Implementing the OECD Anti-Bribery Convention in Romania

Phase 1 report

OECD

This Phase 1 Report on Romania by the OECD Working Group on Bribery evaluates Romania's legislative framework for implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related provisions of the 2021 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the OECD Working Group on Bribery on 12 October 2023.

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A. Procedural Background

1. Working Group on Bribery Membership and OECD Accession Process

1. In January 2022, the OECD Council decided to open discussions with Romania on accession to the OECD. Pursuant to the Roadmap for the OECD Accession Process of Romania, adopted in June 2022 by the OECD Council at Ministerial Level, Romania began participating, on the basis of its status as an accession candidate country, in the meetings of OECD substantive committees and their subsidiary bodies, including the OECD Working Group on Bribery in International Business Transactions (Working Group).

2. On 6 October 2022, the Minister of Justice of Romania submitted a letter to the OECD Secretary-General containing a request to become a Party to the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) and a member of the Working Group. After conducting a preliminary assessment at its December 2022 plenary and a full assessment at its March 2023 plenary, the Working Group decided to propose that the OECD Council invite Romania to become a Working Group member and to ratify the OECD Anti-Bribery Convention as soon as possible. On 17 April, the Council agreed to invite Romania to join the Working Group and to ratify the Convention. Romania became an Associate member of the Working Group on 3 May 2023.

2. Status of the Convention in the Romanian Legal System

3. Under the Romanian Constitution and Law no. 590/2003 on treaties, once an international treaty is concluded, the Parliament generally must ratify it through a legislative act, which would then need to be promulgated into law by the President of Romania. Once the relevant law is promulgated, the Ministry of Foreign Affairs would prepare the instrument of accession, which would be signed by the President of Romania and countersigned by the Minister of Foreign Affairs. Under the Romanian Constitution, once a treaty is ratified it is considered part of domestic law.[1] The law ratifying the OECD Anti-Bribery Convention was adopted on 19 June 2023 and promulgated on 5 July 2023. The instrument of accession was deposited with the OECD Secretary-General on 24 July 2023, and the OECD Anti-Bribery Convention accordingly entered into force for Romania on 22 September 2023 pursuant to Article 13 of the Convention.

3. Phase 1 Evaluation Process and Next Steps

4. The present report has been prepared for the purpose of the Phase 1 evaluation of Romania. At this stage, the Working Group is assessing whether Romania's legislative framework implements the terms of the OECD Anti-Bribery Convention based on responses that the Romanian authorities provided to the Phase 1 questionnaire, and in comments to the draft report. In contrast to subsequent monitoring phases, where the Working Group assesses the evaluated country's legislative framework and its implementation in practice, the Phase 1 evaluation process does not include consultations with other stakeholders during an on-site visit. The Phase 1 evaluation team was composed of lead examiners from Israel and the Netherlands, as well as members of the OECD Anti-Corruption Division.[2] The evaluation team expresses

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1 Constitution of Romania, Article 11(2).

2 **Israel** was represented by Ms. Souria Bishara, Division of Criminal Law and Serious Crime, Office of Legal Counsel and Legislative Affairs, Ministry of Justice, and Ms. Moran Bartfeld, Senior Deputy, Tel Aviv District Attorney's Office, Ministry of Justice, while the **Netherlands** was represented by Ms. Martine J. Dontje, Public Prosecutor, Functioneel Parket, National coordinating anti-corruption prosecutor, Netherlands Public Prosecution Service for Serious Fraud and Environmental Crime and Ms. Desirée T.T.M. van der Hoorn RA, Project Manager, Anti-Corruption Centre (ACC), Fiscal Intelligence and Investigations Service, Tax and Customs Administration. The **OECD Anti-Corruption Division** was represented by Mr. Brooks Hickman,

its appreciation to the Romanian authorities, in particular the Ministry of Justice (MOJ) and the National Anti-corruption Directorate (DNA), for their responses to the questionnaire as well as in their helpful clarifications on Romanian legislation and jurisprudence during the finalisation of this report.

5. After the Working Group completes its Phase 2 evaluation of Romania, Romania will be further assessed for the purposes of OECD accession by the OECD Members of the Working Group in accordance with the procedures that they have established.

B. Implementation of the OECD Anti-Bribery Convention

1. Article 1: The Offence of Bribery of Foreign Public Officials

a. Romania's foreign bribery offence

6. The OECD Anti-Bribery Convention requires member states to criminalise foreign bribery in line with the elements of the offence as defined by Article 1 of the Convention and Annex 1 of the 2021 OECD Anti-Bribery Recommendation. The Romanian Criminal Code (CC) establishes its foreign bribery offence by extending the offence for bribing a domestic public official. That offence is in turn defined in relation to the demand-side offence committed by the domestic official who solicits or accepts a bribe.[3]

7. The demand-side domestic bribery offence reads as follows:

Article 289. Taking a bribe

(1) The act of the public official who, directly or indirectly, for themselves or for another person, solicits or receives money or other undue benefits or accepts a promise of such benefits, in connection with the performance, non-performance, speeding up or delaying of the performance of an act which falls within the duties of the office, or in connection with the performance of an act contrary to the duties of the office, is punished by 3 to 10 years of imprisonment and the deprivation of the right to hold a public office or to exercise the profession or the activity in the execution of which the offence was committed.

(2) The act provided under para. (1), committed by one of the persons provided under article 175 para. (2), shall constitute a criminal violation only when committed in relation with the performance or delaying the performance of an act related to their legal duties or related to the performance of an act contrary to such duties. [….].

8. The supply-side domestic bribery in article 290 CC provides:

Article 290. Giving a bribe

(1) Promising, offering or giving money or other benefits in the conditions provided under article 289 shall be punished by 2 to 7 years of imprisonment.

(2) The act provided under para. (1) shall not be deemed a crime when the bribe giver was constrained by any means by the bribe taker.

Legal Analyst and Coordinator of the evaluation, together with Mr. Balázs Garamvölgyi, Legal Analyst and Ms. Natalia Baratashvili, Legal Analyst.

3 At least one WGB member, Italy, has taken a similar approach to codifying its foreign bribery offence. *See* Italy Phase 1, page 3 ("Article 322-bis refers to articles 321 and paragraphs 1 and 2 of article 322, which establish the offences of bribing a domestic public official. In turn, articles 321 and paragraphs 1 and 2 of article 322 refer to passive bribery offences in relation to domestic officials for the determination of the relevant penalties […].").

(3) The bribe giver shall not be punished if they report the act before the criminal investigation body is notified of it.

[...].

9. For foreign bribery, the Criminal Code extends all the corruption offences in the relevant chapter, including the supply-side bribery offence,[4] to apply to acts involving a list of enumerated foreign officials. Specifically, article 294 CC provides:

Article 294. Acts committed by foreign officials or related to them

The provisions of this chapter shall apply to the following persons, unless the international agreements to which Romania is a Party provide otherwise:

a. officials or persons who carry out their activity based on a labour agreement or other persons with similar duties in an international public organization to which Romania is a Party;

b. members of parliamentary assemblies of international organizations to which Romania is a Party;

c. officials or persons who carry out their activities based on a labour agreement or other persons with similar duties within the European Union;

d. persons who carry out judicial functions within the international courts whose jurisdiction is accepted by Romania, as well as officials working for the registrar's office of such courts;

e. officials of a foreign state;

f. members of parliamentary or administrative assemblies of a foreign state;

g. jurors within foreign courts.

10. Unless otherwise indicated, the term Romania's "foreign bribery offence" refers in this evaluation report to article 290 CC as read with article 294 CC, in light of the conditions contained in article 289 CC.

b. Elements of the offence

11. ***Any person*.** Romania's foreign bribery offence prohibits the act of "promising, offering, or giving" money or other benefits to those foreign public officials specified in article 294 CC, when it would be a criminal offence for the official to solicit or receive the benefits in exchange for an act or omission related to the official's professional duties. As the Criminal Code prohibits the act itself, any person to which Romania's criminal jurisdiction extends would be covered by the offence. As discussed in Section (B)(2) below, this includes legal persons.

12. ***Intentionally*.** Romania's foreign bribery offence does not specify the mental element, or guilt, required to commit an offence. According to article 16 CC, when a crime does not set a lower requirement of guilt, the offence is only established when the act is committed with "intent" (*intenţie*). According to the Romanian MOJ, "intent" must be established for each element of the offence, including the fact that the bribe recipient was a foreign public official. Under article 16(3), "intent" is established when the perpetrator either "can foresee the outcome of the act, in the expectation of causing such outcome by perpetrating the act" or "can foresee the outcome of the act and, while not intending to produce it, nevertheless accepts the likelihood that it will occur". The former is known as "direct intent", and the latter is "indirect intent". A recent Constitutional Court decision (no. 115/2020) has confirmed that the element of guilt for the bribery offence

[4] Romania's demand-side and supply-side trading in influence offences (Articles 291 and 292 CC) would also apply when the enumerated foreign public officials are involved.

can be established with either direct or indirect intent, at least regarding the act or omission of the public official. The intent is established regardless of whether the official actually commits the act or makes the omission.[5]

13. **To offer, promise or give.** Romania's foreign bribery offence proscribes the "promising, offering, or giving" of a bribe to a covered foreign public official in connection with the performance, non-performance, or breach of the official's duties. A 2018 Constitutional Court decision (no. 468/2018) interpreted these elements of the offence in a domestic bribery context as follows:

- "Promising" covers situations where the offender undertakes to "dispatch a sum of money or other benefits in the future" if the official makes the act or omission desired by the offender;
- "Offering" covers situations where the offender presents money or other undue advantage to the official; and
- "Giving" covers situations where the offender actually provides money or other undue advantage to the official.

14. The 2018 Constitutional Court decision expressly states that the mere "offer" will constitute a crime, even if it is not accepted. Romania also provided cases, including a 2008 decision from the High Court of Cassation and Justice,[6] showing that the mere "promise" of a bribe will also constitute a crime, even if it is not accepted. In addition, courts have held that it is no defence whether the bribe was offered at "one's own initiative or in response to requests from public servants".[7] Furthermore, Romania reports that the mere "promise" or "offer" of a bribe are common fact patterns in proceedings involving domestic corruption.

15. ***Any undue pecuniary or other advantage*.** Article 290 CC refers to "money or other benefits" promised, offered, or given in the conditions set forth in article 289 CC. Article 289 CC, in turn, prohibits the public official from soliciting, receiving, or accepting the promise "money or other undue advantages". In 2017, the High Court of Cassation and Justice (Decision no. 223/A) observed that the undue advantage promised to the public official was a non-pecuniary service, namely ensuring that the official's son would pass an exam for trainee notaries. In 2020, the Bucharest Court of Appeal (Decision no. 389/A) upheld the conviction of a director within the Ministry of Justice who had received money and a promise of support to help the director obtain a management position in a public institution.

16. ***Directly or through intermediaries*.** Article 289 CC prohibits officials from soliciting, receiving, or accepting the promise of undue benefits either "directly or indirectly". Article 290 CC prohibits the bribery of an official in breach of the conditions set forth in article 289 CC. According to Romanian authorities, if a bribe-giver uses an intermediary to commit the offence, the bribe-giver remains the author of the crime. While no supply-side cases were provided, Romania did provide court decisions confirming that public officials have been convicted for taking bribes through intermediaries, including legal entities that they beneficially owned.[8] They elaborate that the intermediary would, depending on the facts of the case, be liable as an instigator or an accomplice (see Section B(1)(c) below). In support of their interpretation, the Romanian authorities refer to a High Court of Cassation and Justice decision (No. 235/2017), which upheld the conviction of the bribe-giver's accomplice for acting as the intermediary for the bribe-giver. While further jurisprudence would be necessary to confirm that the principal bribe-giver would equally be held accountable for the acts of the intermediary, it appears that liability can arise for acts taken by intermediaries within the defendant's control.

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5 Bucharest Court of Appeal, Decision 134/A/2020.

6 High Court of Cassation and Justice (Criminal Section), Decision 1315/2008.

7 Mureş Tribunal, Decision 137/2020.

8 Bucharest Court of Appeal, Decision 389/A (May 2020); Constanţa Court of Appeal, Decision 454/P (April 2017).

17. ***To a foreign public official*.** Under article 294 CC, Romania's foreign bribery offence applies "unless international treaties to which Romania is a party provide otherwise", to acts committed in relation to a list of specific officials of foreign countries or certain international organisations. This list reflects the offences and terminology contained in the Council of Europe's Criminal Law Convention on Corruption (CoE Criminal Law Convention), which article 294 CC was enacted to implement.[9]

18. As a preliminary point, now that Romania has ratified the OECD Anti-Bribery Convention, the Convention's definition of foreign public official arguably could be incorporated into Romania's foreign bribery offence by operation of law based on article 294 CC's reference to "international treaties". According to the MOJ, such references can either expand or restrict the scope of criminal liability. There is, however, no jurisprudence confirming that judges could, consistent with the principle of legality, expand liability for foreign bribery beyond the Criminal Code's statutory provisions based on the Convention. For this reason, this evaluation limits its focus to Romania's foreign bribery offence as currently enacted.

19. Concerning "legislative, administrative or judicial" officials of foreign states,[10] article 294 CC expressly applies to corruption offences committed in relation to "officials" and members of "parliamentary or administrative assemblies". While article 294 CC does not expressly refer to "administrative" or "judicial" offices, the CoE Criminal Law Convention's definition of "public official" provides that it "shall be understood by reference" to include "official", "public officer", "mayor", "minister" and "judge". The CoE Criminal Law further defines "judge" to include "prosecutors" and "holders of judicial offices".[11] Thus, it appears that the legislature codifying Romania's foreign bribery offence contemplated that it would apply to the bribery of foreign public officials holding a "legislative, administrative, or judicial office" at both the national and local levels, though this point would need to be confirmed through subsequent jurisprudence.[12] According to the Romanian authorities, Romanian's foreign bribery offence would apply even if a bribery scheme involved the officials of a *de facto* autonomous territory, customs area, or an analogous jurisdiction not recognised as a State by Romania. It would be important to see how the jurisprudence on this point will evolve in practice.[13]

20. Romania's foreign bribery offence does not expressly refer to "person[s] exercising a public function for a foreign country, including for a public agency or public enterprise."[14] This most likely reflects the fact that the CoE Anti-Corruption Convention also does not appear to cover officials of state-owned enterprises (SOEs).[15] There is, however, a definition of "public official" in article 175(1) CC that might be relevant when courts interpret Romania's foreign bribery offence. Under this provision, at least for domestic purposes, the Criminal Code expressly applies to persons who "carry out the duties and responsibilities […] of the legislative, executive, or judicial branches" as well as persons who "exercise a public dignity or public office of any kind". It also covers persons who carry out responsibilities within "a public utility company, or any other economic operator or legal entity of which the State owns all or the majority of its capital". This definition, however, may not necessarily cover all the ways in which a government may

9 Council of Europe Criminal Law Convention on Corruption (ETS No. 173). While the New Criminal Code only expressly mentions the CoE Convention, the legislator presumably also took into account the UN Convention against Corruption (UNCAC), which had been recently ratified.

10 OECD Anti-Bribery Convention, Article 1(4)(a).

11 CoE Anti-Corruption Convention, Article 1(a) & (b).

12 OECD Anti-Bribery Convention, Article 1(4)(b).

13 The MOJ observed the Romanian Constitutional Court held, in in Decision no 456/2018, that interpretations of legal norms "must take into account not only the letter, but also the spirit of the law" so that the legal norm is applied in a manner that is "as close as possible to the purpose pursued by the legislator".

14 OECD Anti-Bribery Convention, Article 1(4)(a) & (b).

15 The CoE Anti-Corruption Convention addresses commercial bribery in "the private sector" (Art. 7 & 8). It is not clear whether these provisions would, or were intended to, apply to State-owned enterprises.

exercise a "dominant influence".[16] Furthermore, article 175(2) covers any person "who performs a service in the public interest, which the public authorities have assigned or whose performance is subject to their control or supervision". There is so far no case law indicating whether courts would apply either of these definitions for purposes of interpreting article 294 CC in the context of Romania's foreign bribery offence.[17]

21. Concerning officials and agents of public international organisations, article 294 CC expressly applies to "members of parliamentary assemblies" as well as "officials or persons who carry out their activity based on a labour agreement or other persons with similar duties" for "international organisations *to which Romania is a Party*" (emphasis added). This limitation reflects the terms of the CoE Anti-Corruption Convention.[18]

22. ***For that official or a third party*.** Article 289 CC criminalises the public official's solicitation, receipt, or acceptance of a promise of undue benefits "for themselves or on behalf of others". Given that Romania's foreign bribery offence applies in the circumstances foreseen under article 289 CC, it would presumably thus criminalise the offering, promising, or giving of any "undue benefit" to a foreign public official for that official or for a third party. In the absence of case law, however, the codification of the foreign bribery offence as a derivative of the domestic (demand-side) corruption offence does raise certain theoretical questions. For instance, it is not clear that it would apply in a situation where the foreign public official was aware of, but did not solicit, an undue benefit given directly to a third party. At the same time, the Romanian authorities reported that legal doctrine considers that the bribe-giver who, with improper intent, gives advantages without the public official's knowledge could be convicted even if the public official would not be liable. It remains to be seen whether this doctrinal position will be confirmed by actual jurisprudence.

