



# Working Paper

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## On High Stakes, Stakeholders and Bulgaria's EU Membership

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### Abstract

This paper argues against the view that Bulgaria's EU accession was premature and that the mechanism for cooperation and the verification of progress (CVM) is not delivering. The EU's continued leverage and the efficacy of the CVM are explained in a framework that goes beyond the dual-conditionality paradigm of incentives and sanctions, and beyond the unitary players model of EU–Bulgarian relations. In this framework, the CVM is viewed as an instrument for supportive reinforcement rather than for the imposition of sanctions. Furthermore, it is seen as targeting not just the government, but all Bulgarian stakeholders. The CVM is regarded as very effective at the level of public opinion and civil society, and as a mechanism that contributes to 'sandwiching' reform-reluctant Bulgarian governments between pressure from Brussels and domestic pressure for reforms. The CVM is also deemed useful for Bulgaria's further Europeanisation beyond the narrower pre-accession phase of 'EU-isation'. The paper suggests that eventual post-accession benchmarks might be appropriate in the process of further EU enlargement if properly understood as instruments for granting support and if discussed broadly with stakeholders beyond the executive. Concerning the efficiency/legitimacy dilemma, it is asserted that the CVM is an opportunity for increasing the EU's legitimacy.

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# ON HIGH STAKES, STAKEHOLDERS AND BULGARIA'S EU MEMBERSHIP

*EPIN WORKING PAPER NO. 27/APRIL 2010*

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## 1. The high stakes of Bulgaria's EU membership

Bulgaria and Romania joined the EU on 1 January 2007. They are considered part of the fifth enlargement that took place in the wake of the end of the cold war and organised on the basis of the Copenhagen criteria decided by the European Council back in 1993.

Until the 2008 global financial crisis, the 10 post-communist new member states (NMS) were too often divided into two groups: the eight 2004 newcomers, presented as the “front runners”, and Bulgaria and Romania, singled out as the ‘laggards’.<sup>1</sup> In 2002, when negotiations were wrapped up for the 2004 big bang enlargement, the reasons for considering Bulgaria and Romania unready for EU membership were mainly related to the second and third Copenhagen criteria – more specifically to concerns about the functioning of their market economies and the level of their adoption and implementation of the *acquis*. Doubts about their level of readiness remained until late 2006, but concerns shifted from the economic and *acquis*-related issues to problems pertaining to “the accountability and efficiency of their judicial systems and law enforcement bodies”. Art. 39 of the Accession Treaty of the two countries, which would allow postponement of their accession by one year,<sup>2</sup> was not invoked but a special mechanism for cooperation and the verification of progress (CVM) was established to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime.<sup>3</sup>

The year 2007 gave reasons to upgrade Bulgaria and Romania to “successful laggards”.<sup>4</sup> In 2008 and 2009, however, the two countries continued to make negative headlines centred on lack of progress in the reform of their judiciaries and the combat of corruption and organised crime, as well as on fraud and abuse of EU funds.<sup>5</sup> The situation provoked statements that the accession of Bulgaria and Romania back in 2007 was premature.

The widely held view in Brussels is that the European Council made a mistake in giving these two countries guaranteed accession in 2007 or 2008. The view is that it would have been better to have spent a year or two with hard conditionality bearing down upon these two countries before giving any unconditional commitment to a date.<sup>6</sup>

Agreeing with the assessment that the accession of Bulgaria and Romania was a failure implies admitting that the two countries' EU membership has put at stake the following:

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<sup>1</sup> The economic crisis following the 2008 global financial crisis seriously shook the ‘frontrunner’ status of several NMS that had joined in 2004.

<sup>2</sup> See the “Treaty of Accession of the Republic of Bulgaria and Romania to the European Union” (Luxembourg, 25 April 2005), OJ L 157/11, 21.06.2005, p. 41.

<sup>3</sup> See the European Commission's (2006a) Decision of 13/XII/2006.

<sup>4</sup> See Noutcheva and Bechev (2008).

<sup>5</sup> With regard to organised crime and abuse of EU funds, Bulgaria was the main target of criticism.

<sup>6</sup> Michael Emerson gave this summary of the overall mood in an interview in 2008 – see O'Rourke (2008).

- the EU's credibility as a transformative power,
- Bulgaria and Romania's credibility as law-abiding EU democracies,
- Bulgaria and Romania's prospects for a social and economic catch-up, and
- further enlargement in general and prospects for EU membership of the Western Balkans and of Turkey in particular.

The claim that a year or two with “hard conditionality” would have delivered better results is based on the unchallenged presumption that the EU has almost unlimited leverage before a country joins and no leverage once a country becomes a member of the EU.

The purpose of the present paper is to challenge this presumption and to propose a framework for a better understanding of the EU's leverage on Bulgaria after accession. The proposed framework is based on a revision of the concept of conditionality (and its metaphorisation as a game of carrots and sticks). Contrary to the general understanding of the EU's relations with candidate countries (NMS) as being among unitary players, this paper suggests their reconsideration as relations among players with a plurality of stakeholders on both sides.<sup>7</sup>

## 2. Revision of the conditionality paradigm

The cornerstone of the EU's strategy for the fifth enlargement was conditionality. The general understanding is that this is crucial for the EU's transformative power and that it has to remain the cornerstone of the strategy for further enlargement of the Union. Conditionality has developed over time on the basis of the 1993 Copenhagen criteria. Based on the experience gained it is still evolving. With regard to the post-fifth enlargement countries, it is referred to as ‘rigorous conditionality’. This creates the impression that the conditionality applied in the process of the fifth enlargement was a kind of ‘conditionality lite’ and therefore needs to be reinforced. Interpretations of ‘rigorous’ go from a tendency to structure the pre-accession phase on the basis of benchmarks for moving from one stage of the process to the next to calls for the introduction of more options for sanctions. The experience with the fifth enlargement in general and with Bulgaria in particular supports the introduction of benchmarks but not of sanctions. Yet the support for more benchmarks in the pre-accession phase and the renunciation of sanctions cannot be explained within the context of the dual conditionality paradigm, which works only with incentives and sanctions.

