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BASEL INSTITUTE ON GOVERNANCE

Enhancing the investigation capacities of the Romanian authorities to confiscate and recover proceeds of crime.

Final Report

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Authors

Basel Institute on Governance

Pedro Gomes Pereira, Senior Asset Recovery Specialist, Basel Institute on Governance

Andrew Dornbierer, Legal Researcher, Basel Institute on Governance

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Steinenring 60, 4051 Basel, Switzerland
www.baselgovernance.org, info@baselgovernance.org

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List of Abbreviations

ANAF	National Agency for Fiscal Administration
ANI	National Integrity Agency
ARO	Asset Recovery Office
CoE	Council of Europe
CTR	Cash transaction report
DCCO	Directorate for Combating Organised Criminality
DDICJ	International Law and Judicial Cooperation Directorate
DIF	Directorate of Investigating Frauds
DIICOT	Directorate for Investigating Organised Crime and Terrorism
DNA	National Anti-Corruption Directorate
EAW	European Arrest Warrant
EJN	European Judicial Network
ETR	Electronic transaction report
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FD	Council Framework Decision
FIU	Financial Intelligence Unit
ICAR	International Centre for Asset Recovery
ICCJ	High Court of Cassation and Justice
MAI	Ministry of Administration and the Interior
MJ	Ministry of Justice
MLA	Mutual legal assistance
NIC	National Integrity Council
OECD	Organisation for Economic Co-operation and Development
ONPCSB	National Office for Prevention and Control of Money Laundering
PICCJ	Prosecutor's Office attached to the High Court of Cassation and Justice
PICCJ	Prosecutor's Office attached to the High Court of Cassation and Justice
RON	Romanian Leu (plural: Lei)
SIMIDAI	Integrated Management Information System of Declaration of Assets and Interests
StAR	Stolen Asset Recovery Initiative
STR	Suspicious transaction report
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
VAT	Value-Added Tax

1. Executive Summary

Romania set up its Asset Recovery Office (ARO) within the Ministry of Justice (MJ) in 2011, pursuant to the requirements of Council Decision 2007/845/JHA. The ARO was set up through Government Decision No. 32/2011.

With a view to enhancing the capacity of Romanian authorities to recover proceeds of crime, a two-component project is being implemented by the ARO in collaboration with International Centre for Asset Recovery (ICAR) of the Basel Institute on Governance in 2012-13, with funding from the Swiss-Romanian Cooperation Programme. The overall objective of the said project is to improve the international judicial co-operation in the field of money laundering and asset recovery, by improving the knowledge in and exchanging of best practices between the practitioners in the above-mentioned fields.

The present report refers to Component II of the abovementioned project.¹ The said component seeks to benchmark and audit the ARO against applicable international and European standards and good practices, thereby increasing the efficiency of the Romanian law enforcement in fighting against economic and financial crime and strengthening the asset recovery regime. Component II has allowed for the identification of strategies to further enhance operational capacity of the ARO.

The report was drafted based on extensive deskwork, an on-site mission conducted 24-28 September 2012, and two validation workshops with the Romanian authorities, carried out 23-26 October 2012. The final revised report has been finalised in May 2013.

Reference to Romanian legislation is done so based on translations of the Law from Romanian to English, as provided by the Romanian authorities.

1.1 Background

In order to assess the Romanian ARO, the project has delved into the asset recovery process in Romania, as well as the institutions directly responsible for and that participate in the asset recovery efforts in the country. In order to assess the Romanian ARO and asset recovery process, the study has benchmarked these with the international and European standards that are applicable to Romania. These include, but are not limited to:

- The Council of Europe (CoE) Conventions on (i) Laundering, Search, Seizure and Confiscation of the Proceeds from Crime², and on (ii) Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.³
- The Council Framework Decisions (FD) (i) 2001/500/JHA;⁴ (ii) 2003/577/JHA⁵; (iii) 2005/212/JHA;⁶ (iv) 2006/783/JHA;⁷ and (v) Council Decision 2007/845/JHA.⁸
- The Financial Action Task Force (FATF) Recommendations on Money Laundering, Terrorist Financing and Proliferation.⁹

¹ Component I of the project refers to improving the knowledge of practitioners (judges, prosecutors, law enforcement, etc.) in the field of money laundering.

² Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8.11.1990.

<http://conventions.coe.int/Treaty/en/Treaties/Html/141.htm>

³ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.05.2005.

<http://conventions.coe.int/Treaty/EN/Treaties/Html/198.htm>

⁴ Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, Luxembourg, 26.6.2001. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:182:0001:0002:EN:PDF>.

⁵ Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, Brussels, 22.7.2003.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0055:en:PDF>

⁶ Council Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, Brussels, 24.03.2005. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:EN:PDF>

⁷ Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, Luxembourg, 06.6.2006.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:328:0059:0078:en:PDF>

⁸ Council Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, Brussels, 06.12.2007. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0103:0105:EN:PDF>

⁹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Paris, 16.2.2012.

- The United Nations Convention Against Corruption (UNCAC)¹⁰ and United Nations Convention against Transnational Organised Crime (UNTOC).¹¹

1.2 Aim

The present report is a result of the external audit of the Romanian ARO conducted by the Basel Institute on Governance, with a view to strengthening its operational capacity, while reviewing its role and functions within the context of the asset recovery process of Romania.

The report follows the methodological approach proposed in Section 2 below. In order to accurately assess the effectiveness of the legal and institutional framework of the Romanian asset recovery model, it was essential to first acquire an extensive knowledge of the structure of the model through comprehensive and accurate research. The study thus seeks to identify the following elements:

- The structure of the current Romanian asset recovery model;
- The strengths and weaknesses of the said model;
- The role and functions of the ARO within the context of the Romanian asset recovery model.

1.3 Report Structure

The report is structured as follows:

- Section 1 brings forth the executive summary of the present study containing, among others, the key findings and recommendations for strengthening the institutional capacity of the Romanian ARO as well as the asset recovery model of Romania;
- Section 2 provides the methodological approach used to conduct the study;
- Section 3 provides an overview of the European standards in the field of asset recovery, in order to benchmark these with the Romanian model;
- Section 4 describes the Romanian asset recovery model, including the current legislative and regulatory framework, as well as the institutions responsible for conducting the asset recovery process in Romania;
- Section 5 outlines conclusions and recommendations with a view to strengthening the Romanian ARO, in particular, as well the asset recovery process in Romania, in general.

1.4 Key Findings

- The Romanian ARO is an administrative body responsible for facilitating and sharing information related to proceeds of crime with other EU Member States. It is not mandated to investigate criminal offences, enforce judicial orders or manage seized assets.
- The Romanian ARO aims to speed up the asset recovery process through rapidly providing basic information requested by both domestic and international authorities.
- Although not within its direct responsibility, the Romanian ARO further facilitates and shares information related to proceeds of crime with national authorities due to its access to numerous databases, speeding up the overall response time to such requests.
- The Romanian central authority for dealing with MLA requests has limited caseload in incoming and outgoing MLA requests in the context of the asset recovery process, in particular with regards to the seizure and confiscation of assets. Thus, expertise in this field requires further development.
- The multiplicity of central authorities for the transmission and receipt of requests for MLA requires the reinforcement of communication and co-ordination mechanisms amongst them and other institutions which are part of the asset recovery system in Romania.
- The Public Ministry is responsible for conducting criminal investigations and prosecution, and has decisional independence.

[http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%20\(approved%20February%202012\)%20reprint%20May%202012%20web%20version.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%20(approved%20February%202012)%20reprint%20May%202012%20web%20version.pdf)

¹⁰ United Nations Convention Against Corruption. United Nations General Assembly Resolution 58/4 of 31 October 2003.

<http://www.unodc.org/unodc/en/treaties/CAC/>

¹¹ United Nations Convention against Transnational Organised Crime and the Protocols Thereto. United Nations General Assembly Resolution 55/25 of 15 November 2000.

<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

- The Public Ministry, as it is part of the Judiciary, has the power to issue freezing orders during the pre-trial investigation, without authority from the courts. Courts, however, may issue freezing orders during the trial stage, if requested by the parties and if not done so already by the Public Ministry.
- The ANAF is the main body in charge of the enforcement of confiscation orders and selling of assets. However, there is misinterpretation in the application of the Criminal Code vis-à-vis the Code of Fiscal Procedures.

1.5 Recommendations

1. The establishment of an asset recovery policy between the relevant stakeholders

There is a lack of an integrated asset recovery policy in Romania. As a result, the actions, which are carried out by the numerous stakeholders responsible for collecting evidence, seizing, managing, confiscating and realising proceeds and instrumentalities of crimes, are disjointed. Notwithstanding the above, the National Anti-Corruption Strategy of Romania has included within projects seeking to create dedicated databases for the statistics of assets which have been seized and confiscated, as well as for the execution of such orders. This dedicated database should include datasets relevant to assets which have been seized, which are under management or which have been sold.

It is through a cohesive asset recovery policy that it will be possible for the relevant stakeholders to fully assess the limitations and redundancies in the asset recovery system in Romania, and to establish goals which will allow them to overcome the challenges currently faced in the current system.

Furthermore, by creating an asset recovery policy, the stakeholders will enable themselves to more proactively co-ordinate their actions at an operational level.

2. Revision of information management policies, and its sharing and retention at the system-wide level.

Romanian agencies appear to have poor information management policies. This is drawn from the fact that statistical data or other information which should readily be available (e.g., number of assets which have been frozen or seized, where they are physically located, and for which crime they have been frozen or seized) is not.

There is a need to review the current information management policies to ensure that all agencies are collecting the necessary information which will allow, on the one hand, the easy production of statistical information, which will itself, in turn, permit the proper allocation of resources at a system-wide level. Furthermore, it is through this information that it is possible to assess risks and trends within the Romanian administration that will allow for the appropriate remedial action to be taken.

At the criminal process level, information management is fundamental in order to properly address the corrective action to be taken. Law enforcement and prosecutorial bodies need to have access to information which may not be confidential (e.g., land registry, etc.). This will relieve the pressure of needing a centralised unit – which is responsible for the communication with foreign jurisdictions – to provide this information, or to have a cumbersome process of requesting the information from several different bodies, which in turn have their own data collection and storing procedures.

3. Increase of the active sharing of information between the relevant stakeholders at a system-wide level

Preventing and combating crime requires a proactive approach to sharing the available information. As has been noted during this report, Romanian agencies are currently not, for the most part, taking a proactive stance in information sharing. In this regard, there is a need for the agencies to share the information produced in a timely manner, taking into consideration the sensibilities of a criminal investigation and the seizure of proceeds and instrumentalities of crime. As such, if administrative information is available, and if it should be sent to the law enforcement authorities for verification of the occurrence of criminal activity, the person under administrative or criminal investigation should not be made aware of this transfer of information until the appropriate time.

Also, there is neither a follow-up nor feedback system between the agencies that are sharing information amongst themselves. The agencies receiving the information produced by another should inform the latter as to whether the quality of the information produced was satisfactory, and whether the information is meeting the expectations of the receiving agency. This process of feedback will allow for the verification of the information production mechanisms and the quality of information produced, with a view to improving the effectiveness of the information being produced, as well as the management and sharing of information amongst the agencies.

Finally, the agency that has produced the information should follow-up with the receiving agency on the actions that have been taken. This is of fundamental importance in order for the producing agency to assess its internal procedures and identify potential gaps that need to be reviewed.

4. Lack of financial investigative capacities

There is currently a lack of financial investigative capacities with the criminal investigative bodies. It has become apparent that the law enforcement and prosecutorial authorities focus on the criminal investigation, giving little attention to the financial investigation. Even when attention to the financial investigation is given, there are limited capacities to undertake any relevant investigative tasks.

There is a need, therefore, for the establishment of a body of financial investigators within the law enforcement bodies of Romania, who will be tasked with conducting the financial analysis and investigations. Furthermore, a financial profiling of perpetrators should become part of every criminal investigation relating to serious, organised or financial crimes. The financial investigation should take precedence in such cases, leaving the criminal investigation to a secondary role.

5. Clarification on the responsibility for, and the actual management of seized assets.

Currently, the Romanian judicial authority (be it the court or the prosecutor) that has issued an order for seizure of assets is generally responsible for the management of the assets. The management is normally conducted by the Judicial Police, which will keep the assets in deposit pending a final confiscation order. Upon the confiscation order, the assets are handed over to ANAF for realisation of the property.

It should be noted that there is no body responsible for the management of seized assets in Romania. As a result, using the current model, the assets are dispersed for management to every court and prosecutor in the country. The management of assets should not be the responsibility of either the Courts or prosecutors, who should either have the ability to transfer these assets to a centralised asset management agency, or the option of placing them under receivership. Moreover, the current model does not take into consideration the cost of management and the depreciation of the assets. As a result, once a final judgement is received, the best value for money may not be observed.

2. Methodology

The benchmarking of the Romanian asset recovery framework with European standards, and the external audit of its ARO sought to assess the legal and regulatory framework capabilities in preventing and fighting economic and financial crimes, as well as the capacities to carry out and execute the several elements comprising the asset recovery process in Romania. In short, the methodology sought to determine the effectiveness of the asset recovery model of Romania.

The study was conducted following the methodological steps below:

- i. A desktop study to:
 - a. Define the operational and the institutional scopes of key thematic streams of “asset recovery”, as considered for the purpose of the current project in the Romanian context;
 - b. Preliminary analysis of laws, regulations, strategies, etc. relevant to the asset recovery process in Romania;
- ii. Preliminary findings and working hypothesis based on desk study. These have allowed for the preparations of the on-site visit (identification of key institutions; working questions and need for additional information), conducted between 24-28 September 2012;
- iii. On-site data collection and analysis;
- iv. The present final report, containing findings and recommendations with regards to the Romanian asset recovery regime and its ARO. The final report was subject to discussion and validation through the two back- to-back workshops (step v), as well as revision from the relevant Romanian authorities and an external review from the World Bank/UNODC Stolen Asset Recovery Initiative (StAR);
- v. Validation workshops which enabled the Institute to present its findings and recommendations to the relevant Romanian authorities, and to validate the work undertaken in Component II of the project;
- vi. Study tours to Switzerland and another key European jurisdiction, with a view to facilitating the knowledge transfer and best practices of the roles and functions of an ARO.

Steps (i) and (ii) above refer to the retrieval and analysis of relevant data sets of the asset recovery regime in Romania, thus preparing the experts for the on-site mission. Together with step (iii), these steps enabled the mapping of the asset recovery process in Romania (in accordance with the sample collection provided in section 5 below). Therefore, step (i)

reviewed the asset recovery process in Romania, its institutions and regulations, both from the perspective of international standards and obligations Romania has acceded to, e.g., the European and international practices and standards, and from a practical point of view looking at the reality of these processes, institutions and laws as currently in operation in Romania. Step (i) has thus identified the key thematic streams of an asset recovery system that will form the basic structure for the following analysis (see section 2.2 below).

Based on this, step (ii) consisted in the development of a theoretical model and working hypothesis in relation to the gaps and weaknesses of the existing system against the benchmark of the European and international standards and practices, and potential avenues for enhancement of the system. This theoretical model comprised the actual requirements needed for an efficient asset recovery model, and was identified based on the respective thematic streams and sample mapping in order to facilitate the comparison with the actual data sets.

Step (iii) consisted of an extended series of interviews and stakeholder consultations in Romania with a view to reviewing and validating the working hypothesis and generating support for any recommendations arising from steps (i) and (ii) above. This step was the crucial stage of the methodology as it allowed engaging of all key stakeholders within the Romanian asset recovery system and for the testing of the feasibility of ideal-type reforms within the political, institutional and structural realities of the country.

Upon clarification of the thematic streams and the definition of relevant institutions which are part of said streams, the data sourcing during this critical phase followed the model outlined in section 2.2 below and the system was mapped in accordance to its source, institution, capacity, topic and system. The interposition of the thematic streams with these mappings allowed the identification of (a) gaps between the legal and regulatory frameworks; (b) the administrative practices in the procedures and processes within one institution and amongst the institutions which comprise the asset recovery regime of Romania; and (c) the human and knowledge resources available.

Step (iv) comprised the drafting of the final report based on the information collected during the on-site visit. It also provided a set of findings and recommendations. The present report was subject to discussions regarding the findings and recommendations, and was validated through step (v) (two back-to-back workshops).

Finally, step (vi) will include two study tours by the Romanian ARO to other European AROs, with a view to identifying the roles and responsibilities played out by these AROs, and also enabling the knowledge transfer of the activities carried out by them. This will be carried out throughout 2013, using the findings and recommendations of the present report as a source for ensuring that the best results are obtained during the said study tours.

2.1 Scope

The overall objective of Component II of the project is to benchmark and conduct an external audit of the Romanian ARO with a view to strengthening its operational capacity. While it should be underscored that the definition of asset recovery and the asset recovery regime in Romania is ultimately dependant on its legal and regulatory framework, the asset recovery process itself can be perceived as a multi-phase process comprising the:¹²

- i. Pre-investigative or intelligence gathering phase, during which the analyst verifies the source of the information initiating the investigation and determines its authenticity. If there are inconsistencies in the intelligence or incorrect statements and assumptions, then the true facts must be established;
- ii. Investigative phase, where the proceeds of crime are located and identified in the pre-investigative phase and evidence of ownership is collated covering several areas of investigative work in more formal processes, for example through the use of requests for mutual legal assistance to obtain information relating to offshore bank accounts and other records, and financial investigations to obtain and analyse bank records. This phase involves substantiating the veracity of the intelligence and information and converting it into admissible evidence. The result of this investigation can therefore only be a temporary measure – e.g., seizure – in order to later secure a confiscation order through the court;
- iii. Freezing or seizure phase, in which orders seeking the restraint of assets is ordered by the responsible authority, with a view to ensuring that the proceeds and instrumentalities of crime are not dissipated, and that they may be realised during the disposal phase.
- iv. Asset management phase, where the assets that have been restrained are managed in order to preserve their value and ensure the best value-for-money during the disposal phase.
- v. Judicial phase, where the accused person/defendant is tried and convicted (or acquitted) and the decision on confiscation is determined;

¹² Adapted from ICAR, *Tracing Stolen Assets*, 2009, p. 20.

- vi. Disposal phase, where the property is actually confiscated and disposed of by the State in accordance with the law, whilst taking into account any applicable international asset sharing obligations in appropriate cases, as well as compensation for victims and determinations on what to do with the confiscated assets.

Therefore, in order to effectively assess the asset recovery regime in Romania, it was necessary to have a complete overview of the legal and regulatory framework enabling the asset recovery process. The legal and regulatory framework was subsequently benchmarked with European and international standards, as well as best practices found in other similar jurisdictions. Furthermore, it was necessary to review both the interactions of the institutions compounding the asset recovery regime in Romania and the capacities available within.

By reviewing both the legal and regulatory framework, as well as assessing the capacities available, it was possible to identify potential elements that may play a role in reducing the overall effectiveness and efficiency of the asset recovery process and regime in Romania. These hurdles may include:

- i. Systemic hurdles (weak job scope and responsibility definitions; uncertain chain of command from within the structures; deficient or lacking communication protocols; problematic workflow processes);
- ii. Institutional and capacity hurdles (lack of performance indicators; lack of an integrated strategy for human resources management, recruitment, capacity building, knowledge retention, performance evaluation and incentives; and lack of a mechanism or institution with the overarching responsibility for co-ordination of the asset recovery process);
- iii. Legislative and procedural hurdles (regulatory hurdles that limit the use and potential of the structures responsible for the asset recovery process; lack of procedures that ensure maximum benefit from formal and informal collaboration between the several institutions comprising the asset recovery regime in Romania).

2.2 Sample, data collection and data analysis

For the purposes of the benchmarking and auditing of the Romanian ARO, the current asset recovery regime underwent an extensive and comprehensive mapping process, as described below:

- Topic mapping: comprising the definition of 'asset recovery' for the purposes of the project, and the criminal activities that are part of the said definition (e.g., financial-related offences, predicate offences to money laundering, etc.). These definitions are further important for the identification of the thematic streams which comprise the project;
- Source mapping: comprising the collection of legislation, regulation, reports, strategies, etc. Source mapping will further include the identification of best practices in Romania;
- System mapping: seeking to identify the inter-institutional interactions of the institutions which comprise the asset recovery regime in Romania;
- Institutional mapping: which seeks to identify the intra-institutional interactions of the relevant departments within the institutions comprising the asset recovery regime in Romania;
- Capacity mapping: seeking to identify the institutional and human capacities within the relevant departments within the institutions comprising the asset recovery regime in Romania, as well as the knowledge and information retention within these departments and institutions.

