

## Worth Having It

*- The Effectiveness of the Co-operation and Verification Mechanism on Romania –*



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## Introduction

Established before Romania's and Bulgaria's accession to the EU, the Cooperation and Verification Mechanism (CVM) meant to insure the post-accession sustainability of EU-driven reforms in the most problematic areas. Today, almost 4 years after Romania's and Bulgaria's accession to the EU, there are lots of political quarrels and misperceptions about the effectiveness of the CVM, both at the EU and the national levels.

The aim of the following paper is to bring a view from the Romanian civil society – which was closely involved in monitoring Romania's anti-corruption policies before and after the EU accession. The Romanian Centre for European Policies and the Romanian Academic Society – two of the leading think-tanks in Romania – implemented in 2009 – 2010 a common project to assess the outcome of CVM. This project delivered four reports and several debates with Romanian NGO's, media, and decision makers. This paper is summarizing the main findings of the reports and the public debates published and organized within this project.

The structure of the paper covers:

- Chapter I - an overall assessment of the anti-corruption conditionalities for Romania before and after accession;
- Chapter II - an expert survey on CVM showing the opinion trends among Romanian NGOs experts and journalists;
- Chapter III - three case studies, each of them relevant for the impact of CVM;
- Annex – a detailed presentation of 29 EU anticorruption conditionalities and their current status.

By presenting all these findings, the authors are trying to answer the main research question: *Was CVM a good policy for the EU and Romania?* There is a strong skepticism in Brussels towards CVM. We strongly believe this skepticism is unfair.

How should the CVM be judged? Measured against some maximalist expectations, CVM has underperformed. Did the CVM succeed in reforming the Romanian judicial system in a profound and sustainable way? It did not. But it is unfair to expect something like that from an external mechanism that has only a limited influence over the decision makers.

Failing to deliver on such maximalist expectations means the failure of CVM? It does not.

A fair assessment of CVM should take into account two criteria:

- a) The changes it brought to the Romanian status quo;
- b) Its success in blocking the attempts to dismantle institutions and rules that were created at the EU request in the pre accession period;

We bring here strong arguments that CVM proved to be efficient when following the above mentioned criteria. It may not be the perfect policy and it may not completely clean Romania of corruption but it has surely achieved its main objective: extending EU's positive influence upon such a murky area as the Romanian anti-corruption sector.

## **I. When, How and Why did Romania Accept the EU Conditionalities in the Anti-corruption Field? *Overview 1999 – 2010***

### ***1.1. The road to the current Co-operation and Verification Mechanism (CVM)***

The first official evaluation of Romania's wish to join the EU was made in July 1997, with mixed results. Considerable progress was required from Romania before being thought to be equipped to join the Union. The 114 page report spoke little about corruption (EC, 1997). Despite pessimistic evaluations, the EC recommended starting negotiations with Romania and Bulgaria in 1999. Opening negotiations with the two Balkan countries was largely a political decision with geo-strategic reasoning. The Kosovo conflict and the military strikes conducted by NATO against Serbia altered the regional situation. Romanian and Bulgarian governments supported NATO despite the pro-Serbian feelings of the public. The EU considered that Romania and Bulgaria deserved to be compensated for supporting the West and for the economic losses caused by the war.

The EC's October 1999 report mentions that corruption was a widespread problem in Romania, which was not addressed with sufficient determination. A special sub-chapter, within the political criteria section, was dedicated to corruption. Still, the EC underlined some general problems with very limited recommendations.

The change of power in 2000 did not change the pro-Western orientation of the country. The new prime-minister Adrian Nastase was eager to prove pro-Western credentials. The public support for European integration was overwhelming. This created both pressure on and incentives for Nastase's government to finish the negotiations. EU integration became the major issue on the public agenda. With the opposition split between right-wing extremists and small democratic parties, the government was unchallenged internally and able to follow its agenda. While it was able to close numerous negotiation chapters, two difficult areas lay unaddressed: agriculture and justice and home affairs (JHA). Anti-corruption was still a matter of political criteria but closely related to justice reform under JHA. Romania was formally respecting the political criteria; however EC reports became more and more critical on the corruption situation. The EC's 2001 regular report on Romania noted there was 'no noticeable reduction in levels of corruption and measures taken to tackle corruption have been limited' (EC 2001: 21). The government responded by taking some legal measures. These failed to convince the EC which became even more critical in a 2002 report (EC 2002). In 2003, the EC took a new step underlining the lack of high-level corruption cases prosecuted. Meanwhile, the government created a special institution to address high level corruption – the National Anti-corruption Prosecutor's Office, but its results remained limited. A pattern occurred in this period, with the Romanian government passing laws and creating institutions and with the EC asking for real results.

In 2003, since corruption had become an embarrassing issue, the government, by way of emergency procedures, passed a massive packet of laws addressing reforms of judiciary and anti-corruption measures. Extensive legislation regarding public disclosure of officials' assets, conflicts of interest and party funding was passed, but the new measures were considered weak by independent experts and the EC (EC 2003 report). Moreover, the EC warned that 'these anti-corruption provisions are not being fully or consistently applied' (EC 2003: 21).

In this context, a second pattern has emerged which remains true even in the present context: The EC asks at first for several legislative changes and institutional mechanisms then notices their poor implementation and comes back with new conditionalities regarding the implementation of laws and the effectiveness of institutions. The EC's 2004 report remained largely critical asking again for real progress. The accession negotiations with Bulgaria and Romania were finished in December 2004. The treaty of accession was signed in April 2005 establishing the accession date for 1 January 2007. In order to ensure the continuation of necessary reforms, a new mechanism was created, with the help of which the EC continued to monitor the two countries. In the worst case scenario, the accession could have been postponed by one year.

The 2004 elections brought to power a new President and a new Government that campaigned on anti-corruption issues. A former anti-corruption independent expert, Monica Macovei, was appointed Justice Minister. The EC appreciated her determination and the new measures taken by the government: 'there has been an increase in the political will to tackle corruption and several steps were taken that could have a positive impact if implemented fully' (EC 2005: 13).

Before 2007, the EC did not recommend a delay to accession, but created a new post-accession mechanism for Romania and Bulgaria, the so-called 'Mechanism for Cooperation and Verification'. This was meant to ensure that the two countries would continue reforms after accession. If they failed to do so, the Commission maintained the option to activate a safeguard clause. There were two such clauses for Romania, one for agriculture and the second one on judicial reform and anti-corruption. Once the safeguard clause was activated, there were no obligations for other Member States to recognize Romanian judicial decisions. Four benchmarks were established in order to evaluate Romania's progress in judicial reform, three of them directly addressing the necessity to continue anti-corruption efforts (EC decision, December 2006).

*BM 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.*

*BM 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.*

*BM 3: Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.*

*BM 4: Take further measures to prevent and fight against corruption, in particular within the local government*

With this new conditionality, Romania got the long awaited EU membership on 1 January 2007. But its first year in the EU proved to be one of the most agitated in its recent history. Only one month after accession, the new majority in Parliament composed of liberals and social-democrats passed a no-confidence vote against Macovei. The prime-minister consequently removed her from the government along with all the ministers who were supported by the President. An impeachment procedure against President Basescu was voted by the Parliament but rejected in a referendum one month later. Throughout the entire 2007 – 2008 period, the Parliament tried to limit the power of the anti-corruption institutions created by EU conditionalities. While praising efforts made by DNA (National Anti-corruption Directorate) prosecutors, the EC criticized other institutions and two reports released in 2008 warned that not a single case of high level corruption was finalized (EC February 2008 and EC July 2008). The sanction related to the CVM was not activated, but the monitoring was prolonged until at least 2010.

***1.2. Conclusions on the effectiveness of conditionalities***

In order to measure the factors that encouraged the compliance, we isolated 29 conditions present in EC reports between 1998 and July 2010 (see the Annex for a complete description and evolution of each of the 29 conditions). We adapted the external incentives model developed by Schimmelfennig and Sedelmeier (2005) to test the power of EU conditionalities in an extreme case: significant distance between EU expectations and the reality in Romania but also the lack of consistent *acquis* (legislation) in this area. For the complete academic perspective on this methodology see our previous report –“When, how and why did Romania accept the EU conditionalities in the anti-corruption field? Overview 1999 – 2010 –” (Ghinea and Tănăsache; 2010).