### 2.1 *The CVM within the dual conditionality paradigm*

The CVM introduced in 2006 for Bulgaria was designed as an element of the EU's evolving conditionality strategy. As with the pre-accession conditionality instruments in the past, it was designed to serve a twofold purpose:

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<sup>7</sup> Although Bulgaria and Romania are often treated in tandem, this paper does not cover Romania for two main reasons. First, Bulgaria's problems stem mainly from a lack of political will on the part of the 2005–09 Stanishev government. Generalising the political situation of the two countries would thus be misplaced. Second, Bulgaria's problems in the last two years go well beyond the criticism of the CVM reports. They are related to the suspension of payments under the PHARE, ISPA and SAPARD pre-accession programmes, to the withdrawal of the accreditation of two implementing agencies and to problems with the conformity assessment of all seven operational programmes (a precondition for their proper functioning and thus for Bulgaria's access to the structural funds earmarked for the country for the 2007–13 period).

- to reassure member states that the NMS will fully comply with EU rules and standards,<sup>8</sup> and
- to guide the country in its preparation for full compliance with EU rules and standards.<sup>9</sup>

Compared with conditionality instruments from the pre-accession phase (e.g. the Accession Partnerships), the CVM has a limited scope. It is intended to tackle “remaining issues” identified in the Commission’s monitoring report of 26 September 2006,<sup>10</sup> “in particular in the accountability and efficiency of the judicial system and law enforcement bodies, where further progress is still necessary to ensure their capacity to implement and apply the measures adopted to establish the Internal Market and the area of freedom, security and justice”.<sup>11</sup>

The Commission proposed six benchmarks that would gauge progress on the identified remaining issues and form the basis for six-monthly reports to the European Council and Parliament:

- 1) Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system.
- 2) 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 both these new laws and the penal and administrative procedure code, notably on the pre-trial phase.
- 3) 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.
- 4) 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 the assets of high-level officials.
- 5) Take further measures to prevent and fight corruption, in particular at the borders and within local government.
- 6) Implement a strategy to fight organised crime, focusing on serious crime and money laundering as well as on the systematic confiscation of the assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas.<sup>12</sup>

In 2007, the Bulgarian government was invited to present an Action Plan.<sup>13</sup> The actions included in the plan were to give substance to the benchmarks. As in the pre-accession conditionality exercises, this implied that the conditionality agenda was not unilaterally set by

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<sup>8</sup> In the decision establishing the CVM, there is an explicit reference to “the opinions expressed by the Member States” (European Commission, 2006(a), *op. cit.*).

<sup>9</sup> The second purpose is less clearly formulated in the European Commission’s Decision (2006a, *op. cit.*). The only reference is part of Art. 1: “The Commission may, at any time, provide technical assistance through different activities”. In the successive CVM reports, the supportive role of the Commission is more clearly expressed; member states are invited to assist Bulgaria as well. Moreover, a reference is made that progress in the CVM will allow Bulgarian citizens to reap the full benefits of EU membership.

<sup>10</sup> See the European Commission’s (2006b) report, COM(2006) 549 final.

<sup>11</sup> See European Commission (2006a), *op. cit.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Republic of Bulgaria Council of Ministers, Action Plan on the implementation of the benchmarks in the areas of judiciary reform and the fight against corruption and organized crime, Ministry of Interior, Sofia, 2007.

the Commission but entailed the active involvement of the Bulgarian government.<sup>14</sup> In late 2009, the newly elected government responded to the recommendations in the 2009 CVM report with a new Action Plan.

The CVM made reference to the provisions of Arts. 36, 37 and 38 of Bulgaria's Accession Treaty,<sup>15</sup> which provide for safeguard measures in the course of the first three years after accession. Failure to address the benchmarks adequately was formulated as a reason to apply such measures. At the same time, a reference was made that "[t]his Decision does not preclude the adoption of safeguard measures at any time on the basis of Articles 36 to 38 of the Act of Accession, if the conditions for such measures are fulfilled".<sup>16</sup>

Safeguard measures such as those foreseen in Arts. 36, 37 and 38 were also part of the 2004 Accession Treaties, but no CVM was established for the 2004 NMS. Consequently, there was a general tendency to interpret the CVM itself as a humiliation for the Bulgarian government and the possible safeguard measures as sanctions.

During the first three years of Bulgaria's EU membership, the Commission adopted five reports on Bulgaria under the CVM – three annual (June 2007, July 2008 and July 2009) and two interim ones (February 2008 and February 2009).<sup>17</sup> The triggering of the safeguard clauses and sanctions in general were discussed on the occasion of each of these reports.

Certain MEPs and politicians from other member states have criticised the Commission for not being tough enough and have threatened sanctions on the basis of the CVM.<sup>18</sup> Several options have been discussed in international and domestic media: adopting safeguard measures on the basis of the Accession Treaty, freezing/cutting EU funds and making Bulgaria's accession to the Schengen area or to the eurozone conditional upon the CVM.<sup>19</sup> Finally yet importantly, in summer 2008 the Bulgarian media referred to unofficial sources that application of Art. 7 of the Treaty of Nice had been considered with regard to Bulgaria.<sup>20</sup> They referred to the provisions that the Council "may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1)" and "may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the

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<sup>14</sup> In the pre-accession phase, governments had to respond with their own strategies, action plans, etc., for the Accession Partnerships. See Primatarova (2008).

<sup>15</sup> See the Treaty of Accession of the Republic of Bulgaria and Romania to the European Union (2005), *op. cit.*

<sup>16</sup> See European Commission, 2006(a), *op. cit.*

<sup>17</sup> See the following European Commission reports: (2007) COM(2007) 377 final; (2008a) COM(2008) 63 final/2; (2008c) COM(2008) 495 final; (2009a) COM(2009) 69 final; and (2009b) COM(2009) 402 final.

