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Analysis Report

Technical evaluation of the “Report from the European Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism”

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The fight against corruption is one of the favourite subjects of the Romanian politicians, national and international mass media, and equally of various institutions with which Romania had relationships or is a party to. The Reports of the European Union during the past decade, regarding either Romania as a whole or only the Romanian judiciary have been always a pretext for public debates, polemics and controversies. In the Report published on 23rd July 2008, the European Commission highlighted Romania's progress in fighting corruption, and simultaneously censured negative aspects and shortcomings of the Romanian judicial and political system liable to hamper the production of tangible results in the fight against high level corruption. The lately Report of the European Commission caused polemics not only with regard to the conclusions negotiated and assumed by the College of Commissaries, but also with regard to the unmatched interventions of the European officials, who aimed at the staffing policy within certain national institutions. The interest for the community document is enhanced also by the fact that the subject of anti-corruption is employed as a political vector in Romania during electoral campaign.

The "Ovidiu Șincai" Institute, continuing its previous analytical approaches proposes to scrutinize the main conclusions of the Report from the European Commission published on 23 July 2008 from a multiple stance: the legal provisions regulating activity undertaken to fight against corruption, the results of the institutions involved (General Prosecutor's Office, DNA) and the lately political history of Romania, the latter aspect being essential for the comprehension of the complex phenomenon referred to as the "fight against high level corruption" in the Euro-bureaucracy wooden language.

I. Domestic and international political framework of the fight against corruption

Several preliminary considerations are necessary for a better comprehension of the Romanian complex political framework of the fight against corruption:

- by the end of 2004, **Adrian Năstase Government completed all chapters of negotiation with the European Union, including Chapter 24 – "Justice and Domestic Affairs"**, making the promise at that time as to the adoption of community *acquis* (including the Civil and Criminal Conventions of the European Council and those concerning the fight against corruption), a structure and contents of the fundamental legislation in areas of judiciary organisation (courts and Prosecutor's Offices) and establishment and functioning of the Superior Council of Magistracy at **European standards accepted by the experts of the European Commission**. *The standards assumed and the judicial instruments deriving from them have been and should have been able to ensure in Romania the true independence of the judicial system, guaranteeing the complete de-politicisation of the fight against corruption, equally to the level existent in the other European countries having adopted the same. The thesis "Romanian exceptionalism" according to which what is functioning in Europe cannot function in Romania, relies only on a collective imaginary, nourished and handled by people who intend to maintain the vulnerability of the Romanian society in terms of corruption or to stop its modernisation so as to minimize the Romanian political influence at European and Euro-Atlantic level.*

- In December 2004, **Adrian Năstase Government completed the New Criminal Code of Romania, adopted by the Parliament in 2004** (*foreseen for entering into force in 2005, but successively postponed*) which is a significant update to the criminal legislation, addressing the main components of the specific community *acquis*, ranging from regulations regarding the criminal liability of the legal person and economic interest groups to environmental offences. **The works on the Draft to the Criminal Procedure Code, envisaging the proper application of the New Criminal Code is making progress.** Mention should be made that the provisions of these two referred codes, essential in fighting corruption by employing correct, modern, depoliticised and professional methods *had also been grounded by permanent dialogue and open consultations with the European experts* as in terms of content and application method.
- **under such auspices and circumstances**, in December 2004, the negotiations with the EU were completed and **the text of the Romania Accession Treaty agreed upon**, subsequently signed in April 2005.
- following the presidential elections in 2004, the New Chief of the State, President Traian Băsescu, in a personal political action and in complete collision with the constitutional provisions, promoted an heterogeneous coalition bringing together a left-wing party at that time (Democratic Party) and a right-wing party (National Liberal Party), coalition that lost elections with a difference of 6.9% in favour of PSD+PUR Union. ***Claiming, as back as during electoral campaign, that the main problem of Romania is a systemic one and consists of perverting the constitutional order of the post-totalitarian Romania (the “infamous system”) on the grounds that the State Chief, the only person who could restore the rule of the law, has restricted powers, President Băsescu promoted perseverant and coherent politics meant to institute a neo-Cesar like regime characterised by a reparative and antiparliamentary rhetoric and authoritative-populist initiatives and measures. Disregarding the fact that such justification mechanism has been, due to various and more or less honourable reasons, praised by some and criticised by others, there is practically a general consensus with respect to its reality, few doubting its true nature.*** Therefore, the subsequent period was the witness of the incessant actions of the President to institute political instability by permanent and sterile attacks against the other institutions of the State – against the Parliament, Government and judicial system, simultaneously with the dictation in the Executive Body and Prosecutor’s Office of reliable, obedient persons, easy to be blackmailed or lacking any professional or political substance;
- **the analysis of President Traian Băsescu’s actions indicate a fact less reflected in mass media: the State Chief main concern was to remove prosecutors and judges.** As per a comparative analysis of Traian Băsescu (January 2005-April 2007), Emil Constantinescu (1997-1999) and Ion Iliescu (2000-2003) mandates the current Chief of State made 1211 removals of prosecutors/judges, Emil Constantinescu - 92

and Ion Iliescu - 62. These figures are an undisputable argument of justice over-politicisation by Traian Băsescu and Monica Macovei;

- Promoting a policy meant to weaken the State's institutions, Mr. Băsescu managed to infiltrate in the Government or other public institutions **persons, who in various times, failed to act for the interest of democracy and justice in Romania, but on the contrary, to serve the interests of the political battle and presidential agenda** by compromising and neutralising the political opponents of the President. The most eloquent example is the appointment of a Minister of Justice, supposedly „apolitical” in the persons of Mrs. Monica Macovei among the pseudo-activists of the civil society who acted as disguised electoral agents during presidential campaign. *The main concerns of this Minister brought in outside the “political class” under the flag of a government instated despite the electorate will were: a) political subordination of investigation bodies and set-up of sui generis institutions, unknown in a democratic world, able to be employed as harassment instrument against precise political targets; b) to generate tension among the executive body and weaken it; c) to compromise Romania's image before the EU courts which, out of interest or ignorance, have believed that Romania needs a particular internal and international treatment in order to tackle the domestic corruption and not to contaminate with its corruption the alliances and organisations to which the country is member to (such actions continued even after Mrs. Macovei left the Government of Romania and accepted the office of counsellor of Macedonian Government financed by the Government of Great Britain); d) to cast doubts on certain investment projects agreed upon by the previous governments (which objectively had the power to remove some of the former economic partners in order to make room to new economic agents in the Romanian market), simultaneously with the occultation of the foreign economic agents liable of being suspected to attempt to corrupt the Romanian authorities (no significant trans-national company lobbying more or less fair in the Romanian market was the target of the reparative action of the Minister of Justice or prosecutors within institutions established by the referred minister to this purpose, which confined to investigate insignificant favouritism cases or to criminalise certain political opportunity internal decisions; e) harassment, prosecution and indictment by a “TV-justice” system of persons considered the political opponents of President Băsescu.*
- the first measures implemented by Monica Macovei, consisted *in cancelling prosecutors' independence, amending the valid legislation to this purpose, so that they could no longer be appointed by the President of Romania at the proposal of the Superior Council of Magistracy, but at the proposal of the Minister of Justice.* Such a measure, promoted by Emergency Ordinance in order to elude parliamentary debate, **re-enacted the legal regulation and, implicitly, the fight against corruption at the level of 2000**, just prior to the point in time when negotiations for Romania accession to EU had began. Thus, Romania restored, from ideological and general political reasons, a judicial system obedient completely, in terms of fight against corruption, to the executive. **The prosecutors' independence and their**

possibility to decide on independent basis in the files prosecuted were cancelled. Such a measure was imposed in breach of Romanian Constitution, the only a constitutional authority permitted to interfere in the internal affairs of justice being the Superior Council of Magistracy – the guardian of justice independence (art. 133 of Romania Constitution). These legislative amendments are unacceptable and inconsistent with the democratic principles of a Member State of the European Union, but they have been illustrated to the European officials as a political victory in the fight with the Romanian atypical chronic deficient political system.

