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How to Address Rule of Law Backsliding in Romania: The Case for an Infringement Action Based on Article 325 TFEU

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The case for an infringement action based on Article 325 TFEU

In this post, we will first summarise the situation in Romania before examining Frans Timmermans' reaction to the latest evidence of rule of law backsliding there. This post concludes with a possible solution considering the diagnosis offered below: an infringement action based on Article 325 TFEU.

1. Situation: State-sponsored systematic undermining of the fight against corruption

On Monday, 27 May, the Supreme Court of Romania sentenced Liviu Dragnea, leader of the Social Democratic Party and president of the Chamber of Deputies, to a three-and-a-half year prison sentence for abuse of power. This was the outcome that Mr. Dragnea, Romania's "most powerful man", had long feared. While his past illegalities had resulted a past conviction for electoral fraud that disqualified him from serving as prime minister, Mr. Dragnea understood that his political future would be over if convicted on the new, abuse of power charges. He thus sought to avoid such an outcome at all costs. The strategy has involved a methodical and all-out attack on judicial independence and the rule of law. Even if eventually unsuccessful as far as Mr. Dragnea is concerned, as this week's conviction shows, attempts to tailor legal reforms to the needs of powerful politicians have inflicted serious damage on Romania's constitutional democracy.

In the area of criminal law, reforms have been attempted to both procedural rules for how prosecutors conduct investigations, and to the material elements corruption crimes. Embezzlement, for instance, is no longer to be investigated *ex officio* but only pursuant to a complaint made by the entity that has suffered damage, the

withdrawal of the complaint resulting in the removal of criminal liability. The *mens rea* for abuse of power, a crime for which many Romanian politicians have been convicted over the past decade, has been redefined as intent to obtain undue material benefits only for oneself, a family member or a relative, but not a third party such as a friend or, say, a party associate. Time periods under the statute of limitations have been shortened for corruption crimes and more lenient punishments have been made mandatory. Outside of the criminal context, the ruling party has challenged the legality of arcane procedures for selecting trial chambers and introduced new appeal mechanisms to reopen cases that have the authority of *res judicata*. They have gone so far as to use EU demands for the decongestion of prisons as cover to justify collective pardons for those serving sentences for crimes including corruption.

The ruling party's strategy also included far-reaching personnel changes. The Constitutional Court has been packed with jurists of no particular distinction, such as, most recently, the head of the new Judicial Inspection tasked with conducting disciplinary actions against magistrates. Many top prosecutors have been replaced. The then-Justice Minister, Tudorel Toader, conducted a self-styled review of the top anti-corruption prosecutor, Laura Codruța Kövesi (who would later become a finalist for the new EU Chief Prosecutor) and whose management style he found to be "deficient." She was dismissed from her position on these grounds. Only unplanned retirement saved the country's Prosecutor General, Augustin Lazar, from the same fate after a similar disciplinary actions by the Justice Minister. All these actions, combined with use of newly created procedures for sanctioning prosecutors and judges, have created a chilling effect throughout the justice system of a kind comparable to Poland and neighbouring Hungary.

One victim of these developments has been the country's constitutional system. Like all semi-presidential regimes, Romania has had to work out rules and convention to establish an equilibrium within its split executive. But since the recent onslaught against the constitutional state has unfolded during a period of cohabitation between a president and a parliamentary majority of opposing political parties, the institutional framework has been object of fierce contestation. With the assistance of the Constitutional Court, the President has been side-lined from any meaningful role in the appointment and removal of top prosecutors.

Given his newly ceremonial role in prosecutorial appointments and dismissals, the President has himself been playing hardball and delayed compliance with the Constitutional Court rulings. In addition, the President has routinely exercised his prerogative to contest the legality of acts of Parliament such as the recent judiciary reforms. His challenges, timed with those of the opposition to create maximum delays, have interfered with the majority's timeline for "reform", which seems largely dictated by the pace of Mr. Dragnea's own then-pending trial for abuse of power. Thus, however quickly the parliamentary majority could get legislation through Parliament, the legislative process has remained too slow and unpredictable given Mr. Dragnea's urgent legal needs.