<sup>18</sup> A case broadly discussed in Bulgarian media was the blog posting of the Dutch minister for European affairs Frans Timmermans (2009) and the report of the Dutch government to the Dutch Parliament on the occasion of the July 2009 CVM reports. The message to the Dutch Parliament and Dutch citizens was that the government would "continue to press for improvements in both countries at the EU level. If this does not happen, it will have consequences for the transfer of EU funds to the two countries and their accession to the Schengen area" (Netherlands Ministry of Foreign Affairs, 2009).

<sup>19</sup> An indirect link between the CVM, accession to the Schengen area and to the eurozone was made in the leaked July 2008 CVM report. Failure to make progress under the CVM and to dispel doubts about Bulgaria's ability to deal with corruption and organised crime were expected to "color the assessment of whether Bulgaria is ready to shoulder the responsibilities and to perform a wider role on behalf of the other member states, which would be necessary if it wishes to enter the Schengen area and the eurozone". The reference was deleted in the final version.

<sup>20</sup> See Novakova (2008).

voting rights of the representative of the government of that Member State in the Council”<sup>21</sup>. The misleading claim was made that Art. 7 had been invoked before with regard to Austria back in 2000 when Jörg Haider's extreme right party had been included in the government. Freezing EU funds would extend to freezing Bulgaria's EU membership, according to Bulgarian media and their unofficial sources.

All these expectations and comments neatly fit into the paradigm of conditionality as a sanctioning mechanism or as a game of carrots and sticks. The speculations around them are based on the understanding that once the EU had given away membership as its 'golden carrot', it has no more sticks and therefore no more leverage.

If one assumes that conditionality in general and the CVM in particular are tools for imposing sanctions, then one could agree with statements that the CVM is not effective and not delivering.

The main sanction attached to CVM – the invocation of the JHA safeguard clause envisaging that sentences/decisions by national courts would not be recognised by other member states – could be costly for emigrants and may induce business cost[s] for Romanian, Bulgarian and European investors, but would neither curb corruption nor affect politicians. Therefore this mechanism is *not effective* for the purpose it has been initially designed. It has a certain political significance which lies in the findings and allegations of high-level political corruption but as it is part of the 'naming, blaming and shaming' instrumentarium, its impact is again *limited*.<sup>22</sup> (Emphasis added)

To insiders, it has always been clear that there is no direct link between the CVM and the eventual safeguard measures under Arts. 36 to 38 of Bulgaria's Accession Treaty, and thus also between the limited time for their application (three years after accession) and the duration of the CVM. The outvoted 2005–09 Bulgarian government seems to have been trapped by this misperception, which was clearly dispelled in the 2009 CVM 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.”<sup>23</sup>

The misperception that the CVM is about sanctions and will automatically be abandoned after three years seems to have been the faulty rationale behind the 2005–09 government's reluctance to cooperate with the Commission in the framework of the CVM. The fact that the safeguard clauses have not been triggered has been interpreted more or less as a success after the release of the successive CVM reports and has been (ab)used to tone down criticism. The government became more cooperative only after the Commission started freezing funds in early 2008 (although initial reactions to the freezing of funds often remained at the level of claims that they can and will easily be replaced through Bulgarian funding). Even after the July 2008 reports the 2005–09 government remained internally divided on whether to cooperate with the Commission or to fight it.<sup>24</sup> What looked like an appreciation of efforts in late 2008/early 2009 was simultaneously a hint at the problematic situation in 2007–08: “The CVM report of July 2008, and the report on the administration of Community funds in Bulgaria resulted in a *change in attitude* and a *more open and frank dialogue* at all levels with the Bulgarian authorities. The

<sup>21</sup> See the “Treaty of Nice” (Nice Treaty), (Nice, 26 February 2001), OJ C 80/1, 10.03.2001.

<sup>22</sup> See Kavrakova (2009), pp. 43-44.

<sup>23</sup> European Commission (2009b), op. cit.

<sup>24</sup> The division was publicly admitted in an interview on the National Radio by Gergana Grancharova, the minister for European affairs.

widespread existence of organised crime and corruption *is no longer denied*<sup>25</sup> (emphasis added).

The freezing of pre-accession funds for Bulgaria in 2008 can no doubt be interpreted as a sanction but it is not directly linked to the CVM. In July 2008, the Commission released a report on the management of EU funds in Bulgaria on the same day as the CVM report and hence reinforced the impression that the withdrawal of the accreditation of two payment agencies and the suspended payments in the first half of 2008 were sanctions under the CVM. Indeed, the Commission could and would have acted in the same way even if a CVM had not been in place. Regardless of the reasons underlying the later decision not to release the reports on EU funds on the same day as the 2009 CVM reports but to postpone them to early autumn 2009, the formal disconnection of the two procedures can help to end the association of the CVM with sanctions.

The financial sanctions against Bulgaria proved the Commission's power to protect the EU's rules and standards. Therefore, the first purpose of the CVM was fulfilled outside the scope of the mechanism. The understanding of the CVM as a sanctioning mechanism does not, however, allow a defence of the CVM as effective with regard to its second purpose, namely that of guiding Bulgaria towards full compliance with the EU's rules and standards.

## **2.2 The CVM within a non-dual conditionality paradigm**

The assessments of the CVM's ineffectiveness can nonetheless be challenged if one dismisses an understanding of it as a sanctioning mechanism.

In an earlier study on Bulgaria's relations with the EU,<sup>26</sup> this author applied a more nuanced model for the analyses of conditionality than the dual one. Instead of differentiating solely between incentives/disincentives, rewards/punishments or carrots/sticks, this model refers to different kinds of reinforcement:

- reactive reinforcement (withholding rewards),
- coercive reinforcement (inflicting punishment), and
- supportive reinforcement (giving support).<sup>27</sup>

This more nuanced model presupposes revising one more element of the widespread conditionality concept (discussed under section 3 of this paper). At this stage it is sufficient to say that contrary to the general perception of EU conditionality,<sup>28</sup> the two agents involved in the conditionality relationship need not to be regarded as unitary players.

