ANNEX 1

Response to the excuses provided by

Cătălin Predoiu – the Minister of Liberties

The Ministry of Justice Misinforms through Ignorance

Transparency International Romania appreciates the promptitude of the reaction and the clarifications provided by the Minister of Justice and Citizen Liberties, Cătălin Predoiu, over the commentaries in the press with regards to the legislative solutions adopted in the Draft Criminal Code. However, the explanations formulated by the Minister of Justice can not conceal the severe conception errors on which the Procedure Code is funded, as it was approved by the Government and sent to the Parliament.

Arguments for the partial and indirect exoneration of corruption in the Criminal Code were:

"Regarding the quantum of penalties provided for in cases of corruption, we emphasise the fact that the **Draft Criminal Code contains a repositioning within normal limits of the punishment treatment**. Consequently, the procedure used in the last decade has proven that **the exaggeration of the limits of penalties is not the efficient solution in deterring criminality.** [...]
As we have already stated, **the penalties provided by the incrimination norms for corruption crimes** in the Draft Code, are greatly reduced compared to those in the current Criminal Code. The reduction of penalties had been sustained by the following arguments:

a) the punishments applied by Courts of Law for this category of crimes
b) the necessity to correlate to the dispositions in the general part referring to the sanctioning mechanisms for plurality of crimes, but also to the limits of punishment stipulated for the application of alternative modalities used to particularise the execution of penalties;
c) the necessity of reflection of the hierarchy of social values that make the object of penal protection within the legal limits of the penalty ;
d) the necessity of returning to the tradition of the previous Criminal Codes (The Criminal Code adopted in 1864, the one adopted in 1936 and the current Criminal Code in its initial form of adoption in 1968)."

Treating with their rightful respect the only extended explanations provided by the Minister of Justice and Citizens Liberties with regards to the regulation of the corruption crimes in the New Criminal Code, we shall analyse these regulations bearing in mind the declaration of the Minister, and not our own expectations.

Accordingly, we shall present a counterargument for each and every justification as claimed above:

Regarding the diminution of the limits of punishment for corruption crimes, the Minister explains such an approach by showing that the last decade practice proves that the exaggerated increase of the limits of punishment is no solution in fighting criminality. Transparency International Romania also shares the principle according to which "the role of the certainty of punishment in limiting criminality, aspect confirmed in rigorous recent studies", has "greater impact than a proportionate increase of punishment of the length of time."[1] However, as per the draft code, the reducing the penalty limits, added to the probation regime, as well as to the provisions regarding the statutes of limitation, in reality contributes to

[1] [1] Prof. Valerian Cioclei, PhD,"Manual of Criminology", All Beck Publishing House, 1998, page 73. *Professor Cioclei is a member of the Elaboration Commission of the Draft Criminal Code, approved by the Government on 11th March 2009*

the certainty of avoiding the penalties for corruption crimes, considering the fact that once the penalty limits are reduced, so is the period for the prosecution of crimes. [2].

At the same time, corruption crimes are affected by the new provisions regarding the probation, which is permitted for all corruption crimes, particularly considering the fact that the provisions regarding the prosecution of multiple crimes are more lenient than the current ones, which is a fact that contradicts the statement of the Minister according to which "the penal repression will progressively increase for those who commit more crimes before they are sentenced".

a) Defending the lessening of the limits of the penalties within the legal provisions, Minister Predoiu invokes the situation of the actual sentencing, as applied by the courts of law, for this type of crimes. Nevertheless, the excessively and unjustifiably lenient judiciary practice, as displayed in the sentencing to punishments which do not achieve their discouraging role towards criminal activities, is a recurrent theme in the critics the European Commission addressed to our country i[3]. The incompetence in the investigation techniques and the indecently light sentencing for corruption crimes cannot be justified, through the judiciary practice therefore through themselves, and in no way can be legalised based on the same grounds.