No wonder that, under such pressure, the governing majority has sought to bypass parliament and get its reforms enacted as emergency executive decrees. If an emergency decree decriminalizing corruption were to come into effect even for the briefest period of time, individuals on trial for corruption would be able to avail themselves of

it whether or not the emergency measures would subsequently survive judicial review. Moreover, in the current climate, emergency executive decrees are de facto immunized from legal challenge. Only the Ombudsman can challenge *ex ante* the legality of an emergency executive decree and, sure enough, the governing coalition has appointed a politically compliant Ombudsman. Furthermore, in the unlikely event that a constitutional challenge is lodged, the Constitutional Court will likely treat challenges to the urgency of the executive decrees as a political question and limit its review to procedural matters.

Unilateral executive action has been the preferred legal tool for the party jurists. The difficulty, however, has been political. Recall that Mr. Dragnea himself is barred from serving as prime minister. As a result, he has had to pursue his agenda through puppet prime ministers. That has turned out to be more difficult than one would have expected. Two prime ministers have been forced out over just a few months when they turned out to be insufficiently loyal to Mr. Dragnea. In fact, the only time a prime minister gave in to the party leader's request for a general amnesty law enacted via emergency executive decree, in early 2017, spontaneous mass protests made the executive's position so untenable that the decree had to be withdrawn before coming into effect.

2. Reaction: Frans Timmerman's letter of 10 May 2019

Not only civil society has fought back. Prosecutors and judges have protested the undoing of an independent justice system both with public protests and legal action that have resulted in a number of preliminary references currently pending in Luxembourg. The EU and the Council of Europe, through the so-called Cooperation and Verification Mechanism (hereinafter: CVM) and reports from the Venice Commission, have been actively monitoring and regularly criticising Romania's justice "reforms". Frans Timmermans' recent letter to Romanian authorities is however particularly important in this respect both for the diagnosis it offers but also the different legal answers it promises should Romanian authorities fail to heed the Commission's diagnosis.

The letter is first noteworthy for the understanding of the rule of law it offers and making clear that the effective punishment of crimes is a rule of law issue. With respect to Romania, Timmermans is concerned with the reduction of the prescription periods (i.e. statutes of limitations) for certain crimes, the reduction of the punishment for certain offenses committed while in a public position, such as abuse of office, and the introduction of a high threshold for direct intention of certain crimes. The Commission is (rightly) concerned about the possibility of certain crimes being committed with impunity, in particular those which, according to EU law should be punishable by effective, proportionate and dissuasive criminal sanctions – hence establishing a link between the Romanian situation and EU Law, and therefore pre-empting any (ill-founded) accusation that it would be acting *ultra vires*.

The letter mentions various examples of crimes for which EU secondary law explicitly requires the Member States to impose such sanctions (counterfeiting currency, market abuse and child pornography). More broadly, the Court of justice ruled in *Commission v Greece* that where EU Law does not specifically provide any penalty for an infringement or refers for that purpose to national law, the principle of sincere cooperation requires the Member States to take all measures necessary to guarantee the application and effectiveness of EU Law. This

means that whilst the choice of penalties remains within their discretion, national authorities must ensure in particular that infringements of EU law are penalised under conditions which make the penalty effective, proportionate and dissuasive.