- ***The European Commission has proven ambiguity and inconsistency, accepting such modifications, although in prior the European officials themselves asserted the extension of the prerogatives of the Superior Council of Magistracy and withdrawal part of the Executive.*** Although questions have been formulated in the European Parliament requiring the Commission to clarify some of these inconsistencies, no explanation has been provided so far.
- Change of the procedure under which prosecutors are appointed, or in other words, **politicisation of the Prosecutor’s Office is the decision resulting in all the failures and shortcomings in the fight against corruption and implicitly of the conflict, correctly identified under the Report from the Commission on Justice, between the Romanian State institutions involved in the fight against corruption.** It is surprising that the Commission experts, in the Supporting Document accompanying the Report (page 12) make an aberrant statement, sustaining that maintaining the actual system of appointment of prosecutors, unchanged since the last Report from June 2007 (*system which is in breach of the community legislation provisions, acquis conditions of Chapter 24 JDA and Romanian Constitution*) is a positive element, and in order to ensure further on the stability of the fight against corruption it would be advisable that the appointment procedure remain the same. Such a statement proves either a profound unawareness of the Romanian regulations or an unexpectedly bad-faith. Whatever the case, it is more than obvious that it represents the echo of the media disinformation campaign of the Presidency and former Minister of Justice Monica Macovei (see for reference the public conferences and declarations of Mrs. Macovei during the “private” visits in Brussels during the past months).
- Another measure promoted by Monica Macovei, in contradiction with the constitutional provisions is the **possibility of the Minister of Justice to exercise, at his/her own initiative, control over the prosecutors as to their conduct of duties.** Practically, the executive representative – the Minister of Justice – has total control over the prosecutor’s professional career and activity, which equals to the political control over the prosecutor’s actions and implicitly over the act of justice. Our opinion is that such provision is unconstitutional. As per the powers of this ministry, the authority of the Minister of Justice over the prosecutors is a technical-administrative one. It cannot justify interferences in the professional duties of the prosecutors, as the prosecutor is autonomous and subject to the law only in his rulings (art. 66 paragraph 1 of Law 303/2004). Through the instrumentality of such

a measure, a significant pressure was exercised during the first month of D.A. Alliance governing upon the National Anti-corruption Directorate and General Prosecutor's Office. They were rebuked for the "inefficiency" in the indictment of certain political opponents of the President. (As in turn the Romanian Parliament is now rebuked by experts of the European Commission for the delay in indictment and trial of approximately the same persons. A coincidence which, ignoring the benefit of the doubt and justice independence, does not convince, but spreads suspicions). There are a lot of reasons to conclude that such a fact finally lead to the resignations of the two governments, on various pretexts.

- In this political context, what is generally named as "fight against corruption" reflects the **vision over society of the neo-conservatory ideology, promoted by the so-called "civil society" from Romania**, in the entourage of Mr. Traian Băsescu and his internal and external supporters. The role of this fake "civil society" in the public life is to be a resonance box for the presidential message, conferring the alibi of an intended neutrality and political objectivity. The public rhetoric of NGO-s network, initially supporter of D.A. Alliance, subsequently only of Traian Băsescu, had a significant effect on the atmosphere created by the debate on stopping corruption. Thus, *the fight necessary against the noxious phenomenon of corruption was diverted into the political crusade against the ideological enemy. This explains how the corruption, from a trans-partisan, trans-party and trans-national phenomena, became the "feature" of a single party – the left-side party – and of its occasional allies (among all parties less the presidential one), as well as the personalisation of the action against corruption.*
- Under such circumstances, on one side, the battle with the corruption "ogre" has begun to be described in a Manichaeism manner, becoming a battle between "angels" (DNA chief, Daniel Morar is a "fearful knight) and "demons" (especially the members of the parliament eluding any liability) and on the other side, the progress is measured against judicial conviction of persons already convicted by the media. **The main natural consequences of this approach are: a) the corruption causes and the action against them are completely ignored, the single concern being the symptoms of the corruption; b) the big corruptors are not sought for, or the high profile corruption acts inquired, all being confined to the forced confirmation of a pre-defined conclusion with regard to certain persons, "accidentally" public personalities critical about the President.**
- ***CURRENTLY NO ONE CAN ASSERT THAT THE PUBLIC PERSONS ENVISAGED BY THE "PRESIDENTIAL AGENTS" ARE NOT GUILTY AS FAR AS THE CHARGES AGAINST THEM ARE CONCERNED. NO ONE CAN ASSERT EITHER THAT THEY ARE GUILTY. IT IS CERTAIN THAT THE POLITICISATION OF THE FIGHT AGAINST CORRUPTION HAS LEAD TO THE LOSS OF TRUST IN ANY CHARGE REGARDING THE PERSONS PUBLICLY AIMED, AND THE HALT OF ANY SEARCH OF THE POSSIBLE TRUE GUILTY PERSONS IGNORED BY THE PUBLIC OPINION.***

- **The agitation more than the anti-corruption action in Romania triggered consequences and sometimes external impulses.** There are insignificantly analysed the international meanings and reasons of the debate about the corruption in Romania. There are more levels of the issue:
 - i) ***Romania is a second-hand member of the European Union due to the characterisation as a country affected by endemic corruption,*** its interests sub-represented, due to this stigmata and its power of negotiation is decreased pending the threat of the “safeguard clause”;
 - ii) ***The fight against corruption was employed as an instrument for the acquisition by foreign companies (in particular occidental and trans-national companies) of certain advantages in the Romanian market and economy,*** especially during the negotiations for Romania accession to the European Union and post-accession period. It is not accidental that the fight against corruption refers to only Romanian politicians and officials, but it is missing the second element, the ***corrupter***, frequently important companies established in the States accusing the Romanian corruption and in close relationships with their governments. The large “successful” companies in Romania had often had in their entourage occidental politicians. This explains the confusion between the “high level corrupts” – meaning persons holding or having held important offices” and “high level corruption”, which involves the distortion of the macro-relations between demand and supply in the Romanian market or European market deriving from the illegal transfer of public funds to private property (either important contracts without any auction or contracts granted preferentially). The European Commission seems to have no concern in the absence of the high level corruption on the list of charges against those on the list of allegedly “high level corrupts”.
 - iii) Not all foreign companies coming to Romania and willing to promote their interests by corrupting Romanian dignitaries succeeded. Consequently, there arises the suspicion that **certain external charges originates in the “corrupters competition”**. Those who lost such competition **may attempt to take back their chances and re-enter the game attacking the Romanian corruption they could not benefit of**. These charges paradoxically signal that Romania is not, according to the opinion of failed corrupters, sufficiently corrupt (sic!). In so far as such a phenomenon cannot be excluded, it explains part of the external actions which irrationally and unusual support the politicisation of the fight against corruption promoted by President Băsescu. The article in the British newspaper *The Economist* arguing (in an unconvincing manner) for the maintaining in office of Daniel Morar, DNA chief, a colourless and an completely unknown character to the British public, cannot be explained otherwise.
 - iv) **The fact that the Euro-sceptical political forces (especially the British ones) are the most vehement in the critique against the corruption in Romania is explained in geopolitical terms.** Romania, owing to its Euro-unionist and Euro-integrationist position, a relatively big State, with a positive economic development over the EU average, may significantly influence the power equilibrium between the political Europe and the European market supporters.

