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The rule of law continues to be under assault in 2008, with strong cross-border implications, warns SAR

ROMANIA – THE WEAK LINK OF THE EUROPEAN FRAMEWORK OF FIGHT AGAINST CRIME

Just one year after its EU accession, Romania is faced with unprecedented attacks against the Code of Criminal Procedure, which is the cornerstone of the national framework of fight against crime. If the draft currently debated in Parliament becomes law, Romania may become Europe's safe-heaven for criminals, increasing anxiety among all its UE partners at a moment when criminality has become essentially trans-border.

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The Senate of Romania adopted a draft law on 19 March 2008 whereby Government Emergency Ordinance 60/2006 amending the Criminal Code and the Code of Criminal Procedure was approved. Although the draft law that the Senate has adopted is significantly better than the version which was first sent out for promulgation and which the President of Romania requested to be reconsidered, the current text still contains a number of provisions that will generate significant practical difficulties.

The original version of the draft law aroused widespread protests, because it was undermining the Romanian legal framework of fight against crime under the pretext that it was protecting the rights of persons under investigation. The harshest criticism against the Parliament of Romania was voiced by prosecutors, the civil society and international partners, *e.g.* the US, UK and the Netherlands Ambassadors.

When Romania joined the EU, it undertook the obligation to comply with the *acquis* that

governs justice and home affairs, which involves close cooperation in criminal matters between the judiciary and the police, especially under EUROPOL and EUROJUST umbrellas.

Let us consider the following example: if Austrian authorities were investigating a network of drug dealers and needed to wiretap the phone calls of a suspect in Romania, they would have to follow the Romanian procedural law. More specifically, if the amendments that the Chamber of Deputies promoted had been effected, suspects could have only been wiretapped after being notified of the investigation.

These amendments to the Code of Criminal Procedure could jeopardise the capacity of the entire EU to fight against organised crime and terrorism and would obliterate Romania's credibility in this area. On the other hand, criminal organisations work very efficiently across the border and are of course attracted by countries having weak systems of combating crime. And due to these legal changes, Romania becomes Europe's weak link.

The main issues that are associated to the amendments of the Code of Criminal Procedure are described below. It is highly important to start a serious discussion with political parties and relevant professionals, in order to choose the course that the Romanian procedural law should take over the upcoming years.

The calendar of events

- **6 September 2006** – the Government adopted Emergency Ordinance No. 60/2006 that amended the Code of Criminal Procedure and other laws;
- **12 September 2006** – the Emergency Ordinance was sent to the Parliament for approval;
- **1 November 2006** – the Senate adopted a draft law whereby to reject Government Emergency Ordinance No. 60/2006;
- **6 November 2006** – the Senate sent the rejection draft law to the Chamber of Deputies, which is the decision-maker in such issues;
- **8 November 2006 - 21 October 2007** – the rejection draft law was processed by the Legal Commission of the Chamber of Deputies;
- **23 October 2007** – the Legal Commission of the Chamber of Deputies sent a report to the plenum of the Chamber of Deputies whereby to change the nature of the law, *i.e.* the act was supposed to be turned from a law rejecting Government Emergency Ordinance 60/2006 into a law approving GEO 60/2006. The approving draft law contained extremely dangerous amendments.
- **23 October 2007** – the Plenum of the Chamber of Deputies approved unanimously the draft law, as sent by the Legal Commission;
- **20 November 2007** – the President of Romania refuses to endorse the law that approved GEO 60/2006 and requests the Parliament to review the law and to have GEO 60/2006 approved as worded originally. The review request lined up as a matter of example a number of provisions that would make criminal prosecution impossible or inefficient;
- **13 February 2007** – the Legal Commission of the Senate files a report to the Plenum regarding the draft law approving GEO 60/2006. Some of the dangerous amendments that the Chamber of Deputies had introduced were rectified, but other extremely problematic provisions were maintained. The report of the Senate's Legal Commission is analysed below;
- **5 March 2008** – the Senate's Plenum sent the draft law back to the Legal Commission for an additional report, which came out on March 15th.
- **19 March 2008** – the Senate unanimously adopted the draft law.

The glass is half full...

The Senate has eliminated some of the dangerous amendments that had been initiated in the lower Chamber. But since the draft law will be discussed in the Chamber of Deputies, which is a decision-making chamber, the risk of having those amendments restored back into the law is significant. So far, the following points can be considered a progress:

1. **The criminal prosecution deadline was waived.** The Chamber of Deputies had introduced as rule a span of six months for

finalising the criminal investigations. All complex investigations in cases of organised crime or economic and financial crime, that extend over several years in all jurisdictions, would obviously be undermined by this amendment.

2. The provision that forbade interception before pressing criminal charges was removed. Had this amendment been maintained, wiretapping would have been pointless in any criminal investigation, since suspects would already be informed about the investigation at the time when criminal charges were pressed against them. Being informed about the investigation, suspects would naturally use their means of communication more carefully; therefore chances that investigators could get relevant information would significantly diminish.

