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The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession

Abstract

Bulgaria and Romania have recently been subject to close scrutiny due to the substantial and unyielding problem of corruption in both countries, which is coupled with serious shortcomings in the competence and independence of their judicial authorities. These problems have prompted the EU to implement a novel monitoring instrument, called the Cooperation and Verification Mechanism (CVM), in an attempt to trigger reform by extending EU leverage into the post-accession period. But the potential sanctions that may be employed in the event of failure to make progress in the CVM process are relatively inconsequential, leaving the CVM with only limited leverage. This changed in 2011, however, as several key EU member states blocked the entry of Bulgaria and Romania into the Schengen free travel zone pending progress as reported in the European Commission's CVM reports. While the CVM has certainly not solved the problems related to corruption and the judiciary, we argue that it has had a positive impact by giving domestic elites in these countries stronger incentives to pursue reform. This has been especially true when progress on CVM benchmarks has been linked to EU funding and, since 2011, entry into the Schengen zone, which is something that voters in Bulgaria and Romania value highly.

1 Introduction

Are Bulgaria and Romania catching up with the EU ECE 8 former communist countries or are they sliding back? We observe relatively little backsliding since accession (as do Levitz and Pop-Eleches 2010, but for a more pessimistic view see Andreev 2009; Ganev 2012). However, the mere absence of backsliding is not the desired outcome – from the point of view of democratic consolidation or indeed of the EU – given the sad state of the judiciary and the presence of very extensive, high-level corruption at the moment of accession.

So are they catching up? The record here is mixed. We measure success in terms of delivering the domestic

institutional changes necessary to create an effective judiciary and to fight corruption. We argue that political leaders and parties will only continue and deepen reforms in response to the twin forces of domestic and EU influence. The domestic incentives for political leaders are primarily electoral ones, and chiefly relate to: the salience of judicial and corruption-related reforms to the voters; the positions of other parties, especially potential coalition partners; and the role of civic groups in publicizing government performance and galvanizing public pressure. The EU incentives stem primarily from the evaluations of government performance made public by the Commission in the twice-yearly CVM reports, and the possibility of punitive actions by the EU, chiefly

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related to EU funding and Schengen entry. Although it is no silver bullet, the CVM has been indispensable in pressuring the Bulgarian and Romanian governments to adopt and implement key institutional reforms. This is at odds with the skepticism about the utility of the CVM expressed privately by some member states and EU officials.

Since the fall of communism in 1989, ten states have passed through the EU's demanding pre-accession process. The tremendous benefits of EU membership created political incentives to satisfy the EU's vast membership requirements. These incentives, along with certain characteristics of the pre-accession process that reward progress and publicize shortcomings, create the EU's leverage on domestic reform. EU leverage has helped compel candidates to reform the state and the economy, improving the quality of democracy and the efficiency of state institutions in various ways (Grabbe 2006; Vachudova 2005; and see Sedelmeier 2006). By 2005, the eight post-communist states that joined the EU in 2004 were, on average, indistinguishable from the EU's old member states on measures of political rights and civil liberties (Cameron 2007: 199).

However, the two post-communist states that joined in 2007, Bulgaria and Romania, have struggled to achieve the same relative success. Severe problems with corruption, judicial quality and state capacity remain. During the pre-accession process, strict enforcement in some areas was limited to the adoption, not the implementation, of EU rules. In other areas, especially those related to corruption, there were few specific rules to enforce. After twenty years of democratization, Bulgaria and Romania find themselves in the category of 'semi-consolidated democracies' – in contrast to the other eight post-communist EU members that are considered 'consolidated' (Freedom House 2010).

Domestic conditions in Bulgaria and Romania at the moment of democratization were less auspicious than in neighboring states. An extensive literature on the comparative politics of post-communism has revealed the importance of communist and even pre-communist legacies in shaping political trajectories after 1989. Bulgaria and Romania suffered under oppressive and highly clientelistic communist regimes that took power in societies that had low levels of industrialization and civil society organization in the pre-communist period. The 'revolutions of 1989' in these countries were instead an internal communist coup where second-

tier opportunists reinvented themselves as transitional democratic leaders, and then used the power of the state to win early elections. For much of the 1990s partial economic reform enriched the elite and entrenched networks of corruption, while prolonging the economic hardships of the average citizen. In both countries, the communist successor parties have been implicated in the most far-reaching and systematic corruption, as years of state capture by these parties would have led one to predict.

By 2000, however, both Bulgaria and Romania were making relatively dramatic progress. The benefits of qualifying for EU membership clearly inspired some of this effort, including significant domestic institutional reform (Grabbe 2006; Schimmelfennig and Sedelmeier 2004; on limits see Haughton 2007; Dimitrova 2010). But was it enough? In this article we investigate whether and how the domestic institutional change designed to strengthen the judiciary and clamp down on corruption has continued in both countries since EU accession. These are important components of democratic consolidation that are at the core of the EU's concerns.

The scale of the problem of corruption in Bulgaria and Romania, in comparison to the 'old' EU member states, depends entirely on which old member states serve as the point of reference. In Transparency International's 2011 corruption rankings (which are based on *perceptions* of corruption), ten EU member states are on the list of the world's twenty *least* corrupt countries. Romania is ranked at no.75 and Bulgaria at no.86; however, they are not alone well down the list, as Italy keeps them company at no.69 and Greece at no.80.¹

2 What is the CVM?

When Bulgaria and Romania joined the European Union in 2007, they still had to demonstrate that the rule of law was fully observed in their domestic systems. In order to identify and address any shortcomings, the EU developed the Cooperation and Verification Mechanism (CVM), a monitoring process that asks for a prompt policy response from the Bulgarian and Romanian governments. The CVM is a tool to maintain the reform momentum in the two countries and prevent reversal of the rule of law reforms enacted during the EU accession negotiations. Every six months, the Council issues a CVM report for Bulgaria and Romania, evaluating progress on the established benchmarks and flagging the most pressing issues that should be addressed before the next report. These monitoring reports have been widely praised for being

very detailed and for following the evolution of specific administrative reforms, judicial cases, and political developments. As such, they have played an important role in gathering and disseminating information about the state of reform in both countries. The main reports have been published in July, and the so-called interim “technical” reports or updates have come in February. July 2012 will mark five years since the inception of the CVM. The Commission is expected to make an overall assessment of reforms in both countries under the CVM since accession, and make recommendations about whether or not the CVM should remain in place.

Benchmarks to be addressed by Romania:

1. Ensure a more transparent and efficient judicial process.
2. Establish an integrity agency responsible for verifying assets, incompatibilities and potential conflicts of interest.
3. Continue to conduct professional, nonpartisan investigations into allegations of high level corruption.
4. Take further measures to prevent and fight against corruption, particularly within the local government. Those measures are intended to affect a broader spectrum of public officials beyond the central government such as those working at the regional and municipal level.

Benchmarks to be addressed by Bulgaria:

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.
3. Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency.
4. Conduct and report on professional, non-partisan investigations into allegations of high-level corruption.
5. Take further measures to prevent and fight corruption, in particular at the borders and within local government. Those measures are intended to affect a broader spectrum of public officials beyond the central government such as those working at the regional and municipal level.
6. Implement a strategy to fight organized crime, focusing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals.

