15 Years of Anti-Corruption in Romania:
Augmentation, Aberration and Acceleration

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Abstract: Romania's criminal prosecution of corruption is a controversial topic. While advocates praise the National Anticorruption Directorate (DNA) for its increasing results, critics voice concerns over the abusive and excessive manner how the fight against corruption is conducted. Is Romania's anti-corruption battle an impressive success or rather a worrisome excess? The article aims to resolve this controversy by assessing anti-corruption activity conceptually and empirically. Firstly, an evaluation scheme of anti-corruption activity -the *anti-corruption evaluation chain* – is developed, which distinguishes between three stages: 1. Input (Capacity), 2. Process (Fairness, Reasonableness) and 3. Output (Results). Secondly, each dimension is measured empirically by relying on a new set of quantitative indicators and qualitative empirical evidence (e.g. analysis of judicial verdicts by the European Court of Human Rights, interviews with magistrates). The findings indicate that Romania's fight against corruption has resulted in the *augmentation* of capacity (e.g. number of human and financial resources), the *acceleration* of results (e.g. increasing number of indicted, prosecuted and convicted persons) and *aberration* from the fair trial (e.g. deficient evidence gathering, violations of fundamental rights) and from the principle of reasonableness (e.g. excessive reliance on interceptions in penal cases, excessive use of pre-trial detention etc.). Overall, Romania's criminal prosecution of corruption has derailed into an over-zealous struggle for a "noble cause" which itself has violated individual rights, the principles of fair trial and reasonableness, procedural integrity and the rule of law.

Keywords: Anti-corruption policy, surveillance, rule of law, fair trial, violation of ECHR rights, Romania, Europeanization, European Union conditionality, anti-corruption agency

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Fiat iustitia et pereat mundus.[1]

Truth, like all other good things, may be loved unwisely
– may be pursued too keenly – may cost too much.[2]

1. Introduction

Romania's fight against corruption has been controversial.[3] On the one hand, the results-driven anti-corruption activity of the National Anticorruption Directorate (DNA) has been praised by the main supporting forces of anti-corruption: the European Commission, Western embassies, NGOs and dedicated anti-corruption fighters. On the other hand, the procedural activities of key anti-corruption structures have been increasingly criticized by various defence lawyers, vocal magistrates, affected politicians and representatives from the civil society, especially after the gradual leaking of evidence on individual prosecutorial misconduct, organizational and procedural deficiencies, aberrations from fair justice as well as numerous "collateral damages" (i.e. indicted people who were eventually acquitted). The public and international controversy over the anti-corruption battle in Romania is reflected in a disagreement among academics. Most of the academic literature presents Romania as a relative "success story" of Europeanization (see Noutcheva/Bechev 2008; Ristei 2010; Spendharova/Vachudova 2012; Sedelmeier 2014; Hein 2015; Bratu et al. 2017). This mainstream tale has been in line with various NGO reports (e.g. Freedom House, Bertelsmann), press coverage and the European Commission's monitoring reports which noted the improved "track records" and overall progress in the fight against corruption (see European Commission 2012, 2015, 2016, 2017).

In contrast with this optimistic picture, a small but growing number of academics have become critical of Romania's problematic anti-corruption activity under the EU's post-accession conditionality, the Cooperation and Verification mechanism (Mendelski 2016; Wagner 2016; Mungiu-Pippidi 2018; see related critical studies in other contexts by Börzel and Pamuk 2012; Di Puppo 2014; Iancu 2018; Zaloznaya et al. 2018). There have been also a

[1] This Latin aphorism, "Let justice be done, though the world perish", reflects the main essence of the fight against corruption in Romania, which has sought justice at all costs even at the expense of fair trial, individual rights of citizens, integrity, human dignity and the rule of law. As such, the aphorism should be understood ironically as a cautionary warning how not to do justice.

[2] What is valid for the pursuit of truth may be also be true for the pursuit of justice. See Pearse v Pearse (1846) 1 De G & Sm 12, 28-29. What https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-2.htm

[3] The article focuses mainly on the repressive and penal activities of criminal prosecution structures and does not include the analysis of the broader anti-corruption movement in Romania, which includes activities such as prevention, education, control and investigation by NGOs, the press, whistleblower, engaged scholars etc.

growing number of "warning calls" by national and international lawyers and consultants,[4] critical European and domestic magistrates,[5] journalists[6] and representatives from civic movements and NGOs representatives.[7] All these groups have drawn attention to excesses, dysfunctionalities, abuses and aberrations during the fight against corruption in Romania, which are said to have undermined democracy, competitive market economy and the rule of law, as well as the legitimacy of the anti-corruption fight itself.[8]

Is Romania's anti-corruption battle a success or an abusive excess? Can we speak of a golden or rather a dark decade of anti-corruption? The sobering answers to these highly relevant questions are provided in my article. My findings indicate that Romania's fight against corruption has derailed from beneficial and useful forms of anti-corruption activity. The ambitious battle against corruption has reinforced dysfunctionalities that have undermined the fair trial in penal proceedings, discrediting attempts to improve integrity and the rule of law. I show empirically that the anti-corruption movement has produced more *inputs* (e.g. number of prosecutors, judges, staff) and *outputs* (e.g. number of investigations) at the expense of deteriorated *processes* in criminal trials. In particular, the fight against corruption was characterized by: 1.) Excesses, e.g. disproportional use of surveillance methods, excessive number of warrants, disproportionate focus on quantitative results and 2.) Violations procedural fairness, e.g. weak procedural quality of investigations, disrespect of procedures, deficient methods of evidence gathering, insufficient quality of evidence etc. Altogether, the ambitious, repressive and results-oriented fight against corruption can be characterized as an aberration from procedural safeguards, appropriate international penal and human rights standards, the principle of reasonableness and moderateness.

Anti-corruption activity is not bad *per se*, however when it transgresses certain normative standards of legality, reasonableness, equity, propriety, then *useful anti-corruption* can turn into *excessive and abusive anti-corruption* which is harmful for the rule of law. The boundaries between these two types of anti-corruption activity are in the Romanian case

[4] See Clark 2016; Giuliani 2018; Freeh 2018.
[5] See http://www.unjr.ro/tag/anticoruptie/; https://goo.gl/SJhS9E
[6] Most notably those from Lumea Justitiei, Evenimentul zilei, Cotidianul and Antena 3.
[7] http://coalitiaromanilor.org/articles.aspx; https://euobserver.com/opinion/140824; http://hrwf.eu/romania-must-take-bold-action-to-tackle-the-legacy-of-corruption-before-assuming-the-presidency-of-the-eu-council/
[8] See also the debate which took place in the US senate on June 14, 2017. Romanian Anti-Corruption Process: Successes and Excesses, organized by Commission on Security and Cooperation in Europe, United States, Senate, House of Representatives. https://www.hsdl.org/?view&did=806689

relatively thin and fuzzy. The article aims to assess empirically whether the criminal and intelligence-driven anti-corruption activity in Romania has reached or even gone beyond the limits of some fundamental principles of the rule of law.

The article makes an empirical contribution to recent (EU-related) anti-corruption literature (Meagher 2005; Della Porta and Vannucci 2007; Börzel and Pamuk 2012; Belloni and Strazzari 2014; Szarek-Mason 2010; Soyaltin 2017; Mungiu-Pippidi 2018; Johnston 2018; Popova 2018; Batory 2018; Elbasani and Šabić 2018; Dixit 2018), as well as to the literatures that have analyzed various deficiencies of criminal justice, including instances of "prosecutorial misconduct" (Gershman 2002; Grometstein 2007), "surveillance-led prosecution" (Sklansky 2018), "criminal intelligence" (Lemieux 2018), "deceptive evidence gathering" (Stuntz 1993), "noble cause corruption" (Caldero 2014) and lack of intelligence oversight (Zulean and Şercan 2018; Leigh and Wegge 2018; Glowacka et al 2018; Fuior 2018).

2. Analytical framework: Conceptualizing and measuring anti-corruption activity

2.1 Assessing anti-corruption activity in Eastern Europe

Previous attempts to assess the activity of anti-corruption agencies (ACAs) have focused on performance-related indicators to curb corruption (see Johnsøn et al. 2011). Performance measures included either input-related measures (e.g. organizational capacity, resources, staff) or outputs-related measures (e.g. effectiveness, operational autonomy, number of investigations, acquittal and conviction rates)[9] (see Meagher 2005; OECD 2007; Doig et al 2005; De Sousa 2009; Quah 2010; Choi 2011; UNDP 2011; Gemperle 2018; Daneva and Bitralkov 2018). Also factors which enable effectiveness have been identified. They included, among others, organizational and individual independence, administrative accountability, political will, socio-economic context and a coherent legal framework (see Recanatini 2011; Johnsøn et al. 2011, UNDP 2011). Most of the existing literature on performance evaluation of ACAs neglects surprisingly the anti-corruption process, and in particular the integrity of the criminal process, i.e. whether investigations, criminal prosecutions and trials respect the fair trial, legal procedures and fundamental rights (see Hunter et al. 2016). Ignoring the criminal process may lead however to incomplete and inappropriate assessment of anti-

[9] However, see Butt and Schütt 2014 who criticized the results-oriented assessment in the case of Indonesia.

corruption activity. This could be also the reason why initially certain "best practice" examples were evaluated as "success stories" (e.g. case of Georgia, Russia, Ukraine) but after thorough consideration of the process were re-evaluated as "façade or fundraising strategy" (Di Puppo 2010), a "construction of an image of success" (Di Puppo 2014), "populist" and "politicized" anti-corruption (Mungiu-Pippidi 2018) or as "flawed anti-corruptionism" (Zaloznaya et al 2018). What these authors criticize rightly is an effective but selective and abusive anti-corruption activity which may be misused as a "political weapon" and which departs from democratic procedures, the respect of individual rights and due process (see Krajewska and Makowski 2017).

2.2 The anti-corruption evaluation chain

To avoid superficial and input and output-focused evaluation which treats the criminal process as a black box, the assessment of anti-corruption activity requires a holistic, process-oriented and relational approach. The assessment scheme which is proposed here is called the *anti-corruption evaluation chain* (see Figure 1). This assessment chain of anti-corruption activity links and evaluates three subsequent and interdependent anti-corruption stages: 1.) Inputs (capacity) → 2.) Processes (activities during pre-trial, trial and post-trial) → 3.) Outputs (results). The inclusion of these three stages is inspired by the "logic model" from the program evaluation literature (see McLaughlin and Jordan 1999; Parsons at al. 2013; Newcomer et al. 2015). The chain can be further extended by including additional stages, such as *outcome* and *impact*. The underlying concepts (capacity, integrity and results) and the differentiation of the criminal process into three phases (pre-trial, trial, post-trial) can be justified by the insights from the anti-corruption and criminal law literature (e.g. Klitgaard 1988; Choo 1993; Sajo 2004; Hunter et al 2016; Ashworth and Redmayne 2010). The measurement and operationalization of capacity, (procedural) integrity and results relies on several objective indicators and concrete insights from contested domestic criminal cases as judged by the ECHR in Strasbourg.

