How to Do Legal Analysis on Draft Laws (Bills) and other Legislation
Bryane Michael, Linacre College (Oxford)

Consider the following points of advice. To see them in practice, I attach a set of comments I have made recently and the original piece of (Romanian) legislation.

1. **Skim the law** – look for how it works (who? what? where? when? how? and sometimes why?) Draw a picture if you need to – especially if you need to consult related legislation. Most countries don’t use signposting, so you will need to put subject postings in front of each article and even organise in chapters in order to take a “gestalt view” of the law.

2. **Think about broad issues before tackling the article-by-article analysis.** Bring into the front of your mind all those theories from political science classes, economics classes and philosophy (this is the area where that abstract stuff finally pays off). Write down theories you know on a blank sheet of paper if you need to...

3. **Go article by article.** Even a quick and dirty analysis should try to do article-by-article. I find many times that later articles remind me of abstract issues (see point 2 above) which I might have forgotten about. You will also get curious about other “affine legislation”...

4. **Draft like you are writing a contract.** Be as specific as possible in defining rights, who does what etc. You, unlike the politicians who passed the bill, are not constrained by practical issues of the day. Often, writing good legislation is like writing a good contract (remember laws are “social contracts”). Don’t worry about political acceptability – your comments will get trashed by at least 40 different people of varying educations, financial interests, etc. Start from the “optimum” and let them mold it into reality (remember, you represent the liberal traditions of the Academy). If your text will be translated, you will spend about 30 minutes per article with your translator – live with it. If you criticise something, offer an alternative....

5. **Look for data.** After you drafted a beautifully worded article, you may fish around Google to find empirically that your proposed concept in your article doesn’t work in practice. Naturally, revise your article(s).

6. **Costs-and-benefits.** If a piece of legislation costs the people who pay for it more than it helps them, it will bankrupt the state. Welfare economics provides nice ways of estimating social costs and benefits – use them. Remember, non-legislation is also an option (as is delegated legislation).

7. **NOW look at other countries’ laws.** You spent years to learn lots of lovely theories about how to make society perfect. Use them. Then consult other countries’ legislation to inspire about (about areas you left out, practicalities of implementation, etc.).

8. **Be humble.** Remember, the piece of legislation sitting in front of you represents compromises between very different people (occupations, backgrounds, values and even ethnicities). You also have your own prejudices. For every admonition in this list, you will find 100 exceptions. After you “do” a lot of these comments, you will get a feel for the important issues and form your own style.
Comments on Romanian Law

On the Passing of the Code of Conduct for Civil Servants

Bryane Michael, Linacre College (Oxford)

Letter of Transmission

The present Law represents a significant step forward in establishing Romania’s leadership within the EU on public sector ethics and codes of conduct. Romania, and particularly the National Agency of Civil Servants (NACS) has provided significant leadership and spent a good deal of time and energy thinking about these difficult issues which most EU countries have decided best not to legislate on.

However, the Law imposes a large regulatory burden on the Romanian state without a clear benefit. The Law at times runs counter to Romania’s EU treaty obligations and suffers from a seeming disregard for international best practice in the area of public sector codes of conduct. Moreover, the drafting of the law itself suffers from several inconsistencies and a lack of clarity which is likely to prevent its implementation by the NACS.

Modification of the Law can significantly improve the law’s performance, including:

1. Clarifying the “resolution” part of the law (general agreement on principles to be followed by civil servants) as opposed to “law-making” part (conferring rights and obligations which can be relied upon by individuals in Romanian courts).

2. Making the NACS a supervisory body for overall government work on codes of conduct, clarifying the NACS’s jurisdiction, regulatory powers, and Disciplinary Committees’ powers of administering punishments.

3. Making compliance “incentive-compatible” – meaning that civil servants are providing with diminished liability, indemnified against civil and disciplinary liability and provided with rewards for following the present Law.

4. Making the present Law “self-financing” – meaning that the Law provides for financial support for activity under the present Law as a function of the NACS’s and Disciplinary Committees’ effectiveness. I have included a speculative provision at the end of the Law which will almost certainly be removed.

5. Improve overall drafting, making procedures easier to follow, more clear and ensuring that the Law conforms with EU standards (and in some cases Treaty obligations).
Other recommendations are discussed in-depth in the analysis below.

With the changes as proposed in this recommendation, I believe the law will effectively achieve the goals stated in Article 5.

I make no representation of being an accreted legal practitioner in Romania and absolutely offer no warrantee on the advice contained within. I make these recommendations as an independent academic without regard for the political feasibility or the legality of implementing them in Romania.

Sincerely yours,

Bryane Michael

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Overview of Law

The Code of Conduct Law aims to promote ethical values within the civil service in order to help civil servants provide “excellent” public services (article 5). The law establishes a fiduciary duty on the part of civil servants toward their Agency (arts 6-7), regulates communication and information (arts 8-13), and re-iterates the commitment to ban corruption (arts 14 to 19). The Law places executive responsibility for implementing the present Law with the National Agency of Civil Servants or NACS and broadly defines its working procedures (arts 20-23), outlines rudimentary disciplinary procedures (article 24) and measures related to informing the public about the present Law.

General Remarks

Moral issues (representing aspects of conduct which are usually not clear enough to legislate on) are traditionally outside the realm of law-making. The Romanian Code of Conduct Law, as a piece of legislation, represents a significant departure from this practice. Such legislation could, if applied, move the Romanian administration away from a black letter rule-of-law system and toward a more US-UK equity-based system of dealing with civil servant conduct. In order to give these values legal content, the present law must provide civil servants the right to rely on the values enshrined in the law (in cases where they may exercise discretion) and must provide administrative law defences for civil servants who may violate orders in reliance on the values enshrined in the Code of Conduct Law.

The design of the enforcement mechanism, centred on the National Agency of Civil Servants (NACS) varies significantly with EU practice -- and is likely to be completely ineffective. First, the NACS has no power under the present form of the Law and its competencies are ill-defined (as is its jurisdiction). Second, the rights and obligations of the NACS, Disciplinary Committees and even civil servants themselves are poorly defined under the present law. Third, the Law is likely to cost much more to implement than the expected social benefits. Without revisions, the Law imposes a negative net burden of roughly €4 million. However, if the changes recommended in this document are adopted, the estimated social welfare impact of the Code of Conduct Law would be neutral to positive – the Law should cost about €20 million to implement and result in an increase in GDP growth (or increase in amenity as measured by service users’ willingness to pay) of roughly €20 million to €30 million. As such, the Law – in its revised format – should not impose an undue regulatory burden.

A new organisational structure, making disciplinary committees bear most of the burden of monitoring and enforcing the present law should help improve the expected effectiveness of the Code of Conduct Law. Such a structure will also help pave the way for a conflict of interest law similar to those in other countries which imposes obligations related to risk assessment and management, risk-based audit, the declaration of civil servants’ asset, and the assignment and management of liability for corruption and other offences. A new
organisational structure should also help law enforcement agencies set-up Internal Affairs or Inspectorate offices.

A number of changes have also been suggested in order to help Romania fulfil its Treaty obligations, particularly related to directives dealing with eGovernment, regulatory impact assessment, and overall legislative changes occurring in Member States tying legislation and rule-making to positive social welfare impacts.

The NACS should revise the present Law and submit to Parliament a new piece of legislation called the (2009) Amended Law on the Civil Servant Codes of Conduct. The deficiencies in the present form of the Law are severe enough to require a complete overhaul of the Act instead of piece-meal changes.
Major General Issues

1. Organisational Structure and Competencies of the National Agency of Civil Servants (NACS)
The vesting of enforcement powers in the NACS has been mis-designed because the present form of the Law:

a) mandates no specialty division or unit to be established in the NACS, making authority (and accountability) for the implementation of the present law unclear,
b) does not provide financing mechanisms for enforcement, stretching the NACS’s resources and providing no incentive for NACS civil servants to execute the present law,
c) does not provide clear jurisdiction related to powers of investigation and prosecution; noting only that the NACS can investigate, but not defining when cases require Agency-level investigation or procedures to follow during an NACS-led investigation,
d) provides for unclear jurisdiction with Disciplinary Committees and with head of Agency (who is legally liable for the ethical infractions of his or her staff)
e) imposes unclear rights and/or obligation to seek injunctive or prospective relief in cases civil servants’ actions (or their superiours orders) are deemed contrary to the present Law (namely unethical),

2. Conflict between values based and rule-of-law based ethics.
This bold piece of legislation attempts to legislation in an area where almost every other EU member state has decided to abstain from law-making. If the present Law succeeds, civil servants should be able to rely on the Law’s values as both positive obligation to act and as a legal defence during administrative disputes. For example, the civil servant’s interpretation of the “public interest” (as enshrined in Art 3(2)) has been a constant vexation in the Anglo-Saxon system – and in the Romanian system, a civil servant’s reliance on upholding the public interest, particularly in violation of an Agency-level procedural order, remains particularly doubtful. A Romanian civil servant who would use Art. 3(2) as a successful defence against a disciplinary proceeding would clearly reorient Romania’s approach to public administration. However, the present Law gives few remedies for a civil servant to rely on such an article 3(2).

