



The Cooperation and Verification Mechanism Three Years Later: What Has Been Done and What Is Yet to Come

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What is the Cooperation and Verification Mechanism?

On 1 January 2007 Bulgaria became a member of the European Union. However, according to the European Commission, the country's judicial system and law enforcement bodies still lacked the necessary capacity to implement and apply the measures adopted to establish the internal market and the area of freedom, security and justice. The remaining issues warranted the establishment of a mechanism for cooperation and verification of the progress of Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime.

The cooperation and verification mechanism (CVM) was officially introduced by a Commission Decision of 13 December 2006.¹ Under the CVM, six benchmarks were introduced for Bulgaria and the Bulgarian government agreed to report on a regular basis in addressing them. The first report was submitted on 31 March 2007.

On a regular basis the Commission conducts an assessment of the progress made by Bulgaria in addressing the benchmarks. The findings and conclusions of the assessment are summarised in annual progress reports. The reports are published in the summer of each year and contain a detailed evaluation of progress and concrete recommendations for further reforms. Each winter the Commission

publishes an interim report, providing a technical update on significant developments that have occurred in the last six months. The interim reports do not contain an assessment of progress achieved, i.e. the progress reports remain the main point of reference for the assessment of progress.

Why was the Cooperation and Verification Mechanism necessary?

According to the Commission Decision of 13 December 2006 the main reason for introducing the CVM was the insufficient progress made by Bulgaria during the pre-accession preparations. At the time of accession the country made certain commitments to continue to implement the necessary reforms and tackle the "remaining issues" in the accountability and efficiency of the judicial system and the law enforcement bodies. However, the EU no longer had at its disposal the pre-accession monitoring instruments so a new type of tool appeared necessary to track progress and exert pressure on the national government, when needed.

To respond to this need the European Commission, using as a legal basis the Act of Accession, which empowers the Commission to take appropriate measures in case of imminent risk that Bulgaria would cause a breach in the functioning of the internal market by a failure to implement the commitments it has undertaken (Article 37), introduced the CVM – a combination of a set of benchmarks and an obligation of the country to report on a regular basis on the progress in addressing them.

Thus, for the first time in the history of the European Union newly acceded Member States were made subject to post-accession monitoring.

¹ Commission of the European Communities (2006) *Commission Decision of 13/XIII/2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the area of judicial reform and the fight against corruption and organised crime*, available at: http://ec.europa.eu/enlargement/pdf/bulgaria/bg_accompnying_measures_1206_en.pdf.

The CVM benchmarks: real benchmarks or flexible targets

The European Commission set six benchmarks to be addressed by Bulgaria:

- Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system.
- Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure codes, notably on the pre-trial phase.
- Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually.
- Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report on internal inspections of public institutions and on the publication of assets of high-level officials.
- Take further measures to prevent and fight corruption, in particular at the borders and within local government.
- Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas.

Despite called “benchmarks” the six items listed by the Commission are not real benchmarks. In general, a benchmark represents a standard or best practice against which something can be measured or judged. The Commission’s benchmarks under the CVM resemble more targets or tasks that Bulgaria should complete rather than a standard against which progress can be measured. Moreover, the CVM does not offer any tools for evaluating or measuring progress, which is usually an integral part of any benchmarking instrument.²

² Center for the Study of Democracy (2007) *Policy Brief No 11: The Future of Corruption Benchmarking in the EU*, available at: <http://www.csd.bg/fileSrc.php?id=2117>.

Indeed, what the CVM actually provides for is a set of targets and tasks, most of which are defined in quite an abstract manner, e.g. “take further measures to prevent and fight corruption” or “continue the reform of the judiciary”. Setting up such broad targets clearly shows that the **CVM is a political instrument rather than a technical one**. This means that whether Bulgaria has satisfactorily addressed the benchmarks or not would be a political decision on the part of the Commission and the Member States.

Meanwhile, the broad definition of the benchmarks opens the door for the Commission to set **specific targets through its regular reports** under the CVM. In its reports the Commission often translates the benchmarks into specific actions that the national government is expected to undertake such as adoption or amendment of laws and regulations, setting up or restructuring of institutions, etc. As an example, in the 2009 regular report the Commission recommended actions such as: “set up specialised structures for prosecuting and judging high level corruption and organised crime cases with appropriate functional and political independence” and “consider a thorough reform of the Penal Procedures Code to simplify criminal proceedings and to reduce excessive formalism”.

Is the CVM’s leverage fading away?

