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NATIONAL REPORT CONCERNING CORRUPTION

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1. Introduction

The National Corruption Report is an annual publication of Transparency International-Romania, which synopsises selectively the most important developments that take place in Romania in terms of legislation, institutions and politics over the current year. *The National Corruption Report* is issued every spring and it accompanies the Global Corruption Report*,* which is issued under the aegis of the TI International Secretariat which is based in Berlin. The 2005 issue of the *National Corruption Report* follows a number of topics that were approached in last year's report — more specifically the conflicts of interest and immunity – yet it also tackles a new topic, meaning the role that political parties play in shaping out anti-corruption policies, especially because 2004 was an election year.

This report will not provide an exhaustive look into how corruption or anti-corruption activities have developed lately.. It will be more of a critical exposition of positive and negative issues in front of the public opinion and will provide starting points and solutions to amend a number of policies that have had weak outputs in this area. Legislative and institutional evolutions are essential to influence the framework that surrounds corruption, specifically for the authorities and procedures whose aim is to prevent and fight corruption. Studying them is essential for assessing the current status of the national and legislative anti-corruption system and the purpose is to identify new targets for the reform process. The section devoted to special topics will approach some very specific developments that significantly impact anti-corruption in Romania.

The Global Corruption Report is an annual report of the international anti-corruption coalition — Transparency International. *The Global Corruption Report* synopsises the theoretical and practical developments of corruption at world level. This year's issue approach a special topic: corruption in construction and post-conflict reconstruction. This is also the first issue of the *Global Corruption Report* which looks into Romanian corruption and its institutional and legislative developments, plus two special topics: justice reform and conflicts of interest. It is important to know that the section devoted to Romania covers June 2003 — June 2004.

Transparency International — Romania launched the *National Corruption Report* as part of a calendar which is quite critical for Romania, which is supposed to cope – over a shortest amount of time – with the difficult tasks undertaken by signing the EU Accession Treaty on 25 April 2005. Under these circumstances, we should also note the contradictory attitude that some European officials put forth, especially in terms of Romanian corruption and of what authorities do to prevent it, fight against it and punish it. According to the latest statements that European officials have made, actual indications that Romania is really fighting corruption are a primary prerequisite that conditions the Accession Treaty being signed on time, meaning for actual accession in 2007.

2. Legislative developments

This section presents the most significant issues that are directly associated or related to prevention of and fight against corruption, that were adopted throughout 2004. Pieces of legislation are not presented chronologically, but rather in a different order that follows the scope of the impact they had on anti-corruption policies. There are two subsections that cover domestic legislation distinctly from international treaties or conventions that Romania is a party to. This assessment of the legislation considers several dimensions – scope of enforcement and compliance, an overview of effects on the relevant institutions and an overview of what is new about how anti-corruption policies have been improved.

2.A. Internal legislation

Law No. 303/2004 on the statute of magistrates,
Law No. 304/2004 on judicial organisation, and
Law No. 317/2004 on the Superior Council of the Magistracy

The purpose of the justice reform package is to strengthen the independence of the judicial authority as against political influences. For the matter, the Super Council of the Magistracy will take over the decision-making monopoly in matters of access to the corps of magistrates, the career of magistrates and the disciplinary punishment of the magistrates and isolates the community of the magistrates from previous instruments that enabled the government to control them indirectly[1]. The statute of magistrates sets the basis of objective and professional criteria for the appointment of magistrates, their permanent training, their promotion to senior positions in courts and prosecutor's offices, suspension or secondment, etc. Something new about the Romanian legislation is that it regulates the civil liability of the magistrate in matters of miscarriage of justice, which – together with the regulation of abuse of official capacity taken together with obtaining personal benefits or benefits for third parties that is considered a criminal act of corruption[2], will put more strain on magistrates who issue judgements that lack integrity.

Law No. 571/2004 on the protection of whistleblowers who work for public authorities, public institutions and other budgetary bodies is aimed at encouraging a civil attitude of the civil servants and the staff who work for state institutions in general, who report on wrongdoing that they discover in public bodies and institutions. The concept relies on the reasoning that wrongdoing is best known by people who actually work inside the public bodies and that whistleblowers must be protected properly against any retaliation. Moreover, the whistleblower law will now supersede the former tacit rule of resolving internally any such problems or irregularities.

This law defines whistle-blowing as a "report made in good faith of any act which involves a violation of the law, professional deontology or the principles of good administration, efficiency, prudence and transparency"[3], which satisfies the requirements of sound administration that are set in Part II of the Constitution for Europe, the Charter of Fundamental Rights. Whistleblowers can approach quite a number of public and private bodies, such as the superior of the wrongdoer, the head of the public authority, the public institution or the budgetary entity for which the wrongdoer

1 See Section 3 — Institutional developments.
2 See the analysis of Law No. 521/2004 below.
3 Article 3, letter a).

works, the discipline commissions or any other similar bodies of the public authority, the judicial bodies, other bodies whose responsibility is to ascertain and investigate conflicts of interest and incompatibility, parliamentary commissions, the mass-media, professional organisations, trade unions' organisations, employers' organisations, and NGO's[4]. The multiple reporting methods are meant to encourage whistleblowers into revealing any irregularities, while being assured that such reports will be pursued and that whistleblowers will be protected properly, including protection against media coverage and recourse to action of the civil society.

The law provides means to protect whistleblowers against direct or indirect retaliation. Whistleblowers enjoy the presumption of good faith in terms of how true their report is. According to this principle, the burden of proof does not devolve upon the whistleblower, but on the person to whom the report refers, which facilitates the resolution of the matter. Whistleblowers can also request the presence of the mass-media, the representatives of the trade union or of professional associations who are part of the commissions that deliberate the wrongdoing reports. All of these provisions, that deviate from the Code of Conducts or from other normative acts that run counter them, provide an efficient mechanism whereby to flag out and supply evidence of corruption and abuse of senior officials, public servants and staffers of public institutions and authorities. They also play a preventive role, since they have prevailed over the "code of silence" that ruled inside public institutions.

