-	-
Bribe given	-	9	13	-	-	-	-	-
Bribe requested	-	10	-	-	-	-	-	-

³⁸ Diagnostic Surveys of Corruption in Romania, carried out by the World Bank at the request of the Government of Romania, in 2001, at www1.worldbank.org/publicsector/anticorrupt/RomEnglish.pdf.

³⁹ Opinion polls commissioned by TI-Ro in 2007 for preparing the National Corruption Report and the campaign "No bribery. No getting rich on your money". See www.faraspaga.ro.

⁴⁰ TI-Ro, 2008 Global Corruption Barometer, at www.transparency.org.ro.

⁴¹ Gallup poll carried out in January 2008, at the request of the SCM.

⁴² Opinion poll carried out through INSOMAR by Asociația pentru Implementarea Democrației (AID) in nov. 2008.

⁴³ Opinion poll on the public perception of corruption, carried out by the General Anticorruption Directorate jointly with Totem Communication, in December 2007, at www.mai-dga.ro.

Lawyers	-	-	-	19	30	60	-	-
Notaries	-	-	-	13	28	35	-	-
Judicial personnel	-	-	-	3	51	46	-	-
Court Enforcement Officers	-	-	-	15	35	43	-	-
Unreported judicial corruption	30-40	80	77	-	-	-	89	-
Major problems	-	-	-	12	34	39	-	44
Corruption	-	-	-	-	-	10	-	-
Length of trials	-	-	-	-	19	5	-	-
Incompetence	-	-	-	-	12	-	-	-
Overloading								

Table 2: Corruption in the judicial system (in percentage points)

Summarising the findings of these surveys, the following conclusions can be reached: there is a major discrepancy between the perceived scope of corruption in the judicial system and people's experience in this respect. Sometimes money was offered from lawyers to magistrates, but without proof that it was actually accepted. More often than not, bribes were offered in exchange for speeding up procedures and for the assignment of certain cases to certain magistrates. Most of those who knew about corruption misdeeds by judicial personnel did not report them because of the complicated procedures that would ensue or due to the belief that nothing would happen (people distrust the criminal prosecution bodies). Apart from corruption, people were dissatisfied with the quality and length of proceedings, characterised by magistrate incompatibility cases and instances of procedural abuse. The typology of complaints prompts us to believe that the general public often mistakes procedural errors and negligence for corruption misdeeds.

The magistrates themselves are aware that corruption exists in the system, yet admit that they have been inefficient in removing it. One out of four prosecutors and judges believe the random case assignment system has been inadequately implemented, while half of the interviewed magistrates think the random case assignment system may be influenced or tampered with⁴⁴. Magistrates themselves have little confidence in the judicial system. Less than 40% of the interviewees regard the overturn index or case dismissal rate as relevant or highly relevant indicators in an objective assessment of the

⁴⁴ In fact, justice minister Cătălin Predoiu pointed out in the plenary meeting of the SCM on January 8, 2009, "There are cases where the ECRIS system (the integrated information system for prosecutor offices and courts, editor's note) was manipulated, with the help of IT workers, so as to avoid the random assignment of cases" (www.realitatea.net, January 8th, 2009).

Romanian judicial system. The overturn index is viewed as irrelevant largely because of the distrust in the verdicts reached by judicial control institutions. In turn, this distrust has several causes including, but not limited to, inconsistent judicial practice. But beyond possible causes and explanations, the distrust within the system denotes, in itself, a relevant indicator for the quality of the administration of justice and for the confidence that the system can expect from court users⁴⁵.

Both magistrates and court clerks, as well as lawyers and the general public, believe the priorities for improving the state of the Romanian judiciary include reducing corruption in the judicial system, simplifying judicial proceedings and addressing the excessive length of trials.

3. Persons prosecuted and penalties for judicial corruption

Existing public data enable us to identify types of persons prosecuted for corruption misdeeds. The number of offences and administrative penalties applied for public misconduct completes this image. However, no benchmark indicates the satisfactory number of investigations or sentences needed in order to measure the efficiency of the fight against corruption.

3.1. A first point of reference in analyzing the scope of judicial corruption is that of criminal investigations. Thus, according to news releases issued by the National Anti-corruption Directorate with respect to prosecutions and according to work reports for 2004-2008, regarding final sentencing⁴⁶, we find that criminal investigations have been carried out into the following categories of judicial personnel and offences:

- *police personnel* in road-traffic police and judicial police departments for offences such as bribe-taking, fraud, trading in influence, aiding and abetting, and forgery of official documents. We could easily note that the more serious the offence that the bribe-giver is charged with, the larger the bribe;
- *Judges, syndic judges, assistant magistrates* for bribe-taking, trading in influence, forgery and fraud;
- *prosecutors* for bribe-giving, bribe-taking, trading in influence, fraud, aiding and abetting;
- *lawyers* for trading in influence, aiding and abetting;
- *public notaries* for trading in influence;
- *liquidators* for bribe-taking, trading in influence;
- *medical examiners* for bribe-taking;
- *forensic experts* for receiving undue benefits.

⁴⁵ Florin Streleanu, Ph.D., quoted in the *Barometer of the Judicial System*, carried out by the Institute for Public Policies and the National Institute of Magistracy in 2008, available at www.ipp.ro, p. 60.

⁴⁶ Both news releases and NAD work reports are available at www.pna.ro.

In order to see at what level corruption in the judicial system starts and how deep it goes, it may be interesting to note that criminal investigations have even been started in cases of bribe-taking and trading in influence involving *academic personnel*. This has involved attempts to facilitate the issuance of B.A. diplomas in law schools by several *high-level police officers* who used improper recruitment procedures, or by *high-level intelligence officers* who used improper promotion procedures.

3.2. Over the past five years, 26 magistrates have gone to court for corruption offences: 3 judges in 2005, 4 judges and a prosecutor in 2006, 8 prosecutors and a judge in 2007, 7 prosecutors and 2 judges in 2008 and none in 2009. These magistrates worked in courts and prosecutors' offices of all levels and have been charged with bribe-taking, trading in influence, and receipt of undue benefits. The offences are alleged to have been committed in relation to cases assigned to them or their colleagues and involved amounts ranging from 20 to 10,000 euro. In certain cases, criminal activities spanned two to three years and were related to several cases assigned to the respective magistrates.

Of the cases given a final ruling in recent years, ten were sentenced for corruption misdeeds⁴⁷. Except for the SCM, which has supplied such data only for the last three years, neither the Justice Ministry nor the Public Ministry have any statistics regarding the categories of judicial personnel sentenced for corruption, which clearly indicates a lack of intention to outline an anti-corruption strategy.

In the past five years, for cases under NAD jurisdiction, 155 members of the police corps have been sent to court for corruption, of whom 90 were officers and the remainder were agents.

3.3. Also relevant to our analysis are measures taken by internal disciplinary bodies or anti-corruption units.

3.3.1. Between January 2005 and June 2009, as many as 36 judges, 17 prosecutors and one assistant magistrate were subject to administrative penalties by SCM Departments. Of these, 15 judges, five prosecutors and one assistant magistrate were penalised for the disciplinary misdeed of malfeasance, as stipulated under Art. 99/h of the Magistrate Statute Law No. 303/2004.

Similarly, between January 2005 and January 2009, the SCM approved the taking into preventive custody of two judges and seven

⁴⁷ The data have been obtained further to a request for public information filed with the SCM. In contrast, in Japan, for the last 60 years, only three judges have been dismissed for corruption. The Japanese judges are virtually the most professional, independent and honorable judicial body in the world. This happens while they enjoy civil servant status and are not bound to declare their wealth. Nonetheless, they maintain no connections with the public and enjoy high salaries and adequate security.

prosecutors. During the same period, SCM ordered the suspension of nine judges and 16 prosecutors following successful prosecutions. One judge and four prosecutors had their right to practice revoked after final court rulings had sentenced them for various crimes⁴⁸.

3.3.2. The General Anti-corruption Directorate (GAD) in the Ministry of Administration and Interior became operational at the end of 2005. In 2006, GAD carried out corruption investigations on 1281 Ministry employees, of whom 219 were accused or prosecuted as a result. Investigations also targeted 678 non-MAI personnel, of whom 281 were accused or prosecuted.

In 2007, 169 Ministry employees were accused of corruption misdeeds (55% of them members of the Romanian Police) – 76 for bribe-taking and 20 for receiving undue benefits. Also, 70 Ministry employees (58% of them members of the Romanian police) were prosecuted for corruption. Worth noting is that 84 cases occurred where Ministry employees notified GAD when they were offered money in exchange for certain services. The respective persons were subsequently investigated for bribe-giving. In addition, 82 cases concerned Ministry employees who reported on colleagues involved in corruption misdeeds, a category that is not included in other categories of judicial personnel.

In 2008, 285 Ministry employees (of whom 143 were members of the Romanian Police) were subject to corruption investigations and 96 (56 of them members of the Romanian Police) were charged with corruption offences. 62 cases took place where Ministry employees notified GAD when offered money in exchange for various services, which followed with investigations regarding the respective individuals for bribe-giving. Moreover, there were another 104 cases of Ministry personnel reporting on colleagues involved in corruption offences⁴⁹.

Corruption sentences passed on MAI employees numbered 17 (all final rulings) in 2006, 88 (70 final rulings) in 2007 and 75 (47 final rulings) in 2008⁵⁰.

3.4. Looking at the judicial system in the broad sense by including courts of law, prosecutors, the judicial police and other bodies involved in the administration of justice, and the maintenance of public order and countering anti-social behaviour, one can say that corruption offences are present in every law enforcement institution⁵¹.

⁴⁸ Data provided in Memorandum no. 3114/1154/BIPRM of 11 February 2009, issued by the SCM.

⁴⁹ Excerpts from the Report on GAD operations and results in 2008, at www.mai-dga.ro.

⁵⁰ Data supplied in Memo no. 1212606/BIRP of 04 February 2009, issued by GAD in the Ministry of Administration and the Interior.

⁵¹ Vasile Dobrinou, Mihai-Adrian Hotca, Norel Neagu, Marius Murea, Costel Căşuneanu, *Law no. 78/2000 on preventing, identifying and penalizing corruption offences*, Wolters Kluwer Publishers, Bucharest, 2008, p. 32.

But given the gap between corruption perceptions (with corruption oft-mistaken for incompetence or excessive bureaucracy) and actual corruption experiences, as well as between corruption experiences and the number of prosecuted cases, we can safely state that corruption cannot be viewed as a systematic practice in the Romanian judicial system.

However, corruption is unacceptable, regardless of its scope in the judicial sector. As part of a system designed precisely to fight against corruption in the society, magistrates, police personnel and all other members of this sector must demonstrate unstained integrity. Therefore, even one case of corruption in a judicial institution can be regarded as a serious problem. Moreover, considering that the number of crimes reported differs from the number of crimes committed⁵² and the statistics of those who claim to have been asked for or offered bribes in their relation with the justice sector (11% and 10% in 2007 respectively) and with the police (9% and 11% in 2007) differ from the number of cases investigated over the past few years, we realise that the number of crimes actually committed could be much larger.

This conclusion should, without doubt, raise concerns among relevant authorities and professional organisations. Beyond accepting or rejecting corruption as a problem within the judicial system, preventing corruption must play a vital part in the operation of any institution or organisation. In other words, we must identify which structures in the system are vulnerable, where the legal operation of the system may be influenced, and what kind of decisions can be influenced.

4. Weaknesses in the justice system

The general public perceives the phrase “corruption in the judicial system” to refer exclusively to bribes taken by judges and, possibly, by prosecutors. The purpose of our research—namely the identification of vulnerable areas which affect the organisation and functioning of a system designed precisely to protect citizens’ rights and to formulate suggestions for an adequate judicial anti-corruption policy—requires a comprehensive analysis of corruption in this system. This is why on the one hand, we cannot overlook other categories of personnel working in the system, and on the other hand we must also examine bribe cases initiated by citizens (because the very act of offering money is an act of corruption in itself, regardless of whether the public agent accepts it or not). And lastly, our analysis must not be reduced to instances when rulings are influenced, but

⁵² This is a criminological assessment which takes into account indices such as: *actual crime rate* – the total number of offences perpetrated in a certain area in a certain period; *official level of crime* – the total number of offences notified to law enforcement institutions; *punished crime* – the total number of offences sentenced under final court rulings; *the dark figure of crime* – crimes perpetrated but for various reasons unreported, and accounting for the difference between actual and apparent crime figures.

must also look at how corruption affects decisions taken in the system which have no direct impact on a court ruling.

This is why the analysis of corruption in the justice system will actually target the judicial system and its users. And the phrase *judicial system* applies not only to magistrates⁵³, but to all the institutions and professionals involved in resolving a legal dispute or litigation. This includes institutions that establish an offence/misdemeanour (from road traffic police to the Financial Guard), the judicial police, prosecutors and judges, administrative personnel of courts and prosecutors' offices (court clerks, archive keepers, registration personnel, etc.), lawyers, mediators, experts, insolvency professionals, bailiffs, probation officers, public notaries, inspectors with the National Integrity Agency.

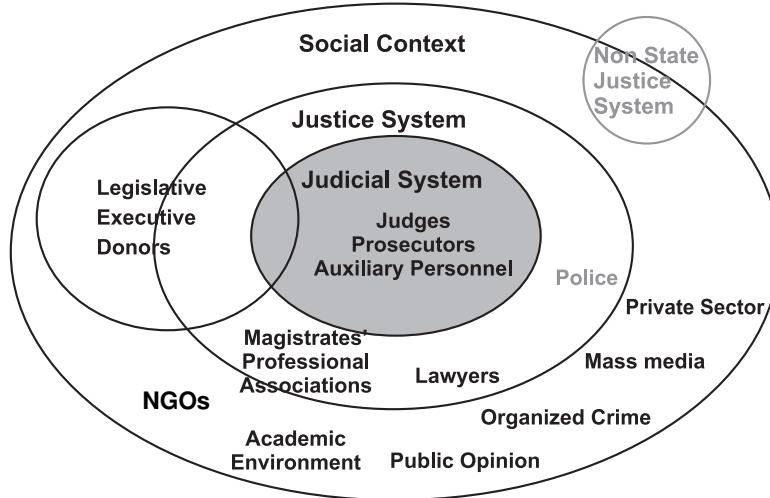


Figure 1: Structure of the justice system (according to TI-Ro)

4.1. Types of decisions in the justice system

Robert Klitgaard, a well-known corruption expert, has put together the following equation that highlights the causes of corruption: C (*Corruption*) = M (*Monopoly*) + D (*Discretion*) - A (*Accountability*)⁵⁴.

This means that optimum conditions for corruption arise where a public, or even private, agent has exclusive authority to make certain

⁵³ Judges and prosecutors are part of the "judiciary," and together with court clerks they make up the "judicial system" or, broadly, the "justice system". The status of magistrates is regulated in Law No. 303/2004, and the organization of the judiciary in Law No. 304/2004.

⁵⁴ Robert Klitgaard, Ronald Maclean-Abaroa, H. Lindsey Parris, "Corrupt Cities – a practical guide to cure and prevention", World Bank, 2000, translated into Romanian and published by Humanitas Publishing House, 2006, p. 42.

decisions, when these decisions are not motivated in fact or in law or are not subject to certain constraints and conditions, and when the entire decision-making process is not transparent to other authorities or to the public.

Similarly, the UNPD *Source Book on Accountability, Transparency and Integrity* takes into account other elements that are important in counterbalancing Monopoly and Discretion. The formula is therefore: **Corruption = (Monopoly + Discretion) – (Responsibility + Integrity + Transparency)**⁵⁵. We will use this corruption ‘recipe’ in our analysis of corruption in the judicial system, more specifically in the identification of the weaknesses of this system.

In order to see where and how corruption occurs in the judicial system, we must first identify both the deficiencies of the system, and the moral weaknesses of the agent with respect to the decisions taken in various judicial areas, regardless of whether they are rooted in the legislation, the institutional management or strictly in the individual conduct. Thus, judicial institutions primarily take *judicial decisions*, i.e., decisions that provide a settlement for litigation via public institutions. For example, prosecutors may decide to terminate criminal investigations against an individual; judges may decide to sentence a defendant, etc.

The public institutions called on to make such decisions sometimes rely, to an overwhelming extent, on expert reports or on assertions made by lawyers or members of other liberal trade professions.

Regardless of the criminal or civil nature of the case, each of those listed above may at some point become an active or passive agent of corruption misdeeds. These can be committed at any stage, from the first steps of a judicial proceeding to the implementation of the ruling.

Beyond the operational goal of the system, namely the administration of justice, the institutions discussed here provide several other services to the public: they register applications, release copies of documents in case files, provide access to archives, certify copies, notarise documents, and so on. We will call these services ‘judicial administration acts’, which are designed either to make judicial decisions possible (e.g., the assignment of cases to judges), or to occur at a later stage (e.g., the communication of court rulings). The completion of judicial administration acts is, as a rule, the job of relevant administrative personnel in the registry, archive and statistics departments.

Apart from these, the institutions in question also make *purely administrative* decisions. Thus, in terms of organisation, a police precinct, prosecutor’s office, tribunal, penitentiary or the Superior Council of Magistracy operate just like any other public institution, in which decisions are made about everything from career management to public procurement. This category also includes decisions on justice-related public policies made by the Justice Ministry.

⁵⁵ UNDP, *Anticorruption practice note*, 2004, [la www.undp.org/governance/docs/AC_PN_English.pdf](http://www.undp.org/governance/docs/AC_PN_English.pdf), p. 2.

4.2. Weaknesses in the judicial and judicial administration areas

Synthetically, for now, we shall mention that the solving of *civil* litigation is the duty of judges, and the implementation of these solutions is the duty of court enforcement officers. When a crime is committed, the *criminal* case gets to the judge only when a prosecutor decides so, based on investigations conducted by judicial police. Later, the National Penitentiary Agency or the probation service executes the final ruling. Helping any of these public agents could be private agents, such as lawyers or technical experts.

In order to identify the system weaknesses, as we have set out to do, we will analyse each of the aforementioned personnel categories, in the chronological order of their involvement in criminal / non-criminal cases. This is how we can relate the relevance and type of corruption to the institutional level.

a. Judicial policemen conduct criminal investigations regarding the misdeeds and individuals suspected of having committed offences. As a rule, they file criminal complaints and reports to the police, and in most cases this institution conducts criminal investigations.

Individuals under investigation are interested in having no criminal proceedings initiated against them, and therefore do not want to be bound to appear before prosecutors. Consequently, they may resort to acts of corruption to be able to continue perpetrating offences (e.g., narcotics smuggling, prostitution, gambling). This ensures that they will receive notice when actions against them are being planned (e.g., knowing of a home search would give sufficient time to allow destruction of criminal evidence) or in order to persuade police workers not to record a victim's complaint in criminal report format. Alternately, they may try to persuade police workers to investigate only a small portion of the misdeeds from the complaint, or to draw up a memo to the prosecutor suggesting that the prosecutor adopt a solution that favours the individual subject to investigation.

Therefore, attempts to breach integrity by corrupting judicial police workers may result in the inaccurate reporting of offences and the concealment of reports. Furthermore, they may affect the investigation manner, the assessment of the misdeed, the solution to the complaint or the provision of crucial information. The risk of distorting the truth can only be minimised if the prosecutor who oversees the work of the criminal investigation body thoroughly checks the documents drawn up by police workers.

The monopoly held by the police with respect to their power to initiate criminal investigations may even prompt them to commit blackmail-related crimes: in exchange for certain benefits, they may promise to ensure the protection of criminal behaviour (e.g., procuring or theft of oil products). Also, the role of the police in executing search

warrants, arrest warrants or sentences may render police workers vulnerable to corruption offences committed with the goals of preventing the investigation, arrest or detention of wrongdoers.

The police workers' closeness to criminal circles and their contact with the underground world may prompt some of them to become part of the organised crime system.

With respect to the position of police workers in the judicial system, the doctrine distinguishes nine types of corruption in the police⁵⁶:

- corruption of authority, which enables police workers to use their status in order to derive undue benefits (e.g., owners of restaurants in ill-reputed areas may offer free meals to police officers in exchange for protection);
- aiding, which involves the receipt of undue benefits in exchange for facilitating the growth of the wrongdoers' businesses (e.g., police providing protection during oil theft from pipelines);
- opportunity theft, where police workers misappropriate the property from people arrested, victims, crime scenes or unprotected estates (e.g., police workers take confiscated narcotics for sale or consumption);
- blackmailing, through which the police receive undue benefits from suspects in exchange for concealing misdeeds (e.g., police accept bribes in order to not initiate criminal investigations);
- protection of illegal activities, which buys a lack of police response so as to ensure the carrying out of illegal activities (e.g., police workers are 'bought' by procurers who force prostitutes to offer them sexual favours);
- bribery, through which offenders try to avoid procedural measures (arrest, search, detention or confiscation of property), have incriminating evidence removed from files, or have the misdeed registered as smaller offences;
- direct criminal behaviour, which does not involve the existence of a corrupting agent, but is an activity carried out by police officers against other individuals (e.g., vigilantes who use police equipment and take the law in their own hands);
- internal arrangements, which involve offer and acceptance of bribes within police units, in exchange for bonuses, incentives, early promotions, important administrative positions, etc.;
- placement of illegal items, (e.g., narcotics, whose possession and sale are punishable under the law) which can be placed among the personal assets of an individual and can form the basis of wrongful charges against that individual.

b. Prosecutors are those who carry out the criminal prosecution. They have a monopoly on the charging decisions which bring individuals under suspicion to court, in order to hold them criminally accountable. If the suspect is innocent, the prosecutor is the only

⁵⁶ See Pavel Abraham, *Corruption*, Detectiv publishing house, Bucharest, 2005, pp. 276-279.

category entitled to cease commencement of prosecution, or terminate the proceedings altogether. When suspects are sent to court, it is the prosecutor who presents the case against them.

There are cases when the prosecutors themselves, and not the judicial police, carry out criminal investigations. In such cases, the aforementioned police corruption-types also apply to prosecutors. In practice, cases have been reported when attempts were made to corrupt prosecutors into commencing the prosecution of third parties⁵⁷.

Since individuals will seek ways to avoid going to court, they may resort to corrupting prosecutors into making a favourable decision. If their case is already before the court, they may bribe prosecutors to not present all the evidence against them or to not challenge court rulings favourable to the bribe-giver.

A method to avoid illegal or ungrounded acts by prosecutors is to have their actions checked by a higher-ranking prosecutor (at random or upon receipt of complaint) and the judge (only upon receipt of a complaint and after the documents have been checked by the higher-ranking prosecutor). In this respect, the audit carried out by Freedom House in 2005 on the impact of the 2001-2004 National Anti-corruption Strategy warns of the weaknesses in the position of lower-ranking prosecutors in relation to higher-ranking colleagues, and identifies prerequisites for systemic problems⁵⁸. The action plan related to the 2005-2007 Strategy includes firm measures concerning the application of the principle of continuity in prosecution: defining objective criteria for the initial assignment of cases, reducing the possibility of case redistribution, reducing intervention by higher-ranking prosecutors in the criminal prosecution in cases specifically stipulated under the law, and introducing court control over decisions of invalidation made by the higher-ranking prosecutor at the request of the prosecutor who prosecutes the case⁵⁹.

Nonetheless, the current Code of Criminal Procedure enables prosecutors in higher-ranking prosecutorial offices to take over the prosecution of cases which fall under the jurisdiction of lower-ranking prosecutorial offices. One weakness could be the assessment of those situations when such transfers are necessary. Discrimination by the head of the higher-ranking prosecutor's office, without a compulsory rationale for this decision and without the agreement of the case

⁵⁷ A complaint was filed against a prosecutor who allegedly took a bribe in exchange for commencing prosecution of a businessman: www.hotnews.ro/Arhiva_noiembrie_2007/articol_1152023/.htm.

⁵⁸ Freedom House Washington, *Anti-corruption Policies of the Government of Romania – Assessment report*, March 2005, available at www.just.ro.

⁵⁹ Nonetheless, the Constitutional Court ruling no. 345/2006, published in the Official Journal no. 415 of 15 May 2006, dismisses as unconstitutional the second sentence in art. 64, paragraph 3 of Law no. 304/2004 (which had been introduced in the 2005 justice reform package), which reads that "*The invalidation measure is subject to the control of the court having jurisdiction over the case file, at the request of the prosecutor having adopted the respective solution.*"

prosecutor, may lead to an interference with the activity of the initial prosecutor and a distortion of the proper progress of the prosecution.

c. Judges are the magistrates who resolve litigation by making rulings and, in the event of a conviction, passing binding sentences. When citizens come to court, they seek favourable rulings, regardless of their position in the trial (claimant or respondent in civil suits, victim or defendant in criminal trials). In order to further acts of corruption, judges may accept or deny evidence to justify their rulings, order the inaccurate recording of spoken statements made by the parties or witnesses, speed up or delay the settlement of the case, or deliberately pass a ruling that runs counter to the evidence in the file or the law. Corrupting a judge may influence the progress of a case in myriad ways, starting from the appointment of the judge and the assignment of the case, the way the judge handles the case, the time allotted to each case, the manner in which debates are handled, the application of rules that require impartiality and the decision-making process.

Since March 2005 in Romania, cases have been assigned to judges randomly, usually through an IT system. But it is possible to circumvent this and have a case assigned to a particular judge through the help of the court clerk or judge entrusted with using the system. Such an individual, who has used the software for an extensive period and who may estimate to which panel the case will be assigned, can ensure that either the operation is not conducted in the order of suit filing, introduce time variables for which there is only one possible assignment (one panel)⁶⁰, or introduce distorted complexity criteria so as to 'pilot' the case to a particular panel⁶¹.

Worth noting is that the software will not generate the assignment of a case to one individual judge, but to a panel of judges which bears a particular identification code that distinguishes it from others. According to internal regulations, membership of these panels should be established at the *beginning of each year*, although the court president reserves the right to subsequently change, under circumstances other than objective. Such a deviation is aided by the fact that in most courts the membership of judge panels is not public. Also, since the membership of a panel is defined at the beginning of the year, even for pending cases, a case which is outstanding at the end of the year may be taken over by other judges appointed at the

⁶⁰ For example, a lawsuit filed in court on a particular day has its first hearing scheduled for a date several days later; if the same lawsuit is filed three days later and all other variables are identical, then the hearing scheduled by the computer system will be three days later. If the panel membership is known ahead of time, then one can "choose" the day when to file the suit. See the article "*Dedication. Court clerk helps C. to win Park B*", in the daily "Gardianul" of 01.02.2008, at <http://tinyurl.com/grefiera>.

⁶¹ This was possible particularly because, between March 2005 and May 2008, no consistent complexity criteria were defined. Only under Resolution no. 561 of May 15, 2008, did the SCM define consistent nationwide complexity levels.

beginning of the year to be part of that panel⁶². Another means to overcome the random assignment can be achieved by changing the membership of the panel of judges *during the year*.

As a rule, judges who have been appointed to solve a case can only be replaced for objective reasons. However, such reasons may be abused by the assigned judge file applications for leaves of absence, sick leaves, and annual leaves, which results in having a substitute judge become a member of the panel. If the substitute also falls 'suddenly' ill, then eventually the case may end up before the desired judge. Similarly, another method of altering panel membership during the year is by setting up or dismantling panels, and having the case transferred from the old panel to the new ones.

Since in Romania the computer program determines both the judge and the date of the first hearing, one can bribe the judge into changing the hearing date, thus illegally speeding up the proceeding⁶³.

Also, one can bribe judges into granting exemptions from or reductions in trial expenses owed for civil proceedings, in circumstances other than those stipulated by law.

It is worth noting that as regards the files assigned to the *Panel of 9 judges of the High Court of Cassation and Justice*, the rules of random assignment do not apply. This is particularly serious since this panel has jurisdiction over the settlement of appeals in cases tried in the court of first instance by the Criminal Court of the HCCJ, with respect to senators, deputies, government members, judges and prosecutors working in courts of appeals and in HCCJ, and members of the SCM (Art. 24 of Law no. 304/2004 on the organisation of the judiciary, Art. 29 of the Code of Criminal Procedure). Article 32 of Law No. 304/2004 stipulates the creation of a nine-judge panel, 'as a rule, of specialised judges, depending on the nature of the case.' However, in practice situations have been reported where this panel has included, sometimes in an overwhelming number, judges from courts other than the criminal court of the HCCJ which is unacceptable in relation to the judge specialisation. In any case, the rules regarding the membership

⁶² This weakness may also affect the jurisprudence of a court: let's suppose that an appeals court has 3 panels of 3 judges each, of which two panels have a certain practice, and the other panel a different practice on the same matter. A decision can be made to redistribute judges, so that one judge in the third panel becomes a member of the other panels, in which they will have to accept the practice imposed by the majority, which may not always be the right one.

⁶³ Worth noting are the procedural inconsistencies in the legislation: under Art. 99, par 8 of the Internal Regulation of Courts, "applications for the rescheduling of the first hearing shall be answered by the panel of judges which has been assigned the file through the random assignment procedure," whereas under Art. 153, paragraph 3 in the Code of Civil Procedure, "the power to answer an application for the rescheduling of the first hearing belongs to the court president, the court vice-president, the court department president or to the judge that replaces the latter. During the proceeding, the rescheduling application is solved by the panel of judges." This legislative inconsistency may facilitate the interference of the court president in the administration of the case by the respective judge.

of this panel, comprised of judges appointed by the HCCJ president, are not public.

Abuses may also affect the circuit of cases in a court, in such situations when a case is transferred to another court, or jurisdiction is declined by a court, which results in a return of the case to the initial court. Unless care is taken to have the case returned to the same initial panel, it may be sent to another panel 'by mistake'. There have also been situations when a case has simply been transferred to another panel by the court president⁶⁴.

As far as the parties are concerned, mention must be made that they do not always know the identity of the judges that try their case, which can render impossible the application of impartiality safeguards. For instance, since the name of the judge is not posted on the door of the courtroom or on the court's website, should one party decide not to attend the hearings, it would be unable to challenge a judge who is related to the opposing party or their lawyers because it would not know who the respective judge is. The same does not hold true as far as prosecutors are concerned. Prosecutors receive notification on a regular basis of the judges scheduled to address arrest requests so that, in theory, prosecutors can choose the day on which they should file for a certain individual's arrest. This action may increase the likelihood of a particular arrest warrant to be solicited from a certain judge, especially since they know the judicial practice is not consistent in this respect.

Parties themselves may sidestep the random distribution of cases: court users and lawyers have already made a practice out of filing several lawsuits, concerning the same subject matter, at different moments in time at a court. After they are assigned to different panels, the party in question abandons the lawsuits that have been assigned to an 'undesired' panels. Advantage is thus being taken of the absence of internal rules requiring courts to check, prior to the registration of lawsuits, whether other proceedings with the same subject matter and parties are already pending within that court⁶⁵. On the other hand, there are no regulations that penalise the parties and/or lawyers who abuse their procedural rights in this manner.

Another vulnerable area is the resolution of transfer requests, which fully reflects the discretion and lack of transparency of judicial bodies. Thus, a party that wishes to transfer a trial to another town must file a

⁶⁴ "Monica's home, the complete story," in the newspaper Cotidianul of 12 December 2005, at www.cotidianul.ro/casa_monicai_povestea_completa-5998.html: a house claimed by the owner was not returned to the owner, and the appeal filed by the plaintiff was dismissed by the HCCJ; later, it came to light that the residents of the respective house were the parents of a doctor who treated the husband of one of the judges in the panel during the trial, and that the case had ended up on the desk of that judge due to the intervention of the court president, although the random assignment procedure had initially sent the case to another panel.

⁶⁵ Only in insolvency cases, under Art. 31 of Law No. 85/2006, is a syndic judge bound to check whether other proceedings against the debtor or filed by the debtor are already pending with the court.

transfer request to the High Court of Cassation and Justice, which answers the request behind closed doors in civil proceedings. This decision does not need to be substantiated according to civil proceeding regulations and is not subject to appeal. The same holds true in criminal proceedings because in actual fact the rationale required under the Code of Procedure is reduced to indicating the texts of law.

Irrespective of the reasons put forth for a transfer request, which are only regulated in general terms,⁶⁶ so long as these reasons are assessed by the judge, a party may try to influence the decision. Nothing binds the panel of judges to indicate why they have approved the file's transfer. Furthermore, so far there have been no regulations that dictate criteria for selecting the court to which the respective case is transferred. This gives rise to major suspicions regarding the fairness of transferring a trial from one court to another. Lastly, in civil proceedings, the president of a relevant court is free to suspend a trial until a transfer request is resolved by the appointed panel, without needing to substantiate his or her decision (Art. 40, paragraph 2, Code of Civil Procedure). This amounts to undeniable meddling by an administrative body in the activity of the court that has jurisdiction over the case.

The defendant may offer a bribe in exchange for a lesser punishment. Judges' failure to adequately – if at all – substantiate their rulings in this respect turns their discretion in apportioning a sentence or defining the manner of serving it into an element that favours corruption or corruption suspicions.

Since possible errors of judgement – be they deliberate or not – are only addressed by means of common or special appeal forms, judges who have monopoly over last instance trials represent a vulnerable area. As long as there is no other court to assess their rulings, appeals judges will be the 'targets' of choice for bribe-givers, unlike judges in lower-ranking courts. Nonetheless, judges in lower-rank courts are also vulnerable, particularly those in towns farther away from cities where Tribunals are located. Citizens would rather try to 'get things done' at a local level rather than travel to another city to challenge the first ruling.

Committing a deliberate judicial error as a consequence of corruption may entail criminal or administrative penalties against that magistrate. In such circumstances, the erroneous ruling may be corrected through the revision procedure (Art. 322/4 Code of Civil Procedure, and Art. 394, paragraph 1 d, Code of Criminal Procedure).

⁶⁶ More specifically, the reasons mentioned in Art. 37, paragraph 2, Code of Civil Procedure: "A case transfer may also be requested for reasons of *legitimate doubt* or *public safety*. Doubt is viewed as legitimate when the impartiality of judges may be assumed to be affected by the circumstances of the case, the status of the parties or local. Public safety reasons are those circumstances which create the assumption that the trial held at the relevant court may distress public order." And Art. 55, paragraph 1, Code of Criminal Procedure: "The High Court of Cassation and Justice transfers a trial from the relevant court to a court of equal rank, in situations where the *impartiality of judges may be affected* by the circumstances of the case matter, by local enmities or the status of the parties, when there is a *danger of public disorder* (...)".

Attempts at corrupting a judge may target not only the outcome a particular ruling. There have been instances where bribes have been offered in exchange for speeding up the issuance of a ruling. But bribes can also be offered in exchange for delaying a proceeding. The unjustified deferral of hearings may push the case towards and past the prescription date, for instance. Also, attempts can be made to corrupt the judge who is charged with applying a ruling so that, after a prison sentence becomes final, the judge can order the court clerk to not issue the sentence-execution warrant.

Mention must also be made of the indirect effects of corrupting a police officer or a magistrate in view of a particular solution to a case; this may influence the life of that community because other states of affairs depend on that solution. For instance, failure to check information regarding a rigged bid may facilitate the completion of construction works in disregard of safety regulations which may jeopardise the lives of other people.

Bribing police members or even intelligence officers enables organised crime groups to operate more freely, which has a negative impact on the interdiction of such cases as trafficking in human beings (limited number of individuals), weapons smuggling (unlimited number of individuals), or drug smuggling.

A judge's failure to penalise an official who has broken the law may allow for fraudulent privatisation. For example, bribing a judge charged with resolving an appeal in a labour law case may lead to the confirmation of illegal discharge and may thus jeopardise the families of the discharged employees. An illegal exemption from the payment of taxes and charges for a company with sizeable debts to the public budget may deepen the budget deficit. Dangerous criminals may remain free thanks to information leaking from police or prosecutors or may be acquitted after bribing judges, which would jeopardise the safety of all citizens.

d. Clerks working with courts and prosecutors' offices are mainly involved in registering data and handling case files. Such court clerks are primarily entrusted with judicial administration activities.

In most courts in the country, the computerised assignment of cases to judges is entrusted to a specially appointed clerk. But while in theory the assignment of cases is done at random, when unethical connections exist between the respective clerk and the lawyer who files the lawsuit, the clerk may be persuaded to postpone the registration of data until subsequent cases are registered to make sure that the case is assigned to a particular judge.

Clerks may be corrupted into not issuing subpoenas to delay proceedings, or to remove evidence from the file to distort the truth. Procedural agents or mail employees may be corrupted by parties into altering or even destroying subpoenas or other documents sent to the parties. The parties may thus avoid or defer their appearance before

judicial bodies, or may have another chance at attending hearings that they have missed.

Bribes may also be offered to have a case file be hidden or, on the contrary, to be found and made more readily available to the parties in the archive. Parties to the lawsuit or even third parties, such as journalists, may offer a bribe in order to obtain copies of the documents in the file without the approval of the judge or senior court clerk. This might include copies of non-public documents such as transcripts of audio recordings.

Similarly, archive clerks may be bribed in order to secure the removal from the file of the logs of procedural steps that have been communicated to the parties, or to speed up the release of official documents certifying that a trial is in progress. In exchange for a 'present', a party or lawyer may be offered preferential access to documents in the archives, even outside working hours, or may be permitted to take files out of the archive or court building, which is prohibited by the internal regulation.

e. Experts are persons who have professional knowledge in a particular area, superior to that of the court in, and help the court clarify a case. As the following examples illustrate, expert knowledge can help a court make a decision. In cases regarding the return of value-added tax money, fiscal court judges will resort to auditors to calculate the exact amounts to be repaid by tax authorities (accounting appraisals⁶⁷). In a real estate case, the court will engage a topography expert to identify the plots under litigation (technical-judicial appraisals⁶⁸). In a case involving a car crash, the court will enlist a technical expert to establish the dynamics of the accident or a forensics expert specialising in graphology to make a determination when a signature on a particular document is being challenged (forensic appraisal⁶⁹). When the blood alcohol content of an individual driving on public roads comes into question, a retrograde BAC extrapolation report can be requested (forensic reports⁷⁰).

Expert reports constitute evidence, which means that such a report may guide a magistrate in forming an opinion and making a decision,

⁶⁷ G.O. no. 65/24.08.1994 on certification as auditor or chartered accountant, published in the Official Journal no. 243 of August 30, 1994.

⁶⁸ G.O. no. 2/21.01.2000 on the organisation of judicial and para-judicial technical appraisal activities, published in O. J. no. 26 of January 25, 2000.

⁶⁹ G.R. no. 368/03.07.1998 on the organisation and functioning of the National Criminalistics Institute, published in O. J. no. 248 of July 3, 1998; Art. 26 / 15 of Law no. 218/2002 on the organisation and functioning of the Romanian Police, published in O. J. no. 305 of May 9, 2002; Art. 1 (a) of H.G. no. 1411/02.09.2004, published in O.J. no. 833 of September 9, 2004 on the establishment of activities fully financed from independent revenues of the Romanian Intelligence Service; O.G. no. 75/2000 on certifying forensic experts, published in O.J. no. 407 of August 29, 2000.

⁷⁰ G.O. no. 1/2000 on the organisation and functioning of forensic institutions, republished in O.J. no. 996 of November 10, 2005.

which obviates the need for further evidence. Corrupting experts aims to secure favourable expert reports, which involves the perpetration of offences by the respective experts – forgery, when they draw up a written report or false testimony when they offer verbal clarifications to the court. When the findings and conclusions of the experts are influenced in this manner, the fairness of the decision made by the prosecutor or judge will obviously be distorted. When there are doubts with respect to how an appraisal has been conducted or to the conclusions reached by the experts, magistrates may order that a new appraisal from another expert or commission of experts. However, magistrates are not bound to give credit to the conclusions of either of the reports.

An alarming fact related to appraisals is that, for years, judicial bodies have lacked the funding needed to order such procedures. This is why courts have to persuade one of the parties to request an appraisal as evidence to the case, and to pay for the services of that expert. However, with the expert paid by one of the parties in the lawsuit prior to the judge's ruling, suspicions will naturally arise as regards the objectivity of the conclusions in the appraisal report.

We should also mention a disquieting aspect related to the official appraisal report – although the law allows for the participation of an authorised expert proposed by a party to the lawsuit, this expert may not, under the law, intervene in the progress of the appraisal. The expert may only submit to the judicial body his or her comments regarding the issue under analysis and the report. In other words, the official appraisal necessarily involves a State monopoly— that of the “Mina Minovici” Forensic Pathology Institute and the National Forensic Institute.

Forensic appraisals also involve areas for which there is a small number of experts⁷¹ which means that should an initial report be challenged, there would be no expert to *run a new appraisal*. Therefore since the findings cannot be checked, these areas become vulnerable to corruption. Even in other areas, where both an initial and second report can be made (by an expert and team of experts, respectively) so long as they are not subject to checks by experts from *outside the official system*, there will be no experts to check these conclusions. For instance, if one party to a lawsuit files a complaint against a forensic expert for forgery in relation to the conclusions in a particular report, judicial bodies should investigate the allegations by requesting the opinion of another expert. But when the second expert works with the first one, in the same institution, accountability may be lost. Due to the organisation of the system, official experts may offer whatever conclusions they want or are requested to give, and no authority can

⁷¹ Such appraisals are conducted by the National Forensic Institute (INEC), subordinated to the Ministry of Justice; INEC has around 30 official experts at a national level.

hold them accountable for their conclusions⁷². The obvious solution is to immediately give up the state's monopoly and promote the liberalisation of this profession⁷³.

A particularly special situation concerns *toxicology tests*. Thus, when an individual is suspected of drunk-driving, the police officer measures the breath alcohol content using the breath test. If the test reveals a blood alcohol content of more than 0.40 mg/L, the driver shall be taken to a healthcare unit for the drawing of blood samples. If a concentration of over 0.80 g/L of pure alcohol is found in the blood then this becomes an offence that carries a potential sentence of one to five years in prison⁷⁴. Therefore, offenders who intend to avoid prosecution will try to corrupt either the police worker (to persuade him/her not to take the offender to the clinic or to delay obtaining the samples, so as to allow the alcohol concentration to drop), or the healthcare personnel (to persuade them to alter the findings). If a criminal investigation has been launched, the suspect may request a retrograde BAC extrapolation test, which is conducted at the premises of the 'Mina Minovici' Forensic Pathology Institute.

In such a scenario, the suspect may admit to having drunk alcohol, but claim that the amount of alcohol was smaller than the actual one, and could also falsely claim that right before the stop he or she had ingested a large amount of food. By taking this into account and using factors such as the driver's weight and age, the forensic expert can conclude in the report that the BAC was lower than the actual figure⁷⁵. This figure should only serve as a guideline for the magistrate; the accused needs to produce evidence to substantiate his or her claims regarding the time frame, and amount of food and spirits consumed.

In criminal cases, we must also mention the importance of favourable appraisal reports drawn up by forensic pathologists with

⁷² See the newspaper *Gardianul* of 10 September 2007, "State monopoly in appraisal mafia," at www.gardianul.ro/index.php?pag=nw&id=100767.

⁷³ *Societatea pentru Justiție* agrees with this position. See the news release of 17.11.2008 at www.sojust.ro.

⁷⁴ See Art. 88 and Art. 89 of O.U.G. no. 195/12.12.2002 on driving on public roads, republished in O.J. no. 670 of August 3, 2006, with subsequent amendments.

⁷⁵ After ingestion, alcohol is absorbed by the body at a rate that depends on the concentration of the drink, the speed of ingestion, the absence or presence of food in the stomach. On an empty stomach, 90-95% of the alcohol enters the bloodstream in 30 minutes, whereas when food has been ingested, the absorption process can be prolonged to up to 90 minutes. The maximum BAC level is reached in 30-90 minutes after ingestion, depending on the amount ingested; the alcohol dissipation rate is 0.10-0.30 g % per hour, depending on the extent to which the body is accustomed to drinking alcohol. Therefore, although a police officer may, for instance, establish a breath alcohol content of 0.75 mg per litre, i.e. roughly 1.5 g of pure alcohol per litre of blood (much over the 0.8 ceiling), if the forensic expert takes into account the suspect's claims of having just drunk 500 gr. of brandy, 1 l of wine and eaten a large serving of meat, rice and salad, the expert may conclude that when the suspect was caught drunk driving, the BAC increase curve was at an initial phase and may put the BAC at 0.75 g % (which is below the 0.8 ceiling), rating the misdeed as a misdemeanour, rather than as a felony offence.

respect to a *serious disease*, from which the convicted offender may suffer as grounds for the suspension or termination of the sentence, and of appraisals drawn up by forensic psychiatrists to assess the suspect's mental state at the time of the crime's commission. The existence of means to avoid serving prison sentences (in the former case)⁷⁶, or any form of criminal liability (in the latter case)⁷⁷, renders these forensics areas corruption targets.

Lastly, the severity of injuries is measured by the *number of health care days*. The judicial status of the misdeed and the severity of the sentence will vary with this number. Therefore, the forensic pathologist may be 'greased' by the offender in exchange for concluding that an injury requires a shorter number of days of medical care than it actually does, which is enough to ensure a milder sentence.

Interpreters are a special type of experts who are charged with the translation of written documents and the interpretation of oral debates held before judicial bodies. Interpreters may be corrupted by individuals who seek to provide the court information that differs from reality; the language barrier prevents the court from recognising the discrepancy.

f. Penitentiary workers may be bribed in exchange for providing a prisoner with imprisonment standards other than those stipulated under the law⁷⁸. A prisoner, a prisoner's relative or the prisoner's lawyer may offer a bribe in order to facilitate an easier job for the prisoner, preferential contacts with visitors, or extra visits and parcels. Prison guards may also be corrupted into allowing prisoners to use certain goods illegally such as telephones, drugs, or alcohol.

Agreements between the prisoners taken out to work and the personnel overseeing them, or between prisoners being transferred or taken to court and their escorts, may facilitate an escape. The officer in charge of prisoner records may receive a bribe in exchange for modifying certain data within the records to ensure a shorter time of imprisonment. The manager of a work site may receive a bribe in exchange for having prisoners work for private beneficiaries. The discipline officer may be bribed, so as not to penalise a prisoner guilty

⁷⁶ According to the media, claustrophobia, deviated septum and testicular atrophy were reportedly considered, under certain circumstances, as medical reasons requiring the suspension of a prison sentence. See "Prison break with medical certificate – from testicular atrophy to glaucoma" in the newspaper *Gândul* of 02 February 2009, at <http://tinyurl.com/scutiremed>.

⁷⁷ A doctor's inaccurate diagnosis of a terrorism suspect enabled him to be freed, enabling him to later flee the country. See "Prosecutor N. – dismissed, Dr. T. from Rahova – charged with fraud," in the newspaper *Curentul* of July 25, 2006 at <http://tinyurl.com/hayssam>.

⁷⁸ Law no. 275/04.07.2006 on the execution of sentences and of measures ordered by judicial institutions during, published in O.J. no. 627 of July 20, 2006; G.H. no. 1897/21.12.2006 approving the bylaws for Law no. 275/2006, published in O.J. no. 24 of January 16, 2007.

of a disciplinary offence (which would otherwise prevent the prisoner from receiving certain benefits) or in order to offer illegal rewards to the prisoner.

A prison warden may receive a bribe in exchange for signing release documents, and the head of the National Penitentiary Agency may be persuaded to approve the transfer of a prisoner to another penitentiary with a lower security level. Prison doctors may request and receive bribes in order to ensure inmates access to illegal substances.

Corruption may also target the members of commissions that have a monopoly over customising the sentence so as to help the prisoner secure an open or semi-open, rather than a closed, detention sentence. The delegate judge for the execution of sentences may receive a bribe in exchange for ordering a change of regime. Also, these members, who make up the parole commission, may be subject to bribe attempts in exchange for proposing the release of a prisoner prior to the completion of their sentence, even when the prerequisites have not been met.

g. Another special type of expert is the **insolvency expert**. These are the specialists involved by syndic judges in corporate bankruptcy procedures⁷⁹. Without criteria for the appointment of liquidators, syndic judges maintain full discretion and may develop connections with the parties involved. Given that liquidator fees are substantial, these experts are eager to be involved in as many cases as possible, particularly when they involve large companies. As such they may be willing to split the fee with the judges to ensure an appointment.

h. The trial equation must not overlook the **witnesses**. While there are situations where witnesses report distorted facts to judicial bodies because of their erroneous perception of reality or because of their age, various disabilities, weather conditions, etc., there are also situations where witnesses provide false testimony after having been 'bought' by a party to the lawsuit⁸⁰.

i. There may also be situations when **lawyers** are bribed by the opposing party, in exchange for not properly representing the interests of their clients. But more often than not, court users hope to corrupt magistrates via their lawyers, who are thus likely to be accused of trading in influence. The most vulnerable are those lawyers who have previously worked as magistrates, police officers or court clerks,

⁷⁹ G.E.O. no. 86/08.11.2006 *On the organisation of insolvency experts*, published in O.J. no. 944 of November 22, 2006.

⁸⁰ There have been cases where testimonies by fictional witnesses have been attached to a case file (particularly assisting witnesses), or statements have been drawn up by police workers or prosecutors themselves, in order to ensure apparent credibility to the accusations they have made against certain individuals. See Society for Justice, *The Judicial System in Romania – an independent report*, 2007, at www.sojust.ro.

because parties in the lawsuit hope that these lawyers have remained in touch with their former co-workers. Indeed, in practice such categories have easier access to the information in the system and to the offices of their former colleagues.

Situations arise when lawyers request amounts of money that they claim are intended for the prosecutor or judge, in order to ensure a favourable ruling, but which they pocket without actually contacting the magistrate. Given the widespread corruption perception and the stake of the case, parties will be tempted to pay such amounts. In fact, depending on the nature of the case, certain rulings may be foreseen by those who request the money to pay the bribe. For instance, this may occur when judicial practice in a certain type of case has been consistent (e.g., a conditional suspension of sentences for first-time offenders and minor offences), or when procedural objections are raised, which are certain to be accepted by the court. When the predicted ruling takes place, the uninformed parties remain under the impression that the bribe has reached the magistrate. This is why, in opinion polls regarding the corruption of magistrates, court users will erroneously answer that they have personally experienced magistrate corruption.

There are also cases when, in order to conceal their own incompetence, some lawyers mislead their clients into believing that the opposing party has bribed the judge. Once again, this generates inaccurate perceptions among court users with respect to the corruption of magistrates.

However, trading in influence and fraud may also be committed by police workers, prosecutors and judges, who may promise to talk their colleagues into passing favourable rulings for bribers, even though the outcome of an individual's situation is a foregone conclusion.

j. We could also think of other corruption offences involving other professionals who play a part in the administration of justice. For instance, a debtor may bribe a **bailiff** into delaying a foreclosure or into excluding certain assets from the foreclosure procedure. Similarly, **probation officers** may be corrupted in exchange for obtaining a favourable assessment report thereby prompting the judge into ordering conditional release. **Social workers** may also be subject to target attempts by parents to ensure a recommendation that the child in question be entrusted to that parent.

k. Corruption may also affect **integrity inspectors** working with the National Integrity Agency (NIA). They have the authority to check how public-office holders, magistrates and civil servants meet their legal obligations regarding the declaration of their assets, incompatibilities and possible conflicts of interests. If they are subject to pressure coming from either the inside of the institution (e.g., from the body charged with the professional assessment of inspectors' work), or

the outside (e.g., via members of the National Integrity Council⁸¹), the accuracy of investigations may be impaired.

4.3. Weaknesses in the administrative area

As indicated above, in organisational terms judicial institutions operate just like any other public institutions, and the vulnerable areas in this respect are those that make purely *administrative* decisions. These ultimately support the functioning of judicial institutions, thus rendering the following areas vulnerable to corruption:

a. Human Resources Department

Judicial bodies, non-governmental organisations and the media have often reported cases of candidates 'buying' questions that appear on exams for senior positions in prosecutors' offices⁸², applicants in courts being tested by people with whom the applicants had direct administrative relations⁸³, nepotism among National Penitentiary Administration (NPA) personnel⁸⁴, 'connections' used in recruiting Police and Gendarme Corps⁸⁵ staff, applicants seeking admission to Justice Ministry⁸⁶ or notary public⁸⁷ offices and who are examined by their own co-workers, experts obtaining the right to conduct expert appraisals in

⁸¹ In fact, the interim EC report to the European Parliament and Council regarding Romania's progress in the Cooperation and Verification Mechanism, of 12 February 2009, reads: "The Agency successfully countered an attempt made by a member of the National Integrity Council, which oversees the Agency, and aimed at influencing the decision-making on a certain case."

⁸² News release issued by the NAD, May 6, 2008, at www.pna.ro: four prosecutors, one judge and one notary sent to court under charges of fraud, after having illegally accessed exam questions in a prosecutor promotion contest in October 2007.

⁸³ News release issued by UNJR, November 30, 2007, at www.unjr.ro: "Judges, some of them holding senior positions, have been tested by other judges holding senior positions in courts within the jurisdiction of the same court of appeals, in a promotion contest in courts".

⁸⁴ Gândul, May 29, 2007, *Penitentiary chief, accused of hiring his relatives in Dolj County jails*, at <http://tinyurl.com/penitfamilie>. Memorandum no. 252122 of 22 January 2007 addressed to the Justice Minister: about half of the 12,000 employees have family relations, with genuine clans forming within penitentiaries; the general manager of the NPA tried to talk the examination commission into having two of his relatives and their landlord employed in the system.

⁸⁵ Cotidianul, November 6, 2007, *MAI staff complains about connections*: According to a survey carried out by the General Anti-corruption Directorate, the perception of the personnel is that people get employed in the Ministry of Administration and the Interior by using "connections."

⁸⁶ Cotidianul, October 22, 2007, *Clan C. gets grip on justice*, at www.cotidianul.ro/clan-nul_chiuariu_acapareaza_justitia-34398.html: In a Justice Ministry contest for the filling of judicial expert positions of similar rank to magistrate posts, applicants included several advisers to the Minister, and the examination and validation commission also included advisers to the ministers, who worked in the same office with the applicants.

⁸⁷ Cotidianul, October 23, 2007, *C. ward gets to be a notary*, at www.cotidianul.ro/pupila_lui_chiuariu_a_ajuns_si_notar-34467.html: An adviser to the minister competes for a notary public post, and the examination commission includes another adviser to the minister, working in the same office with the applicant.

areas in which they are not specialised⁸⁸. We also mention the use of penitentiary vehicles for personal purposes and the construction of private buildings by penitentiary commanders who use convict labour⁸⁹. In every bar admission contest, rumours persist about the amounts of money that applicants allegedly pay to senior lawyers in exchange for being accepted as apprentice lawyers⁹⁰. Some lawyers have admitted to this practice, but none have officially notified the relevant authorities about it.

In all contests, the most vulnerable test has been the *oral examination*. Because passage is at the discretion of the examiners and that, as a rule, no means to challenge their decision, such tests leave applicants in doubt with respect to the objectivity of the examining commission. On the other hand, this method of assessment leaves the general public suspicious, based on reasonable indications, that obvious conflicts of interests help perpetuate group interests to commit criminal acts. Also, appealing negative examination results becomes vulnerable to corruption – the applicants who lose the appeal may be willing to offer a bribe in exchange for a review of their initial score, which implicitly enhances their likelihood of promotion.

Therefore, because of flawed legislation and abusive practices, magistrate career-decisions may be far from objective and can include: the appointment of court presidents or senior prosecutors; promotion as an HCCJ judge⁹¹ and appointment to leading positions within the HCCJ, the prosecutor's office affiliated with the HCCJ and the National Anti-corruption Directorate; admission to the magistrate corps by means of interviews at the SCM for lawyers with more than 10 years' experience or former magistrates⁹²; the appointment or revocation of

⁸⁸ Ziua de Cluj, May 9, 2005, *Dribbling the Justice System*, republished by Hotnews-regional news, at <http://tinyurl.com/driblare>. After having retired as an official expert from the National Criminalistics Institute, a chemist reportedly procured, through the director of the Human Resources Directorate in the Justice Ministry, an identification card certifying his right to work as an authorised forensic voice and speech expert; he allegedly used this identification card in court and obtained the right to conduct appraisals for which he had no qualifications and had sustained no verification.

⁸⁹ Gazeta de Nord-Vest, January 28, 2005, *Theft and corruption in jails*. Ziua, August 12, 1998, *Chief of Găeşti Penitentiary forces inmates to work his land*, at www.ziua.net/display.php?data=1998-08-12&id=11964.

⁹⁰ *Cast charge*, Clujeanul, August 9, 2007 (*10,000 euros if you're lucky. 50,000 euros if you have no recommendation*) <http://old.clujeanul.ro/articol/ziar/cluj/taxa-de-casta/16670/14> and *Can't it be done without bribe?*, Clujeanul, 15.08.2007 <http://old.clujeanul.ro/articol/ziar/cluj/nu-se-poate-fara-spagac/16761/307/>; 10,000 euro is also the charge mentioned in *Bar admission scandal*, Viaţa liberă, Galaţi, January 10, 2008, republished at <http://bota.ro/wp-content/uploads/2008/01/spagagalati.doc>.

