**To the attention of**
**The Council of Europe**
**Mr. Michele Nicoletti,**
**President of the Parliamentary Assembly**
**of the Council of Europe (PACE)**

**The *Romanian Judges' Forum Association*, a private law, independent, non-profit, non-governmental and apolitical legal person, the most active professional association of judges in Romania, hereby submits this request to consult the *European Commission for Democracy through Law (the Venice Commission)* on certain current issues regarding the amendments of the Romanian Criminal Code, Criminal Procedure Code and Civil Procedure Code, as well as certain related regulations, for the following reasons:**

## A. Preliminary issues

The Venice Commission, created in 1990, is a consultative body of the Council of Europe in constitutional matters. The Commission is internationally recognized as an independent reflection body. The Venice Commission also contributes to the dissemination and development of the common constitutional heritage, playing a unique role in promptly providing constitutional solutions for the states in transition, in line with standards and good practices in the field. The Venice Commission aims to disseminate and develop constitutional justice, in particular through the exchange of information.

**Based on the 3rd Article, first and second paragraph of the Statute of the European Commission for Democracy through Law adopted by the Committee of Ministers on 21 February 2002, at the 78th Meeting of the Ministers' Deputies, without prejudice to the competence of the organs of the Council of Europe, the Commission may carry out research on its own initiative and, where appropriate, may prepare studies and draft guidelines, laws and international agreements. Any proposal of the Commission can be discussed and adopted by the statutory organs of the Council of Europe. The Commission may supply, within its mandate, opinions upon requests submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the Secretary General, or by a state or international organisation or body participating in the work of the Commission.**

In Romania, the silent protests of the judges and prosecutors, starting on December 18th 2017, in front of the courts of law, are notorious, being covered by the press all arround the world.[1]

The latest **Report under the Cooperation and Verification Mechanism** (2017)[2] expressly recommends, in the case of Romania, "in order to improve further the transparency and predictability of the legislative process, and to strengthen internal safeguards in the interest of irreversibility", that "the Government and Parliament (...) should ensure full transparency and **take proper account of consultations with the relevant authorities and stakeholders in decision-making and legislative activity** on the Criminal Code and Criminal Procedure Code, on corruption laws, on integrity laws (incompatibilities, conflicts of interest, unjustified wealth), **on the laws of justice (pertaining to the organisation of the justice system)** and on the Civil Code and Civil Procedure Code".

The ability of the Government and Parliament to ensure an open, transparent and constructive legislative process on the laws of justice will be essential. In general, a process in which the independence of the judiciary and its point of view are properly assessed and taken into consideration, **and taking into account the Venice Commission opinion**, it is a prerequisite for the sustainability of the reform and it is an important element in meeting the benchmarks set by the CVM.

**On December 22nd 2017, the Secretary General of the Council of Europe, Thorbjorn Jagland, sent a letter to the President of Romania, Klaus Iohannis, in which he suggested that the President should notify the Venice Commission of the CoE about the legislative reforms in justice adopted by the Bucharest Parliament, saying that *„an opinion from the Venice Commission would make clear the compatibility of these texts with the fundamental principles of the rule of law".*[3]**

***The ad-hoc Report regarding Romania (Rule 34)* adopted by GRECO at its 79th Plenary Meeting (Strasbourg, March 19-23, 2018), is concerned about the „objectives pursued by certain draft amendments to the criminal law (material and procedural) and the legislative process initiated in December in this regard, as they could have a negative impact on the country's efforts to fight corruption.**

It was argued that the proposed amendments to the Criminal Procedure Code discussed by the Joint Special Committee on the EU Directive on the presumption of innocence go beyond the scope of the Directive. These proposed changes give rise to serious concerns both internally and among other states about the potential negative impact on mutual legal assistance and the capacity of the criminal justice system to tackle serious forms of crime, including corruption-related crimes.

For example, it has been pointed out that the authors intend to overly restrict the conditions for the application of undercover investigation techniques and the use of evidence collected through them (for instance, suspects should be informed from the outset about such

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[1] See, for example, the web page http://www.euronews.com/2017/12/18/romanian-judges-protest-over-government-backed-legal-reforms [last accessed on 20.05.2018].

[2] See the web page https://ec.europa.eu/info/sites/info/files/com-2017-44_en_1.pdf [last accessed on 20.05.2018].

[3] See the web page http://stiri.tvr.ro/secretarul-general-al-consiliului-europei-despre-legile-justi--iei--o-opinie-din-partea-comisiei-de-la-venetia-ar-aduce-claritate_826125.html#view [last accessed on 20.05.2018].

measures, they would have the opportunity to participate in the hearings of all witnesses and their alleged victims, etc.).

Moreover, the Senate has registered three draft laws on December 21st 2017 which contain amendments to the Criminal Code (CP), but also to the Criminal Procedure Code (CPC). Leaving aside questions about articulation and possible overlap with the ongoing work of the special committee, these amendments - if adopted - would clearly contradict some of Romania's international commitments, including the Council of Europe Criminal Convention.

GRECO also found that there is another attempt to modify the abuse of service offence so as to completely decriminalize all acts committed in connection with a loss of up to 200,000 EUR (in a country where monthly average wages are between 600 - 800 euros). GRECO recalls that the controversial emergency ordinance that was adopted overnight in January 2017 (and then abrogated) was pursuing a similar objective.

In the case of „law of justice", in the absence of unexplained involvement of Romanian public authorities, which may request the opinion of the Venice Commission, the Romanian Judges' Forum Association, together with other national entities, asked the Parliamentary Assembly of the Council of Europe to request the opinion of the Venice Commission. On April 26th 2018, the Parliamentary Assembly of the Council of Europe has indeed requested the opinion of the Venice Commission..

The Romanian Judges' Forum Association, taking note of the new proposals to amend the Criminal Code and the Criminal Procedure Code, hereby expresses its disagreement and deep concern about the legislative draft pending public debate, the content of which amounts to a retrograde step in building a modern and adapted to the new social realities system of justice, as well as a misrepresentation of the very purpose of the criminal proceedings and criminal policy of the State, and which shows a manifest change of paradigm from a criminal justice which protects the victims of crimes, to a new concept which places the defendant in a privileged position.

As captured in the public statements, the legislative amendments are exclusively aimed at transposing into the domestic legislation a number of European directives intended to strengthen the presumption of innocence, the right to be present in and attend criminal proceedings, and aspects concerning freezing and forfeiture of criminal assets and proceeds of crimes committed in the European Union, as well as at aligning this legislation to the binding instruments enshrined under the case law of the Constitutional Court of Romania.

Nevertheless, the *Romanian Judges' Forum Association* regretfully notes that many of the amendments envisaged under the legislative draft pending public debate have no connection whatsoever with the purpose stated by the lawmaker, and moreover depart from the objectives considered, because the explanatory memorandum and the legislative interventions actually propose solutions which are inadequate for the legal realities in Romania and the standards put in place to safeguard fundamental values embraced at European and international level, and risk compromising the very pursuance of justice and the smooth operation of the national judicial system.

Having reviewed the amendment proposals, we notice with great concern that these are replete with unrealistic solutions by reference to the technological development and the social context, and that the lawmaker manifestly misrepresents the content of European rules contained in the respective European directives by the countless mismatches with provisions already available in the legislation on criminal proceedings, by departing from the ECHR case-

law and by unpredictable innovative solutions which are introduced without mechanisms that are able to support expeditious settlement of the cases and finding the truth.

We point to the fact that most of the proposed amendments are solutions intended to hinder the work of courts and prosecutor's offices, considering that no impact assessment whatsoever has been conducted on these amendments despite the fact that their adoption is likely to genuinely overturn operation of the judicial bodies and, unavoidably and irreversibly, weaken the rule of law.

These legislative amendments cannot be called into question in absence of reliable and in-depth strategies in terms of management of the human and logistic resources; they cannot be adopted in disregard of the law predictability and accessibility standards; and establishing different standards as to the rights of the participants in the criminal proceedings, by enshrining a privileged status for suspects and defendants in the criminal proceedings, or by relying on principles which are not that close to the Romanian criminal legislation and which don't afford the same benefits to other participants, is incompatible with the principles of the rule of law.

Having grasped the importance of smooth operation of criminal justice for any European state, the Romanian Judges' Forum Association has conducted a thorough review of the envisaged amendments to be submitted to the representatives of legislative power, and found the following main problems: the case-law of the Constitutional Court and the legislation and the case-law of the ECHR and the CJEU have been all disregarded and distorted; the balance between the participants in the criminal proceedings has been disrupted; the criminal regulation principles have been disregarded; there is a lack of knowledge of the dynamics of the criminal proceedings; and there is no possibility whatsoever to link the new provisions put in place to regulate criminal proceedings with the other existing rules of the Criminal Procedure Code.

For instance, considering the amendments to the Criminal Code, we note that, while the initiator of such amendments does try to render mandatory the judgments of the Constitutional Court and their underlying arguments and reasoning, according to the case-law of the Court and the common rules published on the website of the constitutional court, the authority of res judicata which accompanies all judicial instruments, and therefore also the judgments of the Constitutional Court, are to be enclosed to the operative part and the underlying reasoning thereof. Consequently, both the Parliament and the Government, as well as the public authorities and institutions are bound to comply as such with both the reasoning and the operative part thereof, however considering this important distinction highlighted in the Decision of the Plenum of the Constitutional Court no. 1/1995 and the Judgments of the Constitutional Court nos. 1415/2010, 414/2010 and 415/2010. The res judicata authority specific only to the underlying considerations of the operative part of the Court's judgments is rooted in article 430 par. 2 of the Civil Procedure Code, reading that the res judicata authority concerns the operative part, as well as the underlying considerations thereof, including those applied to settle a matter of dispute, the provisions of this Code being applicable also to the proceedings developed before the Court.

As to the disregard for the international obligations assumed, we believe that the repeal of article 175, 2nd paragraph of the Criminal Code is not justified, because the capacity of public official cannot be rendered conditional upon that person belonging to one of the entities or offices mentioned at 1st paragraph, but also upon performance of public services the provision of which ensured by a diversified number of persons who are subjects to a form of

control by the public authorities. These amendments benefit a number of professional groups that act in the private sector, or self-employed capacities whom would thus be applied an unreasonable preferential treatment. This legislative proposal is liable to impair Directive 1371/2017 on the fight against fraud to the Union's financial interests by means of criminal law which, at Recitals 10, explicitly states that “As regards the criminal offences of passive corruption and misappropriation, there is a need to include a definition of public officials covering all relevant officials, whether holding a formal office in the Union, in the Member States or in third countries[4].

In the same way, the disregard for the national rules of law is obvious when we speak about the repeal of the offence of neglect of duties. Besides the fact that it finds no objective justification, this amendment, added to re-arrangement of the offence of abuse of office, shall leave unsanctioned many offences committed by persons holding public offices in the exercise of their duties, in absence of any means intended to render these officials more accountable for performance of their duties, and, eventually, lead to dissolution of the rule of law by removing any type of criminal reaction against a conduct noted in performance of such duties. An objective justification can neither be found for proceeding to re-arrangement of article 309 of the Criminal Code which regulates an aggravating cause for criminal liability, when the office-related offences have particularly serious consequences, especially because the legislative draft proposes no amendments whatsoever also to art. 297 of the Criminal Code. Of even greater concern is the argument used in support of such repeal, meaning overlapping of the offence of neglect of duties to the legal text which incriminates the abuse of office, the essential difference as to the form of guilt demanded under the law for each of the offences being manifest.