Law No. 521/2004 which amends Law No. 78/2000 that governs activities conducted to prevent, ascertain and punish corruption adds abuse of official capacity against the public interest to the list of corruption offences and restricts some rights, if wrongdoers obtain for themselves or for third parties a financial or non-financial benefit[5]. The reason why these amendments had to be made is that abuse of official capacity against the public interest and against the rights of persons and the restriction of certain rights can underlie the obtainment of certain personal interests for the wrongdoer or a third party, which actually falls under "corruption" — abuse of public power to obtain personal interests. This new regulation makes criminal anti-corruption legislation more systematic, by properly incriminating and punishing a number of deeds that are considered "corruption". Moreover, the proper administration of justice is ensured in this way since bribery no longer needs evidence, which the most difficult to get in order to substantiate the allegations of corruption, but just the existence of the abuse which is correlated to the personal benefit. One last major issue is related to deeds that are wrongly qualified as abuse, negligence or miscarriage of justice "for lack of evidence", which – further to new incrimination possibilities – the specialised anticorruption prosecutor can qualify as "corruption".

Government Emergency Ordinance No. 24/2004 to enhance transparency of duties of officials and public servants and to intensify measures to prevent and fight corruption brings a number of important legislative amendments, more specifically the mandatory wealth statement (Law No. 115/1996), and changes the way in which the National Anticorruption Prosecution Office is organized and operates (Government Emergency Ordinance No. 43/2002) as well as the regulations that govern the ministerial responsibility[6]. About the wealth statement, the ordinance makes it now mandatory for all candidates to elective positions (Presidency, Parliament, County

4 Article 6.
5 Article 13[2] of Law No. 78/2000 to prevent, ascertain and punish corruption.
6 Government Emergency Ordinance No. 3/2005 that amends Law No. 115/1999 on ministerial responsibility, changes the way in which former ministers can be held criminally accountable. Former ministers are no longer immune as they are while in office and can be held criminally accountable subject to the regular procedures.

Council, city hall) to declare their wealth and enables the General Prosecutors of the National Anticorruption Prosecution Office to request an investigation into the wealth. Also, this piece of legislation changes the standard wealth statement form, meaning that is contains the obligation to declare any aggregated value of over 5,000 Euros of receivables, bank accounts, bank deposits, bonds and securities that a particular public servant or official may have and downsizes the ceiling value of the gifts and services that a public servant or official may receive and is suppose to declare and also decreases the value of protocol gifts and services that must be declared, from 300 Euros to 200 Euros each.

This ordinance changes the structure and material competences of the National Anticorruption Prosecution Office (NAPO) so as to enhance its institutional capacity. In circumstances where that institution was clearly undersized compared to its tasks and activities, the ordinance increases the number of prosecutors and specialised staff by nearly 25%, gives NAPO financial autonomy, but it refocuses NAPO's business on cases of corruption that cause even lower damage, by downsizing the ceiling from 100,000 Euros to 10,000 Euros and the value of the object of crime from 10,000 Euros to 3,000 Euros. These changes of competence have been deemed to be beneficial, since they will enable NAPO to enforce a correct criminal policy for most acts of corruption. To the end of 2004, **Government Emergency Ordinance No. 103/2004** brought one more change to NAPO's material competences, in order to focus NAPO on combating "grand corruption", although this institution was not legally prevented to do so even before this moment. In this way, the value of the damage grew from 10,000 Euros back to 100,000 Euros, *i.e.* the value of the object of the crime grew from 3,000 Euros to 5,000 Euros, for the criminal offences that stay within NAPO's jurisdiction. Unfortunately, an unavoidable lack of attention made the government fail to withdraw Government Emergency Ordinance No. 24/2004 from being passed through Parliament[7] concurrently with issuing Government Emergency Ordinance No. 103/2004, and the consequence was that the latter[8] was only applicable for less than a month.

Law No. 480/2004 to amend the Code of Criminal Procedure contributes to increasing the procedural guarantee granted to a person who files a criminal complaint. The new procedural mechanisms involve the obligation to substantiate the decision not to start the criminal prosecution[9] and to communicate this decision to the complainant, the person the complaint refers to and to any other third parties that may have an interest in this. Also, injunctions or decisions to terminate criminal prosecution shall be notified to both the complainant and to the accused or culprit, as well as to any other persons that may have an interest in that matter[10]. In the same line of reasoning, the same treatment goes for acts whereby motions against non-indictment resolutions are resolved. The notes of substantiation and all communications enhance the decision-making transparency of the prosecuting business and secures the actual and unhindered right of access to justice by knowing the exact reasons that made the basis for decision of the prosecutor. Concurrently, this piece of legislation also secures a mechanism whereby to cut into opportunities to conceal a certain case by not using a certain piece of evidence that has been produced.

Government Emergency Ordinance No. 92/2004 which regulates the salaries and

[7] Law No. 601/2004 which approves Government Emergency Ordinance No. 24/2004 that contains measures aimed at enhancing transparency of the public office and public service, as well as measures to prevent and combat corruption became effective as of 20 December 2004.
8 Effective as of 16 November 2004.
[9] Article 228, par. 6.
[10] Article 246, par. 1.

other entitlements of public servants in 2005 amends Law No. 188/1999 on the statute of public servants (an organic law), republished, about the structure of the public offices, the career system and the professional hierarchy. In this way, all re-assignments on public positions that were made based on *Law No. 161/2003 regarding some measures to ensure transparency for the public office*, *public services and the business environment and the punishment of corruption* were cancelled. The direct consequence was that it became impossible to enforce the provisions of the Statute in terms of the evaluation of the professional performance and career promotion on merit criteria. This legislative involution casts doubt over the principle of tenure of the public office.

Law No. 477/2004 regarding the code of conduct for staff hired under a contract by public authorities and public institutions is another piece of legislation that governs the public service in the spirit of the *acquis communautaire*, in order to close the negotiations on *Justice and Home Affairs* and in accordance with the *right to good administration* which is formalised under Article 41 of the European Charter of Fundamental Rights (Article II-101 of the Constitution for Europe). Legislation in the field of conduct in the public sector has proved to be insufficient as far as the contractual staff of the public institutions and authorities are concerned, since the provisions of the Code of Conduct of the Public Servants did not apply to them[11] and therefore they were not subject to proper professional rigour. And that happened so much the more as most of the staff hired based on Labour Code provisions *(the so-called contractual staff)* in institutions and authorities of the public administration and of the state public services, respectively, include most of this kind of staff and are not public servants.