The fact that the Euro-sceptical employ the argument of Romanian corruption in order to request exclusion of Romanians from the debate regarding the future of the EU or to demonstrate that a federal EU is intended by the corrupts because the decrease of the influence of the large occidental “honest” States in favour of the community institutions would favour them by facilitating the theft, it must be understood as a consequence of a game with more complex geopolitical nuances. It directly or indirectly pursues to marginalise and deprive of international influence certain countries, such as Romania. The stigmata of “corruption of the new Eastern members” may serve the consolidation of the new comers as potential competitors inside EU, as well as promoters of a more democratic EU. The Euro-sceptical attitude towards the Treaty of Lisbon and the failure of the referendum in Ireland, correlated with the radical rhetoric against Bulgaria and Romania, in the matter of corruption, support such an interpretation.

II. Technical assessment of the main conclusions of the Report from the European Commission

Conclusion of the Report:

1. “The performance of the judicial system is hampered by legal uncertainty due to many factors, including an uneven application of the law and the excessive use of emergency Ordinances. It will take some time for the reform to take firm root.”

COMMENTARIES

a) As demonstrated in the first part of this review, the PNL-PD Government promoted, disregarding the initial commitments of Romania towards European Union, a range of legislative amendments in the field of justice organisation which has made the judicial system a subordinate to the executive body. This was implemented exclusively through Emergency Ordinances and systematic avoidance of the Parliament, but pursuing to satisfy the wishes uttered otherwise publicly by the Romania President. Thus, there is no doubt about the coincidence between the respective amendments and the presidential exigencies.

This is the very reason entailing the open conflict between the Parliament and President. The latter attempted, by political methods which are evidently in violation of Romania Constitution, to exclude the Parliament from the debate on the judiciary reform, although the Parliament is the one who restored in 2004 the complete independence of justice, implementing the principles of community *acquis*.

We can infer from the EC Report that excessive use of Ordinances lead to legislative instability and uncertainty. The observation is precise. Unfortunately, the Commission fails to refer to the democratic deficiencies of such procedure. But a serious omission is represented by the absence of any reference to the contents of this fluctuant legislation. What is the relation between the certain disadvantage of the legislative instability and the allegedly advantage of qualitative changes? The Commission lack of retort makes us conclude that the amendments were not necessary and overall they have done more wrong than good. Otherwise, they would not be referred to in a critical tone.

Nevertheless, the Commission should establish the conformity between the legislative amendments and EU regulations, as well as the amendments and usages of the other Member States.

b) On the other side, **we cannot understand what the critique regarding “uneven application of law” from a document on justice refers to.** If such a critique could have been understood as reference to the State administrative bodies’ uneven application of law, the reproach cannot include the justice as well. Jurisprudence is not in Romania a law source, except for the decisions of High Court of Cassation and Justice, rendered in the appeals in the interest of the law, the only decisions binding upon the courts as to the consistent application of law in concrete cases identified in practice and legislation. Otherwise, in the Supporting Document accompanying the Report from the European Commission (page 3) the valutors proved good knowledge of the legal and constitutional regulations, noticing that the decisions made by High Court of Cassation and Justice (HCCJ) in the appeal in the interest of the law are the only element meant to determine an even application of law¹. Consequently, **the *uneven* interpretation and application of the law demonstrates that that magistrates are acting independently, and this is an overriding guarantee after the Prosecutor’s office subordination to the executive body in 2005 and its employing as political weapon.**

The Supporting Document accompanying the Report (page 4) contains a very serious statement, also advanced in the Report sustaining that the contradictory jurisprudence of the HCCJ in the cases of former dignitaries charged with corruption has impeded efforts towards coherent jurisprudence in the area. But there is a colossal confusion. **There is no high-level corruption case in which HCCJ has delivered on the merits of the case.** HCCJ has delivered only with respect to concrete procedural aspects which brought into discussion the conducting by the Parliament of actions similar to the criminal investigations in disregard of the law. These have not referred to the charges on the merits of the case.

EC should differentiate between the consistent application of law and the assessment on the situation on which a prosecutor shall rule. Where a prosecutor reviews the alleged corruption act, considers the benefit of the doubt and cares for observing the individual rights and freedoms of the person investigated and the essential trial guarantees enshrined in the jurisprudence of the European Court of Human Rights in Strasbourg and European Court in Luxembourg. In light of the above, the magistrates examine the case and evidences produced and establish a trial measure. Precisely **the fact that most of the high level corruption files envisage the political opponents of President Bănescu, instead of corruption deeds and are judged at order results, on one side, in the forced application of the law as to the case “needs” and on the other side, in the dismissal of trial measures rendered in order to confirm the conviction, and not to clarify its reasons and correctness. The abandonment of fight against corruption due to its politicisation by DNA lead to the uneven application of the law, and not the HCCJ decisions which were an attempt – and a success otherwise – to annihilate the effects of such politicisation. Practically, the HCCJ asked the prosecutors to have consistent**

¹ It is noticed the progress between June 2007 and June 2008, when 83 appeals were filed in inters of the law, of which 60 were admitted, 4 dismissed and 19 are pending.

application of the law in identical cases, not consistent application in different cases and uneven application in similar situations.

However, it is worrying the fact that in this case likewise many others, the EC Report fails to produce arguments, evidence, examples besides statements in support of the conclusions.

Conclusion of the report:

2. “As concerns the reform of the judicial system, the Superior Council of Magistracy (SCM) as guardian of independence of the judicial system, has been allotted the human and financial resources necessary to allow it to assume its core responsibilities for judicial reform including to advise and act on pressing human resource problems.”

The Supporting Document accompanying the Monitoring Report (page 7) shows that despite its key role in promoting a transparent and efficient judicial process, the SCM has not yet fully taken responsibility for judicial reform.

COMMENTARIES

In fact, the reality is much different from the conclusion of the Report, because by successive amendments after January 1st 2005, the Superior Council of Magistracy was not rendered available the instruments necessary for free and independent intercourse of justice process, such legislative amendments infringing upon even the fundamental principle of separation of state powers following the operational and financial subordination of justice to the Government.

Thus, SCM assignment as main budget manager of the judicial power (courts) was legislated only beginning with 1 January 2008. Following such “direction change” in 2007, the duties regarding High Court of Cassation and Justice’s assuming the management of courts budget was postponed until 1 January 2009.

