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The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism

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1. Introduction

The aim of this article is to demonstrate the interrelatedness between concepts such as: the rule of law, the principles of subsidiarity and proportionality and the Cooperation and Verification Mechanism (CVM). In this article I will connect the CVM with the concept of the rule of law as envisaged by the European Commission regarding the accession of Romania to the EU through its Progress Reports. The application of the CVM to Romania is analyzed from both a rule of law and a proportionality and subsidiarity perspective.

2. The rule of law

The first use of the phrase ‘the rule of law’ occurred in around 1500.¹ In 1607 the English Chief Justice Sir Edward Coke formulated in the *Case of Prohibitions* a phrase that is similar to the meaning of the rule of law.² The term ‘rule of law’ is to be found in a petition addressed by the House of Commons to James I of England in 1610.³ John Locke referred to the rule of law in the *Second Treatise of Government*, as did Montesquieu in *The Spirit of the Laws*. The rule of law is also mentioned in Samuel Johnson’s *Dictionary* from 1755. The idea that no one is above the law is strongly connected with the period of constitutional drafting in the United States, as Thomas Paine wrote in *Common Sense* (1776) that ‘in America, the law is king (...) in free countries the law ought to be king; and there ought to be no other.’⁴ The Massachusetts Constitution of 1780 declares as its purpose to establish ‘a government of laws and not of men.’

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1 According to the Oxford English Dictionary, the first use of the rule of law is attributed to John Blount: ‘Lawes And constitucions be ordeyned be cause the noisome Appetit of man maye be kepte under the Rwle of lawe by the wiche mankind ys dewly enformed to lyue honestly.’

2 Quoted in the Oxford English Dictionary: ‘the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said (...) quod Rex non debet esse sub homine, sed sub Deo et lege [the King ought not to be under any man but under God and the law].’

3 ‘Amongst many other points of happiness and freedom which your majesty’s subjects of this kingdom have enjoyed under your royal progenitors, kings and queens of this realm, there is none which they have accounted more dear and precious than this, to be guided and governed by the certain rule of the law which giveth both to the head and members that which of right belongeth to them, and not by any uncertain or arbitrary form of government.’ H. Hallam, *The Constitutional History of England*, vol. 1, 1827, p. 441, <<http://www.gutenberg.org/files/39711/39711-h/39711-h.htm>> (accessed on 8 December 2013).

4 <<http://www.gutenberg.org/zipcat.php/147/147-h/147-h.htm>> (accessed on 8 December 2013).

The phrase 'rule of law' became a concept with universal meaning because of the classical work of A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885). Dicey emphasized three aspects of the rule of law: 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'; 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals' and lastly that 'we may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (...) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts'.⁵

What the rule of law exactly means is rather a difficult question because, according to Judith Shklar, this phrase 'has become meaningless thanks to ideological abuse and general over-use'.⁶ Nevertheless, it is agreed that the rule of law does have a formal understanding and a substantive meaning. In a formal understanding, rule of law requirements are fulfilled if the executive power is bound by law. This approach does not give any role to the substance of the law. In the 19th century, when the concept of the rule of law gained its autonomy, the purpose was to subordinate the power of the monarchs and of the governments to Parliament. In Germany, the *Rechtstaat* was defined by authors like Robert von Mohl (1833)⁷ as being opposed to the police state where the executive power had an unchecked control over society. According to Stefanie Ricarda Roos, the purely formalistic rule of law approach proved to be erroneous because many laws or administrative and judicial acts may have a content that breaches fundamental rights. Consequently, the rule of law was given a substantive meaning, in addition to the formal one. For a certain action to be in accordance with rule of law standards, the laws must fulfil some requirements. Therefore, by taking both approaches of the rule of law into account, a state based thereon must guarantee:

- Separation of Powers;
- Legality of Administration, in particular the Principle of Legal Certainty and Unity, part of which are, inter alia, the Principle of Reliability, the Prohibition of Retroactive Acts, and the Principle of Proportionality; and
- The Guarantee of Fundamental Rights and Freedoms and Equality before the Law.⁸

The rule of law is part of the category of common values which are applicable to all EU Member States, among other values such as human dignity, liberty, democracy, equality, human rights and minority rights (Article 2f of the Treaty on European Union, in the version of the Lisbon Treaty). The phrase 'the rule of law' has not always been recognized as being a principle or value which is common to all Member States. The Maastricht Treaty used this expression only when it dealt with development policy which must contribute to the objective of development and the consolidation of the rule of law, without clarifying whether this objective is seen in relation to Member States or to third party states, which are the object of this policy, or whether it envisaged both categories. After the release of the Copenhagen Criteria, adopted by the European Council in June 1993,⁹ the rule of law appears explicitly as a criterion that any state that wishes to accede to the European Union must accomplish. This is the reason why the rule of law has been treated as a separate chapter in all the Reports elaborated by the European Commission and that referred to the state of negotiations with each acceding state. The 1997 Amsterdam Treaty mentions, for the first time, the fact that the European Union is based on, among other principles, the rule of law. Consequently, the rule of law has been considered, from 1997 onwards, to be a common

5 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 1982, pp. 110-115.

6 J.N. Shklar, *Political thought and political thinkers*, (edited by S. Hoffmann), 1998, p. 21.

7 R. von Mohl, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, 1832, <http://books.google.ro/books/about/Die_Polizei_Wissenschaft_nach_den_Grunds.html?id=0zxEAAAACAAJ&redir_esc=y> (accessed on 8 December 2013).

8 S.R. Roos, *The "Rule of Law" as a requirement for accession to the European Union*, Rule of law Program, Lecture no. 3, Konrad Adenauer Stiftung, 2008, p. 4.

9 Presidency Conclusions, Copenhagen European Council 1993, 7.A.iii, <http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf> (accessed on 8 December 2013). On the Copenhagen Criteria, see T. Marktler, *The Power of the Copenhagen Criteria*, 2006 *Croatian Yearbook of European Law and Policy* 2, pp. 343-363.

value to all EU Member States which have fulfilled certain standards and an element that any state willing to be part of the EU must respect.