Figure 1: The anti-corruption evaluation chain

Source: Author

1.) Input (organizational capacity). The anti-corruption evaluation chain starts with the input stage, during which organizational capacity is assessed. Every anti-corruption organ, authority or agency requires a sufficient high number of (human, financial, technical and informational) resources and professional competencies which enhance the organizational capacity to investigate, prosecute and adjudicate corruption-related offences. Organizational capacity can be evaluated in terms of quantity and quality. It can be measured by the following indicators: 1. Human resources (e.g. number and quality of prosecutors, judges, staff etc.), 2. Financial resources (e.g. court and prosecution budget, anti-corruption agency's budget) and 3. Technical resources (e.g. technical devices, computers etc.)

2.) Process (fairness, reasonableness). The process stage refers to specific procedural activities of anti-corruption stakeholders (intelligence officers, policemen, investigative agents, prosecutors, judges) during subsequent sub-stages (phases) of the criminal process: A. pre-trial phase (Investigation, Prosecution), B. Court trial phase (trial proper) and C. Post-trial phase (appeal).[10] a.) Pre-trial: This phase focuses on the assessment of activities of investigation authorities such as the police, the prosecution or the intelligence services. It evaluates the gathering of information and potential evidence. b.) Trial: This phase is associated with the trial proper, i.e. with the presentation of indictment in the court and the process of adjudication. c.) Post-trial: This phase refers to the post-verdict trial and in particular to appeal procedures.

The entire criminal process can be guided and evaluated according to a plethora of complementary and conflicting constitutional and structural principles which are associated with the rule of law or the German concept of *Rechtsstaat* (see Stern, see Sobota 1997, Sajo). Procedural aspects of the criminal process can be assessed by the following questions: How fair is the (criminal) trial as a whole? (fairness, equity, procedural integrity)? Is evidence gathered in conformity with legal procedures (legality)? Do the activities of intelligence services, prosecutors and judges respect individual rights (human dignity)? Are the investigative and prosecution activities proportional (reasonableness, prohibition of excessiveness)? How speedy and effective is the trial (effectiveness)? Do the investigative activities apply to all perpetrators in an equal way? (equality, prohibition of selectiveness)?

[10] The phases vary from country to country. In some countries these phases are separated into two (e.g. Bulgaria) in others to three (e.g. Germany) or even four (e.g. Romania after the adoption of the new criminal procedure code).

The assessment of the criminal process in this article is guided by two fundamental legal, constitutional and ethical principles: fairness and reasonableness. First, the assessment of fairness of criminal proceedings is associated with the *principle of fair trial* (see article 6 ECHR)[11], due process and procedural integrity (see Ashworth and Redmayne 2010; Ashworth 2003; Dennis 2007; Monaghan 2007; Ho 2016; Rose and Heywood 2013). This principle requires that the gathering and administrating of evidence is done in in a fair and equitable manner and that subjective evidence is impartially objectified/corroborated by an independent judge. Second, the *principle of reasonableness* serves to assess whether the means are reasonable (or proportional) to the goals. Reasonableness is associated with the related "principle of proportionality" (*Verhältnismäßigkeitsprinzip* in German) and "prohibition of excessiveness" (*Übermaßverbot* in German, *temperantia* in Latin) (see Grabitz 1973; Cianciardo 2010; Stern 2006:861; Möller 2012). The key idea of these restrictive principles is that "the state must use proportional means to legitimate ends" (see Engle 2012). These fundamental principles have been widely applied by the German constitutional court and the ECHR to assess the conformity of surveillance measures and criminal prosecution with fundamental rights (see Maguire 2000; Christoffersen 2009; De Hert 2005; Brown and Korff 2009; Lowe 2016). The key reason for the existence of these restrictive principles is the need for a balance between the interests of the wider national community (including its need for national security) and individual rights.

How to assess whether penal investigations and trials are done in a fair, proportional and just manner? First, there is the possibility of using subjective indicators (either expert of survey indicators), such as various indicators of criminal justice by the World Justice Project. Second, more detailed and concrete information about procedural integrity (fairness) could be obtained by studying concrete criminal cases which were subject to fair trial violations. The empirical data can be collected by analysing domestic cases or alternatively the case-law of the ECHR. Third, an analysis of objective indicators (e.g. number of interception warrants, information and evidence collected, applications sent to the ECHR etc.) could be used to identify deficiencies and excesses over time.

[11] A fair trial is "a trial that is conducted fairly, justly, and with procedural regularity by an impartial judge". See https://www.merriam-webster.com/legal/fair%20trial. "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." (see ECHR article 6).

3.) Output (organizational results): This stage of anti-corruption activity refers to the assessment of outputs (organizational results), which ensue from criminal investigation, prosecution and trial. This stage is associated with the effective, adequate and fair delivery of a public service, such as the investigation, prosecution and conviction of corruption offences. Organizational results of anti-corruption organs can be measured and assessed by counting the output of: a.) Intelligence authorities, e.g. quantity and quality of information collected, number of investigations in anti-corruption cases, b.) Investigative and prosecution authorities, e.g. quantity and quality of potential evidence, number of indictments, defendants sent to trial etc. and c.) High level courts, e.g. number of convictions in anti-corruption cases, number of acquittals etc. The assessment of organizational outputs is tightly linked to the selection of performance indicators which are normally defined by law, action plans, national strategies and internal rules and procedures.

Last but not least, the three dimensions of anti-corruption activity should not be assessed separately (in an additive way) but also in their procedural interaction (i.e. in a multiplicative way), or in other words, as an interlinked *anti-corruption evaluation chain*. This kind of approach implies that there can be necessary overlaps of coordination but also worrying blurred boundaries between the activities of different criminal structures and between criminal proceedings (e.g. pre-trial, investigation, trial, appeal). Similarly, it implies that the organizational output of one anti-corruption structure (e.g. information gathered by the intelligence service) can become the input of the subsequent structure (e.g. evidence of the anti-corruption agency). An appropriate evaluation of anti-corruption activity requires assessing the entire *input-process-output* chain, including the various phases of the criminal process. What is required is a holistic and balanced assessment approach to criminal justice that evaluates inputs, processes (procedural integrity) and organizational outputs against certain standards of fairness, appropriateness, reasonableness but also effectiveness.

If this proper balance between means and ends is neglected -for instance by prosecuting and investigating corruption through unfair, improper and abusive methods- the intention of a useful anti-corruption activity (*usus*) is perverted into abusive anti-corruption activity (*abusus*).[12] Such a deviation from the fair trial and proper means of investigation, prosecution

[12] Bentham has drawn attention to the thin line between usus and abusus when writing: "In this, as in so many other instances, the union between the use and the abuse is unhappily but too close. The chemistry by which they may be separated, and the abuse precipitated, is not of easy practice." (Bentham 1827:429).

and administration can be called *aberratio ab usu recto,* i.e. the aberration from proper usage, moral rectitude and appropriate standards and behaviour,[13] in short an aberration from judicial *decorum* (modesty, moderation and appropriateness (see the early works by Christian Thomasius and Thomas Aquinas).

The transformation of reasonable *intensive* anti-corruption into excessive and *extensive* anti-corruption can for instance occur through the focus on a purely quantitative and results-oriented logic that disregards qualitative processes. Such a simplistic *quantitative logic of accumulation* would assume that the more inputs (e.g. information) and outputs (e.g. prosecutions, indictments, convictions) are generated, the better the performance of the anti-corruption structures and the more beneficial the outcomes or benefits for society. However, a higher organizational output does not mean necessarily more beneficial outcomes, especially if the goals and notions of justice of the anti-corruption apparatus and society diverge. Thus, the quantitative organizational output should be always assessed against certain "procedural quality standards" that allow for evaluation of the organizational output that is generated by the anti-corruption apparatus. The outcomes (extent of benefits) of anti-corruption can be for instance assessed by internal societal conventions of morality and justice or by international and European quality standards (e.g. the European Convention of Human Rights, including the principle of fair trial).

The organizational-bureaucratic productivity logic of generating more outputs (e.g. indictments) by amassing more inputs (e.g. increased number of prosecutors, higher budgets, information) reflects two dominant trends in the fight against corruption and crime: 1. *Strengthening of institutional capacity* (see Dandurand 2007) and 2. A *quantitative accumulation logic* as visible under "surveillance capitalism" (see Zubhoff 2015) and "predictive" or "intelligence-driven prosecution" which has been criticized for undermining individual rights, dignity and the rule of law as well as its lack of accountability and transparency (see Ferguson 2016; Sklansky 2018). The subsequent section will show how this quantitative results-oriented accumulation logic worked in Romania and how it generated more and more inputs and organizational outputs at the expense of integrity of the criminal process.

[13] On the concept of aberration see Charles Fleming 1867 Royal dictionary, English and French and French and English, Volume 1.

3. Romania's fight against corruption: the derailment of a so-called "success story"

3.1 The driving role of the EU in Romania's fight against corruption

As a candidate country to the EU, Romania had to fulfill a set of membership criteria, among others the establishment of the rule of law, which was accompanied by the EU's demand to fight high-level corruption. In its yearly *Accession partnerships* (1997-2003) the European Commission repeated year by year that Romania should fight corruption by establishing an independent anti-corruption department and strengthening its autonomy, by improving coordination between anti-corruption bodies, by strengthening capacity and ensuring effective prosecution and the intensification of the fight against corruption. These demands which were linked to EU membership were an important impulse for Romanian authorities to establish an autonomous anti-corruption agency.

Romania's anti-corruption fight started in April 2002 with the creation of the *National Anti-Corruption Prosecutor's Office* (NAPO or PNA) through an emergency ordinance signed by Prime Minister Adrian Nastase.[14] A background document[15] published by Nastase in 2017 indicates that the anti-corruption office was created to ease Romania's EU and NATO accession. The document shows that government aimed to make the PNA functional within several months, i.e. before the NATO summit in November 2002. The PNA was modeled on the anti-corruption office in Spain and advised by special prosecutor David Martinez Madero (the late Director of the Antifraud Office of Catalonia), who supported a legal and "criminal approach to anti-corruption" but was aware of the need of accountability and oversight over prosecutors.[16] The PNA was an independent body within the Public Ministry, with its own budget. Initially it had few resources and staff and focused also on petty corruption cases. It was criticized by the EU and NGO representatives as ineffective in the fight against high-level corruption (see European Commission 2002).[17] The anti-corruption office was also criticized by the OECD for an approach that focused on the "prosecution of individuals" rather than prevention and building of a coherent integrity system (OECD Sigma 2004:7).

[14] Emergency Ordinance no. 43/2002.
[15] https://adriannastase.ro/2017/09/07/incendiar-circumstantele-in-care-a-fost-creat-pna/.
[16] Communication with an NGO activist who spoke to the late Madero.
[17] http://adevarul.ro/news/societate/nu-stare-facem-fata-intregii-coruptii-romania-1_50ad170a7c42d5a6638e7f02/index.html.

