

## **EMPOWERING ANTI-CORRUPTION AGENCIES: DEFYING INSTITUTIONAL FAILURE AND STRENGTHENING PREVENTIVE AND REPRESSIVE CAPACITIES**

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Co-financed by



ISCTE, Lisbon  
14-16 May 2008

## **GENERAL PRESENTATION OF THE NATIONAL ANTICORRUPTION DIRECTORATE (NAD) GOALS AND OBSTACLES**

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The National Anticorruption Directorate (NAD) was set up in September 2002 following the ratification by Romania of the Criminal Law Convention on Corruption, adopted by the Council of Europe on 27 January 1999 in Strasbourg. Article 20 of this Convention stipulated the obligation for each signatory state to take the necessary measures according to the fundamental principles of its judicial system, with a view to setting up an independent organism specialized in fighting corruption with repression and criminal investigation attributions.

NAD is a judicial structure formed of magistrates who carry out their activity independently in report with the courts as well as with the other state public authorities, exercising its attributions only based on the law and with the purpose of ensuring its observance.

This Directorate is a unit within the *Prosecutor's Office Attached to the High court of Cassation and Justice*, specialized in combating high level corruption and serious fraud :

- reorganized in October 2005 and March 2006
- nationwide jurisdiction
- central structure in Bucharest – 4 sections, 5 independent services, other compartments and 15 subordinated territorial services land three territorial offices
- led by a chief prosecutor assimilated to the prim deputy of the General Prosecutor of Romania, assisted by two Deputy Chief Prosecutors and by two Counselors, who are also assimilated to the Counselors of the General Prosecutor of Romania.

NAD staff is composed of :

- 145 prosecutors;
- 170 judicial police officers;
- 55 highly qualified experts (in fields such as economy, financial, banking, customs, IT and in other fields), with the status of public servants;
- 196 positions for auxiliary and administrative personnel.

## **COMPETENCE :**

According to the Law no. 78/2000 for preventing, discovering and sanctioning corruption offences, NAD has the competence to carry out the criminal investigation in high level corruption cases concerning those persons with positions of public dignity (members of the Parliament, members of the Government, state councilors and councilors of the Presidential Administration, magistrates, persons with leading positions in public institutions, the Governor of the National Bank of Romania, etc.) and the cases of major fraud for the following categories of offences:

- classical corruption (taking bribe, giving bribe, receiving of undue advantages and traffic of influence) when the object of the offence is of more than 10,000 Euro;
- offences assimilated and connected to those of corruption (bank fraud, illegal privatizations, abuse of office and blackmail, illegal reimbursements of VTA, money laundering, smuggling, fraudulent bankruptcy, forgery, etc.) if they caused a prejudice of more than 200,000 Euro;
- offences of tax evasion, abuse of office, fraud and those related to the customs system, if the value of the damage is of more than 1,000,000 Euro
- offences against the financial interests of the European Communities (the illegal access to the external funds from the general budget of the European Communities and the misappropriation of such funds).

High level corruption is associated to severe forms of fraud and to high level public positions.

## **WORKING METHODOLOGY**

- operational task forces - for each investigation, the case prosecutor sets up a team composed of police officers and

specialists that work under his/her direct coordination and control, assisting him/her in the carrying out of the investigation.

## **COOPERATION WITH NAD**

- the person who gave / offered bribe is exempted from the criminal responsibility if he/she denounces the offence before NAD is otherwise notified
- the perpetrator of an offence falling under the competence of NAD who denounces similar offences committed by other persons and facilitates the investigation is granted the reduction of his/her sentence by half
- the prosecutor, during the investigation, and the judge, during the trial can authorize that a witness be heard through a video communication channel, or that his/her real identity be covered
- the prosecutor can ask, when needed, that a witness be introduced in a Witness Protection Program

## **RELATIONS WITH OTHER STATE INSTITUTIONS**

According to the law, the state agencies with control attributions, intelligence services and police – are under the obligation to provide NAD with all the data and information they detain regarding the perpetration of corruption offences that fall under the N.A.D. competence.

Some of the state agencies, according to their competence, give further assistance to the investigations carried out by NAD, following the

prosecutors' request.

