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To the International Association of Judges – IAJ-UIM

The Romanian Magistrates' Association (AMR), professional and national, apolitical, non-governmental organization, stated to be of „public utility" through the Government Decision no. 530/2008 – with the headquarter in Bucharest, Regina Elisabeta Boulevard no. 53, District 5, e-mail amr@asociatia-magistratilor.ro, tax registration code 11760036 – legally represented by Judge dr. Andreea Ciucă - President, sends the following

ANSWERS TO THE THIRD STUDY COMMISSION QUESTIONNAIRE
"The rapid evolution of illicit drug manufacturing and the challenges this unstoppable process poses to successful prosecution"

1. Does your country have legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year – chemical substances and essential equipment possibly used in illicit drug manufacturing and trafficking, including importing, exporting, for domestic distribution and use and private sector due diligence. Please explain.

Yes, our country has legislation in these areas.

1.1. With regard to drugs, the specific legislative framework is Law 143/2000 on preventing and combating drug trafficking and illicit drug use (republished in 2014). Previously, Art. 312 of the Criminal Code (adopted by Law 15/1968) applied.

The legal provisions provide for the following offenses and penalties:

1.1.1. Attempts to the following offenses are punishable:

⏩ the cultivation, production, manufacture, experimentation, extraction, preparation, processing, transformation, offering, offering for sale, sale, distribution, delivery for any purpose, consignment, transportation, procurement, purchase, possession or other operations involving the movement of risk drugs, without right;

⏩ the unlawful introduction into or removal from the country, as well as the import or export of risk drugs;

⏩ cultivation, production, manufacture, experimentation, extraction, preparation, processing, transformation, purchase or possession of high-risk drugs for own consumption without right;

⏩ the intentional dispensing of high-risk drugs on the basis of a prescription intentionally prescribed by a doctor without medical necessity or on the basis of a falsified prescription;

⏩ administering high-risk drugs to a person outside the legal conditions;

⏩ the financing of the above.

The production or procurement of the means or instruments, as well as the taking of measures with a view to committing these offenses are also considered attempts (Art 12 of Law 143/2000).

1.1.2. In the field of drugs, it is also criminalized to manufacture, prepare or experiment drugs without right - drugs and high-risk drugs listed in the tables annexed to the law (Art. 2(1), (2) of Law 143/2000).

Therefore, if equipment is used to carry out these drug operations, the act constitutes a crime and the equipment may be subject to confiscation.

1.1.3. The law also stipulates that drugs and other goods that have been the object of the offenses shall be confiscated, and if they are t found, the convicted person shall be obliged to pay their equivalent in money (Art. 16 of Law 143/2000).

The following are subject to special confiscation: goods that have been used in any way or intended to be used in the commission of an act provided for by criminal law, if they belong to the perpetrator or if, belonging to another person, the latter knew the purpose of their use (Art. 112 of the Criminal Code).

1.2. Romania has acceded to the international conventions on narcotic drugs and psychotropic substances through the following documents:

Decree 626/1973 issued by the Council of State, on accession to the Single Convention on Narcotic Drugs of March 30, 1961 and the Protocol of March 25, 1972 on the amendment of this Convention.

The criminal provisions of the 1961 Convention are contained in Art. 36 and Art. 37, as amended by the amendments contained in Art. 14 of the 1972 Protocol.

Law 118/1992 adopted by the Romanian Parliament, for Romania's accession to the 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The criminal provisions are contained in Articles 21 to 23 of the Convention of February 21, 1971 and Articles 3 to 8 of the Convention of December 20, 1988.

2. Does your country have specific legislation on precursors control?

Yes.

Title of current legislation and date of adoption: ...; Last amended/updated in: ...

2.1. In the case of precursors, the specific legislative framework is Law 142/2018 on drug precursors (republished in 2018). Prior to the adoption of this law, the legal regime of drug precursors was established by Government Emergency Ordinance 121/2006 on the legal regime of drug precursors, respectively by Law 300/2002 on the legal regime of precursors used in the illicit manufacture of drugs.

Law 142/2018 has not been amended since its promulgation.

2.2. Law 142/2018 contains provisions on the legal regime of drug precursors and lays down the measures necessary to implement at national level the provisions contained in the following regulations:

(a) Regulation (EC) 273/2004 of the European Parliament and of the Council of February 11, 2004 on drug precursors, published in the Official Journal of the European Union, L, no 47 of February 18, 2004, as amended and supplemented;

(b) Council Regulation (EC) 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors, published in the Official Journal of the European Union, L, no 22 of January 26, 2005, as amended and supplemented;

(c) Commission Delegated Regulation (EU) 2015/1.011 of April 24, 2015 supplementing Regulation (EC) 273/2004 of the European Parliament and of the Council and Council Regulation (EC) 111/2005 laying down rules for the monitoring of trade between the Community and third countries in drug precursors and repealing Commission Regulation (EC) 1277/2005, published in the Official Journal of the European Union, L 162 of June 27, 2015;

(d) Commission Implementing Regulation (EU) 2015/1.013 of June 25, 2015 laying down rules concerning Regulation (EC) 273/2004 of the European Parliament and of the Council on drug precursors and Council Regulation (EC) 111/2005 laying down rules for the monitoring of trade between the Union and third countries in drug precursors, published in the Official Journal of the European Union, L 162 of June 27, 2015.

2.3. At the national level, in application of Law 142/2018 on drug precursors was adopted the Regulation approved by Government Decision no. 236 of April 18, 2019.