Each of the 29 conditions was evaluated on a scale (using as sources both EC reports themselves but also interviews with experts and officials):

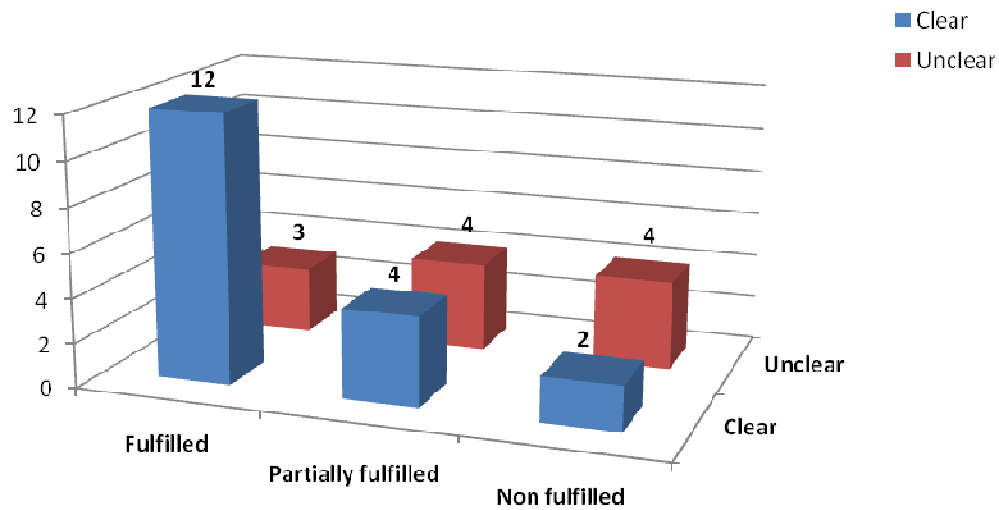
Not fulfilled..... Partially fulfilled.....Fulfilled

***1.2.1 Clarity and *acquis****

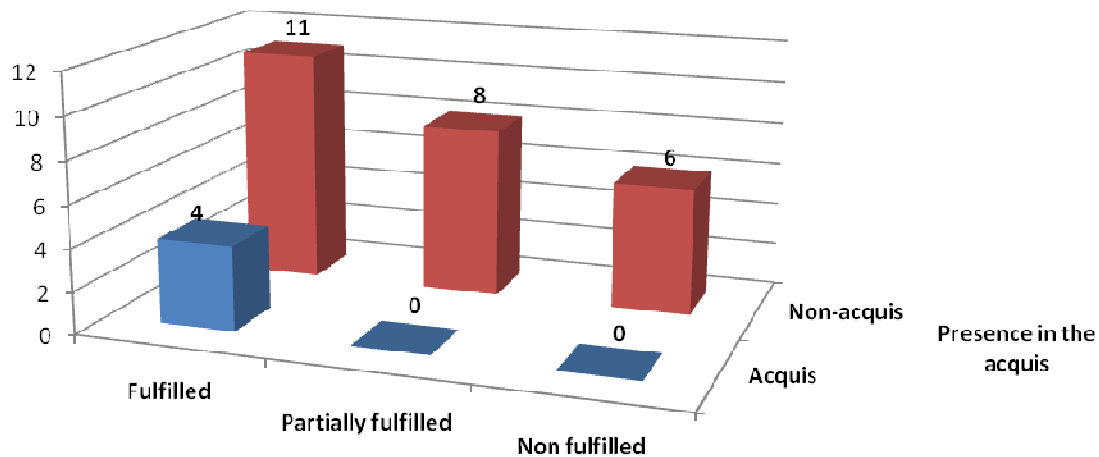
Criteria:

- How clear (measurable) the condition is
- How formal is its character (is it part of the *acquis communautaire* or is it a special requirement developed for particular cases?)

**Fig. 1. Adoption of EU rules depending on the clarity of conditions**



**Fig.2. Adoption of EU rules depending on the presence in the acquis**



**Comments:**

The likelihood of rule adoption increases when the conditions are clear and part of the acquis. At the beginning of negotiations Romania registered serious shortcomings in a vast range of areas. While other chapters were easily closed, the corruption issue remained one with multiple problems and little progress. The EC was thus forced to imagine new conditions to solve this salient problem and it stepped out more from the acquis.

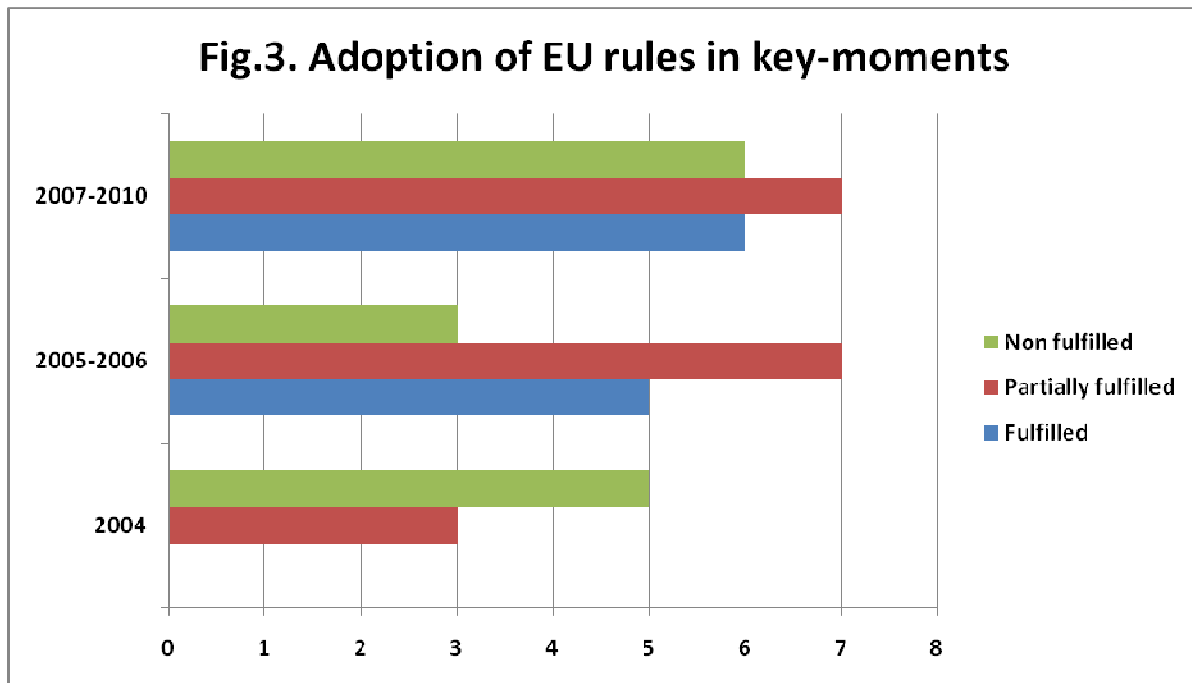
This led to a change in the nature of conditions. The EC moved from asking for laws and new institutions to requiring their implementation and functionality. This inherently created conditions that were fuzzier and more difficult to be measured. To give an example, the EC made the transition from asking for a Law on Prevention and Fighting against Corruption in 1998 to requesting the Romanian authorities to assure the legal and institutional stability of the anti-corruption framework in 2007.

One may notice that all the initial conditions covered by the *acquis* were formal. The assumption was that after the adoption of some laws, they would be implemented. After several years of advocating laws and institutions which tended to remain ineffective, the Commission started to push for practical results and drafted the conditions accordingly.

### *1.2.2 Unclear effects of sticks and carrots – timing is less important than expected*

According to academic model, the bigger the reward, the more significant are the chances of EU rules being adopted. The decision made in December 2004 (closure of negotiations) was the biggest possible reward for the Romanian government, since it meant closing a path that led directly to membership. **Thus a better compliance was to be expected in 2004. But this seems not to have been the case with anti-corruption conditions.** After closing the negotiations, the idea of reward was replaced with the idea of punishment. Romania had to continue progress otherwise the EU was entitled to postpone the accession with one year. According to the theoretical model, the promise of reward is more powerful than the threat of punishment. One should expect a decrease in rule adoption during this period compared with 2004. But this expectation was not confirmed by data.

The idea of punishment continued after accession. Given the discontent with Romania's progress as well as the fact that after accession its usual intervention mechanisms were exhausted, the EC invented especially for Romania and Bulgaria the Co-operation and Verification Mechanism. It was meant to ensure the survival of some rules and institutions which were important for the EU anti-corruption agenda. But the perception was that the sanctions were not meant to be actually implemented or the threat was never credible. One should expect a decrease in the adoption of rules. Actually, the compliance rhythm is superior to the 2004 period although inferior to 2005-2006.