Moreover, a set of amendments of Law 303/2004 on the statute of magistrates and Law 317/2004 on the Superior Council of Magistracy were bound to annul the justice independence declared at the end of 2004 and to turn the fight against corruption from an objective of reforming the Romanian society in a political weapon employed for disposing of the political opponents.

Amendments of Law 303/2004 regarding the statute of the magistrates

- 1. Repeal of paragraph 1 of art. 8, which reads “the magistrates are not subordinated to the political objectives and doctrines” is the inception step for the subordination of the prosecutors to the political objectives and doctrines. This provision is contrary to the basic requirements of independence and of European Charter of Judges.***
- 2. Repeal of paragraph 2 of art. 9 according to which the magistrates are not allowed to make a comment or to argument in the press or audiovisual broadcasts on the decisions or solutions rendered, leaves way for public party-minded attitudes, of any kind, of the magistrates.***
- 3. The repeal of art. 41 limits to a simple consultative opinion, the capacity of the Superior Council of Magistracy to decide with regard to the entire professional career, including promotion of the magistrates. Such responsibility was assumed in 2004 by the Superior Council of Magistracy from the Ministry of Justice and represents a significant guarantee***

as regards the courts power independence. The provisions of art. 125, paragraph (2) of the Constitution are infringed upon, which reads that the appointment proposals and promotion, transfer and sanctioning of the judges lies with the Superior Council of Magistracy.

4. The introduction of 48¹, paragraph 1 “The appointment on the office of General Prosecutor with the Prosecutor Office seconded to the Court of Appeal, chief prosecutor of the county prosecutor office, chief prosecutor of the specialised county prosecutor office or chief prosecutor of the local prosecutor office and their deputies is based on a competition organised by the Superior Council of Magistracy, through the High Court of Cassation and Justice”, paragraph 5 “The examining commission is designated by the General Prosecutor of Romania...” and paragraph 7 “The General Prosecutor of Romania shall validate the result of the competition and propose to the President of Romania the appointment of the prosecutors to executive positions” are in breach of the provisions of art. 134, paragraph (1) of Romania Constitution which stipulates “Superior Council of Magistracy proposes to President of Romania the appointment to office of the judges and prosecutors, excluding the trainees as per the law provisions.”

5. The amendment of article 53 is the obvious proof that the political factor, represented by the Ministry of Justice, is reinstated in order to decide over the appointment or remove of the chiefs of the General Prosecutor's Office and National Anticorruption Directorate, up to level of section chiefs. Thus it is infringed upon the most important obligation undertaken by Romania in the negotiations with the EU in this area and also the provisions of art. 134 paragraph (1) of the Constitution which state that only the Superior Council of Magistracy may propose to the President of Romania the nomination of judges and prosecutors. There are laid down the basis for the political intrusion in the prosecutor's activity through the Ministry of Justice, as Government agent.

Amendments of Law 317/2004 on the Superior Council of Magistracy

1. Removing the syntagm which reads that SCM is “a representative of the judicial authority”, from article 1, paragraph 1, the provisions of art. 1, paragraph (4), art. 125, paragraph (2), art. 134, paragraph (1), (2) and (4) of Romania Constitution are infringed upon and it is attempted the taking over of the duties of the Superior Council of Magistracy by the Ministry of Justice and the political interference in the judicial authority, the minister of justice becoming a representative of the judicial authority.

2. Removing article 3 which reads “The Superior Council of Magistracy in the exercise of its duties provides the efficient functioning of the judiciary and compliance with the law during the course of professional career of the magistrates” the fundamental duty of Superior Council of Magistracy is annulled, regarding the efficient functioning of the judiciary and compliance with the law during the course of professional career of the magistrates and the provisions of art. 125 paragraph (2), art.133, paragraph (1) and 134, paragraph (1), of Romania Constitution. This results in the lack of independence of the Superior Council of Magistracy and consequently of the justice.

3. Introducing paragraph 5¹, of art. 39, “The Superior Council of Magistracy prepares annually a report on its own activity, submitted to the Reunited Chambers of the Romania Parliament until February 15th of the next year”. Therefore, the provisions of art. 1, paragraph (4) of Constitution which stipulate that “The State is organized based on the principle of separation and equilibrium of powers– legislative, executive and judicial – in a

constitutional democracy“; the provisions of art. 124, paragraph (3) of constitution which stipulate that “The judges are independent and subject only to the law”, the provisions of art. 133, paragraph (1) of the Constitution which stipulates that “The Superior Council of Magistracy is the guardian of justice independence” and the provisions of art. 1, paragraph (5) of the Constitution which stipulate that “In Romania, the observance of the Constitution, supremacy hereof and of the laws is mandatory.”

Therefore, the conclusion of the Report which reads that **“While the Superior Council of Magistracy is well established, it has not yet consistently exercised its full mandate, notably as regards pro-active investigations into disciplinary cases”** it is not entirely accurate. Where a restriction of its powers by their assignment to the executive body, SCM could not do more. Likewise, **the complicated and complex division of the duties between the executive body and SCM has spread confusions which makes SCM role quite unclear.**

SCM has accomplished the progress by its own strength. But the Government took care, through Government Ordinances, to curtail SCM real possibilities and it is no longer the single constitutional guardian of justice independence in the process of establishing a transparent and independent justice against the unjustified interventions of the executive body and persons responsible for the appointment of the anti-corruption prosecutors. **The role of SCM in appointing and promoting prosecutors is reduced to a consultative opinion.**

The legislative amendments mentioned above have significantly weakened SCM powers and strengthened the influence of the executive on justice, annulling completely the prosecutor's independence.

Conclusion of the report:

3. “Despite good progress on the investigate side, Romania can show few tangible results in its fight against high-level corruption”.

[...]” No real progress has been made in ten key cases involving former ministers. This is partly due to Parliament having blocked the investigation and partly to dismissal of the cases by High Court of Cassation and Justice which overturned previous decisions. The failure to move on these cases undermines the positive efforts undertaken at pre-trial level”

[...]” while there is a strong will by the prosecution to achieve tangible results at the pre-trial phase, the same determination is not demonstrated throughout the judicial process.”

[...]”The politicization of corruption cases by the Romanian Parliament and the failure of the judicial system to deliver sentences in high-level corruption cases have weakened the public perception of respect for the rule of law.”

[...]”Only firm and deterrent convictions in high profile cases will demonstrate in a convincing manner that the system works. The existing structures should allow Romania to produce effective results in the fight against corruption.”

COMMENTARIES:

a) The first serious aspect we notice in the conclusions of the Commission experts is the focus on the “achievements” of the Prosecutor’s Office and the censure against the core

democratic institutions, such as the Parliament, Superior Council of Magistracy or High Court of Cassation and Justice. Nevertheless, ***Romania is a Member of European Union and in no case a Police State or a new “republic of prosecutors”. The EC preference unsupported with facts for the prosecutors appointed by the executive as against the Parliament elected by the citizens is at least bizarre in a democratic world and cannot remained unsanctioned.***

b) Two assertions deeply inaccurate give rise to suspicions of incompetence and bad-faith.