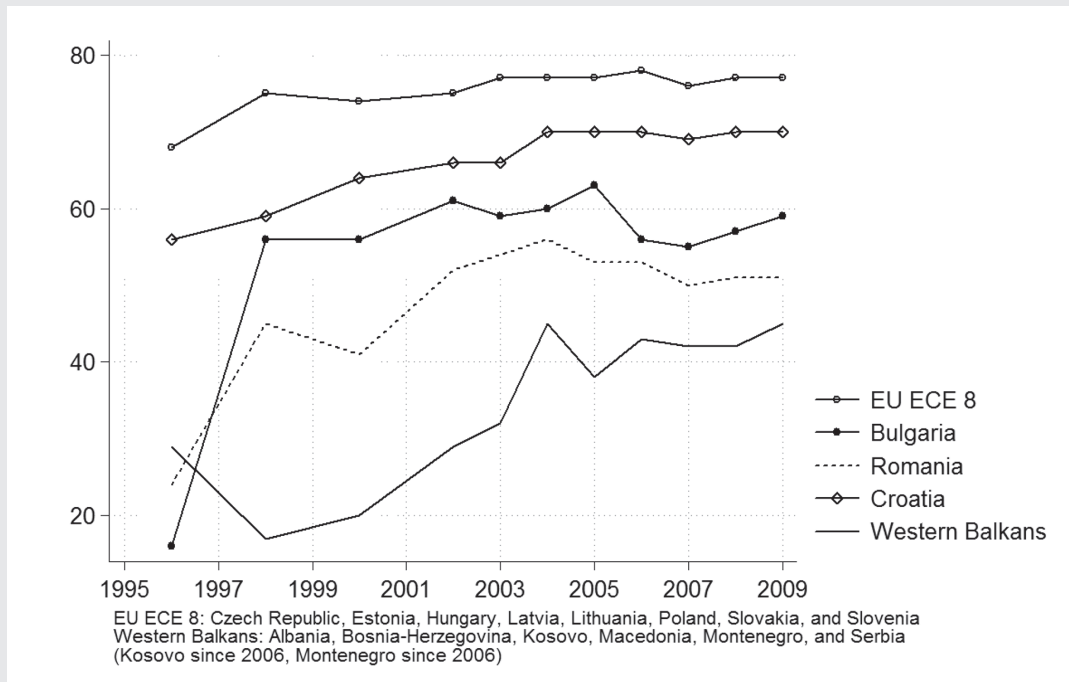
3 Assessing Progress in Bulgaria and Romania

In this section we present data that illustrates how domestic institutional reform in Bulgaria and Romania compares to reform in the eight post-communist EU members that joined the EU in 2004 (called here the EU ECE 8). As illustrated in Figures 1 and 2, Bulgaria and Romania are clearly laggards in government effectiveness and regulatory quality, although they have improved substantially over time. In judicial reform and the fight against corruption depicted in Figures 3 and 4 they have, on average, performed worse than the EU ECE 8. However, they have performed significantly better than the Western Balkan states that are still in the membership queue, with the exception of Croatia. The data here and in other studies is consistent with the argument that the process of joining the EU did help move Bulgaria and Romania away from the administrative and economic backwardness characteristic of the Balkan region.

The composite measure of government effectiveness from the World Bank in Figure 1 shows the gap between the eight post-communist countries that would join the EU in 2004 (the EU ECE 8) and Romania and Bulgaria in 1996 when the data set was started. Bulgaria performs slightly better than Romania overall, but deteriorates significantly during the term of the government led by the Bulgarian Socialist Party (BSP); it then rebounds. Figure 2 shows that all post-communist EU candidates have made quite consistent progress in market liberalization over the past fifteen years. The lion’s share of the EU *acquis* still relates to the functioning of the internal market; removing the state from the economy through deregulation, privatization and lowering state subsidies has gone hand in hand with improving the way state institutions oversee and regulate economic activity. Thus the steady progress exhibited by Romania, Bulgaria and also Croatia in Figure 2 suggests that the EU has had the most influence in this area, narrowing progressively the gap with the EU ECE 8. Overall, this dovetails with other studies that have shown that post-communist states, as a group, have not reversed course after accession, and are quite good at implementing the *acquis* (Sedelmeier 2008, 2011; Levitz and Pop-Eleches 2009).

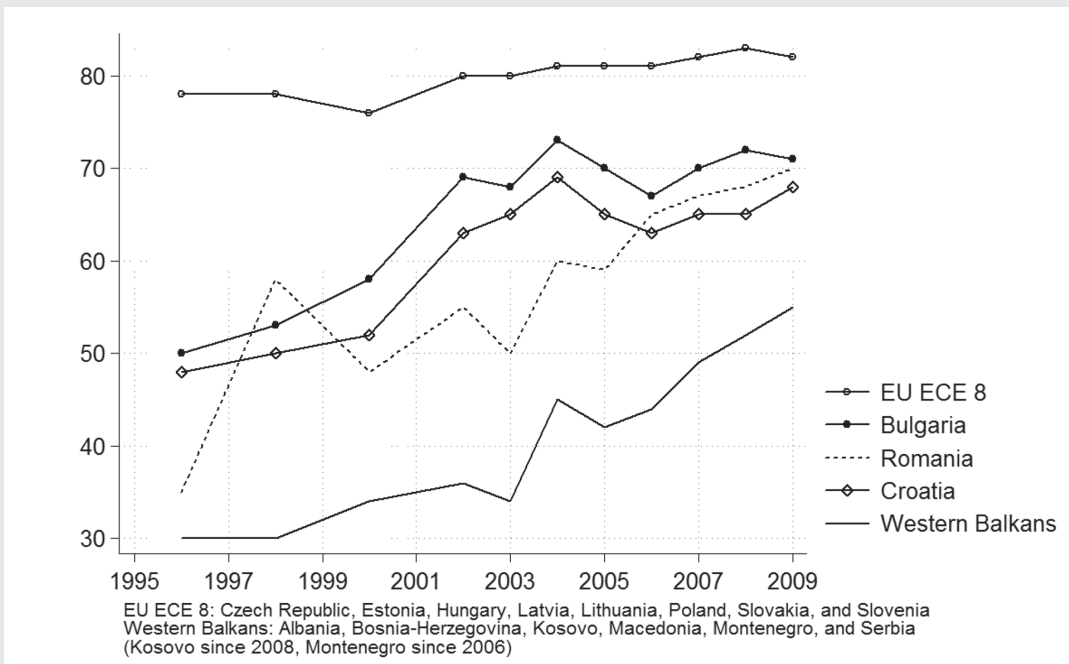
Figures 3 and 4 present the regional trends in domestic institutional change aimed at reforming the judiciary and controlling corruption. This composite measure of the rule of law paints a much less positive picture of the ability of EU leverage to transform domestic institutions – both before accession and after it. The gap between Romania and Bulgaria, on the one hand, and the EU ECE 8, on

FIGURE 1 GOVERNMENT EFFECTIVENESS (PERCENTILE RANKS)²



Note: World Government Indicators (WGI) 1996-2009, World Bank. Available at: <http://info.worldbank.org/governance/wgi/index.asp>. In this graph, the overall percentile rank of the countries or country groups are shown, with higher numbers indicating better performance (Kaufmann, Kraay, and Mastruzzi 2010).

