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Although warned by the European Commission in the last CVM report and by senior representatives of the judiciary that there are problems in the new Codes, the Government refuses to address them. The situation is more serious than you may think, says EFOR

One week till disaster strikes

Warning: starting with Feb 1st the new Codes will turn the judiciary upside down

- **There are divergent views on how the principle of "most favorable law" must be interpreted, i.e. uncertainty;**
- **The penalties have diminished for serious crimes against property, so pending cases may reach the term of limitation;**
- **Collect evidence may become unfeasible (phone tapping);**
- **The Codes should be postponed to September and remedies considered until then.**

Though warned by the European Commission in the last CVM report and by senior representatives of the judiciary that there are issues related to the new Codes, the Government refuses to address them. We have today, one week before the planned date of entry into force of the codes, all the ingredients for a total disaster. The entry into force of the new Codes on February 1, 2014, without solving the issues raised by practitioners, would shake up the criminal justice system in Romania.

At the beginning of the year, the president of the Supreme Court asked the government to adopt as soon as possible an emergency ordinance to amend the loopholes in the legal texts. There was no reaction to this appeal.

DNA and DIICOT also submitted written requests to the Ministry of Justice to amend the texts with problems.

Beyond the obvious inconsistencies between the different items of the new Codes - which will generate chaos in the judicial practice - there are major problems that were not resolved by the legislature or were poorly resolved, and which will be presented below. Responsibility is passed between the Government and the Parliament because, often enough, parliamentary interventions meant amendments that were worsening the legislation proposed by the Government.

For citizens it is irrelevant who is at fault. What is important today, in the twelfth hour, is to solve the urgent issues with the new Codes before their entry into force. If this happens even for a single day, the disaster in the criminal justice system will be beyond repair, practically annulling the work of an entire judicial system (in the recent past Romania faced a similar situation where decriminalization and subsequent re-incrimination of fraudulent bankruptcy). Because criminal law operates based on the "more favorable criminal law" principle, a later amendment of the Codes would not solve any issue for the crimes committed before that date.

At the time of submission of the draft code to Parliament, a coalition of NGOs requested that impact studies be commissioned and extensive public debate be organized on the country's new penal policy. This did not happen, and we still find today unfortunate legislative solutions and texts that are not properly correlated with each other. Nobody knows if the Romanian justice system can really work under the new provisions, even if the mechanisms initially designed to help and bring more clarity - for example the preliminary inquiry - the system would not clog the activity of the Supreme Court ICCJ. In addition, the entry into force of the new code in the middle of the judicial year is a big mistake and it is incomprehensible that the Government did not postpone this action until the beginning of the next year. One must remember that Romania has never passed through a so profound change of its criminal justice system, while in a democracy and rule of law.

1. Differences of opinion on the interpretation of the principle of the more favorable criminal law

The basic question in this matter is whether the principle of more favorable criminal law refers to criminal law as a whole - that is the old penal Code in its entirety or new penal Code in its entirety - or certain criminal institutions, evaluated individually and autonomously.

The first approach assumes that the new Code is in fact a new social contract that the state proposes to its citizens and that they accept on both the elements that might benefit them (significant reduction of sentences) and as to who those that might be to their disadvantage (calculation of penalties for multiple offenses). In this interpretation, the judiciary should evaluate each case in light of the full application of the old Code and the full application of the new Code, and determine which one of the two provides a solution more favorable to the person who perpetrated the offense, and then would apply only those rules.

The second interpretation assumes the existence of penal institutions that can operate autonomously and can be applied in a combined manner, so that in the same criminal file one would apply both rules of the old Code and of the new Code. For example: to calculate the final penalty for acts committed in the contest or relapse state could be taken penalties for individual acts of the new Code (where the penalties are lower than in the old Code) and introduced into the formula of the old Code is favorable to the defendant (increase the penalty that applies under the old code is lower than that which would apply under the new Code).

The latter interpretation is clearly important to establish the criteria used to identify autonomous institutions. For example there is heated debate on the classification of prescription as an autonomous institution. The worst thing - and, unfortunately, most likely - is that each judge would base their judgment on their own interpretation of the principle of the most favorable criminal law, which would lead to contradictory solutions in similar cases, solutions that undermine the public's confidence in the judiciary.

