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*Surpassing the Leaders - Laggards gap?  
Conditionality, Compliance and Europeanisation  
viewed from Romania and Bulgaria in the  
post-accession period*

FOLESCU, CORINA,ANDREEA

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*Surpassing the Leaders - Laggards gap? Conditionality,  
Compliance and Europeanisation viewed from Romania  
and Bulgaria in the post-accession period*

*By*

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*Thesis submitted in fulfilment of the Requirements for the Degree  
of Doctor of Philosophy at the School of Government and  
International Affairs*

*2016*

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## ***Abstract***

*Surpassing the Leaders - Laggards gap? Conditionality, Compliance and Europeanisation viewed from Romania and Bulgaria in the post-accession period*

*By*

*Corina Andreea FOLESCU*

While EU accession has been generally regarded as a highly successful process of policy, and institutional model diffusion, after the 2007 enlargement wave anxiety regarding post-accession backsliding in the case of Romania and Bulgaria has raised the question of whether the impact of pre-accession conditionality is sustainable once membership is achieved. Against this background, the present thesis investigates the manner in which the two countries have abided by their obligations as EU members, while taking into consideration the particular effects generated by separate modes of governance and legal instruments.

The thesis follows infringement cases initiated by the Commission against the two states, examines policy responses under the Europe 2020 Strategy, and explores the steps made by Romania and Bulgaria to fulfil the Cooperation and Verification Mechanism benchmarks. By researching compliance with hard law, as well as openness towards coordination mechanisms we are provided with a more comprehensive outlook over national engagement with both legally-binding commitments and voluntary action.

Based on the obtained results, the thesis argues that lock-in effects with regards to institutional reforms conducted prior to the 2007 enlargement have anchored Romania in the face of political volatility. In the case of Bulgaria, the thesis contends that missed opportunities during the pre-accession phase have placed the country into an institutional stalemate. While backsliding has not been observed, little progress in reforming its judiciary has triggered successive appeals from the European Commission for concrete outcomes.

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My warmest thanks for their sacrifice and care to my mother Vasilica Folescu and my sister Carmen Folescu without whom I would have felt lost. I would like to extend all my gratitude and love for the unconditional support and care to my wonderful husband, Mircea Matei and a special thank you for my dear friend Dr. Emma Black.

In loving memory of my father, Ion FOLESCU.

# Chapter 1

## Introduction

### *1.1. Research Background*

The European Union accession process has been considered as being among the most powerful forces for the international promotion of democracy and the rule of law<sup>1</sup>. However, after the EU's fifth enlargement in 2004 and 2007, certain concerns regarding the new member states, especially Romania and Bulgaria, were raised. The main apprehension was that despite their governance and market reforms, the new member countries had not yet reached EU standards at time of their admission, but most importantly that they will backslide, abandoning the pre-accession pace of change and limiting their adherence to EU rules. In this sense, the degree to which these countries have been 'Europeanised' has been questioned. The present thesis will hence start off from the concept of Europeanisation which is understood as "a complex interactive 'top-down' and 'bottom-up' process in which domestic polities, politics and public policies are shaped by European integration and in which domestic actors use European integration to shape the domestic arena. It may produce either continuity or change and potentially variable and contingent outcomes"<sup>2</sup>.

Our approach to Europeanisation will furthermore differentiate between a *pre-accession phase* in which EU directly influenced changes at the national level were dependent on conditionality or active leverage<sup>3</sup> and a *post-accession phase* where domestic policy change would be expected to be a consequence of assumed responsibility of membership (i.e. passive leverage). A number of pertinent studies have explored the pre-accession Europeanisation phase<sup>4</sup>, underlining the openness of national political elites to EU

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<sup>1</sup> See Whitehead, L. (ed.) (1996): *The International Dimensions of Democratization: Europe and the Americas* (Oxford, Oxford University Press).

<sup>2</sup> K. Dyson, K. Goetz (2003): "Living with Europe: Power, Constraint, and Contestation", in K. Dyson, K. Goetz (eds.) *Germany, Europe, and the Politics of Constraint* (Oxford, oxford University Press), pp. 3-35, p. 20.

<sup>3</sup> See M. Vachudova (2005): *Europe Undivided* (Oxford, Oxford University Press), p. 65.

<sup>4</sup> G. Dimitrova (2002): "The Limits of Europeanization: Hegemony and its Misuse in the Political Field in Bulgaria", *Southern European and Black Sea Studies*, Vol. 2, No. 2, pp. 69-92; H. Grabbe (2001): "How Does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity", *Journal of European Public*

influence, and the speed and breadth of measures required from candidate countries as factors that would influence the extent of institutional change. Furthermore, the presence of substantial incentives (economic and political benefits stemming from membership) and of sanctions (the threat of accession delay) have been previously quoted by the specialised literature as explanatory variables for the depth and speed of domestic adaptation and change resulting from external pressure. In the case of change occurring during post-accession and conditioned by external pressure, the nature of explanatory variables available becomes more complex. Coman and Crespy argue that by modelling Europeanisation as a process whose dynamics and temporality are shaped by actors (bias towards agency), domestic change - understood to occur as a result of external European pressure - has been deemed as short-termed, piecemeal or incremental. While recognising the value of this approach, the authors argue that the transition from incremental to structural change can only be accommodated by a research design that would take into consideration not only the ability and intentionality of national actors to adapt to Europe, but also the potential of EU policy instruments to lead to a more profound transformation<sup>5</sup>. Hence, starting from this argument, we conduct our analysis of the extent to which Romania and Bulgaria have been subject to post-accession Europeanisation by integrating as well the impact of different EU modes of governance in triggering national institutional change. As such, the present thesis explores the extent to which Romania and Bulgaria have been “Europeanised” by following domestic adaptation and change that has occurred as a result of requirements attached to various European legal instruments. Our starting point is set on exploring the particularities of EU modes of governance and of subsequent instruments and seeking to identify the extent to which they generate a different type of change at the domestic level. Starting from Knill and Lenschow’s association between different EU governance patterns and the likelihood of far-reaching national change<sup>6</sup>, we examine the post-accession Europeanisation by analysing adaptation and domestic change generated by both soft and hard law mechanisms. While accounting for national-level variables such as

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*Policy*, Vol. 8, No. 6, pp. 1013-31; D. Papadimitriou, D. Phinnemore (2004): “Europeanization, Conditionality and Domestic Change: The Twinning Exercise and Administrative Reform in Romania”, *Journal of Common Market Studies*, Vol. 42, No. 3, pp. 619-39.

<sup>5</sup> R. Coman, A. Crespy (2014): “Still in Search of Europeanization: From Limited to Structural Change?”, in R. Coman, T. Kostera, L. Tomini (eds.) *Europeanization and European Integration from Incremental to Structural Change* (Basingstoke, Palgrave Macmillan).

<sup>6</sup> C. Knill, A. Lenschow (2005): “Coercion, Competition and Communication: Different Approaches of European Governance and their Impact on National Institutions”, *Journal of Common Market Studies*, Vol. 43, No. 3, pp. 581-606

veto points, former political and economic systems or timing, we factor in as well the impact of the presence or absence of sanctions attached to the policy instruments observed. We thus conduct an analysis of the progress achieved by Romania and Bulgaria in meeting the benchmarks set forward through the Cooperation and Verification Mechanism (CVM), in complying with and timely transposing EU legislation and in coordinating their economic and social policies through the governance architecture of the Europe 2020 Strategy. The CVM is in essence a policy coordination instrument (applied so far only in the cases of Romania and Bulgaria) to which limited sanctioning has been attached. Due to its legal basis (two European Commission decisions referring to the Accession Treaties of Romania and Bulgaria) and limited sanctioning capacity, CVM is not considered as a fully soft law instrument. As the two countries are non-Euro area members (which excludes sanctioning under the Stability and Growth Pact and the Macroeconomic Imbalance Procedure), monitoring carried out under the Europe 2020 Strategy during the European Semester is also deemed as a soft law practice. Finally, the third instrument considered by the analysis is represented by the instruments generated through the Community Method: EU legally-binding directives, regulations and decisions.

## ***1.2. Research Question***

In Central and Eastern Europe, EU enlargement has been associated with transition to democratic forms of government and market economy systems, with decreasing corruption, improving administration and securing the rule of law. But just before their accession to the EU, researchers focusing on European integration and Europeanisation have argued that based on their rather problematic record of achieving benchmarks and meeting accession criteria, both Romania and Bulgaria were prone to backsliding, meaning that the legitimate transformations that had been required by the EU would risk reversal in the absence of sanctioning and rewards. While seeking to address this hypothesis, we question the extent to which Bulgaria and Romania have assumed their EU membership obligations by looking at the two countries' track records in transposing EU legislation, in internalising the targets and overall objective of the Europe 2020 Strategy and in progressing towards the benchmarks set by the Cooperation and Verification Mechanism. In so doing we put forward a set of sub-questions revolving around the characteristics of each policy instrument across

which the assessment is done. The motivation behind the selection of these instruments is binary: on the one hand, as we have mentioned above, when considering the concept of Europeanisation, a more relevant analysis needs to consider the European Union's capacity to induce domestic change via its modes of governance. Secondly, by looking at the various compliance strategies followed at the national level for each instrument, we also contribute to the modes of governance literature that attributes explanatory power to the nature of policy instruments when evaluating compliance and resistance.

### ***1.3. Rationale and significance of the research***

The literature focusing on the concept of 'Europeanisation' is highly extensive and complex, ranging from studies that pursue 'top-down' patterns of interaction and seeking to explain domestic reactions to pressures from outside, to analyses that explore the extent to which national, regional and local actors manage to include their preferences into EU-level policy-making. With distinctions being operated between Europeanisation, harmonization and convergence, the current study will attempt to put forward a new model of evaluating Europeanisation while considering the cases of Romania and Bulgaria which have been less often explored, partly due to the still relatively recent EU accession date (January 2007), and partly to the complexity of veto points that oppose change. Studies on the two Member States have so far focused either on their EU accession process analysing obstacles to political, social and economic reform or on the progress registered during the post-accession period in meeting the benchmarks set under the Cooperation and Verification Mechanism. The approach that we are proposing here seeks to obtain a wider outlook of the first 8 years within the EU. While maintaining the same "top-bottom" approach in analysing domestic change triggered by external pressure, we aim to test the explanatory capacity of historical institutionalism and in so doing obtain an understanding of the factors that have led to a contrast in performance under the CVM. We also seek to explore assessments from national experts and relevant actors regarding the CVM's efficiency in determining the speeding up of reform.

## ***1.4. Research design and methods***

Before discussing the nature and reasoning for the selected toolkit of methods used in order to explore the extent and substance of domestic change resulted in the context of the process of European integration, we will begin this section by evidencing the ontological and epistemological presuppositions that structure the current study. While some authors have questioned the saliency and utility of ontological reflexivity in political science, especially in the context of disputes regarding the directionality of the relationship between ontology and epistemology<sup>7</sup>, these reflexive presuppositions remain nonetheless essential to the choice of methods used in order to explore the presence or absence of domestic change in the context of integration. The interconnectivity between ontology, epistemology and methods and the implications for the latter when establishing one's ontological assumptions can be best explained by going back to the very definitions of each term.

Thus, ontology represents a philosophical branch concerned with the nature of social reality or best defined by Blaikie as referring to the assumptions that a particular approach makes as to "what exists, what it looks like, what units make it up and how these units interact with each other"<sup>8</sup>. When applied to the field of European integration, ontology implies the exploration of the structure and character of the Europeanisation process, providing an answer to the questions of what Europeanisation is and what its components are.

Epistemology refers to "the claims or assumptions made about the ways in which it is possible to gain knowledge of (...) reality, whatever it is understood to be"<sup>9</sup>. It concerns itself "with such issues as the degree of certainty we might legitimately claim for the conclusions we are tempted to draw from our analyses (...) and, in general terms, how we might adjudicate and defend a preference between contending political explanations"<sup>10</sup>. Applied to the area of EU studies, epistemology discusses the method of exploring the Europeanisation process, "and in this sense it analyses what the object of the Europeanisation research is, its

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<sup>7</sup> S. Bates, L. Jenkins (2007): "Teaching and Learning Ontology and Epistemology in Political Science", *Politics*, Vol. 27, No. 1, pp. 55-63.

<sup>8</sup> N. Blaikie (1993): *Approaches to Social Enquiry* (Cambridge, Polity Press), p. 6.

<sup>9</sup> N. Blaikie (1993): *Approaches to Social Enquiry*, p. 7.

<sup>10</sup> C. Hay (2002): *Political Analysis: A critical Introduction* (Basingstoke, Palgrave), p. 63.



relations between the theory and practice, or what its limits are”<sup>11</sup>. The relation between ontological assumptions and epistemology can be considered as cyclical: while we cannot know what we are capable of knowing (epistemology) until such time we have settled on the nature of the context in which that knowledge must be acquired (ontology)<sup>12</sup>, invariably ontology is grounded in epistemology as it rests upon epistemological priors that enable claims about the structure of the real world<sup>13</sup>. Thus, assuming an ontological choice will influence the research questions that will be considered important (epistemology) and to take a step further it will also impact upon the methods that will naturally be picked to achieve results (the methodological choice)<sup>14</sup>. In order to best explain the ontological grounding of this study we will briefly approach the structure-agency question, an ontological dualism representing the relationship between the political actors we identify and the environment in which they find themselves – relationship which in turn places the researcher closer to either a more agency-centred or a more structure-centred account. Structure is defined as the context or environment of political action which to a certain extent shapes the choices of actors and determines political outcomes<sup>15</sup>. Agency is defined as the exertion of causal power and the materialisation of political reality, actors pursuing a political agenda, defining policy problems, framing debates, and altering the structure through intended and unintended effects of their actions<sup>16</sup>.

As this current study aims to explore the extent and nature of domestic change in the context of the integration process (focusing on the cases of Romania and Bulgaria), our approach will be more inclined towards a structuralist ontological stance, being interested in observing how a particular institutional configuration (the European Union and its political and legal instruments) has produced an observable outcome (be it transformation

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<sup>11</sup> K. Wach (2015): “Conceptualizing Europeanization: Theoretical Approaches and Research Designs”, in P. Stanek, K. Wach (eds.) *Europeanization Processes from the Meso-economic Perspective: Industries and Policies* (Krakow, Cracow University of Economics), pp. 11-23, p. 18.

<sup>12</sup> C. Hay (2006): “Political Ontology”, in R.E. Goodin, C. Tilly (eds.) *Oxford Handbook of Contextual Political Analysis* (Oxford, Oxford University Press), p.8.

<sup>13</sup> S. Bates, L. Jenkins (2007): “Teaching and Learning Ontology and Epistemology in Political Science”, *Politics*, Vol. 27, No.1, pp. 55-63.

<sup>14</sup> N. Kauppi (2010): “The Political Ontology of European Integration”, *Comparative European Politics*, Vol. 8, No. 1, pp. 19-36.

<sup>15</sup> C. Hay (2002): *Political Analysis: A Critical Introduction* (Basingstoke, Palgrave Macmillan), p. 94.

<sup>16</sup> I. Bache, S. Bulmer, D. Gunay (2011): “Metatheory and Europeanization Research: Let’s Get Critical!”, paper delivered at the European Consortium for Political Research General Conference (Reykjavik 25-27 August, University of Iceland).

or incremental change). In this context, it is institutions, rather than rational individuals or social forces that are the main units of analysis. At the other end of the spectrum, an individualist stance would view the social environment that actors face as not having its own causal powers and hence, not autonomous from its components.

Starting off from the hypothesis that the nature of the instruments used by the European Union in order to produce domestic change (legally-binding law, guidelines, targets and monitoring etc.) can have an explanatory power in terms of outcome achieved at the national level, the research is structured into three main analytical chapters – each based on different research methods – following different European modes of governance and exploring the extent to which the two member states comply with requirements respectively recommendations. In an attempt to avoid focusing on an exclusively ‘top-down’ approach, chapter 4 which follows the different track records of the two countries under the Cooperation and Verification Mechanism (CVM) expands the model in order to introduce explanatory variables specific to a bottom-up approach. In this sense, it is argued that while permissive conditions (in the form of pressure mechanisms used by the EU during Romania and Bulgaria’s pre-accession period<sup>17</sup>) for change to occur exist in both cases, the absence or presence of productive domestic conditions (embodied by national change agents or norm entrepreneurs) influences the probability of a critical juncture to occur and for a new institutional path to become locked in over time. The toolkit used in this particular chapter includes process tracing and a series of semi-structured interviews carried out with government representatives, national experts on anti-corruption policies and the fight against organised crime and Members of the European Parliament. Process tracing which is a tool of qualitative analysis is a preferred method as it can make decisive contributions to evaluating prior explanatory hypotheses. The steps followed in applying this method include finding diagnostic evidence (the hypothesis of critical junctures being dependent on the co-existence of permissive and productive conditions) and descriptive inference (focusing on the unfolding of situations over time)<sup>18</sup>. A total of 11 interviews were secured with national experts and political actors on the one hand to corroborate the validity of the explanatory hypotheses evaluated through process tracing and on the other hand to obtain

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<sup>17</sup> Pressure mechanisms understood here as increased monitoring, gate-keeping and differentiation strategies, provision of institutional models, financial assistance and twinning.

<sup>18</sup> For further on process tracing see D. Collier (2011): “Understanding Process Tracing”, *Political Science and Politics*, Vol. 44, No. 4, pp. 823-30.

a better understanding of the impact of the Cooperation and Verification Mechanism. The semi-structured interviews (integrating a combination of pre-planned and spontaneous questions in response to the participant's answers) which typically lasted 50 minutes, were recorded using a digital recorder and were coupled with a subsequent transcription. Interviewee selection was considered a methodological question as well, in line with Bogner and Menz's observations regarding the definition of the term "expert". As such, according to Bogner and Menz, expertise is defined not only by functional aspects (knowledge in the field of professional activity), but also in terms of relevance<sup>19</sup>. As such an expert is defined by the potential influence of their knowledge and interpretations, by their possibility to implement their priorities (at least in part) and their ability to structure the conditions for other actors in their field of activity. In order to avoid a biased expert selection (risk that could materialise with snowball-sampling), a list of organisations was drawn so that both state representatives (attached to different ideologies) and civil society members would be included in the sample.

For the analysis of the progress registered by Romania and Bulgaria in reaching their national targets set under the Europe 2020 Strategy, Country-Specific Recommendations elaborated during the European Semester have been examined, as well as successive National Reform Programmes, national and European statistics, governmental strategies and evaluations. Document analysis, understood as a qualitative research method implying the examination and interpretation of multiple sources of evidence for the development of empirical knowledge, was used in order to identify which objectives are more emphasised by the European Commission and the Council in their regular monitoring of the two member states. Document analysis was also used in order to follow national policy development over time. By following the National Reform Programmes of the two countries (starting from 2011 and analysing all of the yearly updates until 2015 for both countries) we were able to track changes and development in policies concerning employment and education. The resulting information was corroborated with national statistics on unemployment, school drop-out, and funding allocations in order to evaluate the distance between the nationally adopted targets (on employment, education, social inclusion etc.) under the Europe 2020 Strategy and the *in situ* progress achieved.

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<sup>19</sup> A. Bogner, W. Menz (2002): "Das Theoriegenerierende Expertinterview – Erkenntnisinteresse, Wissensform, Interaktion" in A. Bogner, B. Littig, W. Menz (eds.) *Das Expertinterview* (Opladen, Leske & Budrich), pp. 71-95.

As the main objective of the study is to explore domestic change in Romania and Bulgaria as a response to various European instruments, the study will also be based on a dataset that clusters the population of instances of delay in transposition (translated as cases of non-communication) and incorrect application into national legislation of European directives covered by the Annual Reports on Monitoring the Application of Community Law between 2007 and 2015. However, while restricting the dataset only to information on the transposition record of the two member states will allow us to test correlations between delay in integrating European directives into national legislation and different institutional variables (both EU directive specific variables and national implementing measure specific variables) in these two cases, we would not be able to extend our observations to the European level and to argue whether the proposed variables exert similar effects both in Romania and Bulgaria's case and other EU member states. Taking into consideration the extensive amount of information to be collected even for the restricted period of five years, we will not have the possibility to put forward at this stage a cross-national analysis that would include all 28 EU member states. Nevertheless, in order to assure a representative sample, the dataset was constructed based on several criteria of state selection. The criteria account for the distinction between accession dates (i.e. founding, older and newer member states), the size of populations (differentiated according to the data provided by the European Commission<sup>20</sup>) type of legal system (i.e. civil law vs. common law), type of political system (i.e. federal vs. unitary structures) and evidenced compliance performance (relatively low vs. high numbers of infringements). Information was thus collected with respect to seven member states: Romania, Bulgaria, the United Kingdom, Sweden, Germany, Italy and Poland, creating a dataset of 7708 infringement cases for the period 2007-2015. The average number of days of delay was calculated for Romania and Bulgaria in order to test a series of hypotheses that assumed a correlation between voting power in the Council of Ministers, the number of national implementation measures and propensity towards delayed implementation of EU law.

Overall, the research toolkit used by the study comprises different methods in order to limit the inherent individual weaknesses of each method. As such, elite interviews are used in order to obtain data unavailable through document analysis and which is central to comprehensive causal explanations which are in turn reached through process tracing.

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<sup>20</sup> Eurostat (2013): Population on 1 January 2013, available at <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00001>.

## Chapter 2

# Literature review on Transposition and Implementation of European legislation

The European Union is perceived today as having evolved from an instrument of centralising Europe's steel sector into a potent regime that regulates an astonishing variety of policies<sup>21</sup>. The myriad of directives, regulations, and decisions corroborated by the web of related national laws form the fabric of the EU and despite the almost mundane character of rule production, the implementation of the EU legislation by member states is marked by diverse incentives to protract or even abandon the application of these norms.

### ***2.1. Defining Compliance***

In a legal context, compliance implies abiding by existing norms. In the context of EU legislation, compliance represents a complex process often requiring a preliminary, formal phase of adoption of the necessary national laws and regulations, the development of secondary rules interpreting and specifying the legislative framework, and conducting activities to ensure that the laws are applied in practice<sup>22</sup>. The formal phase is also known as the transposition process and it represents an essential step conducted by the public authorities (involving ministries, the government, or the Parliament depending on the circumstances). At this stage the national administrations will conduct technical processes such as identifying the internal legislation relevant to the directive, drafting the transposition measures and processing them through the rule-making machinery of the state<sup>23</sup>. The implementation phase encompasses the actions of the public authorities to

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<sup>21</sup> E. Mastenbroek (2005): "EU Compliance: Still a 'Black Hole'?", *Journal of European Public Policy*, Vol. 12, No. 6, pp. 1103-1120, p. 1103.

<sup>22</sup> D. Toshkov (2009): *Between Politics and Administration: Compliance with EU Law in Central and Eastern Europe*, Leiden, Leiden University, unpublished doctoral thesis, p. 4.

<sup>23</sup> *Ibid.*, p. 58.

ensure that the legislation is transformed into practices. Hence in this context, compliance refers to whether countries in fact adhere to the provision of the accord and to the implementing measures that they have instituted<sup>24</sup>. Nevertheless, there are slightly different interpretations that consider transposition, enforcement (monitoring, controlling and ensuring the application of law) and application to be different stages of implementation which in turn is synonymous with compliance<sup>25</sup>.

The debate about the compliance deficit in the EU began in the mid 80s, partly due to the European Commission's interest in keeping the issue under attentive supervision in fulfilment of its role of guardian of the treaty<sup>26</sup>. However, the issue of norm compliance became stringent in the early 1990s, when the process of building a single European market implied the transposition of an impressive legislative programme comprising some 300 measures. However, if in 1991 the transposition rate of the twelve member states averaged 65 per cent<sup>27</sup>, currently, around 1.2 per cent of all EU directives in force are not transposed within the deadlines, according to official estimates<sup>28</sup>. The existing literature on the process of transposition can be broadly divided between studies that have as research focus several member states<sup>29</sup> and in-depth analyses of implementation in one or two countries<sup>30</sup>.

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<sup>24</sup> H. Jacobson, E. Brown-Weiss (1995): "Compliance with International Environmental Accords", *Global Governance*, Vol. 1, No. 1, pp. 119-48, p. 123.

<sup>25</sup> G. Falkner, M. Hartlapp, S. Leiber, O. Treib (2002): "Transforming Social Policy in Europe? The EC's Parental Leave Directive and Misfit in the 15 Member States", *MPIfG Working Paper* No. 02/11 (Vienna, Max Planck Institute for the Study of Societies), p. 1.

<sup>26</sup> E. Borghetto, F. Franchino, D. Giannetti (2006): "Complying with the Transposition Deadlines of EU Directives. Evidence from Italy"; *Rivista Italiana di Politiche Pubbliche*, No. 1, pp. 7-38, p. 8.

<sup>27</sup> J. Pelkmans (1991): "Toward Economic Union", in Centre for European Policy Studies, *Setting European Community Priorities 1991-1992* (Brussels, Centre for European Policy Studies), pp. 39-100.

<sup>28</sup> European Commission (2011): *Internal Market Scoreboard*, Edition 23 (Brussels, September 2011).

<sup>29</sup> Such as A. Zhelyazkova, R. Torenvlied (2011): "The successful Transposition of European Provisions by Member States: Application to the Framework Equality Directive", *Journal of European Public Policy*, Vol. 18, No. 5, pp. 690-708; B. Steunenbergh, D. Toshkov (2009): "Comparing Transposition in the 27 Member States of the EU: the Impact of Discretion and Legal Fit", *Journal of European Public Policy*, Vol. 16, No. 7, pp. 951-970; T. Börzel, M. Dudziak, T. Hofmann, D. Panke, C. Sprungk (2007): "Recalcitrance, Inefficiency and Support for European Integration. Why Member States Do (Not) Comply with European Law"; *CES Working Paper* No. 151, (Massachusetts, Harvard University); M. Kaeding (2006): "Determinants of Transposition Delay in the European Union", *Journal of Public Policy*, Vol. 26, No. 2, pp. 229-53.

<sup>30</sup> E. Mastenbroek (2003): "Surviving the Deadline: the Transposition of EU Directives in the Netherlands", *European Union Politics* (Vol. 4, No. 4, pp. 371-95); E. Borghetto, F. Franchino, D. Giannetti (2006): "Complying with the Transposition Deadlines of EU Directives. Evidence from Italy"; F. Trauner (2009): "Post-accession compliance with EU law in Bulgaria and Romania: a comparative perspective", *EIOP*, Vol. 13, No. 2, pp. 1-18.

## 2.2. Qualitative studies

At the same time, there is a marked distinction between preferences for quantitative research approaches to the process of transposition and qualitative methods employed in order to explore the factors that determine variation in rule adoption. Researchers developing explanatory studies have generally preferred qualitative methods, the typical set-up being that of comparing compliance with a small number of directives (with notable exceptions such as Falkner et al. 2005)<sup>31</sup>. In analysing the factors that drive the implementation of directives, Duina considers the effects that the goodness of fit (degree to which the directive is in line with the current policy legacy of a country and with the organisation of interest groups), the attitude of a country towards the idea of Europe, the political opposition towards a directive and the complexity of the legislative processes within a member state. In order to test these hypotheses, the study focuses on the fate of the Equal Pay Directive in France, Italy and the UK, concluding that in order to benefit of a higher rate of transposition, the European Commission needs to design directives in light of the institutional contexts of each member state<sup>32</sup>.

More recent qualitative studies put forward a vast range of explanatory factors for the dependent variable (compliance or its different phases). Börzel and Risse emphasise the importance of the adaptation pressures exerted by EU directives, noting though the imperative presence of other mediating factors such as the absence of multiple veto points, the presence of supporting institutions that would facilitate change, the positive influence of norm entrepreneurs (or change agents) and the existence of a cooperative political culture<sup>33</sup>. On the basis of empirical evidence from the transposition of six employment rights directives in Germany, the Netherlands, Ireland and the UK, Treib demonstrates the importance of domestic party politics in determining transposition performance<sup>34</sup>.

Contrary to an extensive body of literature based on the goodness of fit as the main explanatory factor for transposition, Falkner *et al.* conclude that, for the field of labour

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<sup>31</sup> G. Falkner, O. Treib, M. Hartlapp, S. Leiber (2005): *Complying with Europe? The Impact of EU Minimum Harmonisation and Soft Law in the Member States* (Cambridge, Cambridge University Press).

<sup>32</sup> F. Duina (1997): "Explaining Legal Implementation in the European Union", *International Journal of the Sociology of Law*, Vol. 25, pp. 155-79.

<sup>33</sup> T. Börzel, T. Risse (2003): "Conceptualising the Domestic Impact of Europe", in K. Featherstone, C. Radaelli (eds.), *The Politics of Europeanization* (Oxford, Oxford University Press).

<sup>34</sup> O. Treib (2003): "EU Governance, Misfit and the Partisan Logic of Domestic Adaptation: An Actor-Centred Perspective on the Transposition of EU Directives", Paper presented at the EUSA 8<sup>th</sup> International Biennial Conference (Nashville, 27-29 March 2003), also available at [http://aei.pitt.edu/6566/1/001317\\_1.PDF](http://aei.pitt.edu/6566/1/001317_1.PDF).

policy, the administrative and legal problems playing a notable role. The study finds that member states with a remarkably good fit with the EU labour directives, such as France and Germany, were “laggards” in implementation, whereas the UK and Ireland tended to comply well and in due time despite the high degree of misfit<sup>35</sup>. Moreover, this large scale research identifies different worlds of compliance (world of law observance, of domestic politics and of transposition neglect) rooted in the cultural and political characteristics of the member states which have in turn an impact on the timeframe of transposition. Using an actor-oriented approach, Steuenerberg demonstrates that single-player coordination is better capable of adapting a directive to domestic preferences than is multi-player coordination. Multi-player coordination entails the implication of two or more higher-level players in the handling of a directive. The hypothesis is applied on the case of the transposition of the laying hens directive, whose implementation in the Netherlands was delayed with more than two years past the official deadline. Consequently, the different dynamics of the single-player coordination was illustrated by the early implementation in the same member state of the cocoa and chocolate products directive<sup>36</sup>.

Distinguishing themselves from the more agent-oriented approaches, Dimitrova and Rhinard analyse the importance of concordance between first, second and third-order norms and European directives. In their view, first-order norms refer to those rules guiding the management of policy programmes (e.g. safety guidelines, water purification standards etc.), second-order norms are those making claims on a wider section of the political community (e.g. approaches to managing markets, to environmental protection etc.). Finally, third-order norms are related to the basic foundations and societal cleavages. The authors argue, by illustrating through the case of the anti-discrimination directives and their transposition in Slovakia, that the level of domestic norm implicated by an EU norm affects the outcome of the transposition. If the highest order norms in a domestic setting are potentially affected by European directives, then this situation will lead to further problems with transposition<sup>37</sup>.

Adopting an inductive research strategy, Trauner analyses Romania and Bulgaria’s recent transposition record, concluding that at a first glance the complexity of the legislative

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<sup>35</sup> G. Falkner, O. Treib, M. Hartlapp, S. Leiber (2005): *Complying with Europe. EU Harmonisation and Soft Law in the Member States* (Cambridge, Cambridge University Press).

<sup>36</sup> B. Steuenerberg (2006): “Turning swift Policy-making into Deadlock and Delay: National Policy Coordination and the Transposition of EU Directives”, *European Union Politics*, Vol. 7, No. 3, pp. 293-319.

<sup>37</sup> A. Dimitrova, M. Rihnard (2005): “The Power of Norms in the Transposition of EU Directives”, *EIOP*, Vol. 9, No. 16, pp. 1-25.



process, the problematic law enforcement structures and governance standards can be considered as the main explanatory factors for the registered shortcomings at the enforcement stage and the actual application of EU law in the two member states<sup>38</sup>. Focusing more on the relationship between member states and the European Commission and on the member state-provision dyad, Thomson illustrates how the Commission's lack of explicit support for a provision can influence a member state's incentive to comply. As such, the author presents the case of four labour market directives incorrectly or incompletely transposed in Germany, Spain and Portugal. The fundamental premise of the research project is the fact that the distinction between political decision-makers and implementers is blurred in the EU, since national governments are among the decision-makers and are also responsible for transposing directives. The study concludes that in the absence of explicit support for a provision from the Commission, states with incentives to deviate are three times more likely to exhibit protracted non-compliance than the states without incentives to deviate. One way in which the Commission can reiterate the need for a correct transposition of a directive is through the statements it makes prior to the adoption of directives or by offering member states the perception of an intense monitoring of compliance (willing to initiate infringement proceedings in the event of incorrect transposition)<sup>39</sup>.

### ***2.3. Quantitative Studies***

More recently, an increasing number of researchers have explored the causal relationships between different explanatory factors and compliance with EU law through quantitative studies<sup>40</sup>. Quantitative works have generally made recourse at a selected range of variables from which we mention political stability, attitude towards the EU, corporatism, efficient

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<sup>38</sup> F. Trauner (2009): Post-accession compliance with EU law in Bulgaria and Romania: a comparative perspective, *Institute for European Integration Research Working Papers* No. 1/2009 (Vienna, Austrian Academy of Sciences).

<sup>39</sup> R. Thomson (2010): "Opposition through the Back Door in the Transposition of EU Directives", *European Union Politics*, Vol. 11, No. 4, pp. 577-96.

<sup>40</sup> A. Mbaye (2001): "Why National States Comply with Supranational Law", *European Union Politics*, Vol. 2, No. 3, pp. 259-81; E. Mastenbroek (2003): "Surviving the deadline: the transposition of EU Directives in the Netherlands"; B. Steunenberg, D. Toshkov (2009): "Comparing Transposition in the 27 Member States of the EU: the Impact of Discretion and Legal Fit".

political institutions<sup>41</sup>, political power and administrative capacity<sup>42</sup>, the number of veto players involved in the transposition process, the number of legal instruments needed for full transposition, the level of corruption in the administration of a state<sup>43</sup> the time employed to abide by EU law<sup>44</sup> and the level of discretion<sup>45</sup>. The advantage of quantitative research is that it permits generalisation and the control for confounding variables. However, an important downside is that it favours the use of indicators which allow easy measurements across countries.<sup>46</sup>

In testing the influence upon transposition of a set of independent variables comprising a stable political culture, the mass opinion and attitudes towards the EU, the role of interest groups and the overall political institutional setting, Lampien and Uusikylä conclude that a stable political culture combined with efficient and flexible institutional politico-administrative design are the best predictors of successful implementation of common European policies. The study is based on comparative implementation data from the Annual Report on Monitoring the Application of Community Law produced by the European Commission and it observed the behaviour of twelve member states<sup>47</sup>.

Analysing cross-national variance in infringement proceeding counts, Mbaye demonstrates a positive relationship between bargaining power in the Council of Ministers and non-compliance. The study also illustrates that states comparatively more powerful economically perpetrate fewer cases of non-compliance, the potential explanation being that in an economically based European Union, economic powerhouses may have sway in crafting policies and hence have the interest to see them materialising<sup>48</sup>.

Kaeding's dual level analysis – national and European – concludes that transposition delay of more than six months was apparently more of a problem in the 1980s and 1990s than in recent transposition history. As the number of veto players grows and the transposition

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<sup>41</sup> R. Lampien, P. Uusikylä (1998): "Implementation deficit – Why Member States Do Not Comply with EU Directives", *Scandinavian Political Studies*, Vol. 21, No. 3, pp. 231-51.

<sup>42</sup> T. Börzel, M. Dudziak, T. Hofmann, D. Panke, C. Sprungk (2007): "Recalcitrance, Inefficiency and Support for European Integration. Why Member States Do (Not) Comply with European Law".

<sup>43</sup> M. Kaeding (2006): "Determinants of Transposition Delay in the European Union", *Journal of Public Policy*, Vol. 26, No. 2, pp. 229-53.

<sup>44</sup> E. Borghetto, F. Franchino, D. Giannetti (2006): "Complying with the Transposition Deadlines of EU Directives. Evidence from Italy".

<sup>45</sup> B. Steunenbergh, D. Toshkov (2009): "Comparing Transposition in the 27 Member States of the EU: the Impact of Discretion and Legal Fit".

<sup>46</sup> E. Mastenbroek (2005): "EU Compliance: Still a 'Black Hole'?", p. 1113.

<sup>47</sup> R. Lampien, P. Uusikylä (1998): "Implementation deficit – Why Member States Do Not Comply with EU Directives", p. 248.

<sup>48</sup> A. Mbaye (2001): "Why National States Comply with Supranational Law", p. 275.

time set in the directive diminishes, the study observes more cases of longer delays in transposition. Moreover, Kaeding observes that the EU directive's level of detail embodied by the number of recitals (which explain the background to the legislation and the aims and objectives that it has) slows down the transposition process and introducing a new topic of legislation requires more time to be fully complied with by the member states<sup>49</sup>.

Approaching a deductive strategy for research, Börzel *et al.* test the independent variables put forward by three prominent compliance approaches in the International Relations literature: enforcement, management and legitimacy approaches. While enforcement approaches assume that states violate international norms voluntarily because they are not willing to bear the costs of compliance, in contrast, the management perspectives find the lack of necessary sources to be the reason for which states fail to comply. The third view ties compliance with the degree to which a norm is internalised and accepted as a standard for appropriate behaviour. In order to test these assumptions, the project relies on a comprehensive set of all of the cases that the European Commission has opened against member states violating European law between 1978 and 1999 (containing the nature of non-compliance, the type of law infringed on, the policy sector, the violating member state and measures taken by EU institutions in response). The empirical findings show that the combined model of enforcement and management approach has the highest explanatory power, illustrating that the best compliers are member states that have ample administrative capacity and lack the power to resist compliance, while the worst transposition records are held by countries with limited capacity, but enough power to resist the Commission's enforcement efforts<sup>50</sup>.

While focusing on the transposition record of Eastern Europe member states (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia), Toshkov observes that implementing legislation is less likely to be transposed on time than regular directives, the Commission directives being usually considered of lesser importance – specifying or updating a regulatory framework already laid down elsewhere. Moreover, legislation is more likely to be timely transposed if the previous three years have been marked by the governance of a more pro-European party of coalition. Similarly, governments leaning towards the right on a left/right socio-economic dimension are again more prone to respect

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<sup>49</sup> M. Kaeding (2006): "Determinants of Transposition Delay in the European Union", p. 248.

<sup>50</sup> T. Börzel, M. Dudziak, T. Hofmann, D. Panke, C. Sprungk (2007): "Recalcitrance, Inefficiency and Support for European Integration. Why Member States Do (Not) Comply with European Law", p. 1.

the deadlines of directives. A strong negative relationship is also being observed in the case of the number of parties in government and the probability that EU legislation will be transposed on time. Nevertheless, Toshkov also observes sectoral differences in transposition performance, with the Internal Market legislation being significantly more likely to be transposed within the deadline. In contrast environmental legislation, being the most costly, is less likely to have been transposed on time<sup>51</sup>.

## **2.4. Mixed Methods Studies**

As a result of the intense debates on competing explanations for the observed compliance patterns which have emerged in the past years among scholars developing projects based on qualitative and quantitative methods, a new body of work which is based on a productive combination of both approaches. As Luetgert and Dannwolf observe, the mixed method approach renders possible both an analysis of the key explanatory factors in the domestic transposition of EU directives and the identification of the decisive underlying structure of national transposition patterns across the member states and policy sectors<sup>52</sup>. As such, Luetgert and Dannwolf develop a nested analysis of transposition timeliness across nine member states (Belgium, Denmark, France, Germany, Italy, Luxembourg, the Netherlands and Spain) and 1192 directives, and observe that both capacity and preferences matter, but possibly at different times. The study also illustrates cross-sectional differences in countries, an interesting dyad being that of Denmark and Italy. While in the case of Denmark the social and environment policies represent the fields with fewer transposition problems, for Italy the area identified as ‘common rules’ causes the fewest issues<sup>53</sup>.

Another notable mixed method project tests the effects of technical fit, discretion, Commission warnings and conflict in the Council on the probability of member state transposition of separate EU policy requirements. Zhelyazkova and Torenvlied analyse the level of compliance of 15 member states with 27 major provisions laid down in the Framework Equality Directive. The study relies on elaborate content analysis of numerous

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<sup>51</sup> D. Toshkov (2008): “Embracing European Law. Compliance with EU Directives in Central and Eastern Europe”, *European Union Politics*, Vol. 9, No. 3, pp. 379-402, pp. 392-95.

<sup>52</sup> B. Luetgert, T. Dannwolf (2009): “Mixing Methods. A Nested Analysis of EU Member State Transposition Patterns”, *European Union Politics*, Vol. 10, No. 3, pp. 307-34, p. 310.

<sup>53</sup> *Ibid.*, p. 325.

implementation reports about the transposition of the directive by the 15 member states and also applies statistical models to a single case by moving to a lower level of analysis: the provision level. The results of the project indicated poor transposition of the provisions of the Framework Equality Directive years after the deadline had passed and despite the fact that all member states had communicated transposition measures to the Commission. The researchers also notice that states are more likely to comply with provisions that require only marginal changes to the existing documents, that discretion facilitates member states' transposition success for medium levels, but not for low levels of technical fit and nevertheless that countries that received a formal warning by the Commission in the past have achieved a better transposition record later on than those that were not sanctioned<sup>54</sup>. In contrast to studies focusing on compliance with legally-binding instruments, Terpan argues that in the case of soft law instruments – distinguished from hard law through the absence of the obligatory character, enforcement is about procedures aimed at ensuring compliance without necessarily resorting to coercion or constraint. In this case compliance only depends on the actors' political will and the extent to which they assume a normative commitment<sup>55</sup>.

As we have observed up until now, different sets of variables that would explain the transposition record of EU member states have been explored both through qualitative and quantitative methods. Different worlds of compliance have been identified and cases have been clustered into 'old' and 'new' member states. Debates have been generated when judging the primacy and need for more parsimonious and generalizable hypothesis over the development of more in-depth study cases. The range of possible explanations for the compliance performance is, from our overview on the existing literature, extensive, encompassing goodness of fit, power, institutions, number of involved actors, culture, etc. The levels of analysis also vary – national, European, policy sector, provision etc. Moreover, almost all of the existing studies are rather eclectic in the theoretical perspectives from which they borrow different concepts. As it is visible, a clearer cut distinction is between the methods of research employed rather than the intellectual stance that the authors take in their research.

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<sup>54</sup> A. Zhelyazkova, R. Torenvlied (2011): "The Successful Transposition of European Provisions by Member States: Application to the Framework Equality Directive", *Journal of European Public Policy*, Vol. 18, No. 5, pp. 690-708, p. 704.

<sup>55</sup> F. Terpan (2015): "Soft Law in the European Union. The Changing Nature of EU Law", *European Law Journal*, Vol. 21, No. 1, pp. 68-96.

## Chapter 3

### **Conceptualising the impact of institutions upon actors' behaviour: of institutions-as-constraint, path-dependency and isomorphism**

In order to understand the degree to which the European Union has exerted its 'transformative power' during the post-accession period generating institutional change within Romania and Bulgaria's domestic structures, we will start off by exploring the concept that represents the foundation of institutional adaptation and change as a consequence of EU integration: Europeanisation. As the areas of influence to which the concept applies have been broadened by an impressive variety of academic works, we need to set the taxonomy or the explanatory toolbox that would demarcate both the objectives of our research and implicitly its limits.

The next step is to delineate the hypotheses of the study which attempt to respond to our research question – to what extent and under what conditions has the EU shaped institutional and policy choices in Romania and Bulgaria after 2007? We specifically focus on the post-accession period, as we intend on differentiating between incentives for rule abidance associated with maximising gains (when the transformative power of the EU is strongly connected to the candidate countries' objective of obtaining EU membership during the pre-accession, the opening and the course of accession negotiations<sup>56</sup>) and constraints and incentives that generate specific patterns of behaviour which are determined by the institutional path taken by a state. As hypotheses play the role of a vehicle for testing the validity of theoretical assumptions, we firstly demarcate the main points of differentiation between the three main branches of the new institutionalist theory – rational choice, historical and sociological – while introducing mediating factors and potential outcomes which would aid in determining the extent of EU post-accession influence.

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<sup>56</sup> T. Haughton (2007): "When Does the EU Make a Difference? Conditionality and the Accession Process in Central and Eastern Europe", *Political Studies Review*, Vol. 5, No. 2, pp. 233-246.

In addition, we differentiate between the domestic and the EU level mechanisms of Europeanisation, the former set of triggers forming the dependent variable while the latter being operationalised as the independent variable. Whereas variation in the dependent variable is assumed by the theoretical framework, variation in the independent variable will follow Knill's fundamental principle which substantiates his policy-analytical framework – the potential for change at the domestic level varies with respect to EU governance patterns<sup>57</sup>. As such, one of the main assumptions of this study underlines the connection between the continuous and gradual evolution of the EU system, the changes of the EU decision-making process, and the variation in compliance at the national level. Understanding the impact that the European Union has had upon institutional and policy change in Romania and Bulgaria both during the pre-accession phase, but especially after membership had been granted entails an initial analysis of the range of modes and instruments of EU governance. Whilst an ontological exploration of the nature of EU polity and the forces driving polity formation are not included in the scope of this study, we will draw on findings of the vast 'new governance' scholarship in order to explore the underpinning mechanisms that generate change which are specific to the different modes of governance.

However, before addressing the impact of EU governance patterns on domestic adaptation, we need first to tackle the broader context of the new institutionalism and discuss both the theoretical core of the school and the epistemological and to some extent ontological differences between the rational choice, sociological and the historical approaches to institutionalism.

The following theoretical analysis will start off by exploring the ambivalence of the Europeanisation process (downloading and uploading norms and procedures) and identify the level of analysis which this study will take. As the policy-analytical model which we will use to explain change at the domestic level as a result of EU influence is founded on a theoretical framework that borrows elements both from institution-based and agency-based approaches in the new institutionalist agenda, we will explore the different assumptions put forward by each. We will then proceed by presenting three theoretical models of Europeanisation and finish by enriching their explanatory capacity with a

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<sup>57</sup> M. Bauer, C. Knill, D. Pitschel (2007): "Differential Europeanization in Eastern Europe: The Impact of Diverse EU Regulatory Governance Patterns", *Journal of European Integration*, Vol. 29, No. 4, p. 406, pp. 405-23.

discussion of potential mediating factors that would aid in explaining the expected degree of domestic change adjusting to Europeanization<sup>58</sup> and the possible outcomes of this process.

### ***3.1. Dimensions of the Europeanisation process: location, nature and consequences of change***

National reforms and change resulting as a response to the pressure stemming from the European level has been explored by the academic relevant literature as a form of ‘top-bottom’ Europeanisation. But it reflects not only a process, but an area of enquiry, with change being regarded as the inherent result and the intensity of change providing insight into the characteristics of the phenomena. The concept itself came under rigorous academic scrutiny, its necessity and utility being questioned as other terms such as the theory-laden ‘European integration’ and ‘spillover’ or contiguous concepts such as ‘harmonisation’ or ‘convergence’ seemed to already respond to some of the functions of the latter. Hence, we will start our analysis by gauging the relationship between these terms. As Radaelli observes, convergence represents a possible, but not implicit consequence of the process of Europeanisation<sup>59</sup>, divergence being a potential outcome as well. An illustration of the co-existence of these consequences after the gradual ‘deepening’ of the EU’s influence over other policy areas and the ‘widening’ of the regional organisation is presented in Draxler and Van Vliet’s study of the European Social Model<sup>60</sup>. The authors argue that while social spending levels have converged across the old members states (a trend which has continued since the 1980s), social policy reforms in the new member states (of the 2004 and 2007 accession waves) had a different trajectory being calibrated by the existent level of economic development and by the EU’s accent on promoting the common market and economic growth in the region.

Harmonisation should not be regarded as an accurate equivalent of Europeanisation either. The former concept can be loosely defined as a voluntary shift towards adjusting the

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<sup>58</sup> Based on the framework proposed by T. Risse, M. Green Cowles, J. Caporaso (2001): “Europeanization and Domestic Change: Introduction”, in M. Green Cowles, J. Caporaso, T. Risse (eds.) *Europeanization and Domestic Change* (New York, Cornell University Press).

<sup>59</sup> C. Radaelli (2003): “The Europeanization of Public Policy”, in K. Featherstone, C. Radaelli (eds.) *The Politics of Europeanization* (Oxford, Oxford University Press), p. 33.

<sup>60</sup> J. Draxler, O. Van Vliet (2010): “European Social Model: No Convergence from the East”, *Journal of European Integration*, Vol. 32, No. 1, pp. 115-35.



regulatory requirements or governmental policies of different jurisdictions so that the problems arising as a result of the legislative and institutional variation would be alleviated. The areas subject to harmonisation vary from fairly specific rules that regulate the outcome, characteristics, or performance of goods, actors and institutions (e.g. the Product Liability Directive<sup>61</sup>), to more general governmental policy objectives (e.g. setting standards for the average workweek), agreed principles that limit the structure or implementation of policies (e.g. the “polluter pays” adopted both by the EU and the OECD), and finally institutional structures and procedures that would reinforce other types of harmonisation<sup>62</sup> (e.g. the European Fiscal Compact that institutes a *modus operandi* for fiscal discipline<sup>63</sup>). The outcome of normative attuning represents the point of departure between the two concepts. Harmonisation targets a level playing field, while the result of Europeanisation can take the form of regulatory diversity, intense competition and in some cases even distortions of competition<sup>64</sup>. A more in-depth exploration of the effects that the EU accession had on democratic consolidation in Central and Eastern European countries<sup>65</sup> also draws attention to the heavy reliance of domestic political actors on a largely European-set policy agenda which could limit their accountability, lead to the attrition of the legislative power, distorted party competition and populist backlash. Moreover, as European integration has been regarded in the region first and foremost as an institution building process, the legitimacy of the ‘externally-imposed’ institutions could be contested<sup>66</sup>. The accession of Eastern and Central European countries presented greenfield investors with

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<sup>61</sup> Council of the European Union (1985): The Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), 25<sup>th</sup> of July, *Official Journal* L210 (07/08/1985), pp. 0029-0033.

<sup>62</sup> The typology of harmonisation used here is based on the analysis of J. Bhagwati (1997): “The Demands to Reduce Domestic Diversity among Trading Nations”, in J. Bhagwati, R. Hudec (eds.) *Fair Trade and Harmonization. Prerequisites for Free Trade?*, Vol. 1. Economic Analysis (Massachusetts, MIT Press), pp. 43-46.

<sup>63</sup> The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union signed in 2012 by all of the member states of the European Union and in force since 1 January 2013 stipulates in Title III (articles 3 to 8) a series of rules (that require the contracting parties to have a balanced or in surplus budgetary position and convergence with the country-specific benchmark figure for the structural governmental deficit) and correction mechanisms [based on seven principles put forward by the Commission Communication on Common principles for national fiscal correction mechanisms (COM 2012/342)] meant to increase the capacity of the EU economies to sustain growth and development standards.

<sup>64</sup> See C. Radaelli (2003): “The Europeanization of Public Policy”, p. 33.

<sup>65</sup> G. Ekiert (2008): “Dilemmas of Europeanization: Eastern and Central Europe after the EU Enlargement”, *Acta Slavica Iaponica*, Vol. 25, pp. 1-28.

<sup>66</sup> This was the case with the Romanian National Integrity Agency – institution established in 2007 as a result of numerous EU requests for the development of an efficient mechanism to tackle high-level corruption. In 2010 the Romanian Constitutional Court severely diminished the Agency’s prerogatives after deeming as unconstitutional provisions of its establishing law (Law no. 144/2007) regarding among others the obligation of holders of public offices to make their income declarations and financial interest statements publicly available.

the benefit of low production costs for the relocation of manufacturing and service activities. However this also triggered an incentive competition with Western Europe that led to subsequent policy deviation from European competition rules<sup>67</sup>.

We also need to differentiate between Europeanisation and spillover, the former, in its most general formulation, referring to “a logic whereby initial steps toward integration trigger endogenous economic and political dynamics which provide an impetus for further integration”<sup>68</sup>. The concept can be broken into three types: functional – indicated when integration in one sector creates momentum and necessity for further integration both in the same and in other sectors<sup>69</sup>. Political spillover, by contrast, describes the accretion of new powers to a central supranational institution, based on the changing demands and expectations of actors such as interest groups and political parties who become aware that their objectives can no longer be adequately served at the national level. Although the above outlined processes provide strong pressures for further integration, the cultivated spillover hypothesis assumes that central institutions such as the European Commission (which embodies the common interest of the member states) will advance the result of negotiations beyond a “minimum common denominator” leading to an expansion of the powers of the international agency<sup>70</sup>. Representing a fundamental explanatory factor deployed by neo-functionalist theoreticians to justify the extent and pace of European integration, the concept of spillover focuses more on a level of analysis specific to grand theories: the supranational one, the emphasis being placed on the factors that generate the dynamic for further integration (i.e. the role played by non-state actors). As we shall observe next in our attempt to conceptualise Europeanisation, the process is an integrative one that involves both projection and reception and that operates concurrently at the domestic and the EU levels of policy-making. Hence, loyalty transfer and expansive sector integration represent pre-requisite stages of the process of European-level institutionalisation. Subsequently, Europeanisation can be regarded as an effect of but at the same time a trigger for ‘deeper’ European integration. As Radaelli observes, the latter concept operates at the ontological stage of research – exploring a process in which

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<sup>67</sup> G. Medve-Balint (2014): “The Role of the EU in Shaping FDI Flows to East and Central Europe”, *Journal of Common Market Studies*, Vol. 52, No. 1, pp. 35-51.

<sup>68</sup> M. Elistrup-Sangiovanni (2006): “Theorizing the Common Market: Neofunctionalism and its Critics”, in M. Elistrup-Sangiovanni (ed.) *Debates on European Integration. A Reader* (New York, Palgrave Macmillan), p. 94.

<sup>69</sup> See E. Haas (1958): *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (London, Stevens and Sons).

<sup>70</sup> J. Tranholm-Mikkelsen (1991): “Neo-functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC”, *Journal of International Studies*, Vol. 20, No. 1, pp. 1-22, p. 6.

countries pool sovereignty, whereas the former is post-ontological, being concerned with aftermath of the creation of EU institutions and with the effects they produce<sup>71</sup>.

### 3.1.1. Defining Europeanisation

So what does Europeanisation mean? Any attempt to define the term would be dependent on the level of analysis adopted. As such, focusing on the supranational level, Lawton suggests that the concept represents the de jure transfer of sovereignty from national governments to supranational institutions<sup>72</sup>. In this case, Europeanisation is inherently connected to institution-building at the European level, while the national level is far from centre stage.

In his study of the effects that the EU exerts upon France's politics and institutions, Ladrech provides an interpretation of the concept that shifts the focus to the domestic sphere, distinguishing Europeanisation as an incremental process that internalises EU political and economic dynamics into the national politics and policy-making, inducing adaptive processes<sup>73</sup>. While the reorientation of domestic organisational logics triggered by Europeanisation is acknowledged, Ladrech also draws attention to the fact that pre-existing national structures and internal developments are likely to play the role of mediating factors for 'external' pressures. The understanding of the concept in this case is a top-down one, but contrasted to the previous definitions it brings into focus the national-specific adaptation strategies to external factors. Moreover, the terminology used sufficiently differentiates Europeanisation from neighbouring semantic terrains (European integration, harmonisation etc.). The downside however is represented by a narrowing of the components of domestic structures that can be under the pressure to adapt.

Recognising the interconnectivity between different levels of governance (supra-national, national, and sub-national), Caporaso, Green-Cowles and Risse extend the definition to the emergence and development at the European level of distinct structures of governance that formalise interactions among actors and of policy networks specialising in the creation of

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<sup>71</sup> C. Radaelli (2003): "The Europeanization of Public Policy", p. 33.

<sup>72</sup> T. Lawton (1999): "Governing the Skies: Conditions for the Europeanisation of Airline Policy", *Journal of Public Policy*, Vol. 19, No.1, pp. 91-112, p. 94.

<sup>73</sup> R. Ladrech (1994): "Europeanization of Domestic Politics and Institutions: The case of France", *Journal of Common Market Studies*, Vol. 32, No.1, pp. 69-88, p. 69.

authoritative European rules<sup>74</sup>. This perspective detaches itself from traditional uses of the term – connected as we have seen to the development of the EU institutional framework, and emphasises the development of new layers of politics that interact with older ones. While the authors go on explaining that the focus is on the impact that the European Union has upon domestic structures which entail both formal (political and social systems and their components) and informal institutions (policy networks, epistemic communities and cultures), the definition that they provide seems to offer more attention to the development and interaction of EU interest groups and their national counterparts which is not an ever-present phenomenon in European governance<sup>75</sup>.

In an endeavour to illustrate the complexity of the concept and the different processes it can be attached to, Olsen differentiates five phenomena that could bear the same label and assigns in each case subsequent mechanisms through which institutional change can occur<sup>76</sup>. The first implies the territorial expansion of a system of governance and the configuration of a single European political space through enlargement. A potential mechanism that fuels the dynamics of expansion is that of rule following which indicates a quasi-mechanical transformation. Institutional change is normatively driven, meaning that new states are being granted membership in a regional organisation such as the European Union as a consequence of a routine application of stable criteria for entry and the execution of standard operating procedures to pre-specified situations<sup>77</sup>. The second case revolves around the development of supranational institutions with the capacity of enforcing binding decisions and sanctioning non-compliance of member states. The frame used for understanding the dynamics of European-level institutional development is purposeful decision-making which regards institutional change as the outcome of voluntary agreements among the relevant actors. The third instance refers to the development of a multi-level governance system and the need for national adaptation and coordination with a European political centre. In this case, experiential learning and competitive selection are the two basic mechanisms through which European-level developments penetrate the domestic level and produce change<sup>78</sup>. Experiential learning suggests that institutional change is dependent upon the responses of relevant actors to alternative forms of domestic

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<sup>74</sup> T. Risse, M. Green Cowles, J. Caporaso (2001): "Europeanization and Domestic Change: Introduction", p. 3.

<sup>75</sup> C. Radaelli (2003): "The Europeanization of Public Policy", p. 29.

<sup>76</sup> J. Olsen (2002): "The Many Faces of Europeanization", *Journal of Common Market Studies*, Vol. 40, No. 5, pp. 921-52.

<sup>77</sup> *Ibid.*, p. 927.

<sup>78</sup> *Ibid.*, p. 932.

organisation and governance. In models of competitive selection, environmental imperatives such as institutions' own performance and their comparative advantages are drivers of change. The fourth interpretation emphasises the extension beyond the geographical borders of Europe of the political organisation and governance that is typical and distinct for the Union. The global extension of the European model can be based on a process of diffusion and institutional change in this case is dependent on the exposure and the attractiveness of the European forms of governance. The last conceptualisation connects the strengthening of the European political entity with some or all of the factors mentioned previously, deepened unification involving mutual adaptation among co-evolving institutions with the sub-national, national, European and even global levels interacting in intricate ways. While this differentiation might at a first glance indicate separate interpretations of Europeanisation, the five conceptualisations are inclusive rather than exclusive. As Howell observes, European enlargement (prior to EU membership) implies exporting EU governance procedures beyond EU borders, but also implies policy change for existing members in order to take into account the extension<sup>79</sup>. However, by expanding the definition to all of these connected processes, we risk failing to abide by the external differentiation criteria (determining what are the semantic boundaries of a concept and thus distinguishing it from others) that Gerring identifies as being essential in the building and evaluation of a theoretically sound conceptualisation<sup>80</sup>.

Featherstone and Kazamias propose a more internally dynamic view of the process which is regarded as being subject to change throughout time<sup>81</sup>. Moving away from a conception of the process as a passive response to external pressures, they argue that at the domestic level, Europeanisation is both a cause and an effect of action. Hence, Europeanisation does not only indicate a process of 'downloading' of EU rules and norms into the national structures, but it also implies that member states compete for supranational policies that

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<sup>79</sup> K. Howell (2004): "Conceptualisations of Europeanization: Developing Methodological Approaches", *Queens University Journal*, Paper no. 3, pp. 1-15.

<sup>80</sup> The other seven criteria are familiarity (degree to which the concept clashes with established usage), resonance (the degree to which the academic audience accepts the concept as being sound), parsimony (simplicity and accuracy), coherence (the attributes or the intension of term need to fit to the phenomena or the extension the term covers), depth (the number of characteristics that a concept can bundle together), theoretical utility (co-relation between theory and concepts) and finally field utility (the degree to which the semantic terrain needs to be re-set in order to accommodate the new concept) – See J. Gerring (1999): "What Makes a Good Concept? A Critical Framework for Understanding Concept Formation in the Social Sciences", *Polity*, Vol. 31, No. 3, pp. 357-93.

<sup>81</sup> K. Featherstone, G. Kazamias (2001): "Introduction: Southern Europe and the Process of 'Europeanization'", in K. Featherstone, G. Kazamias (eds.) *Europeanization and the Southern Periphery* (London, Frank Cass Publishers), p. 6.

conform to their interests thus 'uploading' their domestic preferences at the EU level<sup>82</sup> in order to minimise the costs of adaptation. A third dimension of the process of Europeanization has been termed by Major and Pomorska as 'cross-loading' signifying the exchange of ideas, norms and best practices between member states and other entities for which the European Union sets the scene. This type of change occurs not only due to but most importantly within Europe<sup>83</sup>. Bulmer and Burch develop their study of central government in Britain by applying a similar understanding of Europeanisation as a two-way process. They maintain that domestic adjustment to EU pressure entails two institutional logics: 'reception' understood as the different manners of processing and implementing EU policy and 'projection' or the adjusting of processes by national institutions in order to make an effective contribution at the EU level<sup>84</sup>. In order to connect this dialectical relationship between 'uploading' and 'downloading', Börzel explores the strategies pursued by member states to respond to Europeanisation pressures. The responses are the devised on an axis of variance, with one end being occupied by pace-setting which supposes the active intervention at the European level in order to push for certain policies, followed by foot-dragging which implies the blocking or delaying of costly policies and at the opposite end of the axis being fence-setting which supposes the building of tactical coalitions without pursuing or preventing policies<sup>85</sup>. Were we to focus on an understanding of Europeanisation first and foremost as a process of uploading, an empirical use of this taxonomy would bring both Romania and Bulgaria closer to the fence-sitting strategy as a consequence of the asymmetrical power rapport that marked their relationship with the European Union during their accession which encouraged policy downloading and left fewer opportunities for uploading<sup>86</sup>.

The transition from communism has meant for Central and Eastern Europe not only the construction of a functioning market economy, but also the building of a democratic

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<sup>82</sup> T. Börzel (2002): "Pace-Setting, Foot-Dragging, and Fence-Sitting: Member State Responses to Europeanization", *Journal of Common Market Studies*, Vol. 40, No. 2, pp. 193-214.

<sup>83</sup> See C. Major, K. Pomorska (2005): "Europeanisation: Framework or Fusion?", *CFSP Forum*, Vol. 3, No. 5, pp. 1-4; K. Pomorska (2007): "The Impact of Enlargement: Europeanisation of Polish Foreign Policy? Tracking Adaptation and Change in the Ministry of Foreign Affairs", *Hague Journal of Diplomacy*, Vol.2, No. 1, p. 27, pp. 25-51.

<sup>84</sup> S. Bulmer, M. Burch (2006): "Central Government", in I. Bache, A. Jordan (eds.) *The Europeanization of British Politics* (New York, Palgrave Macmillan), p. 38.

<sup>85</sup> T. Börzel (2002): "Pace-Setting, Foot-Dragging, and Fence-Sitting: Member State Responses to Europeanization", pp. 197 - 206.

<sup>86</sup> H. Grabbe (2006): *The EU's Transformative Power. Europeanization through Conditionality in Central and Eastern Europe* (New York, Palgrave Macmillan), p. 5.

governing system capable of assimilating and implementing the EU's complex *acquis* – a normative body which was internally accommodated by the EU-15 throughout half a century<sup>87</sup>. Moreover, the legacy of 40 years of socialism has contributed to the accommodation of a fluid political party culture (dominated by contextual and unstable coalitions formed by parties closely associated with their founders and leaders), to the absence of official forums for executive and interest groups interaction and nevertheless to the maintenance of a weak civil society<sup>88</sup>. Thus, the characteristics of the socialist regime and the nature of the post-1989 transition left a substantial mark upon the lobby market in both countries and its' capacity to move beyond national borders. In Romania's case social opposition emerged for the first time only after 1989 and remained weak even on the eve of accession due to the overdependence on donor funds, poor knowledge of Romanian public administration and inability to mobilise attention from the political opposition and the international community<sup>89</sup>. While in recent years Freedom House reports have shown a gradual diversification of the domains of activity of the non-governmental sector, there is still a tendency to focus on service provision with less attention being awarded to lobby and advocacy for more effective public policies<sup>90</sup>. In Bulgaria's case the growth of civil society after 1989 has been a top-down process led mostly by donors signalling thus low levels of citizen involvement. While this trend has been gradually corrected, public consultancy in policy-making is still affected by the absence of specific regulations for lobbying activities which in turn creates "a space for dubious practices and hinders the ability of civil actors to effectively express and pursue the interests of various segments of society"<sup>91</sup>. The frequency of Romanian and Bulgarian lobby at the EU level remains low, shortcoming which can be causally connected, following Panke's analysis of domestic engagement in lobbying activities, to member states' level of governmental effectiveness and the transaction costs assumed. Governmental effectiveness is understood as the capacity of

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<sup>87</sup> A. Moravcsik, M. Vachudova (2003): "National Interests, State Power, and EU Enlargement", *East European Politics and Societies*, Vol. 17, No. 1, p. 46, pp. 42-57.

<sup>88</sup> N. Copsey, T. Haughton (2009): "The Choices for Europe: National Preferences in New and Old Member States", *Journal of Common Market Studies*, Vol. 47, No. 2, p. 282, pp. 263-86.

<sup>89</sup> C. Parau (2008): "Impaling Dracula: How EU Accession Empowered Civil Society in Romania", *West European Politics*, Vol. 32, No. 1, p. 121, pp. 119 -41.

<sup>90</sup> L. Stefan, S. Ionita (2012): "Romania" in Freedom House, *Nations in Transit 2012. Democratization from Central Europe to Eurasia* (New York, Freedom House), available electronically at <http://www.freedomhouse.org/report/nations-transit/2012/romania>.

<sup>91</sup> G. Ganev, D. Smilov, A. Primatarova (2012): "Bulgaria" in Freedom House, *Nations in Transit 2012. Democratization from Central Europe to Eurasia* (New York, Freedom House), available electronically at [http://www.freedomhouse.org/report/nations-transit/2012/bulgaria#\\_edn3](http://www.freedomhouse.org/report/nations-transit/2012/bulgaria#_edn3).

receiving preferences put forward by interest groups and disseminating them (which requires domestic co-operation capacities, high quality of policy formulation and financial means to employ experts) and the latter are indirectly determined by the length of membership (which implicitly influences the number of contacts a state has to EU institutional actors) and the level of official and administrative representation within the EU's institutional framework understood in terms of seats allocated to a country in the European Parliament<sup>92</sup>.

According to the data presented in Panke's study which projects an image for the year 2009, Romania and Bulgaria place themselves at the bottom end of table on the frequency of lobbying activities at the European level with policy preferences differing – more resources being allocated by Romania for interest representation in the agriculture sector, while the environment policy being Bulgaria's focus<sup>93</sup>. However, intense public debate regarding the need for regulation of lobby practices in recent years in countries such as Bulgaria, the Czech Republic, Romania and Ukraine<sup>94</sup> indicates both an increased awareness and a nationally perceived necessity of a set of principles and standard procedures as to how public officials should be permitted to engage with lobbyists<sup>95</sup>.

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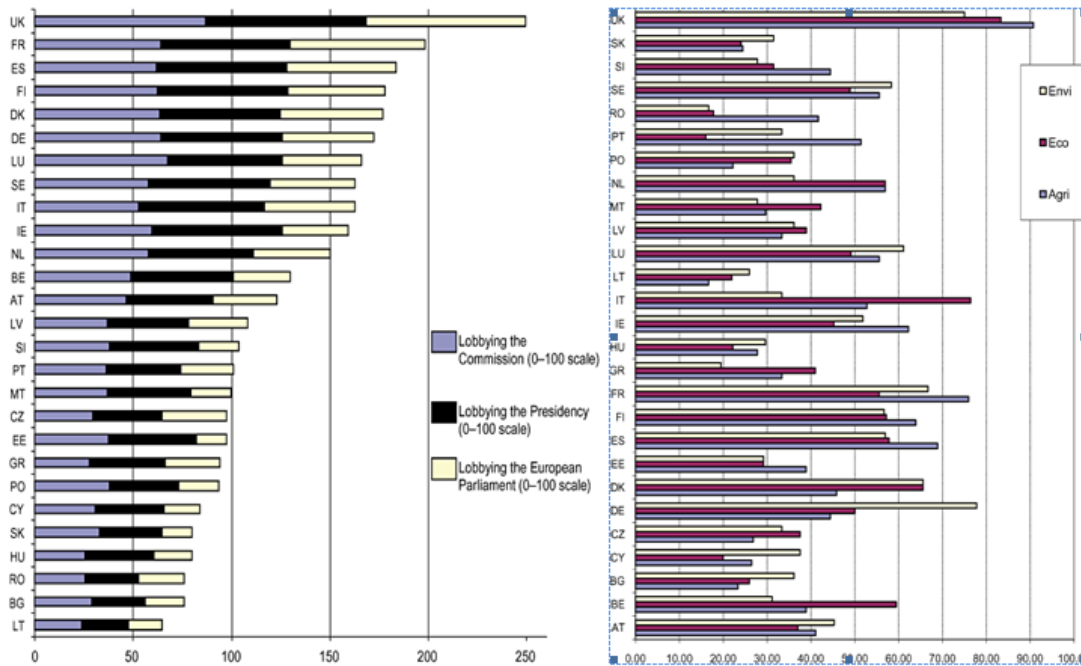
<sup>92</sup> D. Panke (2012): "Lobbying Institutional Key Players: How States Seek to Influence the European Commission, the Council Presidency and the European Parliament", *Journal of Common Market Studies*, Vol. 50, No. 1, p. 134, pp. 129-50.

<sup>93</sup> *Ibid.*, pp. 132-33.

<sup>94</sup> While draft laws have been put forward in Bulgaria in 2008 and in Romania in 2011, formal legislation has not been adopted. However, in Romania's case recent amendments to the legal draft of 2010 regarding the organisation of lobby activities has triggered the intervention of the National Authority for Integrity (Opinion no. 12385/12.12.2013) which deemed the draft law as detrimental to efforts of assuring decisional transparency within the executive and legislative branches.

<sup>95</sup> V. Kalnins (2011): *Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes*, (Riga, Centre for Public Policy Providus), p. 3.





**Figure 1 Additive Frequency of Lobbying Institutional Actors (left) and Average Lobbying Frequency across Policy Areas (right)**

**Source:** D. Panke (2011): “Lobbying Institutional Key Players: How States Seek to Influence the European Commission, the Council Presidency and the European Parliament”, pp. 132-33.

This visible interest is embodied as well in the growing numbers of organisations (with head offices in Romania and Bulgaria) engaged in activities seeking to influence the EU policy and decision making process. As such the Transparency Register – a public platform jointly run by the European Parliament and the European Commission that provides information on the organisations engaged in EU policy-making – informs of 62 Romanian registrants (6 professional consultancies/law firms; 14 in-house lobbyists and trade/professional associations; 36 non-governmental organisations; 2 think tanks; an organisation representing a religious community and 3 organisations representing local authorities) and 35 Bulgarian registrants (a professional consultancy company; 6 in-house lobbyist associations; 24 non-governmental organisations and 4 think tanks)<sup>96</sup>.