FIGURE 2 REGULATORY QUALITY (PERCENTILE RANKS)³



Note: World Government Indicators (WGI) 1996-2009, World Bank. Available at: <http://info.worldbank.org/governance/wgi/index.asp>. In this graph, the overall percentile rank of the countries or country groups are shown, with higher numbers indicating better performance (Kaufmann, Kraay, and Mastruzzi 2010).

the other, is large and has decreased only a little in 12 years. On this measure Croatia is also lagging well behind the EU ECE 8. This is not surprising since the indicators that make up this composite measure include the effectiveness of the judiciary – an institution that was only subject to EU leverage indirectly and which has been notoriously difficult to reform. This composite measure also reflects perceptions about criminality within economic and political activity, which we would expect to be much greater in a country which has high levels of perceived corruption and years of partial economic reform. The figure is consistent with the argument that substantial improvements in the rule of law require a sustained domestic commitment to institutional change (Spendzharova 2008). Helping to create this kind of commitment is one of the purposes of the EU's CVM, as discussed below.

The corruption measure is similar to the rule of law measure, although it shows greater improvement over the last 15 years from a lower starting point, especially in Bulgaria and Croatia. While, in absolute terms, more progress appears to have been made in the area of corruption, the gap between Bulgaria, Romania and the EU ECE 8 is still considerable (for additional data that shows similar results, see Vachudova 2009). This measure shows the deterioration of corruption control measures around the time of EU accession under the Bulgarian Socialist Party (BSP) government, but an improvement in such measures in Romania. However, the last data point, our qualitative analysis, and the EU's recent CVM reports suggest that the trends reversed after the government changed in Bulgaria.

4 Consolidating Liberal Democracy after EU Accession: Fighting Corruption and Reforming the Judiciary

Over the last two decades, two factors have intermittently been successful in prompting Bulgaria and Romania's governments to pursue domestic institutional change in reforming the judiciary and controlling corruption: EU leverage and domestic incentives (Ristei 2010). The CVM aims to prolong some of the EU's leverage after accession in the critical areas of judicial quality, the fight against corruption and also organized crime – areas where powerful domestic players in Bulgaria and Romania have openly tried to scuttle institutional reform.

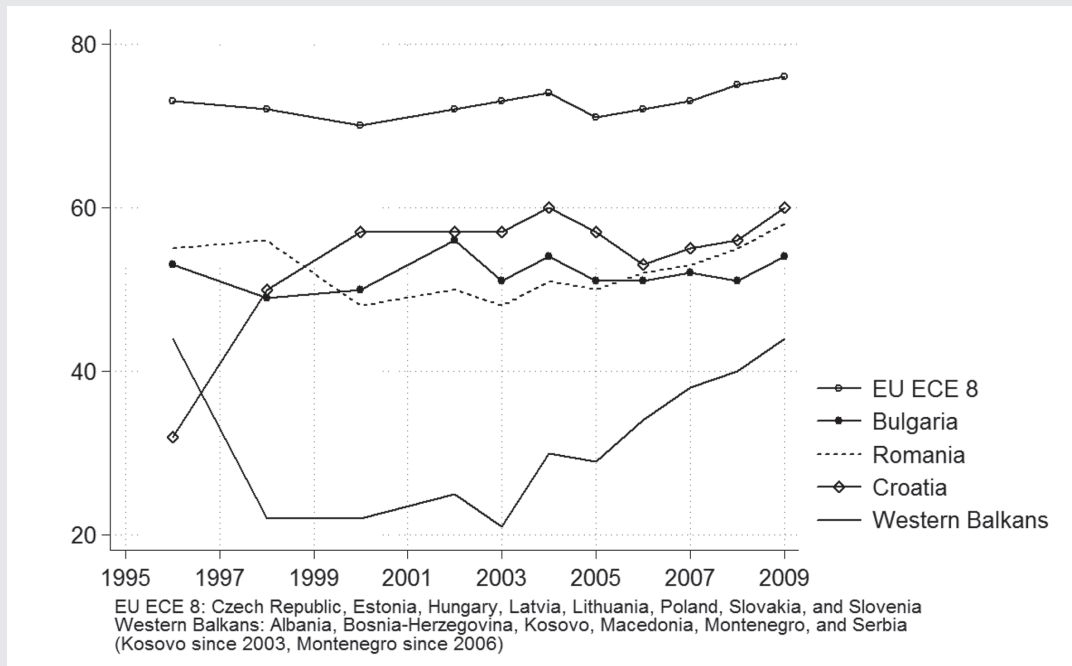
We measure EU incentives using the CVM launched by the Commission in December 2006. The purpose of the CVM is 'to smooth the entry of both countries

and at the same time to safeguard the workings of its [the EU's] policies and institutions'. The Commission created 'benchmarks' for assessing progress in judicial reform, corruption and organized crime, and set up teams to monitor domestic institutional change in these areas. So far seven progress reports have been published for each country (the main reports are in June/July and the interim reports in February of each year).⁶ While the EU's previous reports on the progress of candidate states were often criticized for being too vague, these CVM reports are remarkably detailed, following the activities of relevant institutions and tracking the outcome of high-level criminal cases. Hinting at the likely longevity of the CVM mechanism, the Council declared in September 2010 that the CVM is an 'appropriate tool' that will stay in place 'pending the results expected in this framework' (Council of the European Union 2010).

Since accession, we argue that the causal importance of domestic incentives has increased substantially (see also Noutcheva and Bechev 2008). Why? In a variety of ways, EU leverage has helped empower domestic coalitions with liberal democratic aims and undermine illiberal ones (Vachudova 2005). On the eve of EU membership negotiations, almost all political parties adopted an EU-compatible agenda; subsequently, all ruling political parties helped bring the negotiations to a close (Vachudova 2008). Now that membership has been achieved, however, the obvious externally-imposed costs of *not* pursuing reforms or complying with EU rules have diminished.