Once data was identified and collected as well as processed, and the primary and secondary sources revised, these were allocated to the respective thematic streams. The results thereto assisted in the preparation of semi-structured questionnaires in preparation for the on-site data collection. The outcomes of these questionnaires were further processed and these results comprised the recommendations contained in the findings section of the present report. The following is a list of potential thematic streams that are relevant in the Romanian context:¹³

- i. Intelligence gathering: This thematic stream is responsible for assessing the capabilities, capacities and workflow within the Romanian ARO. This thematic area will also be responsible for assessing, where applicable, the interaction of the Romanian intelligence gathering institutions and its ability, and quality thereto, to interact amongst themselves (in particular with the ARO), and with its counterparts at the international level (in particular in compliance with the Council Decision 2007/845/JHA).
- ii. Criminal Justice System: This thematic stream includes the pre-trial investigation, prosecution and adjudication of asset recovery cases in Romania. It will, in particular, focus on the financial investigation, seizure,

¹³ These thematic streams are not standalone elements but rather interact and intertwine with each other. As such these thematic streams represent different elements of the asset recovery process and to that extent each element is required to be assessed in order to fully identify the effectiveness and efficiency of the overall asset recovery system.

- management, confiscation, repatriation and final destination of proceeds and instrumentalities of crime given by the Romanian asset recovery regime.
- iii. Investigation and Prosecution, subdivided into:
 - a. Criminal investigation, comprising an analysis into the evidence gathering methods used by law enforcement and its ability to cover the required elements of the offence in order to ensure an effective prosecution and adjudication, respecting the necessary elements of fundamental human rights, as well as the due process requirements. This section also comprises an assessment of the interaction of the criminal investigation with the financial investigation, with a view to securing the proceeds and instrumentalities of crime.
 - b. Financial investigation, comprising elements of the financial investigation necessary to ensure the identification and tracing of proceeds and instrumentalities of crime, as well as the assistance to the criminal investigation and the prosecution to obtain the necessary seizure of proceeds and instrumentalities of crime in a timely fashion, taking into consideration the principle of opportunity in investigations.
 - iv. International Co-operation: This thematic stream shall focus on the elements that are needed to ensure proper and effective international co-operation (in particular mutual legal assistance and joint investigation teams) to gather evidence and to seize and confiscate proceeds and instrumentalities of crime.
 - v. Seizure and management of seized assets. This thematic stream comprises of the pre- confiscation areas that have a direct link with the criminal investigation and the financial intelligence and investigation areas above. It will focus on the presentation of evidence leading to the seizure of assets, its effects, as well as the need to have seized assets managed throughout the criminal proceeding leading to the confiscation of assets, in order to preserve their value.
 - vi. Confiscation, repatriation and final destination of assets. This thematic stream shall focus on the confiscation order issued by courts (linking with the thematic stream on seizure and management of seized assets), and the co-ordination efforts undertaken with foreign jurisdictions (if applicable, and linking with the international co-operation thematic stream) to achieve the repatriation of assets. Where applicable, an analysis of the final destination of the confiscated and repatriated assets will also be taken into account and assessed.

2.3 Outputs and outcomes

As a result, the following outputs are expected in the execution of Component II of the present project:

- i. An analysis and evaluation with recommendations for improving the functioning of the Romanian asset recovery regime and its ARO. This result is contained in the present report;
- ii. Two workshops for the purposes of discussing the findings and validating them through the analysis and evaluation of the Romanian asset recovery regime and its ARO. These workshops were carried out on the week of 22-26 November 2012, and their results are reflected in the present report;
- iii. Two country visits, to be carried out during 2013.

3. European Standards on Asset Recovery

The European Union (EU) and the CoE have a comprehensive set of regulations pertaining to the asset recovery process. These are:

- The Recommendation R(88)18 of the Committee of Ministers from the Council of Europe,¹⁴ concerning liability of enterprises having legal personality for offences committed in the exercise of their activities;
- The European Convention on Mutual Assistance in Criminal Matters (CETS 30),¹⁵ and its additional protocols (CETS 99¹⁶ and 182¹⁷);
- The CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, CETS 141;¹⁸
- The CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS 198;¹⁹
- FD 2001/500/JHA,²⁰ on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime;
- FD 2003/577/JHA,²¹ on the execution in the European Union of orders freezing property or evidence;
- The Council Framework Decision 2005/212/JHA,²² on confiscation of crime-related proceeds, instrumentalities and property;
- FD 2006/783/JHA,²³ on the application of the principle of mutual recognition to confiscation orders;
- The Council Decision 2007/845/JHA,²⁴ concerning co-operation between AROs of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime.

3.1 Recommendation R(88)18 of the Committee of Ministers from the Council of Europe

Criminal liability of legal persons is an important component for the effective combating of financial and organised crime. Whether corporate entities engage in criminal activity (e.g., corruption of public officials and foreign public officials), or whether legal persons are used by criminals to hide the true nature, origin and ownership of their unlawful activities (e.g., shell corporations created for purposes of laundering the proceeds of crime), it is an important component of modern criminal law to hold these entities criminally liable for actions committed by and through them.

As the initial European standard in the field of criminal corporate liability, Recommendation R(88)18 set out a number of principles to guide the Member States. Section 1 of its appendix states that legal persons (referred to in the text of the Recommendation as ‘Enterprises’) should be made liable for offences committed in the exercise of their activities, even

¹⁴ Recommendation No. R (88) 18 of 20 October 1988 of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities.

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=233230&SecMode=1&DocId=698704&Usage=2>

¹⁵ European Convention on Mutual Assistance in Criminal Matters (CETS 30), Strasbourg, 20.04.1959.

<http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>

¹⁶ Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS 99), Strasbourg, 17.03.1978.

<http://conventions.coe.int/Treaty/en/Treaties/Html/099.htm>

¹⁷ Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS 182), Strasbourg, 08.11.2001.

<http://conventions.coe.int/Treaty/en/Treaties/Html/182.htm>

¹⁸ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS 141), Strasbourg, 8.11.1990.

<http://conventions.coe.int/Treaty/en/Treaties/Html/141.htm>

¹⁹ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198), Warsaw, 16.05.2005.

<http://conventions.coe.int/Treaty/EN/Treaties/Html/198.htm>

²⁰ Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, Luxembourg, 26.6.2001.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:182:0001:0002:EN:PDF>

²¹ Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, Brussels, 22.7.2003.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0055:en:PDF>

²² Council Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, Brussels, 24.03.2005.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:EN:PDF>

²³ Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, Luxembourg, 06.6.2006.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:328:0059:0078:en:PDF>

²⁴ Council Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, Brussels, 06.12.2007. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0103:0105:EN:PDF>

where the offences are alien to their purposes. Section 2 also informs that the legal person is to be held liable, regardless of whether the natural person who committed the acts or omissions constituting the criminal offence can be identified. Furthermore, Section 5 of the appendix to this Recommendation puts forward the imposition of criminal liability of natural persons implicated in the offence, in particular persons performing managerial functions.

3.2 Council Framework Decision 2001/500/JHA

Seeking to further enhance the effectiveness of the CoE Convention on laundering, search, seizure and confiscation of the proceeds of crime (1990 Convention)²⁵, FD 2001/500/JHA worked towards harmonising the approach regarding the confiscation of proceeds and instrumentalities of crime by EU Member States. It expressly mentions the need for effective combating of serious and organised crime through combating money laundering – by depriving perpetrators of their unlawful gains.

FD 2001/500/JHA further sought to make the money laundering offence uniform and sufficiently broad by requiring Member States not to make or uphold reservations to the 1990 Convention with regards to:

- The adoption of confiscation of the proceeds and instrumentalities of crime (article 2 of the 1990 Convention);
- The money laundering offence, which under the 1990 Convention is to be punishable by deprivation of liberty or a detention order for a maximum of more than one year (article 6 of the 1990 Convention).

The 1990 Convention, however, presented tax-related offences as an exception to the implementation of its abovementioned article 2 (confiscation measures). FD 2001/500/JHA, however, informs that in such cases as deemed appropriate, tax-debt recovery legislation shall be applicable.

This FD raised two other elements to ensure more effective mechanisms to combat money laundering and serious and organised crime. Member States were required to put in place systems of value-based confiscation (foreseen and required by article 2(1) of the 1990 Convention) for both domestic proceedings and those stemming from another Member State. In accordance to second report on FD 2001/500/JHA,²⁶ value-based confiscation appears to be available in varying degrees amongst Member States, at least as an alternative measure. In the specific case of Romania, article 118 (Special Confiscation) Criminal Code contains specific provisions for the value-based confiscation of the instrumentalities of crime (articles 118(b) and (c) Criminal Code), although not for the confiscation of the proceeds of crime (article 118(a) Criminal Code).

Member States were also required to receive requests from one another through mutual legal assistance (MLA) seeking to identify, trace, freeze, seize or confiscate assets. These requests for MLA were to be given the same priority as that given to domestic measures. Thus, under FD 2001/500/JHA, Member States were still required to issue requests for MLA to ensure the confiscation of the proceeds and the instrumentalities of crime. Ultimately, however, this provision has been superseded by FD 2003/577/JHA, which will be explained in more detail in section 3.3 below.

The first²⁷ and second²⁸ reports on FD 2001/500/JHA indicate that, among others, Member States have largely complied with the penalty requirements under article 2, and that value-based confiscation has been made available to varying degrees, at least as an alternative measure. These reports conclude, however, that the information provided by Member States was considered “relatively vague”.

3.3 Council Framework Decision 2003/577/JHA

FD 2003/577/JHA came as a response to the special meeting held by the European Council on 15-16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the EU. The meeting endorsed the principle of mutual recognition of judicial decisions and judgements, as well as the approximation of legislation, in order to facilitate

²⁵ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8.11.1990.

<http://conventions.coe.int/Treaty/EN/Treaties/Html/141.htm>.

²⁶ Second Commission report based on Article 6 of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, COM(2006) 72 final, Brussels, 21.02.2006. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0072:FIN:EN:PDF>

²⁷ Report from the Commission based on Article 6 of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, COM(2004)230, Brussels, 05.04.2004. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0230:FIN:EN:PDF>

²⁸ Second Commission report based on Article 6 of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, COM(2006) 72 final, Brussels, 21.02.2006. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0072:FIN:EN:PDF>

“co-operation between authorities and the judicial protection of individual rights.”²⁹ It also addressed the need for applying the principle of mutual recognition to “pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State’s authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.”³⁰

This FD thus enables competent judicial authorities (be they judges or prosecutors, where applicable, as is the case in Romania) to secure evidence and seize the proceeds and instrumentalities of crime. It provides for rules of procedure pertaining to the transmission of freezing orders directly between competent judicial authorities, the duration of the freezing order, the grounds for non-recognition, non-execution or postponement of the request, as well as the subsequent treatment to be given to the seized property. It also introduces a list of criminal offences in article 3 – amongst which organised crime, money laundering and corruption are included – for which dual criminality checks are to be abolished, as per article 10(3). Thus, The purpose of this FD is to establish the rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings.

In accordance to this FD, such requests would no longer require the use of MLA. This came as a direct consequence to the principle of mutual recognition of judicial decisions and judgement, and sought in order to ensure the rapid response by Member States to collect evidence and seize proceeds and instrumentalities of crime.

Under FD 2003/577/JHA, a freezing order issued by the judicial authority of the issuing State would be directly transmitted to the judicial authority of the executing State, without the formalities MLA. Thus, while the confiscation of proceeds and instrumentalities of crime still required — at the time of the issuing of this Council Framework Decision — the use of formal MLA channels (under FD 2001/500/JHA), the execution of seizure orders (as well as other interim measures to secure evidence) would no longer require the use of such mechanism.

The report regarding the implementation of FD 2003/577/JHA³¹ concludes that the level of execution of this FD has not been satisfactory, drawing its conclusion from the low number of notifications and the numerous omissions and misinterpretations in the national legislations.

3.4 Council Framework Decision 2005/212/JHA

FD 2005/212/JHA acknowledges that the existing EU instruments are insufficient to ensure an effective cross-border co-operation regarding the confiscation of proceeds and instrumentalities of crime. It further states that the main motive for cross-border organised crime is financial gain. The main aim of this instrument is to ensure that all Member States have effective rules on the confiscation of the proceeds and instrumentalities of crime, especially in relation to the burden of proof regarding the source of assets held by a person convicted of an offence related to organised crime.

This instrument enables the confiscation, wholly or in part, of instrumentalities and proceeds from criminal offences punishable by imprisonment for more than one year, or property the value of which corresponds to such proceeds. Furthermore, Member States are also encouraged to use procedures other than criminal ones to deprive the perpetrator of the proceeds of crime (e.g., non-conviction based confiscation).

The threshold for applying confiscation under FD 2005/212/JHA is the same as in FD 2001/500/JHA, but the possibility of maintaining reservations in respect of the confiscation of the proceeds for tax offences was abolished. Nonetheless, it is innovative with regards to its provisions regarding extended confiscation, provided for under article 3. It provides for three situations in which Member States can seek extended confiscation:

- Where a court is satisfied that the property to be confiscated derives from criminal activity of the convicted person during the period prior to the conviction;
- Where a court is satisfied that the property derives from similar criminal activities of the convicted person during the period prior to the conviction; or

²⁹ Presidency Conclusions to the Tampere European Council meeting, 15-16 October 1999, para. 33.
http://www.europarl.europa.eu/summits/tam_en.htm.

³⁰ Presidency Conclusions to the Tampere European Council meeting, 15-16 October 1999, para. 36.
http://www.europarl.europa.eu/summits/tam_en.htm

³¹ Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, COM(2008) 885, Brussels, 22.12.2008.

- Where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a court is satisfied that the property in question derives from the criminal activity of the convicted person.

A fourth non-mandatory situation foreseen is to allow for the confiscation of property acquired by the “closest relations of the person concerned and property transferred to a legal person in respect of which the person concerned [...] has a controlling influence.”

These four circumstances require a criminal conviction of the perpetrator in order for the extended confiscation to take place. However, it allows for the application of value-based confiscation, as well as the confiscation of not only proceeds of crime, but also intermingled or transformed assets. In this regard, Romania has introduced enabling legislation for the value-based confiscation of intermingled and transformed assets, as contained in article 118(c) Criminal Code.

In that regard, the report³² on FD 2005/212/JHA expressed the concern of the Commission on the little progress that had been made in transposing the instrument in the Member States.

3.5 Council Framework Decision 2006/783/JHA

FD 2006/783/JHA applies to the principle of mutual recognition of confiscation orders issued by a court competent in criminal matters for the purpose of facilitating enforcement of such confiscation orders in a Member State other than the one in which the confiscation order was issued. It applies to all offences in relation to which confiscation orders can be issued and it has further abolished dual criminality requirements in relation to offences listed in its articles.

This instrument seeks to establish the rules under which a Member State should recognise and execute a confiscation order issued by a court competent in criminal matters of another Member State. Article 6 defines offences which give rise to confiscation orders. Articles 8 and 10 extended the list of reasons for non-recognition or non-execution and for postponement of execution, respectively, compared to the 2003 Framework Decision. Member States had to comply with this Instrument by 24 November 2008.

Interestingly, FD 2006/783/JHA contains specific provisions pertaining to the disposal of confiscated assets – an area not covered by any of the previous FDs. As such, article 16 (disposal of confiscated assets) provides that when confiscation does not exceed EUR 10,000, the value of the confiscation is to remain with the executing Member State, while a 50 per cent sharing agreement is to be considered for cases in which the amount is higher than the previously mentioned threshold.

3.6 Council Decision 2007/845/JHA

This instrument has sought to build on the informal co-operation that has taken place within the CARIN network.³³ This Council Decision obliges Member States to set up or designate a national ARO, which should co-operate with other national AROS by exchanging information and best practice spontaneously, upon request.

EUROPOL would play an important role under this Council Decision, as it has been established as the secretariat of the CARIN Network. It further established the Europol Criminal Assets Bureau (ECAB), which supports Member States in the identification and confiscation of criminal proceeds.³⁴ Another initiative from EUROPOL that would strengthen communication exchange between AROs is the so-called Secure Information Exchange Network Application (SIENA), which would also provide the Member States the ability to cross-reference and match their data with EUROPOL’s database.³⁵

³² Report from the Commission pursuant to Article 6 of the Council Framework Decision of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property (2005/212/JHA), COM(2007) 805, Brussels, 17.12.2007.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0805:FIN:EN:PDF>

³³ CARIN is an informal network of contacts dedicated to improving co-operation in all aspects of tackling the proceeds of crime. It aims to increase the effectiveness of members’ efforts in depriving criminals of their illicit profits through cooperative inter-agency cooperation and information sharing.

³⁴ The EU Internal Security Strategy – Written Evidence. UK House of Lords, EU Sub-Committee F (Home Affairs), London, 12.01.2011, p.34.
<http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/ISS/ISScollatedwrittenevidence.pdf>

³⁵ The EU Internal Security Strategy – Written Evidence. UK House of Lords, EU Sub-Committee F (Home Affairs), London, 12.01.2011, p.34.
<http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/ISS/ISScollatedwrittenevidence.pdf>

It should be underscored that the report³⁶ on Council Decision 2007/845/JHA informs that only a few AROs actually are involved in the management of seized assets. In the case of Romania, the designated ARO is the National Office for Crime Prevention and Co-operation for Criminal Asset Recovery, within the Ministry of Justice. While it has powers to exchange information with other AROs, which has powers to exchange information both spontaneously or upon request with other AROs, pursuant to article 4 of Council Decision 2007/845/JHA. Furthermore, the Romanian ARO is not responsible for the management of seized assets, an action which is under the responsibility of the authority who issues the seizure order, as will be explained in more detail in the Section below.

³⁶ Report from the Commission to the European Parliament and to the Council based on Article 8 of the Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, COM(2011) 176, Brussels, 12.04.2011.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0176:FIN:EN:PDF>

4. The Romanian Asset Recovery Model

The Romanian asset recovery model is comprised of several institutions at the Executive and Judiciary branches. These include, but may not necessarily be limited to:

- i. The Prosecutor's Office attached to the High Court of Cassation and Justice (PICCJ)
 - a. The National Anti-Corruption Directorate (DNA)
 - b. The Directorate for Investigating Organised Crime and Terrorism (DIICOT)
- ii. The Ministry of Justice (MJ)
 - a. The National Office for Crime Prevention and Co-operation for Criminal Asset Recovery
- iii. The Ministry of Administration and the Interior (MAI)
 - a. The General Inspectorate of the Romanian Police
- iv. The National Agency for Fiscal Administration (ANAF)
- v. The National Integrity Agency (ANI)
- vi. The High Court of Cassation and Justice (ÎCCJ)
- vii. The National Office for the Prevention and Control of Money Laundering (ONPCSB)

These institutions shall be reviewed in more detail as of Section 4.3 below.

The asset recovery system of Romania is centred in the Public Ministry, which is responsible for conducting the pre-trial investigation as well as issuing the freezing and seizure orders of proceeds and instrumentalities of crime. Thus, while the financial intelligence gathered by the ONPCSB – the Romanian Financial Intelligence Unit (FIU) – is to be sent to the Public Ministry, so too is any other information that it deems to be facts which may constitute a criminal offence by any public official of Romania.

Notwithstanding the above, it should be noted that the prosecutor in Romania is not required to request that proceeds and instrumentalities of crime be frozen or seized by a Court. As a judicial authority the prosecutor in Romania has the power to issue such orders during the pre-trial investigation. The Court may further extend the freezing and seizure of proceeds and instrumentalities of crime at the request of the parties (e.g., the civil party, or assistant to the prosecution) under this residual competence, if assets have not already been frozen or seized by the prosecutor during the pre-trial investigation.

4.1 Definitions

Relevant regional and international instruments were utilised as benchmarks for the present study, where applicable. These have been reviewed in Section 3 above. A key component to the study is to define the asset recovery process in Romania in order to adequately benchmark the definitions given in Romanian law with the international requirements Romania has subscribed to.