How the new Code will be applied in practice for crimes committed prior to its entry into force will depend on how this problem is solved - so this issue affects all criminal cases that are today in courts and under prosecution. Romania has never done changes of such magnitude in democratic times and rule of law where judges enjoy independence. ICCJ could intervene in the matter either through a response to a possible preliminary inquiry, or through an appeal in the interest of the law to establish the correct direction in applying the code. ICCJ President asked the government not to throw the responsibility for solving this problem by the judiciary. Normally, a responsible legislature should provide a clear legal interpretation of the law which they adopt.

In the absence of unequivocal interpretation of the legislature each individual judge is asked to guess its intentions and the blame for the chaos generated by diverging legal solutions will be put on the judiciary, even though this chaos was generated by Parliament and made possible by the inaction of the government.

2. Punishment for crimes against property decreases dramatically, including where they have generated serious consequences

The philosophical view of the legislature on the penalties in the new Code is to reduce them substantially, but apply harsher treatment in cases of multiple offenses. The significant decrease of the limits of punishment has extremely important consequences especially in terms of special prescription expiration leading to stopping criminal proceedings - such limitation depends on the penalty provided by law for each offense, a reduction in penalty limits results in many cases in a decrease of the limitation period.

To mitigate this destructive effect, the legislature sets in the Code higher penalties when offenses generate severe consequences – for damages of more than 2 million USD, EUR 500,000 (in the current Code, extremely serious consequences means damages of over 200.000 RON, or about 50,000 euros). This special punitive treatment applies to offenses in service (embezzlement, abuse of power, negligence , usurping the function, disclosure of state secrets , the disclosure of secrets or non-public information , the illegal funds , embezzlement) where penalties increase by half if the offenses in question generate serious consequences.

In these circumstances it is hard to understand why the same mechanism of penalties and offenses against property is used where the damage is the essence of the offense. For example, under the new Code for deception with a damage of 3 million euros the perpetrator could face up to three years in prison. This treatment is a genuine invitation to commit crimes against property!

It is vital for the Government to intervene and modify the new Code to allow the application of higher penalties in the event that damage U.S. $ 2 million by crimes against property such as theft, robbery, piracy, fraud, fraudulent management, bankruptcy and fraudulent bankruptcy. Otherwise files with extremely high damages and whose instrumentation required huge resources will be closed because the crimes will be prescribed before a definitive solution would be issued. In the unlikely event that they would not fall under the statute of limitation, the perpetrators will receive modest

punishments, most likely suspended sentences.

3. Obstacles to investigations by the inability to use certain investigative tools

Both DNA and DIICOT criticized the legislative solution that allows the use of wiretaps only after criminal prosecution. Criminal prosecution must be brought to the attention of the suspect when the prosecution begins against a person suspected of committing a crime (*prosecution in personam*). When the suspect of a criminal offense is not known to the prosecution, it can start on the offense committed, in which case disclosure is not possible because the suspect is not identified (the prosecution *in rem*).

If for some crimes it is possible to start the prosecution *in rem* because investigators do not know who the suspects - for example in the case of drug trafficking - and one could ask honestly to intercept certain telephones without knowing who speaks those phones, this legal construction is impossible to imagine in crimes related to corruption. Prosecutors can not prosecute *in rem* when a person complains that an official asked for a bribe, because by the intimation the suspect is shown. On this, the prosecution is *in personam*, the official is made aware of this, and only after this moment the prosecutors could ask the court to authorize the interception of the suspect's communications. It is obvious that the effectiveness of this measure is totally lost because the suspect is warned beforehand about the possibility of having his phone intercepted.

In the case of ministers and parliamentarians things are worse because criminal prosecution is subject to notice from the Parliamentary chamber to which they belong. If prosecutors can not gather evidence through wiretaps authorized by judges before going to Parliament for its opinion it is unlikely that the case will be convincing enough for the approval to be granted. Basically this provision blocks investigations into high-level corruption cases.

All these issues must be solved before the entry into force of the new codes because otherwise the negative consequences will be impossible to fix later. Government inaction cannot be justified by not knowing the problems because they were clearly highlighted by senior representatives of the judiciary. The solution at the last moment is to delay the entry into force of the new Codes for a few months (ideally by the beginning of the new judicial year) and to correct immediately the identified deficiencies by emergency ordinance.

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