As regards the burden thus placed on the shoulders of the judicial authorities, we note that introduction of a new case of incompatibility, such as that involving the preliminary chamber judge, who shall no longer be able to rule on the substance of the case, shall bring about many shortcomings, considering that neither at the entry into force of the Criminal Procedure Code, nor afterwards the newly-regulated judicial offices have been accompanied by measures intended to resize the establishment plan; this is liable to cause a deadlock in operation of the criminal divisions of the courts, and an excessive burden being imposed to judges specialized on a particular matter, the number of whom is reduced anyway. To the same end, when it comes to objection, the possibility of appealing the order of the higher-ranked prosecutor can lead to delays in criminal prosecution, in particular in complex cases with many defendants, further to lodging of repeated objections. Additionally, this amendment is neither justified as long as no other similar step of the proceedings a judge rules on, such as a court’s resolution, is subject to any appeal, and a potential incompatibility, along the actual

[4]The Recitals of the Directive state that private persons are increasingly involved in the management of Union funds. In order to protect Union funds adequately from corruption and misappropriation, the definition of “public official” therefore needs to cover persons who do not hold formal office but who are nonetheless assigned and exercise, in a similar manner, a public service function in relation to Union funds, such as contractors involved in the management of such funds. Thus, article 4 paragraph 4 letter b of the Directive includes in the definition of the public official any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries. Consequently, in order to abide by the European legislation, the definition of the public official should not be limited, but, to the contrary, broadened so as to include, inter alia, also the private contractors who managed EU funds.

harm thus caused, could be claimed in the preliminary proceedings. Consequently, this amendment is liable to unnecessarily burden courts with a new category of cases the settlement of which is insufficiently articulated in terms of proceedings.

The absence of an impact assessment is highlighted in the taking of evidence, where proposals are made to automatically exclude the statements of the suspect or those of the defendant due to just not recording them by any video or audio means anymore, as long as technical obstacles can sometimes render impossible such recording, and such a shortcoming is not liable to cause any harm insofar as the statement is documented in written form. The legislative proposal provides for no transitory rules whatsoever in this respect, and the entry into force of the new procedural provisions, in absence of suitable recording equipment, virtually compromises the work of the criminal prosecution bodies. Likewise, while institution of this safeguard is aimed at aligning the Romanian criminal justice to certain European standards in the field, it would be just natural that these recordings be given a general applicability and afford the evidence thus collected even more evidential value, while discouraging the persons heard from retracting their initial statements before the judge on grounds of alleged pressures put on them by the criminal prosecution bodies.

As regards the separation of powers, we warn about the unacceptable intrusion in the work of the judicial authorities by de plano enforcing elimination of the fact-finding report when no expert assessment is conducted, despite the fact that the principles of general applicability under art. 100 par. (3) and (4) of the Criminal Procedure Code state that the power to either uphold or dismiss a piece of evidence belongs to the judicial body. In the opinion of the initiator, the mere challenge of the fact-finding report obliges the judicial body to conduct such an expert assessment, but such a solution is liable to prejudice the principle of independence of judges which has been enshrined by the very new provisions of art. 8 par. (2). This new legislative solution contains even a wording flaw because, as long as the judicial body rules on the need for such expert assessment, this means of evidence cannot be rendered binding and left to their discretion at the same time. Imposing performance of an expert report to the judge further to the mere challenging of the fact-finding report, added to the sanction of removing the fact-finding report when an expert assessment is not conducted, is even more questionable as art. 172 par. $9^1$ of the Criminal Procedure Code states the requirement to have the fact-finding report drawn up by certain court experts specialized on particular matters, so that, once an expert opinion is issued, non-performance of a new expert assessment cannot justify such a harsh sanction, like removal of the evidence.

As regards the fundamental rights of the parties and the balance between the particular interests and the general interest, we see that the obligation to commence criminal prosecution further to just indication of a person not only that prejudices from the very beginning the principle of the presumption of innocence, but is further liable to artificially shift the powers of the criminal prosecution body, as per the purpose and the interests of the initiator of such indication, which can prove bad faith. Commencement of criminal prosecution implies not only the existence of a particular person, but also of evidence in support of the criminal charge; but, in the envisaged legislative solution, a mere and freely expressed indication by the initiator is sufficient to cause determination of the criminal prosecution body of jurisdiction and the commencement of the criminal prosecution, which can cause serious moral and professional prejudices to the person affected by such a measure. This legislative solution glaringly comes against the principle of finding the truth in the criminal proceedings, provided under art. 5 of the

Criminal Procedure Code that makes mandatory for the judicial bodies to see, relying on evidence and not just on mere allegations, that truth is found about the facts and circumstances of the case, as well as about the suspect or the defendant. In fact, further to such a mere and freely expressed indication by an initiator, any person might become a suspect because criminal prosecution shall be commenced in personam, in absence of any situations that would prevent the exercise of the criminal action.

In what the injured persons and the purpose of the criminal proceedings are concerned, it can be noted that setting of a 1-year term for any of the solutions at art. 305 index 1 of the Criminal Procedure Code is not enough in very complex cases, and the fact that, in absence of thorough investigations able to support finding the whole truth, a solution to commence prosecution in personam or close the case would be imposed by the mere lapse of time comes against any principles whatsoever. In fact, this solution also infringes the principle of finding the truth provided under art. 5 of the Criminal Procedure Code, as well as the principle of a fair trial provided by the Convention and enshrined under art. 8 of the Criminal Procedure Code because the reasonable time should be assessed, pursuant to the ECHR's case-law, on a case-by-case basis, taking into account also the conduct of the parties and other criteria, in particular the complexity and the difficulties encountered in production of evidence. Such a provision cannot be soundly argued in favour against the other amendments proposed under the draft item of legislation which introduces, inter alia, also the obligation of the judicial bodies to proceed to an expert assessment of certain means of evidence, such as those at art. 97 par. 2 letter f of the Criminal Procedure Code, or to proceed to taking up new expert assessments to counter certain fact-finding reports. But, it is obvious that, insofar as the particulars of the case would not support a certain conclusion about one of the solutions, namely to commence criminal prosecution or to close the case, the lapse of a 1-year term appears excessive for a solution to be rendered as envisaged by the lawmaker, simply to conclude a criminal investigation in process, ignoring finding the truth.

In the light of the considerations mentioned above, the introduction of the sanction of absolute nullity for violation the provisions of art. 307 par. 1 of the Criminal Procedure Code is contrary to the principles laid down in art. 281 of the Criminal Procedure Cod, because such a legal provision is not intended to afford protection to a general interest, but to a particular one. While the party might not claim such harm and could even expressly waive it, undermining the other subsequent steps of the proceedings is void of any reasoning whatsoever, in particular when, having taken note of the potential omission occurred in the report issued to inform one of their capacity of suspect, the interested would not claim such a harm. In this case, there is no indication whatsoever of any interest that the court of law, the prosecutor or the other parties subsequently claim violation of a provision put in place to safeguard a particular interest and which, as envisaged by the lawmaker, is liable to cause termination of the criminal prosecution in absence of a freely expressed indication of the injured party in this respect.

The legislative solution which concerns application of the statements of a defendant who admits to the charges conflicts with the principle of free assessment of evidence enshrined under art. 103 par. 1 of the Criminal Procedure Code, as well as with the principle of the independence of the judge provided in the Constitution of Romania and in the rules applicable to the administration of justice, which are impaired by the countless limitations imposed to free assessment of evidence in decision-making. Moreover, such a legislative solution comes even against the newly-amended provisions of art. 103 par. 3 of the Criminal

Procedure Code which permit the use of the statements of those who enjoy favourable legal provisions for statements made before the judicial bodies as evidence in support of a judgment of conviction, no sanctioning or delayed sanctioning, insofar as this evidence is collated with other items of evidence which have been legally produced in the case. On another note, there is no justification whatsoever either for not using the statements of a defendant who admits to the charge in the simplified court proceedings against other defendants who do not use these procedures in the same case or are investigated in other cases. In fact, such acknowledgement, but in a different form, can also take place when the defendant does not use these procedures, as well as when these procedures would not be permitted under the law, or the use thereof has been rejected by the judge. Unless such a prohibition operated in these cases, we see no reason for such an acknowledgement expressed in the proceedings regulated under art. 375 of the Criminal Procedure Code not to be used as means of evidence, so much the more that this statement needs, in its turn, to be collated with other evidence in order to lead establishing the guilt of the other defendants.

Another unreasonable interference in the powers of the judiciary is also introduction of the ground for review by art. 453 par. 1 letter g of the Criminal Procedure Code, which infringes the authority of *res judicata* because this amount neither to misjudgement due to circumstances not known to courts ruling on cases, nor to procedural errors which cannot be otherwise addressed. On the other hand, insofar as a court judgment needs to be reviewed on this ground, the ground for review should concern all categories of judgments, and not just the conviction ones, for the prosecutor and the parties to enjoy the same legal treatment, and the principle of legal certainty and finality should not be sacrificed only in favour of the defendant. A failure by a judge who took part in a settlement of the case to sign the judgment is not in reality a ground for review supported by the ECHR's case-law because once drawn up by the judge concerned, the court judgment is the outcome of that judge's wish expressed at an earlier date, and the signature of the president of the panel or of the president of the court only confirms official legal proceedings that have been concluded.

Eventually, the transitory provisions in the draft law are unconstitutional because they have retroactive effects and allow that judgments rendered before the effective date thereof are challenged on grounds regulated under the new law, contrary to the constitutional principle that the new law only provides for the future, except for the more favorable criminal law.

Because only the new criminal law may have retroactive effects, and not also the procedural law, the possibility afforded to the interested persons to challenge the court judgments rendered before the effective date of the new law on procedural grounds prejudice the principle of legal certainty and finality, as well as all the principles observed in drawing up transitory rules in civil and criminal matters. In fact, this principle has been constantly observed in application of both the Criminal Procedure Code and the Civil Procedure Code and has not allowed for the procedural law to have retroactive effects regardless the matter of law it is applied to. Under the Romanian criminal procedure law, this principle has been expressly enshrined also in the provisions of art. 13 of the Criminal Procedure Code reading that the criminal procedure law applies in the criminal proceedings to the steps performed and the measures ordered since the effective date and until the expiry thereof, except for the situations provided in the transitory provisions. As for the final court judgments, a legal remedy cannot have retroactive effects regardless the favourable or unfavourable nature of

the new procedural provisions because, while it is accepted that the provisions contained in the law issued for application of the Criminal Procedure Code applies only to the situations caused by the entry into force of the Code, the general provisions of theCivil Proceedure Code applicable only to criminal matters pursuant to art. 2 of this latter Code state that judgments remain subject to the remedies, grounds and terms set out in the law under which the proceedings initially started (art. 27).

In the light of the foregoing, it thus follows that most of the proposed amendments are solutions intended to hinder the work of courts and prosecutor's offices, the effects of which have not been even reviewed further to an impact assessment and which, in a relatively short period of time, are expected to genuinely overturn operation of the judicial bodies and, unavoidably and irreversibly to weaken the rule of law.

These legislative amendments cannot be called into question in absence of a reliable and in-depth strategies in terms of management of the human and logistic resources, by disregarding the law predictability and accessibility standards and by establishing different standards as to the rights of the participants in the criminal proceedings, by enshrining a privileged status for suspects and defendants in the criminal proceedings, or by relying on principles which are not that close to the Romanian criminal legislation and which don't afford the same benefits to other participants.

### B. Legal and factual aspects regarding the amendments of the Romanian Criminal Code, Criminal Procedure Code and Civil Procedure Code, as well as some related aspects

**The following legislative texts or, as the case may be, decisions of the Constitutional Court of Romania require an opinion from the Venice Commission, since they rule aspects where good international constitutional practices can help the Romanian lawmakers to find acceptable legislative solutions under the rule of law:**

**Law amending the Criminal Code (Law 286/2009)**

**In Article 4, after paragraph (1), two new paragraphs (2) and (3) are inserted, with the following wording:**

„(2) There are assimilated to the criminal decriminalization law the decisions of the Constitutional Court which establish the unconstitutionality of some provisions of the criminal laws, by which only certain types of criminality are considered constitutional or by which they are completely or partially deincriminated as contrary to the Constitution as well as the decisions relating to criminal law other than criminality. The obligation to enforce decisions of the Constitutional Court as a more favorable criminal law refers to both the operative part and their considerations.

(3) In the case provided in paragraph (2), the execution of punishments, educational measures and safety measures, based on the law established as unconstitutional, considered constitutional only for certain forms of incrimination or by which criminal acts are totally or partialy decriminalized, as well as all the criminal consequences of court decisions on these facts shall be examined ex officio, as a matter of urgency, within 5 days of publication in the Romanian Official Journal by the executing courts."