## **MEMORANDUMS OF UNDERSTANDING**

NAD signed Memorandums of Understanding with the following state agencies:

- The National Office for Preventing and Control of Money Laundering
- The General Inspectorate of the Romanian Police
- The General Anticorruption Directorate within the Ministry of Administration and Interior
- The Court of Accounts
- The Department for Fighting EU Frauds
- The National Control Authority
- The National Customs Authority
- Intelligence Services.

## **FIGHT AGAINST FRAUD AFFECTING EUROPEAN**

### **COMMUNITIES' FINANCIAL INTERESTS – NAD COMPETENCE**

in April 2003, within the framework of fighting the phenomenon of fraud, the provisions of the Convention on the Protection of the European Communities' financial interests of July 26<sup>th</sup> 1995 (PIF Convention) were transposed into our a distinct chapter included in the special criminal law (Law no. 78/2000 for preventing, discovering and sanctioning corruption offences) : „Offences against the Financial Interests of the European Communities”

- following these legislative modifications, NAD was designated by law to be the single judicial authority with jurisdiction in

prosecuting files dealing with these kind of offences, therefore, offences against the EU financial interests, committed after 21 April 2003, are under the jurisdiction of NAD, regardless of the value of the caused prejudice or the position of persons involved

- were formed investigation teams composed of prosecutors, police officers and specialist at central and territorial level

## **INTERNATIONAL COOPERATION**

Main legal framework regarding international cooperation consists of:

- European Convention on mutual assistance in criminal matters, Strasbourg, 20 April 1959 and its Additional Protocol and Second Additional Protocol;
- Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, Brussels, 29 May 2000 and its Protocol of 16 October 2001;
- Council Decision of 8 November 2007 concerning the accession of Bulgaria and Romania to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

At national level, Law no. 302/2004 on international judicial co-operation in criminal matters is an organic law, regulating cooperation procedures on: extradition, surrender based on extradition, European Arrest Warrant, transfer of proceedings in criminal matters, recognition and execution of judgments, the transfer of sentenced persons, rogatory letters, appearance of witnesses, experts and requested persons, service of procedure documents, criminal record.

For each form of judicial cooperation, the above mentioned national law was harmonized with the new instruments of the European Union.

After 1 December 2007 requests for MLA may be sent directly by the requesting judicial authorities to the requested judicial authorities if the international judicial instrument applicable in the relation between the Requesting State and the Requested State regulates this type of transmission.

### **Cooperation with Eurojust**

Romania signed on the 2<sup>nd</sup> of December 2005, a Co-operation Agreement with Eurojust. The purpose of this Agreement is to enhance the cooperation between Eurojust and Romania in combating of serious international crime, including fraud and corruption and any criminal offence affecting the EU financial interests (as stipulated in the Council Decision of 28 February 2002 setting up Eurojust).

#### European Judicial Network (EJN)

This network was created in 1998 at EU level to improve judicial co-operation between Member States, particularly in combating forms of serious crime, by means of:

- facilitating and speeding up judicial co-operation;
- providing legal and practical information to competent local authorities and
- providing support with requests for assistance.

In 2002, Romania set up contact points with EJN at central level: Ministry of Justice and Prosecutor's Office attached to the High Court of Cassation and Justice.

In 2004, a similar network in this field was set-up at national level, composed of judges and prosecutors, coordinated by our national contact points with EJN.

#### Cooperation with OLAF

NAD started, in 2004, the cooperation with the European Anti-Fraud Office (OLAF) of the European Commission. According to the inter-institutional Agreement signed on 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities, concerning OLAF investigations and Regulations of the European Commission no. 1073/1999 , no. 1074/1999 and no. 2185/1996. , there are two situations:

- OLAF to notify the National Anticorruption Directorate regarding the suspicion of fraud, by submitting a control report based on which the criminal file can be elaborated, having as object offences against the financial interests of the European Communities;
- the prosecutor of the case to request the general director of OLAF to carry out an external investigation in one of the Member States, where one of the projects financed by the European Union was implemented and there is a connection with the investigation carried out by the National Anticorruption Directorate. This request is submitted through a motivated address.