The definitions below are components of the asset recovery process and are necessary to define the operational and institutional scopes of the thematic stream 'asset recovery'. When no other definition is compared with the main definitions below, it shall mean that there is either a match to the definitions between one or more of the instruments, or that no direct definition was found between the international instruments applicable to Romania.

'Property' includes property of any description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and legal documents or instruments evidencing title to or interest in such property, which is considered the proceeds or the instrumentalities of crime, pursuant to the definitions in article 1 of the Framework Decision 2001/500/JHA; article 1(b) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(b) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141.

The definition contained in European regulation is broader than the one found in article 2(d) of both the UNTOC and the UNCAC, as these do not make specific reference to tangible or intangible assets.

'Proceeds' are any economic advantage from criminal offences. It may consist of any form of property as defined in: article 1 of the Framework Decision 2001/500/JHA; article 1(a) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(a) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141.

'Proceeds of crime' are, pursuant to article 2(e) of both the UNCAC and the UNTOC, any property derived from or obtained, directly or indirectly, through the commission of an offence.

‘Instrumentalities’ are any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences, pursuant to: article 1 of the Framework Decision 2001/500/JHA; article 1(c) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(c) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141.

‘Freezing’ or ‘seizure’ is temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property, or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority, pursuant to article 1(g) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198.

The Council Framework Decision 2003/577/JHA, on the other hand, defines a ‘freezing order’ as any measure taken by a competent judicial authority in the issuing State in order to provisionally prevent the destruction, transformation, movement, transfer or disposal of property that could be subject to confiscation or evidence.

Article 2(f) of both the UNTOC and the UNCAC differ from the above-mentioned definitions, as they do not contain in their definition what is meant by the act of ‘destruction’.

‘Confiscation’ or ‘forfeiture’ is a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property, pursuant to article 1 of the Framework Decision 2001/500/JHA; article 1(d) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(d) of the CoE Convention on Laundering, search seizure and confiscation of the proceeds of crime – CETS No. 141.

‘Value confiscation’ or ‘value-based confiscation’ is when legislative provisions allow for alternative procedures on the confiscation of the proceeds of crime, in cases where these proceeds cannot be seized, for the confiscation of property the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State, including requests for the enforcement of foreign confiscation orders, pursuant to article 3 of the Framework Decision 2001/500/JHA. Notwithstanding the above, Member States may exclude the confiscation of property the value of which corresponds to the proceeds of crime in cases where that value would be less than EUR 4,000.00.

‘Extended confiscation’ or ‘extended powers of confiscation’ is when a court based on specific facts finds that the property has been derived from the criminal activities of the convicted person during a period prior to conviction, which is deemed reasonable by the court in the circumstances of the particular case, or where the court is convinced, to the requisite legal standard, that the value of the goods are disproportionate to the known income of the convicted person, pursuant to the Framework Decision 2005/212/JHA. FATF describes extended confiscation as a useful tool in cases in which “property [...] was generated from other or related criminal activity of the convicted person.”³⁷

‘Third-party confiscation’ involves the confiscation of assets that have been transferred by an investigated or convicted person to third parties, in accordance to the EU Internal Security in Action.³⁸

‘Non-conviction based confiscation, or forfeiture’ is where confiscation is ordered but does not derive from a criminal conviction. Council Framework Decision 2005/212/JHA refers to NCB confiscation in its article 3(4) (“procedures other than criminal procedures to deprive the perpetrator of the property in question”).

‘Compensation of Victims.’ For the purposes of the present study, ‘victim’ shall mean a natural or legal person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State, in accordance with article 1(a) of the Council Framework Decision 2001/220/JHA³⁹ on the standing of victims in criminal proceedings. Compensation of victims is defined in Council Directive 2004/80/EC⁴⁰ as relating to compensation to crime victims. According to this Directive, compensation has to be “fair and appropriate”.

³⁷ FATF, Best Practices Confiscation (Recommendations 3 and 38), 19 February 2010, available at: <http://www.fatf-gafi.org/dataoecd/39/57/44655136.pdf>.

³⁸ Communication from the Commission to the European Parliament, The EU Internal Security Strategy in Action: Five steps towards a more secure Europe, COM(2010) 673 final, Brussels, 22.11.2010.

³⁹ Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, Brussels, 15.03.2001. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:082:0001:0004:en:PDF>

⁴⁰ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, Luxembourg, 20.04.2004. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:261:0015:0018:en:PDF>

4.2 Legislative Overview

Romania has comprehensive legislation for the combating of financial crimes through the asset recovery process. Seizure and the confiscation of assets can be found both in the Criminal Code and the Criminal Procedure Code. Some obligations of Romania concerning the asset recovery process also stem from international law.

In that regard, and in accordance to the hierarchy of laws in Romania, the Constitution is superior to all codes, laws, and regulations. In accordance to article 73(1) Constitution, the Romanian Parliament shall pass constitutional, organic and ordinary laws. Constitutional laws shall amend the Constitution (article 73(2) Constitution), while organic laws shall regulate, among others, criminal offences, penalties and the execution thereof (article 73(2)(h) Constitution), and the statute of public servants (article 73(2)(j) Constitution).

The Constitution further provides for two types of Executive orders, which shall have the same status as a law (whether organic or ordinary, as the case may be): (i) Government Ordinances; and (ii) Government Emergency Ordinances. The former refers to specific areas within which the government, upon authorisation from Parliament, is delegated to legislate. The latter, on the other hand, refers to specific areas in which the Government, due to a justified state of emergency, is allowed to legislate without the prior consent of the Legislative. In such cases, the Government Emergency Ordinances will need to be tabled in Parliament within a determined period of time, to be approved or rejected by Parliament.⁴¹

International law, which has been ratified by the Romanian Parliament, becomes part of national law and, for this matter, is subject to the Romanian Constitution (article 11(2) Constitution). Thus, in the event of a conflict between the Constitution of Romania and an international treaty, the former shall prevail.⁴² Notwithstanding the above, the Constitution itself does provide for an exception to this rule under its article 20. In the event that the international treaty refers to fundamental and human rights, it shall prevail over the Romanian Constitution, unless the latter is more favourable than the international treaty.

The Criminal Code contains the main body of criminal legislation in Romania. The criminal laws of Romania are applicable to both natural and legal persons⁴³. With regards to the latter, all legal persons, with the exception of the State, public authorities and public institutions undertaking an activity that is not the subject of the private area. Moreover, criminal liability of legal persons in Romania does not exclude the criminal liability of natural persons who may have contributed to the commission of the criminal offence (article 19¹, 2nd paragraph Criminal Code). This provision is in line with the Recommendation R(88)18⁴⁴ of the Committee of Ministers from the Council of Europe.

In accordance to the articles 3 through 9 of the Criminal Code (Section II — Criminal Law enforcement in space), Romania has the jurisdiction⁴⁵ to apply its criminal legislation to all criminal offences committed within the Romanian jurisdiction (article 3 Criminal Code). Moreover, Romania shall also have jurisdiction over criminal offences when committed by either a Romanian citizen residing outside the Romanian jurisdiction (article 4 Criminal Code), or by a stateless person who has residence in the Romanian jurisdiction (article 5 Criminal Code). The extraterritorial application of Romanian criminal law shall also occur if a criminal offence, under the laws of Romania, has been committed against a Romanian citizen, regardless of the nationality of the perpetrator (article 5(1) Criminal Code), insofar as the criminal offence is also a criminal offence in the jurisdiction where it was committed, and if the perpetrator is in Romania (articles 6(1)(a) and (b) Criminal Code). These rules of territorial and extraterritorial application of the Romanian criminal law are in line with the requirements of both article 15 UNTOC and article 42 UNCAC.

Apart from the general regulation on extraterritoriality, article 7 Criminal Code informs that these are to be superseded by other provisions contained in international treaties ratified by Romania. Thus, as an example, the rules for criminal jurisdiction for the offence of money laundering (articles 23 UNCAC and 6 UNTOC, as well as Recommendation 3 FATF) are to be observed even when these may conflict with the rules of extraterritoriality in Romania.

⁴¹ In the event that Parliament rejects the Government Emergency Order in its totality or partially, it shall be deemed as if the Emergency Ordinance had never existed, and the facts affected by it during its existence shall return to the *status quo ante*.

⁴² Nevertheless, if the treaty is to be ratified by Romania, and it conflicts with the Constitution, the latter must be first amended prior to the actual ratification of the treaty (article 11(3) Constitution)

⁴³ Article 19¹ Criminal Code provides for the criminal liability of legal persons

⁴⁴ Recommendation No. R (88) 18 of 20 October 1988 of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities.

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=233230&SecMode=1&DocId=698704&Usage=2>

⁴⁵ Article 142 Criminal Code defines territory as the stretch of land and the waters between the borders, the underground and the air space, as well as the territorial sea with the ground, the underground and the air space belonging to it.

Article 143(2) also gives rise to territorial jurisdiction when a criminal offence is executed, or the consequences arisen thereof, occurred in the Romanian jurisdiction, or on a Romanian ship or plane.

It is unclear, however, how the dual criminality requirement contained in articles 5(1) and 6(1)(a) and (b) of the Criminal Code is to be interpreted in line with the international standards. Under the UNCAC, in particular with regards to requests for MLA and extradition, dual criminality requirements are to be deemed fulfilled “irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.”⁴⁶

A criminal offence under the Romanian Criminal Code is any action or omission (article 18 Criminal Code) that “constitutes a social threat, which is willingly perpetrated and which is provided in the criminal law” (article 17(1) Criminal Code). The commission of a criminal offence can either happen deliberately or by negligence (article 19(1) Criminal Code). A criminal conduct is understood as deliberate (article 19(1)(1)(a) Criminal Code) if the perpetrator predicts and intends the result of his or her criminal conduct (direct *dolus*) or if the perpetrator predicts the result and accepts the possibility of its occurrence (article 19(1)(1)(b) Criminal Code), even if the perpetrator does not intend it (indirect *dolus* and *dolus eventualis*).

On the other hand, a criminal conduct shall be deemed negligent (*culpa*) if the perpetrator either predicts the result, but does not accept the result (article 19(1)(2)(a) Criminal Code), or if the perpetrator does not predict the result, although he or she should have and could have predicted it (article 19(1)(2)(b) Criminal Code). It should be noted that negligence in criminal offences in Romania only constitute so if specifically provided for in law.

It does not appear that the Romanian Criminal Code provides for the *praeterdolus*. Notwithstanding, *praeterdolus* is recognised by the Romanian doctrine, and consists of committing an offence without predicting the result, which is aggravating, in the case when the perpetrator should have and could have predicted it or the result is predicted, but the perpetrator appreciated that it will not appear, without serious reasons.

4.3 Key Institutions

The present section seeks to provide an overview of the functions carried out by the different stakeholders within the asset recovery process in Romania. While there may be other stakeholders which play an important role in the said process (e.g., the Financial Guard and the National Bank of Romania), these are not contained in the present section as there was not a chance to interview them for the drafting of the present report.

4.3.1 Ministry of Justice

4.3.1.1 International Law and Judicial Co-operation Directorate (DDICJ)

Summary points

- Romanian central authority for dealing with MLA requests.
- Limited experience with MLA in the context of the asset recovery process due to a limited caseload dealing with seizure and confiscation of assets.
- Dual jurisdiction resulting in shared competences for the receipt and transmission of requests for MLA between the DDICJ and the Public Ministry with regards to intra-EU and extra-EU requests for MLA seeking to freeze proceeds and instrumentalities of crime, as well as for the use of specific intra-EU regulation and treaties. These multiple competences are a result of the multiple international, regional and bilateral treaties ratified by Romania or of the application of the reciprocity.
- There is a need for enhanced communication mechanisms between the DDICJ and the PICCJ with regards to their functions and activities as central authorities.

Gaps/Recommendations

- Need for an enhanced integration and communication between both central authorities, in particular to determine the best course of action in multi-jurisdictional investigations and prosecutions.
- The central authority needs to have a better understanding of both the national and foreign requirements for MLA in the context of seizing and confiscating assets, in order to ensure effective and timely transmission of such requests. This may be done through, among others, training on matters related MLA in the context of freezing and confiscation in other jurisdictions relevant for Romania, in order to improve

⁴⁶ Article 43(2) UNCAC.

- current application of these two instruments at the domestic level.
- Greater integration between the sections dealing with criminal and civil law matters within the central authority is needed, in order to best assess the options for effective freezing and confiscation of assets under a criminal case in Romania.

Falling under the Ministry of Justice, DDICJ is the Romanian central authority for MLA.⁴⁷ Law No. 302/2004 (on international judicial co-operation in criminal matters) governs the DDICJ and its functions.⁴⁸ The DDICJ is split into three divisions, dealing with: (i) criminal law matters, including intra-EU requests for confiscation and freezing orders (art. 78(3) Law No. 302/2004); (ii) civil law matters; and (iii) international relations and treaties. This report shall focus on the division of the DDICJ dealing with criminal law matters.

Notwithstanding the above, Romania has designated two central authorities for the purposes of international co-operation: (i) the Prosecutor's Office attached to the High Court of Cassation and Justice (PICCJ), responsible for requests for MLA formulated in the pre-trial investigation phase, as well as requests from extra-EU countries and intra-EU Member States which are done in accordance to the 1959 European Convention on Mutual Assistance in Criminal Matters, among others, and (ii) the aforementioned DDICJ, for requests for MLA formulated during the trial stage or during the execution of the punishment imposed, as well as requests formulated during the pre-trial investigation phase when the international instrument so provides, or when the request is done on the basis of a reciprocity undertaking by the requesting State. Therefore, both the DDICJ and the PICCJ share competences for sending and receiving requests for MLA, depending on the international instrument under use.

It should be highlighted that during the pre-trial investigation phase the judicial co-operation at the EU level may be done so under the Council of Europe's legal framework on MLA – in which the central authority would be the PICCJ – and/or the FD 2003/577/JHA, in which cases there would be a transmission of the seizure orders between judicial authorities, without the need to transmit them via central authorities.⁴⁹ However, if the request for MLA deals with the enforcement of confiscation orders, regardless of their legal basis, the competent central authority is the MJ exclusively, with the execution of such requests falling within the competence of the district courts. As explained by the DDICJ, in the event that there are problems in connecting the relevant judicial authorities of the requesting and requested States, the requesting authority may contact one of the national contact points of the EJM.⁵⁰ In the case of Romania, there are two EJM contact points appointed for the MJ, including the national correspondent, four prosecutors appointed by the Public Ministry (DNA, DIICOT and the Office for International Affairs) and two judges appointed by the court of appeals.

With regards to freezing orders, Romanian legislation does not grant authority to the MJ (and consequently the DDICJ) to receive them. In practice, the jurisdictional competency to receive these requests is shared between the Public Ministry and DDICJ on the basis of the international instrument which forms the basis of the request for international co-operation, such as the 1959 European Convention on Mutual Assistance in Criminal Matters, other instruments applicable to Romania and which have been ratified by both the requesting or requested countries, or a reciprocity undertaking (which would then fall under the jurisdiction of DDICJ). Thus, while the DDICJ has the authority to receive the requests for MLA under specific conditions, it ultimately will send these to the Public Ministry or courts, as the case may be, which will then have the authority to execute, to implement and to enforce these orders on behalf of the foreign state. The DDICJ (as well as the PICCJ, when acting as the central authority) therefore has the responsibility, for the requests for MLA it receives, to assess its compliance with the international instrument (or reciprocity undertaking) it is based, as well as whether all the requirements have been fulfilled in relation to what is being sought in the request.⁵¹

The DDICJ contributes to the asset recovery process predominantly through their role in receiving and issuing international requests for freezing and confiscation orders, especially with regards EU Member States which submit requests for MLA under the 1959 European Convention on Mutual Assistance in Criminal Matters. Effectively, the DDICJ acts as the administrative intermediary between the Romanian judicial authorities and foreign judicial authorities. Thus, it does not have the authority to reject incoming or outgoing requests for MLA unless these do not meet the requirements established by the applicable treaty and/or domestic law. Rather, it issues opinions to the national and foreign authorities

⁴⁷ The DDICJ further has the responsibility for international co-operation with regards to extradition, the transfer of proceedings, the European Arrest Warrant (EAW – FD 2002/584/JHA of 13 June on the European arrest warrant and the surrender procedures between Member States), recognition of foreign orders, among others.

⁴⁸ While the law dates from 2004, the provisions on the FDs pertaining to seizure and confiscation orders were implemented in Romania in 2008.

⁴⁹ Judicial authorities utilise under these FDs the European Judicial Network (EJM).

⁵⁰ Furthermore, the interviewed authorities from the DDICJ informed that at present there is a scarce caseload on the application of the FDs dealing with seizure and confiscation of assets, in particular the former.

⁵¹ It should be noted, however, that a treaty ratified by Romania may provide further powers to the DDICJ. In such cases, e.g., the bilateral treaty on MLA with the United States, the DDICJ can decide on the execution or non-execution of the request for MLA.

with regards to whether they are complying with the requirements of the requested jurisdictions. The DDICJ will further perform a regularity check of the request, observe if there has been a reciprocity undertaking,⁵² and will identify the authority in Romania with jurisdiction to execute the request.

It is paramount, for this reason, that the DDICJ (as well as the PICCJ, when functioning as the central authority under, e.g., the 1959 European Convention on Mutual Assistance in Criminal Matters, and its additional protocols⁵³) have staff knowledgeable of both the Romanian national requirement and those of the main requested jurisdictions for Romania. In this way, the DDICJ can act as a central repository of knowledge and expertise in MLA for the Romanian and foreign authorities, reducing the processing time of a request for MLA by issuing recommendations and revising draft requests for both the requesting and requested countries. Moreover, acting as a central repository will further reduce the chances for refusal of assistance by the requested jurisdiction due to non-compliance with its national legislation, thereby increasing the effectiveness of such requests.

As an example, there is limited experience – resulting from a case law that is not uniform – in determining whether Romanian legislation would require an actual seizure or confiscation order from the requesting state or whether a request for MLA would suffice. Notwithstanding, both situations have been encountered in practice with regard to freezing requests. With regard to requests for MLA seeking confiscation of assets, these have thus far been accompanied by confiscation orders from the requesting jurisdiction. Where, in limited cases, only a criminal judgment has been transmitted by the requesting state, this was not considered as an impediment for the execution of the request. As a result of this limited case law for seizure and confiscation, it was not possible to determine under which conditions a requesting jurisdiction would need to (i) submit a national order from the requesting jurisdiction together with the request for MLA, which would then be enforced by a Romanian court; or (ii) submit a request for MLA, which would act as the basis for obtaining a Romanian court order to confiscate the assets. As mentioned above, such requirements and possibilities have to be known by the central authority, which has the responsibility to guide foreign authorities while these authorities are formulating their requests to Romania, in order to ensure the effectiveness of the request and its timely execution. Thus, further capacity building is required in order to assist the Romanian authorities in clearly determining the requirements for obtaining a seizure and confiscation order in Romania. As mentioned above, such requirements and possibilities have to be known and established as the central authority needs to disseminate these for both Romanian and foreign authorities, as well as to establish best practices in the field.

This limited experience, on the one hand, appears to stem from the fact that the DDICJ itself only deals with intra-EU requests for seizure and confiscation formulated through the 1959 European Convention on Mutual Assistance in Criminal Matters. On the other hand, and due to the fact that there are two central authorities in Romania, it is important that the DDICJ – as well as the PICCJ – be aware of such requirements, in the event that there is a complex asset recovery case which would involve several jurisdictions from both within and outside the EU. This position is enforced due to the fact that there is a need for enhanced interaction, communication and co-ordination efforts between both central authorities is to be pursued.⁵⁴

Currently, DDICJ has 20 staff members, of which ten are assigned to the Division responsible for criminal law matters. The staff members of the criminal law division of the DDICJ deal with approximately 2000 requests each a year, according to information given during interviews. During the on-site visit, the representative from the DDICJ informed that since 2007 the number of requests processed by DDICJ has increased while the number of staff has decreased. Consequently, the office has been under increasing pressure to comply, in a timely fashion, with both the incoming and outgoing requests. DDICJ has also informed that most of the requests dealt by MoJ as central authority originate from EU Member States (with more incoming requests for MLA than outgoing requests), and that most requests are primarily for the freezing of assets.