3. Incentive-compatibility and self-enforcement
The present Law relies on civil servants’ sense of duty toward to the law in order to follow the present Law (as well as to enforce it). Over 20 years of legal research suggests this is a misguided approach. Legislation should be, to the extent possible, incentive-compatible. Namely, civil servants should be provided with positive incentives (carrots) to follow the law instead of simply rely on the threat of enforcement (sticks).

I have suggested provisions which provide such incentives. These provisions revolve around indemnification for notifying the NACS of potential ethical dilemmas and protections for colleagues and managers for complicity if they make a reasonable effort to seek advice on ethical issues. Such an approach has become standard practice in most western European Union countries (though the relatively strong civil service ethic in most OECD countries have made such provisions to date unnecessary and little used).
4. Conflict of Interest

The present law touches on conflict of interest in a highly superficial way. More post-Socialist countries have adopted relatively detailed pieces of legislation regulating conflict of interest. The present Law only touches on these issues (arts 14, 15, and 18) – providing none of the enforcement powers which other countries give to prevent such conflict of interests. The present Law should use these conflict of interest provisions as a “stop-gap” measure and use the opportunity to encourage Parliament to pass a consolidated conflict of interest bill. Therefore, in the revised Law, the NACS should be required to prepare such a conflict-of-interest legislation and the conflict of interest provisions in the present Law should extinguish upon adoption of the new conflict of interest law.

5. Internal Inspection and Internal Security Units (Inspectorates)

The present law fails to address the potentially overlapping jurisdiction with internal audit (or inspection) – particularly as International Auditing and Assurance Standards Board (IAASB) standards require surveillance over an organisation’s “culture of compliance” and general ethical culture. Presumably, the Internal Auditor will be charged with overseeing compliance with this law (when and if Internal Audit becomes a widely adopted practice in Romania). The present Law takes a passive approach to enforcing ethics, relying on complaints and denouncements which Discipline Committees investigation and/or prosecute. In other cases, I have suggested that random checks be conducted (usually as part of a conflict-of-interest law). Such a recommendation would clearly be outside of the legislative intent of the present Law.

The other area of concern involves enforcement of the anti-corruption law (particularly within law enforcement agencies). The issue of non-criminal (administrative and disciplinary) sanctions in corruption cases remain vague in Romanian legislation – with each Agency presumably able to administer its own disciplinary measures in cases of suspected corruption. As the present Law (as per arts. 14-15) directly places responsibility for the investigation and prosecution of non-criminal corruption cases with the Agency’s Disciplinary Committee (if I have extrapolated Romanian jurisprudence correctly as naturally the law is silent on the matter of non-criminal enforcement according to the acts I could obtain). I have not proposed a solution to this matter as I can not divine legislative intent in this matter. Clearly, as Romanian law enforcement agencies establish Internal Affairs units, disciplinary proceedings are likely to fall under their jurisdiction.

6. Confusion over parliamentary resolution and legislation

In my view, the present law confuses parliamentary resolution (a statement of commonly held views by the parliament as a deliberative body) and legislation (rights and obligations backed up by sanctions) to be implemented by the executive branch. The current Chapter 2 broadly represents these values while Chapter 3 represents the rights and obligations civil servants have in fulfilment of these values.

To call the present Law a Code of Conduct would be a large mistake. The text does not read like any code of conduct I have seen in my 10 years in this field. The drafting moreover suggests that little consultation with public officials resulted in the present Law. As such, I propose to divorce the poorly elaborated Code of Conduct part of the Law (which is in fact a parliamentary resolution) and the “law-making” part of the act. My proposed solution consists of using the present Law to establish a minimum set of legally binding obligations for Agency-level Codes of Conduct.
Should the Romanian people (through its parliament) decide a unity Code of Conduct should be part of the present Law, then I can propose three improvements:

a) include a basic list of values (along with a specific enough definition) which could be relied upon in an administrative court which serve as a minimum guide for Agency-level codes of conduct,

b) include a separate code of conduct as an attachment or a separate parliamentary resolution (with the standard wording and format of a normal, usual code of conduct),

c) include a preamble to the present Law which should include a description of the consultative process which created the present values enshrined in the law and which clearly describes the mischief this Law seeks to remedy.

I have chosen to make recommendations in this document based on option (a) as it is the closest to what I think the Romanian legislature is trying to achieve.

7. Disciplinary Remedies

The law “lacks teeth” relying on disciplinary measures in place (and in several places, the present Law foresees penalties as defined “by law.” However, as the intent of the present Law is clearly to endow the NACS with enforcement powers, disciplinary remedies should be clearly defined. Simply put, a law without enforcement is not a law.

In order to remedy this failure, I have proposed classes of remedies to be applied under the present law (which is usual practice in many OECD member states). Due to my own lack of knowledge about Romanian law, I have provided an exception – namely if such a schedule of disciplinary level punishments already exists, these should be preferred and article 24 (revised) should be amended to refer to the act or regulation establishing such a positive list.

8. Failure to address jurisdictional issues (conflict of laws)

The lack of reference to the Civil Service Law as well as obvious jurisdictional issues which I was able to catch with my lay-persons knowledge of Romania law suggests that many issues remain to be worked out with the present Law even if the present proposals are adopted. In order to spare parliament the cost and ennui of hearing every change in the present, I have – in line with the tradition in most OECD countries – recommended delegated legislative powers.

The strategy I chose was to have administrative judges’ decisions serve for future amendments (and purposely avoiding vesting secondary legislative power in the NACS). Such an approach should be preferred as these judges are more likely to be able to resolve immediately jurisdictional and other disputes. I have recommended that their decisions serve to amend the present law in order to save time and energy. Conflict resolution also provides a more reliable guide to law than flights of analytical thought.

9. Failure to resolve issues involving liability
Romanian civil servants are already increasing being exposed to civil liability for their actions in Romania and international fora. As such, law-making needs to address how liability is divided between civil servants as persons and the extent to which the Agency holds liability. These issues are just being defined in Romania (and elsewhere in Eastern Europe). The issues of indemnification, imputed liability and the assignment to the Agency of liability as a natural people (with the concomitant removal of sovereign immunity) represent issues are barely being defined in other branches of Romanian law.

Clearly, however, ethical breaches by civil servants are partly the responsibility (and partly caused by) the person’s boss and the incentives given by the Agency. As such, legislation must (in line with practice in other EU Member States) explicitly assign or divide responsibility (and the attendant financial liability) for offences under the present Law. In the area of conduct and ethics, these issues pose very difficult questions – questions which I completely refrain from addressing in my recommendations.

The issue of imputed liability should clearly be a topic which the NACS should deliberate upon with the view of either proposing a legislative amendment to the present Law or as a matter for regulation (as the present Law devolves particular competencies for secondary/devolved legislation in the form of regulatory decree).

10. Lack of a Regulatory Impact Assessment

Many EU countries have increasingly been incorporating Regulatory Impact Assessment (or RIA) in their work in order to ensure that social benefits of legislation (or regulation) exceed the social costs. I provide a back-of-the-envelopment RIA with the hopes that the Romanian authorities increasingly use such techniques to prevent vexing law-making.

11. Inadequate Implementation of eGovernment directives

The present law does not define how communication will be addressed. Electronic communication has been preferred (in line with EU and Romanian legislation on eGovernment). To the extent possible, I recommend the use of email, Internet and other forms of electronic communication to assist the move away from costly paper-oriented public administration.
Specific recommendations

Article 1: Field of Application

The field of application is unclear. Usually, such a field of application is often defined by the Civil Service Law (and in Romania’s case are somewhat defined in Article 2 and the attached Annex of the 2004 (amended) of The Statute of Civil Servants (I OJ 25/22-3-2004). Even the Statute though leaves unclear coverage of politicians and managers in state owned enterprises. Most conflict of interest laws and/or anti-corruption laws in other countries provide an exhaustive list of individuals covered.

The lack of precise coverage may seem trivial, but poses important jurisdictional problems later in the present Law, particularly related to determining what are “excellent public services” (are teachers and doctors covered for example as they provide most of Romania’s public services on head-count and budgetary terms). Moreover, as the NACS has jurisdiction for violations of the present law, the list of covered classes of civil servants can only extend as far as the NACS’ coverage (precluding doctors and teachers?).

The law also erroneously refers to itself as a Code of Conduct. Any reference to the present Law as a Code of Conduct should be removed. The Law simply does not read like a code of conduct – it reads like a piece of legislation. Moreover, there are few actual moral or ethical admonitions in the document.

The document should either specific refer to the coverage in the Statute, provide its own prescriptive list, or (most usefully) use a combination of the two approaches.

Recommended change:

“Art. 1. Field of Application

1. This Code of Conduct for civil servants, hereinafter called Code of Conduct Law, regulates the method of creation and surveillance of norms of moral and professional conduct for civil servants by government Agencies.