The report drawn up by the OLAF investigators together with the relevant documents can constitute evidence in the judicial procedure at the same extent and under the same conditions as the reports drawn up by the national authorities of control.

## **OBSTACLES IN NAD ACTIVITY 2007**

Legislative modifications in 2007 had a negative impact on obtaining the expected results, but the external evaluations or controls carried out from inside the Romanian judicial system constantly ascertained the improvement of its activity.



1. The decriminalization of the bank fraud

Through the Law no. 69/2007 regarding the modification of letters b) and c) of article 10 of the Law no. 78/2000 for preventing, discovering and sanctioning corruption offences, published in the Official Gazette no. 215 from March 29<sup>th</sup> 2007, to the following criminal offences were decriminalized: the granting of credits without abiding by law or by the crediting norms and regulations; or the non-monitoring, according to the law or the crediting regulations, of the destination of the contracted credits; as well as, the non-monitoring of the deferred loans, as well as using the loans for other purposes than those they were meant for, with the exception of those granted from public funds or which will be reimbursed from public funds.

2. The taxation authority loses its attribution to carry out ascertainties or other controls at the request of the criminal investigation authorities.

The modification of article 94 of the Fiscal Procedure Code, following the Government Ordinance no. 47/2007 regarding the regulation of some financial – fiscal measures, published in the Official Gazette no. 603 from *August 31<sup>st</sup> 2007*, expressly forbids the taxation authority to draft technical – scientific reports or other controls at the request of the criminal investigation authorities.

3. Some legal provisions enforceable during the criminal investigation are modified, following some decisions of the Constitutional Court which had a direct and sometimes even retroactive impact upon the activity of the National Anticorruption Directorate.

- The Military Section of DNA can no longer continue the investigation in cases where civilians are involved together with military personnel.

The decision no. 610/2007, published in the Official Gazette no. 474 from July 16<sup>th</sup> 2007, stated as unconstitutional the provisions of article III paragraphs (2) and (3) of the Law no. 356/2006 for the modification and completion of the Criminal Procedure Code and of other laws, thus, the military prosecutor's offices or the Military Section of the Directorate can not even continue their investigations where civilians are involved together with military personnel.

- The special procedure enforced for investigating the current ministers is also applied for former ministers

The decision no. 665/2007, published in the Official Gazette no. 547 from August 10<sup>th</sup> 2007, stated as unconstitutional the provisions of article 23 paragraphs (2) and (3) of the Law no. 115/1999 regarding the ministerial accountability and, consequently, in order to investigate former ministers, in case they committed the offence while exercising their duty attributions, in the future, it will be necessary for one of the three authorities provided by article 109 paragraph (2) of the Constitution of Romania to exercise their right to request the criminal investigation.

Thus, it was up to the courts to manage the non-retroactive enforcement of this Constitutional Court decision, considering the fact that the courts had already received the indictments submitted before this decision of unconstitutionality was issued.

4. The attributions and structure of the special commission in charge with advising the President of Romania concerning the issue of requesting the criminal investigation of the ministers are modified by government emergency ordinance, a normative act which also provides the immediate cessation of the activity carried out by the existing commission.

Subsequently, the Constitutional Court established that all the

dispositions regarding this commission are unconstitutional, thus, they can not be enforced.

The Government Emergency Ordinance no. 95/2007 for the modification of the Law no. 115/1999 regarding the ministerial accountability, published in the Official Gazette no. 678 from October 4<sup>th</sup> 2007, represents another legislative modification with a negative impact on carrying out with celerity the investigations regarding high level corruption cases. The normative act modified in fact the structure of the special commission appointed to analyze the notifications referring to the perpetration of corruption offences by members of the Government while exercising their positions and it established a period of 30 days for drafting the proposals regarding the persons intended to be appointed within the new commission.

The decision of the Constitutional Court no. 1133/2007, published in the Official Gazette no. 851 from December 12<sup>th</sup> 2007, stated as unconstitutional the provisions of this emergency ordinance, as well as the provisions of article 16 of the Law no. 115/1999, regarding the ministerial accountability.