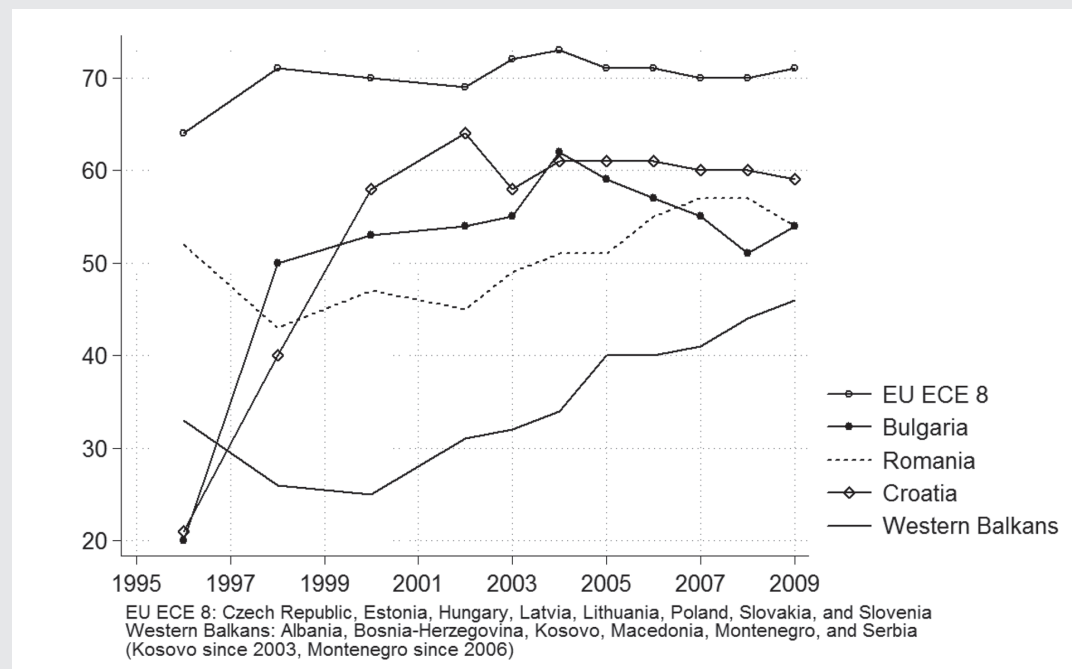
Domestic incentives to fight corruption are generally tied to getting elected or re-elected. Political parties may choose to build their electoral platforms on improving the rule of law. Once these commitments have been made, the credibility of the political party may hinge upon its capacity to deliver. The chance of re-election may plummet if voters no longer trust that the party will enact and implement domestic institutional reforms to fight corruption and organized crime. Here, the resources of society to hold political leaders to account for the reforms they have (or have not) promised to deliver are critical (see also Noutcheva and Düzgüt 2011). A free media and an active civil society are essential for analysing the performance of the governing political parties and highlighting important shortcomings (Primatarova 2010). Sustained domestic pressure for reform, led by civil society, remains weak in both countries. Ultimately, the CVM can only work in conjunction with strong domestic

FIGURE 3 RULE OF LAW (PERCENTILE RANKS)⁴



Note: World Government Indicators (WGI) 1996-2009, World Bank. Available at: <http://info.worldbank.org/governance/wgi/index.asp>. In this graph, the overall percentile rank of the countries or country groups are shown, with higher numbers indicating better performance (Kaufmann, Kraay, and Mastruzzi 2010).

FIGURE 4 CONTROL OF CORRUPTION (PERCENTILE RANKS)⁵



Note: World Government Indicators (WGI) 1996-2009, World Bank. Available at: <http://info.worldbank.org/governance/wgi/index.asp>. In this graph, the overall percentile rank of the countries or country groups are shown, with higher numbers indicating better performance (Kaufmann, Kraay, and Mastruzzi 2010).

demand – a point underscored in the Commission’s February 2012 interim CVM reports that call for a greater role for civil society in judicial and other reforms (European Commission 2012).

5 Bulgaria

Since Bulgaria joined the EU in 2007, it has been ruled by two different governments: by the coalition government led by the Bulgarian Socialist Party (BSP) from 2005 to 2009, and the Citizens for European Development of Bulgaria (GERB) government since 2009. The two governments have differed substantially in their approach to corruption and the rule of law because they have different sources of domestic power; the BSP’s has been built on clientelism and state capture, and the GERB’s on a popular backlash against corruption.

To promote domestic institutional reform in Bulgaria after accession, the EU has used both positive incentives, such as funding and expert advice, and negative incentives, such as freezing EU funds and imposing fines. The June 2007 CVM report detailed the most serious policy shortcomings: judicial reform, corruption and organized crime (European Commission 2007). A year later, the June 2008 CVM report established that despite some formal domestic institutional changes such as anti-corruption legislation and action plans, practical results were missing, especially in the realm of managing EU funds (European Commission 2008). The BSP-led government had failed to translate formal (and quite superficial) domestic institutional change into policy results.

The context of EU incentives in Bulgaria changed substantially in 2008 after the EU froze a number of funding programmes due to mismanagement, and demanded that Bulgaria improve ‘transparency and the regulation of financial asset flows and transactions’ (European Commission 2008: 5). This marked a dramatic shift to using negative incentives in order to induce change. In response, the BSP-led coalition complied with some of the requested institutional and legal changes, but the Commission concluded that concrete results were largely missing and questioned whether genuine reform would take place (European Commission 2009). The domestic incentives for the BSP-led government were geared toward rent-seeking, especially in the realm of public procurement and managing EU funds.

A 2008 Transparency International survey suggested that Bulgaria had the highest level of corruption in the EU. It attributed the entrenchment of corruption to a

lack of transparency in the public procurement deals of the coalition government, and political pressure on the judicial system.⁷ The Centre for the Study of Democracy (CSD) (2007) concurred that even though low-level administrative corruption was in decline, ‘political corruption involving members of the government, MPs, senior state officials, mayors and municipal councilors’ was on the rise. EU accession did help curb administrative corruption, income concealment, tax evasion, and informal employment. However, deeper domestic institutional changes were needed to close loopholes and increase transparency in the management of state assets and public procurement (CSD 2007: 6).

The public procurement market highlights the gaps in the domestic institutional framework that allowed clientelism to flourish. By 2008, this market, as measured by concluded contracts, had doubled both in number and value. At the same time, the share of the companies that participated in public procurement tenders dropped significantly, and the 25 largest contracting authorities commanded more than 45 per cent of the total value (CSD 2009: 82). The lack of legal and institutional provisions for fair competition created a fertile environment in which to establish clientelistic relations and demand kickbacks in exchange for large government contracts. This was especially true in the biggest public procurement markets such as pharmaceuticals, fuels, business services, office equipment, and motor vehicles (CSD 2009: 82).

The Bulgarian case also shows how NGOs can also become a tool of corruption and rent-seeking. After aid for the promotion of democracy in Bulgaria was phased out, EU and other grants distributed by the government became increasingly important, constituting 40 per cent of all NGO funding. The CSD (2009: 38) chronicled a worrying trend of ‘civil society capture’ by elites in order to benefit from EU funding. By 2009, the number of Bulgarian NGOs had increased five-fold. The CSD found that 75 per cent of Bulgarian MPs and ministers, and 90 per cent of Bulgarian municipal mayors were members of NGO boards. Public officials developed ‘loops of NGOs’ which obtained generous grants from the state despite flagrant conflicts of interest (CSD 2009: 40). Where they sat on the board, Members of Parliament often lobbied their colleagues to award EU projects to the NGOs. The Ministry of Regional Development frequently cherry-picked winners of EU funded regional development and rural aid projects. Civil servants in charge of project management offered to process smoothly project reports and receipts in return

for 15 per cent of the project value.⁸ Established NGOs in Bulgaria such as the Centre for Liberal Strategies and the Centre for the Study of Democracy (CSD) have been pivotal in exposing corruption and creating pressure for transparency and accountability in government. Several similar NGOs exist in Romania, including the Romanian Academic Society (SAR) and Pro Democracy. However, since accession, officials from the ruling parties of both countries disburse substantial amounts of NGO funding from EU programmes. As a result, smaller and less-established NGOs are likely to refrain from criticizing the government – a serious blow for accountability, transparency and domestic pressure for reform in both Bulgaria and Romania (SAR 2011).