2. The present Law applies to all civil servants as defined under Article 2 and the attached Annex of the 2004 (amended) The Statute of Civil Servants. This includes as well, but is not exclusively limited to, any individual who acts on behalf (as an agent) of the Romanian government such as teachers and doctors in public institutions funded by the Romanian budget, state enterprise directors, representatives of Romanian quasi-government organisations which receive budgetary support of any kind, as well as representatives of local government and international diplomatic representations of the Government of Romania.

Article 2: Purpose
The purpose of the law is vague. A clear purpose is needed because it is not clear what mischief this Law addresses (or the reason why the law was passed). One way of helping the courts and the NACS interpret the present Law would be to add a preface or make reference to the transcript of the parliamentary debates on the Law. Unfortunately, for legislative drafting, “making public services better” is too broad and abstract an objective. In order to help with the revision of the law, drafters should focus on tying the law to measurable outcomes and avoid ambiguous references. This would help to keep the purpose tight and prevent possible conflict with other legislation in force.

Recommended changes:

a) tie these more closely to measurable outcomes. For example, “to...increase in the quality of the public service” should be tied to public perceptions surveys as should be “contribution to the elimination of bureaucracy and corruption in the public administration”
b) eliminating ambiguous references such as “maintaining at a high level the prestige of the public institution and its servants”.

Article 3: General Principles

The law should establish that actions undertaken relying on these principles may indemnify or serve as a defence in case of accusation of a violation of the Code. At present, these values remain a wish list. In general, good legislation creates a) clearly defined values which can be legally interpreted, b) admonitions which can be executed by the executive, and c) be relied upon by public and private agents in court.

Recommended change:

Sub-point (a) regarding observance of laws should be deleted as it is redundant (and probably tautological). If this is unacceptable (for whatever reason), a list of specific legal provisions should be included to cover the infractions covered by the (now deleted) articles 14 and 15 – related to corruption, conflict of interest, embezzlement, conspiracy to commit a crime (corruption).

Sub-point (d) should be deleted, as it is too vague. Otherwise, it may refer to the part of the civil service law dealing with civil servant training and supervision.

Sub-points (e) and (f) should refer to the conflict of interest or anti-corruption law.

Sub-point (g) is problematic. The law establishes the principle that “civil servants can express and implement their opinions by observing the rule of law and good morals.” However, in Art. 7(1) and 13(1), these civil servants are forbidden from expressing themselves if it harms the image of Romania.

Article 4: Terms
To new definitions should be added and the definition which the Parliament chose could be amended to better account for their (implied) purpose in passing the present Law.

New terms:

The Code of Conduct Law shall refer to the present Law.

Agency – the agency, ministry, public entity or body which the civil servant (as defined by the terms of the present Law) works.

Note: this definition automatically provides a definition for any possible institution in which all civil servants aimed at by this Law work.

The Anti-Corruption Law shall refer to Law No. 78 of May 8th, 2000 On Preventing, Discovering and Sanctioning of Corruption Acts as published in the Official Gazette of Romania No. 219 of May 18th, 2000.*

Two changes:

private interest - The Code of Conduct Law focuses too much on family, friends and colleagues. The Law should instead focus on any person who receives undue advantage (and advantage for which he or she has no official entitlement). The British, for example, solve this problem by referring to “connected persons.” Clearly, this is the objective of the present Law. The law should also make clear that private interest also refers to a civil servant abstaining from (as well as engaging in) particular administrative actions.

public interest – The definition of the public interest is incomprehensible. Moreover, any definition which ties the “public interest” to “the settling of legitimate requests” is both ambiguous and relies on law instead of good will (which runs contrary to the purpose of a law which seeks to clarify the nexus of law and morality).

Article 5: Provision of Excellent Public Service

The present article is vague and represents a resolution or recommendation instead of law-making. In order to rectify this, the present Law should either move this to an annex or separate parliamentary resolution --- or should establish an administrative law test which establishes both a right and obligation on civil servants. I propose a four-part test be used for a revised Article 5 in order to provide civil servants with a clear obligation (as well as right and immunity in case a dispute arises related to their discretionary action). ALL parts of the test upheld in order to provide immunity to the civil servant (and I use underlined “and” only to add with interpretation of the article).

Recommended change:
“The civil servant shall be authorised to take a discretionary decision in the interests of providing excellent public service delivery, to the extent allowed by legislation and subsidiary rule-making if:

a) the decision serves the interests of improving the quality of public service delivery, and
b) such discretion has been the result of participating in decision making, and
c) the civil servant follows procedures as outlined by delegated legislation or rule-making, and
d) the decision has been taken in public view, reported to the civil servant’s superiors, and if necessary publicly announced.”

Article 6: Loyalty to Law
The article is legally void and should be deleted. I appreciate the drafter’s concern to include compliance with legal norms as well as ethical norms in the Code of Conduct Law. However, a law which asks individuals to obey the law is tautological. Moreover, no one would reasonably hold the value of disobedience to the law, so Article 6 does not even represent a value in conflict which a code of conduct could help clear up.

As such, in order to provide specificity needed to provide effective monitoring and sanctions, Article 6 may include a positive list of offences from the Criminal, Civil, Labour, and other Codes. I will not second-guess parliament on which provisions throughout Romanian law should be included, thus provide no recommended text.

Article 7: Loyalty to public authorities and institutions

This article is highly problematic on three grounds. First, it conflicts with the above mentioned (Art 3g) requirement for civil servants to express their views (unless I have misinterpreted the English translation). The article also conflicts with Article 9 (giving civil servants authority to make public speeches if they make clear they are not representing their Agency). Second, the present Article potentially conflicts with the Romanian Freedom of Information Law as it creates a negative obligation against sharing particular types of information. Third, goes against democratic principles contained broadly in Romanian jurisprudence (however weakly I understand it). In a number of other laws, communication with public and medias are encouraged. Indeed, sub-point (e) prohibiting civil servants from “provid[ing] advice and assistance to legal or natural persons in carrying out legal or other kind of actions against the state” goes against the civil servant’s duty to rescue.

The two year “cooling off” period should be eliminated on two grounds. First, the use of official information for personal gain (or to prejudice the interests of others) is covered by the state secrets law and the contractual obligations in place under the civil service labour law. Second, the restriction dampens socially useful (and legally valid) critique of Agency policy (which clearly is in the public interest). Given that EU regulation and directives clearly point toward encouraging such socially beneficial “free speech”, this Article will certainly be stricken down at some point.

Assuming that the article is misconceived (if it does not address some clear and present danger or mischief), the article should be deleted. Deleting the article is my first preference.
Assuming that socially detrimental “leaks” (or some other scandal or prominent court case) has lead to the creation of this article, the possible remedies include:

a) include in the preface a description of the mischief which lead to the article (so as to assist with interpretation),
b) create a balancing test which helps to clarify the obligation. For example, article 7(1) might read: Civil servants shall refrain from public speech in the interest of loyally protecting the prestige of the public authority or institution they work with, and shall refrain from any action that might harm its image or its legal interests if the harm to the Agency’s interests outweigh the gains from the public’s right to know about a particular policy issue.”
c) revise the text to create a single obligation (there are multiple and confusing obligations imposed on civil servants by the article) and assign a penalty (as per Art. 24 revised below) for non-compliance.

A more refined test may benefit from the following drafting language (in case point (b) above proves unsatisfactory).

“The civil servant may make public statements, comments, divulge information, or seek to influence public opinion, only if:

a) it does not address a political issue or change the incentives faced by a politician, or
b) the public official makes clear that the opinion expressed represents a personal opinion and has not been authorised by his or her Agency (and makes every reasonable effort to protect the Agency in case a third-party misreports the statement),
and
c) such communication serves a legitimate function of informing or educating the public, or
d) seeks to explain ministerial policies and procedures, or
e) is made during the civil servants scientific work (as allowed under art X of the Civil Service Law) and does not violate the right to privacy or disclose state secrets (as defined in the Freedom of Information Law),
f) any statement which the authorised Agency communication

The civil servant may not make public statements, comments, divulge information, seek to influence public opinion which causes:

g) the public to rely upon an untrue claim or warrantee (contract by estoppel),
h) provides advantage to one or more parties at the detriment of another,
 i) represent himself as holding legal authority or provide legal opinions and advice without the necessary legal qualifications (as defined by Law no. 51 of 7 January 1995 among other relevant legislation).

In cases where (g)-(i) have been committed, the Agency shall not indemnify the civil servant and shall have the positive obligation to seek damages either an administrative or civil jurisdiction. The NACS shall hold responsibility for such indemnification and shall be liable in cases of non-pursuit.”

**Article 8 (new): Exchange of Information between Government Entities**


The intent of this article was unclear to me. In order to make the article conform with traditional practice in most other EU countries (if I have interpreted the text correctly!), the following wording is preferred:

**Recommended text:**

“The exchange of information shall be governed by protocols signed between various government agencies and any legislation in place (including but not exclusive the Law 116/28 Feb 2002 and Law 182/2002 regarding the protection of classified information and the Law on Free Access to Information of Public Interest (I OJ 544/2001) However, where the civil servant is asked for an informal (non-legally binding) opinion, the civil servant may communicate without authorisation if:

a) the opinion does not violate the right to privacy of an individual, and  
b) does not prejudice the interests of the Agency or any citizen, and  
c) the receiving Agency can assure the confidentiality of the information so transmitted through audited procedures, and  
d) the information is provided in good faith, either by phone or by email.”