The code establishes the basic principles of the conduct of staffers hired under a contract – the priority of the public interest, the equal treatment of citizens by authorities and institutions, the professionalism, impartiality, non-discrimination, moral integrity, freedom of thought and expression, honesty and correctness, openness and transparency. The code also contains a number of interdictions to reveal information that is obtained in the course of professional duties and that could attract some undue gains or could harm the rights of the institutions or any other entitlements of individuals and legal entities. That interdiction stays valid for 2 years from the date when the labour agreement ceases. The Ministry for Administration and Interior, the Ministry of Foreign Affairs and the National Control Authority coordinate and control the way in which the code of conduct is enforced in terms of staffers hired under a contract. One negative issue that has come up in connection to this law is that enforcing institutions and authorities failed to harmonise their internal regulations and codes within 30 days, as they should have done according to Article 25 of the law.

Law No. 251/2004 on some measures regarding goods received free of charge in protocol activities during the term in office brings new change to Government Emergency Ordinance No. 24/2004 meaning such goods whose aggregated value exceeds 200 Euros must be declared. This provision will solve the regulatory gap created by the situation where the individual value of the goods would have been under 200 Euros, but their cumulated value may reach significant ceilings. The law also introduces some new procedures about the goods received free of charge.

Presents whose total value stays under 200 Euros will be returned to the person who

[11] *Law No. 7/2004 regarding the Code of Conduct of staff working under contracts for public authorities and institutions.*

declared them. In the event that the aggregated value of the goods exceeds 200 Euros, they shall be considered property of the institution or may be redeemed by the person who declares them. These mechanisms are necessary for the control of presents made to senior officials, magistrates, public servants, etc., in order not to enable the dissimulation of bribery in "conveniences" that should actually be aimed at obtaining undue benefits by virtue of the position. A present which is received during protocol activities and whose value exceeds 200 Euros can no longer be considered a "token" (including by comparison with the average income in Romania) and, therefore, cannot be accepted as a legitimate practice in the public institutions.

But still, for the sake of symmetry and in order to complete the regulations that govern this field, there should be a similar procedure that should cover the free services that senior officials, public servants or magistrates get, because such services could also have an influence upon the decisions made by virtue of they office they hold. The current text of the legislation that governs the declaration of wealth, goods, interests, etc. is not complete without similar regulations on protocol services, that could have an rationale similar to that of presents, but with a much higher value[12].

Law No. 554/2004 on administrative litigation qualifies government ordinances as legislation that can be challenged, therefore citizens may take legal action against them in a specialised court, if their legitimate rights and interests are harmed. This piece of legislation develops a concept according to which the acts issued by the government can be abusive and therefore they should be subject to control by means of administrative litigation. An interesting avenue of law enforcement in the fight against corruption is the possibility to challenge government ordinances that fail to comply with the legislation of decision-making transparency or conflicts of interest.

Law No. 393/2004 on the statute of local elected officials introduces provisions that complement Law No. 215/2001 on local governments. The statute of the local elected officials regulates the content of the interests statement of the local elected officials, the interests book and the types of punishment that can be administered to people who fail to declare their interests or the adoption of a decision in matters of conflicts of interest[13]. Failure to file the interests statements by the statutory deadline shall entail the suspension *de jure* of the mandate of the adviser or mayor and the refusal to file such statement shall entail the nullity of the mandate *de jure*[14]. These provisions and Law No. 161/2003 overlap, because - although the draft[15] was indeed filed with the Chamber of Deputies on 07 June 2001, the law was hardly passed at the end of the mandate in September 2004. Lack of attention resulted into the statute of local elected officials having provisions similar to the ones of Law No. 161/2003, therefore the integrity of these officials is subject to legislative redundancy. Unlike the obligations that any official, magistrate or public servant has in terms of presents, local elected officials are subject to much severer rules. They are bound to declare and yield all goods that they get in protocol activities of the local authority[16]. The inconsistency of the rules that cover presents that officials receive in protocol activities is not justified and therefore should be solved, meaning that these officials should declare and yield all of the goods they receive in protocol activities.

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[12] Protocol services may consist of partial or total coverage of costs of travelling, accommodation, meals or even scholarships and conference fees.
[13] Article 77.
[14] Article 82.
[15] The draft statute of local elected officials was prepared under an assistance programme, funded by the Council of Europe.
[16] Article 75, letter j).

Law No. 302/2004 on international judicial cooperation in criminal matters consolidates and harmonises the procedures that govern international judicial assistance and is relevant vis-à-vis the ratification of several international anti-corruption conventions. International cooperation in criminal matters covers extradition, delivery of the arrested based on a European arrest warrant, the transfer of the criminal procedures, recognition and enforcement of criminal judgements[17], the transfer of the convicted, letters rogatory and others.

2.B. International conventions

Law No. 365/2004 to ratify the UN Convention against corruption, that was adopted in New York on 31 October 2003, establishes the general framework that signing countries undertake to transfer in the national legislation in order to prevent and fight against corruption. Most of the underlying principles of this framework were already regulated under the domestic legislation, that has been adopted so far, *i.e.* codes of conduct in public activities, special regulations that govern public procurement, freedom of information, decision-making transparency, regulated state aids, regulations that govern conflicts of interest, activities to fight money laundering, criminal accountability of the legal entities, protection of witnesses and victims, protection of whistleblowers, international cooperation in matters of extradition, transfer of the convicted, legal assistance in matters related to letters rogatory, etc. The most important issue deriving from this Convention is that it regulates for the first time the procedure to recover property which is obtained by means of a criminal activity and which has been transferred over the border. These provisions have an important potential to help recover goods and values that have been transferred abroad. For that matter, we recommend that Romanian authorities should prepare a plan based on which to enforce the Convention, *i.e.* to make the most of the potential it has[18].

Law No. 260/2004 ratifies the additional May 15th, 2003 Strasbourg Protocol of the Criminal Convention of the Council of Europe which regulates the incrimination of active or passive corruption of the arbiters in a commercial litigation. This regulation is significant, since commercial arbitration becomes ever more important in Romania and since arbitration courts issue final awards in commercial litigations.

[17] *Including the recovery and enforcement of the object and profit of the crime.*
[18] *This Convention is not enforceable for the time being, since it has been ratified by 19 states only: http://www.unodc.org/unodc/en/crime_signatures_corruption.html.*

3. Institutional developments

Institutional developments are markers of the most significant changes that occurred throughout 2004 and that have an impact upon the evolution of anticorruption policies. The main developments that have occurred in this field bring home the primary conclusion that the lack of coherence of institutional transformation of key bodies that are supposed to fight corruption – *i.e.* NAPO, the National Control Authority, the Control Corps of the Government – as well as the weak institutional capacity put a serious strain on anticorruption activities.

