



H.E. Mr. Frans TIMMERMANS

First Vice-President of the European Commission

European Commission

Dear Mr. First Vice-President,

We received with great interest your letter sent to our Prime-Minister, Mrs. Viorica Vasilica DĂNCILĂ regarding the latest developments in the justice sector in Romania and we would like to assure you firstly that we have read it attentively.

We share some of your concerns from the level of our Government and we are looking into finding the best legislative solutions to further finalize the reform of the Justice laws and of the criminal legislation, having always in mind the principle of the legal security, but also the rights and liberties of the citizens.

In relation to your concerns, I would like to highlight the following:

1. Since our last discussion and the last 2018 CVM progress report sent by the Romanian authorities two crucial decisions have been issued by the Constitutional Court of Romania:

1. On January 16 2019, the Constitutional Court announced its decision on the request to solve the constitutional legal conflict between the Public Ministry - Prosecutor Office attached to the High Court of Cassation and Justice on one hand and the Romanian Parliament, High Court of Cassation and Justice and other courts, on other hand determined by the signing of two protocols between Public Ministry - Prosecutor Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service signed in 2009 and 2016, request lodged by the President of the Chamber of Deputies. According to the said decision that is still pending publication in the Official Gazette of Romania, the High Court of Cassation and Justice and other courts, as well as the Public Ministry, including its subdivisions, will verify in the pending cases if there is a breach of the provisions regarding the material competence and personal competence and shall take all the necessary legal measures.

The Romanian authorities are looking carefully into the matter and waiting for the publication of the Decision mentioned above, before proposing any legislative measures.

The existence of these initially secret Protocols have raised many concerns among the Romanian magistrates, their professional associations and public opinion. On the way to finding a legislative solutions consultations with relevant actors will take place, following the procedures stipulated by the law.

2. By the Decision no 685/07.11.2018, on the request to solve the constitutional legal conflict between the Romanian Parliament on one hand and the High Court of Cassation and Justice on the other hand. The Constitutional Court admitted the request formulated by the Prime-Minister of the Romanian Government and acknowledged the existence of such conflict generated by the decisions of the Leading Board of the High Court and Cassation and Justice, starting with its Decision no. 3/2014 according to which only 4 out of the 5 members

panels have been elected by drawing lots, disrespecting the provisions of article 132 of Law 304/2004 on the judiciary, as amended and completed by Law no. 255/2012.

Such a circumstance raised as well many debates and interest for the professional and the public society while constantly reactions from the members of the Government or of the Parliament have been requested and many statements have been made in the public space, however no legislative solution has been yet taken.

Following this decision, the conviction or acquittal judgments rendered by the High Court and Cassation and Justice's 5 members panels composed without respecting the legal provisions, starting with 01.02.2014 until present, therefore for a limited period of time, could be subject of another judgment in front of an impartial and this time legally composed panel.

Having this in mind, I am confident that the Government and the Parliament both with the view of respecting the rights and the liberties of the citizens and guaranteeing the right to a fair trial, in front of an independent, impartial and objective court, seek for an adequate legislative solution. Such a solution could offer the opportunity to lodge an appeal in annulment for the convicted persons and the Public Ministry both, in the case of those acquitted, reinstating the right to an extraordinary appeal, while the evidence are to be analyzed objectively by a legally composed court.

This reason for an appeal in annulment is provided currently by art. 426 letter d of the Criminal Procedure Code. Any legislative solution will take into consideration on one hand the right to a fair trial, and on the other hand the principle of res judicata and legal security.

II. In reference to the reform of the criminal legislation, there are no major tangible steps taken in this respect by the Romanian authorities since the last CVM Report. However, it was natural to have plenty debates and statements on how to implement the decisions that were issued by the Constitutional Court which ruled unconstitutional many articles of the amendments brought to the Criminal Code and the Criminal Procedure Codes.

As you very well know, in 2017, the Government sent to the Parliament two draft laws on amending the criminal legislation, with the view to put in the line the Romanian criminal legislation with the previous decisions of the Constitutional Court and to transpose the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be heard in criminal proceedings, and the Directive 2014/42 / EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds from crime in the Union and with the European Court of Human Rights decisions. These drafts have been previously well received by the CVM team from the European Commission.

Separately from the drafts promoted by the Government, the Parliament has initiated, debated and approved two other draft laws that were subject to an a priori control in front of the Constitutional Court and to an opinion issued by the Venice Commission in October 2018. So far, there was no progress made in the Parliament in relation to these two pieces of legislation.

In the meantime, the Government is concerned of the length of the legislative process in relation to the transposition of the two aforementioned directives that nowadays make the case for two distinctive infringement procedures, as you very well know. Having this in mind, but also the solutions considered constitutional by the Court on the occasion of it's a priori control over the two draft laws adopted by the Parliament, the Government is looking into identifying the best possible legislative solution to address both aspects. However, such a solution is still under an analysis for the time being.

III. In what concerns the last CVM Report from November 2018, I would like first to underline that important progresses have been made in fulfilling the initial recommendations. The report acknowledges some of them, but not to the full extent.

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As you know, through 2017 and 2018, since I am the Minister of Justice, the Romanian authorities and in particular the Ministry of Justice have had a constructive and loyal cooperation with the European institutions and especially, the European Commission inside the CVM. I personally was fully engaged in the carrying out of all 3 evaluation CVM missions and I will continue to do so in the future. However, we were surprised of the general tone of the Report, of its content as a whole, of its 8 supplementary recommendations and also of the fact that the observations, that were fully documented and sent in advance in relation to the report, were not taken into consideration by the Commission. All of these opened the discussion on the fluidity of evaluation standards used inside CVM and the "moving targets". Our comments sent to the Commission on the text of the report previously its publication, are technical and fully describe our expectations and progress, leaving out any possible interpretation.