### 1.2.3 Affecting the Veto-Players

The theory of Europeanization often speaks of ‘Potemkin harmonization’ (Schimmelfennig and Sedelmeier, 2005) – which describes the adoption of EU rules which produces purely formal effects: the decision-makers do not implement the new rules or they try to undermine them in practice. This was largely the case with many anti-corruption conditions in Romania. In order to measure this effect we split the conditions in two categories:

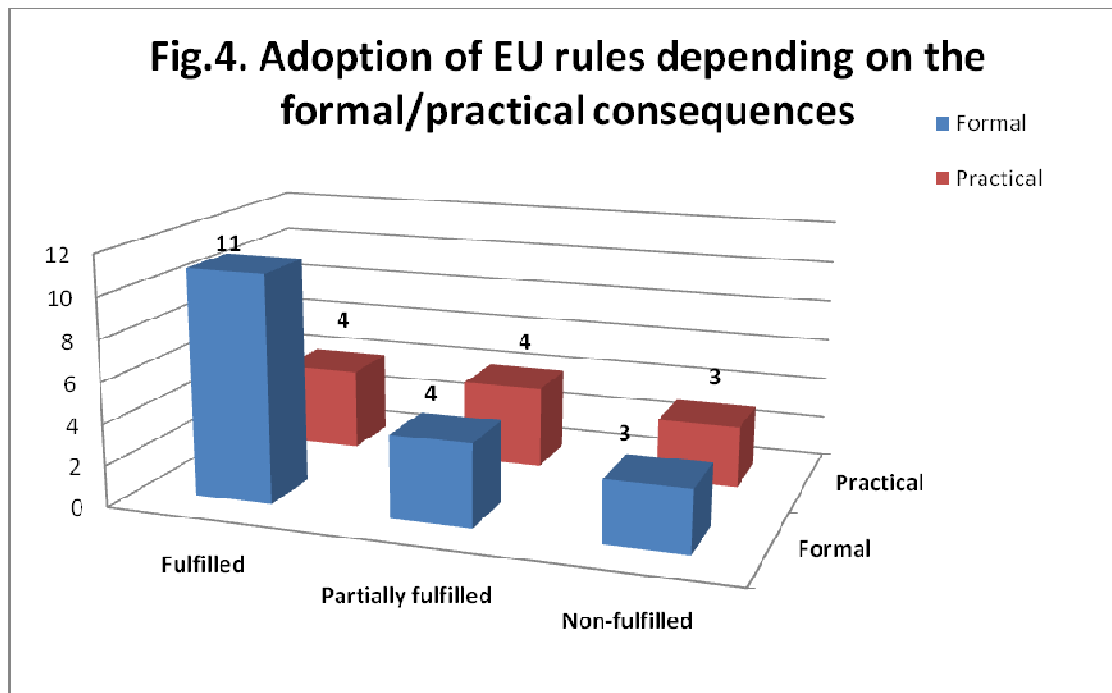
- Formal ones = could have been limited only to formal effects if the decision makers were unwilling to actually implement them.
- Practical ones = created by the EC in such a way as to consider them fulfilled only when they produce real changes (e.g. prosecuting cases, limiting abuses, controlling officials’ assets)

To make the difference clear:

**Formal condition** = ‘independent agency to verify the statements regarding personal wealth’

This appeared as a condition in EC’s report in 2006. The draft law presented by the government was significantly changed in the parliamentary committee. The changes clearly affected the capacity of the proposed agency to produce results. We considered this initial condition to be a ‘formal’ one since it allowed Romanian decision-makers to create a toothless institution. Following the events in Parliament the EC came up in its next report with a more detailed condition, establishing minimum standards for empowering the agency and measurable criteria of activity, going from the ‘formal’ category to the ‘practical’ one.

**Practical condition** = the new institution had to have the `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`.



There is no surprise that the formal conditions were more accepted than the practical ones. In many cases the powerful veto players were able to block the reforms and to change the rules of the game once the institutions had started function. An excellent review of the modalities imagined by the veto players to block high-corruption cases was made by the independent expert W. De Pauw in a report for the European Commission („Expert Report on the Fight against Corruption / Cooperation and Verification Mechanism”; W. De Pauw; 12-15 November 2007). This report was not published by the Commission but leaked to the media and was published by *The Economist* on July 3, 2008.

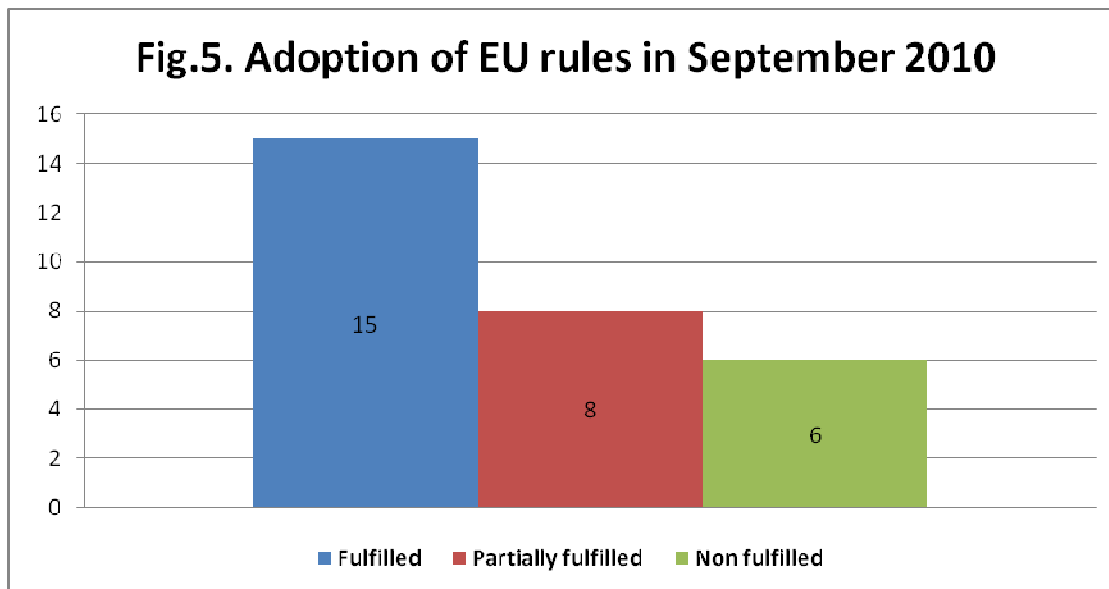
Was the attempt to enforce practical conditions a failure? Rather not. Compared with some judicial systems in Western Europe (although not with all of them), the Romanian judiciary is highly dysfunctional. This dysfunction comes primarily from the political influence and the habit of creating special immunity rules for officials. The status-quo in our case was this de facto immunity of officials. This status-quo was defended by the veto players (many politicians, but also businessmen, magistrates, journalists) and was challenged by the reformist actors – other politicians, NGOs and other journalists. It was an internal war between the status-quo and the reformist forces. Seen in this context, the fact that out of the 11 practical conditions, 4 were fulfilled and 4 partially fulfilled proves a serious challenge to the status-quo (always more powerful internally than the reformist groups).

### 1.3 What was the decisive factor?

EU anti-corruption changed the internal equilibrium of Romania and empowered the anti-status-quo actors. The likelihood of EU conditions being adopted depended on the position of these actors, the conditions having more chance of being adopted when the reformists held power positions.

EU conditions gave anti-status-quo players the opportunity to act and placed the status-quo supporters on defensive positions. This is the main explanation (as it was revealed by the interviews) why 2005 – 2007 saw the increasing in the effectiveness of the conditions. The compliance rate in different periods (discussed above) validates this conclusion. The assumption was to have the best compliance rate in 2004 as the reward was the biggest (closing negotiations). But this assumption was not confirmed by data, since the 2005 – 2007 period shows the most successful rate of complete fulfilment of conditions. That was the period when a new team was empowered in the Presidency, the Government, the Justice ministry (Monica Macovei), the General Prosecutor Office and the National Anticorruption Office.

**Thus we must conclude that differential empowerment of reformist actors was more important for the compliance rate than the timing of EU key decisions on Romania.** This assumption is supported by further qualitative analyses of the conditions. One can notice that some of the conditions only partially fulfilled in 2005 – 2006 refer to measures changed or blocked by other veto-players (e.g. the Parliament and the Constitutional Court blocked the law on the immunity of the former minister).



## II. Asking the Romanian Experts and Media

There is a strange consensus in the Romanian political class that the CVM should end as soon as possible. The various political parties have different reasons to support this idea. The Social Democrat Party criticised the CVM from the very beginning and remained coherent in saying that Romania does not need and should not be monitored in this area. The Liberal Democrat Party and President Basescu often criticize the CVM because it affects the country's status and negotiation power within the EU, although they recognise the positive effects of the monitoring process for the Romanian judicial system.

But the position of the political establishment is not shared by the majority of experts and journalists involved in the judicial and anti-corruption issues. This is the conclusion of an expert survey we undertook this year<sup>1</sup>.