In 2005 the PNA was transformed into the National Directorate of Anti-Corruption (DNA). To make the DNA more effective, the new Minister of Justice transferred the appointment competences for prosecutors from the Superior Council of Magistrates (CSM) to the Ministry of Justice (see Law no. 247/2005). This action weakened the role of the CSM (as a guarantor of judicial independence) but improved effectiveness. Daniel Morar, which was recruited as the new head of the DNA began immediately to dismiss badly performing, idle prosecutors (see Hipper 2015: 176) and recruited relatively young, unexperienced but motivated ones, often through secondment and delegation. These measures, together with an increased budget and new equipment started to produce some visible results in high-level corruption cases to the temporary satisfaction of the European Commission.

After lack of concrete results and worries of "backsliding" in the fight against corruption, the European Commission enhanced and prolonged its conditionality by introducing three results-upholding mechanisms ("Accompanying measures"):[18] The most important among the measures was the *Cooperation and Verification Mechanism (CVM)*. The CVM was discussed and agreed in December 2004 and was officially introduced in December 2006. The mechanism should ensure an enhanced verification and monitoring of progress in judicial and anti-corruption reforms after Romania's accession (1 January 2007). The CVM had no specific period of application and referred to the monitoring of four benchmarks. While one benchmark addressed judicial reform the other three benchmarks referred to anti-corruption issues. The European Commission demand from Romania to: 1. Ensure a more transparent, and efficient judicial process, 2. Establish an integrity agency, 3. Continue to conduct professional, non-partisan investigations and track record of high level corruption, 4. Take further measures to prevent and fight against corruption, in particular within the local government.[19]

In contrast to the more broadly addressed European partnership priorities, the CVM benchmarks addressed very specific ad-hoc problems (e.g. setting up of an integrity agency) and even decisions about leadership of prosecution structures. The European Commission had thus a profound interest in advancing and maintaining specific anti-corruption "change agents" in key positions (Laura Codruta Kövesi, Daniel Morar). From correspondence

[18] http://europa.eu/rapid/press-release_MEMO-06-347_en.pdf
[19] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2012:0231:FIN:EN:PDF; see http://europa.eu/rapid/press-release_MEMO-07-262_en.htm

between Catherine Day (Head of the secretariat of the EU Commission between 2005 and 2015) and Minister of Justice Monica Pivniceru it becomes clear that the Commission had also an interest in being informed on the prosecution of *individual* high-level corruption cases,[20] suggesting that the prosecution of specific high-level targets (either individuals or groups) has been maintained and even reinforced under the CVM. The prosecution of individual high-ranking politicians was reflected in Commissioner Verheugen's demand to "catch a big fish".[21]

The EU Supported also the capacity building of the DNA and other anti-corruption structures through financial and technical assistance (PHARE, Transition facility), as well as advice and twinning (see European Commission 2008:10).[22] Between 1998 and 2006, estimated 90 million EUR of Phare funds were devoted to the judicial and administrative capacity building (ECOTEC 2006a: 12-13; ECOTEC 2006b: 9). For the period 2014-2020, the Administrative Capacity Operational Programme (ESF) dedicated about 103 million EUR for judicial reform projects, including 35 million EUR specifically for anti-corruption (European Commission 2017b:2). In addition EU support evolved Twinning program (i.e. the long-term secondment of EU experts and practitioners to Romania), which addressed judicial capacity building, the fight against corruption. It should be mentioned that all projects were co-financed by Romania (e.g. through national public funds) and other donor funds. Thus, the total budget for the fight against corruption was much higher.

Altogether, the EU's demands for prosecution of high-level corruption as well as its criticism in the progress and CVM reports compelled the Romanian government to design

[20] The European Commission demanded very detailed information on high-level corruption from the Romanian Minister of Justice: "(17) Provide an overview of high-level corruption cases that are pending in court significantly longer than the average such case and set out the next procedural steps as expected by the prosecution. (18) Provide an overview of high-level corruption cases pending in court involving members of the judiciary, shortly describe the state of play in each case and set out the next procedural steps as expected by the prosecution. (19) Provide an overview of high-level corruption cases regarding public procurement, shortly describe the state of play in each case and set out the next procedural steps as expected by the prosecution. (20) Provide a short description of the state of play and set out the next procedural steps as expected by the prosecution for high-level corruption cases pending in court involving the following defendants: Gheorghe Copas (3 cases), Adrian Nastase, Serban Alexandru Bradisteanu, Ion Dumitru, Decebal Traian Remes,Dan Voiculescu, George Becali, Catalin Voicu, Tudor Alexandru Chiuariu." See letter by Cathrine Grey from 10.October 2012. On file with author.

[21] See https://www.europalibera.org/a/1404083.html. See also the policy advice for "frying a few big fish" (i.e. to punish some few big offenders) by Robert Klitgaard, *Finance & Development / March 1998.*

[22] Until 2007 the budget for capacity building was 6,5 million EUR.

comprehensive and ambitious anti-corruption reform strategies[23] which would focus on quantitative indicators, results as well as enhanced inter-institutional cooperation (see section 3.3 for details). Until these days the European Commission continues to monitor and supervise Romania's anti-corruption activity though regular CVM missions and "progress" reports. It could be argued that without EU conditionality and the lure of EU and NATO membership the main anti-corruption structures, strategies and laws probably would have never been created and implemented. The European Commission confirmed in 2017 the crucial role of its post-accession conditionality, arguing that "The CVM has an important role in Romania as driver for reform, as well as a tool to track progress." (European Commission 2017:2).

Overall, it can be concluded that the EU had an important role in initiating and maintaining the fight against corruption in Romania. Yet simply demonstrating that the EU had a significant leverage on initiating and upholding the fight against high-level corruption does not mean automatically that anti-corruption activity was successful across all three stages of anti-corruption activity (input, process and output). The next sections apply the previously developed analytical framework to evaluate the entire chain of anti-corruption activities.

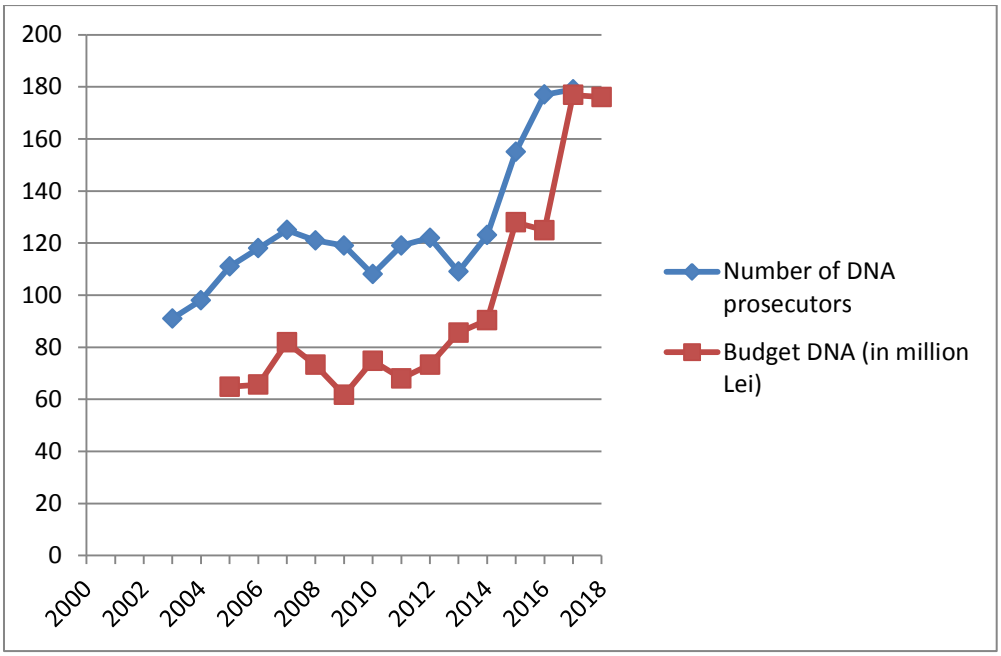
3.2 Input: Augmentation of capacity

The assessment of criminal anti-corruption activity begins with the input stage, which necessitates the evaluation of organizational capacity of the main criminal investigation bodies in high- and medium-level corruption cases: 1.) The DNA, Romania's autonomous anti-corruption directorate, situated within the Public Ministry. It has operational and budgetary autonomy to investigate serious corruption and fraud and cases related to the protection of the EU's financial interests. It is organized in a central structure in Bucharest and 14 territorial subunits (services). 2.) The Supreme Court of Cassation and Justice and 15 courts of appeal, which give final verdicts in corruption cases. 3.) The (internal) Romanian Intelligence Service (SRI), a special domestic investigation organ in criminal cases which concern national security. The SRI is an agency which gathers information that helps to protect the national security of Romania and in particular "threats to national security that are associated with corruption". The SRI's mission is "to protect democratic values and promote the national interest of Romania and of its allies in order to ensure national security, the

[23] All anti-corruption strategies can be found on the website of the Ministry of Justice: http://www.just.ro/strategii-si-politici/strategii-nationale/

observance of civil rights and freedoms and the defense of the rule of law." According to its own strategy guidelines, the SRI has "the obligation to guarantee the balance between security imperatives and human rights, in line with democratic standards."[24]

Figure 2: Organizational capacity of the DNA



Source: www.pna.ro

Data from Figure 2 indicates that Romania's anti-corruption agency (the DNA) experienced a considerable improvement of institutional and prosecution capacity in the last decade. First, the number of prosecutors increased from 91 (in the year 2003) to 177 (in the year 2016). Second, the DNA budget increased from 64 million RON in 2005 (17.67 million EUR) to 118 million RON in 2016 (26.22 million EUR). Noteworthy, the number of prosecutors and budget experienced two accelerating trends: The first augmentation of organizational capacity (2002-2007) was related to initial capacity building of the original anti-corruption agency, the PNA (*Parchetul National de Anticoruptie*), which was transformed in 2005 into the DNA (*Direcţia Naţională Anticorupţie).* The second major augmentation can be observed between 2013 and 2017, i.e. under the Ponta and Ciolos governments and Kövesi's mandate as head of the DNA (May 2013 – July 2018). Between 2013 and 2017 the number of DNA prosecutors increased from 109 to 179 and the annual budget from 85.6 million RON (19.2 million EUR) to 176.8 million RON (38.1 million EUR). Similar to the augmented financial resources of the

[24] See https://www.sri.ro/mission-vision-values and https://www.sri.ro/security-strategy.

DNA, court budgets increased over the last 15 years substantially from 7.8 EUR to 30.4 EUR per 100,000 inhabitants in the year 2016 (see CEPEJ).The budget of the Romanian intelligence service (SRI) grew fivefold. It augmented from approx. 100 million EUR in the year 2002 to approx. 500 million EUR in 2018.[25]

Overall, the improved organizational capacity of the DNA, the SRI and courts should translate (according to a simplistic input-output model) into a more effective and accelerated prosecution of anti-corruption offences (see the increased output indicators of section 3.4). But reinforced capacity and output does not tell us anything about the fairness and reasonableness of the criminal process. The next section opens up the procedural "black box" of anti-corruption activity and discovers various deficiencies of process.