⁹¹ Without criteria for a comparative assessment of applicants for HCCJ judge posts who meet all legal requirements, the SCM decided, for instance, in an August 2005 contest, to reject 28 applicants without indicating the exact reasons from their career backgrounds that did not meet the requirements. This enabled some of the applicants rejected in October to be admitted in a subsequent session, in November 2005. The same happened in subsequent years. See www.csm1909.ro.

⁹² Between September 2005 and August 2008, the SCM interview procedure, as defined under Art. 33, paragraphs (5) – (10) of Law No. 303/2004, abrogated today, resulted in the appointment of 111 applicants as judges and of 145 applicants as prosecutors.

magistrates as inspectors⁹³; the secondment or termination of secondment for a magistrate; the transfer of judges to prosecutor posts and vice-versa; or even the approval of the participation of magistrates in workshops in the country or abroad. The SCM maintains an exclusive monopoly over all these decisions and needs not explain their basis (the mere indication of the law texts does not qualify as justification), nor whether the decisions have been based on objective and transparent criteria. Such seemingly arbitrary appointments create the perception of genuine loyalty networks (such as cronyism, which affects the very independence of the agent), that lead to the perpetuation of abuse and corruption.

Contests for high-ranking positions in courts and prosecutors' offices include oral tests, in which applicants present a project suitable for the position for which they apply. In these examinations, questions differ for all applicants, scores are not measured against established criteria drawn up beforehand, and decisions need not be explained. Furthermore, SCM nominates the members of promotion or appointment commissions, and presidents of courts of appeals. Prosecutors-general nominate the members of admission and promotion commissions for auxiliary personnel without any methodology whatsoever – no database of eligible candidates is put together, commission members are not nominated randomly, and their revenues ensured by the membership to such commissions. This strengthens suspicions that the personal preferences of those in charge of nominations play the key role in the nomination process.

This is why, for example, all contests for high-level positions in courts and prosecutors' offices organised by SCM through the National Magistracy Institute between 2005 and 2007 were distorted by the nomination of members who either did not meet legal prerequisites, or were involved in conflicts of interests with the applicants⁹⁴. This proves not only the lack of responsibility of some magistrates with respect to para-judicial activities, but also the ignorance or even deliberate violation of national administrative law and of international regulations on integrity and conflicts of interests⁹⁵. Just like in any other

⁹³ Thus, according to a news release issued on 26 February 2008, the SCM ordered the termination of secondment for all inspectors in the Judicial Inspection Division. Without explanations based on objective criteria, and considering that the Judicial Inspection Division, currently made up exclusively of seconded magistrates, operates under the coordination of SCM, one may easily assume that these inspectors had "differences of opinions" with SCM members, particularly as inspectors have the power to check and investigate disciplinary and ethical faults of SCM members. Moreover, to prove that there are no criteria for revoking and hiring SCM inspectors, the SCM news release of 09 April 2009 lists the name of the new inspectors, and some of them are selected precisely from among those who had just been revoked.

⁹⁴ Societatea pentru Justiție, *News release issued 07 January 2008*, at www.sojust.ro.

⁹⁵ One may argue that, at that time, the national legislation did not deny commission membership to a court colleague of one of the applicants. But provisions for neutrality, impartiality, objectivity and aspect regulated in the *Model Code of Conduct for Public Officials* adopted through Recommendation no. (2000) 10 of the Council of Europe Committee of Ministers, do apply.

institution, corruption may take the form of the employment of certain persons, spouses, relatives, or friends.

Relevant in this context are the findings of a Gallup survey of January 2008: 27% of the court clerks answered that, when the institution where they work employs personnel, informal connections with existing staff are important, 20% say kinship relations are important, and 3% mention gifts or money offered to institution employees.

The same methods can be used in order to influence assessment of personnel or promotion decisions. In the same survey, 43% of the court clerks say promotion should be based on individual merit, which reveals major uncertainty regarding fairness in the sector.

b. Payroll

Court clerks are given bonuses and incentives by the head of the institution, according to unpredictable, non-transparent and subjective criteria. Therefore, the head of the institution may attract *obedient* employees by offering them certain amounts of money, discounted resort packages, payment for participation in workshops, etc. For instance, a Tribunal president may decide to give a performance bonus to an employee, who will then be nominated as a member of the Tribunal's auction commission and who will be entrusted with the 'mission' of guiding the procurement of goods and services for the court in the direction chosen by the president.

Non-governmental organisations and the media have revealed arbitrary bonus and incentive policies in institutions such as the Justice Ministry, National Penitentiary Authority and the Superior Council of Magistracy⁹⁶. In such cases, the arbitrary allocation of money may cast doubt upon the integrity and appropriateness of the personnel.

c. Public Procurement

Like any public institution, courts, prosecutors' offices, police units, penitentiaries need to purchase various goods and services to ensure their operation. Public procurement legislation is applicable and takes the forms of direct assignment of contracts, public bids, etc. In order to manipulate a bid towards a certain beneficiary, the companies invited to tender bids may be limited, or the tenders received from an open process may be assessed in an arbitrary manner. When such commissions include magistrates, chances to expose irregularities or penalise commission members become diminished given that possible complaints regarding the bid will be filed to that specific court. Naturally, all individuals involved in public procurement may be subject to corruption. This can involve people such as the officer in charge of the procurement procedure, the financial expert who motivates the

⁹⁶ See a news release headlined *The indecency, hypocrisy and disdain of the executive power*, issued on 26 September 2008 by the National Union of Judges in Romania, available at www.unjr.ro.

need for procurement, the decision-maker who approves the need and the procedure, the assessors who select the winning tender, the jurist who drafts and signs the contract, or the acquisition manager who oversees the contractor and the payments.

Mention must be made, in the same context, of the possibility of embezzling institutional funds. This category may include, among others, the abusive use of the institution's vehicles, telephones, office supplies, or even the refunding of rent or transport expenses. However, these are instances of administrative misconduct or trading in influence, and must not be mistaken for corruption deeds; the definition of this concept, as mentioned above, has to do with the "power entrusted" to an individual.

5. Combating corruption in the justice system

As an element with a negative impact on the impartiality of decision-makers, corruption affects the quality of the decisions thus made. We have discussed above what corruption is and where it may be encountered in the judicial system. We will now move on to the causes of judicial corruption and its forms. We will also analyse the means used for corrupting judicial personnel, and indicate how the contact between the individual being corrupted and the corrupting agent takes place. Finally, we will identify types of corruption and the effects it may have on the personnel, the system, and, indirectly, society.

5.1 Causes of corruption

Corruption is a complex social phenomenon. The causes of corruption and circumstances that favour its emergence are manifold and can range from judicial elements⁹⁷ to political ones⁹⁸, from administrative elements⁹⁹, to social and economic ones¹⁰⁰. As far as the judicial system is concerned, the causes and factors that contribute to the spreading of corruption or of perceived corruption are:

a. A shortage of information

- *Personnel conduct.* A judicial body's unfamiliarity with the case file, disinterest in a speedy resolution of the case, granting of unjustified deferrals, or lack of familiarity with the internal circuit of documents or

⁹⁷ E.g., legislative instability, incomplete regulations, inconsistencies between laws, unpredictable court rulings, inconsistent judicial practice,

⁹⁸ E.g., Parliament decriminalises corruption offences, or regulates milder sentences, or even plans to dismantle anti-corruption institutions; the president of the country pardons individuals sentenced for corruption; MPs block prosecution in corruption-related cases involving ministers.

⁹⁹ E.g., the conduct of civil servants, bureaucracy, lack of authority.

¹⁰⁰ E.g., social disparities and aspiration for well-being and comfort.

where to find a piece of information, will be taken by citizens to mean either that the personnel's interest in the respective case must be 'stimulated', or that these elements hint to a bribe request;

- *Lack of information on how the system works.* Often, citizens are not aware of their rights and have no access to information on how the Romanian judicial system works to protect their rights. This creates a population vulnerable to deception by individuals who demand bribe in exchange for ensuring or speeding up a solution to a case;

- *Inadequate access for citizens to legislation.* Romanian legislation is available without cost only in certain circumstances¹⁰¹. Legislation is not accessible to all foreigners or ethnic-minority court users because lacks translations in international and ethnic-minority languages. The guidelines currently posted on the web sites of various institutions, or in some courts, are in most cases excerpts from texts of law, rather than leaflets that explain to regular citizens what their rights are and the procedural means by which to protect these rights;

- *Poor access to jurisprudence.* Free software containing jurisprudence only exists and is used within certain courts and prosecutors' offices. The public has no access to any database, not even for cases in which they are involved. Since 31 January 2006, all courts have been required to make their jurisprudence public via the Internet¹⁰², but there are some which, even today, have failed to publish the required data. At this point, the development of an application, Jurindex, is under way. So far, the application includes the rulings passed by courts of appeals in 2008;

- *Improper cooperation with mass media.* Confidential information often leaks out during judicial proceedings, most often due to 'understandings' between certain journalists and employees. For instance, if the chief of a judicial institution exchanges information with the media on a regular basis, this official can benefit the media suppressing the publication of public criticism targeting the official or the institution's activities, or the official may be able to use the media outlet for personal revenge or pressure.

b. Lack of control and accountability

- *Lack of judicial democracy.* Unfortunately, unwritten rules still underlie the judicial system and are perpetuated because of a lack of culture of professional ethics. Such rules include, but are not limited to, that bosses not be criticised, incompetence be concealed, corruption not be revealed, media be won over, the institution's union must be weakened or discredited, or that their leaders must be denied power of representation;

¹⁰¹ The government offered a web site, <http://legislatie.just.ro>. But in order to access a normative act, the interested party must already be familiar with two basic items of information: the number of the law and its date.

¹⁰² Portal of courts of law, at <http://portal.just.ro>.

- *Non-involvement of civil society in monitoring the system.* Courts and prosecutors' offices are closed to cooperation with non-governmental organisations that identify specific organisational flaws; where external assessment reports exist, they are overlooked and their conclusions and recommendations are not implemented;

- *Poor professional competence.* Both independence and integrity are based on thorough professional training. Where these qualities are absent or insufficient and where personnel receive opportunities for extra gains, the chances for corruption increase;

- *Excessive bureaucracy and disorganisation.* The convoluted circuit of files and primary data, lengthy and inflexible procedures for public relations, rude civil servants who pass citizens from one office to another, may cause people to feel they have no other option than to resort to connections within the system and commit acts of corruption. These issues are facilitated by the inadequate monitoring of administrative procedures within the institution, the failure to apply administrative sanctions in due time or in full, or the concealment of unethical deeds;

- *Fear of retaliation.* Any employee who is aware of illegal or unethical deeds committed by his or her colleagues, superiors or subordinates is under a legal and moral obligation to report them to relevant institutions. Because of the risk of exposure, few misdeeds are actually reported, although failure to notify judicial bodies upon discovering a misdeed at the workplace is, in itself, a crime¹⁰³. Professional ethics codes of the police and penitentiary personnel are the only ones that specifically prohibit tolerance for corruption misdeeds and oblige employees to inform superiors and competent bodies for misdeeds that have come within their knowledge¹⁰⁴ breaching these provisions may entail administrative, civil or criminal liability. In fact, in a January 2008 Gallup survey, 29% of the court clerks answered that they were not encouraged in their institutions to notify cases of misconduct without fear of retaliation, while 42% said they were not encouraged to criticise certain decisions of their superiors. To ensure protection against retaliation targeting the individuals who report illegal or unethical deeds, two laws have been passed: the *witness protection law*¹⁰⁵ and the *law on the protection of the integrity of whistleblowers*¹⁰⁶. Worth mentioning in

¹⁰³ The law binds an individual who becomes aware that a *work-related crime* has been committed to immediately notify a prosecutor; the same obligation holds for persons employed in leading positions, with respect to *any crime* perpetrated in that institution (Art. 214 and 227 Code of criminal procedure, and Art. 263 Criminal Code, respectively), or for officials with power of inspection and who also have data and information on crimes coming under the jurisdiction of the NAD (Art. 14, paragraph 1 in G.E.O. no. 43/04.04.2002);

¹⁰⁴ Art. 19 in the Code of professional ethics of police workers, Art. 6(k) in the Code of professional ethics of penitentiary personnel.

¹⁰⁵ *Law no. 682/19.12.2002 on the protection of witnesses*, published in O.J. no. 964 of December 28, 2002.

¹⁰⁶ 101 Whistleblowers are those employees of an organisation, or former employees or members of certain organisations who report violations of laws and regulations, frauds,

this context are the roles of the mass media and trade associations, which are critical to exposing abuse cases given that public pressure is effective most of the times;

- *Flawed accountability mechanisms.* Corruption blooms where the risk of exposure and penalties is low. At present, with the abolition of the mechanism for action in cancellation (special appeal measure used against final judgements), court of appeals judges may rule as they please, because there is no possibility to challenge it (the judgements are final)¹⁰⁷.

The danger of arbitrary rulings is therefore quite high. Although severe errors of judgement have been reported over the years, there have been no penalties whatsoever for those who have made them. In spite of provisions regulating civil and criminal liability, impunity with respect to errors committed deliberately or out of serious negligence entails significant costs for court users and society and strengthens the sentiment that magistrates are above the law. Also, tolerance for such cases (only few so far), brings most of the magistrates and other civil servants, even the honest ones, into disrepute. Adding to these is the *low risk* that the dishonest civil servant will be penalised. The lack of integrity is further deepened by the discouraging failure to penalise the corrupt. As we will indicate below, in practice the fines ordered by courts for corruption offenders are rather small. Unless such offenders receive harsher punishment, lose their jobs, or are subject to a lengthy trial, the culture of impunity is able to persist, which further generates corruption¹⁰⁸;

- *Regulations that allow for discretionary decisions.* Corruption may affect decisions made by police and prosecutors to commence prosecution, transfer cases from a criminal investigation body to a prosecutor, transfer cases from a case prosecutor to a higher-level prosecutorial agency, determine whether the criteria applied in a penalty will be administrative penalty rather than criminal, or decide which scale of sentences will be issued by judges.

This may occur because the aforementioned decisions are based on general criteria stipulated by law, with the wide discretion of the judicial body playing a key role¹⁰⁹. This discretion explains why judges

corruption misdeeds that they have witnessed or discovered, to those parties who are able or willing to take the required corrective measures, either within the system (superiors, colleagues), or from outside the system (mass media, *watch-dog* organisations, jurists). Such whistleblowers uncovered major irregularities in private companies, e.g., tobacco producers or even the F.B.I. or European Commission.

¹⁰⁷ The acknowledgement of Errors of judgement is still a taboo in Romania. The media covered possible major errors in cases such as Jundrea and Vișan. In other countries, there are heated debates on the topic – see cases such as Dreyfus, Villemain, Toulouse or d'Outreau in France, or *The Innocence Project* in the USA.

¹⁰⁸ UNDP, *Anticorruption practice note*, 2004, quoted above.

¹⁰⁹ We mention once again the UNDP definition of corruption: *Corruption = (Monopoly + Discretion) - (Accountability + Integrity + Transparency)*; and the Klitgaard definition of corruption: *Corruption=Monopoly + Discretion - Accountability*. "Accountability" first of all means "transparency".

may rule differently in similar cases. For instance this may explain why, in similar offences committed under similar circumstances, sizeable differences occur between outcomes in distinct courts, some suspects are arrested and others are not, or why sentences for certain prisoners granted and others are denied.

The law itself uses the word "weigh" with respect to judges' power to decide on the notification of other bodies that may apply administrative sentences to an individual under criminal investigation¹¹⁰; to order the revision or amendment of appraisal reports¹¹¹; to decide to revoke preventive arrests¹¹²; to approve the assignment of public judicial assistance for those who cannot afford a lawyer¹¹³; to order the deferral or suspension of a sentence¹¹⁴; to shorten hearings dates in urgent cases¹¹⁵, with respect to prosecutors' power to request preventive arrest¹¹⁶, its replacement or its revocation¹¹⁷, or with respect to prosecutors' power to settle civil cases¹¹⁸. Also, the word "weigh" is often met in the explanatory memoranda of judicial rulings, which suggests that the ruling is based on subjective elements. Instead, we firmly believe that judges cannot "weigh" a *de facto* state, but can only "acknowledge" it; they cannot "weigh" a *de jure* state, but "establish" it; they cannot "weigh" whether a defendant must be sentenced, but "decide" on it. The only "weighing" that is permitted under the law regards the evidence, but in such instances the word is used in the sense of "evaluation" of evidence, i.e., a logical operation.

c. Opportunities

- *Small salaries.* The monthly incomes of magistrates are reasonable¹¹⁹, but those of auxiliary personnel, particularly those of archive clerks and procedural agents, are very small, which may encourage administrative corruption. An increase in income is not the only safeguard against corruption (in fact, between 2005 and 2008 magistrate salaries were doubled, yet the number of corruption cases involving judges and prosecutors also rose). This must be accompanied by a change in attitudes, by the establishment of a merit-based professional system, and by the adoption and enforcement of anti-corruption regulations;

¹¹⁰ Art. 12 Code of Criminal Procedure.

¹¹¹ Art. 115 paragraph 2, Code of Criminal Procedure.

¹¹² Art. 140³ paragraph 7, Code of Criminal Procedure.

¹¹³ Art. 171 paragraph 2 and Art. 172 paragraph 3, Code of Criminal Procedure.

¹¹⁴ Art. 453 paragraph 1(a), Code of Criminal Procedure.

¹¹⁵ Art. 89 paragraph 1, Code of Civil Procedure.

¹¹⁶ Art.138 paragraph 3, Code of Criminal Procedure.

¹¹⁷ Art.139 paragraph 31 Code of Criminal Procedure.

¹¹⁸ Art. 45 Code of Civil Procedure.

¹¹⁹ Courts of law, tribunals and courts of appeals employ approx. 4100 judges. Their net monthly wages currently range between RON 1,900 and 6,670, which does not include the 50% bonus for risk rate and stress, a right which is currently subject to dispute. See the news release issued on January 13, 2009 by the National Union of Judges in Romania, at www.unjr.ro. 1 Euro = 4,3 RON, 1 SUA Dollar = 2,9 RON (november 2009).

- *Constraints imposed by the nature of the position.* The law prohibits judicial personnel from being employed in other positions, except for certain teaching posts in *higher* law schools. This prohibition unreasonably affects, among others, the auxiliary personnel in courts and prosecutors' offices, who cannot obtain legally additional revenue, although they are not involved in judicial decision-making;

- *Direct contact with the public.* Discretion, combined with direct contact with the public, generates weaknesses. Extended activity at the same post also creates similar effects: if someone works for a long time in the same position, relationships are created, both within and outside the institution that may encourage the concealment of corruption and preferential treatment. This may occur particularly among those employees who have direct contact with the public, but also among those in auxiliary departments (e.g., human resources);

- *High-profile cases.* Thirst for quick and easy money is provoked by contact with cases whose parties are involved with highly valuable assets, or politicians / businessmen under criminal investigation, all of whom who can afford to offer hefty amounts of money or other benefits in exchange for favourable rulings.

d. Social circumstances

- *Attending the same schools, associations and circles, as well as close kinship relations.* Such relations facilitate direct contacts with individuals holding judicial offices, which may encourage bribe-giving and the trading in influence. The high threat posed by such relations between magistrates, court clerks, police workers with their former colleagues who have become lawyers, and by politicians who are also lawyers, prompted the legislature to introduce a number of constraints to practicing law.

ART. 82¹ of Law No. 161/2003:

(1) *Those Deputies or Senators who, during their parliamentary term in office, wish to also practice the lawyer profession, cannot present arguments in cases tried in courts or tribunals, nor can they provide judicial assistance to prosecutors' offices falling under the jurisdiction of these courts.*

(2) *Those Deputies or Senators mentioned in paragraph (1) cannot provide judicial assistance to defendants or respondents, nor can they assist them in court in criminal cases concerning:*

a) corruption offences, offences likened to corruption offences, offences directly related to corruption offences, and crimes against the financial interests of the European Communities, as laid down in Law no. 78/2000 on preventing, uncovering and penalising corruption misdeeds, with subsequent amendments;

b) offences defined by Law No. 143/2000 on fighting against human beings trafficking, with subsequent amendments;

- c) crimes concerning the trafficking in human beings and offences related to trafficking in human beings, as stipulated in Law no. 678/2001 on preventing and combating human beings trafficking, with subsequent amendments;
- d) offences of money laundering, as stipulated by Law No. 656/2002 on preventing and punishing money laundering, with subsequent amendments;
- e) offences against state security, as defined in Art. 155 – 173 of the Criminal Code;
- f) offences that prevent the enforcement of justice, as defined in Art. 259 – 272 of the Criminal Code;
- g) offences against peace and mankind, as defined in Art. 356 – 36 of the Criminal Code.

(3) The Deputies or Senators mentioned in paragraph (1) cannot present arguments in civil or commercial law cases against the Romanian State, against public institutions or authorities, against national companies and corporations in which they hold stock. Also, they cannot present arguments in lawsuits against the Romanian State, tried in international courts.

(4) Provisions under paragraphs (1) – (3) do not apply to cases in which the lawyer is a party to the lawsuit or providing judicial assistance or representation to their spouses or relatives up to and including the 4th degree.

Civil or kinship relations between those involved in trials have actually prompted the regulation of several incompatibility cases or constraints.

For example, under Art. 46, Code of Criminal Procedure: "Judges who are spouses or related by blood or marriage up to the fourth degree, cannot be part of the same panel of judges." Article 48, paragraph 2 stipulates that, "A judge is incompatible with participation in the trial of an appeal, when their spouse or person to whom they are related by blood or marriage, up to the fourth degree has taken part, as a judge or prosecutor, in the trial of the same case."

According to Art. 20 of Law no. 51/1995, (1) The lawyer profession cannot be practiced at the court or prosecutor's office where the lawyer's spouse, relative by blood or marriage up to the third degree, has a magistrate position. (2) Provisions in paragraph (1) also apply to the lawyer whose spouse or persons related by blood or marriage up to the third degree works as a judge with the Constitutional Court or as a financial judge, accounts councillor or financial prosecutor with the Court of Accounts. (3) Provisions in paragraph (1) also apply to the Prosecutor's Office attached to the HCCJ, and to the National Anti-Corruption Department.

(4) Provisions in paragraphs (1)-(3) also apply to the licensed lawyers, associate lawyers, junior lawyers or employed in the profession, who

use the professional organisation form or the professional collaboration relations defined under the law, in order to sidestep these provisions, which shall be punished as aggravated misconduct.

There are nonetheless other situations which remain unregulated regarding connections between two individuals that should prevent them from working together on a particular case such as cohabitation of two judges in the same panel, cohabitation of a judge and a lawyer, or marriage between the appellate judge and the judge who has passed prior ruling.

- *Tolerance in society.* In many areas, people regard the payment of additional amounts of money in exchange for services as "normal". Usually, patients find it normal to pay extra money to their doctors; similarly, court users are more interested in how they may win the favour of the judicial body than in a fair presentation of their case. In this respect, the 2007 Public Opinion Barometer of the Soros Foundation reveals that people having contacts with the elements of the justice system (tribunal, notary public office, law firm) had acquaintances on whom they could rely in 11% of the cases in 2007¹²⁰ and had contacts within the police in 12.5% of the cases¹²¹. The distrust is deepened by the idea—fuelled by mass media reports—that magistrates are subject to political influence;

- *Failure to foster honour and integrity.* The ethics in the judicial system reflects the ethics of the Romanian society, which is rather low. This is because there is no ethics assessment upon the recruitment of applicants, and, throughout their career, assessments are rather perfunctory and sometimes a means of pressure in the hands of decision-makers. There are few, if any, workshops that focus on ethics and impartiality, and none that address anti-corruption. The culture of serving public interests is better promoted among police workers, than it is among courts and prosecutors' offices personnel;

- *Habit or instinct.* As long as an employee has been involved in corruption misdeeds and has not been penalised, or as long as co-workers have done the same, they will be encouraged to adopt or carry on the same forms of misconduct.

5.2. Forms of corruption

As shown above, judicial categories of criminal corruption are regulated in the Criminal Code and Law no. 78/2000. As for the ethics-based, rather than judicial, definition that we have used in this report, there are several forms of corruption that can be identified in several fields including in the areas of judicial, judicial-administrative and administrative decision-making. By contrasting the data provided

¹²⁰ As compared to 26% in 1998, 19% in 2002, 8% in 2005.

¹²¹ As compared to 29% in 1998, 18% in 2002, 9% in 2005.

by official investigations and penalties applied so far with the hypothetical situations inferred from the system weaknesses described above, the forms of corruption present in the justice administration system are as follows:

- **bribe giving and taking**: involves two individuals, the one who promises or offers an asset or other benefit and the one who requests or receives it in exchange for the legal or illegal completion of an action which is part of one's job description; who initiates the act of corruption is irrelevant¹²²;
- **trading in influence**: relates to benefits offered to an individual who promises to convince a public agent to carry out (or fail to carry out) an action that is part of their job description;
- **gift receiving**: involves the receiving of benefits while exercising one's duty, not necessarily intended to distort the handling of that proceeding, but which may facilitate the establishment of unethical relations;
- "**greasing**": involves benefits offered to official agents in exchange for speeding up the progress of a legal procedure or in order to prevent the opposing party from intervening first;
- **fraud**: relates to falsifying data, in the form of intellectual fraud, forgery, aiding and abetting;
- **blackmailing**: comprises obtaining benefits by means of pressure or force (e.g., an individual may be threatened with a weapon, administrative penalties or prosecution unless he or she adopts the desired conduct);
- **preferential treatment**: consists of giving help to one's friends, associates, etc., who obtain positions due to their connections rather than competence. In this respect, the most vulnerable decisions are those where the vacancies are without either contests or where oral tests decide. This may occur with the transfer of judges to other courts, appointment of prosecutors in NAD or DIICOT, promotion of High Court judges, appointment of judicial inspectors to the SCM, or appointment of senior court clerks in courts;
- **nepotism**: is a form of preferential treatment that consists in facilitating the employment in the system of one's spouse or relatives;
- **embezzlement**: refers to the misappropriation of public funds;
- **misuse of classified information**: regards the use (for oneself or for one's friends) of otherwise unavailable information that one receives as part of one's job description for personal gain (e.g., a court enforcement officer buys, through a middleman, a building put up for auction and sold at a price below market value);
- **kickbacks**: occur when an individual provides an illegal favour to another, and the latter does the same in return (e.g., an individual is

¹²² Bribery is part of the employees' motivation categories. In terms of its effects, a bribe is a form of reward. See Eugen Burduş, Gheorghită Câprărescu, *Motivation*, in "Basics of organisational management," Editura Economică, Bucharest, 1999, p. 486.

promoted by the head of the institution to a certain position and, as such, the former facilitates the misappropriation of certain assets to the benefit of the latter; the manager of an institution buys office supplies without issuing a call for tenders from a supplier who then rewards the manager with a percentage of the amount paid by the institution).

In *Appendix III* we list several examples of cases involving judicial personnel, who were sentenced for corruption in 2004-2008. These examples reveal that the most frequent forms of corruption in practice are bribe-giving and -taking, and trading in influence, which is committed in order to sway the decision of a prosecutor or judge.

5.3. Vehicles of corruption

The cases investigated by judicial bodies between 2004 and 2008 enable us to draw a number of conclusions with regard to the goods or services involved in corruption misdeeds, and the circumstances in which they are offered or received.

Thus, the *benefits* that have constituted means of corruption include:

- money (RON, EUR or USD in the form of cash or bank cards; payment of invoices; stock in the "protected" businesses, loans);
- objects offered as gifts¹²³ or sold at heavily discounted prices (e.g., jewels, foodstuffs, electronics, home appliances, furniture, automobiles, tyres, fuel, clothing, cosmetics, construction materials, animals, hunting equipment, icons) or consigned (automobiles);
- services (e.g., holiday packages, travel abroad, facilitation of a home purchase, facilitation of employment, provision of housekeeping services);
- favours (refraining from filing administrative or criminal complaints against the bribe receiver, sexual favours, transfer).

The cases investigated by judicial institutions to date reveal that the *price* of these benefits increases according to the weight of the case, with the highest value in commercial trials that have a lot of money at stake, and in criminal trials, where one's freedom is at stake.

The price also varies according to the position of the official in charge of the criminal investigation (for example, a higher rank implies a leading position) and the person under investigation (i.e., foreign citizen, businessman). The amount requested is in most cases higher than the amount received.

The benefits that constitute the vehicle of corruption may come from the private sector (money paid by court users) or from public funds (embezzlement).

¹²³ In Albania, offering a gift to a judge, including from persons involved in judicial proceedings, is not viewed as illegal, even when it comes from court users who have benefited from a ruling passed by the judge in question. In some localities in Romania, such practices are used by large law firms or insolvency firms, on certain holidays; there is also the practice of offering flowers or a coffee pack to the magistrate. To the extent to which the gift has symbolic value and such conduct is tolerated, we may talk about whether this type of conduct is ethical or not, rather than whether it is a corruption deed.

The *moment* one attempts to manipulate the fairness of the proceeding occurs either at the beginning, or the end of the respective legal proceeding. As a rule, corruption attempts target those institutions that have a monopoly on the initiation of proceedings (e.g., Financial Guard or road traffic police; judicial bodies such as the judicial police and prosecutors) and those that issue the final decisions (courts of appeals). Benefits may also be received after the judicial institution legally completes the proceeding (receipt of undue benefits). Such benefits offered repeatedly can create a habit and turn into a bribe promise.

5.4. Means of corruption

When corruption involves at least two persons, contact between them is achieved in two ways:

- *directly*: requires significant trust between the parties, which is usually based on friendship, previous contacts, or recommendation by another person that the public agent trusts. It could also involve a means of pressure resulting from relations of authority (e.g. with a superior), or through blackmail;

- *indirectly*: requires the use of intermediaries. These may be current or former co-workers, family members¹²⁴ or people with whom the official comes into contact often, such as auxiliary court personnel, lawyers, or even the neighbours of magistrates. The contact may be made for a single corruption misdeed, or it may be repeated (continuing offence).

5.5. The purpose of corruption

a. Bribes can be requested and offered to distort the outcome of a judicial proceeding or to commit an *illegal act*.

The first category includes the failure to impose penalties when the law has been violated, the release of an arrested individual although continued detention would otherwise be necessary, the baseless change of charges, the misreporting of information in the record of another state of affairs in the report, the misappropriation or destruction of evidence in the case file, failure to issue a subpoena, failure to submit or misappropriation of proof of subpoena delivery or of communicating the decision, postponement of a solution to a case file, information leaks, allowing a convicted defendant to remain in police facilities instead of transferring him/her to a penitentiary, making a favourable recommendation for a detainee to ensure the

¹²⁴ Judge Aleksandr Karpov, vice-president of the Supreme Court of Russia, resigned on February 17, 2009, after his son was arrested under charges of corruption. The magistrate's son is suspected of having taken 30,000 USD in exchange for influencing Court judges in a case file (*Juridice.ro*, 18.02.2009).

suspension of sentence, or the illegal disposition of the assets of a trade company during the winding-down procedure.

The other category, that of administrative decision-making, includes: assigning a contract to a bidder who made a tender inferior to others received, issuing a registration certificate when a particular automobile has been illegally procured; ensuring protection by authorities for a criminal group, using detainee labour for the construction of a building (for example, the National Penitentiary Agency personnel or for magistrates); recording employees as present at work despite their absence.

b. Very often, benefits are also offered in exchange for the completion of *legal acts*. Thus, in the 2007 Global Corruption Report by Transparency International, 10% of the respondents from 21 of the countries covered by the survey answered that they gave bribes in exchange for a ruling in their favour. For example, bribes can be given by the defendant, charged with a minor offence, to ensure that the judge does not issue a prison sentence, but either a suspended sentence or probation supervision. This may also occur to sway the judge to issue the minimum legal sentence rather than the maximum, the judicial institution to note the complaint and initiate investigation into the perpetrators of an offence, or for the judge to schedule the hearings sooner or to speed up the passage of a ruling. Bribes can also be given without asking the judicial agent to do anything illegal, but as a safeguard to prevent the opposing party from corrupting the judicial body on its behalf.

5.6. Effects of judicial corruption

Corruption is a threat to democracy, the rule of law and human rights. It undermines the principles of good governance, social equity and justice. It distorts competition, prevents economic development and jeopardises the stability of democratic institutions and the moral foundation of society. The social costs of corruption manifest in the amounts of money spent perpetrating the misdeeds, the expenses incurred through its investigation, the undermining of public confidence and the additional corruption generated thereby (the formation of corruption chains).

By breaking rules, duties and morality, corruption causes societal and community disintegration in that it negatively affects responsibility and social transparency, and wears away social trust. It leads to the loss of the integrity of individuals, who must in turn lie and apply double standards.

Judicial corruption affects not only the integrity of judicial professionals, but also the system as a whole. It encroaches on the impartiality that ought to define magistrate duties and, in general, on responsibility at all levels. The high costs and severe effects entailed by judicial corruption, both directly and indirectly, may be grouped as follows:

5.6.1. For the public and society at large, there is a decline of moral values—the concepts of good and bad become relative when a negative model is given to the young. Protection of rights becomes an illusion and democracy erodes:

- *overall negative perception*: even a small number of corruption cases in the judicial system will negatively impact the public because it is precisely this system that punishes corruption in other sectors. This leads to a decrease in public confidence in the justice system and strengthens doubts about the purpose justice serves. As a result, there is no predictability and transparency in the outcome of a trial when the system does not work, when prosecutors buy their leading positions and judges accept bribes, when high-level corrupted officials or serious offenders receive negligible, if any, sentences.

Increased doubt causes justice to lose its air of legitimacy, thereby decreasing the efficacy of law enforcement;

- *further impoverishing the poor*: with day-to-day corruption, the costs inordinately impact the poor, who cannot afford to pay additional money to enhance their case¹²⁵. This is also the opinion of the European Commissioner for Human Rights, as expressed in *the Viewpoint on corruption in the justice system (2008, 24th June)*, included in *Appendix II* of this report;

- *perpetuation of unfair practices*: the justice system's failure to penalise corruption in a consistent and timely manner helps to increase such offences both among individuals (friends, relatives, co-workers), and in major sectors such as politics, education, healthcare, environment protection. Consequently, overall confidence in the other institutions and authorities declines. Presumed connections with the justice system will prompt people to lose trust in the quality and authority of public institutions and will generate the perception that corruption is the only way to obtain high-quality services, thus encouraging the public to further resort to it. Any position, any service, any resource (politics, economy, mass media) will be seen as for sale, which will weaken the concept of democracy itself. Meanwhile, economic development may be hindered because investments may become less substantial or involve illegal funds, foreign aid could be reduced, and there could be a lower amount of public funds for important sectors. Corruption could become systemic and endemic;

- *reduced protection of rights*: when individuals charged with wrongdoing are eventually cleared due to corruption offences, victims can no longer rely on courts of law to protect their rights and interests. Similarly, companies that do not pay bribes may not be able to reach their goals and protect their economic interests. The law against corruption is seldom enforced, which enables parties to receive preferential and discriminatory treatment. The rule of law that public

¹²⁵ Corruption particularly affects the poor, because finding resources to bribe public agents is a significant effort for them, unlike the well off people.

institutions should ensure becomes destroyed. *Crime is encouraged*: unpunished corruption will not only fuel further corruption, but will also allow and encourage serious related offences, such as trafficking in human beings, drug smuggling, money laundering, organised crime, blackmail, tax evasion, among others.

5.6.2. For the judicial system, corruption affects the very independence of the system:

- *it affects the functioning capacity*: justice becomes private (preferential), or inefficient (which is tantamount to injustice). The overall system becomes unpredictable and insecure;

- *political agents find self-protection mechanisms*: in high-level corruption cases, there will be attempts to bribe magistrates, to meddle with their work or to interfere with their career;

- *the quality of services decreases*: once the personnel derive extra benefits from giving preferential services, they no longer remain interested in improving the quality of their services;

- *the number of corruption cases pending in courts increases*: the extent to which professional bodies combat corruption will cause investigations to be more frequent.

5.6.3. For judicial personnel, corruption affects their integrity, professionalism and accountability and may cause:

- *a decrease in professionalism and quality of work*: judicial personnel will no longer interested in improving their professional skills as long as the services they have already been providing ensure additional incomes;

- *corruption among co-workers*: the illegal, yet lucrative conduct will be replicated unless policies are created to prevent it. It causes justice to become subdued;

- *perpetuation of unfair practices over time*: unpunished corruption misdeeds are an incentive for judicial personnel to continue to carry on this type of conduct;

- *a decline in courage*: failure to punish corruption and the perpetuation of such misdeeds weaken judicial personnel's confidence in reforming the system, discourage employees from reporting them and invite pessimism.

5.7. Types of corruption

Regarding the types of corruption, several typologies are possible, which are all blurry precisely because of the complex nature of corruption:

5.7.1. Minor vs. high-level corruption

There are three criteria to distinguish between minor and high-level corruption:

a. The hierarchical position of the perpetrator

High-level corruption is the so-called *political* or *senior-level corruption*, which involves public leadership positions¹²⁶ (i.e., those who define strategies, policies, laws). Political corruption covers a wide range of practices, from the illegal funding of political parties and election campaigns, to buying votes to influence peddling among politicians or elected officials. Such individuals may use their official position to improve their personal wealth. This may occur in several situations such as the passage of legislation to grant a 24-hour duty waiver for certain imports by certain companies, privatisation procedures may be manipulated, normative acts may become forged (by means of illegally removing or adding paragraphs to the act), or to improve their own status or power (through buying an eligible position in a list of candidates or buying votes).

In relation to the justice system, political corruption may take the form of manipulating the appointment, promotion, transfer or revocation of magistrates; or of distorting payroll standards and the assignment of cases¹²⁷. The way to guarantee protection from political influences to ensure the institutional independence of the justice system is through separation of powers and self-government of the judicial system, which can usually occur by means of judicial councils charged with magistrate career management¹²⁸. The autonomy of courts can ensure the management of a court's own administrative problems.¹²⁹

Minor corruption is *bureaucratic* or *administrative corruption* that occurs in public administration institutions, which are charged with enforcing the public policies and laws drawn up by politicians. It takes place on a daily basis, when citizens have direct contact with officials, including the ones in the justice system. This type of corruption mostly takes the form of bribe-giving and -taking. The amounts vary, but they are usually small. This problem appears to be specific to transition countries.

The Romanian legislature argues that a specific cohort of individuals in the judicial system (e.g. High Court Judges) allows jurisdiction over their prosecution under the National Anti-corruption Directorate.

¹²⁶ This includes the president of a country, parliamentarians, ministers, senior officials (including in security and military services), judges. Some argue that this category should also include local authorities: prefects, mayors, members of county councils and local councils.

¹²⁷ In Algeria, too, independent judges are punished and transferred to other localities. In Peru and Sri Lanka, case files have been transferred to more flexible judges. Until 2006, the chief of the British judicial system was also a member of the government. In the USA, judge election campaigns are financed by private sources. See the 2007 TI Global Corruption Report.

¹²⁸ See *Opinion no. 10 of 2007 on Council for the Judiciary in the service of society*, adopted by the Consultative Council of European Judges, at www.coe.int/ccje.

¹²⁹ See the *Resolution on the financial and administrative status of courts of law and prosecutor's offices*, presented by the SCM for adoption during meetings of the general assemblies of judges and prosecutors in April 2009, at www.csm1909.ro.

According to this criterion, high-level corruption includes cases that are subject to special prosecution, *irrespective of the amount of money or value of the assets concerned*, involve HCCJ and Constitutional Court judges; other judges and prosecutors; SCM members; and police officers. Other individuals may include leaders of national and local authorities and institutions but not leaders in town- and village-based public authorities and institutions; lawyers; commissars with the Financial Guard; customs personnel; individuals holding judicial positions in international courts whose jurisdiction is accepted in Romania, as well as administrative personnel in those courts; judicial liquidators; and court enforcement officers with the Authority for State Asset Resolution¹³⁰. Other personnel are tried by regular prosecutors' offices.

b. The value of the object of corruption¹³¹

High-level corruption may involve, for instance, public procurement procedures, as opposed to minor corruption occurring in customs, tax payments, or the release of authorisations and permits.

The Romanian legislature decided that, where the amount of money or value of assets involved in the corruption offence exceeds the RON equivalent of *10,000 euro*, then the National Anti-corruption Directorate has jurisdiction over the case (art. 13 paragraph 1(a) in G.E.O no. 43/2002).

c. The impact of the corruption offence¹³²

A corruption offense can have a broad impact such as the illegal contracting of public lighting services may affect all taxpayers in a city; it may also be more individual such as bribing a front-desk public servant, which only affects the bribe-giver and others who apply for similar licenses.

In this respect, crimes that threaten the financial interests of the European Communities fall under the jurisdiction of the National Anti-corruption Directorate (art. 13 paragraph 11 G.E.O. no. 43/2002).

5.7.2. Systemic vs. sporadic corruption¹³³

Systemic (endemic) corruption is corruption that forms a significant and essential part of the economic, social and political system. Since virtually all institutions and activities are used and controlled by corrupt individuals, citizens have no alternative but to accept and become involved in such misdeeds.

With respect to one institution alone, corruption is considered systemic when the entire organisation, culture or leadership allow

¹³⁰ Art. 13 par 1(b) of G.E.O. no. 43/04.04.2002 on the NAD, published in O.J. no. 244 of April 11, 2002, and amended by G.E.O. no. 134/2005.

¹³¹ According to a criterion of the Anti-Corruption Resource Centre of the international association U4, at www.u4.no.

¹³² Classification by TI, www.nudaspaga.ro.

¹³³ Classification by U4, www.u4.no/document/glossary.cfm.

corrupt practices, turn a blind eye to such misdeeds or even encourage such improper behaviour¹³⁴.

Sporadic (occasional) corruption happens at infrequently and influences not so much the mechanism, but the individuals, whose ethics are involved. In such cases, one cannot talk about a network, even at a local level.

5.7.3. Functional vs. dysfunctional corruption

Functional corruption is intended to facilitate the legal completion of certain actions. It "greases" the bureaucratic mechanisms, as shown above and involves small amounts of money. It is rather a matter of culture, as society itself sometimes legitimises such behaviours (Russia, South Korea, Turkey)¹³⁵.

Dysfunctional corruption is corruption that results in hindering activities. Benefits offered or received in this case involve high value.

5.7.4. Public sector vs. private sector corruption

Public sector corruption includes:

- administrative corruption: concerns the activity of local and central public administration, customs authorities, healthcare and social assistance, culture and education, defence, public order and national security institutions;
- judicial corruption: relates to judicial authorities, prosecutors' offices and courts;
- economic corruption: particularly involves the financial-banking system, but also agriculture, forestry, certain industrial areas, and the iron, steel and oil industries;
- political corruption: primarily impacts parliamentary activity and political parties through leveraging political immunity¹³⁶, influencing legislative initiatives, and affecting the funding of political parties and election campaigns.

Private sector corruption involves trade operations carried out by national or multinational companies. It interferes with fair competition and the rules of free market economy, reduces the quality of products

¹³⁴ Gerald Caiden, *The Burden on Our Backs; Corruption in Latin America*, paper presented in the 8th "Congreso Internacional del CLAD sobre la Reforma del Estado y de la Administración Pública, Panamá, 2003".

¹³⁵ "Behaviours that used to be acceptable and legitimate according to traditional norms, become unacceptable and corrupt when seen through the lens of modern norms" (Robert King Merton, *Social Theory and Social Structure*, 1968, New York: The Free Press).

¹³⁶ In fact, in *de Jorio vs. Italy*, ruling of 03 March 2004, the ECHR established that the goal of parliamentary immunity is to ensure the freedom of speech of the representatives of the people and to prevent encroachments on the parliamentary activity by means of party-ordered prosecution. But the statements in question were made in an interview to a journalist, therefore outside the legislative chamber, and had nothing to do with the exercise of parliamentary duties *stricto sensu*.

Similarly, see *Cordova vs. Italy* ruling of 30 April 2003, *C.G.I.L. and Cofferati vs. Italy* ruling of 24 February 2009, at www.echr.coe.int.

and services, and undermines economic investments. Corruption offences often involve officials (*private-public bribe*) who are bribed in exchange for granting fiscal facilities or certain contracts to certain companies. This can range from small-scale procurement contracts to weaponry production and natural resource concessions. Equally dangerous is the corruption within a company or among companies (*private-private bribe*)¹³⁷.

5.7.5. Active vs. passive corruption

Active corruption consists in offering or proposing benefits to a decision-maker (bribe giving, influence peddling).

Passive corruption consists in accepting such benefits (bribe taking, receipt of undue benefits, influence peddling).

5.7.6. Black, grey and white corruption¹³⁸

Black corruption relates to behaviours censured both by the general public and elites.

Grey corruption regards corruption acts condemned only by the elites.

White corruption refers to anti-social deeds or behaviours whose penalty is not desired by any social category, and which is regarded as tolerable. It includes lobbying, as well as small “presents” (e.g., flowers) given to a teacher, a doctor, etc.

¹³⁷ Corruption in the private sector is tackled in the *EU Council Framework Decision 2003/568/JHA on combating corruption in the private sector* and the *UN Convention against Corruption*.

¹³⁸ Alexandru Boroi, Sorin Corlățeanu, Mirela Gorunescu, Ioan Molnar, Costică Voicu, *Criminal business law*, fourth edition, All Beck, Bucharest, 2006, p. 6.

PART III

STANDARDS OF JUDICIAL INTEGRITY

Democratic states are founded on the rule of law. Under Art. 16 of the Constitution of Romania, *no one is above the law*, which means that both citizens and public authorities must abide by the law. This requirement need not only be met, but must also appear to be met¹³⁹, which is the only way to create court-user confidence in the judicial system. To build such conviction, *appearances and perception* play a vital role.

There is the more or less grounded assumption that “*he who has power has a tendency to abuse it*”¹⁴⁰. Some also say that “*power tends to corrupt; absolute power corrupts in absolute ways*.”¹⁴¹ Firstly, this is why abusive, unfair behaviours must be prevented through creating standards and by imposing good practices. Secondly, mechanisms must be in place to repress behaviours which depart from these standards.

When outlining a nationwide policy to regulate the conduct of agents operating in the judicial system one must take into account international requirements, which are increasingly relevant in an age of globalisation. Although many regulations concern integrity, and particularly personal independence and impartiality (e.g., *Basic Principles on the Independence of the Judiciary* adopted by the UN in 1985, *the European Charter on the Statute for Judges* adopted by the Council of Europe in 1998), this analysis will only address ethics and anti-corruption regulations.

1. Worldwide regulations and efforts

We will analyse below the main international instruments that regulate corruption, with a focus on those regulations targeting the judicial system. Many of these provide good practices and solutions to prevent and combat corruption, including that within the judicial sector, which is why we will analyse them in the next chapter of our paper.

¹³⁹ “*Justice must not only be done; it must also be seen to be done*” – opinion by Justice Lord Hewart CJ in *Rex v. Sussex Justices, Ex parte McCarthy* [1924].

¹⁴⁰ Montesquieu, *The Spirit of the Laws*, part XI, chapter. 4, Editura Științifică, Bucharest, 1964.

¹⁴¹ Lord Acton, British historian, a professor with Cambridge University, 1887, in *The Biographical Encyclopaedia*, Cambridge, University Press, 1988, p. 6.

1.1. UN

The United Nations was founded in 1945 and it currently brings together 192 member states¹⁴². According to its Charter, the UN has four key goals: to preserve world peace and security; to foster friendship between nations; to contribute to solving international problems and to promoting respect for human rights; and to act as a centre for harmonising individual state actions.

The issue of corruption and integrity has been approached in the following UN instruments:

a. *Code of Conduct for Law Enforcement Officials* (1979)¹⁴³
(‘Code’)

The Code applies to all individuals with policing powers, particularly arrest and detention powers. As such, in Romania it applies to police forces, prosecutors, judges and employees of the National Penitentiary Authority. Each article is accompanied by official comments. The eight articles stipulate that agents must 1) exercise powers for the benefit of the community and to protect individuals from illegal acts, 2) respect human rights, 3) use force only when necessary, 4) not disclose the information they obtain, 5) not initiate or tolerate acts of torture or cruelty, 6) must ensure the health of the detained individuals, 7) must not perpetrate acts of corruption and must resist and oppose such acts, and 8) must abide by the law and the Code, and prevent and fight against their violation.

The enforcement of the Code is encouraged by the “**Guidelines for effective implementation of the Code of Conduct for Law Enforcement Officials**” (1989)¹⁴⁴. The guidelines recommend that utmost importance should be given to selecting, training and educating officials; compensation must be adequate, and working standards suitable; an internal disciplinary mechanism and external monitoring must be in place; and the public must be informed of a mechanism for filing complaints against officials. For national implementation, suggestions include the translation of the guidelines and their transposition to national legislation, communication of the Code and related provisions to civil servants and to the public, organisation of

¹⁴² Romania’s UN accession application was approved in the General Assembly meeting of December 14, 1955, under Resolution 995 (X). The UN Information Centre opened an office in Romania in 1970. The UN is represented in Romania by 11 funds, programmes and specialised agencies. Details available at www.onuinfo.ro.

¹⁴³ *Code of Conduct for Law Enforcement Officials*, adopted under Resolution 36/169 of December 17, 1979. “Law enforcement officials” are all individuals with policing powers, particularly those with arrest and detention powers. The Code is available at www2.ohchr.org/english/law/codeofconduct.htm.

¹⁴⁴ *Guidelines for the effective implementation of the Code of Conduct for Law Enforcement Officials* adopted by the Economic and Social Council under Resolution 1989/61, available at <http://tinyurl.com/ghidcondoficiali>.

symposiums on the role and powers of law enforcement officials with respect to the protection of human rights and prevention of crime.

b. International Code of Conduct for Public Officials (1996)¹⁴⁵

With this Code, the UN declares corruption as a problem that affects the stability and security of citizens, that affects democracy and morality, and that hinders economic, social and political development. Corruption becomes a phenomenon with international consequences and relates to organised crime and economic offences. The Code is recommended for use as an instrument in the battle of states against corruption.

The Guidelines first define *general principles*. Regarding public officials, they must only work for the public interest; complete their duties in an effective, efficient and fair manner; properly manage public resources; and be responsive, fair and impartial in their relations with the public. Next, the guidelines tackle the *conflict of interests and incompatibilities*: public officials cannot use their position in order to obtain undue benefits in their or their families' personal or financial interest, not even after they have left office; they cannot be involved in trade, financial or other relations, which are incompatible with their position; they must declare such interests and relations and take measures to eliminate or reduce such conflicts of interests; they cannot use public money, public assets or information acquired during their work, for activities which are not related to their work.

The last part regulates *obligations and prohibitions* for public officials: the obligation to declare their assets and debts; prohibition from requesting or receiving, directly or indirectly, gifts or other benefits that may influence the exercise of their duties, performance or decision-making capacity; the obligation to keep information confidential, even after they leave that position; the warning exercising political or other public activities must not undermine public confidence in the unbiased exercise of their duties.

c. Global Programme against Corruption (1999)¹⁴⁶

The programme was drawn up by the Centre for International Crime Prevention within UNODC¹⁴⁷ in view of assisting member states in their efforts to curb corruption.

The programme is comprised of two parts: a research component and a technical cooperation component. The *Research Component*

¹⁴⁵ *International Code of Conduct for Public Officials* was adopted under Resolution 51/59 of the UN General Assembly of December 12, 1996, available at www.un.org/documents/ga/res/51/a51r059.htm. By "public officials", the Code means individuals holding a public position.

¹⁴⁶ Available at www.unodc.org/pdf/crime/corruption_programme.pdf.

¹⁴⁷ The web page of *The United Nations Office on Drugs and Crime* specialising in corruption issues is www.unodc.org/unodc/en/corruption/index.html.

involves a global and comparative study of corruption and of types of anti-corruption measures. The study focuses on three types of corruption: 1) day-to-day and public administration corruption, 2) corruption in the business environment and 3) high-level corruption in centres of political, administrative and financial power. The study will help to put together a set of indices for corruption trends and for anti-corruption efficiency trends. The results of this study will be included in an international database, accessible by electronic means and available to member states and the international community. The *Technical Cooperation Component* is intended to assist member states in building or strengthening their institutional capacity to prevent, identify and fight against corruption. The measures are designed for a national, regional and international level.

In the Global Programme, the following have so far been accomplished:

- the *International Group for Anti-corruption Coordination* (IGAC)¹⁴⁸ has been organised, with a view to facilitating the international coordination and cooperation, so as to avoid overlapping activities and to ensure an efficient and effective use of already-existing resources at national and regional levels. IGAC offers a platform for exchanging views, information, experience and good practices related to anti-corruption activities;
- the *UN Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators* (2004)¹⁴⁹ has been drawn up, which comprises a description of all the problems and options facing criminal justice professionals in cases of national and transnational corruption;
- the *UN Anti-Corruption Toolkit* (2004)¹⁵⁰ has been drawn up and includes a set of principles that can be used both by those who try to integrate national anti-corruption strategies into a broader strategic framework, and by those who must subsequently develop and implement each principle. The toolkit also includes case studies that offer examples of practical measures for the proposed solutions;
- the *Compendium of International Legal Instruments on Corruption*¹⁵¹ (2003, republished in 2005) has been put together that includes

¹⁴⁸ *International Group for Anti-Corruption Coordination* was established by UNODC jointly with the GPAC network. IGAC members include: the Council of Europe, the European Anti-Fraud Office (OLAF), Interpol, the Organisation for Economic Cooperation and Development (OECD), the Organisation for Security and Cooperation in Europe (OSCE), Transparency International, European Bank for Reconstruction and Development, World Bank, UNODC. See www.igac.net.

¹⁴⁹ The original name is "The United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators", available at www.unodc.org/pdf/crime/corruption/Handbook.pdf.

¹⁵⁰ The original name is "The United Nations Anti-Corruption Toolkit", available at www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep_04.pdf.

¹⁵¹ The original name is "Compendium of International legal instruments on Corruption", available at www.unodc.org/pdf/corruption/publications_compendium_e.pdf.

all treaties, conventions, agreements, resolutions and other important, global and regional instruments in this field. It includes both binding documents for states and documents that define non-compulsory standards;

- the *UN Manual on Anti-corruption Policies* (2001)¹⁵² has been drawn up and explains general aspects concerning the nature and scope of corruption-related problems and a description of the main anti-corruption policies, which can be used by politicians and public policy makers.

Worth mentioning is also the drafting of the *Compendium of Standards and Norms in Crime Prevention and Criminal Justice* (1992, republished in 2006)¹⁵³ by the Commission for Crime Prevention and Criminal Justice within ECOSOC. The fourth part of this paper describes UN international instruments regarding *Good governance, Independence of Justice and Integrity of Criminal Justice Personnel*¹⁵⁴.

Lastly, we make mention of the collection *Human Rights: A Compilation of International Instruments*, published by the UN Office of the High Commissioner for Human Rights, whose volume 1 includes Chapter J, titled: "*Human Rights in the Administration of Justice: protection of persons subjected to detention or imprisonment*"¹⁵⁵.

¹⁵² "The United Nations Manual on Anti-Corruption Policies", at www.unodc.org/pdf/crime/gpacpublications/manual.pdf.

¹⁵³ The Compendium comprises 55 UN instruments, grouped into four parts: I. Persons in custody, non-custodial sanctions, juvenile justice and restorative justice; II. Legal, institutional and practical arrangements for international cooperation; III: Crime prevention and victim issues; IV. Good governance, independence of the judiciary and the integrity of criminal justice personnel. It is available in full at www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html.

¹⁵⁴ www.unodc.org/pdf/compendium/compendium_2006_part_04_01.pdf. Specifically, these are: the Code of Conduct for Law Enforcement Officials (1979), the Guidelines for Effective Implementation of this Code (1989), Basic Principles on the Use of Force and Firearms by Law Enforcement Personnel (1990), Basic Principles on the Independence of the Judiciary (1985), Procedures for the Effective Implementation of these Principles (1989), Basic Principles on the Role of Lawyers (1990), Guidelines on the Role of Prosecutors (1990), International Code of Conduct for Public Officials (1996), UN Declaration against Corruption and Bribery in International Commercial Transactions (1996).