The second remarkable aspect of Frans Timmerman's letter is its emphasis not only on the direct effect of national laws on judiciary independence, but also the indirect cumulative effect these might have on judges. For example, it is argued (correctly in our view) that the combination of a system of strict and extensive disciplinary and new liability of magistrates, the special section in the prosecution office for investigating magistrates and the recent track record of the Judicial Inspection, results in a *chilling effect* on magistrates when it comes to exercising their independence. Reliance on the concept of "chilling effect", similar to the one used by the European Court of Human Rights, is a welcome acknowledgement of the fact that, for a judge to be truly independent, he or she must *feel* independent and not be in fear of arbitrary sanctions. In this respect, even minor sanctions can negatively impact judiciary independence if they are likely to deter other judges from acting independently of other powers, and the Executive in particular. To put it differently, not only must judicial independence be guaranteed, it must also be felt to be guaranteed.

Thirdly, this letter shows a welcome sophistication of the already compelling working definition adopted by the Commission in its 2014 Communication establishing a new EU Framework to strengthen the Rule of Law and in which the rule of law is understood as set of core and interrelated components which "include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law". In the letter, "separation of powers and loyal cooperation between different powers of the state" are also mentioned. In this context, Timmermans rightly recalls what citizens are entitled to expect when it comes to law-making in a democratic and rule of law compliant system. To begin with, and to state the obvious, which is sadly necessary in the case of Romania, emergency measures should be adopted only when there is a real "emergency". Furthermore, and as decisively, "the absence of impact assessments and inclusive public and stakeholder consultations, the unpredictability of the legislative process … also create further risks to the rule of law". Regrettably, this diagnosis is also fully valid as regards Hungary and Poland where we have had many examples of arbitrary laws being incredibly rushed via diverse subterfuges designed to avoid debate and scrutiny all in the name of the "will of the people".

Be that as it may, and in light of all of the issues and concerns mentioned in the letter, Timmermans explicitly invokes an activation of the Rule of Law Framework "without delay" should the necessary improvements not been made shortly, or should further negative steps be taken, such as promulgation of the latest amendments to the criminal codes. The Rule of Law Framework, also informally known as the pre-Article 7 TEU procedure, was adopted by the European Commission in 2014. It has only so far been used against Poland, eventually leading to the Commission triggering Article 7(1) TEU against this country, due to the lack of any results under the Framework.

In addition, Romanian authorities are warned that the Commission "will not hesitate to swiftly open proceedings

under Article 258" of the TFEU against any related infringement of EU law it may identify (as the Commission has already done in particular with respect to the so-called Polish judicial "reforms" and the multiple, arbitrary pieces of legislation adopted by Hungarian authorities regarding the Central European University, NGOs, free speech, etc.).

A particularly interesting point raised by the letter concerns the articulation between the Rule of Law Framework and the CVM, a special monitoring mechanism put in place at the time of Romania and Bulgaria's accession to the EU so as to allow them to join despite these two countries not fully meeting the EU's rule of law benchmarks in areas such as judicial reform and the fight against corruption. The fact that the CVM is still in operation 12 years later is all you need to know to understand how effective this mechanism has been. In any case, the letter is worth noting for suggesting that should the Rule of Law Framework be activated, this procedure would then "replace the ongoing processes" within the framework of the CVM. This raises the following question: can the Commission legally decide to "replace" the CVM with the Framework?

For Romania, the CVM is based on a 2016 decision of the Commission. The CVM is therefore based on a (binding) decision whereas the Framework is based on a (non-binding) communication. Legally speaking, there is no doubt that the CVM trumps the Framework aka the pre-Article 7 procedure. However, this is only relevant if there is a *conflict* between the CVM and the Framework. Whether it would be the case or not depends on what exactly the Commission means when it says that the Framework will "replace" the CVM. The 2016 decision contains essentially procedural provisions. Considering the overall flexible nature of the Framework, it could be used along the same lines as the CVM. For example, during the assessment phase of the Framework, the Commission could rely on its own CVM report and recommendations. And since the Commission's recommendations under the Framework are to be made public, they could also be communicated to the European Parliament and the Council, in compliance with Article 2 of the 2016 decision.

