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José Manuel Durão Barroso  
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12 June 2009

Dear President Barroso,

The purpose of this letter is to voice Romanian NGOs' and trade unions' serious concerns regarding the recent developments related to benchmark no. 1 as stated by the Commission Decision C of 13/XII/2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the area of judicial reform and the fight against corruption, namely the reporting and monitoring of the impact of the new civil and penal procedures codes.

According to benchmark no.1, Romania must ensure a more transparent and efficient judicial process. In order to achieve this aim, Romania undertook the drafting of four new codes dedicated to improving the legal system: penal and penal procedure codes, civil and civil procedure codes.

In January 2009, the newly appointed Romanian Government decided to withdraw the drafts of these codes from Parliament. Subsequently, the Government re-examined and amended the projects. The new versions were adopted by the Government as draft laws on February 25<sup>th</sup>, 2009 and they were submitted at the Parliament in order to initiate the legislative procedure. By taking this action, the Government of Romania failed to observe several key laws in decision-making and also disregarded the issues highlighted by the European Commission in its last country report – COM (2009) 70 final – in February .2009, as presented below:

a. The Romanian Government adopted the amended the projects without making them publicly available prior to the adoption. Law no. 52/2003 regarding decisional transparency provides that the Government should publish any new legislative project at least 30 days before adopting it. Unfortunately, this did not happen and the stakeholders were thus unable to access and comment on the new form of the projects.

b. The Romanian Government adopted the amended versions without organising a prior public debate on the new form of the four projects. According to Law no. 52/2003 regarding decisional transparency, public consultation prior to taking a decision is mandatory for a period of at least 30 days preceding its decision. In addition, if a legally established association requests a public debate on the draft, the authorities are under the obligation to organise it. As the Government did not allow 30 days time for commenting the projects, such a public debate did not take place.

c. The Romanian Government adopted the modified draft codes and submitted them to the Parliament without obtaining the consultative advisory opinions from the competent authorities which are required to accompany any draft legislation. The advisory opinions are consultative with respect to the recommendations they provide, however their request is compulsory. Law no. 24/2000 on legislative techniques provides that the consultative advisory opinions have to be presented jointly with any draft law. For example, the Superior Council of Magistracy (SCM) issued their consultative opinion on the draft for the civil code on the 2<sup>nd</sup> of April 2009; more than one month after the draft Civil Code was sent to Parliament. According

to the standard procedure, the Government should have waited for the consultative opinion from SCM. Also, on the 7th of April 2009, the Romanian Social and Economic Council refused to issue any consultative opinion as the draft codes have not been discussed by the Commission for Social Dialog within this institution.

d. The Government of Romania adopted the modified codes and submitted them to Parliament without preparing any assessment concerning the impact of the new regulations. The impact assessments are mandatory for any complex draft law, as provided by arts. 6, 6.1 and 29 of Law no. 24/2000. According to this law, the impact assessments have to be submitted jointly with the draft law to the Parliament. Unfortunately, till the date of the present letter, the Government did not conduct any such study concerning the effects of the new regulations.

e. All the above mentioned irregularities contradict the recommendations made by the European Commission in the last interim report - COM (2009) 70 final published in February .2009, which stated that "an assessment of the impact of the codes and a meaningful consultation process must take place nevertheless" (p. 4).

In order to mitigate these irregularities, a coalition of NGOs and trade unions requested that the Government should immediately take the necessary measures to resolve the situation. The Government refused to reply to the official letter sent by the coalition and thus we were forced to find justice before the courts of law. The coalition sought the support of the President of Romania in order to mediate the conflict with the Government, as art. 80 of the Constitution of Romania stipulates that the President "shall act as a mediator between the Powers of the State, as well as between the State and society". Unfortunately, the Romanian President refused to mediate the conflict.