23. ***Act or refrain from acting in relation to the performance of official duties***. Article 289 CC prohibits officials from soliciting, receiving, or accepting the promise of a bribe "in exchange for performing, not performing, speeding up or delaying the performance of an act which falls under the scope of their professional duties". According to the Constitutional Court (decision no. 297/2017), the duties of the official are defined by legislation or regulations applicable to that official's professional duties. Thus, Romania's foreign bribery offence would appear to cover any undue payments made in relation to any use of the official's position within the scope of their professional duties, including to expedite or perform an act to which the bribe giver was entitled. The Romanian authorities report that facilitation payments are considered bribery, no matter how small the amount. They cited, for example, a case where two businessmen were convicted of paying bribes to a public official to ensure that they received payments due to them under contracts concluded with a public institution.[19]

24. Under the OECD Anti-Bribery Convention, Parties should be able to impose liability for foreign bribery committed in order to obtain "any use of the public official's position, whether or not within the official's authorised competence".[20] In particular, the drafters of the Convention specifically sought to cover

16 Commentary to the OECD Anti-Bribery Convention, cmt 14.

17 In the Romanian original, Article 175 CC and Article 289 CC use the term "*funcţionar public*" ("public official"), while Article 294 CC refers to "*funcţionari străini*" ("foreign officials") or "*funcţionari[] unui stat străin*" ("officials of a foreign state). Article 176 CC defines "public" to mean "everything relating to public authorities, public institutions, or other legal entities managing or exploiting public assets". In the absence of case law, the relevance of these textual differences cannot be assessed.

18 CoE Anti-Corruption Convention, Articles 9 & 10.

19 Târgu Mureş Court of Appeal, Decision no. 7/2023.

20 OECD Anti-Bribery Convention, Article 1(4)(c).

the situation in which a "senior official" is bribed "in order that this official use his office—though acting outside his competence—to make another official award a contract".[21]

25. In this regard, article 289(1) CC criminalises demand-side bribery in connection with both the performance or non-performance of the official's duties and "the performance of an act contrary to the duties of the [official's] office". According to the Romanian authorities, there is no definition of acts "contrary to duty" in the legislation. This standard, however, was applied to convict a Romanian mayor who acted contrary to duty when concluding public works contracts at inflated prices and paying sums under them. While this concept might appear to anticipate liability for acts in at least some circumstances not directly contained within the official's defined professional duties, at least one court of appeal has held that a domestic official could not be liable for corruption when the act or omission "does not fall within [the official's] competence".[22] On the other hand, the High Court of Cassation and Justice (Decision no. 3334/2004) has held that an official's performance of an "act relating to his official duties" included a situation where the official, "by the manner in which he performs his own official duties, may influence the performance of the act by the competent official". The same analysis would largely apply to bribery of those carrying out a "public service" under article 289(2) CC. In such cases, their duties would be defined by the scope of their mandate as well as any special rules regulating their professional status.[23]

26. Article 292 CC, Romania's supply-side buying of influence offence, is also potentially relevant for understanding whether Romania's legal framework covers the full range of conduct prohibited under Article 1 of the Convention. Notably, article 294 CC extends the buying of influence offence to dealings with foreign public officials to the same extent as for Romania's bribery offence. As a result, Romania could sanction those who "promise, supply, or give money or other benefits […] to a person who has influence or alleges they have influence over [another] public servant to secure an act or omission within that official's duties or contrary to such duties." The buying of influence offence is punishable with the same range of imprisonment as Romania's foreign bribery offence. It is also possible to be convicted of both offences concurrently.

27. ***To obtain or retain business or other improper advantage***. Romania's foreign bribery offence focuses on criminalising bribery to obtain any act or omission within the scope of the official's duties or any act contrary to those duties without regard to the underlying purpose of the bribery. Thus, Romania's foreign bribery offence applies to all bribery whether or not it has a commercial purpose.

28. ***In the conduct of international business*.** As Romania's foreign bribery offence applies regardless of the purpose underlying the bribery scheme, the offence is not limited to bribery to obtain an advantage in the conduct of international business.

c. Complicity, attempt, and conspiracy

29. Article 1(2) of the OECD Anti-Bribery Convention requires Parties to establish as a criminal offence "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official". Article 1(2) of the Convention also requires Parties to criminalise attempt and conspiracy to commit foreign bribery "to the same extent as attempt and conspiracy" to bribe a domestic public official.

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21 Commentaries to the OECD Anti-Bribery Convention, cmt 19.

22 Iaşi Court of Appeal, Decision no. 339/2022.

23 If article 289(2) CC applies in the context of foreign bribery, it should be noted that it foresees a narrower scope of conduct than article 289(1) CC concerning *de jure* public officials, because the bribery of a person performing a "public service" is restricted to situations where the bribery offence as committed in relation only to the "performance […] of an act", the "delaying the performance of the act", or the "performance of an act contrary to such duties". Whether article 289(2) CC would apply to foreign bribery through article 294 CC remains to be seen.

30. ***Complicity***. Article 49 CC, "the co-author, the instigator, and the accomplices to an intentional offence" shall be punished "with the penalty stipulated by law for the author of the act". Under article 46 CC, the co-authors of an offence are the "persons who directly commit the same act stipulated by criminal law". Under article 47 CC, an instigator is a person who "with intent, causes another to commit an act stipulated by criminal law". Under article 48 CC, an accomplice is anyone who "intentionally facilitates or helps in any way the author to commit an offence".

31. ***Attempt***. Under article 32 CC, attempt only applies in Romanian criminal law when the specific offence expressly provides that an attempt to commit that offence is punishable. The provisions governing attempt are found in articles 32 to 34 CC. Currently, Romania's Criminal Code provisions governing "attempt" do not apply to the domestic or foreign bribery offences.[24] The Romanian authorities explain that "attempt" does not apply to the domestic or foreign bribery offence because Romanian jurisprudence considers that the bribery offence itself criminalises preliminary conduct that might otherwise constitute "attempt".

32. ***Conspiracy***. Romanian criminal law does not criminalise conspiracy, with the exception of the crime of genocide under article 438(3) CC. Nonetheless, Romanian authorities observe that the commission of an offence in coordination with others can constitute an aggravating factor for sentencing (articles 77-78 CC). In addition, the Criminal Code contains a separate offence under article 367 CC for creating, joining, or supporting an "organized criminal group", which is defined as "a structured group, made up of three or more persons, which exists for a certain period of time and acts in a coordinated manner for the purpose of perpetrating one of more offences." According to the Romanian authorities, this offence has been applied in domestic corruption cases, including one involving a former mayor.[25] The Romanian authorities report that offenders subject to article 367 CC would also be liable for any substantive offences that they commit.

d. Defences

33. The Romanian Criminal Code provides for both general and specific defences that could, at least in theory, apply in foreign bribery cases. Based on the structure of the Criminal Code, these general and special defences would in theory be equally applicable to legal persons.

34. ***Solicitation***. As an initial point, mere solicitation of a bribe by a foreign public official would not appear to constitute a defence to Romania's foreign bribery offence. This is because article 290 CC criminalises the giving of a bribe in the circumstances prohibited under article 289 CC, while article 289 CC expressly criminalises the solicitation of a bribe. The Romanian authorities were able to provide jurisprudence confirming this understanding for domestic bribery cases.[26] The Working Group can further examine this issue in future evaluation cycles focused on implementation in practice for foreign bribery.

1. General defences

35. The Criminal Code (articles 18-31 CC) provides for a range of general defences divided into two categories. The first category concerns grounds justifying an otherwise unlawful act (articles 18-22). The second category concerns grounds for not imputing criminal liability to individuals who commit the otherwise unlawful act (articles 23-31). The difference between the two categories is that the former

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24 According to the official Romanian version of the Criminal Code provided for this assessment, only 20 offences currently provide for liability for attempt.

25 Bucharest Court of Appeals, Decision 575/A (May 2022).

26 The Mureş Tribunal, in Decision 137/2020, found that it is "irrelevant whether [the bribe] was given on one's own initiative or in response to requests from public servants". Also, according to the DNA, in jurisprudence bribe givers are routinely convicted for giving a bribe at the request of a public official.

defences negate liability for all participants who committed the act, while the latter defences only negate liability for the specific defendant who satisfies the conditions. The general defence that would appear to be most relevant in the foreign bribery context is known as "moral constraint".[27]

36. ***Moral constraint***. Under article 25 CC, the "moral constraint" defence precludes an otherwise unlawful act from establishing liability when it was "committed as a result of moral constraint, exercised by threatening grave danger of the person of the perpetrator or another person and which cannot be removed in any other way". Notably, it resembles the traditional common law defence of duress to the extent it refers to danger to the "person of the perpetrator" ("*persoana făptuitorului*") or to "another" ("*a altuia*") suggesting a focus on bodily harm or death. The Romanian authorities report that the defence indeed "protects an individual's life or bodily integrity". For the Full Assessment, the National Anti-Corruption Directorate (DNA), which investigates the high-level corruption cases that would be most analogous to foreign bribery cases, reported that there has not been a case where the "moral constraint" defence was raised in a corruption case falling within its competence.

2. Special defences

37. Under article 290 CC, there are additionally two special defences applicable to the supply-side domestic bribery offence. The Romanian foreign bribery offence thus incorporates them by reference.

38. ***Constraint***. Article 290(2) CC provides that the act otherwise criminalized by article 290(1) CC "shall not be deemed a crime when the bribe giver was constrained by any means by the bribe taker". Unlike the general defence of "moral constraint", this special defence is not limited to situations that "threaten […] grave danger of the person of the perpetrator or another person". It also does not require that the threat that the otherwise unlawful act sought to prevent "[could not] be removed in any other way". For the Full Assessment, the Romanian authorities reported that this special constraint defence is not invoked frequently in bribery cases. According to the DNA, for instance, it has no records of this defence being invoked in any of its cases in the past ten years.

39. ***Effective regret***. Article 290(3) CC provides that bribe givers shall not be punished if they report the act before the criminal law enforcement body ("*organul de urmărire penală*") is notified of it. Under article 55 of the Criminal Procedure Code (CPC), these criminal law enforcement bodies are the prosecutors, the criminal investigation bodies of the judicial police, and special criminal investigation bodies. Unlike the special "constraint" defence, this provision, which is a form of what the Working Group calls an "effective regret" defence, does not negate the fact that the offence was committed. Under Romanian law, however, the prosecutor could not file charges if the conditions are met, thus in effect granting the bribe-giver who fulfils the relevant conditions a form of immunity from sanctions. Other participants in the offence, however, can be punished. The DNA observes that this defence is extremely important in domestic corruption cases, as the individuals invoking this defence can be used as collaborators in sting operations to investigate corrupt demand-side officials. The Romanian authorities elaborate that individuals who benefit from the "effective regret" provision can also serve as witnesses in trials brought against those officials or other participants in the scheme. During the Full Assessment, the DNA reported that this defence had not been raised in the ongoing foreign bribery case.

Commentary

The lead examiners consider Romania's legal framework regulating the foreign bribery offence to be largely compliant with Article 1 of the OECD Anti-Bribery Convention. The definition of "foreign

[27] Other general defences include legitimate defence, state of necessity, physical constraint, consent of the victim, mental incompetence, underage perpetrator, and intoxication. The Working Group can explore the relevance of other general defences, including the defence of error (article 30 CC), in subsequent phases focused on enforcement in practice.

public official", however, appears to be overly narrow. In addition, the fact that Romania's foreign bribery offence is tied to the foreign public official's formal "duties of the office" also appears to be narrower than what the Convention requires. The lead examiners recognise that some of these issues, arguably, could be addressed either by clarifying judicial interpretation or, in accordance with the principle of functional equivalence, if it were established that the foreign bribery offence, when read together with Romania's buying of influence offence, in fact covered all undue payments offered, promised, or given to obtain any use of the official's office without regard to the specific official's formal duties. These issues will need to be closely examined in practice in subsequent monitoring, including what evidence the courts would require to satisfy these elements. The lead examiners also consider that the special defences of "constraint" and "effective regret", if applied in the foreign bribery context, are not consistent with the Convention. As an aside, the lead examiners recognise that these defences have policy rationales in the domestic corruption context.

2. Article 2: Responsibility of Legal Persons

40. Article 2 of the OECD Anti-Bribery Convention requires Parties to "take such measures as may be necessary […] to establish the liability of legal persons for the bribery of a foreign public official".

41. ***Legal framework***. Romania provides for criminal corporate liability in Title VI of the General Part of the Criminal Code (articles 135 *et seq*.). These provisions apply to all offences in the Criminal Code, including foreign bribery. Specifically, article 135 CC provides:

> ***Article 135. Conditions for the criminal liability of legal entities***
>
> *(1) Legal entities, with the exception of the State and of public authorities, shall be held criminally liable for offenses perpetrated in the performance of the object of activity of legal entities or in their interest or behalf.*
>
> *(2) Public institutions shall not be held criminally liable for offenses perpetrated in the performance of activities that cannot be the object of the private domain.*
>
> *(3) Criminal liability of legal entities does not exclude the criminal liability of the individual participating in the perpetration of the same act.*[28]

a. Entities subject to liability

42. ***Legal persons covered***. As a general rule, all legal entities are potentially subject to criminal liability under article 135(1) CC. The Criminal Code does not define "legal entity". Under articles 187 and 188 of the Civil Code (Civ.C.), legal entities are those entities, whether established by law or otherwise, that have an independent organisation, possess their own patrimony, and are created with the purpose of achieving certain lawful ends in accordance with the public interest. The High Court of Cassation and Justice has held that all entities with legal personality can be held liable regardless of their form of organisation, their object, or their activity.[29]

43. ***Sovereign immunity exceptions***. Article 135 CC provides two exceptions to this general rule. First, article 135(1) CC provides absolute immunity from criminal responsibility for the Romanian State and public authorities (e.g., counties, municipalities). In addition, under article 135(2) CC, "public institutions"

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28 At least one other Working Group member has taken a similar approach to codifying criminal corporate liability. In France, article 121-2 of the Penal Code excludes criminal liability of the State and limits criminal responsibility for territorial authorities and their groupings to activities that can be the object of agreements to delegate public services.

29 High Court of Cassation and Justice, Decision no.1 of 2016.

have partial immunity: they can only be held criminally liable for offences perpetrated in the performance of activities that can be the "object of the private domain". The Criminal Code does not define "public institutions". According to Romanian authorities, these are structures that, despite not being formally classified as a public authority, provide public services and receive their finances either from the State budget or from their own revenues in accordance with public finance law.[30] One example of a public institution is the Secretariat-General of the Government. According to the Romanian authorities, SOEs are not considered under the doctrine to be public institutions.

44. The Criminal Code also does not define "object of the private domain". The Bucharest Court of Appel, however, held—on the basis of legal doctrine—that the activities that cannot be objects of the private domain are those that the law prohibits private individuals or companies from performing.[31] The contours of this concept can be examined more closely in subsequent monitoring, as needed. According to the Romanian authorities, if a company performed activities within and outside of the private domain, the courts would need to analyse the nature of the activity that gave rise to the offence.

45. ***State-owned enterprises***. According to Romania, SOEs are established as either joint stock companies or limited liability companies.[32] They are thus considered "legal entities" under articles 187 or 188 Civ.C. and would be subject to criminal responsibility. According to jurisprudence provided by the Romanian authorities, Romanian SOEs or entities considered "public utilities" have been sanctioned with fines after convictions for intentional offences, such as abuse of office or the unlawful obtaining of EU funds.

b. Standard of liability

46. ***Objective criteria for attribution***. Under Romania's legal framework, corporate liability can be imposed if an offence is committed "in the performance of the [legal person's] object of activity" or if it is committed "in the interest of, or on behalf of, the legal person". These conditions are independent grounds for liability, which the Romanian authorities have described as follows:

- **Object of activity**. Under this criterion, legal persons can be held liable when the crime is committed in the performance of an activity that the entity could perform pursuant to law or under the charter or internal regulation of the legal entity. According to the Romanian authorities, this criterion broadly covers acts connected with the company's business. In their view, it is especially valuable when the crime was committed by a low-level employee or agent or for the benefit of a third party.
- **Interest**. According to the Romanian authorities, this criterion will trigger liability for any crime in which the proceeds accrue, at least in part, to the legal person. They also report that the commission of a crime to avoid a loss would also be deemed to have been done in the legal person's interest.
- **On behalf of**. According to the Romanian authorities, this criterion will trigger liability if the crime is committed by a corporate body, a corporate representative, or a person fulfilling certain functions or orders issued by the legal person (e.g., an agent). They specify that the company can be held liable whether the person acting on its behalf had *de jure*, *de facto*, or even apparent authority.