Nowadays, the European Union promotes the *rule of law* concept, not only within its enlargement policy, but also regarding the Stabilization and Association Process,¹⁰ as well as the European Neighbourhood Policy.¹¹ The use of the concept on a rather large scale has persuaded some authors to discuss a truly *rule of law acquis*.¹²

Many Constitutions of the EU Member States and also of the acceding states refer to the rule of law as a fundamental value.¹³ Consequently, these countries at least affirm the formalist understanding of this concept. Is the 'rule of law' of the Copenhagen Criteria similar to the 'rule of law' as understood by these countries? It is difficult to give an answer to this question without having at least a workable definition of the rule of law that takes different legal traditions into account. Joseph Raz tried to identify some principles that are associated with the rule of law in most democratic societies:

- Laws should be prospective rather than retroactive;
- Laws should be stable and not changed too frequently, as a lack of awareness of the law prevents one from being guided by it;
- There should be clear rules and procedures for making laws;
- The independence of the judiciary has to be guaranteed;
- The principles of natural justice should be observed, particularly the right to a fair hearing.
- The courts should have the power of judicial review over the way in which the other principles are implemented;
- The courts should be accessible, no one may be denied justice;
- The discretion of law enforcement and crime prevention agencies should not be allowed to pervert the law.¹⁴

Raz believes that the validity of these principles depends upon the particular circumstances of every state, but the lack of one of these aspects means that rule of law requirements are not satisfied.

Currently, definitions of the rule of law are provided by international organizations such as the United Nations and the International Development Law Organization or by professional and non-profit organizations, like the International Bar Association or the World Justice Project. The European Union promotes the rule of law without formulating an official definition of the concept. Some authors consider that there is a tacit agreement regarding the content of such a concept that has been reached by the actors that participate in the elaboration and application of the EU's foreign policy.¹⁵

During the period 1998-2004 that followed the introduction of the rule of law in the European Union treaties, a period that coincided with the first steps by states from Central and Eastern Europe in acceding to the EU, the concept encountered serious difficulties in its approach, both by the candidate states, as well as the European Commission.¹⁶ A comparative approach dealing with the successive Reports that described the state of accession negotiations shows that the phrase 'rule of law' is seen as the sum of some components that are different from case to case. This article looks at all the aspects of the rule of

10 The Stabilisation and Association Process is focused on the Western Balkan countries that are not EU Member States. Stabilisation and Association Agreements (SAAs) are similar in principle to the Europe Agreements signed with the Central and Eastern European countries in the 1990s and to the Association Agreement with Turkey. As of December 2013, Albania, Macedonia, Montenegro and Serbia have SAAs in force. Bosnia has an *interim* agreement in force, with its SAA undergoing ratification, while Kosovo has begun negotiations on a SAA with the EU. Croatia formerly had a SAA, but it lapsed when it acceded to the EU in 2013.

11 C. Dallara, *Uniunea Europeană și promovarea rule of law în România, Serbia și Ucraina*, [European Union and the promotion of the rule of law in Romania, Serbia and Ukraine], 2009, p. 72.

12 A. Magen & L. Morlino, 'Hybrid regimes, the rule of law, and external influence on domestic change', in A. Magen & L. Morlino (eds.), *International Actors, Democratization and the Rule of Law: Anchoring Democracy?*, 2009, pp. 1-25

13 E.g., according to Art. 1(3) of the Constitution, 'Romania is a state based on the rule of law'.

14 J. Raz, 'The Rule of Law and Its Virtue', 1977 *The Law Quarterly Review* 93, p. 195.

15 M. Cremona & C. Hillion, *L'Union fait la force? Potential limitations of the European Neighborhood Policy as an integrated EU Foreign and Security Policy*, EUI working paper no. 39/2006; M. Cremona & G. Meloni (eds.), *The European Union Neighborhood Policy: a framework for modernization?* EUI working paper no. 21/1997; T. Börzel & T. Risse, *Conceptualizing the domestic impact of Europe*, in K. Featherstone & C. Radaelli (eds.), *The Politics of Europeanization*, 2003, pp. 55-78.

16 T. Carothers, *Promoting the rule of law abroad: the problem of knowledge*, Carnegie Working Papers, no. 34/2003.

law and especially those which describe the justice reform process, or that are closely connected thereto. The element of the rule of law that emphasizes the need for justice reform has been analyzed in general terms, but also more specifically in the case of Romania.¹⁷ Many analyses made the connection between these Reports and the accomplishment of the rule of law standards, taking into account the Justice and Home Affairs chapter.¹⁸ In general, the ways in which the EU has defined the rule of law standards, so as to improve the judiciary activities of countries that were candidates for accession, but also of states that aspire towards a special status with regard to their relationship with the EU, is an intensively discussed issue.¹⁹ All these analyses come to the conclusion that the EU holds in high regard the improvement of the judiciary, especially when judicial independence and the effectiveness of the judiciary as a whole are at stake. The promotion of this concept in the states that are or have been at different stages of their accession to the EU also takes other aspects into account, like the improvement of administrative capacity, which is necessary for fighting corruption, organized crime and money laundering. In close correlation with all these issues, the EU insists on reorganizing police forces or free access to justice as fairly as possible. Due to these peculiarities, it has been concluded that the rule of law has, according to the EU, a far greater meaning than that used within the acceding states. The notion of the rule of law itself suffers from a great deal of adaptation in such states as a result of Europeanization. Precisely because of this aspect, the rule of law is a concept that is not defined by any official EU document and that tends to determine, through the strict monitoring of some sectors of third party states, changes to the definition of this concept within those states. In this regard, Romania has followed the same path as other states: it started to define rule of law aspects immediately after the 1991 Constitution was adopted and the definition of the concept is now heavily influenced by the way in which it has been interpreted within the framework of the EU relationship.