When dealing with non-EU member states, if they are UNCAC compliant for example, then the existence of a bilateral MLA treaty is unnecessary because UNCAC is self-executing (or any other self-executing treaty dealing with MLA that

⁵² Non-EU Member States which do not have a bilateral treaty with Romania can submit requests for MLA utilising the procedures contained in a multilateral treaty ratified by Romania and the requested country. If no treaty can be applied, the general rule of letters rogatory shall apply (art. 132 through 135 Criminal Procedure Code), and assurances of reciprocity need to be provided by the requesting jurisdiction to Romania. In the case of letters rogatory, Romania can only provide assistance to the non-coercive production of evidence, and is unable to freeze assets on behalf of the requested jurisdiction.

⁵³ It should be underscored that the Public Ministry is the central authority under the 1959 European Convention on Mutual Assistance in Criminal Matters, amongst other treaties which specifically determine the Public Ministry as the central authority.

⁵⁴ The DDICJ informed that there is periodic meetings to enhance the communication and co-operation between the MJ, the Public Ministry and the DIICOT. No further information, however, was provided in order to fully assess the efficiency of these communication and co-operation mechanisms.

Romania is party to). In the event that they are not UNCAC compliant, then DDICJ can receive requests on the basis of reciprocity.

4.3.1.2 National Office for Crime Prevention and Co-operation for Criminal Asset Recovery

SUMMARY POINTS:

- The Romanian ARO is an administrative body responsible for facilitating and sharing information related to proceeds of crime with other EU Member States. It is not mandated to investigate criminal offences, enforce judicial orders or manage seized assets.
- Although not within its direct responsibility, the Romanian ARO further facilitates and shares information related to proceeds of crime with national authorities due to its access to numerous databases, speeding the overall response time of such requests.
- It aims to speed up the asset recovery process through rapidly providing basic information requested by both domestic and international authorities
- The Office is mandated to implement EU and international best practices on AML, AC and assets recovery
- ARO has also previous tasks, being built as a centre for excellence, for drafting and implementing strategies on countering organised crime and corruption, and also for carrying out the relation with Public Ministry, mainly drafting recommendations addressed by the Minister of Justice to general prosecutor, in order to prevent criminality. The Office is also representing MJ in several committees in CoE, UN, etc.

GAPS/RECOMMENDATIONS:

- The Romanian ARO does not conduct an analysis of the data it gathers.
- The statistical data collected by the ARO is not sufficient in order to adequately prioritise allocation of resources and to establish trends in criminal activity. Furthermore, it is not possible to trace the proceeds and instrumentalities of crime throughout the criminal process with the statistical data made available to the ARO

The Romanian ARO receives its legislative authority from Government Decision No. 32/2011, which establishes the ARO within the MJ. The purpose of setting up the ARO was to facilitate the tracing and identification of proceeds of crime (and related properties) that may become the object of a freezing, seizure or confiscation order made by a competent judicial authority in the course of criminal proceedings (article 1(1) Government Decision No. 32/2011). The role of the ARO is to provide information to investigators, and it can neither impose seizures or confiscations, nor request these directly to the competent authority.

According to article 2 of Government Decision No. 32/2011, in fulfilling its intended purpose, the ARO:

- Co-operates with the AROs or authorities with similar responsibilities from the other EU Member States by providing data and information exchange, for the purposes set out in Article 1(2)⁵⁵ Government Decision No. 32/2011 and FD 2007/845/JHA;
- Exchanges best practices with the AROs or authorities with similar responsibilities from the other EU Member States, in its field of competence;
- Co-operates with the competent Romanian authorities and public institutions in order to track and identify the proceeds of crime and other crime related property;
- [Deals with] requests from the competent Romanian institutions to conduct specialised analysis in order to facilitate the tracing and identification of funds derived from crime and other crime related funds;
- Periodically analyses the methods and levels of disposal of the assets that are subject to special confiscation (article 118 Criminal Code), in the case of the crimes specified in Article 85(1) of Law no. 302/2004 on MLA. In exercising this task the Office requests statistical data and information from the competent Romanian authorities and public institutions;
- Carries out studies and analysis, by synthesis, systematisation and interpretation of statistical data regarding its activity;

⁵⁵ Government Decision No. 32/2011, article 1(2): ‘The purpose of setting up the Office is to facilitate the tracing and identification of proceeds of crime and other crime related property which may become the object of a freezing, seizure or confiscation order made by a competent judicial authority in the course of criminal proceedings.’

- Ensures the representation of Romania at the Camden Assets Recovery Interagency Network (CARIN) and attends the meetings of regional and international bodies and organisations in the fight against corruption and organised crime, as well as the recovery of assets;
- Issues an annual activity report, which presents findings, developments and recommendations in its field of competence.

The Romanian ARO has thus been set up as a centre for excellence responsible for sharing information with other EU Member States. The transmission of data and information requested by other authorities with similar responsibilities from other EU Member States is governed by the terms provided by article 23(1) and (2) of Government Emergency Ordinance No. 103/2006 regarding measures for facilitating international police co-operation, approved by Law No. 104/2007.⁵⁶ Furthermore, the ARO is required to transmit such relevant data and information either upon the receipt of a request from a EU Member State authority, or spontaneously when the ARO considers that this information would facilitate other EU Member States' authorities in the identification of proceeds of crime.⁵⁷

Although the ARO was not established to assist national authorities in their asset recovery efforts, it has been taking such action, as the ARO has access to numerous databases that effectively reduce the amount of time required by a national authority to receive such information from numerous administrative authorities. It should be noted, however, that the national authorities should have the ability to conduct these searches without needing the assistance of the ARO, as the national databases should also be made available to them. In doing so through the case manager, it would further streamline the national investigation and prosecution and relieve the pressure on the ARO, allowing it to focus its resources on co-ordinating the intelligence gathering and sharing between national authorities and those from other EU Member States.

Correspondingly, the ARO may request data and information from other EU Member State authorities with similar responsibilities. This application is made on a form provided in Appendix 2 of Government Emergency Ordinance no. 103/2006,⁵⁸ and must include a description of the evidence held, and provide explanations of the purpose for which the information is requested, as well as the connection between this purpose and the person subject to such data and information (article 7 Government Decision No. 32/2011).

Under article 5 Government Decision No. 32/2011, in order to fulfil its tasks, the ARO co-operates with:

- The Prosecutor's Office attached to the High Court of Cassation and Justice (PICCJ);
- The National Agency for Tax Administration (ANAF);
- The National Trade Register Office;
- The National Office for the Prevention and Control of Money Laundering (ONPCSB);
- The National Customs Authority;
- The Financial Guard;
- The National Bank of Romania;
- The General Inspectorate of Romanian Police;
- National Agency for Cadastre and Land Registration; and
- Any other authority or institution, including those responsible for the management, administration and sale of goods on which protective measures were instituted, and those subject to special confiscation (article 118 Criminal Code).⁵⁹

The ARO has seven staff members. Two staff members work on processing the external and internal requests and transferring of information, while the remaining five are responsible for fulfilling the other roles of the ARO (e.g., drafting strategies on prevention). The ARO is not an independent body and is attached to the Ministry of Justice. Thus, its budget stems from that of the Ministry.

In practice, the Romanian ARO is limited in assisting the asset recovery process. As an administrative body responsible for providing data regarding assets, they cannot thoroughly facilitate the investigative stage of the asset recovery process by providing an analysis of the data collected from the databases it has access to. Rather, they will collect the required

⁵⁶ Government Decision No. 32/2011, Article 3(1)

⁵⁷ Government Decision No. 32/2011, Article 4

⁵⁸ The form appended to the Government Decision is the same as the one provided for in FD 2007/845/JHA.

⁵⁹ Government Decision No. 32/2011, Article 5

intelligence and will not analyse it prior to its submission to the requested authority.⁶⁰ Thus, the ARO has the power to access national databases, including the national database on bank accounts, and is able to acquire basic information on many of these databases (such as bank name where account is held, and whether the account is active or inactive) but not specific information (such as transactions or value of assets). To that end, only a judicial authority (be it the prosecutor or the judge) is able to do so and, if necessary, seize the asset. The ARO deems that the amount of information it has access is sufficient for to carry out its functions on data exchange at a pre-investigative stage.

Nevertheless, the ARO speeds up the asset recovery process by rapidly providing basic information to requesting authorities (both national and from EU Member States). In practice, when receiving a request for information, the ARO will classify its urgency and respond accordingly (with an 8 hour maximum response time for urgent cases, and a 14 day maximum response time for less urgent requests).

In accordance to information provided by the ARO, in 2012, it received a total of 136 incoming applications. Of these, 56 foreign incoming applications were received from AROs from other jurisdictions (both EU and non-EU States), seven of which were to be dealt within eight hours, and 80 national incoming applications were received from agencies within Romania.

The 56 foreign incoming applications requested the collection of information of 161 natural persons (92 Romanian citizens and 69 foreigners). Belgium, France, Germany, Italy, The Netherlands, Spain and Hungary submitted most of these applications. The information provided by the Romanian ARO in these incoming foreign applications were regarding vehicles, real property, bank account information and trade companies.

The 80 incoming national applications sought the collection of information on 180 natural persons, of which 112 were Romanian citizens and 68, foreigners. These national incoming applications also requested the collection of information of 155 legal persons (144 domiciled in Romania and 11 abroad). Four of these 80 applications were of an urgent nature, requiring resolution within 8 hours).

92 outgoing applications for information stemmed from these 80 incoming national applications. The information provided to the Romanian ARO in these incoming national applications were regarding vehicles, real property, bank account information and companies in which the natural persons were listed as associates, stockholders, directors or administrators. The Romanian ARO itself further provided the same information to the national authorities in their applications to the Romanian ARO.

Most of the national incoming applications were made by territorial services of Directorate for Investigating Organised Crime and Terrorism (DIICOT), of the National Anti-Corruption Directorate (DNA), and several law enforcement units. Furthermore, one of the applications was made by the Bucharest Tribunal in order to identify the property of a person under investigation, with the purpose of enforcing a seizure order.

Specifically, the ARO can access basic relevant information to an on-going investigation, and compile this information rapidly for the investigating authority. Through existing protocols with relevant ministries, the ARO has direct access to databases such as:

- The Land Register – which covers the ownership of real estate in Romania. It is important to note that the electronic portion of this register only covers about 30% of Romanian real estate, with the information on the remaining real estate recorded in hard copy files.⁶¹
- The Trade Register – which records information on companies, such as owners, shareholders, managers, and sometimes even beneficial owners.
- The National Bank Account Register – which contains information pertaining to bank account ownership, but not the actual transactions carried out in the account. It is run by ANAF and is updated every couple of days.
- The Public Persons Register – which is a record of identification information regarding Romanian citizens, including ID numbers, passport numbers, driver's license numbers, auto vehicle ownership, marital status and other personal information.

⁶⁰ The Romanian ARO does not receive, upon a potential suspicion, information from the persons responsible for maintaining the databases it has access to. The ARO will require an incoming request, whether from a national or EU Member State authority, in order to conduct its activities. It is for this reason reactive and does not have the legal mandate to conduct its activities proactively.

⁶¹ It was informed during interviews that, due to the fact that the country had different methodologies for land registry until 1996, Romania is still undergoing a process of compiling all of the information into one database following one method. As a result, not all information pertaining to land registry is still available electronically.

Furthermore, the ARO also has indirect access to the registers regarding ownership of sea- and airborne vessels. This access is indirect due to the fact that these registers are not electronic, and requests for information must be made through the Ministry of Transport. The ARO does not have, however, access to tax information, which is controlled solely by ANAF.

4.3.2 Public Ministry

SUMMARY POINTS:

- Responsible for conducting criminal investigations and prosecutions with decisional independence.
- The jurisdiction of the Public Ministry is normally determined by nature of the offence, space or person. However, there are specific crimes which are dealt with through the specialised offices at the PICCJ: the DNA and the DIICOT.
- The Public Ministry, as it is part of the Judiciary, has the power to issue freezing orders during the pre-trial investigation, without authority from the courts. Courts, however, may issue freezing orders during the trial stage, if requested by the parties and if not done so already by the Public Ministry.
- Experts are called during the investigation and during the trial to clarify some aspects as requested by judiciary. Beside the expertise, the judicial authorities usually do not ask for other clarifications. There is a legal obligation for the experts to answer to the concrete requests of the judiciary.

GAPS/RECOMMENDATIONS:

- Reliance on the use of expert opinions for the determination of the value of assets with reduced capacities in financial investigation may hinder the effectiveness of the financial investigation itself, as the expert opinion will focus on the value of the asset (for realisation) and the damage incurred by the victim.

The Public Ministry consists of the PICCJ, as well as the Prosecutors' Offices attached to each of the Romanian courts. Within the Public Ministry there are additionally the DNA and the DIICOT. The Public Ministry receives its authority from Section 2, Chapter IV of the Romanian Constitution, which outlines that it shall represent the general interests of society, uphold the legal order, and defend citizens' rights and freedoms. It specifies that the Public Ministry shall discharge its powers through public prosecutors, constituted into public prosecutor's offices.

The functions, organisation and structure of the Public Ministry are outlined in Law No. 304/2004, Law No. 303/2004, the Criminal Procedure Code, and the Criminal Code. Under article 63 of Law No. 304/2004, the Prosecutor's Office is given the responsibility to:

- Carry out criminal proceedings in cases under conditions provided by the law and take part, according to the law, in the resolution of conflicts by alternative methods;
- Conduct and control the activity of the judicial police, and the activity of other bodies of criminal investigation;
- Call upon law courts for judging criminal cases, according to the law;
- Take civil action, in the cases provided by the law;
- File appeals against court decisions, according to the conditions provided by the law;
- Act to prevent and fight criminality, under the co-ordination of the Minister of Justice, for the consistent accomplishment of the state criminal policy;
- Study the causes that generate and favour criminality, elaborate and present to the Minister of Justice proposals for eliminating them, as well as for improving legislation in the field;
- Verify the observance of the law in the places of preventive detention.

Under article 62 of Law No. 304/2004, prosecutors shall carry out their activities according to the principles of legality, impartiality and hierarchal control, under the authority of the Minister of Justice. Nevertheless, while Prosecutor's Office and its subsidiary branches fall under the authority of the Ministry of Justice, this should not be interpreted as a situation of hierarchal subordination, but as an administrative relationship.⁶² It should be noted, however, that the General Prosecutor is assigned by the President, upon the proposal of the Ministry of Justice, with the endorsement of the Supreme Council of Magistracy.⁶³

⁶² Public Ministry, Prosecutor's Office Presentation Guide, p3

http://www.mpublic.ro/versiunea_engleza/Presentation_public_ministry_Bookmark.pdf

⁶³ Transparency International National Integrity Assessment Romania 2012, p94

The Minister of Justice cannot order the Prosecutor's Office to initiate or stop investigations, nor can they interfere in measures ordained by the prosecutors in the course of criminal prosecutions or the decisions they make.⁶⁴ The Minister of Justice may only check the manner in which prosecutors fulfil their managerial duties, their working obligations, and the manner of their working relationship with litigants.⁶⁵ It is important to note that the Prosecutor's Office retains the decisional independence, which is guaranteed through article 3 of Law No. 303/2004.

The criminal investigation is conducted by the Public Ministry and the General Inspectorate of the Romanian Police (article 201 Criminal Procedure Code). The aim of the investigation is to gather the necessary evidence regarding the existence of crimes, identification of perpetrators, and establishing their responsibility (article 200 Criminal Procedure Code). The case prosecutor is responsible for supervising the criminal investigation and the acts thereto (article 209 Criminal Procedure Code). Thus, the case prosecutor both conducts the criminal investigation and controls the actions performed by the judicial police (article 209 Criminal Procedure Code). Furthermore, under article 218 of the Criminal Procedure Code, the Prosecutor's Office may assist in the performance of any criminal investigation, or may perform any investigation itself. Additionally under article 219 of the Criminal Procedure Code, the prosecutor may give orders regarding the performance of any criminal investigation act, which must be followed by the relevant criminal investigation body (e.g., the General Inspectorate of the Romanian Police).

It is also the responsibility of the Public Ministry, while supervising the criminal investigation and ensuring its compliance with the law, to make sure that every crime is discovered, every perpetrator is held responsible for his crimes and no person is criminally investigated unless there is strong evidence that he or she committed an action or omission prescribed as a criminal offence in Romania (article 216 Criminal Procedure Code).

During the interviews conducted with Romanian authorities, it was informed that the General Inspectorate of the Romanian Police will carry out actions determined by the Prosecutor during the pre-trial investigation. In the event that information is handed to the Police, they shall submit it to the Prosecutor, who will issue an order to open the investigation and for the Police to carry out specific acts with a view to identifying the facts. The Police must carry out the investigation and collect the evidence, which may both incriminate or exonerate the perpetrator of the criminal offence under investigation.

A challenge faced in investigations in Romania is the fact that focus is almost entirely given to the criminal investigation, and the financial investigation is relegated to a secondary position. Whereas the DNA has its own dedicated investigative team, and thus does not have to primarily depend on the General Inspectorate of the Romanian Police to carry out investigations, the DIICOT and other Prosecutor's offices relies on the judicial police, who do not have financial investigative capacities. This aspect of the investigation will be discussed in the paragraphs below.

With regards to money laundering cases, the investigation and the prosecution is divided between different branches of the Public Ministry, depending on the type of criminal offence involved:

- The DIICOT – if the predicate offence involved is organised crime or terrorism;
- The DNA – if the laundered funds originate from a corruption offence or an offence related to corruption; and
- The general section of the Prosecutor's Office attached to tribunals – if the proceeds of crime originate from a criminal offence that does not fall under the jurisdictional competence of the DNA nor the DIICOT.⁶⁶

If one branch of the Public Ministry becomes aware that the case before them falls under the jurisdiction of another branch, then they are required to forward that case to the relevant branch. If a case covers issues that fall under the jurisdiction of two or more branches, the branch that received the notification of that crime first will generally control the prosecution of that crime. Two different branches cannot share the investigation of a case and if there are any disputes over competency then these are resolved by the General Prosecutor.

As noted above, the Public Ministry has the power to investigate offences, and in terms of the investigation of money laundering offences in practice, the prosecutor will always take the leading role. A prosecutor commences an investigation once they receive notification that a crime has been committed (e.g., from ONPCSB, the police, ANI, whistle-blowers or other public sources), or *proprio motu*. If after initial investigations, they confirm that there are solid grounds that an offence has taken place, they will issue a resolution document that formally initiates the criminal prosecution (and is relevant for a number of procedures, including the breach of bank secrecy).

⁶⁴ Law No. 304/2004, Article 69(1)

⁶⁵ Law No. 304/2004, Article 69(2)

⁶⁶ MONEYVAL Third Round Detailed Assessment Report on Romania 2008, p75

During the investigation, the freezing of assets is the sole responsibility of the prosecutor, who has the power to issue such orders without the authorisation of a court.⁶⁷ Once the order is issued, the prosecutor will delegate police officers to physically enforce the freezing orders. In the example of freezing bank accounts, a prosecutor will generally seek account information relating to the subject from the national bank account database (which only contains basic account information not pertaining to the contents of the account) and will freeze the entire account without knowing the details of its contents. This is to prevent any employees of the bank from tipping off the suspect before the account can be frozen. If money is transferred from the account in the time after a police officer has issued the bank with a freezing order (usually through physically presenting the order at the bank's central office), then the bank will be liable to penalties. After the freeze is in place, the prosecutor will then inquire as to the contents of the account, and will adjust his freezing order accordingly.