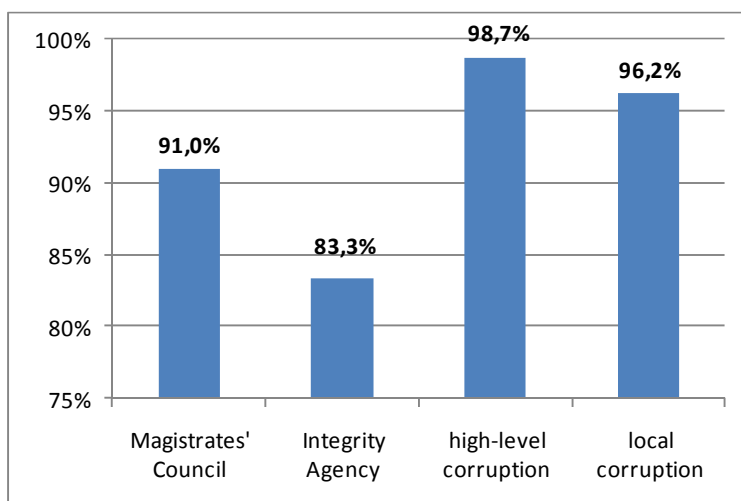
Methodology:

- On line survey
- April – May 2010
- Partnership with University of Essex, using the online polling software Qualtrics
- 84 responses, 60 from journalists (invitations sent to all central media outlets, respondents selfselected within the editorial teams); 24 experts working for Romanian NGOs

This poll's questions closely followed the reasoning of monitoring reports drafted by the European Commission as part of the Cooperation and Verification Mechanism.

### **II.1 General evaluation of the CVM benchmarks**

*Do you consider the benchmark.... to be useful for Romania / unnecessary? (Percentages considering the benchmarks useful)*



<sup>1</sup> The complete results were presented in Ghinea C, Popescu M and Ciucu C; 'The Effects of Justice Monitoring on Romanian Politics and Institutions - *Media and Civil Society Perceptions* -'; CRPE Policy Memo no. 11, June 2010

**Quotes from the open responses – Fragments:**

*All four objectives touched on key areas and forced Romania to act; they kept up interest in the fight against corruption, which otherwise would have been completely compromised.*

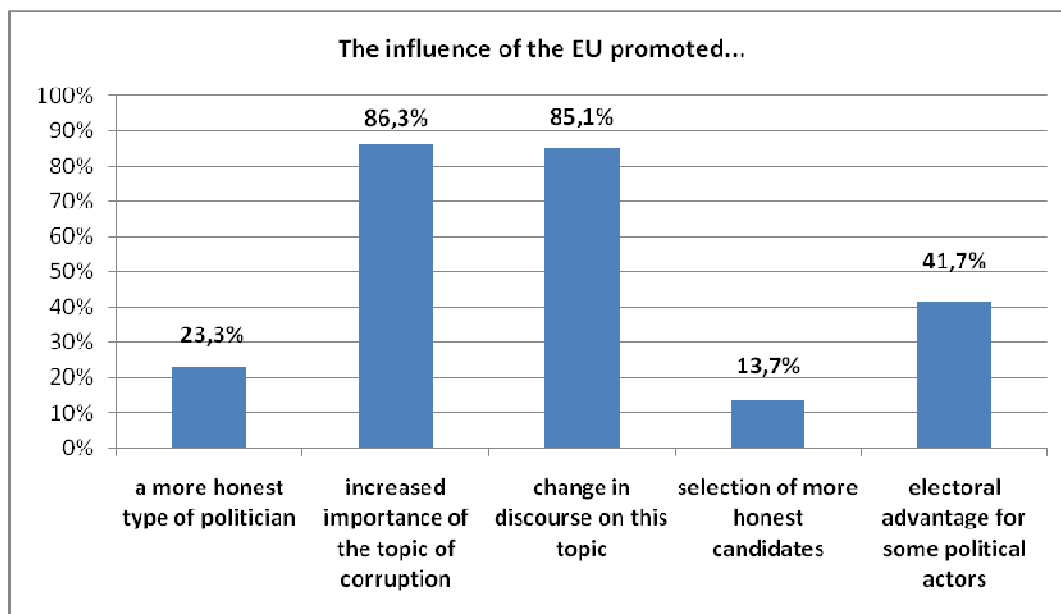
*The entire CVM was useful to Romania, which, without the constraints imposed by the European Commission, probably would not have taken certain measures. Despite the remaining delays, and the periodic stumbles by the European Commission, Romania is still taking measures to reform its judiciary and fight corruption, even if it's not always convincing.*

*Unfortunately the European Commission turned a blind eye to the abuses and lack of transparency in the fight against corruption, while its monitoring reports were not always connected to the realities in Romania.*

*I consider them all to be necessary. As far as I'm concerned, I think it's a problem in the sense that these institutions get moving much more when they're monitored, their activity rises right before the EC reports.*

**II.1.1. CVM and the Romanian political parties**

*In academic literature, there are different specific ways in which EU influence is manifested in candidate countries or those that have recently acceded. In the case of anti-corruption policy in Romania, do you think there was an effect of:*



**Analysis:**

Of the five possible effects tested by our questions, there is a massive discrepancy between, on the one hand, the second and third questions, and, on the other hand, the others. The

respondents believe that the existence of the CVM influences the public agenda by keeping the focus on corruption. One may observe a striking scepticism among respondents with respect to politicians; the dominant opinion is that although the CVM has influenced the public agenda, and thus that of politicians, it did not change their behaviour and practices. Thus an interesting problem appears: **if the CVM and the EU in general had a considerable impact on the agenda, does it also create a long-term pressure on politicians to change their behaviour?** It's a question which this poll cannot answer, and so we limit ourselves to the observation that there is a real rupture perceived by respondents between what is said and what is done by Romanian politicians on the topic of corruption.

**Quotes from the open responses – Fragments:**

Can you explain the concrete ways in which electoral advantages of certain forces and/or political actors was manifested (where applicable)?

*The Romanian leaders interested in supporting the fight against corruption were able to use pre- and post-accession conditionalities as instruments of pressure for reform, especially on the political class. Public opinion had in the EU an independent and external benchmark for better understanding a situation that was presented ambiguously and sometimes one-sidedly in the media. The EU was unable to impose honest political actors and instead just put in an advantageous situation the political actors who knew how to profit from the topic of corruption initiated and sustained by the EU.*

*Politicians spoke “nicely” to make a good impression just in the eyes of voters, not even in those of the EU institutions. Corruption was a major electoral campaign theme, but only thanks to Traian Basescu. Anti-corruption is trendy, a word lacking in substance, but which still makes a good impression on people. People just love to play the judge or applaud those that make speeches about it.*

*I don't think the effects were sensational. It was more as though the general effort to make Romania's administration with the EU more adequate was put in the shadows. The judiciary was in the press way too much. The effects were way too limited qualitatively and at the level of public perception.*

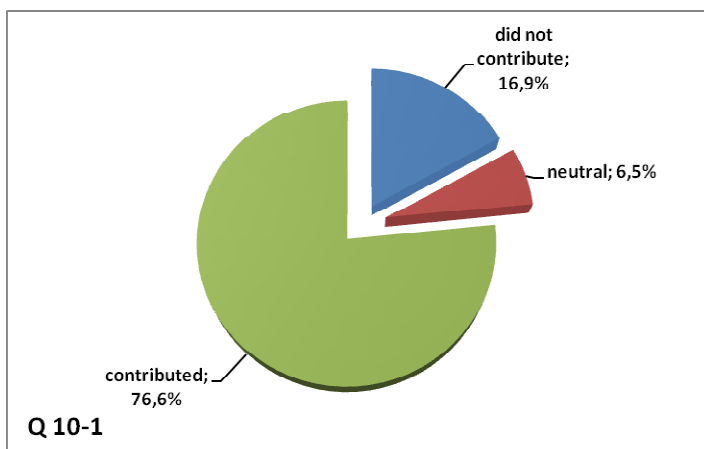
*As an electoral theme, and one which was used intensively, the imperative for a “fight against corruption” provided a decisive electoral advantage to the political forces that had a slimmer corruption case file over those that had more and more visible corrupt members. It did not, however, produce significant systematic effects.*

*The Popular Party + Traian Băsescu played the anti-corruption rhetoric card the best. However, it remained, for the most part, just that – rhetoric.*

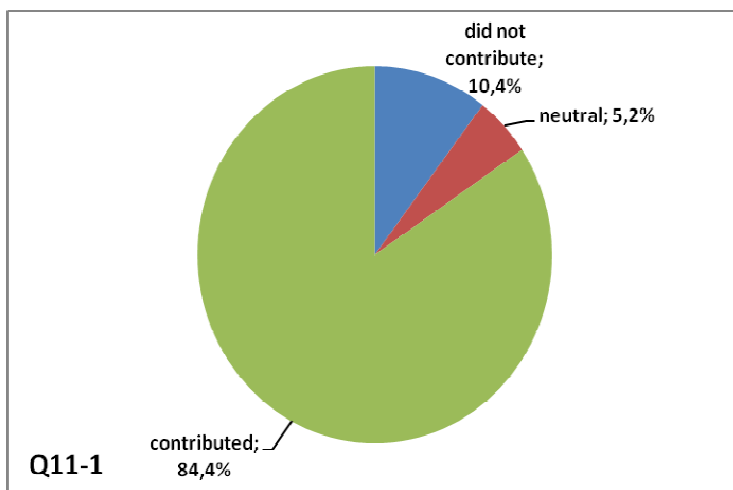
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<sup>2</sup> The correlation between the EU's influence on the increase in the importance of the topic of corruption on the public agenda and the evaluation of the usefulness of the first criterion was 0,29 with a significance of  $p=0,01$ , for the second criterion was 0,25 with a significance of  $p=0,04$ , for the third was 0,25 with a significance of  $p=0,03$ , and for the fourth was 0,26 with a significance of  $p=0,02$ .