<sup>96</sup> Information collected in April 2013 by consulting Joint Transparency Register Secretariat (2012): *Annual Report on the Operations of the Transparency Register* (Brussels, Joint Transparency Register Secretariat) and Transparency Register at <http://ec.europa.eu/transparencyregister/public/consultation/search.do?reset=>.

We are witnessing thus a fertile niche of research which needs to be further explored especially in the light of both Bulgarian and Romanian officials having agreed at the beginning of the year 2013 upon a second attempt to put forward a unitary lobby strategy in order to strengthen their candidacy for the Schengen Area membership.

While the circular dynamics of the Europeanisation process is being acknowledged and the tendency of member states to shape and influence the EU institutional framework and its trajectory is regarded as a part of the process (which has been emphasised above), our study will restrict itself to a 'top-bottom' approach in order to place a boundary around what is already a complex task of empirical research. This will also be visible in our decision over the definition used for the concept of Europeanisation which will be presented below. Moreover, as the range of studies devoted to the impact of European dynamics, decisions and institutions on domestic policies and politics in Romania and Bulgaria after their accession to the EU is fairly limited<sup>97</sup>, we consider this research objective as providing a pertinent starting point for further investigation.

Based on this assumption, a number of implications arise. The first one concerns where the study of the domestic impact of the EU should begin and where it should zoom in. An alternative approach would be to examine the ex-ante domestic context (i.e. the situation before the supposed EU pressure emerges), then to track the participation of the country in the EU level negotiations, and finally study the implementation process of the EU act. Whilst this 'bottom-up-down' modus operandi enables the researcher to remain alert for the domestic level processes before and after the appearance of the EU act, and allows for a better observation of the country's capacity to 'upload' preferences to Brussels, it is more suitable to explore the manner in which member states respond to adaptation pressures on a single policy area. In contrast, in spite of its limitations in tracking the full temporal dimension of European-lead domestic transformation (being thus less time-sensitive), the

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<sup>97</sup> Among others we mention here: A. Hipper (2015): *Beyond the Rhetorics of Compliance. Judicial Reform in Romania* (Freiburg, Springer Fachmedien Wiesbaden); G. Dimitrov, K. Haralampiev, S. Stoychev, L. Toneva-Metodieva (2013): *The Cooperation and Verification Mechanism: Shared Political Irresponsibility* (Sofia, St. Kliment Ohridski University Press); L. Toneva-Metodieva (2014): "Beyond the Carrots and Sticks Paradigm: Rethinking the Cooperation and Verification Mechanism Experience of Bulgaria and Romania", *Perspectives on European Politics and Society*, Vol. 15, No.4, pp. 534-551; A. Dimitrova (2015): "The Effectiveness and Limitations of Political Integration in Central and Eastern European Member States: Lessons from Bulgaria and Romania", Working Paper No. 10/2015 *Maximizing the Integration Capacity of the European Union: Lessons of and Prospects for Enlargement and Beyond* (Berlin, Freie Universität Berlin), M. Ristei Gugiu (2012): "EU Enlargement and Anticorruption: Lessons Learned from Romania", *Journal of European Integration*, Vol. 34, No. 5, pp. 429-446; M. Mendelski (2012): "EU-Driven Judicial Reforms in Romania: A Success Story?", *East European Politics*, Vol. 28, No. 1, pp. 23-42; C. Parau: "Impaling Dracula: How EU Accession Empowered Civil Society in Romania", *West European Politics*, Vol. 32, No. 1, pp. 119-41.

top-bottom approach allows for a more extensive exploration of national responses across multiple policy areas and permits the plotting of the impact that the different EU modes of governance have upon national adjustment. The second note which must be made here involves concept formation. Europeanisation can be treated as an outcome, or as a process<sup>98</sup>. From the first approach we derive that Europeanisation is regarded as a quantity that can be 'more' or 'less' present. A study based on this conceptualisation would be interested in comparing the degree of Europeanisation of a policy area in two or more member states or candidate countries. The present study will be based on an understanding of Europeanisation as a process affecting domestic politics, public policy and institutions, and we expect adaptation to EU requirements to bear the mark of the national context and realities. Therefore, we will explore the changes within domestic institutions of governance and politics that occur as a response to the development of European-level institutions, identities, and policies. To this end we start off from the definition provided by Dyson and Goetz who distinguish between fundamental properties of the process and accompanying properties (i.e. 'uploading'). In their view Europeanisation entails:

"a complex interactive 'top-down' and 'bottom-up' process in which domestic politics, politics and public policies are shaped by European integration and in which domestic actors use European integration to shape the domestic arena. It may produce either continuity or change and potentially variable and contingent outcomes."<sup>99</sup>

The authors deliberately exclude from the definition the phase of national projection or the export of 'ways of doing things'<sup>100</sup> at the European level as Radaelli explains it, particularly in order to distinguish Europeanisation from European integration. While domestic actors will inevitably attempt to shape the terms of European integration, and consequently the adaptational requirements, this process is not necessarily defining as it is dependent on power asymmetries (other variables including territory and temporality<sup>101</sup>) and is

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<sup>98</sup> C. Radaelli (2012): "Europeanization: The Challenge of Establishing Causality", in T. Exadaktylos, C. Radaelli (eds.) *Research Design in European Studies. Establishing Causality in Europeanization* (New York, Palgrave Macmillan), p. 7.

<sup>99</sup> K. Dyson, K. Goetz (2003): "Living with Europe: Power, Constraint, and Contestation", in K. Dyson, K. Goetz (eds.) *Germany, Europe, and the Politics of Constraint* (Oxford, Oxford University Press), pp. 3-35, p. 20.

<sup>100</sup> C. Radaelli (2003): "The Europeanization of Public Policy", in K. Featherstone, C. Radaelli (eds.) *The Politics of Europeanization* (Oxford, Oxford University Press), p. 30.

<sup>101</sup> K. Goetz (2006): "Territory, Temporality and Clustered Europeanization", *Reihe Politikwissenschaft*, No. 109 (Vienna, Institut für Höhere Studien).

unequally distributed across policies. Our approach to Europeanisation, broadly understood as the impact that European policy has within member states, differentiates between a pre-accession phase in which EU directly influenced changes at the national level were dependent on conditionality or active leverage<sup>102</sup> and a post-accession phase where domestic policy change would be expected to be a consequence of assumed responsibility of membership (i.e. passive leverage). A number of pertinent studies have explored the pre-accession Europeanisation phase<sup>103</sup>, underlining the openness of national political elites to EU influence, and the speed and breadth of measures required from candidate countries as factors that would influence the extent of institutional change. Our approach to the post-accession Europeanisation phase will factor in along the mediating factors the weight of different EU modes of governance in triggering national institutional change.

### **3.1.2. Europeanisation through hard and soft law**

One of the main contentions of this study is that the diversity of governance structures that coexist within the European Union can be expected to generate a variety of transfer types and adaptation models. But before moving on to considering some of the taxonomies introduced by the relevant literature and justifying our own selection for this study, we must first attempt to briefly define the concept of ‘governance’ which constitutes the subject of differentiation and classification. The concept has been defined both in an encompassing sense and a restricted one. A restricted view of governance will narrow down this process to a ‘soft’ type of political steering in which non-hierarchical means of guidance (such as socialisation, monitoring, and persuasion) are employed in policy formulation. A broader understanding of governance will cover all types of steering from hierarchical prescription to informative and steering instruments. Drawing from Kohler-Koch’s interpretation, governance is broadly regarded as:

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<sup>102</sup> See M. Vachudova (2005): *Europe Undivided* (Oxford, Oxford University Press), p. 65.

<sup>103</sup> G. Dimitrova (2002): “The Limits of Europeanization: Hegemony and its Misuse in the Political Field in Bulgaria”, *Southern European and Black Sea Studies*, Vol. 2, No. 2, pp. 69-92; H. Grabbe (2001): “How Does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity”, *Journal of European Public Policy*, Vol. 8, No. 6, pp. 1013-31; D. Papadimitriou, D. Phinnemore (2004): “Europeanization, Conditionality and Domestic Change: The Twinning Exercise and Administrative Reform in Romania”, *Journal of Common Market Studies*, Vol. 42, No. 3, pp. 619-39.

“the ways and means in which the divergent preferences of citizens are translated into effective policy choices, (...) the plurality of societal interests are transformed into unitary action and the compliance of societal actors is achieved”<sup>104</sup>.

The aim of governance is adjacent to that of government namely to establish a web of rules and procedures that would guide behaviour. However, while the latter indicates the organisation or agency appointed with explicit rights, subject to control according to established procedures, and invested with the authority to reach binding decisions, the former points to the process of shaping the economic, societal and political systems. Thus, governance is based on a system of rules that shape and coordinate actors' behaviour. From this definition we can derive two dimensions of the concept: one referring to the process, the other to the regulatory structure. As a process, governance encompasses the various modes of coordinating actor behaviour. In its structural dimension, governance points to the actors involved and the institutional setting shaping its different instruments. Based on this dichotomy various modes have been distinguished in the literature, all bearing the caveat that they constitute ideal types which would facilitate academic exploration and analysis, while in practice at the EU level we would encounter more heterogeneity.

In the context of EU studies, orthodox approaches largely distinguish between the Community method (the old governance) and soft governance (new modes of governance). In its 2001 White Paper on Governance, the Commission identified the Community method as an inter-institutional process of decision-making premised on its exclusive right of legislative initiative, the legislative and budgetary powers of the Council of Ministers and the European Parliament and the European Court of Justice's role in enhancing the Union's law enforcement capacity<sup>105</sup>. The process thus involves the setting of rules by the legislative institutions, the monitoring by the Commission of member state implementation and the administrative and judicial infringement proceedings where transposition falls short of requirements. The entry into force of the Treaty on the Functioning of the European Union determined the transformation of the Community method, the inter-institutional balance of power changing in favour of the European Parliament while the Council of Ministers has moved towards majority voting. In this context, some authors argue that as the political and

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<sup>104</sup> B. Kohler-Koch (1999): “The Evolution and Transformation of European Governance”, in B. Kohler-Koch, R. Eising (eds.) *The Transformation of Governance in the European Union*, (London, Routledge), p. 13.

<sup>105</sup> European Commission (2001): *European Governance - A White Paper*, (Brussels, 25th July), 2001/C 287/01, p. 6, also available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0428&rid=2>.

legal implications of law-making through the Community method have intensified, political actors have continued the endeavour of injecting more flexibility into economic and social governance by the means of soft law – process which gain momentum with the Maastricht Treaty<sup>106</sup>. Whether contrasted with ‘hard law’ (legally binding) and presented as an alternative<sup>107</sup> or considered to be operating in the ‘shadow’ of hierarchies and thus complementing legislation<sup>108</sup>, soft law is broadly understood as comprising “rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects”<sup>109</sup>. However, this type of policy instrument is not a clear-cut and uncontested concept, at times being deemed as representing non-legal norms of a political nature especially as Art 288 of the Treaty on the Functioning of the European Union does not mention soft law as part of the EU’s secondary legislation. Identifying obligation (injunction to act or restrain from acting in a specific manner), precision (unambiguous content of obligation) and delegation (granting of third parties the authority to implement and interpret norms and resolve disputes) as the three essential dimensions of law, Abbot et al. observe that a hard mode of governance will have all of these dimensions highly developed, while in the case of soft governance we would expect a dilution along one or more dimensions<sup>110</sup>. Starting from this observation we argue that soft law benefits of an explicit obligation dimension which assures its legal effects. The source of legal obligation lies within art 4 of the Treaty on the European Union which specifies a general duty of member states to cooperate which assures that soft law will be considered in one manner or another<sup>111</sup>. This offers it the status of a legal instrument and as variation can occur on each of the three dimensions (hard law knowing a process of ‘softening’ and vice versa) we can argue that any classification of governance should go beyond the classic hard/soft dichotomy and conceive modes of policy-making as a continuum. After having had discussed the nature of two of the most important elements that differentiate between

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<sup>106</sup> K. Armstrong (2011): “The Character of EU Law and Governance: From Community Method to New Modes of Governance”, *Current Legal Problems*, Vol. 64, pp. 179-214, p. 187.

<sup>107</sup> J. Scott, D. Trubek (2002): “Mind the Gap: Law and New Approaches to Governance in the European Union”, *European Law Journal*, Vol. 8, No.1, pp. 1-18.

<sup>108</sup> J. Olsen (2008): “EU Governance: Where Do We Go From Here?”, *ARENA Working Paper* no. 10 (Oslo, Centre for European Studies).

<sup>109</sup> L. Senden (2004): *Soft Law in European Community Law* (Portland, Hart Publishing), p. 112.

<sup>110</sup> K. Abbott, R. Keohane, A. Moravcsik, A. Slaughter, D. Snidal (2000): “The Concept of Legalization”, *International Organization*, Vol. 54, No. 3, pp. 401-19.

<sup>111</sup> A. Peters (2011): “Soft Law as a New Mode of Governance”, in U. Diedrichs, W. Reiners, W. Wessels (eds.) *The Dynamics Of Change In EU Governance*, (Cheltenham, Edward Elgar Publishing), pp. 21-51, p. 24.

modes of governance, we now turn to some of the most discussed classifications discussed by the literature.

Categorisations of EU policy-making vary substantially as a result of the multitude of locations for addressing policy issues, the different levels (from local to global) and the range of processes (from formal to informal) which form the platform for decision-making. Probably one of the most referenced categorisation is that put forward by Helen Wallace who proposes five variants of policy processes: the traditional Community method, the EU regulatory mode, the EU distributional mode; policy coordination and intensive transgovernmentalism<sup>112</sup>. However, the criteria used to devise this classification do not tailor in the analytical categories which target the research questions of Europeanisation studies. This taxonomy is based on a breakdown of which actors (be it the European Commission, the Council of Ministers, the European Parliament, or the European Council) hold stronger roles in policy design and in setting political directions, the extent to which stakeholders, experts, and local or regional authorities are involved in the policy process, and whether or not the European Court of Justice and the Court of First Instance are involved in ensuring that non-application or discrimination occurs.

However, this analysis will be based on a conceptualisation of governance patterns founded on an emphasis that is placed on different dimensions. As such our starting point is provided by the study of Trieb, Bähr and Falkner who distinguish three dimensions that differentiate between modes of governance: the politics, the polity and the policy one<sup>113</sup>. Along the politics dimension the authors use the predominance of certain actors – be they public or private – as a single criteria of differentiation, arguing that on one hand we would have a hierarchical state that would place the policy process solely in the hands of public actors, whereas on the other governance would entail the prevalence of policy communities, networks or bureaucracies. For the polity dimension we would operate with variation across several axes: hierarchy versus market (traits of the institutional structure responsible for decisions), central locus versus dispersed loci of authority, and institutionalised versus non- institutionalised interactions (i.e. the new modes of governance in the EU such as the open method of coordination). Finally, the third dimension adjoins the axis of legal compulsoriness versus soft law, rigidity versus flexibility in

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<sup>112</sup> H. Wallace (2005): “An Institutional Anatomy and Five Policy Modes”, in H. Wallace, W. Wallace, M. Pollack (eds.) *Policy-Making in the European Union*, fifth edition (Oxford, Oxford University Press), p. 79.

<sup>113</sup> O. Trieb, H. Bähr, G. Falkner (2007): “Modes of Governance: Towards Conceptual Clarification”, *Journal of European Public Policy*, Vol. 14, No.1, pp. 1- 20.

implementation, presence versus absence of sanctions, material versus procedural regulation and finally fixed versus malleable norms. From this variety of criteria, the authors argue that in order to facilitate the establishment of a typology of modes of governance that would be both parsimonious and allow at the same time the largest degree of variation we would need to focus on the policy dimension and more specifically on the axis of legally binding versus soft law and that of rigid versus flexible approach to implementation as these two criteria grasp crucial dimensions of different policy instruments as they are currently discussed in EU research<sup>114</sup>. As a result, four modes of governance could be put forward: coercion, voluntarism, targeting, and framework regulation. Within this typology, the most 'intrusive' mode in terms of EU intervention vis-à-vis domestic societies is that of coercion which re-joins fully binding and highly prescriptive legal instruments. The mode of framework regulation accommodates legal instruments that are binding, but that offer member states more leeway in implementation either by defining only goals which need to be specified in national legislation or by presenting a range of policy options to choose from. The remaining two modes of governance provide member states with significantly more flexibility in norm application, covering more detailed recommendations that leave less room for manoeuvre at the implementation stage (as is the case for targeting) and broad and legally non-compulsory guidelines that typically define policy goals to be achieved rather than concrete reforms (as is the case for voluntarism).

Developing a similar, but tri-partite taxonomy of EU modes of governance, Knill and Lenschow underline the existence of a relevant association between different EU governance patterns and the likelihood of far-reaching national change. The author proposes three types of EU governance patterns focusing solely on the legally binding versus soft law axis<sup>115</sup>. The first governance pattern is that of coercion implied in EU regulatory policy and imposed on national implementers. Notwithstanding the lack of an EU institutionalised government or dominant actor for decision-making, the EU is guided by three legal pillars (direct effect, supremacy and preliminary ruling) which allow for the exercise of power through legislation and rule-making and for the enforcement of compliance. Hence, coercive governance is defined as legally binding European legislation which leaves little or no discretion to the national implementer. As a rule, it is the

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<sup>114</sup> *Ibid.*, pp. 13-14.

<sup>115</sup> C. Knill, A. Lenschow (2005): "Coercion, Competition and Communication: Different Approaches of European Governance and their Impact on National Institutions", *Journal of Common Market Studies*, Vol. 43, No. 3, pp. 581-606, p. 582.



instrument of policy transfer especially at the level of the European single market, but it is not limited to it. Coercive regulatory policies are prone to have an institutional impact as in most frequent cases they suppose the creation of new organisations, the centralisation of regulatory processes, the demand for horizontal organisational change, and can even affect national administrative styles. The subsequent domestic reaction most prone to be triggered by this type of governance will be persistence-driven, actors attempting to meet the policy obligations while minimise the institutional adaptation costs<sup>116</sup>.

The second pattern observed is that of governance by competition which implies only limited legally-binding requirements for domestic institutional change. The objective here is to promote the optimisation of certain institutional arrangements at the domestic level to the standards of a general framework put forward at the EU level. No distinctive institutional model is imposed, but member states need to comply with the legally-binding 'rules of the game' that provide the general setting. The rationale for behaviour in this instance will be performance-driven and as the pattern involves competition, there will be winners and losers. Another important aspect here is the fact that the bureaucracy is no longer in an autonomous position when adapting to external pressure which leaves room for political actors to intervene more freely and increases the chances for potential path-breaking reforms<sup>117</sup>.

The final mechanism addresses the domestic level through communication and information exchange in transnational networks with the objective of developing and promoting 'best practices' to be applied by the member states. Hence the objective here is embodied in mutual learning between national policy makers and legally binding rules are replaced by regulatory models and objectives created to tackle policy problems<sup>118</sup>. The rationale followed in institutional change targets securing and increasing legitimacy of particular models within European discourse and the platform that assure the materialisation of change is that of European network structures through which guidelines, timetables for the achievement of common goals and the development of indicators and benchmarks assures a more uniform and continuous type of compliance<sup>119</sup>.

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<sup>116</sup> *Ibid.*, p. 584.

<sup>117</sup> M. Bauer, C. Knill, D. Pitschel (2007): "Differential Europeanization in Eastern Europe: The Impact of Diverse EU Regulatory Governance Patterns", *Journal of European Integration*, Vol. 29, No. 4, p. 408, pp. 405-23.

<sup>118</sup> *Ibid.*, p. 415.

<sup>119</sup> C. Knill, A. Lenschow (2005): "Compliance, Competition and Communication: Different Approaches of European Governance and their Impact on National Institutions", *Journal of Common Market Studies*, Vol. 43, No. 3, pp. 583-606, p. 599.

### 3.1.3. Hypotheses regarding Modes of Governance

One of the main hypotheses of this study which will be reflected in the structuring of the thesis assumes that post-accession Europeanisation will be sensitive to variation of EU modes of governance. Whilst the taxonomy provided by Trieb, Bähr and Falkner<sup>120</sup> allows for more variation along towards the soft law end of the governance axis, Knill and Lenschow<sup>121</sup> contract it, summing it up under the banner of communication. For the purpose of this analysis we will use the former taxonomy, but we will formulate our hypotheses which are to be tested in the case of Romania and Bulgaria by adopting the latter categories of actor behaviour to explain output at the member state level. The starting hypotheses will be the following:

H1: In the case of 'hard' adaptational pressure which is manifest in coercion and framework regulation modes of governance we would expect the rationale for domestic institutional change to range from persistence-driven (when the directives' level of detail is high) to performance-driven (when directives would allow for more freedom);

H2: In the case of 'soft' forms of governance (targeting and voluntarism) we would expect a more responsive mode of behaviour at the member state level, with exemplary performers in achieving the common benchmarks being identified as model-givers to be copied.

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<sup>120</sup> O. Trieb, H. Bähr, G. Falkner (2007): "Modes of Governance: Towards Conceptual Clarification".

<sup>121</sup> C. Knill, A. Lenschow (2005): "Coercion, Competition and Communication: Different Approaches of European Governance and their Impact on National Institutions".



**Figure 2 Modes of Governance**

**Source:** O. Trieb, H. Bähr, G. Falkner (2007): “Modes of Governance: Towards Conceptual Clarification”; C. Knill, A. Lenschow (2005): “Coercion, Competition and Communication: Different Approaches of European Governance and their Impact on National Institutions”.

In order to test these presuppositions we will examine the extent of post-accession Europeanisation by observing compliance with EU directives, the degree to which the Cooperation and Verification Mechanism benchmarks have been achieved so far and the meeting of the targets set by Europe’s growth strategy – Europe 2020.

### 3.1.4. ‘Mismatch’ as a trigger for Europeanisation

Most orthodox approaches to Europeanisation are based on the ‘goodness of fit’ thesis. This rests upon the idea that the adaptation of the domestic policy-making process to the European-level policy requirements, guidelines and objectives depends on the degree of compatibility between the latter and existing domestic institutions. The fit thesis generates two suppositions. Firstly, that in order for domestic adaptation to occur there needs to be a certain degree of ‘misfit’ between the supranational and national policies, processes and institutions, the lack of incompatibility and thus of adaptation indicating that Europeanisation has not occurred<sup>122</sup>. The second supposition maintains that a substantial degree of ‘misfit’ will require harder and lengthier adaptation processes which in turn will make it less likely for the Europeanisation effect to take place. In other words smooth compliance is assumed to be dependent on the goodness of fit between internal and

<sup>122</sup> T. Borzel, T. Risse (2000): “When Europe hits Home: Europeanization and Domestic Change”, *European Integration Online Papers*, Vol. 4, No. 15, p. 2.

external policies. Studies, however, indicate that these assumptions are not necessary and at times not sufficient conditions for successful domestic adaptation<sup>123</sup>. Whilst we assume these findings, we also consider the fact that not analysing the impact of the goodness of fit might introduce an omitted variable bias in the analysis, especially as the literature argues that states that are unsuccessful or only partly successful in uploading national preferences to the EU level will be subject to significant domestic change as a consequence of downloading EU legislation and hence implementation will entail considerable challenges<sup>124</sup>.

A series of variables – mostly pertaining to the domestic processes of political interaction – have been put forward by the different strands of the new institutionalist theory. In the next section we will start by discussing the ontological and epistemological differences that make up the three approaches to the new institutionalism - rational choice, historical and sociological institutionalism and discuss the different explanatory variables proposed by each approach and how these will substantiate the study.

### ***3.2. Institutions all the way down – Rational Choice, Historical and Sociological approaches***

For much of the post-World War II period political science, especially in the United States, had been marked by the “behavioural revolution” and rational choice approaches. In essence, both theoretical frameworks were based on a methodological individualism, assuming that actors behave autonomously which implied that in order to understand social phenomena one needs to focus either on socio-psychological characteristics or on rational calculations of personal utility. Thus both formal and informal institutions were not considered to exert serious constraints upon individuals, preferences were treated as exogenous and in the case of the behavioural revolution this individualism was reinforced by its focus of inquiry which sought to explain what do the actors involved in social

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<sup>123</sup> C. Knill, A. Lenschow (1998): “Coping with Europe: The Impact of British and German Administrations on the Implementation of EU Environmental Policy”, *Journal of European Public Policy*, Vol. 5, No.4, pp. 595-614.

<sup>124</sup> W. Wessels, A. Maurer, J. Mittag (2003): “The European Union and the Member States: Analysing Two Arenas over Time”, in W. Wessels, A. Maurer, J. Mittag (eds.) *Fifteen into One?* (Manchester, Manchester University Press), p. 5.

aggregates do and how can it be best explained<sup>125</sup>. Institutions were perceived as material structures be they constitutions, cabinets, parliaments, courts, bureaucracies or even political parties, connected in the same explanatory category through their shared attribute of belonging to the state/government<sup>126</sup>.

In contrast, a generation later, rational choice modellers sought to replace the “loose logic” borrowed by behaviouralists from psychology with mathematical and economic rigor, and in the name of theoretical integrity and parsimony, they strove (initially) to reduce politics to the interplay of material self-interest eliminating thus the normative elements of political science<sup>127</sup>. The focal point became individual action guided by a ‘logic of consequences’ (behaviour being driven by preferences and expectation about consequences and the ultimate goal being the maximisation of individual utility)<sup>128</sup> and in this context institutions were conceived of as ‘rules of the game’ (decision-making rules and norms) and information structures that determine the amount of knowledge actors have at their disposal when making interest-led decisions<sup>129</sup>. While this conceptualisation represents a slight departure from the materialist approach mentioned above, the inherent individualism of rational choice is reiterated: institutions become the embodiment of equilibrium as rational individuals, interacting with other rational individuals, “continue to change their planned responses to the actions of others until no improvement can be obtained in their expected outcomes from independent action”<sup>130</sup>. And in order to understand why such patterns of interaction become visible, one needs to return to individual actors and ask what motivates them to produce such equilibrium.

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<sup>125</sup> D. Sanders (2002): “Behaviouralism”, in D. Marsh, G. Stoker (eds.) *Theory and Methods in Political Science* (New York, Palgrave Macmillan), p. 45, pp. 45- 64.

<sup>126</sup> A. Lecours (2005): “New Institutionalism: Issues and Questions”, in A. Lecours (ed.) *New Institutionalism. Theory and Analysis* (Toronto, University of Toronto Press Incorporated), p. 6, pp. 3-25.

<sup>127</sup> R. Goodin (1998): “Political Science: The Discipline”, in R. Goodin, H. Klingemann (eds.) *A New Handbook of Political Science* (Oxford, Oxford University Press), p. 11, pp. 3 -43.

<sup>128</sup> J. March, J. Olsen (1989): *Rediscovering Institutions. The Organizational Basis of Politics* (New York, The Free Press), pp. 160-62.

<sup>129</sup> K. Goetz (2002): “British Political Science and the Study of Contemporary Germany”, in J. Grix (ed.) *Approaches to the Study of Contemporary Germany: Research Methodologies in German Studies* (Birmingham, University of Birmingham Press), p. 171, pp. 162-80.

<sup>130</sup> S. Crawford, E. Ostrom (1995): “A Grammar of Institutions”, *The American Political Science Review*, Vol. 89, No. 3, p. 582, pp. 582-600.

### 3.2.1. Rational Choice Institutionalism (RCI)

In spite of this individualistic underpinning, rational choice institutionalists have gradually turned their attention and understood that political life is deeply rooted in institutions – instance which led to the proliferation and growing dominance of rational choice theories and the development of the normative strand of the new institutionalism as a response. Fritz Scharpf's actor-centred institutionalism reflects most accurately this shift as the main assumption of the author's approach is that social phenomena can be best explained as the outcome of the interaction of actors (individual, collective or corporate), but these interactions are structured and their outcome is shaped by the characteristics of the institutional setting in which they occur<sup>131</sup>. The model is dependent on the concept of actor constellations which represents the sum of players involved, their strategy options, the outcomes associated with strategy combinations and the preferences of the players over the outcomes (concept similar to Tsebelis's institutional design<sup>132</sup>). In contrast to the game-theoretic literature, it is assumed that any such given constellation could be played out in a variety of modes of interaction (be it non-cooperative, cooperative, voting or hierarchical games) which are in the end shaped by institutional rules regulating their use and the larger institutional setting within which the interaction takes place<sup>133</sup>. The distinctiveness of this model lies in the fundamental concept of bounded rationality which assumes that due to the complexity and uncertainty of the environment in which they operate, rational actors are constrained and have to adopt satisfactory rather than optimal strategies<sup>134</sup>. While actors are expected to seek the maximisation of utilities, their decisions will be inherently limited as they are simultaneously operating within the normative setting of one or multiple institutions.

Another significant and growing body of rational choice institutional theory is based on transaction costs economic theory developed by and Douglas North<sup>135</sup> and Oliver

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<sup>131</sup> F. Scharpf (1997): *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research* (Boulder, Westview Press), p. 1.

<sup>132</sup> G. Tsebelis (1990): *Nested Games. Rational Choice in Comparative Politics* (Berkeley, University of California Press), p. 9.

<sup>133</sup> F. Scharpf (1997): *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research*, pp. 51-54.

<sup>134</sup> See H. Simon (1956): "Rational Choice and the Structure of the Environment", *Psychological Review*, Vol. 63, No. 2, pp. 129-38; D. Dequech (2001): "Bounded Rationality, Institutions, and Uncertainty", *Journal of Economic Issues*, Vol. 35, No. 4, p. 913, pp. 911-29.

<sup>135</sup> D. North (1990): *Institutions, Institutional Change, and Economic Performance* (Cambridge, Cambridge University Press).

Williamson<sup>136</sup>. While the starting point in this approach is shared with that of actor-centred institutionalism, with institutions being defined as humanly devised formal (sanctions, codes of conduct etc.) and informal (constitutions, laws etc.) constraints that structure political, economic and social interaction<sup>137</sup>, the change lies in treating institutional arrangements as dependent variables. Here less emphasis is being placed on individual rational action and more on understanding the ways in which institutions can be structured so that transaction costs connected to decision-making could be lowered. Transaction costs are usually associated with asymmetric information which can take the form of policy uncertainty (actors not knowing precisely what outcomes will result from the adoption of specific policies)<sup>138</sup>. If institutions cannot provide benefits (in terms of lower costs) they become subject of change or replacement. However, within institutional design an essential premise revolves around enacting coalitions which use structures, procedures and processes to increase costs for policy opponents seeking to change the institution's direction in the future, leading to a lock in of the designers' preferences<sup>139</sup>. The usual stability of institutions is a hypothesis accepted by historical institutionalism as well, but as we will observe later on this characteristic is generated by path dependency, the notion that 'entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice'<sup>140</sup>. In contrast, the rational choice view on institutional change emphasises a change in the capacity of actors – the increased effectiveness of change-seeking individuals and the decreasing blocking power of status-quo protectors generating the context for modification in institutional arrangements. Applying these theoretical assumptions to the European context, Pollack identifies three instances which can generate 'policy windows' used by entrepreneurs to push for the modification of institutional arrangements: a change in the policy environment; in actors, or in the relative power of actors and lastly a change in the quality of information<sup>141</sup>. But as Moe observes, design efforts place agencies on a path that

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<sup>136</sup> O. Williamson (1993): "Transaction Cost Economics Meets Posnerian Law and Economics", *Journal of Institutional and Theoretical Economics*, Vol. 149, No. 1, pp. 99-118.

<sup>137</sup> D. North (1990): *Institutions, Institutional Change, and Economic Performance*, p. 4.

<sup>138</sup> J. Huber, C. Shipan (2000): "The Costs of Control: Legislators, Agencies, and Transaction Costs", *Legislative Studies Quarterly*, Vol. 25, No. 1, p.27, pp. 25-52.

<sup>139</sup> D. Wood, J. Bohte (2004): "Political Transaction Costs and the Politics of Administrative Design", *The Journal of Politics*, Vol. 66, no. 1, pp. 176-202.

<sup>140</sup> M. Levi (1997): "A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis", in M. Lichbach, A. Zuckerman (eds.), *Comparative Politics: Rationality, Culture, and Structure* (Cambridge, Cambridge University Press), p.28, pp. 19-41.

<sup>141</sup> M. Pollock (1996): "The New Institutionalism and EC Governance: The Promise and Limits of Institutional Analysis", *Governance: An International Journal of Policy and Administration*, Vol. 9, No. 4, p. 438, pp.429-58.

hampers dramatic change as in time the new vested interests created as a result of power asymmetries become built-in forces that protect “the institutional system from large-scale organisational, policy, or program change”<sup>142</sup>.

The fundamental distinctive element that separates these two approaches in rational choice theory is given by the manner in which institutions are understood and defined. As such while focusing on micro-analytical interpretations of institutions, Kenneth Shepsle argues that the different rational choice approaches to institutionalism can be subsumed under three conceptualisations of institutions: as game forms, as constraints and as equilibria<sup>143</sup>. The first definition regards institutions as humanly-devised exogenous constraints<sup>144</sup> which include both formal rules such as law and constitutions and informal ones such as conventions and norms. They are humanly-devised as they result from the interaction between actors, but they are regarded as exogenous as they represent only a strategic environment in which actors pursue their interests. Analyses based on this conceptualisation of institutions, such as the ones based on transaction costs economics, model institutions through their effects upon the actors’ actions, their behavioural repertoires, the timing of strategy selection, and on the structure of information. Focusing on the effects that institutions have upon actors, the matter of compliance is also conceived as a set of games in which designers need to create a matrix of payoffs that would motivate the members of the institutional agreement to comply. In this context, Axelrod argues that a first condition for increased cooperation is that of repeated games meaning that players might meet again and the choices actors make in a first interaction will influence their later strategies. This condition is also reiterated by Peters when analysing decision-making within the European Union, arguing that the division of decisions into functional specialities and the continuing nature of the policy debates limits the capacity of ‘high politics’ to hinder decision making or to force it to sub-optimal levels<sup>145</sup>. A second important condition for cooperation is the development of “tit-for tat” strategies in repeated plays of Prisoners’ Dilemma games. As the “tit-for that” policy requires cooperation on the first move and then emulating the second player’s move, Axelrod argues that a player choosing to defect all the time, following this strategy will be tempted to defect on the first move and all subsequent

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<sup>142</sup> T. Moe (2005): “Power and Political Institutions”, *Perspectives on Politics*, Vol. 3, No. 2, p. 24, pp. 215-33.

<sup>143</sup> K. Shepsle (2006): “Old Questions and New Answers about Institutions”, in B. Weingast, D. Wittman (eds.) *The Oxford Handbook of Political Economy* (Oxford, Oxford University Press), p. 1032, pp. 1031- 1049.

<sup>144</sup> D. North (1990): *Institutions, Institutional Change, and Economic Performance*, p. 3.

<sup>145</sup> G. Peters (1997): “Escaping the Joint-Decision Trap: Repetition and Sectoral Politics in the European Union”, *West European Politics*, Vol. 20, No.2, p.25, pp. 22-36.



moves will represent punishment for constant mutual defection<sup>146</sup>. Thus actors are punished when they defect and rewarded when they cooperate, situation which will lead over time to the creation of equilibrium of mutual compliance.

A second line of rational choice institutionalism depicts institutions as constraints or as Calvert observes as the cumulus of rules either taken as given, or treated as alternative sets of constraints to be imposed by the designers of constitutions, guided by the results these rules will yield once rational behaviour takes place under them<sup>147</sup>. This line of thought, to which the actor-centred institutionalism is attached as well, acknowledges the influence that institutional arrangements exert upon actors' perception of reality, the structure that rules induce upon the interaction between individuals and nevertheless the impact on policy outputs. However, actor-related factors must be treated as explanatory variables in their own right when analysing political phenomena as actor behaviour is influenced, but not determined by the institutional structure. In his analysis of the process of progressive Europeanisation of governing functions, Scharpf identifies four modes of interaction – that of mutual adjustment, of hierarchical direction, of joint-decision and of intergovernmental agreement<sup>148</sup> – which describe “at a highly abstract level the range of interrelationships likely among constellations of composite actors in institutional settings”<sup>149</sup>. While the default mode of Europeanisation of “mutual adjustment” presupposes actor interaction in the absence of a structure or institutions (governments adopting their own policies but in response or anticipation to policy development in other states), all of the other three modes bring in the institutional structure that impacts upon actors' strategies. Thus, in the intergovernmental mode, policies are coordinated through agreements at the European level which are achieved by rational actors only if the expected outcome of negotiation is more attractive than no agreements. The next step on this continuum of modes is that of hierarchical direction which places competencies exclusively at the EU level (exercised by the European Central Bank, the European Court of Justice and the European Commission in the infringement procedure). At this point the actor-centred framework approaches more the sociological branch of institutionalism as the legitimacy of supranational functions that

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<sup>146</sup> R. Axelrod (1984): *The Evolution of Cooperation* (New York, Basic Books Inc.), p. 13.

<sup>147</sup> R. Calvert (1998): “Rational Actors, Equilibrium, and Social Institutions”, in J. Knight, I. Sened (eds.) *Explaining Social Institutions* (Michigan, University of Michigan), p. 58, pp. 57-94.

<sup>148</sup> F. Scharpf (2000): “Notes toward a Theory of Multilevel Governing in Europe”, *MPIfG Discussion paper No. 00/5* (Köln, Max-Planck Institute for the Study of Societies), p. 11.

<sup>149</sup> V. Schmidt (2003): “The Boundaries of ‘Bounded Generalizations’: The Discourse as the Missing Factor in Actor-Centered Institutionalism”, in R. Mayntz, W. Streeck (eds.) *Die Re-formierbarkeit der Demokratie. Innovationen und Blockaden* (Frankfurt, Campus), p.324, pp. 318-350.

exclude the participation of member states depends on shared beliefs in the authority of law and in the capacity of technocrats to lead to the realisation of shared norms and values<sup>150</sup>. The joint-decision mode combines aspects of supranational centralisation and intergovernmental negotiations, but in this case, the presence of constellations where national interests are highly salient and strongly diverge will lead to the blocking of European solutions<sup>151</sup>.

Finally the third rational choice strand that acknowledges the impact of institutions defines the game form as an endogenous equilibrium. The rules that were treated as fixed and exogenous parameters in the institutions-as game forms approach, become here variables that are the product of the larger game<sup>152</sup>. We have observed that in the institutions-as game forms approach exogenous parameters are assumed to be fixed in order for the game to be 'playable', and endogenous variables are also somewhat fixed as individual preferences are stable. In this context, change occurs as a result of exogenous shocks which in turn determine a modification of the parameters and eventually the selection of a new equilibrium. As Canales observes, change in this framework is represented by a modification of the exogenous parameters (while the endogenous preferences remain stable) and is hence marked by "punctuated equilibrium" (moves from one stable point to the next) implying long periods of stasis being interrupted by rare and large exogenous shocks<sup>153</sup>. In the institutions-as-equilibrium approach however the level of analysis shifts and the object of enquiry revolves around stability and change within institutions. Starting off by signalling the overly static view that identifies changes in self-enforcing institutions as always having an exogenous origin (no actor having thus the incentive to deviate from the behaviour associated with the institution), Grief and Laitin introduce the concept of 'quasi-parameters' (aspects that are parametric in studying self-enforceability, but endogenous and hence variable on the long run) in order to address both institutional self-reinforcing or self-undermining equilibrium<sup>154</sup>. Quasi-parameters are not central to the rules of the game (hence not constitutive parameters) as they are not ex ante recognised or anticipated by actors, and they are not variables as they do not directly condition behaviour.

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<sup>150</sup> G. Majone (1996): "Regulatory Legitimacy", in G. Majone (ed.) *Regulating Europe* (New York, Routledge), p. 284.

<sup>151</sup> F. Scharpf (2000): "Notes toward a Theory of Multilevel Governing in Europe", p. 20.

<sup>152</sup> K. Shepsle (2006): "Old Questions and New Answers about Institutions", p. 1033.

<sup>153</sup> R. Canales (2010): "The Mechanisms of Institutional Change: Bringing Agents (back?) In", *Yale School of Management Working Paper* (New Haven, Yale School of Management), p. 7.

<sup>154</sup> A. Grief, D. Laitin (2004): "A Theory of Endogenous Institutional Change", *American Political Science Review*, Vol. 98, No.4, p. 634, pp. 633 – 52.

A sufficient condition for institutional endogenous change is that the institution's implications constantly undermine the associated behaviour. In this context, an institution will reinforce itself when the changes in the quasi-parameters that it entails imply that the associated behaviour is self-enforcing in a larger set of situations, and it will undermine itself when the same conditions imply that the associated behaviour will be self-enforcing in a smaller set of situations<sup>155</sup>. Thus, while initially actors might not be aware of their occurrence, in time quasi-parameters become more visible and lead actors to realise that their actions are no longer self-reinforcing in the institution. In terms of application of this theoretical framework within the field of European integration, Tatham detaches his study from the regular focus of the literature on dramatic evolutions and explores limited institutional change within the EU, accounting for the limitedness of the EU's departure from its original "federal blindness" (low levels of regionalisation)<sup>156</sup>. In this particular case of limited endogenous change, factors such as the deepening process of integration and the regionalisation pressure faced by the EU member states have exerted initial low influence, which gradually increased, thus triggering pressure towards greater recognition and involvement of the sub-state level in EU decision-making. However, on the long run the pressure for change has proved limited, confirming the EU's self-reinforcing capacity in terms of the regionalisation strategy.

In essence, all of these variations of the rational choice approach to institutions present a set of common assumptions and starting points: individuals are in the end the central actors in political life and they act rationally in order to maximise their utility. As a consequence, institutions are collections of rules and required practices based not on values, but on the compliance mechanism inherent to the structure that affect individual action. Thus despite visible variation, rational choice institutionalists conceive the response triggered at the actor level as a rational reaction to contextual constraints based on a 'logic of calculation'<sup>157</sup>. As we have discussed in the previous section, European hard law is sustained by monitoring and enforcement means, making an approach based on the logic of calculation on member

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<sup>155</sup> A. Grief (2006): *Institutions and the Path to the Modern Economy. Lessons from Medieval Trade* (Cambridge, Cambridge University Press), p. 160.

<sup>156</sup> M. Tatham (2013): "Limited Institutional Change in an International Organization: the EU's Shift away from 'Federal Blindness'", *European Political Science Review* (forthcoming), pp. 1-25.

<sup>157</sup> V. Schmidt (2010): "Taking Ideas and Discourse Seriously: Explaining Change through Discursive Institutionalism as the Forth 'New Institutionalism'", *European Political Science Review*, Vol. 2, No. 1, p. 2, pp. 1-25.

states' side the natural theoretical framework to apply when assessing national transposition.

When discussing non-compliance with European legislation, Börzel et al.<sup>158</sup> group rational choice perspectives into the category of enforcement approaches putting forward the essential linking assumptions and a set of hypotheses which they draw from power-based theoretical claims. The leading premise of enforcement approaches is that states choose not to comply with international norms and rules because they are not willing to bear the costs of change. It follows that incentives for defection need to be offset by increasing external constraints in the form of institutionalised monitoring and sanctioning which will exert either material (economic sanctions or financial penalties) or immaterial costs upon states (loss of reputation and credibility)<sup>159</sup>. The response to these additional costs will be dependent either on the EU specific political power or the economic power of nation states, the expectation being that the less powerful EU member states are, the more sensitive they are to external enforcement constraints and the less likely they are to infringe EU legislation.

### **3.2.1.1. Hypotheses grounded in RCI**

Our analysis will explore this hypothesis, but will focus only on member states' direct EU specific political power, as Börzel et al. study shows that greater economic power did not substantially affect a country's compliance record<sup>160</sup>. The proxy for the EU specific political power will be the proportion of votes under QMV (qualified majority voting) in the Council of Ministers and alternatively we will also consider the relative frequency with which a member state is in a pivotal position under QMV (i.e. in the position of turning a losing coalition into a winning one) or what is known in the literature as the Shapley-Shubik index. This later figure will be taken from Barr and Passarelli's mathematical analysis of the distribution of power in the Council of Ministers under the voting rules established by the Treaty of Nice (50% of the member states vote in favour, at least 260 of the possible 352

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<sup>158</sup> T. Börzel, M. Dudziak, T. Hofmann, D. Panke, C. Spungk (2007): "Recalcitrance, Inefficiency, and Support for European Integration: Why Member States Do (not) Comply with European Law", *Center for European Studies Working Paper*, No. 161 (Cambridge, Harvard University), p. 10.

<sup>159</sup> J. Tallberg (2002): "Path to Compliance: Enforcement, Management, and the European Union", *International Organization*, Vol. 56, No. 3, pp, 609-43, p. 612.

<sup>160</sup> T. Börzel, M. Dudziak, T. Hofmann, D. Panke, C. Spungk (2007): "Recalcitrance, Inefficiency, and Support for European Integration: Why Member States Do (not) Comply with European Law", p. 18.

votes are cast and the majority represents minimum 62% of the total population)<sup>161</sup>. Hence, one of the hypotheses which will be tested in order to explore Romania and Bulgaria's transposition record will be the following:

**Ha:** The less powerful an EU member state is, the less likely it is to infringe EU legislation.

Rational choice institutionalism assumes that strategic and rational actors pursuing exogenous and fixed policy interests operate in an institutionalised environment which can either constrain them (e.g. through monitoring and sanctioning mechanisms for free-riding) or enable them (e.g. minimise transaction costs for cooperation)<sup>162</sup>. As mirrored by hypothesis Ha, domestic institutional change will vary across member states and this phenomenon can be accounted for by the degree of economic vulnerability and political capacity. However, there is a third factor identified by Schmidt in the form of misfit that represents an important part of the driving force for institutional change<sup>163</sup>. Rational actors will attempt to upload their policies to the EU level with the aim of lowering the costs of adaptation which they will suffer when implementing ('downloading') norms and procedures established as mandatory by supranational structures. If member states are not successful in uploading their preferences, they will oppose the high costs of adaptation with both the correctness and timeliness of the transposition process being affected.

A caveat must be introduced here, noting that not only rational choice institutionalism uses this variable, but the historical branch of institutionalism as well, the assumption substantiating the concept being that the 'stickiness' of deeply entrenched national policy tradition and administrative routines will impede reforms aiming to alter them<sup>164</sup>. The difference between the two perspectives on 'misfit' is also highlighted by the estimated probability for domestic change to occur, with the historical institutionalist conceptualisation focusing more on the limited capacity that the EU would have in breaking path dependent national structures.

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<sup>161</sup> J. Barr, F. Passarelli (2009): "Who has the Power in the EU?", *Mathematical Social Sciences*, Vol. 57, No. 3, pp. 339-366.

<sup>162</sup> See F. Scharpf (1997): *Games Real Actors Play. Actor-Centered Institutionalism in Policy Research* (Boulder, Westview Press).

<sup>163</sup> V. Schmidt (2002): "Europeanization and the Mechanism of Economic Policy Adjustments", *Journal of European Public Policy*, Vol. 9, No. 6, pp. 894-912.

<sup>164</sup> K. Thelen, S. Steinmo (1992): "Historical Institutionalism in Comparative Politics" in S. Steinmo, K. Thelen, F. Longstreth (eds.) *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge, Cambridge University Press), pp. 1-32; E. Immergut (1998): "The Theoretical Core of New Institutionalism", *Politics and Society*, Vol. 26, No. 1, pp. 5-34.

In line with investigations of non-compliance that account for this factor<sup>165</sup>, we will thus test the goodness of fit variable, translated as a proxy that distinguishes between situations where transposition is realised through a completely new national implementing measure versus transposition through the modification of existing national legislation. The thought behind the addition of this variable is that amendments will display a higher fit between directives and national legislation.

**Hb:** Evidence of a certain degree of fit will lower transposition delay.

However, noting the previous studies that have underlined that the goodness of fit is not decisive (and thus not sufficient as a stand-alone variable) in explaining the implementation of individual directives<sup>166</sup>, we will refer to the realm of domestic politics and a number of national implementing measure specific variables will be used in order to explore the factors that have either a positive or negative impact upon the transposition process. The motivation behind this option is again theory-led, rationalist approaches to Europeanisation drawing attention to mediating institutional characteristics such as the number of veto points in a country's institutional structure and the presence of supporting formal institutions as increasing, respectively decreasing national resistance to change.

More concretely, it is expected that the presence at the national level of multiple veto points within the institutional structures and decision-making processes can empower actors with diverse interests to avoid constraints and adaptation costs leading to increased resistance to change. By way of alternative, the existence of formal institutions that would provide actors with the material and ideational resources to exploit new opportunities will increase the likelihood of change<sup>167</sup>. In order to translate these claims into variables, we consider the type and the number of the legal instruments that are used to implement European directives into national legislation as explanatory factors for variance as well as probability of compliance. The aim is to explore whether in the cases of Romania and Bulgaria we can identify major differences in compliance across different policy fields (whether we can observe that more cases of infringement are registered in a particular policy field and to

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<sup>165</sup> F. Duina (1997): "Explaining Legal Implementation in the European Union", *International Journal of the Sociology of Law*, Vol. 25, No. 2, pp. 155-79; C. Knill (1998): "European Politics: The Impact of National Administrative Traditions", *Journal of Public Policy*, Vol. 18, No. 1, pp. 1-28; T. Börzel, T. Risse (2000): "When Europe Hits Home: Europeanization and Domestic Change", *European Integration Online Papers*, Vol. 4, No. 15.

<sup>166</sup> M. Haverland (2000): "National Adaptation to European Integration: the Importance of Institutional Veto Points", *Journal of Public Policy*, Vol. 20, No. 1, pp. 83-103; G. Falkner, O. Trieb, M. Hartlapp, S. Leiber (2005): *Complying with Europe? The Impact of EU Minimum Harmonisation and Soft Law in the Member States* (Cambridge, Cambridge University Press), pp. 289-291.

<sup>167</sup> T. Börzel, T. Risse (2000): "When Europe Hits Home: Europeanization and Domestic Change", p. 3.

explore the reasons behind this phenomenon) and to compare the two countries' track records with those of the other member states included in the study (the United Kingdom, Germany, Italy, Sweden and Poland). This latter point will serve in order to identify whether any patterns in compliance across policy areas can be observed at the European level. This is especially interesting to test if we also consider that while legislative delegation to the government is constitutional in Romania (which could shorten the timing of transposition), but not in Bulgaria.

**Hc:** Delay in transposition will decrease as the number of actors (veto points) involved in the making of the instrument of national implementation decreases;

**Hd:** More implementing measures used to transpose EU directives will make delays in transposition larger.

However, rational choice institutionalism is not without its critics, a number of drawbacks are frequently emphasised by the academic literature. Firstly, because of the over-reliance on a functionalist understanding of institutions – regarded as effective means for facilitating international cooperation (as actors rely on each other to achieve their goals) by preventing short-term defections that might jeopardise long-term interests (leading to suboptimal outcomes) – it is hard for the theoretical perspective to account for 'dysfunctional institutions'<sup>168</sup>. Secondly, while the deductive nature of this approach makes it a useful framework for capturing the range of reasons individual actors would normally have for action in an institutional setting and the likely outcomes of these actions, it finds anomalies (instances when actors depart from an incentive-based logic) problematic to explain<sup>169</sup>. In this regard, placing itself in opposition to the methodological individualism and to the restricted understanding of institutions that create the fundament of rational choice analyses, sociological institutionalism – as well as the normative approach to the new institutionalism – have gradually provided an alternative theoretical account of the political and social world. In cases of national compliance with supranational norms in the absence of an external enforcement mechanism to prevent free-riding, sociological institutionalism assumes that individuals unconsciously enact cognitive templates as they are guided by a common understanding of what socially accepted behaviour is. Hence, for sociological institutionalists, compliance and enforcement appear to be nonissues. We emphasise

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<sup>168</sup> Hall, Taylor (1996): p. 952.

<sup>169</sup> See F. Scharpf (1997): *Games Real Actors Play. Actor-Centered Institutionalism in Policy Research* (Boulder, Westview Press).

'appear' as recent rationalist contributions provide new avenues for theoretical explanation of incremental institutional change, Mahoney and Thelen arguing for a distributional approach that would envisage institutions as having built in the dynamic tensions and pressures for change<sup>170</sup>. The new modes of change proposed by the authors take the form of displacement (removal of existing rules and the introduction of new ones), layering (new rules introduced alongside existing ones), drift (changed impact of existing rules due to shifts in the environment), and conversion (changed enactment of existing rules due to their strategic redeployment) and they allow for more flexibility in accounting for the differences in veto possibilities and the extent of discretion in institutional enforcement<sup>171</sup>. Nevertheless, it is the sociological branch that introduces complex explanatory variables such as coercive, mimetic and normative isomorphism (with a specific interest in the latter mechanism of policy transfer)<sup>172</sup> in order to explain the domestic effects associated with Europeanisation. We thus turn now to a brief discussion of the main theoretical claims of this perspective.

### 3.2.2. Sociological Institutionalism (SI)

Starting with the 1970s, contributions such as those of John Meyer<sup>173</sup> opened the theoretical space for an alternative to the individual maximisation and utilitarian values inherent in actor-centred functionalist accounts of institutions. The tendency among the new approaches to institutionalism had been, as observed thus far, to incorporate a tension between structure and agency. While the old institutionalisms perceived actors as being embedded in the social and cultural environment, the new perspectives reconsidered this relationship, perceiving structure as a mere element affecting the behaviours, practices and ideas of individuals<sup>174</sup>. Taking into consideration this evolution, sociological institutionalism can be argued to have resonated more with the old approaches, the focal point to this

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<sup>170</sup> J. Mahoney, K. Thelen (2010): "A Theory of Gradual institutional Change" in J. Mahoney, K. Thelen (eds.) *Explaining Institutional Change. Ambiguity, Agency, and Power* (Cambridge, Cambridge University Press), p. 10.

<sup>171</sup> *Ibid.*, p. 18.

<sup>172</sup> C. Radaelli (2000): "Whither Europeanization? Concept Stretching and Substantive Change", *European Integration Online Papers*, Vol. 4, No. 8.

<sup>173</sup> J. Meyer (1970): "High School Effects on College Intentions", *American Journal of Sociology*, Vol. 76, No. 1, pp. 59-70.

<sup>174</sup> J. Meyer (2008): "Reflections on Institutional Theories of Organizations", in R. Greenwood, C. Oliver, R. Suddaby, K. Sahlin (eds.) *The SAGE Handbook of Organizational Institutionalism* (London, SAGE Publications), p. 790, pp. 788-809.



perspective, as Jepperson observes, being the embeddedness of social structures and actors in broad-scale contexts of meaning (i.e. initially the European and later the world culture for social organisation)<sup>175</sup>.

A founding stone to sociological institutionalism has been the research initially conducted on the educational system, two important theoretical points which are now cornerstone for the school of thought being reflected in Meyer's study on the positive and negative effects that high schools have on the students' intentions to attend college. Firstly, institutions (in this case schools) play a fundamental role in bestowing an identity ("graduate") onto actors (students), and secondly holding constant certain characteristics of these institutions (in this case the social status and the role of graduates in society), the effects on individuals would be largely similar, as actors are enacting a singular identity<sup>176</sup>. This latter observation served as the basis for the development of a theory of diffuse socialisation which assumes the acquisition by individuals within the organisation of values, needs and social roles (i.e. identities or self-conceptions) which will considerably guide them throughout a range of social contexts<sup>177</sup>. However, this socialisation will cover not only actors within institutions, but also outsiders (its diffuse nature) as for example universities not only create the identity of graduate, but they also legitimise the social rights and meanings attached to this identity which are transmitted within the larger environment<sup>178</sup>.

The diffuse nature of socialisation can be connected to the concept of isomorphism that assumes a natural tendency of institutions within a field to converge on relatively similar forms. This latter concept extensively explored by DiMaggio and Powell is conceptualised both as a mechanism of change and of convergence. The fundament for isomorphism lays in the understanding of institutions. As such, within the sociological approach, institutions are portrayed as "frameworks of programs or rules establishing identities and activity scripts for such identities"<sup>179</sup> – thus incorporating a set of common responses to situations and affecting actors' expectations regarding the collective environment and collective activity. The totality of such organisations that constitutes a recognised area of institutional life

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<sup>175</sup> R. Jepperson (2001): "The Development and Application of Sociological Institutionalism", *Working Paper* 2001/5 (Florence, European University Institute), p. 1, pp. 1-54.

<sup>176</sup> J. Meyer (1970): "High School Effects on College Intentions", p. 67.

<sup>177</sup> J. Meyer (1970): "The Charter: Conditions of Diffuse Socialization in Schools", in W. Scott (ed.) *Social Processes and Social Structures* (New York, Holt Rinehart & Winston), p. 570, pp. 564-78.

<sup>178</sup> D. Kamens (1977): "Legitimizing Myths and Educational Organization: The Relationship between Organizational Ideology and Formal Structure", *American Sociological Review*, Vol. 42, No. 2, p. 212, pp. 208-19.

<sup>179</sup> R. Jepperson (1991): "Institutions, Institutional Effects, and Institutionalism", in W. Powell, P. DiMaggio (eds.) *The New Institutionalism in Organizational Analysis* (Chicago, University of Chicago Press), p. 146, pp. 143-63.

forms an organisational field which, as DiMaggio and Powell observe, has the tendency towards homogenisation<sup>180</sup>. This increasing convergence among institutions in particular fields is in fact the product of isomorphic change or the constraining process that forces one unit in a population to change its characteristics so that it would resemble to another unit that faces the same set of environmental conditions<sup>181</sup>. The mechanisms identified by DiMaggio and Powell by which convergence change occurs can be coercive, mimetic or normative. The triggers for coercive isomorphism are represented by formal or informal pressure being exerted on an organisation by another and by the cultural expectations of the society within which organisations function. Mimetic processes involve the modelling or borrowing of practices between institutions and are usually generated by the need to cope in an efficient manner with the uncertainties of the environment. However, this type of practices can be diffused unintentionally and indirectly as well through the transfer of employees. Finally the last source of isomorphic organisational change is normative and represents the tendency of professional networks to converge in terms of training and career progression. As such, individuals occupying similar positions across a range of organisations (and having similar professional backgrounds) will tend to respond in similar ways to policies, procedures and structures, this situation in turn leading to a diminished level of variation across organisations<sup>182</sup>.

Normative isomorphism, as categorised by Peters<sup>183</sup>, starts with the assumption that individuals understand the political world on the basis of the values and principles that are embedded in their *forma mentis* through their membership in institutions. The definition of institutions that the normative strand puts forward is not fundamentally different to that of the sociological perspective discussed up until now, as both versions have been reactions to the overemphasis placed on utility maximisation and rationality within the discipline. Hence, an institution is understood as a “relatively enduring collection of rules and organised practices, embedded in structures of meaning (...) that are (...) relatively resilient to the idiosyncratic preferences and expectations of individuals and changing external

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<sup>180</sup> P. DiMaggio, W. Powell (1991): “The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields”, in W. Powell, P. DiMaggio (eds.) *The New Institutionalism in Organizational Analysis* (Chicago, University of Chicago Press), p. 64, pp. 63-82.

<sup>181</sup> *Ibid.*, p. 66.

<sup>182</sup> *Ibid.*, pp. 67-73.

<sup>183</sup> G. Peters (2012): *Institutional Theory in Political Science. The New Institutionalism* (New York, Continuum), 3<sup>rd</sup> edition.

circumstances”<sup>184</sup>. In this institutional context, actors are assumed to form their political values through their membership in formal and informal institutions<sup>185</sup> and through continuous learning within this environment. The process of learning is not however, unidirectional. Organisational knowledge and beliefs are diffused to individuals through means such as instruction, indoctrination, and exemplification, but simultaneously, the institutional code of norms and practices is adapting to individual beliefs<sup>186</sup>.

But the most important implication that is generated from this conceptualisation of institutional change is a very static or passive image of organisations which leaves variation unaccounted. As such, starting from the hypothesis that there is a tendency towards homogeneity, Powell argues that change understood as heterogeneity occurs in the organisational fields where the units are least subject to isomorphic pressures<sup>187</sup>. Thus episodes of change occur in instances where either mimetic or coercive isomorphism is partial. While in the case of unsuccessful modelling (mimesis) internal resistance to new practices represents the trigger for unintended modifications, in instances of weak external pressure (incomplete institutionalisation), due to the fact that the actor that is inducing the incentive for change does not have the power to insure its reproduction, the new practices introduced will be visible for a short term<sup>188</sup>.

As we have observed thus far, while both institutional stability (understood in this case as convergence) and (episodic) change can be explored by using the theoretical assumption of sociological institutionalism, both the motivation for change and normative compliance with institutional practices cannot be explained with the same set of theoretical assumptions set forward so far. A more agency-centred variety of sociological institutionalism designed to counterbalance the rationalist perspectives reckoned as overly individualistic and characterised by largely utilitarian presuppositions and methodologies can be found in the works of James March and Johan Olsen<sup>189</sup>. The authors distinguish

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<sup>184</sup> J. March, J. Olsen (2005): “Elaborating the ‘New Institutionalism’”, Arena Working Paper no. 11/ March 2005, (Oslo, Centre for European Studies – University of Oslo), p. 1.

<sup>185</sup> See also A. Wildavsky (1987): “Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation”, *The American Political Science Review*, Vol. 81, No. 1, pp. 3-22.

<sup>186</sup> J. March (1991): “Exploration and Exploitation in Original Learning”, *Organization Science*, Vol. 2, No. 1, p. 5, pp. 71-87.

<sup>187</sup> W. Powell (1991): “Expanding the Scope of Institutional Analysis”, in W. Powell, P. DiMaggio (eds.) *The New Institutionalism in Organizational Analysis*, p. 198, pp. 183-202.

<sup>188</sup> *Ibid.*, p. 199.

<sup>189</sup> J. March, J. Olsen (1984): “The New Institutionalism: Organizational Factors in Political Life”, *American Political Science Review*, Vol. 78, No.3, pp. 738-49; J. March, J. Olsen (1996): “Institutional Perspectives on Political Institutions”, *Governance*, Vol. 9, No.3, pp. 247-64.

between aggregative and integrative political processes<sup>190</sup>. The former structure is associated with institutions in which individual actors participate in order to materialise their own preferences (a view shared by rational choice institutionalism), while the latter attaches to the organisational environment the concept of “logic of appropriateness” which explains actors’ conformity with norms through their perceived legitimacy. The emphasis here is placed on a process of interaction between structure and agency (ontology of mutual constitution) in which neither unit of analysis (agency or structure) will reduce the other to a state of ontological primitiveness<sup>191</sup>. Actors are seen as embedded in these regulative and constitutive institutions and their interests are shaped by the institutional setting. Institutional constraints on actors in a normative perspective are thus mainly based on self-policing, as individuals who become members of an organisation do so willingly and implicitly accept the set of rules and values attached to the institutional framework they opt for. On the long run however, compliance can also become a product of habitual action, conscious commitment to abiding rules being replaced with reflexive responses<sup>192</sup>. This more agency-centered version of sociological institutionalism (set in contrast to the more structuralist version of isomorphism) focuses on socialisation meaning the process through which actors learn or are persuaded to accommodate new norms and rules that redefine their interests and identities<sup>193</sup>.

### **3.2.2.1. Hypothesis grounded in SI**

In this sociological reading, the EU is regarded as a platform for new ideas, meanings, rule and norms that member states are to absorb/internalise. To facilitate this process two mediating factors have the capacity to encourage change: norm entrepreneurs and co-operative informal institutions. The former act as ‘change agents’ either lobbying for new ideas and norms deriving from the EU level (advocacy groups) or by developing and circulating causal ideas that help create state interests and preferences (epistemic communities). The latter are embodied by co-operative political cultures which ease

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<sup>190</sup> J. March, J. Olsen (1989): *Rediscovering Institutions* (New York, Free Press), p. 118.

<sup>191</sup> J. Jupille, J. Caporaso, J. Checkel (2003): “Integrating Institutions: Rationalism, Constructivism, and the Study of the European Union”, *Comparative Political Studies*, Vol. 36, No. 7, pp. 7-40, p. 14.

<sup>192</sup> G. Peters (2012): *Institutional Theory in Political Science. The New Institutionalism*, p. 41.

<sup>193</sup> M. Finnemore, K. Sikkink (1998): “International Norm Dynamics and Political Change”, *International Organization*, Vol. 52, No. 4, pp. 887-917.

consensus-building in the decision-making process<sup>194</sup>. The impact of co-operative informal institutions will be tested in our analysis of the transposition record in Romania and Bulgaria by starting from the assumption that the degree of compliance correlates with the extent to which “rule addresses accept the legitimacy of the rule of law and consider compliance with legal norms as demanded by a logic of appropriateness”<sup>195</sup>. The hypothesis will thus be:

**He:** The lower the support for the rule of law, the larger the delay in transposition will be.

In order to operationalise this variable we will use the World Bank Rule of Law dimension of the Worldwide Governance Indicators. The Rule of Law index captures “perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence”<sup>196</sup>. We opt for this particular indicator as it assures inclusiveness by aggregating data collected from surveys of firms and households, as well as from assessments of a variety of commercial business information providers, non-governmental organisations and public-sector bodies.

Sociological institutionalism is of course not without its drawbacks. While attempting to provide an alternative approach to the methodological individualism of rational choice, normative institutionalism faces the same difficulties as its nemesis in terms of potential for falsification. By conceptualising motivation for social behaviour as a consequence of pre-fixed rational preferences, the rational choice framework puts forward an un-falsifiable tautology that “says little about human behaviour (save) that it is always and everywhere rational”<sup>197</sup>. To this extent, normative institutionalism is subject to the same pitfall, actor behaviour simply being perceived as a result of the “logic of appropriateness”. This emphasis on social appropriateness can also lead to the disregarding of actors that have competing stakes over certain institutional solutions. These competing stakes can be translated into the institutional genesis that will inherit these power struggles. As Hall and Taylor explain:

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<sup>194</sup> T. Börzel, T. Risse (2003): “Conceptualising the Domestic Impact of Europe”, in K. Featherstone, C. Radaelli (eds.) *The Politics of Europeanization* (Oxford, Oxford University Press), p. 67.

<sup>195</sup> T. Börzel, M. Dudziak, T. Hofmann, D. Panke, C. Sprungk (2007): “Recalcitrance, Inefficiency, and Support for European Integration: Why Member States Do (not) Comply with European Law”, p. 13.

<sup>196</sup> D. Kaufmann, A. Kraay, M. Mastruzzi (2010): “The Worldwide Governance Indicators. Methodology and Analytical Issues”, Policy Research Working Paper No. 5430 (The World Bank Development Research Group), p. 4.

<sup>197</sup> J. Friedman (1996): *The Rational Choice Controversy* (New Haven, Yale University Press) p. 23.

“After all, many actors, both inside and outside an organization, have deep stakes in whether that firm or government adopts new institutional practices, and reform initiatives often provoke power struggles among these actors, which an emphasis on processes of diffusion can neglect”<sup>198</sup>.

Nevertheless, sociological institutionalism brings to the table an important set of mechanisms through which structures exert influence upon actors: normative, cognitive, and dependence mechanisms. More specifically, institutional influence is exerted when actors seeking legitimacy among peer states opt to adopt forms of the parent policy in order to attain acknowledgement, when substantive policy concerns exist but the link between the available means and the desired ends is ambiguous and more viable alternative models are being emulated, and finally when technical authority is delegated to expert bodies (or ‘epistemic communities’) to develop and demonstrate the cognitive and normative feasibility of policy rationales and prescriptions<sup>199</sup>. The fruitfulness of using heuristic learning forms<sup>200</sup> such as persuasion and social interaction as explanatory variables for convergence has been particularly demonstrated in analyses of non-coercive modes of EU governance based on instruments and processes such as benchmarking, mainstreaming or coordination<sup>201</sup>. While we do not contest the perspective’s attributes and its suitability as a theoretical tool to account for deep compliance processes of elite socialisation or cognitive convergence, our analysis of the institutional influence exerted at the national level by new governance instruments such as the Cooperation and Verification Mechanism and the Europe 2020 Strategy will rely on rational choice and historical institutionalism as we are interested in exploring sequences of change across time and the influence that actors have

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<sup>198</sup> P. Hall, C. Taylor (1996): “Political Science and the Three New Institutionalisms”, *Political Studies*, Vol. 44, No. 5, pp. 936-57, p. 954.

<sup>199</sup> E. Amenta, K. Ramsey (2010): “Institutional Theory” in K. Leicht, J. Jenkins (eds.) *The Handbook of Politics: State and Civil Society in Global Perspectives* (New York, Springer), pp. 18-19.

<sup>200</sup> Radaelli distinguishes three types of learning: instrumental learning, emulation and political learning with the first having the aim of legitimacy seeking, the second, policy improvement and the latter the strategic, and symbolic use of knowledge – C. Radaelli (2009): “Measuring Policy Learning: Regulatory Impact Assessment in Europe”, *Journal of European Public Policy*, Vol. 16, No. 8, pp. 1145-164.

<sup>201</sup> C. Radaelli (2004): “Who Learns What? Policy Learning and the Open Method of Co-ordination”, Paper prepared for ESRC seminar ‘*Implementing the Lisbon Strategy, Policy Learning Inside and Outside the Open Method*’ (Birmingham, European Research Institute); N. Alexiadou, D. Fink-Hafner, B. Lange (2010): “Education Policy Convergence through the Open Method of Coordination: Theoretical Reflections and Implementation in ‘Old’ and ‘New’ National Contexts”, *European Educational Research Journal*, Vol. 9, No. 3, pp. 345-58; E. Tulmets (2005): “The Introduction of the Open method of Coordination in the European Enlargement Policy: Analysing the Impact of the New PHARE/Twinning Instrument”, *European Political Economy Review*, Vol. 3, No. 1, pp. 54-90.

exercised during critical junctures. The fundamental premise is that actors might be in a strong initial position, seek to maximise their gains and nevertheless make policy decisions that would transform their positions in unanticipated ways.

In what follows we will explore the themes and heuristics of historical institutionalism, theoretical strand that is distinguished from the frameworks discussed so far by the attention dedicated to empirical questions and by its orientation towards analysing macro contexts and hypothesising about the combined effects of institutions and processes. In order to corroborate the feasibility and value of our theoretical model that reunites both rational choice and historical institutionalist claims, we will present cases of theoretical juxtaposition in the relevant literature. Finally we will introduce a set of hypotheses that will guide our analysis of Europeanisation in the case of soft law and we will conclude the chapter after having presented the potential outcomes of Europeanisation.

### **3.2.3. Historical Institutionalism (HI)**

In the general context of institutionalism, as we have observed so far, the principle that unites all theoretical strands is that institutions matter in the sense that they play the role of a variable in the outcome of decisions of actors. Historical institutionalism as developed by Steinmo, Thelen and Longstreth represents “an attempt to illuminate how political struggles are mediated by the institutional setting in which they take place”<sup>202</sup> and in this context, institutions are catalytic variables that shape not only the strategies that actors put into play, but their goals as well<sup>203</sup>. Theoreticians within this framework distinguish themselves on the one hand from rational choice by emphasising the dependency of individual action and preferences on the social and historical institutional setting<sup>204</sup>, and from the sociological approach by the attention provided to the way in which institutions distribute power unevenly across societal groups. Hence the world that they portray is marked by

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<sup>202</sup> K. Thelen, S. Steinmo (1992): “Historical Institutionalism in Comparative Politics”, in S. Steinmo, K. Thelen, F. Longstreth (eds.) *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge, Cambridge University Press), p. 2.