Seizure is provided for in articles 94 through 111 of the Criminal Procedure Code. Articles 94 and 95 refer to the seizure of objects which may be used as evidence in order to reveal the facts (article 94 Criminal Procedure Code), as well as objects which have been used or are destined to be used for the commission of an offence. The criminal investigation body (the judicial police or police from the General Inspectorate of the Romanian Police, under the authorisation of a prosecutor) must seize the objects that may serve as means of evidence (article 96 Criminal Procedure Code). Due to the fact that there are limited capacities in financial investigation, it is not clear how the investigation determines what the proceeds and instrumentalities of crime are and their value, or the value of the offence, due to the lack of financial investigation in the country. The Criminal Procedure Code establishes the need for the use of expert opinion when the clarification of some facts is required (article 116 Criminal Procedure Code).⁶⁸ These facts include determining the amount of damage caused by the crime committed, so as to ensure both the application of special confiscation under article 118 of the Criminal Code, as well as the payment of damages to the victim of the offence committed by the perpetrator.

It must be noted however that a Prosecutor does not have the power to conduct a search of a physical asset (e.g., house or business) without prior authorisation from the court. If a search discovers electronic equipment (e.g., computer hard drives, phones, etc.) then a further court authorisation is required to search these devices.

Nonetheless, it should be noted that the seizure of proceeds and instrumentalities of crime remain a challenge in Romania. This is due to the fact that article 44(8) Constitution informed that legally acquired assets cannot be confiscated as their lawful acquisition is to be presumed. Thus, the confiscation and accordingly the seizure of proceeds of crime can become a challenge with the limited capacities in financial investigations, as there is no clear determination of which assets have been legally acquired and which are the proceeds of crime.

Confiscation of assets under Romanian law is understood as a security measure (Article 118 Criminal Code) and is, for this reason, not part of the main penalty of a criminal sanction. The security measures provided for in Title VI (Security Measures) of the General Section of the Romanian Criminal Code have the objective of removing a danger to the State and avoiding the perpetration of a criminal offence provided for in law (article 111(1) Criminal Code). They can only be applied against the person who committed the criminal offence (article 111(2) Criminal Code), and can be applied even when the main penalty is not applied (article 111(3) Criminal Code).

Special confiscation is specifically provided for in article 118 Criminal Code. The security measure of special confiscation can be applied against:

- (i) The objects which resulted from the commission of a criminal offence (proceeds of crime);
- (ii) The objects which were used for the commission of a criminal offence (instrumentalities of crime). These objects are to be confiscated if they belonged to another person, and the third party knew the purpose of their use;
- (iii) The objects produced, modified or adapted with the purpose of committing of an offence, if they were used to its committing and if they belong to the offender. When the objects belong to the other person, the confiscation is disposed if the production, modification or adaptation has been performed by the owner or by the offender, with the knowledge of the owner (intermingled or transformed assets);
- (iv) The objects which were given in order to determine the committing of a deed or for rewarding the perpetrator;

⁶⁷ It should be noted that the defence could appeal the decision to freeze assets to the Prosecutor who is hierarchically above the one who has issued the order. There is, however, no possibility for judicial review of these decisions during the pre-trial stage, and the defence must wait until the actual trial stage to commence to request the release of assets.

⁶⁸ Romanian authorities informed that, under the rule contained in article 116 of the Criminal Procedure Code, specialists working in public institutions or prosecution units may also be called to clarify facts.

- (v) The objects obtained through the committing of the deed provided by the criminal law, if they are not restituted to the injured person and to the extent to which they do not serve to the injured person's compensation;
- (vi) The objects whose possession is prohibited by the law.

As can be seen, the Romanian Criminal Code provides for asset-based confiscation; value-based confiscation, as required under article 2(1) of the 1990 Convention and article 3 of the Council Framework Decision 2001/500/JHA; extended confiscation (as per the amendments made to the Criminal Code of Romania in April 2012); confiscation of proceeds and instrumentalities of crime, as well as the confiscation of intermingled and transformed assets.

The statutes of limitation do not apply to the special measures, as informed in article 126(5) Criminal Code. In this regard, some misunderstanding pertaining to the statutes of limitation applicable for the realisation of confiscated assets seem to be apparent, as ANAF — the agency responsible for executing the confiscation orders rendered by courts, applies a 10-year statute of limitation, as provided for in the rules contained in article 91(3) Code of Fiscal Procedures.⁶⁹ This, however, should not be the case. Article 91(3) Code of Fiscal Procedures refers to crimes in which a fiscal responsibility is established (e.g., tax fraud), in which the main sanction will also be the payment of the fiscal obligation in to the state. The special confiscation under article 118 Criminal Code, however, does not refer to non-observation of fiscal responsibility but rather to the proceeds which have arisen from crime (e.g., money laundering, even if the predicate offence is tax evasion or fraud). In such circumstances, the rule for non-applicability of the statutes of limitation would apply.⁷⁰

Nevertheless, the Code of Fiscal Procedures will still be applicable for the realisation of confiscated assets, in accordance to its article 1(3), as the confiscation order becomes an amount owed to the general consolidated budget of the State (there is currently no regulation in Romania with regards to the actual destination of confiscated assets, besides cars, which may be transferred to public institutions by a special commission established General Secretariat of Government). Despite the fact that article 2(1) of the Code of Fiscal Procedures informs that the procedures contained therein shall prevail⁷¹ for matters which include, but are not limited to, amounts owed to the general consolidated budget of the State, it does not supersede the rules contained in article 121 Criminal Code. This interpretation of impossibility of conflict between legislation becomes apparent as the former regulates procedural aspects, whereas the latter deals with substantive law.

4.3.2.1 Directorate for Investigating Organised Crime and Terrorism (DIICOT)

SUMMARY POINTS:

- Competence only covers the prosecution of money laundering crimes that relate to organised crime.

The Directorate for Investigating Organised Crime and Terrorism (DIICOT) was created by Law No. 508/2004, which both establishes the body as a specialised branch within PICCJ, and outlines its specific organisation and functions. The DIICOT is specialised in prosecuting offences directly linked to organised crime, and their overall competence may include money laundering offences, as well as common predicate offences to money laundering such as drug trafficking, human trafficking, capital market offences, IT crimes, and terrorism financing offences.⁷² Interim measures and confiscation are mandatory for DIICOT cases.

Within the DIICOT there are 5 operative services:

- The Service of Organised Crime Offences Investigation
- The Service of Cyber Crimes Investigation
- The Service of Drug Trafficking Offences Investigation
- The Service of Terrorism and its Financing Offences Investigation
- The Service of Economic-Financial Macro-Criminality Offences Investigation (within which the Bureau of Money Laundering Offences and Predicate Offences is established).⁷³

⁶⁹ Government Ordinance No. 92 of 24 December 2003.

⁷⁰ It is not clear, however, who would be responsible for, and what the procedure would be if a request for MLA for the confiscation and return of assets to the requesting jurisdiction.

⁷¹ Article 2(3) informs the subsidiary application of the Civil Procedure Code, in the event of omission by the Code of Fiscal Procedures.

⁷² MONEYVAL Third Round Detailed Assessment Report on Romania 2008, p75

⁷³ MONEYVAL Third Round Detailed Assessment Report on Romania 2008, p75

The personnel of the DIICOT are made up of prosecutors, specialists in data processing and evaluation (in the economic, financial, banking, customs, and computer fields), specialized auxiliary personnel, and economic and administrative personnel.⁷⁴

The DIICOT is charged with the following responsibilities:

- To carry out the criminal prosecution against the crimes stipulated in the present law and in the special laws;
- To be in charge of, to supervise and to control the criminal prosecution actions, carried out, by prosecutor's order, by the Criminal Police officers and agents, who are subordinated to the DIICOT;
- To notify the judicial authorities for them to take the necessary measures, under the law, and to judge the cases related to the offences which fall under the competence of the DIICOT;
- To manage, to supervise and to control the technical activities of criminal prosecution, carried out by economic, financial, banking, customs, computer and other kinds of specialists, appointed within the DIICOT;
- To study the cases that generate the perpetration of the offences of organised crime, drug trafficking, cyber-crime and terrorism and the conditions which enable them, to elaborate proposals with a view to eliminating them and to improving the criminal legislation in this field;
- To set up and update the database on the offences which fall under the competence of the DIICOT; and
- To accomplish other tasks stipulated in the Criminal Procedure Code and in the special laws.⁷⁵

Article 12 of Law No. 508/2004 stipulates the offences that come under the competence of the DIICOT, and includes offences mentioned above. It is important to note that with regards to money laundering, article 12(n) Law No. 508/2004 includes the offences stipulated in Law No. 656/2002 on the Prevention and sanctioning Money Laundering, as well as for setting up some measures for prevention and combating terrorism financing, as re-published, within the competence of the DIICOT, but only if the money or assets that are the subject of the money laundering offence resulted from crimes which already fall under the competence of the DIICOT (e.g., any offence relating to organised crime – such as those outlined in article 12(a) through (k) Law No.508/2004).

With regards to investigatory powers, the DIICOT is duly entitled to have and make use of the 'appropriate means' in order to collect, verify, process, store and identify the data relating to the crimes which fall under its competence.⁷⁶ Additionally, when there are 'solid indications' regarding the commission of crime that falls under the competence of the DIICOT, with the view to collecting evidence or identifying the perpetrator, the DIICOT is permitted to:

- Monitor bank accounts;
- Supervise, intercept, and record communications; and
- Access computer systems.⁷⁷

Furthermore, the prosecutors of the DIICOT can request, in original or in copy, any data, information, documents, banking, financial or bookkeeping documents, from any person who has them or who generates them.⁷⁸ They can also make use of special investigative techniques, such as undercover agents.⁷⁹

To assist with investigations, the DIICOT prosecutors are supported by judicial police officers. These officers are appointed by the Minister of Administration and the Interior from within the Romanian Police with the approval of the General Prosecutor of the Prosecutor's Office, and are reassigned to the DIICOT.⁸⁰ However these officers are not based at the DIICOT, and still come under the administrative subordination of the MAI. Nevertheless the prosecutors have direct co-ordination and control over these officers with regards to investigative duties, and orders from the prosecutors are considered binding.⁸¹

With regards to accountability, the Chief Prosecutor of the DIICOT, and consequently the DIICOT itself, is directly subordinated to the General Prosecutor.⁸² In terms of funding however, the capital expenses of the DIICOT are ensured

⁷⁴ Law No. 508/2004, Article 5(1)

⁷⁵ Law No. 508/2004, Article 2(1)

⁷⁶ Law No. 508/2004, Article 15

⁷⁷ Law No. 508/2004, Article 16(1)

⁷⁸ Law No. 508/2004, Article 16(2)

⁷⁹ Law No. 508/2004, Article 17

⁸⁰ Law No. 508/2004, Article 27

⁸¹ Law No. 508/2004, Article 27

⁸² Law No. 508/2004, Article 1(2)

from the national budget, and the funds allocated to DIICOT are separately identified within the budget of the Public Ministry.⁸³ Appointments of the DIICOT Chief Prosecutor and his deputies are appointed by the President of Romania, based on a proposal by the Minister of Justice, with the assent of the Superior Council of the Magistracy, for a 3 year mandate renewable only once.⁸⁴

In 2011, DIICOT prosecutors issued 961 indictments, and 3308 people were sent to trial. Interim measures ordered by DIICOT: RON 82.738.723 lei (RON 38 million in money laundering cases, RON 23.5 million in cases of crimes against national security, RON 9,8 million in cases of customs offences, RON 6 million in cases of organised crime, RON 3 million in fiscal fraud cases).

4.3.2.2 National Anti-Corruption Directorate (DNA)

SUMMARY POINTS:

- Competence covers laundered funds originated from a corruption offence or an offence related to corruption.

The DNA is governed by the regulations of Government Emergency Ordinance No.43/2002, which establishes the DNA within the framework of the GPO.⁸⁵ The DNA carries out criminal investigation activities in cases of offences related to corruption, as well as offences committed against the ‘financial interests of the European Communities’.⁸⁶

Specifically, the main responsibilities of the DNA are to:

- Carry out criminal investigations according to the Criminal Procedural Code, Law No.78/2000, and Emergency Ordinance No. 43/2002;
- Lead, supervise and control the criminal investigations requested by the prosecutors, and carried out by the judicial police officers, which are under the exclusive authority of the Chief Prosecutor of the National Anticorruption Directorate;
- Lead, supervise and control the technical activities of the criminal investigation, carried out by specialists in the economic, financial, banking, customs, IT fields, as well as in other fields, appointed within the framework of the National Anticorruption Directorate;
- Notify the courts to take legal measures for sentencing cases regarding the offences provided by Law No. 78/2000, with the subsequent amendments, which fall, according to Article 13, under the competence of the National Anticorruption Directorate;
- Participate at trials, according to law;
- Appeal the judges' decisions, according to law;
- Analyse the causes which generate corruption and the conditions which favour it, as well as drawing up and submitting proposals with a view to their elimination, as well as for the improvement of criminal legislation;
- Draw up the annual report on their activity and submit it to the Superior Council of Magistracy and to the Minister of Justice, who will in turn submit to the Parliament their conclusions on the activity report of the National Anticorruption Directorate; and
- Set up and update the database in the field of corruption deeds.⁸⁷

With regards to competence areas, the DNA are competent to carry out investigations for offences provided in Law No. 78/2000, including:

- Corruption offences (such as passive and active bribery, receiving undue advantages, trading in influence);
- Offences assimilated to corruption; and

⁸³ Law No. 508/2004, Article 1(3)

⁸⁴ Public Ministry, Prosecutor’s Office Presentation Guide, p13, available at http://www.mpublic.ro/versiunea_engleza/Presentation_public_ministry_Bookmark.pdf

⁸⁵ Government Emergency Ordinance No.43/2002, Article 1(1)

⁸⁶ National Anticorruption Directorate Website http://www.pna.ro/faces/about_us.xhtml

⁸⁷ Government Emergency Ordinance No. 43/2002, Article 3

- Offences directly related to corruption (concealment of goods originating from the commission of corruption offences, forgery and the use of forgery committed for the purpose of hiding the perpetration of corruption, money laundering committed in relation to corruption etc.);⁸⁸

However, it is important to note that the DNA are only competent to carry out investigations of these offences if:

- The value of the bribe exceeds EUR 10,000; or
- The value of the damage caused exceeds EUR 200,000 or the crime has produced serious disruption in the activity of a public authority or institution of a any other legal person; or
- The offence in question has been committed by dignitaries, magistrates, and high public officials.⁸⁹

If another investigative authority establishes an offence that falls under the competence of the DNA, then they are obliged to notify the DNA immediately, and they are further obliged to ensure that the traces of the offence, or any means of evidence relating to the offence, are preserved.⁹⁰ This also applies to other branches of the Prosecutor's Office.⁹¹

With regards to investigatory powers and similarly to the DIICOT, the DNA is authorised to have and to use 'adequate means' to obtain, verify, process and store the information regarding offences.⁹² When there are substantial indications that an offence (which falls under the competence of the DNA) has been committed, the DNA is permitted to adopt certain measures in order to gather evidence and identify the perpetrator, such as:

- Conducting surveillance of bank accounts (and requesting financial documents in relation to these accounts);
- The surveillance or interception of communications; and
- Accessing IT systems.⁹³

Overall, the DNA prosecutors froze the equivalent of EUR 204 million during trials in 2011.

In confiscating assets or goods related to an offence, the DNA must follow Article 118 of the Criminal Code.⁹⁴ In the event that the goods or assets related to the offence are not found, their equivalent in money or the goods obtained in exchange can be confiscated.⁹⁵

The personnel of the DNA are made up of prosecutors, judicial police, specialists in data processing and evaluation (in the economic, financial, banking, customs, and computer fields), specialized auxiliary personnel, and economic and administrative personnel.⁹⁶ In total, there are 145 prosecutors, 170 judicial police officers, 55 experts and 196 administration staff.

Additionally, a number of judicial police officers work exclusively under the authority of the DNA to assist in carrying out criminal investigations disposed by prosecutors. These judicial police carry out investigations under the direct supervision and control of prosecutors, with the latter's orders binding on the former.⁹⁷ The relocation of the police officers and agents within the DNA shall be made, upon nominal proposal of its Chief Prosecutor, through Order of the Minister of Administration and the Interior, and their appointment shall be made by decision of the DNA's Chief Prosecutor.⁹⁸ The relocation of the police officers and agents within the DNA lasts for a period of 6 years and there is a possibility of extension.⁹⁹ During their relocation, the judicial police officers physically work at the offices of the DNA and agents cannot receive any task from their hierarchical police bodies (ie. the General Inspectorate of the Romanian Police).¹⁰⁰

⁸⁸ Government Emergency Ordinance No. 43/2002, Article 13; Public Ministry, Prosecutor's Office Presentation Guide, p14, available at: http://www.mpublic.ro/versiunea_engleza/Presentation_public_ministry_Bookmark.pdf

⁸⁹ Government Emergency Ordinance No. 43/2002, Article 13; Public Ministry, Prosecutor's Office Presentation Guide, p14, available at: http://www.mpublic.ro/versiunea_engleza/Presentation_public_ministry_Bookmark.pdf

⁹⁰ Government Emergency Ordinance No. 43/2002, Article 14

⁹¹ Government Emergency Ordinance No. 43/2002, Article 15

⁹² Government Emergency Ordinance No. 43/2002, Article 15-1

⁹³ Government Emergency Ordinance No. 43/2002, Article 16

⁹⁴ Government Emergency Ordinance No. 43/2002, Article 22(1)

⁹⁵ Government Emergency Ordinance No. 43/2002, Article 22(2)

⁹⁶ Government Emergency Ordinance No. 43/2002, Article 6

⁹⁷ Government Emergency Ordinance No. 43/2002, Article 10(4)

⁹⁸ Government Emergency Ordinance No. 43/2002, Article 10(5)

⁹⁹ Government Emergency Ordinance No. 43/2002, Article 10(6)

¹⁰⁰ Government Emergency Ordinance No. 43/2002, Article 10(7)

With regards to accountability, the DNA is independent in its relationship with the courts of justice and the prosecutor's offices attached to these, as well as in its relationship with the other public authorities.¹⁰¹

In terms of financial accountability, the financing of the DNA's expenses is ensured from the state budget in article 4 of the Government Emergency Ordinance No. 43/2002, and the DNA's designated funds are mentioned separately within the budget of the Prosecutor's Office attached to the HCCJ. Finally, appointments of the DNA Chief Prosecutor, his deputies, and the chief prosecutors of the DNA sections are appointed by the President of Romania, based on a proposal by the Minister of Justice, with the assent of the Superior Council of the Magistracy, for a 3 year mandate renewable only once.¹⁰²

4.3.3 General Inspectorate of the Romanian Police

4.3.3.1 Directorate for Combating Organised Crime (DCCO)

SUMMARY POINTS:

- Jurisdiction limited to crimes that fall under the competence of the DIICOT – e.g., financial crimes that are connected to organised crime.
- Investigations performed under their capacity as judicial police.

GAPS/RECOMMENDATIONS:

- The DCCO officers are not trained in financial investigations.
- Investigations are limited to mandated tasks – there is very little room for proactive investigations.

The main objective of the DCCO is to perform preliminary acts and criminal procedures based on mandates from the Prosecutor's Office (specifically, the DIICOT) in cases in which investigations for money laundering and terrorist financing are carried out in the context of organised crime.¹⁰³

The DCCO contributes to the asset recovery process through acting as the enforcement arm of the DIICOT in the capacity of judicial police. While the DCCO conduct their work under the instructions of DIICOT, administratively they are a subsidiary of the General Inspectorate of the Romanian Police and consequently they receive their funding through this avenue from the MAI.

Similar to officers from the General Directorate of Investigating Frauds (DIF, see section 4.3.3.2 below), the ability of the DCCO officers to conduct innovative investigations is also limited. They are effectively under the full operational authority of the DIICOT, and thus, this office must authorise all aspects of their investigative activity.

Furthermore, similar to DIF officers, the DCCO officers are also not trained in complex financial investigations, and if an ongoing case requires a financial investigation, the prosecutors will instead seek the assistance of financial specialists and experts outside of the DCCO (e.g., the Financial Guard).

¹⁰¹ Government Emergency Ordinance No. 43/2002, Article 2

¹⁰² Public Ministry, Prosecutor's Office Presentation Guide, p13, available at http://www.mpublic.ro/versiunea_engleza/Presentation_public_ministry_Bookmark.pdf

¹⁰³ MONEYVAL Third Round Detailed Assessment Report on Romania 2008, p77

4.3.3.2 General Directorate of Investigating Frauds (DIF)

SUMMARY POINTS:

- Investigative jurisdiction limited to financial crimes in cases when the prosecutors are obliged by the Criminal Procedure Code to carry out investigations personally.
- Majority of investigative tasks are undertaken as judicial police under the mandate of the General Prosecutor's Office.