In order to somehow simplify the analysis of the rule of law concept, we shall refer to a definition given by two authors with important contributions to the literature dedicated to it:

‘the existence of constitutional and judiciary authorities that are independent and functional, of accountable structures that apply the law, of prepared and disciplined forces that apply the law, of a corpus juris able of solving internal matters of great importance, as corruption, organized crime, money laundering, and to ensure the right application of the EU acquis.’²⁰

In Romania’s case, these analyses ceased when the state acceded to the EU or, at best, considered the pre-accession and post-accession phases as a compact timeframe. Cristina Dallara’s analysis stops in 2005,²¹ Ramona Coman’s in 2007.²²

3. The Cooperation and Verification Mechanism

The Cooperation and Verification Mechanism is not nowadays analyzed from the promotion of the rule of law perspective. This is mainly because such an analysis should first of all give a positive answer to the following question: to what extent may the European Union promote compliance with the rule of law, not only with regard to third party states but also with regard to Member States, while taking into account the current Treaty framework? This question, that seems to be simple enough at first glance, is one that cannot be dealt with in a straightforward manner. If we accept that some Member States will endeavour to reach the same level as other Member States with regard to compliance with the rule of law,

17 R. Coman, *Réformer la justice dans un pays post-communiste. Le cas de la Roumanie*, 2009.

18 E. Baracani, ‘EU democratic rule of law promotion’, in A. Magen & L. Morlino (eds.), *International Actors, Democratization and the Rule of Law: Anchoring Democracy?*, 2009, pp. 53-86.

19 Dallara, supra note 11; Coman, supra note 17; D. Piana, *Reforms and judicial cooperation in the European policy of promotion of the “rule of law”. A comparative analysis of new members*, 2005, <<http://anchorage-net.org/content/documents/reforms%20and%20judicial%20cooperation.pdf>> (accessed on 10 January 2014) ; R. Coman & C. Dallara, ‘Judicial reforms within the European studies: from the first research design on Europeanization to the second one’, in R. Coman & C. Dallara (eds.), *Handbook on judicial politics*, 2010, pp. 279-310.

20 Coman & Dallara, supra note 19, p. 288.

21 Dallara, supra note 11.

22 Coman, supra note 17.

does this mean that the rule of law is not a value which is common to all Member States, as is the logic of Article 2 of the Treaty on European Union? Furthermore, if there are differences between the Member States when it comes to respecting the rule of law, how can the EU promote, in the name of all Member States, the principles of the rule of law in its relationship with third party states? This is precisely why the Cooperation and Verification Mechanism is not often analyzed and usually by reference to its technical aspects and how they have evolved from one European Commission Report to another. The Cooperation and Verification Mechanism raises problems that are difficult to solve without undermining the essence of the whole demarche that underlines it.

Before analyzing how the Cooperation and Verification Mechanism is related to the overall institutional architecture of the EU, it is necessary to look at this mechanism.

In order to assess the level of Member State compliance concerning the application of EU regulations and instruments, there is a need to establish monitoring and evaluation mechanisms. These mechanisms are necessary to determine whether a policy is successful in achieving the desired outcomes (evaluation) and to collect data about the extent to which predefined goals have been met (monitoring).²³ The evaluation of rule of law aspects is already a common approach in assessing EU candidate Member States.²⁴ An additional evaluation mechanism has been developed for two EU Member States, Romania and Bulgaria: the Cooperation and Verification Mechanism. 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 Decision on how it may be applied. This Decision is based on the following articles:

‘Article 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 sectoral 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.

Measures shall be proportional and priority shall be given to measures which least disturb the functioning of the internal market and, where appropriate, to the application of the existing sectoral safeguard mechanisms. Such safeguard measures shall not be invoked as a means of arbitrary discrimination or a disguised restriction on trade between Member States. The safeguard clause may be invoked even before accession on the basis of the monitoring findings and the measures adopted shall enter into force as of the first day of accession unless they provide for a later date. The measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the relevant 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. In response to progress made by the new Member State concerned in fulfilling its commitments, the Commission may adapt the measures as appropriate. The Commission shall inform the Council in good time before revoking the European regulations and decisions establishing the safeguard measures, and it shall take duly into account any observations of the Council in this respect.

23 A. Klip et al., ‘Improving mutual trust amongst European Union Member States in the areas of police and judicial cooperation in criminal matters. Lessons learned from the operation of monitoring, evaluation and inventory mechanisms in the first and third pillars of the European Union’, in M. Dane & A. Klip (eds.), *An additional evaluation mechanism in the field of judicial cooperation in criminal matters to strengthen mutual trust*, 2009, p. 109.

24 P. Albers & P. Langbroek, ‘Transnational cooperation in criminal matters between EU Member States: developing an evaluation methodology’, in P. Albers et al., *Final Report – Towards a common evaluation framework to assess mutual trust in the field of EU judicial cooperation in criminal matters*, 2013, p. 63.

Article 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.

These measures may take the form of temporary suspension of the application of relevant provisions and decisions in the relations between Bulgaria or Romania and any other Member State or Member States, without prejudice to the continuation of close judicial cooperation. The safeguard clause may be invoked even before accession on the basis of the monitoring findings and the measures adopted shall enter into force as of the first day of accession unless they provide for a later date. The measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the shortcomings are remedied. They may however be applied beyond the period specified in the first paragraph as long as these shortcomings persist. In response to progress made by the new Member State concerned in rectifying the identified shortcomings, the Commission may adapt the measures as appropriate after consulting the Member States. The Commission shall inform the Council in good time before revoking the European regulations and decisions establishing the safeguard measures, and it shall take duly into account any observations of the Council in this respect.²⁵

The Commission consequently considered that there was an ‘imminent danger’ of a disturbance of the ‘internal market good functioning’ – a disturbance which could not have been unrelated since accession was not yet in effect at the time when the Commission adopted the mentioned Decision. Taking this observation into account, two measures have been elaborated that, according to Article 37, shall fulfil 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’. Commission Decision C (2006) 6569 final observed that there were indeed some unsolved issues in areas such as the ‘the accountability and efficiency of the judicial system and law enforcement bodies’ and because of this it decided to establish some objectives (*benchmarks*²⁶). Romania regularly reports to the Commission on the degree to which these benchmarks have been fulfilled, and the Commission offers technical assistance. Since Commission Decision C (2006) 6569 final is expressly based on the rule of law concept, we may conclude that, from the European Commission perspective, the rule of law is based on the accomplishment of the following objectives:

25 Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union, OJ L 157, 21.6.2005.

26 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 (Albers & Langbroek, *supra* note 24, p. 64).

