

The Cooperation and Verification Mechanism for Romania and Bulgaria – a deeper integration mechanism or inequity?

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In an attempt to trigger reform by extending EU leverage into the post-accession period, the EU had to implement a novel monitoring instrument, called The Cooperation and Verification Mechanism (CVM). But if those countries did not meet the Copenhagen criteria – demanding stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the ability to cope with competitive pressure and market forces within the EU; and last but not least, the ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that set the body of EU law (the *acquis*), and adherence to the aims of political, economic and monetary union¹ – why the EU still accepted them in the Union? Is there any possibility that EU did not have an idea about Romania and Bulgaria internal affairs and their capacity to reform? I think not. Nevertheless the EU seemed to make a snap judgment and allowed these countries in the Union hoping to keep in the straight and narrow path, which now is questionable.

¹ These criteria (known as the Copenhagen criteria) were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995. http://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhagen.html, accessed on February 13, 2016.

What do we understand by CVM?

When Bulgaria and Romania joined the European Union in 2007, they still had to demonstrate that the rule of law was fully observed in their domestic systems. In order to identify and address any shortcomings, the EU developed that mechanism – a monitoring process that asks for a

prompt policy response from the Bulgarian and Romanian governments. The CVM is a tool to maintain the reform momentum in the two countries and prevent any reversal of the rule of law reforms enacted during the EU accession negotiations.² But why does it apply only to Romania and Bulgaria?

Since the fall of communism in 1989, ten states have passed through the EU’s demanding pre-accession process. The tremendous benefits of EU membership created political incentives to satisfy the EU’s vast membership requirements. These incentives, along with certain characteristics of the pre-accession process that reward progress and publicize shortcomings, create the EU’s leverage on domestic reform. EU’s leverage has helped to enforce candidates to reform the state and the economy, improving the quality of democracy and the efficiency of state institutions in various ways.

The two post-communist states that joined in 2007, Bulgaria and Romania, have struggled to achieve the same relative success. According to the European Commission severe problems with corruption, judicial quality and state capacity remain. During the pre-accession process, strict enforcement in some areas was limited to the adoption, not the implementation, of EU rules. In other areas, especially those related to corruption, there were few specific rules to enforce. Even after twenty years of democratization (in 2010), Bulgaria and Romania find themselves in the category of ‘semi-consolidated democracies’ – in contrast to the other eight post-communist EU members that are considered ‘consolidated’. According to a Freedom House report “the judiciary

² Vachudova, Milada and Spendzharova, Aneta. “The EU’s Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession” in *European Policy Analysis* (March, 2012) pp. 1-20.

is one of the most problematic institutions in Romania”.³ So, the Commission issues a report for Bulgaria and Romania, evaluating progress on the established benchmarks and flagging the most pressing issues that should be addressed before the next report. These monitoring reports have been widely praised for being very detailed and for following the evolution of specific administrative reforms, judicial cases, and political developments.⁴

What is the legal basis for CVM?

The evaluation of rule of law aspects is already a common approach in assessing the EU candidate countries, but an additional evaluation mechanism has been developed for two EU Member States, Romania and Bulgaria, as I already pointed. In the case of Romania this was established through a Commission Decision of December 2006, just before the Treaty on the Accession of Romania and the Republic of Bulgaria to the EU took effect after being signed on 31 March 2005. Consequently, even though the treaty itself did not enter into effect, the Commission had already elaborated a Decision⁵ on how it may be applied.

This Decision is based on the following articles: art. 37: “If Bulgaria or Romania has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectorial policies which concern economic activities with cross-border effect, or an imminent risk of such breach the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative, adopt European regulations or decisions establishing appropriate measures. [...] The measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the relevant

³ Freedom House, 2010. <https://freedomhouse.org/report/freedom-world/2010/romania>, accessed on February 13, 2016.

⁴ Vachudova, Milada and Spendzharova, Aneta. *Op. cit.* p. 4

⁵ Commission decision of 13.XII.2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption. Brussels, 13/XII/2006 C (2006) 6569 final
http://ec.europa.eu/enlargement/pdf/romania/ro_accompanying_measures_1206_en.pdf, accessed on February 23, 2016.

commitment is implemented. They may however be applied beyond the period specified in the first paragraph as long as the relevant commitments have not been fulfilled.”⁶

Art. 38: “If there are serious shortcomings or any imminent risks of such shortcomings in Bulgaria or Romania in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the Treaty

on European Union and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the Treaty establishing the European Community, and European laws and framework laws adopted on the basis of Sections 3 and 4 of Chapter IV of Title III of Part III of the Constitution, the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative and after consulting the Member States, adopt European regulations or decisions establishing appropriate measures and specify the conditions and modalities under which these measures are put into effect.”⁷

The Commission consequently considered that there was an “imminent danger” of a disturbance of the “internal market good functioning”. Taking this observation into account, two measures have been elaborated that, according to Article 37, shall fulfill the following criteria: to be proportional and to be adopted three months after the accession, a timeframe that may suffer an indefinite extension “as long as these shortcomings persist”.⁸ *Commission Decision C (2006) 6569 final* observed that there were indeed some unsolved issues in areas such as ‘the

⁶ Treaty concerning the accession of Republic of Bulgaria and Romania to the European Union. OJ L 157, 21.6.2005. (L 157/ 41) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2005:157:FULL&from=EN>, accessed on February 23, 2016.

