

# Historic evolutions of the effects of the European Union political instruments in the Romanian legal order – effects of the mechanism for cooperation and verification<sup>1</sup>

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## **Abstract**

*Since the accession of Romania to the European Union, many unsolved problems related to the accountability and efficiency of the legal system and of the law enforcement bodies have been identified, a reason for which the European Commission justified the institution of a Mechanism for Cooperation and Verification as a political instrument for the monitoring and optimization of the progresses made by Romania to attain certain reference objectives specific to the field of reform of the legal system and the fight against corruption. This mechanism has been instituted to improve the functioning of the legislative, administrative and legal system and to repair the serious deficiencies in the fight against corruption. The goal of the mechanism for cooperation and verification was and is to ensure the adoption of those measures that may guarantee the Romanians and other member states that the administrative and judiciary decisions, standards and practices in Romania meet those of the European Union. The progresses made in the field of reform of the legal system and the fight against corruption will allow Romanian citizens and trading companies to enjoy their rights in quality of citizens of the European Union.*

**Keywords:** *juridical system; juridical order; legislative procedures; Mechanism for Cooperation and Verification; safeguard clause.*

**JEL Classification:** K33, K40

## **1. Introductory elements**

Ever since Romania's pre-accession period in 2007, and on the grounds of the commitments undertaken during this period, the European Union bodies have realised that additional sustainable efforts are needed in key-fields in order to solve the deficiencies existing in the reform of the Judiciary and fighting corruption. These realities have justified the appearance of a political and judicial framework for supporting Romania in their accomplishment and also for monitoring the progress recorded in these fields, and this mechanism was referred to as

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*Mechanism for Cooperation and Verification* – M.C.V.<sup>3</sup> Based on the provisions of this Mechanism, the need for setting benchmarks in four suggestive fields such as: *reform of the Judiciary, integrity, fighting high-level corruption and preventing and fighting corruption in the public sector*, has been identified. The decision taken to this effect has imposed a periodical submission of reports to the European Union Commission and provided for this mechanism to continue until all benchmarks established by such are fulfilled. This Mechanism will continue to be functional until all targets are fulfilled and is under the coordination of the European Union General Secretariat, under the authority of the President.

## **2. Mechanism for Cooperation and Verification – the safeguard clause**

During the post-accession period, there have been progress and regress periods, during which the cooperation worked satisfactorily, and also, difficult times, during which the provisions of the Mechanism for Cooperation and Verification have faced hostility and heavy resistance.

On the 1<sup>st</sup> of January 2007, the date of the Romania's accession, the European Commission<sup>4</sup> found that there were still minor differences in the field of the judicial reform and of the fight against corruption, and such deficiencies were likely to create, at any time, a significant obstruction to the effective implementation of the legislation, of the policies and programmes of the European Union and also, to prevent Romanian citizen from fully benefiting from all their rights as European Union citizens.

To this effect, all these matters have been included in special provisions of the Accession Treaty, under Article 36 - *Economic Safeguard Clause*; Article 37 - *Internal Market Safeguard Clause* and Article 38 - *Justice and Home Affairs Safeguard Clause*.

*The Safeguard Clause* is a mechanism applied as a last resort and which may be activated for the purposes of preventing or remedying certain threats or problems that may appear in the functioning of the European Union and, whatever the adopted safeguard measures may be, they must be proportional to the envisaged deficiencies<sup>5</sup>; in other words it is a specific bilateral clause able to allow a Member State to apply, in certain situations, a derogation from the basic commitments

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<sup>3</sup> *Conclusions of the Council of Ministers*, 17 October 2006 (13339/06); *Commission Decision* 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, 13 December 2006 (C (2006) 6569 final).

<sup>4</sup> T. Stefan, B.Andresan-Grigoriu, *Drept Comunitar*, C.H.Beck, Bucharest, 2007, pp.53-56.

<sup>5</sup> Example: Art. 143 of the TFEU providing that "If the mutual assistance recommended by the Commission is not granted by the Council with regard to the Council that has not decided to fulfil the necessary conditions for the adoption of the Euro".

undertaken<sup>6</sup>.