- (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 local government.²⁷

Of course, the fulfilment of these benchmarks does not mean that Romania will accomplish all the elements of the rule of law, but merely the most important ones that refer to the good functioning of judicial, executive and legislative powers. In this resides the ambiguity surrounding the CVM: there is no definition as to what the rule of law is that underlies the emergence of these benchmarks in order to know what place they occupy on a large scale. In our opinion, determining the relationship between these benchmarks and all the aspects of the rule of law, with the purpose of arriving at an extensive interpretation of these four benchmarks and consequently to have a large-scale system for monitoring respect for the rule of law, was deliberately avoided. This hypothesis is confirmed if we examine the successive Reports elaborated by the Commission with regard to Romania's progress in the CVM framework. The Reports verify to which extent the four benchmarks are being accomplished, and are composed of an 'immobile' part, that remains the same and that is repeated from one Report to another, and a 'mobile' part (some institutions are sporadically considered by the CVM, without being mentioned in the following Report). Due to this considerable diversity of issues included in the Reports that monitor the functioning of the CVM, we can state that any institution or mechanism that is essential for the rule of law has been passed through the CVM filter.

3.1. Proportionality and subsidiarity

Is the monitoring of the benchmarks' achievement in accordance with the Treaty on European Union, in its Lisbon version? The CVM may be analyzed, according to the model that we propose, by showing how it corresponds to the principles of subsidiarity and proportionality and the way in which the areas where EU Member States have exclusive competence are defined. Of all of these, only the proportionality principle is mentioned in Article 37 of the Accession Treaty of the Republic of Bulgaria and Romania to the European Union (without being mentioned at all by Commission Decision C (2006) 6569 final), but not in a direct way, and only as a reference to the proportional measures.

In order to see to what extent the CVM, in Romania's case, corresponds to the two standards invoked, we must first enunciate them:²⁸

Article 4(2): 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

Article 5(3): 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and

27 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.

28 See Consolidated version of the Treaty on European Union, OJ C 83, 30.3.2010.

local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.²⁹

Article 5(4): ‘Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.’³⁰

According to Article 8 of Protocol no. 2 on the application of the principles of subsidiarity and proportionality, the Court of Justice of the European Union does have competence concerning actions with regard to trespassing on the subsidiarity principle by legislation that has been formulated by a Member State or transmitted on behalf of a national Parliament.³¹ This consequently means that Commission Decision C (2006) 6569 *final* may be contested on grounds of breaching the subsidiarity principle, but not the Reports on Romania’s CVM progress since they are not legally binding.

4. The 11th European Commission Report on progress in Romania under the Cooperation and Verification Mechanism – July 2012³²

4.1. Political turmoil in Romania

The July 2012 Report is particularly important due to the fact that it puts into perspective the evolution of the entire Cooperation and Verification Mechanism, from 2007 to the present. This Report was drafted in exceptional circumstances, just a few days after the suspension of the Romanian President by Parliament and during a period of political turmoil. The time when the Report was drafted coincided with an exceptional situation that threatened the rule of law mechanisms in Romania because the suspension of the President was the last step in a very rapid chain of events:

- According to Article 98 of the Constitution, when the President is suspended from office, the Speaker of the Senate and, next in order, the Speaker of the Chamber of Deputies becomes President *ad interim* until a referendum is organized for the dismissal of the President (within 30 days after the suspension of the President by Parliament, according to Article 95 of the Constitution). Therefore, the first move was for Parliament to remove from office the Speakers of both Chambers of Parliament (they were members of a political party which supported the President in office).
- The People’s Advocate (the Ombudsman) has the authority to challenge emergency ordinances by the Government before the Constitutional Court; he was removed from office for that very reason. The new Ombudsman who was appointed did not challenge any emergency ordinance released during this period.
- The law concerning the Constitutional Court was amended by emergency ordinance, so that the Court would not have the power to nullify Parliamentary decisions; up until then, the Court could annul such decisions as those removing the Presidents of the Chambers and the People’s Advocate.

29 On the principle of subsidiarity, as it is regulated by the Treaty on European Union, but also in general, there are some contributions which are worth mentioning. For a general approach to the principle of subsidiarity, see C. Millon-Delsol, *L’Etat subsidiaire*, 1992. For an approach in the EU context, as well as for an account of the literature on this issue, see K. Lenaerts & P. Van Nuffel, *Constitutional law of the European Union*, 2005, pp. 100-111. For a more recent approach that also includes a review of the latest contributions, see P. Craig, ‘Subsidiarity: a political and legal analysis’, 2012 *Journal of Common Market Studies* 50, no. S1, pp. 72-87. For the approach of the principle of subsidiarity in the framework of Romanian legislation and relating it to how it is applied on the European level, see R. Carp et al., *În căutarea binelui comun [Searching for the common good]*, 2008, pp. 59-72.

30 On the principle of proportionality as it is regulated by the Treaty on European Union, see Lenaerts & Van Nuffel, *supra* note 29, pp. 109-114 and also M. Andreescu, *Principiul proporționalității în dreptul constituțional [The principle of proportionality in constitutional law]*, 2007, pp. 100-108. On how the principle of proportionality has been challenged before the Court of Justice of the European Union, see Andreescu, *ibid.*, pp. 237-249.

31 The Court of Justice of the European Union had invoked the principle of subsidiarity even before being granted explicit competence by the Treaty. See T. Horsley, ‘Subsidiarity and the European Court of Justice: missing pieces in the subsidiary jigsaw?’, 2011 *Journal of Common Market Studies* 50, no. 2, pp. 267-282.

32 European Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, Brussels, 18.7.2012, COM (2012) 410 final.

- According to the Law on the organization of referendums no. 3/2000,³³ the President could be dismissed after being suspended from office if 50% + 1 of the voters enrolled on the electoral lists approved the dismissal in a referendum. This law has been amended in order to reduce this validation quorum. The new quorum is 50% + 1 of the voters that have expressed their votes in the referendum, regardless of the total amount of citizens having the right to vote.

As a reaction to this political crisis, the European Commission decided to intervene and to use the July 2012 Report as an instrument to avoid the spreading of this crisis. It decided to do so because it did not have another instrument to deal with what was going on in Romania and because CVM Reports had proved to be efficient, in the sense that the Romanian authorities generally took into account the recommendations that are part of such Reports.

