

## Context

The Joint Special Committee of the Chamber of Deputies and the Senate for the systematization, unification and ensuring legislative stability in the field of justice (the “lordache Committee”) announced yesterday, on 13 December 2017, that, although initially it was to suspend works during 14-16 December for the national mourning, [it will work at least during 14 December](#) to transpose EU Directive 2016/343 into the Criminal Code and the Criminal Procedure Code.

The very title of the legislative proposal reveals its purpose to transpose the European Directive into the national law. The Committee President, Florin lordache, accused by the opposition to have proposed amendments to the criminal codes that go beyond the framework for transposing the Directive, [said today](#) about the proposed amendments: “They do not go beyond the framework of the directive!”.

## What do we check?

We check whether the proposals under discussion with the lordache Committee are actually meant to transpose EU Directive 2016/343. We do not check their necessity or their particular impact, but we focus our analysis strictly on verifying the assumption that these amendments to the Criminal Code and the Criminal Procedure Code rely upon - are they really about transposing the European Directive?

## Check

### 1. Procedure for transposing European legislation into the national legislation

Firstly, looking at the text of [EU Directive 2016/343](#), we see that Article 14 clearly specifies that the transposition should take place by 1 April 2018. That the Romanian legislature wants faster transposition is in no way condemnable, but it is unusual.

Romania has many other arrears at the moment in transposing European law and, often times, transpositions into national law occur after the deadline is over and infringement procedures are initiated.

A relevant example is the transposition of [Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing](#). The transposition deadline for this Directive was 26 June 2017 and not even a draft law has been registered

with the Senate or the Chamber of Deputies for this purpose, and the European Commission [already initiated](#) the infringement procedure against Romania. The transposition of this Directive would, for example, have made it impossible for bearer shares companies to exist, since article 30 in this Directive states that member states shall ensure that “corporate and other legal entities incorporated within their territory are required **to obtain and hold adequate, accurate and current information on their beneficial ownership**, including the details of the beneficial interests held.”

## 2. Content of the proposals

We reviewed the list of proposed amendments to be discussed by the Iordache Committee and made a selection of only a few, aimed at transposing the Directive. For example, we included in our selection four major amendments that contradict the very EU Directive 2016/343 they were supposed to transpose, or are already included in the national legislation, or one of the provisions in the Directive which has not even been included among the amendments.

### a. Proposals that are inconsistent with the Directive

<i>What the directive says (articles invoked to justify the amendments)</i>	<i>What the law now looks like</i>	<i>Amendments proposed</i>	<i>Fact-check</i>
<p><b>Article 4.</b> <b>Public references to guilt</b></p> <p>1. Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial</p>	<p><b>Article 4</b> <b>Benefit of the doubt</b></p> <p>(1) Any person shall be considered innocent until their guilt is established by a final criminal judgment. (2) After all the evidence is presented in the case, any doubt persisting in the mind of the</p>	<p>In Article 4, after paragraph (2), two new paragraphs, (3) and (4) are introduced which shall read as follows:</p> <p>“(3) In the course of criminal prosecution and trial of a case in preliminary proceedings, public communications, public statements and the provision of other information, directly or</p>	<p>The directive urged Romania to ensure that Romanians would not be named criminals in an official document without going through a fair trial. If we take a look at the Criminal Procedure Code this obligation is already there.</p> <p>Instead, the changes proposed by PSD-ALDE in the special</p>