Supportive reinforcement was a very successful tactic in the application of EU conditionality in the pre-accession phase. Some instances of supportive reinforcement came close to the benchmarks introduced in the framework of post-2007 accession negotiations. Others can be understood only in a framework with a plurality of players at both ends.

A crucial event during Bulgaria's accession negotiations may best illustrate the essence of supportive reinforcement within a model with a plurality of players. Back in spring 2003, as commissioner for enlargement Günter Verheugen announced at a press conference in Bulgaria that unless the country made an amendment to its constitution by September 2003 (allowing, for

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<sup>25</sup> Ibid.

<sup>26</sup> Primatarova (2008), op. cit., pp. 243-354.

<sup>27</sup> This concept is based on Schimmelfennig, Engert and Knobel (2003).

<sup>28</sup> The general perception is that on the one hand we have the Commission, which designed the pre-accession strategy and the conditionality agenda, while on the other hand we have the candidate country's government.



example, a reduction of the immunities enjoyed by magistrates), it would not be able to close the justice and home affairs chapter of negotiations, nor receive support for its target date for accession. The amendment was duly made in September 2003 and enjoys the unofficial label 'the Verheugen amendment'. In terms of the various forms of reinforcement, Verheugen's intervention was perceived by international and domestic observers as either reactive reinforcement or coercive reinforcement. It did sound close to a threat, rather than a neutral announcement about the withholding of an award, and it did provoke a high degree of public embarrassment in Bulgaria. Insiders know, however, that Verheugen's intervention was made at the request of the Bulgarian foreign minister. The problem was that the Bulgarian Constitutional Court had found some of the measures included in the government's Action Plan for judicial reform unconstitutional. The judicial reform was stuck on a dead-end street. Hence, although Verheugen's intervention sounded like a threat, for the government it came as most welcome support. What seemed like a unilaterally-imposed conditionality benchmark was in reality an act of collaboration between the Commission and the Bulgarian government.

When in 2004 Bulgaria concluded its negotiations ahead of Romania and it became clear that the Accession Treaty would contain a so-called 'postponement clause', the future Art. 39, this was perceived as an article that would allow member states under certain circumstances to apply reactive reinforcement (withholding the reward of membership). By the public, strongly affected by the dual carrot-and-stick paradigm, it was perceived rather as an option for coercive reinforcement (inflicting the punishment of non-membership). The Romanian minister of foreign affairs reacted with embarrassment and statements that Romania would never agree to such a clause. For the Bulgarian government, however, this was an instance of clear supportive reinforcement and a possibility to continue to work in close cooperation with the Commission. Without this clause it would have been impossible to conclude negotiations in 2004.

The CVM fits into the same pattern. It gave member states the feeling of having at their disposal an instrument of both reactive and coercive reinforcement. This explains the widespread understanding of the CVM as a mechanism for the imposition of sanctions. Yet as regards the Bulgarian government, it was intended as an instrument of supportive reinforcement, as an instrument to report progress. Still, instruments of supportive reinforcement only work on the basis of cooperation. What went wrong with the CVM was that the 2005–09 government did not react in the proper way of cooperation but started contesting this supportive reinforcement instrument, objecting to it, accusing the Commission of double standards and abusing the CVM as a political tool. The problem was not only the level of corruption and the extent of organised crime, but also the arrogant neglect of these problems and thus the reluctance to fight them. The non-cooperative behaviour of the government under Bulgaria's prime minister, Sergei Stanishev, frustrated both Commission representatives and member states, and provoked criticism that the CVM did not provide for sanctions.

The 2008–09 informal discussions on whether to link the CVM to Bulgaria's accession to the Schengen area likewise deserve to be considered in the context of supportive reinforcement instruments. The leaked 2008 CVM report gave a clear indication that there were such considerations. These have been automatically interpreted within the sanctions paradigm. The same thing has happened in the case of the Dutch government's reaction to the 2009 annual CVM report. Commission spokesperson Johannes Laitenberger has indirectly admitted that linking the CVM to accession to the Schengen area has been discussed while explaining that "the commissioners had decided to treat monitoring and Schengen as separate issues, as no legal factual link exists between them".<sup>29</sup> Interestingly, "opinion within the college diverged over whether linking the admission to Schengen would be seen in Sofia or Bucharest as a 'carrot' or

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<sup>29</sup> See *EurActiv.com* (2009).

a ‘stick’<sup>30</sup>. The interpretation of such uncertainty in this analysis again relates to the supportive reinforcement concept. Clearly there is no legal link between admission to Schengen and the CVM. But it is hard to imagine the two countries being admitted to Schengen with the CVM in place. Being part of Schengen requires political trust among the partners. The CVM performance of the Stanishev government has shaken political trust in Bulgaria.<sup>31</sup> One can well imagine the CVM being repealed at some point and member states nonetheless remaining reluctant to admit the two countries to Schengen. So linking admission to Schengen with the CVM could constitute a reassuring commitment on behalf of the EU.

The Bulgarian case demonstrates that at the governmental level conditionality did work and continues to do so – in both the pre-accession and post-accession phases – as a mechanism of close cooperation between the government and the Commission. Good cooperation by the government with the Commission is also a precondition for obtaining the trust and support of member states. The 2005–09 Bulgarian government made the fatal mistake of believing that as a member state government it would not need the support of the Commission. Attempts in late 2008/early 2009 to return to the close cooperation model of the pre-accession phase came at a late stage and left doubts about the political commitment behind them. Internal tensions among the three coalition parties resulted in a lack of coordination at the governmental level. Regardless of the appointment of a deputy prime minister with special responsibility for EU funds (former Ambassador Meglena Plugchieva) in spring 2008, the progress achieved under the CVM remained insufficient, most of the financial sanctions with regard to the pre-accession funds were left in place and the operational programmes did not get a green light during the term of the Stanishev government.