¹⁵⁵ Available at www.ohchr.org/Documents/Publications/Compilation1.1en.pdf. It comprises 22 international instruments (pp.273-433): Standard Minimum Rules for the Treatment of Prisoners (1955), Basic Principles for the Treatment of Prisoners (1990), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (1990), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (1984), Option Protocol to this Convention (2002), Principles of Medical Ethics Relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (1982), Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (2000), Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1984), Code of Conduct for Law Enforcement Officials (1979), Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), United Nations Standard Minimum Rules for Non-Custodial Measures (*The Tokyo Rules*, 1990), United

d. The Vienna Declaration on Crime and Justice (2000)¹⁵⁶

The UN calls on states to create and preserve a fair, ethical and efficient criminal justice system. The Declaration affirms the will of states to strengthen international action against corruption by setting up regional conventions and regional and global fora. These would start with the UN Declaration Against Corruption and Bribery in International Commercial Transactions and the International Code of Conduct for Public Officials. The declaration proposes development of an international legal instrument against corruption, which should be independent of the UN Convention against Transnational Organised Crime.

e. UN Convention against Corruption (2003)¹⁵⁷

This international judicial document is the first international treaty directly tackling corruption. The drafting of a universal legally binding act confirms the fact that this phenomenon is widespread, and even occurs in developed countries. It is also a proof of the fact that people are growing aware of the need to promote fair practices both in public administration and private transactions. The Convention addresses four areas: prevention, criminalisation, international cooperation and recovery of assets.

Prevention. Corruption is based on criminal behaviour, which is why a number of measures are stipulated (for both the public and private sector) that are aimed at creating or strengthening nation-wide prevention actions among countries. These include model preventive policies, such as the establishment of anti-corruption institutions and enhanced transparency in the funding of election campaigns and political parties. It encourages states to ensure that public services be subject to safeguards of efficiency, transparency and merit-based recruitment. Transparency and accountability in public finances and

Nations Standard Minimum Rules for the Administration of Juvenile Justice (*The Beijing Rules*, 1985), Guidelines for Action on Children in the Criminal Justice System (1997), United Nations Guidelines for the Prevention of Juvenile Delinquency (*The Riyadh Guidelines*, 1990), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), Basic Principles on the Independence of the Judiciary (1985), Basic Principles on the Role of Lawyers (1990), Guidelines on the Role of Prosecutors (1990), Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989), Declaration on the Protection of All Persons from Enforced Disappearance (1992).

¹⁵⁶ Vienna Declaration on Crime and Justice: *Meeting the Challenges of the Twenty-first Century* was adopted by the UN General Assembly under Resolution 55/59 of December 4, 2000 and is available, together with the related action plan, at www.unodc.org/pdf/compendium/compendium_2006_part_02_02.pdf.

¹⁵⁷ United Nations Convention against Corruption (also known as the *Mérida Papers*) was adopted in New York by the General Assembly under Resolution no. 58/4 of October 31, 2003. It came into force on December 14, 2005. It has so far been signed by over 140 states. It was signed by Romania in Merida, Mexico, on December 9, 2003, and ratified by the Parliament of Romania under Law No. 365/15.09.2004, published in O.J. no. 903 of October 5, 2004.

justice must also be promoted. Preventing public corruption requires an effort from society as a whole, which is why the Convention calls on states to engage non-governmental organisations and other civil society components and to improve public awareness about corruption and related solutions.

Criminalisation. The Convention urges states to define corruption offences and other types of misconduct within its sphere, in the public and private sector. In certain circumstances, states are legally obligated to define offences, while in other cases definition is merely optional. The Convention refers not only to the criminalisation of basic forms of corruption, such as bribe and misappropriation of public funds, but also to the trading in influence, concealment and “laundering” of corruption. There are also references to offences which support corruption, such as money laundering and the obstruction of justice.

International cooperation. Countries must work together in any aspect related to the fight against corruption, including the prevention, investigation and prosecution of offenders. They are called on to identify specific forms of mutual judicial assistance in gathering and transferring evidence between courts and in extraditing offenders. They must take steps to monitor, freeze and take possession of assets acquired through corruption misdeeds.

Recovery of assets. This is affirmed as a fundamental principle of the Convention, which is particularly important in transition countries, where high-level corruption is endemic and where resources are needed for the reconstruction and rehabilitation of societies. It is the first time that a document regulates the return of assets acquired illegally or kept overseas, and this topic is included in the UNODC strategy for 2008-2011¹⁵⁸.

The enforcement of the Convention is completed by a ***Legislative Guide for the Implementation of the UN Convention against corruption*** (2006)¹⁵⁹, designed to provide assistance to legislators and policy-makers in the countries that intend to ratify and implement the Convention in their own legislation.

The signature of the Convention is supported by the ***International Association of Anti-Corruption Authorities*** (IAACA)¹⁶⁰, initiated in Mérida in 2003 and realised in 2006 by representatives of national anti-corruption authorities and relevant international organisations. Romania is a founding member of IAACA, where it is represented by its Prosecutor General.

The Association organised two conferences where declarations were adopted. The first declaration, made in Beijing in 2006, recognises the lack of scientific methods to measure corruption, and objective data on

¹⁵⁸ The StAR (the Stolen Asset Recovery) Programme. The UNODC strategy is available at www.unodc.org/documents/about-unodc/strategy-brochure.pdf.

¹⁵⁹ The Guide is available at www.igac.net/pdf/publications_unodc_legislative_guide_e.pdf.

¹⁶⁰ *The International Association Of Anti-Corruption Authorities*, at www.iaaca.org.

how it occurs and its impact. This declaration urges member states to replicate practices that have been successful in other states. The second declaration, made in Bali in 2007, emphasises the need to prevent corruption; for independence, adequate funding, adequate and competent staffing of anti-corruption authorities; to promote the independence and integrity of justice; and to avoid conflicts of interests and regulate access to information. The Bali Declaration recognises responsibility in exercising public duties, regular assessment of the performance of anti-corruption authorities and for harmonisation of national legislation with that of international instruments and the practices of other states.

f. International Anti-Corruption Day¹⁶¹

The UN Convention against Corruption was open for signature by all states, between December 9 and 11, 2003, in Mérida (Mexico), and later at the United Nations headquarters in New York, until December 9, 2005. Under Resolution no. 58/4 of October 31, 2003, the UN General Assembly also established December 9 as the International Anti-Corruption Day. The decision was made in order to enhance awareness of corruption and the role of the UN Convention against Corruption plays in fighting and preventing this phenomenon.

g. Strengthening the Judicial Integrity¹⁶²: Bangalore Principles (2001, 2007)

The UN believes that a serious hindrance to any anti-corruption strategy is corruption within the judicial system, and unfortunately this has expanded in courts in many countries. The UN has thoroughly examined this aspect and drawn up a Programme to strengthen judicial integrity, which has three objectives:

- To define the concept of judicial integrity and to develop a methodology by which to introduce it, without affecting the principle of the independence of the judiciary;
- To facilitate a safe and productive learning environment so as to reform the mindsets of court presidents around the world;
- To enhance public awareness of judicial integrity and to develop, guide and monitor technical assistance projects aimed at strengthening judicial integrity and capacity.

Bangalore is a locality in India that in 2001, at the invitation of the UN and of Transparency International, brought together a group of high-level magistrates and court presidents from Common Law systems (and later magistrates from civil law systems were also

¹⁶¹ Details, posters, audio and video spots at www.unodc.org/unodc/en/about-unodc/9-December.html.

¹⁶² www.unodc.org/unodc/en/corruption/judiciary.html.

consulted). They formed the *Judicial Group on Strengthening Judicial Integrity*, which drew up the Bangalore Principles of Judicial Conduct¹⁶³, which is a Code of Conduct that applies to judges. The respective Principles were improved in 2002 in a meeting in The Hague, Netherlands. A starting point in drafting the Code was a review of the main international documents in the field that had been drawn up by institutions or organisations in various countries.

The Code regulates 6 values: Independence, Impartiality, Integrity, Propriety, Equality, Competence and diligence. Under Resolution 2003/43 of April 29, 2003, the UN Commission on Human Rights adopted these Principles with the recommendation that they should be considered by member states, inter-governmental bodies and non-governmental organisations. However, because the UN realised that the Principles were not widely known, in 2007 it brought together several experts from all states to Vienna to draft the Commentary on the Bangalore Principles¹⁶⁴. The comments describe in detail the desirable conduct of judges—from private meetings with the parties or lawyers, to the attitude and gestures that judges must adopt in and out of the courtroom.

h. Anti-corruption campaigns

In 2006-2007, UNODC planned and implemented a global anti-corruption campaign titled “*You can end corruption*”, intended to publicise the UN Convention in December 2005. The campaign brought a distinct message for the judicial sector: “*Justice is not for sale*”. The 2007-2008 UNODC campaign, titled “Your NO counts”, was designed to support positive and pro-active measures to fight against corruption. This emphasised the need for a global breakthrough, with UN Convention promoted as a key instrument in the fight against corruption¹⁶⁵.

***i. The United Nations Development Programme (UNDP)*¹⁶⁶**

UNDP is a network of 135 national centres that helps countries create a favourable environment to support human development. Under Resolution A/RES/51/59 adopted by the UN General Assembly on January 28, 1997, UNDP was authorised to assist developing countries in their fight against corruption. This is how the Programme

¹⁶³ The principles are available, in Romanian, at www.inm-lex.ro.

¹⁶⁴ Available at www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.

¹⁶⁵ The campaign includes posters, banners, leaflets, and a TV ad in which a police officer, a member of an electoral commission and a customs police officer decline the bribe being offered to them, at www.unodc.org/yournocounts.

¹⁶⁶ *The United Nations Development Programme*, at www.undp.org. The programme involves 166 countries. UNDP has had an office in Romania since 1971. At present the 2005-2009 Country Programme is implemented, which focuses on: democratic governance and decentralised development; economic and social development; building a healthy environment to support sustainable development.

for Accountability and Transparency ("PACT") came into being. In 1998, a UNDP policy recommendation entitled "*Fighting Corruption to Improve Governance*" was adopted. In 2001 the UN developed CONTACT¹⁶⁷, which was a guide for ensuring the integrity of a system through self-assessment of financial management and of anti-corruption systems. In 2004, UNDP drew up an "***Anti-Corruption Practice Note***"¹⁶⁸ which analyses causes of corruption, its effects on the development of society, elements of a strategy to fight against it and a description of UNDP programmes. The UNDP followed up in 2005 when it drafted a study of the anti-corruption institutions required to enforce international policies. This may be used as a model of how national anti-corruption institutions must be designed and includes provisions regarding the National Anti-Corruption Agency, the National Anti-Corruption Commission, Ombudsman, Court of Accounts, Agency of Civil Servants, prosecutors, courts; the second part analysed these institutions in 14 states¹⁶⁹.

After the UN Convention against Corruption took effect on December 14, 2005, the 2004 Note was replaced by a new document, issued in December 2008 and called "***Mainstreaming Anti-Corruption in Development: Anti-corruption practice note***"¹⁷⁰. UNDP regards corruption as a result from lack of good governance. The new Note contains four parts: the first part presents the definition, causes and consequences of corruption; the second part describes relevant institutions, committees and international regulations; the third part discusses UNDP involvement at a local, regional and global level; and the fourth part comprises appendices concerning policies aimed at preventing, containing or combating corruption (e.g., ensuring integrity in the endorsement of laws, strengthening the criminal aspect, the quality of public services, transparency and access to information, etc.), stakeholders (e.g., parliamentarians, government, local public authorities, the education system, justice, anti-corruption agency, mass media, NGOs), the promotion of ATI¹⁷¹, the presentation of international and regional instruments in the fight against corruption on several levels (e.g., UN, in Africa, America, Asia, CoE, EU, OECD), other resources, connections, partner programmes.

That same year, in 2008, "***A User's Guide to Measuring Corruption***" was published. This has been intended as a guide to good practice for governments, civil society and developers with respect to

¹⁶⁷ CONTACT is an acronym for Country Assessment in Accountability and Transparency. Available in English and French at www.undp.org/governance/docs/AC_guides_contact.htm.

¹⁶⁸ *Anti-corruption practice note*, quoted above.

¹⁶⁹ UNDP, "Institutional Arrangements to Combat Corruption – A Comparative Study": <http://tinyurl.com/comparativestudy2005>.

¹⁷⁰ At www.undp.org/governance/docs/Mainstreaming_Anti-Corruption_in_Development.pdf.

¹⁷¹ ATI stands for: *accountability* (in all its forms: financial, administrative, political and social), *transparency* (facilitating citizens' access to information and their understanding of the decision-making mechanism) and *integrity* (defined as incorruptibility, which is synonym with honesty).

recognising and measuring corruption¹⁷². The purposes of the United Nations in terms of trade are supported by an international volunteer network named **The UN Global Compact**¹⁷³.

This is a business environment network that brings together governmental actors, civil society, United Nations departments, companies and workers, with the overarching goal of aligning the operations and strategies of its members to 10 principles related to human rights, labour, environment protection and anti-corruption. The last principle, related to anti-corruption, was adopted in 2004: "*In the business sector, steps must be taken against corruption in all its forms, including blackmail and bribe.*"

j. The World Bank¹⁷⁴ is an organisation that views corruption as the most serious obstacle to social and economic development because it wears down the rule of law and weakens public institutions, thereby affecting the poorer population and public services. According to WB policy, an anti-corruption strategy must be based on *five elements*: enhancing political accountability, strengthening the participation of civil society, building a competitive private sector, institutional restraints on power and improvement of public sector management.

As regards *the restraints on power*, the organisation states that the structure of public institutions is an important mechanism in the field of corruption. This underscores the need for the separation of powers and cross-cutting oversight responsibilities, which can contain and penalise the abuse of power. Specifically, this may be achieved through an independent and effective judiciary, anti-corruption legislation, independent prosecution and enforcement, audit institutions, and legislative oversight.

The World Bank is concerned with judicial reform, both with respect to courts and the judicial power¹⁷⁵, and other institutions in the judicial system¹⁷⁶. It has developed a *strategy for judicial reform in anti-corruption*¹⁷⁷ that looks at three aspects: (1) core laws to fight against corruption: anti-corruption laws, access to information, and control over the discretionary power of administrative authorities; (2) the role of courts in combating corruption; and (3) the fight against judicial corruption. In this latter respect, the World Bank mentions that confidence of citizens in judicial systems requires that judges, lawyers, and court personnel should maintain high moral standards. This

¹⁷² At www.undp.org/oslocentre/flagship/users_guide_measuring_corruption.html.

¹⁷³ Details at www.unglobalcompact.org. The network brings together companies from 100 countries. It has no representatives in Romania.

¹⁷⁴ The World Bank web site is www.worldbank.org. The World Bank has had an office in Romania since 1992. Our country joined the World Bank in 1972. The section devoted to anti-corruption is www.worldbank.org/corruption.

¹⁷⁵ Materials are available at <http://go.worldbank.org/3023X91SE0>.

¹⁷⁶ Materials are available at <http://go.worldbank.org/HC5BA9D380>.

¹⁷⁷ Materials are available at <http://go.worldbank.org/3X2A5GMIH0>.

requires a variety of measures, from clearly defined rules of conduct and moral education programmes, to a procedure by which to settle complaints of misconduct.

1.2. Organisation for Economic Cooperation and Development¹⁷⁸

OECD is the most important international institution focusing on economic and social research. It uses information and statistics to help states fight poverty through economic development and financial stability and fosters good governance in public services. It approaches the fight against corruption at a multidisciplinary level. One of the core documents is the *Convention on combating the bribery of foreign public officials in international commercial transactions* (1997), which is completed by a *Commentary* (1997) and a *Recommendation* (1997). The instruments it has developed to prevent bribery claims are:

a. Principles for managing ethics in the public service (1998)¹⁷⁹:

The principles enunciate that Ethical standards must be unambiguous and reflected in the legislation. Furthermore, employees must have access to guidelines and internal mechanisms for consultations on ethics; must know their rights and obligations with respect to their conduct. It also addresses politicians, who must create the legal framework for ethical regulations and for the punishment of misconduct. It promotes the transparency of decision-making processes and the creation of clear rules regarding the interaction between the public and private sector. The principles demand managers to demonstrate and promote ethical conduct, which should carry over to management policies and human resources management to create a suitable mechanism for enhancing accountability to superiors and the public and to put in place procedures and penalties for cases of misconduct.

b. Guidelines for managing conflict of interest in the public service (2003)¹⁸⁰:

The main purpose of this guide is to help member states, at a central government level, to assess their current policies and practices in terms of conflicts of interests in relations with public officials—including civil servants, employees and holders of various positions in the public sector—who work in the national public administration system. The recommendations in the guide

¹⁷⁸ The Organisation for Economic Cooperation and Development was established in 1960, brings together 30 member states and has relations with 100 other states and organisations. Romania is not an OECD member. Details at www.oecd.org; the anti-corruption sector can be accessed at www.oecd.org/corruption. G.R. no.1607/2004 approves the establishment and operation of the Romanian Centre for Information and Documentation, located in the building of the National Economics Institute of the Romanian Academy, and of the OECD Information and Documentation Office in the Ministry of Foreign Affairs. Its web site is www.ince.ro/oecd.htm.

¹⁷⁹ *Principles for managing ethics in the public service* were endorsed by the OECD Council in Recommendation of April 23, 1998, and are intended for use by national institution leaders. Available at www.oecd.org/dataoecd/60/13/1899138.pdf.

¹⁸⁰ The guide is available in Romanian as well, at www.oecd.org/dataoecd/13/19/2957377.pdf.

may be used in other governmental areas as well, such as at the sub-national level and at companies running on public capital.

The *four principles* that must be respected by employees to avoid conflicts of interests and sustain public confidence are: 1) serving the public interest, 2) supporting transparency and scrutiny, 3) promoting individual responsibility and personal example, and 4) promoting a corporate culture that has zero tolerance for conflicts of interests.

The guide defines a "*conflict of interest*" as a circumstance that involves a conflict between a civil servant's duty to the public and personal interests. In such circumstances, the civil servant has interests as a private individual that may have a negative impact on the servant's ability to meet official obligations and responsibilities. Defined as such, a "conflict of interest" has the same meaning as a "*real* conflict of interest." A conflict of interests may therefore be current, or may have existed at some point in the past. In contrast, one may say that there is an *apparent* conflict of interest when the interests of a civil servant appear to negatively impact the servant's ability to meet tasks and obligations, when in fact they do not. A *potential* conflict emerges when a civil servant has personal interests that are likely to generate a conflict of interest, should that civil servant have (conflicting) official powers in that particular area. Where a personal interest has *actually* affected the suitable performance of a civil servant's tasks, the respective circumstance must be regarded as an instance of misconduct or "malfeasance" or even as a corruption case, rather than a "conflict of interests." By this definition, "personal interests" are not restricted to financial or economic interests, or to those interests that generate a direct personal benefit for the civil servant. A conflict of interest may be related to an activity that would otherwise be legitimate for a private person, to personal affiliations and associations and to family interests, when these interests may be credibly assumed to be able to have a negative impact on how civil servants do their duties.

A special case is the choice of another job for a civil servant. The negotiation of a future job by a civil servant, before he/she gives up the public position, is largely viewed as a conflict-of-interest case.

OECD established in 1998 the ***Anti-corruption Network for Eastern Europe and Central Asia***¹⁸¹, which comprises 20 member states, including Romania, as a regional forum for exchanging anti-corruption practices, information and know-how.

1.3. The Global Forum for Fighting against Corruption and Protecting Integrity

In 1997, recognising an increase in cross-border crime, the US president requested the Department of Justice, Department of State and Department of the Treasury to create a strategy for fighting international crime and reducing its impact on American citizens. In 1998, the first *US Government International Crime Control Strategy* was endorsed.

¹⁸¹ *The Anti-Corruption Network for Eastern Europe and Central Asia*, at www.oecd.org/corruption/acn.

One of its goals was to strengthen the rule of law, which required, first of all, combating corruption among law enforcement institutions. A decision was also made to organise an international conference.

The first conference was titled “*Global Forum on Fighting Corruption and Safeguarding Integrity among Justice and Security Officials*” and was held on February 24-26, 1999 in Washington¹⁸². Guests from 90 countries tried to examine the causes of corruption and what practices could be used in its prevention and combat. On this occasion, participants drew up the ***Guiding principles for fighting corruption and safeguarding integrity among justice and security officials***¹⁸³.

The Principles provide a list of practices to fight corruption, and dishonest and unethical conduct, based on international documents drawn from other institutions and on the experience of participants in the Forum:

1. Establish and maintain systems of government hiring of justice and security officials that assure openness, equity and efficiency and promote hiring of individuals of the highest levels of competence and integrity.
2. Adopt public management measures that affirmatively promote and uphold the integrity of justice and security officials.
3. Establish ethical and administrative codes of conduct that proscribe conflicts of interest, ensure the proper use of public resources, and promote the highest levels of professionalism and integrity.
4. Establish criminal laws and sanctions effectively prohibiting bribery, misuse of public property, and other improper uses of public office for private gain.
5. Adopt laws, management practices and auditing procedures that make corruption more visible and thereby promote the detection and reporting of corrupt activity.
6. Provide criminal investigators and prosecutors sufficient and appropriate powers and resources to effectively uncover and prosecute corruption crimes.
7. Ensure that investigators, prosecutors and judicial personnel are sufficiently impartial to fairly and effectively enforce laws against corruption.
8. Ensure that criminal and civil law provide for sanctions and remedies that are sufficient to effectively and appropriately deter corrupt activity.
9. Ensure that the general public and the media have freedom to receive and impart information on corruption matters, subject only to limitations or restrictions which are necessary in a democratic society.
10. Develop to the widest extent possible international cooperation in all areas of the fight against corruption.
11. Promote, encourage and support continued research and public discussion in all aspects of the issue of upholding integrity and preventing corruption among justice and security officials and other public officials whose responsibilities relate to upholding the rule of law.
12. Encourage activities of regional and, other multilateral organizations in anticorruption efforts.

¹⁸² Documents of the Forum at www.state.gov/www/global/narcotics_law/global_forum/appendix2.html. Romania was represented by officials from the Ministry of Justice, Ministry of Administration and the Interior, Romanian Intelligence Service and the General Prosecutor's Office.

¹⁸³ The “*justice and security officials*” include all those who play a key part in maintaining the rule of law (e.g., police, border police, military personnel, prosecutors, judges).

The second Global Forum was held at The Hague between May 28 and 31, 2001, and focused on "*Overcoming corruption through integrity, transparency and accountability.*"¹⁸⁴ Taking part were 142 states and organisations. According to the Final Declaration, the goal of this conference was to prevent and combat corruption by promoting integrity, transparency and accountability. The involvement of civil society, of the public sector and mass media in the fight against corruption was regarded as necessary.

The third Global Forum for the fight against corruption was organised in Seoul, between May 28 and 31, 2003, and was called "*Increased challenges, shared responsibilities.*"¹⁸⁵ The Final Declaration included a presentation of current problems and an action plan comprising general principles and national and international measures. It found that corruption must be approached in a holistic manner, involving all segments of the society. At a national level, proposals should be made for strengthening judicial independence and integrity, the integrity and effectiveness of police actors, the promotion of good governance, transparency, accountability, integrity and ethics throughout all segments of society. In turn, these proposals support the mass media and civil society in detecting corruption.

The fourth Global Forum took place on June 7-10, 2005, in Brasília, Brazil, and was titled "*From Words to Action*".¹⁸⁶ The conclusions of the conference were the importance of signing and implementing the UN Convention against corruption, the need for steady improvement and the strengthening of additional mechanisms regarding the existing international conventions with respect to corruption, support for participating governments in promoting cooperation in extradition, mutual judicial assistance in the recovery and return of assets procured through crimes, as well as implementation of the conclusions of the Forums held up to that point.

The fifth Global Forum, held between April 2 and 5, 2007, in Johannesburg, South Africa, was called "*Meeting commitments: effective action against corruption*".¹⁸⁷ The topics approached during this conference were as follows: consolidating action in view of implementing anti-corruption measures: law enforcement: operational, practical and effective measures and legislation for law enforcement aimed at combating corruption; organised crime, particularly money laundering; and preventive action through an integrated national system.

1.4. INTERPOL, the largest international police organisation¹⁸⁸, tackles six crime areas: drugs and criminal organisations, public safety

¹⁸⁴ Documents of the forum at www.worldbank.org/wbi/governance/events/gf2hague.html.

¹⁸⁵ Documents of the forum at www.worldbank.org/wbi/governance/pdf/gf3_finaldec.pdf.

¹⁸⁶ Documents of the forum at www.cgu.gov.br/ivforumglobal.

¹⁸⁷ Documents of the forum at www.globalforum5.gov.za.

¹⁸⁸ INTERPOL was established in 1923 to facilitate international police cooperation. It has 186 member states, including Romania. Details at www.interpol.int.

and terrorism, financial and high-tech crime, trafficking in human beings, fugitives, and corruption.

In its *Seoul Declaration* (1999)¹⁸⁹, INTERPOL warns that a corrupt law enforcement officer undermines the confidence of the public in the state in general, and in the public service and law enforcement in particular.

It states that a top priority of member countries is to ensure that law enforcement is free from corruption, and that a national integrity programme should take into account the following factors: combating corruption through education and prevention, investigation, and public relations; the need for a code of conduct and code of ethics for police workers; a recruitment process that should include integrity testing; continuing training for all employees, with special attention to ethics and integrity; the involvement of the management structures in anti-corruption initiatives and adequate remuneration of law enforcement officials so they can afford a decent standard of living.

In 1998, INTERPOL's *Group of Experts on Corruption* (IGEC)¹⁹⁰ was established, and in autumn 2009 the INTERPOL Anti-Corruption Office (IACO) and INTERPOL Anti-Corruption Academy (IACA) were also founded. These compartments support standard and policy making, as well as guidance and assistance through education, research, training, investigation, and asset recovery operations. IGEC has adopted three key instruments for the police sector under discussion:

- **The Code of Conduct for Law Enforcement Officers** (1999): contains the following 10 principles – 1) Honesty and integrity; 2) Fairness and tolerance; 3) Use of force and abuse of authority; 4) Performance of duties; 5) Lawful orders; 6) Non-disclosure; 7) Impairment; 8) Appearance; 9) General conduct; and 10) Cooperation and partnerships;
- **The Code of Ethics for Law Enforcement Officers** (1999)¹⁹¹: is an oath limiting the use of law enforcement powers only for the benefit of people;
- **Global standards to combat corruption in police forces** (2002)¹⁹²: consists of principles and measures intended to make the fight against corruption more efficient. It emphasises the honesty, ethics and professional competences of police workers.

2. Council of Europe instruments

The Council of Europe (CoE) is the oldest political organisation in Europe. Established on May 5, 1949, the Council currently has 47 European member states, Romania included¹⁹³. The main goal of CoE is

¹⁸⁹ The Resolution of the INTERPOL General Assembly no. 4 in the 68th session, November 8-12, 1999, at www.interpol.int/Public/ICPO/GeneralAssembly/AGN68/Resolutions/AGN68RES4.asp.

¹⁹⁰ IGEC home page at www.interpol.int/Public/Corruption/IGEC.

¹⁹¹ The Codes are available at www.interpol.int/Public/Corruption/IGEC/Codes/Default.asp.conduct.

¹⁹² The Standards are available at www.interpol.int/Public/Corruption/Standard/Default.asp.

¹⁹³ Romania ratified the Statute of the Council of Europe through Law no. 64/4.10.1993, published in O.J. no. 238 of October 4, 1993. The CoE Information Office in Bucharest was set up in 2002. Details at www.coe.ro.

to strengthen the unified approach of member states with respect to human rights, fundamental freedoms and the rule of law, principles which underlie all true democracies and influence the lives of all Europeans. The decision-making bodies of CoE are the Parliamentary Assembly and the Committee of Ministers.

In the view of CoE, *the fight against corruption* relies on three elements: 1) drafting European rules and standards, 2) monitoring their implementation, and 3) technical cooperation programmes provided to member states.

The main instruments in fighting corruption are:

2.1. In the Parliamentary Assembly:

a) Resolution 1214 (2000) on the Role of Parliaments in Fighting Corruption¹⁹⁴: states that parliamentarians must set an example in incorruptibility, ensure the transparency of institutions, declare their and their families' financial interests, protect the independence of the judiciary and of the media, endorse legislation to protect *whistleblowers*, and help society become involved in fighting corruption. In this respect, MPs have established GOPAC – the Global Organisation of Parliamentarians against Corruption¹⁹⁵.

b) Resolution 1492 (2006) on Poverty and the Fight against Corruption in the Council of Europe Member States¹⁹⁶: recommends simplification of bureaucratic procedures, implementation of rules for the declaration of civil servants' property, transparency in public spending, suitable salaries, decentralisation and financial autonomy for local or regional authorities, the introduction of analysis systems for corruption complaints, provision of specialised training schemes for magistrates and police, enhanced independence and transparency of the judiciary, and administrative measures against corrupt employees in the public and private system.

2.2. In the Committee of Ministers¹⁹⁷:

a. Anti-corruption Action Plan (1996), drawn up by the Cross-Disciplinary Group against Corruption, was adopted by the Committee of Ministers of the Council of Europe in response to the

¹⁹⁴ *Role of parliaments in fighting corruption* at <http://tinyurl.com/parlcorrupt>.

¹⁹⁵ *The Global Organization of Parliamentarians Against Corruption* (GOPAC), at <http://gopacnetwork.org>.

¹⁹⁶ *Poverty and the fight against corruption in the Council of Europe member states* at <http://tinyurl.com/coecorupt>.

¹⁹⁷ Conclusions of the Committee of Ministers can be formulated, if necessary, as recommendations to national governments. The Committee may invite member governments to communicate the measures taken in response to such a recommendation (Art. 15 (b.2) in the Statute of the Council of Europe, signed in London on May 5, 1949, and taking effect on August 3, 1949).

recommendations of the 19th Conference of European Justice Ministers held in La Valetta in 1994.

b. The Twenty Guiding Principles For The Fight Against Corruption (1997), adopted under Resolution (97) 24¹⁹⁸, invites member states to include these principles in their national legislation and practice, and instructs the Cross-Disciplinary Group against Corruption to draw up an instrument to monitor the implementation of these principles and of the adopted international instruments.

The 20 principles are:

1. to take effective measures for the prevention of corruption and, in this connection, to raise public awareness and promoting ethical behaviour;
2. to ensure co-ordinated criminalisation of national and international corruption;
3. to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations;
4. to provide appropriate measures for the seizure and deprivation of the proceeds of corruption offences;
5. to provide appropriate measures to prevent legal persons being used to shield corruption offences;
6. to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society;
7. to promote the specialisation of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to perform their tasks;
8. to ensure that the fiscal legislation and the authorities in charge of implementing it contribute to combating corruption in an effective and co-ordinated manner, in particular by denying tax deductibility, under the law or in practice, for bribes or other expenses linked to corruption offences;
9. to ensure that the organisation, functioning and decision-making processes of public administrations take into account the need to combat corruption, in particular by ensuring as much transparency as is consistent with the need to achieve effectiveness;
10. to ensure that the rules relating to the rights and duties of public officials take into account the requirements of the fight against corruption and provide for appropriate and effective disciplinary measures; promote further specification of the behaviour expected from public officials by appropriate means, such as codes of conduct;
11. to ensure that appropriate auditing procedures apply to the activities of public administration and the public sector;
12. to endorse the role that audit procedures can play in preventing and detecting corruption outside public administrations;
13. to ensure that the system of public liability or accountability takes account of the consequences of corrupt behaviour of public officials;

¹⁹⁸ Available at www.coe.int/greco.

14. to adopt appropriately transparent procedures for public procurement that promote fair competition and deter corruptors;
15. to encourage the adoption, by elected representatives, of codes of conduct and promote rules for the financing of political parties and election campaigns which deter corruption;
16. to ensure that the media have freedom to receive and impart information on corruption matters, subject only to limitations or restrictions which are necessary in a democratic society;
17. to ensure that civil law takes into account the need to fight corruption and in particular provides for effective remedies for those whose rights and interests are affected by corruption;
18. to encourage research on corruption;
19. to ensure that in every aspect of the fight against corruption, the possible connections with organised crime and money laundering are taken into account;
20. to develop to the widest extent possible international co-operation in all areas of the fight against corruption.

c. Criminal Law Convention on Corruption¹⁹⁹ and **Civil Law Convention on Corruption²⁰⁰** were drawn up as part of the Anti-Corruption Action Plan, by the Cross-Disciplinary Group against Corruption.

The *Criminal Law Convention on Corruption (1999)* regulates the obligation of signatory states to adopt suitable legislative measures to criminalise the following forms of corruption: (1) active and passive bribery of national and foreign public officials; national and foreign parliamentarians; members of international parliamentary assemblies; international officials; national, foreign, international judges and international court officers; and private sector corruption; (2) trading in influence; (3) money laundering of proceeds from corruption offences; and (4) corruption-related offences. The Convention stipulates the need to adopt effective, proportional and deterring sanctions and measures, including custodial measures that entail extradition. It also stipulates the need to regulate criminal liability of legal entities, which must be subject to criminal or other sanctions.

The *Civil Law Convention on Corruption (1999)* is the first international document that lays down civil regulations on corruption. It encourages states to adopt effective remedies for those affected by corruption offences, enabling them to defend their rights and interests, including the possibility to obtain compensation for damages. The Convention also stipulates the obligation of member states to have their national legislation include responsibility of the state for corruption offences perpetrated by its employees, as well as measures to protect employees who disclose corruption misdeeds. The Convention also contains provisions regarding the international cooperation of signatory states in civil proceedings related to corruption, particularly with respect to the notification of documents, obtaining evidence abroad, and recognition and enforcement of rulings issued abroad.

¹⁹⁹ *Criminal Law Convention on Corruption*, endorsed in Strasbourg on January 27, 1999, was ratified by Romania under Law no. 27/16.01.2002, published in O.J. no. 65 of January 30, 2002.

²⁰⁰ *Civil Law Convention on Corruption*, endorsed in Strasbourg on November 4, 1999, was ratified by Romania under Law no. 147/01.04.2002, published in O.J. no. 260 of April 18, 2002.

d. Resolution (99) 5 on GRECO: The Group of states against corruption (GRECO) monitors the implementation of CoE anti-corruption standards and ensures the application of Convention provisions regarding corruption²⁰¹. GRECO is a committee made up of representatives from member states, and is open to the participation of other states that have contributed to the works of the Cross-Disciplinary Group against Corruption (USA, Canada, Japan, Mexico, Belarus, Georgia and Bosnia and Herzegovina). The Group conducts annual assessments, upon which it drafts confidential reports that enable GRECO to make recommendations to member states in view of improving their national anti-corruption legislation and practice.

The conclusions of the GRECO expert mission of October 2001 in Romania include concerns that the institutions most seriously involved in fighting corruption, including the *police* and *magistracy*, are also affected by corruption. This makes it necessary for our country to comply with the specific recommendations made by the mission.

In the second assessment round, in December 2007, GRECO analysed Romania's compliance with the 15 previous requirements. The report concluded that Romania made *evident efforts* in confiscating assets obtained through corruption in a large number of cases, in introducing the criminal liability of legal entities, in improving public access to official documents and consolidating an inter-institutional exchange of information on legal entities. But the document also notes *limited progress* with respect to most recommendations, and *no progress* with respect to the recommendation of introducing proper rules for the recruitment and career of civil servants in general, of harmonising rules and principles related to the decline in gifts, the training of fiscal inspectors in uncovering possible corruption misdeeds. GRECO calls on Romania to be firmly involved in anti-corruption policies that are clearly designed to fully implement the respective recommendations²⁰².

e. Model Code of Conduct for Public Officials: the Code was endorsed under Recommendation no. R (2000)10 and is accompanied by an explanatory memorandum²⁰³. Member states are advised to use it as a model when drawing up codes of conduct for their own public officials. This category is defined as including the employees of a public authority, but not elected officials, members of the government and judicial personnel. In conclusion, such codes are applicable to magistrates when they do not exercise judicial powers in court (e.g., when

²⁰¹ In December 2007, GRECO had 46 member states (including the USA) and 6 international bodies as observers. Romania is a GRECO founding member. See www.coe.int/greco. Also worth mentioning is the existence of MONEYVAL –Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, established in 1997 by the Council of Europe, www.coe.int/moneyval.

²⁰² The report was endorsed on 07.12.2007 and is available in Romanian at www.just.ro.

²⁰³ The Code and explanations are available at www.coe.int/greco.

they are members of auction commissions, employment commissions, assessment commissions), and to the specialised auxiliary personnel in courts and prosecutors' offices.

The goal of the Code is to define integrity and conduct rules for public officials, to assist them in complying with the rules and to inform the public of the conduct they are entitled to expect from public officials.

The Code defines *conflicts of interests* as those situations where a public official has private interests that would influence or would appear to influence the exercise of their lawful powers with impartiality and objectivity. This private interest includes any financial or other civil advantage for the public official or their family, close relatives, friends or any persons or organisations with whom the public official has or has had business or political relations.

The Code requires compliance with the law; politeness; loyalty; competence; impartiality; avoidance of real, potential or apparent conflicts of interests; confidentiality; the reporting of illegal, unethical or criminal orders or conduct. The code binds public officials to declare their interests, refrain from activities that are incompatible with their position, and to fulfil their public or political activities so as not to weaken confidence in the public service. According to the code, public officials must not accept gifts or invitations that might affect their impartiality, must decline and report undue benefits; must not return favours; must not abuse their position in order to secure advantages; must ensure that public assets are employed in a useful, effective and economical manner. The code requires that employers run integrity checks upon recruitment, appointment and promotion; have superiors be accountable for the deeds of their employees; if they failed to take appropriate measures, and take anti-corruption measures such as warning of the importance of compliance with rules and regulations, conducting suitable anti-corruption training, paying attention to the financial and other difficulties that employees may meet, and must be a model of integrity. Furthermore, the code advises that public officials may not be employed in a new job in which they may use the information obtained in the course of their previous official duties, or if they worked previously as a public official in a specific case which would now provide an advantage to the entity that hired them. Finally, the code admonishes that public officials must not give preferential or privileged treatment to former public officials.

f. Conclusions of the fifth European Conference of Services Specialising in Combating Corruption, held on November 15 – 17, 2000 in Istanbul, Turkey, which focused on "Investigating, prosecuting and punishing corruption offences."

The conclusions of the Conference were as follows:

- the establishment of a global strategy and cooperation between relevant institutions is necessary; public services must operate transparently; and the public is one entitled to check the procedures and the substance of administrative decisions;
- mass media must be used in anti-corruption campaigns; the public must be alert and work together with the authorities; studies on public perception and on the perceptions of public-service users may help to understand the phenomenon;

- criminal justice must define effective, proportional and deterring sanctions for corruption offences, which should add to administrative measures such as dismissal; the investigation of corruption offences also leads to uncovering other offences, such as forgery or money laundering;
- prosecutors must be independent, and the judicial police must operate independently;
- the immunity of politicians must be restricted to activities related to their official position; binding prosecutors to notify administrative authorities before investigating or prosecuting a public official hinders the proper operation of the judicial system;
- bank secrecy is not opposable against prosecutors; the secret nature and complexity of the offences requires special investigation methods, which must be specified in the law and used by highly trained police workers, under the supervision of a judicial authority;
- law enforcement personnel must resort to specialised services and exchange information with other relevant institutions;
- covert agents must not entrap suspects into committing offences; the importance of informants is recognised; employees who have information on corruption misdeeds must report them, witnesses and collaborators of the judiciary must be protected;
- full impunity for those who report a corruption offence that they themselves have committed should be questioned, particularly when the reporting occurred long after the fact or in case of imminent commencement of investigations.

g. OCTOPUS²⁰⁴ is the Programme against Corruption and Organised Crime in Europe. It started in 1996.

Participants in the 2003 Conference on "Specialised anti-corruption services: European best practices" reached the following conclusions:

- services specialising in the fight against corruption should be responsible for the leadership and coordination of the implementation of the national anti-corruption strategy;
- such a strategy must include three elements: implementation, prevention and education; and be applied both in the public, and in the private sector;
- the fight against corruption must involve the entire community;
- specialised services must be competent in investigating corruption offences, but also in investigating corruption-related or similar offences; any complaint regarding a corruption offence must be investigated; administrative anti-corruption services must forward the complaint to the departments in charge with investigating the offences and be notified on the findings;
- public support and confidence are rooted in the independence and operational autonomy of the specialised services, i.e., the accountability for their work, which must be stipulated in the law; their activity must be in compliance with human rights standards; appropriate funding must be ensured; any activity must be transparent, unless a particular investigation needs to be confidential;
- the staffing of these services must be exclusively based on merit and include integrity checks; the personnel must comply with the code of conduct;

²⁰⁴ A programme co-financed by the Council of Europe and European Commission. Details available at www.coe.int/cybercrime.

specialised continuing training must be provided to the personnel; the performance of the service must be measured, on a regular basis, against qualitative and quantitative indices, as well as against public perceptions and attitudes, and the GRECO assessments may be used as a starting point.

The 2006 Conference on "Corruption and Democracy" tackled four issues: political party financing, lobbying, conflicts of interests, and *corruption, justice and democracy*.

With respect to conflicts of interests, the conference concluded that the OECD Guide on the management of conflicts of interests in the public service and the GRECO recommendations in the second round of assessment be taken into account.

With respect to inappropriate influences on the judiciary, emphasis is made on the separation of powers; the six principles of conduct included in the Bangalore Principles, which are viewed as critical to guiding the conduct of judges; the strengthening of the independence of those who investigate, prosecute and try corruption offences; and making the judiciary accountable to the public. OCTOPUS recognised that there have been inappropriate influences, abuse and corrupt practices in the recruitment and promotion of judges, the duration of their terms in office, salaries, extra-judicial activities, new jobs, conduct standards and the discipline mechanism. It cited ethical problems and corrupt practices as occurring most frequently in the criminal justice system; rules of conduct as an instrument for strengthening judicial integrity; financial declarations as instruments for monitoring conflicts of interests; public involvement as effective in drafting judicial policies, and transparency as useful in enhancing the activity of magistrates.

h. Code of good administration, an appendix to Recommendation no. 7 (2007) on good administration²⁰⁵.

The *Recommendation* views good management as an aspect of good governance. Good management depends on the quality of organisation and management, and must meet the needs of society, preserve and protect public property and other public interests, and exclude all forms of corruption. Member countries are urged to promote the principle of good management, through efficient, effective and cost-effective administration and operation of public administration institutions (performance indicators, regular inspection, quality of services). They are also urged to promote the right to good management for the general interest, by adopting the norms laid down in this code.

The *Code* details the principles of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, and respect for privacy and transparency. The code presents the status of administrative proceedings, from their creation to their implementation, as well as the means to challenge them and remedies for the damages caused by their issuance.

²⁰⁵ Adopted by the Committee of Ministers of the Council of Europe on 20.06.2007, <http://tinyurl.com/Rec-2007-7>.

2.3. The Consultative Council of European Judges²⁰⁶. The consultative body within the Council of Europe, specialises in matters related to the independence, impartiality and competence of judges. It is comprised of one judge from each member state and issues opinions. Opinion no. 3, entitled "**The principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality**" answers three questions: 1) "What standards of conduct should apply to judges?"; 2) "How should standards of conduct be formulated?"; and 3) "What criminal, civil and disciplinary liability should apply to judges?". According to this opinion, the powers entrusted to judges are strictly tied to the values of justice, truth and freedom. It states that the standards of conduct applicable to judges are consequences of these values, and a prerequisite for the public confidence in the administration of judges. Therefore, according to the opinion judges should exercise their duties without preferences, prejudice and preconceptions, and must act so as to avoid conflicts of interests and the abuse of power. Judges who, in the course of official duties, commit misdeeds that would qualify as offences in any circumstances (e.g., accept the bribes) cannot benefit from immunity in ordinary criminal law.

2.4. Consultative Council of European Prosecutors²⁰⁷. This is another consultative body of the Committee of Ministers of the Council of Europe. It was established in 2005 to institutionalise the meetings held previously in the form of Conferences of European Prosecutors General. One such conference, held in Budapest, adopted on May 31, 2005, a "**European Guide on the Ethics and Conduct of Prosecutors**"²⁰⁸. The Guide recommends prosecutors not give preference to either of the parties; not to allow personal, family or other interests to influence their decisions; not to use the information obtain in the course of official duties in their own interest or the interest of third parties; or not to accept gifts, advantages or hospitality from third parties, all of which may affect their integrity, fairness and impartiality.

3. European Union instruments

EU anti-corruption policies²⁰⁹ are aimed at establishing a common European approach. Specific EU instruments are:

²⁰⁶ The CCEJ web site is www.coe.int/ccje. Opinion no. 3 is also available in Romanian.

²⁰⁷ See www.coe.int/ccpe.

²⁰⁸ Also known as the "Budapest Guide". Available at www.coe.int/t/dghl/cooperation/ccpe/conferences/.

²⁰⁹ As described at <http://europa.eu/scadplus/leg/fr/s30004.html>.

a. Convention on the Protection of the European Communities' Financial Interests (1995)²¹⁰.

The Convention is accompanied by an explanatory report (1996) and completed by two Protocols (1996, 1997), which are each accompanied by an explanatory report. The Council of the European Union endorsed all of them. The first protocol focuses on defining concepts such as "official", "active and passive corruption," and on harmonising and punishing corruption offences.

b. Convention on the fight against corruption involving officials of the European Communities or officials of EU member states, adopted by the Council of the European Union (1997)²¹¹.

The Convention is accompanied by an explanatory memorandum (1998). It stipulates the obligation of member states to criminalise active and passive corruption misdeeds, particularly when perpetrated by or in relation to parliamentarians, ministers, judges, and auditors in the course of their official duties. It also applies to misdeeds by or in relation to members of the European Commission, European Parliament, European Court of Justice or European Court of Auditors. States must take steps to have corruption offences (as well as instigation of or participation in corruption offences) punished effectively, proportionately and with a deterrent effect, including through custodial sanctions that lead to extradition.

c. Communication (2003) 317 from the Commission to the Council, the European Parliament and the European Social and Economic Committee – on a comprehensive EU policy against corruption²¹².

The communication's principles relate to a high-level political commitment to the fight against corruption, implementation by each member state of international anti-corruption instruments, development of investigation instruments, allotment of specialised anti-corruption personnel, and introduction of integrity standards. It also supports candidate states in introducing appropriate anti-corruption legislation, making transparent use of public funds and improvement of the social and economic environments. The goal is to reduce corruption in all its forms and at all levels, in EU countries and institutions as well as outside them.

²¹⁰ *Convention on the protection of the Union's financial interests* was published in the Official Journal C 316 of 27 November 1995 and took effect on 17 October 2002. Available at <http://europa.eu/scadplus/leg/en/lvb/l33019.html>.

²¹¹ *Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union* was published in the Official Journal no. 195 of 25 June 1997; at <http://europa.eu/scadplus/leg/en/lvb/l33027.html>.

²¹² *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – On a comprehensive EU policy against corruption* Com (2003) 317 is not published in the Official Journal; it is available at <http://europa.eu/scadplus/leg/en/lvb/l33301.html>.

d. Framework Decision 2003/568/JHA of 22.07.2003 of the Council of the European Union on combating corruption in the private sector²¹³.

Under the Decision, active and passive corruption committed by profit or non-profit organisations in the private sector must be criminalised; and legal entities must also be held accountable for such deeds. The upper limit of the sanction must be at least one to three years' imprisonment, as well as a temporary-to-indefinite suspension of the right to trade.

e. The European Anti-Fraud Office (1999)²¹⁴ was established in order to carry out administrative investigations into fraud, corruption or other offences that affect the financial interests of the European Union, including misconduct in European institutions.

f. Council Framework Decision 2005/212/JAI of February 24, 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property²¹⁵.

Under this Decision, each member state is to take necessary measures to enable it to confiscate, in full or in part, the instruments and products that have been generated by an offence punishable with a prison sentence greater than one year, or assets of value comparable to the products involved. Therefore, *enhanced confiscation* powers must be implemented: each member state is to take at least the measures needed to enable it to confiscate, in full or in part, the property of an individual convicted in the following cases: (a) where a national court based on specific facts is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively, (b) where a national court based on specific facts is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively, (c) 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 that convicted person.

²¹³ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, in the Official Journal L 192 of 31 July 2003, pp.54-56, at <http://europa.eu/scadplus/leg/en/lvb/l33308.html>.

²¹⁴ OLAF home page, at <http://ec.europa.eu/olaf>.

²¹⁵ Published in the Official Journal L 68 of March 15, 2005, pp. 49-51.

4. Other anti-corruption and public integrity programmes

4.1. Organisation for Security and Cooperation in Europe²¹⁶

OSCE is the world's largest regional organisation and brings together 56 members. Established under the *Helsinki Final Act* (1975), OSCE assists participant states in improving good governance and the fight against corruption by promoting the ratification and implementation of the UN Convention against Corruption; organising workshops at a national and regional level, with respect to international legal instruments and good practices; assistance, upon request, in institutional construction, particularly with respect to the training of public officials; and distribution of the **OSCE Handbook on Best Practices in Combating Corruption** (2004)²¹⁷.

This handbook contains case studies and targets the legislators, public officials, mass media, NGOs, business people, and civil society at large. Chapters broach the transparency of political affairs, the financing of political parties and election campaigns, conflicts of interests and declaration of interests, lobbying, political and judicial immunity, ethics in public administration, public procurement, licenses and concessions, criminal law and the implementation of criminal legislation (this chapter discusses *police* and *prosecutors*), privatisation and anti-corruption procedures, national anti-corruption strategies, anti-corruption commissions, mass media and civil society, and the judiciary (this chapter discusses *Judges* and *lawyers*). The conclusions reiterate that clearly defined anti-corruption strategies are necessary, along with effective public campaigns, codes of conduct and citizen charters. It also emphasises that bureaucratic procedures must be modernised, whistleblowers must be encouraged and protected, integrity checks must be conducted on a regular basis, civil society must be involved, the critical nature of access to public information and the availability to the Internet. Furthermore, the handbook suggests that salary increases are a solution, but only for those officials on junior positions. It promotes that new laws be enforced, regulations on evidence be adjusted to the specific nature of corruption offences (laws must not be a hindrance to criminal prosecution), how laws on illegal activities may spearhead an anti-corruption campaign, and the need for systems to monitor public perception, the impact of corruption on business, and to measure corruption in various sectors. Management methods, anti-corruption and ethics must also be taught in educational institutions. Strictly with respect to *courts*, the handbook emphasises the need for institutional independence, promoting codes of conduct, accomplished leaders, review of courts and the substance of court rulings, a mechanism for public complaints, merit-based appointment and promotion, committees of court-users to meet and discuss with judges about solutions for court operations, overseeing the auxiliary personnel who handle files and work at their assignment, and for posting court case-file data on the Web.

²¹⁶ OSCE home page is www.osce.org.

²¹⁷ The handbook is available in seven languages, at www.osce.org/eea/item_11_13568.html.

4.2. Regional Anti-Corruption Initiative (RAI) is the name, since October 2007, of what was formerly known as the Stability Pact for South-Eastern Europe (founded in 1999). It consists of high-level political agreements to assist Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Moldova, Montenegro, Romania, and Serbia in implementing international and regional anti-corruption instruments; promoting good governance and reliable public administration; promoting the rule of law, transparency and integrity; and promoting active civil society.

4.3. European Partners against Corruption²¹⁸. EPAC is a network of authorities charged with monitoring and investigating national police and anti-corruption bodies. Romanian members of EPAC includes the Directorate General for Intelligence and Internal Protection²¹⁹, the Anti-Corruption Directorate General²²⁰ in the Ministry of Administration and the Interior, and the National Anti-Corruption Directorate²²¹.

The network holds annual meetings. In the 2007 *Helsinki Declaration* 2007, it emphasised the need for independence of the national bodies that oversee the police and national anti-corruption authorities. This independence must be strengthened, particularly in relation to the hierarchical structures of which they are a part. It also states that there is a need for specific legislation, adequate budgetary resources and accessibility for the public. It states that minimum standards and best practices must be drafted to reinforce independence and accountability. It endorses the furthering of human rights in police activities be strengthened, and that their transparency, impartiality and integrity be ensured. Finally, it recommends connections be strengthened between the institutions in charge with education, prevention and combating of corruption.

²¹⁸ European Partners Against Corruption, at www.epac.at.

²¹⁹ DGIPI works to collect, process, store and use intelligence on: the monitoring of criminal groups involved in the perpetration of serious offences with unique MOs, which are significant in scale and require complex, long-term investigations (drugs smuggling, assassinations, corruption offences, smuggling, illegal migration, trafficking in human beings, money forgery, trafficking in capitals, financial crime, cyber-crime); the monitoring of operations involving strategic, dual-use products and technologies, subject to control of the final destination; the implementation and overseeing of the enforcement of regulations on classified information, including NATO intelligence, as well as the protection of assets, missions and personnel of the Ministry of the Interior and of Administrative Reform; technical cooperation and implementation of the Department Strategy of the Ministry of the Interior and Administrative Reform in preventing and combating terrorism and terrorism-related activities, as well as cooperation with strategic national institutions with relevant powers; domestic and international cooperation in the field, with other law enforcement agencies. See www.dgipi.ro.

²²⁰ DGA was established under Law No. 161/30.05.2005 as the structure of the Ministry of Administration and the Interior specialising in preventing and combating corruption among Ministry personnel. See www.mai-dga.ro.

²²¹ NAD was established under Government Emergency Ordinance No. 43/2002, under the initial name of National Anti-Corruption Prosecutor's Office, as a prosecutor's office specialising in combating corruption offences. At present, it is a separate legal entity subordinated to the Prosecutor's Office attached to the High Court of Cassation and Justice, and specialising in the fight against high- and medium-level corruption. Its home page is www.pna.ro.

The 2005 *Lisbon Declaration* encourages the inclusion of human rights values and ethics in the selection and training of police personnel; the dissemination of human rights practices, particularly those related to the use of force and firearms; and the strengthening of confidence between people, NGOs and police forces. Lastly, the 2004 *Vienna Declaration* emphasises the importance of the freedom of the press as a major and vital means in fighting corruption in a democratic society.

4.4. Transparency International Instruments²²²

TI is one of the leading actors in anti-corruption at a global level. Established in 1993, it is the world's largest non-governmental organisation dedicated to fighting corruption. TI brings together civil society, business people and institutions to form a powerful global coalition, thereby generating a worldwide *anti-corruption movement*. Through its Berlin-based secretariat and its 90+ independent branches around the world, it operates at national and international levels to curb corruption demand and supply. At an international level, TI organises campaigns on the damaging effects of corruption, supports reform policies, works to implement multilateral conventions by governments, corporations and banks. At a national level, branches work to enhance responsibility and transparency by monitoring the performance of the main institutions, by lobbying for reform and by bringing together entities concerned with corruption in their countries.

TI has been involved in drafting the main international anti-corruption instruments, such as the UN Convention against Corruption, the African Convention Against Corruption, the OECD Convention for combating bribe. TI attached a new meaning to the concept of "bribe", to include conflicts of interests and gifts in the spectrum of corruption.

In fighting corruption, TI uses the expertise provided by national branches and the International Secretariat. It develops coalitions with decision-makers in all sectors of the society—stitutions, think-tanks, civil society. TI also analyses and diagnoses corruption, by measuring the scope, frequency and forms in studies, surveys, and indices, although it does not investigate individual corruption cases. TI continues its efforts by carrying out public campaigns to warn of the immediate and long-term effects of corruption, to identify individual roles in curbing corruption, to provide solutions at international, national and local levels, and to press the public in requesting reforms.

Below is a presentation of a number of specific TI anti-corruption instruments:

a. Studies of the National Integrity System

Promoting integrity and preventing corruption require a holistic model of the institutions involved in the public, private and civil society

²²² The home page of the organisation is www.transparency.org.

sectors. The following are viewed as the key pillars of the "National Integrity System": the Executive, the Legislature, Political Parties, Electoral Bureaus, the Supreme Accounts Control Institution, the Judiciary, the Public Sector, Police and Prosecutors' Offices, Public Procurement, Ombudsman, Anti-corruption Agencies, Mass Media, Civil Society, the Private Sector, County and Local Administration, International Institutions. The framework is provided by the paper "*National Integrity Source Book*" by Jeremy Pope (2002)²²³.

Drawing on this, TI put together the ***Anti-Corruption Handbook***²²⁴ (2004), an instrument intended to provide assistance in designing and applying anti-corruption measures. It may be used by practitioners in any country, and contains keywords that are updated on a regular basis.

b. The Corruption Perception Index (CPI)²²⁵, launched in 1995, is the world's best known instrument for measuring the perceived corruption among public officials in each country. To measure corruption in a state, the institution prefers the experience and perception of those who face corruption directly in that country, given that measuring corruption against concrete empirical data, such as the number of convictions or the amount of bribe paid, is particularly difficult. In the case of the number of convictions, data do not reflect the actual level of corruption, but rather the capacity of prosecutors, judges and the media to uncover corruption cases. The measures recommended at a global level, upon the launch of the CPI in 2007, underscore the need to improve the independence, integrity and public accountability of *the judiciary*, in view of enhancing its credibility. For the optimal functioning of the judiciary, judicial procedures must be protected from political influence, and judges must be subject to disciplinary regulations and to a code of conduct, while also benefiting from limited immunity. In 2008, recommendations refer to the strengthening of control and accountability mechanisms. Whether we talk about a poor country or not, the challenge of curbing corruption requires functioning governmental and social institutions. In poor countries, corruption is evident in the judiciary, and institutional control is inefficient. In order to reduce corruption in such places, they need powerful institutions, the rule of law, independent mass media and an active civil society.