In sum, while we observed superficial domestic institutional changes addressing the EU's recommendations to combat corruption and improve the rule of law, Bulgaria's BSP-led coalition government did not deliver convincing results. In fact, high-ranking politicians were involved in clientelistic networks and Bulgaria lost ground in the fight against corruption (Andreev 2009; Ganev 2012). The absence of strong domestic incentives to promulgate deeper domestic institutional change leads to, at best, partial progress in democratic consolidation. Let us now examine how domestic incentives changed under the new government of the GERB party following the 2009 parliamentary elections.

GERB's entry on to Bulgaria's political scene highlights the importance of domestic electoral incentives. Political developments in Bulgaria since 1989 suggest that clientelism and corruption undermine economic stability and lead to electoral failure. An earlier BSP government that had also vigorously pursued rent-seeking ultimately faced an escalating economic crisis, country-wide protests, and was ousted in early elections (Ganev 2007; Spendzharova 2008; Vachudova 2009). In 2009, the wide-spread mismanagement and freezing of EU funds contributed to the electoral failure of the BSP-led coalition government. It also made the anti-corruption agenda of the opposition all the more popular and, from the point of view of the citizen and some domestic groups, urgent. A new centre-right political party, GERB, seized the opportunity and won the parliamentary elections on a strong anti-corruption platform. Its leader, Boyko Borissov, became prime minister. Both the European Commission in its July 2010 CVM report and Bulgarian think tanks such as the CSD pointed out a clear shift in the political will of the Bulgarian government to tackle corruption when the GERB cabinet took office (CSD 2010; European Commission 2010a).

For the GERB government, the domestic incentives for reform have been stronger: it ran an election campaign focused on curbing corruption and limiting the influence of organized crime. Borissov emphatically pledged that prosecuting corruption and abuse of EU funds would be a core priority of his government.⁹ By contrast, the policy agenda of the preceding BSP-led government focused on job creation and economic growth (Cholova 2010). GERB's choice of policy priorities for the 2009 election campaign resonated well with public opinion. Voters clearly placed fighting corruption as a top priority: while 35.6 per cent of respondents agreed that anti-corruption should be a top government priority in 2004, 64.7 per cent supported that statement in 2008. Similarly, business managers' tolerance of corruption and their inclination to engage in corruption were at an all-time low in 2009 (CSD 2009: 25). Ivanova's analysis of the Bulgarian case also shows how the CVM mechanism can help galvanize the media and civil society, and put corruption cases in the spotlight. To comply with CVM recommendations after 2008, the Bulgarian government increased the transparency of court rulings and access to court decisions. This, in turn, has allowed the Bulgarian media to investigate and publicize striking discrepancies in court rulings on similar cases, in some instances due to corruption (Alegre et al. 2009: 32).

Following the release of the July 2010 CVM report, the government enacted substantial domestic institutional changes to address EU and domestic criticism. Bulgaria's Ministry of Justice instituted a legal ban on the participation of high-level public officials on NGO management boards. The government streamlined the public tendering procedure and made it more transparent. A new *Law on the Prevention and Detection of Conflicts of Interests* introduced in 2009 obliged public officials to declare and avoid conflicts of interest (CSD 2009: 40).

In addition to domestic institutional changes, the Borissov government showed more consistent behavioural compliance with EU pressure for high-level prosecutions. Three magistrates were dismissed from office and 15 others received disciplinary sanctions (European Commission 2010a: 5). Businessman Mario Nikolov was sentenced in May 2010 to 12 years in prison on charges of fraud and embezzling €7.5m of EU funding. Nikolov was also convicted of money laundering in a related case, both of which came to court following an investigation by OLAF, the EU's anti-fraud office (Trauner 2009).¹⁰ As a result, the first CVM report assessing the GERB government recognized that 'organised crime [was] actively tackled for the first time since the inception

of the CVM' (European Commission 2010a: 3). The Commission's decision to unfreeze blocked EU funds after a positive CVM report in July 2010 was a big success for the GERB government.¹¹ The February 2011 interim report, albeit positive in outlook, recommended further domestic institutional changes such as establishing an independent authority to identify and sanction conflicts of interest, and to confiscate unexplained accumulations of wealth (European Commission 2011a).

Recent developments have highlighted the delicate balance between institutional change and political control. A new law on asset forfeiture was presented to Parliament only to be rejected on 8 July 2011 (European Commission 2011b: 3). The proposal would give the state power to seize criminal assets even when a court verdict is still pending. While this law would allow the state to identify and secure criminal assets, and thus tackle organized crime more effectively, it has become very controversial. A number of Bulgarian MPs have expressed concerns that if passed, the law could be used to silence political adversaries of the government in power.¹² After all, in Bulgaria's recent past under communist rule, pre-arranged trials and asset forfeiture were used frequently to get rid of inconvenient political opponents. However, the Commission raises questions about the unexplained wealth of Bulgaria's political class, and recommends strongly empowering an independent institution to investigate the assets of senior officials and politicians. The February 2012 interim CVM report observes that so far Sofia has failed to act in this area (European Commission 2012).

Reforming the judicial system remains Bulgaria's toughest challenge. Even though the government created a special court to prosecute faster cases related to organized crime, dealing with the cases impartially and efficiently remains problematic (European Commission 2011a: 5). Competent magistrates have very little time to spend on each case. Law-enforcement agents do not have adequate resources and authorization to conduct the investigations and secure quality evidence that can lead to successful indictments in court.¹³ Most important, in both Bulgaria and Romania, stonewalling by 'conservatives' from within the highest ranks of the judiciary itself has blocked comprehensive institutional reform and propagated corruption (SAR 2011). The Commission, calling for sweeping reforms, observes in the February 2012 interim CVM report that the credibility of Bulgaria's Supreme Judicial Council is compromised by a lack of transparency and accountability (European Commission 2012).

While the Commission commended the GERB government on its pursuit of institutional reform, it pointed out in Bulgaria's July 2011 CVM report that 'the leadership of the judiciary has yet to show a real commitment to thorough judicial reform' (European Commission 2011b: 6). For example, the quality and transparency of several important appointments within the judiciary in 2011 has led to widespread public outcry.¹⁴ At the same time, the Association of Judges in Bulgaria asked the Council of Europe for an in-depth assessment of Bulgaria's judicial system and for recommendations on how to avoid political pressure on members of the judiciary.¹⁵ Hence the conundrum that has plagued judicial reform in Bulgaria: How does one reform the judiciary without jeopardizing its independence and substituting one set of political appointees for another?