<sup>203</sup> *Idem*.

<sup>204</sup> R. Adcock, M. Bevir, S. Stimson (2009): “Historicizing the New Institutionalism(s)” in R. Adcock, M. Bevir, S. Stimson (eds.) *Modern Political Science: Anglo-American Exchanges Since 1880* (Princeton, Princeton University Press), p. 280, pp. 259-290.

institutions understood not as means to an end, but as creators that give some groups or interests disproportionate access to the decision-making process<sup>205</sup>. Here the concept of veto player is introduced, understood as “an individual or collective actor whose agreement is required for a change in policy”<sup>206</sup>. Within political institutions, Kay differentiates between veto players arguing that they can be either institutional, meaning that they are built into the structure of the government, or partisan which identifies members within the governing coalition<sup>207</sup>. Focusing on the health care system, Immergut’s analysis of the potential for reform in this sector provides an empirical substantiation that can be attached to the general concept of veto player. The cross-national study explains why the structure of the Swiss federal health care system provides physicians with greater political influence compared to their peers in France and Sweden. The argument is that in spite of the same level of decentralisation, physicians in Switzerland benefit of greater opportunities to veto policies in this sector that they might perceive as harmful<sup>208</sup>. Hence, the institutional environment shapes actors’ power to engage in political conflict in order to protect their interests as different groups are provided with asymmetrical opportunities to veto policy (asymmetrical power).

The conceptualisation of institutions reinforces the distinction from sociological institutionalism, as the research focus is on the impact and influence of “formal and informal procedures, routines, norms, and conventions in the organisational structure of the polity or the political economy”, whereas the sociological approach deals with “cognitive scripts, moral templates and symbol systems”<sup>209</sup> as well. With rational choice, historical institutionalism shares the fundamental assumption that institutions represent humanly devised constraints that shape behaviour. However, from this point on it places itself on a distinct research agenda. As such the focal point for historical institutionalism is centred on long-term evolution and on the outcome generated by the interactions between actors within a conjunction of institutions. Its research ‘agenda’ encompasses three key features: the examination of substantive questions (on the meso- to macro-level), the rigorous

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<sup>205</sup> P. Hall, R. Taylor (1996): “Political Science and the Three Institutionalisms”, *Political Studies*, Vol. 44, No. 5, p. 941, pp. 936-57.

<sup>206</sup> S. Kay (1999): “Unexpected Privatizations: Politics and Social Security Reform in the Southern Cone”, *Comparative Politics*, Vol. 31, No. 4, p. 405, pp. 403-22.

<sup>207</sup> *Idem*.

<sup>208</sup> E. Immergut (1992): *Health Politics: Interests and Institutions in Western Europe* (Cambridge, Cambridge University Press).

<sup>209</sup> E. Amenta, K. Ramsey (2010): “Institutional Theory”, in K. Leicht, C. Jenkins (eds.): *Handbook of Politics, State and Society in Global Perspective* (New York, Springer), p. 17.



analysis of processes of historical change, sequences and transformations, and finally the scrutiny of macroeconomic contexts combining the effects of institutions and processes<sup>210</sup>. At the actor level, preferences are understood as goals (in opposition to utility maximisation logic adopted by rational choice) which as Sanders observes, have a more public, less self-interested dimension and are thus based on ideas that act as mobilising forces for collective action<sup>211</sup>. As such, Hall for example argues that within the economic sector an essential step to understanding decisions implies the initial exploration of the origin and the nature of policy paradigms. In his approach, Hall defines policy paradigms as “a framework of ideas and standards that specifies not only the goals of policy and the kind of instruments that can be used to attain them, but also the very nature of the problems they are meant to address”<sup>212</sup>. In this sense, as Béland observes, by being both ideological and technical, paradigms constitute structured world views for politicians, policy-makers, social movements and representatives of the para-political sphere (located at the joining of the economic, governmental and academic environments and embodied by think tanks and research institutes)<sup>213</sup>.

Goals as well as individual action are shaped to different extents by the environment in which they occur and hence must be pursued as part of the explanatory exercise. The institutional environment, once created and strengthened, becomes ‘sticky’ and choices made at a critical junctures (or choice points) become ‘locked in’ constraining future behaviour. This path dependent instance brings about institutions with mechanisms that provide increasing returns (meaning that where each increment added to a particular activity yields larger rather than smaller benefits) to action and self-reinforcing processes<sup>214</sup>. Hence, path dependency represents “the dynamics of self-reinforcing or positive feedback processes in the political system”<sup>215</sup>. The concept itself was initially borrowed from economics and technology literature where it sought to explain why certain

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<sup>210</sup> P. Pierson, T. Skocpol (2002): “Historical Institutionalism in Contemporary Political Science” in I. Katznelson, H. Milner (eds.) *Political Science: State of the Discipline* (New York, Norton), pp. 693-721, pp. 703-16.

<sup>211</sup> E. Sanders (2006): “Historical Institutionalism”, in R. Rhodes, S. Binder, B. Rockman (eds.) *The Oxford Handbook of Political Institutions* (Oxford, Oxford University Press), p. 41, pp. 39-56.

<sup>212</sup> P. Hall (1993): “Policy Paradigms, Social Learning, and the State: the Case of Economic Policymaking in Britain”, *Comparative Politics*, Vol. 25, No. 3, p. 279, pp. 275-96.

<sup>213</sup> D. Béland (2005): “Ideas, Interests, and Institutions: Historical Institutionalism Revisited”, in André Lecours (ed.) *New Institutionalism. Theory and analysis* (Toronto, University of Toronto Press), p. 36.

<sup>214</sup> E. Amenta (2012): “Historical Institutionalism”, in E. Amenta, K. Nash, A. Scott (eds.) *The Wiley-Blackwell Companion to Political Sociology* (Chichester, Wiley-Blackwell), p. 51.

<sup>215</sup> P. Pierson (2004): *Politics in Time: History, Institutions, and Social Analysis* (Princeton, Princeton University Press), p. 20.

technologies gain advantage to the detriment of others and prevail on the long run, even if they might prove to be less efficient than their alternative. Once transferred to the realm of political science, path dependency was enriched with agency and choice and used to explain why path following becomes locked in. Connected to the concept path dependence is that of policy feedback effects which the literature classifies into two types: functional and distributional<sup>216</sup>. Ikenberry explains functional feedback as the setting in which once a conglomeration of institutions is in place, actors adapt their strategies so that they reflect and also reinforce the “logic of the system”. The second feedback mechanism is connected to the distributional effects of institutions and presupposes that as institutions are not neutral coordination systems meaning that they reinforce within their structure a specific pattern of power distribution, they will reproduce the way in which power is spread and even magnify it<sup>217</sup>.

Historical institutionalism is a school of thought characterised by great internal diversity, in the same line we would argue as the other new institutionalisms, and its critical version starts off with an initial assumption that Paul Pierson (one of the most prominent figures in historical institutionalism in political science) made in one of his earliest essays. The author argued that while the path dependence of politics via the mechanism of increasing returns is the most important concept of the theory, we need to take into consideration the hypothesis of previous interpretive arguments noting that negative learning is also a possible outcome of path dependency<sup>218</sup>. More clearly expressed, previous events in a sequence influence the outcomes, but not necessarily by inducing movement in the same direction. However, Pierson later reinforced a narrower conception of path dependence which assumes that “preceding steps in a particular direction influence further movement in the same direction”<sup>219</sup>, pattern captured by the idea of increasing returns. In turn this narrower conceptualisation brought criticism on historical institutionalism as it was consider falling in the same deterministic trap as the rational choice and sociologic alternatives. So if path-dependent processes preserve past decisions in their forms, how do actors ever break free from them?

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<sup>216</sup> K. Thelen (1999): “Historical Institutionalism in Comparative Politics”, *Annual Review of Political Science*, Vol. 2, No.1, p.392, pp. 369-404.

<sup>217</sup> J. Ikenberry (1994): “History’s Heavy Hand. Institutions and the Politics of the State”, paper presented at the conference “new Perspectives on institutions” (College Park, University of Maryland).

<sup>218</sup> P. Pierson (1993): “When Effect Becomes Cause. Policy Feedback and Political Change”, *World Politics*, Vol. 45, No. 4, pp. 595-628, p. 614.

<sup>219</sup> P. Pierson (2000): “Increasing Returns, Path Dependence, and the Study of Politics”, *American Political Science Review*, Vol. 94, No. 2, pp. 251-67, p. 252.

Change in this context has been explained either in connection with punctuated equilibrium or critical junctures. The former represents a situation where institutions and processes remain stable until faced with exogenous shocks (such as crises and wars) that bring about relatively abrupt change followed by institutional stasis<sup>220</sup>. This model has been criticised however for its lack of agency and failure to account for the effects of political conflicts and the dynamic relation between institutions<sup>221</sup>. The concept of critical junctures remains firmly based on the premise that institutional development is marked by a high level of path dependency, but implies that historical moments create branching points at which new trajectories become followed instead up until a new critical moment arises<sup>222</sup>. These junctures close off alternative routes and lead to the establishment of institutions that generate self-reinforcing path-dependent processes<sup>223</sup>. This approach includes two analytically separate claims – the first involves crucial founding moments of institutional formation which set developmental pathways, whilst the second involves the continuing evolution of institutions in response to changing political contexts, but in ways that are constrained by past trajectories<sup>224</sup>. For a critical juncture to lead to change, three parameters are expected to play an important role: forces external to institutions, internal factors or circumstances or the result of the intervention of a particular group or individual<sup>225</sup>. Judging from these factors we can expect for the duration of a critical juncture to be short relative to the path-dependent process it initiates as what we are looking for in analyses based on the non-ergodicity of the institutional environment are phases of fluidity marked by uncertainty, distinctive decisions of influential actors or in the case of cumulative causes a tipping point (a threshold that once surpassed leads to rapid change)<sup>226</sup>.

Change itself is differentiated, as Hall explains, the process being distinguished between simple change and radical transformation. Simple change entails policy settings (first order) and basic techniques used to attain policy goals (second order). Radical transformation

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<sup>220</sup> S. Krasner (1984): "Approaches to the State: Alternative Conceptions and Historical Dynamics", *Comparative Politics*, Vol. 16, No.2, pp. 223-46.

<sup>221</sup> P. Peters, J. Pierre, D. King (2005): "The Politics of Path Dependency: Political Conflict in Historical Institutionalism", *The Journal of Politics*, Vol. 64, No. 4, pp. 1275-300, p. 1277.

<sup>222</sup> S. Bulmer, M. Burch (1998): "Organizing for Europe: Whitehall, the British State and European Union", *Public Administration*, Vol. 76, No. 4, pp. 601-28, p. 605.

<sup>223</sup> G. Capoccia, D. Keleman (2007): "The Study of Critical Junctures: Theory, Narrative and Counterfactuals in Historical Institutionalism", *World Politics*, Vol. 59, No. 3, pp. 341-69, p. 341. cha

<sup>224</sup> K. Thelen (1999): "Historical Institutionalism in Comparative Politics", p. 387.

<sup>225</sup> S. Bulmer, M. Burch (1998): "Organizing for Europe: Whitehall, the British State and European Union", p. 605.

<sup>226</sup> *Ibid.*, pp. 350-52.

(third order) occurs rarely and involved a shift in the “framework of ideas and standards that specifies not only the goals of policy and the kind of instruments that can be used to attain them, but also the very nature of the problems they are meant to be addressing”<sup>227</sup>. While first and second order change is incremental, paradigm shift does not naturally follow from previous partial alterations. Historical institutionalism tends more often than not to be biased towards structure to the detriment of purposeful agency, institutional development being subject to a high level of path dependency. In this sense, it is closer to the sociological perspective rather than rational choice. However, change is generated during critical junctures “of relative structural indeterminism when wilful actors shape outcomes in a more voluntaristic fashion than normal circumstances permit”<sup>228</sup>. At this point historical institutionalism shares with the rational choice alternative the ontological premise that actors are rational, information is scarce and institutions shape outcomes, but are in turn themselves the results of the strategies and choices<sup>229</sup>.

**Table 1 The Three Institutionalisms**

	<b>Rational Choice Institutionalism</b>	<b>Historical Institutionalism</b>	<b>Sociological Institutionalism</b>
Object of Explanation	Rational behaviour and interests	Historical regularities	Cultural norms and frames
Logic of Explanation	Consequentiality (strategic calculation)	Path dependence and contingency	Appropriateness (socialisation)
Problems of Explanation	Economic determinism	Historical determinism	Cultural determinism
Variables to Explain Change	Fixed preferences and formal institutions	Path dependence and critical junctures	Cultural norms

<sup>227</sup> P. Hall (1993): “Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain”, *Comparative Politics*, Vol. 25, No. 3, pp. 275-96, p. 279.

<sup>228</sup> J. Mahoney (2001): *The Legacies of Liberalism: Path Dependence and Political Regimes in Central America* (Baltimore, Johns Hopkins University Press), p. 7.

<sup>229</sup> Hay, Wincott (1998): “Structure, Agency and Historical Institutionalism”, *Political Studies*, Vol. 46, No. 5, pp. 951-57, p. 954.

**Source:** Adapted after V. Schmidt (2011): "Reconciling Ideas and Institutions through Discursive Institutionalism", in D. Béland, R. Cox (eds.) *Ideas and Politics in Social Science Research*, (Oxford, Oxford University Press) p. 67.

In the context of Europeanisation, while focused mainly on the temporal dimension of domestic processes of adjustment to the EU, historical institutionalist studies have argued however for the need of a synthetic approach to structural, rationalist, and cultural variables and have factored in cognitive and cultural components as well as the influence of important veto players upon national adaptation to EU policy-making<sup>230</sup>. An example in this sense is the study of German and British reactions to EU integration designed by Bulmer and Burch who argue for an enriched historical approach to Europeanisation<sup>231</sup>. The authors start off by introducing and developing a series of theoretical propositions. Firstly, they hold that internal and/or external pressures for change in settled and stable societies usually lead to the adaptation of existing institutions rather than the creation of new ones. The assumption of incremental change is not however regarded as immutable, transformative change being also a potential outcome of accumulated and crystallised incremental change<sup>232</sup>. This 'incremental-transformative change' is generated when 'critical moments' (or moments when opportunity for change arises, but it is not capitalised) become critical junctures which create branching points where institutional development moves onto a new trajectory which will be path-dependent until the option for an alternative route is taken again by important actors. This theoretical model is then enriched with the motor that sociological institutionalism considers as influential in determining change: the institutional environment that creates a normative context to which actors adhere and through which they identify themselves. Hence, without pursuing the objective of theory-building, the authors deem that a historical institutionalist analysis of incremental and transformative changes must be supplemented by particular attention given to the culture and the belief-systems in order to offer deeper insight into the factors that contribute to institutional development.

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<sup>230</sup> See W. Jacoby (2004): *The Enlargement of the European Union and NATO. Ordering from the Menu in Central Europe* (Cambridge, Cambridge University Press).

<sup>231</sup> S. Bulmer, M. Burch (2001): "'The Europeanization' of Central Government: the UK and Germany in Historical Institutional Perspective", in G. Schneider, M. Aspinwall (eds.) *The Rules of Integration* (Manchester, Manchester University Press).

<sup>232</sup> S. Bulmer, M. Burch (2001): "'The Europeanization' of Central Government: the UK and Germany in Historical Institutional Perspective", pp. 81-2.

The case for theoretical juxtaposition is also made by Jacoby who explores the proclivity of Central and Eastern European elites to emulate existing institutions from Western Europe on their way towards joining the European Union and the North Atlantic Treaty Organization (NATO)<sup>233</sup>. At the core of the theoretical model rests the proposition of 'embedded rationality' shared to different extents by all strands of institutionalism which assumes that rationalism plays a central role in political life. Rather than downplaying the effects of this proposition, it is suggested that actors' rationality is embedded within two contexts: norms and history. The research framework thus assumes that elite reason is on the one hand contingent upon normative models that specify much of the institutional design to be pursued and on the other that it is often constrained by historical factors that again limit the range of possible outcomes to be sought. Finally, each of the three theoretical perspectives holds in essence that institutional development and change is influenced by a series of motors and brakes which vary over time and across cases. Rational choice contends that the motor is constituted by the electoral support that elites would gain from voters (as a response to opting for a strategy) and in some cases the material resources forwarded by international organisations that actors can afterwards distribute. The brakes come in the form of veto points and their ability to significantly reshape preferences and to deflect plans for change. In the case of sociological institutionalism the motor is represented by a dense institutional environment, while the brake is epitomised by low salience in some areas subjected to reform (some reform projects benefitting of less legitimacy). Lastly, the main motor driving change in a historical institutionalist view is embodied in the existing capacities of actors to push for institutional development, while the lock-in properties of existing practices constitute the breaks<sup>234</sup>. Hence, it is expected for emulation efforts to be more noticeable when the momentum generated by the sum of motors to be stronger than the hindrance exercised by the brakes. By contrast, elites emulate least when all three types of brakes exercise more influence than the motors.

A third illustration of theoretical synthesis is reflected in Mahoney's analysis of the political trajectories of liberal actors in pursuing the modernisation of the state and agrarian sectors

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<sup>233</sup> W. Jacoby (2004): *The Enlargement of the European Union and NATO. Ordering from the Menu in Central Europe*, (Cambridge, Cambridge University Press).

<sup>234</sup> W. Jacoby (2004): *The Enlargement of the European Union and NATO. Ordering from the Menu in Central Europe*, pp. 20-31.

within countries in Central America during the nineteenth century<sup>235</sup>. In this case the first stage of analysis is based on a rational choice model of political preferences that aggregates behavioural options, potential outcomes, the utility of these outcomes, and the probability of occurrence of a given outcome as components shaping actor choice. Deriving from this assumption is a categorisation of actors into utility maximising seekers (who will pursue an option that would present the greatest sum of expected utilities) and risk adverse actors (whose preferred option is on with the best-worst outcome)<sup>236</sup>. The second phase of the analysis places preference formation in the context of history, the range of components of actor choice being shaped by historical circumstances. More clearly put, the options, outcomes, utility and probability that actors take into consideration before making a decision are factors which do not reflect the objective reality, but mirror former paths previously taken, ideologies, and past events. This inaccurate assessment of reality on actors' behalf serves nevertheless as the basis for rational decision making<sup>237</sup>.

### 3.2.3.1. Hypothesis grounded in HI

This latter theoretical model will be emulated in our analysis of the extent of Europeanisation through two distinct soft law instruments – the Cooperation and Verification Mechanism (CVM) and the Europe 2020 Strategy (based on the Open Method of Coordination as policy instrument). Inherently, the concept of soft law seems to be tangled in a contradiction – “soft law without legal effects is not law and soft law with legal effects is hard law”<sup>238</sup>. However, starting from Snyder’s understanding of the concept as “rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects”<sup>239</sup>, we look at the national impact exercised by two instruments of soft law which are differentiated through their legal basis, their instrumentation, policy objectives/material scope, and addressees. The motivation for the investigation of national

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<sup>235</sup> J. Mahoney (2005): “Combining Institutionalisms: Liberal Choices and Political Trajectories in Central America”, in I. Katznelson, R. Weingast (eds.) *Preferences and Situations. Points of Intersection between Historical and Rational Choice Institutionalism* (New York, Russell Sage Foundation), pp. 313-333.

<sup>236</sup> *Ibid.*, p. 317.

<sup>237</sup> *Ibid.*, p. 318.

<sup>238</sup> L. Senden (2004): *Soft Law in European Community Law* (Portland, Hart Publishing), p. 109.

<sup>239</sup> F. Snyder (1993): “The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques”, *The Modern Law Review*, Vol. 56, No. 1, pp. 19-54, p. 32.

responses both under the CVM and the Open Method of Coordination is twofold. We are firstly interested in observing national responses in Romania and Bulgaria on the one hand in the case of a policy instrument that has all of the 28 Member States as addressees (the Europe 2020 Strategy) and that is based on intergovernmental co-ordination and on the other in the case of a largely monitoring instrument that has a driving institutional actor the European Commission and a limited number of addressees (the two countries under consideration in this thesis). The objective however is not to contrast the progress made by the two Member States under the different soft law instruments as we are dealing with distinct policy objectives, even if one might argue that the common denominator is the Community's limited direct competence in the policy areas subject to soft law mechanisms. Secondly, we are interested in observing the degree of institutional change generated at the domestic level under the Community method and under instruments of the new mode of governance. Should we expect evidence of 'thick' institutional development when analysing the transposition of supranational legal acts which have monitoring and sanctioning elements attached? By contrast, will policy change taking place through voluntary learning be 'thin'?

As we have observed so far the components of the process of rational choice formation (options, outcomes, utility and probability of occurrence of a given outcome) are determined by historical circumstances (former taken paths, ideologies and past events). Hence, change will be essentially contingent on history. In largely stable societies we would expect internal and/or external pressure to lead to adaptation rather than transformation (i.e. incremental institutional change). However, when critical moments become critical junctures, in other words when the usual constraints on action are lifted and the weight of agency prevails over that of the structure, we can witness significant change at the level of domestic structures. The literature has tacitly assumed that the beginning of the accession negotiations coupled inherently with outset of the EU's bargaining strategy of reinforcement through reward and penalty has been such a critical moment that has generated impetus for change in politics, policies, and polity<sup>240</sup>. Nevertheless, several scholars have predicted a significant backslide of reforms in candidate countries from

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<sup>240</sup> See F. Schimmelfennig, U. Sedelmeier (2004): "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe", *Journal of European Public Policy*, Vol. 11, No. 4, pp. 669-87; F. Schimmelfennig, S. Engert, H. Knobel (2005): "The Impact of EU Political Conditionality", in F. Schimmelfennig, U. Sedelmeier (eds.) *The Europeanization of Central and Eastern Europe* (New York, Cornell University Press), pp. 29-50.



Central and Eastern Europe as a response to the weakening of the EU's conditionality in the post-accession period as the main incentive – membership – is reached and the extent and credibility of threats in case of non-compliance decreases. Post-accession centred studies have diverged in explaining the nature of change, on the one hand evidence being provided for incremental institutional development that was largely dependent on previous external incentives and sanctions/threats<sup>241</sup>, and on the other for institutional developments that led to the establishment of new and relatively stable trajectories<sup>242</sup>. Our analysis however will restrain its boundaries on the second and third part of the study to the extent of domestic change in Romania and Bulgaria determined by soft law mechanisms instrumented through monitoring, benchmarks, peer pressure and voluntary learning. Hence, in analysing the progress done meeting the targets and benchmarks of the CVM and the Europe 2020 Strategy, we start off by articulating the following hypothesis based on the logic of historical institutionalism:

**Hf:** Transformative change that would break path dependent stasis is expected to occur when critical moments are capitalised by actors and become critical junctures.

In the case of the CVM, the start of the accession negotiations with the EU (in February 2000) following the decision of the European Council in Helsinki from 1999 marked a turning point in the pre-accession strategy that was built upon the preliminary phases encompassed by the 1993 Copenhagen criteria, the 1995 White Paper on the integration of the Central and Eastern European countries in the Single Market, and the series of proposals and opinions on reform published in 1997 under the Agenda 2000. While the momentum provided by the opening of the accession negotiations with Romania and Bulgaria might not have translated right away into the speed and breadth of national reforms, it was the pressure of the external and internal context that threatened the progress that the two countries had made up until then. Without a real prospect for EU membership, reform-minded governments were struggling to gain support in order to push

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<sup>241</sup> See among others V. Ganev (2013): "Post-Accession Hooliganism: Democratic Governance in Bulgaria and Romania after 2007", *East European Politics and Societies*, Vol. 27, No. 1, pp. 26-44; D. Dragoman (2013): "Post-Accession Backsliding: Non-ideological Populism and Democratic Setbacks in Romania", *South-East European Journal of Political Science*, Vol. 1, No.3, pp. 27-46.

<sup>242</sup> See P. Levitz, G. Pop-Eleches (2009): "Why No Backsliding? The European Union's Impact on Democracy and Governance Before and After Accession", *Comparative Political Studies*, Vol. 20, no. 10, pp. 1-29; on the compliance pattern see D. Toshkov (2012): "The Disaster that Didn't Happen: Compliance with EU Law in Central and Eastern Europe", *L'Europe en Formation. Revue d'Études Sur la Construction Européenne et de le Fédéralisme*, Vol. 2(364), pp. 91-109.

for institutional change. In Bulgaria, the first government to remain in office for a full term since 1989 was formed by Ivan Kostov – the party leader of the Union of Democratic Forces (1997-2001). Repeated changes of government<sup>243</sup> and deep political polarisation had prevented the parliamentary forces from establishing basic political dialogue<sup>244</sup>. In Romania, after the 1996 elections the Romanian Democratic Convention (CDR) which enjoyed the largest popular support (receiving 19.6% of the seats in city council elections) quickly found itself under attack for the revived pace of economic reform both from within the governing coalition, by its partner the Union of Social Democracy (USD), and by the opposition through the Party of Social Democracy in Romania (PDSR). This lack of support was translated in 1998 in the resignation of the Victor Ciorbea government and his replacement with the Radu Vasile government, who despite promising swift economic reform, failed to complete two years in office as well, being replaced in December 1999 by the technocrat Governor of Romania's Central Bank, Mugur Isarescu. The internal context was coupled externally with the Kosovo crisis that saw both Romania and Bulgaria in a security gap generated by the dissolution of the Warsaw Pact, the lack of a patron and the absence of a clear prospect of NATO membership (Bulgaria being especially affected as when having approached NATO in 1990 it had been told to secure better relations with Turkey as cooperation between the two states had been affected as a result of Bulgaria's Regenerative Process<sup>245</sup>). A decision of the European Council to delay the start of the accession negotiations with Romania and Bulgaria – while potentially justified by the scarcity and sluggishness of national reforms – could have fostered the rise to power of anti-Western forces and the marginalisation of pro-Western political parties on the background of disappointment and discontent among the populations. While this alternative would have been possible, it would have come at the expense of the countries' democratisation and regional security. Noting that this is a common critical juncture for both countries, in our analysis of the progress made in reforming the judicial sector we will

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<sup>243</sup> European Commission (1997): *Commission Opinion on Bulgaria's Application for Membership of the European Union* (Brussels, Doc/97/11), p. 7, stated that: "Elections in June 1990 were won by the Bulgarian Socialist Party (BSP), successor of the Communist Party; but the BSP government was forced by economic crisis to resign in November 1990, to be replaced by a "programme" government. New elections in October 1991 resulted in a coalition government led by the Union of Democratic Forces (UDF); but that too was replaced by a non-party government the following year. Elections in 1994 gave a majority to a BSP government which, however, was forced by renewed economic troubles to resign in February 1997, to be replaced by an interim government."

<sup>244</sup> S. Katsikas (2011): *Negotiating Diplomacy in the New Europe: Foreign Policy in Post-Communist Bulgaria* (London, I.B. Tauris), p. 92.

<sup>245</sup> In the 1980s Bulgaria's government launched a campaign to assimilate the Turkish minority by forcing its members to adopt Slavic names.

also take into consideration critical moments that were specific for each of the two countries. This section will be based on a qualitative analysis developed through process-tracing. Data will be collected from the Commission's regular Reports on Progress under the Cooperation and Verification Mechanism, the Freedom House "Nations in Transit" reports, BTI country reports, and from primary analyses developed by national and international think tanks such as Expert Forum, Transparency International, Center for the Study of Democracy, Centre for Liberal Strategies, Bulgarian Judges Association, Konrad Adenauer Stiftung, Romanian Academic Society. The findings will be triangulated by integrating interviews with government representatives, national experts, and members of the European Parliament from the two countries.

The main assumption regarding the behaviour of political actors is extracted from the rational choice literature (instrumental rationality drives political action). Thus we assume that while the perceived options, the outcomes, the utility and probability of occurrence of a given outcome are contingent on historical and nonetheless institutional circumstances, political actors will rank-order their goals and use the best available means for pursuing their ends, thus maximising their utility<sup>246</sup>. Hence, we will apply a deductive approach and focus on short-term goals that politicians tend to share, with one in particular recurring: re-election. When adding the varying degree of pressure for compliance and adaptation brought about by the different EU governance modes (generally split along the lines of hard and soft law), we assume that, similar to the rationalist conjecture, states will favour a policy instrument over another depending on the level of commitment that they wish to take. The utility or advantage of the policy instrument is deemed in accordance to the set of circumstances, soft law being preferred to the detriment of hard law in situations of uncertainty where actors need to gain more information including about the other parties' practices<sup>247</sup>. In addition, soft law is related to the idea that "national policies should gradually become more alike through the voluntary exchange of information among officials on what has worked at the national level in order to achieve shared goals"<sup>248</sup>. Both in the case of the CVM, and in that of the Europe 2020 Strategy, the established benchmarks and

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<sup>246</sup> K. Weyland (2002): "Limitations of Rational-Choice Institutionalism for the Study of Latin American Politics", *Studies in Comparative International Development*, Vol. 37, No.1, pp. 57-85, p. 58.

<sup>247</sup> G. Shaffer, M. Pollack (2010): "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance", *Minnesota Law Review*, Vol.94, No.3, pp. 712-43, p. 715.

<sup>248</sup> A. Stubb, H. Wallace, J. Peterson (2003): "The Policy-Making Process", in E. Bomberg, A. Stubb (eds.) *The European Union: How Does It Work?* (New York, Oxford University Press), p. 142.

targets regard policy areas that largely fall under the attributes of national policy-makers<sup>249</sup> where the Union's competences are still weak, and nevertheless demand a substantial allocation of resources (active labour market policies particularly implying a strong national budgetary discipline).

As mentioned earlier in this chapter, in the case of 'soft' forms of governance (targeting and voluntarism) we would expect a more responsive mode of behaviour at the member state level, with exemplary performers in achieving the common benchmarks being identified as model-givers to be copied. However, this behaviour among actors will largely be dependent on the level of commitment, the governing architecture<sup>250</sup> of the proposed system of coordination and ultimately the deeply rooted political and economic traditions and past trajectories. The analysis of the level of commitment will take into consideration the pre-accession track-record of Bulgaria and Romania on meeting the Copenhagen criteria, as these initial conditions or obligations for membership generated the base for the process of guiding, supporting and monitoring of candidate countries' road towards EU membership. Before concluding the chapter with a discussion of the diversity of potential outcomes of the Europeanisation process, we will turn to a brief review of the main institutional governance aspects of the Cooperation and Verification Mechanism and the Europe 2020 Strategy that are deemed to be relevant in explaining the extent to which Bulgaria and Romania have sought to conduct reforms and design national policies while accommodating the objectives of these soft law instruments. These aspects will be discussed comprehensively in the following chapters, but due to their relevance in the construction of the research hypotheses, they will be included in a nutshell here.

The Cooperation and Verification Mechanism constitutes a special instrument established by two European Commission decisions<sup>251</sup> just before Bulgaria and Romania's accession to the EU, having the explicit objective of monitoring and assessing the ongoing efforts of the new-comers to improve the accountability and efficiency of their judicial systems. The

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<sup>249</sup> An exception in the case of the Europe 2020 strategy is the overlap between the so called "20/20/20" energy targets and the legally binding commitments pursued through the community method that were agreed by the EU leaders in 2007 and enacted through legislation set out in the 2009 climate and energy package.

<sup>250</sup> The concept of governance architecture was defined by Borrás and Radaelli as an institutional arrangement that addresses complex problems in a strategic, holistic, long-term perspective by setting output-oriented goals and implementing them through combinations of old and new organisational structures. See S. Borrás, C. Radaelli (2011): "The Politics of Governance Architectures: Creation, Change and Effects of the EU Lisbon Strategy", *Journal of European Public Policy*, Vol. 18, No. 4, pp. 463-84.

<sup>251</sup> European Commission (2006): *Decision Establishing a Mechanism for Cooperation and Verification of Progress in Bulgaria* (Brussels, 13 December), C(2006)6570 final; *Decision Establishing a Mechanism for Cooperation and Verification of Progress in Romania* (Brussels, 13 December), C(2006)6569 final.

context in which this mechanism was put forward however, goes back to 2002, when after concluding the negotiations for the 2004 big bang enlargement, Romania and Bulgaria's EU accession was postponed due to doubts regarding the meeting of the second and third Copenhagen criteria (functioning market economy and the capacity to take on the obligations of membership). However, Sofia and Bucharest sought reassurance that the deferral would not throw their accession process into limbo and were successful in obtaining an official EU commitment to a precise accession timetable provided that improvement in the reforming of the justice sector would be reached in both countries<sup>252</sup>. In contrast to the member states that had joined the EU in 2004, Romania and Bulgaria had to accept an additional safeguard clause embodied by article 39 of the Treaty of Accession of the Republic of Bulgaria and Romania to the European Union by which the Council would postpone accession by one year if the two states would be deemed, based on the Commission recommendations, manifestly unprepared to meet the requirements of membership<sup>253</sup>. In its 2006 Monitoring Report, the European Commission voiced concerns regarding the accountability and efficiency of the two countries' judicial systems and law enforcement bodies<sup>254</sup>, but as fighting criminality and corruption and furthering the independence of the judiciary are large-scale and long-term objectives, tangible results would have required more than one year to be reached. Considering the time requirements for efficient and sustainable reform and the potential negative signal that postponement would relay among the Bulgarian and Romanian citizens, the clause was not activated, but a set of benchmarks and a monitoring mechanism were put forward serving a twofold purpose: on the one hand reassuring member states that the new-comers will fully comply with EU rules and standards, and on the other guiding and assisting Romania and Bulgaria on their course to fulfilling the EU requirements<sup>255</sup>.

Six benchmarks were introduced for Bulgaria with reference to the independence, accountability, transparency and efficiency of the judicial system, the integrity and professionalism of the judiciary, the conduct of investigations into high-level and local government corruption and the strategy on the fight against organised crime and money

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<sup>252</sup> G. Noutcheva (2006): "Bulgaria and Romania's Accession to the EU: Postponement, Safeguards and the Rule of Law", *CEPS Policy Brief* No. 102/May (Sofia, Centre for European Policy Studies), p. 1.

<sup>253</sup> See the *Treaty Concerning the Accession of the Republic of Bulgaria and Romania to the European Union*, (21.06.2005), OJ L 157/11, p. 41.

<sup>254</sup> See European Commission (2006): Communication from the Commission. Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania (Brussels, 26 September), COM(2006) 549 final.

<sup>255</sup> Antoinette Primatarova (2010): "On High Stakes, Stakeholders and Bulgaria's EU Membership", Working Paper No. 27/April (Sofia, European Policy Institutes Network)

laundrying and its application. For Romania, four benchmarks were established focusing on the transparency, efficiency, institutional structure and accountability of the judicial system, and on the fight against high-level and local government corruption and the legal and institutional framework governing it. In furtherance to the 27 June 2007 Progress Report, Romania and Bulgaria were invited to elaborate action plans that would substantiate the CVM benchmarks with concrete measures and timelines for implementation which were drafted in dialogue with representatives of professional associations and of the civil society<sup>256</sup>. The driving institutional actor of the CVM is mainly the European Commission that carries the evaluation through regular monitoring reports (issued biannually up to and including 2012, but have shifted to annual reports to allow more time for analysis). The reports are elaborated by the Secretary General with direct input from the Home Affairs Directorate General, the Justice Directorate General and the European Anti-Fraud Office (OLAF) on the basis of information provided from various sources (EC Representation Office, Member State diplomatic missions in Sofia and Bucharest, civil society organisations, associations and expert reports), including the governments of Bulgaria and Romania as part of their reporting obligation<sup>257</sup>.

To this point the attributes of the CVM place the instrument within the sphere of soft law. It has the objective of monitoring and guiding judicial reform and the fight against corruption – areas in which the European Union does not have competence<sup>258</sup> – using an initial set of broad benchmarks and continuous assessment of progress, it encourages horizontal cooperation between judiciary representatives of Romania and Bulgaria and other Member States, it includes a wide range of actors in the information gathering phase that is essential

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<sup>256</sup> See Ministry of Interior (2007): Action Plan on the Implementation of the Benchmarks in the Areas of Judiciary Reform and the Fight Against Corruption and Organized Crime, available at <https://www.mvr.bg/NR/rdonlyres/A8FF1DB1-AE91-490F-84B2-8CC1D4EA382F/0/ActionPlanBM16ENFinal.pdf>, Ministry of Justice (2007): Action Plan for Meeting the Benchmarks Established within the Co-operation and Verification Mechanism, available at [http://www.just.ro/Portals/0/Right\\_Panel/Plan%20de%20actiune/plan\\_actiune\\_en\\_21122007%5B1%5D.pdf](http://www.just.ro/Portals/0/Right_Panel/Plan%20de%20actiune/plan_actiune_en_21122007%5B1%5D.pdf).

<sup>257</sup> European Parliament (2013): “The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism”, (Brussels, Policy Department Citizens’ Rights and Constitutional Affairs), available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE\\_ET%282013%29493031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf), p. 18.

<sup>258</sup> According to the *Treaty on the Functioning of the European Union*, Title V. Area of freedom, security and justice, the European institutions can adopt measures with view to border control, asylum, and immigration matters and can assure judicial cooperation in civil (the implementation of the principle of mutual recognition of judicial decisions; effective access to justice; development of alternative methods of dispute settlements and training of the judiciary and judicial staff) and criminal matters (establishing minimum rules concerning the identification and sanctioning of the most serious criminal offences and requesting through Eurojust national authorities to initiate investigations or prosecutions for crimes affecting two or more Member States).

for the delivery of recommendations stage, its objectives are reinforced through EU funding opportunities, and finally the recommendations put forward in the progress reports are not legally binding. But beyond this point, the statute of the mechanism becomes more complex. Firstly, the CVM was established through European Commission decisions which are legal instruments binding in their entirety to their addressees. Moreover, the Commission referenced in its recitals articles 36, 37 and 38 of the Treaty of Accession of the Republic of Bulgaria and Romania which provided the Commission the right to invoke safeguard measures up to three years after accession should serious shortcomings and breaches were observed in the case of the *acquis* (i.e. the economic sectors), the internal market and the justice and home affairs area. Particularly recital 7 in both decisions marks the failure to address the benchmarks adequately as a reason for the Commission to apply such safeguard measures. However, when distinguishing soft law instruments from binding legislation, sanctions are the missing element from the toolkit associated with the former. The effectiveness of soft law is rather explained by mechanisms such as naming and shaming, diffusion through mimesis or discourse, learning and sharing best practices and networking<sup>259</sup>. Following the causal implications of the unfolding of these mechanisms, states would move from a single-loop or adaptive type of learning where the role of the EU is that of a source of information that modifies the range of alternatives available to national policy-makers to a double-loop or reflexive learning process where the EU generates change in instruments, practices and ultimately objectives through the transfer of ideas. Noting the impact that the introduction of hard law elements into soft law instruments has upon the nature and end result of learning and change at the national level, the analysis of the progress made under the CVM will be based on an initial discussion of the extent to which the perspective of sanction application has hastened or improved national policy change. But while the CVM has had a hard law element inbuilt, the Europe 2020 Strategy that aims to connect entrepreneurship with economic growth and social cohesion across Member States represents a soft law policy coordination cycle (only for non-members of the Euro area, as for those countries within it, the Europe 2020 Strategy is built around the monitoring cycle of the European Semester which includes hard mechanisms of binding

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<sup>259</sup> D. Trubek, L. Trubek (2005): "The Open method of Co-ordination and the Debate over 'Hard' and 'Soft' Law" in Zeitlin J., Pochet P., Magnussen L. (eds.) *The Open Method of Co-ordination in Action. The European Employment and Social Inclusion Strategies* (Brussels, P.I.E.-Peter Lang), p. 91.

budgetary and macroeconomic policy coordination and attached sanctions for non-compliance) that was gradually synchronised with hybrid cycles such as the Stability and Growth Pact.

The Europe 2020 Strategy, which succeeded the Lisbon Strategy (2000-2010), was proposed by the European Commission in March 2010 as a means of enhancing growth potential, levels of employment, productivity and social cohesion across the EU on the background of the 2008 economic and financial crisis that had become by 2010 a sovereign debt crisis. The proposed vision of an efficient social market economy for Europe was built up on three mutually reinforcing priorities – smart growth based on knowledge and innovation, sustainable growth through ecological and competitive resource utilisation, and inclusive growth that would assure social and regional cohesion. The ten-year programme also incorporated a series of flagship initiatives (focusing on innovation, education, the digital society, climate and energy, mobility and competitiveness, job and skills and the fight against poverty) which act as umbrella vehicles for more specific initiatives thus being developed into coordinated roadmaps that identify medium and long-term objectives and the means of achieving them.

The priorities and initiatives were set to commit both the EU and the Member States. At the EU level, policies and instruments, notably the single market, financial levers and external policy tools were to be reformed in order to tackle bottlenecks to the delivery of the Europe 2020 goals<sup>260</sup>. At the national level, the European objectives for 2020 focusing on employment, research and development, climate change and energy, education and poverty were translated into domestic targets that would ensure the commitment of Member States to the strategy while also accommodating the uneven national circumstances. Implementation of the Europe 2020 strategy is based on the reporting mechanism developed under Lisbon II (the re-launched Lisbon Agenda from 2005) through which member states are requested to enter into dialogue with the European Commission by setting in their national reform programmes (NRPs) the specific domestic contributions to meeting EU-level targets.

However, considering the fact that macro-economic stability and strong budgetary discipline across Member States are pre-requisites for the achievement of the Europe 2020 targets for growth, starting with 2011 the European Commission decided the integration of

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<sup>260</sup> European Commission (2010): *Communication from the Commission. Europe 2020 – A Strategy for Smart, Sustainable and Inclusive Growth* (Brussels, March), COM (2010)2020 final, p. 7.



the 10 year programme in the economic governance architecture of the European Semester<sup>261</sup>. The semester represents a process of enhanced economic coordination and is initiated each year by the Commission after adopting the Annual Growth Survey through which it takes stock of the economic and social situation in Europe and sets out broad policy priorities for the EU as a whole for the coming year (and in so doing launching a new European Semester). In the annex of the survey the Commission presents its evaluation of the steps taken by the Member States in line with the Integrated Guidelines of the Europe 2020 Strategy<sup>262</sup>. In April, Member States submit simultaneously their National Reform Programmes based on the Broad Guidelines of Economic Policy (Art. 121 of the Treaty on the Functioning of the EU) and the Employment Guidelines (Art. 148 of the Treaty on the Functioning of the EU) along with the Stability (euro area Member States) or Convergence Programmes (non euro area Member States) which represent the mandatory reporting under the Stability and Growth Pact. After the Commission's assessments and based on its proposals, the Council concludes the Semester by the adoption of country-specific recommendations. The objective of the European Semester is to assure the premise for the achievement of the Europe 2020 headline targets by bringing closer an ex-ante economic policy coordination cycle that includes a corrective arm – the Excessive Deficit Procedure – based on hard fines for Eurozone countries that repeatedly fail to meet the criteria of a maximum deficit of 3% of the Gross Domestic Product (GDP). Although the Europe 2020 Strategy is still a soft law policy coordination instrument, separate from the hybrid Stability and Growth Pact and its preventative and corrective arms, the coordination of governance mechanisms<sup>263</sup> done under the European Semester has introduced elements of hard law among the toolkit through which the headline targets are to be reached. Our analysis of the impact of the Europe 2020 Strategy in Romania and Bulgaria (by considering the country-

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<sup>261</sup> European Commission (2011): *Progress Report on the Europe 2020 Strategy to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Annex to the Annual Growth Survey 2012* (Brussels, 23 Nov), COM(2011) 815 final, p. 2.

<sup>262</sup> The Treaty on the Functioning of the EU provides that the Council is to adopt broad economic guidelines (Art. 121) and employment guidelines (Art. 148). The first group of guidelines (1 to 6) address preoccupations with the sustainability of public finances, macro-economic imbalances, the stability of the euro area, the shift to an information society and to a competitive and low-carbon economy and are established by a Council Recommendation on broad guidelines for economic policies of the member states and of the Union. The second set (7 to 10) is set forth through the Council Decision on guidelines for the employment policies of the member states, and concern increasing labour force, improving human resources, matching the supply and demand over time, and bringing people back into the labour market. Together, these guidelines compose the integrated guidelines for implementing the Europe 2020 strategy.

<sup>263</sup> K. Armstrong (2012): "The Lisbon Strategy and Europe 2020: From the Governance of Coordination to the Coordination of Governance", in P. Copeland, D. Papadimitriou (eds), *The EU's Lisbon Strategy. Evaluating Success, Understanding Failure* (Basingstoke, Palgrave Macmillan), p. 208.

specific recommendations, the shifts in the National Reform Programmes and the European Commission evaluations) will however consider the strategy as a soft coordinative process, as the two countries are not Euro areas and the only available sanctioning means remains the 'naming and shaming' process.

### ***3.3. Potential outcomes of the Europeanisation process***

We have discussed so far in this chapter the dimensions, timing, boundaries and instruments of Europeanisation while providing the main assumptions regarding actor responses to institutional pressure and the extent to which change is expected according to the different variants of the new institutionalist theory. However, in order to be able to assess the effects of the Europeanisation process we would need an outcome scale that would accommodate the variation in intensity and depth of change. The first phase of Europeanisation studies have theorised the phenomenon as a set of conditions with convergence or transformation as its expected consequence. Authors as Kohler-Koch and her collaborators have argued that European integration had impacted not only the distribution of power between multiple levels of authority as member states are incorporated into a complex decision-making system, but has also changed the character of the state, as when national policies are partly supplemented and partly replaced by European policies the old actor constellations, instruments and structures were forced to adapt<sup>264</sup>. As we have mentioned in the beginning of the chapter Europeanisation is conceptualised as a process that may entail multiple effects ranging from continuity of status quo to fundamental change (or third order change were we to use the terminology put forward by Hall). Inherent to this conceptualisation is the increasingly shared conviction that Europeanisation is being 'processed' differently across policy sectors, modes of governance, institutions, and member states. While numerous authors have put forward classifications of the potential national outcomes of Europeanisation, they seem to converge

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<sup>264</sup> B. Kohler-Koch (1996): "Catching Up with Change: The Transformation of Governance in the European Union", *Journal of European Public Policy*, Vol. 3, No. 3, pp. 359-80, p. 360; also see M. Jachtenfuchs, B. Kohler-Koch (2004): "Governance and Institutional Development", in A. Wiener, T. Diez (eds.), *European Integration Theory* (Oxford, Oxford University Press), pp. 97-115.

towards Börzel's heuristic summary of the scope and direction of the process<sup>265</sup>. The five discerned outcomes are: inertia, absorption, accommodation, transformation and retrenchment.

The first denotes a lack of change and can occur if a country finds that the EU political architectures, objectives and/or policies are too dissimilar to the domestic practices. Inertia can take the form of lags, transposition delays or simply sheer resistance to EU-induced change<sup>266</sup>. Absorption indicates that policy requirements are accommodated without administrative structures being changed, as these new policies usually do not conflict with existing principles – loosely linking problems and solutions and thus allowing for the implementing organisations to decide over the instrumental aspects<sup>267</sup>. The next type on the axis of Europeanisation outcomes is accommodation, concept similar to what Thelen describes as “layering of new arrangements on top of pre-existing structures”. Transformation refers to a situation where policies, instruments and institutions are replaced with new ideational and organisational templates. This concept is similar to Hall's third order change, entailing ‘paradigmatic’ shifts or profound changes in the logic of political, social and economic structures<sup>268</sup>. Finally, Europeanisation can produce the paradoxical effect which can be partly juxtaposed to Pierson's concept of negative learning – where previous events in a sequence influence the outcomes, but not necessarily by inducing movement in the same direction. Hence, despite being subject to robust forces that would be expected to vector member states towards European policy goals, instruments, and institutions, in some cases we can encounter an antagonistic reaction where the national setting becomes less Europeanised than it was in a previous phase.

Transformation and convergence are not however the dominant domestic consequences of Europeanisation. The extent of change will depend on the type of European policy instruments and governance modes that trigger different responses at the national and sub-national level, the uneven development of EU institutions and policy-making (especially across policy areas) and finally the diversity of institutional traditions, historical

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<sup>265</sup> T. Börzel (2005): “Europeanization: How European Union Interacts with its Member States”, in S. Bulmer, C. Lequesne (eds.) *The Member States of the European Union* (Oxford, Oxford University Press), pp. 45-62.

<sup>266</sup> C. Radaelli (2003): “The Europeanization of Public Policy”, in K. Featherstone, C. Radaelli (eds.) *The Politics of Europeanization* (Oxford, Oxford University Press), p. 37.

<sup>267</sup> A. Héritier (2001): “Differential Europe: National Administrative Responses to Community Policy” in M. Green Cowles, J. Caporaso, T. Risse-Kappen (eds.) *Transforming Europe: Europeanization and Domestic Change* (Ithaca, Cornell University Press), pp. 44-60, p. 54.

<sup>268</sup> P. Hall (1993): “Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain”, p. 279.

experiences and the interpretations and assessment of these experiences in the case of European Member States<sup>269</sup>. It is at the level of the direction (top-down or bottom-up) and the nature of the outcome of the Europeanisation process that the juxtaposition of rational choice and historical institutionalist traditions is mostly justified. Both institutionalist perspectives are top-down approaches, seeking to explain domestic reactions to pressures from outside, while the sociological branch expands toward the horizontal dimension of Europeanization considered to be influenced by the interaction between actors organised at similar levels, but across Member States. Placing greater emphasis on beliefs, values and ideas and thus on the political fit between actors reunited under the same supra-national institutional framework, a sociological perspective would expect an eventual level of congruence among actors. Rational choice and historical institutionalism bring back the focus upon actor preferences, institutions structuring the bargaining game and providing incentives for rational actors to rethink their strategies. But as calculations and national contexts influenced by past paths of development vary, so will the outcomes of the Europeanisation process. Thus, while it is generally agreed that EU institutions change domestic politics, in the absence of a uniform EU policy model and noting the need for national adjustment, we shouldn't expect convergence<sup>270</sup>.

After having explored the attributes of Europeanisation as a concept, the direction, mediating factors and outcomes of the process, and after having connected these with a theoretical framework that would substantiate the hypotheses that form the basis of the study, we now turn to a discussion over how the validity of our assumptions will be tested.

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<sup>269</sup> See J. Olsen (2002): "The Many Faces of Europeanization", *Journal of Common Market Studies*, Vol. 40, No. 5, pp. 921-52.

<sup>270</sup> T. Börzel, T. Risse (2007): "Europeanization: The Domestic Impact of European Union Politics", in K. Jørgensen, M. Pollack, B. Rosamond (eds.) *Handbook of European Union Politics* (London, SAGE Publications), p. 496.

## Chapter 4

### **Securing the momentum for reforms beyond accession - An analysis of Romania and Bulgaria's track record under the Cooperation and Verification Mechanism**

The current chapter will evaluate Romania and Bulgaria's track records in meeting the post-accession benchmarks established by the European Union in the field of justice. Being the only two member states that are subject to ongoing monitoring of their reforms in the justice sector (through the Cooperation and Verification Mechanism), we will analyse the attained results and explain why the two countries have responded somewhat differently to similar soft law instruments and external formal and informal pressure. As we will argue in more detail in the chapter, the focus of our analysis will rest on judicial governance and anti-corruption policies in the two member states as these are commonly monitored under the Cooperation and Verification Mechanism and have been assessed as ancillary elements of the pre-accession political criteria. These outputs will be assessed by using Schimmelfennig and Sedelmeier's distinction between *formal rule adoption*, defined by the authors as transposition of norms and establishment of institutions, and *behavioural adoption* indicating the degree of rule conformation<sup>271</sup>. We will also be referring to historical institutionalist concepts such as critical junctures, path dependence, and lock-in effects in order to explain the current different results obtained by the two countries in tackling high level corruption and attaining European standards of judicial governance. As such, we will argue that despite witnessing in both countries great political instability and turmoil after their European accession, as well as comparable opposition from veto players that have sought to maintain the status quo of incomplete reforms, the lock-in of an institutional path opted for at EU demand during the pre-accession period has led to sustainable efforts in the fight against corruption in Romania.

In terms of the impact of the post-accession system of conditionality and its efficiency in securing in Romania and Bulgaria the sustainability of specific EU-driven reforms, the tendency in the specialised literature has been to regard the Cooperation and Verification

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<sup>271</sup> F. Schimmelfennig, U. Sedelmeier (2005): "Introduction: Conceptualizing the Europeanization of Central and Eastern Europe", in F. Schimmelfennig, U. Sedelmeier (eds.) *The Europeanization of Central and Eastern Europe* (Ithaca, Cornell University Press), p. 1-29.

Mechanism (CVM) as a weak incentive structure marked by toothless explicit threats<sup>272</sup> or as a monitoring and assessment instrument marred by technical deficiencies which renders it not only inefficient, but detrimental<sup>273</sup>. It will be argued that comparative approaches that differentiate between pre- and post-accession conditionality mechanisms as a basis for the evaluation of the latter run into the risk of discounting the importance of continuous procedural guiding provided to Romania and Bulgaria through the recommendations sections of the progress reports, as well as the social pressure exercised during moments of political turmoil in the two countries. The end result would translate into an overlooking of a significant pressure factor that has had an impact upon the direction of reforms in the two member states despite strong domestic political opposition. Nonetheless, the CVM indeed has not been strong enough to ensure cumulative and irreversible progression in the two countries, however at this point we will question to what extent we could have realistically expected for such an outcome to be reached. This latter point will be subsumed in a discussion over the change in the Enlargement Strategy after the 2004 and 2007 waves which saw a reshuffle in the institutional ownership of the process that has led to the Council taking the lead in setting benchmarks and conditions for progress in accession negotiations, and a reconsideration of previously utilised instruments - the European Commission limiting the application of the CVM to Romania and Bulgaria and not extending it or reconfiguring it for Croatia when the country became in July 2013 the 28<sup>th</sup> member of the EU. The chapter will conclude that whilst the impact of EU conditionality has been dependent on the stage of the accession path – being higher during the transition from the negotiation to the accession phase – it is also influenced by previous institutional and/or policy decisions taken by domestic actors during this period of high propensity for EU leverage that have increased the costs of potential path switching at the national level after EU membership was granted. This latter point will also be considered in the context of recent political turmoil both in Bulgaria and Romania as well as in the larger region of Eastern Europe and we will analyse whether we are witnessing a post-accession backsliding phenomenon of a systemic nature.

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<sup>272</sup> See E. Gateva (2013): "Post-accession Conditionality – Translating Benchmarks into Political Pressure?", *East European Politics*, Vol. 29, No. 4, pp. 420-42.

<sup>273</sup> See G. Dimitrov, K. Haralampiev, S. Stoychev, L. Toneva-Methodieva (2014): *The Cooperation and Verification Mechanism: Shared Political Irresponsibility* (Sofia, St. Kliment Ohridski University Press).

## ***4.1. Structure of the argument***

In a recent study that underlines the impact of merging the Europeanization and European integration research agendas, Coman and Crespy argue that by modelling Europeanization as a process whose dynamics and temporality is shaped by actors (bias towards agency), domestic change - understood to occur as a result of external European pressure - has been deemed as short-termed, piecemeal or incremental. While recognising the value of this approach, the authors argue that the transition from incremental to structural change can only be accommodated by a research design that would take into consideration not only the ability and intentionality of national actors to adapt to Europe, but also the potential of EU policy instruments to lead to a more profound transformation<sup>274</sup>. The study contends that the modalities of EU integration determine to a large extent the scale of Europeanization, while the degree and the form of Europeanization constrain, in turn, the possible scope for further integration (circular causality). Hence, structural change is considered to occur when the disparity between the expected effects of European integration and the real domestic outcomes reaches a critical level.

Based on these observations, the current chapter will examine the post-accession record of judicial reforms in Romania and Bulgaria while also observing the idiosyncrasies of the main catalyst - the Cooperation and Verification Mechanism (CVM) - through which the European Commission has sought to maintain momentum for change after EU membership (the most important incentive) had been granted to the two states. However, in order to reach a cogent evaluation of the extent to which we have witnessed an inculcation of EU values, norms and practices at the domestic level, or on the contrary whether domestic institutions have been resilient in resisting conditionality, we need to weight in three factors. Firstly, we need to consider the historical legacy of the Communist regime and its impact upon the pace of institutional reform in the pre-accession period. Thus, the chapter will initially look at the first phase of judicial reforms in Romania and Bulgaria, considering the solutions opted for domestically for institutional and legislative design. As the EU has been one of the most active and involved 'donors' or 'providers' of international technical judicial assistance, we will also consider how the approach to promoting European

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<sup>274</sup> R. Coman, A. Crespy (2014): "Still in Search of Europeanization: From Limited to Structural Change?", in R. Coman, T. Kostera, L. Tomini (eds.) *Europeanization and European Integration from Incremental to Structural Change* (Basingstoke, Palgrave Macmillan).

standards of judicial governance has changed before and after granting the candidate states the status of members. Finally, we will analyse the response of domestic actors to the mix of 'hard' external incentives/sanctions and normative elements reunited under the Cooperation and Verification Mechanism.

The main hypothesis upon which this chapter is constructed posits that critical junctures have occurred during the pre-accession period and in Romania's case it led the country on a current positive trajectory in terms of the efforts made to tackle corruption<sup>275</sup> despite the strong reaction of domestic veto players. The results that we are witnessing today are dependent not only on the power and nature of post-accession conditionality mechanisms, but more importantly on decisions made during the pre-accession period that have set the country on a specific institutional path that has been maintained through lock-in effects despite veto players' efforts to thwart them. One explanation for institutional continuity in Romania rests on the premise assumed by Sedelmeier in his analysis of post-accession persistence of gender equality institutions in five new member states, namely that rules and institutions that were adopted during the pre-accession period and that comply with EU requirements are not cost-free to dismantle<sup>276</sup>. More specifically, national veto players need to weigh not only the costs of compliance against the threat of sanctions for rule violation, but also the costs and institutional obstacles that arise from changing previously established rules and institutions.

But before explaining the lock in of the institutional path followed by the two member states, we will argue that European pressure exercised during the pre-accession period has created both for Romania and for Bulgaria what the literature on critical junctures refers to as permissive conditions for substantial change to occur<sup>277</sup>. The accession process has generated through the wide range of pressure mechanisms (increased monitoring, gate-keeping and differentiation strategies, provision of institutional models, financial assistance and twinning) the necessary conditions for substantial reform to be reached. However, as this will be shown later in the chapter while the emergence of these causal conditions has been paramount, it has not been sufficient for divergence from a previously set path. When

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<sup>275</sup> The European Commission pointing to Romania's growing track record in effectively fighting high-level corruption cases in both its 2014 Report on Progress in Romania under the Co-operation and Verification Mechanism (Brussels, 22 January, COM(2014) 37 final), p. 9 and its 2015 Report (Brussels, 28 January, COM(2015) 35 final), p. 10.

<sup>276</sup> U. Sedelmeier (2012): "Is Europeanisation through Conditionality Sustainable? Lock-in of Institutional Change after EU Accession", *West European Politics*, Vol. 35, No. 1, pp. 20-38.

<sup>277</sup> H. D. Soifer (2009): "What is a Critical Juncture? Permissive and Productive Conditions in Historical Causation", Paper presented at the Annual Meeting of the American Political Science Association (Toronto).



domestic productive conditions have been present – in our case understood as the presence of individual change agents or collective ones embodied by reform-oriented governments – critical junctures have occurred triggering the formation of new institutional paths that became with time locked in. One such example that would help us explain the current progress made by Romania in the fight against high-level corruption revolves around the reorganisation in 2005 of the country’s specialised investigative and prosecution anti-corruption service – the National Anti-Corruption Directorate. Whilst the institution was established in 2002 as the National Anti-Corruption Prosecutor’s Office (PNA), we contend that the moment of institutional genesis cannot be regarded as a critical juncture as the productive conditions for the setting into motion of such a juncture were largely absent.

This initiative to create the specialised institution was based on the strong support of the European Commission and on EU twinning mainly with the Special Prosecutor’s Office against Corruption and Organised Crime of Spain. It was favoured as a response to an unsuccessful strategy of a decentralised system of national bodies responsible for coordinating the fight against corruption that had led to mediocre results<sup>278</sup>. However, whilst the setup *per se* of the institution can be considered as a reference point in the country’s quest to curb corruption, especially in the context of the external technical and financial aid provided, we will argue that this point in time did not render a break into the institutional path upon which the country had embarked – *tactical reform*. We consider that the initial prerogatives of the specialised institution made it more of a window-dressing than an outpost for investigating high-level cases of corruption as it was neither independent, nor powerful enough to improve *de facto* judicial quality<sup>279</sup>. By referring to the literature on critical junctures we will explore how the decision of the European Commission to opt for an enhanced conditionality by including in the 2005 Accession Treaty an unprecedented ‘postponement clause’ (through which perceived serious shortcomings regarding specific membership commitments and requirements could delay

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<sup>278</sup> The 2001 Accession Partnership underlined the urgent need for Romania to “intensify the fight against corruption in a comprehensive way, in particular by (i) clarifying the competences of all bodies involved in anti-corruption activities, ensuring improved coordination between these bodies, and strengthening their implementation capacities”, Council of the European Union (2002): *Council Decision 2002/92/EC on the Principles, Priorities, Intermediate Objectives and Conditions Contained in the Accession Partnership with Romania* (Official Journal L44, 14 February), p. 84, available at [http://www.esiweb.org/pdf/romania\\_ap\\_ro\\_2001\\_en.pdf](http://www.esiweb.org/pdf/romania_ap_ro_2001_en.pdf).

<sup>279</sup> See European Commission (2002): Regular Report on Romania’s Progress towards Accession (Brussels, October 9th), SEC(2002) 1409, p. 27.

the accession date by one year<sup>280</sup>) triggered in Romania's case a puncture in the institutional equilibrium that facilitated the transition of the PNA to the National Anti-Corruption Directorate (DNA) – Romania's good practice story in the fight against corruption. This critical juncture created the context for increased causal power of agency, a series of reforms being promoted by change agents. In the context of the strong explicit threats of accession delay (constructive uncertainty), this punctuated equilibrium has echoed to today assuring a positive trend despite the continuous strong resistance of veto-players in the post-accession period. However, as it will become evident throughout the analysis, while this new institutional equilibrium that had been brought during the pre-accession period and has been kept post-2007, it did not generate what Rothstein calls a 'big bang' societal transformation, whereby the majority of political, social and economic institutions change during a relatively short period of time<sup>281</sup>. Lack of political will and strong political opposition towards the implementation of an effective anti-corruption policy have amounted to a current mix record in ensuring the efficient functioning of the judiciary and in the fight against malfeasance. In this context, we understand the introduction of the CVM as a continuity-ensuring mechanism meant to supplement the transaction costs of a potential path change.

When scrutinising the effectiveness of EU post-accession conditionality, it will be contended that while the CVM did not return a constant pace of national positive results and a cohesive trajectory for reform in the judiciary sector, the mechanism itself has provided technical/procedural guiding through the recommendations sections of the progress reports, it has been a means of social pressure – especially, but not limited to the political turmoil of 2012 – and it has been a tool for issue linkage, concerns over shortcomings in anti-corruption performance blocking Romania's accession to the Schengen area, despite provisions of the Schengen *acquis* not being technically tied to the CVM and having been largely met in 2011<sup>282</sup>. Yet, while the absence of integration advancement rewards and the

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<sup>280</sup> Art. 39(1) of the Treaty concerning the Accession of the Republic of Bulgaria and Romania to the European Union states "if, on the basis of the Commission's continuous monitoring of commitments undertaken by Bulgaria and Romania in the context of the accession negotiations (...) there is clear evidence that (...) there is a serious risk of either of those States being manifestly unprepared to meet requirements of membership by the date of accession of 1 January 2007 in a number of important areas, the Council may, acting unanimously on the basis of a Commission recommendation, decide that the date of accession of that State is postponed by one year to 1 January 2008" – Official Journal (2005), Vol. 48, L157/21 June.

<sup>281</sup> B. Rothstein (2007): "Anti-Corruption – A Big Bang Theory", *Quality of Government Working Paper* (Göteborg, Göteborg University).

<sup>282</sup> Council of the European Union (2011): *Council Conclusions on Completion of the Process of Evaluation of the Preparedness of Romania to Implement All Provisions of the Schengen Acquis* (Brussels, 9<sup>th</sup> of June),

use of flat threats for sanctioning non-compliance have limited the leverage to EU post-accession conditionality, the early removal or the non-application all together of the CVM after 2007 has been deemed by some national actors as having limited the amplitude of the achievements reached so far<sup>283</sup>. This hypothesis will be sustained through input collected through interviews with judicial reform specialists from Romania and Bulgaria, as well as an analysis of the internal and external factors that have contributed or on the contrary hampered reform sustainability.

In Bulgaria's case, despite being grouped together with Romania in 2001 when both countries were excluded by the European Union from the preparations for the 'Big Bang' wave of enlargement, a different institutional path followed during the pre-accession period has led the country to a more sluggish performance in the past few years. While pervaded by similar problems during the pre-accession stage that have extended beyond 2007, and despite being subject to comparable external pressure to maintain reform momentum after accession, in Romania's case we have witnessed recent consistent improvement in addressing high-level corruption<sup>284</sup>, whilst Bulgaria lagged behind. The most recent available report of the Bulgarian General Prosecutor's Office reveals that at the end of 2013 out of the 21 opened investigations on corruption-related offences, only 6 were brought to court and no convictions had been reached<sup>285</sup>. For the same period, the Romanian National Anti-Corruption Directorate brought to court 270 cases with 1051 defendants being investigated and convicted<sup>286</sup>. In concordance with previous studies on post-accession compliance, we also contend that domestic institutional change is dependent on the interaction of EU pressure and domestic incentives<sup>287</sup>. However, our analysis also takes into consideration the impact of organisational path dependence when evaluating the post-

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9166/3/11/REV 3/SCH-EVAL75/Comix 265, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209166%202011%20REV%204>.

<sup>283</sup> Statements delivered by General Prosecutor, Laura Codruța Kövesi and by Member of the European Parliament, Monica Luisa Macovei during the European Parliament's Committee on Budgetary Control Public Hearing on "Cooperation and Verification Mechanism with Regard to Bulgaria and Romania" (Brussels, 14.04.2015), official recording available here <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20150414-1500-COMMITTEE-CONT>; hypothesis underlined as well during author's interviews with anti-corruption specialists in both countries.

<sup>284</sup> European Commission (2015): *Report on Progress in Romania under the Co-operation and Verification Mechanism* (Brussels, 28 January), COM(2015) 35 final, p. 12.

<sup>285</sup> General Prosecutor's Office (2014): *Report on the Implementation of Laws and the Activities of the Prosecution and Investigating Authorities* / Докладът на главния прокурор за прилагането на закона и за дейността на Прокуратурата и на разследващите органи през 2013 г. (Sofia, July), p. 79.

<sup>286</sup> Direcția Națională Anti-Corupție (2015): *Raport privind Activitatea Desfășurată în 2014* / Activity Report for the Year 2014 (Bucharest, January), p. 8, available at <http://www.pna.ro/obiect2.jsp?id=240>.

<sup>287</sup> See A. Spendzharova, M. A. Vachudova (2012): "Catching up? Consolidating Liberal Democracy in Bulgaria and Romania after Accession", *West European Politics*, Vol. 35, No. 1, pp. 39-58.

accession reform track record in the two countries. The story of judicial reform during Bulgaria's negotiation (2000 - 2004) and post-negotiation phases (2005 - 1<sup>st</sup> of January 2007) has been somewhat different from that of Romania, being less about the initial improper influence of the Ministry of Justice, and more about the immunity of the members of the Parliament and of judges. The Bulgarian constitution adopted in 1991 had established a strong judiciary which had asserted itself as a quasi-constitutional constraint on political majorities<sup>288</sup>, both the Supreme Judicial Council and the Constitutional Court adopting a conservative stance towards the draft laws proposed by the government in order to respond to EU requirements. The scarcity of strong change agents, a traditionally conservative judiciary that has tended to respond with scepticism to endeavours to change the status quo<sup>289</sup>, and a political environment dominated by ideologically non-committed parties<sup>290</sup> have weakened the extent to which the European Union has been able to secure momentum for continuous reform in Bulgaria after accession. This state of affairs has forced the European Commission to supplement continuous monitoring for both countries (CVM benchmarking) with other instruments such as gate-keeping which materialised into several postponements of the accession to the Schengen area, the threat of activating safeguard clauses (a general economic clause, a specific market stipulation and a specific justice and home affairs clause which could be triggered in the first three years after accession) and in Bulgaria's case the freezing of EU funds (in 2008, €500 million from farm aid were suspended due to fraud<sup>291</sup> which were partially unblocked at the end of 2009<sup>292</sup> and fully in 2010, after two consecutive positive CVM reports<sup>293</sup>). As it will be discussed in detail below, this strategy has fallen short of delivering transformative results. But this outcome can be better explained when factoring in the manner in which the two countries have responded to external incentives, threats and facilities throughout the pre-accession stage, as well as when observing the changes made to the principles governing the new

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<sup>288</sup> D. Smilov (2010): "Bulgaria: The Discontents and Frustrations of a Newly Consolidated Democracy", in L. Morlino, W. Sadurski (eds.) *Democratization and the European Union. Comparing Central and Eastern European Post-Communist Countries* (New York, Routledge), p. 101, pp. 96-120.

<sup>289</sup> Center for the Study of Democracy (2005): *Anti-Corruption Reforms in Bulgaria* (Sofia, CSD), p. 55.

<sup>290</sup> A. Innes (2014): "The Political Economy of State Capture in Central Europe", *Journal of Common Market Studies*, Vol. 52, No. 1, pp. 88-104.

<sup>291</sup> E. Konstantinova, J. Neuger (2008): "EU Cuts Bulgarian Aid, Warns Romania on Corruption", *Bloomberg* (July 23), available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a0YXM0ulkmyl>.

<sup>292</sup> C. Leviev-Sawyer (2009): "EC to unblock Bulgaria's Sapard Funds", *The Sofia Echo* (September 7), available at [http://sofiaecho.com/2009/09/07/780511\\_ec-to-unblock-bulgarias-sapard-funds](http://sofiaecho.com/2009/09/07/780511_ec-to-unblock-bulgarias-sapard-funds).

<sup>293</sup> See European Commission (2010): *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under Co-operation and Verification Mechanism* (Brussels, July 20), COM(2010)400 final, p. 2.

negotiations for the following EU enlargement waves. Despite not managing to secure irreversible reform and the cementing of the principle of rule of law in these countries, the CVM has maintained national public awareness over the trajectory and pace of judicial reform; it has exerted pressure upon incumbent governments for targeted institutional and legislative changes and by virtue of the relatively flexible character of the benchmarks, it allowed for exceptional intervention. But as we will argue in this chapter, one reason for which we can observe divergence in terms of the results obtained in the fight against corruption despite comparable reform blocking factors and being submitted to the same soft and hard law pre- and post-accession mechanisms is because of the different forms of institutional change in the two countries. If in Romania's case we will argue that a critical juncture occurred in 2005 creating a new equilibrium that has not been punctuated after accession, in Bulgaria's case we will argue that institutional change has been incremental during the pre-accession period and has taken the form of displacement, reforms affecting mostly administrative graft, but not large-scale corruption. And while as in Romania's case the permissive conditions have been present, in Bulgaria which has been subject to largely the same type of mechanisms (monitoring, financial and technical assistance, gate-keeping) we will argue that the necessary productive conditions have not been met.