3.3 Process: Aberration from fair trial and reasonableness

Procedural integrity (and the lack of it) can be assessed along three different phases of the criminal process: 1. Pre-trial phase (A. intelligence-related, B. prosecutor-related), 2. Court trial phase (mainly judge-related), 3. Post-trial phase (appeal). These three distinct phases reflect the threefold division of the criminal process in Romania until 2014. The new Penal Procedure Code introduced *de jure* a new phase during which the Preliminary Chamber should verify the legality of evidence. However, the new Code and the new Chamber leave a lot to be desired and encounter problems of unconstitutionality.

1a) Pre-trial phase (intelligence-related)

The pre-trial phase of identification of potential corruption offences has been closely related to the investigative activities of the Romanian Intelligence Service (SRI) which cooperated intensively with the DNA since 2009 when it committed to information exchange and technical support as well as collaboration and evidence gathering through "mixed teams" (*echipe operative comune*) between prosecutors and SRI officers. The SRI lists in its 2008 and 2009 activity reports the main support activities to criminal prosecution organs: 1. Provision of raw information and concrete information on persons involved in criminal activities, 2. Declassification of information at the request of judicial organs, 4. Participation in joint operative teams (*echipele operative mixte*) and common analysis with prosecutors. 5. Provision of expertise and scientific findings (see SRI report 2008:19), 6. Provision of

[25] See https://www.sri.ro/assets/files/bugete.

specialized technical support). According the SRI, "In certain cases, special joint operational teams were set up which ensured the management of the documentation stage and later on, the efficient use of data and information gathered on the perpetration of crimes" (see SRI report 2009:10f).

The intensified cooperation between the SRI and the prosecution authorities evolved over time and was concluded by a secrete protocol from 4. February 2009, which was signed by the head of the SRI George C. Maior and general prosecutor Laura C. Kövesi.[26] Next to intensified cooperation with the DNA, the SRI established more than 400 other cooperation protocols with ministries, autonomous agencies (ANI, DICCOT), but most controversially also with the Supreme Council of Magistrates (signed in 2012),[27] the Disciplinary Inspection of Magistrates (signed in 2016)[28] and the Supreme Court.[29] The Constitutional Court and the Foreign Intelligence Service (*Serviciul de Informații Externe*) were the two institutions which did not sign a protocol of cooperation with the SRI.[30] While the SRI justified inter-institutional cooperation through secret protocols with threats to national security and as necessity to seek a noble end, i.e. the fight corruption,[31] these non-transparent practices became subject to a constitutional complaint before the Constitutional Court and criticism by representatives politicians, NGOs, lawyers and magistrates associations (e.g. UNJR, AMR, MEDEL).

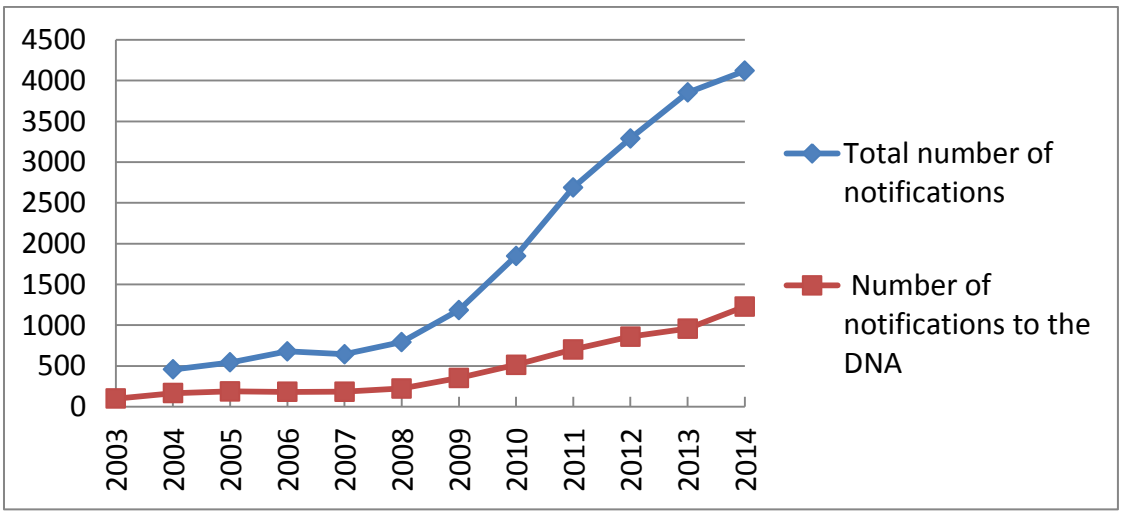
Four examples of excesses (i.e. aberrations from reasonableness) during the intelligence-related pre-trial activities can be identified:

1. The first excess is informational in nature. It refers to the accumulation and dissemination of information (e.g. number of notifications in criminal investigations/prosecutions), the retention and digital storage of "big data" which was obtained during surveillance actions

[26] See secrete protocol no. 003064 from 4.February 2009 which was declassified on 29 March 2018. See https://www.sri.ro/assets/img/news/protocol-de-cooperare/Protocol_declasificat.pdf
[27] https://www.csm1909.ro/ViewFile.ashx?guid=adc26057-d257-4ba6-a8f9-6b8771bfe2aa|InfoCSM.
[28] https://www.juridice.ro/wp-content/uploads/2018/10/Protocol-Inspectia-Judiciara-SRI_.pdf.
[29] In September 2018 it was reported that 137 protocols were still in force from a total number of 432 that were signed since 1990 with all ministries and many governmental agencies. 18 protocols concerned judicial and prosecutorial structures and most of them are no longer in force, except for two. https://www.digi24.ro/stiri/actualitate/politica/manda-din-1990-sri-a-semnat-565-de-protocoale-sau-acorduri-dintre-care-137-sunt-active-996302
[30] https://www.stiripesurse.ro/curtea-constitutionala-are-patru-protocoale-cu-alte-institutii-nu-si-cu-sri_1282494.html
[31] The Supreme Council of National Defense (CSAT) declared corruption already in 2005 a threat to national security. See Decision 17/2005.

(e.g. wiretapping).[32] SRI notifications/briefings (*informari/sesizari*) sent by the SRI to various criminal investigations bodies aimed to support the investigation of criminal offences, including of corruption offences. They consisted of classified and non-classified information. However, the proportion between both types of information is not known to the public. Also the proportion of SRI information which ultimately became concrete evidence in criminal proceedings is not known. Data from Figure 3 illustrates the quantitative increase of SRI notifications provided to the DNA and other criminal investigations and prosecution organs (e.g. Prosecution office, courts, police, DIICOT). The first graph indicates that the total number of notifications in criminal investigations and prosecutions augmented from 542 (in the year 2005) to 4120 (in the year 2014). The second graph shows that between 2005 and 2014, the number of SRI notifications to the DNA increased more than tenfold, from 100 to 1229 notifications. The data suggests that especially from 2009 onwards (i.e. after the intensified inter-institutional cooperation) the DNA and other criminal organs requested and received much more information from the SRI. The growing numbers reflect an intensified correspondence and institutional cooperation between the SRI and the DNA, as well as other criminal investigation bodies (e.g. DIICOT, prosecution office).

Figure 3: Number of SRI notifications in criminal investigations and prosecutions



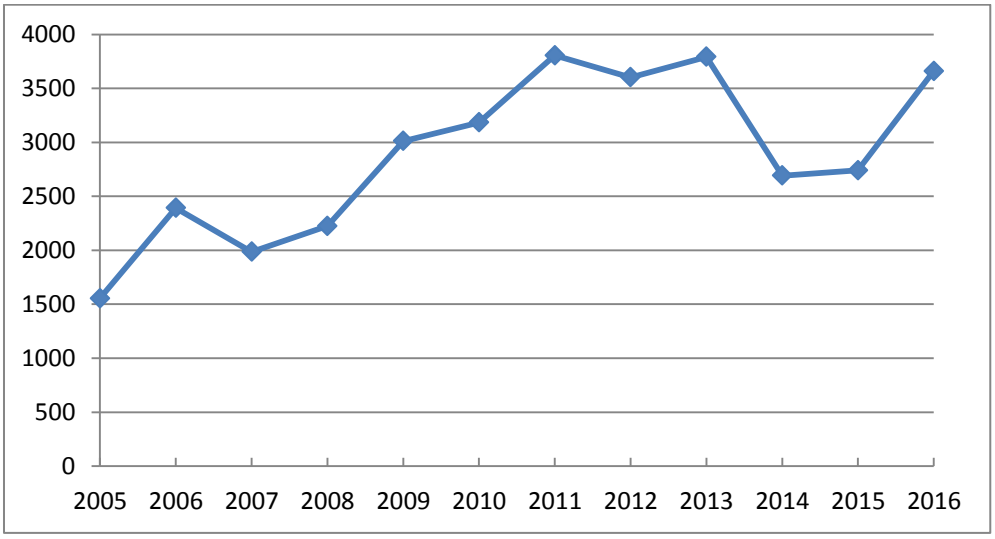
Source: Compiled based on various annual SRI reports.
Note: Data between 2015 and 2018 was not yet released at the time of writing.

2. Another excessive development was the ease of issuing and obtaining interception warrants with regard to threats to national security (see Figure 4). These interception warrants are

[32] The storage of surveillance for up to 6 months was declared unconstitutional by the Constitutional Court in 2014.See https://www.ccr.ro/files/products/Decizie_440_2014_reviz.pdf.

requested by prosecutors, approved by few "eligible" high-ranking judges from the Supreme Court and executed by the SRI. The authorization rate of national-security warrants was around 99%, meaning that there were almost no rejections of requests for surveillance activity.[33] Such high acceptance rates by few chosen judges who were supposed to verify every request thoroughly suggests an excessive aberration from reasonableness (interview with an anonymous Romanian judge). It also suggests lack of judicial restrictions over growing requests from prosecution services. Figure 4 shows that between 2005 and 2016 the number of national security warrants rose from 1554 to 3660. The total amount of national security warrants for the period 2005 - 2016 was 34,640 among which 31,802 were requested by the SRI. The steady growth of these interception warrants suggests a continuous accumulation process already since 2005. The parliamentary investigation Commission on the SRI's activity remarked that interception warrants regarding national security were justified with potential risks, threats and vulnerabilities to national security, however often without concrete evidence of a committed offence by the surveilled person (Romanian parliamentary Commission 2018 :14).