With the amendments to the *Judicial System Act* passed in December 2010, the GERB government created the legal basis for important structural improvements within the judicial system. Overall, close monitoring by the Commission does compel the Bulgarian judicial system to produce some results. In 2010–2011, nine Bulgarian court cases monitored by the Commission were decided by court, including four with final decisions. With regards to improving the outcomes of judicial reform, the Commission recommended establishing and training networks of specialized prosecutors and investigators in economic and financial crime in cooperation with foreign experts (European Commission 2011b: 9). Bringing together the investigators and prosecutors working on cases related to corruption, fraud and money laundering would help to develop a shared understanding of the standard of proof required by the judges. This, in turn, would lead to a higher number of successfully handled cases.

Looking ahead, domestic acceptance and capacity to implement the Commission's recommendations will be crucial for sustaining the momentum of anti-corruption reforms in Bulgaria. To mention a few perennial concerns, the recruitment process in the judiciary still lacks a convincing assessment of the professional qualifications, managerial skills and personal integrity of candidates (European Commission 2011b: 4). Furthermore, analyses by the Commission and independent experts have demonstrated serious weaknesses in judicial and investigative practice. These weaknesses mainly concern the collection of evidence, protection of witnesses and the general lack of comprehensive financial investigations (European Commission 2011b: 6). To strengthen the fight against organized crime, the Commission calls

for 'further improvements in investigative practice, in terms of investigation techniques and in the collection of evidence remain to be demonstrated through enhanced professionalism during police actions, shorter periods of investigation and through final verdicts' (European Commission 2012: 4). In the fight against corruption, it concludes that "The track record of decisions and penalties in cases related to high-level corruption, fraud and organised crime under investigation and in court does not yet provide the convincing results needed to provide effective dissuasion" (European Commission 2012: 2). The report also regrets that instances of electoral fraud and of fraud related to EU funds have not been investigated or prosecuted in Bulgaria over the last year.¹⁶

6 Romania

In Romania, the political will to tackle domestic institutional reform has been uneven since 2007. There was a surge in activity in the run up to accession, but much of the political elite responded by closing ranks and working to dilute or remove the curbs on corruption that were implemented at that time (Gallagher 2009). Unlike in Bulgaria, where a new party exploited the failure of the government to fight corruption, in Romania some of the old parties worked to push the issue under the rug. Nevertheless, when the EU has put strong pressure on Romania, the government has responded, mainly by passing legislation in the parliament. President Traian Basescu, in office since 2004, built his reputation on the fight against corruption. Pressured by criticism from the Commission, his party again pushed through some reform in 2010; most important was the resuscitation of Romania's anti-corruption agency. As Mihaela Ristei argues, even in Romania there has been progress in the fight against corruption when EU leverage and electoral pressure have created political incentives for some domestic elites to spearhead reforms (Ristei 2010).

For the last two decades, Romanian domestic politics have experienced high-level political drama surrounding the issue of corruption. The former communist party, led by Ion Iliescu, ruled from 1989 until 1996 under several names, ending its rule as the Party of Social Democracy in Romania (PDSR). In 1996 it was defeated by a broad coalition of parties led by the Democratic Convention of Romania (CDR). This government changed the trajectory of Romania, orienting it squarely toward fulfilling the requirements of EU membership including tolerance for Romania's Hungarian minority and rapid economic liberalization. The CDR lost the 2000 elections due mainly to the economic hardships of structural economic reform and infighting within the coalition. The former

communist party, now called the Social Democratic Party (PSD), won these elections and Iliescu became president once again (for more on these permutations, see Pop-Eleches 2008). The PSD government continued Romania's preparations for EU membership, but like the BSP-led government in Bulgaria it was mired in accusations of corruption, and these contributed to its defeat in 2004. Traian Basescu from the Liberal Democrat Party (PDL) won the presidency in 2004 on a vehemently anti-corruption platform. A coalition government was formed from several parties under the leadership of Prime Minister Calin Popescu-Tariceanu of the National Liberal Party (PNL). Before long, the PSD and the PNL were working together to block Basescu's reforms, which is evidence of the lack of broad-based support for reform among Romania's political parties that has troubled the EU (Trauner 2009).

As 2007 approached and the Commission considered whether to activate the one-year postponement of Romania's EU accession, it exerted substantial pressure on the Romanian government (Ristei 2010: 23). In 2005 Basescu had appointed and supported government officials who were very energetic in the fight against high-level corruption; but Basescu's opponents in the PSD and the PNL claimed that their investigations were politically motivated, targeting politicians from opposing political parties. The most active was the Minister of Justice Monica Macovei, whose work to improve the judiciary and bring cases to trial was heralded in European capitals as a great breakthrough. Romania's initial CVM reports were consequently much more positive than Bulgaria's. Many politicians in Romania, however, disagreed and the parliament voted overwhelmingly, by 322 to 108, to impeach Basescu in April 2007 for infringing the rights of the government, the parliament and the judiciary. This impeachment had to be put to a referendum in which 74 per cent voted against removing Basescu (turnout was only 44 per cent).¹⁷ Nevertheless, Macovei was sacked by the PNL prime minister in 2007, and this was met with little protest in Bucharest.¹⁸

By 2008 it was clear that the reform momentum following Basescu's presidential victory in 2004 had been stopped and even reversed. The Romanian parliament continued its habit of using its veto to prevent high-profile cases against politicians from going to court. And Romania's judges routinely gave only the mildest sentences for those that did. For example, of the 109 cases that were prosecuted in 2007 by Romania's anti-corruption agency, headed by Macovei appointee Daniel Moran, only 25 resulted in prison sentences,

mostly for the minimum of three years.¹⁹ Reform of the judiciary and the battle against corruption played almost no role in the campaign in the run-up to the December 2008 elections. The Romanian economy, crippled by the global financial crisis, was the main concern; citizens focused on unemployment, the economy, and inflation (European Commission 2010b). After the elections Basescu's party, the PDL, went into coalition with the PSD making new reforms very unlikely. This coalition, led by Emil Boc (PDL), fell apart in October 2009, paving the way for a new PDL government led by Boc in coalition with the Hungarian and minority parties. This new, more auspicious coalition government took office in December 2009. However, Romania was hit much harder by the 2008 economic crisis than Bulgaria. The government had to implement a difficult austerity package to respond to the economic crisis; for this it was viciously attacked by the opposition and lost substantial popular support.

