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Brussels, 16-02-2004
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H.E. Mr A. Nastase
Prime Minister of Romania
Government Building
Victoria Palace, No. 1
Piata Victoriei
Bucharest
Romania

DPC

Dear Prime Minister,

I would like to transmit to you the Independent Panel's Report addressing its discussions with your authorities in Bucharest on 19-21 January and the subsequent revised legislation received recently.

I trust that the Romanian Government will take full account of the Panel's views as expressed in its Report. In particular I should like to draw your attention to the following points.

The report of the Panel stresses the importance of an explanatory memorandum giving details of the intentions of the legal provisions, so that the assessment of the draft proposals could be fully made. This would also provide much better transparency for all parties involved in Romania, including the Parliament.

The Panel is of the view that consent to any of the provisions is conditional on the adoption of clear and satisfactory secondary legislation, which fully respects the relevant international conventions and accepted principles in European Union Member States. I would therefore like to recommend that the Panel members be asked to continue to work with your authorities in relation to the secondary legislation and to provide reports on its progress.

I would like to draw your attention to the Panel's concern that there is insufficient clarity about the legal status of children that have been declared "abandoned" or "adoptable" according to the Abandonment Law of 1993. Such children, which I am informed could total several thousand, should be afforded full protection under the new legislation and their cases should be reviewed under its provisions.

I would also like to draw your attention to the Panel's advice that, in order to ensure the credibility of the new legislative arrangements, reasonable expectations should be made on the time-scales required to develop the necessary administrative and judicial capacity to implement the new legislation throughout the whole of Romania. This will require a carefully planned strategy for the training of officials, care workers and the establishment of specialist courts and procedures.

The Panel has appreciated the co-operation it has received from the Romanian authorities during the last year. It also notes that considerable improvements to the proposed legislation have been made. On the other hand, a number of concerns remain, and clarifications are still required to the drafts now under consideration before they should be adopted. These issues are clearly highlighted in the Report of the Panel, and I trust that they will be fully addressed.

I would like to assure you again of my full willingness to support you and your government in completing satisfactorily this vital piece of work.

Yours sincerely

Ernst Kohnen

Third report to the European Commission of the Independent Expert Panel reviewing the Romanian Government's proposals for new legislation on the Rights of the Child and Adoption

1. This report was drawn up by the Independent Expert Panel on Family Law following their visit to Bucharest on 19 to 21 January 2004 to discuss the revised draft laws submitted to them in December 2003 and after their consideration of the further revised draft laws submitted to them in February 2004. The panel wish to make the point that there has been little time to consider fully the latest drafts.
2. At the meeting in Bucharest the experts discussed the following points in particular with the Romanian representatives (NACPA, Ministry of Justice).

Consultation at ministerial level

3. The experts sought an assurance that the latest texts which had been submitted to them in December 2003, had been agreed with the other members of the Government. The experts obtained the assurance that the latest texts had been drafted taking into account the comments of the other ministries. The Romanian representatives considered that they had the agreement of each of the ministries. However, the legislative procedure in Romania requires the agreement of the Council of Ministers, which has still to be consulted for its approval of the draft laws and this will take place towards the end of the month of February.
4. The experts are aware that the texts may be amended during their examination by both chambers of the Parliament. They must however point out that any amendments which may be made by the Parliament must assure at least a similar level of protection and of promotion of the rights of children.

Explanatory Memoranda

5. The Romanian representatives outlined the practical difficulties which had hindered the development of explanatory memoranda, covering a broad overview of the provisions and an examination, article by article. Whilst appreciating their difficulties, the experts emphasised the importance of explanatory memoranda.

Explanatory memoranda are essential to ensure a good understanding of the laws and to facilitate the passage of the draft laws through the Parliament. A detailed commentary allows one to be sure of the intentions of the Government, and subsequently, in the event of not having been contradicted, of the legislator.

Secondary legislation

6. During her meeting with the experts, Mrs Elena DUMITRU, Minister for the Labour, Social Solidarity and of the Family expressed the view that the proposed legislation would be incomplete, without appropriate secondary legislation. The experts have received a document on this subject, which is essentially a list of the subjects which would form the basis for the secondary legislation. They consider that this document is insufficient. It is simply a list and it does not allow them to see the content of the secondary legislation. The secondary legislation is essential in order to give real meaning to the primary legislation and a complete picture of the legislative framework and must be consistent with the principles of the primary legislation. For example, without the detail of the secondary legislation it is not possible to judge precisely what the new organisations will do or their effectiveness. This will depend to a very large extent on the secondary legislation. In this respect the panel would refer to paragraphs 27 to 29 of the second report.