- Thus the assertion according to which the “***Parliament barred the criminal investigation***” is incorrect as long as the criminal investigation of the members of the parliament enjoying immunity as all European members, is commenced only at the Parliament decision. Consequently, the Parliament could not stop a procedure which itself was called up to initiate. If the prosecution of the members of the parliament had started without Parliament’s approval, such action would have been illegal.
- If it were the investigation of persons who were not members of the Parliament in question, the Parliament could not have stopped it and had not done it either.
- However, the duty of the Parliament to authorise the withdrawal of immunity and initiate the investigation procedure against its members entitles the legislative to take steps in any way whatsoever, either to withdraw or not to withdraw immunity. This procedure is set forth in the Constitution and recognised in all EU countries. There is no reason that rules accepted throughout entire European Union to be censured in Romania.
- The Parliament does not make an abuse in the exercise of its rights. These rights and parliamentary immunity as well are not a privilege in favour of the parliamentarians but a right of the citizens who wants to be assured that their elected people may exercise the mandate entrusted, free of any pressure and harassment. That’s why the parliamentarians cannot give up immunity unless by a resignation.
- In order to decide over the matter of withdrawing immunity, the Parliament does not judge the merits of the case, but establishes the opportunity to initiate the action on the basis of the plausibility and seriousness of the criminal facts which the parliamentarians concerned are very likely to have committed. From the position of essentially political institution, the Parliament shall take the decision assuming the political liability before the electorate; the only who can censure and sanction it. It is true that the guilty persons may escape this way. But no innocent shall be harassed instead. It is true that this system, although quite democratic, is imperfect. No one has claimed that democracy is perfect. It is however, the best system of organisation of the society. The alternative is the dictatorship.
- The second assertion accuses the absence of any progress on the account of “**dismissal of cases by HCCJ**”. As shown, no case has reached to be examined by HCCJ so that to be admitted or dismissed. It could not reach if investigation had not started yet, as stated by EC. So, neither the Parliament nor HCCJ have exonerated anyone. In certain cases the law courts dismissed trial acts of the Prosecutor’s Office in breach of the law. An old legal concept reads that *Res judicata pro veritate habetur* (A matter judged is in lieu of the truth). This means that the final judgments

cannot be debated or censured by anybody. The European Commission seems willing not only to infringe upon this principle but to require the Romanian political factors to proceed with it.

The Supporting Document accompanying the Report (page 11) launches a false statement, distorting the entire reality of the fight against corruption in Romania: “The number and profile of new investigations initiated by the DNA shows a good track record of non-partisan investigation into high level corruption, however the courts have not increased their delivery of dissuasive sanctions in the majority of cases.”

c) The key cases referred to under the Report (DNA has prosecuted 17 high profile cases) concern former and in-office ministers, members of PSD, PNL, PC and UDMR. ***Despite the benefit of the doubt, the EC considers them guilty and the success of the fight against corruption is equal to the success of the fight against them measured in the number of sentences delivered and years of convictions which shall officially confirm the pre-defined guiltiness.*** Such an approach is unacceptable; at least until the EC shall produce the evidences supporting the belief that the accused are guilty.

It is true that the fight against corruption cannot be regarded as a success if the high level corrupts is not revealed. This is the stance from which to consider the failure.

The reasons for the failure of the fight against corruption must be sought for in the prosecutors’ haste to charge the opponents of President Băsescu, within institution subjugated to him. The real objective of DNA is not to conduct real investigations, but media campaigns, in violation of the principles under the Co-operation Mechanism, pursuing not to deliver in files or investigations procrastinated for years but to destroy the public image of the opponents of President Băsescu and Democratic-Liberal Party (PDL), the presidential formation. The analysis on the manner the criminal investigations have been conducted by the Prosecutor’s Office and DNA come to support the conclusion that we deal with the TV-justice mechanism: the systematic leaks of information from prosecutors to mass media, the organisation of investigations and inviting the press at the time the dignitaries appear for hearings, searches transmitted live on television (Adrian Năstase case) or even the provision of records on a possible flagrant (Decebal Traian Remeș case) to the national television station.

d) The Supporting Document accompanying the Report from the European Commission (page 11) shows that DNA has prosecuted 17 high profile cases, also reproaching that of three of them, each concerning former ministers, were returned to the prosecution by the HCCJ in view of other investigative acts, either based on a Constitutional Court judgement or procedural grounds which may will nullify all of the investigative acts carried out by the prosecutors in that case.

The Commission officials are aware of the facts but they do not understand their meaning. If HCCJ applies a decision of the Constitutional Court or returns a file on grounds of nullification of the investigative acts, this indicates, in any state of law, that there are problems with the prosecutors incapable of conducting an investigation and respecting the human rights, trial guarantees and public order and the Constitution. Instead of uttering accusations against HCCJ and praising the prosecutors, it should be debated the professional and property liability of the prosecutors for unjustified expenditure of the budget resources in conducting investigations dismissed by the magistrates.

In the absence of any concrete argument meant to lead to the conclusion that justice is wrong and we are facing judicial errors, it cannot be overlooked the premise the European Commission relies on: the role of the justice is to convict. Thus, the European officials cancel the benefit of the doubt and consider that there should be convictions at any price. We are dealing subjectivity in this case, even ante-rulings and interferences which prejudice the justice independence. *Although politicisation is condemned, the European Commission conclusion exercise political pressure over judges who may be reproached anything but obedience to the holders of political powers. Although the EC denounces the lack of independence of justice, it seems annoyed precisely by the judges' independence.*

c) Contrary to the conclusions of Commission experts, we need to exemplify the concrete involvement in the most spectacular cases of high-level corruption after January 2005.

Dinu Patriciu case. Dinu Patriciu, businessman, proficient member of Liberal Party and well-known redoubtable opponent of President Traian Băsescu (opposing the co-operation between PNL and PD and the idea of forming a mega-presidential party from the merger of PNL and PD) was the first victim of the General Prosecutor's Office. The files fabricated against him by the prosecutors contain a series of confusing accusations, regarding Rompetrol privatisation (one of the largest Romanian taxpayer after its privatisation, meanwhile sold to KazMunaiGaz from Kazakhstan) and the taking over of Romanian State receivables in Libya, all resuming to recurring requests of Public Ministry to place under the arrest the businessman, requests which did not find result before the courts, which considered the grounds and evidences produced absolutely insufficient and inconclusive. It could not be asserted that two courts (Bucharest Law Court and Bucharest Court of Appeal) would have feared to approve the arrest the businessman if guilty. After the parade of arrest-attempt for more than three years, the file is pending with the Prosecutor's Office, as it was not lodged with any court of justice in the absence of serious charges and supporting evidences. Moreover, after the failure of the Prosecutor's Office to arrest Dinu Patriciu, he succeeded in winning a lawsuit against the Romanian Intelligence Division, which illegally tracked the calls of the businessman and his company.

Corneliu Iacubov case. The businessman Corneliu Iacubov, subject of Traian Băsescu speeches during the electoral campaign and former remarkable member of PSD was placed under arrest at the order of the Prosecutor's Office attached to HCCJ for a period of three months, and released subsequently, being tried of charges of corruption and other economic crimes, tried and acquitted by Bucharest Law Court. Currently, Corneliu Iacubov has already filed a complaint against the Romanian State with the European Court of Human Rights in Strasbourg, claiming for compensations corresponding to the three months period of illegal imprisonment.