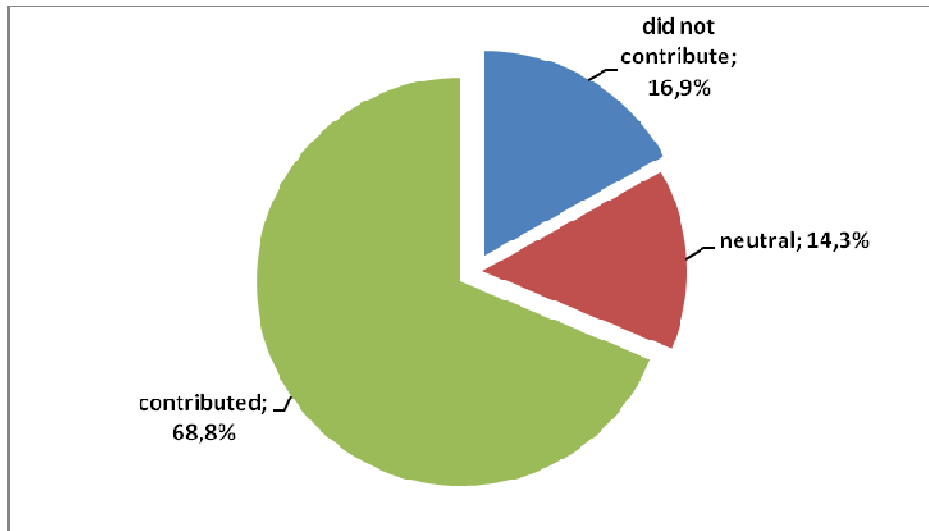
Q10-1. In its regular reports drafted as part of the CVM, the European Commission analyses the activity of the Anti-corruption Directorate and how the investigation of cases of high-level corruption has developed. Do you believe that the existence of the CVM has contributed to the continuation of investigations of high-level corruption?



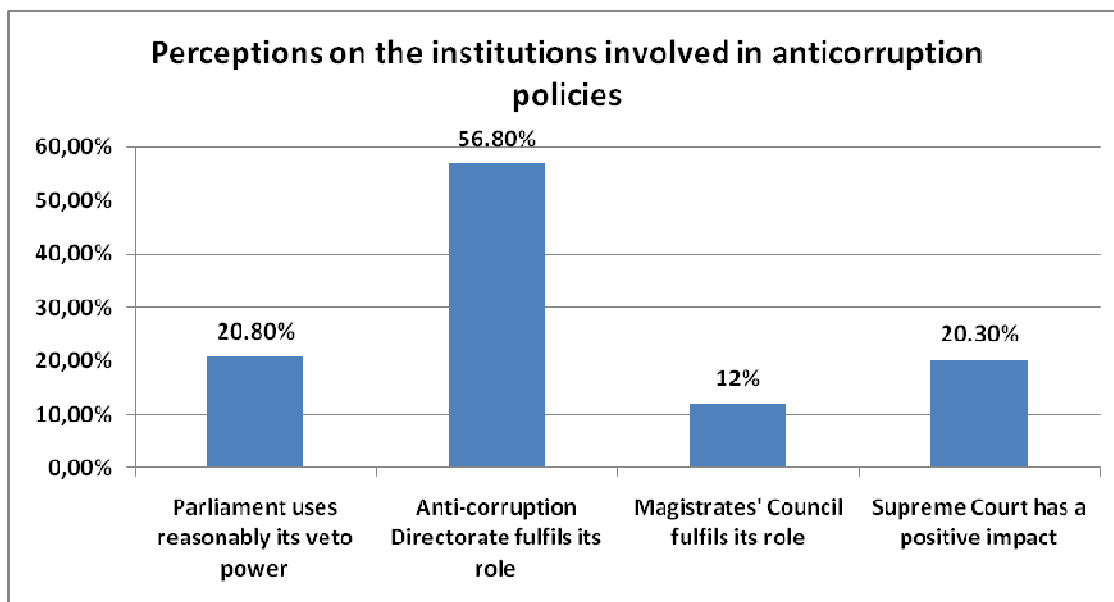
Q11-1. In the same reports, the European Commission identifies a number of barriers raised in the process of investigating high-level corruption. For example, the February 2008 report criticized the draft bill that asked the prior information of the suspects in surveillance and interceptions cases. Do you think the criticisms brought by the Commission contributed to abandoning the idea?



The number of high level cases blocked by the Romanian Parliament fell over 2007-2010, according to EC reports, currently having more cases approved than rejected or blocked. Do you believe the existence of CVM contributed to this development?



Our respondents tend to see negatively the institution involved in the anticorruption policies, with the singular exception of the Anti-corruption Directorate (DNA), which has a limited majority in its favour.



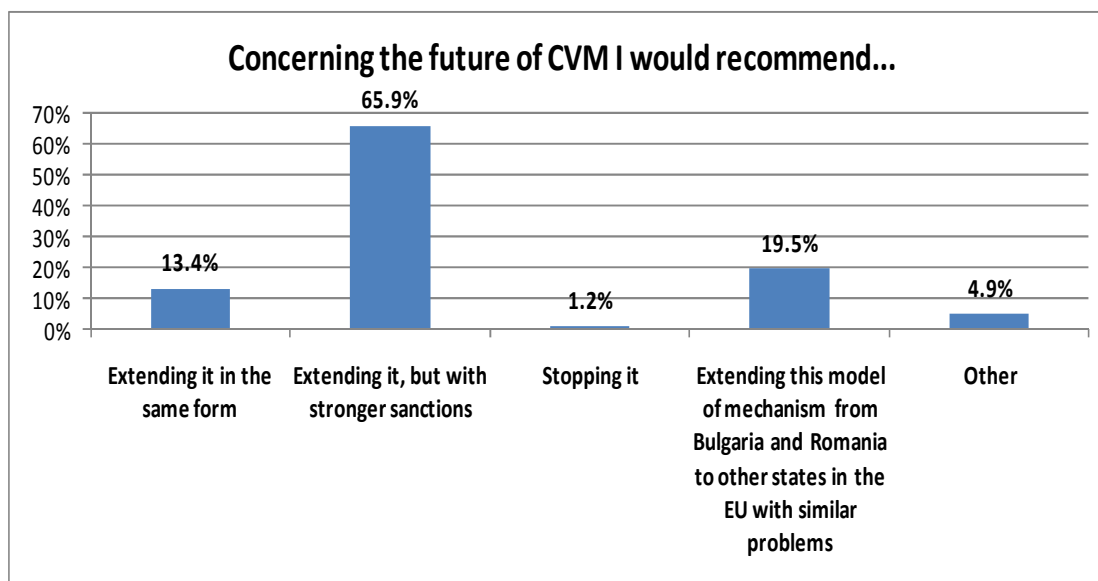
There is a positive correlation between those who believe the CVM encouraged a more honest type of politician and those who have a favourable opinion about DNA.<sup>3</sup> On the other hand, those who consider that the Romanian parliament abused its prerogative to approve the investigation of certain officials tend to evaluate DNA positively. The patterns show then that having a positive opinion on the DNA means having a negative opinion on the Parliament. In this context, CVM is

<sup>3</sup> The correlation is 0,26, with statistical significance of p=0,025.

seen by the respondents as a tool to defend DNA from the attempts of the Parliament to dismantle the institution or to limit its powers.