The governance strategy adopted by Bulgaria after its EU accession in pursuing anti-corruption policies has been one based on legislative reform advanced in small instalments followed by amendments to improve the scope of the reform<sup>294</sup>. However, as the Group of States against Corruption (GRECO) observed in its 2015 report:

"(...) the legal framework is complex, subject to frequent and often unpredictable changes and actual regulation, in some instances, tends to rely on secondary legislation which is not always congruent with the principles and objectives pursued by primary laws."<sup>295</sup>

In Romania, by means of comparison, in the same period of reference, projects of law adopted to meet EU standards have been "amended under pretext of improving efficiency while in fact restraining the scope and power of created bodies to tackle corruption"<sup>296</sup>. In this sense, one of the unequivocal cases has been the failed revision in 2010 of the law regulating the functioning of the National Integrity Agency (ANI) – institution created in

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<sup>294</sup> Difference in strategy emphasised by M. Racovita (2011): "Europeanization and Effective Democracy in Romania and Bulgaria", *Romanian Journal of Political Sciences*, Vol. 01, pp. 28-49.

<sup>295</sup> GRECO – Council of Europe (2015): *Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors. Evaluation Report – Bulgaria* (Strasbourg, GRECO Secretariat), GRECO Eval IV Rep (2014) 7E, p. 3.

<sup>296</sup> M. Racovita (2011): "Europeanization and Effective Democracy in Romania and Bulgaria", p. 36.

2007 to vet public officials' asset declarations and identify potential conflicts of interest and suspicious income – that would have severely curtailed the institution's powers<sup>297</sup>.

The anti-corruption institutional framework established in Bulgaria has been shaped into a complex and decentralised system, with the legislative, executive and judicial branches having their own set of agencies mandated to assess corruption risks, propose preventive measures, ensure compliance with regulations and laws, propose disciplinary proceedings and coordinate with all of the other bodies that share similar responsibilities. Yet, as the latest GRECO Evaluation Report observes, most of these bodies have remained paper tigers, denied the power to conduct substantive checks<sup>298</sup>. Moreover, the same report argues that: "(...) the abundance of reporting instruments and oversight bodies has failed to bring in the desired cumulative effect or attain qualitative changes in corruption prevention efforts. Thus, the high degree of fragmentation and self-containment of relevant oversight bodies as well as their alleged susceptibility to undue influence have meant that a holistic vision of corruption-related risks and vulnerabilities in the relevant sectors cannot be formed"<sup>299</sup>.

While some studies dealing with policy failure and success in public malfeasance control largely rule out the level of centralisation of "watchdog" institutions as a determining factor of their effectiveness<sup>300</sup>, the level of independence of these agencies, the specialisation of their expertise, integrity, material and coordination capacity, and political back-up are deemed as significant aspects that can influence institutional performance<sup>301</sup>. In our attempt to understand the post-accession effects of the complex interaction between on the one hand EU legal mechanisms bearing on the fight against corruption and the sustainability of the rule of law and on the other hand national responses of domestic actors that have translated into the design of judicial policies we need to consider as well how this interaction has manifested itself before 2007 and what long term results it has generated. As such, we will contend that to the dyad of factors identified previously by the literature as determining the pace of domestic institutional change – namely the credibility and intensity

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<sup>297</sup> European Commission (2010): *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism* (Brussels, 20 July), COM(2010) 401 final, p. 5.

<sup>298</sup> Council of Europe – GRECO (2015): *Fourth Evaluation Round – Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors. Evaluation Report Bulgaria*, (Strasbourg, 13 May), Greco Eval IV Rep (2014) 7E, p. 3.

<sup>299</sup> Council of Europe – GRECO (2015): *Fourth Evaluation Round- Evaluation Report Bulgaria*, p. 3.

<sup>300</sup> A. Shah (2007): "Tailoring the Fight against Corruption to Country Circumstances", in A. Shah (ed.) *Performance Accountability and Combating Corruption* (Washington, The World Bank), p. 244; pp. 233-54.

<sup>301</sup> L. De Sousa (2010): "Anti-Corruption Agencies: Between Empowerment and Irrelevance", *Crime, Law and Social Change Journal*, Vol. 53, No. 1, pp. 5-22.

of EU pressure and the domestic political will to sustain the fight against corruption and improve the rule of law, generally tied to electoral gains<sup>302</sup>, one must also add what has been termed by historical institutionalist research as the *structuring effect of existing arrangements*<sup>303</sup>. This collocation simply translates into the assumption that policy choices made throughout different points in time such as institutional formation or policy initiation will carry a continuing and largely determining influence upon future institutional or policy change. This process of sequential contingency, where latter decisions are not independent of those that have been taken in the past, has been termed in the literature as path dependency or self-reinforcing dynamics. As Pierson and Skocpol explain:

“Outcomes at a ‘critical juncture’ trigger feedback mechanisms that reinforce the recurrence of particular pattern into the future. Path dependent processes (...) can be highly influenced by relatively modest perturbations at early stages. Once actors have ventured far down a particular path, however, they are likely to find it very difficult to reverse course. Political alternatives that were once quite plausible may become irretrievably lost. Thus, events or processes occurring during and immediately following critical junctures emerge as crucial.”<sup>304</sup>

#### ***4.2. At the crossroads between substantive and incremental change***

From the beginning of the analysis we assume that the concept of path dependence is not explanatory in the sense of revealing the inherent actor motivations for institutional genesis or change, and thus benefits of little predictive value, as it is difficult to identify *ex ante* what circumstances will trigger institutional transformation. However, it does provide us with a compelling toolkit of concepts that can help us pinpoint the link between initial institutional and/or policy decisions and the present outcome. As Mahoney argues, the notion of path dependence suggests “that crucial actor choices may establish certain directions of change and foreclose others in a way that shapes long-term trajectories of development”<sup>305</sup>. In this

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<sup>302</sup> A. Spendzharova, M. A. Vachudova (2014): “Strategies for Integration in the EU’s Pre-Accession Process”, in L. Bruszt, G. McDermott (eds.) *Leveling the Playing Field. Transnational Regulatory Integration and Development* (Oxford, Oxford University Press), pp. 156-182.

<sup>303</sup> C. Knill, J. Tosun (2012): *Public Policy. A New Introduction* (Hampshire, Palgrave Macmillan), p. 81.

<sup>304</sup> P. Pierson, T. Skocpol (2002): “Historical Institutionalism in Contemporary Political Science”, in I. Katznelson, H. Milner (eds.) *Political Science: The State of the Discipline* (New York, W.W. Norton and Company), p. 703.

<sup>305</sup> J. Mahoney (2001): *The Legacies of Liberalism: Path Dependence and Political Regimes in Central America* (Baltimore, Johns Hopkins University Press), p. XI.

conceptualisation, the relationship between structure (institutions) and agency (individuals) is portrayed as a complex duality – despite current studies that emphasise its tendency toward institutional determinism<sup>306</sup>. As Hay and Wincott explain, historical institutionalism puts forward a model where actors are rational, and seeking to realise complex, contingent goals in institutional contexts where initial pursued strategies constrain the trajectory of future change possibilities<sup>307</sup>. Yet while still dominated by utility-maximising actors, institutions are understood less as functional means of reducing uncertainty and transaction costs (as are thought of through a rational choice lens) and more as structures “whose functionality or dysfunctionality is an open – empirical and historical – question”<sup>308</sup>.

Starting from the premise of the causal relevance of preceding stages in a temporal sequence, historical institutionalist scholarship has enriched the concept of “path dependence” by borrowing from economics the notion of “increasing returns”. The guiding principle behind a process that manifests increasing returns can be summarised as following: the probability of taking further steps along the same path as followed in the past increases with each move down that path<sup>309</sup>. This logic is determined by exit or switching costs (to previous viable alternatives) which become higher as time passes. Turning again to economics, historical institutionalism refers to Brian Arthur’s set of four conditions that can give rise to increasing returns (or self-reinforcing mechanisms): large set-up costs; learning effects; coordination effects and adaptive expectations<sup>310</sup>. In the case of technology manufacturing, increased output (or continuation on a production path) entails the advantages of falling unit costs, improved specifications as other actors start developing new ways of production (learning effects), coordination with other agents following similar action over the existing solution and niche stability that is triggered by the belief that increased prevalence will lead to further path following<sup>311</sup>. Pierson translated this set of conditions from economics into political science by referring to the example of new social

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<sup>306</sup> A. Uygur, D. Sindbjerg Martinsen (2013): “The Pitfall of Institutional Determinism and its Theoretical Displacement Effect. The Case of Working Time Regulation in the European Union”, Research paper presented at the Danish European Community Studies Association Conference (Roskilde, 26 September).

<sup>307</sup> See C. Hay, D. Wincott (1998): “Structure, Agency and Historical Institutionalism”, *Political Studies*, Vol. 46, No. 5, pp. 951-57.

<sup>308</sup> C. Hay, D. Wincott (1998): “Structure, Agency and Historical Institutionalism”, p. 954.

<sup>309</sup> P. Pierson (2000): “Increasing Returns, Path Dependence, and the Study of Politics”, *The American Political Science Review*, Vol. 94, No. 2, pp. 251-67; p. 252.

<sup>310</sup> B. Arthur (1994): *Increasing Returns and Path Dependence in the Economy* (Michigan, University of Michigan Press), p. 112.

<sup>311</sup> B. Arthur (1994): *Increasing Returns and Path Dependence in the Economy*, p. 112.



initiatives – such as the creation of organisations and has argued that in a similar fashion to technology manufacturing, institutional genesis entails considerable start-up costs. Agents – defined either as individuals or collectives – learn by doing and results improve if they are coordinated or “fit” with the activities of other actors or organisations and if they are in concordance with expectations about the actions of others<sup>312</sup>. Associated to increasing returns is the idea of positive feedback mechanisms understood as an increase in the likelihood of an action happening at  $t_1$ , if the same action has been conducted by the same actors at  $t_0$ <sup>313</sup>. Mechanisms of positive feedback are considered as a necessary condition for path dependence and lock-in to occur. When applied to policy analysis, positive feedback mechanisms have been distinguished in two categories. On the one hand, the literature points to functional mechanisms that imply that “once a set of institutions is in place, actors adapt their strategies in ways that reflect but also reinforce the ‘logic’ of the system”<sup>314</sup>. On the other hand, a second type of mechanism relates to the distributional effects of institutions and the central premise is that institutions are not neutral coordinating mechanisms, but in fact reflect, reproduce and magnify particular patterns of power distribution<sup>315</sup>.

Hence, whilst stability is explained through the activation of positive feedback mechanisms that generate long-term entrenchment, institutional genesis and change are modelled around the linked notions of “critical junctures” and “punctuated equilibrium”<sup>316</sup>. The literature on critical junctures varies greatly, but the shared view is that institutional change occurs in a burst that is followed by a period of relative stability. Collier and Collier define the concept as “a period of significant change, which typically occurs in distinct ways in different countries (or in other units of analysis) and which is hypothesized to produce distinct legacies”<sup>317</sup>. The authors put forward a critical juncture framework that reunites three essential elements: antecedent conditions, cleavage/crisis and legacy. They contend that antecedent conditions represent a “base line” against which critical junctures and

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<sup>312</sup> P. Pierson (2000): “Increasing Returns, Path Dependence, and the Study of Politics”, p. 254.

<sup>313</sup> L. Dobusch, E. Scüßler (2013): “Theorizing Path Dependence: A Review of Positive Feedback Mechanisms in Technology Markets, Regional Clusters, and Organizations”, *Industrial and Corporate Change*, Vol. 22, No. 3, pp. 617-47.

<sup>314</sup> K. Thelen (1999): “Historical Institutionalism in Comparative Politics”, *Annual Review of Political Science*, Vol. 2, pp. 369-404, p. 392.

<sup>315</sup> K. Thelen (1999): “Historical Institutionalism in Comparative Politics”, p. 394.

<sup>316</sup> S. Krasner (1984): “Approaches to the State: Alternative Conceptions and Historical Dynamics”, *Comparative Politics*, Vol. 16, No. 2, pp. 223-46.

<sup>317</sup> B. Collier, D. Collier (1991): *Shaping the Political Arena. Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America* (Princeton, Princeton University Press), p. 29.

legacies can be assessed. While this concept is not theoretically explored in detail by Collier and Collier, we find a more recent equivalent in Slater and Simmons's concept of critical antecedent, understood as "factors or conditions preceding a critical juncture that combine in a causal sequence with factors operating during that juncture to produce a divergent outcome"<sup>318</sup>. The following two elements in the critical juncture model proposed by Collier and Collier are the cleavage or crisis understood as emerging out of the antecedent conditions and in turn triggering the window of opportunity and the legacy which is the final product of the critical juncture and represents the crystallisation of the new institutional configurations<sup>319</sup>.

While this model brought further insight into the complex set of interconnected circumstances that complete a critical juncture, it still lacked the necessary theoretical tools that would help distinguish more clearly the factors that separate a juncture during which dramatic change is possible from historical moments in which continuity is favoured. To this end, Soifer extended this conceptual framework by identifying two types of causal conditions necessary for a critical juncture to be triggered: permissive and productive. Permissive conditions are understood as easing the constraints of structure (institutional stasis) and changing "the underlying context to increase the causal power of agency or contingency and thus the prospects for divergence"<sup>320</sup>. Productive conditions are aspects of a critical juncture that "shape the outcomes that emerge and are locked in when the window of opportunity marked by permissive conditions comes to a close"<sup>321</sup>. The example used by the author to add flesh to the conceptual framework provides a new reading to the dramatic shift in the 1940s observed in some Latin American countries from policies guided by the objective of export-led growth to the development of inward-looking industrialisation. As such, the author argues that in this case the permissive conditions were embodied by the Great Depression and the World War II that created the context in which the new economic paradigm could emerge. In this period, theoretical and institutional support for import substitution industrialization coming from the United Nations Economic Commission on Latin America (ECLA) acted as a productive condition that provided the context for the

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<sup>318</sup> D. Slater, E. Simmons (2010): "Informative Regress: Critical Antecedents in Comparative Politics", *Comparative Political Studies*, Vol. 43, No. 7, pp. 886-917, p. 889.

<sup>319</sup> . Collier, D. Collier (1991): *Shaping the Political Arena. Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America*, p. 31.

<sup>320</sup> H. D. Soifer (2012): "The Causal Logic of Critical Junctures", *Comparative Political Studies*, Vol. 45, No. 12, pp. 1572-97, p. 1574.

<sup>321</sup> H. D. Soifer (2012): "The Causal Logic of Critical Junctures", p. 1575.

critical juncture. As the trade recovered and the previously available option of export-led growth became viable again, the results of the critical juncture reached fruition: variation had been locked in<sup>322</sup>. As permissive and productive conditions are necessary, but insufficient if present individually, Soifer argues that for a critical juncture to be triggered, we need both conditions to be present, while the absence of both types will translate into *status quo*, any change in this case being precluded. The presence of permissive conditions and the absence of productive ones will create crisis without change, or a case of “missed opportunity”. Finally, he contends that the absence of permissive conditions, but the presence of productive ones will mark a phase of incremental change<sup>323</sup>. However, while a critical juncture is expected to produce consequences in the form of a legacy, the unit of analysis critically affected can differ from each case. Söyler argues that when focusing on turning points that establish particular sequences, variation can be observed as to the level where change occurs. Thus, during a critical juncture while the macro structure can be affected, many other institutions can remain unchanged, the duration of the conjuncture being part of the reason for which variation across the levels of analysis is determined. The causal force of critical junctures is determined by their duration, their prolongation bearing the possibility that political decisions will be hindered or forced in other directions by structural constraints<sup>324</sup>.

The concept of punctuated equilibrium implies that institutions will function in accordance with the decisions made at their initiation, in an equilibrium state that gets punctuated by brief phases of institutional flux during which more dramatic change can occur. These moments of flux are abrupt, sudden, contingent, metamorphic developments and are expected to be in the majority of cases exogenous<sup>325</sup>. When applying the theoretical model of punctuated equilibrium to analyse policy changes, Baumgartner and Jones argue that institutional systems are characterised by positive as well as negative feedback processes. Stability in policymaking is secured when the general principle of policy action is accepted by stakeholders and when the institutional framework is dominated by negative feedback, meaning that shocks to the system are dampened and self-corrective mechanisms exert the

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<sup>322</sup> *Ibidem*, pp. 1577-78.

<sup>323</sup> *Ibidem*, p. 1580.

<sup>324</sup> See M. Söyler (2015): *The Turkish Deep State. State Consolidation, Civil-Military Relations and Democracy* (New York, Routledge).

<sup>325</sup> See F. Baumgartner, B. Jones (1993): *Agendas and Instability in American Politics* (Chicago, University of Chicago Press).

necessary counter-pressure for a rapid return to the status quo ante<sup>326</sup>. However, political actions can be subject to positive feedback, whereby small inputs can cascade into major effects that can lead to institutional redesign. As the saturation point is reached, negative feedback processes are re-established. The authors argue that a growing number of policy innovations follow the negative-positive-negative feedback pattern of change.

The extent of change produced when equilibrium is punctuated can be determined either quantitatively, provided that numerical data are available, or qualitatively, this latter option of analysis being used more often in social sciences. However, critics have underlined the lack of a common set of *a priori* criteria necessary for determining when there is sufficient political or environmental “pressure” to generate change<sup>327</sup>. In a recent paper, Mahoney responds by clarifying that punctuated change can be deemed as having been met when the absolute size of change passes some minimal threshold – defined by the context of the research. In this context, he introduces the differentiation between punctuated changes, which are relatively bounded episodes with a clear beginning and end points and represent breakpoints within a historical sequence, and incremental change or gradual change<sup>328</sup>. As Thelen observes, the further exploration of incremental change is necessary as the punctuated equilibrium model tends to limit institutional dynamics to a zero-sum view of institutional evolution versus institutional reproduction<sup>329</sup>. As such, while conceiving institutions as “distributional instruments laden with power implications”<sup>330</sup>, and institutional outcomes as generated either by dominant actors, as unintended results of internal conflicts or even as the product of “ambiguous compromises” among actors<sup>331</sup>, the literature focusing on incremental change identifies four modal types depending on the locus of transformation: displacement, conversion, layering and drift<sup>332</sup>.

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<sup>326</sup> F. Baumgartner, B. Jones (1993): *Agendas and Instability in American Politics*, p. 16.

<sup>327</sup> G. Peters (2012): *Institutional Theory in Political Science. The New Institutionalism* (New York, The Continuum International Publishing Group), p. 78.

<sup>328</sup> J. Mahoney (2012): “Conceptualizing and Explaining Punctuated versus Incremental Change”, paper presented at the Lansing B. Lee Jr. – Bankard Seminar in Global Politics (Charlottesville, University of Virginia), available at <http://politics.virginia.edu/speaker-series/lansingleebankard/2011>.

<sup>329</sup> K. Thelen (2003): “How Institutions Evolve: Insights from Comparative Historical Analysis”, in J. Mahoney, D. Rueschemeyer (eds.) *Comparative Historical Analysis in the Social Sciences* (Cambridge, Cambridge University Press), p. 213.

<sup>330</sup> J. Mahoney, K. Thelen (2010): “A Theory of Gradual Institutional Change”, in J. Mahoney, K. Thelen (eds.) *Explaining Institutional Change. Ambiguity, Agency, and Power* (Cambridge, Cambridge University Press), p. 8.

<sup>331</sup> See A. Sheingate (2010): “Rethinking Rules: Creativity and Constraint in the U.S. House of Representatives”, in J. Mahoney, K. Thelen (eds.) *Explaining Institutional Change. Ambiguity, Agency, and Power*, pp. 168-203.

<sup>332</sup> W. Streeck, K. Thelen (2005): “Introduction: Institutional Change in Advanced Political Economies”, in W. Streeck, K. Thelen (eds.) *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford, Oxford University Press), pp. 1-39.

*Displacement* occurs when existing rules are replaced by new ones either through a radical shift or through slow-moving processes, with political entrepreneurs, understood as “individuals whose creative acts have transformative effects on politics, policies, or institutions”<sup>333</sup>, upsetting the status quo. *Conversion* implies the changed enactment of existing rules through their strategic redeployment. In this case, inherent ambiguities of rules are redeployed in a manner that leads to the conversion of the institution to new goals, functions and purposes. However, both displacement and conversion are unlikely to reach fruition in the context of strong veto possibilities within the institution<sup>334</sup>. *Layering* involves the “active sponsorship of amendments, additions, or revisions to an existing set of institutions”<sup>335</sup>, process that sets in motion path-altering dynamics. This mode of change is based on a mechanism of differential growth whereby actors exploit the degree of institutional flexibility and adaptability by promoting new regulatory additions that progressively gain more weight and eventually set in motion the dynamics for deep transformation. Finally, the last mode of gradual change represents the steadiest and most continuous pattern of transformation, occurring when core features of an entity remain in place, but cease to function in the same manner due to shifts in external conditions, thus *drifting*<sup>336</sup>. Out of all of the modes of gradual change presented so far, drift underlines the role that agency has within an institutional context even in the case of stasis, as Streeck and Thelen observe institutional reproduction is not always a matter of positive feedback, but it can require active maintenance and recalibration in response to changes in the political and economic environment<sup>337</sup>. Thus drift can be triggered when exogenous conditions shift and conservative policymakers deliberately decline to respond, their inaction changing the impact or the manner of enactment of old rules.

So far we have explored the theoretical assumptions that substantiate historical institutionalism and have distinguished both mechanisms that causally determine institutional stability (path dependence resulting from self-reinforcing processes and maintained through positive feedback) and that explain institutional genesis and change – be it incremental or transformative (punctuated equilibrium, critical juncture, institutional displacement, conversion, layering and drift). These explanatory tools can be juxtaposed, as

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<sup>333</sup> A. Sheingate (2003): “Political Entrepreneurship, Institutional Change, and American Political Development”, *Studies in American Political Development*, Vol. 17, No. 2, pp. 185-203, p. 185.

<sup>334</sup> J. Mahoney, K. Thelen (2010): “A Theory of Gradual Institutional Change”, p. 19.

<sup>335</sup> W. Streeck, K. Thelen (2005): “Introduction: Institutional Change in Advances Political Economies”, p. 24.

<sup>336</sup> J. Mahoney (2012): “Conceptualizing and Explaining Punctuated versus Incremental Change”, p. 18.

<sup>337</sup> W. Streeck, K. Thelen (2005): “Introduction: Institutional Change in Advances Political Economies”, p. 24.

Ebbinghaus observes, as two distinctive models: the 'trodden trail' that underlines the spontaneous evolution of institutions and their subsequent long-term entrenchment and the 'road juncture' that emphasises the interdependent sequence of events that structure the alternatives for future institutional changes<sup>338</sup>. The key distinctive element between these models that share some key ontological assumptions (that history matters and previous taken produce increasing returns) resides in the nature attributed to change inducing factors. The first model sustains a view of institutional change determined by spontaneous exogenous intervening factors that induce change. The second model accommodates both endogenous (pertaining to the institutions that is the unit of analysis) and exogenous factors as determinants of change generating thus multiple scenarios for institutional transformation. Under this latter model an axis of change can be drawn with alterations of the status quo ranging from *path stabilisation* representing the marginal adaptation to structural constraints, to *path departure* or the gradual adaptation through partial renewal of institutional arrangements and limited redirection of core principles (displacement, conversion, layering and drift) and finally to *path cessation* or *switching* that ends the self-reinforcement of an established institution<sup>339</sup>.

In this chapter, starting off from the theoretical premise that political and institutional outcomes are the result of self-reinforcing historical causation initiated during turning points, we will explore both exogenous and endogenous factors that have determined transformative or gradual change in the institutional makeup of the two countries during their pre- and post-accession period. We will contend that the presence of both permissive and productive conditions during the pre-accession period have generated a critical juncture in Romania's case securing a good track record of corruption prosecution despite the veto power exercised by political actors and in the context of diminishing effectiveness of EU conditionality. Utilising Soifer's framework of determining conditions, we identify the process of EU accession generally as having secured the necessary permissive conditions for transformative change to occur in both countries. Next, while considering Steunenberg and Dimitrova's concept of compliance game<sup>340</sup> as a time-sensitive indicator of EU's leverage in determining domestic adaptation and rule downloading, we argue that the turn towards an

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<sup>338</sup> B. Ebbinghaus (2005): "Can Path Dependence Explain Institutional Change? Two Approaches Applied to Welfare State Reform", *MPiFG Discussion Paper no. 05/2* (Cologne, Max Planck Institute for the Study of Societies).

<sup>339</sup> B. Ebbinghaus (2005): "Can Path Dependence Explain Institutional Change? Two Approaches Applied to Welfare State Reform", p. 17.

<sup>340</sup> B. Steunenberg, A. Dimitrova (2007): "Compliance in the EU Enlargement Process: The limits of Conditionality", *European Integration Online*, Vol. 11.

enhanced conditionality and the inclusion in the 2005 Accession Treaty of the 'postponement clause', as well as the express provision for Romania that tied progress on meeting its anti-corruption commitments to accession, played the role of a critical juncture that closed with the confirmation of the accession date by the European Commission in its monitoring report on the state of preparedness for EU membership of Bulgaria and Romania<sup>341</sup>. This period marked a visible break from what some Romanian judges had deemed as the dark chapter of the post-communist Romanian judiciary (2001 – beginning of 2004)<sup>342</sup>, as it brought much needed legislative modifications (the package of laws on the organisation of the judiciary, on the Superior Council of Magistracy and on the statute of magistrates) designed to improve judicial independence and effectiveness. While critical deficiencies in the judicial sector continued to hamper its efficiency *ex post* the critical juncture, mainly due to the virulent reactions of reform-adverse actors from the Romanian Constitutional Court, political veto players from various parties and even members of the judiciary, the legislative and institutional modifications produced at that point can be traced forward – at least at the level of organising principles – to today's organisation of the judiciary<sup>343</sup>. In order to further sustain our argument that the identified period matches the criteria put forward by the literature, namely the presence of antecedent conditions, of permissive and productive conditions and finally the emergence of a legacy, our argumentation will define the interaction between the European Union and its then candidate states as guided by the principles of a compliance game. Thus, the accession talks between the EU and candidate countries will be understood as "a series of negotiations between the players over the extent to which the applicant at any given stage of its preparation satisfies the conditions set by the Union and the extent to which the Union is willing to continue supporting the applicant's candidacy"<sup>344</sup>. In this model, acquiescing to the agreement and avoiding a strategy of deceptiveness by the applicant is profitable when the benefits of collaborating are greater than the payoffs of breaking the agreement. Deriving from this definition is the assumption that the conditions for the success of conditionality will be incentive dependent. As attainment of EU accession in 2007 had

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<sup>341</sup> European Commission (2006): *Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania* (Brussels, 26 September), COM(2006)549 final, p. 13.

<sup>342</sup> H. Dumbravă, D. Călin (2009): "The Evolution of the Judicial System in Romania during the Past 60 Years", *Revista Forumul Judecătorilor*, No. 1, p. 8.

<sup>343</sup> See Cristi Danileț (2014): "Political vs. Justiție sau O Scurtă Istorie a Reformei Magistraturii/Politics vs. Justice or A Brief History of the Reform of Magistracy", *Revista Polis*, No. 4.

<sup>344</sup> B. Steunenberg, A. Dimitrova (2007): "Compliance in the EU Enlargement Process: The limits of Conditionality", p. 7.

become in both countries the benchmark against which the performance of state institutions and of the ruling coalition was evaluated, the system of enhanced conditionality had further tipped the scale towards the EU in an already asymmetric process, the costs of defection from a reform oriented path for the governing coalition increasing (in terms of future re-election prospects). Moreover, the calls for the freezing of the enlargement in the context of the French and Dutch no-votes on the European Constitutions project<sup>345</sup> and the veiled threat of a potential decoupling the two countries' accession bids<sup>346</sup> impacted upon the pull of the EU's leverage to determine willingness to meet demands and generated a sense of urgency among the national political elites<sup>347</sup>. Finally, we reinforce our assumption that EU accession has created the permissive conditions for transformative change brought through a critical juncture by referring to the a series of existing studies that have underlined the EU's impact upon the character of national political competition in the candidate countries<sup>348</sup>, the indirect domestic empowerment of the electorates by undermining authoritarian governments' credential as reformers<sup>349</sup>, and the role in encouraging the involvement of civil society organisations in the implementation of the *acquis* and the meeting of the Copenhagen criteria (the political criteria in particular)<sup>350</sup>. The presence of change agents occupying top governmental positions (as was the case of Monica Macovei) and leading key institutions in the country's anti-corruption framework such as the National Anti-Corruption Directorate (Laura Codruța Kövesi and previously Daniel Morar) signalled a break from the 'Potemkin' type of harmonisation with EU requirements and standards. Important improvements in the legal framework (the Small Reform Law introduced in 2010, the New Civil Code in force since October 2011, the New Civil Procedure Code in force since February 2013, the New Criminal Code and Code of Criminal Procedure in force since February 2014), and a new generation of judges and prosecutors benefiting of training resources and expertise offered by a multitude of

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<sup>345</sup> J. Boyle (2005): "France's Sarkozy Urges Freeze on EU Enlargement", *Reuters* (June, 27).

<sup>346</sup> Emerging Europe Monitor (2004): *South East Europe Monitor*, Vol. 11, No. 4, p1.

<sup>347</sup> T. Troev (2005): "Bulgaria's New PM Focuses on Joining EU", *Financial Times* (August, 18).

<sup>348</sup> See M. Vachudova, L. Hooghe (2009): "Postcommunist Politics in a Magnetic Field: How Transition and EU Accession Structure Party Competition on EU Integration", *Comparative European Politics*, Vol. 7, pp. 179-212; M. Vachudova (2009): "Tempered by the EU? Political Parties and Party Systems Before and After Accession", in R. Epstein, U. Sedelmeier (eds.) *International Influence Beyond Conditionality. Postcommunist Europe after EU Enlargement* (London, Routledge), pp. 66-84.

<sup>349</sup> F. Schimmelfennig, U. Sedelmeier (2004): "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe", *Journal of European Public Policy*, Vol. 11, No. 4, p. 670.

<sup>350</sup> B. Finke (2007): "Civil Society Participation in EU Governance", *Living Reviews in European Governance*, Vol.2, No. 2.



international networks have further contributed to the sustainability of the efforts to curb corruption in Romania. However, as Hein observed, while formal factors such as institutional and policy adequacy are present, a wide 'coalition of the unwilling' among the Romanian political elite continues to fight by all available means to avoid being prosecuted and convicted<sup>351</sup>. Post-accession, the monitoring mechanism coupled with a naming and shaming strategy used by the EU contributed, despite its shortcomings, to the securing of the institutional autonomisation of the law enforcement agencies – which were able to intensively and successfully investigate corruption crimes<sup>352</sup>. In contrast, we will argue that the same period of time identified as a critical juncture for Romania took the form of a missed window of opportunity for Bulgaria that embarked on a road of incremental change. A series of factors can be identified in order to justify our claim. Firstly, the system of specialised anti-corruption agencies present within each branch has encouraged the development of a culture of improved control, but the absence of a centralised structure to coordinate and to propose a common methodology and set of objectives has meant that the various units could avoid bearing the responsibility of poor results.

In what follows, before starting the discussion over the impact of EU accession in the two countries, we will define the concepts of judicial independence and discuss the costs of high-level corruption and we will place them into context by exploring the EU's strategy in assessing progress made by candidate states in meeting the Copenhagen political criteria (judicial independence and anti-corruption framework being included in the political benchmark) and the assistance provided by the European Union as a *sui generis* rule of law promoter to guide and support reforms. We will then move to discussing the pre-accession track record of the two countries, their approach to transitional justice and finally the most important post-accession political developments as well as the dynamics of the reforms pursued by the two countries. Within this section we will also analyse the manner in which the Cooperation and Verification Mechanism has changed and whether this has been reflected at the national level in the pace and extent of reforms. The chapter will conclude with a discussion of recent events that have been considered to mark the installation of a post-accession backsliding phenomenon in Eastern Europe and ask whether an irregular

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<sup>351</sup> M. Hein (2015): "The Fight against Government Corruption in Romania: Irreversible Results or Sisyphean Challenge?", *Europe-Asia Studies*, Vol. 67, No. 5, pp. 747-76, p. 748.

<sup>352</sup> M. Hein (2015): "The Fight against Government Corruption in Romania: Irreversible Results or Sisyphean Challenge?", p. 750.

impact of EU conditionality (uneven Europeanisation across states and across time) has divided the region into successful versus laggard member states.

### ***4.3. Judicial independence and the fight against corruption – understanding the units of analysis, exploring the emergence of an EU rule of law framework***

In this section we introduce the concepts of judicial independence and accountability as well as that of corruption, and observe how different approaches to these notions have influenced various international donors in providing assistance for the reform of the judicial sectors in Bulgaria and Romania. These external contributions are considered to have formed collectively the permissive conditions for change to occur. We will then move to exploring how the EU has built its own rule of law framework and used its instruments to assess and assist reform in candidate countries during accession and beyond.

The international dimension of democratisation, whilst initially downplayed by the early studies on regime transition, has now become an almost explanatory orthodoxy referred to when analysing the pace and trajectory of domestic transformation. Collaborative relationships between national actors and international organisations have been established on the basis of the latter gradually increasing their role in guiding and sustaining the transition to democracy. However, the strategies for attaining this objective have differed substantially from one provider to another. One example of the earliest and most prominent assistance providers has been that of U.S. Agency for International Development (USAID) which has opted for horizontal mechanisms of diffusion in order to administer assistance under its rule of law programme. More specifically, while complementing and not necessarily competing with European assistance, USAID has contracted the bulk of its rule of law work in Central and Eastern Europe to private actors (such as the American Bar Association or the East-West Management Institute) which in turn outsourced to local specialists, professional civil associations and NGOs. The concept of rule of law, understood as “a state in which citizens, corporations, and the state itself obey

the law, and the laws are derived from a democratic consensus”<sup>353</sup> was acknowledged by USAID as providing the conditions upon which democracy depends: a legal framework rooted in the collective will, the state monopoly on the legitimate use of force, equality of rights and responsibilities and social order. Five elements were identified as necessary for the rule of law to prevail: order and security, legitimacy, checks and balances, and the equal and effective application of the law<sup>354</sup>. While depending heavily on the performance of the executive and legislative branches, the rule of law can be made operative in society largely through the activity of an independent and accountable judicial sector.

Whilst two models defining the relationship between the judiciary to the rest of the government have been acknowledged by USAID – one where the judiciary is dependent on the executive for its administrative and budgetary functions, and a second where these management functions are exerted by the judiciary, the latter was promoted along with the establishment of judicial councils that would oversee the sector and assure some degree of independence from the interference of the judicial hierarchy itself<sup>355</sup>. A balance between judicial independence and accountability was emphasised, the two concepts being considered coterminous. Judicial independence was defined as the freedom from any outside pressures on the branch’s internal operations, while accountability was understood as a form of *ex-post* control through which the judiciary can relate and explain its administrative and functional operations and outputs<sup>356</sup>. Four mechanisms were privileged as necessary for the development of judicial accountability: transparent systems for the selection of magistrates, a system of internal operations that would be available for public review, transparent judicial decisions, and finally a functioning system for registering complaints on institutional operations or behaviour of individual members<sup>357</sup>.

Judicial independence coupled with accountability and efficient institutional organisation were identified as the dimensions of change that would be needed in order to tackle

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<sup>353</sup> United States Agency for International Development (2010): *Guide to Rule of Law Country Analysis: The Rule of Law Strategy Framework. A Guide for USAID Democracy and Governance Officers* (Washington, USAID – Office of Democracy and Governance), p. 6.

<sup>354</sup> United States Agency for International Development (2010): *Guide to Rule of Law Country Analysis: The Rule of Law Strategy Framework*, pp. 8-14.

<sup>355</sup> United States Agency for International Development (2002): *Guidance for Promoting Judicial Independence and Impartiality – Revised Edition*, Report No. PN-ACM-007 (Washington D.C., USAID).

<sup>356</sup> L. Hammergren (2002): “Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals”, in United States Agency for International Development (2002): *Guidance for Promoting Judicial Independence and Impartiality – Revised Edition*, p. 150.

<sup>357</sup> L. Hammergren (2002): “Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals”, p. 153.

systemic problems such as endemic corruption. This latter concept, defined generally as the abuse of entrusted authority for private gain, was distinguished as a “tremendous obstacle to political, social, and economic development”<sup>358</sup>. USAID operated a distinction between administrative corruption, seen as including smaller transactions involving mid- and low-level government officials, and grand corruption that included exchanges of resources, access to rents, or other competitive advantages for privileged firms and high-level officials in the executive, judiciary, legislature, or in political parties. The direction opted for by USAID to support national anti-corruption efforts largely focused on civil society programs that included endeavours to promote free and independent media (Professional Media Program in Romania and Bulgaria during 1996 until 2000), and to strengthen local NGOs and citizens' groups by empowering them to become critical constituencies for reform<sup>359</sup>. The general donor strategy for USAID intervention followed a scheme of three main priorities for the rule of law programmes: assisting the emergence of democratic legal authorities (objective especially followed in Latin America), encouraging the solidification of rights and democratic processes, and contributing to the bolstering of effectiveness and efficiency of the judicial system<sup>360</sup>.

In Bulgaria, this type of “transformative diplomacy”<sup>361</sup> took the form of framework projects such as the Judicial Development Project (1999-2004) and the Judicial Strengthening Initiative (2004-2007) implemented by the East-West Management Institute which targeted among others the improvement of court administration, the provision of general and specialised judicial training (through national organisations such as the Bulgarian Legal Initiative for Training and Development and the Magistrates Training Centre), and the development of a case management system that would facilitate the scheduling of hearings and the tracking of case files<sup>362</sup>. In Romania, USAID sponsored programs run by the American Bar Association designed to strengthen the National Institute of Magistracy (the judicial training school established in 1992), to develop, test and implement new streamline

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<sup>358</sup> United States Agency for International Development (2005): *USAID Anticorruption Strategy*, Document No. PD-ACA-557 (Washington D.C., USAID), p. 1.

<sup>359</sup> United States Agency for International Development (2005): *USAID Anticorruption Strategy*, p. 33.

<sup>360</sup> United States Agency for International Development (2010): *Guide to Rule of Law Country Analysis: The Rule of Law Strategy Framework*, pp. 28-29.

<sup>361</sup> T. Delpuech (2007): “Evaluation of Sociological Critiques of International Legal Reform Transfers Based on an Analysis of American Judicial Assistance in Bulgaria”, in R. Coman, J-M. De Waele (eds.) *Judicial Reforms in Central and Eastern European Countries* (Brugge, Vanden Broele Publishers), pp. 79-106.

<sup>362</sup> East-West Management institute (2007): *Legal Reform: Judicial Strengthening Initiative in Bulgaria*, (New York, EWMI) available at <http://ewmi.org/sites/ewmi.org/files/files/programpdfs/EWMIBulgariaJSI2007.pdf>.

court procedures and to assist the Ministry of Justice in the development of an ethics code for judges and prosecutors (which was adopted in 2001 and revised in 2005)<sup>363</sup>. However, as stated in the USAID commissioned reports, the sequential approach to the rule of law development programmes in Bulgaria, especially in the early stages (from 1990 to 1997), coupled with a hostile political environment and the lack of a broader context of reform commitment, of a clear strategy, and of sufficient resources in the judicial branch affected severely the long-term impact of the provided assistance<sup>364</sup>. The strong attachment of high-level magistrates to the preservation of national juridical traditions supported by a conservative constitutional court that would be far less perceptible to international pressure than the government or parliament further reinforced the relevance of the modes of intervention opted for by USAID: identifying and mobilising local actors likely to support its initiatives, both from the interior (professional organisations, bar associations) and from the exterior (NGOs, think tanks, the media) of the judicial sphere<sup>365</sup>. One of the most successful USAID-supported partnerships in Bulgaria has been *Coalition 2000* – an initiative established in 1997 that brought together local non-governmental organisations, government institutions and media representatives with the aim of curbing corruption. The consortium contributed fundamentally to the improvement of the analytical rigour in diagnosing corruption by developing a *Corruption Monitoring System* that periodically measures administrative corruption (the incidence of corruption practices in interactions between citizens and businesses with the administration)<sup>366</sup>. The initiative has also been involved in the drafting of the National Anti-Corruption Strategy adopted in 2001 that was the first comprehensive official document to outline the government’s future lines of action to tackle malfeasance within public institutions. While some results were achieved (institutional and legislative infrastructure, decrease of administrative corruption), the Anti-Corruption Coordination Commission, established by the government and chaired by the Minister of Justice to facilitate the implementation of the Strategy and coordinate with other relevant governmental agencies failed to fulfil its major tasks, focusing mostly on

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<sup>363</sup> American Bar Association – Central European and Eurasian Law Initiative – Romania (2007): *Promoting the Rule of Law* (Washington, ABA ROLI), available at [http://pdf.usaid.gov/pdf\\_docs/Pdaci266.pdf](http://pdf.usaid.gov/pdf_docs/Pdaci266.pdf).

<sup>364</sup> R. Blue, B. LeDuc (2004): *Rule of Law Assistance Impact Assessment – Bulgaria* (Washington, Management Systems International), available at [http://pdf.usaid.gov/pdf\\_docs/PNADC207.pdf](http://pdf.usaid.gov/pdf_docs/PNADC207.pdf).

<sup>365</sup> T. Delpuech (2007): “Evaluation of Sociological Critiques of International Legal Reform Transfers Based on an Analysis of American Judicial Assistance in Bulgaria”, p. 103.

<sup>366</sup> For a detailed assessment of the methodology and indicators used in the Corruption Monitoring System see A. Stoyanov, A. Gerganov, A. Di Nicola, F. Costantino (2015): *Monitoring Anti-Corruption in Europe. Bridging Policy Evaluation and Corruption Measurement* (Sofia, Center for the Study of Democracy).

general awareness-raising initiatives<sup>367</sup>. This aspect was also underlined by the European Commission in its 2004 Regular Report, observing that “the approach taken by the Bulgarian authorities in the fight against corruption has left aside the need to take specific measures in the fight against high level corruption, in the political, local and business circles”<sup>368</sup>. In an environment that offered little encouragement to foreign consultants, American expertise and aid was aligned with local actors who were, unfortunately, the weakest in the system. These measures and modes of application thus had an overall limited impact as underlined in the assessment of USAID funded rule of law initiatives:

“USAID, faced with limited resources and, in Bulgaria, a time schedule for withdrawal, may be tempted to identify one or the other weaknesses as the ‘key’ to reform. This is seldom the case. Information technology applied to improving efficiency of case management in the courts will not bring about a rule of law. Getting the government to prosecute a few high visibility corruption or narcotics running cases will not do so either. If there is political will, and commitment to making reforms happen, then donors can help governments understand that creating a rule of law requires a more comprehensive approach to the problem.”<sup>369</sup>

The World Bank’s approach as a provider of justice sector assistance has been somewhat different to that of USAID, rule of law prevalence being considered dependent on the reform of laws and of institutions. This perspective has been reflected by the manner in which the Bank has used the rule of law concept throughout time. Thus, while initially a more formal understanding of the concept prevailed, governance based on the rule of law epitomising a “system, based on abstract rules which are actually applied, and on functioning institutions which ensure the appropriate applications of such rules”<sup>370</sup>, the approach soon changed towards a more substantial view that included the fight against corruption as a means to improve governance and sustain growth<sup>371</sup>. This change had its foundations laid in a 1990 legal opinion of the General Counsel that concluded that the World Bank could favourably respond to a country’s request for assistance in the field of legal reform, including judicial

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<sup>367</sup> Center for the Study of Democracy (2005): *Anti-Corruption Reforms in Bulgaria* (Sofia, Center for the Study of Democracy), p. 37.

<sup>368</sup> European Commission (2004): *Regular Report on Bulgaria’s Progress towards Accession* (Brussels, European Commission) p. 20.

<sup>369</sup> R. Blue, B. LeDuc (2004): *Rule of Law Assistance Impact Assessment – Bulgaria*, p. 65.

<sup>370</sup> I. Shihata (1991): “The World Bank and ‘Governance’ Issues in its Borrowing Members”, in I. Shihata, F. Tschofen, A. Parra (eds.) *The World Bank in a Changing World. Selected Essays* (Boston, Martinus Nijhoff Publishers), apud A. Santos (2006): “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development”, in D. Trubek, A. Santos (eds.) *The New Law and Economic Development: A Critical Appraisal* (New York, Cambridge University Press), pp. 253-300.

<sup>371</sup> A. Santos (2006): “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development”, p. 274.

reform, if it finds it relevant to the country's economic development<sup>372</sup>. In its documentation on legal and judicial reform, the World Bank observed that in order to prevail, the rule of law "requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy"<sup>373</sup>. An independent judiciary was considered essential to the rule of law and present if it "issues decisions and makes judgements that are respected and enforced by the legislative and executive branches; (...) receives and adequate appropriation from the legislature; and (...) is not comprised by political attempts to undermine its impartiality"<sup>374</sup>. Judicial independence was considered to operate when judges would be trained in the law and made decisions with integrity and impartiality, while judicial accountability could be maintained by enforcing judicial codes of conduct<sup>375</sup>. In terms of corruption curbing, the approach adopted by the World Bank has been to a certain extent rooted in a principal-agent approach to corruption that connects the phenomenon to deficient accountability, wide political/state discretion for rent collecting and minimal transparency<sup>376</sup>. Thus, the operational definition of corruption used by the World Bank is *the abuse of public office for private gain*<sup>377</sup>. This general interpretation includes various forms of interaction between public sector officials and other agents, for the purpose of obtaining both monetary (graft especially for public procurement contracts) and non-monetary benefits (patronage and nepotism). Moreover, this approach focuses mainly on political corruption, which takes place at the highest levels of authority, involving politicians, dignitaries, and senior civil servants elected or appointed in leading roles, and bureaucratic corruption which takes place both at the implementation end of public policies, as well as in the planning and budgeting stages<sup>378</sup>. The implications of this approach have translated into the points of entry for governance reform that the World Bank has focused upon when providing financial assistance. Namely, it has concentrated its financial instruments towards

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<sup>372</sup> R. Laver (2012): "The World Bank and Judicial Reform: Overcoming 'Blind Spots' in the Approach to Judicial Independence", *Duke Journal of Comparative and International Law*, Vol. 22, pp. 183-238, p. 188.

<sup>373</sup> World Bank (2004): *Initiatives in Legal and Judicial Reform* (Washington D.C., World Bank), p. 3.

<sup>374</sup> World Bank (2003): *Legal and Judicial Reform: Strategic Decisions*, Report No. 26916 (Washington D.C., World Bank), p. 26.

<sup>375</sup> World Bank (2003): *Legal and Judicial Reform: Strategic Decisions*, p. 27.

<sup>376</sup> S. Riley (1998): "The Political Economy of Anti-Corruption Strategies in Africa", *European Journal of Development Research*, Vol. 10, No.1, pp. 129-159.

<sup>377</sup> World Bank (1997): *Helping Countries Combat Corruption: The Role of the World Bank*, available at <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>.

<sup>378</sup> O.H. Fjeldstad, J. Isaksen (2008): "Anti-Corruption Reforms: Challenges, Effects and Limits of World Bank Support", *Independent Evaluation Group Working Paper 2008/7* (Washington D.C., World Bank), p. 6.

enhancing horizontal accountability<sup>379</sup> or the intra-governmental control mechanisms within and between the three branches of power. Vertical accountability, both in its electoral form (through which citizens can hold dignitaries accountable by using electoral channels) and its social form (the civil society and the media that monitor and address actions of the state)<sup>380</sup> has not been addressed to the same extent by the World Bank as the ‘supply-side’ of good governance (individual state institutions/agencies for accountability)<sup>381</sup>.

The financial instruments used by the World Bank to sustain legal and judicial reform efforts have varied from adjustment and investment loans to more recent instruments such as the Institutional Development Fund, designed to finance quick, action-oriented and capacity-building projects with operational emphasis on governance and anticorruption. Through adjustment lending, change would be induced by conditioning the financial support to a country’s budget to the adoption of certain reforms agreed in advance with the recipient governments. Two such examples were the Second Programmatic Adjustment Loan (PAL 2) to Bulgaria and the First Programmatic Adjustment Loan to Romania. PAL 2 for Bulgaria was approved in 2004 and tied fiscal and balance of payment support to the undertaking of anticorruption actions for the judiciary and the submission of uniform criteria for the selection of magistrates. In line with this conditionality, Bulgaria adopted constitutional and legislative amendments that introduced functional immunity for magistrates<sup>382</sup>, performance appraisals, and solutions to modernise the administrative operation of courts (such as the random case assignment system, increased access to court documentation and public information, introducing the positions of court administrator and administrative secretary)<sup>383</sup>. PAL 1 for Romania was approved in 2004 and aimed at reforming core public sector institutions and processes, including the judiciary, in support of the overarching objective of joining the EU. Organic laws were adopted by the Romanian

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<sup>379</sup> On vertical and horizontal accountability see R. Jenkins (2007): “The Role of Political Institutions in Promoting Accountability”, in A. Shah (ed.) *Performance Accountability and Combating Corruption* (Washington D.C., World Bank), p. 148.

<sup>380</sup> For an in depth exploration of vertical accountability see A. Przeworski, S. Stokes, B. Manin (1999): *Democracy, Accountability and Representation* (Cambridge, Cambridge University Press).

<sup>381</sup> S. Migliorisi, C. Wescott (2011): “A Review of World Bank Support for Accountability Institutions in the Context of Governance and Anticorruption”, *Independent Evaluation Group Working Paper 2011/5* (Washington D.C., World Bank).

<sup>382</sup> According to Article 132 of the Constitution of Republic of Bulgaria when administering justice, magistrates cannot be the subject of criminal or civil liability for act done in office, nor can they be held liable for judgements or act rendered by them, unless they have committed an intentional and serious crime.

<sup>383</sup> World Bank (2005): *Simplified Implementation Completion Report. The Republic of Bulgaria Second Programmatic Adjustment Loan No. 4743-BUL*, Report No. 33413 (Washington D.C., World Bank), p. 11.



Parliament redefining the appointment of judges, judicial career development, and court administration, eliminating the process of extraordinary appeal by the Prosecutor General against court decisions entered into force, and introducing the position of economic managers in the court in order to relieve judges from non-adjudicative tasks<sup>384</sup>.

In 2005, under strong EU pressure to implement effectively the reform of the justice sector<sup>385</sup> and facing a potential one year delay to its EU accession date, the Romanian government expressly requested a World Bank loan in order to address the areas that the European Commission had identified as of serious concern. Hence, under the Judicial Reform Project, the country reached an agreement for a Specific Investment Loan of \$130 million scheduled for the period 2005 – 2011 (revised to 2017) in order to enhance institutional capacity (for the Superior Council of Magistracy, the High Court of Cassation and Justice, the Ministry of Justice), improve the efficiency of courts and the transparency of court proceedings, advance court infrastructure, and enhance the degree of professionalism and integrity of judges and other personnel<sup>386</sup>. What distinguished this type of project from previous loans was the strict evaluation criteria used to assess the degree of independence of the judiciary from political authorities. Included in the Bank's scrutiny are the procedures of judicial appointment, transfer, promotion or dismissal, the level of self-governance, and the level of budgetary autonomy<sup>387</sup>.

In 2007, in the context of increased pressure exerted by the European Commission which had requested the preparation of an Action Plan with milestones for the meeting of the CVM benchmarks, the Bulgarian government received an Institutional Development Grant of \$475,000 for the strengthening of the Office of the Prosecutor General's capacities to prosecute corruption –both within its ranks and beyond. In terms of the results achieved, the Implementation report mentions that in the period of the project, the average length of pre-trial prosecutorial cases for corruption was reduced substantially, from approximately 300-330 days to 150-180 days in the first half of 2010. The number of concluded disciplinary sanctions against prosecutors increased as well, from 14 in 2007 to 46 in 2009, while public confidence in the anti-corruption work of the prosecution increasing by 11.2

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<sup>384</sup> J. Anderson, D. Bernstein, C. Gray (2005): *Judicial Systems in Transition Economies. Assessing the Past, Looking to the Future* (Washington D.C., World Bank), p. 73.

<sup>385</sup> European Commission (2005): *Comprehensive Monitoring Report*, SEC(2005) 1354 (Brussels, European Commission), p. 20.

<sup>386</sup> World Bank (2005): *Romania Judicial Reform Project Information Report* No. AB1458, (Washington, World Bank).

<sup>387</sup> World Bank (2005): *Project Appraisal Document on a Proposed Loan in the Amount of Euro 110.0 Million to Romania for a Judicial Reform Project*, Report No. 33987-RO, (Washington, World Bank), p. 33.

percentage points in a year's time<sup>388</sup>. Whilst delays and modifications have occurred affecting the nature or the timing of expected outcomes (especially in the case of the Romania Judicial Reform Project), the World Bank has managed to assert itself as an important and competent actor in promoting and sustaining good governance and anticorruption actions at the national level. It reinforced the credibility of the EU conditionality by incorporating the EU accession criteria into its portfolio for the region and by reiterating in its documentation on the loans and grants offered to Romania and Bulgaria for judicial reform the commitments made and partially met by the countries during the pre-accession stage, the slow progress registered under the CVM, and the need for the priorities identified by the European Commission to be addressed.

Another influential contribution to the promotion of the rule of law has been that of the Council of Europe which has used a triangular approach (standard-setting, monitoring, and technical assistance) and has encouraged the formation of a transnational network of legal experts, located at different levels of governance, which has created, diffused and enforced rules, procedures and policies in accordance with the rule of law principle<sup>389</sup>. Since its creation in 1949, the institution has set standards in the form of conventions and 'soft law' instruments in several policy fields such as penal justice (the Criminal Law Convention on Corruption, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime), civil justice (commercial law, family law, children's rights), administrative law (Recommendation (2007)7 on Good Administration), and constitutional justice (European Convention on Human Rights, European Social Charter). As membership in the Council of Europe was regarded almost as a 'waiting room' for EU accession<sup>390</sup> and a hallmark of achieving political transformation, both Romania and Bulgaria submitted their applications early on during their transition towards democracy, with the Council responding promptly by providing them with a 'special guest status' (to Bulgaria in July 1990 and to Romania in February 1991), full membership perspective coming into sight once fully free elections had been held. Where the Council had previously expected democracy, rule of law and the protection of human rights to be established as givens within the states applying for its

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<sup>388</sup> World Bank (2011): *Implementation, Completion and Results Memorandum – IDF Grant for Combating Corruption: Strengthening Anti-Corruption Capacity in the Office of the Prosecutor General* (Washington D.C., World Bank).

<sup>389</sup> See C. Dallara, D. Piana (2014): *Networking the Rule of Law: How Change Agents Reshape Judicial Governance in the EU* (Farnham, Ashgate).

<sup>390</sup> M. Ram (2009): "Romania: From Laggard to Leader?", in B. Rechel (ed.) *Minority Rights in Central and Eastern Europe* (Oxon, Routledge), p. 187.

membership, in the case of Central and Eastern European countries the entry criteria had been lowered to a demonstration of clear intentions of achieving the provisions of article 3 of the Statute which requires candidates to respect “the principles of the rule of law and of the enjoyment by all persons within [their] jurisdiction of human rights and fundamental freedoms”<sup>391</sup>. Even so, in Romania’s case, the Council served as a gatekeeper to the EU, especially on human rights issues, providing the country with a list of requirements to be fulfilled in a short period of time (the signing of the European Charter of Local Self-Government and of the European Charter for regional or Minority Languages, adopt education laws in agreement with the Council’s recommendations, and use constitutional means to fight racism, anti-Semitism and other forms of discrimination)<sup>392</sup>, closely scrutinising its national minority policies, and eventually delaying the country’s admission until October 1993. After admission, Romania kept being subject to a monitoring procedure until early 1997, when the Council’s Parliamentary Assembly observed that the country had made considerable progress towards the fulfilment of its obligations and commitments<sup>393</sup>.

Input from the Council of Europe through its advisory board, the European Commission for Democracy through Law – better known as the Venice Commission – heavily influenced the process of nation and state-building through which the Central and Eastern European countries had to go after the collapse of the communist regime. An example in this sense was the Demosthenes programme. Launched by the Council of Europe in March 1990, it was designed to strengthen the reform movement in Central and Eastern European countries towards genuine democracy and facilitate their progressive integration in institutions of European cooperation. Technical and legal assistance was thus provided by the Venice Commission to Romania, Bulgaria, Albania, Estonia, Latvia and Russia during the drafting of constitutions<sup>394</sup>.

As the mandate of the Venice Commission was extended beyond constitutional justice to democratic institutions, fundamental rights, elections, referendums and political parties, the institution became a prestigious expert body elaborating, at the request of member states and with the involvement of stakeholders, opinions that aim to bring national legal and

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<sup>391</sup> Council of Europe (1949): *The Statute of the Council of Europe* (London, Council of Europe), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.

<sup>392</sup> Z. Csergo (2007): *Talk of the Nation: Language and Conflict in Romania and Slovakia* (Ithaca, Cornell University Press), p. 84.

<sup>393</sup> M. Ram (2009): “Romania: From Laggard to Leader?”, p. 187.

<sup>394</sup> A. Hyde-Price (1996): *The International Politics of East Central Europe* (Manchester, Manchester University Press), p. 192.

institutional structures in line with European standards of rule of law and democracy. One relevant example occurred in 2012, when intense power struggles between the Romanian Prime Minister, Victor Ponta and the then President, Traian Băsescu culminated in an attempt to impeach the latter (by a simple majority vote of the electorate instead of an absolute majority), the dismissal of the country's ombudsman and of the speakers of the Senate and the Chamber of Deputies (both members of the opposition), and the passing by the government of an emergency decree that curbed the powers of the Constitutional Court. The Venice Commission was asked by the Secretary General of the Council of Europe and later by the Romanian Prime Minister as well to elaborate an opinion regarding the compatibility of the actions taken with constitutional principles and the rule of law. The opinion criticised the controversial steps taken by the Romanian government, and expressed its concern over the lack of respect among representatives of State institutions for the status of other such institutions, including the Constitutional Court<sup>395</sup>. Despite a formal request for a response to the Venice Commission opinion sent by representatives of the Romanian mass media to the Government, the Parliament, the Ministry of Justice and the Foreign Affairs Ministry, no official responses were offered<sup>396</sup>. Representatives of national think tanks such as Expert Forum and Freedom House Romania however emphasised the importance of the opinion not least in confirming the role of rule of law promoter of the civil society:

"The opinion put forward by the Venice Commission confirms the Government and the Parliament's abuses, denounced by Freedom House Romania during the summer. Romania is a European Union member and the Romanian political elites need to respect the rule of law."<sup>397</sup>

"Expert Forum, together with other non-governmental organisations have criticised the unconstitutional and abusive actions of the Social and Liberal Union. (...) The Venice

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<sup>395</sup> European Commission for Democracy through Law (2012): *Opinion on the Compatibility with Constitutional Principles and the Rule of Law of Actions Taken by the Government and the Parliament of Romania in Respect of other State Institutions*, Opinion No. 685/2012 (Strasbourg, European Commission for Democracy through Law, 14-15 December), available at <http://www.venice.coe.int/webforms/documents/CDL-AD%282012%29026-e.aspx>.

<sup>396</sup> M. Bonea, O. Ghergut (2012): "Raportul Comisiei de la Veneția: Guvernul a Luat Măsuri 'Problematic' din Punct de Vedere Constituțional în Perioada Referendumului" / The Venice Commission Report: The Government had Taken Actions that Were Problematic from a Constitutional Point of View during the Referendum Period, *România Liberă*, 17 December.

<sup>397</sup> Cristina Guseth – Freedom House Romania – interview in M. Bonea, O. Ghergut (2012): "Raportul Comisiei de la Veneția: Guvernul a Luat Măsuri 'Problematic' din Punct de Vedere Constituțional în Perioada Referendumului".

Commission sanctions these abuses and ascertains that the attempt to impeach the President has been justified on political grounds rather than constitutional (...) acknowledging the NGOs and independent journalists who have denounced the abuses.”<sup>398</sup> Whilst not providing its own definition of the rule of law, the Venice Commission put forward in a 2011 report six elements necessary for its prevalence: the supremacy of law (legality), legal certainty (the law must be accessible and be foreseeable as to its effects), prohibition of arbitrariness, access to justice before independent and impartial courts, respect for human rights, and non-discrimination and equality before the law<sup>399</sup>. Judicial independence, understood as the ability of acting “without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority”<sup>400</sup>, was differentiated as both external – of the branch itself from the executive and legislative powers, and internal – of individual judges from the judicial hierarchy. Judicial independence would also need to be reinforced through the adequate allocation of resources, facilities and equipment that would enable the efficient delivery of decision within a reasonable time. With the aim of monitoring the functioning of judicial systems, of identifying their difficulties and defining concrete ways for improvement, the European Commission for the Efficiency of Justice (CEPEJ) was established in 2002, bringing together 49 member states of the Council of Europe, two-thirds of them being representatives of the national ministries of justice<sup>401</sup>. CEPEJ launched in 2004 its first evaluation of judicial systems in Europe cycle (followed since then by biannual editions), collecting data covering a wide range of aspects (public access to justice, the management of courts systems, the recruitment and disciplinary matters, efficiency and quality of judicial services) and setting the basis for the analysis of trends cross Europe regarding the evolution of judicial systems and reform processes. The impact of the reports increased over time, the results of the latest evaluation report (2012/2014 cycle) being presented and discussed more extensively than in the past by the Romanian mass media<sup>402</sup>. In Bulgaria, the publication of the

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<sup>398</sup> Laura Ștefan – Expert Forum - interview in M. Bonea, O. Ghergut (2012): “Raportul Comisiei de la Veneția: Guvernul a Luat Măsuri ,Problematică’ din Punct de Vedere Constituțional în Perioada Referendumului”.

<sup>399</sup> European Commission for Democracy through Law (2011): *Report on the Rule of Law Adopted by the Venice Commission at its 86<sup>th</sup> Plenary Session* (Strasbourg, Venice Commission), No. CDL-AD(2011)003rev, pp. 9-10.

<sup>400</sup> Committee of Ministers (2010): *Recommendation of the Committee of Ministers to member States on Judges: Independence, Efficiency and Responsibilities* (Strasbourg, Council of Europe), Recommendation No. CM/Rec(2010)12.

<sup>401</sup> R. Coman (2015): “Strengthening the Rule of Law at the Supranational Level: The Rise and Consolidation of a European Network”, *Journal of Contemporary European Studies*, Vol. 23, No. 1, p. 13.

<sup>402</sup> The Press review prepared by the Secretariat of CEPEJ that summarises the media coverage of the Report “European Judicial System – 2014 Edition” mentioning 7 articles in the Romanian mass media. No articles were

European Commission Justice Scorecard, coupled with the data provided by CEPEJ on judicial efficiency induced public debate over the pace and trajectory of reforms in the sector<sup>403</sup>.

Recognising corruption as a phenomenon that “threatens the rule of law, democracy and human rights, (...) good governance (...) and social justice”<sup>404</sup>, the Council of Europe adopted a comprehensive normative framework for the fight against corruption (among which the Criminal Law Convention on Corruption, the Civil Law Convention on Corruption, and the Twenty Guiding Principles for the Fight against Corruption)<sup>405</sup> which directed signatories on what acts needed to be criminalised under domestic legislation, included the premises for international cooperation in the process of evidence acquisition in cases of corruption, and drew attention to the measures that should be considered by member states to combat the phenomenon. Whilst later international law instruments on the fight against corruption had been adopted having a global scope of application and putting forward more comprehensive standards (such as the United Nations Convention against Corruption or UNCAC in 2003<sup>406</sup>), the early establishment of an effective monitoring network (the Group of States against Corruption or GRECO) that would observe national undertakings under the two Council of Europe conventions and facilitate the exchange of best practices has contributed substantially to the propagation of regulatory diffusion. The monitoring system is divided into two procedures: a horizontal stage in which all members are evaluated during a round and receive recommendations for legislative, institutional and practical reforms, and a second, compliance procedure where the measures taken at the national level in order to implement the recommendations made during the horizontal stage are assessed. Given the weakness of the EU’s anti-corruption *acquis* (which will be discussed

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mentioned for Bulgaria. See European Commission for the Efficiency of Justice (2015): Press Review No. CEPEJ-GT-EVAL(2015)2.

<sup>403</sup> In 2014, Open Society Institute – Bulgaria organised a wide event that brought together representatives of the government, the legislative, civil society organisations and journalists in order to discuss the results presented in the European Justice Scorecard on the quality, independence and efficiency of the Bulgarian judicial system. See [http://www.osf.bg/?cy=10&lang=2&program=1&action=2&news\\_id=627](http://www.osf.bg/?cy=10&lang=2&program=1&action=2&news_id=627).

<sup>404</sup> Council of Europe (1998): *Criminal Law Convention on Corruption* (Strasbourg, Council of Europe), preamble.

<sup>405</sup> On the importance of the anti-corruption framework put forward by the Council of Europe, see N. Kofele-Kale (2006): *The International Law of Responsibility for Economic Crimes* (Hampshire, Ashgate Publishing), pp. 176-183.

<sup>406</sup> A mechanism for review of the implementation of UNCAC was agreed upon in 2009, each state party being assessed by two other parties under the supervision of the intergovernmental Implementation Review Group. The system has inbuilt shortcomings however, civil society organisations not being included in the monitoring exercise, the country reports themselves being confidential and depending upon agreement with the state under review. See C. Rose (2015): *International Anti-Corruption Norms. Their Creation and Influence on Domestic Legal Systems* (Oxford, Oxford University Press).

below), and considering the methodological approach opted by GRECO which ensures a transparent examination of member states' laws and policies (written replies to questionnaires, on-site visits and meetings with public officials and representatives of the civil society), coupled with a consistent compliance surveillance (situation reports re-examine outstanding recommendations within 18 months from the evaluation round) has paved the way for a lucrative partnership with the EU. As such, when elaborating its first Anti-Corruption Report, as an action line established by the Stockholm Programme, the European Commission relied strongly on data provided by international monitoring mechanisms such as those used by GRECO, OECD, and UNCAC, which was corroborated with input from the Member States' public authorities, civil society and independent experts<sup>407</sup>. Cooperation between the European Commission and the Council of Europe institutions has been in fact characterised by some scholars as amounting to a 'division of labour', especially during the enlargement to the former communist countries, the Venice Commission, CEPEJ, and GRECO compensating for the ambiguous conditionality concerning the rule of law that the European Commission displayed<sup>408</sup>. The solidification of supranational institutional cooperation in the area of anti-corruption has been on the European Commission's agenda since 2003, when the possibility of the European Community's accession to GRECO was formally considered<sup>409</sup>. Given the pre-Lisbon Treaty limited competence of the European Community with regard to the Council of Europe's Civil and Criminal Law Conventions on Corruption, the decision to actively pursue full GRECO membership was postponed until the transition to the single legal personality of the EU, which streamlined to a certain extent the EU competence on anti-corruption matters. The option of EU participation in GRECO that would go beyond the cooperation format laid in the 2007 Memorandum of Understanding<sup>410</sup> was again explored in 2011, the Commission emphasising the benefits of the reinforced monitoring of Member States' anti-corruption policies, as well as the

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<sup>407</sup> European Commission (2011): *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Fighting Corruption in the EU* (Brussels, European Commission), COM(2011)308 final, p. 6.

<sup>408</sup> R. Coman (2015): "Strengthening the Rule of Law at the Supranational Level: The Rise and Consolidation of a European Network", p. 12.

<sup>409</sup> European Commission (2003): *Communication from the Commission to the Council, the European Parliament, and the European Economic and Social Committee on a Comprehensive EU Policy against Corruption* (Brussels, European Commission), COM(2003)0317 final.

<sup>410</sup> Council of the European Union/Council of Europe (2007): *Memorandum of Understanding between the Council of Europe and the European Union* (Strasbourg, 23<sup>rd</sup> of May), available at [http://ec.europa.eu/justice/international-relations/files/mou\\_2007\\_en.pdf](http://ec.europa.eu/justice/international-relations/files/mou_2007_en.pdf).

possibility of extending this assessment to the EU own institutional framework<sup>411</sup>. While this option is presently blocked by a legal disagreement between the European Commission and the Council<sup>412</sup>, the steps so far taken have resulted in the establishment of a biennial monitoring instrument extended across all 28 EU member states that would more importantly set the stage for the promotion of EU anti-corruption standards, as one expert on anti-corruption policies consulted by the European Commission observed:

“(...) the most important problem is that once a country becomes an EU member, no other standards can hold [it] in check, with the exception of provisions regarding the protection against the fraudulent administration of EU funds, and this is a limited approach in the broader context.”<sup>413</sup>

So far, we have explored the different approaches that international donors have opted for when promoting the rule of law in Eastern and Central Europe during the region’s democratic transition. We now turn to the actor that has dominated this process, especially after 1993 when the premises for a complex system of monitoring, sanctioning and incentive provision was laid: the European Union.

Starting with the fifth enlargement wave (2004), the European Union established a complex system of assessment of the level of preparedness of the candidate countries from Central and Eastern Europe to take on the responsibilities of membership, alongside to a series of mechanisms designed to promote democratic consolidation, human rights and the rule of law. With the sixth enlargement wave (2007) and in the context of a general hesitance and at times open hostility of existing member states to grant EU membership to new candidate countries<sup>414</sup>, the *stage-structured conditionality model*<sup>415</sup> has been modified to include along the pre-negotiation, negotiation and accession stages the phase of post-accession monitoring. The motivation behind this decision had been substantiated by Romania and Bulgaria’s track record before accession which had been plagued by a high level of corruption, opaque privatisation, unconvincing political will to pursue substantial reform,

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<sup>411</sup> European Commission (2011): *Report from the Commission to the Council on Modalities of European Union Participation in the Council of Europe Group of States against Corruption* (Brussels, European Commission), COM(2011)/0307 final.

<sup>412</sup> Expert Group on Corruption (2015): *13<sup>th</sup> Meeting of the Group of Experts on Corruption Report* (Brussels, European Commission).

<sup>413</sup> Author’s interview with a member of the Expert Group on Corruption of the European Commission, 28<sup>th</sup> November 2013.

<sup>414</sup> A. Szoulcha (2010): “The EU and Enlargement Fatigue: Why Has the European Union Not Been Able to Counter Enlargement Fatigue”, *Contemporary European Research*, Vol. 6, No. 1, p. 5.

<sup>415</sup> E. Gateva (2013): “Post-accession Conditionality – Translating Benchmarks into Political Pressure?”, *East European Politics*, Vol. 29, No. 4, pp. 420-442.



and insufficient transparency, efficiency and accountability of their justice systems. But before exploring the targeted conditionality applied by the EU in the post-accession period, we will briefly discuss the organisation's approach to promoting democracy and the rule of law in candidate countries as membership criteria in a reward-and-sanction system of accession.