"Espionage and high treason" case. In the political battle drawn after 2005 among the governance allies (PNL and PD), when former Minister of Economy (Codrut Șereș of Conservatory Party) in the first Călin Popescu-Tăriceanu government made public the interventions regarding the preferential sales of energy in which economic interest groups

close to President Băsescu were involved, the Prosecutor's Office attached to HCCJ, as a veritable presidential political instrument, fabricated a file on the espionage of Minister Șereș and Minister Nagy (former Minister of Communications) in favour of foreign powers, file in which even consultants of reputable foreign investment banks and other ministerial high officers were involved. After the ministries were dismissed, investigated, subject to an unmatched denigration campaign in the media, at the end of July 2008 (subsequent to the Commission publication of the Monitoring Report) the DNA prosecutor handling the case ruled that no criminal investigation is to be conducted on the account of bribe taking, but for espionage. Once again, as a veritable political instrument, the DNA higher hierarchical prosecutor, within a matter of few days when the press wrote about the failure of the fight against corruption, dismissed the ruling and ordered for the continuance of investigations.

Teodor Atanasiu case. Former Minister of National Defence stands as a school case when to illustrate how Traian Băsescu is employing the prosecutors to dispose of the political opponents. Teodor Atanasiu endorsed Tăriceanu Government initiative to start the procedure for retiring the Romanian troops in Iraq. Without delay, Adriana Săftoiu, Presidential counsellor, filed a complaint with the Prosecutor's Office under which accused the Minister of "committing transgressions such as communicating false information, abuse against personal and public interest". Consequently, the General Prosecutor's office opens a file. By way of a Presidential Ordinance, because ministers are revoked from the office during investigation in accordance with the Constitution, the Minister was suspended during the preliminary investigation. President Traian Băsescu instead fails to revoke the suspension, despite the fact that subsequently the investigation has been ended and concluded that inquiry was not justified. Thus, after the elapse of the legal framework prescribed for maintaining the mandate of a member of Government unable to accomplish his duty, the Minister is considered demitted. He was afterwards involved in other criminal files.

Tudor Chiuariu case. The case of Tudor Chiuariu, former PNL Minister of Justice, was following the same pattern: after a conflict with Traian Băsescu because he intended the revocation of Chief Prosecutor Doru Țuluș, on the grounds of DNA inefficiency. Romania President denied the request of the Minister of Justice and immediately after DNA started the investigation against the Minister. He was revoked from the office and subsequently Tudor Chiuariu submitted his resignation, in order to avoid dismissal. The criminal investigation did not reach before the judges in his case, the file being procrastinated. "The corruption act" he is accused of refers to "abuse in office", namely decisions concerning the political opportunity area. Unfortunately the Romanian Criminal Code continues to criminalise such deed as its constituent elements are so vague that allow to charge anyone where an inconvenient decision.

Adrian Năstase case. Former prime-minister of Romania and counter-candidate to President Băsescu in the race for the presidential chair was the favourite victim of DNA prosecutors, at the orders of President Băsescu. Thus, politician Adrian Năstase has been "fabricated" files which only wording demonstrates the prosecutors' dilettantism and the political vendetta behind them. In one file Năstase is charged with taking bribe for some thermopane windows; in other file is charged with taking bribe for sustaining Ioan

Melinescu's position as official with the Office for Money Laundering etc. Therefore a natural question is posed: a political person who had extended constitutional and legal possibilities for 4 years, who was the leader of a government implementing scaled up privatisations in Romania (such as Sidex, Petrom), who had access to all the economic levers and could have been corrupted in various cases and circumstances, is now charged with taking bribe for the windows of his house? So it is quiet natural that the ridiculous of DNA charges to be reluctantly regarded. Or this exhausts the list of the imputable deeds and we are dealing with "high-profile corrupts" lacking the high-level corruption or there are other imputable deeds (apparently known by the EC officials considering the terms of the Report) but undisclosed due to unclear reasons.

"Fleet case" and "House of Mihăileanu". While the political opponents of Traian Băsescu were the subject of ample harassment campaigns of the prosecutors, supported by pro-presidential mass media, the same prosecutors made all efforts to exculpate the State Chief in office. Initially, Daniel Morar invented a supra-immunity for Traian Băsescu, ruling that the State Chief cannot be subject to criminal investigations during his mandate, although the Constitutions enshrines equal immunity to the President of Republic and the parliamentarians as well. Subsequently, in the case of Traian Băsescu's self-granting a house from the public property, while in office as General Mayor of Bucharest, disregarding the legal rules in effect, the prosecutors have forthwith delivered the decision regarding no criminal investigation be conducted. The "Fleet case", relating to the supposedly onerous sale of almost 300 ships, the prosecutors ordered a new survey, according to which there are no losses in the case of Romanian fleet privatisation, although a survey from 1999 indicated prejudices of over USD 300 million. Thus, Daniel Morar triumphantly announced in February 2008, after ten years of investigated acts, that Fleet file is closed, ruling no criminal investigation against all accused persons. Thus Traian Băsescu maculated its own past, through the instrumentality of the prosecutors.

EC Report does not seem to show any concern about the fact that the list with the accused persons include only persons pertaining to a certain political wing, excluding the State Chief and his political friends, or that the number of prosecutors appointed by the President, after 2005, during his mandate, exceeds much more the number of prosecutors appointed in previous corresponding periods.

d) Descriptions of such cases of failed corruption may continue. But the obvious fact is that all high profile cases of corruption made public in Romania so far are not supported either by serious legal assertions or evidences to endorse the suspicions. There are files fabricated by prosecutors at the political order of President Băsescu or Monica Macovei, former Minister of Justice. **It is natural that owing such circumstances, the files to be dismissed by magistrates who possess certain independence as compared to the prosecutors.**

In this context, it must be highlighted that the investigation of the former parliamentary ministries conducted only pursuant to Romania Parliament assent was established by the Constitutional Court through final decision and represents the official interpretation of Romania Constitution. Where the Prosecutor's Office or DNA requires the assent to institute criminal proceedings against a former parliamentary minister, the

Parliament has the right and obligation to examine the grounds hereto. It is normal, that facing prosecutors' flagrant mistakes, which resulted in the public discrediting of certain persons, subsequently proved innocent, the Parliament to be cautious when examining whether a similar request is not earnest and serves the purpose of a political denigrating campaign. In fact, the rule of parliamentary immunity reflects the principle of separation and equilibrium of powers. The Government should not be allowed to harass the opposition on the grounds of fighting against corruption. The judicial power should not be alone when deciding over the representatives of other power. It should be either autonomous to them, which should rule out the politicisation owing to the executive appointment of prosecutors. As concerns the Members of the Parliament, most of them avoid to abuse the right to withdraw immunity as they are aware that they will be subject to the same treatment when on the other side, and the opposition shall avoid scandalous subjectivisms because the procedure transparency, as the Parliament specifies, exposes it to the public judgment and then electoral sanction.

e) Moreover, it needs to be underlined that according to the actual regulatory system DNA shall not request the Parliament's assent to submit for trial a file completed, but shall request only the assent in order to institute criminal investigation, respectively the phase of the inquiry and production of evidences to the prosecutors. As in Romania, due to the scheduled political refuse of former Minister of Justice, Monica Macovei, to promote a New Code of Civil Procedure, the Code of Criminal Procedure from 1965 is still applicable and fails to indicate a time framework within which criminal investigation to be conducted. Where the Parliament shall give its assent for criminal investigation, such investigation shall continue until after the next elections, without any finalisation and any file lodged with any court to allow the persons investigated to prove their innocence, using in exchange the media in favour of President Băsescu in his battle to win a new mandate as President. In this context, the requests of DNA and Prosecutor's Office to Romania Parliament for the assent against Adrian Năstase in particular, entails a new connotation, if to consider that the latter expressed his intention to candidate to future presidential elections. It is vital for Traian Băsescu to destroy the public image of Adrian Năstase, and Băsescu is using the prosecutors in this political battle. We believe that this is not the justice the European Union experts intend for Romania. The figures are a testimony by themselves. It is quasi-abnormal to open more than 20 files on the name of Adrian Năstase, files successive closed due to the lack of evidences or because the deed did not fall under the Criminal Code.

f) We believe that the idea under the Monitoring Report suggesting that only the firm convictions in the high profile cases would demonstrate Romania's determination in the fight against corruption is absolutely erroneous.