What the EU applauded most enthusiastically was an important domestic institutional change: the creation in 2007 of the National Integrity Agency (ANI) that had substantial powers to force public servants to disclose their assets, to investigate individuals who could not adequately explain where their assets came from, and to seize unexplained assets. It also required public officials to submit conflict-of-interest declarations. The largest number of cases against high-level politicians pursued by this agency involved politicians from the PSD (Dix 2010). In April 2010, many of the ANI's activities were declared unconstitutional by the Constitutional Court after having also been attacked in parliament. Press reports revealed that seven of the nine judges of the Court were themselves being investigated by the ANI. President Basescu promised in Brussels that Romania would reach its objective of 'controlling the income of those in power and investigating the origin of their wealth' even though the ANI had been in practice 'annihilated' by the Constitutional Court.²⁰

The July 2010 CVM report of the European Commission was highly critical, especially of the destruction of the ANI, and declared that Romania was in breach of its accession commitments. The Commission called on Bucharest to 're-establish the ANI's powers to propose the effective forfeiture of unjustified wealth' (European Commission 2010a: 7). The Commission also observed that Romania lacks 'broad-based political support in favour of transparency and the effective protection against corruption and conflict of interest' (European Commission

2010a: 7). Soon afterwards, in August 2010, both houses of the Romanian parliament voted to resurrect a weaker ANI; this was widely understood to be the direct result of EU pressure. The PSD, however, boycotted the vote.²¹ The July 2011 CVM report welcomed the fact that Romania had 'responded swiftly to the Commission's recommendation by adopting a new legal framework for the National Integrity Agency (ANI). The National Integrity Agency has been operational under this new legal framework and started to re-establish its track record of investigations' (European Commission 2011b: 3). The Commission also found that the track record of the National Anti-Corruption Directorate (DNA), which investigates and prosecutes high-level corruption cases, was 'convincing'. It welcomed an increase in final court decisions in DNA cases from 85 in 2010 to 158 in 2011, including some senior politicians and officials (European Commission 2012: 3). Throughout the CVM process, the Commission monitors the progress of important cases and helps build pressure on the judiciary and the parliament to act appropriately.

In spite of this, progress in fighting corruption remains slow. Many cases never go to trial; others are dismissed or lost because of delays during the trial period; and sentences are often very light with little effective confiscation of assets. Court proceedings often enable defendants to raise objections that slow and postpone trials. The Commission regretted that certain important high-level corruption cases saw little movement in court during early 2011 (European Commission 2011a/b). It called for 'urgent action' to accelerate trials that risk being ended because too much time has passed since the alleged crime. In the February 2012 interim report, Romania was praised for progress in this area (European Commission 2012).

In the July 2011 CVM report, the Commission also called for 'urgent measures...to improve the recovery of the proceeds of crime, the pursuit of money laundering and protection against conflict of interest in the management of public funds' (European Commission 2011b: 3). While the ANI identifies and investigates cases of unexplained financial gain, judicial and administrative bodies very rarely take the next step and apply meaningful sanctions. In an important signal to Bucharest, the Commission still regrets that 'the potential dissuasive effect of ANI cases is hindered by the delays and lack of consistency in the judicial and administrative follow-up to ANI cases' (European Commission 2012). Overall, the Commission has called for greater political will and commitment on the part of the judiciary to fight corruption, and

regretted that the parliament does not show strong political support. Parliament is clearly identified as a roadblock to progress and the Commission calls on it to approve the draft anti-corruption strategy and a draft law increasing the penalties for corruption, and to throw out parliamentarians with convictions for corruption (European Commission 2012).

In the area of judicial reform, there has been some institutional change aimed at improving the capacity and the consistency of the judiciary. New criminal and civil procedure codes were passed in 2010 (European Commission 2010a). In the July 2011 CVM report the Commission welcomed the fact that Romania had taken significant steps ‘to improve the efficiency of judicial procedures and continued preparations for the entering into force of four new codes that are the foundation for a modern judicial process’ (European Commission 2011b: 3). Some reformers have joined the Supreme Council of the Magistracy, whose duties include appointing and disciplining judges (Geissler and Rebegea 2011). However, the Commission observed in the July 2011 CVM report that it has yet to deliver tangible reforms (European Commission 2011b). It noted only limited progress in developing cooperation amongst the government, civil society and the judiciary on judicial reform.²² Training and recruitment standards need to be improved along with the transparency and the accountability. As in Bulgaria, a rather large ‘conservative’ faction within the judiciary appears committed to fighting both transparency and accountability as it continues to protect the beneficiaries of widespread corruption in Romania. The performance of government officials in many areas remains poor since accountability is largely absent and political allegiance is the main determinant of success (SAR 2011).

7 Linking the CVM to Schengen Entry for Bulgaria and Romania

In late 2010 the question of Bulgaria and Romania’s entry into the Schengen free movement area took centre stage. Press reports had speculated that Romania would have to produce a functioning ANI to gain admission to Schengen.²³ Formally, the Commission has repeatedly stated that there is no connection between the technical requirements for Schengen entry and the CVM benchmarks. However, in December 2010 France and Germany publicly linked the two, declaring in a joint letter that Schengen entry should be postponed until ‘both member states have initiated clear and objective, sustainable and irreversible positive developments in the fight against corruption and organized crime and in

reforming the judicial system’.²⁴ In June and December 2011 the member states further delayed a decision on Schengen entry for both countries.

Reflecting differences in domestic incentives, the two governments responded quite differently. The Borissov government in Bulgaria immediately agreed that significant work needed to be done, and promised to redouble its efforts. Given how closely Borissov has wedded his agenda with that of the EU, at least rhetorically, this strategy made sense – especially in the context of the abiding respect of Bulgarian citizens for the EU. As 2011 wore on, though, Bulgarian government officials increasingly blamed their Schengen failure on populism in the EU even as the anti-corruption credentials of the Borissov government came under scrutiny. The Boc government in Romania, in contrast, took umbrage and accused Paris and Berlin of discriminatory action seeking a ‘two-speed Europe’. Romanian Foreign Minister Teodor Bachonschi declared that Romania may withdraw from the CVM.²⁵ The Commission, for its part, reminded Romania that only it can phase out the CVM once the benchmarks are fulfilled.²⁶ The Boc and the Basescu government appeared to be mobilizing domestic opinion against the EU, perhaps because they could not deliver far-reaching reform. Nevertheless, the Basescu government has acted on the criticisms and recommendations in the CVM reports. It has also continued to propose institutional changes that seem helpful to strengthening the judiciary and fighting corruption. In a package of constitutional reforms that was well received in Brussels in June 2011, Basescu proposed, for example, limiting parliamentary immunity. In an advisory opinion this was rejected as unconstitutional by the Constitutional Court that is controlled by the PSD. In late 2011, his government drafted an anti-corruption strategy that has been well received by the Commission. It would be wrong to consider Basescu’s party, the PDL, as outside the political cartel that benefits from institutional stasis and corruption in Romania. High barriers to new party entry help protect the PSD, the PNL and the PDL from a new ‘clean hands party’ like the GERB (SAR 2011). However, should the PSD control the next government, corruption will deepen and the balance of power will shift (further) against those working for domestic institutional change.