²²³ Available in over 20 languages at www.transparency.org/publications/sourcebook.

²²⁴ Available at www.transparency.org/index.php/policy_research/ach.

²²⁵ Available at www.transparency.org.ro/politici_si_studii/indici/ipc/index.html. CPI is a composite index, based on corruption data supplied by specialised surveys worked out by several leading independent institutions. It reflects the opinion of business people and analysts around the world, including experts from the countries under analysis. The polls used in drawing up the CPI ask questions regarding the incorrect use of public positions for private gains, with a focus, for instance, on public procurement officials taking bribes, on the embezzlement of public funds, or questions that check the strength of anti-corruption policies, which comprises both political and administrative corruption.

In 2007, Romania ranked 69 out of 179 countries, with a score of 3.7 out of 10 (1-for the most corrupt; 10-for the least corrupt), and was perceived as the *most corrupt state in the EU*, where the average score was 6.51.

In 2008, Romania's index rose to 3.8 points, and but was overshadowed by Bulgaria as the most corrupt member of the European Union. At a global level, Romania now ranks the 70 out of 180 countries²²⁶. TI-Ro recommends the implementation of a consistent standard for the investigation and punishment of all corruption cases and the removal of all other additional filters, that may affect the administration of justice, namely the strengthening of administrative-disciplinary jurisdiction in all components of the public sector including magistrates, civil servants, employed personnel.

Romania's evolution between 1997 and 2008

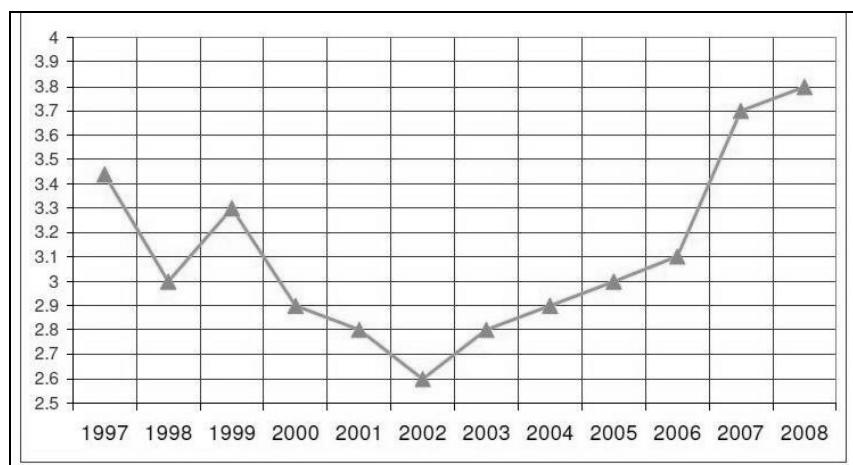


Table nr. 3: Corruption Perception Index (TI)
Romania's performance in 1997-2008

c. **Bribe Payers Index (BPI)**²²⁷ is the standing of the largest exporting countries, by the instructions of their companies to pay bribes outside national borders. So far four editions of this index have been released (1999, 2002, 2006 and 2008). Romania has not been included in the standings because it is not a leader in regional or world exports.

d. **Global Corruption Barometer (GCB)** is a survey released in 2003 to measure both the *perception* of the general public on corruption

²²⁶ In 2008, the 10 least corrupt states are Denmark, New Zealand, Sweden, Singapore, Finland, Switzerland, Iceland, Netherlands, Australia, and Canada. The most corrupt are Congo, Equatorial Guinea, Chad, Guinea, Sudan, Afghanistan, Haiti, Iraq, Myanmar, and Somalia.

²²⁷ Available at www.transparency.org.ro/politici_si_studii/indici/ipm/index.html.

and people's *experience* related to this phenomenon. The Barometer collects citizens' opinions on the most corrupt elements of the public sector, on the aspects of life (family life, business environment or political community) which are the most affected by corruption, as well as on the steps taken by governments to fight corruption²²⁸.

In 2007, data indicated that at a global level, the general public continues to perceive parliaments and political parties as the most corrupt institutions, whereas direct experience reveals that the bribe level is the highest in the *police* and the *judiciary*. Consequently, key institutions in society, particularly institutions playing a vital role in ensuring the integrity and public accountability of governments, are discredited. The perception of the judiciary as the second-most corrupt institution, after the police, raises serious questions about the guarantees of equal access to justice for citizens. It is the duty of institutions such as the judiciary and police to punish corruption misdeeds. If these are affected by bribery, as indicated by the 2007 Barometer, then law enforcement mechanisms, which are vital to the effectiveness of anti-corruption efforts, become obstructed, and the confidence of the public is undermined.

The 2007 Barometer indicates that low- and medium-income respondents were the most affected by small-scale corruption, because the likelihood of their paying bribes to secure public services was higher than that of higher-income respondents. This result is equally valid for rich and poor countries. Everywhere in the world, those who gain less must pay bribes more often.

In 2008, the perception of many public institutions remained negative. The public continued to identify political parties as the most corrupt institution, whereas the direct experience of respondents revealed that the *police*, followed by land registration authorities and the *judicial system*, had the most severe penchant for bribe-taking. The result is that key institutions in society, particularly institutions which are critical to the integrity and accountability of the government and to guaranteeing human rights, become discredited. There is no doubt that the legitimacy of the government is undermined by corruption.

In 2007, 33% of the interviewees admit to having paid bribes, and the most corrupted institutions remained the political parties and Parliament with 3.9 points, *justice* with 3.8 points, and *police* and the healthcare system both at 3.7 points. The survey reveals that over the last 12 months, 10% of the respondents (or people close to them) had contacts with the *judiciary*, of whom 11% were asked to give bribe, and 10% said they paid it. The average amount of the bribe was 114.60 euro. Another 16% came in contact with the

²²⁸ GCB reflects the views of the public on corruption, whereas the CPI is based on expert opinions. The former reflects individual experiences of corruption (small-scale corruption), the latter reflects the perceptions of informed observers on corruption in the public system and in politics. Although different, the results of the two instruments are correlated (in 2007, the correlation index was 0.66).

police; 9% of them were asked for a bribe, and 11% offered bribe to police workers. The average of these bribes amounted to 114.80 euro²²⁹.

In 2008, 14% of the population admitted to having paid bribes (as against the 5% average in Europe or even 5% in Bulgaria). The most corrupt institutions were the political parties and Parliament with 4.3 points each, followed by the *judiciary* with 4.2, the business environment with 3.8 and, for the first time in a leading position, the mass media, with 3.4 points. The survey reveals that in the previous 12 months, 6% of the respondents (or people close to them) came in contact with the *judiciary*. Of these, 8% said they paid bribe. Also, 10% answered that they had had contacts with the police, and 13% of them offered bribes to police workers²³⁰.

The score is calculated on a scale from 1 (not at all corrupt) to 5 (the most corrupt). In fact, the intensity of corruption as perceived by the public is directly proportional to the hierarchical level of the main public institutions or of power.

	Bribe payers	Political parties	Parliament	Legislative system/ judiciary	Business environment private sector	Media	Healthcare services	Police	Education system	Registration/permit bureaus	Revenues to the state	NGOs	Utilities	Army	Religious organisations
2008	14%	4.3	4.3	4.2	3.8	3.4									
2007	33%	3.9	3.9	3.8	3.6	2.8	3.7	3.7	3	2.9	2.6	2.6	2.4	2.4	2.2
2006	20%	4.1	4	3.9	4	2.9	3.8	3.6	3.2	2.8	2.2	2.9	2.3	2.5	2.3
2005	22%	3.8	3.6	3.7	3.4	2.7	3.6	3.6	2.9	2.9	2.4	2.5	2.5	2.4	2.1
2004	25%	4.2	4	4.1	3.7	2.6	3.9	3.8	3.3	3.4	2.9	2.7	2.5	2.4	2.2

Table no. 4: GCB-Institutions the most affected by corruption in Romania in 2004-2008.

	Education system	Judiciary	Healthcare services	Police	Document release	Utilities	Revenues to state	Real estate services
Contact in past 12 months (respondent or somebody close)	33%	6%	49%	10%	15%	58%	53%	12%
Paid bribe	7%	8%	22%	13%	6%	2%	3%	4%

Table no. 5: GCB-Contact with public institutions and bribe payers

²²⁹ Data available at www.transparency.org.ro/politici_si_studii/indici/bgc/2007/tabele.pdf.

²³⁰ Data available at www.transparency.org.ro/politici_si_studii/indici/bgc/2009/index.html.

e. The **Global Corruption Report (GCR)** is drawn up every year on a specific topic and represents a complex analysis of the global corruption situation. The report centralises news and analyses by experts and supporters of the anti-corruption movement, which reveals recent corruption developments. Every report covers a 12-month period, from July to June of the following year, and looks at the impact of corruption on a specific sector. It includes detailed studies from various countries²³¹.

The Report issued on May 24, 2007, addressed *Corruption and Judicial Systems*²³², and is intended as a guideline for analysing judicial corruption at a national level and as a source of inspiration for reforms in the system. The handbook underscores the huge challenge of ensuring compliance with anti-corruption laws and the operation of the judicial system overall. A clean judiciary is central to the anti-corruption fight, and using a judicial post for private gains may also imply higher tolerance to corruption in society. The critical conclusion of the Report is that justice is undermined by corruption in many countries, and that the fundamental right to fair trial is denied to parties²³³. In Appendix I of this analysis we attached a summary of this report.

Every year, the GCR is accompanied by a **National Report on Corruption (RNC)**²³⁴, published by Transparency International Romania, which is intended to provide a selective summary of the most important legislative, institutional and political developments for the year prior to its publication.

According to the 2007 GCR, judicial corruption is present everywhere in the world and hinders the access of citizens to a fair, independent and impartial trial. In turn this erodes economic growth, in that it fuels distrust among investors. The poor are the most affected, because they have to pay bribes which they cannot afford.

Judicial corruption includes the misuse of money and power. For instance, when a judge hires family members in the court over which he/she presides, or uses his/her position to manipulate construction or equipment procurement contracts. Judicial corruption may also take the form of influencing the assignment of cases to judges or, in other pre-trial proceedings, when clerks are bribed into "losing" documents or evidence. This phenomenon may influence any trial or settlement of the parties, as well as the enforcement of court rulings and of sentences.

The bribe, the other negative form of judicial corruption, may appear at any stage of judicial proceedings. As proved by the 32 national reports included

²³¹ The 2007 Report looked at corruption in the judiciary. In 2009, GCR analyses corruption in the private sector, in 2008 GCR analysed corruption in the water sector, in 2006 corruption in the healthcare sector, in 2005 corruption in construction and in post-conflict reconstruction areas, and in 2004 political corruption.

²³² GCR is available in full at www.transparency.org/publications/gcr/download_gcr. The most important aspects of GCR are covered in a presentation posted on the TI-Ro web site, at www.transparency.org.ro/politici_si_studii/studii/global_coruptie/2007/index.html.

²³³ TI, GCR 2007, p. xix-xxi.

²³⁴ Available at www.transparency.org.ro/politici_si_studii/studii/national_coruptie/index.html.

in the *GCR*, judges may accept bribe in exchange for delaying or speeding up a trial, for granting or denying appeals, for influencing other judges or simply for issuing a particular ruling on a particular case. Officials in the judiciary may accept bribes in exchange for services that should be free of charge. Lawyers may request additional "fees" for delaying or speeding up cases, or for guiding clients to judges known as bribe-takers. One factor that increases the likelihood of judges accepting bribes is low salaries. Uncertain working conditions, including unfair promotions and transfers, as well as the absence of continuing professional training, make judges and court auxiliary personnel vulnerable.

With regard to *Romania*, the 2007 NCR notes the small impact that reforms have had on the relations between citizens and the judiciary; the poor administrative capacity of judicial institutions; the unwillingness of court and prosecutors' office leaders to implement reforms; the lack of integrity in courts, archives, and clerk offices; the corruption and lack of transparency in the administration of justice, particularly in the relations between court-users and auxiliary personnel; that magistrates themselves speak of pressure coming from the media, politicians, economic interest groups, and superiors; the unpredictable decisions of magistrates while conflicts of interests are frequent; complaints filed by court users take long to solve; citizens do not know their own rights; and the reduced capacity of the SCM to prevent magistrates from abusing their power²³⁵.

The 2007 GCR is completed by an **Advocacy Toolkit**²³⁶, an instrument that provides advice to civil society members on how to fight corruption in their countries. The handbook contains advocacy strategies and examples of plans from other countries. It also provides explanations on judicial corruption, makes recommendations on how to combat it and suggests instruments to analyse it.

The toolkit presents a number of *indices for the assessment of guarantees against judicial corruption*, grouped into two categories: 1) System requirements for a clean judiciary include guarantees for the protection of judicial independence; good working conditions for judges; appointment of judges; accountability (legal responsibility, clear administrative procedures, justification for the use of public resources, code of conduct, consequences for misconduct); transparency and resources (transparent procedures, education, materials and resources); 2) Accountability of the actors involved in the judiciary: accountability of judges and the judicial power; accountability of legislative and executive powers; the role of judge associations; the role of prosecutors; the role of lawyers; the role of individuals and companies; the role of mass media and journalists; the role of civil society; and judicial reform programmes of donors.

²³⁵ See <http://tinyurl.com/corruptiejustitierom>.

²³⁶ TI, *Combating Corruption in Judicial Systems – Advocacy Toolkit*, at <http://tinyurl.com/advtoolkit>.

PART IV

ANTI-CORRUPTION POLICIES FOR THE JUSTICE SYSTEM

Corruption is a system dysfunction that originates in and affects the legislative framework, institutional system and inter-personal relations specific to social institutions. As a complex phenomenon, it requires special methods to combat. Anti-corruption measures must take into account all the aspects described in the corruption diagnosis. Measures are both legal and administrative, and involve both the authorities and the general public.

We stated in the opening of this paper the importance of establishing and respecting the three 'I's – Independence, Impartiality and Integrity. While independence must be ensured particularly at an institutional level, impartiality and integrity must be safeguarded in other ways because they are moral virtues.

Mention must be made, however, that official studies and analysis on corruption in the system are rather rarely made²³⁷. There are no regular opinion polls among either the employees or the public with respect to the integrity of public officials, and there are no instruments to measure quality in the judiciary²³⁸. Basically, there is no interest in obtaining feedback from those who resort to judicial services. As a result, the efficiency of the system is measured by contrasting statistical data, but not the quality of these services. This is precisely why weaknesses in the system have not been officially identified – personnel have no interest in providing information while the public has no opportunity to express its experiences.

As we announced in the beginning of this review, after explaining what corruption is in the first part, indicating the vulnerable areas in the judiciary in the second part, using international solutions as a model presented in the third part, in this final part of the research we will indicate the most suitable anti-corruption policies that must be

²³⁷ The Justice Ministry researched the integrity and resistance to corruption of the judicial system, and in 2003 it published the results regarding judges, while not disclosing data on prosecutors. TI-Ro drew up, in 2005, 2006 and 2007, a survey on the perception of magistrates on the independence of the judiciary. DGA ran a public poll on the perceived corruption in the Ministry of Administration and the Interior in 2006 and 2008, and a poll among its own personnel, on the same topic, in 2007.

²³⁸ The only polls carried out over the past few years do not refer to specific courts, but to the judicial system as a whole. Timisoara County is the only one which, since 2006, has run an annual programme interviewing users of the judicial service, while a similar survey was carried out in 2007 in courts in Alba County; a pilot project that focuses on the quality of judicial services was launched in Cluj County in 2009.

implemented in view of preventing, controlling and punishing corruption in the judiciary. These policies are designed to provide concrete bases for the general measures valid in any public or even private institutional system, and are intended to strengthen the integrity of the judiciary, at both an institutional and individual level.

After presenting several theoretical concepts, we will introduce the existing legal framework, which outlines the main anti-corruption directions and measures, and then will develop specific directions and measures for preventing and combating corruption in the judiciary.

1. Components of anti-corruption policies

The goal of an anti-corruption policy is to reduce corruption and to enhance confidence in institutions which is tied directly to good governance. Particularly since 2000, strategies have been outlined in Romania for the fight against corruption, laws have been amended, and institutions have been established. What is missing however is anti-corruption education, establishment of best practices, efficient management and specific means to repress and combat conduct which deviates from standards.

An anti-corruption strategy for the judiciary must cover two areas of action: prevention and combating²³⁹.

Corruption prevention seeks to eliminate the weaknesses presented in the second part of this work. Actions against corruption must aspire to limit monopoly, removal of discretionary powers²⁴⁰ and the guarantee of transparency. These must be in addition to information campaigns on how not only the respective institutions are managed and operated, but also on existing anti-corruption instruments; enhancing personnel responsibility, particularly by implementing codes of conduct; incompatibility-resolution and conflict-of-interest regulations.

Corruption combating refers both to inspection activities (general administrative inspection as well as financial audit) and to punishments (consequences when a specific irregularity is found). By this we mean the internal inspection mechanisms to check for compliance with professional ethics, the limitation of interventions of administrative factors in the performance of judicial duties, the separation of judicial and non-jurisdictional powers, concomitantly with the provision of support to judicial and administrative anti-corruption institutions.

²³⁹ Some speak about a three-pillar approach: education (raising the awareness of risk groups and of the general public), prevention (provision of anti-corruption practices to legislative and executive institutions) and containment (effectiveness through specialisation and training); some others speak of three other layers: prevention, control and punishment.

²⁴⁰ See also *Recommendation R (80) 2 on the exercise of discretionary powers by administrative authorities*, adopted by the Committee of Ministers of the Council of Europe on 11 March 1980, at www.coe.int/admin.

Obviously, what the implementation of anti-corruption methods will eventually lead to is not only the enhanced integrity of the personnel and the very reform of the judiciary, but possibly the strengthening of anti-corruption methods by ensuring the independence and efficiency of the system.

2. Defining features of anti-corruption policies

a. In terms of its target group, such a policy must first and foremost target the *personnel* in the respective institutions, whose fair conduct must be requested and encouraged. On the one hand, employees must be prompted to be impartial and responsible, and on the other hand they must be warned of the repercussions that stem from violations of the law or standards of conduct.

It must also address individuals from *outside* the institutions, i.e., those who resort or might resort to these "services". Such individuals must not only be trained on the type of conduct they are entitled to expect from the personnel they will be in contact with, but must also be warned of the potential consequences of attempting to corrupt the official.

b. In terms of its scope, a *general* strategy may be designed, valid for all institutions, along with a *sectoral* one, for a specific area or institution. Given the importance of the judiciary, we believe a sectoral anti-corruption strategy, specific to the Romanian system, must be adopted.

Considering that the Constitution declares judges to be independent, drawing up anti-corruption policies that involve inspection, above all, should not infringe upon the independence of the judiciary. What must be controlled are those aspects that negatively impact the judiciary. Therefore we propose that an anti-corruption policy be designed precisely to protect it.

3. Current anti-corruption framework

The development of an effective anti-corruption strategy requires, first of all, selecting regulations that define the main directions for action, measures, responsibilities and resources. Of the international instruments mentioned in the previous chapter, which describe framework policies to prevent and combat corruption, the most important are the Council of Europe Resolution 24 of 1994 on *The Twenty Guiding Principles in Combating Corruption*, the *Criminal Convention and Civil Convention against Corruption* of the Council of Europe, 1999, and the 2003 *UN Convention on Combating Corruption*. They must also, in fact, be implemented, and not remain mere aspirations.

In Romania, the means to prevent and combat corruption have already drawn on these international instruments. They are strategically

stipulated in the following regulations endorsed by the Government: a) The National Programme for Combating Corruption and the National Action Plan against Corruption of 2001²⁴¹; b) The 2004 National Anti-corruption Strategy (SNA I)²⁴², modified by the 2005 National Anti-corruption Strategy (SNA II) and the Action Plan for implementation²⁴³; c) The Judiciary Reform Strategy 2003-2007 and Action Plan for implementation²⁴⁴, modified by the Judiciary Reform Strategy for 2005-2007²⁴⁵, where Chapter 11 is devoted to a directive that details the *Prevention and combating corruption in the judiciary*²⁴⁶. We mention that the 2008-2010 National Strategy on the prevention and combating of corruption in vulnerable sectors where strategies in the local public administration approach the healthcare sector, the financial and fiscal sector, public order and safety, education, local public administration, but not the judiciary; d) The 2007-2010 Action Plan requested as part of the Mechanism for cooperation and verification of ongoing progress by Romania, established by the European Commission²⁴⁷.

In applying these programmes, several normative acts have been endorsed by Government and Parliament.

The *Criminal Code*, in its chapter on work-related crime, criminalises as many as five corruption offences: conflicts of interest, bribe-taking, bribe-giving, receipt of undue benefits and trading in influence (art. 253¹ – 257).

Law no. 78/2000 on preventing, uncovering and punishing corruption misdeeds, regulates corruption offences, corruption-comparable offences, corruption-related offences, and offences against the financial interests of the European Communities.

Law no. 544/2001 regulates free access to information of public interest.

²⁴¹ Endorsed under G.R. no. 1.065/25.10.2001, published in O.J. no. 728 of 15.11.2001.

²⁴² G.R. no. 1.944/10.11.2004 *endorsing the National Anti-corruption Strategy for 2005-2007*, published in O.J. no. 1.199 of December 15, 2004.

²⁴³ Endorsed under G.R. no. 231/30.03.2005, published in O.J. no. 272 of April 1, 2005.

²⁴⁴ G.R. no. 1052/2003 *endorsing the Judiciary Reform Strategy*, published in O.J. no. 649 of September 12, 2003.

²⁴⁵ Endorsed under G.R. no. 232/30.03.2005, published in O.J. no. 273 of April 1, 2005. See also the G.R. no. 233/30.03.2005 *on the establishment, organisation and functioning of the Council on Coordinating the Implementation of the National Anti-Corruption Strategy for 2005-2007*, published in O.J. no. 273 of April 1, 2005.

²⁴⁶ This chapter comprises *three objectives*, with corresponding measures: (1) ensuring transparency in performing magistrate duties and preventing corruption, by monitoring the submission of wealth and interest declarations by magistrates, establishment of a mechanism to check these declarations and possible incompatibilities, the random assignment of cases, ensuring the independence of prosecutors, implementing the code of professional ethics for magistrates; (2) transposing EU, UN, CoE and OECD anti-corruption standards, by amending the laws on removing the immunity of notaries public and court enforcement officers; (3) enhancing the integrity and resistance to corruption to meet European standards, by reforming the Directorate General for Protection and Anti-Corruption in the Justice Ministry.

²⁴⁷ *Action Plan for meeting requirements in the mechanism for cooperation and verification of ongoing progress made by Romania in the judiciary and the fight against corruption*, endorsed under G.R. no. 1346/31.10.2007, published in the O.J. no. 765 of November 12, 2007. The mechanism was established under the EC Decision 2006/928/EC of December 13, 2006, published in the Official Journal of the European Union no. 354 of December 14, 2006.

Law no. 263/2002 ratified the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (signed in Strasbourg on November 8, 1990).

G.E.O. no. 43/2002 regulates the activity of the National Anti-Corruption Directorate.

Law no. 161/2003 on measures to ensure transparency in the exercise of public duties, of public office and in the business environment and on preventing and punishing corruption (the "Anti-Corruption Package") created an efficient legal framework for the prevention of high-level corruption and ensuring good governance.

G.R. no. 504/2003 endorsed the programme for implementation of Law no. 161/2003.

In order to prevent the use of illegal funds, *Law no. 43/2003* was enacted addressing the funding of political parties and of election campaigns.

Law no. 52/2003 defined the principles of transparency of decision-making in public administration which are prior notification, consultation and active participation of citizens in administrative decisions and in the drafting of administrative bills.

Law no. 7/2004 on the Code of Conduct for public officials regulates norms of professional conduct for public officials, aims at enhancing the quality of public service, and good promoted management in realising the public interest and eliminating bureaucracy.

Law no. 251/2004 defines measures concerning assets received free of charge during official activities in the course of public duties.

G.E.O. no. 24/2004 targets enhanced transparency in exercising public functions and public office, as well as strengthening measures to prevent and combat corruption.

Law no. 144/2007 on the establishment, organisation and operation of the National Integrity Agency; created the institution charged with checking assets acquired in the course of public duties, incompatibilities and conflicts of interests.

In the judicial system, the M.A.I. alone has at present a sectoral anti-corruption policy since as public order and safety are viewed as a vulnerable sector in the 2008-2010 National Anti-Corruption Strategy itself. As for the Justice Ministry, in 2001 alone, a *Sectoral Anti-Corruption Action Plan* was adopted under an order of the Justice Minister. The document identifies the following vulnerable sectors and risk factors within the Justice Ministry: I) Bureau for Granting Citizenship; II) Public Relations Service; III) Judicial Directorate; IV) Directorate General for Penitentiaries. In courts of justice and the Public Ministry – I) Public Relations; II) Judicial Activity; III) Court Clerk Offices; IV) Assignment of cases²⁴⁸.

We firmly believe that, by implementing international standards²⁴⁹ to buttress domestic regulations, a judicial anti-corruption strategy can

²⁴⁸ See Government of Romania, *Combating corruption in Romania. Measures to speed up the implementation of the national strategy*, Bucharest, 2002, at <http://x.gov.ro/obiective/pganticoruptie/anticoruptie-2002-2.pdf>.

²⁴⁹ The UN Convention, in art. 11, recognises the integrity of the judiciary as a central component of any strategy to measure corruption, particularly among judges and prosecutors. With a judicial body made up of a group of individuals in many countries, promoting judicial integrity is a targeted action with high potential. Judicial integrity and capacity strengthening projects have already been implemented and are under way in Indonesia, Iran, Mozambique and South Africa, through UNODC.

be designed based on certain principles. Naturally, in order to achieve the specific measures suggested in this paper, an anti-corruption strategy for the judiciary must be embraced by all the relevant decision-makers and must be accompanied by a plan that defines courses of action, concrete measures, deadlines, officials in charge and resources needed for the implementation. A mechanism must be in place for the constant monitoring of progress in meeting the objectives, the effect of those measures must be monitored, and the initial plan must be adjusted on a regular basis.

This strategy must be implemented and monitored by an independent body (as required by Art. 6 in the UN Convention against Corruption), which explains the basis of the statute for the National Integrity Agency²⁵⁰ and of the National Anti-Corruption Directorate²⁵¹. The benefit of such a public integrity strategy for the judicial system is that it directly meets the challenges of building a system capable of meeting the expectations of citizens. This can occur in spite of the burden of the legacy of the communist regime which is defined by the absence of a sense of public accountability and of a public culture able to clearly identify upstanding officials²⁵².

It is an absolute necessity for an anti-corruption policy to target, among others, the definition of corruption indicators in the judiciary, which can be used as markers of possible deficiencies related to corruption²⁵³. Such indicators may include a number of aspects related to the *general conduct* of professionals, (e.g., a significant increase in the wealth of a public official, high living standards, contacts with the business community or underground circles, and facilities in the purchase of goods or services). Worth analysing are also the *professional indicators* such as violation of internal regulations, voluntary

²⁵⁰ Under Law no. 144/2007 on the establishment, organisation and operation of the National Integrity Agency, this institution has been set up in order to ensure the exercise of public office and dignities with impartiality, integrity, transparency, by means of a consistent and institutional organisation of checks into the assets acquired in the course of official duties and of checks into conflicts of interests, as well as the notification of incompatibilities (*Preamble to the law*). The Agency is an autonomous administrative authority, a separate legal entity which operates at a national level, as a unitary structure (Art. 12 paragraph 1). According to the principle of operational independence, the president, vice-president and integrity inspectors are not to request or accept instructions as to their investigations from any other public authority, institution or person (Art. 14 paragraph 3).

²⁵¹ Under G.E.O. no. 43/2002 on the National Anti-Corruption Directorate, this institution is a separate legal entity, within the Prosecutor's Office attached to the High Court of Cassation and Justice (Art. 1 paragraph 1). It is independent from courts of justice and the prosecutors' offices attached to them, and from other public authorities, and operates exclusively in compliance with the law and in order to ensure compliance with the law (Art. 2).

²⁵² Institutul pentru o Societate Deschisă, *Monitoring the EU Accession Process: Corruption and Corruption Combating Policies*, Exclus SRL, Bucharest, 2002, p. 37.

²⁵³ See UNODC and OSCE, *Access to Justice – The Independence, Impartiality and Integrity of the Judiciary. Criminal Justice Assessment Toolkit*, UN Publishing House, New York, 2006, p. 14.

undertaking of tasks or powers, case resolution times (too long or, on the contrary, much too short), disappearance of evidence in a file, access by outsiders to the office, extensive private contacts with the interested parties, questionable quality of explanations for the instructions given/received, inconsistent practices, an increase in the number of complaints against an official, attempts to talk colleagues into handling a case in a particular manner, concealment of irregularities, a large number of acquittals, or receipt of a particular job after resignation. This requires an integrated assessment system, which combines the individual assessment of the public official²⁵⁴, the assessment of the institution²⁵⁵ and the assessment of the judicial system²⁵⁶.

4. Preventing corruption in the justice system

As we have shown throughout this paper, vulnerability to corruption appears where certain responsibilities are the *monopoly* of certain authorities or institutions, where decisions are made *arbitrarily* and *lack transparency*, and where the system and individuals lack *responsibility* and *integrity*. Corruption control requires policies that tackle these aspects. Therefore, it requires competition, lawfulness, transparency, accountability. But not all these requirements can be met at the same time in all sectors of the justice system. For instance, while liberalisation is possible in the activity of lawyers, notaries public and bailiffs, it is not possible for judges who, under the law, have a

²⁵⁴ The first assessment of magistrates, which under the new laws is carried out every three years, started in March 2008 and should have been completed in March 2009. Because of the absence of secondary regulations, which the SCM failed to issue on time, this assessment did not cover the entire activity of 2005-2007, but only the year 2007. By the time this paper was finalized, no results of this assessment had been made public. Moreover, in view of the 2008-2010 assessment, an interim assessment for 2008 should have been completed, but it has not been carried out in any court or prosecutor's office. For relevant regulations, see the Decision of the SCM Plenum no. 676/2007 (Regulation on the assessment of the professional performance of judges and prosecutors) and no. 10/2008 (Guidelines for assessing the professional performance of magistrates).

²⁵⁵ Currently an annual report on the activity of each court and prosecutor's office is drawn up. This consists mostly of statistical data. A system to assess the performance of a court by measuring the impact on the community or the opinions of court users is not yet available. See the Appendix to the SCM Decision no. 895/2007 which specifies the recommended structure of the Annual Report.

²⁵⁶ At present, each authority in the judicial system delivers its own report, but there is no assessment of the system as a whole. We believe this should be carried out at least every two years, and should include a quantitative and qualitative analysis of: the budget earmarked to the judiciary; the facilitation of citizen access to the judiciary; the number of judges, prosecutors, and other judicial workers and their salaries; the number of lawsuits involving their criminal, disciplinary and financial liability; alternative ways to solve cases; the enforcement of court rulings; data on lawyers and notaries; reforms implemented at a national and local level. A reference in this respect may be the *European Judicial Systems Report of 2004, 2006 and 2008*, drawn up by CEPEJ on Council of Europe member states—see www.coe.int/cepej. Other suggestions, e.g., on judicial statistics, were made by the World Bank, at <http://go.worldbank.org/1K40UZ6YL1>.

monopoly over the distribution of justice. Judges with integrity will remain within the boundaries of this monopoly without abusing their power. This explains how judges' discretion can be eliminated through binding them to substantiate all measures, acts and decisions, which are to be made public and can be challenged in higher courts. This also explains how judge accountability can be enhanced by internal means, namely integrity-awareness raising (hence the need for an ethical code), intervention of an external institution, proper recruitment and use of a disciplinary mechanism, of which the Superior Council of Magistracy currently has a monopoly. In turn, Council members must exercise integrity in accomplishing their tasks, which is ensured by similar means to those listed above. Consequently, corruption prevention measures must be taken at various levels, from the regulation of activity of an institution to its management and funding, to the quality of its human resources.

Therefore, corruption prevention practices must equally address judicial instruments and administrative practices. One does not need to create new formulas. The translation and dissemination of international documents, knowledge of internal regulations and the implementation of good practices taken over from other foreign or domestic institutions will be enough.

4.1. Preventing judicial corruption within the public

The most useful methods to prevent corruption within the public sector are related to the education and information²⁵⁷ of the public and include:

4.1.1. Informing and educating the public

- The existing complex legislation and the various relevant institutions make it difficult for citizens to become familiar with the proper administrative, civil and criminal means to prevent and fight corruption; and with the means to ensure their own protection in case they report on corruption. On the contrary, errors of judgement are often viewed by citizens as consequences of corruption, and notified as such to various authorities, over which they have no jurisdiction. A prerequisite of integrity is for the beneficiaries of justice to be aware of what fair conduct means. One way of ensuring this is to educate the younger generation in anti-corruption, which would require the introduction of ethics courses or modules²⁵⁸ in school curricula. Such

²⁵⁷ For detailed methods and explanations, see *Opinion no. 7 (2005) on "Justice and Society"*, adopted by the Consultative Council of European Judges in the Council of Europe, available at www.coe.int/ccje.

²⁵⁸ In schools in Milan, Italian pupils are taught about the "*Mani pulite*" ("Clean Hands") judicial investigations of the 1990s.

courses should start with the definition and dissemination of relevant concepts, such as "corruption", "moral integrity", "fair conduct", "conflicts of interests", "incompatibility", "public service", "public interest". These courses may be delivered particularly by representatives of NGOs working in the field;

- Re-educating adults on the causes and consequences of corruption and encouraging the rejection of corruption may be achieved particularly through anti-corruption campaigns in the judicial sector, carried out both at a national level (via print and audio-visual media) and within each institution (using posters and information offices, TV and radio broadcasts with the participation of magistrates²⁵⁹, and so on). Without a doubt, warning the public of the negative consequences of corruption misdeeds can act as a deterrent;

- Providing basic judicial concepts in law and judicial organisation modules. In schools and, more importantly, in high schools, such courses may be taught by judicial personnel, either formally assigned by the institution's management, or informally entrusted with this task, through magistrate associations (e.g., Romanian Magistrate Association, the Romanian Judge Association). Undoubtedly, organising pupil and student visits to prosecutors' offices, courts, or penitentiaries, may have a notable impact. Attention should also be given to law courses (dwelling on judicial institutions and procedures) and anti-corruption courses taught in the journalism departments of universities;

- Releasing and disseminating information on sentences passed in corruption trials²⁶⁰. First of all, making these rulings public will likely deter citizens from resorting to corruption, particularly in relation to law enforcement institutions. Secondly, it will strengthen citizens' confidence in justice, which in turn can bring positive effects such as encouraging them to report all such offences. Although the legal framework is already in place, with the approval of Government

²⁵⁹ A starting point may be the *Protocol signed on 23.10.2008 by the Upper Magistracy Council and the Romanian Radio Broadcasting Corporation*. The main goal of the Protocol is to inform the public of the activity of the Council and on the operation of the judicial system in Romania. The means to be employed by the parties in view of reaching this goal include: the production of broadcasts aimed at educating the public on judicial matters; the dissemination of materials and documents drawn up by the Council, which are relevant for its activity; know-how exchange schemes involving magistrates and journalists, in view of improving communication rules and the development of good practices by the parties. So far there have been no reports on the implementation of this Protocol, either at a central level, or in courts and prosecutor's offices.

²⁶⁰ Posted on National Anti-Corruption Directorate home page, at www.pna.ro/hotarari.jsp. are several final rulings on cases prosecuted by this institution, passed by courts since January 2007. Unfortunately, few people know about this site. Paradoxically, the mass media and the public are more interested in the start of criminal prosecution for corruption against individuals holding a certain position in the society than they are in how the process is finalized by judges.

Ordinance No. 1346 / 2007²⁶¹ and Art. 30 of Law No. 78 / 2000²⁶², it has been inadequately applied and publicised;

- Improving citizens' access to legislation: the access to justice involves not only through physical access to courts of law, but also intellectual access to justice, i.e., to sources of information on relevant laws (free access). This is the only way to ensure that rights are effectively and predictably taken advantage of. At present, the Justice Ministry offers a legislation portal at <http://legislatie.just.ro> but it is impossible to use without knowing the number and date-of-issue of a particular normative act. An alternative will be www.e-monitorul.ro, which is not yet operational. Access to the European Union legislation is possible at <http://eur-lex.europa.eu>;

- Access to court rulings: all rulings on litigation, including appeals and challenges, must be justified and communicated to the parties involved. Moreover, rulings must be made public so as to familiarise the public with relevant case law and to enable people to accurately assess their chances to win a lawsuit before they file it. The Justice Ministry has provided courts with a portal, <http://portal.just.ro>, but only certain rulings are posted, after being selected against unknown criteria. Concurrently, a national sale programme is under way, aimed at the publication of all court rulings. *Jurindex*, a programme initiated and extended to a national level by the Vrancea Tribunal, from its own resources, has been available since May 4, 2009, at www.jurisprudenta.org. Also, ECHR jurisprudence is available at www.echr.coe.int, and EU jurisprudence at <http://curia.europa.eu>;

- Informing citizens on their rights and obligations, and on the exact responsibilities and obligations of institutions and staff in relation to citizens: through continuing distribution and posting of guidelines, the beneficiaries of public services will know precisely which institution is in charge of solving their problem and which department of an institution they should contact. This will thus avoid contacting the wrong institution and lower the risk of being deceived;

- Raising public awareness through the mass media, internet, posters²⁶³, round-tables and press conferences on the legal and civil means to fight corruption: constant media coverage on corruption is

²⁶¹ The strategy reads: "Also, in view of informing the public on the entire criminal process in high-level corruption trials, final rulings passed in trials involving the NAD will be made public on a quarterly basis, while also complying with regulations on personal data protection." In this view, the Action Plan stipulates: "The forwarding, by courts, of electronic files comprising the final rulings passed in trials involving NAD prosecution, and the posting of these rulings on the NAD web site, in full compliance with the rules regarding the protection of personal data, on a quarterly basis, as of March 2008".

²⁶² "A sentence of condemnation or clearance may be made public in central or, if applicable, local newspapers mentioned in the sentence." So far we know of no court ruling that orders such publication.

²⁶³ Under Order of the Prime Minister no. 194/2007 on measures to improve public services, published in the Official Journal No. 465 of July 11, 2007, all institutions providing public services must display anti-corruption posters, on A3-size panels.

necessary, so as to explain to the general public what corruption is, its causes and effects, how it is punished, how we can provide public information and enhance the transparency of institutions.²⁶⁴

4.1.2. Getting the public involved:

- Having civil society involved in the fight against corruption: preventing corruption is not the task of public authorities alone; it also needs the cooperation of non-governmental organisations and of all other elements of civil society. In order to create an anti-corruption culture, promotion must be constant and results must be assessed on a regular basis. The active participation of individuals and non-governmental organisations in preventing judicial corruption may encompass the monitoring of the activity of judges²⁶⁵, including the quality of rulings. This may be strengthened by enhancing the transparency of decision-making processes and by promoting the participation of the public in such processes²⁶⁶ (e.g., public participation and comments on candidacies for positions in the system, whether it is the recruitment of magistrates or promotion to the Supreme Court²⁶⁷). Additionally, this can be enhanced by respecting, promoting and protecting the freedom to research, receive, publish and disseminate information on corruption²⁶⁸; provision of free legal advice in cases where a bribe is requested during a trial;

- Making alliances: to ensure consistency, efficiency and the impact of anti-corruption efforts, partnerships and common platforms are preferred, either among non-governmental organisations²⁶⁹ or public

²⁶⁴ In this respect, TI-Ro has drawn up a "Guide on legal means to combat corruption offences in the judiciary," as part of the "NO to Bribe" campaign implemented in 2007-2008.

²⁶⁵ One form of participation in this activity is the presence of civil society members in the SCM, which has been inadequately capitalized on in Romania so far. We believe the SCM should also include representatives of bars and of universities.

²⁶⁶ One example is provided on the web site www.alianzaprojusticia.org.pa created by the Alliance of Citizens for Justice in Panama, which is designed to facilitate citizen participation in finding solutions for the administration of justice, to educate citizens, to promote alternative means to resolve disputes, to promote judicial reform, and to monitor the administration of justice in certain cases.

²⁶⁷ One example is the *Justicia Viva* project developed by the Legal Defense Institute of Peru, at www.justiciaviva.org.pe which publishes, among others, the résumés of applicants for supreme court posts and monitors the solutions to key corruption cases.

²⁶⁸ This freedom may be subject to certain constraints, which must nonetheless be stipulated by law and are necessary: respect for the others' rights or image, protection of national security, public order, public health and morality.

²⁶⁹ A good example is the *Anticorruption Alliance* in the Republic of Moldova (www.alianta.md), which is a voluntary association of non-governmental organisations working in various areas, particularly in public policies, law, democratic institutions. The Alliance currently has approx. 30 members, alongside mass media, youth organisations, education and science experts, etc.

authorities and the private sector (the legal basis for cooperation may be the Law on Volunteering²⁷⁰);

In 2006, a *Strategic Committee for supporting the General Anti-Corruption Directorate* was established as a consultative body headed by the Minister of Administration and the Interior. The committee also includes the secretaries of state, the secretary general, an adviser to the Minister of Administration and the Interior, the chiefs of directorates general in the Ministry of Administration and the Interior, the inspectors general of M.A.I. inspectorates general, the rector of the "Alexandru Ioan Cuza" Police Academy, the president of the National Police Corps, the leader of the National Union of Police and M.A.I. Personnel, and one representative each from eight non-governmental organisations.

Given the low confidence of citizens in Romanian anti-corruption institutions, and the need to strengthen the efforts of public institutions and civil society to reduce corruption in the medium- and long-run. Several institutions have established and supported the *National Centre for Integrity*, including the Association for the Implementation of Democracy and the Ministry of Administration and the Interior, with the British and Dutch Embassies in Romania as main partners, alongside several others. The National Centre for Integrity was established under the Partnership Protocol 406508/02.10.2006, signed by the Association for the Implementation of Democracy (AID) and the General Anti-corruption Directorate. Later, the AID and senior officials with the Ministry of the Interior signed a new cooperation partnership, aimed at ensuring the continuity of the Centre and a favourable, independent and decisive environment for attaining the project's common goals of the project: Partnership Protocol 17841/28.09.2007.

- Encouraging comments on the conduct and results of public agents' activity. Criticising judicial procedures, court rulings and judges should be permitted and encouraged. In spite of the risk of undeserved or manipulated attacks, as long as they know they are under public scrutiny judges will pay more attention to avoid errors in their relations with the public and in drawing up their opinions. This is why legislative barriers should be eliminated, such as the punishment for contempt of court²⁷¹;

²⁷⁰ Law on Volunteering no. 195/20.04.2001, republished in O.J. no. 276 of April 25, 2007. Volunteering is working for public interest on one's own initiative (in areas such as: social assistance and services, human rights, healthcare, culture, arts, education, training, science, aid, religion, sports, environmental protection, social and community programmes, etc.); it is based on a not-for-profit contract signed by an individual, the volunteer, and a legal entity – the host organisation (a public or private not-for-profit legal person), whereby the former undertakes to provide work for the public interest, without receiving material compensation.

²⁷¹ "Journalists must be able to comment fairly on legal proceedings and report suspected or actual corruption or bias. Laws that criminalise defamation or give judges discretion to award crippling compensation in libel cases inhibit the media from investigating and reporting suspected criminality, and should be reformed." (TI, Global Corruption Report, 2007, at www.transparency.org).

- Regular polling: consultation, followed by addressing flaws, may help improve confidence in the justice sector and therefore reduce corruption attempts from the public.

4.2. Preventing corruption among judicial personnel

At a global level, the system must be organised so as to be based on the structural independence of the judiciary and the need to protect judges, prosecutors and the judicial police from the following issues: political pressure on and meddling in the work of judges; instructions given by the government to prosecutors; the manipulation of the selection, appointment, promotion or revoking of magistrates; immunity created for politicians accused of corruption, and so on.²⁷²

At an individual level, both the magistrates and other judicial personnel must be educated on anti-corruption principles. Before becoming effective, the anti-corruption strategy must also play an educational role.

Self-knowledge²⁷³ and self-control are needed in order to turn down a financially tempting offer which goes against one's principles. Unfortunately, such aspects are hardly ever discussed within the system, and neither schools nor law faculties address the individual's will and to resist such temptations. The current judicial system focuses more on repression and the threat of losing certain advantages (disciplinary or even criminal sanctions) in case of departing from one's principles, than on prevention and on fostering these principles.

To prevent corruption among judicial personnel and reduce opportunities for corruption, the following solutions are possible:

4.2.1. Objective criteria and professional training

- Assessment must be regular and must be aimed at finding solutions to update and steadily improve the professional training of judicial personnel, both in formal and informal learning settings;
- Insolvency experts and practitioners must be appointed by judicial bodies according to criteria that ensure fair competition and the promotion of competence;
- The training of judicial staff must also include basic technical knowledge to enable them to detect the (un)intentional errors of auxiliary judicial personnel, such as experts. Specialised training in this respect and the publication of good practice handbooks are highly recommended;
- Developing the *theory of apparent impartiality*: the system must embrace the theory that underlies the importance of apparent

²⁷² Octopus Interface – Corruption and Democracy, Strasbourg, 20-21 November 2006, Workshop on democracy, corruption and justice.

²⁷³ Daniel Goleman, Richard Bozatyis, Annie McKee, *Inteligenta emoțională în leadership*, Curtea Veche, Bucharest, 2005, p. 69.

impartiality and apparent (possible) conflicts of interest. As a rule, public agents put forth excessive formalism – they do not refrain from making decisions, even in cases of actual conflict of interest when a case is not specifically regulated by law. This displays a disregard of the general principles and, more importantly, the theory of apparent impartiality, which would rule out their involvement in the case;

- The personnel recruitment, selection, promotion and regular assessment system must be based exclusively on the objective appreciation of merits, and of professional performance and skills. Criteria must be communicated in advance, be objective and transparent, and challengeable in court.

4.2.2. Fostering a culture of integrity²⁷⁴

- Deontological education of all judicial workers: First of all, this can be achieved through the compulsory introduction of the code of conduct mentioned in the bibliography for recruitment contests for public offices. Secondly, professional training schemes must be aimed at ensuring that all courts are perceived, in all activities, as giving equal treatment to parties (i.e., as impartial and free from discrimination based on race, sex, religion, ethnic origin or social status). Judges and the auxiliary personnel must be trained to detect cases when actual or apparent bias may be perceived, and to handle such cases in a manner that reinforces the public's confidence in and respect for courts. Lawyers must not be overlooked – they must receive special deontological education so as not to contribute, deliberately or not, to the deepening of public distrust in magistrates;

- Measures of testing integrity from the time of recruitment and on a regular basis, using covert agents among other means, must be communicated to personnel. Appropriate procedures are needed for the selection and training of those who will hold public positions viewed as particularly vulnerable to corruption. Obviously, these procedures must involve honest examiners;

- Reducing direct contact with the public to eliminate direct sources of negative influence: this contact primarily involves the auxiliary departments in the judiciary, which may be downsized by means of modern technologies (such as e-mail, telephone, electronic-fee payments, posting relevant case information on the Internet, or information desks); publication of panel schedules, of panel membership, of substitute lists (to check how panels of judges have been formed); or electronic archiving of case files (to reduce the time needed by or eliminate entirely the need for archive workers). Decision-making

²⁷⁴ G.R. no. 1346/2007 stipulates that Romania undertakes to "draw up, in July 2008, an anti-corruption guide in view of strengthening the integrity of its own personnel, and to extensively disseminate it as an example of good practices for other providers of public services."

agents may also be protected. The workplace architecture must not allow for public interference with the public agents' daily work. Measures may therefore also include the regular rotation of personnel working in vulnerable sectors (e.g., public relations offices, random case assignment offices)²⁷⁵ or even their transfer to diverse geographical areas;

- Exact understanding of one's own duties and the duties of others;
- Acquiring knowledge that is useful in public relations (psychology, sociology, grammar, rhetoric);
- Assimilating the practice in disciplinary matters: this involves the disciplinary body communicating to employees on a regular basis, the sanctions applied in the respective period and their reasons for doing so²⁷⁶. Special emphasis must be laid on disseminating and ensuring consistency of the judicial practice with respect to the challenging and recusal of judges, for which public data are not yet available. In fact, the absence of consistent judicial practice is a major problem in Romania as illustrated in *Beian v. Romania* (2008). In that case, the ECHR pointed out that the absence of case-law itself becomes a source of judicial insecurity and undermines public confidence in the judiciary. Instead, the contradictory case-law of various courts and inconsistent rulings of panels within the same court opens the door for arbitrary practices;
- Training in ethics: the importance of a code of conduct as a key instrument in preventing corruption will be detailed below;
- Regular discussion by law professionals on the role of the judiciary and the responsibilities of each legal profession. Representatives of all legal professions should meet on a regular basis and identify appropriate forms of cooperation. They should also be aware that the behaviour of each is critical to creating a positive public perception on the integrity of the system. The obligation and the means to dissociate oneself from fellow workers with improper behaviour should also receive special attention.

4.2.3. Specialised anti-corruption training

- Organising debates on judicial corruption;
- Awareness of international regulations both on functional duties and on corruption: employees must be aware that integrity cannot be

²⁷⁵ "Mobility of civil servants within an authority or public institution will primarily be achieved by ensuring the protection of civil servants in areas vulnerable to corruption, through the regular assignment of different tasks or through temporary transfer to other departments of the public institution or authority," reads the 2008-2010 National Strategy on preventing and combating corruption in vulnerable sectors and local public administration.

²⁷⁶ As a negative example, we mention that the SCM only issues press releases on the sanctioning of magistrates, specifying the name and the legal act that regulate the respective form of misconduct, with no details on the misdeed. Other judicial institutions do not even provide statistics on the sanctions they apply. Therefore, the personnel cannot identify types of undesirable conduct that may be punished under the law.

imposed, but embraced, on an individual basis. This requires explanation and presentation of previously made efforts in other countries or by international organisations;

- Inclusion in the specialised professional training of public sector integrity and anti-corruption modules: regular ethics workshops may be possibly organised by the ethics and deontology trainers with the National Institute of Magistracy or other methods may be used to promote a culture of integrity;

- Participative diagnostic: focus groups may be established, comprising employees from the institution in question, to raise personnel awareness of the risks of corruption in the exercise of their duties, to help identify the vulnerable sectors within their institution and to find the best strategy by which to curb corruption. An overall analysis of corruption risks must be resumed every two to three years and vulnerable sectors must be closely monitored in the meantime. Internal regulations must be regularly improved. Information on judicial corruption risks, possibly including periodic reports, must be made public.²⁷⁷

4.3. Preventing judicial corruption at an institutional level

4.3.1. At a general level, *management* principles must be applied. To a certain extent, the fight against corruption overlaps with efforts to eliminate excessive bureaucracy, improve efficiency and enhance the professionalism of public agents. This is why leading positions must be filled by persons having good knowledge of management, and based on a management plan, the implementation of which must be closely monitored.²⁷⁸

One of the main problems affecting the judiciary is the excessive workload. According to G.R. no. 1346/2007, by June 2008 the SCM was required to establish an optimum caseload for magistrates, this has not yet happened. Very often, the public mistakes flaws in the training or performance of magistrates for a lack of integrity, which reinforces corruption accusations. But the truth is that, with half of the judges bound to resolve 100-150 cases per month, and prosecutors 51-100 cases²⁷⁹, errors are inevitable.

Similarly, the role of court clerks, who are restricted to routine secretary functions in Romania—must be strengthened and given more importance. In time, they must become assistants to magistrates, with

²⁷⁷ For this obligation of the public administration, see Art. 10 of the UN Convention.

²⁷⁸ Since 2005, leading positions in courts and prosecutor's offices have been assigned according to promotion contests. However, more often than not the management plans drawn up by candidates are neither made public, nor communicated to the personnel of those courts and prosecutors' offices. Similarly, there is no means of subsequent monitoring of progress made towards meeting those commitments, either upon assessing the performances of institution leaders, or during administrative inspection.

²⁷⁹ *Justice System Barometer*, carried out by the Institute for Public Policies and the National Institute of Magistracy in 2008, available at www.ipp.ro.

whom they should team up to manage a case, or even be allowed to resolve simpler cases on their own (summons for payment, orders by court presidents, transactions, child allowances, termination of proceedings, etc.)²⁸⁰. Along the same lines, it is not so much the number of judges that needs increasing, but the number of court clerks. In any case, the establishment of new courts is not a solution. On the contrary, small courts, which are unable to ensure their staffing and personnel training, and which waste financial resources, must be dismantled (rationing the courts).

As such, we believe the introduction of alternative dispute resolution forms (e.g., arbitration, regulated by Law no. 192/2006, which took effect over one year ago, but is not in practice²⁸¹), case management procedures for judges, as well as improvement of court management, are particularly important. In this respect, one-quarter of the judges believe that courts and prosecutors' offices should be headed by a trained manager, from outside the judiciary, who may increase the efficiency of court and prosecutor office activity by means of scientific management methods.

4.3.2. Strictly with respect to *anti-corruption* in the judiciary, as stated above, there is no need to come up with novel anti-corruption methods; assimilating the good practices already in use in other states²⁸² or by other national institutions is sufficient. The measures that should be taken at an institutional level are:

- *Reducing discretionary power*: legislation must be modified so as to reduce the discretionary power granted under the law. This includes phrases like "weighing" or "specific threat to public order," which are to be assessed before signing an arrest warrant, or "exceptional situation" used in codes of procedure for the regulation of certain measures. All of these leave room for subjective interpretation, which may easily allow public agents to overstep their duties, without any means of sanction for such decisions²⁸³. Along the same lines, the statements of reasoning of decisions made by judicial bodies²⁸⁴ and communicated to

²⁸⁰ Obviously, core legislation and even the Constitution must be amended accordingly. For a model of court clerk roles in European states, see *Model Statute for an European Rechtspfleger/Greffier* adopted by the European Union of Rechtspfleger in 2005 and the *Green Paper for A European Rechtspfleger* adopted by the same organization in 2008, also available in Romanian, at www.rechtspfleger.org.

²⁸¹ For a collection of national and international instruments on arbitration, see Cristi Danileț, Claudiu Ignat, Zeno Sustac, *Medierea – standarde și proceduri*, Editura Universitară, Bucharest, 2008.

²⁸² The most recommended are the *Independent Commission Against Corruption* in Hong Kong (www.icac.org.hk) and India's *Central Vigilance Commission* (<http://cvc.nic.in>).

²⁸³ The Republic of Moldova even uses a *Theoretical and Practical Guide on conducting anti-corruption appraisals of draft normative acts*, drawn up by the Centre for Combating Economic Crime and Corruption in 2007 and available at www.justice.gov.md/upload/Ghid%20CAPC.doc.

²⁸⁴ See *Opinion of the CCJE no. 11 of 2008 on the quality of judicial decisions*, at www.coe.int/ccje.

the litigants must be improved in terms of extent and content. Thus, according to a January 2008 Gallup survey, 66% of the respondents having had contacts with the judiciary over the last 2 years stated they had not understood the arguments made in court. The decisions of public agents must be accompanied by statements of reasons, so that they may be analysed by interested parties and checked for lawfulness and thoroughness if challenged. We believe statements outlining reasons must also accompany decisions that lead to the transfer of a case from one public agent to another – from a police worker to a prosecutor, from a prosecutor to the higher-ranking prosecutor, or from one court to another. If legislation is to be modified so as to implement the principle of discretionary criminal prosecution, objective benchmarks must be created for the discretionary decisions made by prosecutors²⁸⁵;

- *Enhancing transparency*: the work reports of courts, résumés of magistrates, statistical data, or the membership of panels are not public. In addition, many courts fail to update their web pages. This is why special attention must be given to computerisation, which helps to reduce corruption occasions. Computerisation is useful to the parties, starting from the registration of cases and finding official information regarding the judge who tries a particular case, to using the Internet in order to track the case and existing case law. It is also useful to mass media, which may be able to use information on the overall activity of a court, crime trends, etc. It is useful to judicial personnel, in the random assignment of cases (particularly in courts²⁸⁶ and in the National Integrity Agency) and the electronic management of cases, by means of which the assignment and progress of a case, as well as the number of cases assigned to a judge or inspector can be identified at any moment. It is not only case-related information that must be communicated to the public, but also information concerning administrative and financial activities (e.g., the existence of a random assignment system and its functioning, internal checks and inspections, sanctions applied, membership of leading structures, procedures for

²⁸⁵ This is precisely why *Recommendation (2000) 19* of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system proposes transparency and equity safeguards in the prosecution of cases in countries having adopted the discretionary prosecution principles, after *Recommendation no. (87) 18 on the simplification of criminal justice* proposed this principle with no further details.