Note: underlying used to assist with interpretation of the statute.

**Article 8: Freedom of opinion**

Delete. The article is incomprehensible and creates no positive or negative legal rights or obligations. In any case, the revised Article above provides for (what I interpret) intent of the article.

**Article 9: Public activity**

The current wording is vague, providing no guidance as to when the civil servant should seek redress. Sub-point (3) is redundant (it repeats the right conferred in Article 7). The following is preferred.

**Recommended change:**

“In cases where a representative of the press or other private entity seeks an official comment or asks questions related to politically sensitive issues addressed by the civil servant’s Agency, the civil servant must refer the individual to the Agency’s PR department (or the media liaison appointed by the head of the Agency). The civil servant may address the issue only with the email authorisation of the Agency head.

Sanctions may range from A to F (as defined in Art. 24 (note: as revised below)) depending on the extent of the harm done by the infringement.”

**Article 10: Political Activity**

The wording is too vague. Sub-point (c) is impractical as natural and legal persons have the right (and some argue the duty) to participate in the political process. Sub-point (c) may be interpreted as infringement on the constitutional right to participate in the political process.
(organisations may voluntary abstain from political participation in order to keep civil servants from avoiding them – as they are obliged to do under the present Article 10)!

**Recommended change:**

“During the course of their official duties, civil servants may not:
   a) directly participate in fund raising for political parties, particular politicians, or assist, abet or aid any other natural or legal person with such fundraising,
   b) provide logistical support, time, or government resources for political candidates in national, sub-national or any other elections.
   c) form an official co-operation or participate in the Board or any other office of an entity whose main or subsidiary objective aims at collecting donations or otherwise raising funds for political candidates,
   d) conduct any form of political canvassing (including the posting of political logos or insignias or signs with the names of political parties or particular individuals on walls or by electronic methods).

Class A sanctions (as defined in Article 24) shall be applied to the civil servant violating this article.

**Article 11: Official endorsement**

Note the translation should be official endorsement and not “use of image”. Again, the wording is vague.

**Recommended change:**

“Civil servants may not use their image, their name and official position or rank in the civil service in order to endorse, support, or lead credibility to commercial activities, political candidates, or any other activity which gives the impression of the state endorsing particular interests.

Violation of Article 11 is recommended as a Class C disciplinary offence.”

(Note: the use of the word “recommended” provides discretion to those enforcing the present Law)

**Article 12: Relationships Between Civil Servants**

The article is vague and only sub-point (2) creates (negative) obligations. Moreover, subsection (3) should be deleted as the principle of equality is enshrined in the Constitution and in laws dealing with civil rights. The sanctions are sufficiently dissuasive and the provisions are sufficiently clear such that no further clarification is required by the present Law. Sub-point (4) is incomprehensible. In order to make the article clearer and a legally binding instrument, the following text is required:

**Recommended change:**
“All civil servants, in their dealings with the representative of any agency, person or entity, must communicate and act according to the principles of respect, good-faith, fairness and courtesy. Specifically, the civil servant shall not, during the course of their work, use offensive language, divulge aspects of their private lives or draw up defamatory notes or complaints.

Any aggrieved party shall either apply to the Agency’s ombudsman, contact point or head of Agency with their complaint. Should the NCSA receive the complaint, it shall forward the complaint electronically to the Agency in charge of the accused civil servant. The civil servant may dispute the contents of the file as per the procedures outlined by the law on human resources or the Agencies internal regulations.

Depending on the extent of the offence, a class F remedy shall be applied and the Agency shall be responsible for forwarding an apology to the aggrieved party or parties.”

**Article 13: International Relations**

This article is problematic on a number of grounds. First, as many issues in international matters, the article would be almost impossible to enforce (as proving a civil servant voiced a particular opinion 10,000 km from Bucharest would be almost impossible). Second, the article quashes socially productive free speech and often healthy critique of government policy. The government should adopt policies which civil servants should feel the need to criticise and such a prohibition even has the feel of similar rules from the Socialist times.

**Recommended change:**

1. Delete this article (this is the preferred solution).
2. Change Article 7 to cover the expression of personal views in “domestic as well as international fora”

**Article 14: Restrictions regarding the acceptance of presents, services and advantages**

This article is extremely problematic as it conflicts with the anti-corruption law. Solicitation of bribery is a criminal offence and no further law-making is required (unless the present Law seeks to define non-criminal sanctions for corruption). In order to address the ethical aspect of corruption, the article should address areas of potential confusion. I avoid making any reference to the conditions under which cases involve criminal versus non-criminal liability.

**Recommended change:**

“1) In a situation where the civil servant has been offered a gift or is in a position whereby his or her decision could be considered as corrupt consideration, the civil servant must inform the NCSA by electronic communication. The communication must contain:
   a) the civil servants name and position
b) time, date and place where the potential corruption or conflict of interest occurred,

c) a description of the situation

d) the action taken by the civil servant and

e) the reasons why the civil servant considers the action ethical (or legal)

2) The NCSA has 2 working days to advise the civil servant. If the NCSA does not respond, the action shall be considered ethical (if it is legal). If the civil servant receives a countermanding opinion from the NCSA, the civil servant must follow the NCSA’s advice or be liable for disciplinary remedies outlined in Article 24.

3) Should a complaint be made later, the civil servant may use the electronic communication to the NCSA as a defence. If the decision does not involve a legal infraction, the communication itself shall make immune the civil servant from any pursuit of the complaint or possible disciplinary action.

4) The NCSA must keep the communication for two years.

5) The NCSA shall bear liability for failure to respond to communications and shall indemnify the Agency and its civil servants for advice which leads to legal action against the government.”

**Article 15: Promise of Corruption**

Notice the correct English translation of the content of this article related to the promise of corrupt consideration. This article can be deleted as it is covered by the anti-corruption law. The wording of the present Law is ambiguous, thereby offering a potential defence to a defendant who offers corrupt consideration (namely, an offender may seek the remedies of the present Law instead of the already defined criminal sanctions). Moreover, the lack of remedies (and specificity) offered by the present Law implies that Article 15 in fact represents a resolution instead of law-making.

**Article 16: Objectivity**

This article can be deleted as it is almost certainly covered by the civil service law. The wording of the present Law is ambiguous, thereby offering a defence to an defendant who offers corrupt consideration. Moreover, the lack of remedies (and specificity) offered by the present law implies that Article 16 represents a resolution instead of law-making.

**Article 17: Traffic of Influence**

This article overlaps with the anti-corruption law as that Law foresees the same criminal penalties as other forms of corruption. To be helpful, in order to give the present article relevance in a Code of Conduct Law, the present Law may help guide civil servants when traffic of influence offences are unclear.

**Suggested text:**

In cases where the civil servant’s involvement in an administrative decision causes a potential conflict of interest, the civil servant must:
a) recuse him or herself and the Agency must accept the recusal and appoint an independent and impartial decision maker,
b) notify the CSNA and await a decision (in the procedure outlined in Article 14.1) where such notification provides the same indemnification against disciplinary and civil prosecution.

**Article 17: Conflict of Interest**

The only law against conflict of interest appears to be article 17d in the 2000 Anticorruption Law. Romania clearly requires a conflict of interest law. Until that law emerges, the present article 17d suffices as the proposed article 17 of the present Law provides no more clarification about the types of activities which constitute conflict of interest. Moreover, a modern conflict of interest law tends to include a wide-range of procedures which are beyond the scope of a conflict of interest law (such as risk assessment and asset declaration).

Thus, for the present Law, Article 17 should be deleted on two grounds. First, it provides no more clarification than article 17d of the Anti-Corruption Law. Second, the multiple legal provisions add ambiguity which may serve to strength the defence of guilty parties.

**Article 18: Embezzlement and Misuse of Public Resources**

Article 18 as it presently stands admonishes civil servants not to embezzle state assets (already a crime under the Romanian Criminal Code). The Article could more usefully serve to define the misuse of public resources (which is already partially covered in Articles 9 and 10). Notice that failure to define the scope of the law in Article 2 has resulted in Article 18(1) addressing “local government units” (so presumably the other articles do not cover them).

**Suggested text:**

The misuse of government property shall include, but not be exclusively limited to:

a) the use of assets for the civil servant’s private interest instead of in the service of the public interest (as defined in Article 2),
b) use of office time and the goods belonging to the Agency for the civil servant’s private use,
c) frivolous use of funds resulting in a lack of value-for-money
d) goldbricking and nepotism,
e) use of working hours for scientific, intellectual or publishing activities which have not been approved by the civil servant’s line manager.
f) failure to report waste, fraud, theft or other pecuniary harms to State interests where a reasonable suspicion may be formed.

**Article 19: Restricted participation in acquisitions, license granting or leasing**

No comments.

**Old Title: “Chapter III: The Coordination and Control of the Application of the Norms of Moral and Professional Conduct”**
(The “control of moral issues” sounds rather Orwellian to the Western ear).