<p>decisions, other than those on guilt, do not refer to that person as being guilty. This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.</p> <p>2. Member States shall ensure that appropriate measures are available in the event of a breach of the obligation laid down in paragraph 1 of this Article not to refer to suspects or accused persons as being guilty, in accordance with this Directive and, in particular, with Article 10.</p> <p>3. The obligation laid down in paragraph 1 not to refer to suspects or accused persons as being guilty shall not prevent public authorities from publicly</p>	<p>judicial bodies shall be interpreted in favor of the suspect or defendant. (Criminal Procedure Code)</p> <p>Article 25 - (1) The communication of information on the status of investigations to media representatives may be made only after a suspect has been identified in the matter. If the deed that is the object of the criminal case presents a high degree of social danger or justifies a special interest to the public, information about the commencement of the criminal prosecution in relation to the deed and any measures ordered in the matter may be communicated, with a view to identify the perpetrator or to collect evidence, except for the situation in which the transmission of such information would jeopardize the outcome of the investigation.</p> <p>(2) The information referred to in paragraph (1) refers to the</p>	<p>indirectly, originating from public authorities or any other natural or legal person relating to the facts and persons subject to these procedures are prohibited. Any violation of this obligation is an offense and is punishable under the criminal law.</p> <p>(4) During the criminal trial, the public presentation of persons suspected of having committed offenses wearing handcuffs or other means of immobilization or affected by other ways of a nature to induce the public perception that they are guilty of having committed offenses shall be prohibited.</p>	<p>committee refer to the manner in which details are communicated about criminal investigations. Namely, they extended the provisions of the directive from ensuring the presumption of innocence to the manner in which the public is informed. The proposed change includes the fact that any public communication of information related to criminal files in the stage of investigation becomes a criminal offense. The wording is vague and does not specify to whom it refers, therefore we may conclude that they refer to any person or institution. The directive says the exact opposite, that the authorities are entitled to inform the public on criminal investigations. For this we have a code, which was approved by the Superior Council of Magistracy which takes into account to protect the presumption of innocence. Also, the Directive only refers to an obligation of public</p>
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<p>disseminating information on the criminal proceedings where strictly necessary for reasons relating to the criminal investigation or to the public interest.</p>	<p>following aspects: criminal prosecution has been initiated, a criminal action was initiated, detention has been ordered, the competent court has been asked to take/extend preventative measures, criminal prosecution has been completed, a solution was ordered not to initiate trial, trial has been initiated, an indictment having been drafted and submitted in court. Any releases or communication of information upon request may also include information regarding the person in relation to whom the measures were ordered, the deed committed and its legal classification, and any reasons which led to the specific solution or measure being adopted.</p> <p>(3) The information on the existence of a complaint or denunciation with the criminal prosecution bodies regarding the potential perpetration of criminal deeds, as well as any data in such documents, are not</p>		<p>authorities that would label a person as “guilty”, while the proposed amendments place this obligation on all natural and legal persons.</p> <p>Moreover and possibly most importantly, the Directive provides certain elements in the preamble to its Articles:</p> <p>1. Point (18) explicitly provides that these provisions should not prevent the public dissemination of information such as video material which could help in identifying the alleged perpetrator of the criminal offence by the public</p> <p>2. Point (19) explicitly states that “Member States should inform public authorities of the importance of having due regard to the presumption of innocence when providing or divulging information to the media. This <b>should be without prejudice to national law protecting the freedom of press and other media</b>”.</p>
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	<p>public. Exceptionally, when the author of the referral publicly announces that this document was registered with the criminal prosecution body, the competent prosecutor's office may confirm or deny such facts. When criminal prosecution bodies are notified <i>ex-officio</i>, releases may be communicated for this purpose with the case prosecutor's consent.</p> <p>(4) The communication of information on the existence of a suspect in the case and on any measures ordered against such suspect may be made <i>ex officio</i> or upon the request of mass-media representatives, only after the person who has become suspect has been acknowledged that he/she is a suspect or, if this is not possible, only after the adequate measures have been taken to carry out the due acknowledgement.</p> <p>(5) Access to the categories of information mentioned in paragraphs (1), (2) and (3) may</p>		<p>In conclusion, the European Directive only requires public authorities not to refer to the persons investigated as guilty (provision already in the national law) and that this must happen without prejudice to the freedom of the press. The amendments proposed by PSD + ALDE to the Committee, however, turn any communication of information on cases in the stage of criminal prosecution or preliminary proceedings into a criminal offense.</p>
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	<p>be restricted if the case prosecutor is of the opinion that their communication would jeopardize the outcome of the investigation.</p> <p>(6) Information on procedural acts carried out during the criminal investigation, such as the hearing of persons - irrespective of their quality, removal of documents and objects, home or computer searches may be communicated after such activities have been carried out and if their disclosure does not affect the conduct of the criminal investigation or the right to image as part of the right to privacy of the persons involved. Public information on these judicial activities can be done in one of the following ways:</p> <p>a) By confirming the performance of the judicial activities mentioned in this paragraph at the request of the media representatives;</p> <p>b) By issuing a statement that</p>		
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	<p>the judicial activities referred to in this paragraph have been carried out</p> <p>c) If, in the light of the actual circumstances of a case, it is considered that by informing the public of the judicial activities carried out the course of the criminal investigation may be affected, an announcement shall be made that at the time of the investigation no statements can be made, and as soon as the investigation allows, a release shall be issued.</p> <p>(7) Exceptionally, if media representatives are present at the location where the activities mentioned in paragraph (6) are carried out and there is no risk to affect the conduct of the criminal investigation or the right to image as part of the privacy of the persons involved, the existence of an ongoing procedure will be confirmed.</p> <p><b>(Guidelines on the Relationship between the Romanian Judicial System and</b></p>		
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	<p><b>the Mass Media, approved by the Decision of the Plenum of the Superior Council of Magistracy No. 482 of 1 June 2012, as amended and supplemented by the Decision of the Plenum of the Superior Council of Magistracy No. 573 of 6 May 2014)</b></p>		
<p><b>Article 3</b> <b>Presumption of innocence</b></p> <p>Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law.</p> <p><b>Article 6</b> <b>Burden of proof</b></p> <p>1. Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This shall be without prejudice to any obligation on the judge or the</p>	<p><b>Art. 223 Requirements and cases where pre-trial arrest is applicable</b></p> <p>“(2) Pre-trial arrest of the defendant can also be ordered if the evidence generate reasonable suspicion that they committed a offense with direct intent against life, an offense having caused bodily harm or death of a person, an offense against national security as under the Criminal Code and other special laws, an offense of drug trafficking, illegal operations with precursors or</p>	<p><b>In Article 223, paragraph (2) shall be amended and shall read as follows:</b></p> <p>“(2) Pre-trial arrest of the defendant can also be ordered if the evidence generate reasonable suspicion that they committed a offense with direct intent against life, an offense having caused bodily harm or death of a person, an offense against national security as under the Criminal Code and other special laws, an offense of drug trafficking, weapons trafficking, trafficking in humans, terrorism and related to acts of</p>	<p>The main changes brought by this amendment are related to the removal from the cases of application of pre-trial arrest of offenses such as corruption, tax evasion, money laundering, offenses committed through information systems or electronic communication means or another offense for which the law requires a penalty of no less than 5 years of imprisonment.</p> <p>As regards the word “cumulatively” which has been added, the current wording also provides that all conditions are</p>