GAPS/RECOMMENDATIONS:

- DIF officers not trained in financial investigations
- Very limited investigative capability – officers act on a mandate from prosecutors.

The DIF undertakes investigations on proceeds obtained through economic fraud in financial crimes, including money laundering, mainly under the supervision of prosecutors from DIICOT, but it also carries out investigations in cases when the prosecutors are not obliged by the Criminal Procedure Code to carry out investigations personally. Thus, the DIF has the overall competence to conduct the pre-trial investigations relating to fraud, and specific legal provisions determine when the pre-trial investigation is to be conducted by the prosecutor.

The DIF, in fulfilling its mandate:¹⁰⁴

- Leads, co-ordinates, supports, guides and monitors the activity performed by the territorial structures in the field;
- Informs the management of the General Inspectorate of Romanian Police, the management of the MAI and other decisional factors within the Romanian Government regarding the tendencies and changes within the field of the financial-economic criminality or regarding the aspects resulted from the performed evaluations;
- Periodically analyses when necessary, the operative situation and proposes the adequate preventive and countering measures, including proposals for the modification or adoption of some laws in the field;
- Organises and co-ordinates countering and preventive actions, at regional and national level, on the issues in its competence;
- Participates in the training of students from the "Alexandru Ioan Cuza" Police Academy, specialised in countering financial-economic criminality and also other police officers included in different training programmes in the system of the educational institutions of the MAI;
- Co-operates with the specialised units and institutions in order to draft laws in its field;
- Performs legal assistance activities in criminal matters in requests for international judicial co-operation in the field of financial-economic criminality;
- Implements international programmes in the field of preventing and countering financial-economic criminality;
- Initiates co-operation protocols with the institutions with competences in the field of preventing and countering financial-economic criminality; and
- Draws up methodologies, conceptions and action plans in order to prevent and counter financial-economic criminality

The DIF is made up of roughly 1400 police officers nationwide, with 58 police officers located in the central office in Bucharest. Another 311 police officers are dedicated to conducting pre-trial investigations pertaining to fraud, although the latter work within the Bucharest General Police Directorate, at the local level. The work carried out by DIF is divided into lines of work, allowing its fraud investigations to be specialised on specific types of financial-economic crime, e.g., tax evasion, bank fraud, procurement, etc. The DIF is a subsidiary branch of the General Inspectorate of the Romanian Police, and receives its funding through this avenue from the MAI. However in practice, their investigatory function is performed as judicial police under instructions from the Prosecutor's Office, specifically in financial investigations that fall under the jurisdiction of the General Prosecutor's Office, rather than the DNA or the DIICOT.¹⁰⁵ Consequently, they contribute to the asset recovery process through predominantly serving as the enforcement arm of the General Prosecutor's Office.

Overall, their power to conduct innovative investigation is limited. Furthermore, the DIF officers are not trained in complex financial investigations, and if an ongoing case requires a financial investigation, the prosecutors will instead seek the assistance of financial specialists and experts outside of the DIF.

¹⁰⁴ Romania Police Website, Directorate of Fraud Investigations: http://www.politiaromana.ro/engleza/directia_de_investigare_a_fraudelor.htm

¹⁰⁵ The DIICOT and the DNA may, notwithstanding, request investigators from within the structure of DIF to assist in investigations that fall under their remit.

Moreover, the DIF officers are effectively unable to embark on an investigation without the prior authorisation of the Public Ministry. Even if the DIF receives a direct notification of a crime, they must always refer this information to a prosecutor, who will then decide whether or not to proceed with an investigation.

4.3.4 National Agency for Fiscal Administration (ANAF)

SUMMARY POINTS:

- The main body in charge of the enforcement of confiscation orders and selling of assets.
- ANAF may be *partie civile* in criminal cases. Courts may issue in these cases a compensation and also a confiscation order. ANAF thus represents the state when it suffers damages related to the commission of a criminal offence. In such cases, the court may order compensation besides confiscation.
- An evaluation (or an expert report, in certain cases) is required by regulation to determine the value of the assets which are to be realised by ANAF. It is unclear, however, what objective criteria is used in these cases in order to determine the value of the assets in the valuation process.

GAPS/RECOMMENDATIONS:

- Lack of checks and balances on the procedures undertaken by the ANAF in the disposal of assets
- Process requiring an expert report to value assets is unclear
- When the ANAF enters a criminal case as a *partie civile* to request the seizure of assets, they will not conduct a prior financial investigation of their own – consequently the court, under the principle of real truth, has to conduct the financial investigation and determine the assets in order to freeze them.
- Clarification and harmonisation on the applicability of rules pertaining to the application of statutes of limitation for the confiscation of proceeds of crime is required, as there is a potential misinterpretation of the Criminal Procedure Code vis-à-vis the Code of Fiscal Procedures.

The ANAF was created by Government Ordinance No. 86/2003 and is a specialised body of the central public administration.¹⁰⁶ Subordinated to the Ministry of Public Finances, it has its own legal personality and is primarily in charge of implementing tax administration policy.¹⁰⁷ It performs its activity in the field of budget income administration, by means of the procedures of management, collection, tax control and development of certain partnership relations with the taxpayers.¹⁰⁸ The overarching mission of the ANAF is to provide the resources required for the public expenditures of society by efficiently collecting and managing the taxes, charges, contributions and other amounts.¹⁰⁹

The primary role of ANAF in the asset recovery process is to realise the proceeds and instrumentalities of crime. While it is not responsible for the management of seized assets (as it is the responsibility of the authority which issued the seizing order), it will become so once the competent court issues a final confiscation order.

Furthermore, the ANAF may become *partie civile* in the trial stage of the criminal process in the event that the ANAF or the government is the victim of a crime (e.g., in a crime involving embezzlement of tax related money). In these cases, the court may also determine compensation to ANAF (on behalf of the National Treasury), besides an eventual confiscation order.

A point of contention refers to the fact that specific regulation determines that ANAF must make use of an expert in order to value the confiscated assets. It is unclear, however, why this expert opinion is needed, as a thorough financial investigation would be able to make the determination of the assets under investigation. Furthermore, the use of expert advice by the government will invariably be contested by the defence, who will in turn produce their own expert opinion, risking delaying the criminal process.

With regards to the selling of confiscated property, the ANAF shall apply the rules and fiscal procedures, as mentioned in Section 4.3.2 above, and also Government Ordinance No. 14/2007. There is currently some misinterpretation on the application of the Code of Fiscal Procedures for the realisation of confiscated property. This is because, while the special confiscation contained in art. 118 Criminal Code is a special measure, to which statutes of limitation cannot be applied (article 126(5) Criminal Code), the Code of Fiscal Procedures informs in article 91(3) that a statute of limitation would run in 10 years. Thus, in order to enhance the capacity of realisation of assets, there is a need to clarify the applicability and

¹⁰⁶ National Agency for Fiscal Administration website: <http://www.anaf.ro/public/wps/portal/ANAFEngleza>

¹⁰⁷ National Agency for Fiscal Administration website: <http://www.anaf.ro/public/wps/portal/ANAFEngleza>

¹⁰⁸ National Agency for Fiscal Administration website: <http://www.anaf.ro/public/wps/portal/ANAFEngleza>

¹⁰⁹ National Agency for Fiscal Administration website: <http://www.anaf.ro/public/wps/portal/ANAFEngleza>

interpretation of these rules among the different entities responsible for the asset recovery process in Romania and the ANAF, to ensure that these are in effect removed from the hands of criminals.

4.3.5 National Integrity Agency (ANI)

SUMMARY POINTS:

- It is the administrative body in charge of collecting, monitoring and verifying declarations of assets and interests in order to identify incompatibilities, conflicts of interests and illegally acquired assets.
- ANI implemented a risk matrix that led to the development of analysis performed on local administration area for the identification of conflicts of interests and incompatibilities.

GAPS/RECOMMENDATIONS:

- When the ANI initiates an investigation, they are obliged to notify the subject of the investigation, effectively tipping them off.
- The ANI does not communicate with prosecutors before starting an investigation.
- Revision of the wealth declaration form in order to ensure it provides accurate and worthwhile information to the ANI.
- Revision of the operating procedures of the ANI, so that it can analyse risks and trends and ensure a more effective revision of the wealth declaration forms.

The ANI is granted authority by Law No.144/2007, which establishes it as an autonomous administrative body, with legal authority, operating at a national level.¹¹⁰ The functions of the ANI are also outlined somewhat in Law No.176/2010, which specifies that the ANI's primary objective is to ensure the integrity in the exercise of public positions and to prevent institutional corruption.¹¹¹ The ANI does this by assessing the wealth statements of persons in the public positions outlined specifically in Article 1 of Law No.176/2010 (including, amongst other things, high ranking governmental and judicial staff) and other data and information regarding wealth and potential conflicts of interest.¹¹² In other words, the ANI is the administrative body in charge of collecting, monitoring and verifying declarations of assets and interest in order to identify incompatibilities, conflicts of interests and the significant difference – understood as the difference of more that EUR 10,000 (or its equivalent in RON) – between the changes occurred in the assets acquired during the exercise of public positions and the income obtained during the same period.¹¹³

Under Article 10 of Law No. 176/2010, the responsibilities of the ANI Integrity Inspectors are to:

- Receive, collect, collate and process data and information in regard to the existing wealth of persons exercising public positions, as well as incompatibilities and conflicts of interest;
- Assess wealth statements and declarations of interest;
- Evaluate the timely submission of wealth statements and declarations of interest of persons covered by this law;
- Evaluate significant differences between declared wealth and declared income during the same period;
- Assess conflicts of interest or incompatibilities of persons holding public office or dignity;
- Prepare assessment reports outlining findings; and
- Take actions and apply penalties provided by law.

In practice, the ANI's contribution to asset recovery is both limited and flawed. The ANI receives roughly 600,000 assets and interests declarations per annum, in hard copy, which are submitted (compulsorily by law) by numerous categories of public position holders. These hard copies must all be scanned and put on the ANI's website in the interests of transparency. The asset and interests declarations are scanned and processed through the Integrated Management Information System of Declaration of Assets and Interests (SIMIDAI)¹¹⁴, a task which is outsourced.¹¹⁵ The ANI does not analyse every asset declaration received.

¹¹⁰ Law No. 144/2007, Article 13(1)

¹¹¹ Law No. 176/2010, Article 8(1)

¹¹² Law No. 176/2010, Article 8(1)

¹¹³ Transparency International National Integrity Assessment Romania 2012, p 215

¹¹⁴ http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2012-August-27-29/Responses_NVs_2012/20120417_Romania_English.pdf

¹¹⁵ Report from the Commission to the European Parliament and the Council. Romania: Technical Report. European Commission Staff Working Document SWD(2012) 231 final, p. 19. Brussels, 18.7.2012. http://ec.europa.eu/cvm/docs/swd_2012_231_en.pdf

¹¹⁵ Report from the Commission to the European Parliament and the Council. Romania: Technical Report. European Commission Staff Working Document SWD(2012) 231 final, p. 19. Brussels, 18.7.2012. http://ec.europa.eu/cvm/docs/swd_2012_231_en.pdf

An investigation into the details of a particular declaration can only be triggered by a notification (which may come from a member of the public, the press, or another public source), or through a specific initiative of the ANI to check declaration statements of a certain category of people deemed to possess a high risk of corruption (for example local elected officials during an electoral year). ANI has furthermore instated in 2011 risk assessments to identify high-risk zones.¹¹⁶ This risk assessment has focused on local public administration and authorities responsible for the management of EU funds.¹¹⁷ While the risk assessment has been launched in response to the recommendations issued by the European Commission under the Co-operation and Verification Mechanism,¹¹⁸ it is unclear from the reports issued by the European Commission and the interviews had with ANI authorities whether the risk assessment is carried out periodically and is part of the processes within ANI to verify its assets and interests declarations. Moreover, the ANI will only analyse roughly 1% of the total declarations received each year, as informed during interviews.

If ANI decides to assess a particular declaration, and they discover a significant discrepancy (of EUR 10,000 or more), they are obliged by law to first invite the person subject to assessment to present a point of view.¹¹⁹ This effectively tips off the person that their assets will be subjected to a more scrupulous assessment. In providing an explanation, the person subject to assessment has the right to be accompanied by a lawyer, and the right to present any evidence they deem necessary to explain the discrepancy.¹²⁰

If the investigation proceeds, the ANI will seek information from other sources. Upon 'reasoned' request from the ANI, public authorities, private legal entities, and individuals must provide all information and data relevant to evaluations.¹²¹ Failure to respond to a request from the ANI is punishable by fine.¹²²

Once they have completed their investigation, the ANI will draft a report on their findings, and present this report to the interested parties. The ANI cannot issue resolutions on the basis of its report, but if it establishes a discrepancy that cannot be explained, then the ANI may forward the report to the criminal investigations authorities (such as the Prosecutor's Office), the ANAF, or the courts (more specifically the Wealth Investigation Committee attached to the Court of Appeals).¹²³ If there are court proceedings, both the ANI and the ANAF will join the proceeding as civil parties and will ask the courts to make a confiscation order for the difference.

In terms of accountability, the ANI is accountable to (but not a subordinate of) the National Integrity Council (NIC), and consequently, the ANI is accountable to the Senate through the NIC. The NIC is a representative body, under parliamentary authority exercised by the Senate.¹²⁴ Article 35 of Law No. 144/2007 outlines strict rules regarding the representation of the NIC, and members must be appointed from a wide range of bodies, including, amongst others, the Ministry of Justice, each of the different parliamentary groups, and the National Agency of Public Servants.

The NIC effectively supervises the ANI, and has the following responsibilities:

- To propose to the Senate the appointment and the removal from office of the ANI's president and vice-president;
- To ascertain the suspension from office of the ANI's president and vice-president;
- To approve the Regulations on the organization of the competition/ examination for the selection of the ANI's president and vice-president, as well as the topic areas and the structure of the board responsible for the organization of the competition, the drawing up of the subjects, the correction of tests and the settlement of appeals;
- To analyse the information and reports that are presented by the president of the ANI regarding its activity, each trimester;
- To elaborate recommendations referring to the strategy and the asset evaluation activity, conflicts of interest and incompatibilities of the ANI;

¹¹⁶ Report from the Commission to the European Parliament and the Council. Romania: Technical Report. European Commission Staff Working Document SWD(2012) 231 final, p. 21. Brussels, 18.7.2012. http://ec.europa.eu/cvm/docs/swd_2012_231_en.pdf

¹¹⁷ Report from the Commission to the European Parliament and the Council. Romania: Technical Report. European Commission Staff Working Document SWD(2012) 231 final, p. 21. Brussels, 18.7.2012. http://ec.europa.eu/cvm/docs/swd_2012_231_en.pdf

¹¹⁸ Report from the Commission to the European Parliament and the Council on the Progress in Romania under the Co-operation and Verification Mechanism. COM(2011) 460 final. Brussels, 20.7.2011.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0460:FIN:EN:PDF>

¹¹⁹ Law No. 176/2010, Article 14, 18

¹²⁰ Law No. 176/2010, Article 14

¹²¹ Law No. 176/2010, Article 15

¹²² Law No. 176/2010, Article 27(1)

¹²³ Law No. 144/2007, article 17(4), 18; For regulations regarding the Wealth Investigation Committee see Law No.115/1996 as amended.

¹²⁴ Law No. 144/2007, Article 34

- To analyse annual audit reports;
- To draft and provide the Senate, yearly and every other time where necessary, a report about the ANI's activity; and
- Any other prerogatives foreseen by the law.¹²⁵

With regards to budgetary issues, the ANI's President acts as the Chief Financial Officer, and draws up a draft budget with the approval of the Ministry of Finance, which is forwarded to government.¹²⁶ The current and capital expenses of the ANI are entirely financed by the state budget.¹²⁷

In terms of appointments, the Senate, on the basis of a competition organised by the NIC, appoints the President of ANI.¹²⁸

There are a few important points to note regarding the functioning of the ANI. In a recent report, Transparency International observed that actual submission of reports by the ANI to the NIC has not been efficient. Notwithstanding, the independent external audit of ANI concluded that there were no discrepancies between the practical activity of the President of ANI and its Internal Organisation Manual.¹²⁹

4.3.6 National Office for the Prevention and Control of Money Laundering (ONPCSB)

SUMMARY POINTS:

- Designated institution for receipt of STRs, CTRs and ETRs
- Performs supervisory duties over some financial institutions.

GAPS/RECOMMENDATIONS:

- Still receives some STRs in hard copy format
- The procedures and mechanisms stemming from the provisions contained in Law No. 656/2002 regarding feedback to the FIU and training need to be reviewed with a view to strengthening the feedback and follow-up mechanisms.

The ONPCSB is the Romanian FIU. It was set up as an independent administrative body, and it receives most of its authority from Law No. 656/2002. It was created to assist in the prevention and combatting of money laundering and terrorism financing, and is the designated institution for the receipt and analysis of financial information pertaining to possible offences (such as suspicious transaction reports – STRs).¹³⁰ It also carries out a supervisory role over non-financial reporting entities (auditors, accountants etc.) as well as over the implementation of international sanctions.¹³¹

The ONPCSB contributes to asset recovery predominantly in the pre-investigative stage. It receives three types of reports from reporting entities, namely:

- Suspicious transaction reports (STRs)
- Reports on cash transactions over EUR 15,000, or the equivalent in RON (CTRs)
- Reports for external transfers to and from Romania accounts that exceed EUR 15,000, or the equivalent in RON (ETRs).

When the ONPCSB receives a STR, either electronically or in hard copy form, it conducts a preliminary analysis and prioritises the report according to a mathematically based analysis¹³². This analysis incorporates several different factors (such as position, countries involved, amount involved) and awards each report a high or low risk score. If the report receives a low-risk score, it is put on hold until further information is received. However, if the report receives a high-risk score, it is further analysed, and a report is compiled. This report is handed to the members of the ONPCSB board, who vote for the modality of finalising the case, which are:

¹²⁵ Law No. 144/2007, Article 38

¹²⁶ Law No. 144/2007, Article 16

¹²⁷ Law No. 144/2007, Article 16

¹²⁸ Law No. 144/2007, Article 15

¹²⁹ External Audit of the National Integrity Agency management for the year 2010. Final Report, p.11. Bucharest, March 2011.

http://integritate.eu/UserFiles/File/Audit/2011-03-31_FinalReport_ExternalAuditOfTheANIManagement_2010_EN.PDF

¹³⁰ Government of Romania: Organisation and Functioning of the National Office for the Prevention and Control of Money Laundering, p.3

¹³¹ Government of Romania: Organisation and Functioning of the National Office for the Prevention and Control of Money Laundering, p.1

¹³² The ONPCSB uses a mathematical equation to determine the need for an analysis of a STR, CTR or ETR. This, however, does not mean that it has a risk matrix which enables it to conduct a risk-based assessment of the said reports.

- To send it to the PICCJ, in cases where there are solid grounds of money laundering and/or terrorism financing,
- To send it also to the Romanian Intelligence Service, in cases where there are solid grounds of terrorism financing,
- To send it to a Romanian competent authority, where there in case other offence except money laundering or terrorism financing is identified;
- To put it in as passive information where there are no solid grounds identified.

In cases where the ONPCSB receives a STR with an incomplete or not-performed transaction, the Board votes on whether or not to order the bank to suspend the transaction. Simple majority determines the outcome of the vote and if necessary, the bank is ordered to suspend the transaction. The ONPCSB must complete all of these actions within 24 hours upon receipt of the report, and the suspension of the transaction is valid for 48 hours.

Following this, a hard copy of the report is compiled and sent to the Public Ministry. This report consists of three chapters which outlines (i) how the ONPCSB was notified of the suspicious transaction, (ii) all the raw data used for analysis in the report, and (iii) the conclusions of the analyst from his or her examination of the raw data (as approved by the Board). The analyst remains anonymous, as does the person who notified the ONPCSB.