We were surprised also by the incongruence of the CVM evaluation, in relation to other CVM reports, for example the 2012 Report, when different aspects that were evaluated positively in 2012, were considered a negative in 2018. It is worth mentioning the misunderstandings reflected in the report in relation to the authority of the minister of justice to launch a disciplinary action, when all he/she can do is to referral a situation to the Judicial Inspection. In 2012, the Commission has evaluated positively the amendments introduced by Law no.24/2012 for amending and completing Law no. 303/2004 on the status of the judges and prosecutors and Law no. 317/2004 on the Superior Council of Magistracy, when the Minister of Justice was in deed able to start disciplinary procedure against any magistrate, no matter if he or she was a judge or a prosecutor. Following the amendments brought to the Justice laws in 2018 and also by the GEO no 92/2018, the attributions of the Minister of Justice were significantly restraint in disciplinary matters, having only the right to referral a situation to the Judicial Inspection, in what concerns only the prosecutors and not the judges.

The European Commission stipulates in the CVM Report that the Justice laws are weakening the judicial independence. In our opinion, none of these measures are affecting the independence of the judiciary. For example, in reference to the Section for the investigation of the offences committed by the magistrates, its constitutionality was confirmed by the Constitutional Court by recital 25 and the following of Decision 33/218. Another example is the regulation of the material liability of the magistrates that was validated constitutionally by the court in recital 72 and the following of Decision 417/2018. In the same manner, the early retirement scheme by GEO no. 92/2018, was postponed with the potential to be completely eliminated on the occasion of the discussions in the Parliament concerning the Law on approval GEO no. 92/2018. The same GEO has revised the extensions for the reasons to revoke the members of the Superior Council of Magistracy. The last two aspects were underlined by the Venice Commission as well, and resolved with the adoption by the Government of the GEO 92/2018.

The legislative solutions considered constitutional by the Constitutional Court can not affect in a negative manner the independence of the judiciary. These solutions enjoy a presumption of conformity with the European Convention of Human Rights that could only be invalidated by the Court in Strasbourg. Again, we underline that in 2012, the Commission itself recommended specifically the compliance with the Decisions of the Constitutional Court, while by the 2018 CVM Report, there is space for the interpretation that the Commission could imply to ignore or even to criticize some Decisions of the Constitutional Court.

In relation to the 8 supplementary recommendations introduced in the 2018 CVM Report, in some opinions, the content and the imperative tone of these recommendations, could be interpreted as going beyond the European Treaties, being a disproportionate interference in exercising the legal and the constitutional attributions of the Romanian authorities. Furthermore, in some situations, implementing the supplementary recommendations could be considered a disrespect of the Constitutional Court's decisions. Some of those are impossible to be implemented under the current constitutional framework. The text of the

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supplementary recommendations is contradicting the Commission's advice resulting from the rest of the Report urging the Romanian authorities to have an equilibrated and gradual approach based on analyses, evaluations and wide consultations.

The immediate suspension of the Justice laws and the subsequent GEOs are in force and they produce legal effects. It is necessary to carefully weigh the consequences raised by fulfilling the first two supplementary recommendations and by doing so, the old laws will not automatically be reinforced. In addition the GEO 92/2018 has already partially implemented some of the Venice Commission recommendations and in the process of approving this GEO in the Parliament there is room to further follow upon the Venice Commission recommendations.

As far as the procedures for appointment and revoking are concerned (supplementary recommendations 3 to 6) they are ongoing and carried out in accordance with the entire current legislation and the relevant decisions of the Constitutional Court. The last progress Report sent by the Romanian authorities are also explaining the need for adoption of GEO 77/2018 for amending art. 67 of Law 317/2004 on the Superior Council of Magistracy.

In reference to the amendments of the criminal legislation, as mentioned above, we are facing an ongoing legislative process, where the Parliament has the obligation to put the Criminal Code and Criminal Procedure Code in line with the decisions of the Constitutional Court. Ensuring the compatibility with the European law, Romania's international obligation, CVM recommendations and the opinion of the Venice Commission belong firstly to the Parliament.

Finally, we believe that at this point, the solution is not given by a series of disproportionate recommendations to be followed, adding to the 12 existing CVM recommendations, going beyond the national constitutional framework, as well as the primary European law. We are convinced that solution is given by a solid cooperation based on the same constructive dialogue that we had so far. In this moment, Europe should be united more than ever and avoid further polarization of the member states. We need to identify together, by cooperation and dialogue, new common actions, new grounds, compatible with the Romanian constitutional traditions, but also with the primary legislation of the European Union, and with the obligations of Romania as an EU Member State and as well as with the Romanian citizens' expectations that we are all fully aware of.

We remain committed to fruitful and loyal cooperation, dialogue and also to close the CVM by fulfilling all the recommendations, but it is important that these recommendations remain stable.

While looking forward to our next meeting for which I am expressing my entire availability, and also to the first evaluation CVM mission in 2019, please allow me to reassure you of my highest consideration and of Romania's support including on the occasion of exercising our mandate for the 2019 EU Council's Presidency.

Best regards,

Professor Tudorel TOADER, PhD

Minister of Justice