²⁸⁶ The random assignment of cases makes it impossible for specific judges to be chosen for certain cases, which is also a means to prevent corruption in the system (the 2005-2007 Judiciary Reform Strategy, Line of Action no. 1.II). Since 2005, all courts in the country have been supplied with IT systems and specialized software to conduct the random assignment of cases to judge panels. At present, random assignment is a practice in all courts in the country. For procedural incidents that could not have been solved within the IT system (e.g., incompatibilities), the SCM Resolution no. 71, of March 9, 2005 is applied, to ensure random assignment. This resolution also includes provisions that safeguard the continuity of panels and of judges within panels.

filing complaints or work improvement suggestions, budgets allotted to an institution and its expenses, human resources, etc.).²⁸⁷

Because the role of judges restricts their ability to communicate directly with the public²⁸⁸, the role of spokespersons must be strengthened so as to maintain permanent contact between the institution and mass media;

- *Strengthening responsibility*: professional rights and obligations must be regulated as clearly as possible. Deontological codes must be disseminated among personnel in all judicial institutions and their implementation must be checked. Institution leaders must warn personnel to fulfil, correctly and in due time, their obligation to submit declarations of wealth, interests and kinship. This measure must be accompanied by close monitoring of its implementation and by sanctions for non-compliance²⁸⁹. Depending on the specific situations facing the personnel, the head of an institution or department must provide written instructions (to legitimise good practice)²⁹⁰. Financial and time benchmarks must be defined for case management, clear rules must be defined for access to the offices in the institution, and a tickler system must be in place, to warn that a deadline for a specific task has expired. Personnel recruitment and public procurement commissions must include trained members. Internal regulations or deontological codes must oblige the use of public assets exclusively for the public interest;

- *Effective leadership and inspection*: the training of institution personnel, including auxiliary and administrative staff, but be organised on a regular basis. Unannounced inspections are recommended. It would also be useful to mount cameras in areas where the personnel and public have direct contact. With the public announcement of such a measure, along with records hearings and court proceedings in order to check the accuracy of written records and to assess the conduct of magistrates could also deter corruption misdeeds. Other elements to be checked include the reasons for deferring proceedings, reasons for changing initial case assignments (especially the replacement of panel members, rather than judge recusal and challenge situations), and

²⁸⁷ The web site of the *Costa Rica Judicial Power* is a good example. It provides comprehensive information on legislation, regulations, case law, access to case files, work reports, online complaints, etc., www.poder-judicial.go.cr.

²⁸⁸ Nonetheless, in Peru there is a virtual communication forum for magistrates, law students and professors, other persons interested in human rights issues, including (judicial) anti-corruption and the reform of the judiciary, at www.cajpe.org.pe/rij.

²⁸⁹ For instance, in an August 25, 2008 news release, the SCM announced that several hundreds of magistrates had not submitted their wealth and interest declarations for 2007, or had done so after the deadline expired. Although breaches of this obligation constitute a contravention, the National Integrity Agency did not fine the magistrates; also, although breaches of this obligation constitute cases of misconduct, the SCM did not apply any disciplinary sanction.

²⁹⁰ One example is Art. 5, par 2 in Law no. 303/2004, a regulation which is insufficiently applied in some courts. For conflicts of interests that occur repeatedly in a court, the leading board may issue an instruction that can be applicable for all future cases of that kind.

incompatibilities or the handling of confiscated assets. Integrity testing is another crucial method where the subject is faced with a situation resembling real-life cases, so as to learn to identify the reactions and the appropriate conduct to adopt. The analysis of such test findings may lead to the identification of vulnerable sectors, of risk factors, the improvement of good practices in the institution, or possible changes in employees' tasks or positions. The use of covert agents offering bribes to judicial personnel is also recommended, and to apply administrative sanctions in cases where the bribe is accepted (notably, criminal sanctions do not apply because Art. 68 of the Code of Criminal Procedure prohibits the perpetration of criminal offences in view of obtaining evidence). Finally, the prohibition of direct hierarchical relations between spouses or other first-degree relatives, which under Art. 95 par 1 of Law no. 161/2003 only applies to civil servants, must be broadened to cover the entire public judicial system;

- *Implementing safety and security systems:* this refers to the physical protection of personnel (e.g., secure access to court buildings, courtrooms and judge offices) and electronic security (preventing unauthorised access to internal databases, recording queries in the internal IT system²⁹¹). Personnel must comply with security procedures (e.g., the ban on taking electronic or physical documents outside the institution), confidentiality and classified information management procedures (e.g., all judges and court clerks in Romania have their own computer at the court where they work, but have not received proper instructions on their personal passwords, on monitoring the sites accessed from their computers or means to report irregularities). Such obligations must be fulfilled, even by law students in internship programmes in judicial institutions, who have access to such information. Channels must also be identified through which information leaks to the public, while at the same time strengthening the authorised dissemination of information by professional spokespersons must occur;

- *Broadening and disseminating information on the fight against corruption:* apart from national, centralised campaigns²⁹², this can be

²⁹¹ In February 2009, databases of the police, National Penitentiary Authority and of several courts in Bucharest and other cities were attacked by hackers using Downadup (*Conficker*), regarded as one of the most dangerous computer worms of all time in terms of threat level and extent, with over 15 million computers infected in the last 6 months. Once installed, the worm disables and annihilates computer security systems. It then connects to a server and receives additional instructions (e.g., gather information or download and install additional malware).

²⁹² The main anti-corruption campaigns conducted in Romania are as follows: "Don't Give Bribe," the first nation-wide anti-corruption campaign, implemented in 2004 by the Concept Foundation, TI-Ro, the Ariel Youth and Children's Theatre, Cable Communication Association, Oops Media, the Association of Online Media Publishers, www.nudaspaga.ro; the "Anti-corruption Responsibility Campaign," carried out by the M.A.I. through the Anti-Corruption Directorate General in 2005, www.mai-dga.ro; "I don't give or accept bribe," ↪should that be bribes? initiated by the Ministry for European Integration in 2006, www.demascaspaga.ro; "The Judiciary, A Pillar of Society," launched in 2006 by the Justice Ministry, the first anti-corruption campaign in

done in each and every institution by means of issuing strict rules concerning the obligations of the staff and the public, and emphasising the consequences that corruption offences have on the system and on personal liability. Another corruption deterrent may be to ensure media coverage of interesting corruption cases presented to courts. At present, the National Anti-Corruption Directorate and the Anti-Corruption Directorate General use this policy. They issue press releases to announce the commencement of criminal proceedings against corruption suspects from both outside the judiciary and from within the system. However, official information must also be provided by the courts that handle judicial corruption cases in particular, so as to reinforce public confidence in a system whose members see fit to promptly and efficiently address such problems²⁹³. Also, roundtables or press conferences may be organised on a regular basis to communicate how certain flaws are addressed, including those in vulnerable sectors²⁹⁴;

- *Cooperation between institutions*, both those within the judiciary, and those outside the system such as those in the national security system (in fact, in corruption cases the cooperation of criminal prosecution bodies with the intelligence services is inevitable) or those in the educational system (police workers already carry out activities in schools, which may also be done by magistrates). But establishing dialogue channels between the judiciary and policy-makers, through roundtables, public debates, coalitions with civil society organisations, is equally necessary;

- *Assessing the transparency, costs and efficiency of the system*: although judicial institutions are bound by the law to release annual reports regarding their compliance with the Law on access to public information or on their revenue and expenditure budgets, not all of them actually comply with this obligation. The annual report on state of affairs in the judiciary, drawn up by the SCM, is not accompanied by public debates involving magistrates and Parliament. Furthermore, the 2006, 2007 and 2008 reports have not been analysed by Parliament, in spite of a legal obligation to do so. In none of the years has the Justice Ministry submitted its report on the Public Ministry and the National

courts and prosecutor's offices; "Condemn Corruption!", a campaign initiated by the M.A.I. through the ADG in 2007; the 2007 "NO to Bribe" campaign was initiated by the Justice Ministry and implemented by a group of NGOs and communication companies, www.farasapaga.ro; "First Bribe," conducted in 2007 by the Concept Foundation and Transparency International Romania, www.primaspaga.ro; the campaign "Have Confidence in Magistrates!" implemented in 2008 by the Social Alternatives Association, based in Iași, www.alternativessociale.ro.

²⁹³ For constraints on the justice – media communication during judicial proceedings, see *Recommendation no. (2003) 13 of the Council of Europe Committee of Ministers on the provision of information through the media in relation to criminal proceedings*, and the *Declaration on the provision of information through the media in relation to criminal proceedings*, adopted by the Committee of Ministers on July 10, 2003.

²⁹⁴ See Resolution no. 277 of the SCM plenary assembly of April 13, 2006, endorsing the *Guide on good practices for cooperation between courts, prosecutor's offices attached to them and the media*.

Anti-Corruption Directorate to Parliament, as the law requires. At the beginning of each year, courts and prosecutors' offices draw up reports on their activity from the previous year, but the content is not discussed with all employees (discussions are limited to magistrates only and to no other staff categories). More often than not, the contents of the reports are not made public, although each institution has its own web page. Moreover, reports tend to be analytic and based on statistics, rather disconnected from the day-to-day situations facing magistrates and the administrative and auxiliary personnel.²⁹⁵ Further, a managerial strategy according to which court leaders should plan their activity and which should be the outcome of joint efforts by all employees, is either absent, or has not been communicated to the staff in any judicial institution.

4.4. Conflicts of interest

Over the past few years, a very effective form of preventing corruption is the policy of conflicts of interest. The institution is designed to preserve the impartiality of public agents so that they may objectively fulfil their duties by strengthening individual integrity. As such, not only do conflict of interest regulations impose obligations on public agents, but they actually help them resist improper influences and make an overall contribution to the development of a culture of public service.

4.4.1. Definition:

a. For **public officials** (police workers, court clerks, etc.) the legal definition for conflicts of interest applies, which is regulated under Art. 70 in Law no. 161/2003: *a conflict of interests occurs when an individual has a personal interest of an economic nature, that may corrupt the objective fulfilment of the individual's duties as defined by the Constitution and other normative acts.* The law specifies that a conflict of interest occurs when a civil servant engages in any of the following situations: a) is called to answer to applications, make decisions or take part in decision making concerning individuals and legal entities with which a civil servant has relations of an economic nature; b) is a member of the same committee, established under the law, with civil servants that are his/her first-degree relatives or spouse; c) the economic interest of that civil servant, spouse or first-degree relatives may influence the decisions that the official is to make in the course of his/her duty.

²⁹⁵ A model report on court activity is outlined in Resolution no. 895/2007 of the SCM plenary assembly. Unfortunately, it does not include data on the duration of trials, number of trials (and not of cases, because the same trial may be involved in several cases, when it is retried), data on the auxiliary personnel, the personnel or public satisfaction rate, or monitoring media coverage of judicial issues.

Some argue that a conflict of interest may also take a "personal" form, insofar as a public official may have the legal competence to perform a particular act, but a personal situation or circumstance makes it impossible for the official to be objective. In this case, the official must disclose the conflict of interest and recuse or abstain from acting. In fact, foreign legislation holds that interest is not restricted to an economic nature. "Conflict of interests" can mean a situation where a public agent has or may have a personal interest, of an economic or other nature, that may corrupt the objective fulfilment of the public agent's duty, as defined by the Constitution and other normative acts, as well as the public interest²⁹⁶.

Therefore, a conflict of interest opposes two types of interests – personal and public: a *personal interest* encompasses any financial or other benefit targeted or obtained, directly or indirectly, for oneself or for others, by the public agent by misusing the reputation, influence, facilities, relations and information to which he/she has access in the course of his/her public duties; on the other hand the *public interest* requires the safeguarding and respecting, by public authorities and institutions, of the rights, freedoms and legitimate interests of citizens and of society, as laid down by the Constitution, national legislation and international treaties to which Romania is a party.

b. For the category of **judges and prosecutors**, the law does not provide a definition of conflict of interest, but only general remarks on how to avoid this situation, by binding magistrates to abstain, or otherwise to be recused.

Art. 5 paragraph 2 in Law no. 303/2004 stipulates, "Judges and prosecutors are bound to abstain from an act or acts related to the administration of justice in cases that involve a conflict between their interests and the public interest of administering justice or of safeguarding the general interests of society, except for the cases where the conflict of interest has been notified, in writing, to the leading board of the court or chief of the prosecutor's office, and it has been found not to affect the impartial fulfilment of official duties." Also, *art. 23 in the Deontological Code of judges and prosecutors* stipulates: "Judges and prosecutors are bound to abstain, under the law, from any act related to the administration of justice, in cases which involve a conflict between their interests and the public interest of administering justice or of safeguarding the general interests of society." *Article. 27.1 in the Code of Civil Procedure* regulates recusal as follows: "A judge may be recused when the judge, spouse or first-degree relatives have an interest in the trial of the case in question." Finally, *article 48 paragraph 1.d in the Code of Criminal Procedure* regulates incompatibility cases as follows: "A judge is incompatible with hearing a case, where the respective case involves circumstances indicating that the judge, spouse or close relatives have an interest in that trial."

²⁹⁶ See Quentin Reed, *Sitting On the Fence: Conflicts of interest and how to regulate them*, 2008, at www.u4.no/themes/political-corruption.

Keeping in mind the international instruments that regulate this institution, we define “*conflict of interest*” as the situation or circumstance that concerns a magistrate, where the magistrate’s personal, direct or indirect interest runs counter to the public interest, so as to affect or be liable to affect independence and impartiality in the decision making or the objective and speedy discharge of official tasks.

Strictly with respect to judicial activity, a judge in a conflict-of-interest situation is to choose between the public interest of administering justice, and the private interest of securing a personal benefit. This gives us reasons to state that the rule of avoiding conflicts of interest is a version of the principle *nemo in rem suam auctor esse potest*, i.e. no one can hear his own case.

4.4.2. Preventing conflicts of interest

The conflict of interest policy requires the regulation by the institutions where it applies in terms of defining it, and of drawing up *ex ante* rules to prevent conflicts of interest and *ex post* sanctions for breaching those rules.

Conflicts of interest may be prevented by three methods:

a) *imposing incompatibilities and restrictions*: these include the prohibition from serving in certain offices (e.g., magistrates cannot be the superior of their spouses) or positions (e.g., a magistrate cannot concurrently hold another public or private position), or from conducting activities that are related to the public office in question (e.g., a judge cannot be part of the same panel with a relative);

b) *establishing the obligation to disclose interests*: this includes general, usually annual, declarations of interest, as well as specific statements, filed before making a decision in a particular case (as regulated in Art. 5 paragraph 2 in Law 303/2004). This category also includes the obligation of magistrates and auxiliary personnel in courts and prosecutors’ offices to disclose kinship relations with other employees in the judicial system;

c) *procedures for non-participation in decision-making*: these include abstention, recusal and substitution of a public agent.

Conflicts of interest must not be mistaken for *corruption*. While corruption involves action, conflicts of interest are a circumstance in which the perpetration of an illegal act is merely potential. Thus, when a prosecutor involved in decision-making on a case in which he/she has personal interest acts lawfully and fairly, this is not an instance of corruption. Similarly, a judge may accept a bribe (in which case we speak of corruption) in exchange for making a decision he/she would have made anyway, without this involving a previous conflict of interest. Nonetheless, it is true that in most cases corruption occurs where a previous personal interest has had a negative influence on the conduct of a public agent. This is precisely why safeguarding against conflicts of interest is recommended as an element in a comprehensive policy to

combat and prevent corruption. In this framework, conflict of interest policies are an important instrument not only in building the integrity of the public sector, but also in fostering and protecting democracy.

Nor should conflicts of interest be mistaken for incompatibilities and restrictions. Given the inconsistent use of these concepts by Romanian lawmakers, the following clarifications are needed:

As shown above, a *conflict of interest* is a situation that a person needs to avoid, if he/she is to make an impartial decision. The implementation of this policy is ensured through various safeguards (disclosure of interests, assets and kinship relations, regulation of incompatibilities, provision of restrictions), control mechanisms (internalisation of professional ethics by each public agent and conducting checks by disciplinary bodies, or the National Integrity Agency, respectively) and sanctioning mechanisms (either undertaken at an individual level, such as abstention or recusal, or applied at an institutional level, through deontological, disciplinary, administrative or criminal measures, depending on the gravity of misconduct and on the competent institution).

In this context, *incompatibilities* are guarantees of the impartiality of public agents, aimed at avoiding a conflict of interest in the management of a given case. Policymakers have thus foreseen cases when a conflict of interest may occur, at least at an apparent level. For instance, a magistrate or public agent is prohibited from hearing or handling a case that concerns his/her spouse or close relative. As such, incompatibility concerns the functional capacity of a public agent in handling a specific case.

Under Art. 24 of the *Code of Civil Procedure*, "(1) A judge having passed a ruling in a case cannot take part in hearing the same case in the appeal or recourse stage, or in re-trying it after cassation. (2) Nor can an individual who has been a witness, expert or arbitrator in a case, take part in trying that case." Under Art. 27, "A judge may be recused: 1) when the judge, spouse or their lineal relatives have an interest in the trial of the case, or when the judge is related by blood or marriage, within four degrees of kinship, to any of the parties; 2) when the judge is related by blood or marriage, within four degrees of kinship, to the lawyer or trustee of any of the party, or when the judge is married to a sibling of a spouse of any of these persons; 3) when the judge's spouse (provided that he/she is not dead or divorced) is related, by blood or marriage, to any of the parties, within four degrees of kinship, or when there are children left, in case the judge's spouse is dead or divorced; 4) when the judge, spouse or relatives within four degrees of kinship are involved in a case similar to that which is being heard, or when they are involved in a case tried in the same court where one of the parties is a judge; 5) when there has been a criminal litigation between these persons and one of the parties, five years before the time of recusal; 6) when the judge is a guardian or custodian of any of the parties; 7) when the judge has expressed an opinion on the case that is being heard; 8) when the judge has received from any of the parties gifts or the promise of gifts or other services; 9) when there is enmity between the judge, spouse or relatives within four degrees of kinship, on the one hand, and any of the

parties, their spouses or relatives within three degrees of kinship." And under Art. 36, these provisions (except for Art. 27. 7) shall also apply for prosecutors, assistant magistrates and court clerks.

Similarly, the *Code of Criminal Procedure* stipulates incompatibilities for judges: "Judges who are spouses or otherwise related, by blood or marriage, within four degrees of kinship, cannot be members of the same panel" (Art. 46). "A judge who has heard a case cannot hear the same case in a higher court, or hear the appeal or recourse against the initial ruling. Also, a judge who has previously expressed an opinion on the decision that might be taken on a case, cannot hear that case (Art. 47)". "A judge is also incompatible with hearing a case, when in the respective case: a) he/she has initiated criminal proceedings, or has ordered the commencement of prosecution, or has presented the case in court for the prosecution, or has decided on the preventive custody or extension of preventive custody during criminal prosecution; b) he/she has been a representative or defender of any of the parties; c) he/she has been an expert or witness; d) there are elements indicating that the judge, spouse or any close relative has an interest, of any nature, in the case; e) the judge's spouse or other relative by blood or marriage, within four degrees of kinship, has conducted criminal prosecution, has monitored the prosecution, has decided on the preventive custody or the extension of preventive custody, during criminal prosecution; f) the judge is the spouse or otherwise related by blood or marriage, within four degrees of kinship, to any of the parties or a party's lawyer or trustee; g) there is enmity between the judge, his/her spouse or relatives within four degrees of kinship, on the one hand, and any of the parties, their spouse or relatives within three degrees of kinship, on the other hand; h) the judge is the guardian or custodian of any of the parties; i) the judge has received donations or gifts from any of the parties, their lawyers or trustees" (Art. 48, paragraph 1). "A judge is incompatible with hearing an appeal or recourse, when the judge's spouse or other relative, by blood or marriage, within four degrees of kinship, has been involved, as a judge or prosecutor, in the hearing of the same case" (Art. 48 paragraph 2).

Under Art. 49 of the same Code: "Provisions in Art. 46 shall also apply to the prosecutor and assistant magistrate or, where applicable, to the case clerk, when there is an instance of incompatibility between (any of) them and a member of the panel of judges. (2) Incompatibility provisions in Art. 48 paragraph 1 b) i) and paragraph 2 shall also apply for the prosecutor, the official who conducts criminal prosecution, the assistant magistrate and the case clerk. (3) A prosecutor who has heard the case in first instance cannot decide on the same case in an appeal or recourse stage. (4) An official having conducted criminal prosecution is incompatible with re-running criminal prosecution, when the court orders the remaking of the procedure." And under Art. 54: "Provisions in Art. 48 shall also apply to experts and interpreters. The expert capacity is incompatible with that of a witness in the same case; the witness capacity has precedence."

Restrictions are also designed to safeguard against conflicts of interest, but they concern the general activity of public agents, i.e., the overall conduct of public agents, prior to or independent of any particular case.

Thus, under Art. 40 paragraph 3 in the *Constitution of Romania*, "the following cannot be members of political parties: Constitutional Court judges,

ombudsmen, magistrates, active members of army and police corps, and other categories of public agents as defined under organic law." Under Art. 125 paragraph 3 in the Constitution, "The office of a judge is incompatible with any other public or private office, except for teaching positions in higher-education." Also, Art. 94 paragraph 1 in *Law no. 161/2003* stipulates: "The public agent capacity is incompatible with any public offices, other than that to which he/she has been appointed, and with public dignity positions." Under Art. 47 paragraph 1 in *Law no. 188/1999* on the statute of public officials, "Public officials shall not request or accept gifts or other benefits, directly or indirectly, for themselves or for others, by virtue of their public office." Article 48 paragraph 2 reads: "Public officials shall not directly receive petitions that they are competent to adjudicate, or directly discuss with petitioners, except for those officials who are specifically assigned such tasks, or intervene in the adjudication of such petitions."

Under Art. 43 in *Law no. 360/2002*, "A police worker shall not, under any circumstances: a) receive, claim or accept gifts or other benefits, or the promise of gifts, directly or indirectly, for themselves or others, by virtue of their official capacity; e) collect amounts of money from individuals or legal entities; f) draw up, print or distribute materials or publications which are political, immoral or inciting indiscipline; g) have, directly or through intermediaries, personal interest in a unit in the jurisdiction of the police unit where they are employed, where such interest is liable to corrupt the police worker's impartiality and independence." Under Art. 45 paragraph 1, "A police worker shall not: g) carry out, directly or through go-betweens, trade operations, or take part in the administration or management of a trade company, other than holding stock in it; h) carry out for-profit activities liable to stain the honour and dignity of the police worker or of the institution for which he/she works; i) hold any other public or private office, for which they receive remuneration, except for teaching positions in the education system, scientific research and literary or artistic activities."

Under Art. 14 in *Law no. 51/1995* on practicing the lawyer profession, "Practicing the lawyer profession is incompatible with: a) remunerated employment in other professions than that of a lawyer; b) occupations that injure the dignity and independence of the lawyer profession or involve indecent behaviour; c) direct practice of trading activities."

Under Art. 21 paragraph 1 in *G.E.O. no. 86/2006*, "An insolvency practitioner who has previously worked as a syndic judge can only be appointed as an administrator or liquidator in the jurisdiction of the court where he has worked, at least two years after having left the respective position."

4.4.3. Types of interest

Interest may be *material*, as indicated in the case *D. v. Ireland* (*European Commission for Human Rights*, 1986) where the judge was holding stock in the defendant company involved in the case the judge was hearing.

Interest may also be of a *moral* nature as in *Remili v. France* (ECHR, 1996) where the matter brought before the court was that a juror had declared himself a racist during a trial. In *Pescador Valiero v. Spain* (ECHR, 2003), the matter presented to the court was that the magistrate who heard the case had close professional relations with the

university that had laid off the plaintiff. The private interest of a judge in a specific adjudication of a case may also arise from his/her social relations, kinship, friendship, religious affiliation or cohabitation with any of the parties, their relatives or friends or their attorneys.

The beneficiary of a decision made in a conflict-of-interest situation may be the one who decides (*direct* interest); the decision-makers, their family, friends, close ones (*indirect* interest); or persons or organisations with which they had, have (*current* interest) or will have (*future* interest) business, political or other relations.

A special form of conflict of interest occurs through *pantouflage* (Fr.) or *amakudari* (Jap.). This involves public officials leaving the public sector in order to get employment in the private sector. This runs counter to the interests of the state. For example, when public officials benefit from various special training programmes paid from public funds, and then leaves the public office for a better paying job in the private sector. A future conflict of interest can be defined when public agents are employed by private companies as a reward for certain decisions made for the benefit of that company during the public term in office. Other examples could include cases where a judge contributes to dismissing a challenge against an award-of-services contract to a company, and then resigns and is hired by that company in a managerial position; a police worker licenses a security guard company or detective agency, and then receives employment with that private company; an official expert benefits from training programmes abroad, then resigns and is certified as private expert.

This form of conflict of interest may be countered in ways such as prohibiting employment to a similar position in the private sector after a public official has left a public post, prohibiting the holding of a position in a private company that has been under the control of the public institution where the official has worked, by binding employees to refund the expenses incurred by the state with training the official during the public term. Judges, prosecutors and police workers in criminal prosecution departments are also subject to a prohibition from working as lawyers in those courts or prosecution departments for two years after they leave the public office (Art. 39 and 40 in the Statute of the Lawyer Profession of 2004). Also, where an individual, by virtue of his/her position, office or task assigned, is in charge with overseeing, inspecting or winding up a private business operator, that individual perpetrates an offence if he/she carries out any undertaking on behalf of the private operator. Such activities may include facilitating trade or financial operations for the private operator or investing capital in the private operator, in view of ensuring direct or indirect undue benefits for that individual. Such activities also constitute an offence if they are carried out within five years after the conclusion of the task, office or position (Art. 11 in Law no. 78/2000).

Obviously, the interest may be *actual*, when rooted in evidentiary facts, or *apparent*, when it only generates suspicions regarding the integrity of the official. In this respect, the decision has been reached mere acquaintance by a member of a judicial panel with one of the witnesses being heard is not sufficient to imply that the judge will have

a favourable bias towards that witness' testimony; however, the nature and closeness of their acquaintance must be further analysed²⁹⁷. A similar decision has been made with respect to the affiliation of a judge and one of the parties to the same organisation—e.g., Freemasonry²⁹⁸.

Where the applicant has been involved in a controversial argument in the media against the president of the court that hears the case and the president has publicly expressed negative opinions concerning the court's activity in relation to the applicant's case before the beginning of the trial, the Court in Strasbourg decided that the applicant's concerns over the impartiality of the court were objectively grounded²⁹⁹. Similarly, in another case, it was decided that participation in the proceedings of the same individuals whose conduct was criticised in the media article in question is sufficient to question the impartiality of the decision-making body. This was because courts are not impersonal institutions, but function through the judges that constitute them, and in order to be impartial they be sufficiently distant from the issue under consideration. However, in this case, the personal feelings of judges played a key part in establishing whether or not the judicial authority was offended when the offence targeted the same judges³⁰⁰. Moreover, when the judges who have sentenced the applicant are the same as those subject to the offence, there are enough reasons to raise legitimate doubts, objectively justifiable, regarding the impartiality of the court (*nemo judex in causa sua*). When an official works in a court, which is subordinated—in terms of position and duties—to one of the parties in a case, justice seekers may also possess legitimate doubts as to the independence of that official³⁰¹.

4.4.4. Examples

The phrase “conflicts of interest” is rather infrequent in judicial theory and practice. Nonetheless, we have managed to identify a number of cases that fall within this category, starting from day-to-day situations facing justice professionals or situations that are already regulated under the law. The following situations constitute *conflict of interest*:

- An official who, in his/her capacity as a member of the SCM committee on discipline, has conducted a disciplinary inquiry into a magistrate, then votes on the enforcement of a sanction as a member of the SCM disciplinary department (a situation permitted under the national legislation in 2005-2008);
- A non-permanent member of the SCM, who holds a leading position in a court, files an application regarding his/her court to the

²⁹⁷ ECHR, *Pullar v. UK*, decision of 20 June 1996, par. 38

²⁹⁸ ECHR, *Küskinen v. Finland*, decision of 01 June 1999.

²⁹⁹ ECHR, *Buscemi v. Italia*, decision of 16 September 1999, par. 68.

³⁰⁰ ECHR, *Kyprianou v. Cyprus*, 27 January 2004.

³⁰¹ ECHR, *Sramek v. Austria*, decision of 22 October 1984.

SCM, then as a member of the SCM takes part in discussing and voting on that application;

- A member of the HCCJ leading board votes on the report required under the law with respect to the activity of a magistrate seeking promotion to HCCJ, then, as a member of SCM, votes on the appointment of that magistrate;
- A member of the SCM, who is also a member of a magistrate association, adjudicates certain applications filed by that association to the SCM;
- A member of the SCM votes on the promotion of a judge to a leading SCM position or on the participation of a judge in a conference or workshop abroad, while that judge hears in court a case that personally involves the SCM member;
- A member of the SCM or of the leading structures of the National Institute of Magistracy takes part in the appointment as an expert in a programme funded from foreign sources of a relative or close friend, with whom the official then unofficially splits the expert remuneration;
- A member of the SCM or spokesperson of a court or prosecutor's office has close friendship or cohabitation relations with a journalist, and facilitates the journalist's access to information on the career of magistrates or the functioning of courts/prosecutors' offices;
- The Justice Ministers propose the appointment of an official as a prosecutor general of the Prosecutor's Office attached to the HCCJ, and then, as a lawful member of the SCM, votes in favour of the appointment in the SCM prosecutors' department;
- A lawyer defends, in the same case, parties that have opposing interests, or terminates the contract with the party that had originally employed him/her and is then employed by the opposing party, to use the information to which he/she initially had access (in these examples, there are two private interests that are conflicting, instead of a public and a private interest);
- An insolvency practitioner is appointed as liquidator for a debtor and at the same time for its creditor;
- A former lawyer of a party adjudicates a case, in his/her new capacity as judge;
- A corporate counsel offers advice to employees involved in litigation with the institution;
- In an auction, guardians acquire, directly or through intermediaries, the assets of their wards, or trustees acquire the assets they were instructed to sell; or public officials acquire the public assets they were instructed to sell (Art. 1308 Civil Code);
- A judge is an assignee of litigious rights in the jurisdiction of the court where he/she works (Art. 1309 Civil Code);
- A judge is a member in the public procurement commission for the court where he/she works, and has close relatives holding stock in a company submitting a tender;

- A judge decides on a case in which the lawyer of one of the parties is a member of the Bar Council, while applying for bar entrance without exam;
- A judge adjudicates a case in which the indictment has been drawn up by the judge's spouse/partner/close relative as a prosecutor, or in which criminal prosecution has been conducted by the judge's spouse/partner/close relative as a judicial police worker;
- A judge adjudicates a case that arises from a judicial situation directly concerning the judge (e.g., a party requests restitution of a nationalised building, when the judge lives in such a building; or a fellow judge has filed a petition form to sue the Justice Ministry for overdue salary payments when the judge hearing the case is entitled to similar payments);
- A magistrate adjudicates a case involving a close court colleague, a police worker or a court clerk with whom the magistrate works on a daily basis;
- An appraiser of applications for funding also applies for funding in the same programme or works in the same institution with an applicant, or has kinship or administrative relations with an applicant, or has a dispute with an applicant;
- An institution leader uses the institution's car for personal purposes, without this right being granted to him/her under a regulation or contract;
- An institution leader grants an award or prize to an employee who is related to him/her;
- A magistrate takes part in a magistrate/auxiliary personnel recruitment or promotion commission, when one of the competitors is his/her spouse/close relative;
- A court president is a member of the oral examination commission in the court, with respect to a management project that analyses, among other things, the performance of the court president, as part of a contest for appointment to leadership positions³⁰²;
- A court president denies a leave slip requested by a judge, and then takes part in analysing the challenge submitted by that judge to the leading board and votes again, as a member of the leading board³⁰³.

4.5. Codes of conduct in the judiciary

All international instruments attach special importance to codes of conduct (ethic rules). This is because the fight against corruption

³⁰² Alexandrina Rădulescu, *Dissenting opinion on validating the results of the contest for the appointment of judges to leading positions, held between October 28 – November 25, 2007*, available at www.alexandrina-radulescu-csm.ro/docs/opinie-plen-13-dec-2007.pdf.

³⁰³ Art. 158 in the Internal Regulation for Courts, endorsed by the SCM Resolution no. 387/2005, with subsequent amendments: "(1) Individual applications or complaints by personnel shall be addressed to the court/department president, who is bound to provide an answer in due time and in writing. (2) The person dissatisfied with the answer may challenge it before the leading board of that court."

requires, as an interior mechanism, the honesty and responsibility of public agents. Codes of conduct strengthen the spirit of professional bodies in the positive sense of integrity, as opposed to corporatism and self-protection.

Ethical conduct concerns both the behaviour during the discharge of official duties, and outside these duties. Regarding the decisions made by public officials in the judiciary, (e.g., court rulings), citizens' discontent as to these decisions must be distinguished from the discontent as to their conduct. For acting in an undignified manner in the courtroom towards a witness, a judge may be subject to disciplinary measures, whereas a wrongful ruling may only be straightened by using the appeal procedures defined by law, which involves reconsideration of the original decision by another court.

Codes or norms of conduct ought to include measures and systems able that can facilitate the disclosure by public agents of the corruption misdeeds that have come to their knowledge in the course of their official duties. They must also bind public agents to disclose to competent authorities all their previous activities, occupations, investments, assets and any gifts or substantial benefits that might generate a conflict of interest with their public office. An important role is played by trade associations, which must support judges in ethics-related matters and act as deontological benchmarks.

In light of national and international instruments, the recommended conduct of professionals in the judiciary is defined in the following guides:

a. *Code of Conduct for Law Enforcement Officials* (UN, 1979) is based on the idea that the proper functioning of law enforcement services is vital not only to the effectiveness of criminal justice, but also to the protection of fundamental human rights. The Code emphasises that law enforcement officials must respect and uphold human dignity and apply human rights provisions to all individuals. The Code particularly prohibits torture and any form of corruption, stipulates that force shall only be used if strictly necessary, requires the confidentiality of personal information be respected, and mandates that the health of convicts shall be protected.

b. *International Code of Conduct for Public Officials* (UN, 1996). The Code includes general principles for the conduct of public agents, as well as principles for preventing conflicts of interest, disclosure of assets, acceptance of gifts, handling of confidential information and involvement in political activity.

c. *The Bangalore Principles of Judicial Conduct* (UN, 2001). The Code defines six principles: Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence. As regards *Integrity* and *Propriety*, they are declared as essential to the performance of all of the activities of a judge:

- *appearance* is regarded as a principle: a judge shall ensure that his/her conduct is above reproach in the eyes of a reasonable observer; the attitude and conduct of a judge must reaffirm the people's

faith in the integrity of the judiciary; in all his/her activities, including personal life, a judge shall avoid impropriety and the appearance of impropriety;

- *conflict of interest* is also regulated: a judge shall, in his personal relations with other members of the legal profession who practice regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism; a judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is in any way associated with the case; a judge shall not allow the use of his/her residence by a member of the legal profession to receive clients or other members of the legal profession; a judge shall inform himself/herself on his/her personal and financial interests and shall make reasonable efforts to be informed on the financial interests of the judge's family members;

- *freedoms* are also stipulated: a judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but shall exercise these rights in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary; a judge may establish or join associations of judges or other organisations that further the interests of judges;

- *restrictions* are also defined: a judge shall not use the prestige of the judicial office to advance his/her private interests or the personal interests of the members of his/her family or of other persons, and shall not convey or permit others to convey the impression that anyone is in a special position to improperly influence the judge in the performance of his/her judicial duties; a judge shall not use or disclose the confidential information acquired in his/her judicial capacity for purposes not related to the judge's professional duties;

- the following *rights of judges* are listed: to write, lecture, teach and participate in activities concerning the law, the organisation of the justice system, the administration of justice and related activities; to appear at a public hearing before an official body concerned with matters related to the law, the justice system, the administration of justice or related matters; to serve as a member of an official body or a government commission, committee or advisory body, if such membership is not inconsistent with the principles of impartiality and neutrality of a judge; to engage in other activities that do not detract from the dignity of the judicial office and do not interfere with the performance of his/her official duties;

- as a case of *incompatibility*, the Code stipulates that a judge shall not practice law while serving as a judge;

- with respect to *corruption*, the Principles indicate that a judge, as well as the members of the judge's family, shall not ask for or accept any gift, donation, loan or favour in relation to anything done, or to be done, or to be omitted by the judge during the performance of judicial duties; a judge shall not knowingly allow court staff or others subject to the judge's influence, authority or direction, to ask for or accept

gifts, donations, loans or favours in relation to anything done or to be done or omitted to be done during the performance of his/her judicial duties; to the extent allowed by the law and transparency regulations, a judge may accept a token gift, award or benefit as appropriate on the occasion, provided that the token gift, award or benefit is not perceived as intended to influence the judge in the performance of his/her judicial duties or gives rise to an appearance of partiality³⁰⁴; a judge shall not allow his/her family, social or other relationships to improperly influence his/her conduct and judgement.

The Commentary on the Bangalore Principles of Judicial Conduct (UNODC, 2007) details each principle and includes specific examples of the conduct to be adopted by judges in various circumstances (e.g., discussing cases with fellow judges, employing relatives as court clerks, friendships with police workers or lawyers, membership of secret societies and frequenting clubs, social relations with court users, extramarital relations, connections of a judge's family with law firms or governmental institutions, a judge's involvement in public or political life, judges' statements on flaws in the system, writing recommendation letters, testifying, participation in conferences and public interviews, participation in governmental activities, a judge's accepting assets).

For prosecutors, worth mentioning are the "*Standards of professional responsibility and the statement of the essential duties and rights of prosecutors*," a code adopted in 1999 by the International Association of Prosecutors³⁰⁵ drawing on the *Guidelines on the Role of Prosecutors* adopted by the United Nations in 1990. The Standards dwell on the professional conduct, independence, impartiality, role in criminal proceedings, cooperation and protection of prosecutors. With respect to the conduct, the Guidelines stipulate that prosecutors must practice their profession with honour and dignity, in compliance with the law and ethics, must strive to be, and to be seen as consistent, independent and impartial, must at all times exercise the highest standards of integrity, must keep informed on legal development, must protect an accused person's right to fair trial and serve the public interest.

d. *Model Code of Conduct for Public Agents (CoE, 2000)* offers suggestions on the management of real-life situations facing public officials, (e.g., acceptance of gifts, use of official information or public resources, and relations with former employees). The Code underlines the importance of strengthening the integrity of public agents and the

³⁰⁴ In this respect, mention must be made of *Law no. 251/16.06.2004 on measures concerning assets received as token gifts on official occasions while serving in public office*, published in O.J. no. 561 of June 24, 2004. The law binds magistrates, holders of leading positions, public officials, etcetera, to declare and present to the institution leader, within 30 days, assets received as token gifts on official occasions, except for medals, decorations, badges and office supplies worth up to 50 EUR. This control system is designed to prevent attempts at concealing bribes.

³⁰⁵ *The International Association of Prosecutors* was established in 1995, and is based in The Hague, www.iap.nl.com. The standards are available at www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/standards.html.

accountability of superior hierarchical bodies by means of three objectives: establishing standards for the integrity and conduct to be expected of public agents; helping public agents to understand and adopt these standards; and informing the public on the conduct they can expect of public officials.

e. *Opinion no. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality* (CCJE, 2002) stipulates that the activity of judges should be guided by principles of professional conduct, enabling them to overcome the difficulties faced in this area; the principles must be drafted by judges themselves and be independent from the disciplinary rules applicable to judges; it is desirable to establish in each country one or more bodies or persons within the judiciary to advise judges confronted with problems related to professional ethics or compatibility of non-judicial activities with their status.

As regards the rules of *conduct for individual judges*, the CCJE is of the opinion that each individual judge should do everything to uphold judicial independence, both at an institutional and an individual level. Judges should behave with integrity in office and their private lives, should at all times adopt an approach that is and appears impartial, and discharge their duties without actual or perceived favouritism and without prejudice or bias. They should decide matters by taking into account all considerations that are relevant for the enforcement of the law, and excluding all immaterial considerations, should show the consideration due to all those involved in judicial proceedings or affected by them, and should discharge their duties with due respect for the equal treatment of parties, by avoiding any prejudice and bias, maintaining a balance between the parties and ensuring a fair hearing for each. Judges should be circumspect in their relations with the media, and maintain their independence and impartiality by refraining from any personal exploitation of any relations with the media and from making unjustified comments on the cases before them. They should also ensure that they maintain a high degree of professional competence, have a high degree of professional awareness and show diligence in complying with the requirement to deliver judgements in a reasonable time. They should devote most of their working time to their judicial duties, including associated activities, and refrain from engaging in political activities that could compromise their independence and cause detriment to their image of impartiality.

f. In Romania, there is a *Code of Professional Ethics for Judges and Prosecutors*³⁰⁶, drawn up by the SCM. The Code is faulty, first of all because it applies equally to both judges and prosecutors, which deepens misunderstandings with respect to the two categories of magistrates. Because they exercise two distinct judicial offices, there

³⁰⁶ Adopted under Resolution no. 328/2005 of the SCM Plenary Assembly, published in O.J. no. 815 of September 8, 2005.

should not be a code of conduct they need share. Secondly, this is not a proper code of conduct. Its rules are overly general, not limited to indicating acceptable and unacceptable conduct for judges and prosecutors. Instead, most provisions reiterate, without any details, the stipulations in the Law on the organisation of the judiciary and in the Statute of judges and prosecutors. The Code also fails to identify an ethical guidance body or sanctions for non-compliance with its provisions.

Moreover, until 2005 breaches of the Code of Ethics entailed disciplinary measures against magistrates, another serious mistake, given that infringement of rules of conduct cannot entail disciplinary sanctions³⁰⁷. Disciplinary liability is only imposed for breaking the law and not ethics rules. As indicated above, the Bangalore Principles themselves specify that cases of misconduct should be decided by a separate body from the one in charge of applying disciplinary sanctions. This may be the senate of a trade association (e.g., the *Senate of the National Association of Judges in Romania* or the *National Council of Professional Ethics* of the Romanian Association of Magistrates) or another internal regulatory authority of the profession. Breaches should only entail profession-related sanctions such as reprimand by the association or exclusion from the association. In this respect, the establishment by departments of the SCM (essentially a disciplinary body) of violations of ethical conduct and their inclusion in the professional records of magistrates, to be taken into account upon the professional assessment of those magistrates, not only lacks in legal justification, but also severely infringes upon the independence of magistrates.³⁰⁸

g. In 2006, a *Code of Ethics for Judges in Romania* was finalised. It is the first code exclusively applicable to judges and it was drawn up by the PRO Etica organisation jointly with the SCM³⁰⁹. This Code is waiting to be embraced by judges, most likely through their trade organisations. The values promoted by the Code are based on the idea that it is judges who must embrace ethics, and not the state that must impose it.

³⁰⁷ Mistaking disciplinary rules for (professional) ethics rules is frequently found in the codes of conduct for various professions: court enforcement officials, public agents, etc.

³⁰⁸ These duties were taken over by the SCM, against the will of the 2005 legislature, through the modification of Council's own rules of organisation and functioning, under Resolution no. 564/2008, published in O.J. 515 of July 9, 2007. This resolution was annulled by the Bucharest Court of Appeals, Chamber VII of the administrative and fiscal department, on 1 April 2009 (Case no. 8920/2/2008).

³⁰⁹ The Code is the outcome of the project titled "Coordinates of the ethical profile of magistrates. The new requirements of the moral assessment of judges," initiated by the "ProEtica – Ethics in professions" workshop of the Philosophy Department of the Babes-Bolyai University in Cluj-Napoca, joined in the final stage of the project by the Centre for Applied Ethics within the Philosophy Department of the University of Bucharest. Funding for the project was approved by the SCM in the plenary meeting of December 14, 2006, and the content of the Interim Report was approved by the SCM in a plenary meeting on July 13, 2006. The project is yet to be finalised.

h. Another Code of ethics was proposed by the Romanian Magistrates Association in November 2007³¹⁰. With seven articles accompanied by Guidelines for implementation, following the model of the Commentary to the Bangalore Principles, the *Code of Ethics for Magistrates* was intended for adoption by all judges and prosecutors, and not only by those affiliated to the association. So far there have not been any debates among magistrates in this respect.

i. Lastly, other codes applicable to public officials in the judiciary are available for:

- specialised auxiliary personnel in courts and prosecutors' offices³¹¹,
- public officials, including NIA inspectors³¹²,
- personnel under employment contracts³¹³,
- internal auditors³¹⁴,
- police and gendarmerie corps³¹⁵,
- public notaries³¹⁶,
- bailiffs³¹⁷,
- lawyers³¹⁸,

³¹⁰ Romanian Magistrate Association, *Code of Ethics for Magistrates – Guidelines for implementation*, Hamangiu, Bucharest, 2007.

³¹¹ *Code of ethics for specialised auxiliary personnel in courts and prosecutor's offices attached to courts*, adopted under SCM Resolution no. 145 of 2005, published in O.J. no. 382 of May 6, 2005. We have reservations as to the lawfulness of the endorsement of this code by the SCM, a body which only has jurisdiction over the careers of judges and prosecutors.

³¹² Law no. 7/23.02.2004 on the *Code of Conduct for Public Officials*, republished in O.J. no. 525 of August 2, 2007.

³¹³ Law no. 477/08.11.2004 on the *Code of conduct for personnel under employment contracts in public authorities and institutions*, published in O.J. no. 1105 of November 26, 2004.

³¹⁴ *Code of ethical conduct for internal auditors*, endorsed under Order no. 252 of 2004 issued by the Ministry for Public Finances, published in O.J. no. 128 of February 12, 2004.

³¹⁵ *Code of professional ethics for police workers*, endorsed under G.R. no. 991/25.08.2005, published in O.J. no. 813 of September 7, 2005. Under Art. 25 in the Code, its provisions also apply to the *Romanian Gendarme Corps*. Guidelines have also been adopted for the implementation of the Code (the guidelines include rules of conduct and recommends approaches for the corruption situations encountered by police workers), available at www.mai.gov.ro/Documente/Cariera/GHIDUL_etica_deontologie.pdf. Order no. 6582/2005 endorses the *Code of conduct for public officials in the customs authority*; it includes principles concerning token gifts and the disclosure of corruption cases. At a European level, the Committee of Ministers of the Council of Europe adopted Recommendation no. (2001) 10 on the *Code of Police Ethics*.

³¹⁶ *Code of ethics for notaries public in Romania*, adopted at the 3rd Congress of the National Union of Notaries Public in Romania, 2001. The Conference of Notaries of the European Union adopted in 1995 a *European Code of Ethics for the Notarial Profession*.

³¹⁷ *The Code of ethics of court enforcement officers* constitutes Appendix no. 2 to the Statute of the National Union of Court Enforcement Officers and of the court enforcement officer profession, and was adopted under Resolution no. 21/2007 of the National Union of Court Enforcement Officers, published in O.J. no. 430 of June 28, 2007.

³¹⁸ *The CCBE Code of Conduct for Lawyers in the European Community* was adopted in the CCBE plenary meeting of October 28, 1998, and amended in the plenary sessions of November 28, 1998 and December 6, 2002. This Code has been directly applicable in Romania since January 1, 2007, further to the UNBR decision no. 1486/2007.

- mediators³¹⁹,
- legal advisers³²⁰,
- penitentiary personnel³²¹,
- insolvency practitioners³²².

Forensic pathologists and chartered accountants are subject to the rules of ethics generally applicable to their professions.

5. Combating corruption in the justice system

Liability begins where responsibility ends. A successful corruption prevention campaign should result in fewer sanctions. But practice has proven that the number of judicial employees who are punished for corruption offences is rising from one year to another. Corruption-combating policies involve three directions: regulating misconduct, investigating offences and restraining them. Policies to combat judicial corruption overlap the general anti-corruption policies, with the judiciary becoming its own subject.

5.1. Regulating misconduct

There is no doubt that all criminal and extra-criminal means to combat corruption must be based on strong political will. Members of the legislative and executive power must accept and promote a legislative framework capable of helping reduce corruption in general. At least at a declarative level, such will has been expressed over the past few years, particularly during Romania's EU pre-accession period, through phrases like "zero tolerance to corruption."³²³

³¹⁹ *Code of professional ethics and conduct for mediators*, adopted by the Mediation Council. At an EU level, there is a *European Code of Conduct for Mediators*, launched under the aegis of the European Union in a conference held in Brussels on July 2, 2004.

³²⁰ There are several associations of corporate counsels. Worth mentioning are the *Code of professional ethics for corporate counsels* adopted by the Congress of the Union of Corporate Counsels in Romania on 27 July 2004 and the *Code of professional conduct for corporate counsels* adopted by the e-F.Cons Association on 01 October 2004.

³²¹ Order by the Minister of Justice no. 2794/C of October 8, 2004 endorsing the *Code of ethics for personnel in the penitentiary system*, published in O.J. no. 1098 of November 25, 2004.

³²² *Code of professional ethics and discipline of the National Union of Insolvency Practitioners in Romania*, adopted by the Congress of the Union under Decision no. 3/2007, published in O.J. no. 839 bis of December 7, 2007.

³²³ "European Commissioner for Enlargement, Günther Verheugen stated: EU appreciates the legislative efforts and encourages Bucharest to prove its commitment to a zero-tolerance policy as to corruption at any level" (*Recommendations to Romania by Günther Verheugen, during his visit to Romania, Deutsche Welle, June 23, 2004*). "Government of Romania declares zero tolerance to corruption" (Chap. 4.III in 2005-2008 Governing programme). "We must ensure the development of human resources, the institutional mobility of officials and a measurement system for the performance of public officials. We also need to revise the payroll system, to ensure higher consistency among institutions. These processes must also be accompanied by

a. Criminalisation of corruption offences

At present, corruption misdeeds are criminalised in the Criminal Code (where they fall under the category of offences in office or related to the office) and in Law no. 78/2000.

But our legislation should also criminalise the *illicit enrichment* offence, as required under Art. 20 in the UN Convention against Corruption: "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." At first sight, the structure of the offence seems to be difficult to reconcile with traditional interpretations of the presumption of innocence and the individual's right to protection from self-incrimination. In general terms, the prerequisite of justifying the source of the unjustified wealth is sometimes regarded either as a transfer of the burden of proving to the defendant, or as an obligation upon the defendant to incriminate himself/herself, or both. With respect to the presumption of "illegal acquisition of wealth," Romanian courts have been quite explicit, emphasising that this presumption "ceases to operate" once there is "*clear evidence*" ("*sufficient evidence*," to use the ECHR phrase) that the assets have been illegally acquired.

The High Court of Cassation and Justice has explicitly stated that "reversal of the burden of proof"³²⁴ is conditional on sufficient evidence.

The legislation must also define effective, proportional and deterrent *sanctions and measures* for the perpetration of corruption offences – when committed by individuals, such offences must entail custodial sentences³²⁵. But the following aspect is worth noting: corruption may be reduced by tightening sanctions against those proved to have been involved in such acts. Therefore tightening sanctions may lower the number of corruption offences, but it may also have another effect, namely, of increasing the value of the assets (amounts of money, value of services) involved in the corruption misdeeds that are still perpetrated. Basically, a paradox emerges – in order to stamp out bribery, punishments are strengthened, which results in an increase of the amount of bribe due to the increased risk of being caught. This is why the confiscation of corruption assets and the prohibition of certain rights must also accompany conventional penalties.

zero tolerance for the corruption of public officials." (*address by the president of Romania, Traian Băsescu, before the joint Chambers of Parliament, on Romania's integration to the European Union, Parliament Palace, June 19, 2006*).

³²⁴ For comprehensive reasoning, see Guillermo Jorge, *The legislative framework in Romania regarding illicit enrichment*, ABA/CEELI, 2007, available on the SCM home page at www.csm1909.ro/csm/linkuri/28_01_2008__13799_ro.pdf.

³²⁵ Art. 19 in the Council of Europe's Criminal Law Convention against Corruption.

Conventional penalties must be accompanied by complementary sanctions specific to corruption offences. Thus, the law must stipulate punishment to include a *prohibition of the exercise of the right to hold public office or the profession or activity in the practice of which the offence has been committed*.

It is not only individuals, but also legal entities that must be held liable.

The UN Convention against corruption stipulates under Art. 18 that legal entities may be held liable for the perpetration of active corruption offences, trading in influence and laundering of capital, if these are committed on their account by an individual who acts either individually, or as a member of a body within the legal entity in which the individual holds leading positions. This could relate to a representative capacity within the legal entity; or the authority to make decisions on behalf of the legal entity; or the authority to carry out an inspection of the legal entity, as well as participation by that individual, as an accomplice or instigator to the perpetration of the aforementioned offences. Measures must also be taken to ensure that a legal entity may be held liable if the lack of oversight or control on the part of an individual mentioned above has allowed the perpetration of the aforesaid offences, on the account of that legal entity by an individual subject to his/her authority.

b. Regulating conflict of interest

At present, the rules regulating conflicts of interest and incompatibilities are set out in Law no. 161/2003 and in the laws that define the statute of legal professionals.

If the *conflict of interest* is not avoided by a public agent, who nevertheless carries out a corruption act, this may constitute an offence regulated by Art. 2531 in the Criminal Code. The *conflict of interest* offence governs the situation in which a public official who, in the course of his/her official duties, carries out an act or takes part in making a decision that secures, directly or indirectly, any material benefit for that official, his/her spouse, anyone related by blood or marriage to the official, within two degrees of marriage, or for another individual with whom the official has had trade or office relations during the last five years or from whom the official has received or receives services or benefits of any kind. Unless all the elements of this offence are met (e.g., there have been no material benefits, or there have been material benefits for a person related by blood or marriage within three degrees of kinship), the act falls in the criminal category of malfeasance or mere misconduct.

Rules should also be enacted to prevent conflicts of interest related to transfers to *the private sector*. Restrictions must remain in place for a reasonable time with respect to the practice of professional activities by former public agents or to the private employment of public agents after their resignation or retirement, when the respective activities and

the respective employment are directly connected to the offices that these former public agents held or supervised while serving in the public sector³²⁶. For instance, Romanian legislation prevents the judge, prosecutor or police worker who has become a lawyer from practicing in the court or the criminal prosecution body where they formerly served³²⁷. But the same does not hold true for court clerks who become lawyers. Although the same reasoning should apply, those who become lawyers maintain, at least for a while, close relations with former colleagues, which may affect the former's objectivity. Also, for a public forensic expert who gives up this capacity in exchange for that of a private, certified expert, no restrictions are placed on practicing this profession. Furthermore, current legislation fails to stipulate the incompatibility between serving as an official expert and an authorised expert. This allows, for instance, an expert employed at the National Forensics Institute in the Justice Ministry to be proposed as an expert by one of the parties and accepted by the judicial body to testify in the same case in which a fellow Institute expert is an official expert. The same holds true for forensic pathologists.

For the liberal professions, distinct normative acts that regulate the statute of these professions include rules regarding conflicts of interest and stipulate that non-compliance entails disciplinary measures.

c. Regulating civil liability for corruption

Liability for corruption offences should be established at a civil level as well. Appropriate measures must be created that would allow persons who have incurred damages as a result of a corruption offence perpetrated by a public official, during the course of his/her official duties, to claim remedies from the government or, where the government is not a party, from the competent bodies of that party³²⁸.

In the case of magistrates, this requirement is in accordance with the current form of material liability for judicial errors. Under Art. 52 of the Constitution of Romania, "the government is liable to cover the damage caused by judicial errors. The liability of the government is established under the law and does not exclude the liability of the magistrates who have discharged their duties in bad faith or with

³²⁶ Art. 12.e in the UN Convention against corruption. Tentative regulation of this aspect is included in the national legislation, under Art. 11 of Law no. 78/2000, mentioned above.

³²⁷ Art. 106 of Law no. 161/2003: "(1) A judge who becomes a lawyer shall not present cases in the court where he/she served as a judge, for two years after termination of the public employment. (2) A prosecutor who becomes a lawyer shall not provide judicial assistance in criminal prosecution bodies in the locality where he/she served, for 2 years after termination of the public employment." Art. 19 par 4 in Law no. 51/1995: "Lawyers who are former judges shall not present cases in the courts where they served, and former prosecutors and police workers shall not provide judicial assistance in the criminal prosecution unit where they served, for two years after termination of their respective public employment."

³²⁸ Art. 5 in CoE Civil Law Convention against corruption.

severe negligence." Normative acts ranking under the Constitution regulate the liability of the other members of the judiciary.