The government that came into power in summer 2009 seems to have understood that it can benefit from the CVM if it accepts it as a supportive reinforcement instrument and demonstrates real commitment to fight corruption and organised crime. Statements in this direction came immediately after the release of the 2009 CVM report. Both incoming Prime Minister Boyko Borissov and individual ministers declared that their agenda will be shaped on the basis of the Commission recommendations in the 2009 CVM report. So far, the good intentions have also been followed by action, although it is premature to assess the expected results. Nevertheless, the interim CVM report of 2010, although technical, can be considered a positive assessment of the Borissov government. The CVM evaluation of the results achieved will be made in summer 2010. Irrespective of this pending evaluation, the positive conformity assessment of all seven operational programmes in early February 2010 signals a return to constructive cooperation with the Commission’s services under the Borissov government.

### **3. The stakeholders: Going beyond the unitary players model**

#### **3.1 Stakeholders in Bulgaria**

The EU has practically no possibilities to sanction governments politically. Real power for imposing political sanctions on national governments rests with the citizens of the respective country. In the July 2009 general elections, Bulgarians fully used this power and voted out the 2005–09 government. The five CVM reports on Bulgaria in combination with the Commission’s decisions with regard to the management of EU funds form the backdrop for understanding the election results.

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<sup>30</sup> Ibid.

<sup>31</sup> Svetoslav Tersiev’s comment that no reference to Schengen in the CVM report means that admission would be limited to fulfilment of purely technical requirements, with which it should be easy to comply, is misleading. See Tersiev (2009b).

Stanishev had perceived much of the Commission's actions as sanctions. He tried on several occasions to threaten the EU that sanctions could boost extremists and Euroscepticism.<sup>32</sup> Yet Bulgarians did not perceive the Commission's actions as sanctions against themselves. The Commission was perceived to side with ordinary citizens and ordinary citizens sided with the Commission. Even those who have been personally affected by the freezing of EU funds continued to trust the EU more than the Stanishev government.<sup>33</sup>

On the eve of the European and general elections in Bulgaria, *The Economist* gave this warning:

If the EU can use the tough love of frozen funds in Bulgaria and yet still maintain voter support, that will be a boost not only to reformers in that country, but also to the whole cause of future enlargement. If, on the other hand, EU sanctions trigger a backlash against Europe in Bulgaria, the Commission's experiment could turn out less well.<sup>34</sup>

Keeping the wording of *The Economist*, the experiment has been successful so far. At the same time, an explanation is needed for why EU sanctions did not trigger a backlash against Europe in Bulgaria. The way in which the Commission has been reporting under the framework of the CVM as well as on the management of EU funds is crucial to understanding why 'sanctions' were perceived as justified and were supported by ordinary Bulgarians.

The involvement of public opinion and civil society is a further argument in support of the CVM as an effective instrument. It undoubtedly did not deliver sufficient progress at the level of government. But it has been effective and had a serious impact because it succeeded in involving citizens, civil society and the media, along with progressively more representatives of the Bulgarian judiciary.

In the pre-accession phase, the regular reports adopted by the Commission attracted attention some two weeks before and after their release. The interest of the media and citizens did not go much beyond their interest in the accession date.

Since January 2008 the issues of corruption, organised crime, fraud and management of both EU funds and Bulgarian public money have not been absent from the media or public agenda for a single day. The Commission reports – especially those on the management of EU funds – have made a decisive contribution in giving substance to the general, vague and thus counterproductive anti-corruption rhetoric.

A broad public understanding of the strong link between corruption, on the one hand, and deficiencies and non-transparent implementation of the legislation on conflict of interest and public procurement on the other hand, has arisen. This understanding has helped to extend the debate not only on how EU funds are spent but also on how Bulgarian public money is spent. The initial attempts of the Stanishev government in early 2008 failed to downplay fraud within the road infrastructure agency as a domestic issue and as unrelated to EU funds.

The data on Bulgaria in the Special Eurobarometer survey from late 2009, which examined the attitudes of Europeans towards corruption, demonstrate in an indirect way the effectiveness of the CVM and the EU's leverage on Bulgaria with regard to corruption.<sup>35</sup>

It revealed that 97% of the polled Bulgarians consider corruption a major national problem (up 5% compared with the 2007 Eurobarometer survey). Moreover, 64% of the polled Bulgarians tend to agree that the EU helps in reducing corruption against only 17% who tend to disagree.

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<sup>32</sup> See Wagstyl (2008).

<sup>33</sup> See the personal story referred to in "Bulgarian Rhapsody", *The Economist*, 14 May 2009.

<sup>34</sup> Ibid.

<sup>35</sup> See the Eurobarometer (2009) report, *Attitudes of Europeans towards Corruption*.

Compared with the average figures for the EU-27 (52% disagree and only 29% agree), this is a completely reversed ratio. Still, most Bulgarians remain realistic about who has responsibility for the prevention of and fight against corruption. Most Bulgarians do not have illusions that the EU could act instead of the government and the national institutions: 84% attribute responsibility for the prevention of and fight against corruption to the national government, 59% to the police and 75% to the judicial system (compared with 36% who rely rather upon the EU institutions).

The EU-triggered debate around conflicts of interest and public procurement has patently contributed to the biggest shift in the assessment of where corruption is most spread: 64% of those polled responded that it is among the officials awarding public tenders (up 30% compared with the 2007 Eurobarometer survey).

The controversy between the Stanishev government and the EU in 2008–09 around the CVM and the spending of EU funds contributed to citizens perceiving themselves as real stakeholders in Bulgaria’s EU membership. The EU ceased being a foreign affairs business of the government and became a day-to-day reality. It cannot be denied that after accession the government demonstrated reluctance to cooperate with the Commission; however, ordinary citizens and civil society regarded cooperation with the EU and with the Commission as most welcome. Accordingly, public support is the necessary variable to properly understand the EU’s continuing leverage in Bulgaria.