47. ***Level of authority of perpetrator***. According to the Romanian authorities, the law does not specifically require that any particular individual or individuals commit a criminal act. There would, however, need to be at least one person sufficiently connected to the company with the requisite intent (*mens rea*)

30 Administrative Code & Government Emergency Ordinance 57/2019, article 5(w).

31 Bucharest Court of Appeal (Penal Section II), Decision No. 816/2016.

32 Law no.15/1990, article 16.

to establish that an offence occurred. In addition, the person may only need to have a *de facto* link with the company, such as the authority in practice to act on its behalf or in its interest. For example, in a domestic corruption case, a court found that the beneficial owner's *mens rea* could be attributed to the two legal persons because "the entire objective and subjective activity" of the entities was "determined, imposed, drawn, directed'' by the beneficial owner.[33] As article 135 CC does not expressly condition corporate liability on any act or omission by a person with the highest level of managerial authority, Romania's corporate liability framework would appear to follow the "flexible" approach set forth in Annex I(B)(3)(a) of the 2021 OECD Anti-Bribery Recommendation, but the Working Group should examine how courts apply these provisions in practice.

48. ***Relevance of compliance efforts***. Furthermore, the Romanian authorities report that the law does not specify that the legal person can avoid liability by adopting internal controls or otherwise making best efforts to supervise its employees. They observe, however, that some courts may still consider these efforts in assessing whether the company can be held liable.

c. Liability for intermediaries and related entities

49. ***Intermediaries***. Under Annex I(C) of the 2021 OECD Anti-Bribery Recommendation, Parties to the OECD Anti-Bribery Convention should ensure that legal persons "cannot avoid responsibility by using intermediaries, including related legal persons and other third parties" to engage in foreign bribery on their behalf. According to Romanian authorities, a legal person can be held liable as the author of a crime if it uses an intermediary to commit bribery. They specify that this would include situations where a parent company uses a subsidiary or another related entity as the intermediary to effectuate the scheme. A company, however, will not be liable for the acts of a related entity unless it is directly involved in the offence perpetrated by the related entity.

50. ***Successor liability***. Article 151 CC provides for the allocation of liability if an entity experiences a "loss of legal personality by merger, absorption or demerger after the offence is perpetrated". It provides the "criminal liability and the relevant consequences" that will lay with (i) the entity created by the merger, (ii) the absorbing entity, or (iii) the legal entities resulting from demerger or that acquired the assets of the offending entity. Under article 151(2) CC, the level of sanctions incurred by the successor entities will generally depend on the total income and the total assets of the offending entity, as documented in its financial statements or other accounting reports required by law, if no such report was required by law, the court will consider the value of the original entity's patrimonial assets at the time of the merger or division. In either case, the court will also consider the portion of the assets of that entity acquired by each successor entity.

d. Autonomous liability of legal person

51. The OECD Anti-Bribery Convention requires Parties not to restrict the liability of legal persons for foreign bribery to the cases where the natural person or persons are prosecuted or convicted (2021 Recommendation, Annex I(B)(2)). Article 135(3) CC specifies that the criminal liability of a legal person does not exclude the criminal liability of any natural person who took part in the commission of the offence. According to Romanian authorities, this provision is understood in the doctrine to also signify that the liability of the natural and legal person is not dependent on each other. They also report that there is no requirement in Romanian law to convict or even commence proceedings against a natural person before prosecuting or convicting a legal person. The Romanian authorities provided an example of at least one case where two companies were convicted of an intentional offence independently of any natural persons

33 Iaşi Court of Appeal, Decision no. 4131/89/2012.

involved.[34] In addition, Romanian courts have convicted companies even in cases where no natural person could be identified, though the examples provided did not involve offences requiring proof of intent.[35]

Commentary

The lead examiners consider Romania's legal framework for the liability of legal persons to be largely in compliance with Article 2 of the OECD Anti-Bribery Convention. In particular, the lead examiners welcome the fact that Romania's framework for imposing liability appears, at least on paper, appears to follow the "flexible" approach for attributing liability foreseen under Annex I(B)(3) of the 2021 OECD Anti-Bribery Recommendation. This suggests that the framework can adapt to the different ways in which decision-making power may be diffused within complex corporate entities. Further monitoring will be needed to assess how the framework is actually applied in practice.

3. Article 3: Sanctions

a. Sanctions available

52. Under article 3(1) of the OECD Anti-Bribery Convention, Parties should ensure "effective, proportionate and dissuasive criminal penalties" for foreign bribery comparable to those applicable to bribery of the Party's own domestic officials. The sanctions, in the case of natural persons, should include "deprivation of liberty sufficient to enable effective mutual legal assistance and extradition".

1. Sanctions available for natural persons

53. ***Imprisonment***. Article 290 CC provides that natural persons who give a bribe to a domestic public official are subject to a term of imprisonment of "no less than 2 years and no more than 7 years". Romania's foreign bribery offence carries the exact same punishment. The Romanian authorities report that this range of penalties is sufficient to enable effective mutual legal assistance and extradition.[36] As explained below, this range in practice may be modified by certain mitigating or aggravating factors.

54. ***Fine***. Romania's domestic corruption offence does not specifically envision a fine. Nonetheless, a fine may be imposed in addition to imprisonment under article 62(1) CC, if the offence was intended to provide a material gain ("*folos patrimonial*"). According to the Constitutional Court, "material gain" carries its ordinary meaning, which it interpreted as obtaining or profiting from something that has economic value. According to Romanian authorities, this gain can be tangible or intangible, and there is no limitation in law or in doctrine requiring that the gain be for the perpetrator.[37] It is not possible to impose a fine for foreign bribery on a natural person without also imposing a custodial sentence, whether it is suspended or not.

55. The minimum and maximum range of the fine would be calculated using Romania's fine-day system, based on the court's determination of the value of the fine-day unit and the number of fine-days that will be assessed against the defendant. Under article 61(2) CC, the amount of the fine-day unit would be set within the range of RON 10 to 500 in consideration of "the amount of material gain that was obtained or desired". Under article 62(2) CC, if fines are applied in addition to imprisonment, the actual number of

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34 Timişoara Tribunal (Penal Section), Decision no. 6113/2018 (holding companies liable for unauthorised construction renovations in an historically protected area).

35 Bucharest Court of Appeal Decision no. 1136/2015 (holding company liable for causing bodily injury through negligence even though the negligent natural person was not identified).

36 *See* Section (B)(5) below, for discussion of mutual legal assistance and extradition.

37 Constitutional Court Decision no. 315/2020.

fine-days would, in turn, be set based on the actual term of imprisonment imposed, without regard to any mitigating or aggravating factors. If the defendant were sentenced to the two-year minimum term of imprisonment for foreign bribery, the fine would be set within the range of 120 to 240 fine-days. If a defendant received any term higher than the minimum, the fine would be set within the range of 180 to 300 fine-days. Thus, the statutory minimum and maximum fine for natural persons who commit foreign bribery to obtain a material gain would range between RON 1,200 to 150,000 (approx. EUR 244 to 30,450).

56. ***Concurrent offences.*** Under article 38 CC, concurrent offences are two or more offences committed by the same person before a final conviction is imposed for any of those offences. The concept also applies when an offence was committed to commit or conceal another offence. Under article 39 CC, when the concurrent offences each provide for a term of imprisonment, the court will apply the term of imprisonment for the offence with the highest maximum sanction, which can be increased by up to one-third. If the offences provide for terms of imprisonment and fines, the term of imprisonment will be calculated in the same fashion, while fines will be aggregated. Article 40 CC provides the rules for sentencing when the convicted person is subsequently tried for a previously committed concurrent offence. In future monitoring, the Working Group could examine how these provisions are applied if defendants are charged with foreign bribery and money laundering predicated on foreign bribery.

57. ***Recidivism***. Under article 41 CC, a recidivist offence occurs when a person who has been convicted and sentenced to more than one year in prison commits another offence punishable by over one year with direct or oblique intent. In such cases, the penalty of the new offence shall be added to the sentence of the prior offence or the time of the prior sentence that has not yet been served. Article 44 CC provides that if the second offence does not qualify as recidivism, punishment will be calculated following the rules for concurrent offences.

58. ***Aggravating and mitigating circumstances***. Under articles 77 and 78 CC, when aggravating circumstances are present the sentence imposed may reach or even exceed the maximum statutory range foreseen for that offence (i.e., 7 years in the case of foreign bribery). One aggravating factor that could be applicable to foreign bribery would be committing the offence with two or more other persons. If the aggravating circumstances warrant, the maximum sentence imposed can be increased by up to two years' imprisonment but no more than one-third of the statutory maximum. Thus, the maximum term of imprisonment that could be imposed for foreign bribery, if sufficient aggravating circumstances apply, is nine years. For fines, an increase of up to one-third of the statutory maximum can be applied. As foreseen by article 75 CC, the penalty may also be reduced below the statutory minimum by one-third considering the mitigating factors. Mitigating circumstances that potentially might be relevant in foreign bribery cases are efforts by the offender to eliminate or mitigate the consequences of the offence or the presence of special circumstances that might reduce the offence's seriousness. The application of these factors would need to be assessed in subsequent monitoring.

59. **Resolution through plea agreement**: Under the CPC, the prosecutor and defendant can conclude a plea agreement with respect to offences punishable by a fine or a term of imprisonment of up to 15 years. This includes foreign bribery, whose maximum sanction, as explained above, is seven years. Under article 480 CPC, the defendant who concludes a plea agreement is entitled to a one-third reduction of the statutory penalty limits for imprisonment and a one-fourth reduction of the statutory penalty limits for a fine. In bribery cases, the defendants can receive sentences of 16 months, which reflects a one-third reduction (i.e., 8 months) off the two-year statutory minimum term of imprisonment. In their Phase 1 questionnaire responses, the Romanian authorities provided information on domestic bribery cases concluded through plea agreements.

2. Sanctions available for legal persons

60. ***Fine***. The main sanction applicable for legal persons is a fine based on the fine-day system for legal persons. Under article 137 CC, the fine-day unit would be set between RON 100 and 5,000, taking

into account the legal person's total income or the total value of its assets. Following the adoption of Law 214/2023, the courts will look to the company's financial statements or other accounting reports required by law to assess the value of the company's income and assets in the year proceeding the company's referral to trial. If no such report was required by law or if the company was formed in the same year, the court will consider the value of the original entity's patrimonial assets at the time of the company was referred for trial.

61. The ordinary fine-day range for offences, like foreign bribery, with a maximum term of imprisonment between 5 and 10 years, would be 120 to 240 days. Thus, a legal person would face a fine in the range of RON 12,000 to 1,200,000 (approx. EUR 2,436 to 243,600) for violating Romania's foreign bribery offence. If the offence were intended to obtain a "material gain",[38] the fine-day range may be increased by one-third, resulting in a fine-day range of 160 to 320 days. In this case, the legal person would face a fine in the range of RON 16,000 to 1,600,000 (approx. EUR 3,248 to 324,800). In this scenario, the court would also consider the value of the monetary benefit sought or obtained along with the ordinary factors, such as turnover, mentioned above. In the case of a repeat offence, the special limits of the penalties provided by law for the new offence shall be increased by half (article 146 CC). As with natural persons, the sanctions for legal persons for foreign bribery are the same as those for the bribery of a Romanian domestic official.

62. ***Complementary penalties***. Article 136 CC *et seq*. provides for various complementary penalties. These range from displaying or publishing the judgment of conviction (article 145 CC) to the dissolution of the entity (article 139 CC). Other complementary penalties include suspending the activity of the legal entity, the closure of certain branches, placement under judicial supervision, and prohibiting the legal entity from participating in public procurement procedures. (articles 140-144 CC). These complementary penalties are only mandatory when the law so requires, which is not the case for foreign bribery. Otherwise, article 138(1) CC permits the courts to impose one or more complementary penalties when it considers they are "necessary" in the circumstances of the case, including the nature and gravity of the offence.

b. Confiscation

63. Article 3(3) of the OECD Anti-Bribery Convention requires each Party to take measures as necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property of corresponding value "are subject to seizure and confiscation, or that monetary sanctions of comparable effect are applicable". Romania has several provisions authorising confiscation in cases involving foreign bribery. These confiscation provisions apply equally to natural and legal persons.

64. ***Bribe amount***. Article 290(5) CC provides that "money, valuables or any other benefits offered or given shall be subject to forfeiture". It further provides that if those assets cannot be located, then "the forfeiture of the equivalent shall be ordered". Furthermore, under the general rules of article 112(1)(b) CC, "assets that were used in any way, or intended to be used to commit an offence set forth by criminal law" can be confiscated "if they belong to the offender or to another person who knew the purpose of their use". If the assets do not belong to the defendant and the true owner was not aware of their use, then the cash equivalent can be confiscated under article 112(3) CC.

65. ***Proceeds of bribery***. The general confiscation provision for all criminal offences under article 112(1)(e) CC provides for the confiscation of the "assets acquired by perpetrating any offence stipulated by criminal law, unless returned to the victim and to the extent that they are not used to indemnify the victim". According to the Romanian authorities, this provision reflects the fact that any assets returned to the victim would by definition not be available for confiscation, as confiscation is only imposed on assets that will be transferred into the patrimony of the State. Furthermore, under article 112(5) CC, if the proceeds

38 The meaning of the term "material gain" was discussed above under the section on fines for natural persons.

subject to confiscation "cannot be located", then "money and other assets shall be confiscated instead, up to the value thereof". According to the Romanian authorities, "other assets" would include anything that is not money, whether they are tangible, intangible or virtual assets.

66. ***Extended confiscation***. Under article 112[1] CC, assets not covered by article 112 CC can also be subject to confiscation if a person is convicted of certain offences, including corruption offences and money laundering, if such offence is "likely to procure a material benefit" and the "penalty provided by law is a term of imprisonment of four years or more". As the maximum term of imprisonment for foreign bribery is seven years, extended confiscation is permissible in foreign bribery cases.

c. Additional civil or administrative sanctions

67. The Romanian authorities report that there are no additional civil or administrative sanctions for foreign bribery.

Commentary

The lead examiners acknowledge that the sanctions regime for both natural and legal persons meets the minimum criteria of Article 3 of the OECD Anti-Bribery Convention insofar as it permits mutual legal assistance and extradition. The lead examiners, however, consider that the monetary sanctions in the statute are excessively low for both natural and legal persons. In their view, it is highly unlikely that sanctions will be considered effective, proportionate and dissuasive in law or in practice when the Working Group conducts subsequent monitoring.

4. Article 4: Jurisdiction

a. Territorial jurisdiction

68. Article 4(1) of the OECD Anti-Bribery Convention requires each Party to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory". Commentary 25 clarifies that "an extensive physical connection to the bribery act is not required".

69. Under article 8 CC, Romania has criminal jurisdiction over offences committed on its territory, including its territorial sea and airspace, as well as ships and aircrafts registered in Romania. An offence is considered to have been committed on the territory of Romania if an act of "execution, instigation, or aiding and abetting" was committed in Romania or if the results of the offence materialise in Romania, even only in part.

70. According to the Romanian authorities, a partial connection of the offence to the territory of Romania is sufficient to establish territorial jurisdiction. They maintain that an act taken in Romania in furtherance of the criminal scheme could give rise to jurisdiction. This could include, for example, transferring money from a bank account in Romania, giving, promising, or offering a bribe on Romanian territory, receiving the proceeds on Romanian territory, as well as using means of telecommunication, including email, from Romania to further the scheme.

b. Nationality jurisdiction

71. Article 4(2) of the OECD Anti-Bribery Convention requires each Party which has jurisdiction to prosecute its nationals for offences committed abroad to take measures as may be necessary to establish its jurisdiction in respect of the bribery of foreign public officials, according to the same principles. According to Commentary 26, these principles include "such matters as dual criminality", but if dual criminality is a

condition, it "should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute."

72. As a general rule, Romania asserts nationality jurisdiction subject to certain conditions set forth in the Criminal Code. Under article 9 CC, Romanian criminal law applies to offences committed outside of Romanian territory by a Romanian citizen or legal entity. The conditions for asserting nationality jurisdiction for a particular offence, however, depend on the maximum term of imprisonment foreseen by law. For offences, such as foreign bribery, whose maximum term of imprisonment does not exceed ten years, article 9(2) CC restricts nationality jurisdiction to acts that are also criminalised in the country where it was committed or acts committed in a place not subject to any jurisdiction. The Romanian authorities observe that this dual criminality requirement would not pose an obstacle given the near universal ratification of UNCAC.

73. Under the Criminal Code, there is also a procedural condition that must be met to assert nationality jurisdiction. Under article 9(3) CC, a competent superior prosecutor, who in the case of the DNA would be the Prosecutor General, must authorise the relevant prosecutor's office to start any investigation based on nationality jurisdiction. The superior prosecutor initially has 30 days from receiving the request to investigate the offence to issue the authorisation. The deadline can be extended up to 180 days from the date the request is made. To the extent this procedural step remains relevant for foreign bribery, its impact in practice for foreign bribery cases will need to be assessed in future monitoring.

74. There appears, however, to be a derogation authorising broader nationality jurisdiction for certain corruption offences, including foreign bribery, as well as money laundering and tax crimes. Specifically, a July 2022 amendment to Law 78/2000 on corruption offences[39] appears to have simplified matters by abolishing the requirements for dual criminality and the need for any prior or subsequent authorisation to open an investigation for corruption offences specified in article 6 of Law 78/2000, including the giving of bribes under articles 290 and 294 CC.