Figure 4: Number of interception warrants regarding national security



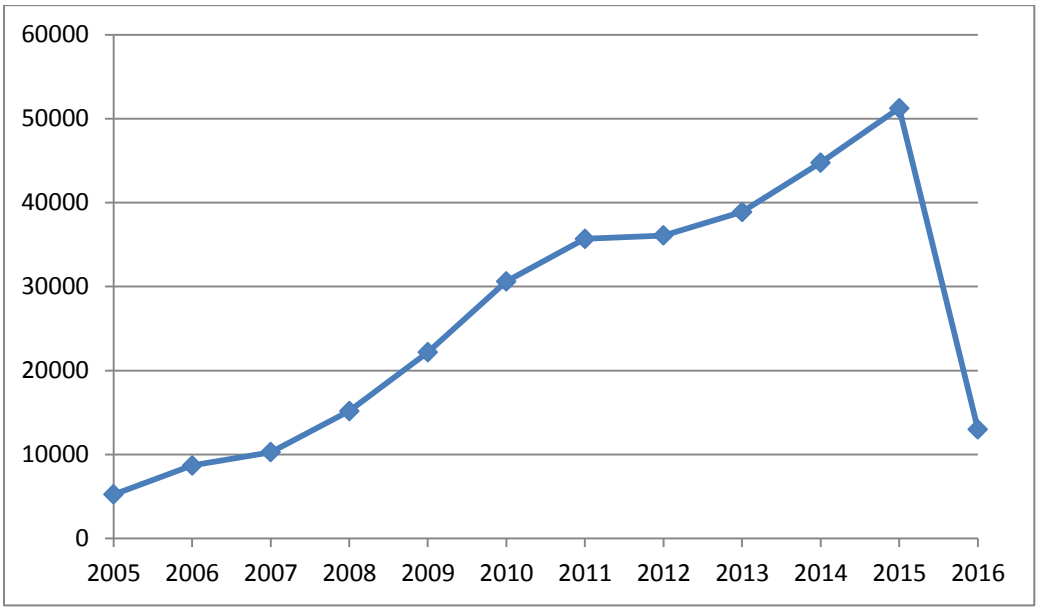
Source: Romanian High Court of Cassation and Justice, data available at http://crct.ro/nqhk.

3. Excess was also visible in the ease of obtaining authorization acts to perform all surveillance activities (i.e. not only those related to national security). The number of all interception warrants increased within 10 years from 5,244 to 51,248 and then drastically

[33] http://www.corectnews.com/social/s-au-ascultat-telefoanele-ca-la-balamuc-zeci-de-mii-de-mandate-ntre-2005-i-2016.

dropped to 12,992 in the year 2016 (see Figure 5). The strong drop in interception warrants can be explained by a decision of the Constitutional Court from 16 February 2016. The Constitutional Court declared article 142 (1) of the Penal Procedure Code as unconstitutional and by so doing restricted interceptions by the SRI in penal cases for one month, until the Government adopted of an emergency ordinance which made the SRI legally a "special organ of criminal investigation" in cases of threats to national security and terrorism.[34] Previously, the SRI could only notify the prosecutors of such cases and assist with the investigation. The total amount of interception warrants between 2005 and 2016 was 311,825.

Figure 5: Number of all interception warrants to perform surveillance activities



Source: Romanian parliamentary Commission 2018.
Note: The total number of interception warrants consists of 1. national security mandates, 2. technical surveillance mandates and prosecutor ordinances issued for 48 hours.

4. There were also instances of excessive surveillance in terms of time (e.g. phone tapping over months and even years) and in terms of scope (e.g. relatively high quantity of surveilled persons). The parliamentary investigation report on the SRI's activity estimated the number of surveilled persons to 6 million, i.e. one third of the entire population. It also mentioned that Calin Popescu-Tariceanu (the president of the Senate) was monitored for 4 months and that there were cases of technical surveillance which lasted several years. It concluded that the

[34] See OUG no. 6 from 11. March 2016. http://legislatie.just.ro/Public/DetaliiDocument/176546. This decision was justified by Minister of Justice Pruna with the "European agenda". https://www.hotnews.ro/stiri-esential-20862718-sri-castiga-mai-multa-putere-guvernul-facut-sri-organ-cercetare-penala-cazurile-siguranta-nationala-terorism.htm.

restriction of rights and liberties as guaranteed by the Constitution were "large scale" in nature and that the interception warrants were used in an "abusive mode" (Romanian parliamentary Commission 2018:8).

These numbers should be relativized in a comparative way in order to assess whether there was an aberration from reasonableness. First, a study done by Romanian Community Coalition in 2015 has shown that there are annually almost twice as many national security warrants in Romania than in the US, despite the fact that Romania's population is 16 times smaller than the population of the US.[35] Second, the number of interception warrants in Romania is of a similar worrisome proportion as in the case *Iordachi and others against Moldova* from 2009, where the ECHR has found a violation of article 8 due to "an uncommonly high number of authorisations" of interceptions (in terms of %), lack of "reasonable suspicion" and safeguards against "overuse" of secrete surveillance as well as "abuse of power" by the state.[36] Third, from a purely surveillance and national security perspective (which is supposed to serve the interest of the people) the growing number of authorizations could have been justified by the growth of recent security challenges (terrorism, cyberattacks, crime and migration) as well as the fragmented nature of the Romanian state (see Mendelski 2018). From the perspective of the rule of law and the respect of citizens' individual rights, the new and excessive surveillance-based pre-trial activities became questionable. Using interception warrants to investigate criminal offences is nothing bad *per se*. However, authorizing them uncritically and using them excessively is worrisome.

1b) Pre-trial phase (prosecutor-related)

A growing number of cases before the ECHR, the recent surge in domestic acquittals (e.g. due to lack of evidence and non-existence of offence)[37] as well as interview evidence suggest certain recurring deficiencies, irregularities and aberrations that occurred during the pre-trial prosecution of anti-corruption offences. The following four examples of aberrations from procedural fairness and proportionality should not be seen as exhaustive evidence to prove the mathematical proportions of prosecutorial abuse, but mainly give an overview of the doubtful

[35] http://coalitiaromanilor.org/a41-romania-stat-politienesc-cu-o-populatie-de-16-ori-mai-mica-decat-sua-sri-asculta-de-2-ori-mai-multe-telefoane-ca-fbi.aspx.
[36] https://rm.coe.int/168067d212.
[37] https://www.stiripesurse.ro/sorina-matei-dezvaluie-cifrele-reale-care-a-fost-de-fapt-procentul-achitarilor-in-dosarele-dna_1261180.html.

methods and organizational deficiencies that have been observed recurrently during the criminal process. Four main deficiencies can be mentioned:

1. Insufficient quality of evidence (article 6)

a. This included the lack of appropriate quality and an excessive focus on quantity of evidence by prosecutors. The logic of more is better was reflected in the thickness of the case file (i.e. big files with many pages) as well as in the inflated calculations of prejudice.[38]

b. The not always adequate quality of evidence resulted sometimes from a discrepancy between "transcripts" and "tape recordings", suggesting discretionary, manipulative or unprofessional transcription and various irregularities of phone tapings.[39] In this regard it should be mentioned that Cluj Military Court has approved the prosecution of 12 SRI officers for "abuse in office" and "forgery of wiretaps in criminal investigation".[40]

c. Another problem was the lack of "concrete" and direct evidence in corruption cases and excessive use of indirect evidence (e.g. recordings, wiretaps provided by the SRI) used by prosecutors, as well as the inclusion of testimonies of witnesses with pending court cases.

2. Deficient methods of evidence gathering (article 6)

a. Use of evidence gathered by *agents provocateurs*[41] and alleged cases of police entrapment.[42] b. Evidence gathering in favor of accusation and a lack of "exculpatory evidence" (although the penal procedure code demands clearly to gather evidence in favor of accusation and defense).[43] c. Non-transparent evidence gathering process which was based on secretive methods without lawyers' access to the file or tape recordings.[44] d. Individual

[38] See as an example the case of former head of the National Integrity Agency Horia Georgescu when the initial prejudice was set by the DNA prosecutors at 80 million and then reduced to zero. https://adevarul.ro/news/eveniment/horia-georgescu-judecat-dosarul-anrp-expertii-numiti-instanta-constatat-nu-exista-niciun-prejudiciu-1_5a5e53d2df52022f75927378/index.html.

[39] See expert opinion by Catalin Grigoras which found several irregularities of phone taping, such as lack of authenticity, montage, evidence of editing through deletion/inclusion, destructive compression, precedent registration etc). https://www.luju.ro/static/files/2018/ianuarie/19/raport-expertiza-catalin-grigoras-in-dosar-chereches_001.pdf. See *Beraru vs Romania* 2014.

[40] https://www.romania-insider.com/romanian-intelligence-officers-forging-wiretap/.

[41] See domestic cases of Adrian Severin, Mariana Rarinca and the ECHR cases of Ali vs. Romania and Constantin and Stoian vs. Romania which found violation of article 6.

[42] For non-corruption-related cases se Bulfinsky v. Romania; Pătraşcu v. Romania.

[43] Interview with an anonymous judge and high ranking prosecutor.

[44] See case *Beraru v. Romania* 2014;

misconduct of DNA prosecutors (intimidation, deceptive evidence gathering etc.) in several cases of DNA prosecutors who nowadays face disciplinary proceedings.[45]

3. Excessive use of pre-trial detention of suspects (article 3 and 5)

Excessive use and arbitrary prolongation of pre-trial detention was in particular problematic when defendants after several months in degrading conditions of pre-trial detention were acquitted. Such violations were reported in several ECHR cases which bemoaned the degrading conditions of detention in prisons and police stations (overcrowding, inadequate hygiene and heating), the detention of old, ill and pregnant suspects[46] as well as mothers/fathers of young children.[47] Prosecutors would justify the use of pre-trial detention with concerns for public security, further offences, hiding of evidence, intimidation of witnesses and required punishment of perpetrators. The escape from prosecution of several high-level suspects who seek refuge from criminal trial abroad (and in their eyes lack of fair trial) probably speaks for the use of pre-trial detention. But the excessive use of pre-trial detention under degrading conditions and violations of rights/liberties (Article 3) and the assumption of innocence speak against it.[48] With regard to arbitrary deprivation of liberty (Article 5), the ECHR concluded that "it does not dispute the fact that corruption is an endemic scourge which undermines citizens' trust in their institutions, and it understands that the national authorities must take a firm stance against those responsible. However, with regard to liberty, the fight against that scourge cannot justify recourse to arbitrariness and areas of lawlessness in places where people are deprived of their liberty." (Creangă v. Romania, no. 29226/03, 23 February 2012; see Popoviciu v. Romania, no. 52942/09, 1 March 2016).

[45] https://www.agerpres.ro/justitie/2018/06/27/csm-discuta-actiunile-disciplinare-formulate-de-inspectia-judiciara-fata-de-lucian-onea-si-mircea-negulescu--134911; https://www.hotnews.ro/stiri-esential-21747603-inspectia-judiciara-exercitat-actiunea-disciplinara-fata-procurorul-negulescu-decizia-finala-luata-csm.htm; https://www.hotnews.ro/stiri-esential-21732618-raportul-inspectiei-judiciare-cazul-procurorului-mircea-negulescu-suspendat-din-magistratura-negulescu-exprimat-serie-opinii-incalcarea-standardelor-conduita-impuse-magistratilor-intr-discutie-telefon.htm.