Article 20 (new): Organisational Structure of Agency-Level Disciplinary Committees

The present Law appears to envision most of the work on the monitoring and implementation of the Code of Conduct to occur at the Agency level (if I interpreted the statute correctly as it is very unclear). The present Law only mentions these committees in passing, yet implicitly assigns an important role to these committees. As such, their organisational structure, obligations, competencies and jurisdiction should be outlined first.

Clearly, the parliament did not intent to regulate Disciplinary Committee under the present Law. Such an intent should be made explicit. Making explicit the rights and obligations implied by the present Law, these committees may be formed at the pleasure of the head of each Agency as their composition and method of operation (procedures). While this may be already provided under law, I think the revised art. 20(1) provides clarity.

As these Disciplinary Committees emerge through the statute, the authors of a revised Code of Conduct Law may wish to offer a definition of them in Art. 4.

Suggested text:

1. Disciplinary Committees shall be in charge of any violations of the present Law which fall under disciplinary jurisdiction, necessarily falling under the responsibility of the head of the Agency. Disciplinary committees shall enjoy the delegated authority of the head of the Agency and shall be responsible for:

   a) their own structure, composition, meeting times and procedures (with the advice of the NACS) as ratified by order, decision or regulation of the head of Agency,

   b) investigating complaints made against specific civil servants working for the Agency,

   c) hearing complaints or injunctive requests,

   d) drafting, posting, publicising and updating the Agency-level Codes of Conduct

   e) liasing with other disciplinary committees on common issues or cases involving overlapping areas of responsibility (jurisdictions),

   f) submitting requests for regulatory or legislative changes to the NACS

   g) representing the Agency in cases of administrative disputes or arbitration.

2. Disciplinary Committees must report on a regular basis, and at least semi-annually, to the NACS on the cases handle. Such reports must contain (at a minimum) case by case statistical information related to the defendant in the case, the accuser, the cause of the complaint, the outcome, and any broader recommendations made by the Disciplinary Committee.
3. Agencies may elect to constitute Disciplinary Committees with other Agencies (or merge these committees) in the interest of saving manpower, time or expense.

**Article 21: Organisational Structure of NACS**

Note the article is about organisational structure. Also note the English translation should be National Agency of Civil Servants (NACS) instead of the “Civil Servant’s National Agency” (as this is the translation on their own website).

The NACS structure as it currently stands, suffers from a number of fatal flaws. First, no specific unit in the NACS has been nominated to deal with issues under the present Law (nor has authority been delegated to the NACS to create or appoint such a structure). Second, the NACS is responsible for all enforcement of the present Law (if I understood the English translation of the act correctly) -- which imposes too great a burden. The suggested text still gives the NACS authority to conduct investigations and hear cases, although only in cases where Disciplinary Committees are unable or unwilling to assume this burden.

Notice sub-point 2 establishes the NACS’s political independence – a very important point for Romania.

**Suggested revisions:**

“(1) the National Agency of Civil Servants (NACS) is the body in charge of coordinating and monitoring the application of the provisions in the present Law. The NACS has all of the following responsibilities:

a) to monitor the application and observance of the provisions in the present Law and in the various codes of conduct elaborated in conformance with this Law,

b) to receive reports and complaints about breaches of the provisions of this Law and any Codes of Conduct written in conformance with this Law,

c) to recommend solutions to the cases it was notified of,

d) to draft studies and reports on the observance of the norms included in this Code of Conduct,

e) to cooperate with the NGOs whose activities focus on promoting and protecting the legitimate interests of the citizens in their relation with civil servants;

(2) the work of the NACS related to the present Law shall be free from interference from senior government officials and politicians. The NACS shall retain discretion over the cases to investigate, prosecute under the present Law (except as noted in sub-points 3 and 4 below), and the information it reports to the public (in conformance with the laws related to freedom of information and national security). No government agency may edit, censor or amend the NACS’s annual report related to the implementation of the present Law.
(3) The NACS shall have no authority over Agency Discipline Committees. Any dispute between the NACS and any disciplinary committee shall be resolved by an administrative judge. If the judgement shall amend or help to clarify the present Law, the NACS shall revise the Law and post an updated version on its Internet page.

4. The NACS shall provide advice to Disciplinary Committees, Agency Ombudsman or similarly appointed representatives of the Agency responsible for enforcing the Code of Conduct. Such advice shall include all of the following:
   
a) legal advice related to the present law and other related or relevant laws,

b) methods of engaging in risk assessment and management,

c) methods of drafting Codes of Conduct (ensuring they are specific, measurable, actionable, realistic, and time-bound),

d) provide facilitation for code of conduct planning sessions in Agencies,

e) advising on informing staff and public service users about the content of their Codes of Conduct

5. The NACS shall have the obligation to advice all Agencies on their Codes of Conduct and Ethics Infrastructure. Such advice shall include, but not be limited to,

a) evaluating the drafting and wording of Agency Codes of Conduct,

b) evaluating any procedures in place aimed at educating staff about the Code and monitoring its effectiveness,

c) assisting with random samples and other verifications that the Code of Conduct is being applied correctly,

d) evaluating the overall culture of compliance and ethical culture of government Agencies. Such an evaluation shall:
   
i) be done in co-operation with the Internal Auditor and in case of overlap, the Internal Auditor shall have complete jurisdiction over such evaluation, and

   ii) evaluation shall focus on changes which add positive net value and reports submitted by the NACS to the Agency shall be conducted according to standard audit practice.

6. The NACS shall nominate one person or department to receive complaints (as described in Article 21). That person’s or department’s contact information shall be widely disseminated.

7. The NACS shall be responsible for investigating and/or hearing cases involving infractions of the present Law only when:
a) the case involves multiple jurisdictions or falls outside the competency of one and only one Disciplinary Committee, or

b) the accused civil servant requests a hearing by the NACS on the grounds the person does not expect a fair hearing in his or her Agency’s Disciplinary Committee, or

c) on the request of a Disciplinary Committee on the grounds the Committee is too busy, or lacks the competencies to handle a particular case, or

d) the case involves a senior civil servant, or

e) the case could establish an important principle or amendment to the present Law, or

f) any case which NACS requests jurisdiction and which the relevant Discipline Committee(s) agree to.

8. Should a conflict between the NACS and the head of the Agency arise over authority to regulate Disciplinary Committees, the dispute shall be resolved by an administrative judge or an arbiter agreeable to both parties.

**Article 21: Complaints**

The correct translation is probably complaints (given the content of the article). In order to correct Article 21, a number of changes are required. The word “any citizen” has been changed to “any person” in order to comply with EU Treaty obligations.

**Recommended changes:**

(1) the appointed person or department of the NACS (as per Article 20.5) may receive complaints from any person related to a civil servant breaching, being coerced to breach, or in any other way failing to enforce the provisions of the present Law,

(2) the NACS shall refer all valid complaints to the Disciplinary Committee of the accused civil servant’s Agency for action, where a the form of a valid complaint may be decided by the NCSA regulation (except where exempted under Article 20.7),

(3) Civil servants shall receive special whistleblower protections if they make a compliant related to the present Law. Without prejudice to any future whistleblower law, if any civil servant attempts to retaliate, exact revenge or in any other way discomfort the accuser, they shall – after a hearing by the Agency Disciplinary Committee – be subject to Class A punishment as defined by Article 24. The accuser will receive any legal assistance required from his or her Agency and if the accusers hires a lawyer, the Agency shall reimburse all legal costs to the accuser if he wins his civil or other complaint.

(4) The NACS shall conduct regular checks or investigations of Disciplinary Committee investigations and follow up on complaints made to them. The procedure of these checks shall be defined in a NACS regulation and the checks shall be conducted according to international audit best practice and audit regulations in force in Romania. Such inspections
or audits shall consist of at a minimum, but not necessarily be constrained to, audits of each Disciplinary Committee’s:

a) following of NACS procedures and the Disciplinary Committee’s own internal procedures during investigations and hearings and

b) procedures and practices in place to protect the identity of individuals making complaints, and

c) expected gain to taxpayers of pursuing each case and value-for-money and,

d) the proportionality of disciplinary punishments given.

(5) Information on all complaints and cases handled by Disciplinary Committees and the NACS shall be maintained in a single and centralised database kept by the NACS. The database shall contain information related to the statistical information related to the defendant in the case, the accuser, the cause of the complaint, the outcome, and any broader recommendations made by the Disciplinary Committee.

Article 22: Case Procedures

This article is relatively okay (compared to the others). Suggested changes to the text are made below. Notice for sub-point (3), the wording should be related to work which the Agency has taken – and not related to work the Agency will take. Such a rewording will help ensure the NACS’s recommendations get implemented.

Point 4 has been removed because the present Law deals only with civil servants (and politicians are not covered) and getting the prime minister to deal with ethical infractions would be impossible in practice to implement. Again, this is another example where Article 1 should have been better drafted. When Romania passes a conflict of interest Law (which the present Law hopefully paves the way for), the issue of politician accountability can be directly tackled.

