



**MORAR BURIES KOVESI FOR GOOD – Constitutional Court judge Daniel Morar reveals how former Chief Prosecutor of the Romania's National Anticorruption Directorate violated the law by signing the 2009 PICCJ-SRI Protocol: “Objectives go beyond the legal framework... Some of the provisions violate the law... Drafting ‘a joint action plan’ enforced by the ‘joint operational teams’ demonstrates at least the intent of an active, implicit cooperation of the SRI in the criminal investigation activity”**



The prosecutors from the Division of Investigation of Judicial Offences who are in charge of the case regarding the 2009 Protocol between Romania's General Prosecutor's Office (PICCJ) and the Romanian Intelligence Service (SRI) – signed by the then-General Prosecutor Laura Kovesi and the then-SRI executives George Maior and Florian Coldea – should read very carefully the Constitutional Court of Romania (CCR) Decision no. 26 of 16 January 2019, which basically states that the 2009 PICCJ-SRI Protocol is unlawful and the 2016 PICCJ-SRI Protocol is partially unlawful, the latter being signed by Prosecutor General Augustin Lazar and Eduard Hellvig. And it should not only read the majority opinion that led to the above decision, but also the separate opinion formulated by **former Chief Prosecutor of DNA Daniel Morar (photo, left side)**. Paradoxically, although he considered that by concluding the PICCJ-SRI Protocols there was no legal conflict between the PICCJ and the Romanian Parliament, on one hand, and the ICCJ and the courts, on the other hand, Morar issued an opinion which is more direct and tough on the signatory of the protocols.

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Basically, we can say that Daniel Morar has finally buried **Laura Kovesi (photo, right side)** and the others who signed the PICCJ-SRI Protocols. And he did it by confirming that these protocols violate the law. **Thus, as Morar's reasoning points out, the absence of a constitutional legal conflict does not mean that the PICCJ-SRI Protocols are legal. Indeed, the former Chief Prosecutor of DNA clearly states that certain provisions of the PICCJ-SRI Protocols violate the law.**

#### **Joint plans and mixed teams violate the law**

Analysing the content of the 2009 PICCJ-SRI Protocol and the 2016 PICCJ-SRI Protocol, Daniel Morar explains that their objectives aim to establish “joint action plans” for SRI prosecutors and workers, as well as the formation of “joint operational teams” of SRI prosecutors and workers are outside the legal framework, as the Romanian Intelligence Service does not have the status of a criminal prosecution body or competence in this field. Daniel Morar says that drafting a joint action plan to be put into practice by mixed teams shows the involvement of SRI in the criminal investigation, which is clearly forbidden. “The Romanian Intelligence Service cannot have judicial attributions and it is not a criminal prosecution body, so it cannot perform any type of criminal prosecution, separately or in cooperation with prosecutors and, implicitly, cannot collect and administer evidence related to a criminal case”, says the former Chief of DNA.

#### **Here is an excerpt from the separate opinion of the judge of CCR Daniel Morar:**

*“In conclusion, taking into account Art. 131 para. (3) of the Constitution, according to which prosecutors ‘lead and supervise the criminal investigation activity of the judicial police in accordance with the law’, on one hand, and the Decision of the Constitutional Court no. 51 of 16 February 2016, which found the phrase ‘other specialized bodies*

of the state' in Art. 142 para. (2) of the Code of Criminal Procedure to be unconstitutional, on the other hand, **we find that the Romanian Intelligence Service cannot have judicial attributions as it is not a criminal investigation body, so it cannot perform any type of criminal prosecution, separately or in cooperation with prosecutors and, implicitly, cannot collect and administer evidence related to a criminal case.**

However, from the analysis of the legislation, it results that the law establishes the duty of the authorities with attributions in the field of national security to make available to the criminal prosecution bodies all information held in connection with the commission of certain offenses. Thus, to the extent that, through authorized activities, information relevant to establishing the existence or non-existence of a crime, for the identification of the person who committed it and, generally, for the clarification of the circumstances of the case are gathered, the Romanian Intelligence Service has the legal obligation to provide them to the competent criminal investigation bodies.

In other words, the legal framework in force obliges the two public authorities to cooperate in order to achieve the purpose for which they were formed - defending the rule of law as well as the rights and freedoms of citizens in the case of the Public Ministry, and ensuring the national security in the case of the Romanian Intelligence Service. **The cooperation will always be achieved as provided by law, the actual forms in which the two public authorities fulfil their legal obligations, namely procedures for the communication of information and the operational organization of this cooperation may be subject to bilateral agreements concluded in the form of protocols. The content of these protocols can only be a strictly technical one, meant to facilitate the organizational and functional cooperation between the two institutions without developing the existing legal framework, thus without adding to the law, by imposing additional obligations or by transferring the legal duties from one authority to another. Therefore, the conclusion of cooperation protocols between the Public Ministry and the Romanian Intelligence Service is not de plano forbidden.**