The consequences of enshrining the principle of non-retroactivity in the Constitution are very severe and perhaps that is why this solution is not met in many countries, but the rise to constitutional principle guarantees legal certainty and citizens' trust in the rule of law, constituting an expression of the principle of separation of powers in the state, respectively the separation between the legislative power, on the one hand, and the judiciary, or the executive power, on the other.

The legislator proposes to assimilate the Constitutional Court's decisions to the concept of criminal law, a concept of strict interpretation, although these decisions can not in principle be qualified as more favorable or not, since this character is inherently and intrinsically linked to the law. From the publication date date, Constitutional Court decisions are a way of interpreting the rule of law in relation to the Constitution without having the same legitimacy and authority in terms of the principle of separation and balance of power in the state. The decision of the Constitutional Court can not be assimilated to a law nor can its effects be extended to retroactive effect.

The proposed law also contains some inaccuracies, since the declaration of the unconstitutionality of rules contained in the provisions of the criminal laws is not always equal to the decriminalization of the deed, and the declaration of the unconstitutionality of some incriminations is synonymous, implicitly, with the partial decriminalization of the deed. The wording in the draft law is incorrect from a legal point of view and due to the fact that it is not in the Constitutional Court's prerogative to completely or partially deincriminate criminal deeds, this attribute belonging to Parliament as the supreme legislative body of the Romanian people.

The Constitutional Court of Romania has applied, in its case-law, the principle that criticism that call into question legislative omissions is not admissible, since the admission of the unconstitutionality exception would be equivalent to subrogation of the Court within the competence of the legislator, thus violating Art. 2 par. (3) of the Law no. 47/1992 on the organization and functioning of the Constitutional Court, according to which the constitutional litigation court only decides on the constitutionality of the acts on which it has been notified, without being able to amend or supplement the provisions under control[5].

Rejecting the objection of unconstitutionality as inadmissible, the Court considered that no genuine criticism of unconstitutionality had been formulated, but rather a „lege ferenda" proposal, on which the Court can not rule, having no prerogative to amend the statutory provisions under control, as set out in Article 2 (3) of the Law no. 47/1992.

The Constitutional Court has ruled in another decision[6] that it „has no competence to create new legal rules by adjusting an existing text, but merely to verify the compliance of existing rules with constitutional requirements and to establish their constitutionality or unconstitutionality."

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[5] Decision no. 89, 27 of february 2014, published in Romanian Official Journal, part I, no.349 from 13 of May 2014; see also Decision no. 502 from 7 of October 2014, published in Romanian Official Journal, part I, no. 941 from 22 of December 2014; Decision no.44 din from 17 of February 2015, published in Romanian Official Journal, part I, no. 378 from 29 of May 2015; Decision no.130 from 10 of March2015, published in Romanian Official Journal, part I, no. 319 from 11 of May 2015.

[6] Decision no. 162 from 24 of March 2016, published in Romanian Official Journal, part I, no. 400 from 26 of May 2016.

A binding effect of the Constitutional Court's considerations would have occurred if they had a common body with the operative part of the decision in case of admitting the exception of unconstitutionality. Only if the objection of unconstitutionality is admissible, the subject of which falls within the competence of the Constitutional Court, and a violation of the Constitution would be found, could arise the obligation of the legislator imposed by art.147 par. (4) of the Constitution, to bring into line the unconstitutional legal rules with the provisions of the Constitution, as specified by the Court.

The distinction between a decision of unconstitutionality and a constitutional interpretation is made by the Constitutional Court itself when emphasizes the different effects in Decision no. 265/2014[7], par. 57: „The Court notes that the provisions of Art. 5 par. (2) the first sentence, according to which „The provisions of paragraph (1) shall also apply to normative acts or provisions declared unconstitutional (...) if, when they were in force, they contained more favorable criminal provisions", are not incidental as a result of delivery of present decision, because, in this case, the Court does not declare unconstitutional a legal provision, so that there are no consequences on the normative existence in the legal order of the provision subject to control, but only by way of interpretation is established a single constitutional meaning of Article 5 of the Criminal Code".

**The question to be addressed to the Venice Commission:**

**„Are the decisions of a Constitutional Court, which, according to constitutional provisions, have power only for the future, can be assimilated to the concept of criminal law and, moreover, to the concept of lex mitior (more favorable criminal law)?"**

**Law amending the Criminal Code (Law 286/2009)**

**In Article 5, after paragraph (1), three new paragraphs (11) - (14) are inserted with the following wording:**

„„(11) The more favorable criminal law is applied taking into account the following criteria:
a) the content of the offence and the penalty limits are checked. If this check reveals that the limits of punishment for the offence established as a result of this check are more favorable in a law, it will be considered a more favorable criminal law.
b) verifying the circumstances of aggravation and mitigation of accountability as well as the way of combining sentences in the case of cumulative crimes (concurrence of several offences) or establishing a state of repeated commission. If, as a result of these checks, the resulting penalty is lighter under one of the laws compared, it will be considered a more favorable criminal law.
c) limitation periods are checked. If, under one of the laws, criminal liability is prescribed, it will be considered a more favorable criminal law.
(12) The legal order of verification in par. (11) is mandatory.
(13) The repealing texts on more favorable incrimination rules are subject to constitutional

[7] Published in Romanian Official Journal, part I, no. 372 from 20 of May 2014.

control and, in the event of the constitutionality being found only partially or the unconstitutionality of the abrogation rule, the repealed or modified texts as unconstitutional may become a more favorable criminal rule.
(14) If one or more criminal laws have been occurred since the offence was committed until the final judgment of the case, the applicable penalty shall be those under the more favorable as well as the terms and conditions of limitation period."

Criteria for determining the more favorable criminal law are incorrectly formulated, because, before comparing the penalty limits, it is essential to verify whether the offence under the old law continues to be incriminated in the new law, an eventual deincrimination making unnecessary to analyze penalty limits. Also, the order of checking of these criteria is inexact, because if the requirements of criminal liability are more favorable under one of the laws, this renders useless the analysis of the other criteria, the limitation of criminal liability prevailing against the legal regime sanctioning the deed. The new provisions of art. 5 par. 13 of the Criminal Code are likely to induce a serious dose of public distrust in the context of abolishing the Emargency Ordinance no. 13/2017, contradicting the normative legal rules, according to which the abrogation is final, being the work of the primary or delegated lawmaker, to which the constitutional court can not substitute, by reactivating a rule whose applicability ceased by the will of the regulator.

**The question to be addressed to the Venice Commission:**

**„Could legal provisions found to be unconstitutional to become a more favorable criminal law? Is it possible to accept the thesis of intentionally unconstitutional legal regulations made with the intention of creating lex mitor (more favorable criminal law)?"**

**Law amending the Criminal Code (Law 286/2009)**

**Article 112[1] par. (2) shall be amended and shall have the following content:**
„(2) (a) Extended confiscation shall not apply to assets acquired before the entry into force of Law no. 63/2012 on the amendment and supplementing of the Criminal Code of Romania and of Law no. 286/2009 on the Criminal Code.
b) Extended confiscation may be applied to goods acquired after the entry into force of Law 63/2012 for amending and supplementing the Criminal Code of Romania and Law 286/2009 regarding the Criminal Code, only if it results that the respective goods come from criminal activities such as provided in paragraph (1)."

Framework Decision no. 2005/212/JAI on Confiscation of Products, Instruments and Assets Related to the Crime was transposed by Romania through Law no.63/2012 for amending and supplementing the Romanian Criminal Code and Law no. 286/2009 on the Criminal Code.

By Decision no. 356 of 25 June 2014 regarding the objection of unconstitutionality of art. 1182 par. 2 lit. a) of the Criminal Code from 1969 stated in paragraph 37 that, in determining

the nature of the extended confiscation measure, the Constitutional Court found that the institution of the extended confiscation is only a form of the confiscation safety measure. In the system of penal sanctions, it was necessary to establish a complementary framework, together with the means of repressive coercive measures, namely the safety measures. They are designed to prevent the commission of other criminal offences by removing the dangers that have led to their taking. The safety measures, including the extended confiscation measure, have the character of sanctions of criminal law in the sphere of legal categories.

As regards the more favorable criminal law in the case of extended confiscation, the Constitutional Court has found that the principle of more favorable criminal law is applicable, including to this institution (see, Decision no. 78/2014). In other words, the provisions on extended confiscation are constitutional insofar as they apply only to the acts committed under the new legislative solution that has occurred since the entry into force of Law no. 63/2012, respectively from 22 April 2012. Thus, laws that stipulate safety measures have always been considered to be of immediate application, and consequently they neutralize the pre-existing dangers on the entry into force of the law providing for safety measures, because their foundation lies in the necessity for the peaceful development of social relations, imperative not only by the adoption of laws that incriminate specific deeds, but also by the adoption of regulations meant to prevent the risk of committing such acts in the future. The safety measures do not relate to the commission of an unlawful act, but to a set of behaviors forming the conduct that the legislator considers to be a social danger.

It is stated in the specialized doctrine that if they are not retroactively applied, the defendants would be given the opportunity to take advantage of activities that were unlawful at the time they were committed (see *Theodore S. Grrenberg, Linda M. Samuel, Wingate Grant, Larissa Gray, A Good Practices Guide to Non-Convicted based Asset Forfeiture*, The International Bank for Reconstruction and Development, Washington, 2009, p.44).

Although, at first glance, the retroactive application of laws stipulating the safety measure of confiscation of the outcome of the offence would contradict the general imperative of prohibiting the application of ex-facto laws, a unanimous doctrine converges in the sense that the principle of non-retroactivity applies only to punishments or other repressive sanctions.

The principle of retroactivity of safety measures is widely recognized in the comparative law: as an exception, laws stipulating safety measures that are not assimilated to penalties are of immediat application. Thus, as the new law does not inforce a genuine punishment but a safety measure, it is admitted that this measure should be immediately put in force because it must eliminate a dangerous fact that should not be perpetuated. The dangerous state of affairs is grafted on an antisocial attitude, which does not need to become a crime, but which can sometimes be potentiated by the commiting of a criminal deed.

**The question to be addressed to the Venice Commission:**

**„Is the principle of more favorable criminal law applicable, including in the case of extended confiscation?"**

**Law amending the Criminal Code (Law 286/2009)**

**Article 309 is amended to read as follows:**

„Art. 309 - If the facts provided in art. 295, art. 300, art. 303, art. 304, art. 306 or art. 307 have produced particularly serious consequences, the special limits of the punishment provided by the law are increased by a third. „

The exclusion of abuse and negligence in the service, which have caused particularly serious consequences, has no justification, especially when that the draft law does not modify Article 297 of the Criminal Code. Most likely, such a change announces the abolishing of abuse in the service, which is, in fact, a prelude decision of the legislator, or a possible conditioning for the existence of this offence on a value threshold that overlaps the particularly serious consequences. If this threshold overlaps with this notion, this is a dangerous option for the initiators of the draft law, and if this threshold is supposed to be a lower one, it is not justified to eliminate Art. 297 of the Criminal Code from the enumeration in article 309.

By Decision no. 392/2017, the Constitutional Court upheld the objection of unconstitutionality and found that the provisions of Article 248 of the Criminal Code from1969 are constitutional insofar as the term „performs defectively" is understood to mean „fulfills by breaking the law".

In the reasoning, it was stated that „the legislator has the obligation to regulate the value threshold of the damage and the intensity of damage to the right or to the legitimate interest resulted from committing the deed in the criminal rules related to the crime of abuse in the service, its passivity being capable of causing the occurrence of some situations of incoherence and instability, contrary to the principle of legal certainty in the sense of clarity and predictability of the law."

Also, the lack of circumstantiation on the determination of a certain amount of damage or of a certain gravity of injuring the rights or legitimate interests of a natural person or a legal person makes it difficult and sometimes impossible to delimit criminal liability from the other forms of liability with the consequence of initiating criminal investigation proceedings, bringing to court and convicting persons who, in the exercise of their professional duties, cause damage to the legitimate rights or interests of a natural person or a legal person, irrespective of the amount of the damage or the severity of the injury.