Another very important issue related to the future of the CVM is its leverage. In particular, the impact and the effect of the CVM has been questioned following the expiry of the main safeguard clauses that used to serve as potential sanctions for lack of compliance.

The Accession Treaty of Bulgaria and Romania provides for **three safeguard clauses**:

- **General economic safeguard clause** (Article 36): protective measures that Member States can take to remedy economic difficulties experienced as a result of accession;
- **Specific internal market safeguard clause** (Article 37): safeguard measures that the European Commission can undertake if Bulgaria (or

Romania) fails to implement internal market legislation with a cross border effect and this risks a serious breach in the functioning of the internal market; measures can cover the four freedoms and other sectoral policies such as competition, energy, transport, telecommunication, agriculture and consumer and health protection;

- **Specific justice and home affairs safeguard clause** (Article 38): safeguard measures that the European Commission can undertake 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 relevant instruments in the area of criminal or civil law; 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.

The triggering of each of the three safeguard clauses (by a decision of the Commission upon motivated request of a Member State or on its own initiative and after consulting the Member States) could have been done until the end of a period of up to three years after accession, i.e. **until 1 January 2010**.³

The **safeguard clauses were directly linked to the progress of Bulgaria under the CVM**. The Commission Decision of 13 December 2006 explicitly states that "if Bulgaria should fail to address the benchmarks adequately, the Commission may apply safeguard measures based on articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute, under the conditions laid down in Community law, Bulgarian judgements and judicial decisions, such as European arrest warrants".

So far, in its regular reports under the CVM the Commission always included a reference to the safeguard clauses as a way of reminding the national government that lack of progress might entail serious sanctions. Although according to Commis-

sion officials the triggering of any of the safeguard clauses was never seriously considered, their very existence put the government under certain pressure to move forward with the expected reforms.

Now that the three-year period is over and the safeguard clauses can no longer be triggered many questioned the future impact of the CVM and Commission's leverage to insist on addressing the benchmarks. The main issue in this respect is whether the CVM will be able to deliver the expected results without appropriate sanctions for lack of compliance.

When trying to answer this question one should have in mind that on the one hand, the **safeguard clauses were not designed to specifically serve as sanctions under the CVM**, and on the other hand **they are not the only instrument** available to the Commission to ensure that Bulgaria (and Romania) will continue to pursue the targets set under the CVM.

In its 2009 regular report on the progress of Bulgaria the Commission explicitly explained the link between the CVM and the safeguard clauses. According to the report: "In public discussion of the CVM there is often confusion between the likely duration of the Mechanism and the time limited safeguard clauses contained in the Treaty of Accession. There is no automatic link between the CVM and the safeguard clauses enshrined in the accession Treaty for Bulgaria. Safeguard clauses are a standard feature included in accession treaties. The safeguard clauses were introduced to ensure the efficient functioning of the internal market and of the area of freedom security and justice".⁴

Despite the expiry of the period in which the safeguard clauses could have been triggered, the CVM continues to be backed by other, even stronger, instruments for ensuring compliance. The most important of them is the remaining possibility for the Commission to **suspend EU funds**. Although the

³ European Union (2006) *Protocol concerning the conditions and arrangements for admission of the republic of Bulgaria and Romania to the European Union*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:157:0029:0045:EN:PDF>.

⁴ European Commission (2009) *Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0402:FIN:EN:HTML>.

progress under the CVM and the allocation of structural and agricultural funds is not formally linked, according to EU officials the Commission may regard the lack of progress under the CVM as a lack of capacity of the country to appropriately manage EU funds, which in turn may result in suspension of funding. Thus for example, the Commission has the power to interrupt, suspend or cancel the disbursement of funds for the programmes under the structural funds if it suspects or detects cases of irregularities or fraud including corrupt practices. The lack of progress under the CVM in the area of fighting corruption and organised crime can easily be interpreted by the Commission as creating environment favourable for corruption and based on such a conclusion the funds can be suspended.

In addition to the potential suspension of EU funds, another important instrument available to the Commission is the acceptance of Bulgaria in the **Schengen area**. Bulgaria and Romania are among the few Member States that are still outside the Schengen. The two countries are still bringing their border controls up to the required standard and according to the most optimistic forecasts they will hardly become full members before 2011. Until then, according to EU officials, any lack of progress under the CVM can be interpreted as a shortcoming in the preparation for joining the Schengen area and may potentially lead to postponing the expected membership.

Who stands behind the CVM: EU vs. Member States?

To better understand the CVM and its role for both the EU and the monitored Member States one should take into account what is the driving force behind the mechanism.