⁷ *Idem*.

⁸ Carp, Radu. “The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism” in *Utrecht Law Review*, Volume 10, Issue 1 (January) 2014

accountability and efficiency of the judicial system and law enforcement bodies’ and because of this it decided to establish some objectives called *benchmarks*⁹.

Romania regularly reports to the Commission on the degree to which these benchmarks have been fulfilled, and the Commission offers technical assistance. Benchmarks to be addressed by Romania, referred to in Article 1 of the Decision are based on the accomplishment of the following objectives: (1) Ensure a more transparent and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes. (2) Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest and for issuing mandatory decisions on the basis of which dissuasive

sanctions can be taken. (3) Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption. (4) Take further measures to prevent and fight against corruption, in particular within the local government.¹⁰

Romania’s case

In Romania’s case, the Commission was more satisfied with the results produced in contrast to Bulgaria. According to the first report, published in July 2007, “the Romanian Government is committed to judicial reform and cleansing the system of corruption. In all areas, the Romanian authorities demonstrate good will and determination”. The Commission positively mentioned progress with the fight against local-government corruption and with the establishment of a national integrity agency, yet pointed to shortcomings in the judicial treatment of high-level corruption. Overall, the Commission concluded that “in the first six months of accession, Romania has continued to make progress in remedying weaknesses that could prevent an

⁹ Benchmarking is an evaluation strategy derived from quality management and involves comparing partners in business or processes. The outcomes for the best performing partner can be used to improve the functioning of partners with lesser performance.

¹⁰ Commission decision. *Op.cit.* p.5

effective application of EU laws, policies and programmes”.¹¹ But a weakness momentum was marked in April 2010, when most of the National Integrity Agency (ANI) activities were assessed by the Constitutional Court as unconstitutional after having also been attacked in the Parliament. Press reports revealed that seven of the nine judges of the Court were themselves being investigated by the ANI.¹²

Against this background, the fight against high-level corruption was the most important issue for the Commission. In February 2008, it complained that with regard to the fight against high-level corruption “convincing results have not yet been demonstrated”. The overall assessment of the Commission also remained positive in the third Commission report on Romania, published in July 2008. The report was considerably less harsh than the one on Bulgaria. The Romanian government was praised for its efforts to reform the judiciary and to investigate corruption, two

areas where “the institutional and procedural changes introduced in recent years [...] are starting to produce first results”. Yet, the Commission encouraged Bucharest to do more in several areas, in particular “to show that the judicial system works and that investigations into corruption lead to arrests, prosecution and, depending on the court’s judgment, to convictions with dissuasive effect and seizure of assets”.¹³ From the Commission’s point of view, the country’s fight against corruption was clearly too politicised.

The lack of support across political parties in dealing with high-profile corruption has remained a major issue in EU-Romanian relations. In July 2009 the parliament was encouraged to “show its full commitment to pursuing the fight against high level corruption” meaning that it should

¹¹ Trauner, Florian. “Post-accession compliance with EU law in Bulgaria and Romania: a comparative Perspective”. In: Frank Schimmelfennig and Florian Trauner (eds): *Post-accession compliance in the EU’s new member states, European Integration online Papers (EIoP)*, Special Issue 2, Vol. 13, Art. 21, 2009, <http://eiop.or.at/eiop/texte/2009-021a.htm>.

¹² Vachudova, Milada and Spendzharova, Aneta. *Op. cit.* p. 11

¹³ Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism. Brussels, 23.7.2008 COM(2008) 494 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0494&from=EN>

refrain from protecting politicians from prosecution.¹⁴ However, on a positive note, the Commission mentioned the adoption of new Criminal and Civil Codes and a number of initiatives taken by the Romanian government in response to concerns expressed in the February 2009 report in which Romania had been criticized not to maintain the pace of reforms. Then, the July 2010 CVM report of the European Commission was highly critical, especially of the destruction of the ANI, and declared that Romania was in breach of its accession commitments. The Commission called on Bucharest to ‘re-establish the ANI’s powers to propose the effective forfeiture of unjustified wealth’.¹⁵ In the July 2011 CVM report, the Commission also called for ‘urgent measures...to improve the recovery of the proceeds of crime, the pursuit of money laundering and protection against conflict of interest in the management of public funds’.

In 2012 the report highlighted that since 2007, Romania has created or has under way the basic legal framework in all areas covered by the CVM, and when completed, the introduction of the new codes should represent a substantial modernisation of the legal system. Also, the report

stated that other political decisions have also provided a solid framework, such as the National Anti-Corruption Strategy. Many important institutions also contribute to this solid basis, including The National Anti-Corruption Directorate (DNA) and the ANI.