4.2. The demands of the European Commission

On 11 July, the Prime Minister Victor Ponta went to Brussels to explain the political developments in Romania and he had meetings with Martin Schulz, President of the European Parliament, and on the following day with the President of the European Commission, José Manuel Barroso and with the President of the European Council, Herman van Rompuy.

Victor Ponta declared that on that occasion he received a list with concrete requirements and that the Romanian Government will have to provide answers in order to show the European Commission and the Member States that the rule of law and European standards are being respected. These requirements by the European Commission were that Romania should:

- Repeal Emergency Ordinance no. 38/2012 and Emergency Ordinance no. 41/2012;
- Ensure that Constitutional Court rulings on the quorum for a referendum and the scope of the Court's responsibilities are respected;
- Respect constitutional requirements in issuing emergency ordinances in the future;
- Implement all the decisions of the Constitutional Court;
- Ensure the immediate publication of all acts in the Official Journal, including the decisions of the Constitutional Court;
- Require all political parties and government authorities to respect the independence of the judiciary; with a commitment to discipline any government or party member who undermines the credibility of judges or puts pressure on judicial institutions;
- Appoint an Ombudsman enjoying cross-party support, through a transparent and objective process, leading to the selection of a person with uncontested authority, integrity, and independence;
- Introduce a transparent process for the nomination of the General Prosecutor and Chief Prosecutor of the National Anti-Corruption Directorate. This should include open applications based on criteria of professional expertise, integrity and a track record of anti-corruption action. No nomination should be made under the acting Presidency;
- Avoid any presidential pardons during the acting Presidency;
- Refrain from appointing Ministers with integrity rulings against them; Ministers in that situation should step down;
- Adopt clear procedures which require the resignation of Members of Parliament with final decisions on incompatibility and conflict of interest, or with final convictions for high-level corruption.³⁴

On 16 July the Romanian Government sent its answers concerning these 11 requirements to the European Commission. On 17 July the Commission confirmed that it had received the answers and that

³³ *Official Journal* no. 84/3 February 2000.

³⁴ The original document was published in the online version of the Romanian newspaper *Gândul*, see <<http://storage0.dms.mpinteractiv.ro/media/1/186/3927/9859699/4/b9hxhkqi.jpg>> (accessed on 16 January 2014).

‘These additional commitments mean that, if implemented as announced, all the requirements outlined by President Barroso in his meeting on the 12th July have been met, or will be met. Effective and speedy implementation will therefore be crucial. The Commission will continue to monitor the situation, also in the context of the Cooperation and Verification Mechanism. The report on Romania that will be adopted by the College of Commissioners tomorrow will be updated accordingly.’³⁵

The Commission referred for the first time to a direct link between its requirements addressed to Romania in order to respect the rule of law standards and the July 2012 Report on CVM. As a result, this Report mentions all these requirements as recommendations under the heading ‘Respect for the rule of law and the independence of the judiciary’.³⁶

The July 2012 Report includes recommendations in seven areas. Apart from the one that includes the 11 European Commission requirements, other recommendations are related to:

- a reform of the judicial system;
- accountability of the judicial system;
- consistency and transparency of the judicial process;
- effectiveness of judicial action;
- integrity;
- combating corruption.

All these recommendations are related to the attainment of the 4 benchmarks laid down in Commission Decision C (2006) 6569 final.

4.3. CVM benchmarks and the Romanian Constitution

For the benefit of the analysis in this article, each benchmark is presented by comparing it to the constitutional framework of Romania, in order to better understand to what extent the limits regarding the European Union’s intervention, as highlighted by the Lisbon Treaty, have been respected. In this way, we will provide an answer to the following question: was the intervention by the European Commission, with regard to these 11 recommendations but also with regard to all recommendations that are included in the July 2012 Report, in accordance with the principles of subsidiarity and proportionality?

Benchmark 1. The action of the High Court of Cassation and Justice and that of the Superior Council of Magistracy is highlighted, both institutions being capable of ‘resisting political challenges to judicial independence’. The Commission declared that there are reasons for concern with regard to certain actions taken by some members of Government, as well as politicians in general, concerning the Constitutional Court, while noting the fact that the independence of the judiciary and the separation of powers must be respected. The Commission was also concerned by the process through which the Constitutional Court’s competences have been limited.

The July 2012 Report generally notes the progress that has been made with regard to justice in general but it does mention the problem of the non-uniform practice of the courts. The decisions that have been reached by some courts, including the High Court of Cassation and Justice, are not being published in electronic format; hence they are not familiar to many people. There is a database (ECRIS) which includes some decisions, especially of the Appeal Courts, and an alternative system (Jurindex), which is not being updated. The unification of jurisprudence may be realized through the process of awarding prerogatives to the Judiciary Inspection Service which may have the capacity to sanction magistrates who do not apply legal norms in the same manner, as well as the implication of the National Institute of the Magistracy, which may deal with this specific issue in the curricula it offers. The lack of a unified

³⁵ <http://europa.eu/rapid/press-release_MEMO-12-575_en.htm> (accessed on 8 December 2013).

³⁶ For a detailed account of these events that are related to the release of the July 2012 Report, see A. Radu & D. Buti, *Statul sunt eu! O istorie analitică a crizei politice din iulie - august 2012 [I’m the State! An analytical history of the political crisis from July - August 2012]*, 2013, pp. 98 et seq.

jurisprudence is mentioned in the Report especially because it is viewed by some investors as an obstacle, especially in the area of public procurements.

The Report observes that there are multiple responsibilities related to the management of human resources at the level of the courts (the Superior Council of the Magistracy and the Ministry of Justice). The legislation regarding the introduction of court managers is still lingering in the project phase. According to the Report, those that follow the courses set out by the National Institute of the Magistracy will have a better knowledge of the new Codes, as the limited capacity of both recruitment and training within the National Institute of the Magistracy is considered to be an obstacle that must be addressed and remedied.