Practically, **NAPO** has been at the focus of all corruption debates. Given the requirements of the European integration vis-à-vis corruption in Romania, NAPO has been subject to significant pressure from the public opinion, but also from political factors (since it was an election year) in order to score some tangible and convincing results in the fight against corruption. Such pressure has resulted into a number of justice reform initiatives that were substantiated rashly, as well as into an instability of NAPO's priorities against its own duties.

NAPO has been transformed substantially in terms of attributions and competences in at least two phases over 2004, under Government Emergency Ordinance No. 24/2004 and Government Emergency Ordinance No. 103/2004. The purpose of the first change was to enhance NAPO's institutional capacity, which became insufficient compared to what NAPO was supposed to do. More specifically, NAPO's General Prosecutor has two deputy GP's and two advising prosecutors to help him or her. NAPO's General Prosecutor becomes the main credit authorising officer (*Rom. ordonator principal de credite*), which secured a more substantial financial authority[19]. NAPO has more departments according to the types of crime it is supposed to deal with, *i.e.* anti-corruption, indictable offences associated to corruption, indictable offences committed by the military and the judicial department. Staff has already increased by 25%.

In the second part of 2004, NAPO was found to be still undersized compared to what it was supposed to do and to the European urge of increased efficiency in terms of "grand corruption", therefore NAPO'S job description changed again under Government Emergency Ordinance No. 103/2004. Despite these changes, Government Emergency Ordinance No. 103/2004 stayed valid for one month only, since it was repealed by Law 601/2004 which approved Government Emergency Ordinance 24/2004[20]. The new legislation actually reinstated the former system of material responsibilities, despite all of the problems associated to the transfer of files between NAPO and ordinary prosecutor's offices. Studies have proved that a more efficient fight against "grand corruption" must not rely on deliberately ignoring the other acts of corruption, but on institutional capacity building. We have found the allocated resources to be still undersized compared to what it is expected from this institution.

The National Control Authority (*Rom. Autoritatea Națională de Control* – ANC) was created under Government Emergency Ordinance No. 64/2003 in order to funnel all control activities into one single authority, including the Government's Control Department, the Tax Evasion and Fraud Authority, the General Customs Department, the Construction Inspectorate, etc. Government Emergency Ordinance No. 11/2004 on

[19] *As per Government Emergency Ordinance No. 43/2002, NAPO's budget was managed by Public Prosecutor's Office.*
[20] *See the section entitled "Legislative Developments", Government Ordinance No. 24/2004.*

measures to reorganise the central government wound up the **Government's Control Department** and transferred its responsibility to control internationally-funded programmes and the enforcement of the *acquis communautaire*, as well as the control over conflicts of interest (as per Charter I, Title IV of Law No. 161/2003) to the **minister delegate who is in charge of controlling internationally-funded programmes and the enforcement of the *acquis communautaire*** and who becomes Romania's only point of contact with the **European Anti-Fraud Office** (OLAF). This transfer was confined to the jurisdiction of the new institution. Despite the outstanding importance of this institution for the European integration process[21] and also in spite of a number of promising results throughout 2003, the new institution that was created as per Government Emergency Ordinance No. 11/2004 failed to operate properly throughout 2004 and has submitted no activity report. Although Government Emergency Ordinance No. 11/2004 was published in the Official Gazette on 23 March 2004, Government Emergency Ordinance No. 1384/2004 that enforces it was hardly published on 26 august 2004. Additionally, Government Decision 1348 does not regulate how the tasks taken up from the former Control Department should be enforced in terms of control over the conflicts of interest throughout the central government, as per Law No. 161/2003[22]: the conclusion is that there was no control focused on conflicts of interest in the central government (see the topic devoted to Regulations on Conflicts of Interest).

Law No. 228/2004 to approve Government Emergency Ordinance 11/2004, transfers the **General Construction Inspectorate** *(Rom. Inspectoratul General in Constructii)* from the National Control Authority to the central government. In early 2005, Government Emergency No. 8/2005[23] transferred the **Tax Evasion and Fraud Control Authority** and **the National Customs Authority** (the former General Customs Department) from the jurisdiction of the National Control Authority into that of the Ministry of Public Finance. The transfer of the whole structure of the National Customs Authority was not justified according to the Memorandum with the World Bank, because – as a natural consequence – the Ministry of Finance should have received the collection task and the competence in financial and customs policy issues, whereas the Customs Supervision Department should have stayed with the National Control Authority, *i.e.* the oversight and anti-corruption competencies. For the time being, both the customs control and supervision of the integrity of the customs control continue to be subordinated to the same head of institution. Such criticism was also signalled in other reports of TI-Romania and of other international organisations too. Also, the separation of the two components was also included in the GRECO recommendations in 2002. Among the anti-corruption measures that should be taken for the signature of the Accession Treaty, a number of measures are envisaged to enhance the public integrity of the customs system, that is why we consider that this anticorruption policy error in the Customs was caused by an unthorough distribution of portfolios[24]. Also, the consequence of the "hasty" distribution of ministry portfolios was that the Tax Evasion and Fraud Authority – whose exclusive task was to control and combat tax evasion – was transferred from the jurisdiction of the National Control Authority (whose institutional strategy actually covered this target) into the jurisdiction of the National Tax

[21] *The European Commission requested this institution in its regular reports that cover progress that Romania makes on its way to EU accession.*
[22] *Article 73, par. 3.*
[23] *This piece of legislation was adopted illegally against Law No. 24/2000 on norms of legislative techniques used to prepare draft legislation, because it was not endorsed by the minister who should have enforced it by transferring the attributions of the National Control Authority to the Ministry of Public Finance.*
[24] *This need became obvious once inside whistleblowers brought a number of cases to the attention of the Centre for Anticorruption Assistance, and after those cases were analysed.*

Administration Authority, whose task is to charge and collect state revenues. Therefore the National Control Authority only oversees the business of the Environment Control Authority (*Rom. Garda de Mediu*), the Romanian Copyright Office, the Agency for Strategic Exports, and the labour, sanitary and veterinarian inspectorates that work under the Ministry of Health and Ministry of Agriculture.