The coalition also addressed letters to the presidents of the two Chambers of Parliament and to the special Parliamentary Commission in charge with evaluating the draft codes. The President of the Senate invited the representatives of the civil society to express their comments and amendments on the draft codes, in a meeting in which the Parliamentary Commission also participated. Nevertheless, the meetings between the members of the Parliament and the civil society representatives revealed substantial flaws in the procedure in which these projects had been drafted. Although very useful, the meetings between the members of Parliament and the civil society representatives cannot substitute a genuine public debate and covered only a limited percent of the provisions of the new codes, especially due to the time constraints. The Parliamentary Commission worked firmly to improve the quality of the draft codes, however without impact assessments to confirm the viability of the drafts, many share the point of view that the penal and civil rules seem impractical. Impact assessments, improvements of the draft codes and public debates are still necessary.

Observing that the draft codes have been substantially modified by the special Parliamentary Commission and taking into account the probability of an unfavourable court decision regarding the petition filed by the NGO coalition regarding the process of adopting the draft codes, the Government withdrew the draft penal and civil codes from Parliament. Currently, the Government announced that it intends to engage its responsibility before the Parliament in relation with the draft penal and civil code. Thus, the Parliament will be put in the position to accept the Government drafts without discussions and amendments or will have to withdraw the confidence invested in Government according to the constitutional procedures.

It is our belief that assumption of responsibility by the Government before Parliament is an infrequent procedure, used in the constitutional design in the case of 'a programme, a general policy or a bill' and this procedure is not appropriate in the current circumstances where there is no genuine public consultation, no impact studies had been prepared and the legislation concerned consists of the fundamentals of the entire legal system. However, the Law no. 24/2000 provided that the Government must publish impact studies also in the case of draft legislation subject to the procedure of assuming the responsibility by the Government before the Parliament.

Furthermore, on the 10<sup>th</sup> of June 2009, the Romanian Government published the Emergency Ordinance (GEO) no. 61/2009 on amending Law no. 24/2000. In the virtue of this Emergency Ordinance, the Government

abolished the necessity of impact assessments on draft legislation, including the legislation subject to the procedure of assuming the responsibility by the Government.

The members of this coalition regard this Emergency Ordinance as a great step backward from the point of view of benchmark no.1. The necessity of impact assessments on draft legislation was a subject of negotiation between the European Commission and the Government of Romania in the process of adhesion of Romania to the E.U. On the Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania – COM/2006/0214 final from 16 of May 2006, the European Commission pointed out that: "Concerning policy-making, legislation is still sent to Parliament without an assessment of all implications or of the administrative capacity needed to enforce it" (p.5).

Responding to this concern of the Commission, the Romanian Parliament adopted in 2007 some amendments to the Law no. 24/2000 and conducted impact assessments which are mandatory in the case of complex legislation. For this 2007 reform, the Romanian Government received technical support within a Phare project (Phare twinning RO2003/IB/OT/10, 2003/005-551.03.03 – "Enhancing the institutional capacity of Romanian Government to improve public policy and decision-making process"). The requirement of impact studies for complex legislation was also one of the measures that the Romanian Government included in a public policy strategy (Government Decision no. 870/2006). Also, the requirement of impact studies in 2007 was consistent with the recommendations of the report of the Mandelkern Group. These efforts made in the previous years by European Union and Romania are now nullified by the Government Emergency Ordinance no. 61/2009, only for achieving a short-run goal: passing the codes without observing the legal provisions regarding mandatory impact studies. After these draft codes will be adopted by the Parliament, Romania will lack a proper instrument for assessing the impact of new legislation. From this point of view, the country will return to the state of affairs of 2006.

Another serious concern regarding the Emergency Ordinance no. 61/2009 is that it allows the possibility for the Government to nullify all the laws adopted by the Parliament before the adopted laws are entering into force. Thus, the Government may exert an explicit censorship on Parliament acts.