Suggested changes:

(1) For investigations handled by the NACS, but which are prosecuted by the civil servant Agency’s Disciplinary Committee, the results of the investigation will be put down in a report, on the basis of which the NACS will draw up a recommendation addressed to the respective Agency regarding the way in which the case can be settled.

(2) The following persons will be informed about the recommendation drawn up by the NACS, including a) the civil servant or the person who sent the complaint, b) civil servant who is the subject of the respective notification and c) the head of the public authority or institution the respective civil servant works with.
(3) Within 30 working days, the relevant Agency for which the offending civil servant works shall inform the NACS about the way in which the measures included in the recommendation have been taken.

**Article 23: Publicity on reported cases**
This article needs rewriting. See revisions below.

**Suggested revisions:**

(1) the NACS shall be responsible for preparing an annual report on compliance with the present Law either as a separate report or part of another annual report. The report shall be submitted to the Government and the relevant parliamentary committee as well as the Government Auditor, and will -- at a minimum -- include all the following:

a) the number and subject matters of complaints about cases of violation of the present Law (as violations of Agency level codes of conduct),

b) the categories and the number of civil servants who have committed infractions as defined by the present Law,

c) the causes and the consequences of the failure to observe the provisions of the present Law,

d) the register of those cases when civil servants were asked to act under political pressure;

e) recommendations to specific Agencies,

f) the names of the public authorities or institutions who failed to observe the recommendations,

g) a summary of consulting, auditing and other policy work with the NACS, Disciplinary Committees and other civil servants working to implement the present law have undertaken.

(2) The NACS may include in its annual report cases presented in detail, which are of a particular interest to the public.

3. The report shall be written in an easy to read format which the average citizen can understand and be posted on the NACS’s website no later than 14 working days after first submission to any government agency (mentioned in sub-point (1)).

**Article 24 (revised): Classes of Offences Accountability**

As previously noted, the Law makes no reference to sanctions. The following provides guidance as to sanctions which can be applied. If these sanctions are already defined in the Agency’s regulations, then these regulations should take precedence.
Sub-point 3 represents a very important provision allowing the NACS to untie the nexus of unethical activity by prosecuting all civil servants who are involved in repeated unethical behaviour – encouraging managers to exercise more oversight over their staff,

**Suggested changes:**

“1. The following classes shall serve as guidelines to the NACS and the head of Agency or Disciplinary Committees of Agencies, respecting the values of proportionality while serving as an effective dissuasion, and only in cases where the Agency’s disciplinary measures related to breaches of ethics are unclear or absent.

**Class A:** Dismissal – the civil servant shall be dismissed according to the terms outlined in the civil service law and labour code,

**Class B:** Demotion - the civil servant shall be demoted according to the terms outlined in the civil service law and labour code, or according to the Agency head’s discretion and upon consultation with the NACS.

**Class C:** Fine – the offending civil servant shall be fined no more than one month’s salary or according to the laws and guidance already in place.

**Class D:** Rectification – a) the Disciplinary Committee and/or NACS committee hearing the case shall issue an order to the civil servant in order to rectify the harm which the offending civil servant’s actions caused. The punishment shall not impose an onerous burden on the offending civil servant but shall rectify the damage which the offending civil servant’s conduct has caused.

b) if the civil servant refuses the order, the civil servant shall either receive a Class A or Class B punishment, at the discretion of the disciplinary committee or NACS committee hearing the case.

**Class E:** Public Dishonourable Mention – the offending civil servant shall receive a dishonourable mention in the public media of the Disciplinary Committee’s or NACS’s choice. The mention shall note the offence committed and shall be executed after any appeals process have been finished. No limit shall be placed on the number of such dishonourable mentions any civil servant may receive.

**Class F:** Dishonourable Mention in Service File - the offending civil servant shall receive a dishonourable mention in his or her service file. The accumulation of THREE private dishonourable mentions shall automatically result in a Class A punishment.

**Class G:** Written Warning – the civil servant shall receive a written warning or reprimand from the Disciplinary Committee along with suggestions for avoiding future violations of the present Law. No copy shall be retained in the person’s service file, though a note will be made the person received a warning. Upon the third, written warning, the Agency’s Disciplinary Committee shall convene a hearing in order to apply and greater class of penalty defined in the present Law.
2. In cases where the infraction involves criminal and/or civil responsibility, the NACS shall inform the competent law enforcement bodies, as provided by the law.

3. Civil servants may present evidence against their superiors or colleagues as mitigating circumstances for a lighter class of punishment. The NACS shall have the right to prosecute any civil servant who served as an accomplice, who has knowledge of the infracting civil servant’s activity, or any manager who is responsible for the infracting civil servant’s job performance. Such associated persons may be immune from imputed liability, if:

a) they contact their Disciplinary Committee or NACS about the suspected unethical behaviour of their colleagues before an investigation is conducted, or

b) they provide testimony or evidence as requested by law enforcement officials, or

c) they can provide evidence of exemplary ethical behaviour (by character references, positive mentions in their service file, participation in developing the culture of compliance in their Agency or other evidence (and the NACS shall deem if such evidence comprises exemplary ethical behaviour under the present Law),

Article 25 (New): Accused Civil Servants’ Rights

Civil servants who have been accused of ethical violations under the present law shall have the right to:

a) view the complaint (with the information about the complainer blackened out if the complainer has requested anonymity). The complaint can be withheld if the Disciplinary Committee or NACS feels the accused could deduce who the complainer is, and

b) appeal any decision and punishment in the administrative courts at the civil servant’s own cost if he or she loses, and

c) seek indemnification or damages from his or her Agency in case the civil servant sought advice about his or her conduct before engaging in the infracting conduct, and

d) the right to include an explanation or apology in any mentions in his or her service file.

Article 26 (New): The Harmonisation of the internal rules of organization and operation

As mentioned previously, Romanian institutions appear at present incapable of engaging in this (very expensive) legal work. Instead of abstract analysis, an operational approach should be preferred. Namely, in areas of conflict with laws or between NACS and disciplinary measures assigned by the head of Agency or the appointed Disciplinary Committee, the measure should go to administrative arbitration (in front of an administrative judge).
Suggested text:

In any conflict between the NACS and any Agency’s Disciplinary Committee or head of Agency over the interpretation or execution of the present Law, the disagreeing parties should bring the matter in front of an administrative judge or arbiter agreeable to both parties.

Article 27 (New): Minimum Guidance on Agency Codes of Conduct

“1. All Romanian Agencies should aspire to include Article 3 in their Codes of Conduct and must include articles 4 to 19 (with details added to take into account the Agency’s particular circumstances),

2. Any publication of any Agency-level Code of Conduct should describe briefly the procedure and consultation process used to form the Code of Conduct, using easy to understand and non-bureaucratic language,

3. The wording for the code of conducts should be concrete, specific to the agency

4. Within 60 days of the entering into force of the present Law, the head of Agency or the person nominated by the head of Agency to deal with code of conduct issues, must ensure that the Agency Code of Conduct complies with, and fully executes, the requirements of the present Law and report to the NACS about such harmonisation. Failure to ensure such compliance shall expose the Head of Agency or his or her nominated agent to Class E or F punishment, as decided by the NACS.

5. The Agency may send a copy of the Agency Code of Conduct to the NACS. If the NACS has not replied to or requested changes to bring the Agency Code of Conduct in line with the present Law, the Agency may assume that Code of Conduct is acceptable until such time as changes are requested. No penalties shall be applied to the Agency or its staff for the NACS’s failure to respond to a Code of Conduct.”

Move Chapter IV Final provisions to the end

Article 28 (New): Delegated authority to amend present law

1. The Parliament delegates the authority to amend particular provisions or to add clarifications or amendments to the existing law to judgements made by administrative judges in cases of disputes arising from the present Law. The NACS shall be responsible for compiling these decisions and maintaining an updated copy of the present law on its website. The NACS shall not hold power to interpret or modify the present Law.

2. The Parliament reserves the right to overrule and changes made to the present law or pass an amended Act at any time.

Old article 26 (now Article 29): Article 26: Publicity

Article 26 is vague. Moreover, the delegation of posting information about this Law and Code of Conduct both represents a large burden and a ... Instead,
Suggested changes:

“1. The NACS shall post this Law on its internet site in Romanian and English and update the law each time an administrative ruling is made which changes the content or interpretation of the present Law. Should a civil servant rely on an obsolete Internet or electronic version of the Law, the NACS shall indemnify the civil servant and his or her Agency for any harms and be liable for any obligations by estoppel.

2. The NACS shall also be responsible for providing all Agencies with easy-to-understand graphical booklets, posters and other media informing civil servants about the rights and obligations conferred in the present Law.

3. The NACS shall be liable in cases where the NACS has not taken every reasonable effort to inform civil servants about the content of the present Law. “Reasonable effort” shall consist of the time, resources, and informativeness of NACS’s outreach efforts given its resources and be ultimately determined by an administrative judge in cases where a civil servant is sanctioned under the present Law and seeks relief. Distribution of copies of the present Law shall NOT be considered sufficient to constitute reasonable effort.

4. Each Agency shall be responsible for providing its civil servants and the public in general, with easy-to-understand version of its own Code of Conduct as well as the contact point for any complaints to be made under the present Law.”