All these direct or indirect modifications of the legislation had an impact on the pending or even finalized investigations, regarding former or present ministers, as follows:

- some courts considered necessary the existence of a request expressed by one of the three authorities provided by the Constitution for the criminal investigation of the former ministers, even though, such a condition hadn't been provided by the law in force at the time when the criminal investigation started or when the indictment was submitted.
- in some cases, the procedure of requesting the criminal investigation

was blocked for five months, through legislative modifications declared unconstitutional. Therefore, it wasn't until January 2008 that the National Anticorruption Directorate received the seven requests of criminal investigation for some former ministers for whom the legal procedure had started in September 2007.

## **STATISTICS**

In 2007, the prosecutors together with the judicial police officers and specialists within the National Anticorruption Directorate had to solve 3,319 cases (compared with 2,615 in 2006), 2,070 of them were solved (compared to 1,509 in 2006), respectively, 1,506 solutions were given by the DNA prosecutors and 564 were solutions of declining the competence or connection with other cases.

Other 1,249 cases are still to be solved (494 of them are older than 1 year since the first notification and 128 are older than 6 months since the start of the criminal investigation).

At the end of the period there weren't any pending investigations against accused or defendants who were under temporary custody.

Out of the 1,506 cases solved by the DNA prosecutors, in 167 cases the defendants were sent to trial for committing 958 offences and in 1,339 the solutions were of ceasing the criminal investigation or of not starting the criminal investigation (out of which, for 203 accused who were not investigated under temporary custody, the dispositions of art. 18<sup>1</sup> of the Criminal Code were enforced – administrative fine).

The total prejudice mentioned in the indictments is of over 385 million RON, compared to 170 million RON in 2006.

Most of the 415 defendants sent to trial are men (324), 308 defendants

have graduated universities and have college education and 8 are foreign citizens.

It is worth mentioning that of the 415 defendants sent to trial, 238 had management, control or other important positions.

The statistics data show that the activity of the National Anticorruption Directorate in 2007 effectively contributed to the speeding up of the fight against high-level and medium corruption, in accordance with the commitments made by Romania by the Adherence Treaty to the European Union.

NAD is able to fulfil its role of a specialised structure in combating the high-level and medium corruption offences, as well as to maintain an ascendant trend in the strengthen of independence and impartiality regarding the carrying out of the criminal investigations.

The solved cases increased in number by 37% more than the precedent year (regarding both the total of the solved cases, from 1509 to 2070, and regarding also the files solved on the merits of the case by the DNA prosecutors, meaning all the solved cases with the exclusion of the cases for which the jurisdiction was declined to another prosecution office and the cases which were connected, from 1,092 to 1,506).

The efficiency of solving the cases was good compared to the complexity of them. Thus, out of 1,506 files solved by the DNA prosecutors, only 33% (499 cases) exceed the interval of 1 year from the date of the first notification, and only 19% (285 causes) exceed the interval of 1 year from the registration date to the National Anticorruption Directorate.

The solutions of sending to trial were with 31,5% more numerous than the precedent year, in the circumstances of maintaining a ratio of 11% in the total solutions rendered by the DNA prosecutors.

Focus on combating the high-level corruption was maintained

a) by the initiation and carrying out of the complex investigations, in important cases of corruption in:

- politics, administration and judicial system
- frauds in public procurements' field
- frauds in area of privatisation and lease of public goods

b) the finalisation with sending to trial, regardless of the political colour of the defendants. Examples: 4 former and actual Members of Parliament, 1 president of a county council, 4 mayors of some municipalities, 7 magistrates, 7 Generals within the Ministry of Defence, 1 former presidential councillor, 1 councillor of a Minister.

The efficiency of the criminal investigations carried out in the field of combating fraudulent activities regarding the funds come from the budgets of the European Communities significantly increased, in comparison with the previous years, as a result of the specialization of the prosecutors, judicial police officers and experts of the directorate, as well as of the improvement the investigation methodology of such criminal deeds.

Compared to the precedent year the number of the indictments increased with 136% (from 11 to 26) and with 183% the number of the defendants sent to trial (from 18 to 51). A significant contribution was brought by the territorial Anticorruption Services (21 indictments compared to 6).