75. The Working Group should examine how Romania asserts nationality jurisdiction over foreign bribery cases in light of the July 2022 amendment in subsequent monitoring evaluations.

c. Other jurisdictional bases

1. Passive personality jurisdiction

76. Under article 10 CC, Romania may exercise criminal jurisdiction over offences committed outside Romanian territory by a non-national against the Romanian State or a Romanian natural or legal person. In such cases, the criminal investigation can only be started with the Prosecutor General's authorisation and if there is no ongoing procedure in the State where the offence was committed. The Working Group can examine the relevance, if any, that this jurisdictional basis may have for Romania's enforcement of its foreign bribery in subsequent monitoring.

2. Universal jurisdiction

77. According to article 11 CC, Romania also has criminal jurisdiction under certain circumstances over offences committed outside of Romania by a non-national if that person is voluntarily located on Romanian territory. This jurisdiction can be asserted if Romania is bound by an international treaty to prosecute the offence regardless of dual criminality or if Romania has denied a request to extradite or surrender the alleged offender. In the latter situation, Romania would not have jurisdiction if there was a

39 Law No. 234/2022.

legal or procedural obstacle to proceed with a criminal investigation, the trial, or the execution of a sentence in the place where the offence was committed.

3. Relevance of the OECD Anti-Bribery Convention

78. According to article 12 CC, Romania can also assert criminal jurisdiction notwithstanding any conditions set forth in articles 8 to 11 CC, if it is required by an international treaty. It is not clear, however, whether the Romanian courts would consider the OECD Anti-Bribery Convention as having any such effect. This issue can be explored, as necessary, in future monitoring concerning enforcement in practice.

d. Consultation procedures

79. Article 4(3) of the OECD Anti-Bribery Convention requires that when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

80. Romania states that both formal and informal consultation channels are available to its law enforcement and judicial authorities, as required by relevant international conventions (e.g. UNCAC[40] and the 1959 Strasbourg Convention[41]). Under Law No. 302/2004 (MLA Law), Romanian judicial authorities can engage in spontaneous exchanges of information with their counterparts to facilitate consultation and co-operation, including determining the best place of prosecution. Romania is also a member of various law enforcement networks, such as, the UNODC GlobE Network, the European Partners against Corruption/European Contact-Point Network against Corruption (EPAC/EACN), and the International Association of Anti-Corruption Authorities (IAACA) and institutions, including Europol and Eurojust, that aim to facilitate these consultations. Since June 2023, Romania has started participating in the informal meetings organised for law enforcement officials from Working Group member countries.

81. The transfer of criminal proceedings is possible by the decision of the prosecutor or the judge, the applicable legal basis being the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972 or the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. In the absence of an international legal basis, Romanian authorities are able to co-operate based on reciprocity or, if the interest justifies it, even in the absence of reciprocity. In each case, the procedural steps are governed by the MLA Law.

e. Reviewing Romania's available jurisdictional bases

82. Article 4(4) of the OECD Anti-Bribery Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

83. Given the range of jurisdictional bases described above, the Romanian authorities currently consider that there is no foreseeable obstacle to establishing jurisdiction over foreign bribery cases. In addition, they observe that the DNA has not had any jurisdictional issues arise in the foreign bribery case that is currently pending before the Romanian courts.

Commentary

In the view of the lead examiners, Romania's legal framework appears consistent with the requirements of Article 4 of the OECD Anti-Bribery Convention given that it provides various jurisdictional bases that would be available in foreign bribery cases, including territorial and

40 United Nations Convention against Corruption, 31 October 2003, 2349 U.N.T.S. 41

41 European Convention on Mutual Assistance in Criminal Matters, 20 April 1959, ETS no. 030.

nationality jurisdiction. The application of these jurisdictional bases can be further examined in subsequent monitoring, in particular, the new derogation eliminating dual criminality for corruption offences committed by Romanian nationals abroad.

5. Article 5: Enforcement

84. Article 5 of the OECD Anti-Bribery Convention provides that investigation and prosecution of foreign bribery "shall be subject to the applicable rules and principles of each Party" and "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

85. ***Overview of relevant institutions*.** The Romanian prosecution's hierarchical structure is headed by the Prosecutor General who heads the Public Ministry, which is the prosecution service of Romania. The prosecution service is divided into Public Prosecutor's Offices (PPOs) throughout the country. The highest PPO is attached to the High Court of Cassation and Justice. Other PPOs are attached to the courts of appeal, the ordinary and specialised tribunals (which typically act as second instance courts), and the first instance courts across Romania. These PPOs are subordinate, either directly or indirectly, to the Prosecutor General.[42] Unless the law provides otherwise, the PPO attached to the court that would generally have jurisdiction over a corruption offence would have the competence and the duty to oversee the investigation and prosecution of that offence. For corruption offences, this would normally be the PPO attached to a tribunal, as these courts are exceptionally designated as the first-instance courts for corruption cases under article 56(6) CPC. The investigations conducted under the instructions of the competent prosecutor would typically be carried out by the Romanian police within the Ministry of Internal Affairs.

86. According to the Romanian Constitution, the prosecution service acts in accordance with the principle of legality, impartiality, and hierarchical control under the authority of the Minister of Justice. The Minister's authority, however, translates into issuing general guidance addressed to the PPOs in relation to policy objectives in fighting crime.[43] In particular, the Minister may not give instructions in specific cases.

87. Notwithstanding the general jurisdiction of the PPO, Romania has assigned exclusive jurisdiction over high-level corruption offences to the National Anti-Corruption Directorate (DNA). Established in 2002, the DNA is a specialised structure[44] that is contained within, but independent of, the PPO attached to the High Court of Cassation and Justice. The DNA maintains its headquarters in Bucharest and 14 branches across Romania. The DNA has its own seconded police officers and technical specialists who carry out investigative steps under the direction of DNA prosecutors, including searches and seizures, executing arrest warrants, interviewing individuals, conducting database checks, obtaining bank records, and effectuating wiretaps or other audio/visual recordings. Under the law, the DNA has exclusive jurisdiction over any foreign bribery matter satisfying at least one of the following conditions:[45]

- The offence causes "material damage" exceeding the equivalent in lei of EUR 200,000;

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42 [SWD(2020) 322 final], European Commission Staff Working Document, *2020 Rule of Law Report: Country Chapter on the rule of law in Romania* (30 Sept. 2020), page 2.

43 Law 304/2004, article 68.

44 The other specialised structures within the Prosecutor's Office attached to the High Court of Cassation and Justice are the Directorate for Investigating Organised Crime and Terrorism (DIICOT) and, from 2018 to 2022, the Prosecutorial Section for the Investigation of Offences in the Judiciary (SIIJ).

45 Government Emergency Ordinance 43/2002, article 13(1). [in Romanian].

- The "object of the corruption offence" exceeds the equivalent in lei of EUR 10,000;
- The offence was committed by specific categories of Romanian officials, including those with management positions in SOEs or public institutions, as well as Romanian members of the European Parliament or the European Commission; or
- The offence was committed against the financial interests of the European Union.

88. The term "material damage" is not defined in the Criminal Code. According to the Romanian authorities, they consider that the term covers harmful results, whether of a "tangible" or "intangible" nature. In their view, "material damage" might be considered to cover the proceeds of corruption. They also consider that the "object of the offence" would cover the bribe. According to the authorities, if the DNA opens a case but ultimately cannot establish that it is competent, it will send the matter to the prosecutor who would have competence. The exact scope of the DNA's competence and how it works in practice will need to be further examined in subsequent monitoring phases.

89. ***Appointment and removal of DNA Chief Prosecutor*.** The DNA is headed by a Chief Prosecutor who must be appointed by the President of Romania after being nominated by the Minister of Justice. As part of the process, the Superior Council of Magistrates (SCM) must also prepare an advisory opinion concerning the nominee's qualifications for the position. In 2018, a constitutional conflict arose when the then-Minister of Justice insisted on removing the DNA Chief Prosecutor over the objection of the President of Romania. When proposing the removal, the Minister also disregarded an SCM opinion finding no grounds to justify the DNA Chief Prosecutor's removal. Ultimately, the Constitutional Court ruled that, even though the President has a substantive role in the appointment process, the Minister of Justice has complete discretion to assess whether a statutory cause for removal exists. As a result, the President must carry out the Minister's request to remove the DNA Chief Prosecutor, provided that the Minister has followed the correct formalities. Following the Constitutional Court's decision, the President ultimately executed the Minister of Justice's request to remove the DNA Chief Prosecutor.

90. ***Civil and disciplinary liability of judges and prosecutors***. The 2019 amendments to the laws regulating the prosecution services and the judiciary (Justice Laws)[46] created a system of civil liability when a prosecutor or judge committed "judicial error". These reforms enabled plaintiffs to seek compensation for "judicial errors" and for the Ministry of Finance to seek recourse from the individual prosecutor or judge found to have committed the error. In a 2021 judgment, the European Court of Justice (ECJ) found that the new civil liability provisions were incompatible with EU law as they could potentially give rise to liability on non-objective grounds.[47] With the December 2022 adoption of new amendments to the Justice Laws, the power of the Ministry of Finance to seek recourse is now restricted to instances where the relevant section of the SCM finds that the prosecutor or judge has committed an error in "bad faith" or "grave negligence". The SCM's section would take such a decision based on a report of the Judicial Inspectorate, which investigates alleged disciplinary misconduct for the SCM.[48] In addition, the December 2022 amendments introduced reforms to restrict the substantive grounds for disciplinary offences and to increase procedural protections for magistrates subject to disciplinary action.

91. ***Seniority requirements for DNA prosecutors***. The Justice Laws reforms also increased the seniority requirement for DNA prosecutors from six to ten years. Though the EU Commission found that this created issues for maintaining DNA staff levels, a 2021 Constitutional Court decision upheld the

46 As used by the European Commission, the "Justice Laws'' are Laws 303/2004 on the status of judges and prosecutors, Law 304/2004 on judicial organization, and Law 317/2004 on the Superior Council of Magistracy.

47 ECJ Judgment (Grand Chamber) of 18 May 2021, paras. 233-241.

48 COM(2022) 664 final (Nov. 2022), page 4.

requirement on the grounds that the DNA, as a specialised structure within the PPO attached to the High Court of Cassation and Justice, should have the same seniority requirements applicable to that PPO.[49]

92. ***Rules and principles regarding investigations and prosecutions*.** Criminal proceedings against both natural and legal persons are governed by the Criminal Procedure Code (CPC). The legality principle (*nulla poena sine lege*) and the obligation to act *ex officio* on suspicion of an offence constitute key aspects of Romania's criminal procedure (article 7(1) CPC). The investigations may be carried out by the police, special investigation bodies, or the prosecutor. The investigations performed by the police or the special investigation bodies are coordinated and supervised by the prosecutor. During the course of the criminal investigation, the judge for rights and liberties decides upon preventive measures, asset freezing, temporary safety measures, and other specified acts of the prosecutor (article 52 CPC).

93. Pre-trial investigations can start either *ex officio* or on the basis of a complaint by the injured party, a denunciation by anyone with knowledge about the conduct, or a report by an inspection body (article 288-292 CPC). Romania states that *ex officio* action can be taken based on media reports about alleged offences. Before starting an investigation, the law enforcement authorities must ascertain that (i) the offending is subject to Romanian jurisdiction, (ii) they have the relevant material and territorial competence over the offending, and (iii) there is a "credible" level of suspicion that an offense has occurred based on the facts known. While the Romanian CPC does not set a time-limit for the investigation, certain coercive (article 202 CPC) and covert measures (article 138 CPC) can only be performed within certain time limits. For example, pre-trial detention can last no longer than 180 days, while interception of telecommunications can be ordered for a term of 30 days, with possibility of extension up to a maximum of 6 months.

94. An ongoing investigation can be suspended in cases provided by article 312 CPC. These include medical conditions that render the suspect unable to take part in the proceedings, as well as temporary legal impediments to taking criminal procedural measures against a person, e.g., immunity of the President during the term of office. Investigations can be concluded with an indictment (article 327 CPC), a plea agreement (article 478 CPC), the prosecutor's decision to close the case (article 315 CPC), or to drop charges (article 318 CPC). A prosecutorial decision to close a case can be made when circumstances prevent the criminal investigation from continuing. This would include any grounds for excluding or removing punishability, such as amnesty or statute of limitations, lack of evidence, or the transfer of criminal proceedings to another country.

95. According to the Phase 1 questionnaire response, prosecutors in principle have a duty to commence a proceeding once they have established that a crime has been committed. A prosecutor, however, can decide to drop charges for offences punishable by no more than seven years of imprisonment (article 318 CPC). This includes Romania's foreign bribery offence. The decision to drop charges is based on (i) the public interest in prosecuting the offence in light of its nature and circumstances, (ii) the personal circumstances or character of the alleged perpetrator, and (iii) the conduct of the alleged perpetrator before and after the commission of the offence. The factors for assessing the public interest include the manner and means in which the offence was committed, its consequences, the time that has passed since it was committed, the difficulty of bringing the case in comparison with the seriousness of the offence, and the disproportion between the cost of the criminal proceeding and the consequences of the offence. The prosecutor can, through a formal decision, impose certain obligations on the alleged perpetrator as conditions for dropping charges, such as making an apology to the victim or performing community service. The prosecutor's decision must be verified by the superior prosecutor who reviews the decision's legality and merits. It will then be examined by a judge during a hearing with the prosecutor and the parties. Depending on whether the judge is satisfied that the prosecutor's decision is lawful and warranted, the judge will either confirm or invalidate the ordinance ending the case.

[49] COM(2021) 370 final (Jun. 2021), page 5; Constitutional Court decision no. 514/2021.

96. ***Article 5 considerations***. In its Phase 1 questionnaire response, the Romanian authorities state that decisions to drop charges cannot be based on the prohibited Article 5 considerations, namely the national economic interest, geopolitical relations with other states, and the identity of the natural or legal persons involved. The Working Group should examine in subsequent monitoring whether and how the criteria for assessing the "public interest" are applied in foreign bribery and high-level domestic bribery cases.

Commentary

The lead examiners recall that in Phase 1 evaluations there is a limited ability to review matters related to Article 5 of the OECD Anti-Bribery Convention, given that the evaluation procedure does not examine the application of the legal frameworks in practice or provide for an on-site visit. For this reason, they consider that the Working Group will need to more closely examine the mandate, investigative powers, and resources of the different authorities that might have competence in enforcing Romania's foreign bribery offence. In addition, the Working Group will need to examine the safeguards that exist, including limits on the powers of appointing and removing the heads of those authorities, to ensure that Article 5 considerations do not play a role in foreign bribery cases.

6. Article 6: Statute of Limitations

97. Under Article 6 of the OECD Anti-Bribery Convention, any statute of limitations applicable to the foreign bribery offence must "allow an adequate period of time for the investigation and prosecution of this offence".

98. ***Default limitations period***. Under article 153 CC, the Romanian Criminal Code contains a limitations period for criminal liability for all but the most serious of crimes. As the limitation period removes criminal liability, this means that a final judgment in the matter must be obtained before the period lapses. Under article 154(1)(c) CC, the length of the applicable limitation period for each offence is based on the term of imprisonment foreseen for the relevant offence. As the maximum term of imprisonment foreseen for Romania's foreign bribery offence is seven years, the default limitation period for foreign bribery is eight years. This limitation period is the same for domestic bribery as well, along with all other offences that are punishable by a term of imprisonment with a maximum greater than five years but not exceeding ten years. Under article 148 CC, the limitations period for legal persons is calculated in the same matter as for natural persons.

99. ***Commencement***. Under article 154(2) CC, the limitations period begins to run from the date when the offence is committed. Under article 174 CC, the commission of an offence is defined as "the performance of any of the acts punished by law as a completed offence or an attempted offence, as well as the participation in the commission of the same […]". For continuing offences, continuous offences, and habitual offences, the limitation period will not start until the date when the last act is performed or when the offending ceases. According to Romanian authorities, as the promising, offering, and giving of bribes can all constitute a completed offence, the limitations period for foreign bribery would start running immediately from a promise or offer of a bribe to a foreign public official. That said, if the bribe is thereafter given, the full offence would be deemed to have been completed only from this latter point in time.

100. ***Interruption***. Under article 155(1) CC, the limitation period can be interrupted upon the performance of any procedural act in the case that must be communicated to the suspect or the defendant. This could include, for example, the prosecutor's decision to continue a criminal investigation, to initiate a prosecution against the defendant, or the issuance of a warrant for pre-trial detention against the defendant. Issuing or receiving an MLA request, however, will not interrupt the limitation period. Under article 155(2) and (3) CC, each interruption restarts the limitations period from the beginning for all participants. No matter how many interruptions there may be, however, under article 155(4) CC, the

limitations period will expire irrevocably once a period equal to twice the length of the original limitations period has elapsed. As a result, a proceeding for foreign bribery must result in a final conviction within 16 years.

101. ***Suspension***. Under article 156 CC, the limitations period will be suspended if an unforeseen or unavoidable circumstance or legal provision prevents the initiation or the pursuit of the criminal proceeding, e.g., lockdown of areas due to a public health or other emergency. In such cases, the limitation period will resume from the point where it left off once the ground that led to the suspension has been removed.