It is a common understanding that the CVM is an instrument administered and used by the European Commission. Indeed, the European Commission plays a crucial role in the implementation of the mechanism, from setting the benchmarks to tracking progress and drafting the reports. The CVM was launched through a decision of the Commission and it is the Commission that is responsible

for communicating with the national governments, conducting missions in the target countries and assessing the progress made.

However, despite the leading role of the European Commission, it is not the only actor on whom the implementation of the CVM depends. The **Council of the European Union has also played and will continue to play a key role** in the monitoring done through the CVM. The Council supported the idea of introducing such a mechanism even before the accession of Bulgaria and Romania and that was explicitly underlined in the *Council Conclusions on Bulgaria and Romania* adopted in October 2006. According to this document: "The Council supports the mechanism to be set up for cooperation and verification of the progress in the area of judicial reform and the fight against organised crime and corruption, including, if necessary and appropriate, the possibility to impose safeguards, as well as the other measures identified by the Commission to accompany Bulgaria's and Romania's accession. These will aim to ensure the proper functioning of EU policies and institutions after accession".⁵

The Council is strongly involved in the implementation of the CVM as well. After the publication of each report the Commission officially presents it to the Council and the **Council adopts its own conclusions** on the Commission's findings. On the one hand, through these conclusions the legislative body of the Union (the Council) gives its official sanction to the work done by the Union's executive body (the Commission). On the other hand, by confirming the findings and recommendations of the Commission, the Council enhances their effect on the monitored Member States.

Last but not least, individual **Member States also play a significant role** in the implementation of the CVM. This role is most strongly manifested in the conclusions of the Council, which are usually based on the Member States' positions (unlike the European Parliament where the political parties

⁵ Council of the European Union (2006) *Council Conclusions on Bulgaria and Romania*, available at: <http://register.consilium.europa.eu/pdf/en/06/st14/st14109.en06.pdf>.

have the leading role). The composition and the voting arrangements of the Council in practice allow individual Member States to strongly influence the Council's decisions. According to various reports the Council's support to the CVM actually comes from the firm position in favour of the mechanism expressed by several Member States including primarily donor countries to the EU budget (e.g. Germany, Austria, the Netherlands, Sweden, and Denmark).

An indication of the involvement of Member States is also the fact that some of them have their own **domestic procedures for reviewing the Commission's regular reports** under the CVM. In the Netherlands, for example, after the publication of each report by the Commission the Dutch parliament officially requests from the government to summarise and assess the Commission's findings. Responding to this request, the government sends back to the parliament an official letter containing comments and remarks on the report. Some of these remarks clearly demonstrate the position of the government not only towards the CVM but also towards the progress made by the reviewed countries. For example, in its part concerning Bulgaria the letter sent following the Commission's report of July 2009 identified a number of shortcomings, including the lack of political will to implement irreversible reforms. The content of the letter was made public and was discussed in the other Member States, including Bulgaria, which further confirms the conclusion that Member States are not only passive users of the CVM but are also actively influencing its implementation.

The timeframe: is the CVM a never-ending process?

The Commission Decision of 13 December 2006 does not envisage any deadline for Bulgaria to fulfil the set of benchmarks. There is no time limit for the implementation of the CVM either. In fact, the only indication as to when the mechanism will be lifted is the provision stipulating that the **CVM can be repealed "when all the benchmarks have been satisfactorily fulfilled"**.

The lack of a timeframe for the implementation of the CVM has provoked various interpretations on the part of Bulgarian politicians and experts. Debates on how long the CVM will be applied and whether or not it should be kept are getting particularly intense after the publication of the Commission's reports and in the course of important domestic political events like elections and pre-election campaigns. Thus for instance, when commenting on the Commission's report of July 2009, many leading politicians referred to the potential lifting of the CVM. Opinions ranged from expectations that the CVM may be lifted in 2010 to open criticism describing the prolonged application of the mechanism as unacceptable.

To avoid speculative interpretations and give a realistic assessment as to how long the CVM will continue to apply one should take into account a couple of important factors.

On the one hand, the legal basis of the CVM clearly shows that **it was designed as a long-term tool**. The lack of any specific time limits and the binding of the mechanism's implementation with the satisfactory fulfilment of the benchmarks clearly show the Commission's understanding that the CVM will stay until convincing results are achieved. Moreover, the Commission has explicitly stated that it sees all the benchmarks as closely interlinked and that it does not envisage removing the benchmarks one by one but rather working with Bulgaria to the point where the CVM in its entirety is ended".⁶

Furthermore, the Commission has explicitly preserved its power to **adjust the benchmarks** if its own assessment points at such a need. The option of adjusting the benchmarks if necessary is a further confirmation that the CVM is seen as a long-term exercise, i.e. the implementation of the mechanism can legally be prolonged even when the benchmarks are formally fulfilled, if results are not satisfactory.