According to Art. 1(3) of Law 142/2018, "drug precursors shall mean those classified and unclassified substances frequently used in the illicit production of narcotic drugs and psychotropic substances, referred to in Article 1 of Regulation 273/2004 and Article 1 of Regulation 111/2005".

The legal rules provide for the following offenses and penalties:

Placing on the market of scheduled substances, their import, export and intermediary activities, as well as holding of scheduled substances without a license provided for in Art. 3(2), sentence I of Regulation (EC) 273/2004 and Art, 6(1) of Regulation (EC) 111/2005 or without a special license provided for in Art. 3(2), sentence II of Regulation (EC) 273/2004 and Art. 4 of Delegated Regulation (EU) 2015/1.011.

Placing on the market of scheduled substances, import, export and intermediary activities, as well as possession of scheduled substances in the absence of the registration provided for in Art. 3(6), 1st and 2nd sentence of Regulation (EC) 273/2004 and Art. 7(1) of Regulation (EC) 111/2005 or of the special registration provided for in these Regulations.

These offenses are punishable by imprisonment of 6 months to 5 years or a fine. The import and export of classified substances without the authorizations provided for in Art. 20 of Regulation (EC) 111/2005 is also punishable by the same penalty.

It is an offense and punishable by imprisonment from 3 months to 3 years or a fine (according to Art. 20(3) of Law 142/2018): selling or making available for any reason classified substances to economic operators or natural persons who do not hold the license provided for in Art. 3(2) sentence I of Regulation (EC) 273/2004 and Art. 6(1) of Regulation (EC) 111/2005 or the special license provided for in Art. 3(2), 2nd sentence of Regulation (EC) 273/2004 and Art. 4 of Delegated Regulation (EU) 2015/1.011 or do not have the registration provided for in Art. 3(6), 1st and 2nd sentence of Regulation (EC) 273/2004 and Art. 7(1) of Regulation (EC) 111/2005 or the special registration provided for in the above listed Regulations, allowing to carry out activities with such substances.

It should be noted that the provisions of Law 142/2018 do not penalize attempts to commit these offenses or preparatory acts.

The following are subject to special confiscation: property that has been used, in any manner whatsoever, or intended to be used in the commission of an act provided for by criminal law, if it belongs to the perpetrator or if, belonging to another person, the latter knew the purpose of its use (Art. 112 of the Criminal Code).

2.4. Misdemeanours related to precursors are also regulated by Law 142/2018, their ascertainment and the application of penalties being the competence of the National Anti-Drug Agency and, in certain situations, of the Romanian Police or customs authorities.

The law also lists acts that constitute contraventions of the legal regime of drug precursors (if the acts have not been committed in such a way as to constitute a criminal offense).

For example, the following acts are contraventions:

(a) failure to comply with the obligation to submit revoked licenses, registrations and import or export authorizations to the National Anti-Drug Agency within the term prescribed by law;

(b) failure by the operator or user to designate a person responsible for the drug precursors activity in accordance with Art. 3(3)(a) of Regulation (EC) 273/2004 and Art. 3(1) of Delegated Regulation (EU) 2015/1.011 and communicating their contact details to the National Anti-Drug Agency;

(c) failure to obtain the customer declaration provided for in Art. 4 of Regulation (EC) 273/2004;

(d) failure to fulfil the obligation to ensure and keep records of the movement of scheduled substances and to draw up the documentation in accordance with Art. 5 of Regulation (EC) 273/2004 and Articles 3 and 4 of Regulation (EC) 111/2005;

(e) failure to comply with the obligation to accompany imports, exports or intermediary activities with the documentation provided for in Art. 3 of Regulation (EC) 111/2005;

(f) failure to comply with the obligation to notify the National Anti-Drug Agency immediately of orders or transactions referred to in Art. 8(1) of Regulation (EC) 273/2004 and Art. 9(1) of Regulation (EC) 111/2005;

(g) failure to comply with the obligation to transmit to the National Anti-Drug Agency the reports on transactions referred to in Art. 8(1) and (2) of Regulation (EC) 273/2004, as well as the

reports on the monitoring of trade between the European Union and third countries referred to in Art. 9(2) of Regulation (EC) 111/2005;

(h) failure to comply with the following obligations, which also apply to scheduled substances: failure to grant the authorities and institutions provided by law access to the commercial premises where drug precursors, operators and users of precursors carry out their activities, in order to verify compliance with the requirements established for the control and supervision of these activities; failure to provide data on orders or operations with drug precursors carried out by them, as well as any other relevant data or information;

(i) failure to comply with the obligation to submit to the customs authorities the documents provided for in Art. 8(2) of Delegated Regulation (EU) 2015/1.011 in order to demonstrate the legal purpose of the operation, in accordance with Art. 8(1) of Regulation (EC) 111/2005.

Offenses are punishable by a fine.

Law 142/2018, supplemented by the Regulation approved by Government Decision 236/18 April 2019 for the implementation of the law, regulates the conduct of operations with drug precursors, including import/export, control of operations with precursors, licensing, registration and import/export authorizations specifically provided by law, destruction of confiscated precursors, recovery of precursors handed over in custody upon termination of the activity, management of qualitatively devalued precursors.

2.5. Law 194/2011 concerns combating operations with products likely to have psychoactive effects, other than those provided for by the laws in force. The law was adopted in compliance with Directive 98/34/EC.