7. Having regard to the importance of the changes to be made and the complexity of the subject matter, the experts consider it is not very probable that the secondary legislation will be able to be brought into force within 6 months of the laws being approved by the Parliament.

8. Transitional provisions would be necessary in this case in order to allow the implementation of the primary legislation in stages. The existence of a transitional period would not prevent the provisions of the primary legislation, which creates rights for children from being immediately applicable. But it would be essential to provide access to the court in the event of a violation of these rights.

9. The experts put forward the suggestion that a committee to monitor the implementation of the legislation should be established bringing together

representatives of the authorities concerned, assisted if need be by international support, to assist in the successful completion of the secondary legislation.

Translations

10. Several times, as in the past, the comprehension of the texts was hindered by the imprecision of the translation into the English language. These difficulties were mostly overcome by the verbal explanations provided by the representatives of the NAPCA. However, the process would have been greatly assisted by the existence of explanatory memoranda.

The draft laws

11. The draft laws on the rights of the child and adoption were discussed mainly on the basis of a list of written comments provided by members of the panel. These comments were sent to the Romanian authorities in advance but other comments were made during the course of the discussions. All remarks and suggestions of the panel were discussed. At the time of the discussions, which were very constructive, the Romanian representatives made it clear that they intended to take into account most of the comments made by the experts and to make the suggested changes. The latest drafts of the revised laws have since been received (February 2004) and although there has not been a great deal of time to consider these latest drafts, we have the following detailed comments.

Draft law on the protection of the rights of the child

12. First, the Panel would like to make sure that the text which contains Articles 7 to 112 and which follows the document on the draft law on the protection of the rights of the child was included by accident (with the name Alina Drogomir in its heading) and is intended to be deleted.

13. On the structure of the present law, the Panel had many difficulties with the changes that have been recently introduced and became even more aware of the need for this law to have a better and clearer structure. The Panel is of the opinion

that a better structure of the Law will make its understanding and application easier. The panel therefore suggests that the Romanian authorities use as a basis for the structure of the law, the guidelines for States to report to the United Nations Committee on the rights of the Child. Then the Law could be organised as follows:

I. Definition of the Child

II. Civil Rights and Freedoms (which includes nationality; preservation of identity; freedom of thought, conscience and religion; freedom of association and peaceful assembly; protection of privacy; access to appropriate information and the right not to be subject to torture)

III. Family environment and alternative care (which could include: parental guidance; parental responsibilities; separation from parents; family reunification; illicit transfer and non return; recovery of maintenance for the child; children deprived of their family environment; periodic review of placement; abuse and neglect including physical and psychological recovery);

IV. Basic health and welfare (disabled children, right to health and health care; social security; standard of living)

V. Education, leisure and cultural activities (education, leisure, recreation and cultural activities)

VI. Special protection measures

1. Children in situations of emergencies (refugees and children in armed conflict)
2. children involved with the system of juvenile justice
3. children in situation of exploitation
 - a. economic exploitation of children, including child labour
 - b. drug abuse
 - c. sexual exploitation and abuse
 - d. sale, trafficking and abduction
 - e. other forms of exploitation

14. If the old version of the law's title is not to be kept, the panel is of the opinion that the new title too defensive. The expression "protection" should preferably be replaced by: protection and promotion, which is a more proactive combination of expressions.
15. On a positive note, the Panel has to stress the fact that some of the new texts, for example Article 36 (former Article 30), are of such good quality that one would wish these to be included in the law of one's own country.
16. The panel was informed of an agreement with the Ministry of Justice on transferring certain parts of the draft law (October 2003 version), in particular Chapter III, Sections 1 and 2, to (the part on family law in) the Civil Code. Such an approach might take away a major concern of the panel that is the relationship between the draft law - even in its present form - and the Civil Code. In principle the panel agrees with this, in particular as the mentioned sections are first of all about parental responsibilities and legal guardianship and do not contain children's rights strictu sensu (and see paragraph 13 above).
17. Consideration should be given to the question whether other parts of the draft law that would better be placed if they are included in the Civil Code. Other provisions such as the ones about legal proceedings, would perhaps better be placed in the Code on procedural law. An example of this is Article 32(2) to (6), (which already seems to be drafted as a more general provision for all legal proceedings affecting the child, but where the (Convention) element of "giving the opinion of the child due weight, in accordance with his or her age and maturity" is still not included).
18. Attention should also be given to the matter of legal aid. Legal aid should be available in order to ensure effective access to court.
19. The creation of a specialised jurisdiction in family matters means, apart from starting and completing a successful major reform of the judicial organisation that it is also necessary to find and to train a sufficient number of judges and staff for the new job. It is therefore likely that the courts will not be in the position to play

the role that is reserved for them already at the time of the entry into force of the new law(s). Transitory provisions (of a not too long duration) to the effect that until the respective legal provisions can fully be implemented, competencies may be exercised by not specialised courts/judges, might therefore be considered.