<p>competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law.</p> <p>2. Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.</p>	<p>other products susceptible to produce psychoactive effects, an offense concerning non-compliance with the regime of arms, munitions, nuclear material and explosives, trafficking and exploitation of vulnerable persons, acts of terrorism, money laundering, counterfeiting of currency, stamps or other securities, blackmail, rape, unlawful deprivation of freedom, tax evasion, assault of an official, judicial assault, <b>corruption, an offense committed through information systems or electronic communication means or another offense for which the law requires a penalty of no less than 5 years of imprisonment</b> and, based on an assessment of the seriousness of facts, of the manner and circumstances under which it was committed, or the entourage and the environment from where the defendant comes, of their criminal history</p>	<p>terrorism, counterfeiting of currency or other securities, blackmail, rape, deprivation of freedom, assault of an official, judicial assault or another offense committed with violence <b>and, cumulatively</b>, based on an assessment of the seriousness of facts, of the manner and circumstances under which it was committed, or the entourage and the environment from where the defendant comes, of their criminal history and other circumstances regarding their person, it is decided that their deprivation of freedom is absolutely necessary in order to eliminate an actual threat to public order”.</p>	<p>met.</p> <p>The Directive says nothing in the quoted articles regarding the removal from the scope of pre-trial arrest of certain offenses, such as tax evasion, money laundering and corruption, so that the proposed amendments have nothing to do with transposing the directive or with the possibility of abusing preventative, thus breaching the presumption of innocence, provided that the amendment only excludes the persons that are suspects of corruption, tax evasion, etc.</p>
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	and other circumstances regarding their person, it is decided that their deprivation of freedom is necessary in order to eliminate a threat to public order		
<p><b>Article 3</b> <b>Presumption of innocence</b> Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law.</p> <p><b>Article 6</b> <b>Burden of proof</b> 1. Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law.</p>	<p><b>Art. 307 Informing one of their capacity as suspect</b> A person who has acquired the capacity of suspect shall be informed, before their first hearing, of that capacity, of the actions they are a suspect for, of the charges for such actions, of their procedural rights under Art. 83, and a report shall be written to that effect.</p> <p><b>Article 4</b> <b>Benefit of the doubt</b> (1) Any person shall be considered innocent until their guilt is established by a final criminal judgment. (2) After all the evidence is presented in the case, any doubt persisting in the mind of the judicial bodies shall be interpreted in favor of the</p>	<p><b>Article 307 shall be amended and shall read as follows:</b> “Art. 307 - <b>Informing one of their capacity as suspect</b> (1) A person who has acquired the capacity of suspect shall be informed, before their first hearing, of that capacity, of the actions they are a suspect for, with a description of all its constitutive elements and the evidence attesting that the action was committed, of the charges for such actions, of their procedural rights under Art. 83, and a report shall be written to that effect. Lack of these elements shall result in the absolute nullity of the act of informing one of their capacity as suspect. (2) When the conditions stipulated by art. 305 par. (1) are</p>	<p>Members of the Parliament claim they proposed the amendment of article 307 because this is what the EU Directive requires in its articles 3 and 6. The article subject to amendment refers to the manner in which a citizen is notified by the prosecutor that he/she is subject of an investigation. Article 3 of the Directive speaks of the presumption of innocence which is not related to the above procedure.</p> <p>Article 6 of the Directive refers to the burden of proof. Again, the Parliament has decided to amend something else. The European Directive seeks to ensure that prosecutors and judges employ the due diligence in verifying the charges. Instead,</p>