Entry to the EU does not mean the end of leverage, but a change in its nature – towards a greater focus on the Commission’s direct outreach to the society and the empowerment of social groups eager to promote change. Thus, in contrast to the accession period when the European Commission contributes to a model of change that can be best described as ‘reforms without politics’, its ambition now is to generate a demand for a genuine reformist politics.

The new Commission approach is to politicise institutional failures, rather than depoliticise them as before. This brings into the game a new player: Bulgarian public opinion. The opinion polls have convinced Brussels that the public perceives the Commission’s pressure not as an act of colonial arrogance (as local nationalists and populists like to portray it) but as an opportunity for much needed and desired changes in the quality of governance in the country.<sup>36</sup>

This new approach does not imply a traditional carrot-and-stick game but a new “sandwich game” in which “corrupt governments find themselves pressed between angry publics and an uncompromising Commission”.<sup>37</sup>

More and more explicit references to citizens and public opinion can be found in the CVM reports. Sometimes wordings have been softened or even dropped in the final reports but both the leaked and the final documents leave no doubt that in criticising the government the Commission is siding with citizens.

The strongest wording (dropped in the final version) was to be found in one of the leaked reports in July 2008, which concluded that Bulgaria needs to “cleanse its administration and ensure that the generous support it receives from the EU actually reaches its citizens and is not siphoned off by corrupt officials, operating together with organized crime”.<sup>38</sup>

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<sup>36</sup> See Krastev (2009).

<sup>37</sup> Ibid.

<sup>38</sup> See the European Commission’s (2008b) report, COM(2008) yyy final (leaked draft).

In the annual 2009 CVM report, the Commission further differentiates among the stakeholders (instead of talking in general about 'Bulgaria') and takes sides. It reports on "commendable initiatives" and "laudable efforts" within the judiciary while simultaneously criticising the "political leadership".<sup>39</sup>

There is a need for clear evidence that the authorities and the political class are unequivocally committed to eradicating the root causes of the problem. This situation causes unease and uncertainty in the administration, the police and the judiciary. They cannot be expected to conduct the fight against organised crime and corruption, when the signals coming from the authorities and the political leadership are not aligned and clear. It should be avoided that their laudable efforts cause exposure to threats and intimidation.<sup>40</sup>

Siding with citizens in general and with reformist initiatives in particular, the Commission does not create illusions that it can continue to be in the driver's seat as during the pre-accession phase: "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*"<sup>41</sup> (emphasis added).

The reference that changes can only come from within Bulgarian society is important beyond the scope of the CVM. Reformist policies are needed (not only in Bulgaria but in all post-communist countries) in many areas that were not covered by the accession agenda and which constitute an "unfinished business" agenda for the transition.<sup>42</sup>

The greater involvement of Bulgarian citizens in the shaping of further reforms would not have been possible had Bulgaria's accession been delayed. The limits of the Commission's leverage on candidate countries are not set by the date of accession, but by how far the areas in need of reform fall under EU competence versus national competence. Areas with strong national competences are best reformed with the involvement of the national stakeholders in a democratic bottom-up approach, and not by relying on the EU to propose solutions in a top-down approach. It should remain questionable how far "[t]he case of Bulgaria should be used to push ahead for closer cooperation [at] EU level in justice and home affairs".<sup>43</sup> The reluctance of a certain Bulgarian government to tackle corruption should not automatically mean that national judiciary models cannot deliver.

Over-reliance upon EU involvement was also at the core of a proposal that Stanishev presented to Commission President José Manuel Barroso in March 2009. The details of the proposal were never made public but reactions to them made it clear that it was not a sincere request for support but a clumsy attempt to replace the CVM through a new structure. In the proposal, EU experts and member states' ambassadors in Sofia were to become direct stakeholders in Bulgaria's reform of the judiciary and the management of EU funds and thus share

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<sup>39</sup> European Commission, 2009(b), op. cit.

<sup>40</sup> Ibid

<sup>41</sup> Ibid.

<sup>42</sup> See Kavrakova (2009). The *Comparative Report* and the 10 national reports on which it is based distinguish 10 areas of "unfinished business" related to transition rather than to accession to the EU: political development and governance; economic development; the welfare system and social inclusion; the health system; the educational system; justice and home affairs; migration; research and innovation; agriculture and rural development; regional development; and the level of absorption of EU funds and their impact.

<sup>43</sup> See Ivanova (2009), p. 54.

responsibility with the government.<sup>44</sup> The discussions around the rejected proposal raised awareness of the borderline between EU responsibility and national responsibility. The Commission can help the Bulgarian authorities to set priorities but it cannot take responsibility for substance.

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The EU's leverage in Bulgaria after accession is based on its tendency to go beyond the interaction with the government and target a growing plurality of stakeholders. The 'executive bias' inherent in the entire pre-accession period gave priority to efficiency over legitimacy.<sup>45</sup> Compared with the pre-accession phase, the CVM might appear less efficient but the way it is functioning in Bulgaria is definitely enhancing the legitimacy of the EU.

### **3.2 Stakeholders in the EU**

Whereas in the pre-accession phase Bulgaria's partner on a day-to-day basis was mainly the Commission, membership implies the country's active interaction with all EU institutions. The CVM reports are within the responsibility of the General Secretariat of the Commission but they have to be submitted to the European Council and Parliament.

Unlike the pre-accession phase, the Commission reports are submitted to the Bulgarian government ahead of their adoption. This gives the government (and the commissioner from Bulgaria) an opportunity to push for softening wordings with which it does not feel comfortable. In summer 2008, a draft CVM report was leaked to the Bulgarian media. Analyses of the preliminary and final reports reveal how 'softening' really works. It has to be admitted that changes are more a matter of applying linguistic diplomacy than of real change in substance. With regard to substance, it could be more rewarding to study the role of the European Council and Parliament.