The criminal provisions in force are formulated broadly and in vague terms, resulting in a high degree of unpredictability, a problematic aspect from the perspective of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms as well as other fundamental requirements of the Rule of Law, this wording being the premise of arbitrary/random interpretations and applications. Such an omission has constitutional relevance in the present case (see also Decision No.503 from 20 of April 2010, Decision No.107 from 27 of February 2014 or Decision No. 308 from 12 of May 2016, paragraph 41, where the Court ruled that „legislative omission and inaccuracy are those that lead to the violation of the fundamental right that is alleged to be infringed") because it affects the fundamental rights and freedoms of the person against whom such a criminal charge is made. In those circumstances, the Court, being bound by the obligation to interpret a legal provision in order to have an effect and to give it a constitutional meaning (see Decision No. 223 from 13 of March 2012) considers it necessary to establish a threshold of damage and the circumstanciation of the damage caused by committing the deed, elements to assess the incidence or not of the criminal law.

The Constitutional Court noted that this principle is enshrined in the jurisprudence of the constitutional courts (the Constitutional Court of Lithuania, the Constitutional Court of Portugal, the Constitutional Court of Hungary), as well as in the documents of the European Commission for Democracy through Law (Venice Commission) or of other entities. Thus, the Court held that, at the request of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, the Venice Commission adopted the Report on the Relationship between Political Accountability and Criminal Accountability of Government Members adopted at the 94th plenary session (Venice, 8-9 March 2013). The Court found that, in this report, the Venice Commission considered that „the criminal provisions prohibiting" abuse of office misuse of powers and abuse of power or similar offences are found in many European legal systems, and the Venice Commission recognizes that there may be a need for such general clauses [...]. At the same time, the Commission points out that such general criminal provisions are very problematic, both in terms of the qualitative requirements of Article 7 of the ECHR and other fundamental requirements based on the rule of law, such as predictability and legal certainty, and also that they are particularly vulnerable to abusive political maneuvers. The Venice Commission considers that national criminal provisions on 'abuse of office', 'abuse of power' and similar expressions should be interpreted narrowly and applied at a high level so that they can be invoked only in cases where the act is of a serious nature, such as, for example, serious crimes against national democratic processes, violation of fundamental rights, undermining the impartiality of the public administration, and so forth [...].

Moreover, additional criteria should be imposed such as, for example, the requirement of serious intention or negligence. For cases of „abuse of office" or „abuse of power" involving economic interests, the requirement of a personal gain may be considered appropriate either for the person concerned or for a political party. [...] In so far as the criminal provisions of „abuse of office" and „abuse of power" are invoked against ministers for actions that are mainly of political nature, then this must be done as the last solution (the last ratio). Moreover, the level of sanctions must be proportionate to the offence committed and not be influenced by political considerations and disagreements. The Venice Commission considers that the responsibility for not misusing the „abuse of service" provisions against former or current ministers for political reasons lies with both the political system, the general prosecutor and the courts, regardless of whether the minister is accused according to some special indictment rules or ordinary criminal proceedings.

The Parliamentary Assembly of the Council of Europe, in line with those set out in the Venice Commission Report, adopted on 28 June 2013, at its 27th meeting, Resolution No 1950 (2013), in which: „urges majorities who are in power in the Member States to refrain from abusing the criminal justice system for the persecution of their political opponents; Calls on the legislative bodies of those states whose criminal provisions still include general provisions on 'abuse of office' to consider abolishing or reformulating such provisions in order to limit their scope in accordance with the Commission's recommendations Venice; invites the competent authorities of those Member States whose Constitutions provide for special prosecution procedures for ministerial criminal responsibility to ensure that they are interpreted and enforced with the precautionary and restrain recommended by the Venice Commission.

At the same time, the Constitutional Court noted that in the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee

and the Committee of the Regions towards a European Union criminal policy: Ensuring the effective implementation of EU policies through criminal law, COM/2011/0573, section 2.2.1 - Necessity and Proportionality - Criminal Law as a last resort measure (last ratio) - states that „criminal investigations and sanctions can have a significant impact on citizens' rights and have a stigmatizing effect. Therefore, criminal law must always remain a last resort. The legislator should therefore consider whether measures other than criminal law, such as administrative or civil sanctions, could not sufficiently ensure policy enforcement and whether criminal law could address the issues more effectively. „

Regarding the way in which the Venice Commission report on 11 of March 2013 was invoked in the internal law, we emphasize that there are indications of a misunderstanding of the recommendations, as the Venice Commission spokesman, Panos Kakaviatos, responded to a request for clarification of some essential issues at the initiative of a Romanian journalist, showing the following:

„The report on the relationship between the political and criminal responsibility of ministers refers, according to its title, only to the situation of ministers";

„It states:" ... the Venice Commission considers that national criminal provisions on „abuse of office", „excess of authority" and other similar expressions should be interpreted narrowly and applied with a high threshold so that they can be invoked in cases where the deed is of a serious nature, such as serious crimes against national democratic processes, violation of fundamental rights, undermining the impartiality of the public administration, etc. „(paragraph 102).

„Therefore, the nature of the deed is decisive, and the threshold to which it refers is by no means a financial one." "Moreover, this threshold applies only to the general provisions in the criminal law on „abuse of office", „excess of authority" but not to other crimes such as corruption, money laundry or abuse of trust".

Thus, the „high threshold" seems to refer to the concrete social danger, at a high level in terms of the attainment of social values (patrimonial or non-patrimonial) and not to a minimum financial amount under which the abstract social danger of the offence should be reflected.

Obviously, the regulation of abuse of service should take into account the obligation assumed by Romania by ratification of the United Nations Convention against Corruption, adopted in New York on 31 of October 2003 and ratified by Law no.365/2004.

Council Decision 2008/801/EC from 25 of September 20088 concerning the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption was intended to engage the Community by the instrument of formal confirmation. It follows that compliance with this Convention is examined not only from the point of view of its obligation under domestic law, but also from the point of view of respecting Romania's obligations as an EU member state.

Article 19 of the Convention reads as follows: „Each State Party intends to adopt the legislative and other measures that prove to be necessary to sustain the criminal character of the offence, if the acts were committed intentionally, the act of a public official to abuse the functions or the post that is to fulfill or refrain from performing, in the performance of its functions, an act in violation of the law in order to gain an undue advantage for himself or for another person or entity."

[8] http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:32008D0801

According to art. 3 par. 2 „For the purposes of the application of this Convention, it is not necessary, unless otherwise specified, that the offences established in accordance therewith cause prejudice or patrimonial damage to the State". Therefore, the idea of applying a value threshold is excluded.

The Convention sets a minimum general standard and not a maximum standard in criminalizing offences.

According to the art. 5 of the Convention: „1. Each State Party shall develop and implement or take into account, in accordance with the fundamental principles of its legal system, efficient and coordinated corruption prevention policies that promote the participation of society and reflect the principles of the rule of law, good management of political issues and public goods, integrity, transparency and accountability. 2. Each State Party shall endeavor to develop and promote effective practices for the prevention of corruption."

The option of criminalizing an antisocial act depends on the importance of the social values protected by the criminal law, the social and economic realities of each state, and the importance that the state grants to its own citizens, who must enjoy full confidence in the civil servants public officials and dignitaries operating in the exercise of a public service.

The criminal cases and the reactions of the public regarding the amendments of the Criminal Code by Emargency Ordinanace no. 13/2017 prove that Romania is not prepared, in terms of the importance of socially protected values, to decriminalize this kind of deeds, and their removal from the sphere of criminal liability can not be accomplished in this way, namely without the immediate, simultaneous regulation of express and effective administrative sanctions (dissuasive fines, prohibitions, damages, safeguards measures, procedural warranties regarding the prosecution and sanctioning of antisocial facts, etc.).

**The question to be addressed to the Venice Commission:**

**„Is there a value threshold an indispensable constituent element of the crime of abuse in the service?"**

**Law amending the Criminal Procedure Code (Law 135/2010)**

**In Article 4, after paragraph 2, four new paragraphs, (3) to (6), as follows:**

(3) In the course of criminal prosecution and trial of a case in preliminary proceedings, are forbidden public communications, public statements and providing other information, directly or indirectly, originating from public authorities or any other natural or legal person relating to the persons and facts that are in the scope of these proceedings.

(4) During the criminal prosecution or trial, the criminal investigation authorities or the court may publicly disclose criminal proceedings which are carried out only when the data provided justify a public interest required by law or this is necessary in the interest of discovering and learning the truth in question.

(5) The public communications referred to in paragraph (4) may not refer to persons suspected or accused of being guilty of an offence.

(6) During the criminal prosecution, the public presentation of persons suspected of committing crimes with handcuffs or other means of immobilization or of other ways that induce in the public perception that they are guilty of committing crimes is prohibited.

The proposal does not exactly transpose Directive (EU) 2016/343. Thus, art. 4 par. 3 of Directive (EU) 2016/343 provides for the possibility for the authorities to publicly disclose criminal proceedings where this is strictly necessary for reasons of criminal investigation or public interest, in compliance with the principle of the presumption of innocence.

The Romanian text uses notions that will make public data release impossible.

The transposition should use the expression „public interest", without limiting the meaning of this expression in a way that would lead to the impossibility of providing information publicly, although it would be necessary. For example, there is a legal definition of the notion of public interest in Law 477/2004 (the interest involving the guaranteeing and compliance by public institutions and authorities of the rights, liberties and legitimate interests of citizens recognized by the Constitution, internal legislation and international treaties to which Romania is a party, as well as fulfilling its service duties, observing the principles of efficiency, effectiveness and economy of resource spending and another in Law No. 544/2001, which lists a number of acts/information related to the functioning of public institutions.

The Directive, as it results from art. 4 and its arguments (16-17), seeks to establish an restriction exclusively on (1) 'statements by public authorities (which should be understood as any statement which refers to a criminal offence and which emanates from an authority involved in the criminal proceedings concerning that criminal offence, such as judicial authorities, police and other law enforcement authorities, or from another public authority, such as ministers and other public officials, without prejudice to national law regarding immunity – argument 17) and (2) „judicial decisions" and, from the point of view of the content of the restriction, only in the sense that they „do not refer to the person as being guilty" for as long as that person has not been proved guilty according to law".

Therefore, the Directive does not impose regulating any communication restriction on the statements of any other physical or legal person.

Consequently, the introduction of such a ban, according to the draft law, is contrary to the Directive and does not constitute a transposition.

The ban in the proposed form will prejudice:

- the ability of the media to provide information in connection with criminal investigations from sources other than judicial, which will be limited in accordance with paragraph 4, although according to argument 19 of the Directive it „should not prejudice national law protecting freedom of the press and other means of mass communication." Journalists will no longer be able to express any opinion on a criminal investigation and will be forced to confine themselves to the replication of the statements issued by judicial bodies.

**- the principle 6 in the Appendix to the Recommendation Rec(2003)13 CE** – *Principles concerning the information provided by the media in relation with criminal proceedings* according to which: „ In the context of criminal proceedings of public interest or other criminal proceedings which have gained the particular attention of the public, judicial authorities and police services should inform the media about their essential acts, so long as this does not prejudice the secrecy of investigations and police inquiries or delay or impede the outcome of the proceedings. In cases of criminal proceedings which continue for a long period, this information should be provided regularly."

The Directive offers not a interdiction but a standard of conduct for the public authorities and judicial bodies imposing them a public conduct of a refrained nature that gives the

impression to an objective observer that the suspected or accused person is treated as if his guilty is established prior to a judicial decision.

This standard is applied to any type of public statements, no matter who is the author, or to any judicial decisions rendered in pending cases, these authorities having the duty to use an appropriate language and to refrain, during the proceedings carried out, from any conduct that infringes the presumption of innocence. Under no circumstances, the Directive does not allow, in persuing its scope, for the public to be, entirely, ignored and misinformed in relation with certain proceedings, their stages and the activities carried out by the competent bodies, because its purpose is not to obstruct the justice and public access to information, but protecting the presumption of innocence and other procedural warranties by eliminating the situations the coul compromise them.