As with the other international organisations, the EU played initially the role of an aid donor, imposing conditions on relations with third countries, conditions that would encourage post-communist transformation of economies and societies<sup>416</sup>. However, it did so initially perceiving association as an alternative to, rather than a preparation for accession, as the ongoing process of deepening brought by negotiations over the Maastricht Treaty raised the question of the organisation's ability to extend. This stage was labelled as a period of passive leverage, when the EU's role in motivating reform was minimal<sup>417</sup>. But even in this context, observance of democratic principles had been included as subject of scrutiny that determined the prospects of EU membership relatively early during the pre-accession stage, the Association or 'Europe' agreements concluded with Bulgaria in March 1993, and with Romania in February 1993 providing for political consultation through a tripartite institutional setup formed of an Association Council, an Association Committee and a Joint Parliamentary Committee. More importantly, the negotiation of the agreements provided the context for the EU to apply enhanced conditionalities and gate-keeping<sup>418</sup> as instruments to incentivise progress, the European Parliament expressing its concerns regarding the fairness of the electoral process from June 1990 in Bulgaria and urging the European Council to make the strengthening of Bulgarian relations with the European Economic Community dependent on the promotion of reforms aimed at democratising the country's political system and liberalisation of the economy<sup>419</sup>. In Romania's case as well, the European Parliament qualified the negotiation of a European agreement on the backdrop of the discredited May 1990 elections and the government-sponsored violence against student demonstrations a month later as "inappropriate until such time as (...)

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<sup>416</sup> H. Grabbe (1999): "A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants", *Robert Schuman Centre Working Paper* No. 12/99 (San Domenico di Fiesole, European University Institute), p. 5.

<sup>417</sup> See M. Vachudova (2005): *Europe Undivided: Democracy, Leverage, and Integration after Communism* (Oxford, Oxford University Press).

<sup>418</sup> See H. Grabbe (2003): *Europeanization Goes East: Power and Uncertainty in the EU Accession Process*, in K. Featherstone, C. Radaelli (eds.) *The Politics of Europeanization* (Oxford, Oxford University Press), pp. 316-17.

<sup>419</sup> S. Katsikas (2012): *Negotiating Diplomacy in the New Europe. Foreign Policy in Post-Communist Bulgaria* (London, I.B. Tauris & Co Publishing), p. 91.

developments in Romania with regard to democracy and a market economy finally follow a similarly positive path to those in other Central and Eastern European countries”<sup>420</sup>. The extent to which gate-keeping was feasible in this case was influenced less by the legislative and institutional changes registered in the two countries and more by the political context in the region: the attempted coup d’état by a group of hard-line members of the Communist Party of the Soviet Union to take control of the country from president Mikhail Gorbachev. This change of heart was best reflected by the subsequent reaction of the European Council that decided to immediately suspend technical assistance aid of 400 million ECU pledged to the Soviet Union until the reestablishment of the constitutional order<sup>421</sup>. Yet, despite security concerns, the European Commission continued along the lines of extended conditionality, starting negotiation for the association agreements with Bulgaria and Romania in 1992, but introducing a suspension clause that linked economic cooperation to the achievement of democratic principles, human rights and a market economy. Despite concerns that any hasty enlargement could impede the effective implementation of the newly adopted Maastricht Treaty, in its report for the Lisbon European Council (June 1992), the European Commission laid the foundations for the transition to the second role assumed by the EU during the CEEs post-communist transformation: that of guiding these countries towards membership which implies the development of a system of incentives and monitoring instruments to assess progress. The European Commission argued that the Community “cannot now refuse the historic challenge to assume its continental responsibilities and contribute to the development of a political and economic order for the whole of Europe”<sup>422</sup> and went on identifying the respect for democracy and fundamental rights, the obligation to adhere to the Community’s legal, economic, and political framework, and the ability to implement the common foreign and security policy as potential preconditions that candidate countries would need to meet in order to be granted membership. In the context of increasing pressure from the CEE countries for a clear membership prospect, and caught in the rhetorical trap created on the one hand by the pan-

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<sup>420</sup> European Parliament (1990): *Resolution on Romania*, OJ C 231/36, 10 July apud D. Papadimitriou, D. Phinnemore (2008): *Romania and the European Union. From Marginalisation to Membership* (Oxon, Routledge), p. 27.

<sup>421</sup> J. Lesourne (1991): “Le CEE Suspend Ses Aides á l’URSS Jusqu’au Rétablissement de L’ordre Consitutionnel”, *Le Monde* (22<sup>nd</sup> of August).

<sup>422</sup> European Commission (1992): *Europe and the Challenge of Enlargement Report*, (Luxembourg, European Commission), Supplement 3/92, p. 9.

European foundations laid in the Treaty of Rome<sup>423</sup> reiterated to a certain extent by the European Commission discourse, and on the other by the 'return to Europe' doctrine<sup>424</sup> adopted by CEE states<sup>425</sup>, the Copenhagen European Council in June 1993 put forward a set of prerequisites for accession - deemed as of equal importance - that created the premises for a clearer and 'depoliticised' Eastern enlargement:

1. The stability of institutions guaranteeing democracy, the rule of law, human rights and the protection of minorities (the political criteria);
2. The existence of a functioning market economy, as well as the capacity to cope with the competitive pressure and market forces within the Union (the economic criteria);
3. The ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union<sup>426</sup> (the *acquis* criteria).

In addition to the political, economic and *acquis* criteria, the Union's capacity to "absorb new members, while maintaining the momentum of European integration"<sup>427</sup> was mentioned as a determinant factor to the timing and pace of enlargement. While no definition of democracy, nor of the concept of rule of law were provided, external indicators used by the EU in its relations with the CEE countries such as the Charter of Paris for a New Europe which was mentioned in the Europe Association Agreement both with Romania and Bulgaria<sup>428</sup> could be used as a point of reference to the dimensions of the political requirement:

"Democracy has as its foundation respect for the human person and the rule of law. (...) Democracy, with its representative and pluralist character entails accountability to the

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<sup>423</sup> The preamble of the Treaty of Rome reads "determined to lay the foundations of an ever closer union among the peoples of Europe" and calls "upon the other peoples of Europe who share their ideal to join in their efforts".

<sup>424</sup> See F. Schimmelfennig (2003): *The EU, NATO and the Integration of Europe: Rules and Rhetoric* (Cambridge, Cambridge University Press).

<sup>425</sup> See Bulgarian President Zhelyu Zhelev's address to the Council of Europe's Parliamentary Assembly (31 January 1991): "The last century will serve as sufficient example: after having suffered five centuries of Ottoman domination, Bulgaria managed to return to the European fold by firmly embracing the fundamental institutions of the European scene - a pluralist parliamentary system, private ownership of property, Christian morality, education and training of the mind. Today, after forty-five years of totalitarianism and enforced Sovietisation, Bulgaria restates its firm intention to rejoin free and democratic Europe." In S. Jeleff (1997): *Voices of Europe* (Strasbourg, Council of Europe Publishing), p. 190.

<sup>426</sup> European Council (1993): *Conclusions of the Presidency* (21-22 June, Copenhagen), available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/72921.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf), p. 13.

<sup>427</sup> European Council (1993): *Conclusions of the Presidency* (21-22 June, Copenhagen), p. 13.

<sup>428</sup> *Europe Agreement Establishing an Association Between the European Economic Communities and their Member States, of the one part, and Romania, of the other Part*, preamble.

electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law.”<sup>429</sup>

The Essen European Council in December 1994 continued the path of fleshing out enlargement tools and formally launched the pre-accession strategy that was based on a *structured dialogue/relationship* and on the framework of the Europe Agreements. The structured dialogue represented a series of consultative, non-decision-making meetings held between the Council and all the Central and Eastern European countries on aspects concerning Community policy areas, the Common Foreign and Security Policy and the Home and Justice Affairs pillar, and were meant to familiarise the applicants with the decision-making process as well as the institutional set-up of the Union. Along with the enhanced structured relationship, the EU leaders also included the White Paper drawn by the European Commission to provide a route plan for progressive integration of the candidates into the Single Market. Finally a pre-accession dimension was incorporated into the EU’s financial support, mainly by reorienting the PHARE programme (Pologne et Hongrie – Aide á Restructuration Economique) that had previously followed a demand-driven approach, to provide assistance in the process of legal approximation and the completion of market reforms<sup>430</sup>.

The Luxembourg European Council of 1997 established a first understanding of the Copenhagen political criteria, in terms of their function in the accession process, determining them as “a prerequisite for the opening of any accession negotiations”, while the economic criteria and the ability to fulfil the obligations arising from membership were to be assessed in a “forward-looking, dynamic way”<sup>431</sup>. The concept of the rule of law has been mentioned from the Maastricht Treaty onwards in the corpus of the Union’s primary law<sup>432</sup> and has been interpreted as an umbrella concept by the European Court of Justice

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<sup>429</sup> Organization for Security and Co-operation in Europe (1990): *Charter of Paris for New Europe* (Paris, OSCE), p. 3.

<sup>430</sup> P. van Elsuwege (2008): *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States’ Accession to the European Union*, (Leiden, Koninklijke Brill NV), p. 226.

<sup>431</sup> European Council (1997): Presidency Conclusions (Luxembourg, 13 December), point II C.

<sup>432</sup> The *Maastricht Treaty* (1992) reiterated in its preamble the attachment of EU Member States “to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law”; the *Treaty of Amsterdam* (1997) mentioned in article 6(1) that “the Union is founded on the principles of liberty, democracy, respect of human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States” and introduced in article 7 the possibility of EU sanctions (suspension of certain rights deriving from the membership status) if Member States are found guilty of a “serious and persistent breach (...) of principles mentioned in Article 6(1)”; the *Treaty of Nice* (2001) additionally authorised preventive action in the form of appropriate recommendations where there is a clear danger of a Member State committing a serious breach of fundamental rights. The *Lisbon Treaty* (2007) lists in article 2 TEU the rule of law among the

case law<sup>433</sup>, but its substance in relation to the enlargement process has been gradually reflected in the framework of Copenhagen-related documents adopted by the European Commission and the Council. The framework of Copenhagen-related documents comprised both targeted evaluations focusing on particular candidate countries as well as derivative analyses of a more general application establishing the principles of progress towards accession assessment. Included in the first category were the Commission's Opinions on the Application for Membership of the EU by the CEECs (released in 1997), the Commission's Regular Reports on the candidate countries' progress towards accession (produced annually from 1998 to 2004), the Commission's Comprehensive Country Monitoring Reports (produced in 2003 for the 2004 accession wave countries, and in 2005 for Bulgaria and Romania), two 2006 Monitoring Report on the state of preparedness of Bulgaria and Romania, and the Accession Partnerships<sup>434</sup>. The second group of acts comprised the European Commission's Agenda 2000, and its Composite and Strategy Papers. Starting from the four element scheme (democracy, the rule of law, human rights and the respect for and protection of minorities) produced by the Copenhagen political criteria, the monitoring, assessment and guidance documentation produced by the Commission and the Council initially emulated this structure.

As such, in its first official appraisal that responded to the EU membership application submitted by Romania in June 1995 and by Bulgaria six months later<sup>435</sup>, the Commission analysed democratic development and the rule of law as an 'organic combination'<sup>436</sup>, including within this common heading a brief description of the structure and functioning of the parliament, the executive and of the judiciary. By fusing democracy and the rule of law under the same sub-criterion for candidate countries to meet and by avoiding pre-set clear definitions of these notions, the Commission allowed itself a good share of flexibility in assessing progress in CEECs, gradually formulating recommendations and developing a

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fundamental values on which the Union is founded, while the EU Charter of Fundamental Rights mentions in its preamble that the "Union (...) is based on the principles of democracy and the rule of law".

<sup>433</sup> For a discussion of the European Court of Justice case law on the principle of rule of law within the EU context see L. Pech (2009): "The Rule of Law as a Constitutional Principle of the European Union", *Jean Monnet Working Paper* No. 04/09 (New York, The Jean Monnet Center for International and Regional Economic Law and Justice).

<sup>434</sup> D. Kochenov (2008): *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Alphen aan den Rijn, Kluwer Law International), pp. 67-69.

<sup>435</sup> European Commission (1997): *Agenda 2000 - Opinion on Romania's Application for Membership of the European Union* (Brussels, 15<sup>th</sup> July) DOC/97/18; *Agenda 2000 - Opinion on Bulgaria's Application for Membership of the European Union* (Brussels, 15<sup>th</sup> July) DOC/97/11.

<sup>436</sup> F. Hoffmeister (2002): "Changing Requirements for Accession", in A. Ott, K. Inglis (eds.) *Handbook on European Enlargement. A Commentary on the Enlargement Process* (The Hague, T.M.C. Asser Instituut), p. 94.

conditionality system that left very few aspects of the functioning of the candidate countries outside the EU scrutiny<sup>437</sup>.

Although the criteria did not originally specify reform of judicial systems as one of the requirements for EU accession, the interpretation given to the concept of rule of law in the evaluation documents has been largely built on two dimensions: judicial capacity (efficiency, resources, institutions) and judicial impartiality/independence. Thus the aspects observed under the democracy and the rule of law gauge in the first Opinions elaborated by the Commission were the character of elections (deemed free and fair in both countries), the exercise of local autonomy (perceived as hampered by the absence of a coherent legislative framework and limited because of financial dependency on the central authorities), the situation of the administrative sector (deemed deficient, exposed to political influence and prone to corruption), the power exercised by the secret services (in both cases perceived as extensive), and the process of dispensing justice (marked by shortcomings such as a large backlog of pending cases, deficiency of human resources, the complexity of new legislation)<sup>438</sup>. However, despite serious shortcomings, it seemed that the European Commission had set a low threshold for the meeting of the political criteria, concluding that Romania was on its way to satisfying the political criteria (which was considered to be met in 1999) and that developments in Bulgaria confirmed that the country was already meeting the requirements. This appraisal was interpreted by some authors as a move that deprived the Commission quite early on of the room for manoeuvre that it initially tried to construct by opting for the broad and over-encompassing criteria<sup>439</sup>. Moreover, whilst offering CEE countries a starting point towards reaching the opening of accession negotiations, Kochenov argues that the lack of a comprehensive set of principles for the assessment of the progress towards meeting these benchmarks, corroborated by a narrow approach to the notion of democracy and the rule of law, and a fragmented assessment that usually devoted insufficient attention to the political criteria (usually 2-4 pages compared to a dozen of pages in the Regular Reports dealing with economic

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<sup>437</sup> D. Kochenov (2005): "EU Enlargement Law: History and Recent Developments: Treaty - Custom Concubinage?", *European Integration Online Papers*, Vol. 9, No. 6.

<sup>438</sup> European Commission (1997): *Agenda 2000 - Opinion on Romania's Application for Membership of the European Union*, pp. 11-15; *Agenda 2000 - Opinion on Bulgaria's Application for Membership of the European Union*, pp. 12-15.

<sup>439</sup> D. Kochenov (2004): "Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law", *European Integration Online Papers*, Vol. 8, No. 10.

conditions) led the Commission to fail the task of providing a clear image of the real progress made by candidate countries in meeting the political Copenhagen criteria<sup>440</sup>.

The subsequent annual Regular Reports on the progress towards the accession of Romania and Bulgaria forwarded by the Commission (1998 - 2004) maintained the same format of analysis under the political criteria, but more attention was gradually allocated to the functioning of the national judicial systems and the development of the legislative and institutional anti-corruption frameworks. Below we provide a summary of the sections on judicial reform and fight against corruption in Bulgaria and Romania from the Commission's Regular Reports.

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<sup>440</sup> D. Kochenov (2004): "Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law", *European Integration Online Papers*, Vol. 8, No. 10, p. 23.

**Table 2 a. Bulgaria - Summary of observations on judicial reform and fight against corruption in 1999 – 2004 European Commission Regular Reports**

<b>Year</b>	<b><i>Developments in the area of judicial reform and the fight against corruption</i></b>	<b><i>Negative observations and Policy recommendations in Regular Reports</i></b>
<b>1999</b>	<ul style="list-style-type: none"> <li>- Amendments to the Law on the Judiciary (change composition of Judicial Council), and the Penal Code (regarding corruption);</li> <li>- Adoption of National Strategy for combating organised crime;</li> <li>- Ratification of major international anti-corruption conventions;</li> </ul>	<ul style="list-style-type: none"> <li>- Absence of a strategy to increase effectiveness and transparency of the judicial system;</li> <li>- Vagueness of the legislative framework (on the liability of dignitaries, party funding and corruption);</li> <li>- Inefficient and unaligned to EU standards training of magistrates;</li> </ul>
<b>2000</b>	<ul style="list-style-type: none"> <li>- Introduction of three-instance proceedings;</li> <li>- Adoption of new legislation (officials being required to declare assets; criminalisation of actual and attempted bribery);</li> <li>- Ratification of Civil Law Convention on Corruption.</li> </ul>	<ul style="list-style-type: none"> <li>- Lack of transparency in recruitment and promotion of judges;</li> <li>- Absence of a public judicial training institution;</li> <li>- Insufficient funding for judicial institutions;</li> <li>- Cumbersome procedures for caseload management.</li> </ul>
<b>2001</b>	<ul style="list-style-type: none"> <li>- Adoption of the Strategy for Reform of the Judicial System;</li> <li>- Obligation of newly appointed judges to be trained at the Magistrates Training Centre (NGO);</li> <li>- Adoption of the National Strategy for Combating Corruption and of the a Code of ethics for Civil Servants;</li> <li>- Ratification of Criminal Law Convention on Corruption;</li> <li>- Publishing of procurement tenders in the Public Procurement Register.</li> </ul>	<ul style="list-style-type: none"> <li>- Provisions on immunity affecting the prosecution of corruption;</li> <li>- Unclear split of roles between the Supreme Judicial Council and the Ministry of Justice;</li> <li>- No substantial progress registered regarding recruitment, appointment and training of judges;</li> <li>- Little progress in the fight against organised crime;</li> <li>- Lack of transparent standards for case assignment.</li> </ul>
<b>2002</b>	<ul style="list-style-type: none"> <li>- Approval of Action Plans for the Strategy for Reform of the Judicial System and for the National Anti-Corruption Strategy (2002-2003);</li> <li>- Amendments to the Law on the Judicial System (addition of prosecution offices and investigation services to the SJC, introduction of a competitive recruitment and promotion system);</li> <li>- Set up by the Parliament of a 24-member permanent Commission to</li> </ul>	<ul style="list-style-type: none"> <li>- Action Plans not covering the overall structure of the judicial system (judicial immunity not discussed);</li> <li>- High level of corruption attributable to low salaries, imperfect legislation, lack of transparent administration controls and poor functioning of judicial system;</li> <li>- lack of an efficient monitoring of asset declaration;</li> <li>- Lack of transparency of the case allocation system, very long proceedings and overall poor functioning of the judicial system;</li> </ul>



	<p>fight corruption;</p> <ul style="list-style-type: none"> <li>- Addition of supplementary staff to the National Service for Combating Organised Crime.</li> </ul>	<ul style="list-style-type: none"> <li>- Professional management of judges by the SJC hampered by the tripartite structure of the magistracy (judges, prosecutors and investigators);</li> </ul>
<b>2003</b>	<ul style="list-style-type: none"> <li>- Amendments to Constitution regarding magisterial immunity (functional penal immunity);</li> <li>- Transformation of the Magistrate Training Centre into the National Institute for the Judiciary;</li> <li>- Amendments to the Civil and Penal Procedural Codes (mechanisms to reduce duration of procedures) and to the Law on Judicial System (asset declaration compulsory for magistrates as well);</li> <li>- Consolidation of the anti-corruption institutional set-up (special units within ministries, police and border guard).</li> </ul>	<ul style="list-style-type: none"> <li>- Lack of comprehensive statistics on court activity;</li> <li>- Further legislative steps required to introduce the concept of liability of legal persons and the definition of fraud;</li> <li>- Unreformed investigation service.</li> </ul>
<b>2004</b>	<ul style="list-style-type: none"> <li>- Amendments to the Law on the Judicial System (introducing fixed term tenures for leading positions, clarification of the process of appointment and promotion of magistrates);</li> <li>- 44% increase of judiciary budget, organisation of the National Institute for the Judiciary (mandatory 6 months trainings), adoption by the SJC of own strategy to fight corruption in the judiciary;</li> <li>- Strengthening of anticorruption institutional set-up (collaboration between SJC, MoJ and the Prosecutor's Office);</li> <li>- Increase in pre-trial proceedings on corruption charges (from 2253 cases in 2001 to 6785 in 2003, with 431 persons convicted in 2003).</li> </ul>	<ul style="list-style-type: none"> <li>- Political interference in new appointments for top positions in the judiciary;</li> <li>- Parliamentary quota of the SJC (11 members) comprising only members from the ranks of the parliamentary majority;</li> <li>- Prosecution capacity affected by frequent referrals of cases back to the investigation stage;</li> <li>- Need for revision of the legislative framework (including penal procedure code) in order to bring the functioning of pre-trial phase in line with EU standards</li> <li>- Deficient system of judgements' enforcement (1/8 of fines being effectively collected);</li> <li>- The new Action Plan not covering high level corruption, or local corruption;</li> <li>- Little transparency regarding dignitaries' personal interests and financing of political parties.</li> </ul>

**Table 2 b. Romania - Summary of observations on judicial reform and fights against corruption in 1999 – 2004 European Commission Regular Reports**

<b>Year</b>	<b><i>Developments in the area of judicial reform and the fight against corruption</i></b>	<b><i>Negative observations and Policy recommendations in Regular Reports</i></b>
<b>1999</b>	<ul style="list-style-type: none"> <li>- Legislative modifications leading to reducing the case backlog and an improvement of the magistrates' promotion system;</li> <li>- Setting up of the National Institute of the Magistracy;</li> <li>- Establishment of National Office for the Prevention of and Fight against Money Laundering and of anti-corruption sections in ministries;</li> <li>- Entry into force of the Law on money laundering;</li> <li>- Concrete steps in tackling corruption in the judiciary (the Superior Council of Magistracy initiating 21 investigations against magistrates).</li> </ul>	<ul style="list-style-type: none"> <li>- Lack of access to case studies and court decisions;</li> <li>- Low level of technical skills in EU law, financial, fiscal and commercial law among judges;</li> <li>- Weakness of the National Council for Action Against Corruption and Organised Crime – institution established in 1997;</li> <li>- fight against corruption not addressed with sufficient determination and institutional set-up is fragmented.</li> </ul>
<b>2000</b>	<ul style="list-style-type: none"> <li>- Amendments to the Code of Civil Procedure introducing measures to speed up court procedures;</li> <li>- Decrease of pending cases and progress registered in the computerisation of courts;</li> <li>- Adoption of new legislation on the prevention and punishment of acts of corruption, penalising private sector corruption, and permitting the tackling of high level corruption in the public sector;</li> <li>- Establishment of Anti-corruption and Organised Crime Unit within the Prosecutor's Office.</li> </ul>	<ul style="list-style-type: none"> <li>- The significant influence of the Ministry of Justice over judicial appointments;</li> <li>- Low technical skills in many areas of law;</li> <li>- Unclear division of tasks among bodies involved in the fight against corruption;</li> <li>- Non-ratification of important international conventions concerning the fight against corruption (such as the Civil and Criminal Law Convention on Corruption; Convention on Laundering Search, Seizure and Confiscation of the Proceeds from Crime).</li> </ul>
<b>2001</b>	<ul style="list-style-type: none"> <li>- Entry into force of the revised version of the Civil Procedure Code (speeding up court procedures; improving enforcement of judicial decisions);</li> <li>- Introduction of mandatory publication of reasoning for all decisions;</li> <li>- Adoption of ordinance introducing</li> </ul>	<ul style="list-style-type: none"> <li>- Extended influence of the Ministry of Justice over the Superior Council of the Magistracy (SCM), appointing 1/3 of its members and chairing its meetings;</li> <li>- Lack of transparency in the demotion of court presidents and vice-presidents;</li> <li>- Inactivity of the Anti-corruption and Organised Crime Unit within the Prosecutor's Office not functional due to lack of staff and equipment;</li> </ul>

	public procurement procedures and establishing right to appeal against the award of public contracts.	<ul style="list-style-type: none"> <li>- Non-ratification of the Council of Europe conventions on corruption;</li> <li>- No noticeable reduction in levels of corruption.</li> </ul>
2002	<ul style="list-style-type: none"> <li>- Adoption of the National Plan and Programme for the Prevention of Corruption;</li> <li>- Setting up of the National Anti-Corruption Prosecutor's Office (NAPO) replacing the existing anti-corruption section that investigates cases involving sums over €100.000 and relating to high-ranking officials;</li> <li>- The establishment of 15 regional branches of NAPO to Courts of Appeal; ratification of Civil and Criminal Law Conventions on Corruption.</li> </ul>	<ul style="list-style-type: none"> <li>- Previous concerns not addressed (involvement of executive in judicial affairs; the extensive right of appeal of the General Prosecutor; inadequate human resources policy; possibility of doctors in law, general inspectors or legal counsellors within MoJ to be appointed as judges/prosecutors without competitive examination);</li> <li>- Considerable role of the MoJ in the appointment of prosecutors to NAPO;</li> <li>- Weakness of NAPO and overlapping institutional tasks (with the Control Office of the Prime Minister);</li> <li>- Excessive court workload and limited legal aid.</li> </ul>
2003	<ul style="list-style-type: none"> <li>- New selection procedure for the SCM (budges selected by the judiciary and proposed to parliament);</li> <li>- Repealing of discretionary power of the General Prosecutor;</li> <li>- Adoption of a Judicial System reform Strategy to enhance judicial independence;</li> <li>- Revision of Constitution (enshrining principles of judicial independence and right to fair trial);</li> <li>- Extension of mandate for SCM members to reduce effect of political patronage and inclusion of representatives of civil society in the SCM;</li> <li>- Adoption of new anti-corruption legislation (extended requirements for public disclosure of assets by officials; concept of conflict of interests was introduced, expansion of types of interests considered incompatible with public positions).</li> </ul>	<ul style="list-style-type: none"> <li>- Maintaining of power to directly appoint judges (from other legal professions) by MoJ;</li> <li>- Limited investigation power of NAPO due to understaffing and limited operational independence due to MoJ's responsibility for anti-corruption enforcement;</li> <li>- Adoption of new anti-corruption legislation through the legislative mechanism of vote of confidence restricting possibility of consultation;</li> <li>- Weak provisions on conflict of interest, potential loopholes such as asset transfer to relatives in order to bypass asset declaration;</li> <li>- Maintenance of the General Prosecutor's discretionary power to bring extraordinary appeals in <i>criminal</i> cases;</li> <li>- Absence of clear rules on distribution of cases;</li> <li>- Need for strategic assessment of the nature and scale of corruption.</li> </ul>
	<ul style="list-style-type: none"> <li>- Requirement for courts of appeal to publish annual jurisprudence bulletins;</li> <li>- Adoption of the three-law package: on the SCM (full responsibility for</li> </ul>	<ul style="list-style-type: none"> <li>- Continued political pressure exerted on judges while exercising official duties;</li> <li>- Limited access to case law, lack of information about new legislation and lack of specialised training for judges;</li> </ul>

2004	<p>the recruitment, career development and sanctioning system), on the Organisation of the Judiciary (establishing random allocation of cases based on IT system) and on the Statute of Magistrates;</p> <ul style="list-style-type: none"> <li>- Adoption of New Criminal Code, of legislation decreasing threshold for wealth declarations;</li> <li>- Removal of obligation for NAPO to report to Parliament.</li> </ul>	<ul style="list-style-type: none"> <li>- Limited impact of the National Corruption Strategy and Action Plan;</li> <li>- Low number of convictions stemming from NAPO investigations (out of the 2300 registered cases investigated by NAPO between 2003 and 2004 only for 160 cases prosecutions were launched in court);</li> <li>- Unprecedented backlog of appeals (from over 3.000 in 2002 to over 35.000 in 2004) by giving responsibility for ruling on all second appeals to the High Court of Cassation and Justice.</li> </ul>
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But if so far the Union brought together countries under the umbrella of eligibility for EU membership based on their association status, the Florence European Council in June 1996 introduced the mechanism of differentiation – based on the *regatta principle* – whereby each state which had signed an Association Agreement with the EU was to be individually judged in relation to whether or not having met the criteria. Furthermore, in an effort to strike the right balance between the speed and depth of the accession process, the Luxembourg European Council in December 1997 introduced a hierarchic differentiation, conditioning the opening of negotiations with candidate states to compliance with the political requirements, the economic criteria and the ability to fulfil the obligations arising from membership being assessed in a forward-looking, dynamic way<sup>441</sup>. Hence, while aspiring to maintain all countries targeting membership in a single accession process but making use of the input provided through monitoring instruments and encouraging momentum for reform, the Council invited six of the CEE countries to start negotiations in March 1998 (the Luxembourg Six or ‘ins’), while from the remaining five countries (Bulgaria, Latvia, Lithuania, Romania and Slovakia) further results were expected.

The broad framework of membership conditions which needed to be satisfied before accession was supplemented by the Accession Partnerships<sup>442</sup>, which formed the basis of the enhanced pre-accession strategy. The new instruments provided *inter alia* for a comprehensive articulation of policy priorities agreed upon between the Commission and the candidate countries that needed to be implemented within the year or in the medium

<sup>441</sup> European Council (1997): *Conclusions of the Presidency* (12-13 December, Luxembourg), available at <http://aei.pitt.edu/43332/1/LUXEMBOURG EUROPEAN COUNCIL.pdf>, paragraph 25.

<sup>442</sup> Council of the European Union (1998): *Council Regulation No. 622/98 on Assistance to the Applicant States in the Framework of the Pre-Accession Strategy, and in Particular on the Establishment of Accession Partnerships* (16 March).

term (defined as a period of five years). The European Commission reported on applicants' progress in meeting each priority (based on the countries' national policy programmes) while making financial aid conditional upon states satisfying the Copenhagen criteria and meeting the specific priorities set up in the Accession Partnership<sup>443</sup>. This new instrument covered a wide range of policy areas, setting a timeframe for the achievement of *acquis*-related issues of concern as well as priorities included under the political and economic Copenhagen criteria. But it also consolidated the EU's incentive structure, setting explicit financial threats to penalise non-compliance with EU rules and including financial and accession advancement rewards. While the Commission monitored implementation, the Council ultimately applied conditionality, being able at any time to take appropriate steps with regard to any pre-accession assistance (PHARE - Pologne et Hongrie - Aide á Restructuration Economique; SAPARD - Special Accession Programme for Agriculture and Rural Development; ISPA - Instrument for Structural Policies for Pre-Accession), acting by qualified majority on a proposal from the Commission where commitments contained in the Agreements were not respected. In terms of the priorities set by the Accession Partnerships that touched upon judicial reform and the fight against corruption, in Romania's case improving the functioning of the judiciary through the adoption of new penal and penal procedure codes, the passing of suitable legislation on corruption prevention, the establishment of an independent anti-corruption department, and ratification of the European conventions on corruption and money laundering were identified as short-term objectives to be achieved by the end of 2000<sup>444</sup>. Similarly, in Bulgaria's case strengthening the independence of magistrates, the efficiency of the court system and the enforcement of civil and penal judgements were identified as key priorities to be achieved in the short term<sup>445</sup>. In its 2000 Regular Reports, the European Commission noted that Romania had only partially met the Justice and Home Affairs priorities that had been agreed<sup>446</sup> and that in Bulgaria "[w]hilst progress has been made to meet some of the JHA (Justice and Home Affairs) priorities, those on strengthening the judiciary and developing a national strategy

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<sup>443</sup> H. Grabbe (2003): "Europeanisation Goes East: Power and Uncertainty in the EU Accession Process", in J. Featherstone, C. Radaelli (eds.) *The Politics of Europeanization* (Oxford, Oxford University Press), p. 313.

<sup>444</sup> European Commission (1999): *Romania: 1999 Accession Partnership* (Brussels, European Commission).

<sup>445</sup> European Commission (1999): *Bulgaria: 1999 Accession Partnership* (Brussels, European Commission).

<sup>446</sup> European Commission (2000): *Regular Report from the Commission on Romania's Progress towards Accession* (Brussels, European Commission), p. 92.

to combat corruption have not been met"<sup>447</sup>. However, despite the rather critical assessment of the countries' progress in fulfilling the short-term priorities of the Accession Partnership<sup>448</sup>, and an unsatisfactory advancement in the area of political reforms underlined by the regular reports, negative conditionality in the form of cutting of pre-accession financial assistance was avoided, while the official reprimanding of the two countries by the Commission and the European Parliament based on the system of benchmarking prevailed<sup>449</sup>. Thus, the EU manifested its preference for exercising implicit threats that usually translated into delaying accession advancement rewards<sup>450</sup>, one early instance being the Luxembourg European Council's decision to include Romania and Bulgaria into the 'pre-ins' group and open accession negotiations in February 2000, instead of March 1998.

A second essential component of the EU's enhanced pre-accession strategy has been the financial aid made available by the EU in order to enable the alignment with the Union *acquis* prior to accession. The PHARE programme (Pologne et Hongrie - Aide à Restructuration Economique) - one of the three pre-accession financial instruments designed to assist candidate countries in their preparation for joining the EU - had been opened for Romania and Bulgaria through Regulation 2698/90. In Romania's case, however, the Council suspended the effective implementation of economic aid until January 1991, largely due to the violent suppression of student demonstrations in June 1990 by the National Salvation Front dominated government<sup>451</sup>. Whilst the main focus of the funding line was to be restricted to the private sector, with an emphasis on certain areas of economic activity such as the industry, investment, transport, environment protection, trade and services, in 1992 the European Parliament insisted on creating a PHARE Democracy Programme that would focus on politics and civil society. A further extension was made in 1998 when PHARE funding was allocated for projects pertaining to the Justice

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<sup>447</sup> European Commission (2000): *Regular Report from the Commission on Bulgaria's Progress towards Accession* (Brussels, European Commission), p. 93.

<sup>448</sup> D. Papadimitriou, D. Phinnemore (2008): *Romania and the European Union. From Marginalisation to Membership* (Oxon, Routledge), p. 42.

<sup>449</sup> T. Börzel, T. Risse (2009): "Venus Approaching Mars? The European Union's Approaches to Democracy Promotion in Comparative Perspective", in A. Magen, T. Risse, M. McFaul (eds.) *Promoting Democracy and the Rule of Law. American and European Strategies* (Hampshire, Palgrave Macmillan), p. 41.

<sup>450</sup> E. Gateva (2013): "Post-Accession Conditionality - Translating Benchmarks into Political Pressure?", *East European Politics*, Vol. 29, No.4, pp. 420-42.

<sup>451</sup> European Commission (1993): *Second Annual Report from the Commission to the Council and the European Parliament on the Implementation of Community Assistance to the Countries of East and Central Europe* (PHARE) in 1991, (Brussels, European Commission), COM(93) 172 final, p. 4.

and Home Affairs area and 30% of the total PHARE funding was devoted to institution building. Moreover, from this point onwards PHARE monies were disbursed in the frame of annual national programmes drafted by candidate countries on the basis of the Accession Partnership priorities and the weaknesses identified by the Commission in its Regular Reports. PHARE national allocation was decided by the Commission on the basis of GDP and population, but also taking into account past performance, needs, absorption capacities and progress in implementing individual Accession Partnerships<sup>452</sup>. An evaluation of the European Commission of the total allocation for Justice and Home Affairs projects funded through PHARE estimated that between 1998 and 2003 €57million had been accorded to Bulgaria, while for Romania the sum amounted to €102million<sup>453</sup>. Launched in 1998 as an initiative of the European Commission to address the issue of deficient administrative and judicial capacities in the candidate countries, the twinning instrument was designed to assist candidate countries in strengthening their administrative and judicial capacities to implement EU legislation as future member states. The format for its implementation rested on a secondment of civil servants from EU member states to work as advisers to beneficiary institutions from candidate states for periods longer than one year. The ‘twinning exercise<sup>454</sup>’ was structured as a two stage programme whereby beneficiary candidate countries issued calls for tenders addressed to any potential administrative partner in EU member states, and administrators from EU member states submitted in response proposals to the European Commission which ensured that the selection of the partner and the implementation of the project were procedurally correct and substantially coherent with the National Plan that each candidate country had previously agreed with the European Commission<sup>455</sup>. The key objective was that of knowledge and competencies transfer from old member states to prospective ones. In Bulgaria, for the period 1998-2007, 141 twinning projects for a total amount of €138 million had been implemented, and 42

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<sup>452</sup> P. Nikolova (2008): “The Implementation of PHARE, ISPA and SAPARD in Bulgaria”, in Centre for EU Enlargement Studies, *Using IPA and Other EU Funds to Accelerate Convergence and Integration in the Western-Balkans* (Budapest, Center for EU Enlargement Studies), p. 91.

<sup>453</sup> European Commission (2006): *Support to the Justice and Home Affairs Acquis. Thematic Evaluation Report of the European Phare Programme* (Brussels, European Commission), Annex 5.

<sup>454</sup> D. Phinnemore, D. Papadimitriou (2003): “Exporting Europeanisation to the Wider Europe: the Twinning Exercise and Administrative Reform in the Candidate Countries and Beyond”, *Southeast European and Black Sea Studies*, Vol. 3, No. 2, pp. 1-22.

<sup>455</sup> D. Piana (2010): *Judicial Accountabilities in New Europe. From Rule of Law to Quality of Justice* (Surrey, Ashgate Publishing), p. 65.

had been designed to deliver specific results in the area of justice and home affairs<sup>456</sup>. Similarly, in Romania between 1998 and 2006, out of 207 initiatives launched, 50 projects had been in the area of justice and home affairs<sup>457</sup>. While the Justice and Home Affairs *acquis* did not cover aspects that would fall under the realm of the rule of law and generally under the Copenhagen political criteria such as judicial independence and efficiency and the fight against corruption<sup>458</sup>, a significant percentage of EU funded projects implemented under the label of Justice and Home Affairs embedded elements of the Copenhagen political criteria (in Romania's case 55% of projects involving JHA and Political criteria, and 17% in Bulgaria's case<sup>459</sup>).

However, in the absence of a unitary model of rule of law and facing a variety of administrative and judicial practices across the EU, clashes between experts on the ground over effective solutions<sup>460</sup>, concerns regarding the capacity both in terms of human resources and financial constraints of candidate countries to absorb the knowledge accumulated, and the question of sustainability of intervention after the programme ended hindered the effectiveness of the instrument<sup>461</sup>.

**Table 3 PHARE-funded projects in Bulgaria in the area of judicial reform - 1997-2007**

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| <ul style="list-style-type: none"> <li>• PHARE 1999 – Strengthening the Independence of the Judiciary and Building the Capacity of the Ministry of Justice (budget: €2 million - twinning)</li> <li>• PHARE 2000 – Strengthening the Public Prosecutor's Office (€3 million - investment)</li> </ul> |
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<sup>456</sup> D. Markov (2013): "The Role of International Assistance for Building the Capacity of National Law Enforcement Institutions: Lessons Learned from the Bulgarian Experience", in G. Andreopoulos (ed.) *Policing Across Borders. Law Enforcement Networks and the Challenges of Crime Control* (New York, Springer), p. 61.

<sup>457</sup> European Commission (2007): *Twinning: Key facts and Figures*, 2006 (Brussels, European Commission).

<sup>458</sup> Starting with the 2005 negotiation frameworks for Croatia and Turkey the *acquis* in the area of Justice, Freedom and Security has been widened by the introduction of Chapter 23 "Judiciary and Fundamental Rights" that focuses on the principles of liberty, democracy, respect for human rights and the rule of law. Chapter 23 includes four main headings: judiciary, fight against corruption, fundamental rights and EU citizens' rights. Chapter 24 entitled "Justice, Freedom and Security" covers the fight against all types of organised crime and terrorism, the Schengen rules, border control and visas, as well as migration, asylum, judicial cooperation in criminal and civil matters and police and customs cooperation.

<sup>459</sup> European Commission (2006): *Support to the Justice and Home Affairs Acquis. Thematic Evaluation Report of the European Union Phare Programme* (London, ECOTEC Research and Consulting), p. 16.

<sup>460</sup> A. Mungiu-Pippidi (2009): "A House of Cards? Building the Rule of Law in East Central Europe", *Paper presented at the ECPR General Conference* (Potsdam, European Consortium for Political Research).

<sup>461</sup> D. Bailey, L. De Propris (2004): "A Bridge too Phare? EU Pre-Accession Aid and Capacity-Building in the Candidate Countries", *Journal of Common Market Studies*, Vol. 42, No. 1, pp. 77-98.



- PHARE 2001 – Recruitment and Training Strategy for the Judiciary (€2 million - technical assistance)
- PHARE 2002 – Implementation of the Judicial Reform Strategy (€10.8 million – twinning and investment)
- PHARE 2003 – Support of the Implementation of the Strategy for Reform of the Judiciary through Introduction of Information technologies (€27.2 million - twinning, technical assistance, investment)
- PHARE 2004 – Strengthening of the Bulgarian Judiciary – Implementation of new penal procedures code; strengthening interagency cooperation between Public Prosecutor’s Office and other concerned bodies in the fight against corruption (€878.600 – technical assistance; twinning)
- PHARE 2004 – Judicial Cooperation in Penal and Civil Matters (€1 million – technical assistance)
- PHARE 2005 – Strengthening Capacity of Anti-Corruption Commission to Counteract Corruption in Public Administration and Judiciary (€4.7 million – technical assistance)
- PHARE 2006 – Strengthening public management of the judiciary and court administration (€1.8 million twinning, technical assistance)
- PHARE 2006 – A Further Step towards a Higher Quality of Training of Bulgarian Judiciary (€800.00 - twinning, technical assistance)

**Source:** Author’s consultation of European Commission: PHARE Financing Memoranda and Project Fiches ([http://ec.europa.eu/enlargement/instruments/former-assistance/phare/index\\_en.htm](http://ec.europa.eu/enlargement/instruments/former-assistance/phare/index_en.htm)).

**Table 4 PHARE-funded projects in Romania in the area of judicial reform - 1997-2007**

- PHARE 1999 – Consolidating Support for the National Institute of the Magistracy (€1 million – technical assistance; investment)
- PHARE 1999 – Inter-Institutional Programme on Anti-corruption – establishment of anti-corruption structure within the Prosecutor’s Office (€2 million - twinning); investment in IT and Technical Assistance to National Anti-Corruption Prosecution Office (€2 million - investment)
- PHARE 2000 – Continuation of the Development of the Case and Document Management System (€8.75 million - investment)

- PHARE 2001 – Continuation of assistance in strengthening the anti-corruption structures in the Romanian judicial system (€0.5 million - twinning)
- PHARE 2002 – Modernisation and reform of law enforcement agencies and strengthening of anti-corruption structures (€4.3 million - investment)
- PHARE 2002 – Assistance in strengthening the independence and functioning of the judiciary system (€1.8 million - twinning)
- PHARE 2003 – Further strengthening the institutional capacity to fight against corruption (€2 million - twinning)
- PHARE 2004 - 2006 – Assistance to enhance the independence, professionalism and management capacity of the Romanian judiciary (€ 56 million - twinning, investment, technical assistance)

**Source:** Author's consultation of European Commission: PHARE Financing Memoranda and Project Fiches ([http://ec.europa.eu/enlargement/instruments/former-assistance/phare/index\\_en.htm](http://ec.europa.eu/enlargement/instruments/former-assistance/phare/index_en.htm)).

What also needs to be emphasised here is that post-communist Central and East European countries became the first target of a very demanding political, economic and institutional conditionality, closely linked with the process of transition towards democracy and market economy. Hence, accession paved the way not only for a Europeanisation process understood as domestic adaptation prompted through conditionality<sup>462</sup>, but also involved the EU in a more structural process, that of institution-building which implied the reform of the judiciary, administration and policymaking structures. However, not having a uniform matrix of institutional design with regard to the implementation of structural reforms required prior to accession, as well as an unclear methodology created the image of the EU leading a fleet of “ships built at sea” that would retain important elements of the initial structure<sup>463</sup>. Due to protracted legacies which were reflected on the one hand in the absence of strategies for institutional development, and on the other on the presence of reluctant Europeanizers both from the political sphere and the judiciary, the impact and sustainability of EU funded projects were at times threatened, as the commissioned 2006 Thematic Evaluation of the PHARE support in the area of Justice and Home Affairs in Romania and Bulgaria noted:

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<sup>462</sup> T. Börzel, T. Risse (2003): “Conceptualising the Domestic Impact of Europe”, in K. Featherstone, C. Radaelli (eds.) *The Politics of Europeanization* (Oxford, Oxford University Press).

<sup>463</sup> A. Mungiu-Pippidi (2008): “The EU as a Transformation Agent. Lessons Learnt from Governance Reforms in East Central Europe”, *Hertie School of Governance Papers*, No. 33, p. 11.

“There is evidence of programmes which are at risk of poor impact or sustainability because of the lack of strategic framework, particularly with regard to overlapping and duplication, or inadequately planned and prioritised resources.”<sup>464</sup>

“Commission officials and twinning experts raised doubts regarding the institutional ability of beneficiaries to implement the *acquis* to the point at which it can deliver freedom, security and justice to citizens, particularly with regard to: (...) fraud and corruption, and money laundering. (...) [M]any Justice and Home Affairs projects targeted subordinate bodies and agencies which generally lacked the necessary ministerial authority to enforce policy and procedures.”<sup>465</sup>

Other studies have questioned the very design of the twinning projects arguing that the EU’s instrumental approach to enlargement that materialised into setting fixed universal goals, and devising country-specific road-maps for those goals to be achieved with the help of various instruments, incentives and penalties led to an overestimation of the role of external incentives/carrots/the prize of EU membership, and to the implicit presumption that national institutions will be willing to implement/assimilate<sup>466</sup>. This vertical approach has hampered the effectiveness of some projects such as the twinning initiative for the strengthening of the Romanian National Institute of Magistrates (NIM) where due to lack of cooperation between external experts and the management of NIM, both project leaders needed to be changed, delaying the start of activities<sup>467</sup>. On a similar note, Bozhilova’s study of Bulgaria’s quest for EU membership substantiated the hypothesis that this Money & Men solution followed by the EU when extending membership to CEECs created a catch 22 situation for Bulgaria<sup>468</sup>. As conditionality surpassed the area of the *acquis*, and as unsatisfactory responses to benchmarks and criteria were penalised with further delays to integration, candidate countries such as Bulgaria and Romania faced the risk of veering off the democratic path of reform (retrenchment). Bozhilova argues that while the EU offered money and personnel (expertise) openly to all candidate states, this offer was essentially a

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<sup>464</sup> European Commission (2006): *Support to the Justice and Home Affairs Acquis. Thematic Evaluation Report of the European Union Phare Programme*, p. 12.

<sup>465</sup> European Commission (2006): *Support to the Justice and Home Affairs Acquis. Thematic Evaluation Report of the European Union Phare Programme*, p. II.

<sup>466</sup> D. Rem, D. Gasper (2008): “Romania’s Accession Process into the European Union: Discourses at Policy-, Program-, and Project-Levels in the Justice Sector”, *Institute of Social Studies Working Paper No. 463* (The Hague, Institute of Social Studies).

<sup>467</sup> D. Rem, D. Gasper (2008): “Romania’s Accession Process into the European Union: Discourses at Policy-, Program-, and Project-Levels in the Justice Sector”, p. 22.

<sup>468</sup> D. Bozhilova (2008): *Bulgaria’s Quest for EU Membership. The Europeanization of Policies in Transition* (Bloomington, AuthorHouse), pp. 47-77.

matter of the latter being able to import the resources and make use of them in order to sustain progress (absorption capacity)<sup>469</sup>. Thus, this approach took away the focus from the problem of institutional capacity-building, despite the fact that CEECs needed to dismantle communist-style governance and implementation structures, so to build new ones compatible with liberal democratic principles.

Yet, despite concerns regarding the impact and sustainability of projects funded through PHARE, with a particular emphasis on twinning exercises, probably one of the most important projects in Romania's case has been the PHARE programme RO9910.05 that supported the establishment of the National Anti-Corruption Prosecutor's Office (NAPO) – a specialised body with the task of carrying out the criminal pursuit activity in cases regarding corruption crimes. The programme had an investment component which facilitated a better cooperation between the anti-corruption investigation unit and the Ministry of Administration and Interior and the General Customs Authority and assured an effective information flow between the entities. Through the twinning component, over 80 seminars were held on topics ranging from the protection of the financial interests of the European Union to the concept of corruption, money laundering, tax evasion and inquiry techniques<sup>470</sup>. Further PHARE technical and investment assistance was provided for the development of NAPO in 2003 and in 2004, in order to develop the institution's territorial services and improve its capacities for retrieving, inspecting, analysing, investigating and storing digital evidence within corruption cases<sup>471</sup>. Yet, while several independent reviews, including peer reviews by the European Commission and the non-governmental organisation Freedom House acknowledged the establishment of NAPO as an important step in the right direction, especially compared to the results recorded up until 2002, when the Unit against Corruption and Organised Crime within the National Public Ministry acted as the specialised body in fighting corruption, the still present reluctance of NAPO to take action against high level political corruption cases was raised once again<sup>472</sup>. The state of affairs shifted only in the context of increased pressure from the EU for results in the fight against corruption that culminated during 2004-2005 when the European Commission

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<sup>469</sup> D. Bozhilova (2008): *Bulgaria's Quest for EU Membership. The Europeanization of Policies in Transition*, p. 49.

<sup>470</sup> Government of Romania (2003): *Report on the Progress in Preparing the Accession to the European Union – September 2002 – June 2003* (Bucharest), p. 51.

<sup>471</sup> Ministry of Justice (2005): Conclusions regarding the 2005 Audit of the National Anti-corruption Directorate (Bucharest, Government of Romania).

<sup>472</sup> J. Windsor, C. Walker (2004): *The Anticorruption Policy of the Romanian Government. Assessment Report* (Washington D.C., Freedom House).

highlighted the need to include within the Accession Treaty with Romania a safeguard clause that would postpone the envisaged date of accession by one year if there was clear evidence of serious risk that the country would be manifestly unprepared to meet the requirements of membership<sup>473</sup>. However, we will focus more in the following sections on the EU's strategy of gate-keeping and its effectiveness in creating momentum for the speeding of reform in Romania and Bulgaria. After having built a clearer and hopefully comprehensive image of the external permissive conditions – necessary, but insufficient on their own – for a critical juncture to occur at a national level, we turn to the domestic realm and trace back the conditions that set the stage for critical junctures to occur.

#### ***4.4. Understanding the past, anticipating the future?***

This section will review the political and economic transition of the two countries and their course towards EU integration as it swayed between exclusion, differentiation and inclusion. The discussion will begin by briefly introducing the historical context and the enabling factors for the development and diffusion of cronyism during the early stages of democratic transition. This will provide us with a basis for understanding the inconsistencies of the early judicial reform and the hindrances that have delayed or even diluted the fight against corruption. In consonance with the theoretical framework discussed at the outset of this chapter we will outline the permissive and productive conditions for political change and argue that the manifestation of both types of conditions in 2005 in Romania's case had generated a critical juncture of which effects we can identify at present. *A contrario*, the same critical moment was translated in Bulgaria's case as a missed window of opportunity, the country continuing on a path of incremental institutional change in reforming its judiciary and controlling malfeasance.

Democratic transition is considered by the transitologist literature as having been completed when a new government that is the result of free and popular vote conducted on the basis of commonly agreed political procedures comes to power and benefits of *de facto* authority to generate new policies, and when the legislative, executive and judicial branches

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<sup>473</sup> European Commission (2004): *Strategy Paper of the European Commission on Progress in the Enlargement* (Brussels, European Commission), COM(2004)657 final.

created by the new democracy do not have to share power with other bodies *de jure*<sup>474</sup>. As well as accommodating initiation by opposition groups (from below), democratic transition can also be facilitated by the authoritarian political elite in power (from above), or occur to that matter as a result of actions of both government and opposition groups<sup>475</sup>. In the face of a larger wave of change in Central and Eastern Europe and a sense that the repression policies of the Communist regime would no longer work, in certain instances, the younger, less implicated leaders of what was to become the former regime became the first democrats, opening up to political competition early on in order to pre-empt the mobilisation and consolidation of opposition forces that could attenuate their dominance. Using the “palace coup”<sup>476</sup> (more the case of Bulgaria as the political elites initiated and guided a peaceful transition, while in Romania events took a regretful violent turn) to their advantage, the new governing elites anticipated the potential challenge coming from the streets and shifted their policy objectives both externally, by adopting the ‘return to Europe’ discourse meant to secure them some international legitimacy and internally, by evoking feelings of nationalism in the public in order to gain the electoral support. However, the ramifications of this antagonistic strategy of seeking simultaneously European legitimization and domestic support whilst nurturing nationalistic tendencies translated into the pace and depth of the Europeanization process within the two countries. The costs of fostering the institutions pertaining to liberal democracies and the requirements of comprehensive economic reform were too high to bear as they ultimately converted into the context of political and market competition, privatization and liberalization, rule of law and freedom which would have severely constrained their rent-seeking practices and grasp of power. Hence, despite their democratic rhetoric, the non-opposition governments started crafting what Milada Vachudova called *illiberal patterns of political change*, wrapping democratic institutions, sabotaging economic reform and fostering intolerance in their efforts to concentrate and prolong their access to power<sup>477</sup>.

The complex transition to democracy and to market economy in Central and Eastern Europe countries has generated favourable conditions for contradictions and setbacks such

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<sup>474</sup> J. Linz, A. Stepan (1996): *Problems of Democratic Transition and Consolidation. Southern Europe, South America, and Post-Communist Europe* (Baltimore, Johns Hopkins University Press), p. 2.

<sup>475</sup> E. Giatzidis (2002): *An Introduction to Post-Communist Bulgaria: Political, Economic, and Social Transformation* (Manchester, Manchester University Press), p. 3.

<sup>476</sup> F. Lirzin (2009): “L’Union Européenne Face au Défi de la Crise des Pays d’Europe Centrale et Orientale”, *Questions d’Europe*, No. 134, p. 1.

<sup>477</sup> M. Vachudova (2005): *Europe Undivided: Democracy, Leverage and Integration After Communism* (Oxford, Oxford University Press), p. 39.

as political, judicial and administrative corruption to cohabit along with political pluralism, institutional reform, the rule of law, privatisation, and the formation of a free civil society. Daniel Kaufmann and Paul Siegelbaum explain this paradox as “transition from the exploitation of power and access to goods and special perks, to the unchecked appropriation of wealth for private use”<sup>478</sup>. Whilst under the communist regime corruption in its different forms was “somewhat held in check by the discipline of the Communist Party, draconian anti-bribery laws and the rigidity of the overall system of itself”<sup>479</sup>, after the breakdown of the socialist system a normative, institutional and political vacuum was created which provided a fertile soil for a “general deterioration of values”, the establishment of a “moral wasteland”<sup>480</sup> and the proliferation of clientelistic structures. In both countries, corruption under the communist regimes was largely shaped by the rigidity of the systems that encouraged the flourishing of nepotism as well as a series of cast privileges of which the top *nomenklatura* benefited. Along with the regime leaders and their families, the members of the highest echelons would gain substantially higher incomes (5-6 times larger than the highest salary allowed by the official remuneration structure), reside in luxurious residences and have access to goods that were absent from the national markets<sup>481</sup>. Submitted to severe privations generated by an increasing inefficient command and planned economy, the majority of population in both countries started to engage in the bribery of the local *nomenklatura* and other state officials. The remarkable changes in the Soviet Union from the mid-1980s onwards embodied by Mikhail Gorbachev’s objective to humanise the communist system were met with strong opposition by both the Ceaușescu and the Zhivkov regime, as both dictators feared the unforeseen consequences upon the *status quo* of such “unrestrained openness of speech in the Soviet Union”<sup>482</sup>.

However, this episode generated slightly distinct trajectories. In Bulgaria, behind the appearance of inertia, changes had been underway for several years, the most important being the regulations governing economic liberalisation promoted in the late 1980s that had planted the seeds both for the regime change and for the ‘smash and grab’ capitalism of

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<sup>478</sup> D. Kaufmann, P. Siegelbaum (1996): “Privatization and Corruption in Transition Economies”, *Journal of International Affairs*, Vol. 50, No. 2, p. 424, pp. 419-58.

<sup>479</sup> *Ibid.*, p. 423.

<sup>480</sup> See T. Verheijen, A. Dimitrova (1996): “Private Interests and Public Administration: the Central and East European Experience”, *International Review of Administrative Sciences*, Vol. 62, No. 2, pp. 197-218.

<sup>481</sup> G. Boldur-Lățescu (2004): *The Communist Genocide in Romania* (New York, Nova Science Publishers), p. 56.

<sup>482</sup> G. Fotev (1996): “Total Crisis and the Reorganization of Society”, in J. Coenen-Huther (ed.) *Bulgaria at the Crossroads* (New York, Nova Science Publishers), p. 17.

the post-communist transition in the 1990s<sup>483</sup>. Among the key officials involved in the preparation of these regulations was Andrei Lukanov, minister for foreign economic affairs from 1987 until 1989 and the country's prime minister between February and December 1990. Andrei Lukanov and the foreign minister (since 1972), Petur Mladenov were the most prominent members of the top nomenklatura who, realising that the communist system was dying, understood that through economic reform the communists could retain power<sup>484</sup>. The set of new rules was designed as a limited albeit reluctant Bulgarian version of the Soviet Perestroika<sup>485</sup>, and authorised the restructuring of state firms as anonymously owned and limited liability companies (decree no. 56/January 1989). Among the beneficiaries of this new legislative context that had enabled by September 1989 the establishment of nearly 5,520 private firms<sup>486</sup> were numerous state officials and members of the economic intelligence services. Unfortunately, this move towards further relaxation of state authority also opened a window for fuzzy institutionalisation<sup>487</sup> – where the boundaries between the state and economy, and the public and private spheres became unclear after the regime transition. Multigroup – Bulgaria's largest business conglomerate up until the early 2000s – is one such case in point. Being established in Bulgaria in 1992 by Multigroup International Holding – the parent company set up in 1990 in Lichtenstein, the entity has developed throughout the country's transition period through political and informal power wielding. In the years after 1989, it saw a steady flow of personnel from the state administration (the Bulgarian National Bank, the Privatisation Agency, and the National Electric Company among others) to its managerial positions, it quickly obtained the status of preferred business associate of various state-owned enterprises, and even gained control of their majority during the early phases of privatisation, including in its portfolio 120 Bulgarian companies from sectors such as metallurgy, mining, engineering, petrochemicals, and distribution of natural gas. However, as Ganey's detailed analysis of Multigroup's rise observes "the profits of the private conglomerate [have been] inevitably

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<sup>483</sup> B. Quirke (2015): "EU Fraud and New Member States – A Success Story? The Case of Bulgaria", in J. Van Erp, W. Huisman, G. Vande Walle (eds.) *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (Oxon, Routledge), p. 233.

<sup>484</sup> R. Kaplan (1998): "Hoods against Democrats", *The Atlantic Monthly*, Vol. 282, No. 6, pp. 32-36.

<sup>485</sup> For a more extensive discussion of the set of policies see V. Paraskevov (2012): "The Decline of Socialism in Bulgaria: Mikhail Gorbachev, Todor Zhivkov and Soviet Perestroika, 1985-1989", *Socialist History*, Vol. 42, pp. 25-42.

<sup>486</sup> N. Ragaru (2010): "Forging Capitalism: A Bulgarian Case-Study", in J-L. Briquet, G. Favarel-Garrigues (eds.) *Organized Crime and States. The Hidden Face of Politics* (Basingstoke, Palgrave Macmillan), p. 121.

<sup>487</sup> W. Outhwaite, L. Ray (2005): *Social Theory and Postcommunism* (Oxford, Blackwell Publishing), p. 80.



accompanied by losses for its state-owned partners"<sup>488</sup>. Described as having a "Mafia structure", Multigroup's activity has been criticised throughout time by the national media as ranging from contraband to rent-extracting schemes such as the Topenergy affair in 1995 which resulted in Bulgaria finding itself buying the most expensive natural gas in Europe after the highly disadvantageous governmental decision of granting Multigroup almost exclusivity in the distribution of natural gas on the domestic market<sup>489</sup>. Thus privatisation, whose foundations had been laid earlier than in Romania's case, had been quickly transformed into a mechanism through which the threatened apparatchiks could lock in power by organising themselves into oligarchical groupings.

The strategy followed by Romania in the last decade of communism was somewhat different. In the context of totalitarian decay, Bulgaria experienced what Linz and Stepan identify as post-totalitarianism or the phase where the official ideology becomes more isolated from society, while ideological commitment of the party officials weakens<sup>490</sup>. Ceaușescu's regime hindered the installation of this phase as it turned to a sultanistic complement in order to preserve the authoritarian backbone of the regime. This translated into dynastic socialism and a policy of elite rotation, whereby members from the higher echelons would be periodically reassigned to new state or party positions in order to prevent any potential rise of dissidents. These two traits of the Romanian communist regime thwarted the development of individual expertise and severely impacted upon the economic policy of the 1980s<sup>491</sup>. The characteristics of the regime also had overwhelming effects on the emergence of the opposition: within the party, it remained clandestine and concentrated on toppling the Secretary General, rather than on reforming the system<sup>492</sup>. The severity of the regime, the pauperisation and shortages created by economic mismanagement and the drive to rapidly reimburse a foreign debt that amounted to \$ 11.4 billion at the end of 1981 created a fertile ground for the proliferation of corruption. Members of the state apparatus, especially officials from the Department of State Security – either being affected by the harsh economic situation of the late 1980s or looking to secure

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<sup>488</sup> V. Ganev (2001): "The Dorian Grey Effect: Winners and State Breakers in Post-Communism", *Communist and Post-Communist Studies*, Vol. 34, p. 8.

<sup>489</sup> V. Ganev (2007): *Preying on the State. The Transformation of Bulgaria after 1989* (Ithaca, Cornell University Press), pp. 104-05.

<sup>490</sup> J. Linz, A. Stepan (1996): *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, Johns Hopkins University Press), p. 77.

<sup>491</sup> S. Roper (2005): *Romania: the Unfinished Revolution* (Amsterdam, Harwood Academic Publishers), p. 51.

<sup>492</sup> L. Dîrdală (2011): "The End of the Ceaușescu Regime – A Theoretical Convergence", *Buletinul Științific al Universității "Mihail Kogălniceanu"*, No. 21, p. 6.

the accumulated wealth started to secretly amass hard currency in foreign bank accounts<sup>493</sup>. As they transitioned to the new governance system and market economy, the former communist elite made use of “insider knowledge, political power, and control over state resources (...) to privatize their personal control over the economy, and, increasingly, over the polity by bankrolling a variety of political parties of all ideologies”<sup>494</sup>.

Whilst corruption cannot be regarded as being the attribute of a certain political system or development stage, the first half of the 1990s displayed a variety of forms of cronyism expanding to multiple governance levels. In the case of Bulgaria, the first phase of democratic transition, which entailed the dismantling of communist structures, was marked by a deep enculturation of corruption that undermined the people’s trust in public institutions. A series of practices such as the draining and subsequent collapse of state and commercial banks with the tacit participation of officials, the lucrative takeovers of profitable activities from state-owned enterprises by private companies followed by the accumulation of losses for the state, the non-transparent privatization deals marked by opaque methods of divestiture, the participation of public officials in smuggling schemes (trafficking of drugs and weapons and the smuggling of commercial goods) and the questionable public procurements inhibited the pace and depth of the transition process towards a market economy in Bulgaria<sup>495</sup>. In Romania, the option for a non-standard means of privatization, which in a first phase took the form of manager employee buyout schemes meant to give citizen part of the ownership and control of firms (70% of any commercial firm was initially owned by the State Ownership Agency and 30% by the Private Ownership Agency which was designed to administrate private owned vouchers distributed by the state to the population) resulted in paving the way for a number of controversial political figures and mafia-type individuals for managerial roles in the still few business firms that were being privatised. This state of affairs developed on the background of a slow pace of privatisation that was not generated by an overall political unwillingness towards the process itself, but by a reluctance to undertake such changes that wouldn’t bring benefits to various politically affiliated interest groups.

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<sup>493</sup> T. Gallagher (2005): *Theft of a Nation: Romania since Communism* (London, C. Hurst Publishing), p. 116.

<sup>494</sup> H. Carey, C. Eisterhold (2004): “Introduction”, in H. Carey (ed.) *Romania since 1989. Politics, Economics, and Society* (Maryland, Lexington Books), p. 16.

<sup>495</sup> Bulgarian Working Group for Partners in Transition (2001): “Corruption in Transition: the Bulgarian Experience” (Sofia), available at <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN012393.pdf>.

In the following sections we will look at the pre-accession reform track-records of the Romanian and Bulgarian administrations in order to sustain our hypothesis that the EU's decision to introduce a postponement clause in the Accession Treaty, coupled with the presence of national change entrepreneurs set the stage for a critical juncture in Romania's case. The absence of productive conditions in Bulgaria during this timeframe – understood in this study case as domestic reformers – meant that the conditions for a critical juncture to occur were insufficient, Bulgaria experiencing a missed opportunity for substantial change. As mentioned in the beginning of the chapter the presence of permissive conditions, while necessary, they are insufficient for the emergence of a critical juncture.

## ***4.5. The Transition to Democracy. The Long Road Back to Europe.***

### **4.5.1. Bulgaria's pre-accession story**

Both in the case of Romania and of Bulgaria the path for transition towards democracy and political, institutional and economic consolidation was marked by the control of the reformist sector of the Communist power establishment<sup>496</sup>. By agreeing to give up their monopoly on power, the ex-communist parties in both countries targeted the securing of the first free elections, aim which was reachable as a result of a clear resource asymmetry that was to the detriment of the opposition, as well as a more stable structure as political organisations. In Bulgaria, opposition groups were slow to emerge during the communist regime, with the environmental Ekoglasnost and the Club in Support of Glasnost and Perestroika in Bulgaria being the most prominent movements. However, the biggest challenge came from the Turkish minority which, after being subject to a gradual assimilation campaign that culminated in 1985 with the imposition of Bulgarian equivalent names and surnames (the policy of Regenerative Process), coagulated under the Turkish National Liberation Movement that responded to discrimination by staging public protests. As a consequence of the sometimes violent stifling and the “encouragement” by the state of the ethnic group to “choose their homeland”, over 300,000 ethnic Turks left the country. This episode coupled with the intra-party opposition that had been brewing since the mid-1980s as a result of the hardliner Todor Zhivkov's conservative stance towards perestroika

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<sup>496</sup> A. Mungiu-Pippidi (2010): “When Europeanization Meets Transformation: Lessons from the Unfinished Eastern European Revolutions”, in V. Bunce, M. McFaul, K. Stoner-Weiss (eds.) *Democracy and Authoritarianism in the Postcommunist World* (Cambridge, Cambridge University Press), p. 64.

provided the context for his engineered resignation in November 1989<sup>497</sup>. The party leadership went to Petur Mladenov – former foreign minister who was elected by the parliament in March 1990 as president of the republic, while Andrei Lukanov, his partner in the reformist wing of the BCP, was appointed as prime minister in February 1990<sup>498</sup>.

In early December 1989, an umbrella organization reuniting most opposition groups emerged under the name of the Union of Democratic Forces (UDF) being led by Zheliu Zhelev, an academic philosopher who had incurred the displeasure of the old regime. Despite the ideological diversity, the different factions shared a common principle: they weren't prepared to play the role of satellites to the Communist Party, even in its reformed version. As such, the UDF was able to marshal substantial public support which translated into the 14 December 1989 protest in Sofia that called for the abolition of article one of the Constitution that guaranteed the Communist Party a leading role in the state and society. In the face of popular discontent, national Round Table Talks with the official authorities were held in January-May 1990 and fourteen of the groups that came under the UDF became part of the delegation representing opposition forces. In terms of the strategies pursued and the long-term goals of the main two political structures, Kolarova and Dimitrov observe that the Bulgarian Communist Party that became at the beginning of 1990 the Bulgarian Socialist Party (BSP) sought to preserve as many financial and organizational resources as possible by preventing the expropriation of party property and by continuing to exert some control over the local government and the state enterprises<sup>499</sup>. Being a temporary coalition that reunited parties with political platforms ranging from social democratic to conservative, the UDF had essentially a single common goal: to consolidate and oust the Communist Party from its dominant position in order for all parties to compete on an equal basis.

The purpose of Round Table Talks that were thus designed as a two-sided forum between the UDF and the BSP was to lay the foundation for the development of a democratic regime. As such, it targeted agreement over the date of the first elections, the elimination of communist organizations in the workplace, the de-politicisation of the army, police, courts and state administration, the amending of the constitution and introduction of a new electoral law (the former two points being negotiated at the second round that began in

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<sup>497</sup> E. Kalinova, I. Baeva (2000): *The Bulgarian Transitions: 1944-1999* (Sofia, Tilia), p. 148.

<sup>498</sup> Council of Europe (1996): *The Rebirth of Democracy. 12 Constitutions of Central and Eastern Europe* (Strasbourg, Council of Europe Publishing), p. 11.

<sup>499</sup> R. Kolarova, D. Dimitrov (1996): "The Roundtable Talks in Bulgaria", in J. Elster (ed.) *The Roundtable Talks and the Breakdown of Communism* (Chicago, the University of Chicago Press), pp. 194-96.

March). The main document of the Round Table, which established the principles guiding the future political system was agreed upon in March 1990 and represented the first expression of national consensus. It called for the establishment of a political system based on the enforcement and protection of all internationally recognised human rights and freedoms, the separation of powers, and the rule by the majority with guaranteed rights of political expression and accountability of all public officials to the people. It included concrete provisions regarding the Constitution of 1971, outlined the organisation of competitive elections in a framework of a multiparty system and it set the mandate of a Constitutional Grand National Assembly composed of 400 members and with an 18 months tenure that was to redesign the country's political system<sup>500</sup>. Elections were held in June 1990 and due to the fractious nature of opposition, the BSP secured a slim majority of 211 seats, the rest being split between the UDF who received 144 mandates, the Turkish Movement for Rights and Freedom (MRF) with 23, and the Bulgarian Agrarian National Union (BANU) with 16. Andrei Lukanov was reconfirmed as prime minister and after Mladenov's resignation amidst continuous protests, the Grand National Assembly selected Zheliu Zhelev as president in accordance with the pre-Constitution electoral rule<sup>501</sup>. However, in the context of a political impasse generated by disagreement over economic reforms, Lukanov was forced to resign following mass protests in November 1990, and a caretaker government comprising BSP, UDF and BANU ministers was agreed upon and was led by Dimitar Iliev Popov, a politically independent judge. But political instability continued to plague the country, the period between November 1989 and the end of 1997 seeing four parliamentary elections and eight changes of government, the BSP and UDF alternating at power. The first elections for the National Assembly under the new political system were held in October 1991, with the UDF winning 110 seats, the BSP – running together with four other parties – taking 106 mandates, and the MRF, the other party to meet the 4 percent vote threshold, gaining 24 seats. The Assembly named Filip Dimitrov, UDF's leader as Prime Minister, but as MRF, the party on whom he relied for parliamentary majority declined to enter a governing coalition and with incessant hostility between him and re-elected President Zhelev producing hiatus, his government was to stay in office for just under a year. The Dimitrov government also faced internal splits over the pace of

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<sup>500</sup> K. Kanev (1996): "From Totalitarianism to a Constitutional State", in J. Coenen-Huther (ed.) *Bulgaria at the Crossroads* (New York, Nova Science Publishers), pp. 55-57.

<sup>501</sup> F. Chary (2011): *The History of Bulgaria* (California, Greenwood), p.161.

economic reform (especially over privatisation of state enterprises and farms and restitution of properties)<sup>502</sup>, and as inflation and unemployment rose, affecting especially the Turkish rural population, the MRF led by leader Ahmed Dogan joined the BSP in a vote of no confidence that subsequently led to the fall of the government. If at the national level, the UDF government had alienated popular support pursuing a crash programme of economic reform, externally it managed to mark a turning point: it engaged in intense diplomatic activity, securing in May 1992 Bulgaria's entry into the Council of Europe and undertaking negotiations for the European Association Agreement in December 1992<sup>503</sup>. As attempts to build a new government failed, the MRF proposed the option of an 'administration of experts' (implying a non-partisan, technocratic approach to governing) led by President Zhelev's economic adviser, Lyuben Berov<sup>504</sup>. A loose alliance between MRF and BSP was formed, gaining the approval of the National Assembly and surviving until September 1994.