A third concern regards the number of emergency ordinances issued by the Government in the first five months of the year – 61. In the Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania - COM/2006/0214 final from 16 of May 2006, the European Commission pointed out that: "the government has continued to have recourse to 'emergency ordinances' to pass law. This strengthens the power of government to the detriment of the parliament and reduces the transparency of the law-making process" (p. 5). Unfortunately, this issue is still on the agenda.

We hope that these concerns will help the European Commission in drafting a balanced comment regarding the Romania's progress in addressing benchmark no.1. We consider that the benchmark no.1 refers to the adoption of the draft codes after public consultation and impact assessment and not only adopting the codes regardless of the legal provisions and their substantive flaws.

We therefore call upon the European Commission to kindly clarify the situation by addressing the following inquiries:

- a. The Romanian Government as well as the President of Romania have publicly stated that rapid adoption of new civil and penal codes represents a requirement on behalf of the European Commission in respect to the EC final report on the reform of the justice system and also that the Commission regards public consultations and the existence of studies regarding the impact of the new regulations as of secondary interest. Taking into account that the first benchmark refers to "reporting and monitoring of the impact of the new civil and penal procedures codes", what is the Commission's point of view regarding the absence of such impact assessments?
- b. Concerning the general policy of the EC, does the Commission regard impact assessments prior to adopting complex legislation as a valuable and therefore mandatory stage of the decision-making process or are these considered irrelevant, the member states freely taking whatever measures they find appropriate? Are there any recommendations of the Commission regarding ex-ante impact assessments?

c. Be so kind as to estimate the release date of the 2009 final EC report to the European Parliament and Council regarding the progress recorded by Romania in addressing each of the benchmarks underlined in the framework of the Cooperation and Verification Mechanism and also inform us whether its output will take into consideration the opinions expressed by civil society and not only public authorities.

We trust that you will take our views into account and we remain at your disposal should you wish to further discuss these issues with us.

Yours sincerely,

The members of the coalition "Stop the Codes!" – <http://www.opritcodurile.ro>:

- Asociația Română pentru Transparență
  - Transparency International Romania
- Centrul de Resurse Juridice
  - Centre for Legal Resources
- ActiveWatch – Agenția de Monitorizare a Presei
  - ActiveWatch – Media Monitoring Agency
- Asociația Română de Comunicații Audiovizuale
  - Romanian Association for Audiovisual Communications
- Asociația Jurnaliștilor din România
  - Romanian Association of Journalists
- Clubul Român de Presă
  - Romanian Press Club
- Centrul pentru Jurnalism Independent
  - Centre for Independent Journalism
- Centrul de Asistență pentru Organizații Neguvernamentale
  - Assistance Centre for Nongovernmental Organisations
- Asociația pentru Apărarea Drepturilor Omului din România – Comitetul Helsinki
  - Association for the Defence of Human Rights in Romania – The Helsinki Committee
- Asociația Pro Democrația
  - Pro Democrația Association
- Centrul de Resurse pentru Participare Publică
  - Resource Centre for Public Participation
- Asociația Consumatorilor de Media
  - Association of Media Consumers
- Fundația Soros România
  - Soros Foundation Romania
- ACCEPT România
  - ACCEPT Romania
- Federația Română a Jurnaliștilor MediaSind
  - Romanian Federation of Journalists MediaSind
- Fundația pentru Dezvoltarea Societății Civile
  - Civil Society Development Foundation
- Asociația Patronală a Editorilor Locali
  - Romanian Association for Local Publishers
- Convenția Organizațiilor de Media
  - Media Organisations Convention
- Salvați Copiii
  - Save The Children
- Institutul Român de Training

- Romanian Training Institute
- Societatea Timișoara
  - Timisoara Society
- Liga Apărării Drepturilor Omului
  - League for Defending the Human Rights
- Asociația GREEN
  - GREEN Association

On behalf of the coalition "Stop the Codes!"

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CC:

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Siim Kallas, Vice-President of the European Commission  
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Antonio Tajani, Vice-President of the European Commission  
Transport