The law establishes the legal framework applicable to preparations, substances, plants, mushrooms or combinations thereof (referred to as products), which may have psychoactive effects similar to those determined by narcotic or psychotropic substances or preparations. The law also establishes the plants or substances under national control, other than those whose legal regime is established by normative acts in force, and establishes measures for prevention, control and combating consumption in order to protect the health of the population from their negative effects.

If there is or it is justifiably presumed that there is a risk of carrying out operations with products likely to have psychoactive effects, the legal representatives of the Ministry of Health, the National Authority for Consumer Protection and the National Sanitary Veterinary and Food Safety Authority have the right to order the blocking of the goods, withdrawal from the market, prohibition of the use of products, suspension of activities, advertising or, where appropriate, temporary closure of the premises where these operations are carried out.

If the operations are carried out by electronic means, the Ministry of Communications and Information Society, upon referral to the competent authorities, shall require electronic communication service providers to block access to the content of the site in question, under the conditions provided by law.

The law criminalizes several acts, including:

- the act of the person who, without holding an authorization issued in accordance with the law, carries out operations with products without right, knowing that they are likely to have psychoactive effects. The attempt is punishable. The production or procurement of the means or instruments, as well as the taking of measures with a view to committing the offense, are also considered attempts;

- the act of the person who, without holding an authorization issued under the conditions of this law, performs without right operations with products which he should or could have foreseen that they are likely to have psychoactive effects;

- the deed of the person who, with intent, unlawfully carries out operations with products likely to have psychoactive effects, pretending or dissimulating that they are products authorized by law or whose marketing is permitted by law.

3. In your country, is an approval by a judge a pre-condition to launch investigations into a case of diversion and trafficking of precursors? Similarly, is a court order or approval by a judge required for effecting controlled or monitored deliveries? Please explain.

(i) The **launching of criminal investigations** in a case of diversion and trafficking in precursors does not require the approval of a judge, as this is not a precondition for the prosecution of the case**.**

(ii) For **controlled delivery** (a special method of surveillance and investigation as defined in Art. 138(1) (i) and (12) of the Criminal Procedure Code and regulated in concrete terms in Art. 151 of the Criminal Procedure Code), no court order or approval by a judge is required. Supervised delivery is authorized, by order, by the prosecutor supervising or conducting the criminal prosecution in the case.

Controlled delivery means the surveillance and search technique by which the entry, movement or exit from the country of goods in respect of which there is a suspicion of unlawful possession or possession, under the supervision or with the authorization of the competent authorities, is allowed for the purpose of investigating a crime or identifying persons involved in its commission (Art. 138(12) of the Criminal Procedure Code).

(iii) Technical surveillance of persons (Art. 138 of the Criminal Procedure Code), consisting of interception of communications or any type of remote communication, access to a computer system, video, audio or photographic surveillance, localization or tracking by technical means) requires authorization by the competent judge of rights and freedoms, who issues a warrant for technical surveillance (under Art. 141 of the Criminal Procedure Code).

Exceptionally, measures of technical surveillance of persons may be authorized by the public prosecutor, provisionally, for a maximum period of 48 hours (under the conditions provided for in Art. 141 of the Criminal Procedure Code). The provisional measure ordered by the public prosecutor is subject to confirmation by the judge of rights and freedoms within 24 hours of the expiry of the measure.

4. When a drug/precursor-related crime is being investigated in your country, does the judiciary have any role: *(a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state? If your answer to either (a) or (b) is yes, what legislation, regulations or rules of procedure apply to the decision of a judge involved at the investigation stage?*

The answer is yes to both questions (a) and (b).

The Romanian judiciary may receive and/or provide information related to the investigation or prosecution of a drug/precursor case.

The national legal framework for international judicial cooperation procedures in criminal matters is Law 302/2004 on international judicial cooperation in criminal matters.

It comprises two main instruments:

(i) International letters rogatory

- transmission of information needed in a particular case (Art. 231(1)(a) of Law 302/2004);
- spontaneous transmission of information (Art. 236 of Law 302/2004);

The Romanian judicial authorities may, without prior request, transmit information obtained in the course of an investigation to the competent authorities of a foreign State, when they consider that the information could assist the receiving State in initiating criminal proceedings or when the information could lead to a request for judicial assistance. The Romanian State may impose certain conditions regarding the use of the information transmitted. The receiving State is obliged to respect the conditions imposed by the Romanian State.

- principle of specialty (Art. 243 of Law 302/2004);

Evidence or information obtained by the Romanian judicial authorities on the basis of requests for international mutual legal assistance executed by the authorities of other States may not be used in criminal cases other than the one mentioned in the request, without the prior consent of the competent authority of the requested State.

These provisions shall also apply in respect of evidence or information obtained by Romanian judicial authorities on the basis of requests for international legal assistance executed by Romanian authorities. The executing judicial authority or the central authority, as the case may be, shall make a note to this effect on the date of transmission of the evidence or information.

(ii) The European Investigation Order in Criminal Matters (EIO) transposes Directive 2014/41/EU of the European Parliament and of the Council of April 3, 2014 and applies in relation to the Member States of the European Union - with the exception of the Kingdom of Denmark and the Republic of Ireland (Art. 328 et seq. of Law 302/2004).

A European Investigation Order is a judicial decision issued or validated by a judicial authority of a Member State for the purpose of carrying out one or more specific investigative measures in another Member State, with a view to obtaining evidence or to transmitting evidence already in the possession of the competent authority of the executing State (Art. 328(2)(a) of Law 302/2004).