- First of all it must be ascertained whether there are real corruption acts so that one can say that convictions should be in place. It is a matter of principle that according to the criminal law the prosecution starts *in rem* and completes *in personam*. To put it otherwise, initially it should be established the crime and then identified the criminal. EC has failed to produce any evidence or information concerning the corruption deeds which it is so concerned about it. There are serious grounds to believe that, in fact, the EC keeps secret such facts as they involve important persons from other Member States of the EU, which it understands to protect. The

fight against the alleged corruption in Romania shall be nothing but a farce as long as no relevant information regarding those persons is provided. Until that time, Romanian corruption shall pertain to imaginary and serve the purpose of internal or external politics.

- As concern the initial phases of the procedure, the European Union officials cannot require the Romanian Parliament or law courts to turn into simple agents to authenticate the charges of the prosecutors and executants of the actions dictated by prosecutors.
- **Generalisation of the quantitative criteria in the fight against corruption turns the scope of the justice system into the search of guilty people and does not justice to them. Such approach is dangerous for the democratic system itself.** No one can rule with respect to the culpability of other persons. The Constitution of Romania similar to all constitutions of European Union's States enumerates among its fundamental principles, the benefit of the doubt. Delivering on somebody's culpability and enforcing a criminal sanction by a court law conviction is legitimate only pursuant to a lawsuit during the course of which fundamental human rights and all judiciary trial guarantees inherent to a democratic state shall be respected. ***Conviction is not important, but people's belief that no guilty person can get away with it.***

This is maybe the only gain – which the EC Report fails to indicate – deriving from anticorruption ritualistic agitation during the past years: all come to fear that they may be accused and punished for being corrupt, without knowing when, where and why! Such an uncertainty feeling increase the cautiousness of those tempted of committing corruption acts. This would explain either the decrease of corruption or sophistication of its methods or both of them.

g) The public opinion loss of trust in the fight against corruption does not result from the failure of the magistrates to deliver a sentence in the high profile cases, as these cases are in 90% situations fabricated and never on the table of the magistrates for ruling in respect thereto. The doubts result from the Executive and President persistence in conceiving files to the political opponents, files that fail at the examination even of the obedient prosecutors. Such loss of confidence derives from the fact that only opponents of President Băsescu and PD-L are being investigated, while the economic interest groups around the President (mass media talks about the business protected by Traian Băsescu for Costel Casuneanu, Dumitru Bucсарu, Dumitru Becsenescu, Elena Udrea-Dorin Cocos) have made fabulous fortune from fraudulent contracts concluded with the state, and DNA has not instituted proceedings against any of them, although numerous complaints and claims were voiced from mass media.

The loss of confidence lies in the fact that former Minister of Interior, Vasile Blaga (secretary of PD-L and close man of President Băsescu), pretends in his fortune declaration that he would have taken a loan of Euro 800,000 from a controversial businessman and UDMR politician in order to justify the inexplicable increase of his real estates during his mandate. DNA failed to take any measure in such case. Presentation of such cases can continue, but the conclusion is one: ***the lack of tangible results in the fight against high-level corruption owes exclusively to its politicisation.***

Conclusion of the report:

4. Romania has also made progress with the establishment of the National Integrity Agency (ANI) [...] it is too early to judge if the legal mandate of the National Integrity Agency is sufficiently robust. The supervisory role of the National Integrity Council can only be judged on the basis of its future track record.

COMMENTARIES

Romania has adopted the entire legislation necessary to the establishment of the National Integrity Agency which has already started its job and applied 68 fines. Mention should be made that the National Integrity Agency is only an organism conducting investigations with respect to the circulation and increase of dignitaries fortune during their political or administrative mandate, with no duties relating to the manner they acquired such fortune neither before or after the expiry of the mandate.

Likewise, except for a series of fines for violation of rules of procedure relating to the filing or updating of the fortune declarations, ANI does not have the role to enforce sanctions, but to investigate and where they perceive some criminal activities, to notify the prosecutor's office or law courts. Therefore, ANI's results shall need to be appraised even further on against the functioning of an extended mechanism of supervision of people's honesty subject to this law. Nevertheless, an observation seems relevant and namely that the lawmaker enlarged extensively the range of the persons who may be subject to the investigations conducted by ANI. Therefore, the Agency may be hampered further on by the rife of duties.

Moreover, it needs to mention that ANI is an institution unmatched in the other countries of the EU. That's why there are grounded fears that its role in the fight against corruption shall be either prejudicial – owing excesses or errors, or marginal and irrelevant. That is why it is advisable to align the Romanian institutions (among which ANI) to the best directions and practices in the EU, and improve them according to the European models they inspired form.

III. Conclusions

1. It is alarming that the progress in the fight against high level corruption in Romania is resumed, according to the opinion of the “European officials”, to the trial of former Romanian dignitaries charged with minor deeds, and the success in the fight against corruption to their conviction. It is inadmissible and also ridiculous, to consider that the high level corruption resumes to minor favouritisms and services obtained at no cost, adding a paradoxical dimension to the corruption in Romania. According to this vision, *the corruption in Romania is only “corruption without corrupts”, but becomes “high level corruption without high profile corruption cases”*; *in Romania there is corruption without corrupts and corrupts without corruption!*

2. The experts of European Commission failed to identify the causes resulting in the deficiencies of the judiciary as a whole and of the fight against the high-level corruption in particular. The causes were wrongly identified both in the Monitoring Report and the Technical document accompanying it. *The instruments proposed by the European bureaucracy have not barred corruption but preserve it!* The European Commission persist in maintaining inefficient solutions, attempting in exchange to subrogate the Romanian justice and establishing quantitative and symbolic criteria for the measurement of the success in the fight against corruption. Such attitudes represent a form of politicisation of this fight. Such pressures doubled by TV-justice, annihilate the benefit of doubt, the foundation of the state of law.

3. The causes of anti-corruption fight inefficiency do not lie either in the lack of courage of the magistrates in delivering sentences, or in the attitude of Romanian Parliament and generally, the causes do not reside in the lack of will of the core institutions of the State in producing tangible results. *The causes lie in the annulment of prosecutors’ independence back in 2005 and excessive politicisation of criminal investigation and subordination to the executive body of the criminal investigation organs.* These legislative amendments allow the executive and Presidency to employ the National Anti-Corruption Directorate and the General Prosecutor’s Office in the political fight, by ordering inquiries exclusively against the political opponents.

