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## **CONFORMITY OF THE ROMANIAN LEGISLATION TO THE UNITED NATIONS CONVENTION ON TRANSNATIONAL ORGANIZED CRIME**

I. Organized crime, a strictly national problem in the past, is today one of the dark sides of globalization: it surpasses ordinary geographic limits, joining continents by exploiting open borders policy and easy access to high technology. The illicit income is comparable with the range of activities: global.

Until now, the UN Organization did not have a legal coherent tool to fight transnational organized crime. Not by chance, the global 21<sup>st</sup> century began with a specific action in the field. In New York, at 15<sup>th</sup> November 2000, the 55<sup>th</sup> Session of UN General Assembly adopted the United Nations Convention on transnational organized crime. It was the first international treaty of the century and was opened for signing at the High Level Conference of the states, the Millenium Conference, held in Palazzo di Giustizia in Palermo, Italy, from 12<sup>th</sup> to 15<sup>th</sup> December 2000.

The convention became legal binding instrument on 29<sup>th</sup> September 2003, after the 40<sup>th</sup> ratification. Romania, participant at the Conference, has become party to the Convention by ratifying it on 8<sup>th</sup> November 2002 (Ratification Act no. 565).

Under the Convention provisions, member states establish a common theoretical and practical basis to fight transnational organized crime. Member

states recognize the necessity of common fight against criminal activity, the necessity of conceiving real action instruments for fighting and the necessity of developing into national law the Convention legal tools.

Theoretically, enriched by the most representative ideas in the field (see the Ad Hoc Commission on preparing the draft of Convention) the Convention gives strength to the subsidiary principle for the practical reasons. Fighting organized crime is not a one-man-fight, even with large will and logistics, but common states effort fight. Member states should define a solid national policy according with the Convention settlements.

The explicit purpose of the Convention is to promote cooperation to prevent and combat transnational organized crime more effectively (art. 1). Also, the Convention intended to harmonize national states laws, so there can be no uncertainty that a crime in one country is also a crime in another.

Present work deals with the question of conformity of Romanian legislation to the United Nations Convention on transnational organized crime provisions.

- II. Harmonizing national states laws is made by the following measures:
- Criminalize participation in an organized criminal group, money laundering, corruption and obstruction of justice;
  - Take measures to establish the liability of corporations when they are involved in organized crime;
  - Crack down on money-laundering and the proceeds of crime;
  - Protect witnesses testifying against criminal groups.

### **Participation in an organized criminal group**

The Convention proposes a delimitation of fundamental terms in the field (art. 2 a). The term organized criminal group shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit. The term structured group shall mean a group that is not randomly formed for the immediate commission of an offence and that

does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

Romanian specific legislation (Organized Crime Act no. 39 since 29<sup>th</sup> January 2003) settles a similar definition for organized criminal group and for other groups (art. 2).

Under the terms of Convention (art. 5), participation in an organized criminal group means:

- (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
- (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
  - a) Criminal activities of the organized criminal group;
  - b) Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;
- (iii) Organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crime involving an organized criminal group.

Member states should inform de UN Secretary General about the crimes which are considered by national law serious crimes. Serious crime means conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty (art. 2 b).

Romanian law considers serious crime the following offences: homicide, kidnapping, slavery, blackmail, property offences with serious consequences, firearms explosives nuclear and radioactive material offences, forgery, fraud, unfair competition, gambling, drugs offences, smuggling migrants and persons offences, whoremongering, money laundering, corruption offences, illicit bankruptcy, cyber offences, speculation and any other indictable offence for at least five years imprisonment.

Anyhow, the offence must be transnational in nature (art. 3 par. 2 of Convention and art. 2 c of Romanian law), as the following:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.

Romanian law criminalizes in art. 7 the following offences:

- Organizing, directing, aiding and abetting an organized criminal group is indictable for 5 to 20 years of imprisonment and rights restriction, but not more than the penalty regarding the most serious offence aimed by the organized criminal group;
- Organizing, directing, aiding and abetting any structured group are indictable for the penalty regarding conspiracy or crime association (specific offence in Romanian criminal law);
- Concealment of goods proceeded from a serious crime committed by an organized criminal group is indictable for 3 to 10 years of imprisonment, but not more than the penalty regarding the serious crime from which it proceeded from.