[46] See Pendiuc v. Romania 2017, where the ECHR found that "there has been a violation of Article 3 of the Convention in respect of the applicant's physical conditions of detention".

[47] See case of *Micu vs. Romania* 2015;

[48] See case of a former Romanian mayor who was indicted for passive corruption and abuse of office and had to spent 1 year and 3months in pre-trial detention (*Anderco vs. Romania*, no 3910/04, 2014). See also several criminal cases (not related to corruption) where the excessive practice of pre-trial detention over years: Hamvas vs. Romania, Leontin Pop vs. Romania.

4. Infringement of the presumption of innocence (article 6) and degrading treatment (article 3)

In this regard, the widespread practice of "show trials in handcuffs" (*festivalul catuselor*) could be equally mentioned here critically. The pathological practice of presenting suspects in handcuffs (or intimidating them with handcuffs[49]) in front of the media could potentially violate article 3 of ECHR and "the principle of the presumption of innocence" ("innocent until not declared guilty", Article 6) and has been widely criticized, for instance by the Romanian Association of Magistrates in the case of a handcuffed judge Florin Constiniu.[50]

5. Violation of privacy (article 8)

Two questionable practices from the past could be mentioned here. First, the practice of "information leaks" (telephone taps, documents) by authorities, i.e. leaking of sensitive and private information from case files to the media before the verdict, brought Romania several violations of article 8 (respect for private life) before the ECHR.[51] Second, the ECHR found in some previous investigation practices insufficient lawfulness of interceptions and inaccuracy of transcripts, including a "lack of safeguards in the procedure governing telephone interceptions on grounds of national security".[52]

2) Court trial phase (judge-related)

The court trial phase should objectify (corroborate) the subjective investigation process (e.g. evidence gathering). It can be regarded as a potential safeguard against the subjectivism of law enforcement bodies and prosecutors and potentially restrain excess and abuse. The problem in Romania has been that courts as crucial guardians of procedural integrity were not always able to function as "beneficial constraints" over ambitious investigators and prosecutors. The court trial phase has seen the following problematic issues that affected negatively the right to a fair trial:

[49] https://www.luju.ro/culise/vorbe-de-fumoar/vorbe-de-fumoar-9-05-2016-procurori-din-dna-practica-santajul-ca-metoda-de-ancheta?print=1.

[50] https://www.juridice.ro/106086/imobilizarea-cu-catuse-a-judecatorului-florin-costiniu-protest-amr.html See the ECHR cases of *Costiniu* vs. Romania and Casuneanu vs. Romania, which were however rejected for non-exhaustion of domestic remedies. See Bujac vs. Romania 2010; see Archip vs Romania 2011. See for instance https://www.stiripesurse.ro/adina-florea-critica-festivalul-catu-elor-nu-cred-ca-e-necesar-sa-defilam-oameni-in-catu-e-aceasta-defilare-nu-a-facut-bine-nimanui_1287892.html; https://goo.gl/17eGHv.

[51] See ECHR cases Apostu v. Romania and Căşuneanu v. Romania 6 april 2013.

[52] See Stana vs. Romania, 4 December 2018.

1. Confirmatory "rubber stamping" verdicts based on inconsistent interpretation of evidence (article 6)

Romania's fight against corruption has included judicial verdicts that were regarded by the ECHR as "mere reiteration of prosecutor's findings" i.e. judicial decisions which were insufficient to correct earlier procedural defects, errors or negligence, committed for instance by prosecutors, policemen or SRI officers. The non-critical endorsement of indictments has generated a bias in favor of accusation and a departure from fair trial. This practice resembled a "copy paste" activity of the indictment, i.e. a simple validation of the prosecutor's work by the judge (interview with an anonymous Romanian judge). The ECHR case Beraru vs. Romania exemplifies this deficiency of judicial. The ECHR noted "…that none of the defects noted at the pre-trial and first-instance trial stage were subsequently remedied by the appeal court. Despite having jurisdiction to review all aspects of a case on questions of both fact and law, the High Court of Cassation and Justice did not conduct a new judicial examination of the available evidence and the parties' legal and factual arguments. Both the Bucharest Court of Appeal and the High Court of Cassation and Justice merely reiterated the prosecutor's findings, and did not address the repeated complaints made by the defendants concerning various defects in the trial."

Confirmatory, rubber-stamping justice results according to my interviews with Romanian magistrates from: 1. Pressure of statistics to deliver speedy justice, 2. Lack of judicial professionalism (e.g. carelessness, lack of critical corroboration of evidence, superficial verification due to overwork etc.), 3. The "active role" of the prosecutor during the criminal process and the "passive role" of the judge. Another potential explanation for the presence of reiterating, confirmatory justice could be the over-representation of prosecutors at the penal section of the Supreme Court. According to my own calculations the number of former prosecutors at the penal section of the Supreme Court is one third (33%). The inclusion of former prosecutors into the highest court level could have produced "blurred boundaries" between accusation and impartial adjudication, including a bias in favor of accusation.

"Confirmatory justice" has remained a problem, despite a recent wave of acquittals and despite changes in the Penal Code of Procedure in 2014. Lawyers argue that the new code strengthened the discretionary powers of the prosecutor. Judges argue that the introduction of the preliminary chamber increased formalism, bureaucracy and the workload of judges. This is also the reason why the verification of legality of evidence occurs in a superficial and

haphazard way, with undesirable effects for procedural quality. In May 2018 Justice Minister Toader announced the dissolution of the preliminary chamber provision.[53]

2. Procedural irregularities during trial (article 6)

In the past, a number of procedural deficiencies have been identified during the court trial stage. They include the limitation of right to defense"[54] , the lack of proper access to the file by lawyers[55] and deficiencies related to the assessment of evidence (e.g. judicial decisions based on recordings of contested authenticity, lack of proper investigation of abusive investigation methods).[56] More recently, it was reported that the composition of court panels at the Supreme Court of Cassation and Justice did not respect the law since 2014. [57] The disregard of law no.255/2013 which required a random selection of all five panel members (including the presiding judge) undermined therefore the impartial composition of the 5-judge panels. In the last four years, dozens of high-ranking dignitaries were brought to trial before the unconstitutionally constituted judicial panels. Altogether there were 975 verdicts in criminal cases. Whether these verdicts have automatically violated fair trial procedures cannot be proven nor refuted. The subsequent Constitutional Court's decision of unconstitutionality (Decision no.685, 7 November 2018)[58] poses a dilemma for Romanian criminal justice. The aberration from the law requires an appropriate corrective solution which needs to strike a balance between principles of fairness on the one hand and legal continuity and effectiveness on the other.

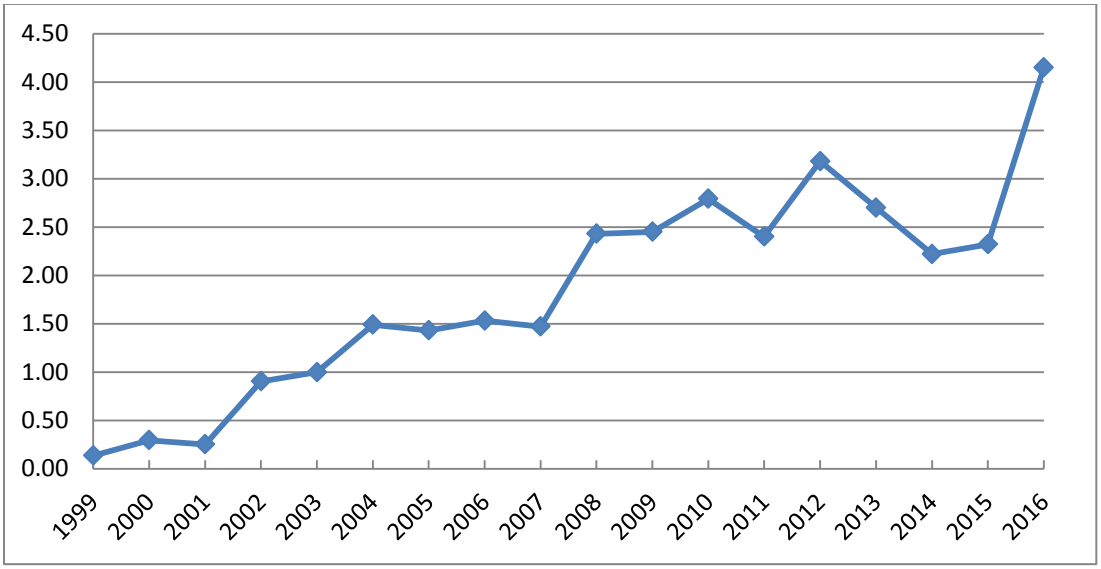
3.) Post-trial (appeal phase)

The post-trial phase has been characterized by inconsistent adjudication. This lack of uniform jurisprudence in criminal cases was for instance reflected in the inconsistent interpretation of evidence. Several verdicts in appeal cases at the Supreme Court level were based on „new" interpretation of „old evidence" (e.g. written declarations of witnesses), despite two previous

[53] See https://www.clujust.ro/un-judecator-penalist-din-cluj-solicita-desfiintarea-procedurii-camerei-preliminare-scrisoare-deschisa/; https://www.juridice.ro/578150/tudorel-toader-vom-propune-abrogarea-reglementarilor-privind-camera-preliminara.html.
[54] See ECHR case Gutau vs. Romania.
[55] See the ECHR case Beraru vs. Romania.
[56] See Beraru vs Romania; see Ali vs. Romania.
[57] http://www.coalitiaromanilor.org/a86-de-4-ani-legea-nu-se-aplica-la-iccj-in-compunerea-completelor-de-5-judecatori-propunere-de-sesizare-a-ccr-pe-conflict-intre-iccj-si-parlament.aspx; https://www.qmagazine.ro/noaptea-penala-a-cazut-asupra-inaltei-curti/.
[58] https://www.ccr.ro/files/products/685_cu_opinii_separate.pdf.

acquittals at lower court levels.[59] More systematic domestic data would be required to show how widespread this recurring deficiency was. However, indirect evidence shows that the impartiality of criminal justice did not improve in Romania, that trust in the judicial system declined in the last years towards a trust level around 30% and an increasingly number of citizens have been seeking justice before the ECHR.[60] The overall lack of procedural integrity during domestic investigations, prosecutions and court trials is numerically reflected in a growing number of ECHR applications (see Figure 6).

Figure 6: Allocated ECHR applications by Romania per population (10,000)



Source: ECHR.

Also the number of concrete violations of fundamental rights increased. The most recent ECHR statistics indicate that since Romania ratified the *European Convention on Human Rights* in 1994 it accumulated 226 violations of Article 3 (inhuman and degrading treatment), 119 violations of article 5 (right to liberty and security) and 437 violations of article 6 (right to a fair trial).[61] According to the latest ECHR data from 2018, Romania accounts for the second

[59] See case of Flueras vs. Romania; Gutau vs Romania, see Nitulescu vs. Romania. For non-corruption cases of the same problematique see cases of Mischie vs Romania, Moinescu vs Romania, Găitănaru vs Romania and Văduv vs Romania.