Since 2013 the pressure on judicial independence was the main issue stressed by the reports concerning that in the summer and autumn of 2012, the Commission received a large number of representations from judicial institutions concerning direct criticism by politicians and politically motivated media attacks on individual judges, prosecutors and members of their families, as well as on judicial and prosecutorial institutions.

¹⁴ Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SEC(2009) 1073}. Brussels, 22.7.2009 COM(2009) 401 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0401&from=EN>

¹⁵ Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SEC(2010) 949}. Brussels, 20.7.2010 COM(2010) 401 final, http://ec.europa.eu/cvm/docs/com_2010_401_en.pdf

Finally, the last MCV report from January 2016 reiterates the importance of the respect for judges and the judicial process. “The successful prosecution and conviction of many prominent politicians in Romania for high level corruption is a sign that the underlying trend of judicial independence is positive”, and that no one committing a crime is beyond the reach of justice. But there has also been a reaction to this trend: criticism of magistrates by politicians and in the media and lack of respect of judicial decisions remain frequent.”¹⁶ Here is adding the recommendation made in 2015 to "ensure that the Code of Conduct for parliamentarians includes clear provisions so that parliamentarians and the parliamentary process respect the independence of the judiciary" – recommendation which has not been followed.

Again, are emphasized the two key institutions responsible for integrity and fight against corruption: ANI and DNA. Regarding ANI it is mentioned that it continues to initiate a substantial number of cases on conflicts of interest and incompatibility issues, many of them concerning local politicians.¹⁷ But this shows a problematic feature of low acceptance and even resistance to integrity rules within a substantial number of local authorities, with implications for public procurement.

On the other side, DNA reported an increased number of signals from the public which seems to reflect a public confidence in the institution which is also reflected in opinion polls.¹⁸ A particular trend has been the identification of corruption at local level. Since 2013, the total numbers of local officials sent to trial for corruption amount to almost 100 mayors, over 20 county council presidents and dozens of other local officials. The report also states that the arrest of the Mayor of Bucharest in 2015 was the strongest illustration of this problem.¹⁹ Regarding the public administration, The National Anti-Corruption Strategy is the core instrument to encourage the prioritisation of preventative action by public administration at national and local level.

¹⁶ Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SWD(2016) 16 final}. Brussels, 27.1.2016 COM(2016) 41 final. http://ec.europa.eu/cvm/docs/com_2016_41_en.pdf p. 4

¹⁷ *Ibid.* p. 8

¹⁸ DNA reports that 85 to 90 % of cases originate from citizens' complaints, 5 to 10% are ex-officio or complaints from other institutions and less than 5% of cases originate from notification of the intelligence services.

¹⁹ COM(2016) 41 final . *op cit.* p. 10

Concrete prevention projects within ministries, some supported by EU funds and NGOs, continue to bring a useful contribution to fighting corruption within the administration.²⁰

Even if the track record of the key judicial and integrity institutions to address high-level corruption has remained impressive, Romania has to make further progress towards the CVM benchmarks. Judicial independence and respect for court decisions continue to face challenge, the Criminal Codes reform is put into question in Parliament, decisions in Parliament on whether to allow the prosecution to treat parliamentarians like other citizens still lack objective criteria, etc. which means that judicial reform and the fight against corruption remain important issues for Romanian society.

Conclusions

Nine years after joining the EU, Bulgaria and Romania still lag significantly behind the EU ECE 8 in clamping down on corruption and improving the quality of the judiciary. It is unclear whether episodic bursts of domestic institutional reform can overcome deeply entrenched corruption in state institutions sufficiently to close this gap. At the same time, the two countries are performing substantially better than the EU-eligible states from the Western Balkans, with the exception of Croatia.²¹ Croatia outperforms Bulgaria and Romania on the rule of law and control of corruption indicators. This is interesting in light of the fact that Croatia joined the EU with no CVM mechanism in place – and of statements by the Commission in 2011 that it has no intention of including a CVM mechanism in any future accession treaty.

However, CVM benchmarks backed by concrete rewards and sanctions can help mobilize institutional change. It is a slow, painstaking process – and both Romania and Bulgaria have sometimes made progress and at other times appeared in stasis or in decline. However, the CVM process has clearly helped push through positive reforms. Also EU leverage tied to the CVM

²⁰ *Ibid.* p. 11

²¹ Vachudova, Milada and Spendzharova, Aneta. *Op. cit.* p. 13

process is more effective in motivating governments if the EU is threatening to withhold something that voters really want.

The decision by some EU members in late 2010 and 2011 to block Schengen entry, as a sanction for not meeting CVM benchmarks, and then postponed for many times has helped trigger reform in both Romania and Bulgaria, since Schengen membership is valued by citizens. Linking Schengen entry to satisfying CVM benchmarks has helped trigger reform, but also states that formal requirements are not enough to integrate Romania and Bulgaria.

As a conclusion, the introduction of the MCV to fulfill the necessary standards for a deeper integration, even if at a glance seems to be unfair or precisely discriminatory, represented a good opportunity to reform. It helped the Romanian and Bulgarian societies to realize that the corruption is a serious problem and inappropriate for a health country and that is wrong to give/take bribe or to take advantage of your power or position.

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