It should be expressly stated that there are exceptional situations when suspected offenders can be brought in court or presented in public with coercive measures.

In this regard, the arguments of the Directive should be taken into account:

„The competent authorities should refrain from presenting suspects or accused persons as being guilty, in court or in public, through the use of measures of physical restraint, such as handcuffs, glass boxes, cages and leg irons, unless the use of such measures is required for case-specific reasons, either relating to security, including to prevent suspects or accused persons from harming themselves or others or from damaging any property, or relating to the prevention of suspects or accused persons from absconding or from having contact with third persons, such as witnesses or victims. The possibility of applying measures of physical restraint does not imply that the competent authorities are to take any formal decision on the use of such measures".

Where feasible, competent authorities should also refrain from presenting suspects or accused persons in court or in public with prison uniforms to avoid giving the impression that they are guilty.

Moreover, for legal accuracy, placing such a provision in the Criminal Procedure Code is somewhat inappropriate, given that these aspects are already regulated by Law no. 254/2013.

One last aspect to be taken into consideration is that, in the case of an offence committed by the escorted person, responsibility lies with the accompanying worker but who has no competence to establish in relation to the situation what are the means required in escorting.

Amendment from par. 3 can undermine freedom of expression by prohibiting any natural or legal person to have any public statement of the facts and persons subject to the criminal proceedings or the procedure of the preliminary chamber. This is an unacceptable limitation of the freedom of the press, which can use the right to inform the public by relying on official acts carried out by the prosecuting authorities, respecting the presumption of innocence.

Amendment from par. 4 must also include the exception to this rule, relating to the safety of persons and property, to warn the population about a possible state of danger.

In the judgment of January 29, 2013 in the Catana case against Romania, the European Court of Human Rights recalled that Article 6 § 2 can not prevent, with respect to Art. (10) of the Convention, the authorities to inform the public of the ongoing criminal investigations, but

require them to do so with all due care and all the restrain required by the presumption of innocence (*Allenet de Ribermont*, paragraph 38).

The Court pointed out that, in the present case, the incriminated press release informed the public about the decision of the prosecutor's office to start criminal proceedings against the applicant for the bribery offence. Stressing the importance of the choice of terms used by State agents, the Court recalls that what is important for the application of the above-mentioned provisions is the true meaning of the statements in question and not their textual form (*Lavents v. Latvia*, No 58.442/00, par. 126, November 2002). In the present case, the press release stated that the plaintiff was caught in the flagrant case, as well as the specific circumstances found during the procedure of organizing the flagrant. The facts of the press release can be understood as a way in which the Public Ministry asserts that there was sufficient evidence to justify its decision to initiate criminal proceedings against the applicant (see, *mutatis mutandis, Butkevičius v. Lithuania*, no 48.297/99 , point 52, ECHR 2002-II).

The Court noted that the impact of the case and the importance that it had in the eyes of the public opinion resulted from the position occupied by the applicant, a judge at the Piatra-Neamţ District Court, in the context of the fight against corruption, a subject of interest to both the national authorities and the general public.

The Court did not acknowledge any harm to the presumption of innocence.

Likewise, in the case *Gonta v. Romania*, the Court considered that a fundamental distinction must be made between a statement that a person is only suspected of committing a crime and a clear statement in a judicial decision in the absence of a final conviction that the person committed the offence (see *Wojciechowski v. Poland*, no 5422/04, par. 54, 9 of December 2008).

The Court noted that, in the reasoning of the decision from 30 of June 2004, the Bucharest Court of Appeal did not state that the applicant had committed the crimes he was accused of, but generally referred to the nature of the offences committed without naming their authors.

Regarding to the prohibition set out in paragraph 5, it is necessary to bear in mind that a general prohibition such as formulated by the legislator does not address the risk situations for society and the hypotheses in which the disclosure of information about the suspects is absolutely necessary. For example, if the suspect is free and the assistance of citizens is needed to capture the suspect; if it is necessary to identify and be given images of the suspect; if he/she escapes from legal possession (preventive measures). A general ban that constitutes an interference with the right guaranteed by Article 10 of the ECHR, respectively in the public's right to receive information, is not necessary in a democratic society and is not proportionate to the aim pursued, being obvious that in certain situations, the general interest is superior to the particular interest of the accused person. In case Craxi vs. Italy, Court has ruled that there is no violation of presumption of innocence when aggressive publicity around some criminal cases is done and the deffandants held public offices (i.e. ex-prime minister). European Court noted that, taking into consideration the freedom of expression, press is entitled to channel the attention on the issues of public interest in cases of such nature, the pressure on the right to be presumed innocent is considerably diminished if the case is judged by professional judges and the use of scientific criteria that guide criminal proceedings could not be altered by such media campaign as it is the situation of the countries whom criminal law allows the jury trial.

**The question to be addressed to the Venice Commission:**

**„A general prohibition may be justified in the course of criminal prosecution and in the preliminary sitting chamber procedure for public communications, public statements and the providing of other information, directly or indirectly, from public authorities or any other natural and legal entity relating to the facts and persons subject to these proceedings? Can the risk situations for society and the hypotheses that disclosure of information about the suspected person are absolutely necessary be ignored?**

**Law amending the Criminal Procedure Code (Law 135/2010**

**In art. 83, after the letter b), two new letters are inserted, the letter b1 with the following content:**

„b1) the right to be informed of the date and time when a criminal investigation or hearing of the judge for rights and freedoms is performed. The notification shall be made by telephoning, fax, e-mail or other such means, and a minute shall be drafted in this way. His/her absence does not prevent the act from being carried out."

According to the provisions of art. 8 par. 6 of Directive (EU) 2016/343, „the right to be present at the trial" shall not be affected in the case of States which allow written procedures or phases of proceedings, provided that the right to a fair trial is respected. Modification of Art. 83 of the Criminal Procedure Code, which gives the suspect and the defendant the right to attend witnesses' hearings, would make it more difficult to conduct criminal investigations, given that in many situations the witnesses will be intimidated by the presence of the offender, especially in situations in which they are in a relationship of subordination to the accused, as happens in the case of abuse of service and corruption. Currently, the law entitles the lawyer to attend these hearings, an absolute guarantee for the right of defence of the investigated person. Also, in court hearings, there would be situations where the victim of the offences could be intimidated by the presence of the perpetrator.

The jurisprudence of the ECHR is constant in assessing that, in order to determine the modalities of application of Art. 6 of the Convention, must take into account the whole of the internal procedure, and not only one of the stages of the process. In the domestic law, the defendant has the possibility of argueing the other means of proof during the debates at the trial stage. Thus, in ECHR jurisprudence it was stated that the right provided by art. 6 (3) (d) does not require the defendant to witness the hearing of the witnesses in the criminal investigation phase, in this respect are the causes *Can c. Austria, Adolf v. Austria, Ferraro - Bravo v. Italy, Schertenlieb v. Switzerland*. His right to request the hearing of witnesses in his defence or to question the witnesses of the prosecution is not absolute or unlimited even at the trial stage, as the EDO Court ruled in *Gani v. Spain*.

Once again, the initiator's intervention appears to be unjustified and the exercise of a right is strictly conditioned by the beneficiary's conduct. If the beneficiary does not provide the

modern means of communication, the criminal prosecution body is unable to administer the evidence, the proposed rule for change appearing to be imperative. In conclusion, it is possible for the beneficiary to invoke the unlawfulness of the evidence, which must be administered immediately and without delay, invoking his own conduct.

Thus, in an artificially manner and unrelated to the European normative acts invoked, legislator tries to make it difficult to carry out the criminal prosecution and thus may result in the misappropriation of the purpose of the criminal proceeding: finding out the truth and bringing to justice those responsible for committing an offence. Instead, it is justified to add explicitly the right not to incriminate oneself, which is recognized by law only at the principle level and the obligation of the judicial body to explain to the defendant what it means: not to cooperate with the judicial body by giving statements of recognition or incriminating evidence, etc.

Amendments proposed in Art. 83 infringes Directive 2012/29/EU of the European Parliament and of the Council from 25 of October 2012 laying down minimum rules on the rights, support and protection of victims of crime, replacing Council Framework Decision 2001/220/JIA.

Directive (EU) 2016/343 establishes a right for the person accused of committing an offence to be present at the trial stage, not in all stages of the criminal proceedings. In this respect, the official version of the Directive in English should be considered, in which it uses the notion of „trial" when establishing this right of the accused (for example - see arguments 33 and seq., Article 8). At the same time it uses the notion of „pre-trial" to designate the stage of criminal prosecution in the sense of the Romanian criminal procedural law (see argument 16 of the Directive). These notions refer to different procedural steps, this resulting from the case-law of the ECtHR: „In addition, paragraph 3 (e) of Article 6 states that every defendant has the right to the free assistance of an interpreter. That right applies not only to the oral statements made at the hearing but also to the documentary material and the pre-trial proceedings „(paragraph 69, *Hermy v. Italy*).

**The question to be addressed to the Venice Commission:**

**„Can the unconditional right of a suspect and of a defendant to be present in witnesses and victims hearings, bearing the risk of intimidation, especially in situations where they are in a relationship of subordination, such as in the case of abuse of service and corruption be justified?"**

**Law amending the Criminal Procedure Code (Law 135/2010)**

**In Article 143, after paragraph (4), a new paragraph, paragraph 4 index 1, shall be inserted, with the following content:**

„Intercepted and recorded conversations or communications that do not relate to the deed which is the object of the investigation or which are not related to the offence or persons under investigation or which do not contribute to the identification or localization of persons, can not be used or attached to the criminal investigation file. They are archived at the

headquarters of the prosecution office, in special places, in a sealed envelope, bounded by confidentiality and can be made available to the targeted party at his request. When the case is finally settled, they will be erased or, as the case may be, destroyed by the prosecutor, and a minute will be drafted if no interception order has been obtained for the rest of the conversations.
If in the course of the conversations or communications interception or recording there are clues of committing another crime, it may be requested the completion of the interception warrant for those offences. Intercepted and recorded conversations or communications can only be used to proof the deed that is the object of investigation or to help identify or locate people for whom authorization has been requested from the judge of rights and freedoms, the rest of the records resulting from the technical surveillance mandate will be destroyed within 30 days of their receipt."

Article 143 paragraph 41 of the Criminal Procedure Code has a deficient nature because it allows the use of the records only in relation with the deed which is the object of the investigation, though the contents of the records may give clues of preparing or commiting other crimes for which the investigation can be started and carried out later, but which, being insufficiently substantiated, does not allow an immediate or concurrent solution to the one for whom investigations are carried out. There is no reason why this evidence should not be used to prove other facts and therefore to be used in separate, parallel criminal proceedings that can be finalized at different dates, depending on the evidence existing at at some point. Although the amended text would allow for other offences resulting from the content of the initial records to obtain a new warrant of technical supervision, this will have effect on future discussions or communications, being unable to cover past situations that have entered in the area of the old warrant.

Therefore, if a distinct warrant can only have effect from the date of its issueing, for future situations, the information obtained on other facts than those covered by the investigation should be used on the basis of the initial warrant, its subsequent completion being unable to cover information obtained at an earlier date.

Moreover, according to art. 131 par. 1 of the Romanian Constitution: „In the judicial activity, the Public Ministry represents the general interests of society and defends the rule of law, as well as citizens' rights and freedoms." Thus, we note that the role of the Public Ministry has been diminished, being unable to defend the rule of law and the rights and freedoms of citizens, including the rights of injured persons. What would be the case if, in the course of investigating corruption offences, it is clear that a crime of murder is being prepared?

Such regulation violates art. 2 ECHR on the conduct of an effective investigation into crimes against life and art. 6 ECHR on the right to a fair trial for the victim of a crime. An undue imbalance occurs between the interests of the offender and those of the victim or of society. It violates the provisions of art. 124 par. 2 of the Constitution - „justice is unique, impartial and equal for all." It violates the provisions of art. 21 of the Constitution - Free Access to Justice and art. 131 of the Constitution - The Role of the Public Ministry.