The safeguard clause, regardless of the nature thereof, is adopted only based on agreed rules, as provided in the Accession Treaty, and which have been negotiated and concluded.

In fact, in practice, the safeguard measure involves the following:

- the concessions granted may be withdrawn or modified; or
- other obligations undertaken under the Treaty may be suspended, in whole or in part.

In essence, this safeguard clause includes all the features of a legal rule<sup>7</sup> used in political decision-making, which belongs to the European law system and, if applied, aims at preventing and also, sanctioning behavioural acts – actions, inactions or abstention to act – taken by any of the Member States that would act against the legal order of the European Union principles<sup>8</sup> under the different community and extra-community political strategies – considering that, following the Treaty of Lisbon, the European Union has acquired legal personality – and may be part of the constitutive elements of an international organisation<sup>9</sup> – therefore, may be subject to the international law.

Under the Accession Treaty, as part of the European integration process<sup>10</sup>, the most important targets that needed to be fulfilled by Romania as a Member State were as follows:

- Ensuring a judicial procedure that is more transparent, more effective and more efficient, focusing on strengthening the capacity and liability of the Superior Council of Magistracy, and also, reporting and monitoring the effects of the new Civil Procedure and Criminal Procedure Codes.
- Setting-up, as provided by the Accession Treaty, an integrity agency having verification responsibilities concerning the wealth, incompatibilities and potential conflicts of interests, and which agency to have the competency to issue mandatory decisions on the grounds of which to be able to apply sanctions likely to determine the changing of a specific party's decision to continue or not the action or inaction subject to the integrity agency decision.
- With a view to the progress recorded until that particular moment, to continue to conduct impartial fair professional investigations in case of notices on high-level corruption.

<sup>6</sup> According to the provisions of Art. 139 of the TFEU – The Commission has the right to authorise “the Member State with a derogation” which is in difficulties to take protective measures, the conditions and details of which the Commission shall determine.

<sup>7</sup> M. Badescu, *Teoria generala a dreptului*, Sitech, Craiova, 2014, pp. 123-124.

<sup>8</sup> M. Niemesch, *Izvoarele dreptului internațional și ale dreptului Uniunii Europene*, Hamangiu, Bucharest, 2010, p. 153.

<sup>9</sup> M. Niemesch, *Dreptul organizațiilor internaționale*, Hamangiu, Bucharest, 2015, pp. 5-6.

<sup>10</sup> C. Calinoiu, *Relatii ale dreptului internațional public în contextul procesului de coeziune europeană*, in volumul *Tendințe actuale în dreptul public-Abordare juridică și filosofică*, Universitară, Bucharest, 2014, p. 66.

- Adopting additional measures for preventing and fighting corruption, especially at the level of the local administration bodies<sup>11</sup>.

Based on the commitments undertaken by Romania during the pre-accession period and which needed to be monitored by the European Commission, the European Union proposed a specific safeguard clause for Romania which was also adopted – and also accepted by Bulgaria – providing that, when the Commission's monitoring of the commitments undertaken by Romania until the accession date – the 1<sup>st</sup> of January 2007 – and specifically of the Monitoring Reports, clearly results in an indication that the state of the European *acquis* adoption and implementation is such that there is the risk that Romania is not yet prepared to face all membership conditions, the European Council, acting unanimously on the basis of a Commission recommendation, may decide to postpone the accession date by one year, until January 2008.<sup>12</sup>

For Romania, the Commission has proposed the safeguard clause specific to the Romanian State which provided, on the one hand, that a safeguard clause may be activated by a qualified majority, namely, by a vote from the majority of the Council states, by 72.27% of the votes, accounting for at least 62% of the European Union population, and, on the other hand, that, if it does not fulfil the commitments undertaken for the Chapters Justice and Internal Affairs and Competition, the deferral of the accession date by one year, until the 1<sup>st</sup> of January 2008, may occur.