Commentary

The lead examiners consider that, at least on paper, the limitation period foreseen for foreign bribery appears to be compatible with Article 6 of the OECD Anti-Bribery Convention. The Working Group, however, will need to examine how the limitation period affects actual investigations and proceedings in practice to determine if the authorities have adequate time to enforce Romania's foreign bribery offence.

7. Article 7: Money Laundering

102. Article 7 of the Convention provides that, "each Party which has made bribery of its own public officials a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of foreign public official, without regard to the place where the bribery occurred".

103. Romania's money laundering offence is stipulated in article 49 of Law 129/2019 (AML Law). The criminalisation of money laundering is based on an all-crimes approach, meaning that all crimes, including domestic bribery and foreign bribery, are considered predicate offences for money laundering. Under article 49(1) AML Law, the money laundering offence is codified as follows:

> *The offence of money laundering shall be punishable by imprisonment for a term of 3 to 10 years:*
>
> > *(a) the exchange or transfer of property, knowing that it is derived from the commission of criminal offences, for the purpose of concealing or disguising the illicit origin of such property or for the purpose of assisting the person who committed the offence from which the property is derived to evade prosecution, trial or execution of sentence;*
> >
> > *(b) concealing or disguising the true nature, source, location, disposition, movement or ownership of property or rights therein, knowing that the property is derived from crime;*
> >
> > *(c) acquiring, possessing or using property by a person other than the person who committed the offence from which the property is derived, knowing that the property is derived from crime.*

104. Concerning the "knowledge" element, article 49(4) AML Law provides that the "knowledge of the origin of the goods or the intended purpose must be established from the objective factual circumstances". According to the High Court of Cassations and Justice (Decision No. 16/2016), the perpetrator of the predicate offence can be convicted of laundering assets originating from the offence (self-laundering). Furthermore, the money laundering offence is an autonomous offence that can be imposed even without a prior conviction for the predicate offence.[50]

[50] High Court of Cassation and Justice Decision No. 16 of 8 June 2016 (interpreting article 29(1) (a), (b) & (c) of Law 656/2002).

105. Under article 49(3) AML Law, the money laundering offence applies equally to natural and legal persons. Legal persons are subject to the possible application of certain complementary sanctions under article 136(3)(a)-(c) CC.

106. Under article 49(5) AML Law, the money laundering offence is punishable even if the predicate offence was committed outside the territory of Romania. Furthermore, Romania will assert nationality jurisdiction over its citizens and legal persons without imposing any dual-criminality requirements that might otherwise be applicable. Finally, under article 49(2) AML Law, attempted money laundering is also a crime, and, as such, can be sanctioned up to one-half the penalty specified for the offence under article 33 CC.

Commentary

The lead examiners consider that Romania's money laundering offence is largely compliant with Article 7 of the OECD Anti-Bribery Convention, though the Working Group will need to conduct subsequent monitoring to assess how it is applied in practice.

8. Article 8: False Accounting

a. Accounting requirements

107. Under Article 8 of the OECD Anti-Bribery Convention, "each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement discloses and accounting and auditing standards, to prohibit the establishment of off-the-book accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations for the purpose of bribing foreign public officials or of hiding such bribery". The Convention also requires that each Party provide for effective, proportionate, and dissuasive penalties for such omissions and falsifications in respect of the books, records, accounts, and financial statements of such companies.

108. Romania's general regulatory framework, providing a set of rules and accounting requirements, includes the Accounting Law (Law 82/1991) and Accounting Regulations issued by the Ministry of Finance (Order No. 1802/2014). The Ministry of Finance, the National Bank of Romania, and the Financial Supervision Authority also issue additional specific accounting regulations for entities in their regulatory areas. Pursuant to Article 1, the Accounting Law applies to a wide range of entities, including commercial companies, state-owned enterprises, public institutions, and associations. The rules apply whether they are for-profit or non-for-profit entities. Furthermore, the law will apply to foreign entities operating in Romania, and it can also apply to other foreign entities as well as entities lacking legal personality, if they belong to qualifying Romanian entities covered by the law, including commercial companies and state-owned enterprises.

109. There does not appear to be a standalone false accounting offence in Romanian law covering all the elements of Article 8 of the Convention. The Accounting Law, however, appears to cover several aspects of Article 8, with prohibitions against:

- "[H]olding […] assets and liabilities […] without being recorded in the accounts (article 41(1));
- "[C]arrying out economic and financial operations without being recorded in the accounts" (article 41(1));
- Failing to comply with regulations issued by Ministry of Public Finance or other authorities concerning the "use and keeping of accounting records", the "drawing up and using [of] supporting and accounting documents for all operations carried out", and the "preparation, signing and submission to the [..] Ministry of Finance […] of the annual financial statements and, where

applicable, the annual consolidated financial statements, the interim financial statements and the accounting reports (article 41(2));

- Presenting “financial statements that contain erroneous or missing data” (article 41(3));
- Failing to draw up and publish annual financial statements or, for parent companies, the failure to draw up and publish consolidated annual financial statements (articles 41(5)-41(6)); and
- Failing to audit or submit, in accordance with the law, the annual financial statements or consolidated financial statements (articles 41(7)-41(8)).

110. Under article 42 of the Accounting Law, the sanctions for these violations vary considerably between a minimum of RON 300 (EUR 61) and a maximum of RON 40,000 (approximately EUR 8 120).

111. The Accounting Law appears to only provide for fines for the natural or the legal persons that commit the actual violations that arise when carrying out the accounting or auditing requirements. Under article 10(4), the responsibility for the improper application of the accounting regulations with “the economic director, the chief accountant or other person empowered to carry out this function, together with the subordinate staff or specialized natural or legal persons contracted for that purpose.” Thus, it appears that the legal person to which the accounting or auditing requirements applied would be exempted from responsibility. The detection of contraventions and the imposition of fines is carried out by persons in charge of tax inspection and financial control, as well as by the staff of the National Agency for Tax Administration (article 42 (4)).

112. The Romanian authorities also maintain that certain other offences in the Criminal Code may be applicable to conducts covered by Article 8 of the Convention, depending on the facts. Unlike the contraventions in the Accounting Law, these offences would—to the extent they applied—also be applicable to legal persons. These include the article 323 CC offence of using false documents (forgeries) as well as the article 321 CC offence of inducing the issuance of an erroneous official document by certifying untrue facts or by knowingly omitting to insert relevant facts. In addition, in certain contexts, the use of accounting documents to claim fictitious expenses can constitute the offence of tax evasion, according to the High Court of Cassation and Justice jurisprudence interpreting Law 241/2005 (Decision no. 21/2017). Without any jurisprudence, however, it is not clear how these alternative offences would be applicable to false accounting in foreign bribery contexts.

b. Auditing requirements

113. The rules and procedures for auditing financial statements are set by the Statutory Audit Law, the Accounting Law and Order No. 1802/2014. Article 2(1) of the Statutory Audit Law defines a statutory audit as an audit of individual annual financial statements or consolidated annual financial statements carried out in accordance with international auditing standards. Audited financial statements are mandatory when required under EU or national law.

114. Under article 34 of the Accounting Law, the annual financial statements of ‘’legal entities of public interest’’ are subject to statutory audit. These entities include, for example, listed companies, national companies, and state-controlled companies. In addition, large and medium-sized entities, as defined in Order No. 1802/2014, are also subject to statutory audit requirements. Other entities will also be subject to the auditing requirements if they meet at least two of the following three criteria: (i) have total assets exceeding RON 16,000,000 (EUR 3,248,000); (ii) have a net turnover exceeding RON 32,000,000 (EUR 6,496,000); or (iii) have at least 50 employees during the financial year. Under article 41(7) of the Accounting Law, the failure to comply with the obligation to audit, according to the law, annual financial statements, consolidated annual financial statements, as well as interim financial statements entails a fine of RON 30,000 to 40,000 (EUR 6 090 to 8 120). The Statutory Audit Law also establishes penalties for violations of statutory audit regulations, including failures to establish responsible audit committees in legal

entities of public interest, to ensure the exercise of internal audit activity by other entities subject to statutory audit, or to take measures for the independence and objectivity of the audit process. The violation of these obligations entails a fine ranging from RON 10,000 to 100,000 (EUR 2,030 to 20,300).[51]

Commentary

The lead examiners observe that it is not clear whether Romania's legislation covers the full range of conduct described in Article 8 because much depends on the interpretation and applicability of different provisions in the Criminal Code as well as other legislation. In their view, even if it is assumed that these different offences or requirements would implement the scope of Article 8, the sanctions that are provided appear to be quite low. Both issues will need to be examined in subsequent monitoring.

9. Article 9: Mutual Legal Assistance

115. Under Article 9(1) of the Convention, each Party "shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party" concerning offences within the scope of the Convention, including for non-criminal proceedings against legal persons.

116. ***Relevant laws, treaties, and arrangements*.** Under Law 302/2004 (MLA Law), Romania can provide a broad range of assistance, whether based on treaty or reciprocity. First, Romania is a party to multilateral MLA conventions for criminal law matters under the auspices of the Council of Europe, the European Union, and the United Nations,[52] and it also has bilateral MLA treaties with 12 countries.[53] Second, as an EU member, Romania can send and respond to European Investigation Orders (EIOs), a special regime for MLA requests sent between most EU countries. It can also establish joint investigation teams pursuant to relevant multilateral conventions, such as those with the EU, CoE and UN. Under article 3 of MLA Law, Romanian authorities may refuse to execute an MLA request if its execution would be contrary to Romania's sovereignty, security, public order, or other fundamental national interests of the State as defined in the Constitution.

117. ***Competent authority***. During the investigative stage, the competent authority is the respective prosecutor's office with substantive and territorial jurisdiction under the Romanian Criminal Procedure Code. For corruption offences, the DNA would be the competent authority for offences within its mandate. Once a matter goes to trial, the relevant court, contacted through the Ministry of Justice, would be the responsible authority for MLA.

118. ***Types of assistance***. Under Romanian law, the authorities can provide various forms of assistance in corruption matters, including (i) assistance in identifying or locating persons or objects; (ii) examining suspects, defendants, injured parties, civil parties, as well as witnesses and experts; (iii) searches; (iv) the seizure of objects and documents; (v) freezing as well as special or extended confiscation of assets; (vi) on-site investigation and crime scene reconstruction; (vii) expert reports;

51 Statutory Audit Law, article 44(1)-(2).

52 The multilateral MLA treaties in criminal matters include: the European Convention on Mutual Assistance in Criminal Matters. Strasbourg, 1959 and its 1st and 2nd additional protocol, the Convention on Cybercrime (Budapest, 2001); the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw, 2005). At the EU level, Romania mainly applies the 2000 Mutual Legal Assistance Convention and its Additional Protocol (2001) and the EIO Directive. Romania also applies the UNTOC and UNCAC.

53 ` Romania has concluded bilateral MLA treaties in criminal matters with Albania, Algeria, Canada, Cuba, Egypt, Kazakhstan, Moldova, Mongolia, Morocco, the People's Republic of China, Syria and the United States of America.

(viii) audio intercepts, surveillance, undercover operations, and controlled deliveries; (ix) the examination of archives; and (x) the transmission of information, evidence, or files. In addition, any other investigative steps can be taken if not inconsistent with national law.

119. ***Assistance in non-criminal proceedings***. In most cases, Romania can only provide MLA in criminal matters. However, Romania's law concerning the use of EIOs between EU member states authorises assistance "in proceedings brought by administrative authorities", including in situations brought against legal persons.[54] If an EIO by a competent investigative authority has been validated by a judicial authority from that country, then it will be recognised under Romanian law. Also, based on the Second Additional Protocol to the 1959 Strasbourg Convention, MLA requests brought by administrative authorities may be executed, provided that the acts are punishable in either of the countries and the decision may be appealed to a court of law. Thus, given the broad approach that Romania took concerning the liability of legal persons, it appears that Romania should be able to provide assistance at least to EU and CoE countries that use non-criminal liability to hold legal persons liable for foreign bribery. While the Romanian authorities report that they are generally unable to render assistance in non-criminal proceedings, they assert that such assistance can be provided when required under an international treaty as treaties are self-executing under Romanian law. It will remain to be seen how the Romanian authorities and courts will interpret the OECD Anti-Bribery Convention in this regard.

120. ***Dual criminality***. Romania imposes different conditions on MLA depending on the measure for which assistance is sought. In general, dual criminality is required for certain coercive measures (e.g., search, seizure, confiscation) as well as for the recognition and enforcement of judgments. In addition, for controlled deliveries and cross-border surveillance, the offence must also give rise to extradition.[55] Dual criminality is construed broadly, with the condition being fulfilled if the conduct is punishable as some offence in both jurisdictions. It is not clear if the extradition requirement is also construed broadly to cover all offences that could, in theory, justify extradition or if the extradition requirement must be established for the particular offence as applied to the particular defendant at the time the MLA request is made or executed. The Romanian authorities report that they are currently able to provide assistance in foreign bribery cases, including for coercive measures and to obtain bank information, given the seriousness of the offence. Furthermore, Romania does not apply the dual criminality requirement when a treaty provides otherwise, such as in the EU context.

121. Now that Romania is a Party to the Convention, the general rules concerning dual criminality may no longer be relevant given that under Article 9(2) of the Convention dual criminality should be "deemed to exist" for any request from a Party within the scope of the Convention. This will need to be examined as practice develops. Nonetheless, the Romanian authorities observe that they have already been providing assistance in relation to MLA requests concerning foreign bribery even before ratifying the Convention.

122. ***Bank secrecy***. Consistent with Article 9(3) of the OECD Anti-Bribery Convention, Romanian authorities report that bank secrecy is not a ground for refusing MLA. In relation to EU member states, article 273 of MLA Law expressly excludes bank secrecy as a ground for refusal, and article 146[1](7) CPC mandates financial institutions to provide bank records pursuant to a warrant issued by a judge.[56]

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54 Law 302/2004, article 329(b) and (d).

55 Specifically, under article 26 of Law 302/2004, the act must be punishable by a term of imprisonment of at least one year in both the requesting country and Romania, or, if the assistance is requested with a view to secure the execution of a sentence, the custodial sentence must be for four months or longer.

56 In addition, under article 306(6) CPC, "Banking and professional secrecy, except for the defence counsel's professional secrecy, cannot serve as a basis to deny a prosecutor's requests once the criminal investigation has started."

Commentary

The lead examiners consider Romania's framework for mutual legal assistance to be comprehensive and largely consistent with Article 9. The Working Group will need to assess Romania's ability to provide MLA in practice, in particular, in the context of non-criminal cases and when applying the dual criminality provision outside of the EU context.

10. Article 10: Extradition

123. Under Article 10 of the OECD Anti-Bribery Convention, Parties have obligations to make foreign bribery an extraditable offence and to facilitate extradition between the Parties consistent with national law and treaties. If extradition is refused solely on the ground that the person is its national, the refusing Party is required to submit the case to its competent authorities for the purpose of prosecution.

124. ***Relevant laws, treaties, and arrangements*.** According to Romania, extradition is sought and provided on the basis of international multilateral conventions and treaties.[57] In addition, Romania has 16 bilateral extradition agreements.[58] Romania does not require a treaty for extradition if assurances of reciprocity are given. For EU member states, the European Arrest Warrant (EAW) is used instead.

125. ***Dual criminality***. Unless a treaty provides otherwise, Romania can generally only extradite a suspect or a defendant for criminal prosecution or trial if the acts concerned are also criminal under Romanian law and punishable by at least one year. Romania can extradite a convicted person to serve a custodial sentence or a suspended sentence under supervision if the dual criminality and reciprocity conditions are met, provided that the remaining term of the sentence is at least four months. According to Romanian authorities, as with MLA, the dual criminality requirement is construed broadly and is satisfied if acts concerned would be considered criminal in both Romania and the requesting country. Even if the dual criminality condition is met in an abstract sense, however, extradition will still be refused if the act is no longer prosecutable in both countries. Thus, extradition would be denied if, for example, the statute of limitations has elapsed in Romania, even if the requesting country's investigation can still proceed under its own law. In the context of cooperation with EU member states, the dual criminality requirement is excluded for a catalogue of offences, corruption being one of them.[59]

126. ***Extradition of nationals***. As a general rule, Romania cannot extradite its citizens.[60] It can, however, extradite its citizens on the basis of bilateral or multilateral conventions to which Romania is a Party, provided that reciprocity exists and one of the following conditions is met: (i) the person was domiciled in the requesting State when the request was issued; (ii) the person is also a citizen of the requesting State; or (iii) the person committed an act in the territory of an EU country or against an EU citizen, so long as the requesting State is an EU member. Romania also requires states seeking the extradition of a Romanian citizen to agree that any term of imprisonment will be served in Romania. Romania will also not extradite political refugees, asylum seekers, or foreign nationals granted immunity from jurisdiction in Romania (e.g., diplomats). The optional grounds for refusal include the circumstances when the offence on which the request is based is the subject of an ongoing criminal trial or where the

57 Most notably, the European Convention on Extradition (Paris, 1957), ETS No. 24, plus its Additional Protocols. Other multilateral conventions providing a treaty basis for extradition include UNCAC and UNTOC.

58 Romania has concluded bilateral extradition treaties with Algeria, Australia, Brazil, Canada, Cuba, Egypt, Kazakhstan, Moldova, Mongolia, Morocco, New Zealand, the People's Republic of China, Syria, Tunisia, and the United States of America.