Despite initial delays of the constitutional committee proceedings, either encouraged by the BSP in order to postpone the following round of elections<sup>505</sup>, or triggered by the UDF hardliners ('Dark Blues' or the right wing of the heterogeneous coalition) who opposed a constitutional draft largely proposed by the Socialists, the new fundamental law was adopted on the 12<sup>th</sup> of July 1991, after effectively four months of debate. The 1991 Constitution started off with its share of ambiguities and deficiencies that were epitomised by virulent clashes between the three branches of power, the institutional balances between the President of the Republic, the Council of Ministers (embodying Bulgaria's government) and the judicial branch (with its self-administration organ embodied by the Supreme Judicial Council) being early matters of contention<sup>506</sup>. However, it incorporated the principles of popular sovereignty (article 1), rule of law (article 4 providing an extensive understanding of the concept that reflects not only the formal, but also the material

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<sup>502</sup> See J. Swinnen (1994): "Political Economy of Reform in Bulgarian Agriculture", in A. Schmitz, K. Moulton, A. Buckwell, S. Davidova (eds.) *Privatization of Agriculture in New Market Economies: Lessons from Bulgaria* (New York, Springer Science and Business Media), p. 131.

<sup>503</sup> V. Dimitrov (2000): "Learning to Play the Game: Bulgaria's Relations with Multilateral Organisations", *Southeast European Politics*, Vol. 1, No. 2, pp. 101-114.

<sup>504</sup> J. Friedberg, B. Zaimov (1994): "Politics, Environment, and the Rule of Law in Bulgaria", *Duke Journal of Comparative and International Law*, Vol. 4, No. 2, pp. 225-264.

<sup>505</sup> J. Elster, C. Offe, U. Preuss (1998): *Institutional Design in Post-Communist Societies. Rebuilding the Ship at Sea* (Cambridge, Cambridge University Press), p. 74.

<sup>506</sup> A. Slavov (2011): "Challenges to Constitutional Supremacy in a New Democracy: A Critical Study of Bulgaria", *Centre for Advanced Study Working Paper No. 4/2011* (Sofia, Centre for Advanced Study).

substance of the principle<sup>507</sup>), separation of state powers (article 8), political pluralism (article 11), and fundamental rights and freedoms in accordance with internationally recognised standards (Chapter II). As the neo-communist dominated National Assembly was primarily concerned by potential attempts of future opposition governments at the exploitation of the judicial system as a tool for 'de-Communistation' of the state, the constitutional design of the judiciary was aimed at theoretically insulating it from political influence.

As such, the 1991 Constitution provided for a tripartite judiciary comprising judges, state prosecutors, and state investigators (charged with the preliminary investigation of penal matters) that benefits of financial, organisational, personal, and regulatory independence from the other two branches of power. The inclusion of the pre-trial investigation and the prosecution in the judiciary were preferred in order to assure a high degree of insulation of the Bulgarian judiciary from the other branches of the government. Among European countries, only Italy and Croatia displayed similar unified institutional setups. The Constitution established the institutional foundation for judicial review as well, basing it on Western European models, with a Constitutional Court not incorporated by the judicial branch, consisting of twelve justices (with a nine year term with no removal), elected in a modified French fashion: one-third by the national assembly, one-third by the president, and one-third by the Supreme Court, changing after 1997 to a joint appointment by the justices of the Supreme Court of Appeal and the Supreme Administrative Court<sup>508</sup>. The functions with which the Court was vested were established as two-fold: firstly, to offer authoritative and binding interpretations of the Constitution, and secondly to evaluate post-promulgation the consistency with the Constitution of laws passed by the Parliament and Presidential decrees. With no historical experience with constitutional adjudication, the establishment of the Court (only months after the Great National Assembly adopted the Constitution) was a radical innovation in Bulgaria's case, even if when considering the potential measures that would ensure the independence of the judiciary in the state, some academics consider *a priori* judicial review, whereby parties are allowed to challenge the

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<sup>507</sup> Article 4 emphasises a democratic construction based on legitimacy, popular sovereignty, institutional predictability, equality, justice and human dignity and its functioning is secured through political responsibility and civic culture.

<sup>508</sup> R. Ludwikowski (1996): *Constitution-Making in the Region of Former Soviet Dominance* (Durham, Duke University Press), p. 116.

constitutionality of statutes and decrees prior to their application, as offering courts real power in affecting policy<sup>509</sup>.

Life tenure was awarded to all members of the judiciary upon completing a third year in office, the possibility of being relieved of one's duties before the end of one's term being made possible only for a limited number of situations: retirement, the enforcement of a prison sentence, or as a result of a disability lasting more than a year. The same type of immunity that Members of the Parliament benefited from was extended to judges, prosecutors and investigative magistrates who were immune from detention or criminal prosecution except perpetration of grave crimes. Moreover, the administrative control of the justice apparatus was not entrusted with the Ministry of Justice - restricted to elaborating the law, but rather to the Supreme Judicial Council (SJC), institution inspired by the 1958 French Constitution and the Spanish and Italian models<sup>510</sup>, but with a historical precedent in 1910 in the consultative body for personnel policy of the Bulgarian Ministry of Justice. After a long political struggle between the BSP and UDF for domination in this governing body with a wide scope of authority, the Supreme Judicial Council Act was adopted in 1991. In order to ensure the organisational independence of the judiciary, the SJC was thus entrusted with the governance and management of the judicial branch, having as responsibilities the promotion, demotion, reassignment and dismissal of judges, prosecutors and investigative magistrates. With the judicial reform of 1994 the SJC was also conferred the responsibility of preparing and submitting for approval to the National Assembly the annual budget for the judicial branch and the appointment.

The configuration of the SJC included 25 members, legal practitioners with at least 15 years of judicial experience. The presidents of the two Supreme Courts - Administrative and Cassation - as well as the Prosecutor General are appointed to the SJC *ex officio*. Eleven members were elected through simple majority by the National Assembly (the so-called Parliament College/quota), and the remaining 11 members were elected from the judiciary: five by judges, three by prosecutors, and three by investigative magistrates. The elected members of the SJC were assigned 5 years terms, not being eligible for immediate re-election. The latter professional quota which was fixed through law in 1991 became a point

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<sup>509</sup> S. I. Smithey, J. Ishiyama (2000): "Judicious Choices: Designing Courts in Post-Communist Politics", *Communist and Post-Communist Studies*, Vol. 33, No. 2, pp. 163-82.

<sup>510</sup> E. Tanchev, M. Belov (2008): "The Republic of Bulgaria", in C. Kortmann, J. Fleuren, W. Voermans (eds.) *Constitutional Law of Two EU Member States: Bulgaria and Romania. The 2007 Enlargement* (Deventer, Kluwer), p. I-81.



of dissention for the magistracy, being modified several times, firstly in 1998, when the representation for judges increased to six and that of the investigative magistrates lowered to two (6-3-2), and finally being established in 2007 to six representatives of judges, four prosecutors and one investigative magistrate. The Minister of Justice was designated to chair the meetings of the SJC, but without voting rights. But, while the SJC was given considerable governance powers over the judicial system, having authority not only over professional development matters, but also over a broad range of administrative determinations (such as fixing the number of judges and supporting personnel in courts, setting judges' remuneration), the technical and material capabilities of the body were still limited and the degree of insulation from the other state powers was to a certain extent questionable. As the SJC's membership included among representatives of judges, prosecutors, and investigators, elected out of their own ranks, it also comprised members elected by the Parliament, which have regularly reflected the political majority. Moreover, as observed by an Open Society report, the conflicting interests of judges, prosecutors and investigators have often limited the ability of the SJC to provide consistent management, over the years a clear voting pattern emerging with judges and prosecutors opposing each other (especially on distribution of funds) and investigators changing sides depending on the political context<sup>511</sup>. In addition, the report questioned the extent of internal independence of the judiciary in Bulgaria when prosecutors, who are members of the magistracy according to the Constitution, would have the right to decide on issues of appointment, promotion and disciplining of judges through their representatives on the Supreme Judicial Council. Also, as the government was held politically responsible for successfully tackling crime and has thus had a clear interest in establishing some control over investigation and prosecution in order to carry out consistent policies, it has passed legislation replacing the SJC before its constitutionally mandated five-year term had expired (in 1992, 1996 and 1998). This direct political intervention was deemed by the report as creating disincentives for the SJC members to take principled positions at odds with the interests of the Government in power, even if those interests were detrimental to the professional development of the judiciary<sup>512</sup>.

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<sup>511</sup> Open Society Institute (2002): *Monitoring the EU Accession Process: Judicial Capacity* (Budapest, Open Society Institute), p. 68.

<sup>512</sup> Open Society Institute (2002): *Monitoring the EU Accession Process: Judicial Capacity*, p. 68.

While the Constitution and the Judicial System Act of 1994 provided for an impressive accumulation of institutional safeguards protecting the independence of the judicial system, international evaluations revealed a different situation *in situ*. A World Bank report<sup>513</sup> noted that while the SJC had a broad-base administrative mandate, it lacked the resources and capacities to execute its functions. As such, while determination of staffing levels within the judiciary ultimately rested with the SJC, the institution could not produce any systematic assessment of the existent needs as it was dependent on input from presiding judges, the Chief Prosecutor and the National Investigative Service. This in turn meant that staffing requests largely depended on the personal assessment of presiding judges or other supervisors and inevitably on their local connections. Moreover, the SJC had not set a cohesive policy for the promotion of judges, prosecutors and investigators was set, relying again on court presidents to report disciplinary matters. While an inspectorate function was carried out by the Ministry of Justice, this function was not directly connected to the review of disciplinary matters. The result translated into the absence of referrals to the SJC and overall a judiciary deprived of any form of review for internal corruption matters.

In the absence of a strong political backing, the Berov government failed to implement structural reform, following a mix of successive indexations of pensions and wages based on the rate of inflation (that had reached 64% in 1993)<sup>514</sup>, sluggish privatisation<sup>515</sup>, and more dramatically what Dimitrov termed as a process of mafiotisation of the economy, whereby the government allowed itself “to be taken over by shadowy conglomerates which operated on the unclear boundary between the state and the private sector and combined the interests of state enterprise directors, private commercial firms, criminal bosses and corrupt state officials”<sup>516</sup>. Criminal activity surged, especially in the form of racketeering and illegal trafficking (notably during the years of the embargo on Yugoslavia in connection with the conflict in Bosnia and Herzegovina), while the Berov government failed to take the necessary measures to curb the phenomenon and a weak judiciary, facing substantial problems related to large caseloads, inadequate training possibilities and lacking an internal professional assessment system, failed to prosecute and try crime. Some reports had pointed to the implication of state agencies in illegal fuel trafficking, arguing that the

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<sup>513</sup> A. Iorio, G. Mikhlin (1998): “Bulgaria: Legal and Judicial Reform. Judicial Assessment”, *World Bank Mission Report* (Washington D.C., World Bank).

<sup>514</sup> V. Dimitrov (2001): *Bulgaria. The Uneven Transition* (London, Routledge), p. 78.

<sup>515</sup> T. Frye (2010): *Building States and Markets after Communism. The Perils of Polarized Democracy* (Cambridge, Cambridge University Press), p. 199.

<sup>516</sup> V. Dimitrov (2001): *Bulgaria. The Uneven Transition*, p. 77.

high number of illegal large transactions destined for Yugoslavia and the soaring losses made to the state treasury (an official estimation of \$ 250 million loss in revenues during the first embargo) would have otherwise been impossible without the involvement of state institutions and people from the highest ranks of power<sup>517</sup>. However, no substantial investigations were ever launched.

Moreover, serious threats to the constitutional order occurred within this period, culminating with the passage of the Law on Judicial Power in 1994 that introduced new eligibility standards (requirement of five years of legal experience) for the country's top judgeships. As Ganev observes, the new standards "which were crafted so as to eliminate all jurists appointed after 1989, were to result in the immediate dismissal of any judge who did not qualify"<sup>518</sup>. Among the targets of this proposal were the Chief Prosecutor, Ivan Tatarchev, and chairman of the Supreme Court, Ivan Grigorov, both open UDF supporters<sup>519</sup>. The Constitutional Court declared unconstitutional all the provisions that gave retroactive force of the law and struck down a section that was authorising the parliament to dismiss judges if they undermined the prestige of the judicial power<sup>520</sup>. In the context of economic stagnation and rising crime, the Berov government eventually fell in September 1994, being replaced by a caretaker administration under Reneta Indzhova.

The December 1994 elections confirmed BSP to power, the party securing 52 percent of the popular vote and 125 parliamentary seats, while the UDF gaining only 28.6 percent and 69 mandates. Together with the Bulgarian Agrarian People's Union and the Political Club Ecogalsnost, the BSP formed the new government under the leadership of hard-liner Zhan Videnov, BSP leader between 1991 and 1996<sup>521</sup>. While Videnov announced in his inaugural speech that his administration would follow a governing program designed to revive the economy, curb crime and pursue integration into the EU, during his mandate Bulgaria faced one of the harshest economic crises fuelled by the snail's pace in restructuring the still state-dominated economy and even attempts to reverse the effects of the 1991 land legislation and reintroduce collectivisation for farmers<sup>522</sup>. In this latter case, at the referral

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<sup>517</sup> B. Todorov, O. Shentov, A. Stoyanov (2000): *Corruption and Illegal Trafficking: Monitoring and Prevention. Assessment Methodologies and Models of Counteracting Transborder Crime* (Sofia, Center for the Study of Democracy), p. 13.

<sup>518</sup> V. Ganev (1997): "Bulgaria's Symphony of Hope", *Journal of Democracy*, Vol. 8, No.4, p. 126.

<sup>519</sup> V. Ganev (1994): "Bulgaria", *East European Constitutional Review*, Vol. 3, No. 1, p. 5.

<sup>520</sup> V. Ganev (1997): "Bulgaria's Symphony of Hope", p. 126.

<sup>521</sup> J. Bugajski (2011): "Bulgaria: Progress and Development", in S. Wolchick, J. Curry (eds.) *Central and East European Politics. From Communism to Democracy* (Plymouth, Rowman and Littlefield Publishers), p. 256.

<sup>522</sup> R. Bideleux, I. Jeffries (2007): *The Balkans. A Post-Communist History* (New York, Routledge), p. 104

of President Zhelev, the Constitutional Court struck down the collectivisation amendments as they infringed private-property rights. The government's foreign affairs agenda looked different from the initial plans, Videnov having no intention for Bulgaria to join NATO and pursuing instead a reconsolidation of the country's relations with Russia. Although Videnov was not directly involved in corruption scandals, the entire government was accused not only of tolerating corruption, but taking part:

"Despite warnings from the World Bank and the International Monetary Fund that the economy was collapsing, the Videnov Government sat by as state industries were stripped of their assets by economic groups allied to the Socialist Party."<sup>523</sup>

"The Bulgarian Socialist Party (...) has balked at undertaking market reforms, and many of its leaders have been under fire from a parliamentary corruption commission for allowing politically connected banks to drain the country's hard currency reserves."<sup>524</sup>

The Vitosha affair during Videnov's administration highlighted best the nexus between corruption, the political system and the economy: state banks such as the Bank for Agricultural Credit 'Vitosha' became vulnerable to collapse due to the numerous non-performing loans given preferentially to economic groups – made up of members of the former nomenklatura and security officers with close links to the government. Organised crime and contract killings surged, one of the most resonating cases being the assassination of former Prime Minister Andrey Lukanov in October 1996. His death was veiled in controversy as Lukanov was allegedly preparing to disclose proof of large-scale misappropriation of public funds, especially through Topenergy – a lucrative Bulgarian-Russian joint venture that supplied Russian gas to the Balkan Peninsula through Bulgaria<sup>525</sup> and from which Lukanov was removed as chair a few months before his death<sup>526</sup>. As the crisis deepened and more banks were placed under the supervision of the Bulgarian National Bank due to the pressure of credits given to insolvent enterprises, the IMF announced the freezing of a \$582 million loan that Bulgaria desperately needed as its inflation spiralled in 1996 to circa 500 percent<sup>527</sup>. The failure to pursue reform measures soon led to a rapid downturn of living standards, and public reaction to the growing crisis

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<sup>523</sup> J. Perlez (1997): "With Hard Times, Bulgarian Protesters Demand Elections", *The New York Times* (13<sup>th</sup> January).

<sup>524</sup> J. Perlez (1996): "Bulgaria's Premier Likely to Keep Job Despite Economic Mess", *The New York Times* (23<sup>rd</sup> December).

<sup>525</sup> S. Katsikas, P. Siani-Davies (2011): "The Europeanization of Bulgarian Society: A Long-Lasting Political Project", in S. Katsikas (ed.) *Bulgaria and Europe. Shifting Identities* (London, Anthem Press), p. 14.

<sup>526</sup> C. Leviev-Sawyer (2011): "Andrei Lukanov, Red Baron of Bulgaria", *Sofia Echo* (11<sup>th</sup> February).

<sup>527</sup> R. J. Crampton (2005): *A Concise History of Bulgaria* (Cambridge, Cambridge University Press), p. 234.

did not fail to manifest itself, large demonstrations being organised in Sofia in June 1996. Public anger was also expressed during the November 1996 presidential elections, with the BSP candidate losing the race to the UDF supported Petur Stoyanov. Soon after, following BSP internal disputes over the formation of a new administration under a new leader, Videnov stepped down as Prime Minister and as leader of the party. Meanwhile, despite several internal splits, the UDF regained its popular support by promoting a pro-reform agenda and differentiating itself as the most credible centre-right force. The newly sworn-in president called for early parliamentary elections to be organised in April 1997 and, after reaching an agreement with the BSP not to form a new government under the Socialist's mandate, appointed in February Stefan Sofianski – popular and charismatic UDF mayor of Sofia – as caretaker Prime Minister. The UDF, participating at the 1997 parliamentary elections as part of a broad coalition that included the right-of-centre People's Union (an alliance between the Democratic Party and the Agrarian Party), won 137 of the 240 parliamentary seats, securing an absolute majority of 52.3 percent of the vote. The BSP secured only 58 seats and MRF 19 mandates. The new appointed government that became the first post-communist administration to run its full constitutional term of four years, was headed by UDF chairman Ivan Kostov, who put forward a governing programme targeting the stabilisation of the economy, combating corruption and crime, and pursuing Euro-Atlantic integration. On this latter priority, one of the most notable successes was achieved during the December 1999 European Council in Helsinki, when the EU extended the invitation to Bulgaria and Romania to open negotiations for membership in March 2000. This achievement came at a cost, as the European Commission conditioned the start of the accession negotiations to the government's agreement to decommission two of the environmentally hazardous Kozloduy nuclear plant by 2002 and the following two by 2006<sup>528</sup>. It is also during this period that we witness a differentiation of the pace of reform between Romania and Bulgaria which translated both in better quality of governance and better control of corruption in the latter's case. To a certain extent, the severe economic crisis in Bulgaria, coupled with the consolidation of the UDF – which had become a strongly programmatic party headed by a competent leadership<sup>529</sup>, and the clarification of the EU's

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<sup>528</sup> European Commission (1999): "EU Commission Welcomes Decision of Bulgaria on Early Closure of Units 1-4 of Kozloduy Nuclear Plant" (Brussels, European Commission), *Press Release* No. IP/99/916.

<sup>529</sup> Ivan Kostov had held the position of Finance Minister in two consecutive governments – Popov and Dimitrov. For a more detailed discussion of the UDF's coagulation as a strong alternative to the BSP see S. Fish, R. Brooks

accession strategy towards candidate countries from Central and Eastern Europe created a critical juncture that generated the premises for reform. The gap created between Romania and Bulgaria was to be closed in the period 2005-2006, when as we will argue Romania found itself at a critical juncture, with effects that have reverberated to the present.

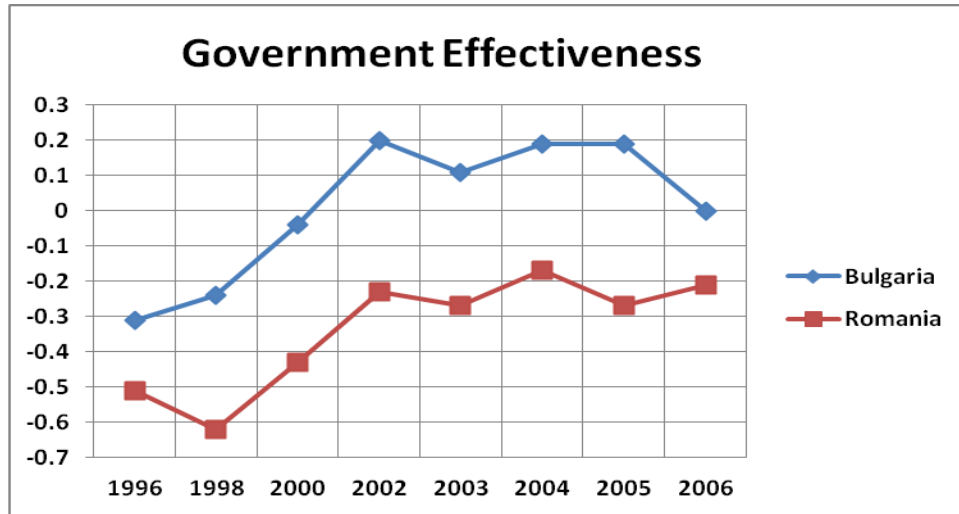


Figure 3 Government Effectiveness 1996 – 2006

**Source:** World Bank - Worldwide Governance Indicators (WGI). The Governance Effectiveness indicator captures perceptions of the quality of public services, the quality of the civil service and its degree of independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies. The indicator is measured on a scale of -2.5 (worst) to +2.5 (better governance).

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(2000): "An Improbable Success in the Balkans: Bulgarian Democracy's Organisational Weapon", *East European Constitutional Review*, Vol. 9, No.3, pp. 63-71.

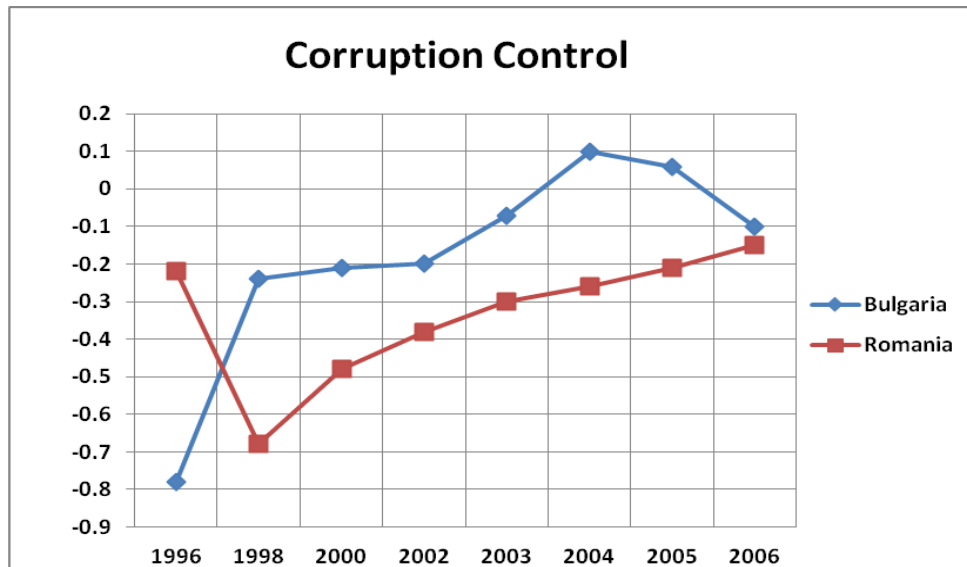


Figure 4 Control of Corruption 1996 – 2006

**Source:** World Bank - Worldwide Governance Indicators (WGI). WGI reports aggregate and individual indicators for 215 economies for six dimensions of governance. The Control of Corruption indicator captures perceptions to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as capture of the state by elites and private interests. The indicator is measured on a scale of -2.5 (worst) to +2.5 (better control).

The first steps taken to reverse the effects of the crisis came after consultations with the World Bank and the International Monetary Fund, the government launching a stabilisation programme that lifted price controls, introduced a currency board in June 1997, and pegged the national currency (the Lev) to the German mark and after 1999 to the Euro. A new wave of privatisations was launched in January 1999, this time Bulgaria seeking to sell large loss-making state enterprises, as recommended by the IMF. However, studies conducted by national think tanks such as the Centre for the Study of Democracy underlined that throughout the period between 1997 and 2004 privatisation was still conducted in a non-transparent manner, with numerous and frequent changes to the legislation and negotiations with potential buyers remaining the preferred method of selling, while more transparent mechanisms such as competitive auctions and stock exchange were largely ignored<sup>530</sup>. This in turn opened the door to subjective criteria and corrupt practices to proliferate.

<sup>530</sup> Coalition 2000 (2005): *Anti-Corruption Reforms in Bulgaria* (Sofia, Center for the Study of Democracy), p. 11.

Nonetheless, as Rose-Ackerman observes, “in countries where the public fiscal system and the profitability of business have been undermined by corruption (...) economic crises can provide a catalyst for anti-corruption policies as well as economic adjustment”<sup>531</sup>. In Bulgaria’s case the alarming high inflation and its effects upon the population prompted the new government to pursue not only an economic stabilisation programme, but also initiatives at curbing corruption. In its “Bulgaria 2001” governing programme, the administration reiterated its commitment to preparing Bulgaria’s membership in the EU by bringing the country’s laws and institutions in line with European standards, strengthening public institutions and developing appropriate mechanisms for combating and eliminating opportunities for corruption and crime. Initial concrete steps to tackle corruption were made in the context of public-private partnerships between national NGOs such as Transparency International and Coalition 2000 and the government, the former developing studies on the phenomenon of corruption and forwarding recommendations for the latter to improve its transparency and reduce malfeasance. A strategy for combating organised crime was adopted in 1998, the Public Register Law was passed in 2000 introducing the requirement for officials to declare their assets, incomes and expenses to the National Audit Office, the Criminal and Civil Law Conventions on Corruption were signed and by 1999 the country was part of the Council of Europe’s GRECO initiative. Substantial modifications to the civil and penal procedural codes were made in order to increase the speed of court proceedings, and progress was achieved in the area of legal training with the creation in 1999 of the Magistrate Training Centre (although the MTC was an association and not a public institution). Moreover, the new cooperative relationship between the government and President Stoyanov encouraged a more meritocratic approach to governance that transpired in the context of a series of corruption scandals involving members of the government. As such, at the request of the President, Kostov dismissed half of his cabinet after allegations of corruption arose. The government also sought the assistance of the World Bank and USAID in designing and implementing policies for the judicial branch and benefited in October 1998 of a joint mission of the two international donors that diagnosed the deficiencies, dysfunctions and needs of the justice system<sup>532</sup>. The report recommended increasing the SJC’s financial, material and human resources to enable it to exercise its

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<sup>531</sup> S. Rose-Ackerman (1999): *Corruption and Government. Causes, Consequences and Reform* (Cambridge, Cambridge University Press) p.212.

<sup>532</sup> USAID (1998): *Judicial Strengthening in Bulgaria* (Washington D.C., USAID).



authority as provided by the Constitution and the Judicial System Act, and pointed out several problems in the recruitment and professional advancement of magistrates, as well as the reduced opportunities for general and specialised training. The introduction of a computerised system of managing court files was seen as mandatory to limit the backlog and improve transparency, instituting statistical evaluation of individual and collective activity. The document highlighted the need to change the immunity law applying to magistrates, to substantially increase their remuneration and create a mechanism of verification of assets and incomes. The extent to which the government responded to these issues was however quite limited, the European Commission observing in its Regular Report in 2000 that while the budget for operating expenditure was raised for most government branches, the budget for the judiciary received a relatively minor increase, judges continued to be appointed to particular courts by the SJC upon suggestion of the presidents of courts, and no progress was registered in developing a compulsory training system for magistrates (neither upon entry into the profession, nor whilst holding office).<sup>533</sup> In response to the European Commission's observations regarding the lack of efficiency and transparency in the handling of cases by magistrates, a series of amendments to the Criminal Procedure Code were introduced in 2000 in order to remove unnecessary formalities during the preliminary investigation (such as passing this stage to the police for all cases of minor importance) and the three-instance judicial proceedings system (first instance, second instance and cassation) as provided by the Constitution was introduced in 1999.

But the credibility of the government was profoundly affected by the alarmingly large number of malfeasance accusations, as well as the subjects of the claims. Cases such as that of Alexnader Bozhkov, the country's Chief Negotiator with the EU, who was forced to leave office after a judicial inquiry into his activities pointed to financial irregularities and false documents<sup>534</sup> cast a shadow over the government's adherence to the fight against corruption. Even the Prime Minister's wife, Elena Kostova, did not escape corruption accusations, a Bulgarian socialist newspaper, *Trud* (Labour) pointing to a donation of \$80,000 made to her charity by Russian businessmen with reported ties to organised

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<sup>533</sup> European Commission (2000): Regular Report on the Progress of Bulgaria

<sup>534</sup> The Economist (2000): "Petar Stoyanov, Bulgaria's Gladiatorial President", *The Economist* (15<sup>th</sup> June).

crime<sup>535</sup>. Following this allegation, the Russian donors stated that their political involvement did not stop there, confessing to transferring substantial sums on a monthly basis to the ruling party<sup>536</sup>. If corrupt practices before 1997 bore the mark of cronyism – a mode of distribution of favours based on clientelism and/or personal relationships with regime officials –, after this point a shift could be observed towards competitive rent-seeking, “whereby market opportunities are allocated to the highest bidders and thus ultimately benefit a wide spectrum of interest groups”<sup>537</sup>. Thus, as the government was in essence dependent on the support of powerful economic networks, and despite the legislative changes put in place to limit the opportunities for malfeasance (for example the Law on Administration – 1998; the Law on Civil Servants – 1999; the Law on Property Disclosure by Persons Occupying Senior Positions in the State – 2000; the Code of Tax Procedure – 2000; Law on Public procurement - 1999), high-level corruption in politics and administration was tolerated, and the often illegal connections between politics and economics, while changing form from cronyism to competitive rent-seeking, remained in place. But what the UDF had proven during 1997-2001 was best summed up by Ganev:

“The fact that some UDF officials were corrupt should not obscure an even more central fact: While corruption was not eliminated under the UDF, it was ‘sublimated’ into a state-building effort.”<sup>538</sup>

But, in the context of stagnant living standards and offering no strategic approach to curbing corruption (although the need for an anti-corruption national strategy had been expressed both by national think tanks and in the European Commission’s Regular Reports<sup>539</sup>), shortcoming which also impeded progress in the accession negotiations with Brussels, support for the Kostov government withered away and left widespread public disillusionment which was capitalised unapologetically by a new challenger to both the UDF and the BSP: the former monarch Simeon Saxe-Coburg-Gotha II, who had been exiled by the Communist regime and had returned to Bulgaria in April the same year to form his National Movement Simeon II (NMS II).

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<sup>535</sup> T. Frye (2010): *Building States and Markets after Communism. The Perils of Polarized Democracy* (Cambridge, Cambridge University Press), p. 208.

<sup>536</sup> R. J. Crampton (2007): *Bulgaria* (Oxford, Oxford University Press), p. 413.

<sup>537</sup> V. Ganev (2006): “Ballots, Bribes, and State Building in Bulgaria”, *Journal of Democracy*, Vol. 17, No. 1, p. 79.

<sup>538</sup> V. Ganev (2006): “Ballots, Bribes, and State Building in Bulgaria”, p. 80.

<sup>539</sup> European Commission (2000): *Regular Report on Bulgaria’s Progress towards Accession* (Brussels, European Commission), p. 18.

The June 2001 elections thus brought to power the new political formation that managed to gain 43.4 percent of votes and 120 seats, the UDF securing 51 mandates, the BSP 84 and the MRF 21 seats. With the support of the MRF, Simeon II was appointed at Prime Minister by the National Assembly, leading a cabinet formed in majority of members with no previous political experience. The NMS II's proposed platform had three main objectives to be achieved in 800 days: to end political partisanship and bring more ethics into politics, to eliminate corruption, and to pursue immediate and qualitative reform in order to bring Bulgaria's economy in line with EU standards<sup>540</sup>. But while the initial platform was dominated by populist promises and vague objectives, the actual governing programme benefitted of the expertise of Western-trained economists and bankers who intended to follow a similar neo-liberal reform programme to that pursued by the UDF (including tax-cuts on businesses, increase privatisation, target public-spending cuts and substantially lowering public borrowing), but at a faster pace and in a more transparent manner. Likewise, achieving substantial progress towards EU integration, obtaining membership of the North Atlantic Treaty Organisation (NATO), decreasing crime rates and eliminating corruption were also put forward as priorities to be fulfilled within the 800 days of governance. NATO membership proved to be a slightly easier task to achieve compared to EU membership and the extensive requirements attached to it. The country's conduct during the Kosovo crisis (granting NATO use of its air space) and its participation in the wars in Afghanistan and Iraq, corroborated by the government's effort to modernise its military forces paved the way for its invitation to join NATO ranks during the Prague Conference in 2002. The road to EU accession required sustained efforts to reach the standards of a functioning market economy, and in its 2001 Regular Report the European Commission deemed Bulgaria as "close to being a functioning market economy"<sup>541</sup> despite the previous government's efforts, with the high inflation rate, insufficient investment, deficiencies in the land market, administrative obstacles to private sector development and a problematic judicial system being identified as the shortcomings that needed to be tackled. If in the case of the Copenhagen economic criteria, the Saxe-Coburg-Gotha government managed to achieve successes quite early on (the criteria being considered as met in 2002), by largely continuing the same policy lines as his predecessor and securing

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<sup>540</sup> I. Jeffries (2002): *Eastern Europe at the Turn of the Twenty-First Century: A Guide to the Economies in Transition* (London, Routledge), p. 124.

<sup>541</sup> European Commission (2001): *Regular Report on Bulgaria's Progress Towards Accession* (Brussels, European Commission), SEC(2001)1744, p.36.

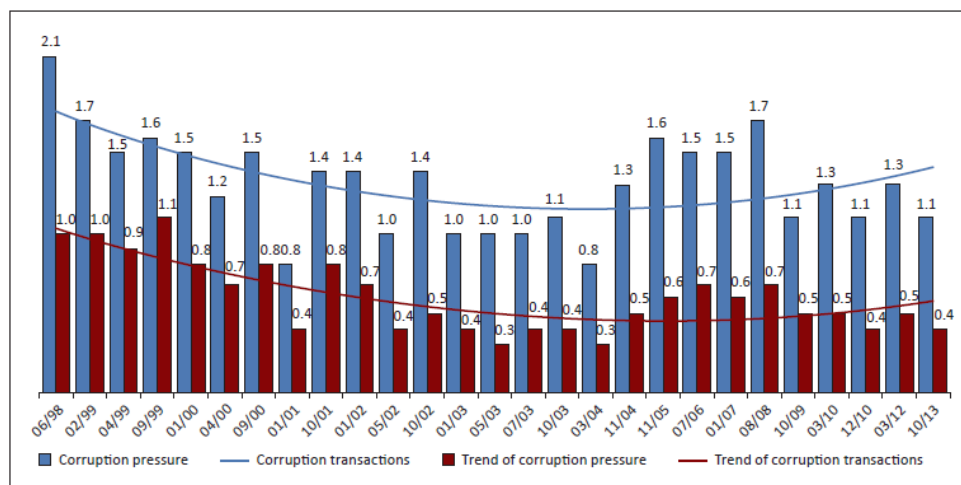
real progress in term of substantial increase in state and custom revenues, lower unemployment rates, declining inflation, sustained GDP growth, meeting the political Copenhagen criteria was not as in sight as the Prime Minister initially declared it. While substantial normative and institutional changes had been introduced (the adoption of the National Anti-Corruption Strategy, the introduction of the Standing Anti-Corruption Committee within the National Assembly with the task of preparing reasoned opinions to suggest amendments to anti-corruption legislation in order to improve its effectiveness; and the setting up of the Anti-Corruption Coordination Commission within the Council of Ministers with the task of coordinating the implementation of the National Anti-Corruption Strategy), a protracted confrontation between the government and the judiciary over amendments to the Judiciary System Act (and hence the organisation of the branch) hampered the pace of reforms that the European Commission required. A 2005 evaluation of the effectiveness of the anti-corruption bodies created during the NMS II administration revealed that while the Standing Anti-Corruption Committee of the National Assembly made efforts to establish cooperation with NGOs and various anti-corruption initiatives, it fell short of realising its stated intention of analysing corrupt practices and the legal or factual grounds from which they emerge, and initiate the legislative measures required in response<sup>542</sup>. Moreover, interim fact-finding committees set up by the National Assembly to explore existing suspicions of corruption and abuse by government officials were primarily used for political attacks, thus failing to hit their targets and fulfil their tasks, a relevant example provided here being the committee set up to check the distribution of PHARE and ISPA instruments by the Ministry of Regional Development and Public Works. The lack of efficiency in dealing with suspicions over mismanagement of funds reached its pinnacle in 2008, when an investigation carried out by the European Anti-Fraud Office (OLAF) showing a worrisome mishandling of EU funds led the European Commission to withhold €220 million of pre-accession funding (PHARE), freeze €300 million of post-accession funding in November 2008<sup>543</sup>, and withdraw the accreditation of two government agencies charged with disbursing EU money for failing to guarantee sound and transparent management of funds (the Central Finance and Contracting Unit and the Implementing Agency at the Ministry of Regional Development and Public Work). The Anti-Corruption Coordination Commission created within the executive branch and chaired by the Minister of Justice in

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<sup>542</sup> Coalition 2000 (2005): *Anti-Corruption Reforms in Bulgaria* (Sofia, Center for the Study of Democracy), p. 34.

<sup>543</sup> K. Hope, T. Troev (2008): "Bulgaria Loses €520m EU Funds", *Financial Times* (26 November).

order to collect, analyse and summarise information about anti-corruption measures and to supervise efforts in combating corruption provided a similar reading of its activity as the Anti-Corruption Committee in the National Assembly. The institution issued reports on the anti-corruption operations of ministries, agencies and of municipal administrations, but failed to provide an in-depth analysis of the underlining factors that hampered the fight against malfeasance at the highest levels of the government<sup>544</sup>. In fact, this approach of focusing on administrative corruption was reflected in the results recorded by indigenous indicators such as the Center for the Study of Democracy's Corruption Monitoring System, which pointed for the period between 2001 and 2005 a clear decreasing trend in the prevalence of corrupt transactions between citizens and the public administration. However, despite a still strong corruption pressure indicated by the business sector in Bulgaria<sup>545</sup>, the number of convictions for crimes related to corruption remained low for the entire accession period (the average number of convictions for the period between 1997 to 2006 being of 36 per year).



**Figure 5 Dynamics of Involvement in Corruption Transactions and Corruption Pressure among the Bulgarian population (1998-2013)**

**Source:** Center for the Study of Democracy (2013): *Corruption and Anti-Corruption in Bulgaria (2012-2013)*. Policy Brief No. 43.

<sup>544</sup> Coalition 2000 (2005): *Anti-Corruption Reforms in Bulgaria* (Sofia, Center for the Study of Democracy), p. 54.

<sup>545</sup> See Center for the Study of Democracy (2013): *Corruption and Anti-Corruption in Bulgaria (2012-2013)*, (Sofia, Center for the Study of Democracy) Policy Brief No. 43, p. 6.

As the judiciary was still being perceived by the Bulgarian people as one of the most corrupt powers in the state, and in the context of consecutive European Commission reports that underlined the fact that the inefficient, corrupt, and underfinanced judiciary was a hurdle to the country's EU accession, the Saxe-Coburg-Gotha administration put forward in 2001 the first major legislative initiative that would attempt at addressing these issues: the Strategy for Reforming the Judiciary. The document was drafted by the Ministry of Justice sought to deal with the unclear split of roles between the Ministry of Justice and the Supreme Judicial Council – the body designed to insulate the functions of appointment, promotion, and discipline of judges from partisan political processes. A list of serious shortcomings in the functioning of the judiciary were identified: inefficient court administration and case management; substantial delays in hearings and in delivering judgement; poor enforcement; a poor level of selection and training of the judges and insufficient financial and technical resources that would assure the continuous tracking of cases<sup>546</sup>. In order to reach the document's objectives, amendments to the Judiciary System Act, the law voted in 1994 that laid down the institutional structure of the judiciary, were submitted to the parliament in March 2002, stipulating fix mandates for court presidents and their administrative counterparts among the prosecution and the investigation, tests and competitions for hiring and promotion, reducing magistrates immunity to their professional actions, and increasing the Ministry of Justice prerogative of submitting proposals to hire, promote, demote or transfer magistrates. The judiciary reacted by forwarding a resolution that called on the contrary for an even further insulation of the branch vis-à-vis the other powers by fixing financing of the judiciary to a certain percentage of the GDP<sup>547</sup>. The executive did not accept this proposal, and used its majority in the National Assembly to adopt the revised Judicial System Act in July 2002, which in turn caused further escalation of the conflict, the judiciary invalidating all three major privatisation deals for the tobacco company (Bulgartabak), the telecommunications monopoly (BTK) and the electric utility monopoly for which the government had found investors and upon which the EU had insisted. The new law envisaged the creation of a professional assessment system based on competitions organised around transparent and objective criteria, the setting up of a public Institute of Justice responsible for the training, it provided for the Supreme Judicial Council

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<sup>546</sup> Council of Ministers (2001): *Strategy Paper on the Reform of the Bulgarian Judicial System* (Sofia, 1<sup>st</sup> October), Decision no. 672/2001.

<sup>547</sup> M. Popova (2010): "Be Careful what You Wish For. A Cautionary Tale of Post-Communist Judicial Empowerment", *Demokratizatsiya*, Vol. 18, No. 1, p. 59, pp. 56-73.

(SJC) to have the power to supervise court and prosecutors, and introduced monitoring mechanisms meant to prevent and combat corruption within the justice service based on the declaration of assets and incomes, and the adoption by the SJC of codes of conduct for judges and administrative staff<sup>548</sup>.

The Constitutional Court decided in December 2002 that nearly every article of the revised Judicial System Act submitted for its review was unconstitutional. The next blow to the government's plan of reducing the judiciary's insulation from the other powers in the state came from the Supreme Cassation Court, which, after having filed the appeal against the 2002 law to the Constitutional Court, moved to challenge the constitutionality of the 2003 judiciary budget for reflecting the Ministry of Finance's estimations and not so much those of the Supreme Judicial Council. The Constitutional Court sided with the Supreme Cassation Court, striking down part of the budget. Finally, probably the most important move of the Constitutional Court against the government's attempt to modify the balance of power this time by complying with the request made by the European Union during accession negotiations to transfer the Investigation Service from the judiciary to the executive, came in April 2003, when the Court decided that such a transformation would constitute a change in the form of governance and would thus require a Grand National Assembly rather than an ordinary parliament. Pursuant to article 158 of the Constitution, an ordinary National Assembly could not resolve on the form of state structure and the form of government, which were the attributes of a Grand National Assembly. The Constitutional Court assumed a very broad interpretation of these concepts, with the latter especially being understood as comprising any modification to the system of all basic constitutional institutions, their existence, their place in the relevant branch of power, their structure and mode of formation, and their remit<sup>549</sup>. The interpretation resulted in the narrowing of the scope of possible constitutional and legislative reform in respect to the judiciary. What remained feasible was to focus on measures for institutional strengthening. Thus the Constitutional Court reacted as a veto player, essentially signalling to the executive that any dilution of the judiciary's independence or in fact any structural change (such as excluding the prosecution from the judicial branch and including it together with the investigation in the executive

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<sup>548</sup> Council of Europe – Commissioner for Human Rights (2006): *Follow up Report on Bulgaria. Assessment of the Progress Made in Implementing the Recommendations of the Council of Europe Commissioner for Human Rights* (Strasbourg, Council of Europe), CommDH(2006)6.

<sup>549</sup> M. Yordanova (2005): "Judicial Reform – State of Play and Opportunities", in M. Yordanova, D. Markov (eds.) *Judicial Reform: The Prosecution Office and Investigation Authorities in the Context of EU Membership* (Sofia, Center for the Study of Democracy), p. 9.

power) would require a constitutional amendment and implicitly elections. However, in the context of weakened public support for the NMS II government, already visible since the November 2001 presidential elections that resulted in the victory of the BSP leader, Georgi Purvanov, such a move of calling new elections was a political suicide. By the spring of 2003, this war of institutions translated into the state's failure to implement the judicial reform strategy, and a severe delay in the government's privatisation programme. Under increased pressure from the European Commission, a decision was reached and in April 2003, all parliamentary factions agreeing to detach from patchwork legislative revisions and support reform through a constitutional amendment, setting up a parliamentary Temporary Commission for Constitutional Amendments that was to vote the replacement of the absolute immunity of magistrates with a functional alternative. This prompted the European Union Commissioner for Enlargement, Gunther Verheugen to explicitly condition the closing of negotiations on the Justice and Home Affairs Chapter to further progress being registered in reforming the justice sector. Negotiations on the justice chapter were concluded however in October 2003, prior to any radical change, demonstrating and reiterating the European Commission's preference towards tactics of supportive intervention, rather than coercive reinforcement of the obligations that the country had taken on under the Copenhagen criteria<sup>550</sup>. Constitutional modifications were eventually adopted in March 2004, leading to a replacement of the magistrates' civil and penal immunity with functional immunity that could be invoked solely in respect of acts committed in the exercise of duties and that could be suspended by the Supreme Judicial Council and after the Chief Prosecutor would submit the request to the institution, an increase from three to five years of the probationary period before tenure would be awarded to magistrates, and instituted positive evaluation of magistrates' professional performance and a limitation of a five-year mandate for judges holding managerial posts (with the exception of the President of the Supreme Court, the President of the Supreme Administrative Court and the Chief Prosecutor)<sup>551</sup>. With the relaxing of the Constitutional Court's position starting with September 2005 on constitutional modifications regarding the structure of the judicial branch, the foundation for a new cycle of transformation was

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<sup>550</sup> A. Primatarova (2010): "On High Stakes, Stakeholders and Bulgaria's EU Membership", *EPIN Working Paper* No. 27/ April 2010 (Brussels, European Policy Institutes Network), p. 8.

<sup>551</sup> T. Delpuech, M. Vassileva (2010): "Lessons from the Bulgarian Judicial Reforms. Practical Ways to Exert Political Influence on a Formally very Independent Judiciary", in L. De Groot-van Leeuwen, W. Rombouts (eds.) *Separation of Powers in Theory and Practice. An International Perspective*, (The Netherlands, Wolf Legal Publishers) p. 61.



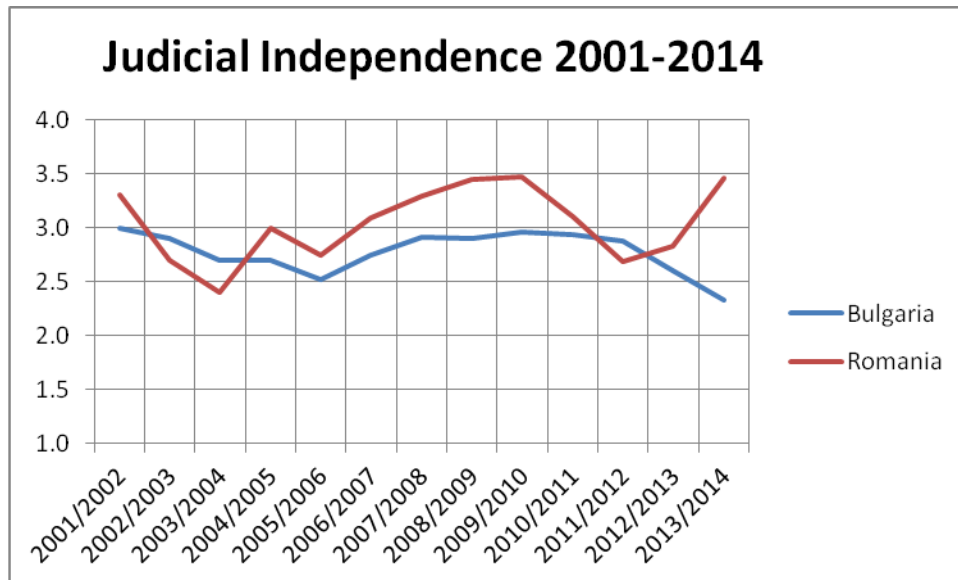
laid. Thus, in December 2005, under intense pressure from the EU and after protracted political consultations, the new governing coalition comprising the BSP, NMS II and MRF and led by Sergei Stanishev, chairman of the BSP since 2001, made a series of proposals to amend the Constitution in order to introduce more accountability in the judiciary. Yet, some of the proposed modifications in the course of 2006 only raised further concerns, envisaging annual hearings in the Parliament of the Supreme Administrative Court and the Supreme Court of Cassation and the possibility of the Parliament to impeach these magistrates under certain specific circumstances. However, this latter provision was immediately declared un-constitutional, while the provision regarding the reporting obligation of the Chief Prosecutor and the chairpersons of the Supreme Administrative Court and the Supreme Court of Cassation produced little effects in terms of accountability, the first hearing in the parliament in 2008 of the 'big three' retrieving little interest among the members of the National Assembly<sup>552</sup>. In February 2007 the National Assembly addressed the European Commission's concerns regarding the independence of the judiciary by introducing new amendments that mandated the creation of an independent judicial inspectorate in the Supreme Judicial Council to monitor the integrity of the branch<sup>553</sup>. The new Judicial System Act reflecting the modifications was adopted in July 2007 and the necessary measures were taken to make the new inspectorate operational. Thus, when political willingness for judicial reform was displayed by the Kostov and the Simeon Saxe-Coburg-Gotha administrations, the pace in pushing for institutional and legislative change has been slowed down by veto players in an insulated but not fully independent judiciary. While the Constitution and subsequent secondary legislation have laid the basis for an independent judiciary, where the Supreme Judicial Council was granted wide formal governance powers, especially as we will observe in comparison to the situation in Romania, indicators such as that of judicial independence monitored by the World Economic Forum and presented in the table below have shown a lower rating for Bulgaria despite an early legislative framework that provided a noteworthy accumulation of institutional safeguards protecting the judicial system<sup>554</sup>.

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<sup>552</sup> I. Ivanova (2009): "The Case of Bulgaria", in S. Alegre, I. Ivanova, D. Denis-Smith, *Safeguarding the Rule of Law in an Enlarged EU. The Cases of Bulgaria and Romania* (Sofia, Centre for European Policy Studies), p. 36.

<sup>553</sup> G. Noutcheva (2012): *European Foreign Policy and the Challenge of Balkan Accession: Conditionality, Legitimacy and Compliance* (London, Routledge), p. 147.

<sup>554</sup> B. Schönfelder (2005): "Judicial Independence in Bulgaria: A tale of Splendour and Misery", *Europe-Asia Studies*, Vol. 57, No.1, pp. 61-92.



**Figure 6 Judicial Independence 2001-2014**

**Source:** World Economic Forum’s Executive Opinion Survey (data from 2001 up until 2014) – Judicial Independence is rated on a scale from 1 to 7, with 1 representing the lowest level of progress, and 7 the highest.

As the judiciary and the constitutional court have gradually expanded their powers while reducing the political scope of the parliament and government, the European Commission began emphasising the need to pursue reform that would consolidate the accountability of the judiciary as well. But any substantial change has usually been dependent on the establishment of a wide political consensus between parties. In turn this consensus was achieved usually only under strong EU pressure, in Bulgaria’s case especially between 1998 and up until the 2005 elections when the prospect of European integration was not vulnerable to internal political cleavages in Bulgaria, the political elite displaying consensus over EU accession as this reflected the wide popular support for the objective of integration. In this context, conditionality proved to be more effective when the EU coerced the governments reluctant to change with the threat of postponing the country’s accession. As we have explored so far in the previous sections of this chapter, the influence and involvement of key international donors such as the World Bank, USAID, the Council of Europe and the European Union (through its complex system of monitoring instruments, gate-keeping actions, funding programmes and technical guidance) have created the permissive conditions for critical junctures determining substantial institutional, behavioural and legislative change to occur in Bulgaria. The presence of strong veto players,

be they political, within the judicial branch or even within the Constitutional Court in the latter stage of accession, led the country down the path of partial reform, with agents of partial change having to balance two contradictory objectives: on the one hand, supporting the country's preparations for EU membership which in turn opened a window of opportunity for new profits, and, on the other hand, guarding their privileged positions by not allowing a loss of control of rent-seeking opportunities in their specific sector<sup>555</sup>. Previous studies on the effects that early rule of law reforms in transitions countries have upon future similar efforts, such as Mota Prado's study on the case of Brazil, observe that states pursuing piecemeal and sequenced rule of law reforms can run into *reform traps* whereby the practices, values and attitudes laid during the early stages of institutional transformation are given the time and context to become entrenched while interest groups who wish to maintain the *status quo* become stronger in pursuing this objective<sup>556</sup>. To a certain extent, this was the case of Bulgaria as well and the absence during the pre-accession stage of change agents that would be able to capitalise the external pressure exercised by the European Union in order to secure the necessary political consensus to push for the consolidation of judicial effectiveness and the materialisation of anti-corruption efforts meant that in the post-accession stage new obstacles in achieving institutional change occurred.

#### 4.5.2. Romania's pre-accession story

Starting from Munk and Leff's thesis that transition affects the form of subsequent political developments through its influence on the pattern of elite competition, on the institutional rules crafted during transition, and on key actors' acceptance or rejection of the new rules of the game<sup>557</sup>, we now turn to Romania's post-communist past in order to understand the member state's track record in upholding the rule of law and combating corruption.

If the end of the communist regime in Bulgaria came as a result of a *palace coup*, in Romania, the change came about in a less peaceful manner, being initiated by a violent street

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<sup>555</sup> G. Noutcheva (2009): "Bulgaria: Rule of Law Wanted", in M. Emerson, R. Youngs (eds.) *Democracy's Plight in the European Neighbourhood. Struggling Transitions and Proliferating Dynasties* (Brussels, Centre for European Policy Studies), p. 34.

<sup>556</sup> M. Mota Prado (2010): "The Paradox of Rule of Law Reforms: how Early Reforms Can Create Obstacles to Future Ones", *University of Toronto Law Journal*, Vol. 60, No. 2, pp. 555-78.

<sup>557</sup> G. Munck; C. Leff (1997): "Modes of Transition and Democratization: South America and Eastern Europe in Comparative Perspective", *Comparative Politics*, Vol. 29, No. 3, pp. 343-62.

revolution that produced more than 1,000 casualties, killed by the army in the days prior to 22 December, and afterwards by unidentified snipers. This difference in the mode of transition present in Romania's case has been interpreted by some authors as necessary due to the sultanistic nature of Nicolae Ceaușescu's regime, arguing that a coup alone would not have been enough for an overthrow of the authoritarian leader<sup>558</sup>. With party elites being highly dependent on Ceaușescu for their position and privileges that led to their alienation, and in the midst of the chaotic series of events, a swift trial against the communist leader and his wife was organised before a military tribunal culminating in the execution of the defendants on the charges of genocide, undermining of the power of the state by organising armed actions, and undermining of the national economy<sup>559</sup>. Within four days, a provisional government was formed by the National Salvation Front (FSN), an initial grassroots movement comprising communist cadres, student and human rights activists, with Ion Iliescu, a prominent member of the Communist Romanian Party before his demotion in 1971, acting as interim president of the country, and Petre Roman as caretaker prime minister from December 1989 to June 1990. The FSN initially described itself as 'the emanation of the revolution', denying any intentions to transform itself into a political party. However, by January 1990, the FSN had announced its decision to compete in the first post-communist elections, despite protests from civil society groups and opposition parties. The unparalleled penetration of former Communist state officials into the FSN, who unproblematically had switched allegiance to the new central authorities, meant that despite the instability brought by the revolution, the „operating power structure was never truly affected”<sup>560</sup>. In this sense, Mihăilescu observes that as the FSN took over immediately the administration of central economic resources, supplying cities and the population, preserving the administrative network and maintaining trade and the overall cohesion of the state apparatus, it gained a head start that provided it with increased authority and popular sympathy<sup>561</sup>.

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<sup>558</sup> K. Verdery, G. Klingman (1992): "Romania after Ceausescu: Post-Communist Communism?", in I. Banac (ed.) *Eastern Europe in Revolution* (Ithaca, Cornell University Press), p. 121.

<sup>559</sup> P. Siani-Davies (2005): *The Romanian Revolution of December 1989* (Ithaca, Cornell University Press), pp. 138-39.

<sup>560</sup> V. Pasti (1997): *The Challenges of Transition: Romania in Transition* (Boulder, East European Monographs), pp. 106-07.

<sup>561</sup> M. Mihăilescu (2006): *Dampening the Power Keg: The Role of Democratic Oppositions in Fostering Ethnic Peace in Post-Communist Romania and Slovakia*, (Minneapolis, University of Minnesota), p. 137.

The street confrontations that marked the years 1990-1991 (the so-called “mineriade”)<sup>562</sup> reflected the turbulent reconfiguration of the political system as well. Despite the discursive commitments made by the new government, old practices and political barriers to the rule of law were preserved. In this sense, the 1991 Romanian Constitution has been considered as a mechanism of securing power and institutional control, as it placed judicial courts and the Public Ministry under the same banner of “judiciary authority”, provision which annulled the effective distinction between the judicial and executive branches<sup>563</sup>. Moreover, while the promotion, transfer and sanctioning of judges was provisioned in the Constitution to rest upon only the Superior Council of the Magistracy (CSM), the institution meant to guarantee the independence of the judiciary, the actual organisation of the CSM was postponed due to heated political debates between the governing party that strived to maintain control of the Public Ministry over the administration of the judicial system and the opposition which argued that the independence of the judiciary could not be secured under this solution. *De facto*, all of these attributes were carried out by the Ministry of Justice, the head of the institution deciding whether a disciplinary measure against a magistrate was to be imposed or not. Before becoming officially independent from the executive in 2005, the CSM was comprised of 10 judges and 5 prosecutors appointed by the Parliament for a mandate of four years, and was headed by the Ministry of Justice who appointed a third of its members. The composition of the first CSM was decided in 1993 through a series of decisions of the Parliament<sup>564</sup>. Appointments to higher courts were made by presidents of courts in charge of selecting judges through the Ministry of Justice, mechanism which further exacerbated the dependency upon the executive branch. In 1992 the first post-communist law on the organisation of the judiciary was passed (in force up until 2005), establishing a four-tier hierarchical structure of the legal system, establishing the Supreme Court (as the highest judicial authority with general national competencies, now named the High Court of Cassation and Justice), courts of appeal provided with extensive territorial competence (over two to four districts), county courts (one for each county), and first instance courts or lower courts. This hierarchical structure determined some authors to note that as neither the leading structures of the courts of appeal, courts of

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<sup>562</sup> For a detailed analysis see T. Gallagher (2005): *Theft of a Nation. Romania since Communism* (London, C. Hurst & Co.).

<sup>563</sup> Open Society Institute (2002): *Monitoring the EU Accession Process: Corruption and Anti-Corruption Policy in Romania* (Brussels, Open Society Institute), p. 494.

<sup>564</sup> Parliament Decisions No. 4/1993, No. 6/1993, No. 21/1993 and No. 25/1993.

justice, and first instance courts depended strictly on the interests of local political power, this led to a change in the ratio of forces that secured the obedience of court presidents to the central political power that was ruling<sup>565</sup>. Moreover, the 1992 Law on the Organisation of the Judiciary also offered the Justice Ministry the right to set the organisation and jurisdiction of courts, as well as the right to be informed of the activity of each court through its inspectors<sup>566</sup>.

After the nearly seven-year reign of Ion Iliescu, the victory of the Romanian Democratic Convention (CDR) (and the appointment of the Victor Ciorbea Government), a right-wing alliance of seven small political parties, in the November 1996 elections and the election of Emil Constantinescu as president of the country spurred hopes both among external and internal actors regarding the pace of reforms. The most important changes in the judicial sector brought by during the CDR government and supported by president Constantinescu were the enhancement of the training of magistrates (judges and prosecutors) which was linked to the National Institute of Magistrates (NIM), and the enactment of two laws against corruption such as the Criminal Law Convention on Corruption (June 1999) and the Civil Law Convention on Corruption (November 1999). President Constantinescu also sought to reform the judiciary by modifying the Constitution and improving the functioning of the Constitutional Court (with the two-fold jurisdiction of examining laws before their promulgation by the President and the examination of laws in force when their constitutionality is challenged), but the lack of support and authority within the institutional structures and the CDR itself hindered a straightforward approach to pushing for reforms. The results achieved in prosecuting corruption for example between 1996 and 2000 reflected some of the inefficiencies of the judiciary: out of more than 35.000 investigated during this time, only 617 were convicted<sup>567</sup>.

The fourth presidential and parliamentary elections in November 2000 were marked by the victory of Ion Iliescu and of the Romanian Social Democratic Party (PDSR later becoming PSD). The Adrian Nastase government (2000-2004), having as assumed as milestones EU and NATO membership put forward initially ambitious plans to reduce bureaucracy , curb corruption, privatise state-owned companies and increase foreign direct investment. One

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<sup>565</sup> H. Dumbravă, Călin (2009): "The Evolution of the Judicial System in Romania during the past 60 Years", *Revista Forumul Judecatorilor*, No. 1.

<sup>566</sup> T. Gallagher (2010): *Deceniul Pierdut al României. Mirajul Integrării Europene după Anul 2000* (Bucharest, Editura All), p. 128.

<sup>567</sup> P. Abraham (2005): *Corupția / Corruption* (Bucharest, Editura Detectiv), pp. 458-464.

important step was the adoption of Law no. 78/2000 on the prevention, investigation and combat of corruption acts, that differentiated between corruption-related offences and contained provisions regarding the incompatibilities between the public office and other activities<sup>568</sup>. While some steps were made in creating and improving legislation, at the institutional level, the 2002 GRECO Report revealed that the two institutions involved in the fight against corruption – the policy and the judiciary – were subjects as well to the phenomenon<sup>569</sup>. In the context of harsh criticism coming from the European Commission as well that deplored among others the inefficiency of the anti-corruption section within the General Prosecutor’s Office that a year since its establishment had only 17 prosecutors and 38 open positions<sup>570</sup>, the government elaborated its first anticorruption strategy and action plan for 2001-2004, and established the National Committee for Crime Prevention, an inter-ministerial body without legal status, directly subordinated to Prime-minister and coordinated by the Ministry of Justice that had as responsibility the implementation and monitoring of reforms aimed at preventing corruption. But the most important decision in the anti-corruption policy was the adoption of Emergency Ordinance no. 43/2002, later approved through organic law<sup>571</sup> that transformed the Section against Corruption and Organised Criminality within the Prosecutor’s Office into an independent structure, with its own investigative staff – the National Anti-Corruption Prosecutor’s Office (NAPO). The institution was responsible for the prosecution of grand corruption offences under the Law no. 78/2000 that produced prejudices of over Euro 200.000 to the public authority, involved a good or a service subject to the offence with a value exceeding Euro 10.000, and the authors of the offence were high officials. Its Chief Prosecutor was appointed by the President of the country, following an evaluation by the Superior Council of Magistracy of the candidates proposed by the Ministry of Justice. While the institution was relatively well staffed, including 150 police officers and 75 prosecutors, the extent of its independence was questioned, as by law the Chief Prosecutor was subordinated to the Prosecutor-General, and

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<sup>568</sup> A. Dorobanț (2003): “Report on Fighting Corruption in Romania”, *Revue Internationale de Droit Pénal*, Vol. 74, p. 658.

<sup>569</sup> Group of States against Corruption (2002): *First Evaluation Round – Evaluation Report on Romania* (Strasbourg, GRECO), Greco Eval I Rep (2001) 13 E Final, available at [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1\(2001\)13\\_Romania\\_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1(2001)13_Romania_EN.pdf).

<sup>570</sup> European Commission (2001): *Regular Report on Romania’s Progress towards Accession* (Brussels, European Commission), SEC(2001)1753.

<sup>571</sup> Law no. 503/2002 regarding the approval of the Emergency Ordinance No. 43/2002 on the National Anti-Corruption Prosecutor’s Office, Official Gazette No. 523, 18<sup>th</sup> of July 2002.

the Minister of Justice had the power to reshuffle his office at any point in time<sup>572</sup>. A 2005 Freedom House assessment of the country's anti-corruption policy highlighted that the lack of transparency and objectivity of the institution's human resources practices, the absence of coordination with agencies responsible for corruption prevention, and the lack of an evaluation system of the institution's performance meant that NAPO "was neither autonomous, neither efficient"<sup>573</sup>.

This period in fact was marked by strong contrasts, situation which substantiates the hypothesis according to which the external pressure exerted from this point onwards has created permissive conditions for change to occur. More specifically, important formal steps were made such as the voting of further anti-corruption legislative package in 2003 which required public officials to fill out income and asset declarations, and the most important political development in 2003, the revision of the Constitution, which by new provisions granted the Superior Council of Magistracy the exclusive competence to appoint, promote, transfer and sanction the magistrates. At the same time, we consider these shifts as 'formal' as when focusing on their implementation, as Gallagher observed the asset declaration forms omitted properties owned abroad, art collections and jewellery, while in the case of the Prime Minister's wealth, no public agency has the authority to carry out an investigation<sup>574</sup>. In the case of judicial independence guaranteed by the revised Constitution, still existent intrusion mechanisms such as control over budget, nomination attributions of the Ministry of Justice, and the presence of the Minister of Justice at the CSM meetings raised question marks as regards to the substantial transposition of the principle<sup>575</sup>. Moreover, national resistance to substantial change was particularly observed as regards to the struggle over the competences of NAPO, making its legislative framework one of the most amended and changed pieces of legislation in post-Communist Romania<sup>576</sup>. Overall, the progress made towards improving judicial independence and the fight against corruption during the mandate of PSD-appointed Rodica Stanoiu (2000-2004) was

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<sup>572</sup> T. Gallagher (2009): *Romania and the European Union. How the Weak Vanquished the Strong* (Manchester, Manchester University Press), p. 137.

<sup>573</sup> Freedom House (2005): *The Anticorruption Policy of the Romanian Government. Assessment Report Commissioned by the Romanian Ministry of Justice* (Washington D.C., Freedom House), p. 163.

<sup>574</sup> T. Gallagher (2009): *Romania and the European Union. How the Weak Vanquished the Strong* (Manchester, Manchester University Press), p. 138.

<sup>575</sup> A. Hipper (2015): *Beyond the Rhetorics of Compliance. Judicial Reform in Romania* (Freiburg, Springer Fachmedien Wiesbaden), p. 110.

<sup>576</sup> M. Ristei (2010): "The Politics of Corruption: Political Will and the Rule of Law in Post-Communist Romania", *Journal of Communist Studies and Transition Politics*, Vol. 26, No. 3, pp. 341-62, p. 351.



interpreted by some authors as “the darkest period for the Romanian legal system from the standpoint of the independence of post-communist justice”<sup>577</sup>. Transcripts of party meetings published in the national media in 2004 only came to reinforce suspicions of political implication in the investigation and prosecution of high-level corruption cases, with the Minister herself reassuring other PSD members of the possibility of delaying high-profile cases involving members of the government<sup>578</sup>. Under intense criticism by both the Commission and the European Parliament and fearing a delay in the conclusion of EU membership negotiations, Prime-minister Nastase responded with a cabinet reshuffling that led to the removal, among other of Justice Minister Stanoiu. A ‘To Do’ list comprising some 30 items that had to be addressed by July 2004 was also signed under the encouragement of Commissioner Verheugen<sup>579</sup>. As a result, an Emergency Ordinance was passed in 2004 amending and updating the existing laws on ministerial liability, on the functioning of the NAPO and on the control of dignitaries and the public servants’ wealth. A three-law package on the Superior Council of Magistracy, on the Organisation of the Judiciary and on the Statute of Magistrates<sup>580</sup> was also enacted in June 2004. The rules amending the Law on the Organisation of the Judiciary (Law no. 92/1992) aimed at transferring to the Superior Council of Magistracy most of the competences previously exercised by the Ministry of Justice<sup>581</sup>. However, while applauded as a genuine and ambitious attempt to adopt and implement the EU conditionality to guarantee the separation of powers, resistance from the Constitutional Court translated into 4 articles that were related to the status of members of the SCM being declared unconstitutional, the final three-law package being enacted at the end of 2005 without these provisions.

The Parliamentarian and presidential elections of 2005 shifted power from PSD to the Justice and Truth Alliance, comprising the centre-right National Liberal Party (PNL) and the Democratic Party (PD – later turned PDL). The new government headed by Prime Minister

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<sup>577</sup> H. Dumbravă, Călin (2009): “The Evolution of the Judicial System in Romania during the past 60 Years”, *Revista Forumul Judecatorilor*, No. 1.

<sup>578</sup> O. Simonca, A. Mihai, I. Stoica, O. Ghergut, L. Moise, S. Fati (2004): “Stenogramele PSD au Făcut Furori în Presa Internațională”/”PSD Transcripts Creating a Stir in the International Press”, *Evenimentul Zilei*, 24<sup>th</sup> November.

<sup>579</sup> L. Stan (2006): “Romania’s EU Integration between Political Will and Political Capacity”, Paper prepared for the South East Europe and EU Enlargement Conference (Ottawa, Carleton University).

<sup>580</sup> Law no. 317/2004 regarding the Superior Council of Magistracy, Official Gazette No. 599, Law No. 304/2004 regarding the organization of the judiciary, Official Gazette no. 576, Law No. 303/2004 regarding the statute of judges and prosecutors, Official Gazette No. 576.

<sup>581</sup> R. Coman, C. Dallara (2012): “Judicial Independence in Romania” in A. Seibert-Fohr (ed.) *Judicial Independence in Transition: Strengthening the Rule of Law in the OSCE Region* (Heidelberg, Max Plank Institut), p. 839.

Calin Popescu Tariceanu together with the newly-elected President Traian Basescu came to power in a new context both internally and externally, with the revised Constitution and adopted legislation providing a clearer separation of competences, and the EU on the other hand using gatekeeping mechanisms in order to secure the sustainability of reforms. The appointing of Monica Macovei, former prosecutor, international anti-corruption activist and legal expert for the Council of Europe, as Minister of Justice signalled a change of approach to reform which did not take long to materialise. Soon after taking office, Macovei submitted a draft law to CSM to analyse that included several amendments to the 2004 law package which proposed among others the introduction of mandatory competitions for acquiring a position in CSM, and the incompatibility of CSM membership with any other position of authority<sup>582</sup>. After the enactment of the new reform law, two attacks were triggered on the one hand by PSD submitting an unsuccessful no-confidence motion against the new government and on the other by the Constitutional Court that declared articles of the law as unconstitutional<sup>583</sup>. While the law was eventually re-drafted and reintroduced in the Parliament, in its new form it was substantially adjusted. As NAPO's track record in prosecuting high-level corruption cases was not satisfactory (in 2005 for example the institution having 2314 cases out of which only 744 were sent to trial<sup>584</sup>), the institution's budget was increased. Very shortly afterwards, the Constitutional Court ruled out the institution's competence to investigate Members of the Parliament, which was passed to the General Prosecutor of the High Court of Cassation and Justice. Through Emergency Ordinance no. 134/2005 however, the Justice Ministry managed to open the door for the reorganisation of NAPO in 2005 into the National Anti-Corruption Directorate (DNA), an independent body operating within the High Court of Cassation and Justice and led by a Chief Prosecutor seconding the General Prosecutor, in this way re-securing the competence to investigate deputies and senators. Despite strong opposition in the Senate towards this solution, the ordinance was eventually approved, setting the scene for the gradual optimisation of the institution. Lacking political support and being accused of undue interference in the judiciary, Macovei was eventually ousted in April 2007. During the first

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<sup>582</sup> C. Dallara (2014): *Democracy and Judicial Reforms in South-East Europe. Between the EU and the Legacies of the Past* (Heidelberg, Springer), p. 65.