### II.1.3 Opinions about the future of CVM

*CVM is already in its third year and the European Commission will reconsider the way it functions. There are more options for the future of the CVM. Would you personally recommend...*



*N.B. Insofar as some of the options were not mutually exclusive, respondents were allowed to choose more than one option. Nevertheless, few chose to do this, which is why the scores of the five options add up to 104%.*

**Contrary to the political consensus in Romania, our survey showed a strong preference among journalists and NGO experts for CVM to continue, even with stronger sanctions. There is a strong majority for continuing the CVM or even adding it some supplementary sanctions.** Only 1.2% of our respondents subscribe to what has become the anti-CVM consensus on the political level. There is a visible divide between the political parties and opinion leaders / experts in the area of justice and anti-corruption; the latter expect nothing positive from politicians and invest their hopes in the EU.

**Quotes from the open responses – Fragments:**

*[other possible sanctions] Linking the granting of certain aid, the participation in certain European initiatives in the area of Justice and Internal Affairs to real and sustainable reforms.*

*Romania has a major need for Europe's help to clean itself of corruption. Unfortunately, the current sanctions, while necessary, are insufficient. The Anti-corruption Directorate and Integrity Agency need robust support.*

*The CVM needs to continue, and the EU needs to be a bit more receptive to what is actually happening in Romania. The last few reports were of an increasingly poorer quality, and their impact has begun to be adverse. The EU reports legitimise the leadership of institutions like Anti-corruption Directorate, General Prosecutor, and Integrity Agency which under the guise of the fight against corruption do the dirty work of certain political players.*

*At the end of the day, if there were not a certain amount of pressure on the part of the EU for a serious approach to corruption in Romania I think we would be much farther behind in combating it. Even from the present-day discourses of some elected officials we can deduce that if these external pressures did not exist, institutions like the Anti-corruption Directorate and Integrity Agency would not have been established.*

*It has been historically demonstrated that Romanian politicians don't act toward reform except as a result of external pressures. There is no will from within the system. If the EU doesn't want Romania to be a paradise for corruption, it will have to take harsher measures and forswear political negotiations in virtue of which the critical evaluations are attenuated in the final versions of the evaluation reports.*

### III. Three Case Studies

In the following section we will present several case studies which prove how the existence of CVM influenced the agenda and the decisions made by the Romanian officials. We choose to select some particular cases that have produced fervent debates within the Romanian society. In each of the following cases, the positions assumed by European officials and Member States governments improved the situation.

#### ***III.1 Stopping the changes to the Criminal Procedure Code***

Just one year after its EU accession, Romania faced unprecedented attacks against the Code of Criminal Procedure - the underlying cornerstone of the national framework of fight against crime. The Parliament tried to limit the anticorruption prosecutors' powers and to raise new administrative barriers against the prosecution of high level cases. If Parliament would have been successful in this endeavour the fight against corruption would have been halted and Romania would have become Europe's safe-heaven for criminals.

The main amendments proposed in the Parliament regarded:

1. **The closure of the criminal investigation after 6 months.** All complex investigations in cases of organized crime or economic and financial crime would have been undermined by this amendment.
2. **The prohibition to use phone-tapings before pressing criminal charges.** Under these circumstances wiretapping would have become pointless, since suspects must be informed about the investigation at the moment when criminal charges are pressed against them. Being informed about the investigation, suspects would naturally use their means of communication more carefully; therefore chances that investigators could get relevant information would significantly diminish.
3. **The interdiction to use as evidence the communications intercepted by parties**
4. **The prohibition to have 48 hours phone-tapping approved by the prosecutor and later examined by a judge. This practice is used in other EU countries such as:**
  - a) **Germany** – the authorisation that prosecutors issue under emergency circumstances has to be confirmed by the judge within not more than 3 days;
  - b) **Spain** – the authorisation that prosecutors issue under emergency circumstances has to be confirmed by the judge within not more than 48 hours;
  - c) **Poland** – the authorisation that prosecutors issue under emergency circumstances has to be confirmed by the judge within not more than 5 days;
  - d) **Norway** – the authorisation that prosecutors issue under emergency

- circumstances has to be confirmed by the judge within not more than 24 hours;
- e) **Belgium** – the authorisation that prosecutors issue in cases of flagrant violations and in other cases that are described by the law has to be confirmed by the examining judge within not more than 24 hours;
  - f) The **Netherlands** – the authorisation that prosecutors issue under emergency circumstances, subject to the verbal approval of the judge, has to be confirmed by the judge within not more than 3 days;

*Commission experts had a detailed discussion with the Chamber of Deputies on 8 May 2008 wherein it expressed its concerns on the proposed amendments to the Criminal Procedure Code. We are concerned that these amendments may impede effective investigation and prosecution of criminal cases. These concerns were outlined in our latest report on 23 July 2008. We will continue to monitor the situation closely and comment further when a consolidated version of the amendments have been published".*  
*(Mark Grey, EC Spokesperson, July 2008)*

### **III.2 Integrity Agency loses powers, EU saves the day**

On 14 April 2010, the law on the organization and functioning of the National Integrity Agency (ANI) was ruled unconstitutional following an exception raised in one case involving the confiscation of a large amount of money from a former member of the Parliament. The Court considered that not only the confiscation of illegally acquired assets breached the Constitution, but also the obligation to make public the wealth statements infringed the right to privacy. Moreover, judges believed the powers of ANI to investigate cases had a jurisdictional nature while

**BENCHMARK 2: Establish 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.**

ANI itself was not a judicial institution (thus affecting the constitutional separation of powers). Following the ruling of the Constitutional Court, all investigations carried out by the Agency were suspended. However, information leaked to media claimed the Agency was investigating 7 of the 9 judges of the Constitutional Court in cases linked with their personal assets.

After a meeting with all parliamentarian parties, the Romanian President recommended a fast-track amendment of the ANI law in accordance with the Constitutional Court requirements. In one

of his speeches, the President highlighted the fact that EC reports might link Romania's lack of progress in the judiciary with the accession to the Schengen area foreseen to take place in March 2011.

The new draft law was debated in Senate where it underwent major changes, namely the elimination of the assets' control commissions and the elimination of criminal sanctions if the wealth statement were not filled in correctly. The new law led to serious criticism from the Romanian civil society which asked the President not to promulgate it. Following the President's decision to send back the new law to the Parliament for re-examination, the Chamber of Deputies took into account most of the President's suggestions, namely the re-introduction of the asset control commissions. However, on 30 June, the Senate adopted a text from which the asset control commissions were removed and the period in which officials could be investigated after the end of their mandate was reduced from 3 years to only 1 year. Several EU ambassadors publicly criticized the Senate's version, reminding the officials about Romania's promises under the CVM to have a functional Integrity Agency with real power to control dignitaries' assets. The Hungarian Party senator Gyorgy Frunda who was also the author of the above-mentioned amendments called their intervention 'political pressure at the decision-making level'.

The new law was sent back by the head of state to the Constitutional Court on procedural grounds. After wide criticism from the European Commission (monitoring report issued in July 2010), the Government re-introduced those provisions which had been previously eliminated by the Senate. This version of the text was supported by a wide majority in the Chamber of Deputies, but in the absence of Social Democrats who argued that the new law might be used as a tool in the "political fight". The Senate accepted the new form of the law and reintroduced the obligation for trade union leaders to fill in wealth and interest statements. Although they previously criticized the new law, the National Liberal Party (in opposition) agreed to vote it as a way of supporting Romanian commitments within the European Union. The revised law was promulgated by the President on 31 August 2010.

### ***III.3. Eliminating several blockages***

The Commission made in its July 2010 report the harshest remarks towards Romanian authorities since the beginning of CVM. The criticism concerning various technical aspects was completed by general considerations that accused Romania of not delivering on its accession promises. This new level of criticism completed with the positions of several member states that suggested linking the CVM's monitoring reports with the country's accession in Schengen zone had an immediate impact in Bucharest. Besides the above mentioned interventions to save the powers of ANI, several other measures were adopted after the Commission's report. The Liberal Party agreed to vote the so-called 'Small Reform Bill' - a package of laws meant to speed up the judicial procedures and to eliminate some of its blockages. The measure was advocated by the European Commission in its previous reports.