Law No. 233/2004 that amends Law No. 35/1997 that governs the organisation and existence of the **Ombudsman** gives more power to this institution that protects constitutional rights that are violated by legislation which is issued by the Parliament or Government. This piece of legislation widens out the jurisdiction of the Ombudsman, including the possibility to take action before a certain law is promulgated, since the Ombudsman can notify the Constitutional Court about an instance of non-constitutionality[25]; therefore, the Ombudsman has a pro-active competence as against a newly promoted piece of legislation that could harm the civil rights. Albeit this new prerogative may turn out to be useful in terms of the role the Ombudsman plays to prevent government abuse through legislation, there is a risk that this new prerogative may reduce the efficiency of this institution even more, given the weak administrative capacity that affects the main function of the Ombudsman.

The justice reform package brought a major institutional change[26]. More exactly, a number of administrative responsibilities of the judicial system were transferred from the central government (the Ministry of Justice) to the **Superior Council of the Magistracy.** The Superior Council of the Magistracy becomes the guarantor of the independence of the magistrates, since it now controls access to this profession and to judicial management positions, and for that purpose the Superior Council can now use disciplinary liability procedures. The Superior Council of the Magistracy is more independent now against the central government because (1) it can prepare its own budget subject to consultative advice from the Ministry of Public Finance, and because (2) it has an advisory role in terms of the draft budgets of the courts and prosecutor's offices. Moreover, the Superior Council of Magistrates obtained a right to give consultative advice on draft legislation that concern the activity of the court authority, as well as the right to submit justice-related legislative proposals to the ministry of justice[27]. What is still a shortcoming is the non-permanent statute of the members of the Superior Council of the Magistracy ("SCM"), who can also work as magistrates too at the same time, which could affect the efficiency and coherence of the institution at a critical time – meaning the very outset of this institution. The controversy that has been generated by the irregularities found over the validation and appointment of some SCM members, as well as the incompatibility that some civil society organisations and professional organisations of the magistrates have flagged out will not enhance the credibility of this institution and of the judicial authority in their entirety. This weakness places a question mark over the capacity of this institution to enforce and continue the judicial reform before signing the Accession Treaty, as well as the capacity of the SCM to take active part in the fight against corruption inside the judicial authority.

[25] *As per Article 13, letter c[2] of Law No. 35/1997.*
[26] *Law No. 303/2004 on the statute of the magistrates, Law No. 304/2004 on judicial organisation and Law No. 317/2004 on the Superior Council of Magistracy.*
[27] *Articles 38 and 39 of Law No. 317/2004 on the Superior Council of Magistracy.*

4. Special topics

4.A. Regulation of the conflicts of interest

Under Law No. 161/2003, Book I, Title IV, Romania adopted the general regime of the conflicts of interest, incompatibilities and wealth statements. Wealth statements and wealth control had been regulated as early as 1996 under Law No. 115.

Law No. 161/2003 covering conflicts of interest really meant a step forward, but the civil society and international experts raised a vigorous objection against it in matters of both substantive law and procedural enforcement and the validity of the penalising system, respectively. Throughout 2004, a number of imperfections of this law were confirmed. The main shortcomings were the following:

- The definition of the conflict of interest makes a confusion between being a decision-maker and the decision adopted as such;
- The definition does not cover the conflicts of interest that are concealed behind a go-between;
- Elements of conflict are not established by defining public interest and personal interest, which has led to avoidance of law enforcement in a number of clear cases;
- The publishing methodology did not take into account the logistic possibilities of the authorities of the public administration in rural areas (over 3200 communities);
- Local elected officials (local or county councillors) were not included in the chapter devoted to the conflict of interests, which resulted into the fact that the Law on the Statute of Local Elected Officials established the obligation to file a statement of interests (which is not consistent with the framework law and was established by derogation under a special law).

One major hindrance in monitoring how this law is enforced is the **institutional fragmentation** in terms of how compliance with the law is controlled and how penalties are enforced in this sense. The law defines several levels of the control over conflicts of interests:

1. *The Prime Minister's Control Department,* for people who are members of the central government, secretaries of state, deputy secretaries of state or similar positions, prefects or subprefects.

   Inefficiency of the institutional infrastructure: under Government Emergency Ordinance No. 11/2004, article 2, letter a) "the Government's Control Department, which is a public institution that reports to the prime minister and is subordinated to the National Control Authority, having a legal personality, is hereby terminated". More specifically, starting 28 March 2004, Romania no longer had an institution that could monitor conflicts of interests of senior officials. The responsibilities of the former Control Department of the Government were taken over just to some extent as article 2, par. (4) stipulates that "as of the date when this emergency ordinance takes effect, the National Control Authority shall also manage the activities of the control bodies of the ministries and central public authorities and shall also conduct internal administrative controls".

This solution actually created a serious gap in the corruption prevention system, because of the institutional fragmentation that allowed for this serious error to "sneak" in. The minister delegate for control activities did not take over the responsibility to check conflicts of interests and incompatibilities on an exhaustive basis, while monitoring conflicts of interests associated to internationally-funded programmes and monitoring the enforcement of the *acquis communautaire* were transferred back into the jurisdiction of the relevant minister delegate, who is part of the prime minister's chancellery. Our opinion is that, in 2004, the law was not enforced in this area, for the most important category of persons.

2. *The Prefect*, for the mayors and vice-mayors, the general mayor and vice-mayors of Bucharest.

   The inefficiency of the institutional infrastructure: as part of the legality control, the prefect did not initiate any prevention mechanism by activating the impartiality statements, although there is a number of good practice examples in this sense. Moreover, prefects' offices reported no dismissals or penalties enforced for conflicts of interests and – as a consequence – there was no request to control personal wealth either. Prefect's offices do not have oversight mechanisms established through the legislation that governs their organisation.

3. *The head of the public institution or authority,* further to the proposal of the hierarchical superior, notifies the Public Service Discipline Commission (over 4150 public authorities and institutions).

   Inefficiency of the institutional infrastructure: the principle of the hierarchical subordination of the public positions involves a hierarchical approval of the solutions, so that hierarchical superiors that should be "supervisors" are actually co-decision-makers since they ratify and endorse decisions. Another aspect is the impossibility to create discipline commissions for local public authorities in rural areas (over 3,200 communities), since public servants are very few in numbers and there are no legal advisers. Since the Statute was amended (Law No. 188/1999), one commission could take charge of several communities, but this opportunity was only used for 70% of the localities and practically these commissions did not even work for other disciplinary misdeeds. Therefore, the law was not enforced. As a total, given the institutional fragmentation, no reports have been seen about conflicts of interests that competent administrative bodies may have solved throughout 2004.