Benchmark 1, as it was defined in 2006, referred solely to the Superior Council of the Magistracy. The High Court of Cassation and Justice, as well as the Constitutional Court, were not mentioned. The High Court of Cassation and Justice is part of the court system and therefore such a remark makes sense. Regarding the Constitutional Court, the Report does not monitor its activity, but merely states that representatives of other state powers shall not exert pressure on it. By doing this, the European Commission has done nothing more than to reiterate Article 145 of the Constitution which states that ‘the judges of the Constitutional Court are independent’. The Constitutional Court is particularly mentioned only when it is stated that magistrates who do not comply with its decisions when they hear appeals in the interest of the law may be subjected to disciplinary measures, in accordance with Article 99, paragraph s) of Law no. 303/2004 regarding the status of judges and prosecutors, as amended by Law no. 24/2012.³⁷

Regarding the restriction on the Constitutional Court’s competences, the Report refers to the situation that emerged as a result of adopting Emergency Ordinance no. 38/2012 modifying Law no. 47/1992 regarding the organization and functioning of the Constitutional Court,³⁸ by which the Court could no longer determine the constitutionality of acts adopted by Parliament. Emergency Ordinance no. 38/2012 was approved by means of a law which the Constitutional Court had declared to be unconstitutional through its Decision no. 727/2012.³⁹ The Report recommends that Emergency Ordinance no. 38/2012 should be repealed, as well as Emergency Ordinance no. 41/2012 modifying and complementing Law no. 3/2000 regarding the organization and the holding of the referendum.⁴⁰ Meanwhile, the Report recommends that all constitutional requirements should be respected regarding the issue of emergency ordinances and the application of all Constitutional Court decisions, all these measures being addressed by the phrase ‘respect for the rule of law and the independence of the judiciary’. Can the European Commission elaborate such precise recommendations within the framework of the CVM and what is their relationship with ‘national identity’, ‘inherent to the fundamental constitutional structure’, quoting Article 4(2) of the Lisbon Treaty? In this case, it may be clearly stated that the European Union intervened in accordance with the principle of subsidiarity, because the objectives set out by a particular action could not be fulfilled by a Member State on a satisfactory basis. And even if the subsidiarity principle had not existed, such an appreciation would clearly not collide with the provision according to which the limit of the European Union intervention is determined by the constitutional organization of each Member State, because the Constitutional Court had already decided that these normative acts were unconstitutional, long before the Report had been drafted, the recommendation thus becoming a strictly technical one while referring to an issue that had been insufficiently regulated.

Benchmarks 2, 3 and 4. As they were laid down in 2006, these benchmarks envisaged the emergence of an integrity agency, the combating of large-scale corruption, as well as combating corruption at the local level. The Report positively evaluates the long-term activity of the National Integrity Agency (ANI) while stating that it is truly ‘an institution prepared to pursue its mandate with conviction’. Although the National Integrity Agency is reviewed in positive terms in the Report, it does state that the problem of imposing and maintaining some integrity standards in public life, especially through the implementation of an efficient system that would spot incompatibilities, is not just related to the activity of the National Integrity Agency, but also to how the Agency positions itself with regard to other institutions having the

37 *Official Journal* no. 51/21.01.2012.

38 *Official Journal* no. 495/4.07.2012.

39 *Official Journal* no. 477/12.07.2012.

40 *Official Journal* no. 452/5.07.2012.

same objective. In other words, as the Report states, 'the effectiveness of the Romanian integrity system also suffers from slow court proceedings, inconsistent jurisprudence and an insufficient cooperation between other administrative authorities, the judiciary and ANI'. The cases of incompatibility that are being investigated by the Agency are subsequently examined by the courts and a final decision is reached in a matter of years. Even though the Agency has a number of cooperation agreements with other administrative or prosecutors' offices, the only fully functioning agreement is that between the Agency and the National Anti-Corruption Directorate.

Regarding the way in which the National Integrity Agency's activity is presented in the Report, the same question arises as the one that refers to the Constitutional Court. The Agency is not mentioned by the Constitution as being different from the Constitutional Court. Consequently, no matter what kind of recommendation or measure the European Commission makes concerning this institution, it does not clash with Article 4(2) of the Lisbon Treaty. On the compatibility between the subsidiarity and proportionality principles, on the one hand, and the way in which the Report evaluates the Agency itself, on the other, it must be said that the National Integrity Agency emerged as a result of Commission Decision C (2006) 6569 final, in May 2007, by means of Law no. 144/2007.⁴¹ By establishing the National Integrity Agency, Romania has explicitly admitted the fact that the objectives of an action (in the area of establishing and respecting integrity standards) may be accomplished through the common intervention of both the EU as well as a Member State on the basis of a clear separation of competences: The National Integrity Agency acts according to internal infra-constitutional law, as the European Commission periodically evaluates the Agency as part of the CVM.

Concerning the same issue as the National Integrity Agency, the July 2012 Report mentions the fact that in August 2012 the Constitutional Court had rejected an appeal regarding this institution.⁴²

As for the fight against high-level corruption, this Report also positively evaluates the activity of the National Anti-Corruption Directorate in cases involving politicians, starting from 2007 up until the present. The National Anti-Corruption Directorate's activities have led to a rise in the number of convictions in such cases and reliable statistics are mentioned in the Report. In practice, however, there is a lack of unified jurisprudence: the High Court of Cassation and Justice usually registers a higher number of convictions in such cases as opposed to the lower justice levels where the courts still act rather inefficiently within expanded timeframes. Another issue mentioned in the Report is that most sentences in high-level corruption cases are suspended. Those who actually have to serve time in prison represent 40% of the overall conviction rate, but this is still a rate that shows some progress when compared to 2007 when it was just 25%.

4.4. CVM Benchmarks for Romania and the EU principles of proportionality and subsidiarity

As for an evaluation of the fulfilment of those benchmarks, from the perspective that is of interest for this article, namely that of applying the two principles for sharing competence between a Member State and the EU, one has to mention the Report's analysis of parliamentary immunity. In accordance with Article 72 of the Constitution, Members of Parliament may not be arrested or searched without the consent of the House of Parliament where they are members. According to the Report, the refusal to grant this consent in some cases 'generates a de facto immunity from criminal investigation'. The Report mentions the situation of several Members of Parliament, as well as 'a former Prime Minister'. In their case, the refusal expressed by Parliament could be equated with the impossibility of conducting criminal investigations. The Report underlines serious concerns as to the objectivity of such decisions, since Parliament failed to produce an official written statement as to why it opposed measures suggested by the National Anti-Corruption Directorate.

⁴¹ *Official Journal* no. 359/25.05.2007.