For judicial errors, Art. 96 in Law no. 303/2004 and Art. 504-507 in the Code of Criminal Procedure stipulate the following liability system:

1) *in criminal law*, there are two situations:

- a person who has been *wrongfully convicted under a final sentence* is entitled to remedies if, under a sentence passed during the retrial of his case (following revision, i.e. a new trial based on new evidence in the same case), that person has been discharged;
- a person who was *arrested/detained or prohibited from leaving the country/locality* is entitled to remedies provided the unlawful nature of the measure has been established by a prosecutor or a judge.

The person in question or his/her beneficiaries are entitled to take legal action against the government, through the Ministry for Finance within 18 months. The government shall pay a lump sum or life annuities, then shall move to recover the money from the magistrate or any other person who has generated the situation that has given rise to the damages (e.g., the police worker who has used illegal means to obtain the testimony of a key witness, the court clerk who has removed from the case file an important piece of evidence which would have led to a different decision) if this person has acted in bad faith or with severe negligence.

2) *in civil law*: if a sentence has been pronounced that remains final but which is in fact a judicial error, the injured party must first seek a sentence against the magistrate who perpetrated the offence, or a SCM decision regarding disciplinary measures against the magistrate, for the act that generated the error (e.g., misappropriation of documents from the case file, failure to consider crucial evidence such as NAD tests). Only then is the party affected by the judicial error entitled to take legal action against the Romanian state, represented by the Ministry of Finance. If the government loses the case and pays remedies, the government may seek repayment of the amounts from the judge or prosecutor who, by acting in bad faith or with severe negligence, has made the judicial error that caused the damage. The ill faith or severe negligence shall be proved during the respective proceedings. But all these measures must be made within one year.

Naturally, where a public agent in question has been involved in a corruption misdeed, his/her *bad faith* shall always be recorded.

d. Regulating disciplinary measures

The acts that constitute misconduct are laid down in the rules that define the statute of each personnel category in the judiciary. Misdeeds subject to disciplinary action include those related to malfeasance or corruption such as illegal interference with the work of a colleague, intervention in view of influencing the adjudication of applications to meet the interests of any person, acceptance of gifts, breaches of incompatibility or confidentiality rules, failure to disclose one's assets or interests. We believe this category should also include the failure to disclose such misdeeds perpetrated by colleagues, particularly when they have come to the knowledge of officials in management and supervisory functions.

In this respect, Law no. 293/2004 on the Statute of public officials with a special status in the NPA lists “the lenient attitude of superiors as to the misconduct of their subordinates” as an instance of misconduct.

Strictly with respect to corruption, the Law on the Statute of Police Workers is the only one that obliges police workers to inform their superiors and other competent authorities of the corruption offences perpetrated by other police workers in the course of official duties (Art. 41 g), otherwise risking disciplinary measures themselves (art. 57 lit. k). But in order to ensure that police personnel engage in an effective fight against corruption, similar provisions must be laid down for other professions.

For the disciplinary liability system to function, knowledge of the procedure as a whole must be accessible to its target group. In this respect, several cases have been reported of sanctions applied to police workers under an unpublished order such as Order no. 400 of 2004 on disciplinary rules for M.A.I. personnel³²⁹.

The law must also stipulate, explicitly and unambiguously, what types of behaviour qualify as misconduct. Too general phrases make the law unpredictable and allow abusive measures to be taken by disciplinary bodies. Relevant examples include a provision applicable to lawyers, in Art. 252 par. 2 of the Statute of the lawyer profession³³⁰, which reads, “*A deed committed by a lawyer, which is against the law, the statute of the profession, binding decisions of professional bodies, of the bar council to which the lawyer is a member or where the lawyer has his/her secondary office, and which is likely to prejudice the honour or reputation of the profession or of the lawyer corps, constitutes misconduct.*” There is a similar rule applicable to court clerks in Art. 84(g) of Law no. 567/2004 on the statute of specialised auxiliary personnel in courts, and prosecutors’ offices attached to courts, according to which “*behaviour that prejudices professional dignity or propriety*” constitutes misconduct. An example of misconduct also appears in Art. 65(d) of the UNNP Statute³³¹, which recognises, “*behaviour that prejudices the honour or reputation of the profession.*” Yet another illustration comes from Art. 44(c) in Law no. 188/2000 on court enforcement officers, where “*the perpetration of deeds that prejudice the honour or reputation of the profession is indecent*”.

³²⁹ On 29 October 2004, the Minister of Administration and the Interior issued Order no. 400/2004 on disciplinary action for M.A.I. personnel. The document was not published in the Official Journal, as required under Art.10 and Art.11 in Law no. 24/2000 on rules of legislative procedure, in view of taking effect. In the first three years of enforcement, approx. 5,000 of the 75,000 police workers in Romania were subject to disciplinary penalties. Unlike this order, for probation personnel the Justice Minister approved, in Order no. 2017/2007, the Regulation for the functioning of the disciplinary committee investigating the misconduct of probation personnel, which was published in the O.J. no. 570 of August 20, 2007.

³³⁰ Adopted in the UNBR Council meeting of 25 September 2004 and published in O.J. no. 45 of January 13, 2005.

³³¹ Statute of the National Union of Public Notaries in Romania, published in O.J. no. 59 of February 11, 1999.

Within the disciplinary procedure, the *fair trial principle*³³² must be complied with, which requires the checking of the defence of those accused of misconduct. As a rule, disciplinary procedures for the aforementioned personnel stipulate the obligation to listen to the accused person and to verify the evidence he/she produces as a defence. Finally, the sanctions regulated must be gradual, ranging from reprimand or warning to the prohibition against practicing the profession, but which link the gravity of the misconduct to the nature of the penalty. In this respect, in the case of certain professions, the law stipulates a variety of criteria for determining the punishment³³³, whereas other professions' regulations only make reference to the gravity of the case of misconduct³³⁴. This latter provision allows the sanctioning body to apply abusive, unjustified penalties, or even distinct penalties for the same deed committed by two employees, which is unacceptable. This is why legislation must stipulate objective criteria for the determination of penalties, by ruling out any discretionary powers of disciplinary bodies.

e. Regulating conduct

The conduct of judicial personnel must be regulated in a code of ethical conduct. With respect to judges, the concepts of "judge", "independence" and "impartiality" must be explained, and a culture of the importance appreciating these values must be upheld. But independence, impartiality, and integrity are first and foremost obligations derived from the work duties – work which is intended to serve with the jurisdictional office with utmost professionalism. Therefore, such a

³³² The rules of fair trial also apply in disciplinary action, as stipulated by the ECHR in the cases *Olujic v. Croatia*, judgement of 05 February 2009 (on members of the judicial council who make public statements about the case during the disciplinary procedure regarding a judge upon whom that they were making a decision) and *Engel v. Netherlands*, judgement in principle of 08 June 1976.

³³³ Art. 59 par 8 in Law no. 360/2002 on the statute of police workers: "In determining the penalty, attention shall be paid to the previous activity, to the circumstances in which the case of misconduct has occurred, to the causes, gravity and consequences of the case of misconduct, to the degree of guilt of the police worker, and to the concern for removing the consequences of misconduct." Art. 74 par 3 in Law no. 123/2006 on the statute of personnel in probation services: "In determining the disciplinary sanction, attention shall be paid to the causes and gravity of the case of misconduct, taking into account the circumstances in which it occurred, the degree of guilt of the person and the consequences of the case of misconduct, the general professional conduct and, if applicable, previous disciplinary sanctions applied in the past to the person in question." Art. 63 par 1 in Law no. 293/2004 on the statute of public officials with a special status in NPA: "In determining the disciplinary sanction to the applied, attention shall be paid to the causes and gravity of the case of misconduct, to the circumstances in which it occurred, to the degree of guilt and the consequences of the case of misconduct, to the general professional conduct of the perpetrator, and to the existence of previous disciplinary sanctions."

³³⁴ Art. 85 par 1 in Law no. 567/2004 on court clerks, Art. 100 para.1 in Law no. 303/2004 on the statute of judges and prosecutors, Art. 46 in Law no. 188/2000 on court enforcement officers only stipulate that disciplinary measures must be proportional to the gravity of the case of misconduct.

code must highlight the importance of integrity and of its forms, from the obligation to prevent corruption and work to combat it, to that of avoiding nepotism and conflicts of interest, explaining the conduct that magistrates must adopt in the course of their official duties and the restrictions that apply outside the institution. Such codes must also emphasise the idea of authority of judges, primarily the moral authority which would make them more credible and on which overall confidence in the judiciary is based. And lastly, such codes must uphold the idea of the independence of the judiciary, which is an external guarantee of the impartiality of judges (which may be viewed as a form of integrity) and which must be promoted first and foremost by judges, through the practice³³⁵ and strengthening of the judges' freedom of speech³³⁶ and freedom of association.

The need for such a document resides in the need to guide the judicial conduct. This may govern working with the media and politicians; the constraints on friendships between judges and prosecutors or lawyers; the responsibility of judges with respect to the auxiliary personnel in courts; the importance of precision, patience and transparency; the proper management of a hearing; the importance of self-preparation, prejudice, maintaining a balance between the rights of the parties; treating parties with dignity and avoiding discrimination; the freedom of association and freedom of speech, including appearances in the media, the acceptance of gifts, frequenting clubs, bars, gambling activities or secret societies; or the practice of other judicial or administrative activities. The code must address not only professionals. It must also be designed as an instrument to assist politicians (in understanding the significance and importance of the independence of the judiciary that they are called on to uphold), lawyers (in understanding the need to maintain proper and honest relations within the system) and the general public (in understanding how a judge should appear so that his/her honesty and abilities are trustworthy, the

³³⁵ A judge has not only the freedom, but also the obligation to react to injustices in the system, to unprofessional acts committed by colleagues, to management flaws that affect the administration of justice. The importance of the participation of magistrates in public debates on the organisation and functioning of the judiciary was actually underlined by the ECHR in the case of *Koudechkina v. Russia* (2009), in which the Russian state was sentenced for revoking from office a judge who had publicly disclosed irregularities with respect to the adjudication of major criminal cases by the supreme court. For judges' freedom to express their ideologies, see the judgement on *Albayrak Aktaş v. Turkey* (2008).

³³⁶ In Egypt, the magistrates affiliated with the national trade association rejected the validation of unfair elections. Although the government reacted violently, it only managed to spark a campaign in favour of the independence of the judiciary, which culminated in April-June 2006, when protests were organised by both civil society and opposition parties, and journalists and international organisations protecting human rights and fundamental freedoms. Although the Egyptian government initially arrested the protesters, it subsequently recoiled, after the charges against two judges were dismissed as unfounded by a disciplinary council, and a silent protest was held by 300 judges from of the Supreme Court in Cairo (Eric Alt, *Efficiency of Law in Combating and Preventing Corruption*, in the SCM magazine "Justitia in actualitate" no. 3/2008, p.46).

circumstances in which judges and their judgements may be criticised, etc.). A code of ethics or conduct must contribute particularly to the development of a sense and a practice of responsibility with respect to the performance of public duties.

We emphasise that a distinction is rarely made between the code of ethics and the deontological code. This distinction is only made in regulations concerning police workers and mediators³³⁷. For the other professions, confusion reigns supreme³³⁸.

A *deontological (professional conduct) code* has been drawn up by authorities in order to regulate the general principles and rules that govern a profession (i.e., the minimum necessary and compulsory standards for the practice of that profession). The rules of professional conduct are restricted to the fulfilment of legal obligations related to the discharge of respective duties, as stipulated in the law on the organisation of that judicial institution and in the law that regulates the professional statute. Therefore, the distinction between law and morals is visibly blurred. A breach of deontological rules may be and must be subject to disciplinary penalties, usually applied by the same authorities. This is why, by virtue of the constitutional principle of the separation of powers, a deontological code of magistrates could not be imposed by the other two powers. To summarise, a code of professional conduct is a means of correction imposed from the "downside up", which "proscribes" unacceptable behaviour, and results in negative, disciplinary sanctions.

A *Code of ethics (of ethical conduct)* on the other hand provides its target group with rules on the conduct to be adopted in specific situations. These rules are intended to help the target group perform their duties in the institution, as well as outside the office, so as to contribute to the preservation of public confidence in the system. Such rules add to the legal obligations of the professionals, and are designed to enhance their responsibility in the discharge of their duties. The rules of professional ethics are intended to define moral obligations as professional standards, outside the direct scope of legal provisions. They are a means of self-reflection, i.e., of growing aware of and assimilating certain principles and moral requirements in view of improving one's individual performances and the image of the system.

³³⁷ *Code of ethics and professional conduct for police workers*, endorsed under G.O. no. 991/25.08.2005; *Code of ethics and professional conduct for mediators*, approved on 17 February 2007 by the National Council of Mediators.

³³⁸ For instance, Resolution no. 145/2005 from the SCM Plenary meeting endorses the *Code of professional conduct for specialised auxiliary personnel in courts of justice and prosecutor's offices attached to them*. According to Art. 1, the Code aims to regulate the "ethical conduct of auxiliary personnel." Paradoxically enough, the *Motto* of this Code reads, "any deontological code addresses, first and foremost, man and man's conscience, and it must be embraced on one's own free will." This is "paradoxical" because the Code is adopted by a body which has no powers concerning court clerks; it is a Code imposed by this body on this category of personnel and whose breach is viewed as a case of misconduct (i.e. the very opposite of the initial sentences in the Code text).

It is preferable that these codes should be drawn up by the very corps of professionals (usually through trade associations) who are also the target group, because such rules are embraced, rather than imposed³³⁹. Therefore, a code of ethical conduct is accepted by professionals who have agreed to adjust their own behaviour to strict or lenient standards, and who embrace these rules "from the bottom up." A code of ethics prescribes desirable conduct.

Given that a code of ethics is intended to encourage the conduct desired by the professional corps, and is designed as a self-regulatory mechanism within the profession, "sanctions" for meeting or exceeding goals should be positive (incentives such as awards, rewards, decorations, promotion). The only true sanction must be the distrust, the weakening of one's reputation within the professional corps, and possibly exclusion from the trade association. Nonetheless, depending on the gravity of the misdeeds, their recurrence and their effect on the institution or the system, breaching these rules may entail disciplinary measures³⁴⁰. In other words, the most severe breaches of the code of ethics may be viewed by lawmakers themselves as cases of misconduct and punished as such³⁴¹.

For example, Art. 11 par. 3 in the Code of Professional Conduct for Judges and Prosecutors stipulates: "Judges and prosecutors shall not intervene for the determination of a case, or ask for or accept the fulfilment of their personal interests or of the interests of their family members or of others, in any manner that is outside the legal framework. Interference with the work of other judges and prosecutors is prohibited." Article 99(b) of Law no. 303/2004 on the statute of judges and prosecutors lists among cases of misconduct "interventions for the determination of a case, the request or acceptance of the fulfilment of one's personal interests or of the interests of one's family members or of others, in any manner that is outside the legal framework defined for all citizens, as well as the interference with the work of other judges and prosecutors."

Article 13 in the Code reads, "judges and prosecutors are under the obligation to make all necessary efforts in order to accomplish the tasks assigned to them within the legal deadlines, and where the law defines no such deadlines, within reasonable time frames." Article 99(e) stipulates disciplinary sanctions for "the failure, repeated and imputable to magistrates, to comply with legal provisions regarding the speedy adjudication of cases."

³³⁹ In this respect, it is regrettable that a code of professional conduct for the specialised auxiliary personnel in courts and prosecutors' offices has been adopted by the *SCM*, instead of the personnel bodies; that it was the *Parliament* which endorsed a law on a code of conduct for public officials; that it was the *Government* which adopted a code of ethics and conduct for police workers; and that it was the *Minister of Justice* who adopted a code of conduct for the personnel in the penitentiary system. The judicial liberal professions were the only ones to draw up their own codes.

³⁴⁰ In this respect, see points 18-20 in the *Commentary on the Bangalore Principles of Judicial Conduct*, at www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.

³⁴¹ Art. 8 point 6 in the UN Convention against Corruption: "(...) disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article."

Article 14 in the Code stipulates that "Judges and prosecutors must impose order and solemnity during the hearing of cases, and adopt a dignified and civilised attitude as to the parties, lawyers, witnesses, experts, interpreters or others, and request them to adopt an appropriate behaviour as well." And Art. 99(k) in the law lists as a case of misconduct "the undignified attitude in the course of official duties, with respect to colleagues, lawyers, experts, witnesses or court users."

In this respect, we state that there are regulations which stipulate disciplinary measures against the violation of the entire deontological code (or rather, the purported code of ethical conduct), which is unacceptable. Thus, under Art. 84(l) in Law no. 567/2004, "the failure to comply with provisions in the Deontological Code for specialised auxiliary personnel in courts of justice and prosecutors' offices attached to them" constitutes a case of misconduct. But the Code includes both minor obligations, such as one regarding the appropriate dress code, and major obligations, such as one regarding the confidentiality of information obtained by virtue of the office held. The former obligation concerns the *dress code* outside the courtroom, which should be of little relevance for court clerks who have no contact with the public, and the violation of which should not even entail mild disciplinary measures. Similarly, under Art. 68(e) in G.E.O. no. 86/2006, disciplinary penalties are stipulated for the "breaching by insolvency practitioners of the fundamental principles of professional ethics, as defined by the Code of professional ethics." Article 23 para. 1 in Law no. 7/2004 on the Code of conduct for public officials stipulates that "violation of the provisions of the present Code of conduct entails disciplinary action against public officials, in accordance with the law." This is why we reiterate that there is an unacceptable failure to distinguish between professional deontology and ethical conduct.

The implementation of such a code of ethics must be ensured by *ethics consultation committees*, from which a person receives advice regarding the conduct to be adopted in an unclear or unregulated situation. The establishment of such an internal consultancy and self-adjustment body is actually stipulated in the case of public officials. It is an institution of ethics consultants that is designed to ensure the efficient application of the provisions in the code of conduct.

Ethics consultants are public officials, usually working in human resources, who are selected by an institution's leader to provide ethics advice and to monitor compliance with the rules of conduct. They have the following duties: a) advise and assist public officials with authority from the public institution in complying with the rules of conduct; b) monitor the implementation of provisions from the code of conduct within the public authority or institution; and c) draw up quarterly reports on the compliance with rules of conduct among the public officials in the public authority or institution³⁴².

³⁴² The institution of ethics advisers was introduced under Law no. 50 of 2007, which modified and completed Law no. 7/2004 on the Code of Conduct for public officials.

For courts and prosecutors' offices, a similar mechanism is defined in Art. 5 of Law no. 303/2004, which gives powers in this respect to the *leading board* of the court or prosecutor's office. But the board only has powers with respect to giving advice on conflicts of interest involving magistrates during the adjudication of a case, without covering other activities of the magistrates, or the conduct of other categories of personnel who work in the institution.

Recently, a new occupation was included in the Romanian Register of Classifications, under number 241942 – that of an *expert in corruption preventing and combating*³⁴³.

According to the *Occupational Standard*, corruption, conflict of interests, incompatibilities, fraud against the national and/or EU financial interests and corruption related to public procurement, are the aspects most frequently dealt with by such an expert. The experts' activity is aimed at improving the understanding of fraud and corruption mechanisms and at encouraging fair practices, which are in line with the applicable legislation. An essential component of the experts' activity consists in informing the personnel of trade companies of the legal obligations of institutions, and on the methods to fight against corruption, using the legal and civil means available to all citizens. The "experts in corruption preventing and combating" give support and advise technical, economic and administrative personnel on making decisions for the proper enforcement of the relevant legislation on actual and potential corruption misdeeds. Experts must have the necessary skills to identify potential corruption sources, to oversee the conduct of notified personnel and to inform the leaders of the institution of the possible violations of rules regarding conflicts of interest or incompatibilities.

Consequently, if decision-makers in judicial institutions are to strengthen discipline among professionals, they must first create mechanisms to deter improper behaviours and to outline the behaviour expected of these professionals. In this respect, it is quite strange that neither the SCM nor the Ministry of Justice or trade associations are interested in applying the Bangalore Principles on judicial conduct and, more importantly, the Commentary on these principles, even though they have been endorsed by the United Nations, of which Romania is a member. The model provided by these regulations, both in terms of the code of ethics imposed on magistrates and on the procedure of ethics advice, would be the ideal model for strengthening integrity principles and for enhancing citizens' confidence in the judiciary.

Naturally, in order to avoid corporatism, such an endeavour also requires an external view (the involvement of civil society should be encouraged) and a neutral one (the reason why ethics researchers should be involved as well). Also, as stated above, a code of ethics must include ethics procedures as well.

³⁴³ Order no. 170 of 10 March 2008 by the Minister of Labour, Family and Equal Opportunity, and Order no. 179 of 13 March 2008 by the president of the National Statistics Institute, amending the Romanian Register of Occupations, published in O.J. no. 219 of 21 March 2008.

5.2. Detecting misconduct

In order to sanction the illegal behaviour of professionals, their misdeeds must be communicated to competent bodies. If there are cases of misconduct, the internal professional body of the profession must be notified; in case of offences, judicial bodies must be informed.

a. Disclosure mechanisms

a.1. Those who need to file complaints against judicial personnel are first and foremost the *beneficiaries* of judicial services. The need to notify criminal judicial bodies about deeds that constitute offences is well known, but in cases of misconduct the mechanisms regulated by law are less known. For instance, a complaint against a magistrate can only be filed with the Superior Council of Magistracy (the discipline commission of the Department on Judges and of the Department on Prosecutors). In practice, complaints are filed with the Ministry of Justice or other authorities (the Parliament of Romania, the prime minister, the president of Romania or even European bodies), rather than the administrative superior. And less known is the competent body for misconduct committed by lawyers (the discipline committee organised within each bar), by police personnel (disciplinary council) or by court clerks (a warning is issued by the leader of the court or prosecutor's office, while the other disciplinary sanctions are applied by the president of the court of appeals, and the prosecutor general of the prosecutor's office attached to the court of appeals).

For the beneficiaries of judicial services or other persons who learn that such deeds have been committed, apart from the current disclosure system (complaint or report, submitted in writing or communicated verbally to the competent body) there must be another, *faster means*, or means able to prevent their identification in case they wish to preserve their *anonymity*³⁴⁴. But according to the current legislation, all anonymous criminal or disciplinary notifications are closed without investigation. This is why, particularly for the corruption offences perpetrated by judicial personnel, it is recommended to have disclosure mechanisms such as complaint boxes, telephone (e.g., toll-free line)³⁴⁵, e-mail³⁴⁶ or online complaint forms³⁴⁷.

³⁴⁴ Access to anti-corruption bodies shall be provided for the reporting, including anonymously, of any incidents that may be considered to constitute an offence in accordance with this Convention (Art. 13 in the UN Convention against Corruption).

³⁴⁵ Corruption offences committed by the personnel of the M.A.I. may be notified to D.G.I.P.I., telephone no. 021.311.13.53 or A.D.G. telephone no. 0800.806.806 (toll-free line); the latter may be used even by M.A.I. employees who disclose the corruption misdeeds committed against them by citizens. The notification to the N.A.D. can be submitted by telephone, at 021.3127399 (regular line).

³⁴⁶ A.D.G. may be notified at anticoruptie_petitii@mira.gov.ro.

³⁴⁷ Such a disclosure means is available at the N.A.D. – the *On-line Form for communication of data on corruption*, at www.pna.ro/sesizari.jsp; and at the A.D.G. – the *e-petitie* at www.mai-dga.ro/index.php?l=ro&t=139. Both forms however require identification data for the person who submits the notification.

The public must be encouraged to take action against corruption. In this view, the public must be informed of the institutions involved in combating corruption and on the means to disclose and complain about abusive acts in each institution and each sector. Information campaigns may be either national or, more importantly, within each institution (through guidelines, leaflets, posters).

The media must also be encouraged to notify judicial bodies. Thus, the role of investigative journalists is particularly important in the identification and public disclosure of irregularities committed in public institutions. Nonetheless, the publication by the media of information regarding the perpetration of certain offences may hinder or even block the criminal prosecution. For this reason, in certain circumstances, editorial offices may be encouraged to notify the competent authorities before the news on corruption offences is published or broadcast, so that the first official verifications may be completed by the date of publication.

a.2. Within the institution, it is the inspection corps or chief of department who are charged with detecting irregularities. In view of fostering a culture of integrity, the obligation to disclose judicial corruption offences belongs to *public agents themselves*³⁴⁸.

For police workers, Art. 41(g) in the Law on the Statute of Police Workers stipulates the duty of "informing the superior and the other competent authorities with respect to the corruption misdeeds perpetrated by other police members, which have come to the knowledge of that police worker." Article 57(k) in the law stipulates that "breaching the provisions regarding the duties" constitutes a case of misconduct.

For magistrates, such an obligation is not expressly stipulated. It may however be inferred from Art. 107 in Law no.161/2003: "Magistrates are under the obligation to immediately communicate to the president of the court or, where applicable, of the prosecutor general to whom they are subordinated, any interference, be it political or economic, with the administration of justice, coming from a natural person, a legal person or a group of persons." The phrase "economic interference" must be taken to include, among others, acts specific to corruption. Breaches of this obligation constitute cases of misconduct under Art. 108 in the law and are punishable, depending on the gravity of misconduct, by suspension from performing the duties of the office for a maximum of 6 months, or even removal from the profession. A judge or prosecutor removed from magistracy cannot hold any judicial office for 3 years.

In practice however, the lack of culture of integrity has led to a broadening of demagogic: the one who speaks about irregularities is viewed as guilty, instead of the one who commits them. This explains,

³⁴⁸ In the Republic of Moldova, at www.justice.gov.md/index.php?cid=215&lid=55, the Justice Ministry has posted the following key messages on corruption: "*Corruption concerns all of us*," "*No one is above the law*," "*Transparency prevents corruption*," "*You are responsible, if you knew but did nothing to prevent the involvement of your colleague in corruption crimes*."

for instance, the absence of reporting by magistrates of acts of corruption perpetrated in the profession (the very small number of reports only refers to cases of magistrates giving bribes, and not taking them). Remarkably enough, among police workers there have been cases of them reporting on their own colleagues.³⁴⁹

The UN Convention against Corruption binds states to adopt measures and systems able to facilitate the reporting, by public agents to competent authorities, of the acts of corruption that have come to their notice in the course of their official duties (Art. 8 pt. 4). In this respect, Romanian legislation obliges the *public official* who finds out about the perpetration of an office-related offence to immediately notify the prosecutor. Failure to do so constitutes the offence of omitting to notify criminal judicial bodies (Art. 227 para. 2, Code of Criminal Procedure, Art. 263 para. 1 Criminal Code). Quite inexplicably, although the same obligation holds for *other officials*³⁵⁰ as well (art. 227 para. 2 Code of Criminal Procedure), its breach does not entail the same sanctions as it does for public officials, although this responsibility particularly concerns corruption offences. The same obligation is valid for holders of supervision or inspection positions, but this time with respect to *any* offence committed in his/her institution, subject to the aforementioned penalties (Art. 227 para. 1 Code of Criminal Procedure, Art. 263 para. 2 Criminal Code). The law makes special reference to the obligation of officials with inspection powers to notify relevant bodies of any data or information concerning an act of corruption³⁵¹. If the official deliberately fails to fulfil this obligation, he/she faces criminal penalties according to the article that criminalises the non-disclosure of certain offences (Art. 25 para. 4 in Law no. 78/2000, corroborated with Art. 262 Criminal Code). In practice, no cases of criminal action against those who failed to fulfil this obligation have been reported.

Persons with leading or inspection powers are bound to take the necessary measures to preserve the proofs or traces of the crime, the *corpora delicti*, or any other pieces of evidence.

The cases of misconduct reported in an institution may also be disciplinary in nature, which requires a procedure for the notification of

³⁴⁹ In 2007 there were 82 cases of workers in M.A.I. who reported situations in which their colleagues were involved in corruption misdeeds. In 2008, there were 104 such cases.

³⁵⁰ Under criminal law, "official" refers to any employee who fulfils a task in the service of legal persons, other than public authorities, public institutions, other services or legal entities of public concern (Art. 147 para. 2, alongside Art. 145 Criminal Code). This category may include, for instance, the persons employed in a law firm or mediation firm.

³⁵¹ Art. 14 par 1 in G.E.O. no. 43/2002 on the NAD: "Persons with inspection powers shall notify the National Anti-corruption Directorate on any data or information indicating that any of the offences assigned by the present emergency ordinance to the jurisdiction of the National Anti-corruption Directorate has been perpetrated." Art. 23 par 1 in Law no. 78/2000: "Persons with inspection powers shall notify the competent criminal prosecution body or, where applicable, the competent body to investigate offences, on any data indicating that an illicit operation or act has been conducted, which may entail criminal liability, under the present law."

disciplinary bodies. There are cases, however, which have not been regulated by positive law. For instance, a magistrate is bound to disqualify himself/herself from determining a case, if any of the reasons stipulated under the law or confirmed by ECHR case law are met. Unless the magistrate disqualifies himself/herself, the interested party may recuse him/her. A colleague of that magistrate decides on the application for recusal which, if sustained, leads to the replacement of that magistrate, therefore causing the case to be adjudicated by another magistrate. The problem here is that in such a situation, although there are indications of misconduct that consist of failing to comply with incompatibility rules, no procedure allows for the leaders of the court or prosecutor's office to report it to the SCM.

b. Encouraging and protecting informants

b.1. To encourage the disclosure of acts of corruption by the very persons involved, there is a system of *impunity* or *reducing the punishment* for the individual who discloses the misdeed, and a system for *returning the assets* used in the acts of corruption. However, granting of full impunity to an individual who discloses an act of corruption that he/she has committed is controversial, particularly if the disclosure is made long after the act or at the time of an imminent investigation.

In the Romanian justice system, bribe payers and buyers of influence are not punished if they disclose their misdeed to authorities before the prosecution body has been notified on the misdeed, and the money or other assets are returned to them (Art. 255 para. 3 Criminal Code, Art. 61 para. 2 in Law no.78/2000³⁵²). Also, any individual involved in the perpetration of any offence is protected from punishment if he/she has ceased involvement or prevented the result from occurring before the offence has been exposed (Art. 22 Criminal Code). And finally, a person who has committed any of the offences assigned to the jurisdiction of the NAD under G.E.O. no. 43/2002, and who during the criminal prosecution discloses and facilitates the criminal prosecution of other persons involved in the perpetration of such offences, benefits from their sentence being cut in half as stipulated under the law.

To encourage the reporting of corruption offences that come to the attention of public agents (whether they are committed by their colleagues or by individuals outside the institution), *appropriate protection* must be in place. Such protection would present an unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities (Art. 9 in the CoE Civil Law Convention on Corruption). This system of protection would ensure that public agents are not held liable for offences such as malicious reporting. Romanian

³⁵² For the application of the impunity clause, see Judgement no. 59/2007 passed by the HCCJ further to an appeal on a point of law filed by the prosecutor general of Romania.

law only provides such protection from possible criminal liability for officials with inspection powers who have notified competent bodies on corruption suspicions³⁵³. Whistleblowers are also protected from disciplinary or administrative penalties³⁵⁴.

To encourage *third parties* to report acts of corruption that come to their notice, a disclosure-reward system may be designed.

b.2. Two institutions are relevant for ensuring protection against repercussions incurred by those who report illicit or unethical acts: *protection of witnesses* and *protection of whistleblowers*. Both of them are regulated in the Romanian law, but there is still room for improving their implementation.

The persons who must benefit from effective and appropriate protection are those who provide information on certain crimes to which judicial bodies usually have difficulties detecting the offences or identifying the perpetrators; those who otherwise collaborate with the authorities in charge with investigations and prosecution and witnesses who testify regarding such crimes. Law no. 682/2002³⁵⁵ regulates the *protection and assistance of witnesses* whose life, safety or freedom is endangered as a consequence of their withholding information or data on the perpetration of serious crimes, and of providing or agreeing to provide such information to judicial bodies. This plays a key role in identifying the offenders and the determination of a case. Corruption offences qualify as serious offences³⁵⁶.

Whistleblowers are current or former employees of an institution, or members of various organisations, who report breaches of laws and

³⁵³ Art. 25 in Law no. 78/2000: "(1) The fulfilment in good faith of obligations stipulated in Art. 23 (...) and 24 does not constitute a breach of professional secrecy (...) and does not entail criminal, civil or disciplinary liability. (2) The provisions in para. 1 apply even where the investigation or adjudication of the notified acts has led to an instruction not to commence prosecution, to terminate prosecution or to acquit."

³⁵⁴ Art. 9 in Law no. 571/2004: "(1) In work-related or office-related disputes, the court may order the annulment of the disciplinary or administrative penalty applied to a whistleblower, if the penalty has been applied further to a report lodged in good faith and in the interest of the public. (2) The court shall verify the proportionality of the penalty applied to the whistleblower for a case of misconduct, by contrasting it with the relevant practice or with similar cases in the same public authority, public institution or budgetary unit, so as to prevent future and indirect penalties for whistleblowing, as protected in accordance with this law."

³⁵⁵ *Law no. 682/19.12.2002 on the protection of witnesses*, published in O.J. no. 964 of December 28, 2002; *G.R. no. 760/14.05.2004 on rules for the endorsement of Law no. 682/2002 on the protection of witnesses*, published in O.J. no. 475 of May 27, 2004.

³⁵⁶ Under Art. 2(h) in the law, a serious offence is an offence that falls in any of the following categories: offences against peace and humanity, offences against public safety and the security of public institutions, terrorism, murder (first-, second- and third degree), offences involving trafficking in drugs and trafficking in human beings, money laundering, the forging of coins or bank notes or other instruments, offences involving the breaching of weapon regulations, offences involving nuclear or other radioactive materials, *corruption offences*, offences against property with aggravated consequences, as well as any other offence for which the law stipulates imprisonment sentences starting from ten years or longer.

regulations, frauds, acts of corruption that they have witnessed or discovered. They report to those who are competent or willing to take appropriate remedial action, either within the system (superiors, co-workers), or outside it (media, watchdog organisations, members of the legal profession). Romania endorsed Law no. 571/2004 on whistleblowers³⁵⁷. According to Romanian law, a whistleblower must be employed by public authorities and institutions in the central public administration; local public administration; Parliament; the Presidential Administration; the Government; administrative authorities; public corporations; public institutions in the culture, education, healthcare and social assistance sectors; national companies; and national or local state-owned corporations. The law also applies to persons appointed in scientific and advisory councils, specialist committees and other collegial bodies within the structure of or attached to public authorities or institutions³⁵⁸. The law regulates a number of measures to protect people who report misdeeds such as corruption or similar offences or those directly linked to corruption offences; forgery offences; offences in public office; work-related offences; crimes against the financial interests of the European Communities; breaches of provisions on incompatibilities and conflicts of interests; and others (Art. 5). The report may be filed to either one or all of the following: the superior of the person who breached the legal provisions, the leader of the respective entity, the disciplinary commission, judicial bodies, the mass media or nongovernmental organisations. (Art. 6). Whistleblowers benefit from the presumption of good faith; the presence of the media, trade union or trade association; and, in certain cases, from the protection of their identity (Art.7).

Therefore, of the professionals discussed in this paper, the law on whistleblowers seems to inexplicably omit the protection of the very people who work in courts and prosecutors' offices, and this aspect should be immediately addressed. This is because, as stated above, not only do these institutions make judicial decisions for the determination of cases, but they also make judicial administrative decisions with respect to these cases and purely administrative decisions with respect to the day-to-day management of the institution. Each of these sectors is vulnerable to corruption.

Worth mentioning is also that the identity of whistleblowers is protected by right-of-office when whistleblowers report, in good faith, corruption offences, forgery offences, offences in public office, and

³⁵⁷ Law no. 571/2004 on the protection of personnel in public authorities, public institutions and other units, who report violations of the law, published in O.J. no. 1214 of December 17, 2004.

³⁵⁸ See TI-Ro, "Guidelines on the protection of whistleblowers", 2005, at www.transparency.org.ro/files/File/Ghid_avertizori.pdf; the campaign "Your Silence Costs Us" as part of the project "Stop Corruption," ProDemocrația Association-Club Timișoara, at <http://integritate.resurse-pentru-democrație.org>; and the information at www.avertizori.ro.

offences against the financial interests of the European Communities (Art.8 in the law). For the other offences, whistleblowers are protected by right-of-office only when the person about whom the whistleblower who reports is his/her direct or indirect superior or has inspection, assessment or control powers on the whistleblower (Art. 7 para. 2).

The protection of whistleblowers requires appropriate administrative measures where the protection of witnesses is performed within or in relation to a criminal trial that must be approved by the judicial body and enforced by the National Office for the Protection of Witnesses in the M.A.I.³⁵⁹. The confidence of public whistleblowers in the enforcement of this law is crucial to the fight against corruption in the sector where the whistleblower works, and the implementation of a protection system for them requires appropriate mechanisms, which should be stipulated in the internal regulations of institutions³⁶⁰. None of the institutions which employ judicial personnel use such provisions, which can refer to how irregularities are reported with respect to a superior; to a person outside the hierarchy, or to the availability of complaint boxes, e-mail addresses, web sites³⁶¹ or blogs³⁶² where the report may be lodged while preserving the informant's anonymity.

Apart from institutional protection and anonymity, witnesses or whistleblowers may be encouraged to report offences through material rewards. For instance, at the end of the trial the witness or informant may receive a portion of the monetary amount seized by the state.³⁶³

b.3. Both the personnel outside institutions, and within them, whether or not they are involved in an act of corruption, must at any moment be aware of what the procedures to adopt when faced with such an offence. In this respect, a best practices guide must be made

³⁵⁹ In accordance with Law no. 682/2002, the *protection measures* for a protected witness are: a) protection of the identity of the protected witness; b) protection of his/her testimony; c) the hearing of the protected witness by judicial bodies, under a different identity than his/her real one or using special image and voice distortion means; d) protection of arrested or detained witnesses, in collaboration with the management of the detention facilities; e) close home security measures and escort of the witness to and from the judicial offices; f) resettlement; g) change of identity; h) change of physical appearance. The *assistance measures* for a protected witness are: a) reinsertion in a different social environment; b) professional retraining; c) assistance in employment; d) securing income until employment.

³⁶⁰ Within 30 days since the entry into force of this law, the public authorities, public institutions and other state-funded units listed in Art. 2 should have brought their internal regulations in line with this law (Art. 11 in Law no. 571/2004).

³⁶¹ One example is <http://wikileaks.org>, offered to those who wish to report corruption cases in the world's governments and major corporations, but on condition of anonymity.

³⁶² For the anonymous reporting of abuse in EU institutions, there is a web portal, created by GOPAC-Europa (*Global Organisation of Parliamentarians against Corruption*), at www.meddelarfrihet.nu.

³⁶³ Part of the fine amount ordered by the Court may be given to the whistleblower or informant. For instance, where a court sentences a defendant to pay RON 50,000 in damages for fraud against the state, 10% may be offered to the person who disclosed the information that enabled the prosecution and conviction.

available, which should define corruption offences and indicate the conduct to be adopted by a public agent when offered a bribe. Theoretically, this would entail how to decline the offer and explain to citizens the potential legal consequences of the offer; to announce to institution leaders when goods or money are left by citizens who leave his/her office; and to report to judicial bodies when he/she is offered bribe or is pressured to breach his/her duties. Such a guide should also compel public agents to notify criminal prosecution bodies of the offences that come to their notice in the course of their duties or on other offences. It would obligate public agents to take measures to prevent the loss of evidence, provide a means of protection for honest employees who report a corruption offence, and specify the criminal and administrative consequences of the perpetration of corrupt acts by public agents. The guide should also include a presentation of the jurisdiction of the institutions that must be notified and their contact data, and possibly a model complaint or report form.³⁶⁴

c. Special detection systems

Given that the perpetration of corruption offences has specific features, in that they are kept away from public eyes and involve a small number of persons, resorting to specific detection and investigation methods is only natural.

In this respect, *internal anti-corruption units* are necessary, designed to have powers related to the primary collection and investigation of data and information on the perpetration of corruption offences. So far, one specialised unit has been established within the Ministry of Administration and the Interior – the *Anti-corruption Directorate General* (ADG)³⁶⁵, which specialises in the prevention of and fight against corruption among ministry staff. ADG aims to carry out investigations of a proactive nature as well as to anticipate and identify weaknesses and risk factors. Removing them would enable the M.A.I. staff to offer corruption-free, high-quality public services to citizens. It has 15 territorial services, spread across towns which are home to courts of appeals and territorial offices of county capital cities.

Until 2006, there was such a unit for magistrates as well. This was the *Independent Protection and Anti-Corruption Service* (IPAS), a military structure within the National Penitentiary Authority, set up in

³⁶⁴ The only such guide available to the public is the *2008 Anti-Corruption Guide* drawn up by the ADG, available at www.mai-dga.ro/downloads/ghid_anticoruptie2008.pdf.

³⁶⁵ ADG was established under Law no. 161/2005. At present, it operates under Art. 10 par 4 of G.E.O. no. 30/2007 on the organisation and functioning of the MAI, published in O.J. no. 309 of 9 May 2007: "The Anti-Corruption Directorate General is the Ministry structure specialising in preventing and combating corruption among Ministry personnel." In the organisational structure of the MAI approved by G.R. no. 3/2009, ADG is mentioned as directly subordinated to the minister.

1997 and subordinated to a secretary of state in the Justice Ministry³⁶⁶. Although its main powers concerned information in the penitentiary system, it also received competencies in the context of endorsing the first anti-corruption strategy, in collecting chance information on corruption offences committed by magistrates, court clerks, police workers, lawyers, notaries³⁶⁷. In practice, IPAS collected information that included information about the personal life of judicial staff. In 2004, IPAS was replaced by the Protection and Anti-Corruption Directorate General (PADG)³⁶⁸, which should have been granted powers restricted to information in the penitentiary system. However, a 2005 audit found that "the former leadership exceeded the PADG powers as defined under the law, and ordered that certain officers in this institution should obtain information on corruption offences committed by magistrates or other public officials."³⁶⁹ Pursuant to G.R. no. 127 of January 26, 2006, PADG was dismantled.

In the same year, the Justice Minister established the *Direktorat on Preventing Crime in the Penitentiary System*, a structure subordinate to the National Penitentiary Authority, on grounds that an information-collecting structure of this type was necessary for preventing

³⁶⁶ G.R. no. 65/1997 on the functioning and organisation of the Ministry of Justice, published in O.J. no. 43 of 14 March 1997, rectified in O.J. no. 53 of 31 March 1997. Under Order no. 321 of 19 March 1997, the Justice Minister endorsed the Regulation on the organisation, functioning and powers of IPAS, which was later completed with Order no. 1551 of 1997 of the Justice Minister. None of these orders has been published.

³⁶⁷ G.R. no. 1065/2001 on the 2001 *National Corruption Prevention Programme and National Action Plan Against Corruption*, publicly defines, for the first time, the categories of information that IPAS was empowered to collect. Thus, "the Independent Protection and Anti-Corruption Service works to become familiar with and prevent corruption. In this respect, the following categories of information are taken into account: 1. Acts of corruption related to the failure to discharge, or the flawed discharge of official duties, which may lead to such elements in the penitentiary system as: Romanian or foreign citizens concerned with establishing relations (which are vulnerable to corruption) with penitentiary system staff; connections of penitentiary personnel with underground circles or other offenders; the employment of prisoners for personal purposes; asking for or accepting undue benefits in exchange for easing the detention conditions; 2. Any other chance information concerning acts of corrupting persons in sectors such as: public administration, justice, prosecutors' offices, doctors working with the National Institute of Forensics Pathology, etc. Later, G.R. no. 637/2004 on the functioning and powers of the ADG subordinated to the Ministry of Justice reduces the categories of information to the penitentiary system and other units subordinated to the Ministry of Justice; but once again, Art. 6 par 2: "Chance information regarding the activity of other institutions and specialised public structures, will be immediately communicated to these units and, where applicable, to the beneficiaries stipulated under the law."

³⁶⁸ Under G.R. no. 637/2004 on the functioning and powers of PADG, subordinated to the Ministry of Justice, the new structure was granted the status of separate legal entity, clearly defined powers and competences, further to the reorganisation of IPAS, which was dismantled on this occasion.

³⁶⁹ The answer given by the Ministry of Justice, no. 113595/II/14.12.2005, to the request for public information on PADG filed by the association Societatea pentru Justiție, is posted at www.sojust.ro.

illegal acts carried out in penitentiaries³⁷⁰. It was publicly stated that former IPAS employees would not work there³⁷¹. The directorate's structure includes a department for the prevention of organised crime and terrorism and a separate department to prevent crime and *corruption*. It has offices in every penitentiary unit in the Authority, and a total of 105 officials on its payroll. Among others, this Department guides and checks the activity in offices to prevent crime in the penitentiary units with the goal of preventing acts, situations and circumstances specific to crime and *corruption*, that have been identified among the prisoners or the personnel of the National Penitentiary Authority and its subordinated units.

The Department preventing crime and corruption has the following specific powers: a) to identify and prevent the acts, situations and circumstances in which National Penitentiary Authority staff and the personnel of subordinate units fail to respect the rights of prisoners or resort to torture, inhuman or degrading treatment against prisoners; to identify legal provisions that may favour or generate grave incidents; or to identify corruption misdeeds or other acts that come against the law; b) to identify and monitor the activity of those prisoners suspected of trying to corrupt National Penitentiary Authority staff in exchange for better detention conditions; c) to identify and prevent acts specific to crime and corruption; facts and events with dangerous consequences for the security of detention; and any other situation or circumstance that might generate such threats. Where negative events occur the National Penitentiary Authority must act in order to control their effects; d) to identify prisoners who plan to organise violent acts against penitentiary staff, judges, prosecutors, police workers or other persons in a position to exert public authority or who, on various occasions, find themselves in a penitentiary unit; e) in view of fulfilling its duties to cooperate, in a direct and unmediated manner, with officials in the Ministry of the Interior and Administrative Reform, Public Ministry, Ministry of Justice, and so on, in compliance with the law and in keeping with its duties that arise from the international judicial instruments to which Romania is party, to foreign institutions having similar duties, and to domestic and international organisations specialising in the prevention of crime and corruption.

According to public information, in 2007 and 2008 active data were collected which resulted in reports, some of them referring to the existence of weaknesses, in certain locations or areas of activity in units, liable to facilitate the perpetration of offences or violation of regulations in force; intentions or acts of corruption on the part of the penitentiary staff; bribe-giving and -taking; receipt of undue benefits; trading in influence and any act of corruption as defined by Law no.

³⁷⁰ See Art. 31-38 in the Order no. 2003/2008 by the Justice Minister, endorsing the Regulation for the organisation and functioning of the National Penitentiary Authority, published in O.J. no. 603 of 13 August 2008, and Order no. 1540 of 20 June 2006 by the Justice Minister on the organisation and powers of the Directorate on Preventing Crime in the Penitentiary System, published in O.J. no. 594 of 10 July 2006.

³⁷¹ Interview by Doru Dobocan, director of the DPCPS, in "Intelligence Service or Penitentiary System," in the daily *România Liberă* of 11 October 2006.

78/2000³⁷². Therefore, both in law and in practice, the Directorate collects information on corruption offences which involve employees from within the judiciary or outside it, and forwards the information to judicial bodies. As compared to the former IPAS, there are not yet sufficient data regarding the surveillance of the private lives of magistrates, lawyers, police members, and other potential targets.

Since 2008, this structure has been known as the *Directorate for preventing crime and terrorism*, directly subordinate to the NPA Director General³⁷³. It is structured into two departments: the Analysis, Studies and Preventive Programmes Department, and the Department for Preventing Crime and Terrorism. But the powers and duties of this directorate remained unchanged, the same as those regulated by Justice Ministry Order no. 1540/C/20.06.2006 and Justice Ministry Order no. 2003/C/22.07.2008 endorsing the Regulation for the organisation and functioning of the National Penitentiary Authority.

In conclusion, we believe in the utility of such an internal anti-corruption unit. However, because the ADG and DPCT have no jurisdiction, the question remains as to who may collect information on the illegal acts committed by court and prosecutor's office personnel. The Justice Ministry has recently voiced support for the reestablishment of the IPAS³⁷⁴. It is our opinion that such a service should collect information that strictly concerns the discharge of professional duties and that covers all categories of judicial staff. The service can only function if established by law, and must become subject to civilian authority, which in the form of measures that can only be enacted by Parliament (Art. 65 para. 2(h) in the Constitution), precisely in order to prevent such abuse cases as those reported for the former IPAS/PADG. This is why, rather than establishing a new service, we find it preferable to set up such a structure within the *Romanian Intelligence Service*³⁷⁵, which already has the necessary infrastructure, logistics and resources. This choice should raise the question of a possible reconsideration of the current prohibition of magistrates and specialised auxiliary personnel from being collaborators or informants in intelligence services.

d. Inter-institutional Cooperation

When acts of corruption in the judiciary come to the knowledge of other authorities, including intelligence services, the information thus

³⁷² Excerpts from the 2007 and 2008 NPA Annual Activity Reports, available at www.anp-just.ro.

³⁷³ Order no. 3.028/C of 27 November 2008 by the Justice Minister, approving the organisational structure of the National Penitentiary Authority, published in O.J. no. 824 of 08 December 2008.

³⁷⁴ Justice Minister says he is considering the reestablishment of the intelligence service in Penitentiary Authority, the defunct IPAS, 09 February 2009, at www.realitatea.net.

³⁷⁵ The Romanian Intelligence Service (RIS) is the institution of the Romanian State which has powers in the area of collecting and using relevant information for the national security of Romania.

obtained must be immediately and officially forwarded to competent bodies. For this reason, the limits of employee relationships with superiors must be defined (particularly in respect of prosecutors) and direct relations must be created between prosecutor-judicial police and prosecutor-intelligence services.

G.E.O. no. 43/2002 of the NAD stipulates the legal duty of intelligence services and structures to immediately *make available to the NAD* the data and information obtained as concerns the perpetration of corruption offences³⁷⁶. In this context, in accordance with its official duties, a key role is played by the Romanian Intelligence Service, as the main intelligence service of Romania, specialising in intelligence concerning the national security. The efficiency of collaboration with corruption-combating structures is closely connected to the results obtained in documenting major corruption cases. MAI units are also bound to notify judicial bodies and have specific duties in this respect.

Nonetheless, clear procedures should be defined for the cooperation of the NAD with all other structures involved in the fight against corruption. For instance, Art. 912 of the Code of Criminal Procedure stipulates that *interception and audio-video recording* are a duty of the prosecutor or, if delegated by the prosecutor, of the criminal investigation body, in practice they are carried out by the RIS, on grounds that judicial bodies lack the necessary equipment³⁷⁷. Apart from the technical hindrance that may be removed at any point, two matters deserve consideration with respect to how such interception is conducted.

Firstly, the involvement in criminal proceedings of a body other than the ones specifically laid down in the law should not be allowed. In our

³⁷⁶ Art. 14 (1) Persons with inspection powers are bound to notify the National Anti-Corruption Directorate on any data or information indicating the perpetration of one of the offences assigned by this emergency ordinance to the jurisdiction of the National Anti-Corruption Directorate. (2) Persons with inspection powers shall, in the course of inspections, in situations stipulated in para. (1), take action to ensure and preserve the proofs of the offence, the *corpora delicti* or other evidence that may be used by criminal prosecution bodies. (3) The services and bodies specialising in collecting and processing information shall make immediately available to the National Anti-Corruption Directorate the data and information they have with respect to the perpetration of corruption offences. (4) The services and bodies specialising in collecting and processing information shall, at the request of the chief prosecutor of the National Anti-Corruption Directorate or of a prosecutor specifically designated in this view, make available the data and information mentioned in para. (3) in an unprocessed form. (5) Failure to comply with provisions in para. (1) – (4) entails judicial liability, under the law.

³⁷⁷ "Both the NAD, and the DIICOT, as well as other units of the Public Ministry lack the technical equipment to intercept communications. For the time being, no structure in the Public Ministry has equipment to intercept communications" (Prosecutor General of Romania, Codrula Kovesi, Mediafax, 27.07.2007). "Both the NAD, and the Police use RIS logistics for the interception of phone calls. What the NAD can do is usually surveillance of the natural environment" (chief prosecutor of NAD, Daniel Morar, Mediafax, 4 February 2009).

opinion, there is no doubt that the duty of intercepting, recording and playing conversations should be given exclusively to the judicial police.

Secondly, in Romania, the authenticity of recordings can only be certified by audio-video experts working with the Forensics Institutes of the RIS, MAI or Ministry of Justice. But on the one hand, a private expert appointed by a party cannot actually take part in the appraisal³⁷⁸, and on the other hand the official experts working in public institutions are unable to present the independence guarantees required by relevant international standards³⁷⁹.

Nonetheless, there are various institutions in the judicial system, which hold entire *databases* on violations of the law by judicial personnel, and such data are not used. By this we mean the complaints lodged by the public to the SCM and other authorities, applications for case transfer filed at the HCCJ (which, after adjudication, are stored in a special archive), complaints addressed to heads of institutions and magistrate recusal applications. All these contain data on alleged abuse cases and errors of magistrates, and sometimes on possible corruption offences, but notifying the prosecutor's office by the relevant body is not yet a well established practice in Romania.

And last, we also find that the cooperation among the National Office for Preventing and Combating Money Laundering, the Financial Guard, the National Integrity Agency and the Court of Accounts to be of the utmost importance.

5.3. Prosecuting offences

In this section we will make special reference to how criminal investigations into corruption cases are conducted.

³⁷⁸ Certified experts, appointed by judicial bodies, at the request of the parties, see their participation in the appraisal limited to observations on the object of appraisal, on its modification or addition, to checking and completing the material needed for the appraisal, as well as to objections to the appraisal report, addressed to the judicial bodies (Art. 7 in G.O. no.75/2000 on the certification of forensics experts). As such, they do not personally take part in the appraisal process; instead, this is the monopoly of the official expert. But in *Mirilashvili v. Russia*, the ECHR established in 2008 that the expert of the defence was only permitted to express opinions on the conclusions of the experts appointed by the judicial bodies to carry out the appraisal, which has put the defence at a serious disadvantage and runs counter to the principle of fair trial.

³⁷⁹ Because of the current system that enshrines the monopoly of the state on forensics appraisals, Romania has already been sanctioned by the ECHR, in its judgement on *Dumitru Popescu v. Romania* in 2007 where the ECHR established the lack of independence of the authorities that were supposed to certify the reality and reliability of the evidence. The Court found that there must be a private authority, independent from the one having produced the evidence. Other judgements in which the ECHR ascertains the need for the independence of experts are those pronounced in: *Bonich v. Austria* (1986), *Kostovski v. Netherlands* (1989), *P.S. v. Germany* (2001), *Taal v. Estonia* (2005), *Bonev v. Bulgaria* (2006), *Krasniki v. the Czech Republic* (2006), *Pello v. Estonia* (2007), *Prepelită v. R. of Moldova* (2008), *Mirilashvili v. Russia* (2008), *A.L. v. Finland* (2009).

a. A prerequisite for the impartiality and professionalism of criminal investigations is for the corruption prosecuting body to be independent in institutional, financial and political terms.

The most important step in the recent history of the fight against corruption has been the establishment of the *National Anti-Corruption Directorate*, a judicial structure specialising in the fight against corruption through criminal means, and of the *National Integrity Agency* for preventing and combating corruption through administrative means. Another goal is to strengthen the capacity of the NAD (the competent body in fighting high-level corruption) and of the other prosecutors' offices (for the determination of the other corruption cases). Keeping in mind that many of these suggestions also apply to the NIA, we believe the following to be necessary in order to strengthen this capacity:

- recruitment of anti-corruption prosecutors: because of the shortage of human resources in the system, NAD prosecutors have occasionally been recruited from prosecutors lacking appropriate experience, and whose sole interest was of a financial nature; in ordinary prosecutors' offices, the prosecutors entrusted with corruption cases must be carefully selected;

- professional training: apart from specialising in corruption cases, prosecutors must also be trained in tackling economic-financial crime and even organised crime (if the cases are merged, it is the NAD who has jurisdiction), while, obviously, not neglecting the continuing training in criminal proceedings; prosecutors specialising in anti-corruption within ordinary prosecutors' offices must join the training network of NAD prosecutors. Apart from a flawless command of the law, there must also exist guides of best practices for NAD prosecutors³⁸⁰ and NIA inspectors, to support their activity in specific cases. Such guides should contain descriptions of procedures, methods and routines for the various stages of investigation and removal of hindrances that might appear. These would include:

- thorough professional evaluation of prosecutors: it must include, among others, integrity tests, tests for the ability to handle pressure and tests for extended effort;

- actual independence of prosecutors: relations with superiors must be clarified (e.g., criteria must be defined for the assignment of cases to prosecutors, for the replacement of a prosecutor during an investigation, or for the circumstances in which a higher-ranking prosecutor may take over cases from a lower prosecutor's office) as well as those with the Justice Minister (the Constitution of Romania still stipulates that the

³⁸⁰ The February 2009 *European Commission's Interim report on progress in Romania*, reads: "The General Prosecutor adopted a set of measures to increase the effectiveness of local prosecutors' offices in corruption cases. These measures included an analysis of relevant indictments issued between 2007 and 2008, a manual of best practice applicable to corruption investigations and local strategies for combating corruption drafted by all 41 regional prosecution offices."

