



FRANS TIMMERMANS
First Vice-President

Brussels, 10 May 2019

Excellencies,

In recent months the European Commission has had to revert at frequent intervals to the question of the rule of law developments in Romania. On each of these occasions, the Commission has underlined that the backtracking from the progress made in recent years has continued. The problems we have identified, and the recommendations issued to mitigate these concerns, are not being addressed. There has been similar unwillingness to address the recommendations made by the Venice Commission and the Council of Europe's Group of States Against Corruption. Unfortunately, the recent developments in Romania have further exacerbated the existing problems regarding the respect for the rule of law.

In the Cooperation and Verification Mechanism report of November 2018, the Commission set out a clear path forward – to call a halt to this backward trend and to put Romania's commitments and efforts on the right track again. Following this path would imply that the initiatives are prepared on the basis of proper consultation and if necessary with the help of external expertise. It would also avoid the risk that steps are taken which would be incompatible with EU law and international anti-corruption instruments, as well as with the recommendations under the Cooperation and Verification Mechanism and of the Venice Commission. The Commission at all levels has repeatedly urged the Romanian authorities to engage in such a constructive approach in a series of meetings, letters and discussions over the past six months. Unfortunately, this route has not been taken.

The Commission, fully respecting the sovereignty of the Republic of Romania, and carrying out its responsibilities as guardian of the Treaties including of the values on which the European Union is founded in an objective and non-partisan manner, has identified, at this stage, the following points as matters of concern regarding the rule of law in Romania.

H.E. Mr Klaus Iohannis
President Romania

H.E. Mr Călin Popescu-Tăriceanu
President of the Romanian Senate

H.E. Mr Liviu Dragnea
President of the Chamber of Deputies

H.E. Mrs Viorica Dăncilă
Prime Minister Romania

Regarding judicial independence, the Cooperation and Verification Mechanism report of November 2018 identified serious issues concerning reduced legal guarantees for judicial independence. Subsequent Government Emergency Ordinances amending the Justice laws¹ have increased these concerns. For example, the Romanian authorities have put in place a system of strict and extensive disciplinary and new liability of magistrates². Together with the special section³ in the prosecution office for investigating magistrates and in light of the recent track record of the Judicial Inspection, this results in a chilling effect on magistrates when it comes to exercising their independence.

Regarding the effective fight against crime, there is a clear trend to challenge the authorities, notably the High Court of Cassation and Justice and the National Anti-Corruption Directorate, which are essential for the fight against corruption. This trend points to a lack of loyal cooperation between state institutions, affecting the efficiency and independence of the judicial system. This lack of cooperation has also been shown in controversial nomination procedures, which have damaged confidence in the system. The long-standing Commission recommendation to put procedures in the public prosecution on a robust and independent basis continues to be ignored.

The amendments adopted by the Romanian Parliament on 24 April 2019 to the Romanian Criminal Code, the Criminal Procedure Code and the Special Law on Corruption add to these concerns. In my previous correspondence, my meetings and a series of technical dialogues with Romanian representatives a few weeks ago provided the opportunity to set out the Commission's major concerns. In spite of these efforts, many concerns have been disregarded in the adopted texts and remain valid, such as:

Reducing prescription periods⁴: for crimes subject to a penalty of between 10 to 20 years and of between 5 to 10 years, the period to come to a final conviction would in principle be reduced by two years. This amendment can result in many cases reaching prescription period before the last instance court has the opportunity to judge. This means that many crimes can end unpunished, including crimes which according to EU law should be punishable by effective, proportionate and dissuasive criminal sanctions (such as counterfeiting currency, market abuse or child pornography).

Reducing the punishment for certain offenses in public position, such as abuse of office⁵: The amendment provides that in cases, in which the suspect pays back the material benefit received in context of certain corruption crimes before the judgment, the period for the prison sentence will be

¹ Emergency Ordinances No. 90/2018 of October 2018, No. 92/2018 of 16 October 2018, No. 7/2019 of 20 February 2019 and No. 12/2019 of 5 March 2019.