<p>2. Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.</p>	<p>suspect or defendant. (Criminal Procedure Code)</p> <p><b>Article 99</b>  <b>Burden of proof</b>  (1) In a criminal action, the burden of proof rests primarily with the prosecutor, while in a civil action it rests with the civil party or, as applicable, upon the prosecutor initiating the civil action, if the victim lacks mental competence or has limited mental competence.  (2) A suspect or defendant benefits from the presumption of innocence, has no obligation to prove their innocence, and has the right not to contribute to their own incrimination.  (3) In criminal proceedings, victims, suspects and parties have the right to propose the production of evidence to judicial bodies.  (Criminal Procedure Code)</p>	<p>met and the person in relation to whom there is reasonable suspicion is known, the criminal prosecution body shall immediately inform such person of their capacity as suspect, under penalty of absolute nullity of all acts of criminal prosecution carried out in breach of this provision against such person after the identity of the person is known.”</p>	<p>the amended article refers to the moment and manner in which a citizen sees the evidence and charges brought by prosecutors.</p> <p>The changes to this procedure are criticized by a part of the magistrates who claim they will have difficulties in producing some evidence. Other prosecutors that were consulted claim that the changes are not the best they could be, but they will not completely cancel the possibility to investigate offenses. Instead, they will oblige case prosecutors to expose the entire documentation on the very first interaction with the subject of the investigation.</p>
<p><b>Article 6, paragraph (2) of the Directive</b>  2. Member States shall ensure</p>	<p>Article 97  Evidence and methods of proof  (1) Any factual element serving</p>	<p><b>In art. 97, letter f) para. (2) is repealed.</b></p>	<p>Members of the Parliament proposed the limitation of the</p>