⁴² Decision no. 663/2012 on the rejection of the exception of unconstitutionality regarding Article 1, paragraph. (3), Article 6, letter e), Article 10, Article 12, paragraphs (1) and (2), Articles 13 - 19 and Articles 20 - 26 of Law no. 176/2010 regarding integrity in exercising public office, issued to modify and complement Law no. 144/2007 on the establishment, regulation and functioning of the National Integrity Agency, as well as to modify and complement other normative acts, *Official Journal* no. 596/21.08.2012.

Through such an analysis, the European Commission does not question the mechanism of parliamentary immunity, as it is described by the Constitution, but merely tries to depict, in a neutral manner, how these provisions are being applied, in order to evaluate an institution that is regulated by infra-constitutional norms, as in the case of the National Integrity Agency. Thus there is no reason to believe that the 'national identity, part of the fundamental constitutional structure' might have been infringed. The subsidiarity principle is not applicable, because only the *de facto* situation is presented by the Report and no recommendations or imperative norms are taken into consideration.

The second case, where, concerning a description of the fulfilment of these benchmarks, the Report does make a reference that may be related to the application of the two principles of sharing competence between the EU and the Member States relates to the Ombudsman. The relationship between this institution and the fulfilment of the benchmarks assumed by Romania in the CVM framework is that, according to the Report, the Ombudsman 'plays an important role in the fight against corruption in Romania', being 'empowered to conduct investigations concerning alleged illegal acts of the administration'. The Ombudsman does have, according to the law that regulates his activity, the obligation to report serious cases of corruption to Parliament and to the Prime Minister. The previous Reports did not refer to the Ombudsman. The inclusion of this institution in the category of institutions analyzed by the Report (different from the National Integrity Agency and the Anti-Corruption Directorate (the DNA), the activity of the Ombudsman is not evaluated, the relationship between the benchmarks and this institution being briefly described) is justified from the perspective of certain events that occurred when the final version of this Report was drafted, especially the decision by Parliament to revoke the Ombudsman. The European Commission formulates the recommendation to appoint an Ombudsman 'enjoying cross-party support', who will be able 'to effectively exercise its legal functions in full independence'.

This recommendation is made, just as the one related to the abrogation of some emergency ordinances that affects the functioning of the Constitutional Court, under the larger heading of 'respect for the rule of law and the independence of the judiciary'. The issue of breaching the norms describing the sharing of competence between the EU and a Member State is not at stake, because no recommendation is made concerning the way in which such an institution is regulated, either by the Constitution or by the law relating to the Ombudsman's functioning.

From the examination of all 11 recommendations made by the European Commission in this Report, it is obvious that no recommendation includes references concerning the necessity to change the current legal framework.

5. The 11th European Commission Report on progress in Romania under the Cooperation and Verification Mechanism – January 2013⁴³

The January 2013 Report is different from the July 2012 Report as regards its structure. It does not take into account the 4 benchmarks described by Commission Decision C (2006) 6569 final, but rather the 7 Recommendations of the July 2012 Report. This aspect is very important to underline, because it gives rise to a different approach as regards respect for the subsidiarity and proportionality principles. Taking into account the fact that all 7 Recommendations are in line with the 4 benchmarks, the two approaches are not similar but they are strongly related.

- 1. Respect for the rule of law and the independence of the judiciary.** Not all of the 11 recommendations made by the European Commission in July 2012 are considered to have been implemented, especially those related to 'the independence of the judiciary and regarding the response to integrity rulings'. The Commission observes that 'the appointment of a new leadership for the prosecution and DNA is still outstanding'. As for the requirement for the Commission to appoint an Ombudsman enjoying cross-party support, the January 2013 Report observes that such an appointment took place in January 2013 but this step does not entirely fulfil the recommendation, since the Ombudsman has

⁴³ European Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, Brussels, 30.1.2013, COM (2013) 47 final.

received the support of the ruling coalition but not the opposition. This does not mean that, by choosing this procedure, the way in which the Ombudsman has been appointed is contrary to the Commission's recommendation. This attitude shows very effectively how the Commission takes into account the subsidiarity and proportionality principles.

A possible conflict between these principles and the content of the Commission's assessment in the January 2013 Report concerns the discussion on the constitutional reform that was in its very early stages at the time when this Report was drafted. The Commission is very careful in not trespassing on the limits that define what is considered to be a competence of the Member States, namely the content of constitutional norms and this aspect cannot therefore be included in the category of shared competences between a Member State and the EU. The Report does not go into detail concerning which constitutional norms have to be amended or repealed, but it simply states that it is important to respect 'fundamental values such as respect for the rule of law and the separation of powers' that includes 'respect for the Constitutional Court as guarantor of the supremacy of the Constitution, as well as the independence and stability of judicial institutions including the prosecution'. The Commission is concerned not only by the content of the revised Constitution, but also by the procedural aspects, stating that 'it is also important that the debate about possible reform allows enough time and openness to secure through the appropriate constitutional procedure the widest possible consensus'. The Report does not say how such a consensus must be obtained, only that it is desirable to arrive at this outcome.

A completely new issue is discussed under the framework of these Reports, namely harassment against individuals working in judicial and anti-corruption institutions, and harassment by means of media campaigns. The fact that the media exert pressure on justice institutions is a subject that deserves discussion, especially as to how this issue could be addressed from the subsidiarity and proportionality perspective. The Report does not indicate an effective remedy against this kind of pressure on justice, but only states that the National Audiovisual Council shall be 'an effective watchdog'.

One recommendation from the July 2012 Report was not to appoint Ministers with integrity rulings against them and that Ministers in that situation should step down. It does not seem, from the Commission's perspective, that promising developments have occurred since then, since two new Ministers are under investigation for corruption.

In order to fulfil the first category of recommendations from the July 2012 Report, the January 2013 Report makes another set of recommendations:

- Introduce a framework of requirements to refrain from discrediting judicial decisions;
- Review existing standards to safeguard a free and pluralist media;
- Ensure that the new leadership in the prosecution and the DNA are chosen after an open and transparent process;
- The new Ombudsman needs to demonstrate authority, integrity, independence and a non-partisan approach;
- Ministers who are the subject of integrity rulings should step down;
- Parliament shall adopt clear and objective procedures to suspend parliamentarians who are the subject of integrity rulings or corruption convictions.