<sup>583</sup> R. Carp (2007): A Constitutional Principle under debate: Immovability of Judges in the Romanian and Comparative Law context, in R. Coman, J. De Waele (eds.), *Judicial Reforms in Central and Eastern European Countries* (Brugge, Editions Vanden Broele), pp. 11-23.

<sup>584</sup> NAPO (2005): *Annex no. 1 – Statistical Data regarding the Prosecution Activity undertaken during 2005* (Bucharest, NAPO), available at [www.pna.ro/obiect2.jsp?id=11](http://www.pna.ro/obiect2.jsp?id=11).

post-accession year, the attempt of the government to issue a decree suspending the activity of the National Anti-Corruption Directorate after the newly appointed Justice Ministry, Tudor Chiuariu became the subject of a DNA investigation induced the view that Romania was set on a backsliding path<sup>585</sup>.

#### ***4.6. Post-Accession Europeanisation? Impact of the Cooperation and Verification Mechanism in Bulgaria and Romania***

As both Romania and Bulgaria still had to demonstrate that the rule of law was fully observed in their domestic systems, even after the main incentive of EU membership was granted, on December 2006, the European Commission adopted two decisions<sup>586</sup> on the basis of Articles 37 and 38 of the Treaty of Accession, thereby establishing a Cooperation and Verification Mechanism. The material scope of the mechanism covers judicial reform and the fight against corruption for both members, as well as the fight against organised crime for Bulgaria only. The leading role in the monitoring of the two countries is taken by the European Commission that carries out the assessment based on input from governmental, civic, and administrative sources. Specific benchmarks were put forward initially such as in the case of Bulgaria the adoption of Constitutional amendments removing ambiguities regarding the independence and accountability of the judicial system or for Romania enhancing the capacity and accountability of the CSM. If in the technical reports these benchmarks are reiterated, in the monitoring reports they have been integrated in the assessment itself under general headings. The reporting was done up until 2012 bi-annually and up until 2010 safeguard clauses, included in the Accession Treaty of Bulgaria and Romania at articles 36-38, were available as means to redress backsliding and severe shortcomings. The general economic clause, the internal market specific one, and the justice and home affairs safeguard clause could take the form of temporary suspension of specific rights under the EU *acquis* directly related to the area where shortcomings were

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<sup>585</sup> The Economist (2008): "In Denial: The European Union Conceals Romania's Backsliding on Corruption", *The Economist*, 3<sup>rd</sup> July, available at <http://www.economist.com/node/11670671>.

<sup>586</sup> European Commission (2006): Decision establishing a mechanism for cooperation and verification of progress of Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime, (Brussels, European Commission) C(2006)6570 final; Decision establishing a mechanism for cooperation and verification of progress of Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime (Brussels, European Commission), C(2006)6569 final.

identified<sup>587</sup>. Other potential sanctions included the suspension of Member States' obligation to recognise and execute judgements and judicial decisions from Bulgaria and Romania. However, throughout the period of reference (2007-2015), the safeguard clauses were never invoked. Yet some authors go beyond the three clauses and consider that the Commission's decision to freeze Euro 400 million in pre-accession funding in the case of Bulgaria in 2008 constituted a sanction deployed under the Cooperation and Verification Mechanism<sup>588</sup>. The author's own interviews with experts from the Bulgarian think tank Centre for Liberal Strategies and the Romanian think tank Expert Forum<sup>589</sup> have revealed however, that this decision was regarded as separate from the CVM, the mechanism being considered as designed for supportive reinforcement rather than sanctioning.

The decision to maintain the CVM after 2010, the end date for the availability of the 'stick' attached to the mechanism which has been wrongly equated by the Bulgarian government with the overall duration of the CVM<sup>590</sup>, has triggered a wide variety of reactions at the national level. As such, in Romania's case, representatives of the Romanian government<sup>591</sup> emphasised the expandable nature of the CVM, arguing that if with the first monitoring reports, the Commission limited itself to evaluating progress across the 4 benchmarks initially set, by 2013 the issues monitored by the Commission would have equated with 30 new benchmarks. Benchmark 4 that regarded the fight against corruption, in particular within the local government was identified as the evaluation indicator that had expanded the most, including after 2012 a rule of law component as well. The evaluation methodology attached to the benchmarks was also criticised as lacking precision that allowed the mechanism to extend in time and in scope. The Romanian government also addressed these perceived issues to the European Commission, elaborating in March 2013 a detailed analysis of the progress made under each benchmark and sub-indicator and requiring the

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<sup>587</sup> S. Carrera, E. Guild, N. Hernanz (2013): *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU. Towards an EU Copenhagen Mechanism* (Brussels, Centre for European Policy Studies), p. 8.

<sup>588</sup> S. Carrera, E. Guild, N. Hernanz (2013): *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU. Towards an EU Copenhagen Mechanism* (Brussels, Centre for European Policy Studies), p. 45.

<sup>589</sup> Interview conducted by the author with A. Primatarova, Director of the European Program of the Center for Liberal Strategies in Sofia, conducted in February 2014; Interview conducted by the author with L. Stefan, international expert on the rule of law with the European Commission and specialist on anti-corruption at Expert Forum, in November 2013.

<sup>590</sup> Interview conducted by the author with A. Primatarova, Director of the European Program of the Center for Liberal Strategies in Sofia, conducted in February 2014.

<sup>591</sup> Interview conducted by the author in November 2013 with expert within the European Affairs and Human Rights Department, Romanian Ministry of Justice.

establishment of a new evaluation methodology on the Commission's part that would secure an endpoint to monitoring<sup>592</sup>. Thus, were we to compare the CVM with policy coordination under the Europe 2020 Strategy, because of the restricted character of the mechanism which was interpreted as a sort of 'punishment' directed solely to the two Member States, the Romanian authorities, especially members of the Ponta cabinet, have actively sought to set a 'completion' timetable. In fact the continuous monitoring applied to Romania and Bulgaria has been identified as hindering the countries' negotiation positions at the EU-level. In the context of the introduction in 2013 of the EU Justice Scoreboard, a comparative tool monitoring the quality, independence and efficiency of justice systems across Member States, and the introduction in 2014 of the EU Anti-Corruption Report<sup>593</sup>, representatives of the Romanian Justice Ministry considered that the country was submitted to triple monitoring and argued that one of the two instruments could have been used as an alternative to the CVM.

Interviews conducted with Romanian Members of the European Parliament<sup>594</sup> have also revealed a diversity of interpretations regarding the efficiency of the CVM in triggering sustainable change at the national level. While all interviewees agreed upon the benefits of monitoring, the extended use of the CVM by the Commission has been however deemed by some as having generated adverse effects, as the overuse of the theme of the fight against corruption in political rhetoric has led to an erosion of the concept. Moreover, Commission observations regarding the progress achieved under each benchmark have been used at times as 'fuel' for internal political conflicts which determined some of the interviewees to again underline the potential hidden adverse effects. Overall, the mechanism has been deemed to be fundamentally political in nature and not technical, as its assessment arm falls largely with the Secretariat General and not so much the niche Commissioner. Bulgarian MEPs have regarded the CVM as a useful instrument that has run its course, a former driver for change and a good starting point for guidance for legislation to be adopted, but a clear

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<sup>592</sup> Ministerul Justiției (2013): *Analiză privind Mecanismul de Cooperare și Verificare. Instituirea, Implementarea, Perspectivele și Direcțiile de Acțiune Propuse/ Analysis regarding the Cooperation and Verification Mechanism: Establishment, Implementation, Perspectives and Proposed Lines of Action* (Bucharest, Ministry of Justice).

<sup>593</sup> European Commission (2014): *Report from the Commission to the Council and the European Parliament. EU Anti-Corruption Report* (Brussels, European Commission), COM(2014)38 final.

<sup>594</sup> Interviews conducted by the author in September 2014 with MEP Cristian Preda, Marian Jean Marinescu, Norica Nicolai and Daniel Buda.

exit strategy was deemed necessary in order to avoid the rooting of a double standard when submitting the country to further monitoring<sup>595</sup>.

At the grass-roots level, the efficiency of the CVM has been evaluated very differently in Romania. On the one hand, it has been viewed as an initial constraining/pressuring instrument for the period during which the safeguard clauses were available sanctioning options, securing in this sense certain changes that previously had been rejected. As such, the Deputy Director of Transparency International Romania<sup>596</sup> argued that while previous advocacy attempts to determine the establishment of a national agency for integrity, the Parliament passed the law regarding the formal establishment of the National Integrity Agency (ANI)<sup>597</sup> only days from the publication of the first Monitoring Report. However, when turning to the procedure of adoption of the new Civil (in force since October 2011), Penal (in force since February 2014) Civil Procedure (in force since February 2013) and Penal Procedure Codes (in force since July 2013), the haste with which these essential instruments have been adopted and the manner itself – with the government assuming responsibility (a practice whereby legislative proposals made by the executive do not need to be voted by the parliament and are considered adopted unless censure motions are forwarded within three days), have been judged as negative effects of CVM benchmarking. The complexity of such legal instruments and the necessity of considering potential effects at the wider level of society did not take precedence in this sense over the ticking of requirements.

Alternatively, the CVM has been considered as a support mechanism, especially in cases where the political sphere has tried to by-pass the principles of accountability and the rule of law<sup>598</sup>. In this sense, the representative of national think tank Expert Forum argued that during what came to be known as “the Black Tuesday” in 2013 when the Romanian Parliament attempted to pass through secret ballot a series of contested draft laws – one that under the pretext of overcrowded prisons would have pardoned those convicted for minor offenses (postponed) and two modifications brought to the New Penal Code that have changed the definition of ‘conflict of interests’, and have excluded the Members of the

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<sup>595</sup> Speech in the European Parliament of MEP Mariya Gabriel, 13<sup>th</sup> of March 2013.

<sup>596</sup> Interview conducted by the author with Iulia Coșpănar, Deputy Director at Transparency International Romania in January 2014.

<sup>597</sup> Law no. 144/2007 regarding the establishment, organization and functioning of the National Integrity Agency, Official Gazette No. 359.

<sup>598</sup> Second interview conducted by the author with L. Stefan, international expert on the rule of law with the European Commission and specialist on anti-corruption at Expert Forum, in December 2013.

Parliament and the President from the category of public servants (voted)<sup>599</sup>. Such instances have been neither singular nor infrequent, in 2012 the Social Liberal Union between PSD, PNL and the Conservative Party (PC) have trigger a political and institutional crisis in their endeavour to impeach the president and topple the PDL-led government through a no-confidence vote in the Parliament, dismissing afterwards the speakers of the Senate and Chamber of Deputies (both PDL members) and the country's Ombudsman, and curbing the powers of the Constitutional Court<sup>600</sup>. In this instance, Prime Minister Victor Ponta was invited for an emergency meeting at Brussels by both the European Commission President José Barroso and the Council President Herman Van Rompuy and was presented with an 11-point list of measures that were deemed necessary to restore the rule of law. The requirements referred to the respect for the powers and decisions of the Constitutional Court, the transparency of appointment procedures in the case of the heads of the General Prosecutor's Office, the National Anti-Corruption Directorate, and of the Ombudsperson (appointment which needed to benefit of cross-party support), and the imperative of a clean criminal record (with emphasis on the absence upon appointment or at the beginning of the mandate of any final convictions ) for members of the Parliament and Ministers. Thus in such cases, where the political class did not demonstrate enough 'maturity', the CVM with its flexible character was used by the European Commission as a checks and balances security measure.

In contrast to Romania, in Bulgaria the CVM was regarded at times by representatives of the civil society with more scepticism as regards to its capacity to produce change. In this sense, a representative of the Bulgarian think tank Centre for the Study of Democracy<sup>601</sup> argued that in a context where a political class has direct interest in exercising influence over the judiciary and where the judiciary is marred with political appointees, it would be difficult for the CVM to generate change when the only two sources of change have vested interests in maintaining the status quo. Moreover, in the absence of a European model of structuring

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<sup>599</sup> C. Pantazi (2013): "Câteva Concluzii După Marțea Neagră a Parlamentului României"/"A Few Conclusions after the Black Tuesday of the Romanian Parliament", HotNews.ro (11 December), available at <http://www.hotnews.ro/stiri-opinii-16178658-cateva-concluzii-dupa-martea-neagra-parlamentului-romaniei.htm>.

<sup>600</sup> V. Tismăneanu (2013): "Democrația pe Marginea Prăpastiei. O Lovitură de Stat Eșuează în România"/"Democracy on the Verge of Abyss. A Coup d'état Fails in Romania", *Revista 22* (8 January), available at <http://www.revista22.ro/democratia-pe-marginea-prapastiei-o-lovitura-de-stat-esueaza-in-romania-21554.html>.

<sup>601</sup> Interview conducted by the author in January 2014 with Philip Gounev, Director of the Security Programme of the Center for the Study of Democracy, former Deputy Minister of Interior in the interim government led by Prof. Georgi Bliznashki.

the judicial system, the CVM is considered to become a moving target, here again the necessity of devising an exit strategy for Bulgaria being put forward as a next step.

The political instability of the post-accession years in both countries that saw Bulgaria having changed 5 governments<sup>602</sup> from 2007 to present and Romania 7 governments<sup>603</sup> has translated into fractioned institutional and legislative reforms. However, even in this context successive Monitoring Reports of the Commission for Romania<sup>604</sup> have underlined a good reform trajectory and note-worthy results that throughout this chapter have been explained as the products of a pre-accession critical juncture that has triggered a new equilibrium. In fact the strategies pursued by the two countries in curbing corruption and improving their judicial systems have differed substantially. Bulgaria has opted for a decentralised institutional framework, having on the investigative and prosecution side, the State Agency for National Security, the Internal Security Directorate within the Ministry of Interior and the Prosecutor's Office all collaborating for the investigation of corruption crimes committed by senior public officials. However, as two of these institutions are subordinated to the Bulgarian Council of Ministers, the extent to which these can be detached from the political realm remains problematic. The Centre for Prevention and Countering Corruption and Organised Crime established in 2011 by the Council of Ministers represents a separate body that is responsible for collecting and registering information from all domains sensitive to corruption, and to produce complex analyses and methods tailored to each field to curb corruption. The results however, have not been proportionate to the funding redirected towards the institution<sup>605</sup>. The Commission for Combating Crime and Corruption within the Council of Ministers was created in 2006 with the purpose of

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<sup>602</sup> The Sergei Stanishev BSP government (2005-2009); the Boyko Borisov GERB government (2009-2013); the caretaker government led by Marin Nikolov (March-May 2013); the Plamen Oresharski government formed around the BSP (2013-2014); the caretaker government of Georgi Bliznashki (August-November 2014); and the incumbent Boyko Borisov GERB government (from November 2014).

<sup>603</sup> The Calin-Popescu Tariceanu government led by PNL and the Democratic alliance of Hungarians in Romania (2007-2008); the first Emil Boc cabinet (2008-2009 formed between PSD and PDL); the second Emil Boc cabinet PDL-led (2008-2012); the Mihai Razvan Ungureanu cabinet (February-April 2012) led by PDL, UDMR and independents; four Victor Ponta cabinets between April 2012 and November 2015, when a government of non-politically affiliated members took office.

<sup>604</sup> European Commission (2013): *Report from the Commission to the European Parliament and the Council on the Progress in Romania under the Co-Operation and Verification Mechanism* (Brussels, European Commission), COM(2013) 47 final, pp. 10-11; European Commission (2014): *Report from the Commission to the European Parliament and the Council on the Progress in Romania under the Co-Operation and Verification Mechanism* (Brussels, European Commission), COM(2014) 37 final, p. 9; European Commission (2015): *Report from the Commission to the European Parliament and the Council on the Progress in Romania under the Co-Operation and Verification Mechanism* (Brussels, European Commission), COM (2015)35 final p. 10.

<sup>605</sup> European Commission (2015): *Report from the Commission to the European Parliament and the Council on the Progress in Bulgaria under the Co-Operation and Verification Mechanism* (Brussels, European Commission), COM (2015) 36 final, p. 7.



establishing objectives of state anti-corruption policies, provide decisions in this sense. Recent evaluations have shown unfortunately that the institution lacks the necessary capacity to effectively perform its functions, especially implementing a synergetic approach to corruption<sup>606</sup>.

Romania has opted for a more centralised approach to anti-corruption with the National Anti-Corruption Directorate and the National Integrity Agency being the main specialised bodies that on the one hand conduct, supervise and control all criminal investigations on corruption crimes and send cases to court for trial and on the other hand combat corruption through administrative means such as control of assets. While both institutions have been the direct targets of successive political attempts to restrain their powers, budgets, or structures, both the European Union and the national public have been active in demanding a return to the status quo and the well functioning of these institutions. Overall, this protective double monitoring coupled with the institution's highly trained and specialised prosecutors, the available means for conducting investigations and the legislative instruments in force have led to impressive results, DNA for example contributing to the prosecution by 2015 of over 1250 persons for cases of high-level corruption, and identifying overall prejudices from corruption of Euro 431 million<sup>607</sup>. Yet, the sheer number of cases to be investigated, which in 2015 rose to 10.974, and their severity demonstrated in the same year by the staggering number of dignitaries under investigation (1 Prime-minister, 5 ministers, 16 deputies and 5 senators) indicates a highly embedded phenomenon. It is our contention however, that on the basis of a consistent legislative framework, maintenance of DNA's standard of activity and the strengthening of the capacity to recuperate prejudices of the National Fiscal Administration Agency, the price of engaging in corruption activities will substantially increase.

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<sup>606</sup> Centre for the Study of Democracy (2014): *Corruption and Anti-Corruption in Bulgaria (2013-2014)* (Sofia, CSD).

<sup>607</sup> National Anti-Corruption Directorate (2015): *Activity Report 2015*, available at <http://www.pna.ro/faces/obiect2.jsp?id=249>.

## ***4.7. Conclusions***

In this chapter we have strived to demonstrate that the difference in performance that we now observe between Romania and Bulgaria in terms of their efforts towards curbing corruption and addressing the weaknesses of their judicial systems can be explained through a historical institutionalist lens. In this sense, we consider that governmental decisions (such as opting for a particular institutional framework for fighting corruption, requesting international loans and directing funds where the European Commission usually pointed at the debilitating effects of insufficient funding etc) made during the pre-accession period, as well as the 'transformative diplomacy' conducted not only by the European Union, but by a myriad of international organisations have created what the historical institutionalist literature calls permissive conditions for a critical juncture to occur and create a new equilibrium in the case of Romania. The same factors, but in the absence of productive conditions at the national level have translated in Bulgaria's case in a missed opportunity. In the case of Romania, the productive conditions included the presence of strong change agents (occupying either top governmental positions or leading key institutions) pushing for real reform and important improvements in the legal framework (such as the legislation amending in 2004 the functioning of NAPO or the three-law package on the Superior Council of Magistracy, on the organisation of the Judiciary and on the Statute of Magistrates) that have generated an institutional path that has secured progress being reached in prosecuting high level corruption. The impact of the threat to delay accession put forward by the European Union played an essential role as well, providing the context for empowerment of change agents and for the adoption of essential legislation.

## Chapter 5

### Laying the path for European prosperity and social cohesion? Analysing Romania and Bulgaria's performance under the objectives of the Europe 2020 Strategy

One of our starting hypotheses extracted from the rational choice literature connected the propensity of state compliance with supra-national law with either the political clout at the EU level of Member States, or their economic power. The premise of this hypothesis identified actors as rational self-interested agents that calculate the costs and benefits of non-compliance. Incentives and disincentives in this scenario play a role in tipping the balance in favour of the transposition at the national level of external norms. Thus, when employing this reasoning to the European level, Member States are expected to avoid complying with EU norms due to the associated costs of the targeted change to be achieved. In order to counterbalance the incentive for defection, external constraints in the form of institutionalised monitoring and sanctioning of Member States need to be established or increased. However, in the case of certain policy areas which do not fall in the sphere of the Community method, such as Research and Development, Education, or the Information Society, both the level of obligation to comply and the level of enforcement attached to norms are largely soft. These types of norms have been bracketed under the umbrella term of 'soft law', and their effectiveness in generating change has been connected by 'optimist' perspectives<sup>608</sup> to the room that they provide to implementers for policy experimentation, to the wide range of actors that become involved in the process of policy-making<sup>609</sup>, and to the long-lasting learning effects that they induce through voluntary and rational assessment of past experience and new information<sup>610</sup>. The most emblematic mode of governance falling in this category has been the Open Method of Co-ordination (OMC), a mechanism described as 'softer' than the EU regulatory mode but more inclusive in terms of the

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<sup>608</sup> M. Büchs (2009): "The Open Method of Coordination – Effectively preventing Welfare State Retrenchment?", *European Integration Online Papers*, Vol. 13, No. 1.

<sup>609</sup> See J. Cohen, C. Sabel (1997): "Directly-Deliberative Polyarchy", *European Law Journal*, Vol. 3, No. 4, pp. 313-342; D. Trubek, L. Trubek (2005): "Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination", *European Law Journal*, Vol. 11, No. 3, pp. 343-364.

<sup>610</sup> P. Hall (1993): "Policy Paradigms, social Learning, and the State: The Case of Economic Policy Making in Britain", *Comparative Politics*, Vol. 25, No. 3, p. 278, pp. 275-96;

involvement of EU institutions than intensive transgovernmentalism<sup>611</sup>. The OMC originated with the European Employment Strategy (EES) that was launched at the Essen European Council in 1994 a set of recommendations that were to be translated by Member States into long-term programmes, annually assessed at the Community level<sup>612</sup>. The mode itself which now stands at the basis of the Lisbon Strategy and the Europe 2020 Strategy which will be presented in this chapter, “employs non-binding objectives and guidelines to bring about change in social policy and other areas”<sup>613</sup>. Thus, in the absence of “hard” sanctions when Member States fail to adopt or achieve OMC objectives, the subsequent natural question is: why would these governments assume the inherent costs of implementing recommendations when they are not legally obliged to do so and the only threat for non-compliance is naming and shaming by the European Commission? Moreover, a “sceptical” view over the extent to which Member States would strive to meet the Europe 2020 Strategy targets would also question whether the relatively open-ended nature of the policy substance promoted (in this case the lax understanding of competitiveness which has been corroborated with social cohesion<sup>614</sup>) would affect the extent of “soft Europeanization” at the domestic level. In the context of voices that identify a potential inherent tension between negative and positive European integration on the one hand and the social component of soft law instruments such as the Lisbon strategy and its 2010 relaunch, the Europe 2020 Strategy, should we simply consider these governance modes as very ambitious programmes with very limited instruments, and inevitably insufficient results? In what follows we will explore the characteristics and differences between soft law initiatives employed by the European Union, and we will proceed to follow their impact at the national level, more specifically in the two countries under analysis. As the 20-20-20 climate targets contained by the Europe 2020 Strategy are also part of binding legislation, namely the Climate and Energy Package for 2020 and the Energy Efficiency Plan of 2011<sup>615</sup>, the focus of

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<sup>611</sup> H. Wallace C. Reh (2014): “An Institutional Anatomy and Five Policy Modes”, in H. Wallace, W. Wallace, M. Pollack (eds.) *Policy Making in the European Union* (Oxford, Oxford University Press, 7<sup>th</sup> edition), pp. 73-111.

<sup>612</sup> J. Goetschy (1999): “The European Employment Strategy: Genesis and Development”, *European Journal of Industrial Relations*, Vol. 5, No. 2, pp. 117-37.

<sup>613</sup> D. Trubek, L. Trubek (2005): “Hard and Soft Law in the Construction of social Europe: the Role of the Open method of Co-ordination”, *European Law Journal*, p. 343.

<sup>614</sup> For further discussion see B. van Apledoorn (2009): “The Contradictions of ‘Embedded Neoliberalism’ and Europe’s Multi-level legitimacy Crisis: The European Project and its Limits”, in B. van Apledoorn, J. Drahokoupil, L. Horn (eds.) *Contradictions and Limits of Neoliberal European Governance. From Lisbon to Lisbon* (New York, Palgrave Macmillan), p. 21-43.

<sup>615</sup> See more on the EU’s climate policy in E. Woerdman, M. Roggenkamp, M. Holwerda (2015): *Essential EU Climate Law* (Cheltenham, Edward Elgar Publishing Limited).

the analysis will be placed on the social policy targets, namely employment, poverty reduction, education and innovation.

### ***5.1. Mapping distinctions between EU modes of governance***

In this section, we will introduce and clarify the concepts of soft law, mode of governance and governance architecture with which we will operate in the following sections in order to understand better the nature of enforcement and obligation attached to norms, as well as to be able to distinguish the plethora of various instruments applied in the same policy. This clarification will aid in identifying the distinctions between the EU's high-profile initiatives, the Lisbon Strategy and its 2010 relaunch, the Europe 2020 Strategy, and implicitly their domestic impact.

However, a first step that must be taken when proceeding to understand a contested concept such as "soft law"<sup>616</sup>, which stands at the basis of the related terms of mode of governance and governance architecture, would be to go back to the definition of hard law and its essential elements. In their study on the increasing legalisation of international governance, Abbott and Snidal define hard law as "legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law"<sup>617</sup>. Three dimensions are thus identified – obligation, precision, and delegation, the authors arguing that a harder or softer legal character of a norm would depend on variation across one or more of the legalisation dimensions. The authors contend that the realm of soft law 'begins' where legal arrangements are characterised by moderate/low levels of obligation/precision/delegation. This perspective places international law on a wide continuum running from non-legal positions to legally binding and judicially controlled commitments, each of the ends having their own merits and shortcomings. Starting from the three dimensions of obligation, precision and delegation, hard law can be defined as "legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and

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<sup>616</sup> L. Blutman (2010): "In the Trap of a Legal Metaphor: International Soft Law", *International and Comparative Law Quarterly*, Vol. 59, No. 3, pp. 605-24.

<sup>617</sup> K. Abbott; D. Snidal (2000): "Hard and Soft Law in International Governance", *International Organization*, Vol. 54, No. 3, p. 421, pp. 421-456.

implementing the law”<sup>618</sup>. Critics of the efficiency of hard law argue that the uniformity of treatment supposed by such legal commitments is bound to limit compliance in the context of significant diversity among Member States. Moreover, hard law also presupposes a set of fixed conditions based on prior knowledge, while situations of uncertainty may demand constant experimentation and adjustment<sup>619</sup>. On a more targeted note, in the context of the so-called “paradox of a popular Europe”, where popular expectations are high (regarding to take an example the reducing of unemployment) but political unwillingness to expand formal legislative and budgetary competences to the EU is low<sup>620</sup>, the need for diversification of legal instruments increases.

Recent studies have altered the three dimensions of obligation, precision and delegation in favour of an approach based on obligation and enforcement as essential traits that would facilitate the identification of the rich range of instruments that would qualify as soft. In this sense, Terpan argues that a more accurate understanding of EU soft law would require covering both legally binding norms that do not necessarily reach the level of legality that is required to be seen as hard law and non-legally binding norms that despite their voluntary character still have legal relevance<sup>621</sup>. Understanding obligation as the injunction to act or restrain to act in a specific manner, and enforcement as the range of mechanisms that can be used to ensure that obligation is being fulfilled, the author argues that in the new model of classification of norms, obligation needs to be regarded as taking precedence over precision (which in essence is the content of the obligation and hence can be regarded as a secondary feature of norms) and enforcement (which goes from monitoring to coercive mechanisms, including judicial control and sanctions) needs to take precedence over delegation (which focuses more on the authorities designed to implement agreements)<sup>622</sup>. Based on variation across these dimensions, Terpan considers soft law all norms imposing hard obligations, but soft or no enforcement mechanisms attached, and all norms putting forward soft obligations (loose provisions) and having attached soft and in some

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<sup>618</sup> K. Abbott; D. Snidal (2000): “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, p. 421.

<sup>619</sup> D. Trubek, P. Cottrell, M. Nance (2005): “Soft-Law, Hard-Law and European Integration: Toward a Theory of Hybridity”, *Jean Monnet Working Paper* 02/05 (New York, NYU School of Law), p. 3.

<sup>620</sup> L. Miles (2004): “Editorial: The Paradox of a Popular Europe”, *Journal of Common Market Studies*, Vol. 42, No. S1, pp. 1-8.

<sup>621</sup> F. Terpan (2015): “Soft Law in the European Union – The Changing Nature of EU Law”, *European Law Journal*, Vol. 21, No. 1, pp. 68-96.

<sup>622</sup> F. Terpan (2015): “Soft Law in the European Union – The Changing Nature of EU Law”, *European Law Journal*, Vol. 21, No. 1, pp. 72-73.

cases hard enforcement instruments (in this latter case directives dealing with social standards applying to pregnant or young workers being identified as a case in point). However, opinions remain divided in this sense, with earlier studies focusing mostly on the flexible, non-binding quality of soft law which in turn provides for a more restricted plethora of instruments including communications, declarations, resolutions, frameworks, guidance notes, circulars and codes of conduct<sup>623</sup>. Moreover, when contrasting the advantages and costs of opting for soft law in various policy fields, earlier studies tended to cast a more sceptical view over the efficiency of such instruments in assuring compliance. In this sense, authors pertaining to the so-called 'anti-soft camp' have argued that in the social policy field, the absence of enforcement mechanisms could lead to potentially denying citizens fundamental rights<sup>624</sup>. In other cases, 'a third way in European soft law' is suggested in order to ensure a minimal enforcement of European-level policy objectives. The solutions put forward by this third way would largely take the form of policy duplication, scholars either suggesting framework directives that would enable the EU to draw broad legal commitments, but still provide member states enough leeway to suit local conditions, or a mix and match of hard and soft law that would enable innovation in policy areas as well as an expansion of the EU's remit<sup>625</sup>.

Overall, while sovereignty costs – understood as ranging from simple differences in outcomes on particular issues to more fundamental encroachments on state sovereignty – would be lowered by soft law, objections have been formulated. More specifically, a lower level of clarity and precision translates into diminished predictability and a less reliable framework of action. Clear effects are difficult to be traced back directly to the soft law instruments themselves, in the context of laxer time constraints and usually no enforcement mechanisms<sup>626</sup>. Change at the domestic level is thus usually attributed to the Member States themselves (as a case of political appropriation whereby countries complying with criteria/guidelines/goals might not want to express overtly that changes have been induced

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<sup>623</sup> E. O'Hagan (2004): "Too Soft to Handle? A Reflection on Soft Law in Europe and Accession States", *Journal of European Integration*, Vol. 26, No. 4, pp. 379-403.

<sup>624</sup> A. Neal (1997): "Labour Law in the 1990s: An Unweeded Garden that Grows to Seed", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 13, No.1, pp. 11-18.

<sup>625</sup> See F. Scharpf (2002): "The European Social Model: Coping with the Challenges of Diversity", *Max-Planck Institute for the Study of Societies Working Paper No. 02/08 July* (Cologne, Max-Planck Institute); J. Kenner (1999): "The EC Employment Title and the 'Third Way'", *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 15, No.1, pp. 33-60.

<sup>626</sup> E. Szyszczak (2006): "Experimental Governance: The Open Method of Coordination", *European Law Journal*, Vol. 12, No. 4, pp. 486-502.

by EU policy, but rather present them as their own policy)<sup>627</sup>, and when considering the case of the European Union, the questionable efficiency of deployed soft instruments would only support declining public confidence in the European project, which the European Commission observed that can be reversed should people “feel that Europe provides an added value”<sup>628</sup>. Finally, soft law has been criticised as being a device used to produce effects while bypassing normal systems of accountability<sup>629</sup>. The literature<sup>630</sup> shows however that the involvement of national parliaments in soft law processes depends more on the constitutional structure of each Member State, with federal and regionalised countries having higher levels of regional authorities’ involvement<sup>631</sup>, as well as national governance practices, with countries having a tradition of including civil society in policy-making, tending more to follow the EU request to involve and mobilise NGOs in social policy issues<sup>632</sup>. A similar situation has been observed in terms of national stakeholder involvement in soft law processes at the national level in the Research and Development policy and the employment policy. In this case, the low political saliency of the former, more technocratic policy area, in contrast to the latter, translated into a larger stakeholder support and a higher degree of consensus<sup>633</sup>.

Yet, soft law instruments offer significant offsetting advantages over hard law, which in the context of the EU have been considered to have triggered a shift in governance. This transition has been more visible in terms of a steadily decline in the volume of EU legislative output since the mid-1990s (the last peak year being 1991 when a total of 6.711 directives, regulations and decisions were adopted) and a particularly sharp drop in 2009<sup>634</sup> (to a total

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<sup>627</sup> S. Borrás, B. Greve (2004): “Concluding Remarks: New Method or Just Cheap Talk?”, *Journal of European Public Policy*, Vol. 11, No. 2, pp. 329-336.

<sup>628</sup> European Commission (2005): *The Commission’s Contribution to the Period of Reflection and Beyond: Plan-D for Democracy, Dialogue and Debate*, (Brussels, European Commission), COM(2005)494 final, p. 2.

<sup>629</sup> M. Büchs (2007): *New Governance in European Social Policy. The Open Method of Coordination* (New York, Palgrave Macmillan), pp. 131-140.

<sup>630</sup> Also see S. Borrás, C. Radaelli (2015): “Open Method of Co-ordination for Democracy? Standards and Purposes”, *Journal of European Public Policy*, Vol. 22, No. 1, pp. 129-44.

<sup>631</sup> A. Michalski (2012): “Social Welfare and Levels of Democratic Government in the EU”, *Journal of European Integration*, Vol. 34, No. 4, pp. 397-418.

<sup>632</sup> T. Brandsen, E. Pavolini, C. Ranci, B. Sittermann, A. Zimmer (2005): “The National Action plan on Social Inclusion: An Opportunity for the Third Sector?”, *Third Sector European Policy Working Papers*, LSE WP 14-53 (London, London School of Economics and Political Science), available at <http://eprints.lse.ac.uk/29023/>.

<sup>633</sup> S. Borrás, A. Ejrnæs (2011): “The Legitimacy of New Modes of Governance in the EU: Studying National Stakeholder’s Support”, *European Union Politics*, Vol. 12, No. 1, pp. 107-126.

<sup>634</sup> R. Dehousse (2016): “Has the European Union Moved towards Soft Governance?”, *Comparative European Politics*, Vol. 14, No. 1, p. 6, pp. 20-35.



of 2.475 directives, regulations and decisions<sup>635</sup>). The so called governance shift in turn triggered a wide range of extensive academic work exploring both the diversity of policy tools and instruments which became to different extents politically, socially and morally binding for actors involved<sup>636</sup>, as well as the more extensive forces that could explain the new approach to policy-making. In this sense, some authors have argued that the period marked by a drop in the volume of EU hard law can be superimposed over the intergovernmental movement that reached its apex between 2009 and mid-2012<sup>637</sup>, with soft law in this case being understood as norms not entailing judicial control. More theoretical approaches seeking to explain the governance shift have suggested that the emergence of 'softer' modes of operation in fields such as the social policy could be better understood under a neo-functionalist approach as the result of a 'spillover' effect from the development of the Economic and Monetary Union (EMU)<sup>638</sup>. Rational-choice institutionalist analyses on the other hand put forward the hypothesis that Member States opt for alternatives to the conventional Community Method of legislation for 'sovereignty-protecting' reasons, as these policy instruments have "low degree of legalisations and limited potential for unintended consequences"<sup>639</sup>. Finally, constructivist approaches underlined that coordinative mechanisms such as peer-reviewing, mutual monitoring and benchmarking could change – depending on the capacity of expert discourse – the cognitive and normative beliefs and preferences of political actors<sup>640</sup> and based on this premise the flourishing of various soft law mechanisms was explained.

But regardless of the approach opted for in explaining the decline in the volume of EU legislative output, a first step taken by studies focusing on this shift from hard law is to define the concepts of governance and mode of governance in the context of the EU. Thus, in

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<sup>635</sup> V. Miller (2010): "How Much Legislation Comes from Europe?", *Research Paper* no. 10/62 (London, House of Commons Library), p. 12.

<sup>636</sup> A. Jordan, A. Schout (2006): *The Coordination of the European Union. Exploring the Capacities of Networked Governance* (Oxford, Oxford University Press); B. Eberlein, D. Kerwer (2004): "New Governance in the European Union: A Theoretical Perspective", *Journal of Common Market Studies*, Vol. 42, No.1, pp. 121-42; M. Cini, M. Rhodes (2007): "New Modes of Governance in the EU: Common Objectives versus National Preferences", *European Governance Papers* (EUROGOV) No. N-07-01.

<sup>637</sup> S. Fabbrini (2013): "Intergovernmentalism and its Limits. Assessing the European Union's Answer to the Euro Crisis", *Comparative Political Studies*, Vol. 46, No. 9, pp. 1003-1029.

<sup>638</sup> M. Cini, M. Rhodes (2007): "New Modes of Governance in the EU: Common Objectives versus National Preferences", *European Governance Papers* (EUROGOV) No. N-07-01.

<sup>639</sup> A. Schäfer (2004): "Beyond the Community Method: Why the Open Method of Coordination was Introduced to EU Policy-Making", *European Integrational online Papers*, Vol. 8, No. 13, p. 13.

<sup>640</sup> T. Paster (2005): "The New Modes of EU Governance: Combining Rationalism and Constructivism in Explaining Voluntarist Policy Coordination in the EU", *Österreichische Zeitschrift für Politikwissenschaft*, H2, pp. 174-61.

broader terms, in contrast to governing, governance has been defined as the provision of “common goods or the establishment of public order resulting from the interaction between various categories of actors and from forms of coordination of their behaviour”<sup>641</sup>. We contrast the two concepts as in the case of the former, common goods and public order are the result of hierarchical coordination between public actors, while the latter implies non-hierarchical coordination between both public and private actors and can be further clarified as a concept based on two dimensions: structure and process. Governance structures emerge from the actors involved and their relationships, while as a process, governance encompasses various modes of coordinating between actors<sup>642</sup>. The specialised literature has presented a wide variety of modes of governance and defining criteria according to which a categorisation could be done. The most comprehensive to date however has differentiated between modes of governance along the politics, polity and policy dimensions<sup>643</sup>. On the polity dimension, modes of governance run on various contrasting axes, from legal bindingness to soft law, rigid versus flexible approaches to implementation, presence versus absence of sanctions, material versus procedural regulation (setting specific material standards versus codes of conduct), to fixed versus malleable norms (revisable and integrated with other norms and policies). On the politics dimension, modes of governance can be distinguished in terms of the actors involved – solely public or private. Finally, on the polity dimension, modes of governance vary according to the nature of the institutional structure of the actors’ interactions (be it hierarchical or non-hierarchical), the locus of authority (central or dispersed among territorial units or boundaries of states), and the degree of formal institutionalisation of decision-making and implementation processes. Focusing on the policy dimension, Trieb *et al* proposed four main modes of governance at the EU level, namely coercion (characterised by binding legal instruments prescribing detailed and fixed standards that leave little leeway in implementation), voluntarism (non-binding instruments setting broad goals), targeting (non-binding recommendations to member states), and framework regulation

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<sup>641</sup> I. Tömmel (2007): “Modes of Governance in the EU”, Paper presented for the EUSA Conference 2007 – Montreal (Osnabrück, Universität Osnabrück), p. 4.

<sup>642</sup> T. Börzel, S. Guttenbrunner, S. Seper (2005): “Conceptualizing New Modes of Governance in EU Enlargement”, *NEWGOV Research Project* no.12/D1. (Berlin, University of Berlin).

<sup>643</sup> O. Treib, H. Bähr, G. Falkner (2007): “Modes of Governance: Towards a Conceptual Clarification”, *Journal of European Public Policy*, Vol. 14, No. 1, pp. 1-20.

(binding law offering more leeway in implementation)<sup>644</sup>. The starting point of this section, the concept of soft law can thus be placed on an axis that would run from voluntarism to framework regulation as demonstrated by Peters and Pagotto's analysis based on a working definition of soft law as reuniting norms that are not legally binding in an ordinary sense, but that are not completely devoid of legal effects which range from normative guidance and hard law complementarity to creating political obligation<sup>645</sup>. In fact, some authors have taken a step further and expanded the functions of European soft law to a soft form of legal obligation, derived from Art.4(3) of the Lisbon Treaty which sets the basis for a general duty of Member States to cooperate and facilitate the achievement of the EU's tasks and objectives<sup>646</sup>.

While focusing on identifying and differentiating soft modes of governance, Hérítier argued that in practice two basic new modes of governance could be distinguished. On the one hand, we would have a type that develops substantive targets to be reached either by using reputation mechanisms and mutual learning or by using voluntary accords, and on the other we would have a type that defines procedural norms without setting specific substantive outcomes<sup>647</sup>. Codes of conduct and guides for best practices are included in this latter category, while the former referred to the Open Method of Coordination (OMC) formally launched during the Lisbon European Council in March 2000. Although envisaged among others in the procedures for coordinating national economic policies under the Economic and Monetary Union established in the Maastricht Treaty (through the main instrument of the Stability and Growth Pact) and in the employment chapter of the Amsterdam Treaty (through the European Employment Strategy), the OMC was 'launched' in 2000 as a politically coherent governance method supported by a legitimising discourse<sup>648</sup>. The Lisbon summit thus defined the OMC as facilitating policy convergence (and not harmonisation as Member States are encouraged to develop their own policies in order to achieve coordination) and identified the following instruments within its toolkit:

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<sup>644</sup> O. Treib, H. Bähr, G. Falkner (2007): "Modes of Governance: Towards a Conceptual Clarification", *Journal of European Public Policy*, Vol. 14, No. 1, pp. 14-15.

<sup>645</sup> A. Peters, I. Pagotto (2006): "Soft Law as a New Mode of Governance: A Legal Perspective", *NEWGOV Research Project* no. 04/D11 (Basel, University of Basel).

<sup>646</sup> A. Peters (2011): "Soft Law as a New Mode of Governance", in U. Diedrichs, W. Reiners, W. Wessels (eds.) *The Dynamics of Change in EU Governance* (Cheltenham, Edward Elgar Publishing Limited), pp. 21-51, p. 24.

<sup>647</sup> A. Hérítier (2001): "New Modes of Governance in Europe: Policy-making without Legislating?", *MPIRCG Working Paper* no. 2001/14 (Bonn, Max-Planck Projektgruppe Recht der Gemeinschaftsgüter), pp. 1-25.

<sup>648</sup> C. Radaelli (2003): "The Open Method of Coordination. A New Governance Architecture for the European Union?", *SIEPS Rapport* no. 1 March/2003 (Stockholm, Swedish Institute for European Policy Studies), pp. 1-67.

- EU level guidelines combined with specific timetables for achieving short, medium and long term goals;
- Quantitative and qualitative indicators as well as benchmarks tailored to the context of each Member State and as a means of assessing national performances;
- National and regional-specific targets designed to encourage policy changes;
- Periodic monitoring, evaluation and peer reviews organised as mutual learning processes<sup>649</sup>.

In terms of the general procedural steps behind the OMC, the need for this soft mode of governance has been observed to arise once the European Council decides that areas of problem-interdependence necessitate policy coordination, but authority cannot be delegated to the EU. The next step is made by the Commission which proposes, after a series of consultations on the matter between the Council of Ministers and public and private actors, a common strategy for dealing with the identified problems as well as a series of general guidelines or objectives under overarching strategic pillars. Quantifiable targets and timetables are also put forward and are regularly reaffirmed and in certain cases updated. Finally, in order to monitor national policy measures adopted to meet benchmarks and targets, Member States are expected to produce reports (in the form of national action plans or national reform programmes) which are in turn assessed by the European Commission<sup>650</sup>. Specific recommendations to Member States are made based on national reporting, and the process is completed with mutual evaluation and peer-review between Member States (occasionally coupled with a system of naming and shaming/faming), at the Council level. But despite these general steps, as the OMC has not been limited to one specific policy area, variation in terms of duration of the cycle of coordination, the type of outcomes, degree of compliance pressure imposed, stakeholders involved, and the role of the participating institutions has been observed. As such, by 2007, 13 different OMCs were considered to be in place in areas that possessed a legal basis within the Treaty (the Broad Economic Policy Guidelines and the European Employment Strategy), adjunct areas (social protection and inclusion, pensions and healthcare), nascent areas (innovation and research, education, information society, environment and immigration policy) and unacknowledged

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<sup>649</sup> European Council (2000): Lisbon European Council 23 and 24 March 2000 Presidency Conclusions (Lisbon, European Council), available at [http://www.europarl.europa.eu/summits/lis1\\_en.htm#top](http://www.europarl.europa.eu/summits/lis1_en.htm#top).

<sup>650</sup> V. Hatzopoulos (2007): "Why the Open Method of Coordination is Bad for You: A Letter to the EU", *European Law Journal*, Vol. 13, No. 3, pp. 309-42.

tax<sup>651</sup>. However, whilst acknowledging the differences that occur when applying the OMC to various policy areas, both legal scholars and political scientists alike have come to consider this new mode of governance as a fully-fledged alternative to the Community Method<sup>652</sup>.

In terms of the context that enabled the emergence of co-ordination as a policy tool, starting with the 1990s and especially after the Maastricht Treaty, alternative modes of governance have been gradually explored at the EU level, the European Commission itself funding research to explore a new approach to policy-making and announcing its readiness to turn to new ways of governing in its 2001 White Paper on governance<sup>653</sup>. This change of heart came on the background of a perceived weakened European Commission after the forced resignation of the Santer administration due to repeated allegations of mismanagement<sup>654</sup> in conjunction with fading public enthusiasm and growing resistance from Member States to the transfer of powers towards Brussels<sup>655</sup>. The Maastricht Treaty itself has been considered by some researchers as an expression of this transition towards new modes of governance, as it led to the establishment of the European Union as a legal entity based on a three-pillar structure, guided by different types of policy-making<sup>656</sup>. As such, the first 'pillar' or the supranational pillar essentially comprised all areas of competences that the Member States had previously agreed to pool at the European level (economic and social affairs) and had the European Community as its operative entity. The second and third pillars, comprising the Common Foreign and Security Policy and the Justice and Home Affairs domain, were left to intergovernmental co-operation, Member States dominating the decision-making process to the detriment of the Commission and the European Parliament,

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<sup>651</sup> E. Szyszczak (2006): "Experimental Governance: The Open Method of Coordination", *European Law Journal*, Vol. 12, No. 4, pp. 486-502

<sup>652</sup> See for example J. Scott, D. Trubek (2002): "Mind the Gap: Law and New Approaches to Governance in the European Union", *European Law Journal*, Vol. 8, No. 1, pp. 1-18; Borrás, Jakobsson (2004): "The Open Method of Co-ordination and New Governance Patterns in the EU", *Journal of European Public Policy*, Vol. 11, No. 2, pp. 185-208.

<sup>653</sup> European Commission (2001): *European Governance: A White Paper* (Brussels, European Commission), COM 428/25<sup>th</sup> July.

<sup>654</sup> See H. Kassim, A. Menon (2003): "The Member States of the EU and the Prodi Commission", *French Review of Political Science*, Vol. 53, No. 4, pp. 491-511.

<sup>655</sup> For a detailed analysis of the transition from V. van Ingelgom (2014): *Integrating Indifference. A Comparative, Qualitative and Quantitative Approach to the Legitimacy of European Integration* (Colchester, ECPR Press), pp. 17-44.

<sup>656</sup> R. Dehousse (2008): "The 'Community Method': A Chronicle of a Death too Early Foretold", in B. Kohler-Koch, F. Larat (eds.) *Efficient and Democratic Governance in the European Union* (Mannheim: Connex Report Series No. 09), pp. 79-108.

and the European Court of Justice being excluded from the second Pillar and given only a limited role under the Third Pillar<sup>657</sup>.

But the building block for the OMC was represented by the Essen summit in 1994 when a number of objectives to fight increasing unemployment (such as investing in human capital and reducing non-wage labour costs) were agreed upon, with Member States being urged to transpose recommendations, being monitored by the European Commission (together with the Economic and Financial Affairs Council) and expected to report annually to the European Council about their progress. As such, the core elements of the OMC – common objectives, national implementation and surveillance by the Commission and Member States (peer review) – were in place starting with 1994<sup>658</sup>. But the biggest inspiration for the OMC has been embodied by the European Employment Strategy (EES), the EU's main instrument for coordinating Member States' reform efforts in the area of labour market and social policies. Launched in 1997 during the Luxembourg European Council (and since also labelled the 'Luxembourg process'), the EES included key instruments passed onwards to the OMC: guidelines, best practices, and objectives adapted to national specificities<sup>659</sup>. Thus, the policy coordination process attached to the EES would start with the Council's adoption through a qualified majority vote, and following the Commission's proposals, of a set of common European employment guidelines<sup>660</sup> which were to be translated into national employment policies which would be communicated to the Commission and the Council annually via 'National Action Plans'. To the elaboration and implementation of the National Action Plans, subsequent EU summits also insisted on the engagement and input of national trade unions and employer associations. An annual joint evaluation by both the Commission and the Council would next take place, on the basis of which the Council would issue

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<sup>657</sup> P. Craig (2015): "Britain in the European Union", in J. Jowell, D. Oliver, C. O'Conneide (eds.) *The Changing Constitution* (Oxford, Oxford University Press), p. 106.

<sup>658</sup> See A. Schäfer (2004): "Beyond the Community Method: Why the Open method of Coordination was Introduced to EU Policy-making", *European Integration online Papers*, Vol. 8, No. 13, pp. 1-23.

<sup>659</sup> R. Dehousse (2002): "The Open Method of Coordination: A New Policy Paradigm?", Paper presented at the 1st Pan-European Conference on Union Politics "The Politics of European Integration: Academic Acquis and Future Challenges" (Bordeaux, 26-28 September).

<sup>660</sup> The Luxembourg Jobs Summit organized the guidelines under four pillars: namely employability, entrepreneurship, adaptability and equal opportunities. These were changed following a comprehensive evaluation done by the Commission in 2002 to three overarching objectives: full employment, improving quality and productivity at work, and strengthening social cohesion and inclusion. For a further analysis see J. Cletcher-Greshenfeld, S. Sleight, F. Pil (2006): "The Political Economy of Employment Relations in the European Union", in D. Lewin (ed) *Contemporary Issues in Employment Relations* (Champaign, University of Illinois), pp. 69-102. Starting with 2005, the European Employment guidelines were integrated with the broad economic policy guidelines to become 24 integrated guidelines for growth and jobs. See K. Anderson (2015): *Social Policy in the European Union* (New York, Palgrave), pp. 111-133.

individual recommendations to Member States. As Goetschy observed, in cases where the guidelines were deemed not to have been followed by individual states, no legal effects could be triggered but the political costs of naming and shaming were still powerful enough to trigger some reactions<sup>661</sup>.

However, the EES was subsequently modified starting with the launch of the Lisbon Strategy during the March 2000 European Council and the 2002 European Commission review that observed a perceived a cumbersome guideline structure of the process, as well as a need for better synchronisation and complementarity of economic and employment objectives<sup>662</sup>. In terms of the results achieved, successive EU Joint Employment Reports presented an overall lukewarm performance at the EU level, emphasising a series of shortcomings such as an uneven implementation at the national level of the four pillars' provisions (employability, entrepreneurship, adaptability and equal opportunities), discrete policy initiatives that Member States had in stock regardless of the EES, the absence of quantified EU-level objectives which made national policy progress assessment under the EES difficult, and a lack of coordination between national institutional structures normally involved in the EES<sup>663</sup>.

In an effort to break from economic growth stagnation and to provide more effective policy instruments, the March 2000 Lisbon European Council put forward an ambitious ten-year reform programme designed to make the Europe more dynamic and competitive in a sustainable manner while also enhancing social inclusion. The Lisbon Strategy thus developed promoted the integration of social and economic policies while focusing in particular on strengthening the EU's research capacity, completing the Single Market, encouraging entrepreneurship, promoting fiscal consolidation and sustainability of national public finances, boosting progress within information society technologies, developing active employment policies and modernising social protection systems<sup>664</sup>. In the field of

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<sup>661</sup> J. Goetschy (2003): "The European Employment Strategy, Multi-level Governance, and Policy Coordination: past, Present and Future", in J. Zeitlin, D. Trubek (eds.) *Governing Work and Welfare in a New Economy. European and American Experiments* (Oxford, Oxford University Press), pp. 59-87.

<sup>662</sup> European Commission (2002): *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. Taking Stock of five Years of the European Employment Strategy* (Brussels, European Commission), 17 July, COM(2002) 416 final, available at <http://ec.europa.eu/transparency/regdoc/rep/1/2002/EN/1-2002-416-EN-F1-1.Pdf>.

<sup>663</sup> See J. Goetschy (2003): "The European Employment Strategy, Multi-level Governance, and Policy Coordination: past, Present and Future", in J. Zeitlin, D. Trubek (eds.) *Governing Work and Welfare in a New Economy. European and American Experiments* (Oxford, Oxford University Press), pp. 65-66.

<sup>664</sup> European Council (2000): *Lisbon European Council 23 and 24 March 2000 Presidency Conclusions* (Lisbon, European Council), available at [http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm).

economic performance the strategy did not comprise specific targets, but implied that Member States needed to lessen tax pressures on labour, maintain budgets close to balance and redirect public expenditure to focus more on human capital accumulation<sup>665</sup>. In the policy field of employment, Lisbon aimed at attracting more people in employment via pension reforms, active-aging strategies, reducing the informal economy and undeclared work and minimising gender gaps in payment. A strong emphasis was also placed on research and innovation, one of the goals being that of establishing a European Area of Research and Innovation that would assure a good coordination of national research activities. Europe needed to maintain its leadership role in key technology areas, and the level and quality of training and skills development activities needed as well to be increased.

To achieve these numerous strategic goals, the OMC was launched following a template that did not differ fundamentally from the EES receipt: identification and setting of common goals for the EU with specific timetables, establishment of indicators and benchmarks for assessing progress, translation of common objectives into national and regional policies, and engaging in periodic monitoring, evaluation and peer review organised as mutual learning processes. For the four main deficits identified as essential to be addressed by 2010, namely the standard of living, the productivity, the labour and the environmental deficits, the strategy comprised initially 28 main objectives and 120 secondary objectives for a total of 117 indicators<sup>666</sup>. The large number of objectives and indicators translated into confusion about the aims of different coordination processes, and in time this led to a lack of engagement by Member States, harshly emphasised in the 2004 “mid-term review” of the High Level Group headed by former Dutch Prime Minister Wim Kok<sup>667</sup>. In response to criticism regarding the inadequate progress, lack of commitment and incoherence and inconsistency between means and ends, the Barroso Commission relaunched the Lisbon Strategy in 2005, reorganising the process into three major steps: defining European Integrated Guidelines, their implementation through three-year national reform programmes and monitoring of progress on a country by country basis and collectively.

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<sup>665</sup> European Council (2000): *Lisbon European Council 23 and 24 March 2000 Presidency Conclusions* (Lisbon, European Council).

<sup>666</sup> J. Creel, É. Laurent, J. Le Cacheux (2005): “Delegation I Inconsistency: The ‘Lisbon strategy’ Record as an institutional Failure”, Paper prepared for the *CONNEX Workshop “Delegation and Multi-level Governance”* (Paris, Observatoire Français des Conjonctures Économiques).

<sup>667</sup> High Level Group (2004): *Facing the Challenge. The Lisbon Strategy for growth and Employment* (Luxembourg, Office for official Publications of the European Communities).



Moreover, the number of goals was narrowed down and focused on boosting jobs and growth (an employment rate of 70% and Research and Development investment to 3% of GDP by 2010), and two other surveillance and coordination instruments, namely the Broad Economic Policy Guidelines (BEPGs)<sup>668</sup> and the European Employment Guidelines were assembled into a single set of 24 Integrated Guidelines for Growth and Jobs, divided into separate macroeconomic, microeconomic, and employment chapters. In line with this architectural shift, the National Actions Plan for Employment became a section within the Member States' National Reform Programmes, shift which has been argued by scholars to have reduced the visibility of employment policy coordination and greater unevenness in national employment policy reporting<sup>669</sup>. Another newly introduced element was the Community Lisbon Programme which complemented the National Reform Programmes by comprising measures foreseen in the regulatory domain, financial instruments and proposals for policy development to be launched at the European level. A new general three-year timeframe was established that provisioned for priorities to be defined during the first year of the policy cycle, programmes to be delivered in the second year, and stock-taking and revision of priorities for the following period during the third year. But in practice the renewed strategy continued to follow the pre-2005 practice of evaluating national achievements on an annual basis. Moreover, the Commission made no country-specific recommendations for 2005 and 2006 and significantly played down the practice of ranking Member States in relation to EU targets and benchmarks not attempting to group them according to the progress made. This in turn led the Commission itself to report in its 2010 evaluation of the strategy that despite some positive effects (such as building more consensus over the necessary pace and direction of reforms), the policy instrument was substantially weakened in assuring the meeting of its main targets by a lack of focus on critical elements such as macro-economic imbalances and competitiveness problems, the

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<sup>668</sup> The BEPGs are at the heart of the EU economic coordination cycle pursuant to Article 120 of the Treaty on the Functioning of the European Union (TFEU). The guidelines, introduced by the Maastricht Treaty, are aimed at the consolidation of state finances through balanced budgets, at price stability and moderate wage increases. While similar to the Open Method of Coordination insofar as they ultimately rely on soft sanctions and non-coercive methods, the BEPGs are underpinned by a well-developed, Treaty-based system of enforcement that assigns clear roles to the Commission and the Council of Ministers for Economic and Financial Affairs (ECOFIN). See S. Deroose, D. Hodson, J. Kuhlmann (2008): "The Broad Economic Policy Guidelines: Before and After the Re-launch of the Lisbon Strategy", *Journal of Common Market Studies*, Vol. 46, No. 4, pp. 827-48; A. Steinbach (2014): *Economic Policy Coordination in the Euro Area* (London, Routledge), pp. 55-71.

<sup>669</sup> J. Zeitlin (2010): "Towards a Stronger OMC in a more Social Europe 2020: Governance Architecture for EU Policy Coordination", in E. Marlier, D. Natali, R. Van Dam (eds.) *Europe 2020: Towards a More Social EU?* (Brussels, P.I.E. Peter Lang), pp. 253-274.

absence of internal prioritisation with regards to the guidelines put forward, the lack of agreed commitments and an inconsistent impact of country-specific recommendations<sup>670</sup>. Independent evaluations of the influence of the Lisbon Strategy have been even more critical, revealing that the gap between the best and worst performing countries in 2010 was wider than in 2000, policy convergence within the EU not differing substantially to that of the rest of the Organisation for Economic Co-operation and Development (OECD)<sup>671</sup>. Furthermore, when analysing these disparities, in the case of better performing countries such as the Nordic Member States, Austria and the Netherlands, the main reform triggers have been connected more often to domestic political dynamics than to policy coordination under the Lisbon Strategy<sup>672</sup>. Various academic assessments of the impact of the Lisbon Strategy have associated the lukewarm results with collective action problems. In this sense, Collignon argued that the most important intrinsic issue attached to the OMC has been the underestimation of the importance of vested interests articulated in national politics. Along this line of thought, as political leaders seek to get (re-)elected, they formulate policies constrained by national debates and interests articulated within their home constituencies. Thus, factional interests of national constituencies would inevitably prevent the realisation of a collective utility optimum, and in the case of governance with many governments the tendency of individual Member States will be to free-ride on others<sup>673</sup>.

On the background of the widely acknowledged failure of the Lisbon agenda, as well as under the financial pressure of the economic crisis, a prominent debate was sparked over the nature of the 'beast' that would follow after 2010. Concurrent proposals were put forward by some Member States, EU institutions, local and regional authorities and academics focusing largely around four core demands aimed at redressing key perceived defects of the Lisbon Strategy, especially in its relaunched version. Firstly, requests regarding the parity of economic and employment goals were formulated, followed by the demand for a more visible social character of Europe embodied in specific quantifiable commitments towards reducing poverty and promoting social inclusion. A third demand

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<sup>670</sup> European Commission (2010): *Commission Staff Working Document. Lisbon Strategy Evaluation Document* (Brussels, European Commission), SEC(2010)114final.

<sup>671</sup> S. Tilford, P. Whyte (2010): *The Lisbon Scorecard X: The Road to 2020* (London, Centre for European Reform).

<sup>672</sup> S. Tilford, P. Whyte (2010): *The Lisbon Scorecard X: The Road to 2020* (London, Centre for European Reform).

<sup>673</sup> S. Collignon (2008): "The Lisbon Strategy, Macroeconomic Stability and the Dilemma of Governance with Governments; or Why Europe is not Becoming the World's Most Dynamic Economy", *International Journal of Public Policy*, Vol. 3, No. 1/2, pp. 72-99.

was for more effective mainstreaming of social cohesion and inclusion objectives into EU and Member State policy-making, while the fourth demand was for greater stakeholder participation<sup>674</sup>. The response came in March 2010, the European Commission proposing a new ten-year strategy for smart, sustainable and inclusive growth<sup>675</sup> which was approved in amended form by the June European Council.

More recent studies, when exploring the Lisbon Strategy and its 2010 relaunch, have transitioned from the theoretical concept of mode of governance to that of governance architecture. As such, governance architectures have been differentiated as “strategic and long-term institutional arrangements of international organisations exhibiting three features; namely, they address strategic and long-term problems in a holistic manner, they set substantive output-oriented goals, and they are implemented through combinations of old and new organisational structures within the international organisation in question”<sup>676</sup>. In contrast to the notion of mode of governance Borrás and Radaelli argue that governance architectures refer to patterning processes which include ideational and organisational dimensions that on the one hand lead to the socialisation of actors to new frames of reference and on the other constrain or enable different governmental levels involved in the political and administrative processes. Along the ideational dimension, institutional arrangements such as the Lisbon Strategy are differentiated through an ideational repertoire (concepts which are essential to the strategy and need to have widely accepted meanings) and a discourse (the means that uses the ideational repertoire in order to legitimise the relationship between goals and policy instruments) constructed around them. Along the organisational dimension, complex policy initiatives are characterised by various formal and informal organisational arrangements, policy instruments and procedural requirements that represent the basis for engagement and implementation. The concept of governance architecture has been particularly useful in facilitating a deeper understanding of the creation, evolution and impact of EU strategies. In the following section we will explore the Europe 2020 Strategy whilst keeping in mind the two dimensions mentioned here.

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<sup>674</sup> J. Zeitlin (2010): “Towards a Stronger OMC in a More Social Europe 2020: A New Governance Architecture for EU Policy Coordination”, in E. Marlier, D. Natali (eds.) with R. Van Dam, *Europe 2020: Towards a More Social EU?* (Brussels, P.I.E. Peter Lang), p. 261.

<sup>675</sup> European Commission (2010): *Communication from the Commission. Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth*, (Brussels, European Commission), COM(2010)2020 final.

<sup>676</sup> S. Borrás, C. Radaelli (2011): “The Politics of Governance architectures: Creation, Change and Effects of the EU Lisbon Strategy”, *Journal of European Public Policy*, Vol. 18, No. 4, p. 463, pp. 463-84.

## ***5.2. Shifts in softer modes of governance – the transition from Lisbon to the Europe 2020 Strategy***

The Commission's Europe 2020 Strategy differed from its predecessor first of all in terms of its focus. A limited number of goals were proposed, namely five aggregate EU-level targets to be achieved by 2020: concerning employment (to reach 75%), research and innovation (of 3% of GDP), climate change and energy (the 20/20/20 targets on caps emissions, indicators for energy efficiency, and the share of consumption of renewable energy), education (share of early school leavers below 10% and at least 40% of people in the tertiary education) and poverty reduction (20 million less people at risk of poverty). The targets were also translated at the national level encouraging countries to set the long-term trajectories towards meeting them. The new strategy seeks thus to lead towards a European economy based on knowledge and innovation that would be resource efficient and greener and foster high employment and social and territorial cohesion. In addition to the five targets, seven flagship initiatives (Digital for Europe; Innovation Union; Youth on the Move; Resource-Efficient Europe; Industrial Policy for the Globalisation Era; Agenda for New Skills and Jobs; European Platform against Poverty) were also created as the main tool regarding the implementation of the three priorities of smart, sustainable and inclusive growth. Each of the flagship initiative "acts as an umbrella vehicle for more specific initiatives, consistent with the intentions of the original Lisbon agenda"<sup>677</sup>, deploying a plethora of instruments such as legislation, non-binding recommendations, EU funds, and policy coordination processes (periodic monitoring, evaluation, peer reviews etc.). In terms of the focus of the strategy, some authors have argued that in the case of Europe 2020 one could identify growth as the only goal, dividing the concept in a linguistic sleight into three distinctive types<sup>678</sup>. In this sense, smart growth is considered dependent on improvements in educational attainment, investment in research and innovation and harnessing information and communication technologies. Sustainable growth is conceived largely as environmental efficiency corroborated with a strong business environment and informed consumers. Finally, inclusive growth entails raising the employment rate by investing in skills and

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<sup>677</sup> K. Armstrong (2012): "EU Social Policy and the Governance Architecture of Europe 2020", *Transfer. European Review of Labour and Research*, Vol. 18, No. 3, pp. 285-300, p. 289.

<sup>678</sup> M. Daly (2012): "Paradigms in EU Social Policy: A Critical Account of Europe 2020", *Transfer. European Review of Labour and Research*, Vol. 18, No. 3, pp. 273-84.

training, modernising welfare systems and ensuring that the benefits of growth reach all parts of Europe.

Again, in distinction to the Lisbon agenda, Europe 2020 offered prominence to poverty reduction, making it one of its headline initiatives, and setting an ambitious target in this sense despite the very limited legal and political mandate for EU action in this field. However, as poverty has been a highly contested concept and a contentious problem, the Europe 2020 target concerning it and social exclusion has been interpreted by the academic literature as an example of EU compromise. The motivation behind this assertion rests on the fact that Member States are given a choice regarding the indicator against which they would be monitored in their progress on meeting the limitation of poverty and social exclusion target. This is possible as the target itself represents an amalgam of three measures of the phenomenon: disposable income from whatever source, access to the customary standard and style of living, and joblessness in households. Even though each measurement is given equal weight, the underlining phenomena have been different both in terms of intensity and scale across Member States<sup>679</sup>. Another shift brought by the new strategy has been visible in terms of a certain synchronisation of its financial framework. More specifically, different funding instruments such as structural funds, agricultural and rural development funding, the Research Framework Programme and the Competitiveness and Innovation Framework Programme have all accommodated to varying degrees or have been aligned with the key thematic areas of the Europe 2020 strategy so that the achievement of the targets would be facilitated.

Relating to governance, the strategy also tried to remedy the rather weak architecture exhibited by its ancestor, imposing on Member States the obligation to present two reports every year, the Stability and Convergence Programme and the National Reform Programme, which are forwarded every April and are fully integrated in the European Semester, the EU's annual cycle of economic policy guidance and surveillance. This latter exercise is initiated by the European Commission through its annual Growth Survey that sets out priority actions to be taken by Member States. Annexed to this document is a progress report in which the European Commission evaluates the steps taken by Member States – in line with the Europe 2020 guidelines – to implement the strategy's initiatives and to improve progress towards achieving of the targets. The Commission also publishes the Alert

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<sup>679</sup>P. Copeland, M. Daly (2012): "Varieties of Poverty Reduction: Inserting the Poverty and Social Exclusion Target into Europe 2020", *Journal of European Social Policy*, Vol. 22, No.3, pp. 273-87.

Mechanism report<sup>680</sup> which identifies Member States at risk of macro-economic imbalances (signalling which states will subsequently be subject to in-depth reviews) and proposes draft Council recommendations on the economic policy of the Euro area. The European Parliament and the Council also express their opinions on the Annual Growth Survey. The next step in the monitoring and evaluation cycle belongs to the Commission which publishes country reports, providing Member States with assessments of the implementation of Country Specific Recommendations. The Spring European Council, the annual meeting dedicated to economic stocktaking, provides strategic guidance over the priorities to be pursued during the Semester cycle and invites Member States to take account of those priorities in their Stability or Convergence Programmes and National Reform Programmes. The Stability and Convergence Programmes are part of the exercise being based on the economic governance rules of the Stability and Growth Pact, agreement adopted in 1997 and reformed in 2005, 2011 and 2013 having as main objective the enforcement of fiscal responsibility among Member States. Thus, countries sharing the Euro currency lay out their fiscal plans over a period of three years in Stability programmes, while non-Euro states submit Convergence Programmes that also contain monetary strategies as well as outlines of medium-term budget plans. The European Commission and the Council assess the National Reform and the Stability or Convergence Programmes, as well as the progress made by Member States towards the Europe 2020 targets and on the basis of this documentation, the Commission proposes updates Country Specific Recommendations, which are discussed (by employment, economic and finance and competitiveness Councils), endorsed and finally adopted by the Council, bringing the cycle to a close.

The Stability and Convergence Programmes setting Medium-Term Budgetary Objectives (MTOs) - a budgetary target defined in structural terms - represent the basis for the two

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<sup>680</sup> The Alert Mechanism report is part of the Macroeconomic Imbalance Procedure (MIP), a surveillance mechanism to detect and address economic trends that may adversely affect the proper functioning of a Member State, the Euro area, or the EU in its entirety. The MIP is based on Regulation 1176/2011 and includes much like the Stability and Growth Pact a preventive and corrective arm. The former comprises the Alert Mechanism report whereby the Commission establishes a scoreboard of economic indicators and identifies sources of macroeconomic imbalance in EU Member States from both within and outside the Euro area. In cases where the scoreboard and associated analyses indicate large deviations, the Commission carries out In-depth Reviews to determine the extent of the potential imbalances and formulates policy recommendations that form part of a package of recommendations made under the European Semester. At the recommendation of the Commission, the Council can trigger the Excessive Imbalance Procedure (the corrective arm), the Member State in subject being given a timeframe to present a Corrective Action Plan. If the efforts are deemed insufficient, a new Corrective Action Plan can be requested and finally sanctions can be imposed for Euro area Member States.