[60] http://cursdeguvernare.ro/sondaj-curs-increderea-parlament-scazut-cu-9-pana-la-14-increderea-justitie-crescut-la-34.html; https://www.stiripesurse.ro/sondaj-curs-care-sunt-institutiile-in-care-romanii-au-cea-mai-mare-incredere_1313226.html.; https://evz.ro/sondaj-incredere-romani-justitie.html.; https://www.hotnews.ro/stiri-esential-21231172-eurobarometru-increderea-romanilor-justitie-scazut-13-pana-35-cea-mai-mare-corectie-nivel-european.htm.

[61] https://www.echr.coe.int/Documents/Stats_violation_1959_2017_ENG.pdf.

highest proportion (15.1 %) of all pending applications to the ECHR.[62] When counting per population, Romania takes the first (and infamous) place in allocated applications per capita (4.15 per 10,000 population). While the high amount of applications and violations relates currently to a small fraction of anti-corruption cases, the growth could nevertheless reflect some systemic deficiencies related to criminal justice. It also shows how problematic it is to focus on effectiveness of prosecution of anti-corruption cases when the criminal process is deficient.

3.4 Output: Acceleration of "results"

How effective was the criminal and repressive approach of anti-corruption in terms of output? Figure 7 gives an overview of several indicators to assess the DNA's effectiveness of prosecution which are used officially by the Public Ministry as "results" indicators. The data shows that the anti-corruption activity is characterized by growing numbers of indictments, defendants sent to trial, and definitive convictions. Most indicators saw a clear acceleration between 2009 and 2015, i.e. towards the end of the mandate of Daniel Morar and under the mandate of the new chief prosecutor Laura C. Kövesi. For the period 2002-2016 the annual number of defendants sent to trial (at the public ministry level) increased from from 388 to 1652; the number defendants sent to trial (at the DNA level) increased from 69 to 925; the number of final convictions augmented from 22 to 879. Also the numbers for prosecuting and convicting various criminal offences (bribe giving and receiving and influence peddling) augmented as well. Between 2005 and 2016, a total of 8,347 people were sent to trial and 5,726 final sentences were passed. Among the convicted were countless members of parliament, ministers, mayors, magistrates, bureaucrats, generals, businessmen, administrators, lawyers, doctors and professors. Supporters of anti-corruption interpreted these numbers as "effectiveness" or "progress" and an opportunity to renew the political class. In contrast, critical voices from politics and business (such as Călin Popescu-Tăriceanu, Ludovic Orban, Sebastian Ghita, Sorin Ovidiu Vantu), saw the growing "results" as a decimation of Romanian capital and the political class.[63]

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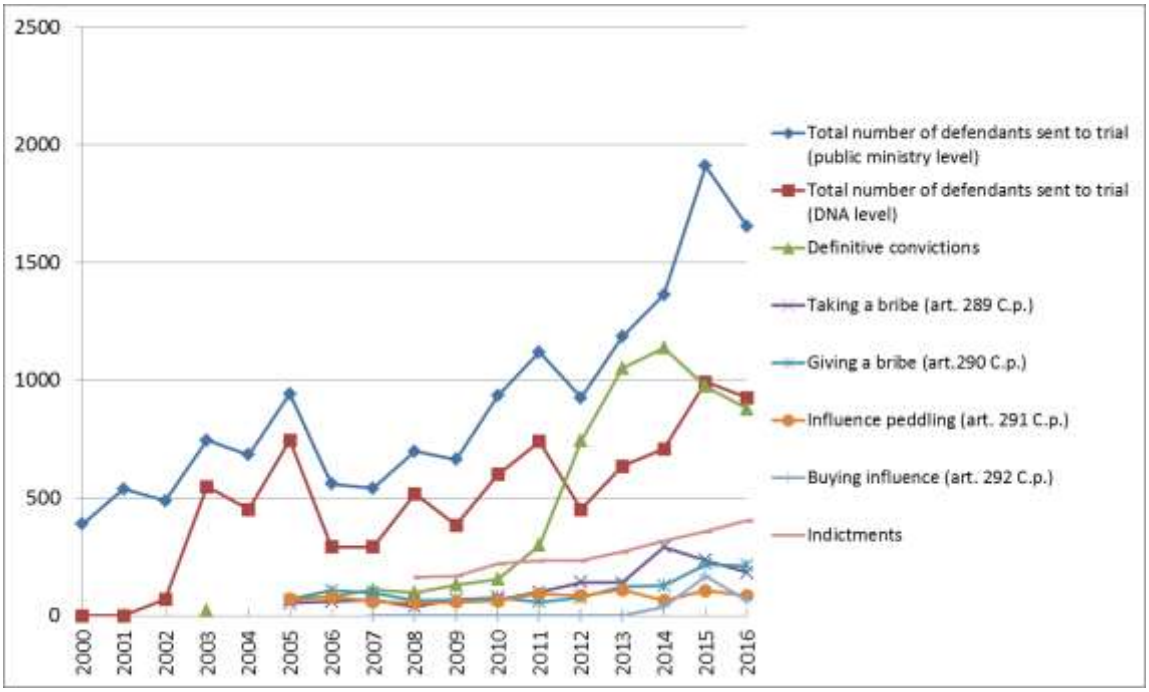
[62] https://www.echr.coe.int/Documents/Stats_pending_month_2018_BIL.pdf.

[63] See https://www.realitatea.net/tariceanu-capitalul-romanesc-e-fugarit-cu-dna-ul-si-facem-loc-companiilor-straine_2099485.html.;https://www.activenews.ro/stiri-politic/Sorin-Ovidiu-Vantu-acuzatii-grave-la-adresa-SRI-si-DNA-Romania-este-o-colonie-a-confirmat-chiar-Klaus-Iohannis.-Avalansa-de-arestari-un-plan-bine-pus-la-punct-125017; https://www.b1.ro/stiri/economic/mai-avem-putin-si-vom-avea-un-capitalism-original-capitalismul-fara-capital-romanesc-ludovic-orban-acuza-guvernul-si-marile-institutii-ale-statului-ca-prigonesc-afaceristii-romani-163434.html.

Figure 7: Selected results-related indicators of DNA anti-corruption activity



Source: http://www.mpublic.ro. Annual activity reports.

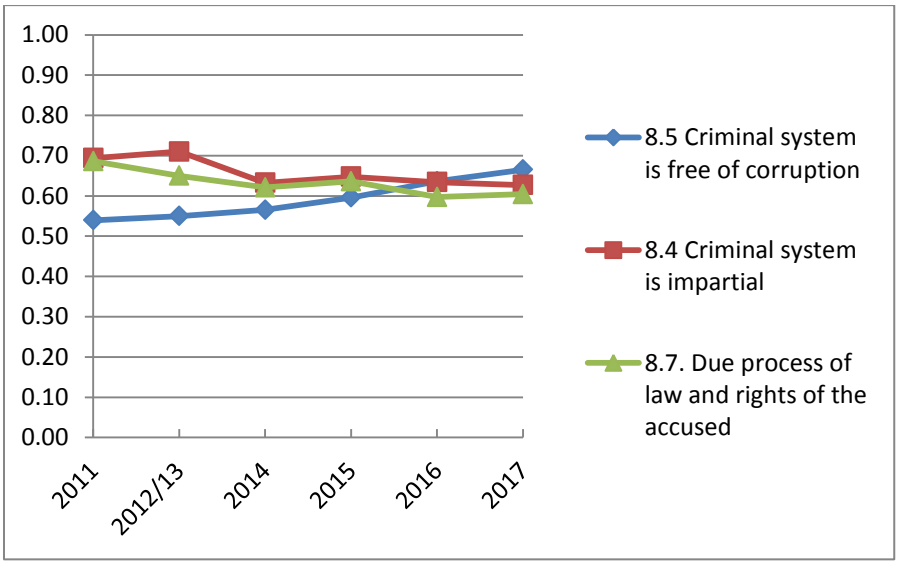
The augmenting and accelerating trends on this dimension suggest an impressive, unrestrained and worrisome accumulation of quantitative results (or "track records" in the familiar language of CVM reporting). These numerical results were presented annually by the chief prosecutors of the DNA as evidence of progress and performance. [64] The accelerating trend was hailed by the European Commission as ("effective prosecution ", "improving performance", "further progress", "impressive track records", "impressive momentum", "sign of sustainability" in the fight against corruption (see European Commission 2010, 2015, 2016, 2017). These growing numbers formed also the basis of the EC's yearly *laudatio* of Romania's anti-corruption activity, which was repeated enthusiastically by NGOs, the press and anti-corruption academics. The key question for a critical observer is however if these accelerating and growing *quantitative* results were obtained through proper *qualitative* processes, i.e. procedures that were compatible with the rule of law, integrity and the principle of fair trial. The previous section which identified various deficiencies of criminal justice has shown that this was hardly the case.

[64] The DNA reports and speeches of its heads that have praised quantitative results can be found at www.pna.ro

4. Summary and discussion of findings

The present analysis of anti-corruption activity in Romania has produced surprising findings. While many capacity and results-related indicators augmented and accelerated, suggesting better effectiveness of the criminal justice system, the assessment of the criminal process suggests also the presence of lack of fair trial and reasonableness.[65] This discrepancy is reflected in selected indicators of criminal justice as assessed by the World Justice Project (see Figure 8). While Romania's criminal system improved in the last 15 years with regard to the effective prosecution of corruption and became less corrupt (see indicator 8.5), this positive achievement has been obtained at the expense of impartiality, due process and individual rights of the accused, which declined over time (see indicators 8.4 and 8.7). Overall, the criminal approach to fighting corruption in Romania has been characterized by considerable misbalance and discrepancy between output-oriented distributive justice and procedural justice. On the one hand, we can observe increased capacity and quantitative results. On the other hand, the criminal process as a whole lacked integrity and deviated from principles of fairness and reasonableness. In other words, effective prosecution of corruption was done at the expense of equitable and fair prosecution. Results-oriented criminal justice has crowded out procedural criminal justice.

Figure 8: Selective indicators of criminal justice development in Romania



Source: World Justice Project. https://worldjusticeproject.org/
Note: Scale between 0 (worst) and 1 (best). Higher score indicate a better functioning of criminal justice.

[65] A more complete analysis of other domestic cases that violated fair trial standards but which did not yet reach the ECHR could provide further evidence. However, such an encompassing analysis is beyond the limits of this article. It could become subject to future research.

This impression of a dysfunctional criminal process was also confirmed in my interviews with judges, lawyers and prosecutors who stated that the prosecution and trial of corruption offences suffers from deficiencies, aberrations, abuses, anomalies and injustice. One interviewee argued that criminal justice in Romania resembles a lottery and you never know if you will be convicted or acquitted. In recent years critical voices have multiplied which expose instances of injustice and misconduct, excesses and aberrations from domestic legal and constitutional procedures but also European human rights standards (e.g. fair trial).