Article 30 (new) – Transitory Provisions.

“1. the NACS shall, in co-operation with foreign experts, study the feasibility of a Conflict of Interest Law. Should such a bill be deemed useful, the NACS shall present a draft bill for first reading by no later than September 2009.

2. Article 21.3 shall extinguish upon the execution of a whistleblower law.

3. if any article of the present Law shall be overturned or severed, the other articles shall remain in force.”

Article 31 (new): Financing the Code of Conduct Law

This is a controversial article and likely to be stricken (as no EU countries accepts qui tam-like rewards). However, I would be remiss not to include it as the provision clearly falls within the intent of this present Law.

Suggested drafting:

1. Resources for the enforcement of the present Law shall come from the state budget. Allocations from the state budget to the NACS shall be guaranteed at a minimum level based on the following:

   a) at least 15% of all recoveries or state resources spared as a result of the NACS’s work,
b) 100% of all fines levies as Class C remedies defined in Article 24,

c) 90% of a civil recoveries which the NACS advises on and assists Agencies with,

d) any voluntary contributions made by an Agency from its own budget (in accordance with the Agency’s internal regulations),

e) 100% of any EU funds earmarked for work on public sector ethics,

f) 30% of any cost savings accruing to an Agency as a direct and intimate result of the NACS’s work (as ascertained by the Agency’s Internal Auditor).

2. The Ministry of Finance shall be charged with guaranteeing the NACS at least the funds as stipulated in sub-point (1) of this article.

**Article 32 (old Article 27): Enforcement**

I suppose the proper English translation is “Execution” or even better Entering into Force.
Initial assumptions:

2% infraction rate = 18,000 civil servants
1% reduction due to effective law (and no decrease under current form of Law)

Regulatory Costs (Burden)

Regulatory Burden Associated with Promulgating Law by paper and internet:
200 nominated officials in agencies and in NACS spending 2 days each at €7 per hour (or €56 per day)

\[ = \text{€224t} \]

Regulatory Burden Associated with Learning Law:
900,000 * 2 hours = 1,800,000 hours at 7€ per hour

\[ = \text{€12,600t} \]

Regulatory Burden on Disciplinary Committees:
200 people on Disciplinary Committees * 2 weeks a year (200 hours a year) * 7€ per hour

\[ = \text{€280t} \]

Regulatory burden of investigation
500 investigators at €12,000 per year

\[ = \text{€6,000t} \]

Regulatory burden associated with
number of expected disputed cases to go to administrative judge
200 cases a year at €4,000 in all associated costs per case

\[ = \text{€800t} \]

Subtotal Regulatory Costs
≈ €20 million

Regulatory Benefits (gain in amenity)

Romania’s government effectiveness is one of the lowest in the region, measuring in the 53rd percentile of countries according to the World Bank’s Governance Indicators Database (in contrast to 63rd percentile for Turkey and 67th percentile for Poland). If Romania would increase its government effectiveness by 1% at its level of government effectiveness, regression analysis suggests that it could increase its GDP growth by 1.6%.

However, empirical evidence is increasing showing that codes of conduct have little to no impact on civil servant behaviour. As such, only the binding parts of the law (dealing with complaints) would increase government effectiveness by 0.1%.

Romanian GDP: $202.2 billion.
A one percent change in the growth rate would result in $2 billion (or €1.5 billion) extra. As the present law is expected to increase government effectiveness by 0.1%, the total expected gain is $20 million.

As a double check: 22.2 million population = assuming 5% are affected by lack of ethics and willing to pay €20 for change. The net gain would be €20.2 million.
Teaching Version of the (Romanian) Law on the Passing of the Code of Conduct for Civil Servants

(I find making a table of contents helps me grab the overall law at a glance... the original doesn’t include the contents. Feel free to re-label items in your own working draft TOC).

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Chapter I: Field of Application and General Principles

Article 1: Field of Application
(1) This Code of Conduct for civil servants, hereinafter called Code of Conduct, regulates the general norms of moral and professional conduct for civil servants.
(2) The general norms of moral and professional conduct stipulated by this Code of Conduct are compulsory for civil servants and for those who are temporarily holding a public office within public authorities and institutions.

Article 2: Purpose
The purpose of this Code of Conduct is to secure the increase in the quality of the public service, a good management with a view to best serving public interests and to contribute to the elimination of bureaucracy and corruption in the public administration sector by:

a) regulating the norms of moral and professional conduct needed in making social and professional connections with a view to creating and maintaining at a high level the prestige of the public institution and its servants.

b) raising the citizens’ awareness as to the conduct they should expect from civil servants when pursuing their public duties.

Article 3: General Principles
The principles that govern the moral and professional conduct of civil servants are:

a) The supremacy of law, meaning that civil servants shall observe the Constitution and the Romanian laws;

b) The priority of the public interest, meaning that civil servants shall place the public interest above any other interest in pursuing their public duties;

c) Securing the equal treatment of citizens in their relation with public authorities and institutions, meaning that civil servants shall apply the same legal principles in identical or similar situations.

d) Professionalism, a principle according to which civil servants shall be responsible, competent, efficient, honest and conscientious in pursuing their duties.

e) Impartiality and independence, meaning that in pursuing their public duties civil servants shall be objective and neutral when it comes to any political, economic, religious or any other interest.

f) Integrity, the principle according to which civil servants mustn’t request or accept, directly or indirectly, for themselves or for others, any advantages or benefits in pursuing the duties of their civil service position or to take any unfair advantage of the positions they hold;
g) Freedom of thought and expression, meaning that civil servants can express and implement their opinions by observing the rule of law and good morals.

h) Honesty and fairness in pursuing public duties and responsibilities.

**Article 4: Terms**

For the purposes of this law:

a) *personal interest* means any patrimonial or non-patrimonial advantage civil servants may pursue, for themselves or their families, parents, friends or closed ones or for legal persons and organizations they have had business or other types of relations with, which might affect their impartiality and integrity in pursuing public duties.

b) *public interest* means the settling of legitimate requests by natural and legal persons, of public and private law, Romanian and foreign, as well as the fulfillment of duties by public servants regularly and continuously, with impartiality and fairness, in keeping with the responsibilities they have under the law.

**Chapter II: General Norms of Moral and Professional Conduct for Civil Servants**

**Article 5: To provide a high quality public service**

(1) Civil servants shall provide high quality public services to the benefit of the citizens, by actively participating in decision making and by turning decisions into practice, with the aim of meeting the responsibilities of the respective public authorities and institutions.

(2) In pursuing their public duties, civil servants shall have a professional conduct and shall prove, under the law, administrative transparency, so as to maintain public confidence in the integrity, impartiality and efficiency of public authorities and institutions.

**Article 6: Loyalty to the law**

(1) Civil servants, through their actions, shall abide by the laws of the country and take action in order to enforce legal provisions, in keeping with their responsibilities, by observing the principles of professional ethics.

(2) Civil servants shall obey the legal provisions regarding restrictions for certain rights, because of the features of the public position they hold.

**Article 7: Loyalty to public authorities and institutions**

(1) Civil servants shall loyally protect the prestige of the public authority or institution they work with, and shall refrain from any action that might harm its image or its legal interests.

(2) Civil servants must not:

a) publicly express untrue opinions about the activity of the respective public authority or institution, about its policies and strategies or about normative or individual draft acts;

b) make unauthorized remarks about disputes pending, to which the public authority or institution is a party;

c) divulge information that does not have a public character, in circumstance other than those provided by the law;
d) divulge information they have access to as civil servants, if that may bring about unwarranted advantages or harm the image or the rights of some civil servants, natural or legal persons;
e) provide advice and assistance to legal or natural persons in carrying out legal or other kind of actions against the state or the public authority or institution they work for, unless they have responsibilities of this kind;

(3) The provisions in paragraph (2) lit. a)-d) also apply when the work report ends, for a period of 2 years, if special laws do not provide other terms.

(4) Civil servants are allowed to disclose information that do not have a public character or to provide documents containing such information, upon the request of another public authority or institution, only if approved by the head of the public authority or institution the respective civil servant works at.

(5) The provisions of this Code of Conduct cannot be interpreted as derogation from the civil servant’s legal obligation to offer information of public interest, as provided by the law.

**Article 8: Freedom of opinion**

(1) In pursuing their duties, public servants shall respect the dignity of their position, correlating the freedom of dialogue with the promotion of the interests of the public authority or institution they work at.

(2) Civil servants shall observe the freedom of opinion and should not be influenced by personal or populist motives. When expressing their opinions, civil servants shall have a conciliatory attitude and avoid conflicts generated by exchanges of opinions.

**Article 9: Public activity**

(1) The relationship with the media is the duty of the civil servants specially appointed by the head of the respective public authority or institution, as provided by the law.

(2) The civil servants appointed to participate in public events or debates, as officials, shall act within the range of responsibilities assigned to them by the head of the respective public authority or institution they work at.

(3) If not appointed to act as such, the civil servants can participate in public events or debates, provided they make public the fact that the opinions expressed do not represent the official standpoint of the public authority or institution they work at.