20. In this stage of the process of drafting it is still not possible for the panel to give a more final judgement on the new text of the draft law since a lot of secondary legislation is still to be prepared. It should be emphasised that only a complete picture of at least the intended content of the relevant secondary legislation as to its substance, would make such a judgement possible.

Examples of relevant secondary legislation in the above mentioned sense could be found in Articles:

- 17 para (2): "based on a procedure approved through a joint order",
- 34, para (1): "within the limits stipulated by the law",
- 43, para (1): "except in special and limited cases stipulated by the law",
- 55: "other regulations",
- 56: seems to provide for a rather too broad and undefined mandate (to whom?) "to elaborate normative acts",
- 94, para (2): "is established through the law",
- 97, para (2): "is regulated through a Government decision",
- 98, para (5): idem
- 100, para (2): idem
- 107, para (3): idem (and: it is still unclear what the content of, in particular, the criteria and conditions will be; similar points may be made regarding Articles 109, para (2), 110, para (2) and 112).

21. A similar remark could be made in relation to the existence in many places in the draft law of open norms such as "in accordance with the law" (e.g. Article 26) or "except in cases stipulated by the law" and "within the natural restrictions of the educational act" (Article 31 para (3)) as well as to sentences like "are established through a Government decision" (e.g. Articles 107 para (3) and 109 para (2)) since here no indication is given as to the possible scope and content of the secondary legislation.

22. Furthermore it is unacceptable that a provision like article 130 which seems to leave, and this without any specific criteria, the whole subject of sanctioning to a Government Decision.

23. The panel is not entirely sure whether the relevant texts in the draft law (e.g. Articles 14 and 15) do properly reflect the notion of "contact" in all its meanings according to the Council of Europe Convention and whether the texts do focus on all possible situations (ie. not just parents who are divorced and including parents who live in different states) and the panel has doubts as to the restrictions provided for in article 15, para 2.

24. The Panel would also like to make some concrete comments on certain specific articles of the draft law:

Article 7: There are some prohibited grounds of discrimination, mentioned notably in Article 2 of the UNCRC which are missing here (although at the end the provision mentions "or of any other distinction". The Panel is of the opinion that that some of them may be of particular importance, which are: religion; **national, ethnic or social origin; property; disability; birth or other status**. Moreover, at the beginning of the Article one should perhaps mention that the "rights specified under the current law are guaranteed for all children **without discrimination of any kind**" and then go on specifying the possible grounds of discrimination.

Article 8 (2): The Panel would suggest that expression "if possible" is removed.

Article 8 (5): leave out "the basic elements of".

Article 18 (2): The Panel wonders whether the drafting of the provision is not excessive. Does this mean that a child must have the authorisation of both parents? And should such an authorisation be necessary for travelling inside the country?

Article 21: Corresponds to former Article 15. The Panel would be interested in knowing what the compulsory education in Romania is and it thinks that this is an important issue specially, when it is considered with the provision on child labour (see article 24). If compulsory school stops at for example 13 and the child is only allowed to work at 16, what will she or he then do for 3 years?

Article 22: The Panel suggests that a reference to the prohibition of corporal punishments in schools could be added.

Article 23: here, and in many other articles (e.g. 29, para (3), 44, para (2) and 94) are fine examples of many new tasks. If these are to come into force immediately, the necessary provision will need to be in place. If not, transitory provisions should be included.

Article 24: The former provision on child labour had a reference to the minimum age for employment – which was, in the panel's opinion, a good thing. Even if there was a problem in the panel's view with Article 18 (3) of the former version, as it enabled children to work below the age of 16 in conflict with the international legal obligations Romania has assumed.

So, the panel's suggestion is that Romania goes back to the earlier version of this Article (of course eliminating its former paragraph (3) for the reasons explained) and specify the minimum age for admission to employment or work, which is 16 (according to the Declaration Romania made upon ratification of ILO Convention no. 138).

Moreover, as in the earlier version of the text, there should be a provision explicitly stating that work, which is likely to jeopardise the health, safety or morals of the child shall not be carried out by persons under the age of 18 years. This is also in conformity with ILO Convention no. 138.