² See, especially, Art. 96(6) of Law No. 303/2004 as amended by Article 1 (152) of Law no. 242/2018, also in the context of the amendments in the footnote above, and Art. 99 seq. of law 303/2004 as amended by Article 1 (153-156) of Law no. 242/2018.

³ Articles 88¹ - 88⁹ of law 304/2004, subsequently amended by Emergency Ordinances.

⁴ Amendments to Article 154(1) of the Criminal Code.

⁵ Amendment to Article 308 of the Criminal Code by inserting two new paragraphs (3) and (4).

reduced by half. This will have an impact on the duration of prison sentences in such cases and ultimately on the deterrent effect of the underlying criminal provisions.⁶

Introducing high threshold for direct intention of certain crimes⁷: The required direct intention “must be evident beyond all doubt”. The introduction of such a strict degree of intent might affect the fight against serious crimes and can lead to impunity.

Changing rules for reporting bribery crimes⁸ : the adopted rules would limit possibilities to provide evidence of bribery crimes, as well as would have a dissuasive effect for inciting reporting by someone involved in a bribery if after 1 year lapse a reduction of punishment is no longer available.

These provisions risk creating a situation of de facto impunity for crimes, including corruption crimes, whereas, as underlined by the Venice Commission⁹, Romania, like every other State, is under the positive obligation to ensure that its criminal system is effective in the fight against serious forms of crimes.

The impact of these changes would be aggravated further by any legislation to allow extraordinary appeals in cases affected by the Constitutional Court ruling on panels of the High Court of Cassation and Justice, which in itself amounts to an interference in the independence of the judiciary and could affect the effective protection of the financial interests of the EU.

The process undertaken for these key legislative changes is symptomatic of broader rule of law concerns about the principle of legality, which implies a transparent, accountable, democratic, stable and pluralistic process for enacting laws, legal certainty, the separation of powers and loyal cooperation between different powers of the state. The use of Government Emergency Ordinances in situations where it is far from obvious that there effectively is an “emergency”, the absence of impact assessments and inclusive public and stakeholder consultations, the unpredictability of the legislative process – including through the use of emergency procedures in Parliament – also create further risks to the rule of law. The Venice Commission provides valuable guidance on these issues, including its electoral guidelines.

In view of these major concerns, and if the necessary improvements are not made shortly, or if further negative steps are taken, such as promulgation of the latest amendments to the criminal codes, the Commission will trigger the Rule of Law Framework without delay. This process – which foresees a dialogue to correct the concerns and avoid triggering Article 7 of the Treaty on European Union – would then for the time being replace the ongoing processes of the Cooperation and Verification Mechanism. The relevant benchmarks and recommendations under the Mechanism would be looked at under the Framework. Romania of course remains bound by its commitments taken at the time of accession and the Cooperation and Verification Mechanism benchmarks remain open until they are fully and satisfactorily met.

⁶ Another amendment in this regard concerns the deletion of Article 13 2nd intend of Law 78/2000 on preventing, discovering and sanctioning corruption offences, which had provided the possibility to increase a sanction for abuse of service abuse of service or usurpation of the position.

⁷ Amendments to Article 16(3) of the Criminal Code

⁸ Amendment to Article 290(3) of the Criminal Code and to Article 290 of the Criminal Procedure Code, where two new paragraphs (1¹) and (1²) are inserted.

⁹ Venice Commission Opinion 930/2018 of 20 October 2018 p. 9 para. 31.

In addition, the Commission reserves its powers as guardian of the Treaties and will not hesitate to swiftly open proceedings under Article 258 of the Treaty on the Functioning of the European Union (TFEU) against any related infringement of Union law it may identify.

The objective of the Commission remains to help the Romanian authorities to find solutions to the rule of law issues that have emerged and to resume progress under the Cooperation and Verification Mechanism, as Romania has committed to doing. This is first and foremost in the interest of the people of Romania, but is also in the interest of the Union as a whole. As always, the Commission stands ready to engage in an active and constructive dialogue with the Romanian authorities and working together for a stronger Romania in the European Union.

Yours sincerely,

A handwritten signature in blue ink, consisting of several stylized, overlapping loops and lines, positioned above the name 'Frans Timmermans'.

Frans Timmermans