The European Investigation Warrant may be issued in the framework of criminal proceedings initiated by a judicial authority or which may be initiated before a judicial authority in respect of an offense in accordance with the law of the issuing State (Art. 329(1) of Law 302/2004).

The competent Romanian authorities for issuing and executing an EIO are the following:

➲ where Romania is the issuing State, the EIO shall be issued, in the course of criminal proceedings, by the prosecutor conducting or supervising the criminal prosecution or by the competent judge, depending on the stage of the proceedings, ex officio or at the request of the parties or main parties in the proceedings, under the conditions laid down in the Code of Criminal Procedure;

➲ when Romania is the executing State, the recognition and execution of EIO falls within the competence of the prosecutor's office or court with material jurisdiction and according to the status of the person, according to Romanian law. Territorial jurisdiction is determined according to the place where the investigation measure is to be carried out. EIOs concerning facts which, according to the law, fall within the competence of the Directorate for the Investigation of Organized Crime and Terrorism or the National Anticorruption Directorate shall be recognized and executed by them.

The competence to perform the tasks of the **central authority** shall be exercised by the Ministry of Justice, in the case of EIOs relating to the activity of trial or execution of decisions, and by the Public Prosecutor's Office, through its specialized structures, in the case of European Investigation Orders relating to the activity of investigation and prosecution.

The Directorate for the Investigation of Organized Crime and Terrorism Offences (DIICOT) cooperates with other national or foreign authorities and is the **permanent contact point** in cooperation or judicial assistance networks established at national and international level with regard to crimes for which the Directorate is prosecuting, according to the law (Art. 2(3) of the Emergency Ordinance 78/2016 on the organization and functioning of the Directorate for the Investigation of Organized Crime and Terrorism Offences).

The DIICOT is competent, among others, for the offenses provided for by Law no. 143/2000 on combating illicit drug trafficking and consumption and by Law 142/2018 on the legal regime of precursors (art. 11(1), point 2 of Government Emergency Ordinance 78/2016).

5. Does your country have legislation or court rules that relate to monitoring manufacture and distribution of precursors which are applicable over the entire national territory? Please explain.

Yes.

The specific legislative framework is Law 142/2018 *on drug precursors* (republished in 2018). Prior to the adoption of this law, the legal regime of drug precursors was established by Government Emergency Ordinance no. 121/2006 on the legal regime of drug precursors, respectively by Law 300/2002 on the legal regime of precursors used in the illicit manufacture of drugs.

Law 142/2018, supplemented with the Regulation approved by Government Decision 236/2019 for the implementation of the law, regulates *the conduct of operations with drug precursors, including import/export, control of operations with precursors, licensing, registration and import/export authorizations specifically provided by law, destruction of confiscated precursors, recovery of precursors handed over into custody upon termination of the activity, management of qualitatively impaired precursors*.

The competent national authority is the National Anti-Drug Agency subordinated to the Ministry of Internal Affairs, with the powers set out in Law 142/2018, namely:

(1) monitoring operators and operations with scheduled and non-scheduled substances, in order to ensure the legality of operations with drug precursors and apply, for this purpose, the administrative control measures provided by law;

(2) coordination, at national level, of the activities carried out by national authorities and institutions responsible for preventing the diversion of drug precursors;

(3) ensuring cooperation with civil society and international authorities and bodies in the field of drug precursors, by organizing or participating in meetings or working groups with their representatives, briefings, data exchange and any other activities necessary for the performance of the specific functions;

(4) setting up and managing the national database on drug precursors, under the conditions set out in the Regulation for the implementation of Law 142/2018, approved by Government Decision;

(5) is the single contact point in accordance with Art. 12 of Implementing Regulation 2015/1.013;

(6) the transmission to the European Commission of the communications provided for in Art. 13(1) of Regulation (EC) 273/2004 and Art. 32(1) of Regulation (EC) 111/2005 under the conditions provided for in Art. 13 of Delegated Regulation (EU) 2015/1.011.

The contact between operators and users of drug precursors with the relevant national authorities, in order to fulfil the obligations provided by law, is carried out through the specialized structure of the National Anti-Drug Agency, which acts as a one-stop shop on drug precursors (Art. 2 of Law 142/2018).

The National Anti-Drug Agency shall ensure that the guidelines developed by the European Commission, provided for in Art. 9 of Regulation (EC) 273/2004, and the guidelines of Regulation (EC) 111/2005, as well as the list of non-scheduled substances are brought to the attention of the operators of drug precursors, by any means it deems appropriate to fulfil their purpose. Pursuant to Art. 10(4) of Regulation (EC) 111/2005, the National Anti-Drug Agency, in consultation, where appropriate, with the relevant national authorities, may propose to the European Commission the addition of a non-scheduled substances to the list referred to in Art. 10(2)(b) of Regulation (EC) 111/2005 (Art. 3 of Law 142/2018).

In order to verify the legitimacy of operations with drug precursors or the reality of the data contained in the requests made by operators or users of drug precursors, the National Anti-Drug Agency may request relevant data and information from public or private entities holding such data.

For the purposes set out in Art. 12 of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which Romania acceded by Law 118/1992, the National Anti-Drug Agency, in collaboration with national authorities and institutions with competences in the field, participates in international projects and mechanisms for the prevention of diversion of drug precursors (Art. 4 of Law 142/2018).