Article 28: There is overlap between Article 28(2)(c) and Article 24 and between Article 28(2)d) and Article 27.

Moreover, this Article should be drafted in a more open way in order to enable it to cover other forms of exploitation not explicitly foreseen or mentioned.

Article 31 (3): In the panel's opinion the current drafting may be dangerous, as we do not know what the natural restrictions of the educational act may be.

Article 31 (5): In the panel's opinion, this drafting should not be acceptable. Article 13 (2)(a) and b) of the UNCRC only accepts two types of restrictions of these rights "but these shall only be such as are provided by law and are necessary (a) for respect of the rights and reputation of others or (b) for the protection of national security or of public order or of public health and morals".

Article 32 (1): The panel wonders if discerning is the same, or is rather a wider expression, than "child who is capable of forming his or her views". We recall that this last formula is the one contained in the UNCRC.

Article 33: In the panel's view, paragraphs (2) and (3) seem to be contradictory.

Article 34, (1): what are the "limits stipulated by the law" and in what way are they to restrict the right?

Article 42: The panel cannot exclude the possibility that this provision may be interpreted and applied in a dangerous way. The fact that there is a reference to the right of the child to be brought up in an environment of material security may, in our opinion, be used to declare a child adoptable in those cases where the parents have not realised this right to material security.

Article 43: This provision, and especially paragraph (2) seems dangerous to the panel. The panel does not know what the official statistical indicators are, and in which way they may be interpreted in order to justify the separation from the parents. Moreover, and concerning paragraph (3): one should add after according to the law “and subject to judicial review”! It would then be in perfect conformity with the UNCRC (Article 9(1)).

Article 53: This provision is better than the corresponding article in the former version of the law, which was too large/widen. But the panel is not sure it has understood the scope of this provision or how it will be enforced by the child.

Article 55: In the second line, what can these “other regulations” be?

Article 58 (1): The panel would like to be enlightened on the reason why there is here no reference to 18 years.

Article 64: The panel would like to know why the reference to legal guardianship, which was in former Article 119, was eliminated from this provision.

Article 131: The panel has serious doubts whether this re-evaluation can be accomplished within six months from the date of enforcement of the draft law.

Article 132 (2): The same remarks as regarding Article 131 apply here.

Article 134 e): No indication is given at what date the here mentioned activity is to be done .

Article 134 f): This provision seems to create a rather uncertain situation about which laws will then be in force or not.

The draft law of adoption

25. Article 1. The panel was concerned about the difference between Article 1 and Article 60(2). Article 60(2) referred to "the adoptee and his or her descendants on the one hand". Article 60(2) of the January 2004 draft makes it clear that a relationship is established through adoption between the adoptee and the adopter and that a kinship relationship is created between the adoptee and the adopters' relatives. It would be sensible for Article 1 and Article 60(2) to use the same terminology to avoid any doubt. The term "legal operation" in Article 1 is odd but it may be a question of translation. The panel wonder whether "a civil order" was a more accurate description. The absence of explanatory memoranda means it is not clear what function Article 1 fulfils. Is it intended to describe the legal effect of adoption or merely a broad description? In this respect there is some overlap with Chapter V.

26. The panel had two concerns about Article 2 – the reference in paragraph (a) to the child's superior interest and paragraph (e). Paragraph (a) has been amended to refer to the principle of the child's best interests and paragraph (e) has been omitted. The panel is content with these amendments.

27. Articles 3 and 5. The definition of the child was discussed. The Romanian representatives explained that a child who is married can acquire full capacity. So the definition of child would exclude a married child. Article 5(2) provides that a child may be adopted unless he has reached the age of 18 (when he has full capacity to exercise his or her rights) or is married at which point he or she can acquire capacity. Paragraph (3) is concerned with the adoption of an adult.

28. Article 7(1). A drafting point. The words "only once" in paragraph (1) do not make much sense given in particular paragraph (3)(b).

29. Article 11(1)(b) was discussed. The panel had understood the Romanian representatives to say that there had been a decision of the constitutional court that had declared that any legal personality or body who exercises parental responsibility has to give consent to adoption. The latest draft, paragraph (1)(b), now provides that the legal guardian of the child whose parents are deceased, are not known, have been legally declared dead or missing or under interdiction also has to consent to adoption. The panel is content that the reference to the private or legal entity has been removed but considers the term "under interdiction" needs to be defined for the purposes of this draft law.