   One highly illustrative example[28] of incoherence and of disregard of national anticorruption objectives is the situation that was found inside the National Medicine Agency (*Rom. Agenția Națională a Medicamentului*). Article 81 of Law No. 96/2004 which approved Government Ordinance No. 66/2003 stipulates that "members of the scientific council must declare their personal interests, as well as interests that their spouses and first-degree relatives have in companies that produce, distribute or import Romanian or foreign medicines, before being assigned on their positions and whenever needed or whenever the situation changes. Members of the scientific council, who are at a conflict of interests in relation to one of the issues debated by the scientific council must voluntarily decline participation and must leave the meeting room " which runs counter

[28] *The monitoring was performed based on the cases referred to the Anticorruption Citizens' Assistance Centre, a program developed together with the National Control Authority and the National Anti-Corruption Prosecutor's Office.*

provisions of Law No. 161/2003.

This change that took place in 2004 opens up the possibility to exercise the membership mandate of the Scientific Council in circumstances of a permanent conflict of interests. As people who may have interests on the relevant market, certain Council members should not get involved in Council activities at all, since it is a market regulator. The obligation to abstain in relation to decisions that have an impact on the companies they are interested in comes too late and is not efficient, as long as members participate in decisions that focus on competition. The Government proposed this special exemption and the Parliament accepted it, despite the Report of the Healthcare Commission of the Chamber of Deputies No. 28/15/28 January 2004, which provided for the introduction of the special exemption: "In article 12, after paragraph (2), paragraphs (3) and (4) are introduced, and shall read: (3) Individuals holding personal interests, or interests of their spouses, first-degree relatives and other individuals in their care, according to paragraph (2), or the individuals who are employees of the producers, distributors or importers of medicines, or employees of the country branches of the producers, distributors or importers of medicines cannot be appointed members of the board of directors or the scientific board."

Incompatibilities. The remarks on the lack of institutional capacity to enforce the law on conflicts of interests are also relevant in the enforcement of the law on the status of incompatibilities. *We are especially mentioning* the situation of the deputy and lawyer Iorgovan, who, at first, represented the secretary of state Domocos, who was arrested for taking bribe in the Sapard case. The deputy and lawyer Iorgovan submitted his request to represent this individual and then, upon the hearing devoted to the motion against arrest, he withdrew. Because of this delay, the deadline for the court to decide on the extension of temporary arrest was surpassed; consequently Domocos was set free. After a while he fled the country and evaded prosecution.

The deputy and lawyer Iorgovan expressly violated the provisions of Law 280/2004 approving Emergency Government Ordinance No. 77/2003, which stipulates that "Deputies or senators who choose to work as attorneys at law while in office cannot accept cases that are being judged by trial courts or tribunals, nor can they provide legal counselling to the prosecutor's offices associated with these courts. The deputy or senator in the situation described in par. (1) cannot provide legal assistance to the accused or defendants, nor can they represent them in a court of law, in criminal cases on: corruption offences, crime assimilated to corruption, crime associated with corruption offences, as well as offences against the financial interests of the European Communities, as stipulated in Law 78/2000 for the prevention, discovery and punishing corruption offences, as subsequently amended and completed". However, no legal action has been taken against the deputy and lawyer Iorgovan.

Another example of preferential standards, this time stipulated by law, is Law No. 114/2004, whose Article 1 reads that "In exceptional cases, for the individuals who are appointed, by law, by the President of Romania, the Parliament upon his proposal or the National Supreme Defence Council, the standing bureaus of the two Chambers, may approve, in a joint meeting, to keep these individuals in office even if there is an incompatibility, if there is a public interest requiring this solution". It is obvious that the phrase "public interest" cannot be conceptually perverted to breach the very public interest for which a state of incompatibility was established, by organic law or even by the Constitution. There is only one public interest and there can be no hierarchy or prioritisation regarding it.

Wealth control. As for this matter, the mechanism stipulated under Law No. 115/1996 is still totally inefficient, even though subsequent amendments have been added to the law, but without any tangible effects. Under two different legislatures, the wealth control committees under the courts of appeal only acted scarcely and they only ruled in two cases over 8 years, according to a report from the Institute for Public Policies. The Prosecutor's Office of the High Court of Review and Justice requested no wealth check from the Wealth Control Committee. We should remember that, during this period, the General Prosecutor's Office worked on a number of fraud and evasion cases with several officials involved. This situation proves that they were not interested in using this instrument, or that the law had flaws, or that the effectiveness of such committees was not trusted actually.

Proposals and recommendations:

i. Review the definition of the conflict of interests, including the defining elements for public and private interest, so that the whole range of conflicts of interest may be covered, even those concealed behind a go-between.

ii. Redefine the status of incompatibilities, proportionally with the scope of jurisdiction, competence and actual duties that the law sets forth for each category of individuals in the public sector (dignitaries, magistrates, civil servants, contracted employees as well as members of deliberative bodies of any kind that work under public authorities and institutions).

iii. Provide for concrete penalties and enforcement thereof for every violation of the legal provisions of Title IV, Book I of Law 161/2003.

iv. To remove the phrase "irrefutable clues" from the text regarding wealth control.

v. Unify the interests and wealth statements for all categories of staff.

vi. Transparency International—Romania advocates the proposal of the European Union regarding the fact that institutional fragmentation should be eliminated, and all the monitoring competences for conflicts of interest, for all the categories of individuals provided by law, should be aggregated into one institutional mechanism, independent of the executive power and private or group interests.

vii. Set a unified standard for conflicts of interest, for all categories of public sector decision-makers, and eliminate all the exceptions provided by special laws.

viii. Introduce the monitoring and coordinated control over conflicts of interest, incompatibilities, wealth statement submittal and control (by the institution mentioned under recommendation no. 1), using the connection to the national information system (monitoring by means of the personal identification number and the databases of the Registry of Companies and the National Tax Administration Agency).

ix. Set a quick and efficient penalty mechanism, based on an administrative jurisdiction system with a mandatory primary character, whose decisions

should be challengeable in independent courts.