⁶ European Commission (2009) *Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Cooperation and Verification Mechanism*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0402:FIN:EN:HTML>.

In its 2009 regular report on the progress of Bulgaria the Commission also made it clear that the CVM is a long-term instrument and its application depends entirely on the achieved results. According to the report: "The CVM has now entered its third year. It was not introduced for a fixed period, as it should only be removed when all the benchmarks it set have been satisfactorily fulfilled. It is clear that meeting the objectives set in the benchmarks is a long-term task: for instance, tackling the root causes of corruption and eradicating organised crime will take time. The kind of deep-seated changes that are needed can only come from within Bulgarian society. The CVM is a support tool in this endeavour; it is not an end in itself nor can it replace commitment that Bulgarian authorities need to make in order to align the judicial system and practice with general EU standards".⁷

On the other hand, one should take into account the **strong support to the CVM expressed by some Member States and the Council**.

In its very first conclusions of July 2007 the Council explicitly noted that it "appreciates that the Mechanism for Cooperation and Verification is working well and is contributing positively to the results achieved so far".⁸ Since then the **Council continued to consistently underline the positive impact of the CVM and further consolidated its position on the necessity of the mechanism**. Three years after the introduction of the CVM the Council is still convinced that the mechanism should be kept: "Recalling that the Cooperation and Verification Mechanism has now entered its third year, the Council notes that it is an **appropriate tool**, and that **it will remain in place pending the results** expected in this framework".⁹

⁷ European Commission (2009) *Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Cooperation and Verification Mechanism*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0402:FIN:EN:HTML>.

⁸ Council of the European Union (2007) *Council Conclusions on the Mechanism on Cooperation and Verification for Bulgaria and Romania*, available at: <http://register.consilium.europa.eu/pdf/en/07/st11/st11904.en07.pdf>.

⁹ Council of the European Union (2009) *Council Conclusions on the Mechanism on Cooperation and Verification for Bulgaria and Romania*, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/gena/110110.pdf.

As far as Member States are concerned, the situation is even more serious. There are a number of **Member States that unconditionally stand behind the CVM** and do not hesitate to publicly manifest their position. Some of them go even further than the Council calling for stronger sanctions to be attached to the mechanism to encourage compliance. The most recent example in this respect was the infamous letter sent by the Dutch EU Affairs Minister to the EU Commissioner on Justice, Freedom and Security in June 2009 asking the Commission to consider activating the safeguard clause in the judicial field should the then upcoming monitoring report fail to register enough progress on judicial reform.¹⁰

According to EU officials the CVM is unlikely to be lifted anytime soon. Despite the progress made by Bulgaria in addressing the benchmarks, the country is still far from achieving the expected results. Both the Council and the Commission are fully convinced in the usefulness of the CVM in its current format, which, combined with the increasing support on the part of individual Member States, leads to the conclusion that the mechanism will remain for at least a couple of years more.

Latest developments: what comes next?

The Commission is expected to publish its next regular report on Bulgaria's progress under the CVM in the second half of July 2010. Based on the conclusions and recommendations of the previous regular report and the work done by the government in the areas covered by the CVM one can reasonably expect a balanced report focusing on the following main issues.

The Commission will continue to praise the **open and frank dialogue** with the Bulgarian authorities. Although progress in addressing the benchmarks is undoubtedly the focus of the CVM, the Commission has repeatedly underlined that cooperation on the part of national authorities is equally important for the effective implementation of the

¹⁰ 'Netherlands gets tough on Bulgaria, Romania', in *EurActive.com* (18.06.2009), available at: <http://www.euractiv.com/en/enlargement/netherlands-gets-tough-bulgaria-romania/article-183298>.

mechanism. Moreover, the commitment of the Bulgarian government to fully and openly cooperate with the Commission may receive additional praise in the light of the increasing negative reactions against the CVM coming from Romania, where the mechanism is often criticised with a Romanian MEP even publicly describing it as an “outdated and inadequate bureaucratic instrument”.¹¹

The Commission will most probably welcome the first-instance **convictions in some of the high-profile cases** of corruption and organised crime delivered in 2010. In the same time, the recent acquittal of the two main defendants in what was considered by many observers as the most exemplary trial against organised crime would most likely entail certain criticism.