A similar case concerned the so called `exception of unconstitutionality`. This was a way to delay ruling in the high-level cases. The defendants used to file complaints to the Constitutional Court claiming various legal provisions were not in line with the Constitution. When a constitutional challenge was raised, the court procedure would be suspended until the Constitutional Court issued its decision. This led to a high number of complaints to the Constitutional Court and only in approximately 2% of the cases the Court found the challenged provision unconstitutional. Since 2005 several attempts were made to eliminate the automatic suspension of trials by this procedure. The European Commission raised this particular issue in its 2010 reports, both under benchmark 1 and under benchmark 3:

*‘As regards the duration of the court phase, trials in high-profile cases remain lengthy. In all cases concerning high-level defendants, exceptions of unconstitutionality were raised at least once. Although the Constitutional Court has rejected virtually all such claims to date, many cases have been delayed by more than 6 months whilst the trial is suspended pending resolution of the unconstitutionality exceptions. Two alternative legal amendments to restrict the suspensive character of exceptions of unconstitutionality have been pending in Parliament since September 2009` (March 2010 CVM report)*

*` Exceptions of unconstitutionality continue to delay high-level corruption cases while a draft law eliminating the suspension of trial proceedings when unconstitutionality exceptions are raised still awaits adoption in the Parliament`.*  
(July 2010 CVM report)

After the last report, the draft bill blocked in Parliament since 2005 were finally voted and the procedure was changed in August 2010.

## Annex.

### Compliance with EU conditionalities

Nr.	Conditionality	Report in which is mentioned	Compliance	Comments
1	Law on Prevention and Fight against Corruption	Nov. 1998	Mai 2000 - fulfilled	Source: EC's 2000 report
2	Clear definition of corruption in the Criminal Code	Nov. 1998	Mai 2000 – partially fulfilled  2010 – fulfilled (new Criminal Code)	The definition was included in the 2000 law. We considered it to be only partially fulfilled because the Criminal Code remained unchanged, creating the possibility for the prosecuted persons to use the differences between the general Criminal Code and the particular law on corruption.  Source: EC's 2000 and July 2010 reports
3	Solve the institutional overlapping and create a special independent office to target corruption	Nov. 1998	Mai 2000 – Partially fulfilled  2006 - fulfilled	In May 2000 an Anti-Corruption and Organized Crime Unit was created within the General Prosecutor's office. It was later replaced in September 2002 by the National Anti-Corruption Prosecutor's Office (NAPO). We considered the condition to be partially fulfilled by creating the first structure. EC still criticized some institutional overlapping and the lack of independence of the two bodies. The new legislation on creating the DNA (2006) solved the problems and therefore we considered the condition fulfilled in 2006 (see also the next condition).  Sources: EC's 2000, 2002 and 2006 reports
4	Strengthen the autonomy of anti-corruption office (better definition of the status of the prosecutors, giving prosecutors guarantees for permanence in office)	Oct. 2002	April 2004 – partially fulfilled	The obligation of NAPO to report to Parliament was removed in April 2004. Although it granted the chief prosecutor more autonomy, this change did not provide a better status for prosecutors within the office, as the condition asked for.  We considered this condition only partially fulfilled in 2004. Hereafter, the

				changes in legislation and the creation of DNA clarified the status of prosecutors. In 2006, a decision of the Constitutional Court obliged for a change in legislation and the former NAPO was subordinated to the General Prosecutor's office, creating the Anti-corruption Directorate (DNA). The new office kept its functional autonomy and the condition was modified by the third benchmark of MCV which asked for the stability of the DNA institutional structure (the EC thus appreciated the new office and asked for its stability).  Sources: EC's 2004, 2005 and 2007 reports.
			2007 – fulfilled	
5	Properly staffing and properly funding NAPO	Nov. 2003	September 2006 – fulfilled	The 2004 EC's report considers the staffing request to be fulfilled, but in the same time criticizes the government's decision to lower the financial threshold for cases that the central NAPO structure can investigate because it could overload the office. Because of this contradictory evolution, we considered the objective to be only partially fulfilled in 2004.  The new government raised the above-mentioned threshold in 2005. Taking into consideration other aspects as well, the EC concluded in May 2006 that: `DNA ( <i>replacer of NAPO</i> ) has the staff, financial resources and training to conduct effective investigations into high-level corruption`.  <i>Sources: EC's 2004, 2005 and May 2006 reports</i>
6	Adoption of the Civil Service Act	Nov. 1998	December 1999 – fulfilled	
7	Ratifying two Council of Europe Conventions on combating corruption	Nov. 2000	2002 – July – fulfilled	Sources: EC's 2002 report
8	A fully transparent system of party funding	Nov. 2001	April 2006 – partially fulfilled	EC's 2003 report welcomed improvements in legislation but warned against serious loopholes, such as funding parties through NGOs. In its 2005 report, EC still considers the system not transparent enough. Further improvements were added in April 2006 in order to publish finance sources in the Official Gazette. Still, in the 2008 local election, independent reports raised doubts about the accountability of the system, all major parties spending more than the declared amounts. Since the initial condition went further than the legal

				<p>aspect, we considered it only partially fulfilled by the 2003 and 2006 improvements.</p> <p><i>Sources: EC's 2003 and May 2006 reports.</i></p>
9	Legislation on access to public information	Nov. 2000	October 2001 – fulfilled	<i>Source: EC's 2002 report</i>
10	A new National Strategy to Combat Corruption	Nov. 2001	October 2001 – fulfilled	<i>Source: EC's 2002 report</i>
11	Introducing in legislation the concept of criminal liability of companies	Nov. 2001	December 2005 – fulfilled	<i>Source: EC's May 2006 report</i>
12	Addressing potential conflicts of interest of politicians and civil servants	Oct. 2002	July 2010 – partially fulfilled	<p>In April 2003 the government passed by emergency procedure anti-corruption legislation including provisions on conflicts of interests. Still, in its 2003 report, EC considered the new legislation 'weak and, for politicians in particular, the definition of conflict of interest is limited'. New improvements were added in April 2004. In 2004 report, EC considered that 'Romanian anti-corruption legislation is well developed and is broadly in line with relevant EU <i>acquis</i>'.</p> <p>The problem was not mentioned in the reports released between 2004 and 2010, but it reappears in the EC's July 2010 report: 'the protection against conflict of interest in the law is not sufficiently effective. Several laws address different aspects of conflicts of interest and are not sufficiently harmonised. This leads to confusion regarding the attribution of responsibilities among competent authorities (EC, July 2010: 19). Taking into account the legislative progresses of 2003 and 2004, we considered the condition partially fulfilled.</p> <p><i>Sources: EC's 2003, 2004 and 2010 reports.</i></p>
13	Producing a strategic assessment of the nature and scale of corruption	Nov. 2003	March 2005 – fulfilled	EC's 2005 report considered the document assessing corruption to be 'clear, well structured and operationally focused with deadlines, benchmarks,

				<p>guaranteed budgetary resources and clear institutional responsibilities`.</p> <p><i>Source: EC's 2005 report</i></p>
14	Removing immunity of former ministers from criminal prosecution	Oct. 2004	Not fulfilled	<p>Following a government's decision, EC's 2005 report considered this recommendation fulfilled. But the Romanian Constitutional Court (RCC) rejected the new provision and the immunity was reinstated. RCC considered that former ministers should benefit from the same status as current ministers. Thus, the prosecutors need the approval of the President or the Parliament (for former ministers currently being MPs).</p> <p>Given the fact that former ministers still enjoy exceptional immunity, we considered this recommendation not to be fulfilled.</p> <p><i>Sources: EC's July 2006, 2007 and February 2008 reports.</i></p>
15	Establishing an independent agency to verify officials` personal wealth.	May 2006	2010 – fulfilled	<p>The EC imposed two conditions regarding this agency. In May 2006, EC asked for the creation of an independent agency. In October the same year, it included more details on its responsibilities. Because between May and October 2006, the Commission added clear requirements regarding ANI's competences, changing thus the substance of the condition, we considered them as two separate conditions.</p>
16	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`	October 2006	2010 - fulfilled	<p>Although the creation and effectiveness of ANI was a real adventure, when this paper was written the institution still existed and had a satisfactory legal independence (due to the legislation amended after EC's July 2010 report).</p> <p><i>Sources: EC's May 2006, October 2006, June 2007 and July 2010 reports + press analysis for ANI legislation in 2010.</i></p>
17	Demonstrate the effectiveness of the National Integrity Agency (ANI)	June 2007	Partially fulfilled	<p>Although established in May 2007, ANI was not operational in 2008. The July 2008 report mentioned: `This agency now has to demonstrate that it can monitor financial asset flows, detect and sanction unjustified increases in assets and regulate conflicts of interest.'</p>