The Council adopts conclusions. These have remained mostly unnoticed since they do not go much beyond the Council sharing the analyses and recommendations of the Commission. In more or less official statements, some member states have nonetheless indicated that they would be in favour of a tougher stance and even 'sanctions'. It cannot be excluded that these comments are targeted at the domestic audience much more than the Bulgarian authorities and they have not been reflected so far in the Council's conclusions.

The European Parliament does not adopt special documents on the CVM, but in an indirect way it has referred to it in the 2007 Discharge Report. The tendency to flex their muscles in relation to the Commission on every possible occasion has resulted in rather contradictory behaviour on the part of some MEPs. On the one hand, there was a proposal to request from the Commission reports on the management of EU funds every three months. This was then amended to a request for reports on both Bulgaria and Romania by 15 July 2009. The request has been perceived and presented as Parliament putting screws on corruption in the two countries.<sup>46</sup> On the other hand, after intensive lobbying the European Parliament adopted a text that partly 'discharges' the Bulgarian and Romanian government of their responsibilities and puts the blame on the Commission. The European Parliament holds the opinion

that the preparation of the absorption capacity of Romania and Bulgaria for funds in the Agricultural and Cohesion policy fields has not been treated by the Commission with the necessary seriousness, and that statements and actions of the Commission in

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<sup>44</sup> See *The Economist* (2009).

<sup>45</sup> See Grabbe (2006), pp. 207-208.

<sup>46</sup> See Pop (2009).

this context were misleading, not only for Parliament but also for the Bulgarian and Romanian governments, and were one reason for the loss of funds by those Member States.<sup>47</sup>

The final text is an adjustment of an amendment proposed by two socialist MEPs, Dan Jorgensen and Paulo Casaca, which was even more critical towards the Commission. In it, the European Parliament was supposed to hold the view

that the accession of Romania and Bulgaria has not been treated by the Commission with the necessary seriousness and that *statements of the readiness of the two candidates for enlargement were misleading*; [it] regrets that this misinformation has led to the current situation where cohesion funds were released for Member States with non-functioning administrative and legal systems; [it] is of the opinion that the Commission disregarded the Copenhagen criteria and misled public opinion and Parliament about the readiness of these Member States to the detriment of the reputation of the Union and the steady development of the Member States in question.<sup>48</sup> (Emphasis added)

Like many previous attempts of the Stanishev government to blame others for its own failures this one did not have any real impact – not in Bulgaria and even less so outside Bulgaria, but the way the text was adopted undermines the European Parliament's credibility with regard to the CVM.

The European Parliament's credibility was also seriously undermined by an interview of MEP Graham Watson.<sup>49</sup> In a parliamentary horse-trading spirit, Watson gave support not only to his liberal brothers in the Bulgarian government but also to their socialist partners, claiming that the best for Bulgaria in the pending elections would be to re-elect the incumbent government, so to stay in line with the American adage, "if it ain't broke, don't fix it". Concerning the explicit question concerning how he would justify his support for a government that has been so strongly criticised by Brussels in the framework of the CVM, and which has had so many problems with EU funds management, Watson said that he was convinced that no other government could do better because the problems had been inherited from the communist past.

Support from European parties has been given to the Bulgarian parties from all the large European partners – the Socialists, the Alliance for Liberals and Democrats for Europe (ALDE) and the European People's Party (EPP) members, sometimes at party level, sometimes in an individual capacity. Behind the criticism of the CVM reports, the Bulgarian Socialists perceived an EPP conspiracy triggered by the Bulgarian opposition. Commissioner Verheugen tried to alleviate the Socialists' situation.<sup>50</sup> The Bulgarian EPP members and some of their European partners saw a socialist bias behind Commissioner Danuta Huebner's decision to unfreeze €115 million of ISPA (Instrument for Structural Policies for Pre-Accession) funds on the eve of the general elections.<sup>51</sup> EPP support after the July 2009 general elections misled the winner Boyko Borissov to issue a statement that the Union is going to release all frozen funds as a result of the election's outcome. Bulgarian analysts suspected a political deal behind the softening of the

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<sup>47</sup> European Parliament, 2007 Discharge: Commission, P6\_TA-PROV(2009)0289, text adopted 23 April 2009(a).

<sup>48</sup> European Parliament, Amendments to 2007 Discharge: Commission, Committee on Budgetary Control, 24 February 2009(b).

<sup>49</sup> See Watson (2009).

<sup>50</sup> See *EurActiv.com* (2008b).

<sup>51</sup> *PresseEcho.de* (2009); see also Graessle (2009).

2009 CVM report at the level of President Barroso and Prime Minister Stanishev.<sup>52</sup> The list of examples could be continued.

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The increasing plurality of stakeholders on the EU side after accession creates some uncertainty about the EU's requirements under the CVM since the different stakeholders do not always speak with one voice.<sup>53</sup> Whereas the Commission remains an unbiased actor, member states can sometimes be tempted to politicise the CVM for domestic purposes. As regards the European Parliament, there is a clear tendency among the three large political groups – the EPP, the Socialists & Democrats and ALDE – to side with political partners rather than with principles and thus to undermine the legitimacy of the EU's demands.

#### 4. Conclusions

In 1990, Ralf Dahrendorf wrote that constitutional democracy is built in three stages:<sup>54</sup>

- the drafting and establishment of a new constitution laying down the basic values of statehood, fundamental rights, the main paradigms of the rule of law, independent administration of justice and separation of powers. This is “the hour of the lawyers”, as he put it;
- the creation of a market economy, including among other things antimonopolism, economic rivalry and free competition alongside the development of a certain network of social protection; and
- the establishment of civil society – the building of substantial sources of power outside the state and, more often than not, against the state. This is a network of autonomous institutions and organisations that have not one centre, but hundreds or even thousands of them, and which a monopolistic state or party authority cannot liquidate or eliminate.