3. The provision obliging judges to admit all motions whereby litigators requested expert reports to confirm the legal administration of evidence was also removed. This provision would have significantly slowed down criminal proceedings and would have limited the possibility of courts to restrain the unsubstantiated requests of litigants. It is also mandatory that the legality or non-legality of evidence administration should remain the exclusive prerogative of the court; this fact cannot be established by means of an expert analysis.

4. Now things are back to normal since the absolute nullity, as a universal solution for procedural deficiencies, has been eliminated.

Procedural deficiencies will continue to be penalised differently depending on gravity, on consequences they could produce and also on the extent to which these deficiencies could be covered. Absolute nullity should only be used for a small number of situations in which the rights of the person under investigation have been affected irreparably. The European Court of Human Rights actually considers that judges could decide to use a piece of evidence in a case even if the administration of evidence has been subject to a procedural error.

5. The interdiction to use communications intercepted by parties as evidence has also been nuanced. The Senate's text allows courts to use communication intercepted by the parties insofar as connected to an investigation of corruption, organised crime and crimes against the person.

6. The minimum value starting from which a criminal offence generated extremely serious consequences is 1 million lei. The Chamber of Deputies had inexplicably raised that limit to 30 million lei, which would have resulted into significantly reducing the statutes of limitation and the related punishments for those crimes. For example, the penalty for abuse of office generating very serious damages is imprisonment of 5 to 15 years, whereas the simplest form of this crime is penalised with imprisonment from 6 months to 5 years. The statute of limitation covers 10 years in the first case, and 5 years in the second case.

7. The incrimination proposed by the Chamber of Deputies in relation to broadcasting audio or video tapes associated to criminal cases has been abolished. The practice of the European Court of Human Rights is consistent, more specifically journalists will not be criminally penalised for broadcasting or publishing these records, in those cases where the public interest prevails over the private one.

... or half empty

On the other hand, the text preserves some of the amendments that the Chamber of Deputies has proposed and that the Senate has not changed, which make it difficult and sometimes even impossible to conduct an investigation.

1. Temporary wiring authorisations that prosecutors issue for not more than 48 hours have been eliminated by repealing Article 92[2](2, 3)[1]. According to

[1] According to the initial version of the Article:

"(2) in emergency situations, whenever the authorisation that is referred to under Article 91[1], paragraphs 1, 2 and 8 is issued too late, thereby obstructing the prosecution significantly, the prosecutor that conducts or supervises the prosecution procedure could issue a substantiated warrant, that should be recorded in the special register described under Article 228, paragraph 1[1], and whereby to authorise the temporary interception and the recording of all conversations or communications, for not more than 48 hours.

the said regulation, **the existence of this procedure is justified by the fact the urgent use of special investigation tools is essential in some circumstances in order to successfully solve a case.** For instance, if the prosecutor finds out while the investigation is in progress that the suspects will speak on the phone to establish details of a deal involving drugs transfer, then the prosecutor has to react immediately and issue a warrant whereby to authorise the wiretapping of people under investigation for not more than 48 hours. Entrusting this prerogative to the judge would be completely inefficient, because the judge would need time to become familiar with the case and the operative timeliness would be missed. **The regulation now in force, according to which judges have control over temporary interception at a subsequent moment, is more logical, as the judge could confirm or overrule the prosecutor's warrant.** More specifically, the prosecutor's decision is subject to judicial control in all cases, in compliance with the requirements imposed by the European Convention on Human Rights. Other European countries have adopted a similar solution too, more specifically:

- Germany – the authorisation that prosecutors issue under emergency circumstances has to be confirmed by the judge within not more than 3 days;
- Spain – the authorisation that prosecutors issue under emergency circumstances has to be confirmed by the judge within not more than 48 hours;
- Poland – the authorisation that prosecutors issue under emergency circumstances has to be confirmed by the judge within not more than 5 days;
- Norway – the authorisation that prosecutors issue under emergency circumstances has to be confirmed by the judge within not more than 24 hours;
- Belgium – the authorisation that prosecutors issue in cases of flagrant violations and in other cases that are described by the law has to be confirmed by the examining judge within not more than 24 hours;
- The Netherlands – the authorisation that prosecutors issue under emergency circumstances, subject to the verbal approval of the judge, has to be confirmed by the judge within not more than 3 days;

Therefore, the current solution to ban interceptions authorised by prosecutors under emergency procedures does not reflect the European practice in this field.

2. The search warrant has been turned into a completely inefficient instrument, since the persons whose home would be searched is warned, before the judge even issues a search warrant, about the objects or documents that the investigator tries to obtain in this way. More specifically, the new version of the Code provides the steps to take*,* whereas this succession illustrates clearly that any element of surprise necessary to ensure the success of a house search disappears (see the article in Annex at the end, with the new or modified texts in *italics*).