Every noble cause or virtue can turn into a vice through excess. The prohibition of excess (i.e. temperateness) is not for nothing a fundamental principle of the rule of law. Unfortunately, Romanian criminal justice neglected the principle of reasonableness in favor of effectiveness of prosecution. This was visible in the excessive accumulation of intelligence and overuse of surveillance activities at the request of prosecutors, the excessive swelling and collection of evidence by prosecutors in case files, the growing number of interception warrants and the superficial reiteration of prosecutorial accusations by judges (confirmatory criminal justice). Romanian authorities were thus able to present the growing quantitative output to Brussels, Strasbourg and the domestic and international media as evidence of progress. Quantitative results trumped qualitative processes in every stage and phase of the anti-corruption chain.

This output-and effectiveness-driven progress has created over the years the myth of a Romanian success story (similar as in the Georgian case, see Di Puppo 2014). It was a "success" of effectiveness at the expense of procedural quality. Brussels, instead of examining more thoroughly the "black box" of the evolving deficient criminal process behind the increasing "results", continued to insist on the building and expansion track record in investigations of high-level corruption cases and the production of "convincing and tangible results" (see European Commission 2008, 2009, 2011). The CVM was not able to mitigate deficiencies of Romanian criminal justice, but rather exacerbated them.

The paradox which emerges from the Romanian case is that every group involved in the criminal process could present growing results and "indicators of success" to the public, thus gaining legitimacy, access to resources, applause by citizens and recognition from international observers. Eventually, many stakeholders and structures involved in the anti-corruption prosecution were able to accumulate some benefits (awards, promotions, prestige

and financial or human resources). Results were obtained in the name of a "noble cause": a judicial and political system free of corruption.

However, the Romanian "success story" had also a "tragic side" which many knew, but nobody dared to speak about: countless collateral victims, who were detained, indicated, prosecuted without the guarantees of a fair trial and in some cases acquitted after many years of painful struggle with a deficient criminal justice system.[66] The race for results, prestige and power which was reinforced by individual ambitions, numbers and quantitative statistics produced a systemic output-oriented excess that was not effectively restrained. The process of accumulation of disjointed "organizational results" was neither constrained by the heads of the prosecution and anti-corruption agencies, nor by the Superior Council of Magistrates (often dominated by prosecutors) and the Judicial Inspection. The parliamentary oversight committees over intelligence structures were superficially implemented, based on obsolete laws and remain an "unfinished business" (see Zulean and Şercan 2018).

The European Commission, foreign embassies, most part of the press and civil society - instead of blowing the whistle and drawing attention to excess and unfair procedures, instead of beneficially constraining overly ambitious and at times abusive prosecutors of various territorial structures of the DNA- have opted to draw a veil of silence over these matters. However, such a transnational pact of silence may have precluded accountability and at least delayed the auto-correction of a deficient system. While the Constitutional Court as the "Guardian of the Constitution" turned out in recent years as an effective restrainer of abuse and excess, more concrete (procedural, ethical, legal and organizational) measures are required to restore an equitable criminal justice system with a human face.

Such corrective reform measures are currently contested. Two competing factions can be identified in Romania. They reflect a fierce struggle between advocates of procedural justice and (outcome-oriented) distributive justice. On the one hand, we have a growing faction of affected, sensitized and well-informed groups (critical lawyers, magistrates, NGO representatives, affected parliamentarians and government representatives), as well as the

[66] See https://evz.ro/dupa-bucuresti-ploiesti-constanta-brasov-explodeaza-si-abuzur.html. Most of such "cases of procedural criminal injustice" will probably never reach the ECHR in Strasbourg, because 90% of all applications are rejected as inadmissible and not everybody attempts to seek justice before the ECHR. So in many cases committed will not be alleviated or undone.

Constitutional Court, which have noticed the excess and procedural injustice of the criminal system. They seek to introduce procedural safeguards and legal solutions against the pathological effects of results-oriented anti-corruption activity.

On the other hand, there are staunch advocates of effective anti-corruption who minimalize the excesses, abuses and aberrations from the course of procedural justice. They argue that the proportion of abuses and violations of fair processes concerns only a small fraction of all anti-corruption cases. They claim that many violations of fair trial occurred under the old penal and penal procedural code, but they also admit that the new codes are inconsistent, that many of its articles were declared unconstitutional and that they leave much room for differing judicial interpretations.[67] Some of the anti-corruption supporters argue that the extent of corruption in Romania is so high that temporary procedural injustice (lack of high standards of fair trial, irregularities, collateral victims) may be justified by the "noble ends", i.e. the effective fight against corruption to do justice.[68] A vocal high-ranking judge has recently argued: "The fight against corruption which began with prosecutors Daniel Morar and L.C. Kövesi needs to continue. Anti-corruption is a policy of any civilized country."[69]

Similarly, the European Commission, which has for years disregarded abuses and aberrations from fair investigation, prosecution and trial in its regular CVM reports, continues to insist on effectiveness and results. In a recent communication to the Romanian government, Mr. Timmermans continued to stress the "obligation to effectively prosecute and punish criminal offences", to abide by the treaties, the EU law and requirements of the CVM (*pacta sunt servanda*). In addition, he demanded from the Romanian Prime Minister to verify if the intended legislative changes and procedural provisions affect "the capacity and effectiveness of investigation and prosecution".[70] The European Commission has recently tried to absolve itself from responsibility of a complete assessment of Romania's anti-corruption activity by pointing to the limits of the CVM. It argued that "The operation of the intelligence services is not a matter for the EU and falls outside the CVM benchmarks." (see European Commission

[67] See "Assessment of the 10 years' Cooperation and Verification Mechanism for Bulgaria and Romania", p.46. http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)603813.
[68] This attitude was confessed to me by a Romanian judge in a private conversation.
[69] https://www.digi24.ro/stiri/actualitate/justitie/cristi-danilet-presedintele-romaniei-nu-avea-de-ales-avertismentul-judecatorului-960760.
[70] Letter from Frans Timmermans to the Romanian Prime Minister from 4 October 2018. See http://www.ziare.com/vasilica-viorica-dancila/premier/ce-i-a-scris-timmermans-premierului-viorica-dancila-iata-scrisoarea-1532958.

2018:2). The CVM's lack of evaluation criteria to assess the joint activities between the Romanian intelligence Service and the relevant judicial and prosecutorial organs as well as lack of indicators to assess violations of fair trial procedures reflect the EU's rule of law evaluation deficit (see Mendelski 2016) and is a reason for some of its misguided policy recommendations.

One-sided demands for more effective criminal prosecution reflect in the Romanian context a simplistic reasoning of *fiat justitia et pereat mundus*, i.e. obtaining results-oriented justice (to prosecute effectively) at all costs, similar to the consequentialist aphorism: "the (noble) ends justifies the (improper) means". Should criminal justice focus mainly on distributive results and outcomes or consider aspects of procedural justice (e.g. due process)? The decision about how a future and properly working justice system may look like should be of course left to the Romanians themselves, who are however divided on this topic. A (re)balancing of both aspects of criminal justice seems reasonable. Maybe my differentiated approach to evaluate anti-corruption activity -which distinguishes between inputs-processes and outputs- may help to open some eyes and reconcile a polarized judiciary, polity and society. Combining effective prosecution with fair processes and integrity is not impossible. It will however require a political consensus and a collective solution of all stakeholders involved in the criminal process.

My analysis has provided evidence that Romania's criminal justice does not work always in an appropriate way. Explaining these deficiencies of criminal justice is admittedly a complex and multi-causal issue. No single group or individual actor can be blamed for a systemic and multi-level pathology which resembles rather a "wicked problem" (Rittel and Webber 1974). Because of limits in writing space I stop now and leave the (probably much expected) explanation and policy solutions to my future work.

5. Conclusion

My intention of writing this paper was to better understand the complex and controversial case of Romania's fight against corruption. To do so I developed an assessment scheme of anticorruption activity, the *anti-corruption evaluation chain*, which helped me to analyse the empirical reality of criminal justice in a more differentiated way. The evaluation of Romania's anti-corruption activity could be summarized in three key catchphrases: *augmentation* (of capacity), *aberration* (from the principle of fairness and reasonableness)

and *acceleration* (of results). In particular, Romania's criminal approach to fight corruption has seen the emergence of a dilemma and growing imbalance between two seemingly incompatible rationales: 1. The pursuit of the noble cause of effective criminal prosecution of corruption to the benefit of society and the financial interests of the European Union (outcome-justice) and 2. The pursuit of integrity and fairness of the criminal process to the benefit and protection of individual rights and citizen's liberties (procedural justice). While the former goal was achieved by means of a stronger institutional capacity and growing quantity of results, the procedural aspects of a fair trial was neglected. Part of the intelligence, the prosecution and the judiciary functioned according to the motto: *Fiat Justitia et pereat mundus*, i.e. to do justice and fight corruption at any cost, even at the cost of fair trial, reasonableness and the rule of law.

The disregard of procedural integrity (processes) contributed to excesses and aberrations that are currently being most prominently condemned by those well-informed groups in society which work closely with the apparatus of criminal (in)justice, i.e. lawyers, magistrates, high-level bureaucrats. The perception of injustice during the prosecution of corruption offences has also mobilized the European association of magistrates and international lawyers from abroad. The latter are perceived as paid advocates of prosecuted oligarchs, but they may simply be advocates of a fair trial and beneficial retainers of excess. Among the protective counter-movement of affected and worried groups are also "collateral victims" who suffered from identified excesses and aberrations and from proper criminal prosecution and trial. These groups have a lower threshold of tolerance against abuse of process and procedural injustice and have mobilized against anti-corruption on Facebook, through open letters, advocacy and civic action. More and more people from society join them, which is reflected in the protest against an autonomous and unaccountable anti-corruption apparatus that has been initially regarded as a necessary protection of society against the threat of corruption but is accused of becoming a self-serving apparatus that became a danger for political unity and society.

A self-serving or autotelic justice (*justice pour la justice*) which disregards the needs of citizens and their fundamental rights cannot be an appropriate and noble behaviour. The current mobilization against perceived procedural injustice can be seen as a protective movement against a derailed anti-corruption campaign, which pursued effectiveness of "output justice" at all costs. As such, my research findings of more results, more aberrations and more growing mobilization against them reflect a dialectical interaction of an ambitious

civilizational process of Europeanization which has gone astray and requires a correction. The recent decisions of unconstitutionality by the Romanian Constitutional Court and the verdicts of the ECHR can be seen as necessary corrective and constraining steps to organizational and civilizational aberrations from reasonableness and fairness. Whether these *ex post* measures will be sufficient to improve the entire chain of criminal anti-corruption activity is a question to be answered in the future. So far, my findings have one substantial implication, which poses an intricate dilemma for reformers. Fighting corruption through a criminal, repressive and bureaucratic approach without sufficient (legal, democratic, constitutional and procedural) safeguards against excesses and abuses may likely enhance procedural injustice and undermine the development of the rule of law.

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