59 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA.

60 Constitution of Romania, article 19(1).

offence may be the subject of a criminal trial in Romania, or the extradition is likely to have particularly serious consequences due the age or state of health of an individual.

127. ***Obligation to prosecute.*** Under article 23(1) of MLA Law, if Romania refuses to extradite a citizen or a political refugee, Romania will submit the case to its competent judicial authorities for prosecution and trial, if the requesting state so requests. In addition, the requesting state must submit, free of charge, the available files and evidence concerning the offence to the Romanian authorities in order to effectively transfer the procedure to Romania. Romania will inform the requesting country about the results of the request. On the other hand, if Romania declines to extradite any foreigner who is not a "political refugee", the authorities will automatically refer the matter for prosecution and trial, *ex officio*, under article 23(2) of MLA Law, if the offence under the requesting state's law provides for a minimum prison sentence of at least five years.

Commentary

The lead examiners consider that Romania's extradition regime is largely consistent with Article 10 of the Convention. In their view, there may be a need to assess in subsequent monitoring whether Romania's requirement that dual criminality be satisfied in the specific case might constitute a potential obstacle to its effectiveness in practice.

11. Article 11: Responsible Authorities

128. Under Article 11 of the Convention, each Party must notify the Secretary-General of the OECD, as the Depositary of the OECD Anti-Bribery Convention, of the authority or authorities for making or receiving requests for the purposes of consultation under Article 4(3), mutual legal assistance under Article 9, as well as extradition under Article 10 of the Convention. Article 11 provides that the designated authority or authorities "shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties".

129. By email dated 28 July 2023, the Romanian Ministry of Justice provided its designations for each provision.

130. ***Article 4(3) consultations.*** The responsible authority for consultations under Article 4(3) of the Convention is either (i) the Prosecutor's Office attached to the High Court of Cassation and Justice or (ii) the National Anti-Corruption Directorate (DNA) "in accordance with [Romania's] domestic legislation regarding their mandate to prosecute corruption".

131. As discussed in Section 5 above, the Prosecutor's Office attached to the High Court of Cassation and Justice has general competence over corruption matters, unless the law designates another authority. Under Law 78/2000 (as amended), the DNA has exclusive competence over corruption offences that cause material damage greater than EUR 200,000, that involve an object of the offence greater than EUR 10,000, specific categories of Romanian or EU officials, as well as offences against the financial interest of the European Union.

132. ***Article 9 mutual legal assistance.*** The responsible authorities for consultations under Article 9 of the Convention vary based on whether a request is made before or during the trial phase. Before the trial phase, the responsible authority is again either (i) the Prosecutor's Office attached to the High Court of Cassation and Justice or (ii) the DNA "in accordance with [Romania's] domestic legislation regarding their mandate to prosecute corruption". During the trial phase, the responsible authority is the Ministry of Justice.

133. ***Article 10 extradition.*** The responsible authority for consultations under Article 10 of the Convention is the Ministry of Justice.

Commentary

While the lead examiners initially queried whether it might be more efficient to consolidate the number of responsible authorities for mutual legal assistance requests under the OECD Anti-Bribery Convention, they understand that the Romanian authorities have sought to expedite requests for assistance by ensuring that requests from other Parties are sent directly to the most relevant authority at each stage of the process. They have also heard the Romanian authorities explain that the relevant authorities routinely work to ensure that any misdirected requests will be redirected to the appropriate authority to ensure their timely execution. Accordingly, they believe that it would be appropriate to check in subsequent monitoring how the system works in practice.

C. Implementation of the 2021 OECD Anti-Bribery Recommendation

1. Targeted Focus on Selected Issues in Phase 1

134. In addition to evaluating the implementation of the OECD Anti-Bribery Convention, the Working Group also monitors whether Parties are implementing the 2021 OECD Anti-Bribery Recommendation and other related instruments. Given that the Phase 1 evaluation primarily focuses on legislative issues related to the implementation of the Convention, this report has focused on those aspects of the 2021 Recommendation that elaborate on the content of specific articles of the Convention. In line with Phase 1 evaluations conducted for other Parties, this report also examines the issue of non-tax deductibility.

2. Non-Deductibility of Bribes for Tax Purposes

135. Recommendation XX of the 2021 OECD Anti-Bribery Recommendation states that member countries shall "fully and promptly implement the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials.[61]

136. Romania's legal framework contains a provision explicitly disallowing the tax deductibility of bribes, including those paid to foreign public officials. Under article 25(4)(s) of the Tax Code, expenses that are subsequently proved as being related to acts of corruption are not deductible, regardless of their nature. Article 25(4)(s) does not expressly require a final court decision to establish the proof necessary to trigger a denial of a claimed tax deduction. According to the MOJ, the relevant decision-maker could make a determination based on all the available evidence, including court decisions, audit reports, or other material. In practice, however, the tax authorities have followed a stricter approach, making the denial of tax deductions for corruption acts contingent on a final court decision.[62]

Commentary

The lead examiners find it positive that Romania expressly prohibits the tax deductibility of bribes or other corrupt payments. While the law itself does not appear to expressly require a prior conviction before a tax deduction can be denied, the lead examiners recognise that certain authorities may interpret the law to in fact require a prior conviction. As this issue pertains to how the legislation is applied in practice, they would invite the Working Group to examine this aspect in more detail in subsequent monitoring.

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61 [OECD/LEGAL/0371]

62 In this regard, article 132 of Law no. 227/2015 obliges tax auditors to refer facts that could constitute a crime to the competent judicial authorities.

D. Evaluation of Romania

1. General Comments

137. The Working Group considers that Romania's legal framework is largely in conformity with the standards of the OECD Anti-Bribery Convention, though there remain some issues that will need to be further examined, as noted below. These issues, along with the application of the legal framework in practice, should be examined during Romania's Phase 2 evaluation.

2. Specific Issues

Foreign bribery offence and defences

138. Romania's foreign bribery offence appears largely compliant with Article 1 of the OECD Anti-Bribery Convention. There are, however, potential issues concerning certain elements, notably the definition of "foreign public official" and the requirement that the act relate to the official's formal duties. For the definition, the issue is whether Romania's offence covers the bribery of those performing "public functions" for a foreign state, including employees of foreign state-owned enterprises. It is also not clear how Romanian law would treat officials of a *de facto* territory not recognised as a State by Romania. The requirement that the bribe be given either for an act or omission within the scope of the official's duty—or for an act that is contrary to the official's duty—might not cover the full range of conduct that the Convention intended to cover, in particular, the scenario contemplated in commentary 19 to the Convention. The extent to which Romania's foreign bribery offence is tied to the concept of acts falling "within the duties of the office" and acts "contrary to the duties of the office" will need to be examined further, together with Romania's trading in influence offence to determine whether they together—in accordance with the principle of functional equivalence—cover the full range of conduct prohibited under Article 1.

139. Romania's decision to create its foreign bribery offence by extending its domestic offence creates an issue by also extending the special defences for domestic bribery. Unlike Romania's general "moral constraint" defence, which appears similar to defences, such as "duress", found in other Parties to the Convention, the special "constraint" defence appears to lack sufficiently restrictive conditions that would be needed to address the concerns that the Working Group has raised in the past, in particular where such defences could be established by the threat of economic harm. In addition, the Working Group has determined repeatedly that "effective regret" provisions that automatically grant immunity to a perpetrator in foreign bribery cases are not compatible with the Convention. At the same time, the Working Group has consistently recognised that certain defences, in particular "effective regret", may have important policy rationales in the domestic corruption context. This is because in domestic corruption cases the prosecuting jurisdiction that grants immunity to the bribe-giver who reports the offence, confesses, and cooperations with the investigation will also have jurisdiction over the public official who took the bribe. In this context, "effective regret" can provide a means for enforcement authorities to detect and prosecute corruption offences that otherwise would go unpunished.

140. Now that Romania has ratified the OECD Anti-Bribery Convention, it is theoretically possible that the Convention's definition of a foreign public official and the understanding of the "performance of official duties" will be automatically incorporated into Romania's foreign bribery offence by operation of law. However, it may take considerable time for jurisprudence to confirm whether the Convention's provisions can in fact—while still respecting the principle of legality—expand the scope of liability of the foreign bribery offence as codified in the Criminal Code. For this reason, Romania could consider amending its legislation to create a new standalone foreign bribery offence that is not defined in relation to the domestic bribery offence. This would not only clearly resolve the issues concerning the scope of the foreign bribery offence

in relation to Article 1, it would also fix the problem that Romania's current framework extends defences that are, when applied in the foreign bribery context, incompatible with the Convention, even if they are acceptable in the context of enforcing the domestic bribery offence.

141. The Working Group will further assess Romania's foreign bribery offence as well as its application in practice through future evaluations and monitoring.

Responsibility of legal persons

142. Romania's framework for holding companies liable for foreign bribery seems, at least as codified in the Penal Code, to follow a "flexible" approach consistent with Annex I(B)(3) of the 2021 OECD Anti-Bribery Recommendation without requiring that the natural person(s) involved in the offence have any specific level of authority within or concerning the legal person. The Working Group, however, should examine how the jurisprudence applies the standards to ensure that this flexible approach is applied in practice, in particular in the context where intermediaries are used to engage in foreign bribery.

Sanctions

143. Romania's sanctions regime appears to satisfy the minimum standards in Article 3 of the Convention insofar as the sanctions are sufficient to permit mutual assistance and extradition. However, the maximum fines for both natural and legal persons are extremely low from a comparative perspective with existing Working Group members. This raises substantial concerns about how effective, proportionate and dissuasive they may be. Romania could increase the maximum fines or consider creating an alternative fine provision (e.g., a multiple of the benefit sought or obtained) to ensure that the sanctions will be proportionate to the severity of the offence in high-level foreign bribery cases.

144. For legal persons, the Working Group should also follow up on how the complementary sanctions are applied in practice as case law develops.

145. Romania appears to have a solid regime for confiscating both the bribe and the proceeds in foreign bribery cases. The Working Group should follow up on how these provisions are applied in practice.

Jurisdiction

146. Overall, Romania appears to have a solid framework for asserting jurisdiction over foreign bribery using different jurisdictional bases, including territorial and nationality jurisdiction.

147. The Working Group should examine the practical effect of the July 2022 amendments abolishing the dual criminality requirement concerning corruption crimes, tax crimes, and money laundering when establishing jurisdiction over Romanian natural and legal persons.

Enforcement

148. The Working Group should evaluate more carefully the different authorities that may have competence over foreign bribery investigations and prosecutions to ensure that they have sufficient powers, resources, and independence. The Working Group should also examine whether sufficient safeguards are in place to ensure that considerations prohibited by Article 5 of the Convention are not taken into account in the foreign bribery context, for example, when prosecutors terminate cases on "public interest'' considerations.

Statute of limitations

149. Romania's default limitations period for foreign bribery is eight years and can be extended up to 16 years. While this is a long period of time, Romania's statute of limitations applies to the entire period between the offence to the time when a final conviction is secured. Thus, the Working Group will need to examine whether the limitations period is adequate in practice for purposes of Article 6 of the Convention in light of the time it takes for criminal court proceedings to resolve in foreign bribery and similarly complex white-collar criminal cases.

Money laundering

150. Romania's money laundering framework appears largely consistent with Article 7 of the Convention. The Working Group will have to examine in subsequent monitoring how the money laundering offence is applied in practice either independently or in conjunction with foreign bribery charges.

False accounting

151. While Romania has at least some provisions in its Accounting Law and related regulations, the Penal Code, and the Tax Code, that would appear to prohibit certain misconduct covered by Article 8 of the Convention in at least some circumstances, it is not clear that all these provisions would necessarily apply or, if they did apply, that they would cover the full scope of Article 8. In addition, the administrative sanctions provided in the Accounting Law appear to be quite low and do not apply directly to the legal persons whose operations are subject to the auditing and accounting requirements. In subsequent monitoring, the Working Group should examine whether the combination of offences, as applied in practice, could be considered functionally equivalent or if legislative amendments will be needed to expand their scope and sanctions.

Mutual Legal Assistance

152. Romania appears to have in place a comprehensive framework to provide a broad range of mutual legal assistance consistent with Article 9 of the Convention. The Working Group can follow up on how this framework is applied in relation to MLA requests for the purpose of criminal proceedings, as well as non-criminal proceedings concerning legal persons, within the scope of the Convention. Another issue to examine is the practical application of the dual criminality requirement outside of the EU context.

Extradition

153. The Romanian extradition regime appears to be largely consistent with Article 10 of the OECD Anti-Bribery Convention. Outside the EAW context, Romania's dual criminality requirement appears to be applied in a concrete rather than an abstract sense, thus limiting assistance to conduct that not only would constitute a crime in both jurisdictions but also to offences that are still prosecutable in both jurisdictions. The Working Group could further examine the operation of Romania's mutual legal assistance and the extradition regimes in relation to offences within the scope of the Convention through future evaluation and monitoring.

Responsible authorities

154. The Working Group may need to follow up on how the Responsible Authorities designated under Article 11 of the OECD Anti-Bribery Convention will coordinate, in particular, if another Party sends an MLA request to a Responsible Authority that does not have the competence to handle that specific request.

Non-Tax Deductibility of Bribes

155. Romania's legal framework appears to explicitly disallow the tax deductibility of bribes in line with the 2021 OECD Anti-Bribery Recommendation and 2009 Tax Recommendation. The Working Group could further explore how the provision is applied in practice through future evaluation and monitoring.

Annex 1. List of Abbreviations and Acronyms

Abbreviation	Term
Civ.C.	Civil Code of Romania
CC	Criminal Code of Romania
CoE	Council of Europe
CPC	Criminal Procedure Code of Romania
DNA	National Anti-Corruption Directorate of Romania
EAW	European Arrest Warrant
ECJ	European Court of Justice
EIO	European Investigation Orders
EU	European Union
EUR	Euro
FIU	Financial intelligence unit
OECD	Organisation for Economic Cooperation and Development
MLA	Mutual legal assistance
MOJ	Ministry of Justice of Romania
PPO	Public Prosecutor's Office of Romania
RON	Romanian new leu
SCM	Superior Council of Magistrates of Romania
SOE	State-owned enterprise
UNCAC	United Nations Convention Against Corruption
UNTOC	United Nations Convention Against Transnational Organized Crime
Working Group	Working Group on Bribery in International Business Transactions

Annex 2. Excerpts of relevant legislation

Unofficial English translations

Provisions related to Romania's foreign bribery or other corruption offences

Criminal Code

Article 175. Public official

(1) For the purposes of criminal law, a public official is the person who, on a permanent or temporary basis, with or without remuneration:

(a) exercises the duties and responsibilities, set under the law, to implement the prerogatives of the legislative, executive, or judiciary branches;

(b) exercises a function of public dignity or a public office irrespective of its nature;

(c) exercises, alone or jointly with other persons, within a public utility company, or any other economic operator or legal entity of which the State owns all or the majority of its capital shares, the responsibilities needed to carry out the activity of the entity.

(2) At the same time, for the purposes of criminal law, a person who performs a service in the public interest, which the public authorities have assigned or whose performance is subject to their control or supervision, shall be deemed a public servant.

Article 289. Taking a bribe

(1) The act of the public official who, directly or indirectly, for themselves or for another person, solicits or receives money or other undue benefits or accepts a promise of such benefits, in connection with performance, non-performance, speeding up or delaying of the performance of an act which falls within the duties of the office, or in connection with the performance of an act contrary to the duties of the office, is punished by 3 to 10 years of imprisonment and the deprivation of the right to hold a public office or to exercise the profession or the activity in the execution of which the offence was committed.

(2) The act provided under para. (1), committed by one of the persons provided under Article 175 para. (2), shall constitute a criminal violation only when committed in relation with the performance or delaying the performance of an action related to their legal duties or related to the performance of an act contrary to such duties.

(3) The money, valuables or any other benefits received shall be subject to forfeiture, and when such items can no longer be located, the forfeiture of the equivalent shall be ordered.

Article 290. Giving bribes

(1) Promising, offering or giving money or other benefits in the conditions provided under Article 289 shall be punished by 2 to 7 years of imprisonment.

(2) The act provided under para. (1) shall not be deemed a crime when the bribe giver was constrained by any means by the bribe taker.

(3) The bribe giver shall not be punished if they report the act before the criminal investigation body is notified of it.

(4) The money, valuables or any other assets given shall be given back to the person who gave them in the case provided under para. (2) or given following the denunciation provided under para. (3).

(5) The money, valuables or any other benefits offered or given shall be subject to forfeiture, and when such items cannot be located anymore, the forfeiture of the equivalent shall be ordered.

Article 292. Buying influence

(1) The promise, the supply or the giving of money or other benefits, for oneself or for another, directly or indirectly, to a person who has influence or who alleges they have influence over a public servant to persuade the latter perform, fail to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties, shall be punishable by 2 to 7 years of imprisonment and the prohibition to exercise certain rights.

(2) The perpetrator shall not be punishable if they report the action prior to the criminal investigation bodies be notified thereupon.

(3) The money, valuables or any other assets shall be given back to the person who gave them if they were given following the denunciation provided under para. (2).