**However, by analysing the content of the two Protocols, namely Protocol no. 00750 of 4 February 2009 and Protocol no. 09472 of 8 December 2016, we find that the objectives which mainly concerned 'joint action plans' and 'joint operational teams' established by the first Protocol [Art. 3 let. (g)] to act "in order to document the facts provided for in Art. 2 of the Protocol", under the condition that this article does not state only the cooperation to prevent national security threats, but also to fight against "serious crimes", exceed the legal framework, given that the Romanian Intelligence Service does not have the status of a criminal prosecution body and, therefore, no competence in this field.**

Even if they only provided technical support for carrying out technical surveillance activities, as the Court stated in its Decision no. 51 of 16 February 2016, the persons referred to in Art. 142 para. (2) of the Code of Criminal Procedure are obliged to cooperate with the criminal prosecution bodies when enforcing the surveillance warrant, and these are clearly and unequivocally specified in the above-mentioned legal provision by the wording "providers of public electronic communications networks or providers of electronic communications services for the public or of any type of communication or financial services". **As the Romanian Intelligence Service is not such a provider, it means that the technical support provided exceeds the legal framework established by the rules of the Code of Criminal Procedure.**

On the other hand, if inter-institutional cooperation was limited to providing technical support (using the SRI's technical equipment), it seems unnecessary and therefore unjustified to draw up 'joint action plans' and form 'joint operation teams'. Thus, while the granting of technical support involves the provision to the criminal prosecution bodies of the technical means/equipment through which the implementation of the surveillance measures is carried out, which, in the context of the cooperation implies an inactive, passive attitude of the Romanian Intelligence Service as such cooperation may be included in an agreement between the specialized technical services of the two authorities (PICCJ and SRI), the drafting of a "joint action plan" implemented by "joint operational teams", which will record in writing the activities carried out during the technical surveillance demonstrates at least the intent of an active, implicit cooperation of the Romanian Intelligence Service in the criminal investigation activity. The natural conclusion that could be formulated is that the cooperation plans concerned concrete situations, on the basis of which 'joint operational teams', which had as objective the fulfilment of those action plans were organized.

Even though, in our opinion, **some of the provisions contained in the above-mentioned cooperation protocols violate the law**, it does not implicitly mean that we are in the presence of a constitutional legal conflict as for its existence being necessary the fulfilment of several conditions as I have shown above."

In conclusion, considering Art. 131 para. (3) of the Constitution, according to which the prosecutors "lead and

supervise the criminal prosecution of the judicial police under the law” on one hand, and the Decision of the Constitutional Court no. 51 of 16 February 2016 that asserted the unconstitutionality of the phrase “other specialized bodies of the State” of Art. 142 para. (2) of the Code of Criminal Procedure, on the other hand, we ascertain that the Romanian Intelligence Service may not have judicial powers as they are not a criminal prosecution body, thus it may not prosecute separately or in cooperation with the prosecutors and, implicitly, may not gather and administer evidence in respect of a criminal case.

However, from the analysis of the legislation it results that the law establishes the obligation of the authorities with attributions in the national security field in respect of making available to the criminal prosecution bodies all information held with respect to committing a criminal offence. Therefore, to the extent that by authorized activities relevant information is gathered in order to establish the existence or non-existence of a crime, to identify the person who committed such crime and, in general, to explain the situation in which the crime was committed, the Romanian Intelligence Service has the legal obligation to provide such information to the competent criminal prosecution bodies.

In other words, the legal framework in force obliges both public authorities to cooperate in order to fulfil the scope for which they were established – to defend the public order as well as the rights and freedoms of the citizens for the Public Ministry, and to accomplish national security for the Romanian Intelligence Service. The cooperation shall always be according to the law, and as to the actual forms in which both authorities meet their legal obligations, i.e. information communication procedures, the operational organization of this cooperation being able of becoming part of bilateral agreements concluded as protocols. The content of these protocols may only be one strictly technical, designed to facilitate the inter-institutional cooperation from an organizational and functional point of view, without developing the current legal framework, thus without adding to the law by creating new additional obligations or by transferring the legal attributions from one authority to the other. As a result thereof, the conclusion of cooperation protocols between the Public Ministry and Romanian Intelligence Service is not de plano prohibited.

However, by analysing the content of those two protocols, i.e. Protocol no. 00750 of 4 February 2009 and Protocol no. 09472 of 8 December 2016, we ascertain that the objectives that mainly targeted the “joint action plans” and the “joint operational teams” set through the first Protocol [Art. 3 let. g)], which should have acted “for the documentation of the facts provided for in Art. 2 of the Protocol”, given that this article does not lay out only the cooperation to prevent the threats to national security, but to fight “the serious criminal offences” exceed the legal framework as the Romanian Intelligence Service is not a criminal prosecution body and, therefore, has no powers in this matter.

**Even if it had ensured only the technical support for the carrying out the technical surveillance activity, as stated by the Decision of the Court no. 51 of 16 February 2016, the persons provided for in Art. 142 para. (2) of the Code of Criminal Procedure are obliged to cooperate with the criminal prosecution bodies to enforce the surveillance warrant, and these are clearly and unequivocally specified in the above-mentioned legal provision by the wording “providers of public electronic communications networks or providers of electronic communications services for the public or of any type of communication or financial services”. As the Romanian Intelligence Service is not such a provider, it means that the technical support provided exceeds the legal framework established by the rules of the Code of Criminal Procedure”.**

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