Undoubtedly, this agenda was not designed as one for accession to the EU. It was rather conceived as an agenda for post-communist transition. Still, there is a certain overlap of these three stages with the Copenhagen criteria for accession to the EU. That the two agendas did overlap in the process of preparation for accession and that the European Commission was very much in the driver's seat for both processes has created some misperceptions. It might be useful to differentiate between the ‘EU-isation’ and the Europeanisation of a country.<sup>55</sup> Conditionality for EU membership has gone beyond the strict EU-isation agenda. Moreover, the process of Europeanisation goes well beyond the date of accession to the EU.

Dahrendorf speculated that the first of his three stages might last six months, the second six years and the third sixty years.

The fifth enlargement proves that Dahrendorf's estimate about the creation of a market economy (six years) was the most realistic one. With regard to EU membership, it is also the one for which it is easiest to make assessments on the basis of quantitative benchmarks and criteria.

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<sup>52</sup> See Tersiev (2009a).

<sup>53</sup> As rightly observed by Heather Grabbe (2006, op. cit.), “[t]he EU has its greatest influence where it has a detailed policy to be transferred, it gives consistent advice, its actors speak with one voice, and it sets clear and certain requirements. It has its least impact where a policy area lacks these elements, and tends towards diffuseness and uncertainty.”

<sup>54</sup> See Dahrendorf (1990).

<sup>55</sup> Grabbe (2006), op. cit., pp. 4-5.



The estimate that “the hour of the lawyers” would take just six months was obviously over-optimistic. With regard to EU membership, the emerging area of freedom, security and justice is far from being communiterised. Benchmarks and criteria for the reform of the judiciary systems are much more difficult for the Commission to set unilaterally. The reform of the judiciary requires the active involvement of civil society and public opinion in the candidate countries.

As regards the third stage, the establishment of civil society, there are no reasons to believe that Dahrendorf might have been over-pessimistic. The 20<sup>th</sup> anniversary of the fall of the Berlin wall was widely celebrated in 2009. Twenty years on, there can be no doubt that membership in the EU has been a major factor in the development of civil society in post-communist countries and that this development is an ongoing process.

Once a country joins the EU, governments may sometimes be reluctant to continue on the path towards further Europeanisation. This was clearly the case with the Stanishev government in Bulgaria, especially in the period 2008–09. But in Bulgaria there is a strong public commitment to further Europeanisation of the country.

Developments in Bulgaria demonstrate that if viewed as targeting not just the government but all of the stakeholders in the country, the CVM can function as an instrument for further Europeanisation. Unfortunately, the CVM did not achieve good results at the level of the government during the first three years of its implementation because of a lack of political will on the part of the respective Bulgarian government. The CVM can nonetheless be considered very effective at the level of public opinion and civil society. It has and continues to contribute to giving real substance to the vague anti-corruption rhetoric and to raising public awareness of and intolerance towards corruption. It has also contributed to ‘sandwiching’ Bulgarian governments between pressure from Brussels and domestic pressure for reforms.

When taking decisions with regard to further enlargement, especially with countries undergoing processes of transition or stabilisation, the Commission, member states and the European Parliament have to consider that membership is not the end of the longer Europeanisation road. Through admitting a country to the EU they can rather speed up the process of Europeanisation than bring it to a stall. Furthermore, they can speed up the process of development and consolidation of civil society in these countries and its involvement in the Europeanisation process, and thus contribute to its legitimacy. Eventual post-accession benchmarks should not be presented as instruments for imposing sanctions but as instruments for granting support. Meeting the benchmarks should be discussed broadly with stakeholders beyond the executive. This approach would allow putting reform-reluctant governments under more effective pressure.

As regards candidate countries, they can also learn from Bulgaria's experience with the CVM. They should not regard benchmarks proposed by the Commission (be it in the pre-accession or in the post-accession stage) as humiliating sanctions but as instruments of support for identifying challenges, setting the right priorities and resolving problems. The governments of candidate countries should be aware of the need to work in good cooperation with the Commission beyond accession. Civil society and the media should learn as early as possible to act as stakeholders in their country's membership and dismiss mistaken expectations that the EU can help with blueprints for all reforms.

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## About EPIN

EPIN is a network of European think tanks and policy institutes with members in almost every member state and candidate country of the European Union. It was established in 2002 during the constitutional Convention on the Future of Europe. Then, its principal role was to follow the works of the Convention. More than 30 conferences in member states and candidate countries were organised in the following year.

With the conclusion of the Convention, CEPS and other participating institutes decided to keep the network in operation. EPIN has continued to follow the constitutional process in all its phases: (1) the intergovernmental conference of 2003-2004; (2) the ratification process of the Constitutional Treaty; (3) the period of reflection; and (4) the intergovernmental conference of 2007. Currently, EPIN follows (5) the ratification process of the Lisbon Treaty and – should the treaty enter into force – (6) the implementation of the Treaty.

Since 2005, an EPIN Steering Committee takes the most important decisions. Currently there are six member institutes: CEPS, DIIS (Denmark), ELCANO (Spain), HIIA (Hungary), Notre Europe (France) and SIEPS (Sweden).

### Status quo

Currently there are 31 EPIN members from 27 countries, also from countries outside of the EU. The 'hard core' work of the network is based on the cooperation of about 10 most active institutes. The member institutes are quite diverse in size and structure, but are all characterised by political independence and the absence of any predetermined point of view or political affiliation.

EPIN organises two major conferences in Brussels per year; as well as ad hoc conferences or other activities in member states. The network publishes Working Paper Series and other papers, which primarily focus on institutional reform of the Union. The network follows preparations for the European elections, the EU's communication policy, and the political dynamics after enlargement, as well as EU foreign policy and justice and home affairs.

### Achievements

EPIN is a network that offers its member institutes the opportunity to contribute to the 'European added-value' for researchers, decision-makers and citizens. The network provides a unique platform for researchers and policy analysts to establish personal links, exchange knowledge and collaborate on EU-related issues. Members bring their national perspectives to bear on the issues tackled and through collaboration they contribute to establish a 'European added-value' (e.g. on EU communication, flexible integration). By doing so they strengthen a common European dimension in the national debates on Europe.



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