(4) The money, valuables or any other benefits given or supplied shall be subject to forfeiture, and when such cannot be located anymore, the forfeiture of the equivalent shall be ordered.

Article 294. Acts committed by foreign officials or related to them

The provisions of this chapter shall apply to the following persons, unless the international agreements to which Romania is a Party provide otherwise:

(a) officials or persons who carry out their activity based on a labour agreement or other persons with similar duties in an international public organization to which Romania is a Party;

(b) members of parliamentary assemblies of international organizations to which Romania is a Party;

(c) officials or persons who carry out their activities based on a labour agreement or other persons with similar duties within the European Union;

(d) persons who carry out judicial functions within the international courts whose jurisdiction is accepted by Romania, as well as officials working for the registrar's office of such courts;

(e) officials of a foreign state;

(f) members of parliamentary or administrative assemblies of a foreign state;

(g) jurors within foreign courts.

Provisions related to complicity or participation in organised criminal group

Criminal Code

Article 32. Attempt

(1) An attempt means acting on the intent to commit an offense, where the consummation of the act was interrupted or failed to cause its effect.

(2) "Attempt" does not exist when the impossibility to consummate the offense was the result of the way in which consummation was designed.

Article 46. Author and co-authors

(1) An author is the person who directly commits an act stipulated by criminal law.

(2) Co-authors are persons who directly commit the same act stipulated by criminal law.

Article 47. Instigator

An instigator is a person who, with intent, causes another to commit an act stipulated by criminal law.

Article 48. Accomplice

(1) The accomplice is the person who intentionally facilitates or helps in any way the author to commit an offence.

(2) The accomplice is also the person who promises, before or during the commission of the act, that they will conceal the assets originating from it or that they will favour the perpetrator, even if, after the commission of the act, the promise is not fulfilled.

Article 49. Penalty in case of participants

The co-author, the instigator and the accomplices to an intentional offence is punished with the penalty stipulated by law for the author of the act. When the penalty is established, the contribution of each person to the commission of the act shall be taken into account, as well as the stipulations stipulated in art. 74.

Article 367. Creation of an organized crime group

(1) The act of initiating or creating an organized crime group or of joining or supporting such a group in any way shall be punishable by no less than 1 and no more than 5 years of imprisonment and a ban on the exercise of certain rights.

(2) When the offenses included in the purpose of an organized crime group are punished by life imprisonment or by a term of imprisonment exceeding 10 years, it shall be punishable by no less than 3 and no more than 10 years of imprisonment and a ban on the exercise of certain rights.

(3) If the acts set out in par. (1) and par. (2) were followed by the commission of an offense, the rules on multiple offenses shall apply.

(4) No penalty shall apply to the individuals who committed the acts set out in par. (1) and par. (2) if they report the organized crime group to the authorities before it was discovered and before the commission of any of the offenses included in the purpose of the group.

(5) If the perpetrator of one of the acts referred to in par. (1) - (3) facilitates, during the criminal investigation, discovery of the truth and the prosecution of one of more members of the organized crime group, the special limits of the penalty are reduced by one-half.

(6) An “organized crime group” means a structured group, made up of three or more persons, which exists for a certain period of time and acts in a coordinated manner for the purpose of perpetrating one or more offenses

Provisions related to Romania’s framework for defences

Criminal Code

Article 25. Moral constraint

An act stipulated by criminal law does not carry imputability when committed as a result of moral constraint, exercised by threatening grave danger of the person of the perpetrator or another person and which cannot be removed in any other way.

Provisions related to Romania’s framework for the liability of legal persons

Criminal Code

Article 135. Conditions for the criminal liability of legal entities

(1) Legal entities, with the exception of State and public authorities, shall be held criminally liable for offenses perpetrated in the performance of the object of activity of legal entities or in their interest or behalf.

(2) Public institutions shall not be held criminally liable for offenses perpetrated in the performance of activities that cannot be the object of the private domain.

(3) Criminal liability of legal entities does not exclude the criminal liability of the individual participating in the perpetration of the same act.

Article 136. Penalties applicable to legal entities

(1) The penalties applicable to legal entities include main penalties and complementary penalties.

(2) The main penalty is represented by fines.

(3) The complementary penalties are:

(a) winding-up of legal entities;

(b) suspension of the activity or of one of the activities performed by the legal entity, for a term between three months and three years;

(c) closure of working points of the legal entity for a term between three months and three years;

(d) prohibition to participate in public procurement procedures for a term between one and three years;

(e) placement under judicial supervision;

(f) display or publication of the conviction sentence.

Article 138. Enforcement and service of ancillary penalties for legal entities

(1) The enforcement of one or more ancillary penalties is ordered when the court acknowledges that, considering the nature and gravity of the offenses, as well as the circumstances of the case, such penalties are necessary.

(2) The enforcement of one or more ancillary penalties is mandatory when the law stipulates such penalty.

(3) The ancillary penalties provided under Art. 136 par. (3) let. b) - f) may be enforced cumulatively.

(4) The service of ancillary penalties starts after the relevant conviction sentence is final.

Article 151. Effects of consolidation and demerger of legal entities

(1) In case of loss of legal personality by merger, absorption or demerger occurred after the offense is committed, the criminal liability and the relevant consequences will rest upon:

(a) the legal entity resulting from merger;

(b) the absorbing legal entity;

(c) the legal entities resulting from demerger or that acquired parts of the estate of the initial legal entity subject to demerger.

(2) In the case provided under par. (1), when customizing the penalty, the turnover, the value of the assets of the legal entity perpetrating the offense respectively, shall be considered, as well as the part of the estate which was transferred to each legal entity participating in such operation.

Provisions related to Romania's framework for sanctions and confiscation

Criminal Code

Article 61. Establishing the amount of fine

(1) A fine consists of the amount of money a convicted individual is compelled to pay to the State.

(2) The amount of the fine shall be established in the system of fine-days. The amount for one fine-day ranges from 10 RON and 500 RON, and will be multiplied by the number of fine-days, which ranges from 30 and 400.

(3) A court shall establish the number of fine-days according to the general criteria for customization of sentencing. The amount that corresponds to one fine-day shall be calculated on the basis of the financial status of the convicted defendant and their legal obligations towards persons they are supporting.

(4) The special thresholds for fine-days range between:

(a) 60 to 180 fine-days, when the law stipulates only a penalty by fine for that offense;

(b) 120 to 240 fine-days, when the law stipulates a penalty by fine alternatively for a term of imprisonment of no more than 2 years;

(c) 180 to 300 fine-days, when the law stipulates a penalty by fine alternatively for a term of imprisonment of more than 2 years.

(5) If the committed offense was intended to provide a material gain, and the penalty stipulated by law is only a fine or the court chooses to only sentence to that penalty, the special thresholds for fine-days can be increased by one-third.

(6) Increments established by law for mitigating or aggravating circumstances shall apply to the special thresholds for fine-days stipulated at par. (4) and par. (5).

Article 62. Penalty by fine that accompanies a penalty by imprisonment

(1) If the committed offense was intended to provide a material gain, the penalty by imprisonment can be accompanied by a penalty by fine.

(2) The special thresholds for fine-days stipulated at Art. 61 par. (4) lett. b) and lett. c) shall be calculated on the basis of the length of the term of imprisonment awarded by the court and cannot be reduced or increased as an effect of mitigating or aggravating causes.

(3) In establishing the amount of one fine-day consideration shall be given to the amount of material gain that was obtained or desired.

Article 77. Aggravating circumstances

The following constitute aggravating circumstances:

(a) the offense was committed by three or more persons together;

(b) the offense was committed with cruelty or subjecting the victim to degrading treatment;

(c) the offense was committed by methods or means of a nature likely to endanger other persons or assets;

(d) the offense was committed by an offender who is of age, if they were joined by an underage person;

(e) the offense was committed by taking advantage of a clear state of vulnerability of the victim, caused by age, health, impairment or other reasons;

(f) the offense was committed in a state of voluntary intoxication with alcohol or other psychoactive substances, when such state was induced with a view to committing the offense;

(g) the offense was committed by a person who took advantage of the situation caused by a disaster, of a state of siege or a state of emergency;

(h) the offense was committed for reasons related to race, nationality ethnicity, language, gender, sexual orientation, political opinion or allegiance, wealth, social origin, age, disability, chronic non-contagious disease or HIV/AIDS infection, or for other reasons of the same type, considered by the offender to cause the inferiority of an individual from other individuals.

Article 78. Effects of aggravating circumstances

(1) In case aggravating circumstances exist, sentencing can go up to the special maximum. If the special maximum is insufficient, in the case of a prison sentence an addition of up to 2 years can be added that cannot exceed one-third of the maximum, and in the case of a fine one-third of the special maximum can be added at most.

(2) Increasing the threshold of the maximum penalty can only be done once, irrespective of the number of aggravating circumstances found.

Article 112. Special confiscation

(1) The following shall be subject to special confiscation:

(a) assets produced by perpetrating any offense stipulated by criminal law;

(b) assets that were used in any way, or intended to be used to commit an offense set forth by criminal law, if they belong to the offender or to another person who knew the purpose of their use;

(c) assets used immediately after the commission of the offense to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use;

(d) assets given to bring about the commission of an offense set forth by criminal law or to reward the perpetrator;

(e) assets acquired by perpetrating any offense stipulated by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim;

(f) assets the possession of which is prohibited by criminal law.

(2) In the case referred to in par. (1)(b) and (c), if the value of assets subject to confiscation is manifestly disproportionate to the nature and severity of the offense, confiscation will be ordered only in part, by monetary equivalent, by taking into account the result produced or that could have been produced and asset's contribution to it. If the assets were produced, modified or adapted in order to commit the offense set forth by criminal law, they shall be entirely confiscated.

(3) In cases referred to in par. (1)(b) and (c), if the assets cannot be subject to confiscation, as they do not belong to the offender, and the person owning them was not aware of the purpose of their use, the cash equivalent thereof will be confiscated in compliance with the stipulations of par. (2).

(4) The stipulations of par. (1)(b) do not apply to offenses committed by using the press.

(5) If the assets subject to confiscation pursuant to par. (1)(b)–(e) cannot be located, money and other assets shall be confiscated instead, up to the value thereof.

(6) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such, except for the assets provided for in par. (1)(b) and (c), shall be also confiscated.

Article 112[1]. Extended confiscation

(1) Assets other than those referred to in Art. 112 are also subject to confiscation in case a person is convicted of any of the following offenses, if such offense is likely to procure a material benefit and the penalty provided by law is a term of imprisonment of 4 years or more:

(a) drug and precursor trafficking;

(b) trafficking in and exploitation of vulnerable people;

(c) offenses on the state border of Romania;

(d) money laundering offenses;

(e) offenses related to the laws preventing and fighting pornography;

(f) offenses related to the legislation to combat terrorism;

(g) establishment of an organized crime group;

(h) offenses against property;

(i) failure to observe the law on firearms, ammunition, nuclear materials and explosives;

(j) counterfeiting of currency, stamps or other valuables;

(k) disclosure of economic secrets, unfair competition, violation of the stipulations on import or export operations, embezzlement, violations of the laws on imports and exports, as well of the laws on importing and exporting waste and residues;

(l) gambling offenses;

(m) corruption offenses, offenses assimilated thereto, as well as offenses against the financial interests of the European Union;

(n) tax evasion offenses;

a) offenses related to customs regulations;

(p) fraud committed through computer systems and electronic payment means;

(q) trafficking in human-origin organs, tissues or cells.

(2) Extended confiscation is ordered if the following conditions are cumulatively met:

(a) the value of assets acquired by a convicted person within a time period of five years before and, if necessary, after the time of perpetrating the offense, until the issuance of the indictment, clearly exceeds the revenues obtained lawfully by the convict;

(b) the court is convinced that the relevant assets originate from criminal activities such as those provided in para. (1).

(3) In enforcing the stipulations of para. (2), the value of the assets transferred by a convicted person or by one-third party to a family member or to a legal entity over which that convicted person has control shall also be considered.

(4) Sums of money may also constitute assets under this Article.

(5) In determining the difference between the legitimate income and the value of the assets acquired, the value of the assets upon their acquisition and the expenses incurred by the convicted person and their family members shall be considered.

(6) If the assets to be seized are not to be found, money and other assets shall be confiscated instead, up to the value thereof.

(7) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such shall be also confiscated.

(8) Confiscation shall not exceed the value of assets acquired during the period referred to in para. (2) that are above a convicted person’s lawfully obtained income.

Article 137. Calculating fines for legal entities

(1) A fine consists of the money a legal entity is ordered to pay to the State.

(2) The amount of the fine is determined based on the fine-days system. The amount corresponding to the fine-days, varying between Lei 100 and 5000, shall be multiplied by the number of days subject to the fine (between 30 and 600 days).

(3) The court shall decide on the number of days subject to the fine considering the general criteria for the customization of penalty. The amount of the fine-days is determined by taking into account the turnover (in case of for-profit legal entities), and the value of assets (in case of the other legal entities), as well as other obligations of the legal entity.

(4) The special limits of the days subject to the fine range between:

(a) 60 and 180 days, when only the penalty consisting of the fine is provided by law for the offense committed;

(b) 120 and 240 days, when the law provides a term of imprisonment of max. five years, as such or as alternative to the fine;

(c) 180 and 300 days, when the law provides a term of imprisonment of max. 10 years;

(d) 240 and 420 days, when the law provides a term of imprisonment of max. 20 years;

(e) 360 and 510 days, when the law provides a term of imprisonment exceeding 20 years or life imprisonment.

(5) When the offense committed by legal entity was intended to the obtaining of a monetary benefit, the special limits of the fine-days provided by law for the committed offense may be increased by one-third, without exceeding the general maximum of the fine. When determining the fine, the value of the monetary benefit obtained or sought shall be considered.

Provisions related to Romania's framework on jurisdiction

Criminal Code

Article 8. Territoriality of criminal law

(1) Romanian criminal law applies to offenses committed on the territory of Romania.

(2) The territory of Romania is defined as the expanse of land, the territorial sea waters and inland waters, complete with the soil, sub-soil and airspace located inside the national borders.

(3) An offense committed on the territory of Romania is defined as any offense committed on the territory defined at par. (2) or on a ship sailing under Romanian pavilion or on an aircraft registered in Romania.

(4) The offense is also considered as having been committed on the territory of Romania when on that territory or on a ship sailing under Romanian pavilion or on an aircraft registered in Romania an action was committed with a view to perform, instigate or aid in the offense, or the results of the offense have been manifest, even if only in part.

Article 9. Legal standing under criminal law

(1) Romanian criminal law applies to offenses committed outside Romanian territory by a Romanian citizen or a Romanian legal entity if the sentencing stipulated by Romanian law is life imprisonment or a term of imprisonment longer than 10 years.

(2) In the other cases Romanian criminal law applies to offenses committed outside Romanian territory by a Romanian citizen or a Romanian legal entity if the act is also criminalized by the criminal law of the country where it was committed or if it was committed in a location that is not subject to any State's jurisdiction.

(3) A criminal investigation can start on receiving authorization from the Chief Prosecutor of the Prosecutor's Office attached to the Court of Appeals in whose jurisdiction the first Prosecutor's Office is

located that received information about the violation, or, as the case may be, from the Prosecutor General of the Prosecutor's Office attached to the High Court of Review and Justice. A prosecutor is entitled to issue such authorization within 30 days of receiving the application for authorization; such deadline can be extended, under the law, but for no more than a total of 180 days.

Article 10. Reality of criminal law

(1) Romanian criminal law applies to offenses committed outside Romanian territory by a foreign citizen or a stateless person against the Romanian State, against a Romanian citizen or against a Romanian legal entity.

(2) A criminal investigation can start on receiving authorization from the Prosecutor General of the Prosecutor's Office attached to the High Court of Review and Justice, and only if the violation is not the object of judicial procedures that are already ongoing in the State on whose territory it was committed.

Article 11. Universality of criminal law

(1) Romanian criminal law also applies to other violations than those stipulated at Art. 10, committed outside Romanian territory by a foreign citizen or a stateless person who is located voluntarily on Romanian territory, in the following cases:

(a) an offense was committed that the Romanian State has undertaken to repress on the basis of an international treaty, irrespective of whether it is stipulated by the criminal law of the State on whose territory it was committed;

(b) extradition or surrender of the offender has been requested and denied.

(2) The stipulations of par. (1) lett. b) do not apply when, under the law of the state on whose territory the violation was committed, there is a cause to prevent the start of criminal action or the continuing of the criminal trial or the serving of the sentence or when the sentence has been served or when the sentence is considered as having been served.

(3) When the sentence has not been served or has only been served in part, the applicable procedure is that of the law on the recognition of foreign judgments.

Law No 234 of 19 July 2022 (amending Law No 78/2000)

Article II.