The letter seems, however, to indicate a *suspension* of the CVM while the Framework is being used. But again, this would not necessarily be a legal problem since the 2016 decision has been adopted by the Commission itself. Its power to adopt this decision is founded on Article 38(1) of the Act of accession of Bulgaria and Romania. If the Commission decides to suspend the CVM in favour of its Framework, it would therefore only require an extra step: The Commission would have to amend, repeal or suspend the 2016 decision after consulting the Member States.

The fact that the Commission's strategy of replacing the CVM with the Framework would be legal does not say anything, however, as to whether it would be successful. In our opinion, activating the Framework would just be as ineffective as the CVM and would merely result in more time being wasted as we are dealing here with a ruling party which is deliberately engaged in a strategy of rule of law backsliding in open violation of the principle of sincere cooperation.

If the situation in Hungary and Poland has taught us anything is that there is no point dialoguing with would-be

autocrats all too happy to establish autocratic regimes while pocketing EU funds. This is why the Commission should not bother with activating the pre-Article 7 procedure and rather prioritise the prompt initiation of an infringement action based on Article 325 TFEU.

3. Solution: An infringement action based on Article 325 TFEU

Article 325 TFEU is to be found in chapter 3 of the TFEU which concerns the EU's annual budget. Article 325 TFEU itself is about combating fraud. Under this provision, national authorities of EU Member States have committed themselves to do the following:

– To counter fraud and any other illegal activities affecting the financial interests of the EU through national measures which shall act as a deterrent and be such as to afford effective protection in the Member States;

– To take the same measures to counter fraud affecting the financial interests of the EU as they take to counter fraud affecting their own financial interests;

– To coordinate their action aimed at protecting the financial interest of the EU against fraud and to this end, organise close and regular cooperation between the competent authorities.

It is our submission that Romanian authorities have *deliberately* and *repeatedly* violated this Treaty provision and the obligations therein via a number of "positive measures" (i.e., measures essentially legalising corruption via the reduction of prescription periods or of sanctions for certain offense such as abuse of office, new rules limiting the possibility to provide evidence of bribery crimes, etc.) and "negative measures" (i.e., measures undermining judicial independence)

An infringement action directly based on Article 325 TFEU – coupled with Article 19(1) TFEU regarding aspects relating to judicial independence as well as an application for interim measures to provisionally prevent the application of relevant national provisions – is not only possible in our view but urgently warranted considering the pattern highlighted in section 1 of this post. In other words, and as shown in section 1 of this post, the cumulative effect of Romania's ruling party's systematic and ongoing attempt to legalise fraud to save its members from prosecution and sanctions has now reached a level where it structurally threatens not only the rule of law but also the financial interests of the EU.

In this respect, we would also submit that the fight against corruption ought to be understood as one of the core component of the rule of law (see e.g. the 2003 UN Convention against Corruption but also the 2006 Commission Decision establishing a CVM for Romania, recital 3: the rule of law "implies for all Member States the existence of an impartial, independent and effective judicial and administrative system properly equipped, *inter alia*, to fight corruption") and that the time has come for the Commission to remind Romanian authorities but also every other EU Member State that Article 325 TFEU subjects national authorities to a positive obligation not to undermine their anti-corruption capacity.

Recent developments – Mr Dragnea's sentence, the heavy loss suffered by Mr Dragnea's party in the European Parliamentary elections and the result of the non-binding referendum on the "reforms" of the judiciary – should preclude further deterioration of the situation in Romania in the short term. This should be no reason however for the Commission to delay action. The Commission should rather stand on the side of those fighting against corruption and impunity. In a situation where national authorities have deliberately and repeatedly ignored the EU's concerns, no futile attempt at dialoguing should be made. Instead the Commission ought to promptly enforce EU law and demand an immediate change of course via an infringement based on Article 325 TFEU.

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ONE COMMENT

Gregory Brain Jackson, Do 30 Mai 2019 at 11:06

Article is tendentious. Does not convince me.

Reply