4.B. Political parties and the anti-corruption policy

Political corruption was the main topic of the Global Report on Corruption – 2004. About the time when the UN Convention against corruption was finalized (signed in Merida, Mexico, on December 9th, 2003), as a preface to the electoral fights from 2004, TI-Romania challenged Romanian political parties to answer 10 questions that would define their standing about the future anti-corruption policies. The topic was even more interesting because the Global Corruption Barometer (Transparency International & Gallup International, July 2003) suggests that, if the general public had a magic wand to use in order to eliminate corruption, political parties would be the first subjected to this "magical healing" (24.3% in Romania, as compared to 29.7% globally, on a representative sample of 40,000 people).

The results of TI-Romania's research on the positions of Romanian political parties about corruption and ways of preventing/fighting it were rather disappointing. Five months before the local elections and 11 months before the general ones, parliamentary parties still did not have a well designed anti-corruption public policy, even though the topic of corruption was sensed to be among the hottest in debate, closely connected with another major theme – EU integration (see the European Commission Progress Reports on Romania's integration). In a series of debates hosted by *Radio Romania Actualități* in the final week of the election campaign before the local elections (May 4-6, 2004), as well as a comprehensive analysis made by a group of independent experts for magazine *Dilema Veche* and EurActiv.ro (October 22nd, 2004), showed a very poor understanding of the concepts and a gross lack of vision regarding the engine of anti-corruption reform.

As compared to other peoples, Romanians tend to wait for the state to support them in solving issues which are clearly linked to their personal welfare. This is why Romanians expect so much from public institutions in terms of anti-corruption (the Public Opinion Barometer of OSF) and, by extension, transfer the responsibility for finding anti-corruption solutions to the Government. From this angle, this is the reason why it becomes so important for political parties to be able to create viable policies and/or anti-corruption strategies. The flaws which generally affect the political parties' speeches about corruption[29], also mark the way in which political parties develop anti-corruption measures:

1. The proposed measures and rationales are vague. Example: *The main cause of this situation is connected to the exponential increase of corruption and political clientele. The direct, organized and cascading theft, the trading of public positions and obligations towards the citizens (through direct and hierarchical relations, from the civil servant to the top-ranking government) as well as the mismanagement of public funds impede on the fundamental rights of the general public – healthcare, education, safety.*

2. It is difficult to measure the causes of corruption and the effects of the proposed measures. Example: *Most of the revenues generated in this country go to the*

[29] The examples illustrating these discourse flaws were taken from the web pages of political parties – the sections on electoral programs. The identity of these parties is not mentioned, in order not to transfer the analysis of the errors in understanding integrity policies to the authors of these errors.

pockets of a small number of clients of the incumbents. The gap between the transition nouveaux-riches and the rest of the population is now wider than it has ever been in the past 12 years.

This is also proved by the Barometer of Consumer Confidence, which shows that three quarters of the Romanians do not have enough money to get by. If you connect that with the fact that economy is growing, we can only wonder whose pockets will be filled with this money. We got an answer the other day: the court ruled that [the deputy under debate] *should pay damages of 2,253 billion lei! This is how much one of the high and mighty managed to collect.*

3. Lack of coordination among various institutions of the state in implementing these measures. The European Commission stated, in 2003, that there were three major obstacles against Romania's integration: compliance with European integration standards namely a) the functional market economy, b) the administrative capacity of enforcing the acquis communautaire, and c) the independence of justice, corruption being the thread that runs through all three areas. In their public positions, political parties treated corruption as a stand-alone issue, which led to difficulties for Romania in concluding the chapters on justice and internal affairs on the one hand, and fair competition and regional development policies on the other. Even now, towards the end of the first quarter of 2005, the danger of a negative vote of the European Parliament or the future activation of the safeguard clause seem to fully depend on the measures taken to fight corruption.

4. People in charge, deadlines, financial and human resources that would make these measures possible are unclearly or not at all defined. Example: *People and institutions that defraud other people and the economy in any of its organizational forms to fraud must be punished exemplarily. We support an effective campaign to reduce and finally eliminate corruption and to combat the chronic poverty most of the population lives in, and we have already started along this path.*

5. Realistic and feasible measures. The setting up of the National Anti-Corruption Prosecutor's Office (NAPO) was one of the most important steps against corruption in the past 4 years. However, the institution was established without a prior feasibility study, cost-benefit analysis or risk and impact study. NAPO regulations have been changed ten times in three years, especially with regard to its jurisdiction and infrastructure. More specifically, NAPO's legislative and institutional never-ending story reveals the difficulties encountered by anti-corruption measures, if they are not rooted in an adequate and coherent public policy. The similar evolution of the National Control Authority and/or other institutions involved in the anti-corruption efforts raise questions about the additional costs incurred by the regulation of insufficiently substantiated mechanisms. It is possible for these subsequent regulation mechanisms to surpass the initial costs of solving the issue.

Political parties and politicians are very easily tempted to discuss corruption issues of their political competitors and to refer to (alleged) corruption offences which happened in the past, instead of focusing on change or anti-corruption reform that they could start themselves (media monitoring report, August 2004). In the campaign for the 2004 local elections, "corruption" was present as a topic of political speech especially in electoral attacks. The anti-corruption measures covered by the national media during the monitored period cover very few articles (14 of a total of 349) and are poorly articulated. Electoral attacks usually focused on acts which does not qualify as corruption under Romanian legislation, but which are generally part of what is understood as corruption,

i.e. an abuse of the incumbents to obtain private benefits. The most frequently invoked such offence was electoral fraud.

Thus, anticorruption speeches of political parties during the electoral campaign do not illustrate their capacity to prepare anti-corruption policies. There is a number of reasons for this: political parties do not have the capacity and political will to promote the policies: anti-corruption measures are not regarded as a source of votes in their electoral strategy; the national press omitted possible anti-corruption messages proposed by political parties during the local election campaign. One thing is sure: political speeches as reflected in the national press over the period under scrutiny provide voters with no benchmarks or criteria based on which to make a distinction among candidates based on their political will and ability to enforce anti-corruption measures. The speeches of the political parties omitted to explain why civil servants reacted in a certain way and to check conflicts of interests, although they were relevant for the local election campaign.[30]

The quality of the political parties' anti-corruption message, as reflected in the national press, is unsatisfactory: parties highlight their anti-corruption objectives, but rarely explain how they want to implement them. The monitoring emphasized that political parties did not mention the persons in charge and their responsibilities in terms of anti-corruption measures, financial, human or time resources necessary to implement them in the above-mentioned areas. Moreover, the parties and candidates presented anti-corruption measures by association with the EU integration efforts. Very few political parties identified themselves with the victims of corruption, and no party ever said who these victims were and who the beneficiaries of the proposed measures were.