For the candidate countries and the Member States to gain detailed knowledge on the Union rules, the European Commission has been providing internal and external expertise for the purposes of the cooperation, and provides guidance needed for the reforming, and also, for the purposes of verifying the progress recorded by such. To this effect, the Commission has undertaken the responsibility to submit progress reports on the specific targets to the European Parliament and to the Council, and the purpose of the Commission reports is to assess whether the targets undertaken have been fulfilled, whether there is need for such to be adjusted and, to this end, additional progress reports may be requested, as appropriate.

Ever since Romania's pre-accession and also during the accession periods, each year, in June-July, the Commission issued Progress Reports to the European Union Parliament and to the Council in regard to Romania under the M.C.V., and also, several interim reports for the period February – March of each year.

The Reports submitted by the Commission for the implementation of the Mechanism for Cooperation and Verification consist in four parts, as follows:

1. an introduction to the specific matters of the Mechanism provisions;
2. a thorough analysis of the reform process in Romania, starting with the achievements and challenges of the field and continuing with matters that are implied by the reform of the Judiciary and the fight against

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<sup>11</sup> J. Friedmann-Nicolescu, *Current aspects of Romania's Public Administration and Judicial System* in Journal of Law and Administrative Sciences Special Issue/2015, Petroleum and Gas University Publishing House of Ploiesti, Ploiesti, 2015, p. 249.

<sup>12</sup> I.G. Bărbulescu, *Procesul decizional in Uniunea Europeană*, Polirom, Iași, 2008, p. 304.

- corruption at all levels;
- 3. the conclusions of the Commission evaluation;
- 4. recommendations on the achievement of each individual field.

### **3. Romania and safeguard clause in Reports of European Commission – the point of view of Mechanism for Cooperation and Verification**

In order to become a Member State, Romania needed to fulfil several undertaken targets, which have been continuously monitored by the European Commission.

In respect of the specific targets to be fulfilled by Romania during the pre-accession period, in its first report of 2006, the European Commission identified<sup>13</sup> several matters remaining unclarified and unresolved, especially in terms of the accountability and efficiency of the Judiciary and of other bodies applying the law, which are very sensitive fields, where additional progress is needed in order to guarantee the ability of these bodies to implement the adopted measures for economic stability, for establishing the internal market and for area of freedom, security and justice<sup>14</sup>.

Also in this first Report of the European Commission<sup>15</sup>, it concluded that, in respect of the reform of the Judiciary and the fight against corruption, Romania, as a Member State, must continue and increase efforts in order to fulfil the specific targets undertaken, and especially: to finalise the adoption of a new Civil Procedure Code, continue the adoption of a new Criminal Procedure Code and also, to consolidate the new Criminal Code proposed; to resolve all matters concerning the personnel and the organisational issues of the Judiciary and use the results of the studies and pilot projects so as to establish key performance indicators which to be used in the Judiciary; to prove the efficiency and effectiveness of the newly-established National Integrity Agency; to ensure the judicial and institutional stability of the anticorruption system, including of key institutions such as the National Anticorruption Agency, and to promote firm deterrent decisions for high-level corruption. Furthermore, the Commission also found that much stricter deterrent measures must be taken, such as the tightening of the legal conditions for the conditional sentences and that there was need for conforming judicial training to be organised; also, a more coherent national anticorruption strategy must be established which to cover the most vulnerable economic sectors and local administration bodies, and monitor the implementation of such strategy.

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<sup>13</sup> Brussels, 26.09.2006, COM (2006).

<sup>14</sup> Commission Decision 2006/928/EC of 13 December 2006, JO L 354, 14.12.2006.

<sup>15</sup> *Report from the Commission to the European Parliament and the Council on Romania's progress on accompanying measures following Accession*, Brussels, 27.06.2007 COM (2007) 378 final.

Also in this Report, the most praised measure was the establishment of the National Integrity Agency<sup>16</sup>, aimed at ensuring the integrity in the exercising of public functions and offices and preventing corruption at institutional level, through the exercising of responsibilities concerning the evaluation of the wealth declarations of the concerned parties, of all data and information concerning wealth, and also, of the changes in estate occurred during the office, of incompatibilities and of potential conflicts of interest of the persons covered by the legislation, during the exercising of the latter's public functions and offices.