By way of derogation from Article 9 of Law No 286/2009 on the Criminal Code, as amended and supplemented, and in application of Article 6 of the said Law, the following shall apply 12 of the same law, if the acts are committed outside the territory of the country by a Romanian citizen or a Romanian legal person, regardless of the penalty provided for by Romanian law, even if the act is not provided for as an offence under the criminal law of the country where it was committed and without the prior authorisation of the public prosecutor of the prosecutor's office of the court of appeal in whose territorial district the prosecutor's office first referred to is located or of the public prosecutor of the prosecutor's office of the High Court of Cassation and Justice, Romanian criminal law shall apply to the offences provided for in:

(a) Articles 6, 7 and 18^1-18^5 of Law No 78/2000 on the prevention, detection and punishment of corruption, as subsequently amended and supplemented;

(b) Articles 4, 8 and 9 of Law No 241/2005 on preventing and combating tax evasion, as subsequently amended and supplemented, Articles 270 and 272-275 of Law No 86/2006 on the Customs Code of Romania, as subsequently amended and supplemented, Articles 289-292, 294, 295, 297, 298, 306-309 and 367 of Law No 241/2005 on preventing and combating tax evasion, as subsequently amended and supplemented. 286/2009 on the Criminal Code, as amended and supplemented, and Art. 49 of Law No. 129/2019 on preventing and combating money laundering and terrorist financing, as well as amending and supplementing certain legislative acts, as

amended and supplemented, if they resulted in the European Union's financial interests being affected.

Provisions related to Romania's framework for enforcement

Criminal Procedure Code

Article 7. Obligatory character of starting and exercising the criminal investigation

(1) The prosecutor is under an obligation to start and exercise the criminal investigation ex officio when evidence exists that shows the commission of an offense and there are no legal grounds to prevent them other than those stipulated at par. (2) and (3).

(2) In the cases and conditions specifically stipulated by law, the prosecutor can waive the exercise of the criminal action if, considering the concrete elements of the case, there is no public interest in performing its object.

(3) In cases specifically stipulated by law, the prosecutor shall start and exercise criminal action after a prior complaint is filed by the victim or after securing authorization or referral from the jurisdictional body or after satisfying another condition required by law.

Article 288. Avenues for referral

(1) A referral can be filed with the criminal investigation body in the form of a complaint or report, following acts performed by other law enforcement bodies; or the criminal investigation body can take action ex officio.

(2) When the law requires that criminal investigation only starts based on the prior complaint by the victim, on a referral formulated by the person entitled to under the law, or on authorization from the body entitled to under the law, the criminal investigation cannot start in the absence of such acts.

(3) In the case of criminal offenses committed by the military, the commanding officer's referral is only necessary for the offenses listed in Art. 413 - 417 in the Criminal Code.

Article 318. Dropping charges[63]

Waiver of prosecution

(1) In the case of crimes for which the law provides for a fine or imprisonment of up to 7 years, the prosecutor may drop the prosecution when he finds that there is no public interest in pursuing the act.

(2) The public interest shall be assessed in relation to:

a) the content of the act and the concrete circumstances of committing the act;

b) the manner and means of committing the act;

c) the purpose pursued;

d) the consequences produced or likely to have occurred by committing the offence;

e) the efforts of the criminal investigation bodies necessary for the conduct of the criminal proceedings in relation to the seriousness of the act and the time elapsed since it was committed;

f) procedural attitude of the injured party;

63 Article 318 is available at COD PR. PENALA 01/07/2010 - Portal Legislativ (just.ro); unofficial translation used.

g) the existence of a manifest disproportion between the costs involved in conducting the criminal proceedings and the seriousness of the consequences produced or likely to have occurred by committing the offence.

(3) Where the offender is known, the assessment of the public interest shall also take into account the person of the suspect or defendant, conduct prior to the commission of the offence, the attitude of the suspect or accused person after the offence has been committed and efforts made to remove or mitigate the consequences of the offence.

(4) When the perpetrator of the act is not identified, the criminal prosecution may be waived by reference only to the criteria set out in para. (2) subparagraphs (a), (b), (e) and (g).

(5) No prosecution may be waived for offences resulting in the death of the victim.

(6) The public prosecutor may, after consulting the suspect or defendant, order him or her to fulfil one or more of the following obligations:

a) remove the consequences of the criminal act or repair the damage caused or agree with the civil party on a way to repair it;

b) publicly apologize to the injured person;

c) perform unpaid community service for a period of between 30 and 60 days, unless, owing to his state of health, the person is unable to perform such work;

d) attend a counselling programme.

(7) If the prosecutor orders the suspect or defendant to fulfill the obligations set out in para. (6), establishes by order the deadline by which they are to be fulfilled, which may not be more than 6 months or 9 months for obligations assumed by mediation agreement concluded with the civil party and arising from the service of the order.

(8) The order waiving prosecution shall contain, where appropriate, the particulars provided for in Art. 286 para. (2), as well as provisions concerning measures ordered pursuant to paragraph 6. (315) of this Article and Art. 2 para. (4)-(6), the deadline by which the obligations set out in para. (<>) of this Article and the penalty of failure to submit evidence to the public prosecutor, as well as legal costs.

(9) In case of non-fulfillment of obligations in bad faith within the term provided in para. (7), the prosecutor revokes the order. The burden of proving the fulfilment of obligations or presenting reasons for non-fulfilment lies with the suspect or defendant.

(10) The order ordering the dropping of criminal prosecution is verified in terms of legality and merits by the First Prosecutor of the Public Prosecutor's Office or, as the case may be, by the General Prosecutor of the Prosecutor's Office attached to the Court of Appeal, and when drawn up by him, the verification is made by the hierarchically superior prosecutor. When it has been drawn up by a prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice, the order is verified by the chief prosecutor of the section, and when it has been drawn up by him, the verification is done by the general prosecutor of this prosecutor's office.

(11) The provisions of para. Paragraph 10 shall apply accordingly when the hierarchy of functions in a structure of the Public Prosecutor's Office is established by special law.

(12) The order ordering the dropping of the criminal prosecution, verified according to para. (10), shall be communicated in copy, as appropriate, to the person who made the notification, the parties, the suspect, the injured party and other interested persons and shall be sent, for confirmation, within 10 days from the date on which it was issued, to the preliminary chamber judge of the court which, according to law, would have jurisdiction to hear the case at first instance.

(13) The preliminary chamber judge sets the deadline for settlement and orders the summoning of the persons referred to in para. (12).

(14) The judge of the preliminary chamber decides by reasoned conclusion, in the council chamber, summoning the persons referred to in para. (12), as well as with the participation of the prosecutor, on the legality and merits of the solution to waive criminal prosecution. The failure of duly summoned persons to appear shall not prevent the confirmatory application from being processed.

(15) The preliminary chamber judge checks the legality and merits of the decision to waive criminal proceedings on the basis of the papers and material in the prosecution file and the new documents submitted and, by conclusion, grants or rejects the prosecutor's request for confirmation. If the preliminary chamber judge rejects the confirmatory application:

(a) abolishes the solution of waiving criminal prosecution and sends the case to the prosecutor to start or complete the criminal investigation or, as the case may be, to initiate criminal proceedings and complete the criminal investigation;

(b) abolishes the waiver of criminal prosecution and orders dismissal.

(16) The conclusion by which one of the solutions provided for in para. (15) is final. If the judge has rejected the request for confirmation of the waiver of prosecution, a new waiver may not be ordered, regardless of the reason given.

Provisions related to Romania's framework for money laundering

LAW No 129 of 11 July 2019 on preventing and combating money laundering and terrorist financing, and amending and supplementing certain legislative acts

Article 49.

(1) The offence of money laundering shall be punishable by imprisonment for a term of 3 to 10 years:

(a) the exchange or transfer of property, knowing that it is derived from the commission of criminal offences, for the purpose of concealing or disguising the illicit origin of such property or for the purpose of assisting the person who committed the offence from which the property is derived to evade prosecution, trial or execution of sentence;

(b) concealing or disguising the true nature, source, location, disposition, movement or ownership of property or rights therein, knowing that the property is derived from crime;

(c) acquiring, possessing or using property by a person other than the person who committed the offence from which the property is derived, knowing that the property is derived from crime.(2) Attempt shall be punishable.

(2^1) The commission of the offence of money laundering by one of the reporting entities referred to in Article 5 in the exercise of his professional activity shall constitute an aggravating circumstance.

(3) If the offence was committed by a legal person, in addition to the fine, the court shall impose, as appropriate, one or more of the additional penalties provided for in Article 136, para. (3)(a)-(c) from Law no. 286/2009, with subsequent amendments and additions

(4) The knowledge of the origin of the goods or the intended purpose must be established/established from the objective factual circumstances.

(5) The provisions of para. (1) to (4) shall apply irrespective of whether the offence from which the property originates was committed in the territory of Romania or in other Member States or third countries. (1)-(4) shall also apply to money laundering offences committed outside the territory of the country by a Romanian citizen or a Romanian legal person, even if the offence is not provided for as an offence under the criminal law of the country where it was committed.

Provisions related to Romania's framework for false accounting

Criminal Code

Article 323. Use of false documents

The use of an official document or of a deed under private signature, while knowing that it is false, in order to produce legal consequences, shall be punishable by no less than 3 months and no more than 3 years of imprisonment or by a fine, when the document is official, and by no less than 3 months and no more than 2 years of imprisonment or by a fine, when the document is issued under private signature.

Accounting Law

Article 41.[64]

The following acts constitute contravention:

1. holding, with any title, elements of an asset's nature and debts, as well as carrying out economic-financial operations, without being recorded in accounting;

2. non-compliance with the regulations issued by the Ministry of Finance, respectively by institutions with regulatory powers in the field of accounting provided for in art. 4 para. (3), regarding:

(a) approval of good accounting policies and procedures by legislation;

(b) the use and keeping of accounting registers;

(c) the preparation and use of supporting and accounting documents for all operations performed, their accounting in the period to which they refer, their preservation and archiving, as well as the reconstruction of lost, stolen or destroyed documents;

(d) carrying out the inventory,

(e) drawing up, signing and submitting within the legal term to the territorial units of the Ministry of Finance the annual financial statements and, as the case may be, the consolidated annual financial statements, the interim financial statements, as well as the accounting reports;

(e^1) drawing up and submitting within the legal term to the territorial units of the Ministry of Finance the reports provided for by art. 28 para. (7) and art. 29 para. (2^1);

(f) drawing up, signing and submitting to the Ministry of Public Finances and its territorial units, as well as to hierarchically superior public institutions, the quarterly and annual financial statements of public institutions, according to the law;

(g) submission of a declaration stating that the persons referred to in 1 para. (1) - (3) have not carried out activity, respectively of the notification provided for in art. 27 para. (6) subparagraph (b);

3. Submission of financial statements containing erroneous or uncorrelated data, including on the identification of the reporting person;

4. Failure to comply with the provisions relating to the drawing up of declarations referred to in Articles 30 and 31;

5. Non-compliance with the provisions regarding the obligation of members of administrative, management and supervisory bodies to prepare and publish annual financial statements;

[64] Article 41 is available at https://legislatie.just.ro/Public/DetaliiDocument/38127; unofficial translation is provided,

6. Failure to comply with the provisions regarding the obligation of the members of the administrative, management and supervisory bodies of the parent company to prepare and publish consolidated annual financial statements;

7. Failure to comply with the obligation to audit, according to the law, annual financial statements, consolidated annual financial statements, as well as interim financial statements;

8. Failure to submit, according to this law, annual financial statements, consolidated annual financial statements, interim financial statements, as well as accounting reports;

9. Failure to comply with Article 10, and 361.

Provisions related to Romania's framework for mutual legal assistance and extradition

LAW No 302 of 28 June 2004 on international judicial cooperation in criminal matters

Article 3. Limits of judicial cooperation

The application of this Law shall be subject to the protection of Romania's interests of sovereignty, security, public order and others, as defined by the Constitution.

Article 5. International courtesy and reciprocity

(1) In the absence of an international convention, judicial cooperation can take place by virtue of international courtesy, upon request sent by diplomatic means by the requesting State and with a written assurance of reciprocity from the competent authority of that State.

(2) In the case provided in paragraph (1), this Law is the common law in the matter for the Romanian judicial authorities.

(3) The absence of reciprocity shall not prevent the execution of a request for international judicial cooperation in criminal matters, if it:

a) proves to be necessary because of the nature of the act or of the need to fight against certain serious forms of crime;

b) may contribute to an improvement of the situation of the suspect, defendant or convict or to his social reinsertion;

c) may serve to clarify the judicial situation of a Romanian citizen

Article 21. Mandatory grounds for refusal of extradition

(1) Extradition shall be refused if:

a) the right to a fair trial under the European Convention on Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, or of any other relevant international instruments in this field, ratified by Romania has not been observed;

b) there are reasonable grounds to believe that extradition is requested for the purpose of prosecuting or punishing a person on account of race, religion, sex, nationality, language, political or ideological opinions or affiliation to a particular social group;

c) the person's situation is likely to worsen for any of the grounds set forth in letter b);

d) the request is made in a case pending before certain extraordinary tribunals, other than those established by relevant international instruments, or in view of execution of a punishment applied by such a tribunal;

e) concerns a political offence or an offence connected with a political offence;

f) refers to a military offence which is not an offence of common law.

(2) There shall not be considered political offences:

a) the attempt on the life of a Head of State or of a member of his family;

b) the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948 by the General Assembly of the United Nations;

c) the offences provided in Article 50 of the Geneva Convention of 1949 for the Amelioration of the Wounded and Sick in Armed Forces in the Field, in Article 51 of the of the Geneva Convention of 1949 for the Amelioration of the Wounded and Sick in Armed Forces at Sea, in Article 129 of the Geneva Convention of 1949 on the Treatment of Prisoners of War and in Article 147 of the Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War;

d) any similar violations of the laws of war, which are not covered by the provisions of the Geneva conventions provided in letter c);

e) the offences provided in Article 1 of the European Convention on the Suppression of Terrorism, adopted in Strasbourg on 27 January 1997, and in other relevant international instruments;

f) the offences provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment, adopted on 17 December 1984 by the General Assembly of United Nations;

g) any other offence the political character of which was removed by the treaties, conventions or international agreements to which Romania is a party.

Article 22. Optional grounds for refusal of extradition

(1) The extradition may be refused if the act motivating the request is subject to a pending criminal trial or when this act may be subject to a criminal trial in Romania.

(2) The extradition of a person may be refused or postponed, if surrender of such person is likely to have particularly serious consequences for such person, especially for reasons related to the age or health of such persons. In case of refusal of extradition, the provisions of Article 23 (1) shall apply accordingly.

Provisions related to Romania's framework for tax non-deductibility of bribes

Fiscal Code

Article 25. Expenses

(1) For the determination of the fiscal result, the expenses incurred for the purpose of carrying out the economic activity, including those regulated by the normative acts in force, as well as the registration fees, levy and contributions owed to the chambers of commerce and industry, employers' organizations and trade unions, are considered deductible expenses.

(2) Expenses with salaries and those assimilated to salaries as defined according to title IV are deductible expenses for determining the fiscal result, except for those regulated in para. (3) and (4).

(2^1) The expenses borne by the employer related to the remote work activity for the employees who carry out the activity in this regime, according to the law, are deductible expenses for determining the fiscal result.

(3) The following expenses have limited deductibility: [...]

(4) The following expenses are not deductible:[…]

s) The expenses recorded in the accounting records, regardless of their nature, if subsequently proved as being related to corruption crimes, according to the law. […].

Provisions related to the DNA's competence

Government Emergency Ordinance 43/2002

Article 13

(1) The National Anticorruption Directorate shall be competent for the offences provided for in Law no. 78/2000, as subsequently amended and supplemented, committed under one of the following conditions:

(a) if, regardless of the quality of the persons who committed them, they caused a material damage greater than the equivalent in lei of EUR 200,000 or if the value of the amount or property forming the object of the corruption offense is higher than the equivalent in lei of EUR 10,000;

(b) if, regardless of the amount of material damage or the value of the amount or property forming the object of the corruption offense, they are committed by: deputies; Senators; Romanian Members of the European Parliament; the member appointed by Romania to the European Commission; members of the Government, State Secretaries or Undersecretaries of State and their equivalents; advisers to ministers; judges of the High Court of Cassation and Justice and of the Constitutional Court; other judges and prosecutors; members of the Superior Council of Magistracy; the President of the Legislative Council and his deputy; The Ombudsman and his deputies; presidential advisers and state counselors within the Presidential Administration; State Councillors of the Prime Minister; members and external public auditors of the Romanian Court of Accounts and of the county chambers of accounts; the Governor, First Deputy Governor and Deputy Governors of the National Bank of Romania; President and Vice-President of the Competition Council; officers, admirals, generals and marshals; police officers; presidents and vice-presidents of county councils; the general mayor and deputy mayors of Bucharest; mayors and deputy mayors of Bucharest districts; mayors and deputy mayors of municipalities; county councillors; prefects and sub-prefects; heads of central and local public authorities and institutions and persons with control functions within them, except for heads of public authorities and institutions at the level of cities and communes and persons with control functions within them; Lawyers; commissioners of the Financial Guard; customs staff; persons holding management positions, from directors including, within autonomous administrations of national interest, national companies and companies, banks and commercial companies in which the state is a majority shareholder, public institutions with responsibilities in the privatization process and central financial-banking units; persons referred to in Articles 293 and 294 of the Criminal Code.

(2) Offences against the financial interests of the European Union shall fall within the competence of the National Anti-Corruption Directorate.