There is no reason to exclude evidence obtained through a legal process. There is no reason why the interceptions accepted by the judge can not be used to prove all the crimes

resulting from the communications, but only those for whom the respective surveaillance measure was approved.

On the other hand, the provision on „completion of the warrant" contradicts Art. 142 par. 5 and 6 of the Criminal Procedure Code, according to which the data resulted from the technical surveillance may also be used in another criminal case if they contain conclusive and useful data or information regarding the preparation or the committing of another offence regulated in art. 139 par. (2). Data resulting from surveillance measures that do not relate to the deed which is the object of the investigation or which do not contribute to the identification or localization of persons, unless they are used in other criminal cases according to paragraph (5), is archived at the headquarters of the prosecution Office, in special places, complying with the confidentiality rule.

Corruption is part of the area of particularly serious crime with a cross-border component and often having implications for the internal and external borders of the EU; Due to the fact that European Union has a general right to act in the sphere of anti-corruption policy, Article 67 TFEU lays down the obligation for the European Union to ensure a high level of safety, including by preventing and fighting against crime and bringing different criminal laws closer together. Article 83 TFEU lists corruption as one of the most serious offences with a cross-border dimension. Corruption undermines the rule of law, leads to inappropriate use of public funds in general and EU funds provided by taxpayers and causes market distortions, playing its own role in the context of the current economic crisis. Corruption is causing social harm, organized crime groups using it to commit other serious crimes such as drug and human beings trafficking (COM (2011) 0308).

**The question to be addressed to the Venice Commission:**

**„Are they compatible with the rule of law those provisions that prevent the investigation of offences and limit the possibilities of gathering evidences as a result of prohibiting all intercepted or recorded conversations and communications which are not related to the deed under investigation and which are not related to the offences or persons who are the object of the warrant or which do not contribute to the identification or localization of persons in being used or attached to the criminal investigation file?"**

**Law amending the Criminal Procedure Code (Law 135/2010)**

**After Article 145, a new Article 1451 is inserted with the following content:**

„Art. 1451 - (1) The data, information and results of the technical surveillance warrants obtained under Law no. 51/1991 can not be used in other cases and for the investigation of crimes other than those that affect the national security, according to this law and for which there were suspicions that substantiated the request, under the sanction of absolute nullity. (2) Facts provided by Law no. 51/1991, which affects the national security, mean the offences provided by the titles X - XII of the Criminal Code, those stipulated by the Law no. 535/2004 on the prevention and fighting against terrorism, as subsequently amended and

supplemented, as well as those provided by the Government Emergency Ordinance no. 159/2001 on preventing and fighting against the use of the financial and banking system for the purpose of financing acts of terrorism. The extension of situations for which national security warrants can be obtained through any normative or administrative acts is forbidden and is punished, according to the law. (3) The data, information and results of the technical surveillance warrants obtained with the infrigement of the provisions of paragraph (1) and (2) may not be used in any criminal proceedings, regardless of the state of the case."

The regulation provided by the new Art.1451 of the Criminal Procedure Code does not allow the use of recordings made under Law no. 51/1991, although the clues of committing crimes other than those affecting national security may have their source in this original authorization. The legislator does not even provide a solution to this kind of recordings already made and absolutely prohibits the use of such data and information in other cases, imposing that the facts that would result from these recordings to be omitted only because the clues of committing have resulted from other types of interceptions than the usual one.

Such an approach not only undermines the principle of finding out the truth but represents a serious violation of the principle of official carrying out of authority, applicable to all offences, with the exceptions provided by law.

Under Law no. 51/1991 it is not possible to obtain technical surveillance warrants, technical surveillance being a procedure proper to criminal law. For the legal culture of the legislator, it is important to note that the warrants obtained under Law no. 51/1991 are national security warrants, they are obtained in an extra-criminal procedure and the conditions and proceedings applicable to them can not be modified or limited by the Criminal Procedure Code. On the other hand, the use of communications obtained through enforcement of national security warrants was possible, in the criminal proceedings, based on Article 139 paragraph (3) of Criminal Procedure Code, the nature of these being considered as recordings made by third parties in another procedure prescribed by law. Considering that by this draft, art.139 par. (3) of Criminal Procedure Code is doomed to be abolished, it seems that the legislator is unaware of the mechanisms for amending the normative acts or it does not know what he really wants to change, in both cases being obvious the unjustified nature of the changes.

The Decision no.9/2018 allowed the exception of unconstitutionality and it was found that the phrase „seriously undermines the fundamental rights and freedoms of the Romanian citizens" contained in Article 3, letter f) of the Law no.51/1991 on the national security of Romania is unconstitutional.

In its reasoning, the Constitutional Court held the following: par.81. "For example, committing offences, such as those against a person, will not qualify as a threat to national security even if the deeds seriously undermine the fundamental right to life or the fundamental right to physical and mental integrity of a person. At the same time, certain offences such as corruption or anti-patrimony can not be qualified as a threat to national security even if the facts seriously undermine certain fundamental rights and freedoms of Romanian citizens. This is because, although some crimes are likely to seriously undermine certain fundamental rights and freedoms, being in the general interest to sanction these facts, they do not have the magnitude necessary to be qualified as threats to national security. On the other hand,

committing acts against a group, such as genocide or crimes against humanity, may pose threats to national security."

The Constitutional Court did not take into account the fact that some EU Member States include in the notion of national security objectives such as national welfare, high-level corruption and migration.

Thus, the United Kingdom includes in the notion of national security: the prevention and discovery of serious crimes, the economic well-being of the Kingdom, the aim of ensuring the effects of an international understanding. In France, the notion of „the fundamental interests of the nation", which was considered sufficiently precise by the Constitutional Court, gives rise to surveillance measures and includes the major economic, industrial and scientific interests of France, collective violence affecting public peace, the prevention of organized crime, preventing the proliferation of weapons of mass destruction. In Germany „national security" is not limited to the investigation of crimes against national security.

The concept of national security is in constant evolution and it must be interpreted and regulated in such a way as to comply with the international obligations assumed by Romania in the light of Article 11 of the Constitution. If initially the notion of national security was to protect the military interests of states, it should now be analyzed in terms of the concepts used at the level of the European Union and the United Nations as including, beyond military security, socio-economic security. The notion of national security is to be interpreted in the light of the common European Union security policy that prioritises the ability of Member States to respond promptly to terrorism, organized crime and cybercrime issues. The national legal framework for national security has been designed to be adaptable to the notion of autonomous and evolving security and, at the same time, to have sufficient safeguards to protect citizens' rights and freedoms when there is punctual interference with these rights.

**The question to be addressed to the Venice Commission:**

**"Is it acceptable that corruption offences and those assimilated to them, as well as serious crimes such as those covered by EU security policy, can not be ab initio qualified as threats to national security and can not be identified and dealt with executing national security warranties?"**

**Law amending the Criminal Procedure Code (Law 135/2010)**

**In Article 168, a new paragraph, paragraph 15 index 1, shall be inserted after paragraph 15, with the following content:**

„(15¹) Data obtained from a computer system or a computer storage system that is unrelated to the criminal offence for which the investigation has been carried out and for which the search was authorized in that case shall be permanently erased from copies made under paragraph (9) and can not be used in other criminal cases and to prove other facts for which there is no search warrant.
If, during the search of the data storage system, evidence is found indicating suspicions of other criminal offences, a search warrant may also be required in relation to those facts or

persons."

Criminal prosecution bodies would indirectly become selective in investigating and prosecuting offences. Thus, if an offence is detected by a criminal investigative body, by means other than those regulated in art. 188/168 of the Criminal Procedure Code, it will be possible to investigate, unlike the offences discovered during an IT search (if in a computer search in a corruption case the criminal prosecution bodies will find materials on child pornography, which will be their conduct in relation to what they found?).

Also, criminal prosecution bodies could become subject to offences precisely because they did not detect those offences. Appraisals „on the purpose of criminal prosecution bodies to challenge or pre-constitute evidence with bad faith" fall within the competence of the Preliminary Chamber Judge. Such regulation would significantly reduce the role of the Preliminary Chamber Judge. There is no reason why data proving the committing of other offences can not be used to order the extension of criminal prosecution for the new offences found.

**The question to be addressed to the Venice Commission:**

**"Are the provisions, that prevent the investigation of offences and limit the possibilities of gathering evidences as a result of prohibiting data obtained from a computer system or from a computer storage system which are not related to the deed under investigation and for which it has been authorized the search in that case to be used in other criminal investigation file, compatible with the rule of law?"**

**Law amending the Criminal Procedure Code (Law 135/2010)**

**In Article 406, paragraphs 1, 2 and 4 are amended to read as follows:**

„(1) The judicial decision shall be drafted within maximum 30 days from the date of pronouncement, and, in duly justified cases, the term shall be extended by 30 days, at most 2 times. (2) The decision shall be made by one of the judges who participated in the resolution of the case and shall be signed by the members of the panel who participated in the administration of the evidence and in the debates as well as the assistant magistrate. (4) If any of the members of the panel of judges is prevented from signing the decision, the case shall be reopened, and the debates resumed. When the impediment concerns the clerks, the decision shall be signed by the Chief clerk. In all the cases, the judgment shall state the cause of the impediment."

The reason for this amendment in the explanatory memorandum is the case *Cerovšek and Božičnik v. Slovenia*, that involves changing the composition of the panel of judges, composed of a single judge, retiring between the time of the minute and the drafting of the

judgment (which, just as in our legal system, had to be done within 30 days from pronouncement), thus leading to its written motivation after almost 3 years, by another judge, on the basis of the evidence (mainly testimonials) administered in the case and in the reconstituted case file (the initial one being lost after the minute).

The Court found that the applicants' right to a fair trial had been violated because the judge who conducted it did not provide a written reasoning for its solutions and because no appropriate measures had been taken to compensate for this deficiency either by involving another judge at an early stage of the procedure, either by providing verbal reasoning.

In a similar case, *Cutean v. Romania*, „the Court recalled that, according to the principle of immediacy, in a criminal proceeding the decision must be taken by the judges who were present in the court hearings and during the evidence management process (see *Mellors c United Kingdom* (dec.), No. 57.836/00, 30 of January 2003). However, it can not be considered to be a prohibition on changing the composition of the panel of judges during a trial (P*.K v. Finland*). Significant administrative or procedural factors may arise making it impossible for a judge to continue to participate in a trial. Measures can be taken to ensure that judges who continue to hear the case properly understand the evidence and arguments, for example, by ensuring the written availability of the statements if the credibility of the witnesses in question is not put in doubt, or by listening to relevant arguments or important witnesses before the new created panel (see *Mellors and PK*, cited above).

Therefore, we note that the conventional standard establishes a significant difference with respect to various procedural incidents that prevent the sole judge or members of a panel from drafting the reasons for the decision. In the first case, it is natural for the requirements to be higher, since the single judge is the only connoisseur of the reasoning that has led him to reach a certain solution. In the second case, instead, the deliberations take place between all members of the panel, the decision being adopted as the result of collective consensus on all issues of fact and law. It is natural, therefore, if one of them suffers a natural impediment (death) or administrative one (retirement, transfer, detachment) and the reasoning cannot be written by this judge, the other member of the panel, who knows the case and shared the decision, is able to render the reasoning.

The amendment to Article 406 of the Criminal Procedure Code, by the new provisions of paragraph 4, is only slightly supported by ECHR jurisprudence, because the quoted conviction decision against Slovenia stems from a particular situation and can be reflected in our internal legislation only in the case of a single-member panel and only when the judge has completely failed to motivate his decision. In the case of a collegial panel, in case of preventing one of the members of the panel from signing, the decision already drafted must be signed by the chairman of the panel or the president of the court, and it is not necessary to reopen the case for resuming debates, as long as they have already taken place in front of the other members. Furthermore, the specific situation set out in the ECHR case-law must not be extended to any situation, for the Strasbourg Court also accepts the existence of assumptions which do not necessarily require the resume of proceedings, such as those relating to the long absence from the court of the judge, sickness or death.