Prevention of the organized crime activity is realized by the Central analysis and coordination group for criminal activity prevention subsidiary of National Committee on Criminal Prevention founded on the basis of the Government Act no. 763/2001.

### **Laundering of the proceeds of crime**

According to art. 6 par. 1 of Convention, each State Party shall adopt measures for criminalizing:

- (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
- (iii) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

- (iv) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.

In the same manner as presented above, each State shall furnish copies of its laws that give effect to the article of Convention and of any subsequent changes to such laws or a description there of to the Secretary-General of the United Nations (art. 6 par. 2 d).

Romanian law (Money Laundering Act no. 656 since 12<sup>th</sup> December 2002) criminalizes money laundering offence, with content similar to that of Convention and indictable for 3 to 12 years of imprisonment.

Further more, organizing, directing, aiding and abetting an organized criminal group for the purpose of money laundering is indictable to 5 to 15 years of imprisonment.

Due to the Convention rules (art. 7 par. 1) in the field of customer identification, records keeping and record-keeping, the reporting of suspicious transactions and the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering, Romanian law takes the following measures:

- Duly information relative to the suspect operations of money laundering of all financial, credit and assurance companies (art. 8);
- Observation of all inner and foreign financial operations of minimum 10.000 euro;
- Duly customer identification for business relations, opening banking accounts or supplying services and duly preservation of the evidence for 5 years;
- Establishing Money Laundering National Board, as official competent organism;
- Confidential banking and professional dates can not be opposed to official investigation in judicial case.

## Corruption

The fight against corruption has two dimensions. The first deals with preventive administrative measures and the second, the combative one, belonging to criminal law.

The first category of measures are taken for promoting the integrity and preventing, revealing and punishing public agents corruption, also assuring them a real independence in order to prevent any inappropriate influence. Mainly, Romanian legislation is based on Transparency and Corruption Act no. 161 since 21<sup>st</sup> April 2003 and on Government Act relating Transparency and Corruption no. 24 since 27<sup>th</sup> April 2004.

Under the penal provisions of convention are to be criminalize the following (art. 8):

- (a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
- (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
- (c) The participation as an accomplice in an offence established in accordance with this article.

Romanian provisions are included in Criminal Corruption Act no. 78 since 18<sup>th</sup> May 2000. This law states a typology of offences:

- Corruption offences (bribery, illicit influence, undue benefits). All these offences are indictable for imprisonment increased by 5 years if are committed for the purpose of organized criminal group or one of its members or for influencing commercial transactions and international investment (art. 9);
- Assimilated corruption offences (art. 10-13);
- Related corruption offences (art.17);
- Offences against financial interests of the European Communities (art. 18<sup>1</sup>-18<sup>3</sup>).

Duly to art. 8 par. 2 provisions of the Convention, Romanian law (art. 8<sup>2</sup>) criminalizes the promise, offering or giving, directly or not, money or any benefits to a foreign official in order to fulfill or not any act concerning his duties for undue advantages in international commercial transactions and this is subjected to imprisonment from 1 to 7 years.

The official organism to fight against corruption is the National Anticorruption Board of Prosecutors, inner body of the Public Office, attached to High Cassation and Justice Court, coordinated by the General Attorney of Romania.

### **Obstruction of justice**

Convention suggests that each State Party shall adopt legislative and other measures as may be necessary to establish as criminal offences:

- (a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention;
- (b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention.

The new Romanian Criminal Act no. 301 since 29<sup>th</sup> June 2004 (valid 1 year from publishing) states similar offences as following: determining perjury (art. 336), obstruction of justice (art. 348) and obstruction attending trial (art. 337).

## **Corporations criminal liability**

Criminal liability of corporations committing serious crimes as described in art. 5, 6, 8, 23 of Convention and relating to organized criminal groups is defined by the international agreement.

Romanian law did not admit until recently (Corporations Criminal Liability for Forgery no. 299 since 1<sup>st</sup> July 2004) the responsibility of corporations in the field of criminal law. The Criminal Code admits clearly that corporations can be subjected to criminal law. Otherwise, all the offences analyzed above are apt to be committed by corporations (art. 268 – money laundering, art. 309 – bribery, art. 312 – illicit influence, art. 354 – organizing criminal group).