30. Article 15(2). The panel had understood the Romanian representatives to say that consent had to be given to the court and indeed this appears to be what is provided for in paragraph (1). Paragraph (2) now provides an easement in the case of step-parent adoptions where the consent may be in a certified form. It is not clear what certified form means. Is it to be prescribed in secondary legislation and does it have to be independently witnessed?

31. Article 17(1) still does not deal with the position of the child who is not capable of understanding.

32. Article 19(2). The panel has no difficulty with this amendment. It simply serves to make it clear that if the prospective adopter is approved, the Department issue a certificate to that effect.

33. Article 20 – there was some discussion about whether or not a legal guardian needed to be approved before he could adopt. It was agreed that he should and the latest draft removes "© for the adoption of the child by his or her legal guardian".

34. Article 22(3). The panel think the reference to paragraph (1) should be to paragraph (2).

35. Article 23. The panel consider on reflection that there are two further issues arising out of this provision. The court decree which approves the initiation of the internal adoption procedure automatically ceases if, within one year from the date on which the decree is made, the Department does not then identify an appropriate individual or family for the child or does not initiate the procedure stipulated for finalising the internal adoption process. In this situation the Department has to consider the plan for the child and ask the court either to maintain etc. the child protection measure to approve the initiation of a new internal adoption procedure or to approve the initiation of an international adoption procedure. The panel wonder whether this is intended to preclude the Department from going back to court before the year is up when for example there has been a significant change in circumstances or it is clear that adoption is not in the best interests of the child. Secondly, why does there need to be a reference to the initiation of an international adoption procedure?

36. Article 28(2). The panel is concerned that this provision is rather specific and runs the risk that other relevant provisions to which Article 6 properly applies need not be met.

37. Article 35 (1). The panel is still unclear why it is the Department which applies for the petition for adoption approval, given the nature of the order. Paragraph (3)((i) - the panel was unclear about what this provision is directed at.

38. Article 36. A small drafting point. The panel think the reference to final reports specified under Article 31, paragraph (2) should actually be a reference to the documents referred to in 31(2).

39. Article 39(2). The panel consider that it should be added that they are satisfied that the initiation of the international adoption procedure would be in the best interests of the child.

40. Article 42. This provision lacks clarity. What does it mean? Why is it limited to international adoption procedures?

41. Article 65. These provisions appear to be opposed to the principle that adoption is intended to be irrevocable and the grounds for applying are too easy.

42. Article 71(3). The panel wonder whether the reference to placement should rather be to entrustment in view of adoption in light of the earlier debate. What are the words "with the exception specified under the present law" referring to?

43. Article 73(5). There is a reference to natural parents whereas the previous expression has been biological parents.

44. The panel has the opinion that the draft has chosen transitory provisions that ensure the widest possibility of maintaining the prior legislation. The panel considers it is more appropriate to ensure that the new legislation is valid and applies as much as possible to pending cases. If there are not irrevocable rights of parents, children and other persons concerned, the new legislation should be taken into account.

Conclusions

45. Subject to the comments made in this report the panel considers the draft laws on the Rights of the Child and Adoption are generally satisfactory and in principle seem to be compatible with the UNCRC and the European Convention on Human Rights.

46. However, and as has been made clear, these draft laws do not stand alone. The panel has grave concerns about the absence of the detail of secondary legislation and whether sufficient time has been allowed to draw up that secondary legislation. Any secondary legislation must be consistent with the principles of the primary legislation and UNCRC and the European Court on Human Rights and the panel is unable to give final approval to the legislative framework in relation to children and

adoption without sight of that secondary legislation. The panel has asked for an implementation strategy but this has not been received. In order to implement legislation fully and effectively and consistently with the UNCRC and the European Convention on Human Rights, the Romanian authorities will need to have put in place not only the primary legislation but the detailed secondary legislation and have in place the necessary capacity and experience in terms of the judiciary and those working in the child care and adoption fields. It is not possible to comment further without sight of the implementation strategy and the proposed timescale.

47. The panel also has concerns about the children who are presently in the system. In their second report (see paragraph 25) the experts sought clarification of the position of those children but this has not been provided. A particular concern is what is to happen to the children who have been declared abandoned. In the view of the panel it would be unacceptable for these children to be "available for" inter-country adoption (see the UNCRC).

48. Finally, the need for hundreds of international adoptions in Romania is uncommon when we compare the position with the other states of the European Union. Without strict limitations in the law, it is to be feared Romanian authorities might consent too easily to children being adopted by foreign residents. International adoption outside adoption between relatives is a deliberate choice for a State. Preference should always be given, and in conformity with the UNCRC, to alternatives like foster care and suitable institutional care.