This is why the general conclusion seems to be that Romanian political parties do not have policy-making capacity, in general. "Apparently, the identity and legitimacy of Romanian parties only flow from the affiliation with one of the large European political families. The political foundations or research institutes of the parties are not visible, although they would represent the channels of communication by which party leadership could learn about society needs and alternative solutions," according to the preliminary conclusions of the political party reform in Romania, drafted by AID-Romania, jointly with TI-Romania. This analysis will be published after the congresses of the main political parties have taken place and will mostly focus on their policy-making ability, interactions and communication with civil society, revival of internal political management and implementation of adequate strategies of strengthening human resources in the political field.

Beyond the unavoidable mistakes of the electoral campaign, that were mentioned in the section on Legislative Developments, there is the pardon act on December 15, 2004, standing proof for the supposed incapacity of the political class to understand the causes and mechanisms of corruption, and the gap between statements about fighting corruption and the cancellation of any example of punishment. The pardon act has a deep political content, animated by "humanitarian" reasons and with significant results on the national effort of fighting corruption. A number of individuals were pardoned by

[30] *Political discourse about anticorruption measures focused on the following: enhanced efficiency and accessibility of the administration, transparency of contracts that involve public money, explanation of the roles that administration department play, assignment of senior officials based on transparent procedures and merit (preliminary internal elections); citizens should be consulted about the regulations of the local authorities. Topics of anticorruption debates also focused on anti-corruption bodies, the independence of magistrates, monitoring the enforcement of international anticorruption conventions that Romania has signed, which were also topics for the national elections that took place in the autumn of 2004.*

this act, although they had been punished for corruption offences:

1. Valentino Acatrinei, the first judge ever found guilty and sentenced for influence peddling and bribery;

2. Petre Isac, the first governmental advisor ever found guilty and sentenced for influence peddling; as well as

3. Vasile Buse, the first bank vice-president ever found guilty and sentenced for misuse of authority by the fraudulent awarding of credits.

The pardon came at a time where international organizations and Romania's foreign partners were flagging severe deficiencies in terms of justice integrity, were requesting the identification of high level corrupt individuals, and Law 78/2000 had been amended to qualify the abuse associated to personal benefits as corruption (for oneself or another party) as a corruption offence. The comments in the media were along the lines of "for the EU integration, NAPO is supposed to catch the big sharks, and the presidential administration will set them free for humanitarian reasons." Thus, most political leaders pronounced in favour of the withdrawal of the pardon act, without any connection having been made to the corrupt individuals on the list.

4.C. Regulating immunities

Up until the Constitutional changes in late 2003, Romanian civil society had continuously requested the elimination of the dignitaries' total immunity, in order to improve the legal anti-corruption framework, especially fighting against "grand corruption". In 2004, Law No. 255, amending and completing Lawyers' Law No. 51/1995 changed the status of immunities by a significant amendment to the status of lawyers vis-à-vis criminal liability. Thus, in order to be protected from possible judicial harassment, lawyers get a sort of immunity against criminal justice:

> *Art. 37[1] — Lawyers can only be prosecuted and indicted for a crime committed during the exercise of his profession or in relation subject to the approval of the general prosecutor of the Prosecutor's office that works under the court of appeal having jurisdiction over the area where such crime was committed.*

Two types of remarks can be raised here – one referring to the status of immunities as compared to other similar statuses for other categories of individuals, and the other one referring to the consequences of such status in terms of the criminal liability and the exercise of this profession. With respect to other types of immunities, they can refer to the following professional categories: magistrates and dignitaries. On the grounds of Law No. 303/2004 on the statute of magistrates,[31] as well as Law No. 317/2004 on the Superior Council of the Magistracy,[32] magistrates cannot be searched, held in custody or arrested, unless previously approved by the Sections of SCM. Criminal investigation and indictment follow the same rules as for every other citizen. In their turn, deputies and senators cannot be held legally responsible for the opinions they express during their term in office, nor can they by searched, held in custody or arrested unless

[31] *Article 100 par. 2.*
[32] *Article 42, par. 1 and 2.*

previously approved by the Chamber they are members of.[33] Similarly to magistrates, members of parliament subject to prosecution and indictment follow the same rules as for every other citizen for any criminal offence, other than the ones resulting from the opinions they express while in office. As for the members of the government, criminal investigation against them can be requested only by the Chamber of Deputies, Senate or Presidency.[34]

Taking into account all of the above, lawyers have a special immunity against acts of criminal procedure, similar to those of the government members, but substantially different from that of the magistrates or Parliament members. This difference against the magistrates appears unjustified, as the approach should have been similar. These additional guarantees in the criminal procedures, which lawyers benefit from, and magistrates do not, generate incoherence in the judicial system. Moreover, lawyers have a beneficial immunity system even compared to Parliament members, which is totally unjustified too.

As for the consequences, they are obvious in the situation of criminal liability and exercising the lawyer profession. For criminal liability, the need for an approval from the general prosecutor with the prosecutor's office of the court of appeals may by obstructive in judicial procedures. This procedure adds up to the regular one, according to which magistrates are also held liable, and can bring on more difficulties in criminal procedures against lawyers. On the other hand, the fact that lawyers depend on the prosecutor's offices, for cases of criminal liability, may alter the position of the defence against the prosecution in court, because of the control which can be thus exercised by the general prosecutor with the prosecutor's office of the court of appeals against the lawyers under their territorial jurisdiction. This hierarchical relationship between lawyers and prosecutors is abnormal and may have unwanted consequences on the enforcement of justice.

Because of all these reasons, the special immunity enjoyed by lawyers should be eliminated, in order to make judicial procedures more coherent. This proposal is only based on the fact that lawyers already enjoy immunity for this statements before the court or other bodies, regarding the case they represent in court, in a similar, justified and sufficient situation with that of Parliament members.

[33] *Article 72 of the Romanian Constitution.*
[34] *Article 109, par. 2 of the Romanian Constitution. As for the immunity of former ministers, see the analysis on Government Emergency Ordinance 3/2005 that amends Law No. 115/1999 on ministerial accountability, in the section on Legislative Developments.*