Since Schengen entry is strongly desired by Bulgarian and Romanian voters, using Schengen as a reward for meeting CVM benchmarks has significantly increased the external incentives for both ruling parties to deliver reform. In October and November 2011, the Netherlands and Finland

took the lead from Germany and France in predicating Schengen entry on progress in the fight against corruption, as measured by the Commission through the CVM. The Dutch declared that any progress on Schengen entry would only come after at least two positive CVM reports, and they also raised concerns about border security.²⁷ Others have worried that mafia elements could gain access to the Schengen databases after Bulgaria and Romania join.²⁸

8 Conclusions and Recommendations

Five years after joining the EU, Bulgaria and Romania still lag significantly behind the EU ECE 8 in clamping down on corruption and improving the quality of the judiciary. It is unclear whether episodic bursts of domestic institutional reform can overcome deeply entrenched corruption in state institutions sufficiently to close this gap. At the same time, the two countries are performing substantially better than the EU-eligible states from the Western Balkans, with the exception of Croatia (see also Noutcheva and Düzgüt 2011). Croatia outperforms Bulgaria and Romania on the rule of law and control of corruption indicators (Figures 3 and 4) – but only slightly. This is interesting in light of the fact that Croatia is joining the EU with no CVM mechanism in place – and of statements by the Commission in 2011 that it has no intention of including a CVM mechanism in any future accession treaty.²⁹ The Commission may be planning that the remaining candidates in the Western Balkans should get all reforms done before they join. However, we have shown that, should they fall short, CVM benchmarks backed by concrete rewards and sanctions can help mobilize institutional change. It is a slow, painstaking process – and both Romania and Bulgaria have sometimes made progress and at other times appeared in stasis or in decline. However, the CVM process has clearly helped push through positive reforms. Capitalizing on the Schengen carrot, it can be hoped that the media and domestic civil society groups in Bulgaria and Romania as well as many international actors will focus substantial attention on the July 2012 CVM reports in order to motivate further, immediate reforms.

Our main conclusions and recommendations are as follows:

1. The Romanian and Bulgarian governments have both responded to specific demands in the CVM reports, suggesting strongly that in the absence of the CVM there would be less reform. The detailed monitoring and assessment in the CVM reports, coupled with political pressure and concrete sanctions, can deliver substantial results.
2. Given the huge problems besetting the rule of law, judicial quality and the fight against corruption in the Western Balkans states, the EU would do well to set up a CVM structure for each acceding state. This could always be dismantled rapidly where it was not needed. Some have observed a significant deterioration in the comportment of public officials in the areas of accountability, transparency and the fight against corruption once their country has joined the EU. A CVM structure would help deter backsliding.
3. EU pressure can be powerful when it is twinned with domestic incentives related to winning elections and holding power. Civil society groups play an essential role in highlighting corruption and the need for judicial reform. The EU needs to rethink civil society funding that is funneled through government institutions, since this undermines the readiness of civil society groups to highlight corruption.
4. EU leverage tied to the CVM process is more effective in motivating governments if the EU is threatening to withhold something that voters really want. The decision by (some) EU members in late 2010 and 2011 to block Schengen entry, as a sanction for not meeting CVM benchmarks, has helped trigger reform in both Romania and Bulgaria, since Schengen membership is valued by citizens. Linking Schengen entry to satisfying CVM benchmarks has helped trigger reform.
5. Charges that delaying Schengen entry is motivated by populism in some of the old member states does, however, risk diminishing the leverage created by linking the CVM to Schengen entry. It would be preferable for EU member states to speak on this with a more unified voice.
6. One of the most significant consequences of Romania and Bulgaria joining the EU is that it helped put the fight against corruption squarely on the EU agenda – an instance, perhaps, of ‘reverse conditionality’ (Sasse 2005). In June 2011, the European Commission launched a new initiative, the EU Anti-Corruption Report, which will be published by the Commission every 2 years, starting in 2013. The report will be accompanied by country analyses of each EU member state and will contain country-specific recommendations. The thrust of this initiative consists of soft law (i.e. non-binding) measures such as identifying trends and best practice in the fight against corruption, and improving information exchange

among the member states (European Commission 2011c). Yet countries will also face close scrutiny in the individual reports and will be obliged to take action in response to the Commission's recommendations.

The biennial EU Anti-Corruption Report follows up on the Stockholm Programme, 'An open and secure Europe serving and protecting the citizen,' adopted by the European Council in 2009.

Notes

- ¹ For full details, see the website of Transparency International at: <http://cpi.transparency.org/cpi2011/>.
- ² This index combines responses on the quality of public service provision, the quality of the bureaucracy, the competence of civil servants, the independence of the civil service, and the credibility of the government's commitment to policies. The main focus of this index is on 'inputs' required for the government to be able to produce and implement good policies and deliver public goods.
- ³ This index includes measures of the incidence of market-unfriendly policies such as price controls or inadequate bank supervision, as well as perceptions of the burdens imposed by excessive regulation in areas such as foreign trade and business development.
- ⁴ This index measures whether agents have confidence in and abide by the rules of society. It includes perceptions of the incidence of crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts.
- ⁵ This index measures perceptions of corruption, conventionally defined as the exercise of public power for private gain. The survey includes the frequency of additional payments to get things done, the effects of corruption on the business environment, grand corruption in the political arena, and state capture by groups of elites.
- ⁶ The reports are available at: http://ec.europa.eu/dgs/secretariat_general/cvm/progress_reports_en.htm
- ⁷ *Sega Newspaper*, 23 September 2008.
- ⁸ *Deutsche Welle*, 1 August 2008
- ⁹ *Sofia Echo*, 6 July 2010.
- ¹⁰ *The Financial Times*, 20 July 2010.
- ¹¹ *Ibid.*
- ¹² *Dnevnik Newspaper*, 9 July 2011.
- ¹³ *Capital Newspaper*, 17 July 2009.
- ¹⁴ *Dnevnik Newspaper*, 10 and 20 July 2011.
- ¹⁵ *Dnevnik Newspaper*, 22 July 2010.
- ¹⁶ *EurActiv*, 9 February 2012; "Bulgaria has one last chance to show results under CVM," *EUinside* at: <http://www.euinside.eu/en/analyses/bulgaria-has-one-last-chance-to-show-results-under-the-cvm>.
- ¹⁷ *The Financial Times*, 21 May 2007.
- ¹⁸ *The Financial Times*, 27 March 2007; 12 June 2007.
- ¹⁹ *The Economist*, 31 July 2008. On Daniel Morar and his star reputation in Brussels, see "Beacon of Hope," *Europeanvoice.com*, 11 December 2008.
- ²⁰ *EurActiv*, 23 April 2010.
- ²¹ *EurActiv*, 17 August 2010.
- ²² Two Senate-appointed seats to the Supreme Council of the Magistracy were created for representatives of civil society, though it was evident that the Senate and the Constitutional Court were endeavouring to fill these seats with individuals close to the PSD, such as the wife of a PSD deputy. *Nineo-clock.com*, 14 June 2011; *Hotnews.ro*, 10 June 2011.
- ²³ *The Diplomat Online*, Bucharest, October 2010 at: <http://www.thediplomat.ro/articol.php?id=1440>
- ²⁴ *The Financial Times*, 21 December 2010. The text of the letter is at: <http://blogs.ft.com/brusselsblog/2010/12/france-and-germany-vs-bulgaria-and-romania/>.
- ²⁵ *Sofia News Agency*, 22 December 2010; *EurActiv*, 4 January 2011.
- ²⁶ *EurActiv*, 4 January 2011.
- ²⁷ *Sofia Echo*, 24 November 2011.
- ²⁸ *Euractiv*, 7 June 2011.
- ²⁹ *Ibid.*

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