In its 2009 regular report the Commission praised the first convictions achieved through **plea-bargaining and a shortened trial procedure** (“expedited procedure”) but also expressed its concerns that this process often leads to sentencing below the legal minimum in cases where the defendant admits the facts. Along with recognising the positive effects of these procedures in terms of imprisoning members of organised crime groups and facilitating asset freezing the Commission explicitly pointed out that the extensive use of plea-bargaining may negatively affect the overall deterrent effect of the punishment and should not prevent Bulgaria to organise a proper trial system. The use of plea-bargaining and shortened trial procedures entailed negative reactions in Bulgaria as well with the judiciary being accused of referring to these instruments because of its inability to effectively prosecute offenders. Against this background one can reasonably expect that the Commission will again stress on the need of further enhancing the criminal justice process instead of relying on plea-bargaining and shortened trial procedures.

The Commission will most probably repeat its conclusions about the lack of progress in countering **killings linked with organised crime**. The topic

has been constantly present in the Commission’s reports so far and the recent shooting at a municipal councillor, which happened less than two weeks after the Commission’s mission visited Bulgaria, will hardly remain unnoticed.

The authorities that will most probably get a **positive evaluation** for their work are the **Commission for freezing and confiscation of criminal assets (CEPACA) and the Inspectorate to the Supreme Judicial Council**. Both institutions enjoy considerable support for their efforts on the part of the Commission and are likely to be singled out as the best performing bodies in the field of countering corruption and organised crime.

In the area of **legislative reform** the Commission follows closely the development several pieces of legislation.

- The amendments to the **Criminal Procedure Code** are in the most advanced stage having already passed the two readings at the National Assembly and an additional vote to overcome the veto imposed by the President. However, two of the new provisions were challenged before the Constitutional Court (the introduction of reserve counsel for the defence and the admission of convictions based only on special intelligence means and anonymous witnesses) where the case is still pending.
- The amendments to the **conflict of interest law** have recently been submitted to the parliament but will most probably be discussed after the publication of the progress report.
- A new **asset forfeiture law** was presented at a public discussion but is yet to be officially submitted to the parliament.
- No progress has been made as regards the drafting of a new **Law on Statutory Instruments**.

Most probably the Commission will praise the efforts to move forward with some of the expected legislative amendments but it will not be surprising if there are critical remarks as to the slow speed of the reforms as none of the legislative changes recommended a year ago will be in force when the next progress report is published.

¹¹ ‘Bulgaria, Romania remain under Commission scrutiny’, in *EurActive.com* (23.07.2009), available at: <http://www.euractiv.com/en/enlargement/bulgaria-romania-remain-commission-scrutiny/article-184311>.

Serious criticism may be reasonably expected in the field of **judicial reform** as almost none of the conclusions and recommendations made by the previous reports have been adequately addressed. Despite the advanced work on the Strategy for continuing the reform of the judiciary in the context of full EU membership and the Concept paper on the penal policy for the period 2010 – 2014, which will be noted in the upcoming report, issues such as the unreasonable delays in judicial proceedings, the extreme formality of the criminal procedure, the long outdated Criminal Code, etc., are still pending and the lack of progress will again be reminded by the Commission. Serious criticism can also be expected as regards the lack of criminal investigations into any of the numerous allegations of corruption and trade in influence related to senior appointments in the judiciary, which have been made public in the second half of 2009. The disciplinary sanctions imposed will gain certain recognition but will most probably not be regarded as sufficient to compensate for the lack of criminal prosecutions.

Mixed assessment can also be expected in the field of **anti-corruption**. The adoption of the *integrated strategy for the prevention of and fight against*

corruption and organised crime will certainly be noted as a step forward. In the same time, a lot of the Commission's specific recommendations included in its previous progress report have not been implemented. Among the most important areas where limited or no progress has been made are the protection of whistleblowers and the setting up of specialised structures for prosecuting and judging high-level corruption.

One area that will most probably receive increased attention is **public procurement**. In its last interim report of March this year the Commission expressed its concern that Bulgaria's efforts to prevent irregularities in public procurement and implementation of EU funds are not sufficient. A follow-up on this conclusion might be expected to be present in the upcoming report, in particular as regards the effectiveness of the remedies available to bidders.

Finally, the Commission is expected to reconfirm the importance of the CVM and, as long as none of the benchmarks is likely to get the status of fully and satisfactorily achieved, the report will once again conclude that the **mechanism needs to be maintained** and a **reassessment of progress will be scheduled for the summer of 2011**.

Sofia, July 2010

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Imprint

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