6. Does your country have legislation or court rules that establish as a criminal offence the manufacture, transport and distribution of essential equipment intended to be used for illicit drug manufacturing. Please explain.

6.1. For the **manufacture, transport and distribution of essential equipment** intended to be used for the illicit manufacture of drugs, national law does not contain legal rules criminalizing these acts as offences on their own, i.e. by an express legal provision.

However, Art. 12(1) of Law 143/2000 on preventing and combating illicit drug trafficking and drug abuse criminalizes attempts to commit certain drug offences (*see point 1.1.*). The production or procurement of the means or instrumentalities, as well as the taking of measures with a view to committing these offenses, are also considered attempts.

Therefore, in this form, the preparatory acts carried out with a view to committing illicit operations that fall within the material element of the crime of drug trafficking, provided for by Art. 2(1) and (2) of Law 143/2000, are criminalized.

6.2. In the **field of drugs**, it is criminalized to manufacture, prepare or experiment drugs, without right (risk drugs listed and high-risk drugs listed in the tables annexed to Law 143/2000).

If, depending on the concrete situation, the manufacture/transportation/distribution of essential equipment intended to be used for the illicit manufacture of drugs are included in the preparatory activities that the Romanian legislator assimilates to the punishable attempt ("producing or procuring the means or instruments, as well as taking measures with a view to committing offenses"), they can be considered a crime (Art. 12(1) and (2) of Law 143/2000).

6.3. Romania has acceded to the international conventions on narcotic drugs and psychotropic substances through the following documents:

(i) Decree 626/1973 issued by the Council of State, on accession to the Single Convention on Narcotic Drugs of March 30, 1961 and the Protocol of March 25, 1972 on the amendment of this Convention.

(ii) Law 118/1992 adopted by the Romanian Parliament, for Romania's accession to the 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

6.3.1. The criminal provisions contained in the above-mentioned international conventions are binding on the States which have acceded to them, and have the following content:

Single Convention on Narcotic Drugs of March 30, 1961, as amended by the Protocol of March 25, 1972

♦ "Each Party shall, subject to its constitutional provisions, adopt such measures as may be necessary to ensure that the cultivation and production, manufacture, extraction, preparation, possession, offering, offering for sale, offering for sale, distribution, procurement, procurement, sale, delivery, in whatever form, brokering, sending, dispatching, shipment through transit, transportation, import and export of narcotic drugs which are not in conformity with the provisions of this Convention, or any other act which, in the opinion of the aforesaid Party, would be contrary to the provisions of this Convention, to constitute offenses punishable if committed intentionally, and to make serious offenses punishable by an appropriate penalty, namely imprisonment or other deprivation of liberty" (Art. 36(1) of the Convention as amended by Art. 14 of the Protocol);

♦ "Subject to the constitutional provisions of each Party, its legal system and national legislation: (a) (....) (ii) intentional participation in any of the offences referred to in this Article, association with or conspiracy or intent to commit or attempt to commit, as well as knowingly preparatory acts and financial transactions in relation to the offences referred to in this Article, shall constitute offences punishable as provided in paragraph 1" (Art. 36(2) (a), sub-paragraph (ii) of the Convention as amended by Art. 14 of the Protocol);

The 1971 Convention on Psychotropic Substances

♦ "Subject to its constitutional provisions, each Party shall consider as a punishable offence any wilful act contrary to any law or regulation in the execution of its obligations under this Convention and shall take such measures as may be necessary to ensure that serious offences are punishable, for example by imprisonment or any other deprivation of liberty" (Art. 22(1) lit. a);

♦ "Subject to the provisions of each Party's constitution, legal system and national law: (a) (...) (ii) international participation in any of the offences referred to above, association or conspiracy to commit or attempt to commit such offences, as well as preparatory acts and financial transactions intentionally carried out in connection with the offences referred to in this Article, shall constitute offences punishable as provided in paragraph 1" (Art. 22(2) (a), point (ii)).

The 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances has redefined criminal offenses and penalties

The Convention provided that each Party shall take the necessary measures to establish as criminal offenses, in accordance with its domestic law, when the act was committed intentionally - in the areas listed in the Convention. It was also provided that, subject to the constitutional principles and fundamental concepts of its legal system, each Party shall take the necessary measures to establish as criminal offenses under its domestic law, when committed intentionally, the character of criminal offenses in certain areas listed in the Convention. These areas include possession and purchase of narcotic drugs and psychotropic substances and cultivation of narcotic drugs for personal consumption.

Each party undertook to take measures to ensure that these offenses are punishable by sanctions (imprisonment or other custodial sentences), depending on their gravity. The Parties may provide that measures of treatment, education, after-treatment, rehabilitation or social reintegration of the offender may either replace or be in addition to the sentence.

The Parties shall proceed in such a way that their courts and other competent authorities may take into account the factual circumstances which give particular gravity to these offenses.

The Parties shall endeavor to do so in order to maximize the effectiveness of detection and law enforcement measures with respect to the offences in question, taking into account the need to exercise a deterrent effect with respect to their commission.

For the purpose of cooperation between the Parties, these offenses shall not be considered as fiscal or political offenses, nor shall they be considered as politically motivated, without prejudice to the constitutional limits and fundamental laws of the Parties.

The provisions of the Convention shall be without prejudice to the principle that the definition of the offenses concerned and the respective legal defenses derive exclusively from the domestic law of each Party and that the offenses referred to shall be prosecuted and punished in accordance with that law.