b) At the same time, the Minister of Justice and Citizen Liberties explains the reducing of the penalties for corruption crimes through the "necessity to correlate with the provisions in the general part regarding the mechanisms to sanction multiple crimes, as well as to the penalty limits provided for the application of the alternative means to individualise the execution of the sentences". However, this line of reasoning is valid for any of the crimes the Criminal Code provides for, and ultimately could justify the lessening of any penalty for any crime, which is inadmissible.

c) With the third reasoning, Minister Predoiu appeals to the necessity to reproduce the natural hierarchy of the social values the penal law protects within the legal penalty limits. Are we to understand that the prevention (through the discouraging role of the criminal law) and the combating (through sentencing) of a phenomenon that resembles a plague, that is systemic and generalised in Romania, a phenomenon which is condemned by the *Council of Europe Criminal Law Convention on Corruption*[4], which the Minister applies erratically[5], all these are on a lower level within the social values the penal law protects?

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[2] Thus, according to the article 288 paragraph 1 of the draft Criminal Code, taking bribe, when the author is a civil servant, as defined in article 175 of the same regulation, shall be punished with prison time from 2 to 7 years and prohibiting the right to hold civil service or to exercise the profession or activity in the practice of which the deed was committed. In case the deed was committed by a person other than a civil servant (as per paragraph 3), the limits are reduced to half of the former. The current Criminal Code provides a penalty of 3 to 12 years prison time and the ban of certain rights. In these circumstances, if according to the current provision the statute of limitation for this corruption crime is of 10 years, in the light of the new provisions it is reduced by 2 years, and for the case of a person who is not a civil servant, it is halved. In other words, the crimes of taking bribe committed between 1999 – 2001, and, for the case of a person who is not a civil servant, 1999 – 2004, could not be investigated and prosecuted, as opposed to the current legal circumstances.

[3] Uniform and consistent application of law has been hampered further by the frequent resort to emergency ordinances. This practice creates overlaps and contradictions and results in procedural flaws in implementation. Inconsistent jurisprudence by higher courts in turn leads to legal uncertainty. All these factors weaken the judicial system, often resulting in lenient court decisions and frequent suspensions of sentences. This is particularly problematic in corruption cases. - *REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, July 2008*
http://ec.europa.eu/dgs/secretariat_general/cvm/docs/romania_report_20080723_en.pdf;
Romania must demonstrate the existence of an autonomously functioning, stable judiciary which is able to detect and sanction corruption and preserve the rule of law.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0070:FIN:en:PDF

[4] The Convention emphasises that that corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society.

[5] Following the ratification of the Additional Protocol to the Criminal Law Convention on Corruption (through the Law no. 260/2004), tit was necessary to complete the corruption crimes legal framework with a provision regarding the broadening of the criminal regulation regarding taking and giving bribe by the persons involved in solving litigation through national or international arbitration (articles 2 – 4 of the Protocol) – *Clarifications regarding the sanctioning system for corruption crimes in the Draft Criminal Code*, Cătălin Predoiu, 12 March 2009 (in Romanian)
http://www.just.ro/Portals/0/Comunicate/Martie%202009/20090312_Raspuns_Gardianul_Atac.doc

d) Finally, in which the Minister's clarifications regarding the necessity to revert to the previous criminal codes tradition, requisite which otherwise is randomly applied (e.g., exoneration of mutually consented incest between adults), it is easy noticeable that, with the exception of the 1936 Code, all the other codes the Minister mentions, provide for more severe penalties for corruption crimes than the draft code adopted by the Government.

Consistent with the *"Cuza complex"* of the justice officials, devoid of a coherent argumentation for syllogistic provisions, these codes rather suggest a revolution of the republic at 17 Apolodor Street[6] than a natural evolution of the legislation. We consider that a state evolution is needed more than an ambiguous revolution.

Other issues regarding the general part of the draft Criminal Code are related to the capacity to continue the ongoing investigations, and bring into discussion the way the deed is provided for by the regulation, and also the verification that the specific conditions existent at the time the deed was carried out, are still regarded or not as constitutive elements of the crime.