				<p>Progresses related to ANI :</p> <p>Progresses made by ANI were praised in the reports issued in February 2009, July 2009 and March 2010: ‘The National Integrity Agency has established an operational record of cases. This needs to be maintained’ (EC February 2009 report); ‘ANI is now operational and has developed a track record of cases’ (EC July 2009 report); ‘The progress of the National Integrity Agency (ANI) has been consolidated and extended’ (EC March 2010 report).</p> <p>Despite this, following the April-June 2010 events, the July 2010 report criticized the new amendments brought to the law on the organization of ANI and warns that “the new law interrupts the encouraging development of ANI and breaches commitments taken by Romania upon accession”.</p> <p>Criticism in regard to ANI:</p> <p>EC’s February 2009 report mentions that further investments in logistics, equipment, case management software and human resources are needed for ANI to achieve full operational capacity.</p> <p>EC July 2010 report warns that the National Integrity Council (the body overseeing ANI) ‘has not been able to act as an interface between ANI and politics and was not able to shield the agency from political accusations and promote its development.’</p> <p>Given this ambivalence, we considered this condition only partially fulfilled.</p> <p>Sources: EC’s reports 2007 - 2010</p>
18	Continue to conduct professional, non-partisan investigations on high-level corruption allegations.	Oct. 2006	Fulfilled	<p>EC’s February 2008 report considered that ‘the DNA continues to show a consistently positive track record for prosecution high level corruption cases, court sentences remain lenient and inconsistent’. The report further criticizes the Parliament for raising legal barriers and the High Court of Cassation and</p>

				<p>Justice for reversing some of the initial decisions.</p> <p>The good progresses registered by the DNA are mentioned in all the reports from the period 2009-2010. However, high-corruption investigations face difficulties following the lack of jurisprudence, weakness of sanctions and procedural delays. Due to the fact that the condition refers to investigations and the work of prosecutors in general, we considered this condition to be fulfilled.</p> <p>Moreover, some of the problems mentioned in EC's reports as obstacles for obtaining sentences have started to be solved. For instance, on 24 August 2010 the Senate adopted a draft law which abrogated a paragraph from the organisation and functioning of the Constitutional Court. Following the adoption of this draft law, processes will not be suspended anymore if an exception of non-constitutionality is raised (98% of the exceptions of non-constitutionality are rejected). The law passed with the votes of the Democrat-Liberals and the Liberals and was validated by the Constitutional Court.</p> <p>Sources: EC's reports 2008 - 2010</p>
19	Assure the legal and institutional stability of the anti-corruption framework including key institutions such as the DNA and promote dissuasive decisions in cases of high-level corruption	June 2007	Partially fulfilled	<p>The stability of the anti-corruption framework is criticised in EC's July 2009 report which mentions that the Parliament's initiative to modify the nomination procedure of chief-prosecutors impedes the efficiency of the judicial system. The same report criticises Parliament's attempt to modify the nomination and revocation procedures for key-positions within the General Prosecutor's Office. However, EC's July 2010 report mentions that the anti-corruption framework remained unchanged.</p> <p>Given the Parliament's attempt to modify the procedures for nominating key-persons in the judiciary as well as the possibility that these may occur in the future, we have considered that this conditionality is partially fulfilled.</p> <p>Sources: EC's reports 2007-2010</p>

20	Further measures to prevent and fight against corruption, in particular within the local government	Oct 2006	Not fulfilled	<p>The report published in July 2008 considers that ‘Romania continues to make progresses in the fight against local corruption, but needs to produce more results’</p> <p>The report issued in July 2009 shows that ‘a complete assessment of progress is not possible. Detailed and verifiable outputs are not available and actual tangible results are difficult to measure.</p> <p>The 2010 report ties the issue of local corruption to the legislative gaps concerning public procurement and conflict of interests. As there is a permanent critical trend in EC’s reports regarding this benchmark and no concrete measures from the part of Romanian authorities, we considered this condition unfulfilled.</p> <p>Sources: EC’s reports from July 2008 and July 2010.</p>
21	Establish a coherent country wide anti-corruption strategy targeting most vulnerable sectors and local administration and monitor its implementation.	June 2007  Again in February 2008	June 2008 – fulfilled	<p>A new national corruption strategy targeting corruption in local public administration was adopted in June 2008.</p> <p>The report released in July 2010 shows that the impact of the ‘National Strategy for preventing and combating corruption in vulnerable sectors and in the local administration sector (2008-2010)’ is difficult to evaluate. However, as the conditionality referred to the elaboration of a strategy, we considered it fulfilled.</p> <p>Source: EC’s reports from July 2008 and July 2010.</p>
22	Assess the results of the recently-concluded awareness-raising campaigns and, if necessary, propose follow-up activities that focus on the sectors with a high risk of corruption	June 2007	Partially fulfilled	<p>The EC July 2008 report mentions that ‘the number and variety of awareness campaigns undertaken by Romanian authorities show a willingness to act constructively to combat local corruption. These campaigns have contributed to raising awareness about the disadvantages of corruption, but more measures need to be taken in order to explain to average citizens how they could combat corruption. Research has not been conducted to determine the most vulnerable sectors, and authorities in some traditionally susceptible sectors, such as health and education, demonstrated little awareness of the</p>

				extent of the problem. Further critical analysis of the impact of campaigns and corruption within different sectors is needed to enable more targeted actions in future. An effective and comprehensive system to collect and follow-up corruption signals of diverse origins providing for easy access and the protection of confidentiality is missing’.
23	Report on the use of measures to reduce the opportunities for corruption and to make local government more transparent, as well as on the sanctions taken against public officials, in particular those in local government	June 2007	Not fulfilled	<p>The EC July 2009 report mentions that ‘detailed and verifiable outputs are not available and actual tangible results are difficult to measure.’ The Strategy is ‘an opportunity that has not been exploited’.</p> <p>The same report shows that ‘the police are reporting an increase in intelligence leads and notifications to prosecutors, whilst there has been an increase in indictments made for corruption by local prosecutors’ offices’</p>
24	Unifying jurisprudence	June 2007	Partially fulfilled	<p>The EC July 2009 report shows that the Supreme Court (ICCJ) ‘does not act as a proper Court of Cassation in charge of the interpretation of the law but as a third (and sometimes first) degree of jurisdiction. This does not allow the ICCJ to play fully the usual role of a Supreme Court, which is to ensure a uniform application of law.’ In addition, the report mentions that it is necessary a ‘reform of the ICCJ to allow it to judge only on legal matters’;</p> <p>The July 2010 report recommends the revision of ICCJ attributions: ‘additional measures to revise the internal organization and working methods of the ICCJ and to the creation of specialized panels while respecting the principle of random allocation of cases’.</p>
25	Design and implement a rational and realistic staffing model for the justice system on the basis of the ongoing needs assessment	June 2007	Not fulfilled	<p>The revised Strategy for the management of human resources in the judiciary was launched by the Magistrates` Council (CSM) on 10 September 2010, immediately after the Strategy for Human Resources 2008-2011 was criticized by the Commission in its July 2009 report because it did not offer solutions for re-allocating staff and reorganizing courts.</p> <p>Since the problem is present ever since 2007 and the measures taken by the CSM have been constantly criticized, we have considered the condition unfulfilled. The strategy published by CSM was not even evaluated when this report was being written, so one can hardly speak about an already existing</p>

				framework, as the condition requires.
26	Develop and implement a plan to restructure the Public Ministry that addresses the existing managerial shortcomings and human resources issues	June 2007	Partially fulfilled	EC July 2010 report mentions the progresses registered in introducing a financial management system and an asset recovery as an indicator for evaluating the performance of prosecutors. However, the same report warns that 'a more fundamental reform of the Public Ministry is necessary'. At the same time, the plan to restructure the Public Ministry does not enjoy the support of CSM which is the only institution which is responsible for the promotion, sanctioning, evaluation, recruitment and transfer of magistracy staff.
27	Monitoring amendments to the Procedural Codes	June 2007	Not fulfilled	EC's July 2008 report mentions that Romanian authorities did not provide information concerning the amendments brought to the Procedural Codes as they only concentrated on the elaboration of the new codes. The following reports issued by the EC do not mention anymore this conditionality.
28	Report and monitor on the progress made, as regards adopting the new Codes including adequate consultations and the impact it will have on the justice system	June 2007	Partially fulfilled	On 22 June 2009, the Government assumed responsibility in front of Parliament on the Criminal and Civil Code by an emergency procedure. The Criminal and Civil Procedural Code were adopted by Parliament on 22 June 2010. The evaluation of the effects that the new codes might produce on the judiciary has not been achieved. The Strategy for the Development of the Justice as a Public Service, launched for public debates, refers to the issue of the implementation of codes (EC report July 2010). Taking into account that the adoption of codes was not accompanied by training sessions and that no impact studies were elaborated on the 4 codes, we considered this condition to be partially fulfilled.
29	Enhance the capacity of CSM to perform its core responsibilities as well as its accountability.	June 2007	Not fulfilled	The July 2008 report shows that 'despite its key role in promoting a transparent and efficient judicial process, the SCM has not yet fully taken responsibility for judicial reform and for its own accountability and integrity'  EC July 2009 report warns that 'the evaluation system introduced by the CSM to assess the performance of magistrates appears of questionable value'.

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