<p>that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.</p>	<p>to the ascertaining of the existence or non-existence of an offense, to the identification of a person who committed such offense and to the knowledge of the circumstances necessary to a just settlement of a case, and which contribute to the finding of the truth in criminal proceedings represents evidence.</p> <p>(2) Evidence is obtained in criminal proceedings through the following means:</p> <ul style="list-style-type: none"> <li>a) statements by suspects or defendants;</li> <li>b) statements by victims;</li> <li>c) statements by civil parties or of parties with civil liability;</li> <li>d) statements by witnesses;</li> <li>e) documents, expert reports or fact finding reports, minutes, pictures, physical evidence;</li> <li>f) any other methods of proof that are not prohibited by law.</li> </ul>		<p>types of evidence. This means that in addition to what has been explicitly mentioned in article 97, no other lawful means of proof are accepted in the documentation of a criminal case. For example, the images captured by video cameras in subway stations will no longer be usable.</p> <p>We tried very hard to find a provision in the Directive explaining why other means of proof are eliminated, such as video materials. We couldn't find any.</p>
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## **b. Provisions of the Directive that are not even included in the proposed amendments**

For example, Article 7 (6) of the Directive says that: “This Article shall not preclude Member States from deciding that, with regard to minor offences, the conduct of the proceedings, or certain stages thereof, may take place in writing or without questioning of the suspect or accused person by the competent authorities in relation to the offence concerned, provided that this complies with the right to a fair trial”. Moreover, the Directive provides in its preamble that member states could apply such possibilities with regard to minor road traffic offenses, for example. However, in this regard, we do not see any intention to transpose European legislation.

## **Conclusion**

Based on our analysis, a conclusion can be drawn that, as shown by the amendments proposed by the lordache Committee today, the justification behind the amendment of the Criminal Code and of the Criminal Procedure Code in the light of the need to transpose the provisions of EU Directive no. 2016/343 into the national legislation is partly false. We do not question whether they are good or not, but we do question their link to transposing European legislation into the national law. The statement of the president of the special committee that the amendments brought to the criminal codes do not exceed the framework of the Directive is at least partly false.

First of all, the deadline for transposing the Directive is April 2018, which does not explain any hurry to adopt the changes now, in a fast forward procedure.

Second of all, regarding the contents of the amendments proposed by the majority coalition, we identified at least four major changes which do not seem to be related to the transposition of the Directive, which we summarize in the simplest manner possible (see the technical details in the above table):

1. Turning the communication of case information during criminal prosecution or preliminary proceedings into a criminal offense - **contrary to the Directive** - the Directive only provides that public authorities should refrain from referring to a person subject to criminal prosecution as guilty pending a final judgment. The amendments change into a criminal offense any communication not only from public authorities, but also from any natural and legal person. According to the amendments, it is forbidden not only to call a person “guilty”, but also to refer to actions and persons, although the Directive expressly provides that any provisions on the freedom of the press should not be affected.

2. Removing the possibility to place persons prosecuted for offenses such as corruption or tax evasion under pre-trial arrest - **no connection to the Directive** - the proposed amendments refer to the need to transpose the provisions of the Directive regarding the presumption of innocence, but there is no distinction between various types of offenses in the Directive. In this case, the Directive seems to be just a pretext, with no connection whatsoever to the contents of the amendment.
3. Changes in the time and manner in which the persons subject to prosecution are acknowledged the evidence and charges on file - **no direct connection to the Directive** - the amendments proposed oblige prosecutors to announce the persons subject to prosecution about the evidence produced or about the fact they have reasonable suspicion, which is already covered by legislation. The invoked articles in the European Directive do not seem to have any connection to the amendments made.
4. By a rather particular diligence, one of the amendments removes means of proof such as video materials - **no connection to the Directive** - the amendments fully repeal, under the pretext of complying with the need to have no doubt on a person being (not) guilty, an article which allowed, for example, the use of video materials in criminal prosecution. At this point, it appears that if photos are used there is no doubt, but when videos are used, there may be doubts. In this case as well, the Directive says nothing about the type of evidence produced, but about such evidence being grounded.