7. In respect of non-scheduled chemicals/ equipment, is the fact that they have been mis-declared before the Customs, sufficient to impute 'knowledge' on the part of the supplier of their being used for illicit drug manufacture? Please explain.

No.

The fact that the unclassified chemicals/equipment were wrongly declared to customs is not sufficient to impute "knowledge" by the supplier of their use for the illicit manufacture of drugs.

The unlawful conduct of the purchaser (declarant) at the time of the customs formalities cannot, in the absence of other evidence, render the supplier of the equipment liable for the use of the equipment for the illicit manufacture of drugs.

In matters of criminal liability, according to Art. 50(2) of the Criminal Code, the circumstances of the offense are only imposed on the perpetrator and the participants to the extent that they have foreseen or known them.

The Criminal Code also provides that the following are subject to special confiscation: property that has been used, in any manner whatsoever, or intended to be used in the commission of an act provided for by criminal law, if it belongs to the perpetrator or if, belonging to another person, the latter knew the purpose of its use (Art. 112 of the Criminal Code).

8. In your country, does domestic legislation include measures and/or civil, criminal and/or administrative sanctions to address non-scheduled chemicals and emerging precursors, namely those that are used as starting materials and/or intermediaries in the legitimate manufacture of substances in Table I and Table II of the 1988 Convention? If yes, which type of sanctions? Please explain.

Yes.

8.1. *Law 142/2018 on drug precursors provides for a number of offenses with regard to the regime of scheduled substances (Art. 20).*

With regard to non-scheduled substances, misdemeanour sanctions are provided for (art. 18).

Failure to comply with the obligations laid down by law constitutes a contravention of the legal regime of drug precursors, if the act has not been committed in such a way as to constitute a criminal offense (*see point 2.4.*);

Contraventions are punishable by a fine. The National Anti-Drug Agency and the police officers and agents of the Romanian Police are responsible for detecting contraventions and imposing penalties.

With a view to verifying, by the authorities and institutions prescribed by law, compliance with the requirements established for the control and monitoring of drug precursors, operators and users of precursors have the following obligations which also apply to non-scheduled substances:

❖ to allow access to their business premises;

❖ provide data on their orders or operations with drug precursors and any other relevant data or information;

❖ allow verification of the documents on the basis of which they conduct their business or commercial documents;

to allow samples to be taken, where necessary, in accordance with the provisions of the implementing regulation.

The National Anti-Drug Agency transmits, on the basis of protocols concluded for this purpose with drug operators and drug precursors, the lists of non-scheduled substances to individuals and legal entities that carry out activities with such substances, under the conditions established by the Regulation on the implementation of the law.

8.2. *Law 339/2005 on the legal regime of narcotic and psychotropic plants, substances and preparations*

The Law establishes the legal regime regarding the cultivation, production, manufacture, storage, trade, distribution, transportation, possession, offer, transmission, intermediation, acquisition, use and transit on the national territory of spontaneous or cultivated plants, substances and preparations listed in the tables annexed to the Law.

The law also provides for penalties for non-compliance with its provisions. Where there is an imminent and serious risk to health, or where it is justifiably suspected that there is an imminent and serious risk to health, the health authorities will take precautionary measures, which consist of:

(a) blocking the goods, withdrawal from the market and prohibition of the use of pharmaceutical specialties, magistral formulae and officinal preparations, as well as suspension of activities, advertising and temporary closure of premises, centers or services;

(b) suspension of the development, prescription, release and supply of preparations in clinical or animal research.

In case of repeated violations of the legal provisions on the submission of reports by authorized importers and exporters or growers, the Ministry of Health may suspend the authorization to carry out activities for a period of 1-3 months.

The law also expressly sets out the acts that constitute contraventions and the amount of the fine.

The contraventions are established and sanctions are applied by specifically empowered staff of the Ministry of Health and the Ministry of Agriculture, Forestry and Rural Development, the General Directorate for Combating Organized Crime and Anti-Drug and the National Anti-Drug Agency.

The provisions regarding contraventions are supplemented by the provisions of Government Ordinance no. 2/2001 on the legal regime of contraventions (approved with amendments and additions by Law 180/2002, with subsequent amendments and additions).

9. Please elaborate on specific pieces of information and level of details that would allow you as a judge to act on information/intelligence/evidence received from counterparts in investigations related to new emerging drug precursor chemicals not under control in your country. Please explain.

If, under Romanian law, certain substances are categorized as high-risk drugs, high-risk drugs, drug precursors or psychoactive substances and their possession, consumption and sale are punishable as criminal offenses, the courts may take into account only the legal evidence administered according to the Romanian criminal procedure.

Information received, for example, by police officers from their counterparts in another EU country that a person is trafficking drugs cannot be used as such directly by the judge. But on the basis of the information (e.g. in connection with a drug shipment), evidence is collected by the prosecutor and the court can use, in a criminal trial, only evidence obtained in accordance with the law.

If the evidence is located in another EU country, it is obtained under the European Investigation Order. If the evidence involves investigative measures in other EU countries, a European Investigation Order is also required under Directive 214/41/EU.

10. Are there any specific provisions that allow you as judge to act on non-scheduled chemicals with no known legitimate uses? Would information from an international body, or a collection of information from other countries, that a chemical has no known legitimate use facilitate your work in any way? Please explain.

The judge can act, within the limits of his or her legal powers, only when an act is criminalized by the Criminal Code or special laws.