At the same time, the conviction of the Slovenian state is also a consequence of the fact that the reasoning of the decision in the first instance lasted for more than 3 years, and the initial judge analyzed a series of evidence, which was then used in reaching a verdict, based on the direct perception of witness statements. The reason for reopening of the case in the

event of signing impediment of the judgment was therefore quite different in the case in question, and it does not even exist if the judgment is written as a draft by the original judge or the case has not been decided on a direct administration of the evidence, or if the decision is delivered by a collegial panel whose members as a majority may still be present in the Court.
Moreover, nothing prevents the judge who is no longer in office from drafting in concept the decision after his withdrawal, as this act is the reflection of his own deliberation that has already taken place, and for reasons of formalism of the acts the signing of his/her decision belongs to the other colleague in the collegial panel or the president of the court.

**The question to be addressed to the Venice Commission:**

**"In all cases, preventing a member of the court panel from signing a court order is likely to require that the case already decided to be reopened and the debates resumed?"**

**Decision No. 377 from 31 of May 2017 issued by the Constitutional Court of Romania**

**The Law approving the Government Emergency Ordinance no. 95/2016 for the extension of certain deadlines and for laying down the necessary measures for the preparation of the implementation of certain provisions of Law no. 134/2010 on the Civil Procedure Code provides as follows:**

*"**Art. I.** - Government Emergency Ordinance no. 95 of 8 December 2016 for the extension of certain deadlines and for laying down the necessary measures for the preparation of the implementation of certain provisions of Law no. 134/2010 on the Civil Procedure Code published in the Official Gazette of Romania, Part I, no. 1009 of 15 December 2016 is hereby approved.*

***Art.II.** — Law no. 134/2010 on the Civil Procedure Code, republished in the Romanian Official Journal, Part I, no. 247 of 10 April 2015, as subsequently amended and supplemented, shall be amended and supplemented as follows:*

*1. **In Article 509, paragraph (1), after point 11 four new points, 12-15, shall be introduced which shall read as follows:***

*„12. when, after delivery of the final judgment, the Constitutional Court adopts a decision declaring that the legal provisions on which the final judgment was based are unconstitutional or whose reasoning and/or operative part are contrary to the final judgment;*

***13. the judgment is pronounced in violation of constitutional provisions, even though the issue of public order has not been invoked before the courts;***

***14. the judgment is delivered in disregard with the provisions of the Constitutional Court's decisions, as well as of their reasoning;***

*15. where the judgment is unlawful by imposing sanctions on the basis of legal provisions which were not in force at the time when the legal relationship subject to settlement in court has arisen".*

*2. **In Article 509, paragraph (2) shall be amended and shall read as follows:***

*„(2) For the reasons of reviewing a Court decision provided in paragraph (1), point 3, but only in the case of the judge's, point 4 and points 7-15, judgments which do not refer to the merits shall also be subject to review".*

*3. **In Article 511, after paragraph (3), two new paragraphs, (3[1]) and (3[2]) are introduced which shall read as follows:***
*„(3[1]) For the reasons set out in Article 509 (1), points 13 to 15, the time limit shall be 12 months from the date the judgment has remained final.*
*(3[2]) For the reasons set out in Article 509 paragraph (1) point 12, the term is 12 months from the date of publication in the Romanian Official Journal, Part I, of the decisions of the Constitutional Court".*
***Art. III.** - In the situations provided for in Article 511 (3[1]) and (3[2]) of Law no. 134/2010 on the Civil Procedure Code, republished, as subsequently amended and supplemented, including those brought by this law, in which the judgment or the Constitutional Court's decision, as the case may be, is prior to the entry into force of this law, the term shall be 12 months from the date of entry into force of this law".*

The Constitutional Court of Romania was referred, by the Decision No. 1 of 10 May 2017 issued by the High Court of Cassation and Justice - Joint Sections, with the plea of unconstitutionality of the provisions of the Law for the approval of Government Emergency Ordinance no. 95/2016 for the extension of certain deadlines and for laying down the necessary measures for the preparation of the implementation of certain provisions of Law no. 134/2010 on the Civil Procedure Code.

**By Decision no. 377 of 31 May 2017[9], the Constitutional Court admitted the plea of unconstitutionality formulated and found that the provisions of Articles II and III of the Law for the approval of Government Emergency Ordinance no. 95/2016 for the extension of certain deadlines and for laying down the necessary measures for the preparation of the implementation of certain provisions of Law no. 134/2010 on the Civil Procedure Code are unconstitutional, for the following reasons:**

In the reasoning of the plea of unconstitutionality of the provisions of Article II (1) of the Law [referring to art. 509 paragraph (1) point 13 of the Civil Procedure Code], although reference is made to the violation of Article 1 (5) ) of the Constitution in its provisions on the quality of the law, in fact, it mainly concerns the violation of the constitutional provisions regarding the authority of the Constitutional Court and of the courts and, only subsidiarily, the requirements of the quality of the law in terms of determining the scope of the wording *"in violation of constitutional provisions"*.

In order to carry out a full analysis of Art. II point 1 [with reference to Article 509 paragraph (1) point 13 of the Civil Procedure Code] from the perspective of Article 1 paragraph (5) of the Constitution, this legal text must be corroborated with the provisions of Art. II point 1 [with reference to Article 509 paragraph (1) point 14 of the Civil Procedure Code]. This latter text governs the hypothesis of reviewing a court rulings issued in violation of the Constitutional Court decisions; therefore Article 509 (1) point 13 of the Civil Procedure Code should aim to review judgments given in violation of the Constitution and, since the case of review for the violation of Constitutional Court decisions is distinct, this means that this text of law requires

[9] Published in the Romanian Official Journal, Part I, no. 586 of 21 July 2017.

that the interpretation of the constitutional provisions invoked in the application for reviewing to be carried out directly by the courts, at first hand, on a case-by-case basis. (par. 63)

Courts become competent themselves to carry out a constitutional review, verifying the constitutionality of the judgment. Also, the courts will apply the Constitution directly. In that regard, the Court has held in its case-law that a court of law has the power to apply directly the Constitution only in the hypothesis and in the terms established by the Constitutional Court's decision which declare unconstitutionality [see Decision no. 186 of 18 November 1999, published in the Romanian Official Journal, Part I, no. 213 of 16 May 2000, Decision no. 774 of 10 November 2015, published in the Romanian Official Journal, Part I, no. 8 of 6 January 2016]. Consequently, the courts can directly apply the Constitution only if the Constitutional Court has found the unconstitutionality of a legislative solution and authorized, by that decision, the direct application of constitutional provisions in the absence of a legal regulation of the legal situation created by the decision that uphold the plea of unconstitutionality. (par. 64-65)

The Court has also held that the court having the authority to examine this case of review is not unique, but, according to Art. 510 paragraph (1) of the Civil Procedure Code, is the court which issued the judgment whose review is requested. Thus, there may be various interpretations of constitutional rules, on the one hand, at the level of each court rank [city court, tribunal, court of appeal, the High Court of Cassation and Justice], taking into account that the substantive jurisdiction is doubled, on the one hand, by an express territorial jurisdiction under civil procedural rules, and, on the other hand, by the level of judge panels in those courts. Under these circumstances, beyond the lack of substantive jurisdiction of the courts to carry out a constitutional review, which inherently means an interpretation given to the constitutional provision, if there is a jurisprudential divergence on to one and the same constitutional provision, it arises the question of which authority is competent to unify the case law and to interpret the constitutional text: The High Court of Cassation and Justice [by the settlement of an appeal in the interest of the law] or the Constitutional Court. *Per absurdum*, there might be a situation where there are jurisprudential divergences with regard to the interpretation of a constitutional text between the High Court of Cassation and Justice on the one hand and the Constitutional Court on the other hand, when they exercise their right of constitutional review of the judgments, respectively of the primary regulatory norms. (par. 66)

**The Constitutional Court of Romania has found that the criticized normative regulation actually establishes a means of achieving constitutional checking, namely the constitutional review of judgments, and not a reason for review.**

In Romania, constitutional control is carried out by the Constitutional Court, the only authority of constitutional jurisdiction [Article 1 paragraph (2) of Law no. 47/1992], therefore the Constitutional Court has stated that, according to the Fundamental Law, the only authority competent to exercise control over the constitutionality of laws or ordinances is the constitutional court. Therefore, neither the High Court of Cassation and Justice nor the courts or other public authorities of the State have the power to review the constitutionality of laws or ordinances, whether or not they are in force [Decision No. 838 of 27 May 2009, published in the Romanian Official Journal, Part I, no. 461 of 3 July 2009]. According to article 142 paragraph (1) of the Constitution, the Constitutional Court is the guarantor of the supremacy of the Fundamental Law and, under article 1 par. 2 of Law no. 47/1992, this is the only authority of constitutional jurisdiction in Romania. In other words, in accordance with the constitutional

and legal provisions in force, only the Constitutional Court is empowered to control the Government's simple or emergency ordinances, no other public authority having substantive competence in this area [Decision no. 68 of 27 February 2017, published in the Romanian Official Journal, Part I, no. 181 of 14 March 2017, paragraph 79]. According to the provisions of Article 146 (d) of the Constitution, in conjunction with Law no. 47/1992 on the organization and functioning of the Constitutional Court, this is the only competent authority in the matter of constitutional review, excluding any sharing of this authority with the courts of common law [Decision no. 766 of 15 June 2011, published in the Romanian Official Journal, Part I, no. 549 of 3 August 2011]. The Court has also found that a dimension of the Romanian state is represented by the constitutional justice exercised by the Constitutional Court, a political and judicial public authority which is outside the sphere of legislative, executive or judicial power, its role being to ensure the supremacy of the Constitution, as a Fundamental Law of a system governed by the rule of law [Decision no. 727 of 9 July 2012, published in the Romanian Official Journal, Part I, no. 477 of 12 July 2012]. (par. 69)

The granting of a decision-making role to the courts of law in carrying out the constitutional control implies, on the one hand, the interpretation of the constitutional notions and concepts, the determination of the scope and limits of the fundamental rights and freedoms, or the explanation of the organization and functioning of the state authorities in constitutional law relations and, on the other hand, the creation of a hybrid model of constitutional control without precedent in other states of the world. Thus, the authority of the Constitutional Court is undermined, since it would remain in the area of the constitutional litigation of norms, while the courts of law would take over the authority to apply in concrete cases the provisions of the Constitution, the final act of judgment - the judicial decision - thus becoming subject to constitutional review by the judge of common law. It should be noted that, in a plea of unconstitutionality, an *a quo* judge is only allowed to express his opinion on the merits of the plea as an aid to the constitutional court, but instead is denied the authority to make that assessment itself a condition for the admissibility of the plea. The reason why the lawmaker did not set such a condition of admissibility is precisely the fact that the *a quo* court would carry out a constitutional review, the results of which would become a condition for referral to the Constitutional Court. This view of the exercise of constitutionality control is, however, undermined by the legal provisions under consideration, which recognize the decision-making power of the courts both in establishing the meaning of the constitutional norm and in verifying *in concreto* the constitutionality of the act referred to judgment [the court decision]. (par. 70)

In Romania, the ability to exercise the constitutionality control belongs exclusively to the only authority with constitutional jurisdiction, namely the Constitutional Court. Moreover, axiomatically, the European model of constitutionality control excludes the jurisdiction of the courts in exercising such control, and this activity is entirely the responsibility of the specialized constitutional courts. Having clarified the issue of the authority competent to exercise the constitutionality control, the Constitutional Court held that the provisions of Article 146 (a), first sentence and (d), (b), (c) and (l) of the Constitution, in conjunction with Article 27 (1) of Law no. 47/1992 expressly regulate the constitutionality control, on the one hand, of primary normative acts and, on the other hand, of international treaties, regulations and parliamentary resolutions. **Thus, the constitutional control of court judgments, through the complaint of unconstitutionality, has not been yet regulated. The Constitutional Court found that**