3. Prosecutors have lost the competence of forbidding criminals to leave the town or the country while they are being prosecuted. Apart from the 24-hour custody, these were the only measures that prosecutors could order themselves in order to make sure that a person under investigation does not disappear while the investigation is underway. The orders of prosecutors could have been challenged with the judge, a fact that ensured compliance with

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(3) Within 48 hours from the time when the term which is mentioned under paragraph 2 expires, the prosecutor should present the warrant and records of the interceptions and records and a report describing the wiretapped conversations to the judge of the court that has the jurisdiction to judge the case as a court of first instance or to the judge of the court corresponding to the court of first instance whose jurisdiction covers the office of the prosecutor that conducts or supervises the prosecution, for confirmation purposes. Then the judge shall have to decide whether the warrant is legal and grounded within 24 hours, based on a substantiated procedural decision made in the chambers. If the warrant is confirmed and the prosecutor wants to have the authorisation extended, then the judge shall authorise the continued interception and recording, as per Article 91[1] paragraphs 1-3 and 8. If the judge does not confirm the prosecutor's warrant, then the judge shall have the interception and recordings immediately stopped and those that have been made shall be erased or, as applicable, destroyed by the prosecutor. These actions have to be documented in a report, a copy of which has to be submitted to the court.

the judiciary control requirement which is stipulated in the European Convention of Human Rights.

4. Article 493[4](5) covering interceptions has been amended by removing the express **reference to prosecutors, who were supposed to operate the interception themselves** or to delegate interception operations to the Police. Provisions in force empower prosecutors significantly, since they can directly control how interceptions are conducted, while intelligence services only assist the judiciary technically. Nevertheless, even this kind of technical involvement of intelligence services in the interceptions that are conducted during judicial procedures was subject to severe criticism during the pre-accession period by experts in EU countries, who said that **interceptions in criminal cases should be totally and exclusively controlled by the judiciary.** The text that this draft law proposes weakens the role which prosecutors play, by eliminating the express reference to their personal prerogatives regarding interception. In circumstances where the EU criticised even the previous text, the new text – which weakens the role the judiciary plays and strengthens the one played by intelligence services - is so much the more contradictory to the European practice in the field.

Conclusions

The novelties described above are just the tip of the iceberg, since this regulation also contains a long chain of less conspicuous changes (for instance "or" has been changed into "and") which sometimes alter the meaning of legal provisions significantly. Such changes are undermining the framework of fight against crime and will have negative consequences not only for Romania, but also for the other countries that cooperate with Romania in criminal matters.

That is why the latest report of the European Commission has flagged the legislative changes that have been adopted against the commitments that Romania has undertaken as a full EU member. Therefore, the Parliament of Romania would prove political maturity if it removed these controversial amendments off the law that approves GEO 60/2006. Such attitude could preclude Romania from being again criticised in the next report of the European Commission and, most importantly, from undermining the legal framework of fight against crime.

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ANNEX. The article dealing with house search; the modified text in italics

„Article 100. *(1) Whenever persons who have been requested to hand over any of the objects or documents that are described under Article 98 deny that they hold such objects or documents or that these items exist, a search of the residence or home of such persons may be ordered. The refusal to hand over a certain object or document of the ones described under Article 98 or the fact that the said persons deny the existence or possession of such items shall be formalised in a report.*

(1[1]) *House searches can also be ordered if requested by the prosecutor who conducts or supervises the prosecution, whenever there is solid evidence indicating that a house search is necessary in order to discover and collect evidence. Such request contains a clear presentation of the underlying clues that ground the request.*

(2) The search may be a house search or body search.

(3) *House searches may only be ordered by judges further to the request of the prosecutor who conducts or supervises the prosecution or during court proceedings, while the criminal prosecution is in progress, if there are solid clues that the search is needed to discover and gather evidence. House searches shall be ordered by the judge of the court that would decide upon the case in the first instance or by another court of the same level to the court of first instance, whose jurisdiction should cover the office of the prosecutor that conducts or supervises the prosecution.*

(3[1]) *The prosecutor's request which is described under paragraph 3 shall contain the following details:*

a) *full name of the person whose home or residence should be searched;*

b) *The position of the person in the case under investigation;*

c) *Address of the home or residence that should be searched;*

(3[2]) *The request of the prosecutor that conducts or supervises the criminal prosecution should be accompanied by the following documents:*

a) *A copy of the decision to press criminal charges, that has to be ordered as per Article 228;*

b) *A copy of the report that formalises the refusal to hand over a object or document of the ones described under Article 98 or that formalises the person's denial that such items exist or are in his/her possession.*

(4[1]) Based on their procedural decision, judges issue the search warrant immediately. The search warrant shall contain the following information:

a) Name of the court;

b) Date, time and place when/where issued;

c) Full name and capacity of the person who issued the search warrant;

d) How much time the warrant is valid;

e) The place where the search will take place;

f) The name of the person whose home or residence will be searched;

g) The name of the accused or culprit.

(4[2]) The warrant may only be used once.

(5) The body search or the vehicle search may be ordered, as applicable, by the criminal prosecution body, the prosecutor or the judge.

(6) The house search shall not be ordered before the criminal prosecution starts.

(7) *Search warrants that are issued in violation of this Article shall be null.*

(8) *Evidence which is collected in violation of this Article is null and shall not be considered for purposes of the criminal proceedings."*