**Article 10: Political activity**

In pursuing their public duties, civil servants mustn’t:

a) participate in fund raising for political parties;
b) provide logistical support to candidates for public offices;
c) collaborate with natural or legal persons who make donations and sponsor political parties;
d) post within the premises of the public authorities or institutions logos/insignia or any other signs with names of the political parties or their representatives;
Article 11: The use of image
Civil servants mustn’t use their name or image in advertising events for the promotion of commercial activities or for electoral purposes.

Article 12: Relationships
(1) In the relationship with the staff of the respective public authority or institution, as well as with natural or legal persons, civil servants shall have a conduct based on respect, good-faith, fairness and courtesy.
(2) Civil servants shall not harm the honor, reputation and dignity of the other people working with the respective public authority or institution, as well as of those who they get in contact with while pursuing their public duties by:
   a) using offensive language;
   b) divulging aspects of their private lives;
   c) drawing up defamatory notes or complaints;
(3) Civil servants shall have an unbiased and justifiable stand so as to efficiently solve the problems of the citizens. They shall observe the principle of equality before the law and public authorities by:
   a) promoting similar or identical solutions to the same category of situations
   b) eliminating any form of discrimination on grounds such as nationality, religious and political orientation, wealth, health, age, sex or other.
(4) In order to engage in social and professional connections that protect the dignity of the persons involved, secure the efficiency of the activity performed and an increase in the quality of the public service provided, the norms of conduct stipulated in paragraphs (1)-(3) shall be observed by the other parties involved in these relationships as well.

Article 13: International relations
(1) the civil servants that represent the public authority or institution at international organizations, education institutions, conferences, seminars and other activities shall promote an image favorable to Romania and to the public authority or institution they represent.
(2) In the relationship with representatives of other countries, civil servants mustn’t express personal opinions on national issues or international disputes.
(3) When traveling abroad, civil servants shall act as provided by the corresponding protocol rules and they mustn’t break the laws and customs of the country they’re visiting.

Article 14: Restrictions regarding the acceptance of presents, services and advantages
Civil servants shall not ask for or accept presents, services, favors, invitations or any other advantages for themselves, their families, parents, friends or people they have business or political relations with, which might influence their impartiality in exerting their public duties or which might stand for rewards related to their position.

Article 15: Participation in decision making
(1) As regards decision making, civil servants shall act as provided by the law and use their power of decision in a justifiable and impartial way.
Civil servants mustn’t promise that a certain decision will be made by the respective public authority or institution, by other civil servants or that certain responsibilities will be carried out in a privileged manner.

**Article 16: Objectivity**

(1) In pursuing their public duties as leaders, civil servants shall ensure equal chances of career development for the civil servants subordinated to them.

(2) Civil servants in leading positions shall objectively examine and apply professional skills evaluation criteria for the staff subordinated to them when they propose or approve promotions, transfers, appointments or dismissals, or when granting material or moral incentives, excluding any form of favoritism or discrimination.

(3) Civil servants in leading positions mustn’t favor or hamper the access or promotion to public positions making use of discriminatory criteria, or reasons such as kinship, affinity or other criteria which break the provisions stipulated in paragraph 3.

**Article 17: The use of political prerogatives**

(1) The use of the prerogatives entailed by the respective public positions for purposes other than those provided by the law is forbidden.

(2) In decision making, counseling or document drafting, evaluations or participation in investigations or control actions, civil servants mustn’t pursue their own personal interests or harm in any way other people.

(3) Civil servants mustn’t use their public position or the connections they have established while pursuing their public duties to influence any internal or external investigation or to influence the making of a certain decisions.

(4) Civil servants mustn’t force other civil servants to enroll in organizations or associations, irrespective of their character or suggest them to do so by promising material or professional rewards.

**Article 18: The use of public resources**

(1) Civil servants shall protect the state’s public and private property as well as that of the local government units, to avoid any prejudice, acting in any situation as a good owner.

(2) Civil servants shall use office time and the goods belonging to the respective public authority or institution just for carrying out activities specific to the public position held.

(3) Civil servants shall propose and secure, in keeping with their official responsibilities, the proper and efficient use of public money, as provided by the law.

(4) Civil servants engaged in didactic or publishing activities, to their own benefit, mustn’t use the office hours or the logistics of the public authority or institution they work for in carrying out these activities.

**Article 19: Restricted participation in acquisitions, license granting or leasing**

(1) Civil servants can purchase goods owned by the state or by local government units, put up for sale legally, except for the following situations:
a) When they learnt about the value or the quality of the goods to be sold during or following the fulfillment of their public duties;
b) When they participated, as part of their public responsibilities, in organizing the selling of the respective good;
c) When they can influence the selling or when they got information to which those interested in purchasing the respective good had no access to;

(2) The provisions in paragraph (1) also apply when goods owned by the state or by local administrative units are licensed or leased.

(3) Civil servants mustn’t supply information on public or private property of the state or of the local administrative units which are put up for sale or leasing, in conditions other than those provided by the law.

Chapter III: The Coordination and Control of the Application of the Norms of Moral and Professional Conduct

Article 20: The public institution in charge
(1) the National Civil Servants’ Agency is the body in charge of coordinating and monitoring the application of the norms stipulated, and it has the following responsibilities:

f) to monitor the application and observance of the norms stipulated in this Code of Conduct

g) to receive reports and complaints about breaches of the provisions of this Code of Conduct

h) to recommend solutions to the cases it was notified of

i) to draft studies and reports on the observance of the norms included in this Code of Conduct

j) to cooperate with the NGOs whose activities focus on promoting and protecting the legitimate interests of the citizens in their relation with civil servants;

(2) The National Civil Servants’ Agency cannot influence the proceedings of the discipline committees.

Article 21: Notification

(1) the National Civil Servants’ Agency can be notified by any citizen of:

a) a civil servant breaching the provisions of this Code of Conduct;
b) a civil servant being threatened or constrained to break the law or avoid its proper enforcement;

(2) The notification of the National Civil Servants’ Agency does not exclude the notification of the competent discipline committee, as provided by the law.

(3) Civil servants cannot be sanctioned or prejudiced in any way for rightfully reporting the case to the National Civil Servants’ Agency or the competent discipline committee, as provided by the law.
(4) The National Civil Servants’ Agency shall check the situations it was notified of, by observing the principle of confidentiality regarding the identity of the person who sent the report/complaint.

(5) All notifications will be centralized in a database, used to:

a) Identify the causes which led to the violation of the norms of professional conduct;

b) Identify ways of preventing the violation of the norms of professional conduct;

c) Take the necessary measures aimed at cutting down on and doing away with cases of law violation.

Article 22: Settling the case

(1) the results of the investigation will be put down in a report, on the basis of which the National Agency will draw up a recommendation addressed to the respective public authority or institution regarding the way in which the case can be settled.

(2) The following persons will be informed about the recommendation drawn up by the National Agency:
   a) the civil servant or the person who sent the notification;
   b) the civil servant who is the subject of the respective notification;
   c) the head of the public authority or institution the respective civil servant works with;

(3) Within 30 working days, the public authorities and institutions shall inform the National Agency about the way in which the measures included in the recommendation will be taken.

(4) If the head of the public authority or institution or his/her deputies are involved in the respective situation, the recommendation drawn up by the National Agency will be submitted to the upper hierarchical body, or if the case may be, to the prime-minister.

Article 23: Publicity on reported cases

(1) the annual report on the public office and civil servants management which is drawn up by the Civil Servant’s National Agency and is submitted to the Government, will also include the following:

   a) the number and subject matters of complaints about cases of violation of the norms of conduct;
   b) the categories and the number of civil servants who violated the norms of moral and professional conduct;
   c) the causes and the consequences of the failure to observe the provisions of this Code of Conduct;
   d) the register of those cases when civil servants were asked to act under political pressure;
   e) recommendations;
f) the names of the public authorities or institutions who failed to observe the recommendations;

(2) The Civil Servants’ National Agency can decide to include in its annual report cases presented in detail, which are of a particular interest to the public.

Chapter IV: Final provisions

Article 24: Accountability
(1) the violation of this Code’s provisions triggers the disciplinary liability of the civil servants, as provided by the law.

(2) The Discipline Committees have the necessary competence to investigate into cases of Code of Conduct violation and to suggest disciplinary measures, as provided by the law.

(3) If the respective notified situations are criminal matters, the competent law enforcement bodies will be notified, as provided by the law.

(4) Civil servant will answer before the law if by violating the norms of moral and professional conduct harm in any way natural or legal persons.

Article 25: The harmonization of the internal rules of organization and operation
Within 60 days since the enforcement of this Code of Conduct, the public authorities and institutions will harmonize their internal rules of organization and operation or the specific codes of conduct, in keeping with the provisions of this Code of Conduct, depending on their field of activity.

Article 26: Publicity
For citizen information, the PR departments with the public authorities and institutions shall post or distribute this Code of Conduct in a proper presentation form.

Article 27: Enforcement

This Code of Conduct for Civil Servants gets in forces within 15 days since it publication of the Official Gazette of Romania, Part I.