A second Report of the European Commission was submitted in 2011<sup>17</sup> concluding that Romania had taken significant measures for improving the effectiveness and efficiency of the judicial procedures and had continued the specific preparations for the reform of the Judiciary by the entering into force of the four new codes which were the foundation for a modern judicial process<sup>18</sup>, which is effective and efficient. Before implementing the four new codes, the Small Reform Law had been adopted, which has brought significant improvements in terms of the celerity of the judicial process.

Acting on Commission's recommendations, Romania has promptly responded by adopting a new legal framework for the National Integrity Agency, and it has become operational under the new legal framework and has started to re-establish its track record of investigations. The competent Romanian authorities have decided to carry out reviews of the specific judicial system and of public procurement, making an evaluation of policy on fighting corruption at all levels, although these were not part of the Mechanism for Cooperation and Verification benchmarks. During the same period, the National Anticorruption Agency has showed a consistent and convincing track record in the investigation of high-level corruption cases.

Moreover, Romania had considerably improved the *efficiency of the judicial process* by simplifying certain judicial procedures and introducing new legal tools and institutions, such as greater possibilities for the prosecution to dismiss cases where existing evidence does not warrant further investigation, or the possibility for a defendant to plead guilty in court, thereby shortening trial proceedings. These significant changes in the legal system have aimed at strengthening the efficiency of the prosecution and at speeding-up a number of cases pending in court.

Under the same *Small Reform Law*, the Romanian State has reviewed the competences of the High Court of Cassation and Justice with a view to enabling it to function more effectively as a cassation court. However, these reforms could not

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<sup>16</sup> Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency (A.N.I.) - Published in the Official Gazette, Part I no. 359 of 25.05.2007.

<sup>17</sup> *Report from the Commission to the European Parliament and the Council on Romania's Progress under the Mechanism for Cooperation and Verification*, Brussels, 20.07.2011, COM (2011) 460 final.

<sup>18</sup> C.R D. Butculescu, *Short Considerations Regarding the System of Law from the Perspective of General Systems Theory*, Journal of Legal Studies, Year VII, no. 3-4/2012, Lumen Publishing House, Iasi, 2012 p. 130.

have enough span as to effectively and efficiently tackle the matter of non-unified jurisprudence. The new codes of procedure have introduced a new legal mechanism for unifying jurisprudence – the preliminary ruling, which is an important stage – aiming at complementing the existing mechanism, namely, the *appeal in the interest of the law*. With reference to this proceeding, the concerned judges have the possibility to request to the High Court of Cassation and Justice to deliver a preliminary ruling in a pending casefile, when contradictions are identified in the existing specific jurisprudence.

Although the Report found several significant steps for the improvement of the efficiency and effectiveness in justice, the European Commission issued several recommendations aimed at supporting the Romanian State in focusing its efforts in preparing for the Commission's overall assessment of progress in Romania under the Mechanism for Cooperation and Verification in summer 2012, and such recommendations concerned the following: accountability and reform of the Judiciary, effectiveness and efficacy of the judicial actions, integrity and fight against corruption at all levels.

As such, 2012 the Report of the Commission<sup>19</sup> was adopted at a very delicate moment, when persistent questions were asked in regard to the observance of the rule of law<sup>20</sup> and on the independence of the Judiciary in Romania – as a Member State. Under this Report, the Commission considered that the overall progress needed to be evaluated under the framework of a more comprehensive social acknowledgment of certain essential principles<sup>21</sup>, such as the observance of the rule of law and of the independence of the judicial actions as components of the balance of powers existing in every democracy that must function efficiently and appropriately; a Judiciary that must be efficient, functional and independent, and also, the observance of all democratic institutions, which are the requisite elements for the existence of an environment of real mutual trust within the European Union, and also, for the purposes of earning the trust of own citizens and investors.

Six months after the 2012 Report, in January 2013, the European Commission<sup>22</sup>, under another Report to the European Parliament, it took stock of the specific recommendations previously issued by the Commission on the observance of the rule of law and the independence of the Judiciary, such evaluation pointing out that Romania had implemented only certain of the Commission recommendations covering the restoration and observance of the rule of law and the independence of the Judiciary. While the Constitution provisions and the Constitutional Court's role and decisions had been conformed to, the

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<sup>19</sup> *Report from the Commission to the European Parliament and the Council Romania's Progress under the Mechanism for Cooperation and Verification*, Brussels, 18.07.2012, COM (2012) 410 final.