The report is considered an intelligence report, and cannot be considered as evidence. Upon receipt of the report, the Public Ministry must determine whether or not to proceed with a formal investigation. If they do, the Prosecutor will sometimes request further information from the ONPCSB. However, this is done through formal channels, and the Public Ministry will never make contact with the analyst working on the case.

In 2011, the ONPCSB submitted a total of 207 files to the Prosecutors Office with solid grounds of money laundering, of which 6 were suspected of relating to terrorist financing.¹³³ However the vast majority of suspicious transaction reports were received after a transaction has taken place (10 of 4116) and the ONPCSB gave orders to suspend transactions on only 4 occasions.¹³⁴ The ONPCSB was required to give further information to the Prosecutors Office regarding 257 on going cases during 2011, and furthermore, they submitted 199 requests for information abroad from foreign FIUs, and processed 200 incoming requests from similar institutions.¹³⁵

The ONPCSB manages the national databases on STRs, CTRs and ETRs, and also has access to most national information databases such as the trade register, bank account database, and public citizens register.

In terms of accountability, according to article 26 para 1 of the AML Law, the ONPCSB is a specialised body with legal personality, and is subordinated to the government. The ONPCSB is run predominantly by a seven-member board, among which one is designated as President, the latter appointed by the government from the Board.¹³⁶ To secure the independency of the ONPCSB and to prevent any undue influence, the board is made up of one representative from the Ministry of Finance, the MJ, the MI, the PICCJ, the National Bank of Romania, the Court of Accounts and the Romanian Banks Association.¹³⁷ Each member is appointed for a five-year period, by government decision in consideration of a proposal of the represented institution.¹³⁸

To further guarantee its independence, the ONPCSB has its own budget, sourced directly from the government budget, and makes annual reports on its activities published in the Official Gazette. The President of the ONPCSB is the main credit ordinator in respect to the budgetary exercise of the institution.

¹³³ Government of Romania: Organisation and Functioning of the National Office for the Prevention and Control of Money Laundering, p.3

¹³⁴ Government of Romania: Organisation and Functioning of the National Office for the Prevention and Control of Money Laundering, p.4

¹³⁵ Government of Romania: Organisation and Functioning of the National Office for the Prevention and Control of Money Laundering, p.4

¹³⁶ Government of Romania: Organisation and Functioning of the National Office for the Prevention and Control of Money Laundering, p.1

¹³⁷ Government of Romania: Organisation and Functioning of the National Office for the Prevention and Control of Money Laundering, p.2

¹³⁸ Government of Romania: Organisation and Functioning of the National Office for the Prevention and Control of Money Laundering, p.2

5. Conclusions and Recommendations

After conducting onsite interviews with personnel from each of the identified key institutions, it was possible to identify several fundamental deficiencies in Romania's asset recovery framework. The core deficiencies are outlined below. These were further validated through two separate workshops with representatives from the relevant agencies.

Insufficient mechanisms for the co-ordination, co-operation, communication and sharing of information

There is a general lack of effective and productive interaction amongst the key asset recovery institutions. Each institution tends to operate as a stand-alone unit, and does not undertake strategies of communication, co-operation and information sharing with other institutions. Each institution strictly observes their outlined duties, and does not proactively seek to aid the function of other institutions. Through the lack of effective inter-institutional interaction, the efficiency of the asset recovery process as a whole is severely limited, both at a strategic and an operational level.

The asset recovery process requires a multi-agency approach in Romania, given the numerous agencies responsible for collecting intelligence and information, investigation, seizure of the proceeds and instrumentalities of crime, as well as the prosecution, adjudication and subsequent recovery of those proceeds and instrumentalities. For this reason, it is imperative that there be an effective system for communication and sharing of information between the numerous institutions.

At the operational level, the institutions involved need to produce reliable statistics which can be matched at the system-wide level, in order to efficiently trace the efforts being conducted by these agencies at the intelligence, pre-trial investigation, prosecution and adjudication levels. It has been perceived as deficient refers to the lack of centralised data which would enable to check for the efficiency of the asset recovery process in Romania. Furthermore, it is necessary to be able to locate the assets which have been seized, confiscated and realised at any given step of the asset recovery process.

Moreover, there is a need for the institutions to inform each other of the quality of the information which is being shared amongst themselves. To this end, it is necessary for them to create mechanisms that will allow the recipient institution(s) to provide feedback on the actions taken with the information received from the institution(s) that have provided the information, as this will allow them to inform on the quality of the information received, as well as to provide purpose for the production of information by the institution(s) providing information. On the other hand, it is equally important that the institution(s) providing the information follow-up on the actions taken by the recipient institution(s), so that they can analyse and review their internal processes and protocols with a view to increasing the overall effectiveness of the transmission of the information.

The sharing of information also requires effective co-ordination of actions between the numerous institutions that comprise the asset recovery system of Romania. As such, prior to any action being taken, specific objective criteria should be laid out between these institutions to ensure that standard operational procedures are set up with a view to enabling the determination of the best course of action being taken. Reference in this regard is made to the National Strategy for Prevention and Control of Money Laundering and of Terrorism Financing, adopted in 2010.

There is consequently a need to ensure, at the strategic and policy levels, a more efficient co-ordination, co-operation and communication between the relevant agencies that comprise the asset recovery system of Romania. The establishment of a system-wide asset recovery policy, with the active involvement of all the relevant stakeholders will allow the identification of challenges at both the intra- and inter-institutional levels, enabling these stakeholders to prioritise the actions which need to be taken. This system-wide asset recovery policy is to be periodically assessed and reviewed by the relevant stakeholders.

At the operational level, the institutions which comprise the asset recovery process can create a multi-agency task team which would ensure better communication for the determination of actions for specific cases. The criteria for the determination of these cases would be done through objective criteria (e.g., above a certain monetary threshold or in relation to specific crimes), which would trigger the need for several institutions sitting down together to determine the best course of action to be taken to ensure the recovery of assets in the shortest time span. In short, the Romanian authorities should establish guidelines for the asset recovery process in the country, including the steps that need to be taken and the institutions that should be involved from the outset.

Insufficient recording of key statistics

Institutions generally fail to keep a record of critical statistical data related to asset recovery. Furthermore, those institutions that do record some data fail to record several specific categories of statistics that would be necessary to

acquire a comprehensive view of the effectiveness of their particular function. Accurate statistics are fundamental for the effective prioritisation of actions to be undertaken at an operational level, and for the prevention of financial crime in general.

Consequently, due to the lack of statistics, it is impossible to follow a particular asset as it passes through the asset recovery process. Furthermore, it is extremely difficult to identify trends and patterns in both the individual stages of the process, or relating to the process as a whole. As a consequence, it becomes more difficult to identify priorities which require additional attention from the institutions that are part of the asset recovery process in Romania.

Insufficient knowledge of financial investigation techniques

Staff of key asset recovery institutions is generally not aware of financial investigation issues and methods, and are not trained to conduct their own investigations.¹³⁹ They generally lack understanding in critical theories of financial investigations, in particular the importance of financial profiling of perpetrators and their accomplices, and are thus unable to ascertain a complete picture of the nature and extent of the illegal assets that may be held in a particular case.

While prosecutors will mandate the judicial police to conduct an investigation into a crime (through either a specific or general mandate), the judicial police are only able to search for and acquire basic financial information (such as bank account numbers and transaction records) or hard evidence (such as business documents from a company office). However, the judicial police do not have at this time a dedicated team devoted to conducting financial investigations in parallel to the criminal investigations. Such financial investigations would enable to carry out an analysis of the sources of income of the alleged perpetrators, determining their unlawful wealth and the persons associated to the perpetrators in the commission of criminal offences. At present, however, the judicial police do not have the capacity to conduct a thorough financial analysis of the acquired information, and therefore cannot reach conclusions about the legality of particular assets or connect them with the alleged perpetrator and facts of the crime.

Notwithstanding the above, while the judicial police, subordinated to the MAI, do not have the capacities to conduct a fully-fledged financial investigation, such capacities can be found with the Financial Guard, subordinated to the Ministry of Public Finance. The Financial Guard is responsible for the enforcement of tax laws, and the prevention and the investigation of tax evasion and tax-related fraud. During the on-site mission and the validation workshops, it was informed that the judicial police would rely on the expertise in the area of financial investigations provided by the Financial Guard. It should be underscored that it was not possible to interview with the Financial Guard during in preparation for this final report.

However, due to the limited scope of action and competency of the Financial Guard, it cannot undertake a financial investigation for all of the financial crimes (e.g., embezzlement and other corruption-related offences, as well as money laundering whose predicate offence is not tax-related offences). For this reason, there is a need to bridge the gap in financial investigations by providing the judicial police with the capacities to conduct such investigations. Moreover, making use of the Financial Guard for the financial investigation in connection to a criminal investigation requires an additional co-ordination element among the Ministries of Administration and the Interior and of Public Finance and the General Prosecutor's Office.

Thus, targeted training, as well as continuation of training which has already been given, of police officers to conduct financial investigations is necessary at the short-term, in order to allow the Romanian government to better respond to financial crimes (e.g., money laundering, tax fraud, corruption, embezzlement, etc.). In the medium- to long-term, however, there is a need to review the current format of the criminal process in Romania and the activities carried out by the Romanian Police. A dedicated team of financial investigators, specialised in forensic auditing, financial investigations, etc. should be housed in the authorities responsible for conducting investigations, such as the judicial police and the Public Ministry. These would in turn join the criminal investigators in financial crimes and would assist these while they conduct the criminal investigation.

Another element pertinent to the financial investigations is maximising the use of the provisions of article 118 Criminal Code. During the on-site mission, it was identified that some prosecutors seize all of the assets belonging to the alleged criminal, be they of lawful or of unlawful origin. This is done so due to the fact that a financial investigation is not conducted thoroughly and it is not possible to determine during the seizure phase which assets are unlawful and which are

¹³⁹ The ONPCSB informed that in the context of the financial intelligence gathering phase the Romanian FIU has issued guidelines on anti-money laundering and counter terrorist financing and made available to the reporting entities. These guidelines have been published and largely disseminated by the Romanian FIU.

lawful. Nevertheless, an appropriate balance between the rights of the victims, the protection of human and constitutional rights, as well as the need to deprive criminals from their unlawful assets should be sought.

As a consequence, the seizure of the assets focuses on the assets which are in the name of the alleged criminal, and does not generally include the seizure of assets in the name of an associate, third party or co-conspirator. Another consequence is the fact that there is a general focus on the perpetrator and determining the damage that the criminal action has caused, rather than focusing on the unlawful assets obtained in connection to the criminal activity, which may consequently generate damage.

Mechanism for the management of seized assets is inadequate and largely unclear

Responsibilities surrounding the management of seized assets are largely undefined. Authorities were generally unsure as to which institution would manage seized assets in certain stages of the asset recovery process. As a general rule, the authority determining the seizure of the assets (whether the GPO at the pre-trial investigation or the court during the trial phase) is responsible for the management of the assets. This means that, in general terms, the prosecutor issuing the seizure order of an asset will transfer said asset for deposit by the judicial police, or the judge will transfer the responsibility of management to ANAF.

It should be noted notwithstanding that Romanian legislation does allow, in certain circumstances contained in article 165 Criminal Procedure Code, the anticipated sale of seized assets (e.g., perishable items), or specialised institutions that are responsible for the management of specific items (e.g., precious metals or stones, etc.).

The direct consequence is that there is no unified database which can indicate the total of assets which are currently seized in the country, under the authority of which court or prosecutor the assets have been seized, and to which criminal investigation or proceedings these assets refer to. It becomes, for this reason, cumbersome to identify seized assets throughout the whole chain of custody it will have from seizure to confiscation and realisation. Another direct consequence is that the assets which have been seized, as they are generally kept in storage, will depreciate in value and may not be realised at a maximum value.

Romania thus needs a policy on the management of seized assets. This is so as to ensure that these assets do not excessively depreciate over time, and can be returned in good condition to the alleged criminal, if acquitted, or sold at a maximum value, in case of confiscation of the assets. It should be noted, however, that not all assets should be seized, due to the intricacies and the costs incurred during the management of the assets.

Appropriate procedures and guidelines should be established with regards to which assets should be seized by the competent authorities. Furthermore, a policy on the management of assets should be created, with a view to: (i) centralise the information regarding the assets seized, their value, the responsible authority which has order the seizure of the assets and the criminal proceedings to which the seized assets are attached to; (ii) establishing guidelines for the management of seized assets, determining under which conditions the assets should be stored and under which the assets will require a court-appointed receiver, etc.; and (iii) if applicable, establishing an authority responsible for the management of the assets within government.

With regards to the points above, the ARO, the ANAF, the Romanian Police and the GPO should discuss amongst themselves the management of seized assets and discuss the applicable legislation (e.g., the application of the Criminal Procedure Code *versus* the Code of Fiscal Procedures and the Code of Civil Procedures) and responsibilities in order to determine the most efficient method for the management of seized assets with a view to maximising their value during realisation of the property.

The management of seized assets should also keep in sight the actual realisation or return of the seized property. In this regard, the realisation of property has been identified in this report as an issue in the asset recovery process in Romania. Once the courts have reached a final judgement, the order is to be executed by ANAF. This means that ANAF must reach out to the authority responsible for the management in order to take the property to assess its value and prepare it for sale. This becomes a cumbersome endeavour because ANAF must identify the authority which is responsible for the asset which has been seized and must realise the property.

With regards to item (ii), an assessment should be carried out by the seizing authority with regards to the expected costs of management and the expected final value of the seized assets. A cost-benefit approach to the seized assets should be taken into consideration, so as to avoid stressing resources (financial and human) which could otherwise be used for other purposes within the asset recovery process. This assessment, in turn, should be turned into guidelines to be taken into consideration and used by the seizing authorities in order to make an informed decision prior to issuing the seizure orders.

Finally, with regards to item (iii), Romania should consider establishing an authority responsible for the management of seized assets. In order to do so, several steps should be taken:

- i. The creation of a database identifying all the assets seized in connection to the commission of a criminal offence. This database should include enough information in order to identify the asset, the seizing authority, the proceedings in which the seizure order has been issued, and the underlying criminal offence which gave rise to the issuance of the seizure order. The creation of such a database not only would facilitate the overview of the assets currently seized in Romania, but would also enhance transparency in the seizure process and accountability of the seizing authority, avoid dissipation of the seized assets throughout the criminal process, and allow for the production of reliable statistics to verify the efficiency of the asset recovery process in Romania.
- ii. The establishment of the previously mentioned guidelines for seizing assets. This approach would seek to enhance knowledge of the steps needed to be taken to more effectively seize assets and the costs attached to it, as well as the verification of all available methods (e.g., deposit, receivership or anticipated sale of the seized assets) for the actual management of seized assets.
- iii. Revision of the legislation and regulation pertaining to the seizure of assets, taking into consideration a balance between the right to property of the defendant, the costs of management of seized assets, and the establishment of a managing authority, where appropriate.
- iv. The establishment of a managing authority within an existing body (e.g., the Ministry of Justice, through ARO, or ANAF) or the establishment of a new agency for the management of seized assets. Prior to the actual establishment of the managing authority, a thorough revision of the steps that need to be taken prior the management authority and after it, as well as whether the managing authority will be given powers to enforce the seizure orders or, rather, be responsible for the management of the assets without, however, having powers to enforce the seizure orders.

A revision of the practices regarding the realisation of property is also necessary. Currently, the responsibility is of ANAF. However, it is unclear which legislation should be used for the realisation of the property, as well as there are applicable statutes of limitation. This revision does not necessarily entail the enactment of new legislation or the revision of existing legislation, but rather the identification of gaps and priorities, as well as the standardisation of practices across all actors responsible for the confiscation and realisation of property. This is to ensure that the property, which has been managed in order to ensure the maximum value for sale, is in fact sold quickly to lessen the burden caused by the extended management of such assets.

Finally, the Romanian authorities should consider attaching the asset manager at the beginning of the case. The asset manager will be able to better support the financial and criminal investigation team to make the determination of which assets should in fact be seized taking into consideration the cost/benefit of such an action.

Incomplete or lacking databases

An important component of the asset recovery process, as mentioned above, is the ability to gather information and analyse it to establish trends in order to effectively prevent and combat financial crime. As such, the Romanian ARO, as well as the ONPCSB has access to numerous databases (see section 4.3.1.2 above), which they can access and provide information from to both national and international authorities. Having and maintaining relevant databases, as well as having access to them, is thus a key component of the asset recovery process.

In Romania, however, there are numerous databases that are still in paper format, or that are largely incomplete. As an example, the property database is largely incomplete due to the differing property systems within each of the regions in Romania. A common system has been established for the different regions of the country, and efforts have been made to update all the properties to this common system, while putting them in an electronic database.

However, some challenges remain. Interviewees informed that currently the database still exists in hard copy format in its majority, having only about 30% of the records in electronic form. Moreover, due to the previous regime in Romania, there is a significant amount of real property which has not been properly registered, or which have not had their ownership status verified. This lack of digitalisation of the property database, as well as the large volume of property which has not been yet verified reduces the effectiveness of this database in an asset recovery context. The prevention of financial crime is also hindered due to the fact that fake title may be created, as the verification would take considerable time in the current scenario in Romania. The result is a morose and bureaucratic process to gather real property information, which may take up to two months, and whose information may not be accurate.

Romania should seek to address this situation by first determining which databases are needed for the asset recovery process (most of which the ARO already has access to), and their current status and reliability. Upon this assessment, a prioritisation list of which databases should be reviewed should be established.

At the short-term, the solution whereby local authorities may directly request information to the ARO for information from these databases is efficient as the ARO itself becomes a one-stop shop for local authorities to gather such information, rather than having to request to each individual institution responsible for the databases available. However, at the medium- to long-term, Romania should review its information management policies, as well as the clearance levels of each institutions and the individuals within them. This is so that these databases become available at different levels, where appropriate or required, to all those involved in the asset recovery process. This is needed so as to reduce the burden of the ARO, which has limited resources and does not provide an analytical overview of the information produced, and to make the overall system more efficient.

Mechanisms for Mutual Legal Assistance (MLA) are largely unclear

As mentioned in Section 5.2 above, Romania has two separate central authorities for MLA, being one in the PICCJ and the other in the MJ. This shared competence is made concerning the legal basis of the request, thus determining which central authority is responsible for incoming and outgoing requests for MLA.

While it was not possible to interview both central authorities (only the central authority within the MJ was interviewed), there is currently little experience in the use of MLA for the purposes of seizure and confiscation of assets. While there are procedures in place in Romanian legislation for the seizure and confiscation of assets under Law No. 302/2004 and the Criminal Procedure Code, establishing procedures and mechanisms to ensure the proper co-ordination of national legislations for incoming and outgoing requests for MLA of such nature appears unclear to analysts within the central authority in the MJ, in particular what the Romanian requirements needed to be fulfilled in order to execute a request to seize assets in Romania.

Appropriate training, including specialised training on asset recovery and continuous education and refresher courses on MLA, should be given to staff within both central authorities with regards to the international requirements for collecting evidence and seizing assets, with a view to confiscating and repatriating them. Moreover, appropriate training should be conducted in order to better understand the national requirements, in Romania, for seizing and confiscating proceeds and instrumentalities of crime, so that the analysts working at the central authority are able to give precise indications to foreign authorities on what is needed.

Notwithstanding the above, a communication mechanism should be better established between both central authorities. This is for the purposes of expediting requests (as many of the requests for MLA received by the MJ will be transmitted to the GPO for execution), but also to ensure that, while a request may have been sent to the wrong central authority by the foreign jurisdiction, the Romanian authorities can expeditiously correct this.