Public Ministry functions under the authority of the Minister, which we believe should be solely of an administrative nature);

- provision of sufficient resources: the NAD must have the resources necessary for purchasing its own interception equipment, and funding to use to catch offenders in the act of committing the offence. A good human resources department is also essential, from the employment of a sufficient number of prosecutors and judicial police officers, to technical personnel;

- improvement of the NAD IT system to allow, on the one hand, access to other databases (e.g., Trade registry, NIA), and on the other hand the development of its own statistical database (e.g., at present, no public institution can provide statistics on corruption offences committed by judicial personnel and the associated sanction);

- presentation by the NAD to Parliament of an annual report on the progress in fighting high-level corruption, in view of raising public awareness and that of national authorities of the scope of corruption, of the need to fight corruption and how to overcome possible obstacles.

b. Our analysis cannot overlook the *judicial police*, as a criminal investigation body. Ensuring the independence of this structure from the Ministry of the Interior and its transfer to the exclusive authority of prosecutors' offices is essential to the effectiveness of investigations. At present, the NAD alone has its own judicial police corps, made up of police workers seconded from the MAI³⁸¹. Meanwhile other prosecutors' offices work with the judicial police within the structure of the MAI³⁸².

³⁸¹ Art. 10 of G.E.O no. 43/2002: "(1) In view of a speedy and thorough completion of activities related to the detection and prosecution of corruption offences, the National Anti-Corruption Directorate employs police officers, who make up the judicial police of the National Anti-Corruption Directorate. (2) The judicial police officers and agents mentioned in para (1) work exclusively within the National Anti-Corruption Directorate, under the exclusive authority of the chief prosecutor of this directorate. (3) The judicial police officers and agents shall only conduct the criminal investigation activities ordered by the National Anti-Corruption Directorate prosecutors. The judicial police officers and agents shall work under the direct management, supervision, and authority of prosecutors. (4) The orders issued by prosecutors with the National Anti-Corruption Directorate are compulsory for the judicial police officers mentioned in para. (1). The acts conducted by judicial police officers upon written order of a prosecutor are carried out in the name of that prosecutor. (5) The secondment of judicial police officers and agents to the National Anti-Corruption Directorate is carried out upon the nomination made by the chief prosecutor of the National Anti-Corruption Directorate, under order by the Minister of Administration and the Interior, and their appointment to office is carried out by order of the chief prosecutor of this directorate."

³⁸² See Law no. 364/2004 on the organisation and functioning of judicial police, published in O.J. no. 869 of 23 September 2004. The judicial police are organised and function within specialised structures of the Ministry of Administration and the Interior. Judicial police investigation units are organised and function within the structure of the Inspectorate General of the Romanian Police, the Inspectorate General of the Romanian Border Police and of their territorial units. The judicial police investigation units operate under the management, supervision and authority of prosecutors, and are bound to carry out their instructions. Superiors may give instructions and directions to judicial police workers in the course of detecting offences and collecting data in view of

In performing their professional duties, other than those directed and controlled by prosecutors, in accordance with the law, judicial police workers are subordinated to the superior officers appointed according to competence regulations endorsed under the order of the Minister of Administration and the Interior.

Worth noting in this respect is that the Italian judiciary managed to complete Operation *Mani pulite* (*Clean Hands*) in the 1990s precisely due to the independence of the Prosecutor's Office, whose members in Italy have a status comparable to that of judges. This was also due in part to the activity of judicial police officers seconded to the judicial authority and only subordinate to the Public Ministry. Operation *Clean Hands* targeted over 5000 persons, council presidents, numerous ministers, 250 parliamentarians, 100 members of the economic police, judges and political party officials.

c. According to all studies on anti-corruption, the success of any campaign against corruption is measured by the conviction of the "big fish", i.e., a person with a certain hierarchical status. Strictly with respect to the Romanian judicial system, we should note that so far prosecutors with the Prosecutor's Office attached to the supreme court (HCCJ) have been indicted, judges with high-ranking courts have been convicted (including judges with leading positions), and an assistant magistrate from the HCCJ has also been convicted. Unfortunately, the cases having received final judgements have been insufficiently publicised, particularly among court and prosecutor office personnel. Therefore, the judicial staff as well as the general public must be warned that the system itself is determined to penalise all types of abuse. Apart from informing the public on the success of anti-corruption efforts, such signals will indicate that earnest members of the system wish to remove their dishonest colleagues from the judiciary, which will strengthen the confidence in the judiciary and will encourage the reporting of crime and corruption by the public, who thus see tangible results of these campaigns.

The 2007 Global Corruption Report of Transparency International focuses on judicial corruption. The report pays homage to Ana Cecilia Magallanes Cortez, an outstanding prosecutor, whose efforts led to the arrest of many high-profile figures in the Peruvian judiciary, including her former chief, the former federal prosecutor, several Supreme Court justices and prosecutors and judges at various jurisdiction levels. Ana Cecilia Magallanes Cortez has served as an inspiration for an entire generation of judges and prosecutors in Latin America.

identifying and prosecuting the perpetrators. The superior bodies of the judicial police workers cannot give instructions or directions regarding criminal prosecution; the only competent entities in this respect are prosecutors. Judicial police workers in territorial units work under the direct authority and supervision of senior prosecutors of the prosecutors' offices attached to courts of law and tribunals, according to their jurisdiction.

d. In conducting criminal or non-criminal investigations, the removal of all *procedural filters* is essential. Until 2004, the Justice Minister's opinion was required prior to the commencement of criminal prosecution, the initiation of a criminal proceeding or the arrest or indictment of a magistrate. This discretionary administrative filter allowed certain criminal investigations to be blocked. The Minister's opinion was also required for the investigation of court enforcement officers and notaries public.

Such a procedural filter is still retained at present by the SCM in two cases: SCM departments approve the search, detention or preventive arrest of magistrates (Art. 42 in Law no. 317/2004 on the SCM), and the SCM Plenary Assembly is the one which orders a preliminary investigation in view of taking disciplinary measures against a SCM member. For all other magistrates such preliminary investigations are ordered by the disciplinary commission made up of inspectors (Art. 54 and 46 in Law no. 317/2004). But neither the law nor the SCM Regulation explain the need for such provisions. In the former case it may hinder the prosecution of magistrates and the acquisition of evidence, while in the latter it may prevent the disciplinary sanctioning of SCM members.

e. *Procedural barriers* must also be removed. With respect to the unfolding of criminal proceedings, we mention that in order to have access to classified national information, when case files contain such information, judges must have an *ORNIS authorisation*³⁸³. But since some corruption cases may involve other offences, including some which concern national security – for which this authorisation is required – if a judge fails to apply for it or the RIS denies the authorisation, then the investigation of the corruption case by a certain specialised judge is hindered³⁸⁴.

It is our opinion that the requirement concerning this authorisation severely affects the independence of judges on the one hand, in that an administrative authority is called to decide whether a judge has the capacity to determine a certain genre of case (which allows certain

³⁸³ Office of the National Registry of Classified State Information, www.orniss.ro. The authorisation for access to classified information is a document released with the approval of competent institution, by the leader of the legal person that holds such information, and it confirms that, in the course of his/her official duties the holder of the authorisation may access national classified information at a specific confidentiality level, on a need-to-know basis (G.R. no. 585/2002, Art. 3).

³⁸⁴ Such procedural barriers are encountered in other states as well. During the 1990s, France created a financial pole in Paris, alongside specialised interregional institutions, under a law of March 9, 2004. But the law did not grant the police and prosecutor's office sufficient autonomy to tackle corruption cases efficiently. The closing of the *Frigates for Taiwan* trial, in September 2008, is relevant for this weakness of the law. Although 350 million euro worth of kickbacks were cashed by the accused in this deal, political authorities used the national secrecy pretext to deny judges' access to evidence (see Eric Alt, *Justiția penală în combaterea infracțiunilor economice și financiare*, in the SCM magazine *Justiția în actualitate*, no. 3/2008, p. 43).

judges to be “chosen” and others denied from adjudicating such cases). On the other hand, this impacts the fair nature of the trial on the other hand, in that neither the parties, nor (usually) their lawyers have such authorisations, which prevents their access to evidence in the case file.

f. The criminal prosecution and the unfolding of criminal proceedings in general may also be affected by the existence of *statutes of limitations* of criminal liability which are too short. This is why the lawmaker must adjust these limitations to the specific nature of the investigation and choose either to define higher maximum sentences for the offence (given that statutes of limitations are calculated on the basis of the maximum legal punishment), or to define special statutes of limitations for corruption offences.

In this respect, Art. 29 in the UN Convention against Corruption stipulates the need to establish long statute of limitations periods for corruption offences and a longer statute of limitations period or suspension of the statute in the case where the alleged perpetrator has evaded the administration of justice.

g. As previously mentioned, corruption offences are hard to detect; as a rule, they are committed without witnesses, and the usual means to collect information and use evidence are inadequate.

For this reason, *modern investigation methods* are needed to facilitate the collection of evidence. By this we mean methods such as interception of conversations from the very early stages of the investigation, access to IT systems, monitoring of bank accounts, use of covert investigators, informants and collaborators of judicial police, and use of controlled delivery. As for the last aspect we emphasise the need for thorough control over the spending of public money to ensure successful infiltration of the covert agent or of narcotics shipment in the customs’ office, or to prevent collusion of prosecutors and covert agents. Within the same context we emphasise that in order to prevent information leaks, especially when the suspects work within the same system with the investigators, it is recommended that the detention or search decision should be made within as small a group of persons as possible, and, if necessary, that they be implemented by agents from other territorial units.

We also mention that, according to ECHR practice, the use of special investigation methods—especially of covert operations—must not run counter to the principle of fair trial. However, if a covert agent is a member of a police force and provokes a magistrate to accept a bribe when there are no indications that the crime would have been committed without the agent’s intervention, the agent runs counter to Art. 6 par. 1 in the European Convention on Human Rights.³⁸⁵

³⁸⁵ ECHR, *Ramanauskas v. Lithuania*, decision of 05 February 2008.

h. In terms of evidence, we believe a *reversal of the burden of proof* may be feasible. Corruption offences are, in general, punishable by severe penalties, and in this case binding the suspect to prove his/her innocence with respect to the legal source of the assets he/she holds is acceptable³⁸⁶.

In France, the criminal code was amended in March 2007 to conform to the Framework Decision on the confiscation of crime-related proceeds, instrumentalities and property (2005/212/JHA). Art. 2 reads, "Each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds." The amendments broadened the option of confiscating the proceeds from any offence punished by imprisonment for more than 2 years so that for serious offences (e.g., trafficking in illegal drugs, trafficking in human beings, organised crime, money laundering), assets may be confiscated irrespective of whether they have been acquired lawfully, or through crime. The new law also stipulates that the assets may be confiscated if their origin cannot be proved, where the offence has generated profits for the offender and when the punishment for that offence is imprisonment for more than 5 years. Since corruption offences perpetrated by public officials can be punished in France by more than 10 years' imprisonment, the burden of proof is reversed. This onus transfers from the prosecution to the defence, which has to prove the lawful source of the profit in cases where direct or indirect benefits have been made.

Given that this mechanism involves an exception from the presumption of innocence, guarantees must exist that the punishment for the offence will be more than 5 years' incarceration and that the accused is permitted to produce evidence to refute the accusation of illegal acquisition of assets. The same principle of the reversal of the burden of proof also applies in cases where an individual has a lifestyle that cannot be explained by the declared incomes, particularly when the individual has connections to criminal circles (drug dealers, etc.). In applying these procedures, French courts are concerned with complying with European and international regulations; the special training of judges in such cases is encouraged, and access to relevant information (tax records, real estate documents, etc.) is facilitated³⁸⁷.

Naturally, in the Romanian justice system this raises the issue of the compatibility of this exception with the presumption of innocence found in Art. 44 para 8 in the Constitution of Romania, under which "*assets acquired lawfully cannot be confiscated. Assets are presumed to have been lawfully acquired.*" We believe the interpretation of this rule in the sense explained above is substantiated by two regulations in the current legislation.

³⁸⁶ The reversal of the burden of proof operates, for instance, under Art. 5.7 in the *United Nations Convention against Illicit Traffic in Illegal Drugs and Psychotropic Substances, of December 20, 1988*, to prove the lawful origin of the assets liable to confiscation, suspected of being proceeds from illicit traffic in drugs and psychotropic substances.

³⁸⁷ Excerpts from the summary of talks in the workshop "*High-level Corruption and Penalties Applied by Courts,*" Bucharest, 2007, at www.csm1909.ro/csm/lin-kuri/28_01_2008_13794_ro.pdf.

Firstly, Art. 10 in the Code of Fiscal Procedure regulates "The duty to cooperate: (1) Taxpayers shall cooperate with fiscal authorities in view of determining the fiscal situation, by presenting the facts of which they have knowledge, in full and in truth, and by indicating the means, of which they have knowledge, to prove these facts. (2) Taxpayers shall take measures to produce the necessary evidence, by using all judicial and practical means available to them." There is no doubt that the task of proving the fiscal situation rests with the taxpayers.

Secondly, the recent regulation in the NIA Law no. 144/2007 also impacts how we interpret this rule. In accordance with Art. 4 para 3, if cross-analyses of the data in statements, and in the additional documents available to the integrity inspector, reveal a noticeable difference (i.e., of at least 10,000 euro) between the assets acquired during the term in public office and the income earned during the same period, the integrity inspector must check whether the respective difference is justified., Where the integrity inspector finds that it is not, he/she notifies the competent court to establish the basis for the portion of the asset(s) acquired or of the asset(s) found to have been acquired from unjustified sources, for whose confiscation he/she applies³⁸⁸. In adjudicating the case, the court begins by reviewing the evidence used by the inspectors, and may accept the introduction of new items of evidence, if the parties so request. If the conclusion is reached that the acquisition of specific assets or portion of asset is not justified, the court of appeals will either order the confiscation of the unjustified assets or a portion thereof, or require payment of an amount of money equal to the value of the asset, as established by the court further to expert appraisal. Where payment is ordered, the court should also decide the payment deadline. Where the decision is reached that the source of assets is justified, the court orders that the case be closed³⁸⁹.

It is the party in question which has to prove that the assets have been lawfully obtained considering the compulsory disclosure of assets, duty to submit the supplemental documents on request of the inspector, and the non-mandatory use of other pieces of evidence before the court, a judgement can be passed exclusively on the basis of the findings of integrity inspectors, drawing on the data disclosed by the person in question.

³⁸⁸ Law no. 144/2007 on the establishment, organisation and functioning of the National Integrity Agency, published in O.J. no. 359 of 25.05.2007, amended and modified by G.E.O. no. 49/2007, endorsed by Law no. 94/2008 and G.E.O. no. 138/2007, endorsed by Law no. 105/2008.

³⁸⁹ Art. 17 and 18 in Law no. 115/1996 on the disclosure and evaluation of the assets of dignitaries, magistrates, and persons having leading and inspection powers over public officials, amended by Law 161/2003, through E.G.,O. no. 24/2004 endorsed by Law no. 601/2004 and G.E.O. no. 14/2005.

5.4. Sanctioning corruption

Sanctioning corruption and abuse offences is the subject matter of regulations concerning administrative, disciplinary, civil and criminal liability.

Regardless of the procedure adopted for each type of breach, its *speed* is a common prerequisite. For misconduct and corruption offences, speed involves a special requirement. This is because the significant length of procedures has two negative effects that must be countered. On the one hand, a sanction applied long after the act of corruption has been perpetrated no longer fulfils its deterrent role. On the other hand it undermines citizens' confidence, keeping them from reporting acts of corruption, on the grounds that "nothing happens anyway." This is why the maximum duration of specific procedural acts may be specified.

Also, to ensure appropriate and objective sanctions, since the entity entrusted with this power comes from the same system as the perpetrator, the grant of material and even territorial *jurisdiction* is needed, which can put some distance between the perpetrator and the sanctioning body. In fact, under current legislation, judges and prosecutors only receive disciplinary sanctions from the SCM, a central body based in Bucharest. Similarly, courts of appeals are the competent bodies with respect to offences committed by magistrates in courts of law and tribunals, notaries, lawyers, court enforcement officers. For offences committed by magistrates in courts of appeals and the supreme court – for SCM members and Constitutional Court judges, the supreme court is the sanctioning body – Art. 281 and Art. 29 of the Criminal Code govern these respectively. Competence over penitentiary staff is given to tribunals, over officers to courts of appeals, and over crimes committed by inspectors general of penitentiaries to HCCJ (Art. 60, Law no. 293/2004)³⁹⁰. Similarly, the body competent to decide on the confiscation of a portion of the wealth or of a specific asset is the court of appeals that has jurisdiction over the area where the person in question lives, whereas for HCCJ judges, court of appeals judges and prosecutors in prosecutors' offices attached to these courts, and for SCM members and Constitutional Court Judges, the competent body is the HCCJ according to Art. 46 in Law no. 144/2007.

In this respect, we have identified a number of weaknesses where criminal cases that involve judicial personnel are to be determined by the respective person's colleagues. For instance, prosecutors' offices attached to tribunals address offences committed by judicial police agents, while prosecutors' offices attached to courts of appeals handle

³⁹⁰ Law no. 293 of June 28, 2004 on the Statute of public officials with special status in the National Penitentiary Authority, published in O.J. no. 581 of 30 April 2004.

cases against police officers (Art. 27 in Law no. 218/2002³⁹¹). However, working in these prosecutors' offices are the very prosecutors under whose supervision these police workers conduct regular criminal investigations. Similarly, offences committed by court clerks in prosecutors' offices are investigated by the very prosecutors who work with the suspects' offices. The offences perpetrated by the court clerks working with a court of law are adjudicated by the very judges working in that court. Consequently, in order to safeguard the judgement from being influenced by relations affecting objectivity, and to maintain the appearance of impartiality, these cases must be adjudicated by higher-ranking courts or prosecutors' offices, or ones from a different county.

a. Disciplinary sanctions

Certain acts committed by judicial employees may be mere deviations from their professional duties, or simple breaches of ethical rules. Some cases of misconduct may be related to corruption (e.g., failure to disclose an illegal act committed by a colleague or accepting gifts), while others may indicate corruption suspicions (failure to disclose one's assets, breaches of incompatibility regulations, delays in determining certain cases).

Such sanctions are applied if, upon the completion of the disciplinary action, the person in question still retains the capacity he/she had at the time the act was committed. But in recent years the following trend has developed - in order to sidestep sanctions, the person in question tends to leave the profession before the completion of the disciplinary action, through resignation or retirement.

For instance, according to a news release of 25 February 2009, the SCM dismissed a disciplinary action against judge BV. The judge's retirement on 10 February 2009 rendered the action moot. The disciplinary action had been initiated over an unjustified failure to carry out an official duty and an undignified attitude toward colleagues in the course of official duties. By retiring before completion of a disciplinary action, a judge may subsequently maintain all the benefits accorded to an honest judge (e.g., retirement stipends, retirement benefits, the option of re-employment).

This is why we believe that if this institution is to meet its goal, the law must be changed to allow disciplinary actions to continue, even after the person in question leaves the judge or prosecutor office. Sanctions that the SCM may apply include: reducing pension benefits for a specified period, prohibition from re-employment as a magistrate or in any legal profession for a specified or open-ended period, and suspension altogether of the right to pension stipends.

³⁹¹ Law no. 218/2002 on the organisation and functioning of the Romanian Police, published in O.J. no. 305 of 9 May 2002, amended by Law no. 281/2003.

In fact, Art. 145 in the 1865 Criminal Code (repealed in present) stipulated that where a judge has been bribed in a criminal case, the punishment was maximum imprisonment and *forfeiture of the right to be admitted to their respective professions for life, as well as forfeiture of the right to pension benefits.*

At present we suggest a particular regulation with respect to conflicts of interest and incompatibilities. Under Art. 47 in Law no. 144/2007 on NIA, "(1) the act of the person found to have issued an administrative document, to have concluded a judicial document, to have made a decision or taken part in making a decision that goes against legal obligations concerning conflicts of interest, constitutes misconduct and is punishable according to regulations applicable to the respective high public function, public office or activity, unless the act in question presents the constituent elements of an offence. (2) A person discharged or dismissed from office loses the right to hold a public office or dignity as stipulated under Art. 39³⁹², except for elected positions, for up to 3 years following the discharge or dismissal from that public office or dignity. The interdiction is ordered, at the request of the Agency, by the competent court (...), as a complementary sanction to the confiscation of a portion of the acquired wealth or of a specific asset, or in the case of conflicts of interest. (3) The act of the person found to have been in an incompatible position constitutes grounds for the discharge or, where applicable, constitutes a case of misconduct punishable according to regulations on the respective dignity, office or activity. (4) If the person under investigation no longer holds a public office or dignity of the ones stipulated under Art. 39 on the date when the disciplinary report becomes final, the person loses the right to hold public office or high public office as stipulated under the law, except for elected positions, for three years following the date that the disciplinary report becomes final. The interdiction is ordered, at the request of the Agency, by the competent court (...) as a complementary sanction to the confiscation of a portion of the acquired wealth or of a specific asset, or in the case of conflicts of interest" (emphasis ours).

b. Criminal sanctions

Corruption has been punished since time immemorial. In ancient legislation, the corruption of judges was punished by confiscation of

³⁹² This includes those categories that are bound to disclose their assets and interests, including the justice minister, secretaries and under-secretaries of state, and personnel employed at public dignitaries' offices; members of the Superior Council of Magistracy; judges, prosecutors, assistant-magistrates or similar categories, as well as judicial assistants; specialised auxiliary personnel in courts and prosecutors' offices; Constitutional Court judges; members of the National Integrity Council, as well as the president and vice-president of the National Integrity Agency; persons holding leading and inspection powers, as well as public officials, including those with a special status, who work in all local or central public authorities or, as applicable, in all public institutions.

the assets (India), whipping (Jewish state) or death by crucifixion (Persia). Roman law laid down the obligation of judges and lawyers to provide their services free of charge and to allow the bribe-payer to initiate action to recover assets offered in the bribe. Subsequently, a punishment was introduced, consisting of payment equal to double the value of the received benefit, and forfeiture of the right to hold offices. Later on, a distinction was drawn between bribes accepted in civil cases (punishable by a fine two or three times higher than the value of the benefit), and bribes received in criminal cases (punishable by confiscation of the asset and exile)³⁹³.

At present, standards for sanctioning corruption offences are laid down by Art. 30 of the UN Convention against Corruption, which reads that punishment for commission of a corruption offence must result in sanctions that take into account the gravity of that offence. The same criterion must be considered when examining the option of early release or parole of persons convicted for corruption offences. As a complementary sanction, the Convention sets out the need to establish procedures through which a public official accused of an offence established in accordance with the Convention may, by court order or any other appropriate means, be disqualified from holding a public office or from holding office in an enterprise owned in whole or in part by the State.

b.1. In terms of the main punishment, Romanian legislation meets this requirement because corruption offences are only punishable by imprisonment, and their duration is generally significant: 3-12 years for bribe-taking, 6 months -5 years for bribe-giving, and 2-10 years for trading in influence or influence buying.

When corruption offences involve police workers, prosecutors or judges determining criminal cases, the upper limits of the penalty are two years higher (Art. 7 in Law no. 78/2000). But we see no reason why civil law judges who commit corruption offences should not be subject to the same increase in penalty. The only difference that might exist should refers to cases when the corrupted judge himself/herself specialises in adjudicating corruption cases.

In **Germany**, corruption offences fall under Chapter 30 in the Criminal Code – Crimes in Public Office. It criminalises the *acceptance of benefits* as the act of allowing to be promised or to receive a benefit, for oneself or a third person, in return for the discharge of a duty. Acceptance of a benefit (Section 331) is punishable by imprisonment for no more than three years or a fine. The offence may take an aggravated form, when the active subject of the offence is a *judge* or arbitrator, in which case the punishment is imprisonment for up to five years or a fine.

³⁹³ Extensively in Vasile Dobrinoiu, *Corupția în dreptul penal român*, Atlas Lex, Bucharest, 1995, pp. 86-89.

The offence of bribe-taking (Section 332) has as constituent elements the demand allowing the promise or actual acceptance of a benefit, for oneself or a third person, in return for the performance of an official act, and thereby violate one's official duties. The *corruption* offence is punished with imprisonment from 6 months to 5 years. In less serious cases, the punishment is imprisonment for up to 3 years or a fine. Also, when the active subject of the offence is a *judge* or arbitrator, the punishment is imprisonment from 1 to 10 years. In less serious cases, the punishment is imprisonment between 6 months and 5 years. *Granting a benefit* is punished with imprisonment for up to 3 years or a fine, and when it involves a *judge* the punishment is imprisonment for up to 5 years or a fine (Section 333). As regards *offering a bribe*, which refers to the act of a person who promises, offers or grants a benefit, for that person or a third person, in return for the performance of an official act that thereby violates one's official duties (i.e. an illegal act), the punishment is imprisonment between 3 months and 5 years, and the aggravated (when the official whose decision is to be influenced is a *judge* or arbitrator) punishment includes imprisonment between 6 months and 5 years (Section 334).

In **Finland**, in Chapter 16, Offences against Public Authorities, of the Criminal Code, the punishment for the offence of *bribery*, consisting of the act of promising, offering or giving to a public official, in exchange for his actions in office, a gift or other benefit, for the official or other person, intended to influence or be conducive to influencing the actions in office of the public official, is a fine or imprisonment for up to two years. *Aggravated bribery* is a more serious form of bribery, where the gift or benefit is intended to make the person act contrary to his/her duties with considerable benefit to the briber or to another person or of considerable loss or detriment to another person, or when the value of the gift or benefit is considerable, and the bribery is aggravated when assessed as a whole. Aggravated bribery is punished with imprisonment for at least 4 months and at most 4 years. Bribe-taking offences are regulated in Chapter 40 – Offences in office. *Acceptance of a bribe* is punished with a fine or imprisonment for up to 2 years. For aggravated acceptance of a bribe, the punishment is imprisonment for at least 4 months and at most 4 years, and, in addition, dismissal from office.

Chapter 17 in the Criminal Code of **Sweden** (Crimes Against Public Activity) stipulates the special punishment limits and the constituent elements of the offence of *bribery*: "A person who gives, promises or offers a bribe or other improper reward to an employee or other person defined in Chapter 20, Section 2, for the exercise of official duties, shall be sentenced for *bribery* to a fine or imprisonment for at most two years." According to Chapter 20, offences of misuse of office, whereby an employee receives, accepts a promise of or demands a bribe or other improper reward for the performance of his duties, shall be sentenced for *taking a bribe* to a fine or imprisonment for at most two years. The same shall apply if the employee committed the act before obtaining the post or after leaving it. If the crime is gross, imprisonment for a maximum six years shall be imposed.

The Criminal Code of **Portugal** devotes Section I in Chapter 4 to corruption offences. Under Art. 372 – *Passive Corruption for an illicit act* – the official who, by himself/herself or an intermediary having his/her consent or ratification, requests or accepts, for himself/herself or for a third person, a financial or non-financial benefit, or promise of a benefit, in return for an act or omission of an act contrary to his/her duties, is punished with

imprisonment for 1 to 8 years. *Passive corruption for a licit act* (Art. 373) is punished with imprisonment for up to 2 years and a fine of up to 240 days. *Active corruption for an illicit act* is punished with imprisonment from 6 months to 5 years, while *active corruption for a licit act* is punished with imprisonment for at most 6 months or a fine of up to 60 days (Art. 374).

In the Criminal Code of **Estonia**, the section on the "Breach of Duty to Maintain Integrity" defines the offence of accepting gratuities in Art. 293: the act of an official who consents to a promise of property or other benefits in return for a lawful act of which there is reason to believe he/she will commit, or for a lawful omission of such an act and in so doing, he/she takes advantage of his/her official position, is punished with a fine or imprisonment for up to 3 years. If the offence is committed at least twice, or by demanding gratuities, the punishment is imprisonment for up to 5 years. If the act of accepting is committed in return for an unlawful act or omission, it constitutes bribe-taking and is punished with imprisonment for 1 to 5 years; its aggravated form brings a greater sentence of imprisonment for 2 to 10 years. The offence of giving bribes consists in the offer or promise of a bribe and is punished with imprisonment for 1 to 5 years and if committed at least twice, with imprisonment between 2 and 10 years³⁹⁴.

At first sight, we notice that the punishments for corruption in these European countries are easier than in Romania. Worth noting however is that in these countries the scope of corruption is also considerably smaller than in Romania: in terms of corruption perceptions, Germany ranks 14th, Finland 5th, Estonia 27th, Sweden 1st, Portugal 32nd, while Romania ranks 70th (according to TI – 2008 Corruption Perception Index, which looked at 180 countries in the world). The order is from the least corrupt to the most.

In Romania however there are serious problems that accompany sanctions in concrete cases. Both civil society and international bodies have thus constantly criticised Romania for judges who apply too lenient penalties (imprisonment towards the special minimum threshold or below, or even criminal fines, conditionally suspended sentences or probation sentences). This attitude is not limited to cases that involve members of the judiciary; instead, it is common regardless of the status of those involved in corruption offences.

In 2008, 63 final judgements of conviction were passed that concerned 97 defendants. Of these, 28 were given custodial sentences ranging between 1 and 5 years (in one case, imprisonment for 9 years), versus 42 defendants who received suspended sentences between 6 months and 3 years (in one case 3 months, in two cases 2 months), and 26 defendants who received suspended sentences under supervision, ranging from imprisonment for 1 to 4 years. Under non-final judgements, as many as 122 defendants were sentenced in 2008 in 71 cases, of whom 38 defendants were given custodial sentences, as compared to 58 defendants who received conditionally suspended sentences, 20 defendants who received suspended

³⁹⁴ Excerpts from the document *Position of the Ministry of Justice and Citizen Freedoms on the articles in the draft Criminal Code that generated public debates*, 23 March 2009, at www.just.ro.

sentences under supervision and 6 defendants who were sentenced to payment of criminal fines ranging between 1000 and 1500 lei.

In other words, approximately only 29% (*i.e. less than one-third*) of the convicted offenders will serve their imprisonment sentences, which, in our opinion, is not likely to have a deterrent effect. Therefore, with 58% of convicted offenders receiving punishments at the special minimum rate stipulated by the law or under that rate, 39% receiving punishments towards the special minimum and only 1% punishments towards the special maximum, one may safely conclude that, even in terms of the length of sentences applied, corruption offences, corruption-related offences and similar offences to corruption entail lenient punishments. It is a fact that analyses conducted so far reveal a discrepancy between the abstract social threat of the acts of corruption, as determined by lawmakers by imposing high levels of punishment, and the concrete social threat recognised by courts, which is demonstrated by the application of small penalties.

The high percentage of judgements overturned at appellate stages (57%), compared to the large number of situations in which such overturns are substantial or even conflicting, highlight an image of inconsistent judicial practice. Thus objective criteria regarding the value in adjudicating corruption offences and of the damages caused or the social relations affected therefrom do not prevail as they should. The common view that exclusion from eligibility of holding public office, by applying a criminal sanction, (which allegedly causes a deterrent effect even when the punishment is below the minimum, oriented towards the minimum or suspended), is not, in our opinion, likely to further the goal of criminal proceedings in corruption or corruption-related cases³⁹⁵.

The opinion of Romanian lawyers, as expressed in a January 2008 Gallup poll, is that there is generally a major discrepancy between the punishment imposed by judges and the gravity of offences. 62% of the lawyer-respondents believed the punishments are too mild compared to the gravity of the wrongdoing, and 83% agreed that often judges impose overly harsh penalties for petty crimes. In the same poll, 82% of the public believed that the punishments imposed by judges were too harsh for minor offences, and 71% of the public believed that punishments were too mild for serious offences.

This perception reveals a fact – a lack of predictability exists in the handing down of punishments, absent clear criteria for determining punishments.

This phenomenon brought justified criticism from the European Commission in its June 2007 report on Romania: "the sentences applied by courts in corruption cases do not have a dissuasive effect and fail to fulfil their

³⁹⁵ Data taken from the 2008 Annual Activity Report of the National Anti-Corruption Directorate, at www.pna.ro/bilant.jsp.

preventive function. With an average length of sentence for corruption offences at 1-2 years imprisonment and the vast majority of the convictions having the execution conditionally suspended, the courts fall short in demonstrating that they understand their essential role in the efforts to curb corruption in Romania.³⁹⁶

The same criticism was reiterated in their July 2008 report: "The commitment of Romania to eradicate corruption is reflected at pre-trial stage, but does not carry through to increased numbers of convictions or deterrent sanctions. The onus is on the Romanian authorities to show that the judicial system works and that investigations into corruption lead to arrests, prosecution and, depending on the court's judgement, convictions with dissuasive effect and seizure of assets."³⁹⁷

The explanation for the light punishment of corruption by judges is the absence of an anti-corruption culture, the lack of the understanding of this phenomenon and of awareness regarding its effects. Some magistrates have argued for suspending sentences in high-level corruption cases, stating that in corruption offences the social threat is less significant than it is in other offences (i.e., robbery, assault). Others have pointed out that, after a corruption case reaches the court after lengthy criminal proceedings), an imprisonment sentence is not justified because the social threat is no longer imminent³⁹⁸. With respect to corruption offences, the penalties applied by courts are generally mild as compared to those imposed for more common offences such as those against property³⁹⁹.

Apart from the measures mentioned above, two solutions, which are not mutually exclusive, emerge to encourage the adequate punishment of corruption. These solutions apply particularly when legal professionals are involved and do not impair the decision-making independence of judges in selecting and determining the sanction for each particular case.

One of these solutions is *administrative* in nature, and it involves the drafting of an instrument for determining sanctions for corruption

³⁹⁶ Report by the European Commission to the European Parliament and Council on Romania's progress on accompanying measures following Accession, COM (2007) 378 final, 27 June 2007, at http://ec.europa.eu/dgs/secretariat_general/cvm/progress_reports_en.htm.

³⁹⁷ Report by the European Commission to the European Parliament and Council on Romania's progress under the Co-operation and Verification Mechanism, COM(2008) 494 final, 23 July 2008, available at http://ec.europa.eu/dgs/secretariat_general/cvm/docs/romania_report_20080723_ro.pdf. In this report, the Commission mentions as many as five times on six pages the need for dissuasive punishments in corruption cases.

³⁹⁸ Summary of discussions in the workshop on "High-level corruption and sanctions imposed by courts," Bucharest, November 19, 2007, p. 3. The workshop was delivered by ABA/CEELI, with the participation of the National Institute of Magistracy. Attending the workshop were 14 judges from the criminal chamber of the Bucharest Tribunal and Court of Appeals, and from the criminal chamber of the High Court of Cassation and Justice. The summary is available at www.csm1909.ro/csm/linkuri/28_01_2008_13794_ro.pdf.

³⁹⁹ For stealing a bag of potatoes from a field, a woman was sentenced definitively to one year in prison, without suspension – Evenimentul Zilei, February 12, 2007, *Justiția cu două fețe*, at www.evz.ro/article.php?artid=291833.

offences, so as to restrict the discretion of judges in determining the punishment in a specific case. It could come in the form of a compilation of case law presenting sanctions imposed by various high-ranking courts for similar cases, which have received final sentences over the years, or in the form of actual sentencing guidelines, as available in other states, suggesting to judges various sentence lengths that they may impose, depending on certain circumstances in those cases⁴⁰⁰. Upon sentencing, judges must take into account not only the specific circumstances in which the offence was committed and the personality of the offender, but also the impact produced by the commission of the offence and the importance of the offender's position at the time the offence was committed. For instance, a certain sentence length may be imposed for a 100 lei bribe given to a hospital security guard in exchange for access in the hospital outside visiting hours, and an entirely different sentence for a similar amount given to a judge in exchange for fulfilling (or not) an official duty. The same balancing system may also be used for compensation awards., Romania lacks criteria today for such decisions, both for granting and calculating amounts, which may have a dissuasive effect on those who wish to disclose corruption offences, should the offender take civil action against them for the damage done to his/her image.

Through G.R. no. 1346/2007, endorsing the Action Plan for meeting benchmarks in the Cooperation and Verification Mechanism for Romania's progress in the reform of the judiciary and in fighting against corruption, published in O.J. no. 765 of 12.11.2007, Romanian authorities undertook the job of strengthening the relevant legal framework through an independent assessment of the manner of determining punishments imposed by courts for categories of offences in the economic-financial area, including corruption offences. The analysis was intended to help identify necessary legislative and institutional measures, and should have been carried out by the Ministry of Justice by May 2008 at the latest. After the European Commission warned Romania of its failure to meet this obligation, laid down in the July 23, 2008, report which was publicly undertaken by the SCM. A focus group has been set up in this respect, made up of prosecutors and judges, under Order of the Justice Minister no. 2723/C of October 21, 2008. The group has yet to complete its work.

The other solution is *legislative* in nature and involves the rethinking of the sentencing system. Given that the higher the maximum sentencing level for an offence, the less likely judges are inclined to impose it, the special minimum of sentences for corruption offences must be increased so as to prompt judges to apply punishments that are harsher than today. Sentencing below the special minimum (e.g., by using mitigating circumstances) may be prohibited under the law, and so may the imposition of penalties that are alternatives to

⁴⁰⁰ See, for England and Wales, www.sentencing-guidelines.gov.uk, and for the USA, www.ussc.gov/guidelin.htm.

imprisonment. Romania may thus follow the example of Slovakia, where the minimum punishment for corruption is imprisonment for four years, with suspension of sentence prohibited under the law. This applies regardless of it was a bribe offered to a train conductor, a magistrate or a politician.

b.2. As regards complementary punishments, Romanian legislation is more permissive than what international standards dictate, which should be addressed.

Thus, apart from the standard sentence, judges may impose a complementary punishment of forfeiture of certain rights for a period of one to ten years (Art. 64, Criminal Code), specifically the right to hold a *public office*; or to hold a position, practice a profession or carry out an activity of the kind the offender did prior to the perpetration of the offence. The problem is that in order to apply these interdictions, two conditions must be met:

- the court must have imposed an imprisonment punishment of at least two years. However, as stated above, the length of specific sanctions applied by judges for corruption cases is generally short, which is why a new criminal policy should eliminate this condition;

- either the law must set guidelines down for the compulsory application of complementary punishments, or judges must assess the need for such punishments depending on the nature and gravity of the offence, the circumstances of the case and the identity of the offender. Regarding the former, the law stipulates mandatory complementary punishments only for the offence of bribe-taking, but this regulation must be broadened to include other corruption offences. With respect to the latter hypothesis, to become aligned with international standards, the discretion of judges must be eliminated because, as we have seen, in practice not only do judges refrain from imposing complementary measures, but, in two-thirds of the cases, they suspend sentences of imprisonment. The exact period for which the forfeiture of rights is applied is also left entirely to judges, which again leaves room for discretionary measures. For this reason, the law should at least define criteria to guide judges in determining the duration of forfeiture.

In any case, for corruption offences committed by public agents in the judiciary, the length of sentence should be defined by the law as the maximum, and the interdiction against holding public office should cover any judicial office or profession.

We note that as far as magistrates are concerned, special rules are laid down in Law no. 161/2003. According to Art. 108 in the law, "(1) The breach of provisions in Art. 101-105 and 107 constitutes misconduct and shall be punished, depending on the gravity of misconduct, with: a) suspension from the performance of duties of public office for maximum 6 months; b) removal from the magistracy. (2) Disciplinary sanctions are applied by the Superior Council of Magistracy (...). (3) A judge or prosecutor removed from magistracy shall not hold a specialised judicial position for 3 years."

In *Italy*, the term “corruption” is defined, in a narrow sense, as facilitating or promising, by a public official, a benefit in exchange for a favour (such as a bribe), and in a broad sense, as a set of actions that result in damaging the public budget or the budget of the European Union (including the embezzlement of public funds, fraud, etc.). For this type of offence, alternative sanctions exist apart from prison, such as prohibiting access to public office (either temporarily, if the person is sentenced to prison for more than 3 years; or permanently, if the person is sentenced to prison for more than 5 years); prohibiting access to management positions in the private sector; or prohibiting any type of gainful relationships with public administration institutions.

b.3. With respect to confiscation, Romanian national legislation should be improved. The current law stipulates that money, valuable goods or any other assets that have been the object of a corruption offence are to be seized, and when these cannot be traced, the convicted offender is bound to pay their equivalent value. In accordance with international standards, we believe it is not only the received asset or its equivalent value that should be seized, but an amount of money representing two or three times the value of that asset. Romanian law also stipulates that an offender is not to be punished for the corruption offence he/she has committed, if he/she discloses the misdeed to the authorities before they notify the prosecution body. In this case the money, valuable goods or any other assets that have been the object of offence are returned to their original owner.

In practice, there are cases when an offender discloses the misdeed either when he/she has already been prosecuted for offences related to the one in question, or when the commencement of criminal prosecution is imminent. In such cases, if the assets belong to the disclosing party, we believe the offender should not benefit from restitution, under the law.

In the same respect, the Romanian law must mirror the regulations on extended confiscation as defined in Council Framework Decision 2005/212/JHA of February 24, 2005, on the confiscation of crime-related proceeds, instrumentalities and property⁴⁰¹. According to this document, each member state is to take appropriate measures to enable it to confiscate, either wholly or in part, the instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year or property, the value of which corresponds to such proceeds. As such, extended confiscation powers must be implemented. At a minimum, each member state is to take at least the necessary measures to enable it to confiscate, wholly or in part, property belonging to a person convicted of an offence if a national court is fully convinced, based on specific facts, that the assets in question are proceeds from criminal activities carried out by the convicted person during a period prior to conviction that is deemed reasonable by the court, considering the circumstances of the case.

⁴⁰¹ Published in Official Journal L 68/49 of 15.03.2005, pp. 58-61.

Where it has been established that the value of the property is disproportionate to the lawful income of the convicted offender, and a national court is fully convinced, based on specific facts, that the assets in question are the proceeds from criminal activities carried out by the convicted offender then the offender should forfeit such property.

b.4. In terms of other measures. In order to ensure a deterrent effect, lawmakers may exclude convicted corruption offenders from the benefit of probation or may leave it within the judge's discretion, as the Anglo-Saxon law system allows. Also, the rehabilitation period may be longer in the case of corruption offences, than that of other crimes.

c. Administrative sanctions.

In terms of administrative measures, an employees' accountability can be reflected in negative employee reviews regarding their professional competence and the annulment of acts, when this is possible. Specifically, when corruption suspicions are grounded, the public agent must be taken off the matters on which he/she has been working, either through replacement (e.g., changing the membership of a panel), or through the assignment of the case to another public agent. If the employee is eventually found guilty, as discussed above, various measures may be applied, from termination of employment regardless of the offence committed or the punishment received, to the prohibition of further employment, in the same position or another within the same system of institutions, to the forfeiture of retirement stipends or related benefits.

d. Civil law sanctions

In the event that corruption offences perpetrated by judicial staff cause damages, it is not only the individual public agent in question who must be held accountable, but also the employer, for faulty recruitment, assessment and control of the agent. Facing such a threat will cause the employer to proceed with more caution in discharging its own leadership and inspection obligations⁴⁰².

5.5. Sanctioning conflicts of interest

Failure to comply with provisions regarding the avoidance of conflicts of interest constitutes misconduct. Deriving material benefits from the instance of misconduct constitutes an act of corruption and criminal prosecution bodies must be notified.

⁴⁰² See *Recommendation no. R (84) 15 of the Council of Europe Committee of Ministers regarding public liability ("liability of public authorities")*, at www.coe.int/admin. The Recommendation reads that, as long as public authorities serve the community, they must ensure reparation for damages caused to individuals. The motion for reparation must be lodged against the public authority, and not against its agent; where the agent acted illegally, the authority is entitled to bring an action against the agent.

Where a person subject to a conflict of interest has nonetheless completed judicial or administrative acts, directly or through intermediaries, such acts become null and void⁴⁰³.

With respect to magistrates, there are several particular aspects that are worth mentioning. Under Art. 60 para 3 in Law no. 144/2007, "provisions in the present law concerning the verification of conflicts of interest and detection of incompatibilities do not apply to magistrates in the course of determining cases pending in courts and prosecutors' offices attached to them, with respect to which the conflict of interest or incompatibility challenges have been raised." This provision was introduced in the law so as to ensure that the procedure is not used as a means of pressuring or of interfering with the independent activity of judges in the course of determining specific cases.

Particularly with respect to decisions made by judges who have had conflicts of interest, parties may have these judgements corrected / revised through *ordinary* appeal procedures, but only if they have raised this objection to the judge on the case, through a recusal procedure. Where parties have agreed to have their case heard by a judge with a conflict of interest, they forfeit the right to later make this argument to obtain a retrial. The magistrate, however, may be subject to a disciplinary sanction applied by the SCM for the misdeed defined in Art. 99(a) in Law no. 303/2004, which tackles "the breach of legal provisions concerning the disclosure of assets, interests, incompatibilities and interdictions concerning judges and prosecutors." Still, where a judge has been exhausted all avenues of appeal after conviction for an offence related to a case that he/she determined (either civil or criminal cases) or has received disciplinary sanction for discharging his/her official duties in mala fide or with serious negligence (in civil cases) there is the option of reopening the case by means of the *special* procedure of revision⁴⁰⁴.

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As pointed out above, the mere existence of legislation concerning the prevention and tackling of corruption among judicial personnel is not enough. This legislation must be enforced. And while this may actually occur in court, the public must also be able to see it happen.

Therefore, beyond the legislative effort of ensuring the needed legal framework for the fight against corruption, beyond the efforts of judicial management to adopt administrative measures needed in preventing corruption, and beyond the effort of competent judicial bodies to combat corruption through speedy procedures and deterrent sanctions, such cases and measures also need publicity. Dissemination of relevant

⁴⁰³ Art. 45 in Law no. 144 of May 21, 2007 on the establishment, organisation and functioning of the National Integrity Agency.

⁴⁰⁴ Art. 322 pt. 4 Code of Civil Procedure, Art. 394 par 1(d) Code of Criminal Procedure.

information must first of all take place among legal professionals, as a warning of the possible consequences of unjust conduct, and therefore as a means of prevention. Certain measures or sanctions must also be communicated to the public to showcase the promptness and strictness of penalties imposed on those who, themselves, are called to sanction corruption in society. The immediate effect will undoubtedly be a strengthening of confidence in the judiciary and a decrease in the number of attempts to bribe judicial and other officials.

Not in the least, Romanian law must allow for the *revision* of trials⁴⁰⁵ as part of the sentencing or disciplinary sanctions applied to the officials involved in the determination of a case, for acts related to that case. At present, the Code of Criminal Procedure stipulates that an application for revision of a final judgement is permitted when a member of the panel of judges, the prosecutor or the employee having conducted the criminal investigation has committed an offence related to the case for which revision is applied, or when a witness, expert or interpreter has committed the offence of false testimony, provided that these offences led to an unlawful or ungrounded judgement (Art. 394). In non-criminal law, the Code of Civil Procedure states that the revision of a judgement that remained final in the court of appeals or that was not appealed, as well as a ruling passed by a competent court on an appeal on a point of law, may be applied for if the judge, witness or expert who has taken part in the trial, has been sentenced for an offence related to that case or if the magistrate has been subject to disciplinary action for the discharge of official duties within that case in mala fide or with serious negligence (art.322). We notice, therefore, a regulation loophole in the criminal law, as compared to civil law – where a public agent is subject to *disciplinary sanction* for an offence committed while determining a specific case (e.g., the agent failed to disqualify himself/herself although he/she had a conflict of interest, or the agent enforced the law in mala fide), there are no means available to reopen a lawsuit that received a final judgement. This aspect must be addressed by legislative means.

⁴⁰⁵ A means to start a new trial on the matter when new evidence is discovered after a final decision had been passed.

Conclusions

Judicial corruption has been a concern since ancient times. In recent years, this topic has been discussed extensively because it is perceived as the main hindrance to imposing and respecting the "rule of law", a principle that forms the very foundation of any democracy. Integrity is a requirement for magistrates that can be used as a mechanism to enhance their accountability to the public. If the state grants magistrates institutional independence and appropriate powers, then the public will naturally expect professionalism, competence and integrity of their part.

Judicial corruption is, in itself, a threat to the independence and impartiality of the judiciary, of fair trial. It is an attack against civil rights and liberties, against the economic development of states, against foreign investments and against the progress of democracy. Judicial corruption is completely incompatible with and undermines entirely the role of the judicial system – that of ensuring compliance with the laws and the administration of justice in a fair, efficient and predictable manner. Judicial corruption is not specific to one state or region. It is a global concern, but its effects are deeper in developing and transition states.

In Romania, corruption is not a systematic practice in the judiciary. However, the concrete judicial corruption cases should attract the attention of the authorities. For the time being, a strategy for the fight against judicial corruption has yet to be drawn up. Judicial personnel are reluctant not only to anti-corruption programmes, but also to simple discussions about this topic. More often than not, they deny the existence of the phenomenon, even at a general, societal level. There are no private projects in this respect. International donors are not interested in the judicial corruption area.

The fight against judicial corruption must not be viewed as an effort with a narrow purpose, but rather as a means to reform the system. A strategy against judicial corruption should include regular and high-impact campaigns, public opinion polls, the organisation of conferences and focus groups, support for publications on this topic, regulation of appropriate mechanisms to monitor the conduct of judicial personnel, the rethinking of the recruitment and training system in order to reduce vulnerability to corruption, training programmes in judicial ethics, and enhanced transparency in the judicial activity.

Tolerance for corruption must be zero. A response against it must come first and foremost from the state authorities, which are under a duty to define instruments for its prevention and combating, as well as from the public, which must realise the disastrous consequences of this scourge. Judicial corruption is unacceptable regardless of its scope. The

means of raising awareness on the due importance that must be attached to fighting corruption, as discussed in this paper, may help impose respect for the law and for citizens. Ethics within society and particularly in the legal world must be disseminated, consolidated and constantly updated to create an infrastructure that behaves and responds accordingly.

Judicial organisation courses are currently optional subjects in certain law schools. Concepts of independence and impartiality are briefly discussed in certain criminal and civil procedure classes, or included in the theoretical study of human rights protection. Ethics, professional conduct and integrity are only studied at the National Institute of Magistracy and only as subject matters, not as life principles.

We firmly believe that external constraints on magistrates are not sufficient to prompt them to adopt an appropriate conduct. The goal of the fight against corruption can only be reached when it is rooted within magistrates who have realised the vital role that they play in the life of community – that of imposing rectitude and compliance with the rules by all citizens – by turning into moral pillars of democratic society.

But this goes beyond a discussion about law and judicial organisation. This is about awareness, passion, vocation—truly important performance standards. It is about revealing the truth and admitting to one's mistakes—about authenticity. It is about embracing reality and change—therefore about true reform.

Therefore, corruption must be subject to judicial reform, which must eventually lead to strengthening the judiciary and improving its performances.

Annex I

Global Corruption Report 2007⁴⁰⁶ Summary: key issues of judicial corruption

Corruption is undermining justice in many parts of the world, denying victims and the accused the basic human right to a fair and impartial trial. This is the critical conclusion of TI's *Global Corruption Report 2007*.

It is difficult to overstate the negative impact of a corrupt judiciary: it erodes the ability of the international community to tackle transnational crime and terrorism; it diminishes trade, economic growth and human development; and, most importantly, it denies citizens impartial settlement of disputes with neighbours or the authorities. When the latter occurs, corrupt judiciaries fracture and divide communities by keeping alive the sense of injury created by unjust treatment and mediation. Judicial systems debased by bribery undermine confidence in governance by facilitating corruption across all sectors of government, starting at the helm of power. In so doing they send a blunt message to the people: in this country corruption is tolerated.

Defining judicial corruption

TI defines corruption as 'the abuse of entrusted power for private gain'. This means both financial or material gain and non-material gain, such as the furtherance of political or professional ambitions. Judicial corruption includes any inappropriate influence on the impartiality of the judicial process by any actor within the court system.

For example, a judge may allow or exclude evidence with the aim of justifying the acquittal of a guilty defendant of high political or social status. Judges or court staff may manipulate court dates to favour one party or another. In countries where there are no verbatim transcripts, judges may inaccurately summarise court proceedings or distort witness testimony before delivering a verdict that has been purchased by one of the parties in the case. Junior court personnel may 'lose' a file – for a price. Other parts of the justice system may influence judicial corruption. Criminal cases can be corrupted before they reach the courts if police tamper with evidence that supports a criminal indictment, or prosecutors fail to apply uniform criteria to evidence generated by the police. In countries where the prosecution has a monopoly on bringing prosecutions before the courts, a corrupt prosecutor can effectively block off any avenue for legal redress.

Judicial corruption includes the misuse of the scarce public funds that most governments are willing to allocate to justice, which is rarely a high priority in political terms. For example, judges may hire family members to staff their courts or offices, and manipulate contracts for court buildings and equipment. Judicial corruption extends from pre-trial activities through the trial proceedings and settlement to the ultimate enforcement of decisions by court bailiffs.

The appeals process, ostensibly an important avenue for redress in cases of faulty verdicts, presents further opportunities for judicial corruption. When dominant political forces control the appointment of senior judges, the concept

³⁹¹ Global Corruption Report 2007, Executive summary: key judicial corruption problems. The report is available in full and abridged at www.transparency.org/publications/gcr/gcr_2007.

of appealing to a less partial authority may be no more than a mirage. Even when appointments are appropriate, the effectiveness of the appeals process is dented if the screening of requests for hearings is not transparent, or when the backlog of cases means years spent waiting to be heard. Appeals tend to favour the party with the deepest pockets, meaning that a party with limited resources, but a legitimate complaint, may not be able to pursue their case beyond the first instance.

The scope of judicial corruption

An important distinction exists between judicial systems that are relatively free of corruption and those that suffer from systemic manipulation. Indicators of judicial corruption map neatly onto broader measures of corruption: judiciaries that suffer from systemic corruption are generally found in societies where corruption is rampant across the public sector. There is also a correlation between levels of judicial corruption and levels of economic growth since the expectation that contracts will be honoured and disputes resolved fairly is vital to investors, and underpins sound business development and growth. An independent and impartial judiciary has important consequences for trade, investment and financial markets, as countries as diverse as China and Nigeria have learned.

The goals of corrupt behaviour in the judicial sector vary. Some corruption distorts the judicial process to produce an unjust outcome. But there are many more people who bribe to navigate or hasten the judicial process towards what may well be a just outcome. Ultimately neither is acceptable since the victim in each case is the court user. In the worst judicial environments, however, both are tolerated activities, and are even encouraged by those who work around the courthouse. TI's *Global Corruption Barometer 2006* polled 59,661 people in 62 countries and found that in one third of these countries more than 10 per cent of respondents who had interacted with the judicial system claimed that they or a member of their household had paid a bribe to obtain a 'fair' outcome in a judicial case.

Types of judicial corruption

There are two types of corruption that most affect judiciaries: political interference in judicial processes by either the executive or legislative branches of government, and bribery.

A. Political interference in judicial processes

A dispiriting finding of this volume is that despite several decades of reform efforts and international instruments protecting judicial independence, judges and court personnel around the world continue to face pressure to rule in favour of powerful political or economic entities, rather than according to the law. Backsliding on international standards is evident in some countries. Political powers have increased their influence over the judiciary, for instance, in Russia and Argentina.

A pliable judiciary provides 'legal' protection to those in power for dubious or illegal strategies such as embezzlement, nepotism, crony privatisations or political decisions that might otherwise encounter resistance in the legislature or from the media. In November 2006, for example, an Argentine judge appointed by former president Carlos Menem ruled that excess campaign expenditures by the ruling party had not violated the 2002 campaign financing law because parties were not responsible for financing of which 'they were unaware.'

Political interference comes about by threat, intimidation and simple bribery of judges, but also by the manipulation of judicial appointments, salaries and

conditions of service. In Algeria judges who are thought 'too' independent are penalised and transferred to distant locations. In Kenya judges were pressured to step down without being informed of the allegations against them in an anti-corruption campaign that was widely seen as politically expedient. Judges perceived as problematic by the powerful can be reassigned from sensitive positions or have control of sensitive cases transferred to more pliable judges. This was a tactic used in Peru by former president Alberto Fujimori and which also occurs in Sri Lanka.

Key to preventing this type of corruption are constitutional and legal mechanisms that shield judges from sudden dismissal or transfer without the benefit of an impartial inquiry. This protection goes much of the way toward ensuring that courts, judges and their judgments are independent of outside influences.

But it can be equally problematic if judges are permitted to shelter behind outdated immunity provisions, draconian contempt laws or notions of collegiality, as in Turkey, Pakistan and Nepal respectively. What is required is a careful balance of independence and accountability, and much more transparency than most governments or judiciaries have been willing to introduce.