<sup>20</sup> J.J. Chevallier, *Statul de drept*, Translation from French made by Diana Danisor, Universul Juridic, Bucharest, 2012, pp. 10-12.

<sup>21</sup> M. Tutunaru, *Dreptul Uniunii Europene*, 2<sup>nd</sup> edition, Scrisul Romanesc, Craiova, 2014, pp.34-35.

<sup>22</sup> *Report from the Commission to the European Parliament and the Council Romania's Progress under the Mechanism for Cooperation and Verification*, Brussels, 30.01.2013, COM (2013) 47 final.

commitments undertaken with respect to the independence of the Judiciary and the response to integrity rulings had not been appropriately implemented.

In the Report Conclusions, the European Commission considered that the election of a new legislative body – Parliament – and the appointment of a new executive body – Government – could provide the opportunity to deliver fully and rapidly on the recommendations made. To this effect, the Commission urged the new Government to take the necessary steps. Moreover, the Commission noted the need to accelerate progress on the recommendations covering the reform of the Judiciary, and also, the integrity criteria and the fight against corruption at all levels. To ensure these measures are implemented, the Commission undertook to monitor progress closely, in a constant and permanent dialogue with the competent Romanian authorities, in order to be able, toward the end of 2013, to submit to the Parliament a report on the reform process.

Therefore, the 2013 Report of the Commission continues to stress the importance of appointing a new General Prosecutor and a new management of the National Anticorruption Agency, for these institutions to earn more and more the trust of the public and prove the existence of the independence, integrity and professionalism needed in order to have more consistent results of anticorruption actions. Moreover, the Commission recommendations also highlight the responsibilities of the ministers and parliamentarians in setting strong examples in terms of integrity rule observance.

Later on, the 2014 and 2015 Reports of the Commission on the Mechanism for Cooperation and Verification were able to highlight several other fields in which the reform had been consolidated by the Romanian authorities by means of recording consistent, positive results in time, and continuing this trend is a sign of positive evolution for sustainability purposes. At the same time, the Reports pointed out that the results obtained by the most important judicial and integrity institutions in the field of high-level corruption fighting had been significant and surprising, and the Judiciary, as a whole, had continued to develop and prove professionalism and determination, including by way of the ability to adapt to all significant changes brought by the New Civil and Criminal Codes, of substantial efforts on unifying jurisprudence, and the will to build up a strong defence for the independence of the Judiciary<sup>23</sup>.

#### 4. Conclusions

In conclusion, the Mechanism for Cooperation and Verification was established as a genuine legal rule as part of the European legal order, aiming at preventing and sanctioning certain political and organisational slippages that could have put in delicate legal situations the very functioning of the European Union, and could have determined the discrediting of the very essence of European institutions. Basically, each Report of the European Commission aimed at

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<sup>23</sup> I.Les, *Sisteme judiciare comparate*, All Beck, Bucharest, 2002, pp.30-32.

establishing a reference political and juridical framework. In the absence of a chart that could have ensured a potential concomitance in time of the targets needed to be fulfilled, under each Report, new elements were added *post factum* which, actually, have generated a certain difficulty in terms of the fulfilment thereof, one of the reasons being the inability to anticipate them, and another one being their unique and rather unpredictable feature. In fact, the competent authorities concerned have aimed at fulfilling the targets added under each of these Reports, and this process, without a common anticipation made on the basis of well-established criteria, has been able to generate only a verification of the conditions and recommendations included in each year on the concerned Reports, entailing a reactive achievement, and not a proactive one, as actually required by the cooperation competence under the Mechanism. This way, the internal legal order of the Member State has been positively influenced to consolidate its own evolution mechanisms for the Judiciary, first and foremost, by improving the confidence of the person subject to the law in an efficient, effective, professional and performing Judiciary.

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