2. **Reform of the judicial system.** The July 2012 Report recommended the implementation of all four legal codes (Civil, Criminal, Civil Procedure, Criminal Procedure). The Civil Procedure Code entered into force in February 2013 and the entry into force of the Criminal and Criminal Procedure Codes is scheduled for February 2014. Since the last Report, the Ministry of Justice has set out a multiannual strategy for the implementation of the Codes.

Another recommendation has been to reduce the workload pressures on the judicial system. Some legislative changes proved to be effective but the Commission considers that it is necessary to increase the number of judges and prosecutors.

3. **Accountability of the judicial system.** The January 2013 Report points out that the Judicial Inspection Service is working more effectively because of a new legal framework adopted in 2011. The new procedure for being promoted at the High Court of Cassation and Justice is also welcomed by the Commission.
4. **Consistency and effectiveness of judicial action.** The July 2012 Report mentioned the 'transparency of judicial action', but the January 2013 Report refers to the 'effectiveness of judicial action'. These are related because, according to the January 2013 Report, 'the consistency and transparency of the judicial process is a key element in its credibility and its effectiveness'. The Commission has welcomed the fact that since the July 2012 Report, the High Court of Cassation and Justice has taken concrete steps to unify jurisprudence and to improve online access. Two projects related to judicial databases (ECRIS and Jurindex) are underway, as was the assessment in the last Report.
5. **Effectiveness of judicial action.** The Public Ministry, the Directorate General for Anti-Corruption and the High Court of Cassation and Justice have a good track record when it comes to high-level corruption and this, according to the January 2013 Report, is 'one of the most significant signs of progress achieved by Romania under the CVM'.
6. **Integrity.** The National Integrity Agency has developed its efficiency and has started 'an ambitious IT project aiming at collecting data on elected and appointed officials, allowing for a cross-check with other state databases, such as the registry of commerce or the tax office, to detect conflicts of interest', but it needs additional resources. Another issue that is mentioned in the January 2013 Report is that this Agency has issued four incompatibility reports against Ministers and senior officials since the July 2012 Report.
7. **The fight against corruption.** DNA activity is evaluated in a positive way because it has 'continued to investigate and bring forward corruption cases successfully'. The number of final convictions based on the prosecutions launched by the DNA doubled in 2012 in comparison with 2011. According to the January 2013 Report, an important element in combating corruption is the prosecution of money laundering and the confiscation of assets. There has been a new legal framework on extended confiscation since 2012, but the January 2013 Report states that 'it is too early to yet assess its effectiveness'.
The issue of public procurements has been specifically addressed by the July 2012 Report: 'public procurement cases are an exception to the general positive trend regarding high-level corruption cases in court. Such cases require particular skills in prosecutors and judges, fostered through training, specialisation and external expertise'. No advancements concerning this issue have been made, since the January 2013 Report came up with a very similar assessment: 'progress seems very limited in the prevention and sanctioning of corruption related to public procurement. The advances made against high-level corruption have not been matched in public procurement'.

The conclusion of the January 2013 Report is that Romania has implemented several, but not all, of the Commission recommendations formulated in the July 2012 Report aiming at restoring the rule of law and the independence of the judiciary. The next Commission Report will be available at the end of 2013.

6. Conclusion

The rule of law concept is an integral part of the CVM and the different Reports that have been drafted for assessing Romania's progress in the areas of justice reform and combating corruption do mention this concept. The July 2012 and January 2013 Reports do not make an exception to this rule and they concentrate on this concept – all the recommendations are related to the rule of law. The fact that there is no definition thereof in the official documents of the European Commission regarding CVM is an advantage – some institutions or mechanisms may become part of the CVM monitoring at some point in

time and precise recommendations on the way they function may be formulated. This flexible approach is deliberate and is not incidental. Commission Decision C (2006) 6569 only mentions the Superior Council of Magistracy and, in an indirect way, the National Integrity Agency and the Anti-Corruption National Directorate. The July 2012 and the January 2013 Reports do mention, apart from these institutions, the High Court of Cassation and Justice, the Constitutional Court and the Ombudsman as being important from the perspective of ensuring the rule of law.

The answer to the question of why the Constitutional Court and the Ombudsman are mentioned in the Reports that monitor the accomplishment of the CVM benchmarks, even if they are not part of the judicial authority, is given by the importance of these institutions in ensuring the rule of law standards. Fighting high-level corruption and ensuring the independence of the judiciary are, from the European Commission's perspective, the two pillars which underlie the rule of law. The Constitutional Court and the Ombudsman are not relevant *per se*, but it is very important how these institutions relate themselves to these two pillars.

The CVM Reports have not so far been analyzed in relation to the institutional architecture of the European Union and to competence sharing between the EU and a Member State. Because of this, an illusion has emerged that this mechanism does have supremacy even in relation to the Constitution, being composed of norms that are superior to constitutional and legal provisions. From the analysis of the July 2012 and January 2013 Reports that refer to how Romania is complying with the obligations assumed under the framework of the CVM, one can observe that none of the recommendations envisages any change to the current constitutional framework. The assessment of the current constitutional revision by the January 2013 Report only takes fundamental values into account, such as the rule of law or the separation of powers that have to be respected during the process of constitutional reform, without going into detail in this respect.

The recommendations included in the July 2012 Report only provide some suggestions as to how this constitutional framework may be applied in order to correspond to the rule of law requirements. From the perspective of the principles of subsidiarity and proportionality, these recommendations are in accordance. Both Reports deal with benchmarks that Romania has accepted and, by signing and ratifying the Accession Treaty, it may accomplish these benchmarks through a careful monitoring of the institutions and mechanisms related to the functioning of the pillars mentioned above.

As a conclusion, the rule of law is not just a theoretical model that may manifest itself differently from one national level to another; there is a truly EU *acquis* on this issue. This **European Union *acquis* on the rule of law** is complementary to the 'national *acquis*'. The principles of subsidiarity and proportionality have to be applied when dealing with the relationship between the EU *acquis* and the 'national *acquis*' on the rule of law, as they are applied to other issues where the Member States and the EU have shared competences. ¶