## **Confiscation and Seizure**

The Convention deals also with the confiscation and identification, tracing, freezing or seizure (art. 12) of:

- (a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;
- (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention;
- (c) Property in which proceeds of crime have been transformed or converted, in part or in full;
- (d) Property acquired from legitimate sources intermingled with proceeds of crime up to the assessed value of the intermingled proceeds;
- (e) Income or other benefits derived from proceeds of crime.

Romanian law has similar provisions (art. 13 of Act no. 39/2003, art. 25 of Act no. 656/2002, art. art. 6<sup>1</sup> and art. 19 of Act no. 78/2000).

## Witness protection

Protection of testifying witness against organized criminal act is envisaged by the Convention (art. 24) using relocating residence, identity and residence protection, assuring testifying security. Romanian Witness Protection Act no. 682 since 28<sup>th</sup> 2002 put in action all these means (art.12) for the competence of National Witness Protection Board.

III. Envisaging international cooperation between member states for the purpose of preventing and combating organized criminal group, the Convention refers to:

- Speed up and widen the reaches of extradition;
- Tighten cooperation to seek out and prosecute suspect;
- Boost prevention of organized crime at the national and international levels;
- Provide resources to countries that require assistance to jointly fight transnational organized crime.

1. Article 16 of Convention states that each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

At the time of ratification, Romania considers the Convention as the legal basis for cooperation on extradition with other States Parties to the Convention. The international instrument makes applicable the national law concerning the conditions for extradition, especially those regarding the minimum penalty and the reasons for declining the extradition.

More, the Convention subordinates the transfer of sentenced persons to bi and multilateral agreements (art. 17).

2. Mutual legal assistance to be afforded in accordance with the Convention may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures, and freezing;
- (d) Examining objects and sites;
- (e) Providing information, evidentiary items and expert evaluations;
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

Joint investigations (art. 19), controlled delivery (art. 20), transfer of criminal proceedings (art. 21) and establishing criminal record (art. 22) envisaged by the Convention are to be ruled by mutual agreements between parties.

For all above cases, Romanian International Judicial Cooperation Act no. 302 since 1<sup>st</sup> July 2004 include complex provisions for extradition (art. 22-76), transfer of criminal proceedings (art. 109-115), transfer of sentenced persons (art. 127-157), international rogatory commissions (art. 156-172), appearing of witnesses, experts and investigated persons (art. 173-179), communication of judicial documents and records (art. 180-187).

National law gives preeminence to international conventions, in absence of which it represents the fundamental basis (art. 5) anytime when proceedings are developed in Romanian state.

3. Each State Party shall initiate, develop or improve specific training programs for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention (art. 29). Such programs shall deals with the following:

- (a) Methods used in the prevention, detection and control of the offences covered by this Convention;

- (b) Routes and techniques used by persons suspected of involvement in offences covered by this Convention, including in transit States, and appropriate countermeasures;
- (c) Monitoring of the movement of contraband;
- (d) Detection and monitoring of the movements of proceeds of crime, property, equipment or other instrumentalities and methods used for the transfer, concealment or disguise of such proceeds, property, equipment or other instrumentalities, as well as methods used in combating money-laundering and other financial crimes;
- (e) Collection of evidence;
- (f) Control techniques in free trade zones and free ports;
- (g) Modern law enforcement equipment and techniques, including electronic surveillance, controlled deliveries and undercover operations;
- (h) Methods used in combating transnational organized crime committed through the use of computers, telecommunications networks or other forms of modern technology; and
- (i) Methods used in the protection of victims and witnesses.

4. States Parties shall make concrete efforts to provide technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of this Convention (art. 30). To that end, States Parties shall endeavor to make adequate and regular voluntary contributions to an account specifically designated for that purpose in a United Nations funding mechanism. States Parties may also give special consideration, in accordance with their domestic law and the provisions of this Convention, to contributing to the aforementioned account a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention.

IV. Taking into account all the dates above mentioned it can be said that Romania has proven to be in the large family of states fighting against criminal activity. Specific tools exist, know-how is pending to achieve, what is missing consists in the lack of funds for supporting a constant activity. Legal instruments doubled by economic resources are the key to make the mechanism work.