In the area in question, criminal proceedings can be initiated only if the act is a crime provided for by law, i.e. if it concerns high-risk drugs, high-risk drugs, drug precursors and psychoactive substances. Apart from the legal provisions, evidence cannot be obtained on the basis of information from judicial bodies in other countries.

11. As a judge, if you receive a request for assistance in a drug/precursor-related crime from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), how is it relevant to your determination to ensure that basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected? Please explain.

The Romanian judicial authorities shall comply with any requests for international legal assistance, provided that the protection of Romania's sovereignty, security, public order and other interests, as defined by the Constitution - as provided for by Article 3 of Law 302/2004 on international judicial cooperation in criminal matters - is respected.

The concept of public order and Romania's "other interests" also include the safeguarding of fundamental rights and freedoms in a democratic constitutional state based on the rule of law, as enshrined in the Constitution. Romania's interest as a democratic state is to protect fundamental rights and freedoms.

In addition, this obligation results from the rules concerning judicial cooperation in criminal matters, contained in the international legal instruments to which Romania is a party, Law 302/2004 being applied on the basis and for the execution of these rules (Art. 4(1) of Law 302/2004).

In this context, the Romanian judge has also the obligation to analyse whether there is a risk that fundamental rights and freedoms are not respected in the requesting State (*see point 12*).

12. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.

As regards the judge's obligation to analyse whether there is a risk that fundamental rights and freedoms may not be respected in the requesting State, I recall an experience of fellow judges.

The public prosecutor of the Public Prosecutor's Office of the Court of Appeal referred to the Court of Appeal the proposal to take the measure of arrest of the requested person (in the procedure provided for by Art. 102 of Law 302/2004 on international judicial cooperation in criminal matters). The referral was made on the basis of the alert entered in the Schengen

Information System on the name of the requested person, on the basis of a European arrest warrant issued by a court of an EU Member State. The purpose was to conduct ongoing criminal proceedings in relation to the commission of the crime of criminal conspiracy for the purpose of drug trafficking (an act covered by Law 302/2004).

The Romanian court emphasized that, according to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, the rule is that of mandatory execution of a European arrest warrant. The diversity of the legal systems of the Member States, the variety of national rules transposing the Framework Decision and the evolving case-law of the CJEU show, however, that this rule is not absolute. Therefore, the executing judicial authority is allowed a number of mitigating circumstances as conditions for the execution of the European warrant, which, if not fulfilled, the court may refuse to execute the European warrant.

Such conditions refer to: a) the existence of a valid European Arrest Warrant issued by a judicial authority, containing all the information required by Article 8 para. 1 of Framework Decision 2002/584/JHA and fulfilling the requirements set out in Art. 2 of the Framework Decision; b) the absence of the grounds for refusal, mandatory or optional, among those prescribed in Art. 3, 4 and 4a of the Framework Decision; c) the exclusion of any real risk that the fundamental rights and freedoms of the person would be seriously jeopardized in the issuing Member State, the CJEU holding in a clear manner that the respect due to the rights and freedoms of the individual cannot be sacrificed either by the principle of effective judicial cooperation or by the principles of trust and mutual recognition (the Romanian court citing a number of judgments of the CJEU).

The requested person has not consented to his surrender to the issuing judicial authority and has claimed that, during his arrest, he was subjected to poor detention conditions and was beaten by other detainees, so that he fears that, if he were to surrender, his life and health would be endangered by the other persons involved in the criminal activity described in the European Arrest Warrant.

With regard to the existence of a real risk that he would be subjected to material conditions of detention contrary to the standard of protection of fundamental rights guaranteed by Article 4 of the Charter of Fundamental Rights of the European Union and Article 3 ECHR, the Court referred to the case-law of the CJEU, which has established three important benchmarks:

1) the mere fear of the requested person that he or she would be subjected to inhuman or degrading treatment in the issuing Member State because of the conditions of detention is not sufficient for the executing judicial authority to question the respect in that State of the fundamental rights recognized by the Charter or the ECHR;

2) where the executing judicial authority is confronted with objective, reliable, precise elements showing the existence of deficiencies with regard to the material conditions of detention, it is required to verify whether in the circumstances of the case there are serious and substantial grounds for believing that, following his surrender to the issuing Member State, the person concerned would face a real risk of being subjected to inhuman or degrading treatment in that State (C 404/15 and C 659/15 PPU, paras. 92 and 94; C 128/18, par. 55). In this respect, the executing judicial authority must request additional information from the issuing judicial authority and the latter must provide it within the time limit set for this purpose;

3) in order to assess whether, in the issuing Member State, the requested person is at risk of being subjected to inhuman or degrading treatment because of the material conditions of detention to which he is exposed, the executing judicial authority must take account of those conditions as a whole, and not merely of the mere size of the prison cell, which remains an important criterion, or of any other factor considered in isolation. The examination to be carried out by the executing judicial authority does not relate to the general conditions of detention existing in all the prisons in the issuing Member State in which the person concerned might be detained, but only to those in the prisons in which the requested person is actually to be detained, including on a temporary or transitional basis (C 128/18, paragraphs 64, 66).

Therefore, the Romanian court initiated consultations with the issuing judicial authority, requesting it to provide, by a certain deadline, information on the concrete conditions of detention to which the requested person will be subjected and, more specifically, to indicate the penitentiary where he will be accommodated and whether he will be provided with minimum space and air standards throughout the duration of his detention.