On this account:

1. An essential critique that can be brought to the draft Criminal Code is that it does not fulfil the major objective of any code – to unify and systematize, although the rationale states the need to eliminate the incoherence and the irregular practice. However the actual dispersion of the incriminatory norms into a high number of criminal laws has been an obstacle for efficient activities and a unitary practice. The unification in this matter has not been accomplished since the draft code only comprises only a small number of infractions selected from special laws. It should be noticed that the draft code is meant to replace the criminal code already adopted through the Law 301/2004, which is currently suspended until 1st September 2009. The suspension occurred after observing several serious deficiencies which are also presented in the rationale of the current draft code. Given these, the use of the Criminal Code from 1968 was preferred, since it is functional compared to the one adopted through the Law 301/2004. It is therefore possible for a code four decades older to be superior to a new one. Furthermore the Criminal Code adopted in 1968 was amended numerous times after 1989; therefore stating that "we follow a communist code" is inaccurate. On the other hand, the general section of the Criminal Code includes mainly technical definitions with no ideological features, evidence that certain definitions (e.g., the culpability forms) were entirely assume by the draft code. The continuity, as well as the discontinuity, merely exist where the law is concerned, however, the periodic demolishing of a whole construction in order to start it all over, stands for a detrimental mentality, unfortunately present in our cultural space.

2. The general section of the project includes unexplainable novelties from the abovementioned perspective, as well as the lack of absolutely necessary definitions. For example, article 15 – The essential features of the infraction. "The infraction is the deed provided for by the criminal law, unjustifiable and imputable." The authors therefore consider three fundamental features of the infractions: a. the provision for by the criminal law, b. the lack of justification, c. the imputativeness. Nevertheless, the last two features are not defined, which creates room for confusion and equivoque.

3. On the other hand, guilt, which currently constitutes an essential feature of the infraction, is provided for in the article 17 of the draft code with no mention of what guilt is. Article 17 paragraph 1 only provides that the deed is not provided for by the criminal law if it was not committed with guilt. This negative sentence cannot stand for a definition.

[6] The address of the Romanian Ministry of Justice

Moreover, it develops an unacceptable fiction since it practically considers the hypothesis according to which a fact exists and it is incriminated as infraction, although it is decreed as being not provided for by the criminal law as it is not committed with guilt. As if we were saying it is not daytime, although in reality it is, yet we close our eyes, so it is dark.

4. Article 17, paragraph 2 of the draft code indicates that guilt exists and has two forms – fault and intention; however, besides showing that it merely exists, the draft code does not tell what guilt is.

5. Article 17 paragraph 6 provides a superfluous definition: the faulty deed constitutes a infraction only if specifically provided for by the law. This is obvious, considering that the infraction is the only ground for the criminal liability, and the infraction is provided for by the criminal law. Such definition is useless and can only result in confusion. It is equally hard to understand the provision according to which the deed is a infraction only if committed with intent, since it actually is a infraction because it is provided for by the criminal law, and the form of guilt constitutes an essential feature of the infraction. Unwilling to mention the guilt as a feature of the infraction, the authors of the project designed provisions to demonstrate that guilt is indeed a feature of the infraction.

6. Article 15 paragraph 2 of the draft code continues to use the notion of criminal liability, yet it replaces the current regulation which provides for the circumstances which eliminate the criminal liability and the causes which eliminate the criminal character of the deed through the regulation of the justificatory and non-imputation circumstances. First and foremost, it should be noted that if the current regulation uses the criminal liability as a starting point, and therefore there is a clear accessible representation, which is defined by the mere statement of the causes eliminating the criminal liability and, respectively, the criminal character of the deed, the draft code uses the undefined terms of justificatory and non-imputation circumstances. The result is that, for instance, the self defence is both a justificatory and a non-imputation circumstance (the non-imputable excess), hindering the coherent and unified regulation the current code provides in article 44.

These are just a few observations following a not very thorough study, a working group having the possibility to generate more observations.