Judicial independence is founded on public confidence. The perceived integrity of the institution is of particular importance, since it underpins trust in the institution. Until recently, the head of the British judiciary was simultaneously speaker of the UK upper house of parliament and a member of the executive, which presented problems of conflict of interest. In the United States, judicial elections are marred by concerns that donations to judges' election campaigns will inevitably influence judicial decision making.

Judicial and political corruption are mutually reinforcing. Where the justice system is corrupt, sanctions on people who use bribes and threats to suborn politicians are unlikely to be enforced. The ramifications of this dynamic are deep as they deter more honest and unfettered candidates from entering or succeeding in politics or public service.

B. Bribery

Bribery can occur at every point of interaction in the judicial system: court officials may extort money for work they should do anyway; lawyers may charge additional 'fees' to expedite or delay cases, or to direct clients to judges known to take bribes for favourable decisions. For their part, judges may accept bribes to delay or accelerate cases, accept or deny appeals, influence other judges or simply decide a case in a certain way. Studies in this volume from India and Bangladesh detail how lengthy adjournments force people to pay bribes to speed up their cases.

When defendants or litigants already have a low opinion of the honesty of judges and the judicial process, they are far more likely to resort to bribing court officials, lawyers and judges to achieve their ends.

It is important to remember that formal judiciaries handle only a fraction of disputes in the developing world; traditional legal systems or state-run administrative justice processes account for an estimated 90 per cent of non-legal cases in many parts of the globe. Most research on customary systems has emphasised their importance as the only alternative to the sluggish, costly and graft-ridden government processes, but they also contain elements of corruption and other forms of bias⁴⁰⁷. For instance in Bangladesh

⁴⁰⁷ OECD/DAC Network on Conflict, Peace and Development Co-operation, Enhancing the Delivery of Justice and Security in Fragile States, August 2006,

fees are extorted from complainants by ‘touts’ who claim to be able to sway the decisions of a *shalish* panel of local figures called to resolve community disputes and impose sanctions on them. Furthermore, women are unlikely to have equal access to justice in a customary context that downplays their human and economic rights.

Tackling judicial corruption

Our review of 32 countries illustrates that judicial corruption takes many forms and is influenced by many factors, whether legal, social, cultural, economic or political.

Beneath these apparent complexities lie commonalities that point the way forward to reform. The problems most commonly identified in the country studies are:

1. Judicial appointments Failure to appoint judges on merit can lead to the selection of pliant, corruptible judges

2. Terms and conditions Poor salaries and insecure working conditions, including unfair processes for promotion and transfer, as well as a lack of continuous training for judges, lead to judges and other court personnel being vulnerable to bribery

3. Accountability and discipline Unfair or ineffective processes for the discipline and removal of corrupt judges can often lead to the removal of independent judges for reasons of political expediency

4. Transparency Opaque court processes prevent the media and civil society from monitoring court activity and exposing judicial corruption.

These points have been conspicuously absent from many judicial reform programmes over the past two decades, which have tended to focus on court administration and capacity building, ignoring problems related to judicial independence and accountability. Much money has been spent training judges without addressing expectations and incentives for judges to act with integrity. Money has also been spent automating the courts or otherwise trying to reduce court workloads and streamline case management which, if unaccompanied by increased accountability, risks making corrupt courts more efficiently corrupt. In Central and Eastern Europe, failure to take full account of the societal context, particularly in countries where informal networks allow people to circumvent formal judicial processes, has rendered virtually meaningless some very sophisticated changes to formal institutions.

Recommendations

The following recommendations reflect best practice in preventing corruption in judicial systems and encapsulate the conclusions drawn from the analysis made throughout this volume. They address the four key problem areas identified above: judicial appointments, terms and conditions, accountability and discipline, and transparency⁴⁰⁸.

⁴⁰⁸ These recommendations draw on a more extensive list, the ‘TI Checklist for Maintaining Integrity and Preventing Corruption in Judicial Systems’, which was drafted by Kyela Leakey with input from a number of senior judges and other experts from around the world. These are available from TI.

Judicial appointments

1. **Independent judicial appointments body** An objective and transparent process for the appointment of judges ensures that only the highest quality candidates are selected, and that they do not feel indebted to the particular politician or senior judge who appointed them. At the heart of the process is an appointments body acting independently of the executive and the legislature, whose members have been appointed in an objective and transparent process.

Representatives from the executive and legislative branches should not form a majority on the appointments body.

2. **Merit-based judicial appointments** Election criteria should be clear and well publicised, allowing candidates, selectors and others to have a clear understanding of where the bar for selection lies; candidates should be required to demonstrate a record of competence and integrity.

3. **Civil society participation** Civil society groups, including professional associations linked to judicial activities, should be consulted on the merits of candidates.

Terms and conditions

4. **Judicial salaries** Salaries must be commensurate with judges' position, experience, performance and professional development for the entirety of their tenure; fair pensions should be provided on retirement.

5. **Judicial protections** Laws should safeguard judicial salaries and working conditions so that they cannot be manipulated by the executive and the legislature to punish independent judges and/or reward those who rule in favour of government.

6. **Judicial transfers** Objective criteria that determine the assignment of judges to particular court locations ensure that independent or non-corrupted judges are not punished by being dispatched to remote jurisdictions. Judges should not be assigned to a court in an area where they have close ties or loyalties with local politicians.

7. **Case assignment and judicial management** Case assignment that is based on clear and objective criteria, administered by judges and regularly assessed protects against the allocation of cases to pro-government or pro-business judges.

8. **Access to information and training** Judges must have easy access to legislation, cases and court procedures, and receive initial training prior to or upon appointment, as well as continuing training throughout their careers. This includes training in legal analysis, the explanation of decisions, judgment writing and case management, as well as ethical and anti-corruption training.

9. **Security of tenure** Security of tenure for judges should be guaranteed for around 10 years, not subject to renewal, since judges tend to tailor their judgments and conduct towards the end of the term in anticipation of renewal.

Accountability and discipline

10. **Immunity** Limited immunity for actions relating to judicial duties allows judges to make decisions free from fear of civil suit; immunity does not apply in corruption or other criminal cases.

11. **Disciplinary procedures** Disciplinary rules ensure that the judiciary carries out initial rigorous investigation of all allegations. An independent

body must investigate complaints against judges and give reasons for its decisions.

12. **Transparent and fair removal process** Strict and exacting standards apply to the removal of a judge. Removal mechanisms for judges must be clear, transparent and fair, and reasons need to be given for decisions. If there is a finding of corruption, a judge is liable to prosecution.

13. **Due process and appellate reviews** A judge has the right to a fair hearing, legal representation and an appeal in any disciplinary matter.

14. **Code of conduct** A code of judicial conduct provides a guide and measure of judicial conduct, and should be developed and implemented by the judiciary. Breaches must be investigated and sanctioned by a judicial body.

15. **Whistleblower policy** A confidential and rigorous formal complaints procedure is vital so that lawyers, court users, prosecutors, police, media and civil society can report suspected or actual breaches of the code of conduct, or corruption by judges, court administrators or lawyers.

16. **Strong and independent judges' association** An independent judges' association should represent its members in all interactions with the state and its offices. It should be an elected body; accessible to all judges; support individual judges on ethical matters; and provide a safe point of reference for judges who fear they may have been compromised.

Transparency

17. **Transparent organisation** The judiciary must publish annual reports of its activities and spending, and provide the public with reliable information about its governance and organisation.

18. **Transparent work** The public needs reliable access to information pertaining to laws, proposed changes in legislation, court procedures, judgments, judicial vacancies, recruitment criteria, judicial selection procedures and reasons for judicial appointments.

19. **Transparent prosecution service** The prosecution must conduct judicial proceedings in public (with limited exceptions, for example concerning children); publish reasons for decisions; and produce publicly accessible prosecution guidelines to direct and assist decision makers during the conduct of prosecutions.

20. **Judicial asset disclosure** Judges should make periodic asset disclosures especially where other public officials are required to do so.

21. **Judicial conflicts of interest disclosure** Judges must declare conflicts of interest as soon as they become apparent and disqualify themselves when they are (or might appear to be) biased or prejudiced towards a party to a case; when they have previously served as lawyers or material witnesses in the case; or if they have an economic interest in the outcome.

22. **Widely publicised due process rights** Formal judicial institutional mechanisms ensure that parties using the courts are legally advised on the nature, scale and scope of their rights and procedures before, during and after court proceedings.

23. **Freedom of expression** Journalists must be able to comment fairly on legal proceedings and report suspected or actual corruption or bias. Laws that criminalise defamation or give judges discretion to award crippling compensation in libel cases inhibit the media from investigating and reporting suspected criminality, and should be reformed.

24. **Quality of commentary** Journalists and editors should be better trained in reporting what happens in courts and in presenting legal issues to the

general public in an understandable form. Academics should be encouraged to comment on court judgments in legal journals, if not in the media.

25. **Civil society engagement, research, monitoring and reporting** Civil society organisations can contribute to understanding the issues related to judicial corruption by monitoring the incidence of corruption, as well as potential indicators of corruption, such as delays and the quality of decisions.

26. **Donor integrity and transparency** Judicial reform programmes should address the problem of judicial corruption. Donors should share knowledge of diagnostics, evaluation of court processes and efficiency; and engage openly with partner countries.

These recommendations complement a number of international standards on judicial integrity and independence, as well as various monitoring and reporting models that have been developed by NGOs and governmental entities. They highlight a gap in the international legal framework on judicial accountability mechanisms. TI draws particular attention to the Bangalore Principles of Judicial Conduct, a code for judges that has been adopted by a number of national judiciaries and was endorsed by the UN Economic and Social Council in 2006. The Bangalore Principles go some way towards filling this gap, though they remain voluntary. In addition, the UN Basic Principles on the Independence of the Judiciary should be reviewed in the light of widespread concern that has emerged in the last decade over the need for greater judicial accountability.

There is no magic set of structures and practices that will reduce corruption in all situations. The country reports in part two of this volume highlight the wide variety of recommendations for judicial reform that are context-specific and therefore not applicable in a general way. Differing situations may require measures that would not be helpful elsewhere. Nevertheless, the recommendations serve as a guide for reform efforts to promote judicial independence and accountability, and encourage more effective, efficient and fair enforcement. As this volume demonstrates, multi-faceted, holistic reform of the judiciary is a crucial step toward enhancing justice and curbing the corruption that degrades legal systems and ruins lives the world over.

Annex II

Standpoint of the Commissioner for Human Rights on corruption in the judiciary⁴⁰⁹

"Corruption distorts the system of justice and damages poor people in particular"

[24/06/08] In several European countries there is a widespread belief that the judiciary is corrupt and that the courts tend to favour people with money and contacts. Though this perception may sometimes be exaggerated, it should be taken seriously. No system of justice is effective if not trusted by the population. Even worse, there are indications to show that people's suspicions are in some cases well justified.

During my visits to member states of the Council of Europe I have often heard complaints about corruption affecting key components of the justice system: the judiciary, the police and the penitentiary.

Such allegations may be part of party political propaganda and are in many cases difficult to verify. Still, it has become clear to me that corruption in the justice system is a serious problem in several European countries – not only as a perception but also as a concrete reality.

In reports from recent visits I have therefore raised this problem and recommended strong action. One of several examples is the report on Albania(1) – where the government has given priority to this problem – but I still had to conclude that '[m]ore effective and efficient measures addressing corruption in the justice system need to be taken in order to restore public confidence and enable fair trials and due process'.

The report on Azerbaijan(2) also recognised that a number of legal and other measures had been taken to put an end to corrupt practices. However, some aspects of the administration of justice still seem to be influenced by pecuniary interests. I concluded that problems of corruption and dependence on the executive still marred the Azerbaijani justice 'as in many countries in fast transition from the former Soviet system'.

Corruption in the justice system often goes hand in hand with political interference. Ministers and other leading politicians do not always respect the independence of the judiciary and instead give underhand signals to prosecutors or judges on what they are expected to deliver. The distortive effect of such practices is even worse in countries where there are close links between the political leaders and big business. This is where greed tends to trump justice.

⁴⁰⁹ "Corruption distorts the system of justice and damages poor people in particular" of June 24, 2008. This viewpoint has been recently reiterated by the commissioner in his paper "Corruption is a major human rights problem" which he presented at the GRECO conference of October 5, 2009. The initiative of setting up this institution was born at the second summit of the heads of state and government of the Council of Europe held in Strasbourg between October 10 -11 1997. On May 7 1999, the Committee of Ministers passed Resolution (99) 50 which sets up the Commissioner's office and establishes his attributions. In order to act for the promotion and protection of human rights, the Commissioner pays visits, issues reports, makes interventions and communicates his points of view. The current commissioner, Thomas Hammarberg, took office on April 1, 2006. The institution's site is www.commissioner.coe.int.

Corruption threatens human rights and in particular the rights of the poor. Policemen are badly paid in several countries and some of them try to add to their income through asking for bribes; the result is that people without money are treated badly. I have met prisoners who have had no family visits because the relatives could not pay the unofficial fee for the entry into the prison.

Sadly, there are also cases of court officials who have been influenced by money under the table or by other less obvious favours, like career promises. This is one explanation for the excessively drawn out trials in some cases and for the very shortcut procedures in others.

Judges should be well paid in order to minimise the temptation for such corrupt practices. However, a higher salary level is only one aspect of this picture and not always effective (greed sometimes tends to grow with income).

What is needed is a comprehensive, high-priority programme to stamp out corruption at all levels and in all public institutions. There is also a need to react clearly on corrupt practices in private business, the consequences of which tend to spill over into the public sphere.

The basis has to be a concise legislation which criminalises acts of corruption. However, such laws can in themselves hardly address all concrete problems in this field. It is extremely difficult to define the criminal dimension of some of the corrupt practices, such as nepotism and political favouritism. Issues relating to 'conflicts of interest' must also be assessed in their contexts. In other words, more focused standards and effective follow up mechanisms are necessary.

Clear procedures for the recruitment, promotion and tenure of judges and prosecutors are a must and should confirm the fire-wall between party politics and the judiciary. As I stressed in the report on Ukraine(3) the process of appointing judges should be transparent, fair and merit-based. Requirements concerning the integrity of judges should be part of their training and defined clearly and early in the recruitment process.

Codes of conduct could serve as useful tools to enhance the integrity and accountability of the judiciary. The standards should regulate behaviour in office but also for outside activities and their remuneration. Independent disciplinary mechanisms should be established to deal with complaints against court officials. They should be able to receive and investigate complaints, protect the complainants against retaliation and provide for effective sanctions.

The experience is that such proceedings should not be conducted in a political setting, but rather through a special and independent body within the judicial system itself – still with the requirement that no undue influence is allowed, including from colleagues. Allegations of corruption must of course be investigated through procedures which are scrupulously fair.

Relevant recommendations have been presented by the Group of States against Corruption (GRECO), a body initiated by the Council of Europe to fight bribery, abuse of public office and corrupt business practices. GRECO has also developed a system for regular review of anti-corruption measures among its participating member states; its reports have encouraged important reforms on national level.(4)

Legally binding norms for measures against corruption are set by a couple of important international treaties which should be used as inspiration for national action. The Council of Europe has adopted the *Criminal Law Convention on Corruption* and the *Civil Law Convention on Corruption* which entered into force in 2002 and 2003 respectively(5). There is also the *United Nations Convention against Corruption* which entered into force in 2005.

One aspect stressed in these treaties is the need to protect those individuals who report their suspicion in good faith internally or externally. Such whistle-

blowers have too often been hit by retaliation – dismissals or worse – which in turn may have silenced others who have had grounds to report. Even if such overt sanctions are prevented there remains a problem of how to hinder more subtle forms of retribution, for instance non-promotion or isolation.

Many corruption scandals have been exposed by the media and freedom of expression is indeed key in this struggle. This is one reason why it is essential to promote freedom and diversity of the media and to protect the political independence of public service media. The European Court of Human Rights has recognised that the press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the task entrusted to them.(6)

It is also important that *Freedom of Information* legislation promotes governmental transparency. The public should in principle have access to all information which is handled on their behalf by the authorities. Confidentiality is of course necessary, for instance in order to protect privacy and personal data, but should be seen as exceptional and be justified. Though progress on this is being made in Europe, transparency is far from the general rule.

Not only should governments be passively transparent, they have an obligation to ensure that the public has effective access to information. The European Court of Human Rights has emphasised that the public must have information on the functioning of the judicial system, which is an essential institution for any democratic society. "The Courts, as with all other public institutions are not immune from criticism and scrutiny".(7)

When reporting on Ukraine I had to stress the importance of such transparency, 'With the exception of the judgments of the highest courts, only a small percentage of judicial decisions are published. Accurate and reliable records are an exception'.

Parliamentarians could play a particularly important role in the fight against corrupt practices. They should certainly set a good ethical example themselves and openly declare their income and capital assets as well as all relevant side-activities, connections and interests. Further, they could act as watchdogs on the risk of corruption within the government administration and ask questions which others may find difficulty in answering. They could ensure that legislation and oversight procedures are in place and functioning.

Some of the *non-governmental organisations* already play an important role in the struggle against corruption. On an international level the Berlin-based Transparency International (TI) has made major contributions and also managed to encourage the World Bank to take the problem with greater seriousness. TI has now national sections in several countries and there are also other groups on national level who which expose bad practices and seek reforms against corruption.

Ombudsmen and other independent national human rights structures are in some countries actively working against undue influence and other corrupt practices. Examples are the Public Defenders in Georgia and Armenia who have described how poor and destitute people are damaged by such tendencies.

The poor need legal aid, not pressure to pay bribes. They need proof that everyone is equal before the law. They need a system of justice that is fair and unbiased.

This is their right.

Thomas Hammarberg

Notes

1. Report by the Commissioner for Human Rights on his visit to Albania, 27 October – 2 November 2007, CommDH(2008)8
2. Report by the Commissioner for Human Rights on his visit to Azerbaijan, 3-7 September 2007, CommDH(2008)2
3. Report by the Commissioner for Human Rights on his visit to Ukraine, 10-17 December 2006, CommDH(2007)15
4. In May 1998, the Committee of Ministers authorised the establishment of the "Group of States against Corruption – GRECO" in the form of an enlarged partial agreement and on 1 May 1999, GRECO was set up by 17 founding members. It now has 46 members.
5. The Additional Protocol to the Criminal Law Convention on Corruption, which entered into force in 2005 complements the Convention's provisions aimed at protecting judicial authorities from corruption.
6. *Prager and Oberschlick*, 26 April 1995, para. 34.
7. *Skalka v. Poland*, 27 May 2003, para. 34.

Annex III

Final judgements of conviction in Romanian criminal cases for judicial corruption offences⁴¹⁰

In 2005:

Through the final, unappealed judgement in criminal case no. 49 of January 20, 2005, the Bucharest Tribunal, Criminal Chamber II, sentenced defendants V.I. and V.R. to **prison for 5 years** and **2 years** respectively, for the offence of trading in influence.

Between July and August 2002, defendants V.I. (**a lawyer** in the Bucharest Bar) and V.R. (**principal agent** with the Romanian Police Inspectorate General), repeatedly claimed and received from G.I., money in the total amount of *31,000 USD*, hinting that they could influence magistrates to order the release of defendant G.R. The defendant V.I., in pursuing the same criminal strategy, forged several private documents (a legal assistance contract and receipts), which were made to include false data and the counterfeit signature of G.I., with the goal of producing legal consequences.

In March 2002, the defendant V.I. demanded and received *6,000 USD* from R.P., suggesting that she had influence over the magistrate who was conducting criminal proceedings against D.M. in view of having the latter released.

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Through judgement no.559 of July 14, 2004, of the Timiș Tribunal, confirmed by Decision no. 2437 of April 12, 2005, of the High Court of Cassation and Justice, defendants I.R, L.F. were sentenced to **imprisonment for 4 years** each, and N.Gh. to **3 years and 6 months**, after the Court found that they demanded and received from P.V. (administrator of the company S.C. „I.C.” and Travel Agency S.C. „P” S.R.L.), booking *vouchers* for three holidays, for six people, in resorts on the Adriatic Sea and in Montenegro for August – September 2003, amounting to a total *1500 euro*, in return for not applying contravention fines ranging between 1-5 billion ROL.

Defendant L.S, together with nine other defendants, were sentenced, through judgement in criminal case no.758/2003 of the Cluj Tribunal, confirmed by decision no.1114 of February 5, 2005, of the High Court of Cassation and Justice, to **imprisonment between 3 and 4 years**, for the commission of offences in violation of Art.323 par (1) Criminal Code, in conjunction with art.17 b) in Law no.78/2000, art.254 par (2) in conjunction with art.7 par (1) in Law no.78/2000, applying art.41 par (2) Criminal Code, art.26 in conjunction with art.208 par (1), art.209 par (1) a), g) and i) Criminal Code, applying art.41 par (2) and art.13 Criminal Code, art.208 par (1) in conjunction with art.209 par (1) a), g) and i) Criminal Code, applying art.41 par (2) and art.13 Criminal Code.

In 1997, defendants L.S., R.Gh and C.T, in their capacity as **police workers**, accepted from defendant C.D. various amounts of money, in exchange for not drawing up inspection reports and criminal prosecution documents against the perpetrators of the leather theft at S.C. „C” S.A. Cluj-Napoca,

⁴¹⁰ In drawing up this appendix, we relied on references in the NAD activity reports for 2005-2008 available on the NAD home page, at www.pna.ro/bilant.jsp, and the definitive sentences passed in corruption cases, posted on the same website, at www.pna.ro/hotarari.jsp.

for ensuring protection of the area and the transport of the goods. After the perpetration of the thefts, they received various amounts of money.

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In 2006:

Through judgement no.69/2005, passed by the Bucharest Court of Appeals, Criminal Chamber I, in case file no.4001/2004 (judgement confirmed by decision no.1669 of March 15, 2006, of the Criminal Chamber of the High Court of Cassation and Justice), defendant L.C.E. was sentenced to **imprisonment for 2 years and 6 months**, defendant L.A. was sentenced to **imprisonment for 1 year and 6 months**, with conditional suspension of the sentence, and defendant T.P.M was sentenced to **imprisonment for 1 year** with conditional suspension of the sentence, for the perpetration of offences stipulated under art.257 Criminal Code in conjunction with art.6 in Law no.78/2000, art.264 Criminal Code, art.289 Criminal Code in conjunction with art.17 c) in Law no.78/2000, applying art.41 par (2) Criminal Code and art.25 in conjunction with art.290 in conjunction with art.17 c) in Law no.78/2000.

It has been found that defendant LCE, in her capacity as a **lawyer** with the Bucharest Bar, on May 27, 2003, demanded **20,000 USD** (of which she received 11,000 USD) from the Iranian citizen MA (detained and indicted for the offence of illegal drug trafficking) and from his wife. LCE had claimed that she was able to influence police workers and judges with the High Court of Cassation and Justice, in drawing up criminal prosecution documents (fictitious denunciation of other illegal drug traffickers, etc.) and in bringing to bear art.16 in Law no.143/2000, based on which the defendant would have benefited from a reduction of the sentence. The same defendant, on June 3, 2003, deliberately induced MM to draw up a false denunciation report (concerning other persons involved in drug dealing). On October 29, 2003, LCE deliberately made witness EC put a fictitious date on the denunciation report drawn up in the name of MA and compelled MM to forge the signature of MA in that report. In addition this, Memo no.5110/P/2003 was issued by the Prosecutor's Office attached to the Bucharest Tribunal, which was appended to case file no.159/2003 of the Criminal Chamber of the High Court of Cassation and Justice, to help the author of the incriminating report, MA, obstruct the trial. Defendant LCE, in her capacity as a **lawyer** with the Bucharest Bar, in September 2003, demanded **10,000 USD** (of which she received 7,500 USD) from Turkish citizen AS (taken in custody for illegal drug trafficking), claiming that she had such influence on judges with the Bucharest Tribunal as to have AS released.

Defendant LA, in his capacity as a **prosecutor** with the Prosecutor's Office attached to the Bucharest Tribunal, repeatedly and with the same criminal intention, drew up the testimony of MA dated November 10, 2003, and communication no.5110/P/2003, attested to circumstances that were inconsistent with the truth. It was with respect to the capacity of MA as author of the incriminating report and with the objective of concealing the offence of trading in influence perpetrated by defendant LCE. LCE, upon drawing up of testimony and the communication, made statements that were inconsistent with the truth, by means of which he helped MA.

Defendant TPM, in his capacity as a **police officer** with the Bureau for Countering Organised Crime and Drug Trafficking of the Bucharest Sector 3 Police, when drafting a police report for the *flagrante delicto* of October 28, 2003, made false statements concerning the allegedly incriminating report of MA against Turkish citizen YMN (who was reportedly dealing drugs), and thereby helped defendant MA to obstruct the trial.

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Through judgement no.7/2005 (passed by the Dolj Tribunal on case no.2430/2004), which became final under decision no.94 of January 10, 2006, of the Criminal Chamber of the High Court of Cassation and Justice, defendant VM was sentenced to **imprisonment for 5 years** for perpetrating the offence stipulated under art.257 Criminal Code, in conjunction with art.6 in Law no.78/2000, applying art.41 par (2) Criminal Code.

Defendant VM repeatedly requested and received the amount of *468,000,000 ROL* from TGh, hinting that she had influence (both directly and through a lawyer) upon certain judges with the High Court of Cassation and Justice and the prosecutor general of the Prosecutor's Office attached thereto. LCE also hinted that she could ensure that the appeal on point of law would be accepted and the sentence of defendant TD (who had been convicted to 20 years' imprisonment) would be reduced, and an appeal for cancellation would be lodged.

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Through judgement in criminal case no.429/2004 of the Timiș Tribunal, which became final under decision no.630 of February 1, 2006, of the Criminal Chamber of the High Court of Cassation and Justice, defendants JM and GV were sentenced to **imprisonment for 4 years** each, IS and MFD were sentenced to **imprisonment for 2 years each** (with the conditional suspension of the sentence), while CLC and BIM were sentenced to **imprisonment for 3 years** each (with conditional suspension of the sentence), for the perpetration of offences stipulated by art.254 par (1) Criminal Code, in reference to art.6 in Law no.78/2000, applying art.41 par (2) Criminal Code, art.288 par (2) Criminal Code, in conjunction with art. 17c) in Law no.78/2000, applying art.41 par (2) Criminal Code, art.289 par (2) Criminal Code, in conjunction with art.17 c) in Law no.78/2000, applying art.41 par (2) Criminal Code, art.26 in relation to art.254 par (1) Criminal Code, in reference to art.6 in Law no.78/2000 and applying art.41 par (2) Criminal Code, art.288 par (2) Criminal Code in conjunction with art.17c) in Law no.78/2000, applying art.41 par (2) Criminal Code and art.26 in conjunction with art.289 par (2) Criminal Code and art.17 c) in Law no.78/2000, applying art.41 par (2) Criminal Code.

In February 2002, based on a prior agreement, defendant JM, in her capacity as a **secretary** of Law School X, and defendant GV, in his capacity as **corporate counsel** of the foundation, accepted the promise of *3,500 USD* each from defendants IS and MF, via defendants CC and BI, in exchange for the release of forged academic records attesting that these defendants graduated from that law school. The forged academic records were used by defendants IS and MF to take the B.A. degree exam at the Craiova Law School.

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Through judgement no.37 of March 15, 2006 (passed on case no.3629/2005 of Criminal Chamber II of the Bucharest Court of Appeals), which became final further to decision no.5366 of September 19, 2006, of the Criminal Chamber of the High Court of Cassation and Justice, the defendant PA was sentenced to **imprisonment for 4 years** (under supervised probation), for the perpetration of the offence stipulated in art.254 par (2) Criminal Code, in conjunction with art.5 par (1) and art.7 par (1) in Law no.78/2000, applying art.41 par (2) Criminal Code.

In his capacity as **chief commissioner** with Bucharest Police Precinct 17, throughout the year 2005 defendant PA demanded and received from FV the amounts of *100,000 ROL* (August 2005) and *3,000,000 ROL* (October 2005), in exchange for a favourable determination of a criminal investigation on which he was working.

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The Ploiești Court of Appeals, through judgement in criminal case no.49/2005, which became final under decision no.1230 of February 24, 2006, of the Criminal Chamber of the High Court of Cassation and Justice, sentenced defendant SD to **imprisonment for 3 years**, for 10 counts of bribe-taking, in accordance with art.254 par (2) Criminal Code in conjunction with art.7 in Law no.78/2000, applying art.33 a) Criminal Code.

Defendant SD, in his capacity as **police sub-commissioner** with inspection powers, between June 2003 and January 2005, demanded 74,000,000 ROL from several individuals (administrators of trade companies), in return for not drawing up police reports concerning irregularities discovered, as well as refraining from inspections at the respective companies.

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Judgement no.38/2005 of the Oradea Court of Appeals, which became final under decision no.442 of January 24, 2006, of the Criminal Chamber of the High Court of Cassation and Justice, sentenced defendants CM and DMS to **imprisonment for 3 years** each, for the perpetration of offences defined under art.254 par (1) and (2) Criminal Code, in conjunction with art.6 and art.7.1 in Law no.78/2000, applying art.41 par (2) Criminal Code.

Defendants CM (**sub-commissioner**) and DMS (**sub-inspector**), as public officials with inspection powers, between March 2, 2004, and March 11, 2004, demanded, more than once, the amount of 3,000 euro (that later, further to "negotiations," was decreased to 700 euro) and received 700 euro and 2,500,000 ROL (the latter amount representing the price of meals in various restaurants) in return for not fulfilling their official duties during an inspection at S.C. „X" S.R.L. as noted in the police report of March 2, 2004.

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Through judgement no.24 of January 18, 2005, of the Hunedoara Tribunal, which became final under decision no.1246 of February 27, 2006, of the Criminal Chamber of the High Court of Cassation and Justice, defendant SV was sentenced to **imprisonment for 3 years** (with conditional suspension of the sentence), for perpetrating the offence stipulated in art.257 par (1) Criminal Code, in conjunction with art.5 par (1) in Law no. 78/2000, art.215 par (1) Criminal Code and art.290 Criminal Code.

In his capacity as a **commissioner** with the Financial Guard, defendant SV demanded and received, for exerting influence on a magistrate and on another Financial Guard commissioner, the amount of 99 million ROL from CM (administrator of S.C. „F" S.R.L.), in exchange for helping the CM win a lawsuit pending in court, and for convincing another commissioner to not inspect companies managed by the influence buyer.

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The Iași Tribunal, through judgement no. 833/2004, which became final under decision no.5737 of October 5, 2006, of the Criminal Chamber of the High Court of Cassation and Justice, sentenced defendant SOC to **imprisonment for 2 years and 6 months** (with conditional suspension of the sentence), for perpetrating the offence stipulated in art.257 Criminal Code in conjunction art.6 d) in Law no.78/2000. In July 2003, defendant SOC (**chief inspector** with the Iași Border Police) demanded and received from CG the amount of 3,000 euro in exchange for promising to arrange, with employees of the Police Academy in Bucharest, a grade above 8.50 in the B.A. exam.

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Through judgement no.296 of October 10, 2005, which became final under decision no.49/A/2006 of the Oradea Court of Appeals, defendant MC was

sentenced to **imprisonment for 4 years**, for the perpetration of the offence of trading in influence, stipulated in art.257 Criminal Code in conjunction with art.1 g) and art.6 in Law no.78/2000, applying art.19 in Law no.503/2002. The Court also noted that, in 2001-2002, MC demanded and received the amounts of *1 billion ROL and 25,000 DM* from the aggrieved party CVR, and claimed to have such influence on a judge with the High Court of Cassation and Justice as to convince that judge to pass a favourable judgement in a criminal case in which the aggrieved party was a defendant.

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In 2007:

Through judgement no.126 of 29 March 2007 of the Arad Tribunal (which was modified by judgement no.138 of July 4, 2007, of the Timișoara Court of Appeals, and became final through decision no. 5850 of 5 December 2007 of HCCJ) defendant TSD was sentenced to **imprisonment for 4 years** for committing the offence of trading in influence, as defined in art.257 Criminal Code in conjunction with art.5 in Law 78/2000.

We note that on 11 October 2000 the defendant, a **lawyer**, accepted 10,000 DM from the partner of the convict VM in exchange for promises that, with the help of connections and acquaintances working in the Ministry of Justice, he could arrange the pardon of VM's partner.

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Judgement no. 483 of 21 April 2006, the Criminal Chamber II of the Bucharest Tribunal (which was modified by the Brașov Court of Appeals, where the trial was transferred, under judgement no.335 of November 28, 2006, and which became final under criminal decision no. 3035 of 06 June 2007 of HCCJ) ordered the **imprisonment** of defendant SN for **3 years** for perpetrating the offence of trading in influence as defined in art.257 Criminal Code, applying art.6 in Law no.78/2000, with the conditional suspension of the sentence, under supervision⁴¹¹.

The Court noted that defendant SN, a **former judge** who had retired in 2003 from Tribunal G, accepted promises and received from the informer PMS the amount of *10,000 euro* on December 13, 2004, in return for arranging with members of a panel of judges in Tribunal G. the passing of a favourable judgement for FP, whose legal representative was the informer in a civil law case concerning whether a property title was null and void.

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Through judgement no. 85 of 29 May 2006 of the Buzău Tribunal (as modified by judgement no. 369 of 18 December 2006 by the Ploiești Court of Appeals, and becoming final under decision no. 1911 of 5 April 2007 of the Criminal Chamber of HCCJ) the Court found that on October 23, 2004, based on a prior agreement between the parties, defendant BN promised **the informing prosecutor** CD the amount of *10,000 euro, a railcar-load of grains and the right to use a holiday apartment in Sinaia*, in return for making a favourable decision for co-defendant DD in case file no.50/P/2004 with the Slobozia Anti-corruption Bureau, a criminal offence that features the constituent

⁴¹¹ With respect to the enforcement of the sentence, the Court of Appeals ordered the conditional suspension of the sentence, under surveillance. In the appeal on a point of law stage, HCCJ changed this order, on the following grounds: "the goal of the sentence does not require mandatory serving of prison time; however, given that the defendant is aged 70, is retired, and has exhibited normal civic conduct, supervision during the probation period is not required, and the application of supervision measures and obligations on the part of the convicted offender is no longer appropriate."

elements of the offence of bribe-giving, as defined in art.255 par 1 Criminal Code, applying art.7 par 2 in Law no.78/2000, perpetrated by the aforesaid defendants, as author and accomplice respectively.

The defendants were sentenced to **imprisonment for 3 years** each, with a six-year supervised probation period⁴¹².

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Through judgement no. 34 of September 7, 2006, of the Bacău Court of Appeals (which became final under decision no. 1420 of March 14, 2007, of the Criminal Chamber of HCCJ), defendant SM was sentenced for four charges of trading in influence, as defined in art.257 par 1 Criminal Code, in conjunction with art.6, 7 par 3 of Law no.78/2000, republished, applying art.74 par 2 Criminal Code and art.76 c) Criminal Code, to **imprisonment** for a total **1 year and 10 months**, with a conditional suspension of sentence for 3 years and 10 months.

The Court noted that SM, in his capacity as a **judge** with the TM Court of Law, promised informer KA he would take action to convince his colleagues to release KA pending trial, and to secure favourable judgements in the criminal cases in which the defendant was subject to criminal proceedings, between 1998 and 2002. In exchange, he accepted various benefits and services (payment of invoices for his mobile telephone; 3 paintings; restaurant bills for the defendant and his friends, housekeeping services, payment of taxes and charges owed by the defendant). The same defendant SM, as a judge with Tribunal M, accepted the payment of his various restaurant meals by informer R\$ more than once in return for influencing fellow judges to pass a favourable ruling on a civil-law eviction lawsuit against S.C. The same defendant, in the Autumn 2000 – Spring 2001, demanded through OAR the amount of 1,000 DM (of which he only received 500 DM) from the informer G, in exchange for promising to convince his fellow magistrates to pass a favourable decision on civil law case no.2793/2001, pending appeal before Tribunal M, and concerning the eviction of a MZ. Finally, defendant SM received from informer SJ, on 11 July 1997, through KA, the amount of 250 DM, in exchange for promises to convince court enforcement officer OT to enforce the eviction order concerning the said individuals⁴¹³.

⁴¹² With respect to the position of the bribed official, HCCJ has noted: "Considering that the Slobozia NAP prosecutor did not claim the bribe in order to take personal advantage of it, but to check the conduct of the defendants, then obviously their offence incorporates all the subjective and objective elements of the offence of bribe giving. While it is true that the bribe was not given *sua sponte*, and that the initiative did not belong to the bribe payers, this was not a case of "incitement" and cannot be associated to any constraints, because it did not rule out the free will of the defendants, who promised the money and other benefits in order to identify a solution for a disadvantageous situation for co-defendant DD."

⁴¹³ Here is the explanation given by the court for the reduced sentence: "The defendant SM is young, currently working as a lawyer with Bar M. He is well educated, born into an honourable family: the defendant's father, now deceased, was a judge, while the defendant's mother was a manager, and is now retired. The defendant SM suffers from heart conditions. Keeping in mind the circumstances and conditions in which the misdeeds were perpetrated, the goal of the penalty as defined in art.52 Criminal Code, the Court is of the opinion that applying punishments below the minimum stipulated by the law, and awarding mitigating circumstances, may help ensure both the prevention of future offences, and the rehabilitation of the defendant."

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Criminal Chamber I of the Bucharest Court of Appeals, through judgement no. 161 of October 11, 2006 (which became final through decision no. 1465 of March 16, 2007 of the Criminal Chamber of HCCJ), sentenced defendants P.F., P.V., B.R. and N.R. to **imprisonment for 7 years, 6 years, 5 years and 4 years** respectively, for the commission of such offences as defined in art. 254 par (2) Criminal Code, in conjunction with art. 7 par (1) in Law no. 78/2000 applying art. 41 par (2) Criminal Code, in art. 26 in conjunction with art. 254 par (2) Criminal Code and art. 7 par (1) in Law no. 78/2000 applying art. 41 par (2) Criminal Code, in art. 17b) in Law no. 78/2000 in conjunction with art. 323 par (1) and (2) Criminal Code and in art. 18 par (1) in Law no. 78/2000, applying art. 33 a) Criminal Code.

The Court found that defendant P. F., in his capacity as **chief inspector** with the Ilfov County Police Inspectorate (head of the Fraud Investigation Department), with criminal intent, while conducting checks as part of his official duties, demanded on four occasions, through defendants B.R. and P.V., amounts ranging between *6,000 USD and 60,000 USD*. He received, on three occasions, with the complicity of the two defendants and of defendant N.R., the total amount of *18,000 USD and 1,500 lei*, from several Chinese citizens who had rented warehouse facilities from S.C. "Orient Internațional Group" S.R.L., in exchange for not levying fines for violations on the trade companies he was inspecting.

During the same period, together with defendants B.R. and P.V., he initiated the establishment of a criminal group, which he used to perpetrate bribe-taking offences.

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Through judgement no. 164 of October 24, 2006, Criminal Chamber II of the Bucharest Court of Appeals ruled to sentence defendants M.F. and S.D.S. to **imprisonment for 3 years each**, for the perpetration of the offence laid down in art. 254 par (1) Criminal Code in conjunction with art. 6 and art. 7 par (1) in Law no. 78/2000.

Defendants M.F. and S.D.S. (police commissioner and sub-commissioner respectively, with the Money Laundering Department of the Directorate General for Countering Organised Crime in the Romanian Police Inspectorate General), on March 30, 2006, while discharging their official duties as **judicial police officers**, conducted inspections into S.C. „L” S.A. and S.C. „A” S.R.L., based on the delegation resolution issued by the Directorate Investigating Organised Crime and Terrorism Offences of the Prosecutor's Office attached to the High Court of Cassation and Justice. On that occasion they demanded and received *10,000 euro* each, from informer P. P. (a shareholder in the aforesaid trade companies), in return for not carrying out certain criminal investigation procedures.

The Criminal Chamber of the High Court of Cassation and Justice, through decision no. 228 of January 16, 2007, accepted the appeal lodged by the National Anti-Corruption Directorate and increased MF and SDS's sentences of **imprisonment to 4 years each**.

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Through judgement no. 60 of December 19, 2006, the Brașov Court of Appeals ordered the acquittal of defendant M.V. for the offence defined in art. 254 par (1), applying art. 13 Criminal Code.

In fact, defendant M.V., then a **Judge** and head of the Criminal Chamber of Tribunal B., in return for passing a favourable judgement in a case involving P.V. (who was detained pending trial for blackmail and association for criminal purposes) in July 1998 demanded and received, from PV's wife, the total

amount of 150,000 DM, in three instalments, through M.C. He promised to order the release of P. V. and later, at the appeals stage, to suspend the execution of his sentence⁴¹⁴.

The High Court of Cassation and Justice, through criminal decision no. 5134 of October 31, 2007, accepted the appeal on a point of law lodged by the National Anti-Corruption Directorate and sentenced defendant M.V. to **4-year imprisonment**⁴¹⁵.

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The Prahova Tribunal, through judgement no. 473 of October 31, 2006, sentenced defendants A.M. to **5 years' imprisonment**, under art. 257 Criminal Code, in conjunction with art. 6 in Law no. 78/2000, applying art. 37 a) Criminal Code **and A.A.S. to 3 years' imprisonment**, applying art. 861 Criminal Code, under art. 257 Criminal Code in conjunction with art. 6 in Law no. 78/2000.

The Court found that in January 2006, defendants A.M. and A.A.S., accepted the promise of money (for themselves and other persons) from G.N. in exchange for convincing magistrates to acquit the informer, in a case pending before the Ploiești Court of Law. They were caught on February 2, 2006, while accepting *15,000 euro*.

The Ploiești Court of Appeals, through criminal case decision no. 370 of December 28, 2006, accepted the appeals lodged by defendants A.M. and A.A.S., and reduced the sentences for defendants A.M. (from 5 to **4 years' imprisonment**) and A.A.S. (from **3 to 2 years' imprisonment**) and ruled that they serve supervised probation. The High Court of Cassation and Justice, through decision no. 2343 of May 2, 2007, dismissed the appeals lodged by the defendants.

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Defendant T.V.C. was sentenced by the Satu Mare Tribunal, under judgement no. 575 of October 17, 2006, to **imprisonment for 2 years and 8 months**, for committing the offence stipulated in art. 257 Criminal Code in conjunction with art. 1g) and art. 6 in Law no. 78/2000, and to **imprisonment for 3 years**, for committing the offence stipulated in art. 23c) in Law no. 656/2002 in conjunction with art. 17 e) and art. 18 par (2) in Law no. 78/2000; and in accordance with art. 33 a) and art. 34 b) Criminal Code, the Court ordered the serving of an aggregate sentence of imprisonment for 3 years.

Through decision no. 25/A/2007 of February 13, 2007, the Oradea Court of Appeals accepted the appeal lodged by the National Anti-Corruption Directorate and defendant TVC, and, applying art. 19 of Law no. 682/2002, the sentences applied to the defendant were reduced to **imprisonment for 2 years** each, with the defendant ordered to serve only this sentence. In hearing the appeal on points

⁴¹⁴ The trial started in 1998 and came to a close in 2007.

⁴¹⁵ With respect to sentencing, the HCCJ noted: "As far as the length of the sentence is concerned and its enforcement, the High Court shall take into account the general criteria for sentence determination, as laid down in art. 72 Criminal Code, namely the sentencing limits stipulated under the law (from 3 to 12 years), the serious social threat posed by the misdeed (i.e. undermining the credibility of the judiciary and impairing its good image), the specific circumstances in which the misdeed was perpetrated, as described above, and not least, who the perpetrator is (a 53-year-old former magistrate, who stepped down as a judge further to criminal charges of abetting the offender, which are tackled in another criminal case, and without prior criminal records. Considering these criteria, the High Court shall establish an imprisonment sentence oriented not much over the special minimum stipulated by law, served in penitentiary, on grounds that this is the only means able to ensure the meeting of the goal defined in art. 52 Criminal Code, namely re-educating the defendant, preventing the commission of new offences, as well as appropriate constraints on the violation of criminal law.)"

of law lodged by defendant TVC, the Criminal Chamber of the High Court of Cassation and Justice, through decision no. 3615 of July 5, 2007, quashed the said judgements, broke down the aggregate sentence into its two components and ruled that the defendant was to be acquitted, under art. 11 pt. 2a) in conjunction with art. 10d) Code of Criminal Procedure, for the offence stipulated in art. 23c) in Law no. 656/2002, but also lowered the sentence for trading in influence to **imprisonment for 2 years** (custodial sentence without suspension).

The Court found that in December 2004, defendant T.V.C. demanded *50,000 euro* (of which he received 40,000 euro), from informer C.G., who was led to believe that the defendant had such influence on prosecutors and officials with the Financial Guard and the Satu Mare Directorate General for Public Finances, as to convince them to conclude their criminal and fiscal investigations in a manner favourable to the informer.

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Through judgement no. 90 of November 14, 2006, issued by the Galați Court of Appeals, in criminal case no. 1525/44/2006 (which became final under decision no. 1812 of April 2, 2007, of the Criminal Chamber of the High Court of Cassation and Justice), defendants A.D. and P.I. were sentenced to **imprisonment for 4 years** each, under supervised probation, for the commission of offences of bribe-taking, as defined in art. 254 par (1) Criminal Code, in reference to art. 6 and art. 7 par (1) in Law no. 78/2000, applying art. 41 par (2) Criminal Code.

In August 2003 – April 2004, defendants A.D. and P.I., repeatedly and out of a common criminal intention, in their capacity as **police officers** with the Criminal Investigations Bureau of the Brăila City Police Department, demanded *3,000 lei* and received 1,986 lei from informer P.J., in return for a favourable decision in a criminal investigation (part of the defendants' official duties) in which the son of the informer PJ was subject to criminal investigations.

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Through judgement no. 88 of December 4, 2006, passed by the Ploiești Court of Appeals in criminal case no. 7470/200 (which became final under decision no. 3487 of June 27, 2007, of the Criminal Chamber of the High Court of Cassation and Justice), defendant C.C.C. was sentenced to **imprisonment for 3 years**, with conditional suspension of the sentence, for the commission of the offence stipulated by art. 254 par 1, Criminal Code, in conjunction with art. 7 par 1 in Law no. 78/2000.

The Court found that defendant C.C.C., a **Judge** with the PN Court of law, on October 15, 2004, demanded *700 euro* from informer B.C.V., in return for a favourable judgement in the criminal case that CCC was hearing. The defendant received from the informer the amount of *500 euro* on October 18, 2004, which is when he was caught in the act of taking the bribe.

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In 2008:

Through judgement of criminal case no.972 of June 29, 2007, of the Bucharest Tribunal, Criminal Chamber II, which became final under decision no.75 of January 11, 2008, of the High Court of Cassation and Justice, defendant **E.L.** was sentenced to **imprisonment for 9 years** for the commission of the offence defined in art.25 in conjunction with art.257 Criminal Code, in reference to art.6 in Law no.78/2000, applying art.37b) Criminal Code, with an addition of 3 years, and ordered to serve 12 years.

The Court noted that in 2001, while serving a custodial sentence in the Jilava Penitentiary, defendant E.L. demanded from witness B.D. the amount of *40,000 USD*, of which he received *10,000 USD*, and incited lawyer T.R. (indicted

in a separate case) to demand various amounts of money from BD, as well as from other persons. He hinted that he had influence over the magistrates in the Bucharest Tribunal, which would ensure favourable judgements for various convicted offenders.

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Through judgement no.52 of March 28, 2008, of the Bacău Court of Appeals, which became final under decision no.2391 of July 1, 2008 of the High Court of Cassation and Justice, defendant **B.A.** was sentenced to **imprisonment for 4 years (custodial sentence without suspension)**, under art.254 par(1) and (2) Criminal Code, in conjunction with art.7 in Law no.78/2000, applying art.41 par (2) Criminal Code, and defendant **B.S.** was sentenced to **imprisonment for 3 years, with conditional suspension of the sentence**, under art.26 in conjunction with art.254 par (1) and (2) Criminal Code, in reference to art.7 in Law no.78/2000, applying art.41 par(2) Criminal Code.

The Court found that, between July 2003 and April 2006, defendant B.A., in her capacity as a **senior prosecutor** with the Prosecutor's Office attached to the Court of Law, accepted from 8 persons, through defendant B.S., the amount of *3,900 euro and 350 pound sterling*, in return for instructions to not commence criminal prosecution with respect to certain individuals.

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The Bucharest Court of Appeals, Criminal Chamber I, through judgement no.11 of February 7, 2008, which became final under decision no.3008 of September 26, 2008, of the High Court of Cassation and Justice, sentenced defendant **L.C.E.** to **imprisonment for 2 years, under art.257 Criminal Code, in conjunction with art.6 in Law no.78/2000**. Taking into account that the offence was concurrent with the offences for which the same defendant received a sentence of imprisonment for 2 years and 6 months, the Court ordered that LCE also serve only **the longer sentence: 2 years and 6 months**.

The Court took note of the fact that defendant L.C.E in her capacity as **lawyer**, between May and July 2001, demanded and received *12,000 USD*, from as many as 3 persons, hinting that she might arrange with magistrates of the Court the release of an arrested defendant.

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The Bucharest Court of Appeals, Criminal Chamber I, through judgement no.195 of October 8, 2007 (which became final under decision no. 102 of 15 January 2008 by HCCJ), sentenced defendant DA, a **lawyer** with the Bucharest Bar, to **imprisonment for 1 year**, for the commission of the continuing offence of trading in influence, punishable under art.257 para1 Criminal Code, in conjunction with art.6 in Law no.78/2000 and art.19 in G.E.O. no.43/2002.

It was found that between April 2006 and May 2007, in his capacity as defender of informer EH, DA repeatedly demanded and received *97,800 euro* from the latter, in return for a favourable decision in case no. 147/D/P/2006 of the Prosecutor's Office attached to the High Court of Cassation and Justice – DIICOT, in which the informing witness was a defendant. DA hinted that he could influence judicial police officers and the case prosecutor; that he could arrange for the informer to be released, and, subsequently to have the ban on leaving the country lifted; and that eventually he could secure a favourable judgement in the case.

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Through judgement no.200 of 1 October 2007 of the Bucharest Court of Appeals (which became final under decision no. 390 of 31 January 2008 by HCCJ), defendant BR received the aggregate sentence of **imprisonment for 3 years** under supervised probation (instead of prison), for 4 counts of

bribe-taking in the form stipulated by art. 254 para 1, 2 Criminal Code in conjunction with art.6 and 7 para1 in Law no.78/2000, as modified and amended (injured parties I. C. L., P.M., T. P., J. Gh., B. V.); one count of receipt of undue benefits, as stipulated in art. 256 Criminal Code, in conjunction with art.6 and 7 para1 and 3 in Law no.78/2000 from the injured party L. I.; one count of forgery, as stipulated in art.289 Criminal Code, in conjunction with art.17c) in Law no.78/2000, for aggrieved party T. P.; and one count of use of forgeries as defined in art.291 Criminal Code, in conjunction with art.17 c) in Law no.78/2000, as modified and amended.

In was stated that defendant B.R., in her capacity as **senior prosecutor** with the Prosecutor's Office attached to the PT Court of Law, repeatedly demanded and received, from various persons subject to investigations for the commission of crimes, *money* (500 euro, loans), *services* (redecorations of the defendant's house by the informer), *goods* (whisky, coffee, champagne, chocolate, other food products) in return for decisions favourable to these persons. In another situation, after deciding a case, BR received various goods from the person about whom the criminal prosecution was not initiated, as a token of appreciation. In yet another situation, BR accepted the replacement of a criminal record sheet with a forged one, in view terminating the criminal prosecution against the respective person appear legitimate.

In her criminal activities, the defendant acted either on her own, or jointly with defendant B. B. I., her husband, who was a **police worker** with the PT Police Bureau. The latter was also sentenced, under the same judgement to **imprisonment for 3 years**, suspended, but to remain under supervision.

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Through judgement no. 377 of 16 November 2006, passed by the Suceava Tribunal (as modified under decision no. 62 of May 30, 2007, of the Criminal Chamber of the Suceava Court of Appeals, and as it became final under decision no. 500 of 11 February 2008 by HCCJ), the defendants SML and CIA were sentenced to **imprisonment for 1 year and 10 months** each, for two counts of trading in influence (SML) and one such count (CIA), as stipulated in art.257 Criminal Code in conjunction with art.1 a) and art.6 in Law no.78/2000, applying art.74 a), art.76 d) Criminal Code.

It was found that on 30 October 2003 defendant SML, in her capacity as a **lawyer** with Bar B, demanded and received from FV 1,000 euro, in exchange for which she claimed she could influence a magistrate with the B Court of Appeals to ensure a judgement favourable to FV. Subsequently, before the hearing of 05 February 2004, SML arranged for FV to contact lawyer CIA, and told FV he was to pay a certain amount of money to CIA, by means of which another magistrate with Tribunal B would be persuaded to pass a favourable judgement. For this, defendant SML was rewarded by the accused CIA with 200 euro). In turn, defendant CIA, in her capacity as a **lawyer** with Bar B, during the hearings of 05 February 2004 and 19 February 2004 demanded and received 1,500 euro each, totalling 3,000 euro, from the said FV, who led CIA to believe that a judge at the Bacău Tribunal would be contacted and persuaded to issue a favourable judgement⁴¹⁶.

⁴¹⁶ The Tribunal had sentenced the defendants to imprisonment for 1 year and 6 months each, on grounds that "*In determining the sentence, attention was paid to the nature and level of social threat of the offences, to the consequences that emerged, namely the distortion of social relations concerning the activities of courts of law, the appropriate unfolding of which is incompatible with the suspicion that judges can be influenced in the discharge of their duties by persons who have an actual or alleged influence over them; to the circumstances and the means of perpetration, to the*

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Through judgement no. 563 of 29 June 2007 by the Slatina Court of Law (as it became final under decision no. 420 of 5 June 2008 by the Craiova Court of Appeals) defendant JSA was sentenced to **imprisonment for 2 years**, with conditional suspension of the sentence under art. 11 para 1 and 2 in Law no. 78/2000.

It has been noted that the defendant was appointed by the syndic judge as **liquidator** and entrusted with the bulk sale of the assets of S.C. A C S.A. Corabia, with a view to recovering the money owed to creditors. After the auction procedure was held, the defendant drew up the sales contract, but included in the list of company assets a parcel of land that did not belong to the company.

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Through judgement no. 522 of October 24, 2006, passed by the Dolj Tribunal, as modified in the appeals stage and later in the appeal on point of law, through decision no. 723/2008 of HCCJ, defendant T.M. was sentenced to **imprisonment for 1 year**, served as supervised probation, under art. 257 Criminal Code, in conjunction with art. 6 in Law no. 78/2000.

The court of first instance found that defendant T.M., a **lawyer** with Bar Y, demanded and received 100,000,000 ROL from the witness F.M. in exchange for persuading the dean of Bar Y to facilitate the admission of the witness as a lawyer with this Bar. The framework regulation concerning the organisation of the admission exam for the lawyer profession and of the exam for the license to practice the profession, issued by the Council of the National Association of Bars in Romania, states that the dean of Bar is the president of the aforesaid exam commission and has numerous powers with respect to the exam for admission to the lawyer profession.

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Through no. 61 of March 6, 2007, passed by the Gorj Tribunal, as modified under decision no. 123/2007 by the Craiova Court of Appeals, Criminal Chamber, defendant B.N. was sentenced to **imprisonment for 3 years**, with conditional suspension of the sentence, for the commission of the offence stipulated in art. 255 para1 Criminal Code.

Essentially, the Court noted that the defendant was indicted for bribe-giving: on January 8, 2006, he offered 1,000,000 ROL to police agent S.M. in exchange for a favourable solution to a criminal case and for annulment of a contravention report. In fact, the previous day the defendant had been found by the police agent drinking spirits in a bar in locality F, while on duty at Quarry A- Rotor Section, in the Energy Complex. The defendant was also subject to contravention penalties, under Law no. 61/1991, because of his disorderly behaviour on that occasion⁴¹⁷.

amount of money received from informers, but also to the character of the defendants, who had no prior criminal records, had appropriate conduct in the past, but did not admit to having perpetrated the offences." In the appeals stage, the Court extended the sentences to 1 year and 10 months: "With respect to the determination of the sentences, the Court believes they should be tightened, given the gravity of the offences, enhanced by their effect and their social resonance, but argues that mitigating circumstances, as stipulated under art. 74 a) Criminal Code, may be retained, taking into account that the defendants are young, with unquestionable prospects of rehabilitation and with commendable behaviour prior to the commission of the offences. They have had an outstanding professional performance, a sound family life, and the imprisonment sentence is, in itself, a warning powerful enough to ensure future compliance with the rule of law."

⁴¹⁷ "Records of decisions – offences related to corruption and economic – financial crime," posted on March 13, 2009, at www.csm1909.ro/csm/linkuri/13_03_2009_21723_ro.pdf.

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