The issuing judicial authority did not comply with this request, so the Romanian court requested the assistance of the Romanian liaison magistrate in the requesting State in order to obtain a reply before another hearing. Through the Romanian liaison magistrate, the issuing authority communicated a number of pieces of information and the Romanian court found that the possible prisons where the requested person would be incarcerated, if he surrendered, were indicated and provided sufficient guarantees that he would not be accommodated in the same cell or in the same prison as the other co-defendants.

However, with regard to the material conditions of detention of the requested person, the Romanian court noted that the data submitted were of a high degree of generality, which did not allow it to reasonably deduce whether, as a whole, the requested person will be provided with detention conditions at the accepted standards in the penitentiaries where he will be detained, in case of surrender.

In order to receive specific details, the Romanian court continued its consultations with the issuing judicial authority, but apart from the information and assurances concerning food, medical care and the right to petition of detainees, the competent authority of the requesting State avoided a firm answer on the other aspects on which it was asked and which are important to assess the overall correspondence of the detention conditions with the right of the requested person not to be subjected to inhuman or degrading treatment in the issuing Member State.

Thus, in order to obtain certain, complete and detailed information and assurances regarding the conditions of detention in the prisons where the requested person was to be held, the Romanian court continued its consultations with the issuing judicial authority, giving it a final deadline by which it had to reply to 8 questions in detail.

As the reply to this information was delayed, the Romanian court again called upon the assistance of the Romanian liaison magistrate of the requesting State and, through him, the issuing judicial authority communicated that it had already answered the questions and sent the requested information.

In this context, the Romanian court noted that the Report of the Committee for the Prevention of Torture (CPT) on the conditions in prisons in the requesting State visited by the delegation of this

Committee found shortcomings, in particular in terms of poor hygiene, inadequate treatment of prisoners by prison staff (in the case of medium-security prisoners), lack of ventilation in sanitary annexes, problems with the provision of heating and hot water, restrictions on the range of work activities, the right to visits and the right to telephone calls (in the case of maximum-security prisoners). At the same time, although the size of the cell and the prisoner's personal space do not constitute singular criteria for determining the quality of detention conditions, they are a priority, as prison overcrowding may be sufficiently serious to justify a finding of a violation of Article 3 ECHR (ECtHR, Judgment of July 17, 2012, Radu Pop v. Romania, para. 94). Adequate ventilation and an adequate amount of fresh air per minute that the prisoner breathes per minute are also particularly important for maintaining the prisoner's physical and mental health at optimal levels.

Furthermore, in assessing the overall conditions of detention, the *a posteriori* remedies available to the detainee under the law of the issuing State may be decisive in order to challenge the unsuitable material conditions of detention and the infringement of the rights to which he is entitled during the deprivation of liberty and to obtain redress of those deficiencies within a short period of time.

Accordingly, the Romanian court noted that, in order to exclude any inhuman or degrading treatment on the territory of the issuing State caused by the material conditions of detention, it was essential, in particular, for the issuing judicial authority to clarify whether the requested person, once surrendered, retained the possibility of moving normally in the cell. In this respect, it was necessary to answer whether the guaranteed space of 3 square meters per detainee is a space free of use or is also occupied by furniture as well as furniture and/or fittings (including toilet) and on average how many persons are accommodated in a cell and how many cubic meters of fresh or filtered air is provided in the cells of each detainee in the prisons where the requested person was to be held.

It was also essential that the issuing judicial authority provided categorical assurances as to the hygienic conditions in the cells, sanitary facilities and other premises intended for the use of prisoners, including access to drinking water and hot and cold domestic water.

It was also essential for the issuing judicial authority to spell out in concrete terms, on the one hand, the ways in which detainees could exercise their rights to access information of public interest, consult personal documents, receive legal assistance, receive telephone calls, On the other hand, in the particular case of the requested person, who was a Hungarian citizen and did not know the language of the issuing state, it was essential to specify the ways in which he would be granted access to the social, cultural and educational programs in the prison.

In addition, it was essential that the issuing judicial authority should specify the remedies available to detainees under Italian law to challenge the inadequate material conditions of detention and the infringement of their rights during deprivation of liberty. It should also have specified under what conditions those remedies are exercised and within what time-limits those requests are dealt with.

Finally, it was essential for the issuing judicial authority to provide all the clarifications and assurances requested by the Romanian court, as long as the requested person, if convicted of the act for which the European Arrest Warrant was issued, would be at risk of a lengthy deprivation of liberty in the territory of the requesting State, of at least 6 and up to 20 years.

In the light of all the arguments set out above and the refusal of the issuing judicial authority to provide the executing judicial authority with the information and guarantees which it was requested three times in a certain, complete and detailed manner, the Romanian court reasonably inferred that there was a real risk that the requested person would be subjected in the issuing Member State to material conditions of detention contrary to the standard of protection of fundamental rights guaranteed by Article 4 of the Charter of Fundamental Rights of the European Union and Article 3 ECHR. It therefore refused to execute the European Arrest Warrant.

The Romanian court emphasized that the adoption of this solution does not mean that it did not continue to have high confidence in the legal system of the issuing Member State, but the solution means, in the particular case of the requested person, that the absolute standard of protection of fundamental rights guaranteed by Art. 4 of the Charter and Art. 3 ECHR prevails.

Judge Andreea CIUCĂ, PhD,
President of the Romanian Magistrates' Association (AMR)

Judge Mihaela VASIESCU, PhD