**the exercise of a constitutional control on court judgments implies a review of their compliance with the Constitution, which can only be performed by the Constitutional Court, and not by the courts of law, and the decision of the constitutional court thus rendered may provide grounds for a review of a court judgment canceled for reasons of unconstitutionality. <u>However, under no circumstances a constitutional control of a court judgment may be performed by the court having jurisdiction to rule on a review application because this would take us to a situation where the unlimited jurisdiction of the Constitutional Court in terms of constitutional control would be infringed.</u>** Otherwise, the Constitution would become subject to more or less heterogeneous interpretations at the level of all existing courts in Romania. It is also obvious that, under these coordinates, the extraordinary appeal in review is not the appropriate legal means for the constitutional control of judgments. (par. 72)

The Constitutional Court remarked that the violation of the constitutional provisions of Article 142 paragraph (1), according to which the Constitutional Court is the guarantor of the supremacy of the Constitution, as well as of art. 124 paragraph (1) and art. 126 paragraph (1), according to which justice is served in the name of the law by the High Court of Cassation and Justice and by the other courts as provided by law. **The Constitutional Court, on the basis of Article 18 paragraph (1) of Law no. 47/1992, has extended its constitutional control over Article II (1) of the Law with reference to Article 509 (1) 14 of the Civil Procedure Code, because the assessment of the compliance of the judgment with the decisions of the Constitutional Court is also an aspect of constitutional control on the basis of the complaint of unconstitutionality.** Therefore, this legal text also violates art. 124 paragraph (1), Article 126 paragraph (1) and Article 142 paragraph (1) of the Constitution. In fact, assessing the compliance of a legislative solution with the decisions of the Constitutional Court is also an aspect of constitutional control in the light of Article 147 (4) of the Constitution regarding the compliance with the generally binding effects of Constitutional Court decisions [see Decision No. 581 of 20 July 2016, published in the Romanian Official Journal, Part I, no. 737 of 22 September 2016, paragraph 49 et seq., or Decision No. 681 of 23 November 2016, published in the Romanian Official Journal, Part I , No. 1000 of 13 December 2016, paragraph 21 et seq.]. Furthermore, the Constitutional Court has the authority to rule on the situation of unconstitutionality created by the non-compliance with the considerations of a decision finding unconstitutionality [Decision no. 463 of 17 September 2014, published in the Romanian Official Journal , Part I, no. 704 of 25 September 2014, paragraph 37]. (par. 74)

**The Constitutional Court found that the lawmaker relied on a correct hypothesis in terms of Article 1 paragraph (5) of the Constitution, referring to the compliance with the Constitution by all public authorities, including by the courts in the judgments they render, but regulated a defective legal mechanism both with regard to the authority competent to exercise the constitutional control and with regard to the procedural manner in which it is carried out.**

There are two models of constitutional control in the Member States of the European Union: **the European model**, involving a special and specialized authority that is, as a rule, outside the powers of the state (legislative, executive, and judicial power), authority called Constitutional Council (France), Constitutional Tribunal (Spain, Portugal, Germany, Poland) or Constitutional Court (Austria, Romania, Slovakia, Slovenia, Hungary, Belgium, Bulgaria, Croatia, Italy, the Czech Republic, Cyprus, Latvia, Lithuania, Luxembourg); **the American**

**model,** which involves a constitutional control exercised by supreme courts or by all courts, as the case may be (Denmark, Greece, Sweden, Estonia, Ireland, Finland, the United Kingdom of Great Britain and Northern Ireland).

In several states - a minority (Germany, Spain, Croatia, Austria, Poland, the Czech Republic, Slovakia or Hungary), classic constitutional control is supplemented by the protection of fundamental rights. For example, the Federal Constitutional Tribunal in Germany settles constitutional appeals, which may be formulated by any person who considers himself or herself to be injured in one of his or her fundamental rights or other rights expressly provided for by the Fundamental Law. The system has been taken over also in the other countries listed above, for instance, the Constitutional Court of Spain rules on *recurso de amparo* (individual appeal regarding the violation of the rights and freedoms) differently from the German model because this occurs once the usual remedies have been exhausted. Similarly, the Austrian Constitutional Court rules on appeals against court judgments in the field of asylum law, when violation of a right guaranteed under the Constitution is alleged. These constitutional courts are composed of constitutional judges appointed either by the Parliament (Germany, Poland, Hungary, or Croatia) or by the President (Austria, or the Czech Republic) or by both Government and the Parliament (Spain).

**With the Decision no. 377 of 31 May 2017, without the prior consultation of the Venice Commission, the Romanian Constitutional Court acts as a lawmaker, attempting to cause the introduction of the "unconstitutionality complaint" as a concept in the Romanian legislation in a case law.**

**As for the effects of its decisions, the Constitutional Court has constantly argued that, according to art. 147 para. (4) of the Constitution, the general binding nature regards not only the operative part of the Constitutional Court's decisions, but also their supporting reasoning. Consequently, both the Parliament and the Government, and the public authorities and institutions, are bound to comply with both the reasoning and the operative part of the Court's decisions** (for instance: Decision no. 196 of 4 April 2013, published in the Romanian Official Journal, Part I, no. 231 of 22 April 2013; Decision 163 of 12 March 2013, published in the Romanian Official Journal, Part I, no.190 of 4 April 2013; Decision no.102 of 28 February 2013, published in the Romanian Official Journal, Part I, no. 208 of 12 April 2013; Decision no. 1039 of 5 December 2012, published in the Romanian Official Journal, Part I, no. 61 of 29 January 2013; Decision no. 536 of 28 April 2011, published in the Romanian Official Journal, Part I, no. 482 of 7 July 2011).

**Nevertheless, before such a legislative solution is imposed under a decision of the Constitutional Court, which can imply even a review of the Romanian Constitution, this needed/needs to be widely discussed in the society, the academic environment and within the framework of the judiciary.**

We believe that the express point of view of the Venice Commission on the draft law whose debate shall be resumed in the Parliament, further to the decision of the Constitutional Court, is necessary as the legislative solution demands, for the rule of law foundations not to be affected, including the right to a fair trial, appropriate safeguards (a different selection of the judges sitting in the Constitutional Court, considering that many constitutional judges in Romanian have a political background, not being "career judges"), a potentially bringing of the Constitutional Court, which is now a special and specialised body, into the judiciary field, even

with a change of constitutional setup.[10] ***Likewise, according to art. 14 of Law no. 47/1992 on the organization and functioning of the Constitutional Court, the judicial proceedings before this Court are supplemented with the civil procedure rules, but only insofar as these are compatible with the nature of the proceedings before the Constitutional Court, as exclusively determined by the Court.***

**The question to be addressed to the Venice Commission:**

***"Is constitutional control of the court judgments by the Constitutional Court of Romania, a special and specialised body outside the national judicial system, using as a mean the unconstitutionality plea (as the Constitutional Court ruled under Decision no. 377 of 31 May 2017 where it upheld the challenge of unconstitutionality lodged in regards with art. II and III of the Law approving the Government Emergency Ordinance no. 95/2016) liable to affect the foundations of the rule of law system, including the right to a fair trial?"***

## Resolution no. 1/2017 issued by the Constitutional Court of Romania

**According to Resolution no. 1/2017 issued by the Constitutional Court of Romania**[11], the attachment to the case file and the publication of the dissenting and concurring opinions shall be at the discretion of the President of the Constitutional Court, although no law allows such a deviation from the legal obligation to publish these opinions.

The provisions in Resolution no. 1/2017 issued by the Constitutional Court of Romania add to the express provisions of Law no. 47/1992 on the organization and functioning of the Constitutional Court, as follows:

*„Art. 2. - A dissenting or concurring opinion shall be handed over to the President of the Constitutional Court with the decision to which it relates. After discussing the decision, the President of the Constitutional Court, insofar as he finds that there are deviations from the rules established in art. 1, shall request the judge, by resolution, to reissue the decision.*

*Art. 3. - If the Constitutional Court judge fails to comply with the request under Art. 2, the president of the Constitutional Court, by resolution, orders that the dissenting or concurring opinion, as the case may be, should not be published (...) nor attached to the case file.*

*Art. 4. - This resolution concerns the jurisdictional duties of the Constitutional Court only".*

We believe that the right of Constitutional Court judges to produce dissenting and concurring opinions cannot be restricted, given the considerations of legality, and the fact that,

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[10]The Venice Commission issued a positive opinion on certain national draft laws as regards the establishment such legal institutions (constitutional pleas), such as, for instance, in case of Hungary (http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)001-e), or of Turkey (http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)024-e), including on the idea that subsequent constitutional review of the court judgments would help reduce the number of convictions by the European Court of Human Rights. However, due consideration should be given to the entire national constitutional and lower-ranking legislative context.

[11] Published in the Romanian Official journal, Part I, no. 477 of 23 June 2017.

as the **Venice Commission stated (Opinion No. 537/2009[12])**, these views *„do not weaken a Constitutional Court but they have numerous advantages*. *They enable public, especially scientific, discussion of the judgments, strengthen the independence of the judges and ensure their effective participation in the constitutional control in the case".*

Also, **the Venice Commission (through Opinion 622/2011[13])** considered that *dissenting and concurring opinions also affirm the moral independence of judges and their freedom of expression, and improve the quality of judgments and their convincing character, strengthening institutional transparency. At the same time, their publication together with the decision must be mandatory.*

**By this ruling of the Constitutional Court, which deviates from the rules established for similar courts of the EU Member States that allow dissenting and concurring opinions[14], without prior consultation of the Venice Commission, there is practically a censorship of the minority opinion, thus affecting the independence of those judges. This censorship not provided by law can result in negative consequences, affecting the right of litigants to know the arguments of the minority and hindering the evolution of the Constitutional Court case law.**

We reaffirm a series of **principles regarding the activity of Constitutional Court judges**:

- judges of the Constitutional Court shall be independent (Article 145 of the Romanian Constitution);
- the jurisdictional powers of the Constitutional Court are those established by the Constitution and by the law for the organization of the Court (Article 3 paragraph 1 of Law no. 47/1992) and not by acts with restrictive or even prohibitive effect which rank lower than the law in the hierarchy of legal rules;
- judges of the Constitutional Court have the right (not restricted in any way by law) to formulate dissenting or concurring opinions, which are published in the Romanian Official Journal together with the Court's decision (Article 59 paragraph 3 of Law n. 47/1992).

Immediately after the issuance of Resolution No. 1/2017, many non-governmental organizations and magistrates' associations called for a reconsideration of the position of the Constitutional Court regarding the rules of drafting and publishing dissenting and concurring opinions.

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[12] See the Opinion on the draft constitutional law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan adopted by the Venice Commission on 17-18 June 2011, available on the website http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)018-e [last accessed on 31 January 2018].

[13] See the Opinion on draft amendments to the law on the constitutional court of Latvia adopted by the Venice Commission on 9-10 October 2009, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)042-e [last accessed on 31 August 2017].

[14] For example, the Czech Republic, Lithuania, Slovenia or Poland. See, for further details, the study *Opinions divergentes au sein des cours suprêmes des États membres*, edited by the European Parliament, authored by Rosa Rafaelli, available on http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462470/IPOL-JURI_ET(2012)462470_FR.pdf [last accessed on 27 June 2017]. In doctrine, ample discussions took place in the specialty Western literature, see, for an exhaustive debate, Anne Langenieux-Tribalat, *Les opinions séparées des juges de l'ordrejudiciairefrançais*, thesis available on http://epublications.unilim.fr/theses/2007/langenieux-tribalat-anne/langenieux-tribalat-anne.pdf [last accessed on 31 August 2017].

**The question to be addressed to the Venice Commission:**

***"Can the right of Constitutional Court judges to formulate dissenting and concurring opinions be restricted? If yes, can this censorship be ordered by the President of the Constitutional Court?"***

**The question to be addressed to the Venice Commission in connection with the amendments of the Criminal Procedure Code regarded as a whole:**

**„Are all the amendments of the Criminal Procedure Code which, regarded as a whole, break the balance of the judicial proceedings and put victims in a position of inferiority toward the suspect/accused due to the restriction of the means of protection and to the impossibility in carrying out an effective investigation by the judicial authorities compatible with the rule of law and the supremacy of the law?".**

Sincerely,

Judge Dragoş Călin, Bucharest Court of Appeal, co-president
Judge Anca Codreanu, Braşov Tribunal, co-president