4. It is interesting that all cases of convictions in corruption lawsuits are based on files created and prosecuted largely before 2005. After 2005, subsequent to the reorganisation of the National Anti-corruption Prosecutor’s Office and DNA in order to enable the politic interference in the investigate acts, most of the files handled by prosecutors were dismissed by magistrates on procedural grounds or application of measures against the Romania Constitution. *When the European experts and occidental press talk about “backward steps in the fight against corruption” the EU is right, but is wrong when it praises for progress precisely the persons responsible of such regress.*

5. It is at least strange that no person is accused in files relating to large European companies (despite information circulating in press during the past years), circumstance that makes us think that there is a dangerous connivance between the European officials and the political factors involved in corruption acts, both as corrupts and corruptors. *Such corruption acts involving companies or foreign political lobbyists are distorting the report between demand and supply in the Romanian market, for the purpose of transferring the public money to private property.*

6. The lack of vision in choosing the instruments recommended, after 2005, by the Romanian authorities and European officials, may be noticed even in the successive changes in the competences of certain institutions (such as the Superior Council of Magistracy, as above shown) respectively the invention of institutions unknown in Europe, such as the National Integrity Agency (ANI). The vulnerabilities of this system could have been intuited as from the beginning and proved afterwards. In this respect, *it is not too early to pronounce on ANI's efficiency, as stated in the Report; on the contrary, it is expedient to admit that such institution unmatched in another European country lacks the capacity to function and accomplish the aimed objectives.*

7. As for DNA, there has not been and is not will to investigate on independent basis all persons suspected of illegal activities, irrespective of the political colour of such persons. So, it is symptomatic that the most press-mediated economic interest groups starting 2005 and until present time and introduced as making onerous and illegal business with the State money are linked to country President and have never been investigated by DNA. Although grounded corruption suspicions concerning important political persons among PDL (Adrian Videanu, Vasile Blaga, Radu Berceanu) have raised, still DNA has not instituted any proceeding against them. *It is quite hard not to notice that all people closely connected to the President are "immune" to DNA, which one cannot say about the political opponents of President Băsescu.*

8. *No one can affirm about the persons close to the President or about the President himself, until their investigation and trial by the competent authorities, whether they are guilty of the corruption acts which the public suspects them, and equally no one can affirm about the people accused by the President and institutions he dictates, whether they are guilty or not. What is alarming and suspicious is the discriminating treatment and ideological approach employed in the attempt to justify it. Such approach would create an imaginary corruption which instead really affects the external statute of Romania and its internal order. **It is not excluded and it should be verified whether the failure to track high level corruption cases lies, beside the culpable hushing up, with the fact that the corruption in Romania has***

not reached the levels imagined by the public internal and external opinion. The enrichment during and by transition, upsetting, immoral and frustrating phenomenon generating social anxieties, does not always coincide with or results from illegal acts. This aspect should be reviewed both for the purpose of reconsidering the perception over the level of corruption in Romania, and in order to avoid overlooking the corruptors in places where they really belong to in the search for corruption and corrupts in places where they are not.

9. In this context, when the fight against the high level corruption is oriented exclusively for political demonisation, in particular of the members of Social Democratic Party, core institutions of the Romanian State, such as the High Court of Cassation and Justice, Constitutional Court, the Parliament of Romania, have attempted to put an end to a series of abuses, to defend the fundamental human rights and trial guarantees. *The prosecutors appointed on political grounds can be trusted no more than the Parliament elected by the direct vote of the Romanian people. It is not the Parliament which politicise the fight against corruption but the Executive, by the mediation of prosecutors appointed by Government and whose political harassment actions cannot be acknowledged by any independent court.*

10. DNA and the General Prosecutor's Office did not demonstrate, as above evinced, besides obedience and "determination" as correctly identified in the Report, either professionalism or impartiality. Therefore, the "congratulations" of the European experts to DNA and the General Prosecutor's Office make us conclude that **the failure of the fight against corruption in Romania and maintaining this country as a second tier country are imputable equally to the Romanian authorities and the European Commission.**

11. The problem with the EC Report is not that it praises or blames Romania unjustly but that, in both cases, it does so by giving course to false perception, unjustified fears, by encouraging hopes without resolve, suggesting wrong therapies and condemning Romanians to a second rate statute within the EU.

IV. Recommendations

- **The basic problem lies in the legal framework. The European Commission should require the Government of Romania and especially the Presidency to agree to the justice independence and prosecutors' independence in particular.** This means the restoration of the judiciary regulatory system as in December 2004 and set forth with the experts of the European Commission during the negotiations at Chapter 24 "JDA".
- ***DNA and General Prosecutor's Office structure should be reconsidered for reaching tangible results in the fight against high level corruption in accordance with the principles of democracy and human rights.*** Thus: a) the single professional leader of justice to be SCM instead of Ministry of Justice; b) the President of Romania should no longer have any role within SCM (French model having inspired the Romanian Constitution has recently been amended to this purpose); c) the prosecutors within the Prosecutor's Office shall function and be organised similar to the investigation judges from other European countries, to be appointed exclusively at SCM's recommendation (eventually upon Ministry of Justice's consent), to enjoy immovability and stability in the office and not to be at the discretion of the Executive and superior hierarchical prosecutor; d) DNA's prosecutors, appointed, promoted and coordinated in professional matters by SCM to establish a Public Minister seconded to the Ministry of Justice for the purpose of watching the general defence of legality and in support of governmental action.
- **The system of immunities and incompatibilities** (designed to remove the conflict of interests) to be revised in view of alignment to the best European practices, the most modern European directions and the evolvments of the models from which they inspired, being also pursued the consolidation of their coherence avoiding the mixture of provisions pertaining to different models taken over from different cultural and social environments.
- Implementation of a consistent investigation system against the State dignitaries, so that equal treatment shall be applied to the President, ministers and parliamentarians where concerning the corruption acts or common law offences.
- **We recommend the European Commission to give up the current monitoring system and support of the exceptional institutions proposed so far.** The current verification system shall contribute only to the legitimacy

of a reparative populism but its effects in barring the high level corruption and recovering the prejudices are minimal.

- The criterion for the assessment of “high profile corruption” shall no longer be the actual or past position of dignitary, but the damages caused by the onerous exercise of the public office. The high level corruption deforms the relationship between demand and supply in the market by the illegal transfer of public property assets into the private accounts. Also, an additional criterion for measuring the efficiency of the fight against corruption should be represented by the proportion between the costs incurred with expenditure during criminal investigation and the recovery of the damages caused. The focus should be translated from persons to damages.
- *In lieu of the actual monitoring system, the European Commission together with the Government of Romania should prepare a joint program regarding combating the corruption causes, as well as for social reintegration of the persons suspected of corruption and for the determination of facts in which the costs are higher than the chances of recovering the damages caused by the act of corruption.* This program should adjust means of fight against corruption specific to the transition period to the characteristics of corruption in the post-transition period.
- **The Government of Romania should envisage that, in parallel with the measures regarding the eradication of causes of high level corruption and social reintegration of high profile corrupts, to set up a strategy regarding combating low level corruption (counter corruption affecting directly the citizen), as well as a strategy concerning the people awareness and education against the mass corruption (nepotism and favouritism, tip’s corruption and other forms of offering or taking undue proceeds).**