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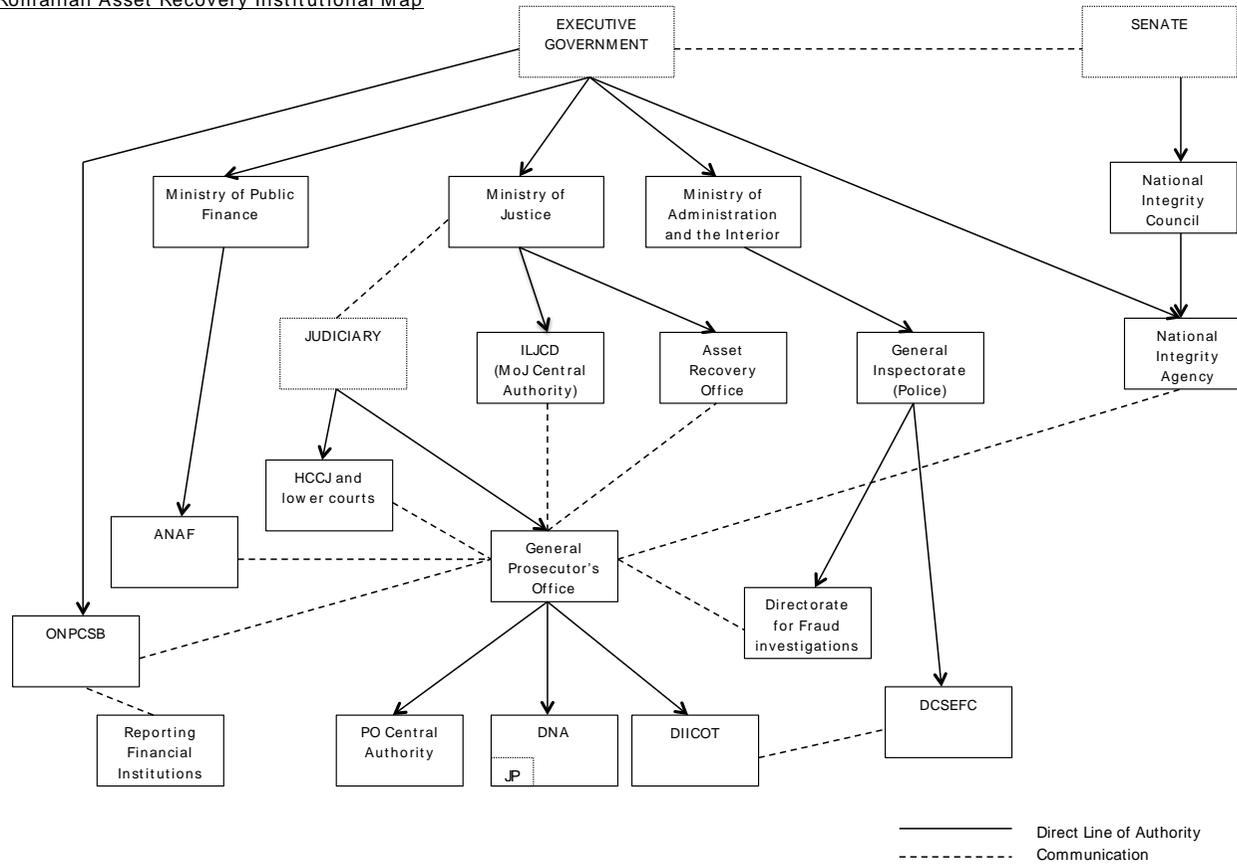
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Annex I – Romanian asset recovery institutional map

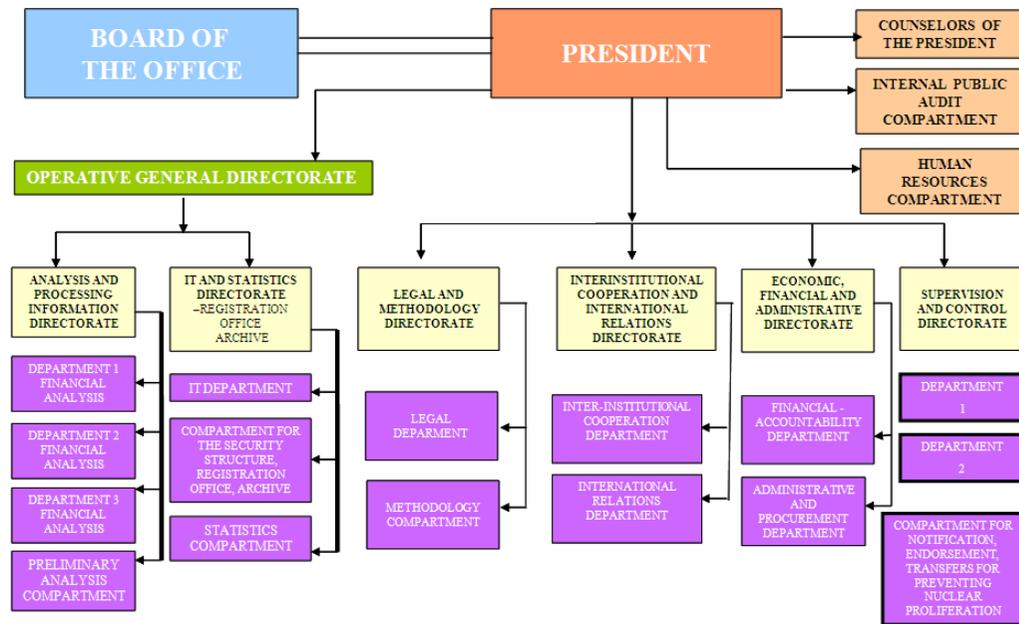
Romanian Asset Recovery Institutional Map



Annex II – Organisational charts

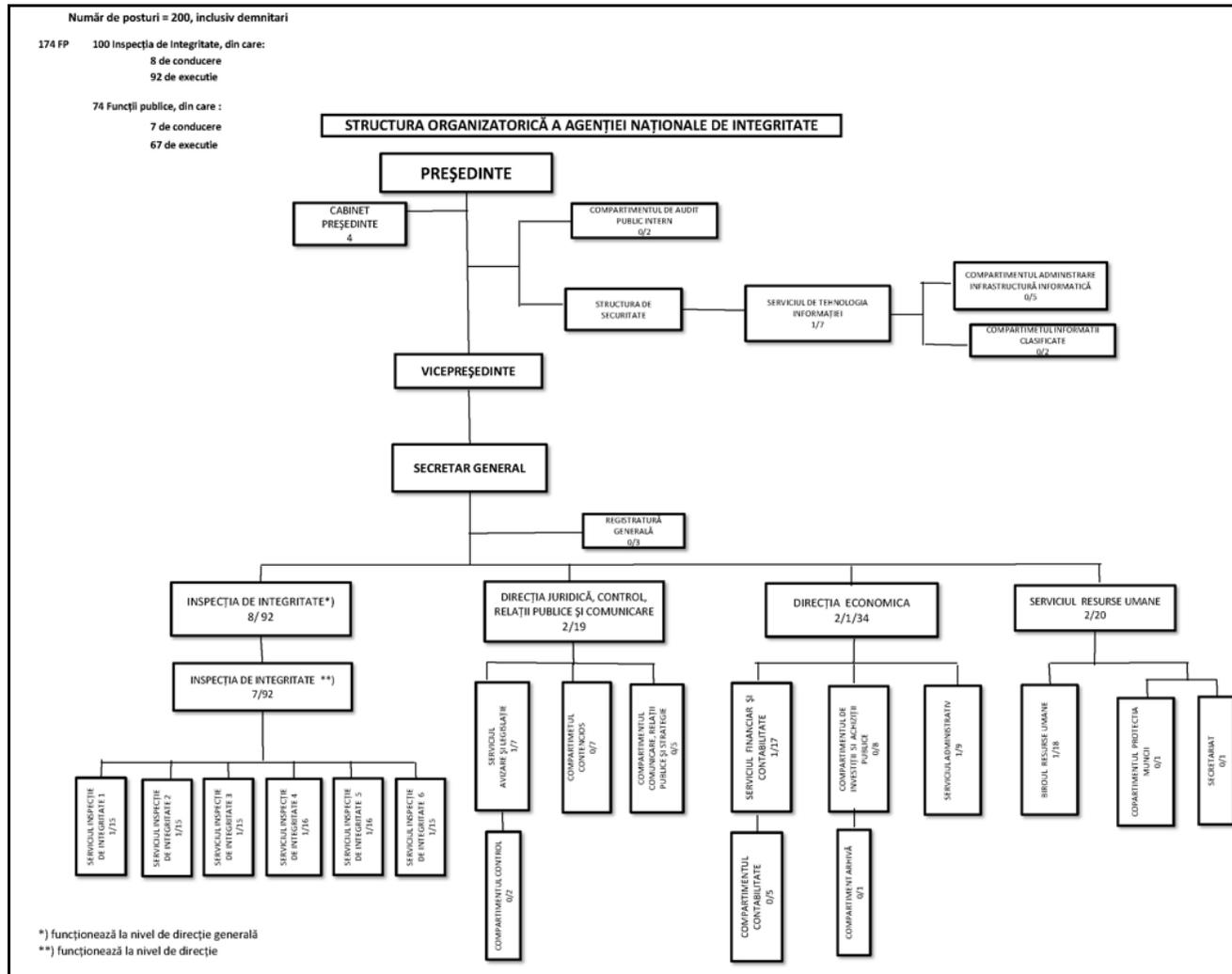
i. The National Office for Prevention and Control of Money Laundering (ONPCSB)

ORGANISATIONAL CHART



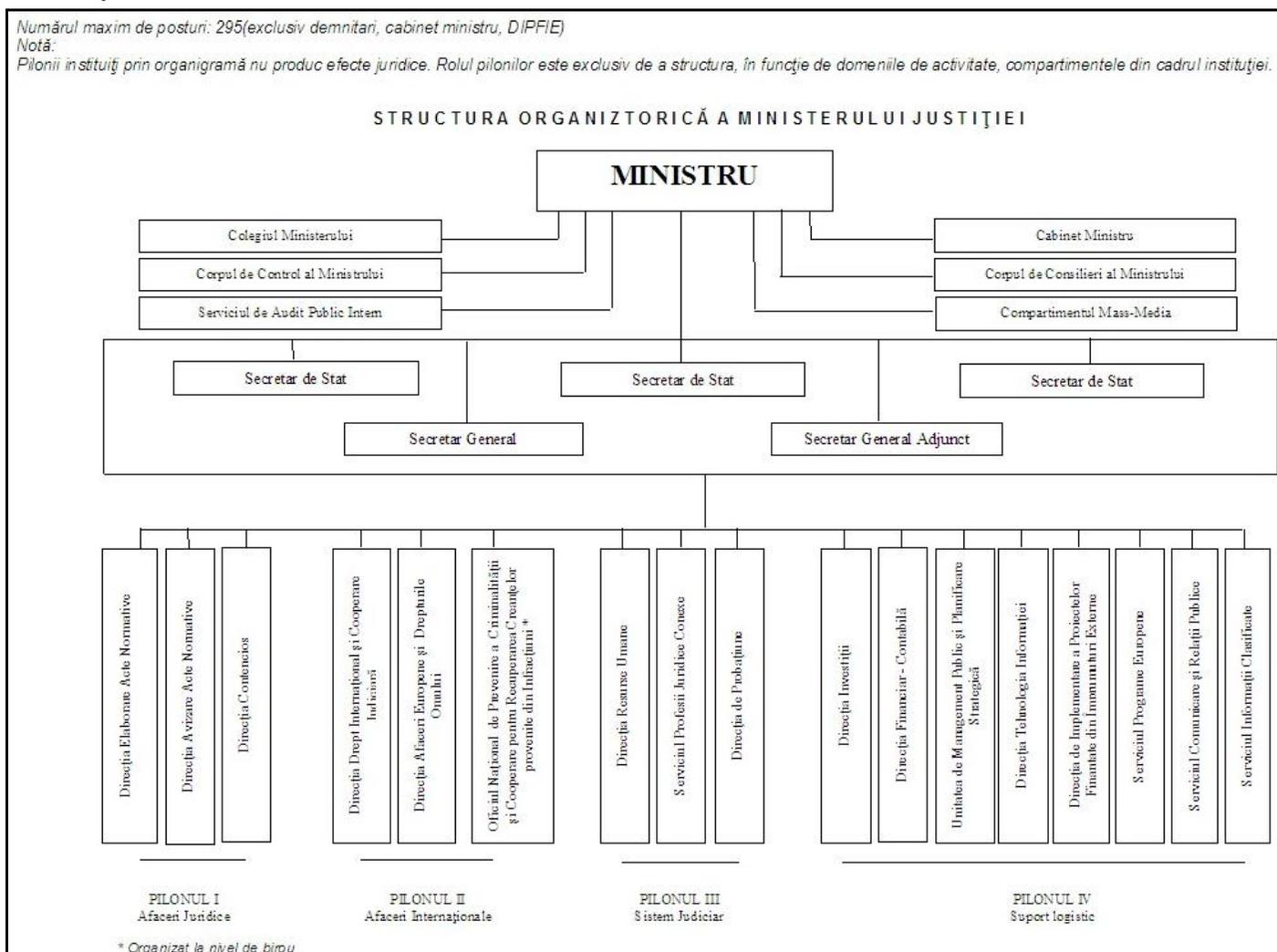
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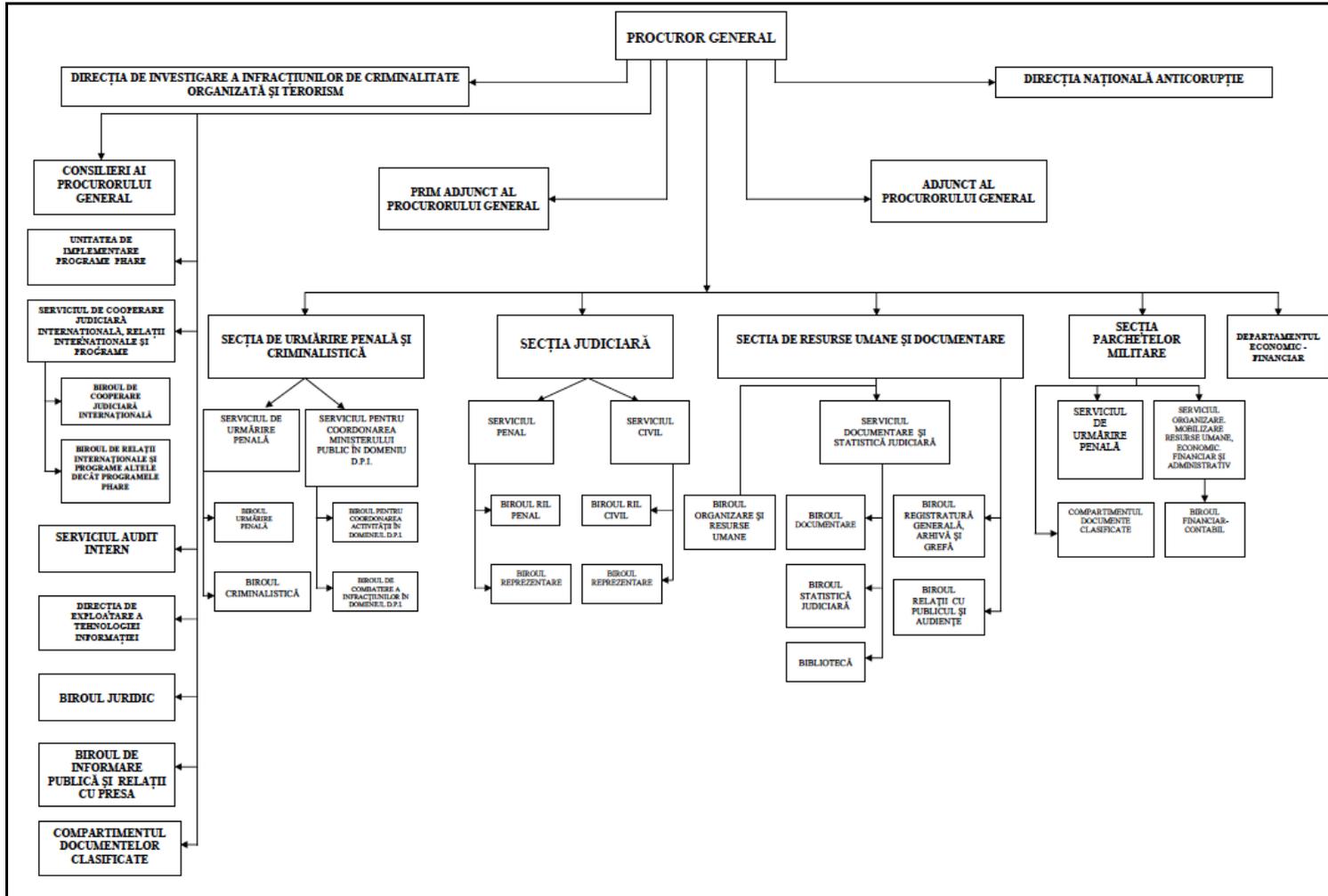
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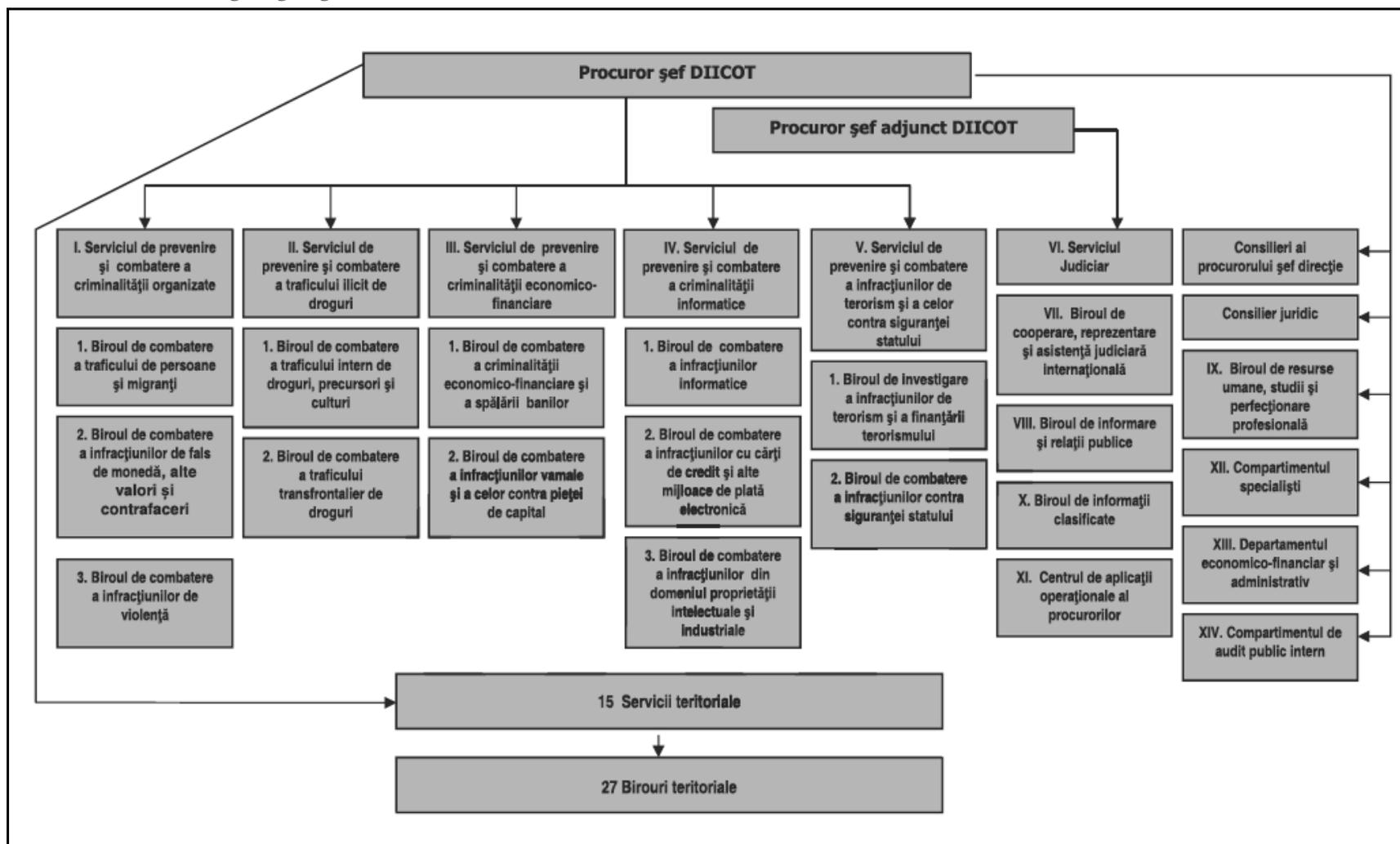
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