'arms' of the Stability and Growth Pact, namely the preventive arm (through which Member States are guided to address temporary deviations from their MTO) and the corrective one governing the Excessive Deficit Procedure whereby non-compliance with recommendations can trigger sanctions for Euro area Member States<sup>681</sup>. The National Reform Programmes, initially developed under the Lisbon agenda, remained the central mechanism for national reporting on domestic policy measures to achieve the Europe 2020 targets. In order to avoid the risk of poor performing states' free-riding on the better performance of others, when requesting Member States to set their specific national contributions towards meeting the EU-level targets, the Commission encouraged countries to enter into dialogue<sup>682</sup>. However, even so, a 2011 assessment of the Commission revealed that in the case of full compliance with national targets, these results would not secure the meeting of the EU-level targets<sup>683</sup>. While concerns have been voiced that the new policy coordination framework embodied in the European Semester with its focus predominantly on economic and fiscal policy monitoring could create the risk of marginalisation of whatever social policy messages might emerge through the reporting and monitoring of Member States' National Reform Programmes<sup>684</sup>, it certainly provided for the co-ordination of co-ordination processes across economic governance and Europe 2020. Mid-term reviews of the Strategy show however, that the disparity in the attention provided by the Commission to issues of financial stability to the detriment of structural reforms (micro-economic issues) has placed the employment and poverty targets at the largest distance from being reached in the present than they were in 2010<sup>685</sup>. However, even in this case the opinions are divided, more recent studies showing that starting with 2011 a progressive 'socialisation' of the European Semester has taken place, a shift visible through the expansion in scope (range of 'social' topics covered) and the ambition (asking for the recalibration of social policies) of the Country-Specific Recommendations from year to year, and the enhanced role of social

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<sup>681</sup> European Parliament (2014): *Briefing. Stability and Growth Pact – An Overview of the Rules* (Brussels, Economic Governance Support Unit).

<sup>682</sup> K. Armstrong (2012): "The Lisbon Strategy and Europe 2020: From the Governance of Co-ordination to the Co-ordination of Governance", in P. Copeland, D. Papadimitriou (eds.) *The EU's Lisbon Strategy. Evaluating Success, Understanding Failure* (New York, Palgrave Macmillan), pp. 208-28.

<sup>683</sup> European Commission (2011): Annex, Progress Report on the Europe 2020 Strategy, to the Communication from the Commission to the European Parliament, the Council, the European Economic Committee and the Committee of the Regions. Annual Growth Survey 2012 (Brussels, European Commission), COM(2011)815 final.

<sup>684</sup> O. Derruine, A. Tiedemann (2011): "The First European Semester and its Contribution to the EU2020 Strategy", *European Policy Study* (Brussels, Green European Foundation).

<sup>685</sup> A. Renda (2014): "The Review of the Europe 2020 Strategy: From Austerity to Prosperity?", Policy Brief No. 322 (Brussels, Centre for European Policy Studies).

and employment policy actors (such as the Directorate General for Employment, Social Affairs and Inclusion, the Social Protection Committee and the Employment, Social Policy, Health and Consumer Affairs Council) in the monitoring, reviewing and amending of Country-Specific Recommendations<sup>686</sup>. Yet in terms of compliance and sanctioning possibilities attached to the Europe 2020 Strategy, some authors have argued that the very weak option of the Commission to issue a warning in accordance with art. 121 paragraph 4 TFEU in cases where Member States fail to adequately respond to policy recommendations further reinforces the risk of free-riding<sup>687</sup>. However, under the new Structural Funds Regulation covering the 2014-2020 programming period the Commission benefits of three levers through which it can exert pressure on Member States to implement Country-Specific Recommendations<sup>688</sup>. The *ex-ante* conditionality presupposes that the Commission can refuse to approve Member States' Operational Programmes if they do not target expenditure on the priorities set in the Country-Specific Recommendations. The reprogramming conditionality implies the Commission's possibility to request Member States to redirect a portion of their structural funding to meeting newly arisen priorities. And finally, through the suspension conditionality, the Commission is obliged to bring forward a proposal for the progressive suspension of structural funding for Member States failing to comply with recommendations under the corrective arm of the Excessive Deficit Procedure and of the Macroeconomic Imbalance Procedure. While limitations to these types of conditionality exist and no proposals for suspensions have been so far tabled, the presence of these options for the Commission to encourage compliance does indicate a tendency towards 'hardening' the Europe 2020 Strategy. In what follows we will explore the impact of the strategy in the cases of Romania and Bulgaria.

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<sup>686</sup> J. Zeitlin, B. Vanhercke (2015): "Economic Governance in Europe 2020: Socialising the European Semester against the Odds?", in D. Natali, B. Vanhercke (eds.) *Social Policy in the European Union: State of Play 2015* (Brussels, European Trade Union Institute), pp. 65-95.

<sup>687</sup> C. Luminosu (2011): "Governance and the European Commission's 2020 Strategy", *Review of Applied Socio-Economic Research*, Vol. 2, pp. 121-28.

<sup>688</sup> J. Zeitlin, B. Vanhercke (2015): "Economic Governance in Europe 2020: Socialising the European Semester against the Odds?", in D. Natali, B. Vanhercke (eds.) *Social Policy in the European Union: State of Play 2015* (Brussels, European Trade Union Institute), pp. 65-95.



### ***5.3. Evaluating Romania and Bulgaria's progress towards "smart, sustainable and inclusive growth" – focus on social policies***

#### **5.3.1. Bulgaria**

In the period marked by the introduction and the implementation of the governance architecture of the Europe 2020 Strategy, both Romania and Bulgaria were marked by severe political struggles and reverberations of the global economic crisis, despite relatively prudent macroeconomic management.

In Bulgaria's case, the three-party coalition government (June 2005 – July 2009) - comprising the Bulgarian Socialist Party, the centre-right National Movement Simeon II (NMSII) and the right-wing nationalist Movement for Rights and Freedom pursued a reasonable fiscal policy which earned it high marks from the International Monetary Fund. In its 2009 Country Report, the IMF was observing that as the country was entering economic slowdown due to drops in the capital inflows, the previous strategy of running large fiscal surpluses in previous years was placing the country on a strong position<sup>689</sup>. Moreover, the structural reforms implemented before 2007 coupled with EU accession support translated in Bulgaria's case to a rate of real economic growth at 5.5% in 2005, 6.2% in 2006 and 6.3% in 2007<sup>690</sup>. One concern underlined in this period however was the fact that the Bulgarian economy distinguished itself as one of the most heavily reliant on foreign direct investments capital inflows in the Central and Eastern Europe, in 2005 reaching 9.9% of GDP per annum – compared to 5.6% in Romania, 2.2% in Poland, 4.1% in Slovakia, 3.1% in Hungary and 4.4% in the Czech Republic<sup>691</sup>. Moreover, these capital inflows also fuelled and financed a credit boom, with private sector credit rising from 26% of GDP in 2003 to 66.7% of GDP in 2008<sup>692</sup>. The danger in this sense was that as the global economy contracted and confidence of investors decreased, because the majority of investments in Bulgaria went to the service and property sectors instead of developing production capacity in the industrial sector, accelerated withdrawals from the national

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<sup>689</sup> International Monetary Fund (2009): *Bulgaria: 2008 Article IV Consultation – Staff Report* (Washington D.C., International Monetary Fund), Country report No. 09/96, p. 30.

<sup>690</sup> Bertelsmann Stiftung (2009): *BTI 2010 – Bulgaria Country Report* (Gütersloh, Bertelsmann Stiftung), p. 29.

<sup>691</sup> D. Bozhilova (2010): "When Foreign Direct Investment is Good for Development: Bulgaria's Accession, Industrial Restructuring and Regional FDI", *Hellenic Observatory Papers on Greece and Southeast Europe* (London, London School of Economics), GreeSE Paper No. 33, p. 5.

<sup>692</sup> World Bank (2010): *Domestic credit to private sector (% of GDP)* indicator, data available at [http://data.worldbank.org/indicator/FS.AST.PRVT.GD.ZS?page=1&order=wbapi\\_data\\_value\\_2006%20wbapi\\_data\\_value%20wbapi\\_data\\_value-first&sort=asc](http://data.worldbank.org/indicator/FS.AST.PRVT.GD.ZS?page=1&order=wbapi_data_value_2006%20wbapi_data_value%20wbapi_data_value-first&sort=asc).

economy were imminent. In this sense, between 2005 and 2008, the percentage of inward foreign direct investments (FDI) in manufacturing and construction sectors decreased from 30.3% to 25.8%. In the same period, foreign investments in the wholesale, retail trade and real estate sectors grew from 25.1% to 37.1%<sup>693</sup>. In 2009, FDI withdrawals continued to decrease in the manufacturing and construction sectors reaching 25.2%. This trend began to be observed in the case of services as well, in 2009 FDI investments in the wholesale, retail trade and real estate sectors reaching 36.2%<sup>694</sup>.

Bulgaria had embraced financial reforms in this time in order to sustain macroeconomic stability and damped somewhat the effect of shocks. As such, it built between 2004 and 2008 fiscal buffers by accumulating fiscal surpluses, the foreign exchange reserves amounting to approximately 41% of annual GDP, while the cash fiscal reserves (accumulated over the years from the budgetary surplus) standing at around 17% of the annual GDP<sup>695</sup>. Public debt was also reduced in 2008 to 13.3% from over 70% of the GDP in 2000<sup>696</sup>. However, while the macroeconomic policies pursued by Bulgaria were generally effective, the country managing low and controlled deficits and relatively low levels of public debt, the microeconomic policies have not been successful. Lukewarm achievements in curbing unemployment, a deficient regulatory and administrative system that could not adequately support the private sector, and little progress in increasing the level of skills of its active population, in fostering innovation and raising productivity have been recurrent issues identified by the European Commission both in its Annual Country Assessments under the Lisbon Strategy and in its regular assessments of Bulgaria's national reform programme under the Europe 2020 Strategy. The unemployment rate in Bulgaria, while initially below the average registered in the Euro area which for 2008 was calculated at 7.6%, doubled in 2011 reaching 11.3%. This upsurge in unemployment is partly explained through its cyclical nature. Growth in sectors that had been the engine of job creation up until 2008, namely the construction, industry, real estate, and trade sectors, had started to

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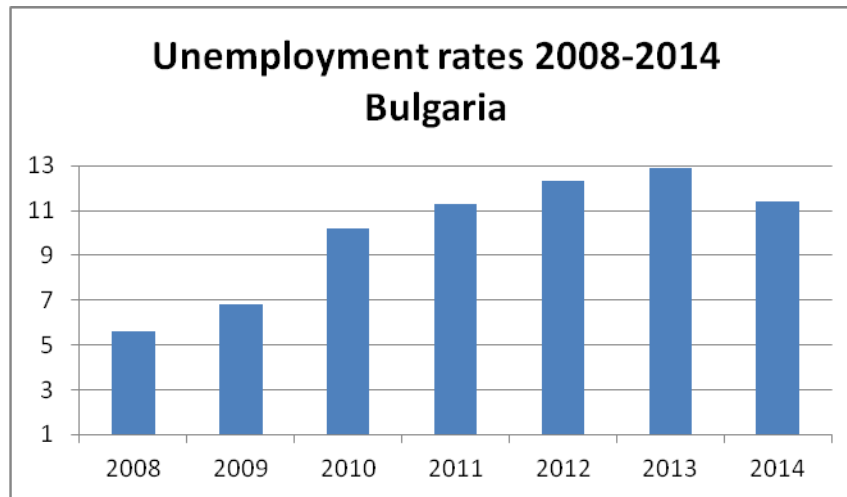
<sup>693</sup> Data calculated by author based on annual figures presented in G. Hunya (2009): "FDI in the CEECs under the Impact of the Global Crisis: Sharp Declines", *WIIW Database on Foreign Direct Investment in Central, East and Southeast Europe* (Vienna, The Vienna Institute for International Economic Studies).

<sup>694</sup> G. Hunya (2010): "FDI in the CEECs Hit Hard by the Global Crisis", *WIIW Database on Foreign Direct Investment in Central, East and Southeast Europe* (Vienna, The Vienna Institute for International Economic Studies).

<sup>695</sup> A. Mihailov (2009): "Bulgaria: Coping with Multiple External Shocks", in V. Gligorov, G. Hunya, J. Pöschl (eds.) *Differentiated Impact of the Global Crisis* (Vienna, The Vienna Institute for International Economic Studies) Economic Prospects for Central, East and Southeastern Europe Series, p. 25, pp. 24-27.

<sup>696</sup> The Statistical Office of the European Union (2015): *General Government Gross Debt – Annual Data*, available at <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=teina225&plugin=1>.

decline. Exports, which within the Balkan region accounted for approximately one-fifth of employment, declined in 2009 in Bulgaria by 22% (10% in volumes)<sup>697</sup> which translated in large layoffs and prolonged unemployment in the trade industries. Construction, tourism, the metallurgy and textile sectors were particularly hard-hit with worker layoffs and subsequent protests and labour unrest<sup>698</sup>.



**Figure 7 Unemployment rates Bulgaria 2008-2014**

**Source:** Republic of Bulgaria National Statistical Institute, Labour Time series, available at : <http://www.nsi.bg/en/content/6503/unemployed-and-unemployment-rates-national-level-statistical-regions-districts>.

Planned commercial and residential real estate developments were also either scaled back or postponed as the credit policies of commercial banks became restrictive and no new governmental policies towards residential construction were included in the anti-crisis package. In contrast, in Romania's case the government launched in May 2009 the "Prima Casa" (First Home) programme designed to boost the residential constructions sector which had also been seriously affected by the economic and financial crisis. Through this programme, the state was offering support to citizens wishing to purchase a home for the first time and who had not contracted a mortgage loan previous to the date when the

<sup>697</sup> International Monetary Fund (2010): *Bulgaria: 2010 Article IV Consultation Staff Report* (Washington D.C., International Monetary Fund), p. 11.

<sup>698</sup> Reuters (2009): "Bulgaria Steel workers rally over layoffs, pay", (Sofia, March 9<sup>th</sup>) available at <http://www.reuters.com/article/bulgaria-protest-steel-idUSL930825120090309>.

programme became effective (June 2009). The programme, which to the time of writing still continues, is based on securities provided by the state, through the National Loan Guarantee fund for Small and Medium-sized Enterprises for loans of up to Euro 60.000 (in the case of old apartments) or Euro 70.000 (for new apartments), thus allowing access to mortgage loans to many who otherwise could not qualify. Beneficiaries were able to buy an apartment or house by making an advance payment of 5% compared to 20-25% in the case of regular mortgages. Between the launching of the programme and the beginning of 2015, approximately 130.000 loan guarantees were provided for funding totalling Euro 2.525 billion, of which 31% represented the value of guarantees for the purchasing of apartments/houses constructed between 2008 and 2014<sup>699</sup>. In Bulgaria, as the purchasing power of the population decreased by 4.29% in 2009 compared to the previous year<sup>700</sup>, the decreasing demand in the residential constructions sector translated into a contraction of transactions of approximately 35%. Over the 2008-2011 period, employment in this sector declined by more than 30%<sup>701</sup>.

However, the overall situation in the labour market was also marked by a series of factors of a fundamental nature. Firstly, the demographic crisis manifested in sharply increased emigration flows, mainly of young, educated and highly skilled people and in decreasing birth rates especially sustained by low living standards affected both the size and the quality of the labour force. Moreover, Bulgaria faced relatively high drop-out rates in secondary education, only in the 2004/2005 school year, approximately 21,000 students leaving general schools for different reasons<sup>702</sup>. And while PISA (Program for International Student Assessment) scores for Bulgaria improved by 27 points from the 2006 survey to the 2009 one (thus reflecting improved learning achievements among Bulgarian students)<sup>703</sup>, the latter still revealed that 41% of surveyed students had the lowest score for reading proficiency, having serious difficulties in evaluating, understanding, using and reflecting on written texts, and almost 50% of students receiving a similar low score for mathematical

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<sup>699</sup> The Government of Romania (2015): "Plafonul pentru 2015 al Programului 'Prima casă'"/"The 2015 Cap for the 'First Home' Programme", Press Release (Bucharest, 14 January 2015), available at <http://gov.ro/ro/guvernul/sedinte-guvern/plafonul-pentru-2015-al-programului-prima-casa>.

<sup>700</sup> International Monetary Fund (2015): *World Economic Outlook Database* (Washington D.C., International Monetary Fund), data available at <https://www.imf.org/external/pubs/ft/weo/2015/02/weodata/download.aspx>.

<sup>701</sup> M. Maiväli, M. Stierle (2013): "The Bulgarian Labour Market: Strong Wage Growth in spite of Rising Unemployment", *ECFIN Country Focus*, Vol. 10, No.2, p. 4.

<sup>702</sup> UNICEF (2008): *Education in Bulgaria Country Profile*, available at [www.unicef.org/ceecis/Bulgaria.pdf](http://www.unicef.org/ceecis/Bulgaria.pdf).

<sup>703</sup> World Bank (2010): *Assessing the Quality of Education in Bulgaria Using PISA 2009* (Washington D.C., World Bank), p. 3.

proficiency, not being able to use and engage with mathematics and make well-founded judgements. A similar situation was also recorded in Romania's case, the mean score achieved not revealing statistically significant differences between the two countries<sup>704</sup>. Thus, at the onset of the financial crisis, both countries faced the same dilemma: the learning content of their vocational and training systems lagged in terms of fostering generic, transferable skills, increasingly needed in an era of fast technological advance. For the labour markets this meant that the young staying in education did not necessarily acquire the skills and competences essential in order to compete in a high innovation economy. As regards to early school leavers, their opportunities to be (re)integrated on the labour market and to benefit of labour mobility were severely lowered. It is within this context that the European Commission recommended Bulgaria at the beginning of 2009, within the framework of the Lisbon Strategy, to focus on:

“(...) increasing the quality of labour supply and the employment rate by improving the efficiency, effectiveness and targeting of active labour market policies and by further modernising and adapting the way education is governed to raise skills to levels that better match labour market needs, and reducing early school leaving.”<sup>705</sup>

The initial response of the Stanishev government was synchronised with the situation on the labour market, which was marked by an activity rate of the Bulgarian population of 66.3% in 2007<sup>706</sup> and boosted by three consecutive years (2006-08) of high economic growth of more than 6%. As part of the 2007 state budget, the government allocated approximately Euro 90 million for active labour market policies, 80% of the sum being oriented towards the creation of subsidised employment, 11% subsidising measures related to the Employment Promotion Act (adopted in 2001, the institution regulates the promotion and support of employment, vocational information, consultation and training), and 9% being allocated to vocational training<sup>707</sup>. Moreover, under the 2007 National Action Plan for

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<sup>704</sup> OECD (2010): *PISA 2009 Results: Learning Trends. Changes in Student Performances since 2000* (Paris, Secretariat General OECD).

<sup>705</sup> European Commission (2009): *Implementation of the Lisbon Strategy Structural Reforms in the Context of the Economic Recovery Plan – Annual Country Assessments* (Brussels, European Commission), COM(2009)34 final, p. 10.

<sup>706</sup> European Commission (2008): *Employment in Europe 2008* (Brussels, Directorate-General for Employment, Social Affairs and Equal Opportunities), p. 228.

<sup>707</sup> B. Arsov (2007): “National Action Plan to Promote More and Better Employment”, *European Observatory of Working Life*, (Brussels, Eurofound), 17 June.

Employment, the government put forward measures aimed to encourage employers to hire new workers by providing for subsidised wages and tax relief, and to promote entrepreneurship among unemployed citizens. Among the active measures applied in this sense were the National Programmes “From Social Aid to Employment”, “Assistants to people with disabilities”, “Assistance for Retirement”, and “Career Start”. The most important programme - “From Social Aid to Employment” had as main aim the employment and social integration of long-term unemployed persons benefiting of monthly social assistance for whom the programme would assure participation in community activities implemented by municipalities, non-governmental organisations or businesses. In 2008 the programme included 52.586 individuals representing 60.3% of the total number of citizens included in all of the programmes run by the Employment Agency<sup>708</sup>. By 2009, 76.751 persons were benefitting of short-term subsidised employment<sup>709</sup>. However, the extent to which these active measures have been successful over the long-term has been debated, as these programmes were mainly targeting individuals with low qualifications and were not able to address the problem of long-term unemployment. A recent assessment of the efficiency of the programme “From Social Aid to Employment” emphasised that the drawbacks of the scheme, namely the temporary nature of employment provided under the programme, the low-skilled jobs offered (cleaning, planting, local infrastructure sustenance etc.) that did not translate into the development of new abilities, and the discriminatory attitudes among some private employers attracted into the programme towards beneficiaries led to a dependency relationship between the activity status of beneficiaries to state subsidies. Otherwise said, the programme “would not offer hired persons some different life perspective besides their turning back to the registration as unemployed or participation in some other project of the programme”<sup>710</sup>.

In April 2008 the Bulgarian government adopted a renewed strategy for employment for the 2008-2015 period which targeted the increase of the employment rate to 72% by 2015, an increased participation of elder workers on the labour market (up to an average retirement age of 68), a 3% decrease of the unemployment rate, a decrease of the early

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<sup>708</sup> Bulgarian Employment Agency (2009): *2008 Yearbook* (Sofia, Ministry of Labor and Social Policy – Employment Agency), p. 37.

<sup>709</sup> Bulgarian Employment Agency (2010): *2009 Yearbook* (Sofia, Ministry of Labor and Social Policy – Employment Agency), p. 17.

<sup>710</sup> V. Terziev, S. Dimitrova, E. Arabska (2015): “Positive and Negative Characteristics of active Social policies through the Example of the Program ‘From Social support to Employment’”, *Economics and Management in the XXI Century: Trends*, Vol. 20, pp. 202-220.

school-leaving rate from 16.6% to 10% and increased labour productivity. The strategy, which was aligned to the updated Lisbon Strategy for Growth and Jobs<sup>711</sup>, benefited of input from social partners, being developed within the National Council for Tripartite Cooperation - the main body for social dialogue in Bulgaria (established in 1993) comprising representatives of the government (the deputy Prime Minister and one minister depending on the issues discussed), of the trade unions (the largest being the Confederation of Independent Trade Unions in Bulgaria and the Confederation of Labour “Podkrepa”) and of the employers’ organisations. The overall new focus of labour policies was on activating vulnerable groups and increasing literacy among low-skilled persons, while in terms of improving education performance, Bulgaria implemented quality assurance mechanisms and general performance evaluations, school funding was decentralised and linked to performance and a system of differentiated pay and teacher training was set up. The wage differentiation scheme was based on three payment pillars which granted a monthly pay increase equivalent to 20% of the gross monthly wage in the education sector to 10% of the best teachers in the country, an equivalent of 10% raise to the remaining 10%, and a 5% salary increase to another 40% of teachers<sup>712</sup>.

As the first signals of the onset of the crisis began to crystallise in Bulgaria the government made a first step to introducing a set of anti-crisis measures. As such, the government presented at a meeting held in December 2008 with representatives of social partners such as the Confederation of Independent Trade Unions in Bulgaria (CITUB) and the Confederation of Employers and Industrialists in Bulgaria (CEIBG) a package of anti-crisis measures that aimed primarily at the prevention of the further growth of the unemployment rate. In terms of social security, the governmental proposals aligned around three main courses of action:

- Training and retraining 150.000 individuals, of whom 64.000 would be hired and over 10.000 would start their own businesses, using resources provided through the “Human Resources Development” programme;
- Implementing measures for the protection of existing employment, such as the recognition of up to 160 days of unpaid leave per year as part of seniority and length of service in insurance;

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<sup>711</sup> And taking into consideration the Integrated Guidelines for Growth and Jobs (2008-2010) proposed by the European Commission in December 2007.

<sup>712</sup> E. Skarby (2007): “Wage Differentiation Scheme for teachers Gets Go-Ahead”, *European Observatory of Working Life*, (Brussels, Eurofound), 1<sup>st</sup> of July.

- Guaranteeing part-time employment for periods longer than three months, and providing public subsidies to companies for the payment of salaries (the state covering up to a half of the minimum salary per month)<sup>713</sup>.

Together with these measures which were accepted by social partners, the government also established, at the request of the Bulgarian Industrial Association, an Anti-crisis Council under the authority of the Prime Minister, and supplemented funding to support increased competitiveness of local businesses and of regions. In this sense, after the Bulgarian Parliament changed in April 2008 the mandate of the Development Bank, constituting it as the country's specialised vehicle for financing small and medium sized enterprises (SMEs), the government began the gradual capitalisation of the institution by a total of BGN 500 million. By February 2009, the Bulgarian Development Bank had provided BGN 250 million to 13 commercial banks for medium and long-term investments loans and pre-export financing provided to businesses. In the first month of the implementation of this measure, the Development Bank had already given out loans totalling BGN 43 million<sup>714</sup>. A similar facility was also provided for agricultural producers, in April 2009 the Development Bank granting 100 BGN million in credit funding<sup>715</sup>.

In terms of fiscal policy, for 2008 the government continued to aim for tight aggregate spending and managed to reach a surplus of 1.6% of the GDP. Fiscal discipline came not only as a political decision, but was also strongly connected to the Currency Board Arrangement (CBA) that was introduced in Bulgaria in 1997, in the context of a severe exchange-rate and a banking crisis that had led the country to default on its international debt and battle hyperinflation (soaring to 500%) that sent the economy into a free fall<sup>716</sup>. The benefits of such arrangements are many: a fixed exchange rate regime can be an effective anti-inflation tool as it provides transparency and raises the costs of politically geared (loose) monetary and fiscal policies (governments are prevented from financing budget deficits by printing money as the local currency can only be issued in exchange for

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<sup>713</sup> P. Markova (2012): "The Case of Bulgaria", in I. Guardiancich (ed.) *Recovering for the Crisis through Social Dialogue in the New EU MemberStates: The case of Bulgaria, the Czech Republic, Poland and Slovenia* (Budapest, International Labour Office), p. 27.

<sup>714</sup> Bulgarian Development Bank (2009): "Bulgarian Development Bank provided BGN 230 million to 12 Commercial Banks for loans to local Small and Medium-Sized Firms", (Sofia, Bulgarian Development Bank), 9<sup>th</sup> February Press Release.

<sup>715</sup> Bulgarian Development Bank (2009): "Bulgarian Development Bank Gives the Banks a Hundred Millions Leva to Fund Farmers" (Sofia, Bulgarian Development Bank), Press Release 22<sup>nd</sup> April Press Release.

<sup>716</sup> N. Fabris, G. Rodić (2013): "The Efficiency of the Currency Board Arrangement", *Journal of Central Banking Theory and Practice*, Vol. 1, pp. 157-76.



reserve assets and the reserve currency), and as it anchors inflationary expectations it also encourages foreign investors to negotiate long-term trade and investment contracts (the national authorities not being able to be inconsistent with previous arrangements)<sup>717</sup>. Thus, through this arrangement, the national currency (BGN) was pegged to the Euro and the monetary policy attributes of the Bulgarian National Bank were restricted to influencing credit expansion to a limited extent, by putting a regulatory ceiling on lending or increasing the reserves required by commercial banks. The results of the CBA introduction were immediate, inflation being lowered to single-digit values after just two years. In the following years the inflation rate remained within single-digit values, although significantly larger than the EU average (in 2004 for example being at 6.1% compared to 2.0%), a situation reflecting the higher risks in the domestic economy<sup>718</sup>. And as the economy began to overheat with the labour market tightening, wage growth accelerating to a peak of 25% in June 2008, and food and oil prices rising, inflation reached 12.3% at the end of 2008. Starting with 2009, as the domestic demand began to slow down and the international prices for raw material and fuel started to decrease compared to the past year, the inflation rate was moderated to 2.5%.

In terms of budgetary allocations, as commitments began to materialise and budget allocations for social spending increased, the overall government spending in the last two months of 2008 had reached 10.8% of the GDP<sup>719</sup>. Furthermore, despite the implemented measures to curb expenditures and improve tax compliance (between 2008 and 2009 the government intensifying onsite controls particularly in the case of large taxpayers, restructuring the National Revenue Agency and the customs agency and linking together their information systems<sup>720</sup>) the government was not able to offset the significant revenue shortfall. Hence, for 2009 the general government deficit reached 4.1%<sup>721</sup>, yet this still placed Bulgaria both below the EU and the Euro area averages (-6.7% and -6.3%

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<sup>717</sup> S. Gedeon (2013): "Stability Properties of the Currency Board: A Case Study of Bosnia and Herzegovina 2004-2010", *Banks and Bank Systems Journal*, Vol. 8, No. 3, pp. 87-99.

<sup>718</sup> S. Trifonova (2011): "Optimal Choice of an Exchange Rate Arrangement in the New EU Member States: Some Empirical Evidence from Bulgaria", in A. Karasavoglou (ed.) *The Economies of the Balkan and Eastern Europe Countries in the Changed World*, (Newcastle upon Tyne, Cambridge Scholars Publishing), pp. 56-83, p. 76.

<sup>719</sup> International Monetary Fund (2009): *Bulgaria: 2008 Article IV Consultation – Staff Report* (Washington D.C., International Monetary Fund), IMF Country Report No. 09/96, p. 31.

<sup>720</sup> International Monetary Fund (2010): *Bulgaria: Selected Issues*, (Washington D.C., International Monetary Fund) IMF Country Report No. 10/159, p. 19.

<sup>721</sup> The Statistical Office of the European Union (2015): General Government Deficit (-) and Surplus (+) – Annual Data, available at <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=teina200&plugin=1>.

respectively). During its mandate, the coalition government came under increased pressure, the parliamentary opposition calling for three votes of no confidence during 2008 that mirrored concerns emanating from Brussels: the high level of corruption, the government's links to organised crime and its inability to manage EU funds and the material and non-material damages caused as a consequence. The governing coalition survived all three votes, benefiting of an oversized majority in the Parliament. Governmental reshuffling was however done, the ministers of internal affairs, defence, agriculture and healthcare being replaced, and a new Deputy Prime Minister and minister responsible for the management of EU funds were appointed<sup>722</sup>. But this was not enough, and the July 2009 parliamentary elections brought forward the Citizens for the European Development of Bulgaria Party (GERB) that formed a minority government, headed by Boyko Borisov. Following a series of protests organised in June 2009 by the Confederation of Independent Trade Unions that called for urgent measures to deal with the effects of the financial and economic crisis<sup>723</sup>, social partners were invited by the new government to the negotiations table in order to agree over a much-needed anti-crisis pact. Initial policy proposals were drafted by the social partners and negotiated in March 2010 in the National Council for Tripartite Cooperation. The resulting anti-crisis package containing 59+1 measures was announced on the 31<sup>st</sup> of March 2010. The first group of measures were aimed at fighting budgetary deficit through accelerated privatisation of minority residual shareholding in companies through the Bulgarian Stock Exchange, the reduction of administrative spending by 10% and the sale of CO<sub>2</sub> emission quotas, and was expected to generate BGN 1.6 billion in savings. The second set of measures targeted private enterprises and included increasing the capital of the Bulgarian Development Bank for investment funding, repayment of all state debts resulting from public procurement contracts with private firms by the first half of 2010, and improvement of the system of payment of sums from European funds due to beneficiaries. In the social sphere, the pact provided for a new mechanism for increasing the minimum wage, the removal of an upper limit on unemployment benefits (setting the level of benefits as 60% of the contributory income before the loss of job), a temporary freeze of state-regulated utility prices, the provision of additional funds for subsidised employment,

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<sup>722</sup> M. Spirova (2009): "Bulgaria", *European Journal of Political Research*, Vol. 48, No. 7-8, pp. 913-16.

<sup>723</sup> N. Daskalova (2009): "Trade Union and Civil Protest Rally over Government Response to Economic Crisis", *European Observatory of Working Life*, (Brussels, Eurofound), 20<sup>th</sup> July, available at <http://www.eurofound.europa.eu/observatories/eurwork/articles/trade-union-and-civil-protest-rally-over-government-response-to-economic-crisis>.

the application of a mechanism guaranteeing the funds of insured persons with additional capital held in deposits at Bulgarian commercial banks, and the introduction of a set of measures for preserving employment at enterprises experiencing difficulties in the production and sale of their outputs (such as the introduction of flexible hours, specific leave for economic reasons, state guaranteeing compensations to dismissed workers etc.)<sup>724</sup>. In the case of the measures concerning privatisations and the selling of carbon emission quotas, the GERB government did not reach its proposed targets, but the socially-oriented and labour market measures were largely implemented, although some analysts have argued that the active measures taken by both the BSP and the GERB governments, namely subsidised employment and the training and retraining of unemployed persons, have come at large public costs while not producing lasting results and economic growth due to their mechanic nature<sup>725</sup>.

In terms of the fiscal policy pursued by the new government, what was clear was that it aimed for balanced budgets through expenditure reductions across the board. As such, for both 2009 and 2010 most end-year and other bonus payments in the public sector were scrapped, especially as the authorities hoped that by pursuing fiscal stringency the country's case for its application to enter the European Exchange Rate Mechanism, which was going to be submitted in early 2010, would be improved. However, by both curbing public investment and withholding of payments due from the budget especially to firms involved in public procurement trapped the economy "in a largely self-inflicted vicious cycle of an economic downswing and a swelling fiscal imbalance"<sup>726</sup>. In 2010, after the deficit from the previous year was revised, increasing from 1.9% to 4.9% of the GDP (large arrears primarily in the construction and defence sectors being discovered), the government saw itself forced to drop its application for the European exchange rate Mechanism II, while the European Commission initiated an Excessive Deficit Procedure<sup>727</sup>.

The procedure was first introduced by the European Union through its Stability and Growth Pact (1997), the cornerstone of the European Union's macroeconomic architecture which

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<sup>724</sup> PROFIT.bg (2010): "Bulgarian Government Adopts Anti-Crisis Package" (Sofia, PROFIT.bg), 1<sup>st</sup> of April, available at <http://profit.bg/news/Bulgarian-Government-Adopts-Anti-crisis-Package/nid-62665.html>.

<sup>725</sup> Z. Slavova (2011): "Labour Market 'Active' Measures 2000-2011", *Economic Policy Review*, No. 83, pp. 6-8.

<sup>726</sup> A. Mihailov (2010): "Bulgaria: In the Trap of Macroeconomic Mismanagement", *WIIW Country Analyses and Forecasts* No. 6, p. 65.

<sup>727</sup> Council of the European Union (2010): Council Decision No. 2010/422/EU on the Existence of an Excessive Deficit in Bulgaria, (Brussels, Council of the European Union), *Official Journal of the European Union*, No. L. 199/26, published on 31<sup>st</sup> July.

was based on two Council regulations<sup>728</sup> that urged Member States to maintain their budgets in surplus or close to balance (budget deficit not to exceed 3% of GDP) and to restrict their public debt to no more than 60% of GDP. At its core, the Pact which was revised in both 2005 and 2011<sup>729</sup>, has both a preventive and a corrective mechanism, the first focusing on detailed monitoring by the Commission of Member States' fiscal positions based on annual convergence (in the case of non-euro members) or stability programmes (members of the Euro zone). The preventive arm includes two policy instruments: an early warning addressed by the Council on the basis of a proposal by the European Commission and policy recommendations which the European Commission directly addresses to a Member State as regards the broad implications of its fiscal policies<sup>730</sup>. The core requirement in this case is that Member States reach and maintain a Medium Term Objective (MTO) – a country-specific budgetary reference value defined in structural terms (cyclically adjusted and net of one-off and temporary measures) that is to be set within a safety margin in view of the 3% deficit limit. The yearly stability and convergence programmes must contain a formulation of an adjustment path towards meeting the specific Medium Term Objective, and in the case Euro zone members if significant and repeated deviations from the adjustment path are observed, financial sanctions (interest-bearing deposits of up to 0.2% of the GDP) are foreseen<sup>731</sup>. The corrective or dissuasive part of the Pact governs the Excessive Deficit Procedure through which countries are given a deadline of six months (or three in the case of a serious breach) to comply with recommendations that provide it with concrete steps to correcting its deficit within a set timeframe. The European Commission together with the Council assess the progress done by the country in question, and if effective action is deemed, but public finances are affected by exceptional events, an extension or revision of recommendations is considered. Where

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<sup>728</sup> Council Regulation No. 1466/97 of 7<sup>th</sup> July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, *Official Journal of the European Union*, No. L 209/1; and Council Regulation No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, *Official Journal of the European Union*, No. L 209/6 (both amended in 2005 and 2011).

<sup>729</sup> Under the 2005 reform, the Excessive Deficit Procedure was revised to include more factors that would be considered when determining whether a country had an excessive deficit such as if spending fostered international solidarity or if it promoted the unification of Europe. Once an excessive deficit would be identified, the Member State in question would be provided with extended deadlines to correct the imbalance. The 2011 reform introduced among others the reverse qualified majority voting procedure in case the decision to impose financial sanctions of up to 0.5% of the GDP on a Eurozone state that does not comply with its obligations.

<sup>730</sup> M. Sanchis I Marco (2014): *The Economics of the Monetary Union and the Eurozone Crisis* (New York, Springer), p. 20.

<sup>731</sup> H. Siekmann (2015): "The Legal Framework for the European System of Central Banks", in F. Rövekamp, M. Bälz, H. Günther Hilpert (eds.) *Central Banking and Financial Stability in East Asia* (New York, Springer), pp. 43-87, p. 64.

countries fail to take effective action to correct the excessive deficit in due time, revised recommendations and new timelines are issued, but in the case of Euro zone members the stepping up of the procedure may result in the imposition or strengthening of sanctions in the form of a fine of 0.2% of GDP (on a recommendation by the European Commission for a Council decision which is taken semi-automatically unless a qualified majority of Member States votes against it). Moreover, all countries in receipt of assistance from the Cohesion Fund may face a temporary suspension of this financing (under the 2014-2020 budgetary exercise, the Cohesion Fund concerns Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia and Slovenia)<sup>732</sup>.

As for the 2007-2013 European budgetary exercise, Bulgaria had been allocated approximately Euro 6.9 billion representing EU structural and cohesion funds (Romania was allocated Euro 19.7 billion), and as in 2008 the country had had the experience of the EU freezing Euro 500 million due to funds mismanagement, the GERB government pursued a strict fiscal policy: it froze pensions and wages, streamlined public administration (including by reducing the civil service by some 9.000 workers), increased excise duties (cigarettes and electricity), and hiked taxes on gambling and real estate<sup>733</sup>. While the adopted economic austerity measures were successful in improving the budget position (the deficit being cut from almost 4% of the GDP in 2010 to 1% in 2012), they came at the cost of increasing social unrest. In 2013, expenditures on dwellings, water, electricity and fuels increased by 1.8%, reaching a share of 18% of the household expenditures<sup>734</sup>. In the context of a material deprivation rate that reached 43 points in Bulgaria in 2013, which reflected the inability of close to a half of the country's population to afford among others unexpected financial expenses and adequate heating, the steadily increase since 2004 of electricity prices coupled with a slow increase of household incomes (the National Statistical Institute of Bulgaria reporting an increase of household income between 2008 to 2012 of just 13%) led at the beginning of 2013 to wide-spread protests against the GERB-

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<sup>732</sup> European Commission (2015): *EU Economic Governance – Stability and Growth Pact. The Corrective Arm* (Brussels, European Commission), available at [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/corrective\\_arm/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/corrective_arm/index_en.htm).

<sup>733</sup> B. Bakker, P. Mitra (2012): "Bulgaria: Surviving the Crisis on its own", in B. Bakker, C. Klingen (eds.) *How Emerging Europe Came through the 2008/2009 Crisis. An Account by the Staff of the IMF's European Department* (Washington D.C., International Monetary Fund), pp. 235-45, p. 240.

<sup>734</sup> Author's calculations based on National Statistical Institute of Bulgaria – Households income, Expenditure and Consumption (1999-2014), available at <http://www.nsi.bg/en/content/5640/households-income-expenditure-and-consumption>.

led government and public anger over the economy. The government resigned in February, and a caretaker government was appointed by the President of the country, Rosen Plevneliev.

During Borrisov's mandate the new Europe 2020 Strategy was adopted in June 2010, and the country was subsequently invited to adopt its own national targets on employment, innovation, education, social inclusion and climate/energy and to submit its national reform programme. Social participation within this process was also secured. The process of preparation of the National Reform Programme which sets the country's policies and measures to sustain growth and jobs and to reach the Europe 2020 targets included the involvement of the Bulgarian Economic and Social Council (ESC) – the permanent institutionalised form of social dialogue between the state – The Council of Ministers and the parliament – and organised civil society in the area of social policy<sup>735</sup>. By law, the Council which was formed in 2003 and reunites nationally representative organisations of employers, employees and of various interests (agricultural producers, cooperatives, craftsmen, professional branches etc.), is required to develop opinions on draft laws, national programmes, and plans regarding the economic and social development of the country. Based on this provision, the Bulgarian Economic and Social Council was invited to take part within the interdepartmental working group on Europe 2020 which drafted the National Reform Programme. The ESC has also forwarded observations and recommendations regarding the quality of education and drop-out rates which were incorporated into the updated 2012 National Reform Programme<sup>736</sup>.

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<sup>735</sup> E. Iankova (2009): *Business, Government and EU Accession. Strategic Partnership and Conflict* (Plymouth, Lexington Books), p. 95.

<sup>736</sup> European Economic and Social Committee (2012): *Europe 2020 Strategy. European Semester 2012. Contributions from Economic and Social Councils and similar Institutions from EU Member States* (Brussels, European Economic and Social Committee), p. 13.

Europe 2020 targets	Situation in Bulgaria in 2009	Bulgarian Europe 2020 targets
3% of EU GDP invested in R&D	0.5%	1.5%
75% of 20-65 year-old to be employed	65.4%	76%
Reducing early school leaving to below 10%	14.7%	11%
At least 40% of 30-34 year-old population completing tertiary education	27.9%	36%
At least 20 million fewer people in/at risk of poverty/exclusion	3.5 million people at-risk-of poverty or exclusion	Reduction by 260,000 persons
20% increase in energy efficiency		Reduction of 3.20 Mtoe
20% reduction in greenhouse gas emissions (from sources not covered by Emissions Trading System)	0%	+20%
20% of Energy from renewable sources (share of renewable energy in gross final energy consumption)	9.4%(Eurostat 2008)	16%

**Figure 8 Europe 2020 & Bulgaria targets**

**Source:** Government of Republic of Bulgaria (2011): National Reform Programme (2011-2015). Implementation of “Europe 2020 Strategy” (Sofia, 13 April), p. 16.

For its national employment rate, despite low levels of population optimism regarding the economic situation of the country revealed by a 2010 Eurobarometer<sup>737</sup>, the GERB government set out a target slightly higher than the EU one, the then Deputy Minister of Labour and Social Policy, Krasimir Popov, arguing that the goal while ambitious was not

<sup>737</sup> European Commission (2010): *Eurobarometer 73 May-November 2010* (Brussels, TNS Opinion & Social) revealed that 94% of Bulgarians judged the situation of the national economy as ‘total bad’ with employment being deemed by 53% as the most important issue facing the country and 30% believing that the impact of the crisis on jobs had not reached at that time its peak. A similar situation was observed in Romania’s case as well, with 91% of the population deeming the situation of the national economy as ‘totally bad’, and 68% of the respondents considered that the effects of the crisis on jobs had not reached its peak.

impossible to be reached<sup>738</sup>. In reality, throughout 2010 up until 2014, the employment rate remained well below the European average and the Euro area, reflecting a weak labour market as well as skills mismatch between demand and supply. In order to advance in approaching this goal, on the short term, the National Reform Programme for 2011-2015 proposed a series of active measures in the form of subsidised employment (the National Programme “Assistants to People with Disabilities”, “Employment and Professional Training of People with Permanent Disabilities”, “New Chance for Employment”, “Career Start”, and encouragement measures for subsidising employment in the private sector), and the training and retraining of unemployed (such as the “Development” Scheme or the “I can” and “I can more” schemes). Overall, based on the implementation of these measures, the National Reform Programme targeted the employment of at least 10.497 people and the subsidising of 11.180 employees <sup>739</sup>. However, while funding for the active measures increased, totalling BGN 127 million (a raise by 30% in comparison to 2010, largely based on supplementary funding available under the Human Resources Development Operational Programme), the results achieved were lukewarm, the total number of persons working under programme measures for employment and training in 2011 being of 23.908, lower by 12% compared to the previous year<sup>740</sup>.

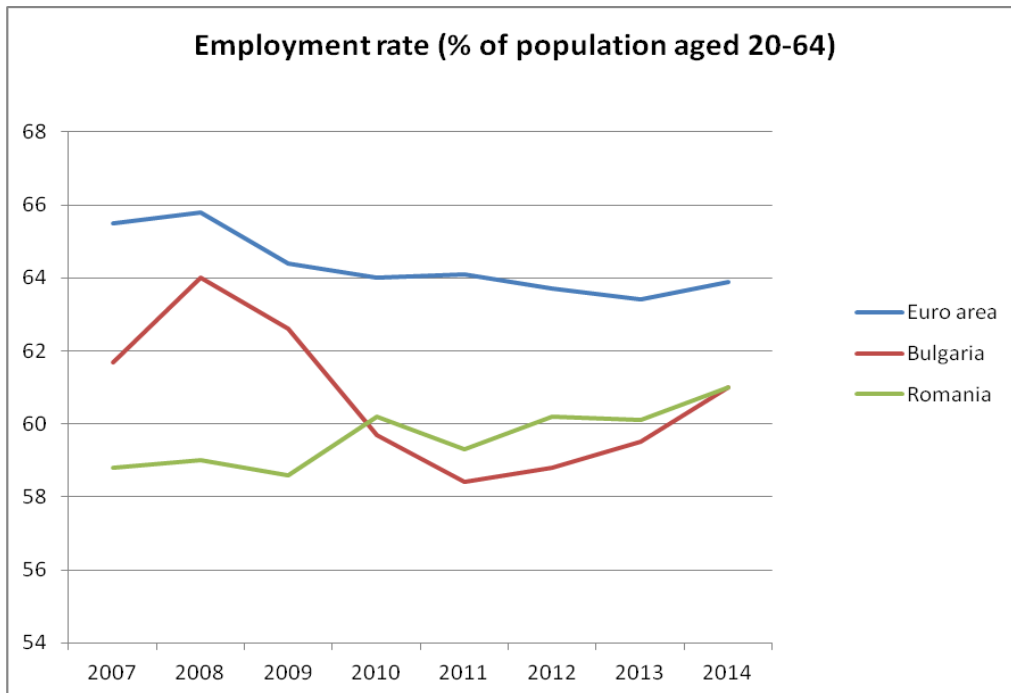
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<sup>738</sup> EurActiv.com (2010): “Bulgaria Sets Higher Employment Target than EU Average” (EurActiv.com, 31<sup>st</sup> of August), available at <http://www.euractiv.com/priorities/bulgaria-sets-employment-target-higher-than-eu-average-news-497282>.

<sup>739</sup> Figures based on the calculation of all of the targets attached to each National Programme presented as an active measure on the labour market in the National Reform Programme (2011-2015). Implementation of “Europe 2020 Strategy”.

<sup>740</sup> Government of Republic of Bulgaria (2012): *Yearbook 2011* (Sofia, Ministry of labor and Social Policy – Employment Agency), p. 26.





**Figure 9 Employment rate (% of population aged 20-64)**

**Source:** European Statistical Office, 2007-2014, data available at [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Employment\\_rate\\_age\\_group\\_15%E2%80%9364\\_2004%E2%80%9314\\_\(%25\)\\_YB16.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Employment_rate_age_group_15%E2%80%9364_2004%E2%80%9314_(%25)_YB16.png)

On the medium term, the country targeted a 27% increase by 2015 in participation of young people in the labour market through internship schemes (paid traineeship of up to 6 months organised for people aged up to 29 years), activate by 2015 35% of the long-term unemployed and integrate vulnerable groups on the labour market through various schemes (such as “Back to work” whereby long-term unemployed persons would be hired to look after children of 1 up to 3 years of age), improve employment services by introducing a general information system in all labour offices, improve matching between labour demand and supply by connecting forecasting of labour demands with the educational curricula and programmes in the secondary level of education, and increase skills and knowledge of the work force through life-long learning programmes.

An analysis of the 2012-2015 Country reports, European Commission proposals and Council recommendations for Bulgaria on the trajectory towards meeting its national employment target reveals that the active labour market policies pursued by the Bulgarian government have been deemed as insufficiently developed both in terms of coverage and of

targeting, the fragmentation of agencies being a major challenge in the delivery of benefits and services to the unemployed and the inactive. In its Recommendation to the Council regarding the 2015 National reform Programme of Bulgaria, the European Commission observed that a high proportion of young people in the country are neither employed, nor in education or vocational training and are not in touch with the employment services. In this way this category is virtually outside the scope of any standard labour market activation policy<sup>741</sup>. Moreover, a recent assessment of the impact of active social programmes on the labour market observed that *in situ*, social workers assuring the operationalisation of the policies expressed their preference to advising and orienting individuals with better prospects of obtaining full time employment offers, in contradiction to the objectives of some of the programmes that targeted the integration and motivation of the poorest marginalised persons<sup>742</sup>. This situation was also reflected in the 2013 European Commission recommendation towards Bulgaria which encouraged the country to reform its National Employment Agency so that the counselling services provided to jobseekers would become effective and the capacities of the institution for forecasting and matching skill needs on the labour market would be developed<sup>743</sup>. The latter issue of ineffective matching of demand and supply on the labour market is best reflected when considering employment among young graduates. In this sense, in 2013 the employment rate of graduates was of 67.3% and data from the Bulgarian university ranking system revealed that approximately half of the tertiary students are concentrated in 6 (economics, administration, law, computer technology, pedagogy, tourism) out of 52 professional fields, while severe shortages of specialists were present in key sectors<sup>744</sup>.

In order to address the ever larger rates of youth unemployment across Europe, the European Council agreed to create in 2013 a Youth Employment Initiative which is a financial instrument concentrating on young people not in employment, education or training (the so-called NEETs) to support their access to the labour market and upgrade their skills. In the case of Bulgaria, the specific allocation for the 2014-2015 period was of Euro 55 million and by 2014 a Youth Guarantee was put in place, the government

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<sup>741</sup> European Commission (2015): *Recommendation for a Council Recommendation on the 2015 National Reform Programme of Bulgaria* (Brussels, European Commission), COM(2015)253 final, p. 4.

<sup>742</sup> T. Venelin, D. Sevdalina, E. Arabska (2015): "Assessing Impacts of Active Social Programs on the Labor Market in the Republic of Bulgaria", *Procedia Economics and Finance*, Vol. 30, pp. 890-902.

<sup>743</sup> European Commission (2013): *Recommendation for a Council Recommendation on Bulgaria's 2013 National Reform Programme* (Brussels, European Commission), COM(2013) 352final, p. 6.

<sup>744</sup> European Commission (2015): *Country Report Bulgaria Including an In-Depth Review on the Prevention and Correction of Macroeconomic Imbalances* (Brussels, European Commission), SWD(2015) 22final, p. 49.

estimating that through this facility 154.000 young people would be provided with subsidised employment and 60.000 with jobs within the primary sector of the labour market<sup>745</sup>. While a strong and direct causal effect is difficult to be established, it is noteworthy here to mention that with 2014 and throughout the rest of the year, as well as in 2015 the youth unemployment rate in Bulgaria decreased from 26.40% in January 2014 to 21.00% in August 2015<sup>746</sup>. In view of responding to a recurring Council recommendation of addressing the increasing skills and geographical mismatches, Bulgaria has also made steps to establish a National System for Forecasting the Development of the Labour Market, steps that have materialised into the application of a pilot Survey of the employers' labour needs in 2012, replicated afterwards on an annual basis. At present, the Bulgarian government thus plans to use results of the surveys as well as a model of forecasting qualification needs on the labour market and develop an enrolment plan in the secondary and higher education system<sup>747</sup>. While it is too early to be able to assess the impact of these measures, what should be emphasised here is the willingness of the government to move beyond the option of creating subsidised employment in order to address the structural problems of unemployment.

Intimately connected to the sensitive matter of equilibrating the qualified supply of workforce to the skills demand on the labour market are the targets relating to early school leavers and people aged 30-34 attending a form of higher education. For these targets, namely reducing school dropout to 11% by 2020 and increasing to 36% the share of people aged 30-34 within higher education, the 2011-2015 National Reform Programme set forward very few measures and largely general in nature and lacking a strong connection to the labour market requirements. The introduction of compulsory pre-school education for children aged 5 years together with the implementation of a system of consultations and additional activities for pupils with learning difficulties registered in primary and lower secondary education were envisaged for 2011, while for the medium-term the only proposed policy measure was the implementation of full-day schooling programmes for

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<sup>745</sup> Council of Ministers of the Republic of Bulgaria (2013): "Bulgaria is among the first countries to already have a plan for the European Youth Guarantee", (Sofia, Council of Ministers), Press Release 18<sup>th</sup> December, available at <http://www.government.bg/cgi-bin/e-cms/vis/vis.pl?s=001&p=0137&n=112&g=>.

<sup>746</sup> European Statistical Office (2015): *Youth Unemployment 2014-2015*, data available at [http://ec.europa.eu/eurostat/statistics-explained/index.php/Youth\\_unemployment](http://ec.europa.eu/eurostat/statistics-explained/index.php/Youth_unemployment).

<sup>747</sup> European Parliament (2013): *Youth Unemployment. Interparliamentary Meeting* (Brussels, Committee of Employment and Social Affairs), Committee of Employment and Social Affairs Interparliamentary Meeting 29<sup>th</sup> January.

children in primary education by 2013<sup>748</sup>. The 2012 update of the National Reform Programme provisioned the development of a National Strategy for Reducing the Number of Early School Leavers by 2020 which would focus on developing long-term policies for school dropout prevention, intervention and compensation based on more efficient systems of monitoring<sup>749</sup>. In terms of the measures initiated by the Bulgarian authorities as a response to the Council recommendations, in 2012 a series of programmes were implemented towards improving the general educational content and curricula, setting a system of career orientation in schools, and a programme designed for pedagogical specialists to raise their professional competences in scientific, methodological and managerial training<sup>750</sup>. However, subsequent county assessments delivered by the European Commission have emphasised that despite these measures funded under the European Social Fund, no substantial steps have been taken to reform the educational system. The new School Education Act which is expected to introduce among others new national educational standards, provide schools with more freedom in curriculum development and teaching methods and improve the system of professional development and evaluation of teaching staff has been postponed numerous times since 2012 – when it was initially planned to be adopted. The Law on National Education, adopted in 1991 and amended over 20 times in the past years has been supplemented by secondary legislation which has not always been coordinated. The postponement of the new law on education was partly the result of political instability, as well as of a lack of public consensus which was also visible during the preparation and adoption in 2012-2013 of the Law on Pre-school and School Education (which introduces among others obligatory pre-school training from the age of 4)<sup>751</sup>. In terms of political instability, from 2009 to 2015, the country was governed by two caretaker governments (March-May 2013 and August-November 2014) and three elected cabinets (GERB-led between July 2009 and March 2013; BSP-led coalition between May 2013 and August 2014; and the incumbent GERB-led government). This translated into a lack of continuity between different cabinets in approaching education

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<sup>748</sup> Council of Ministers of the Republic of Bulgaria (2011): *National Reform Programme (2011-2015). Implementation of "Europe 2020" Strategy* (Sofia, Council of Ministers), 13<sup>th</sup> of April, p. 76.

<sup>749</sup> Ministry of Finance (2012): *Europe 2020: National Reform Programme 2012 Update* (Sofia, Ministry of Finance), p. 43.

<sup>750</sup> Ministry of Finance (2012): *Europe 2020: National Reform Programme 2012 Update* (Sofia, Ministry of Finance), p. 44.

<sup>751</sup> See Y. Totseva (2014): "The Education Reforms, Public Discussions and Social Changes in Bulgaria", *International Journal of Cross-Cultural Studies and Environmental Communication*, Vol. 1, No. 1, pp. 124-34.

reform as well as lagging in adopting essential legislative frameworks that would lead to the implementation of necessary comprehensive reforms of the school system.

As a result, the 2015 European Commission assessment of the education system in Bulgaria observed that while the 2012 PISA results have shown improvements, the country remained the worst performer in reading and mathematics and the third-worst performer in science, with students from non-profiled general education and vocational education and training schools (VET) doing particularly poorly. The Commission argued that this outcome needed to be considered against the backdrop of a very low level of annual expenditure per pupil, estimated at around 40% of the EU average when measured in Purchasing Power Standards<sup>752</sup>. PISA evaluations have also revealed that differences in mathematics scores between students in the highest and lowest quintiles of socio-economic status in Bulgaria were among the highest in the region<sup>753</sup>, making opportunities for obtaining a good education in the country highly unequal and dependent on students' background characteristics. In this sense, comparative data on the educational status of the three main ethnic groups in the country (Bulgarians, Turks, and Roma) derived from the 2011 National Census, has shown significant disparities in the educational integration of Roma children<sup>754</sup>. As a result, starting with 2012, the Council has expressly reiterated the need for Bulgaria to actively improve access to education for disadvantaged children, in particular of Romani ethnicity. Steps towards addressing this problem have been made, two of the most important strategic documents in this sense being the National Roma Integration Strategy (2012-2020) adopted in 2011 and the Strategy for Reducing the Share of Early School Leavers (2013-2020) adopted in 2013 which has identified Roma children as one of the groups at risk of dropout and put forward a series of additional measures. Amendments made to the Education Act have made enrolment in pre-school education of children aged 5 compulsory, introducing as well financial sanctions for parents who failed to ensure the presence of their children in class. While the effectiveness of this decision has been debated, an increase of the percentage of Roma children aged 3-6 enrolled in kindergartens

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<sup>752</sup> European Commission (2015): *Country Report Bulgaria 2015 Including an In-Depth Review on the Prevention and Correction of Imbalances* (Brussels, European Commission), SWD(2015) 22final, p. 49.

<sup>753</sup> L. Gortazar, K. Herrera-Sosa, D. Kutner, M. Moreno, A. Gautam (2012): *How Can Bulgaria Improve its Education System? An Analysis of PISA 2012 and Past Results* (Washington D.C., World Bank Group), p. 14.

<sup>754</sup> S. Danova (2015): *Advancing the Education of Roma in Bulgaria. REF Country Assessment – 2015* (Sofia, Roma Education Fund), p. 9.

increased from 73% in 2007 to 84% in 2014<sup>755</sup> - Bulgarian authorities choosing to focus their attention on pre-school integration of children as an active measure of preventing primary and secondary dropout. This approach has seen some success, as Eurostat data shows that the rate of early leavers from education and training has decreased from 13.9% in 2010 to 12.9% in 2014<sup>756</sup>.

### 5.3.2. Romania

When turning to Romania, the pre-crisis period was marked by strong progress towards the country's convergence with other EU Member States in terms of income and living standards, the economy expanding during 2001-2008 by an average of 5-6% per year, thus benefitting of one of the fastest growth rates in the EU. The prospects of the country gaining EU membership and the subsequent adoption of the *acquis communautaire* encouraged, as in the case of Bulgaria, large Foreign Direct Investment (FDI) inflows and in turn growth. The foreign investment inflow translated into capital and access to markets, but also contributed substantially to the transfer of technology and knowledge, with a beneficial impact on productivity<sup>757</sup>. However, similar to the case of Bulgaria, growth was uneven across different sectors such that between 2000 and 2008, average annual growth for the construction sector was reported around 15% and for services 6% - both sectors which tend to be non-tradable in Romania, while industry grew at 5% per year - below the average for the economy, and the agriculture sector registered a negative growth of 3.3%<sup>758</sup>. In contrast to Bulgaria though, where the currency board and prudent fiscal policies had kept the budget balanced, the Romanian authorities followed in this period pro-cyclical policies, increasing public-sector salaries at a pace that surpassed those in the private sector and witnessed an acceleration of domestic demand (understood as aggregate spending in an economy that includes imports). Real private credit expanded by some 50%

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<sup>755</sup> European Commission (2015): *Country Report Bulgaria 2015 Including an In-Depth Review on the Prevention and Correction of Imbalances* (Brussels, European Commission), SWD(2015)22 final, p. 50.

<sup>756</sup> European Statistical Office (2015): *Early Leavers from Education and Training - Total*, data available at [http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=t2020\\_40&plugin=1](http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=t2020_40&plugin=1).

<sup>757</sup> N. Arnhold, O. Arias, C. Pauna, M. Moarcas, J. de Laat, R. Florescu, P. Cahu (2013): *Europe 2020 Romania: Evidence-Based Policies for Productivity, Employment, and Skills Enhancement* (Washington D.C., World Bank), Report No. ACS4924, p. 11.

<sup>758</sup> World Bank (2013): *Reviving Romania's Growth and Convergence. Challenges and Opportunities. A Country Economic Memorandum* (Washington D.C., Poverty Reduction and Economic Management Unit - World Bank), Report No. 74635-RO, p. 6.

in 2007<sup>759</sup>, newly privatised banks being keen to boost profitability and market share while the population and economic operators nurtured optimistic expectations on the financial situation. High consumption was stimulated by a flat tax of 16% introduced in 2005 which increased the household disposable income, as well as by increasing remittances (money sent in the country by Romanians working abroad) that peaked to Euro 6.5 billion in 2007<sup>760</sup>. This in turn fuelled an excessive demand for imports, putting trading balances at a deficit. In this context that was deemed by some analysts as unsustainable economic growth<sup>761</sup>, the expansionary budgetary policy pursued by the Romanian government further fuelled macroeconomic imbalances. As such, an increase in government spending from 31% of GDP in 2004 to 37% of GDP in 2008, a stagnation of revenues at around 31% of GDP in this period, and a hike in public employment, which expanded by 15% between 2005 and 2008<sup>762</sup> lead to an escalation of the government budget deficit from -1.2% in 2004 to -5.7% of GDP in 2008<sup>763</sup>. The general elections of November 2008 further encouraged increases in public spending, as the reshuffled centre-right coalition in power (formed of the National Liberal Party, and the Democratic Union of Hungarians in Romania) led by Călin Popescu Tăriceanu attempted to gain popularity by raising voters' salaries and pensions. In this sense, two consecutive increases in public pensions brought the pension fund from surplus into deficit, undermining its long term financial sustainability. By the end of 2008, the public debt was of 13.4% of GDP, the unemployment rate was at 5.8% and the current account deficit was of -11.4%. At the same time, the country began to be directly affected by the economic crisis in the last quarter of 2008, industrial production and domestic consumption accelerating their declining tendency and budget revenues shrinking. In December 2008, a new government formed of a grand coalition between the Democratic Liberal Party (PDL) and their erstwhile rivals, the Social Democratic Party (PSD) and led by Emil Boc (PDL) received the vote of confidence from the Parliament and was sworn in by the President. However, the collaboration protocol did not show much on

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<sup>759</sup> International Monetary Fund (2008): *Romania – 2008 Article IV Consultation: Concluding Statement of the Mission* (Washington D.C., International Monetary Fund), 21<sup>st</sup> April.

<sup>760</sup> B. Suditu, G. Prelipcean, D. Virdol, O. Stângaciu (2013): *Perspectivile Politicii de Migrație în Contextul Demografic Actual din România/Perspectives on the Migration Policy in the Current Demographic Context in Romania* (Bucharest, Institutul European din România), p. 42.

<sup>761</sup> D. Constantin, Z. Goschin, A. Danciu (2011): "The Romanian Economy from Transition to Crisis. Retrospects and Prospects", *World Journal of Social Sciences*, Vol. 1, No. 3, pp. 155-71.

<sup>762</sup> World Bank (2010): *Romania – Public Expenditure and Institutional Review* (Washington D.C., World Bank), Volume 1, Report No. 51191-RO, p. 4.

<sup>763</sup> F. Oprea, I. Bilan, O. Stoica (2012): "Pre-Crisis Fiscal Pattern in Romania and Effects on Crisis Alleviation Measures", *IBIMA Business Review*, Vol. 2, pp. 1-14.

the side of policy strategies to comply with EU requirements, address political corruption or protect the country against the effects of the international economic crisis. In fact, it detailed the allocation of over 3.000 posts in the national and local administration, suggesting a tendency towards a position-seeking strategy instead of a policy-seeking one. As an example, at the national level, the administration comprised 20 minister portfolios, 80 deputy minister posts, and hundreds of councillors, directors and deputy-directors, each with their own advisors<sup>764</sup>. Moreover, given that the budget for 2009 was calculated on a presumed economic growth of at least 3%, the sharp economic contraction of 6.6% led to a deficit of 9%. In the spring of 2009, pressed by the rapid deterioration of the country's economy and the fragility of the national currency, the Boc government requested a loan of Euro 19.95 billion from the International Monetary Fund (IMF), the EU, the World Bank and the European Bank for Reconstruction and Development (EBRD). The loan, which was the largest the country had ever contracted, was to be disbursed in six instalments within two years, conditional on the country scaling down of public spending, reducing the budget deficit to 5.9% of GDP, the number of public servants, and of the debt to private firms. The support was meant to be given to the banking system in order to prevent high inflation and a dramatic drop in the exchange rate. However, in September 2009, contrary to the commitments taken by the country, the government used Euro 1 billion in order to cover public servants' wages, pensions and benefits, most of which had been raised in view of the November 2009 presidential elections. In response, the IMF delayed the third instalment and warned that in future all money should go to the National Bank<sup>765</sup>. By October, the political situation in the country worsened as well, with the Social Democrats ministers resigning – partly as a strategy to force the cabinet to fall and the Democrat-Liberals to take the full blame for the financial instability. In response, the remaining Democrat-Liberal ministers assumed all portfolios for 45 days, as stipulated in the country's Constitution, in the hope that during this period they would be able to bring in another party to govern<sup>766</sup>. However, a motion of no-confidence was introduced by the opposition (the National Liberal Party, the Democratic Union of Magyars and the Social Democrat Party), criticising the government for its lack of legitimacy and representativeness, as well as for the economic hardship that had led to 700.000 people losing their jobs, and over 100.000 SMEs closing

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<sup>764</sup> L. Stan, R. Zaharia (2009): "Romania", *European Journal of Political Research*, Vol. 48, No. 7-8, pp. 1087-099.

<sup>765</sup> L. Stan, R. Zaharia (2010): "Romania", *European Journal of Political Research*, Vol. 49, No. 7-8, pp. 1139-153.

<sup>766</sup> L. Stan, R. Zaharia (2010): "Romania", *European Journal of Political Research*, Vol. 49, No. 7-8, pp. 1139-153.



down<sup>767</sup>. As a result, the Boc cabinet lost the Parliament's confidence and support, however, in a defying move, President Băsescu re-appointed in December 2009 a PDL-supported government led again by Emil Boc. By 2010, the unemployment rate had reached 7.3%<sup>768</sup>, while the public debt had soared to 30.5% of the GDP. While the IMF had preferred for the government to respond to the deteriorating financial context through a mixture of tax increases and expenditure cuts, the Boc government was reluctant to raise the income tax, and instead opted in June 2010 for a package of particularly severe austerity measures. The public servants' wages were cut by 25%, social security benefits were lowered by 15% (a provision for a 15% reduction of pensions was included, but the measure was ruled as unconstitutional), entitlements due to teachers, the army, police and intelligence service personnel, monthly food allowances, subsidies for rent and other benefits granted to scientists and artists were cut, and compensations for retirement or decommissioning from active military service were abolished. VAT was also increased from 19% to 25%.

But while the government declared that in the absence of these harsh measures Romania could not have met the budget deficit ceiling of 6.8% of GDP, it refused in first instance to cut hundreds of unneeded public administration posts, fuelling public dissatisfaction<sup>769</sup>. In August 2010, the government announced plans to cut 54.000 posts in local public administration and 20.000 posts in central administration, in addition to the 30.000 posts that had been cut during the first half of the year<sup>770</sup>. In reality, in many cases mayors and country council presidents opted to cut positions that were included in the structural organisation of institutions, but that were not filled at the time when the governmental decision was made. As a result, operating costs for the public administration did not go down and in the context of manifest public dissatisfaction, the opposition introduced in the Parliament four different no-confidence motions against the government (in June, October, and December). The motions did not unseat the government, but led to cabinet reshuffling and finally to contestation of its working style, which was revealed after an audit in 2010 by

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<sup>767</sup> The Chamber of Deputies (2009): "Eleven against Romania" – *No-Confidence Motion*, initiated by PNL and UDMR deputies and senators (Bucharest, Chamber of Deputies), Registered at 06.10.2009, available at <http://www.cddep.ro/pls/parlam/parlament.motiuni.detalii?leg=2008&cam=0&idm=1369>.

<sup>768</sup> National Statistics Institute (2011): "Ocuparea și Șomajul în Anul 2010" / "Employment and Unemployment in 2010", (Bucharest, National Statistics Institute), Press Release No. 130/14.05.2011.

<sup>769</sup> L. Stan, R. Zaharia (2011): "Romania", *European Journal of Political Research*, Vol. 50, No. 7-8, pp. 1108-117.

<sup>770</sup> Mediafax (2010): "Guvernul s-a Angajat să Concedieze încă 74.000 de Bugetari în 2010 și Minimum 15.000 în 2011" / "The Government had Committed to Dismiss Another 74.000 Public Servants in 2010 and a Minimum of 15.000 in 2011", (Mediafax, 4<sup>th</sup> of August), available at <http://www.mediafax.ro/social/guvernul-s-a-angajat-fata-de-fmi-sa-concedieze-ince-74-000-bugetari-in-2010-si-minim-15-000-in-2011-6771300>.

the Court of Auditors to have led to the squandering of over Euro 750 million on unjustified purchases and spending<sup>771</sup>. Moreover, the Boc government assumed responsibility (a practice whereby legislative proposals made by the executive do not need to be voted by the parliament and are considered adopted unless censure motions are forwarded within three days) on multiple occasions and have heavily relied on emergency ordinances (normative act issued by the government which comes into force after being debated by the parliament and once published in the Official Gazette or within thirty days from its submission). Among the most important issues for which the government assumed responsibility was to amend the Labour Code. The amendments introduced longer probation periods for employees, extending them from 30 to 90 days for workers and from 90 to 120 days for managers. The maximum length of fixed-term employment contracts was modified, being extended from 24 to 36 months, thus making it easier for employers to use non-standard contracts and utilise temporary agency workers. Employers were also allowed to unilaterally reduce the working week, and to demand employees to work overtime. Furthermore, the influence of trade unions was diminished through the adoption in the summer of 2010 of a new Social Dialogue Code that imposed certain legal obstacles in the sphere of collective labour relations by introducing new minimum membership thresholds for forming trade unions, making it very difficult for unions to be formed at company level in the vast majority of employing enterprises. Also, trade unions were no longer allowed to associate on the base of sharing a “branch of activity”, but had instead to fall within the same “sector of activity”. At the beginning of 2011, the government further amended the Law on Social Dialogue by eliminating national collective agreements, meaning that for this point onwards collective bargaining was only to take place at the company level, groups of companies, or the sector of activity. Combined with the new minimum membership thresholds, and changes to the criterion of trade union “representativeness” (a provision stating that multiple trade unions could not be accredited as representative in a company) resulted in an exclusion of an estimated 1.2 million employees from collective bargaining<sup>772</sup>.

On the short term, the changes did not manage to set in action positive effects on the labour market. In fact, a study conducted by the National Trade Union Block concluded that after

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<sup>771</sup> L. Stan, R. Zaharia (2012): “Romania”, *European Journal of Political Research Political Data Yearbook*, Vol. 51, No. 1, pp. 269-79.

<sup>772</sup> L. Chivu, C. Ciutacu, R. Dimitriu, T. Ticlea (2013): *The Impact of Legislative Reforms on Industrial Relations in Romania* (Budapest, Decent Work Technical Support Team and Country Office for Central and Eastern Europe), p. xi.

the entering into force of the amendments, the rate of long-time unemployment rose to 58% in 2011, compared to 50% in the previous year, meaning that by 2011 6 out of 10 unemployed citizens could not become active on the labour market. Moreover, the report showed that the probability of a person active on the labour market to become unemployed or inactive rose to 7.7% in 2011, compared to 3.3% in 2010<sup>773</sup>. In their attempt at fiscal consolidation, Romanian policy-makers “failed to implement measures that would have required sophisticated administrative and political skills”<sup>774</sup>. While the measures reduced the budget deficit from 9% of GDP in 2009 to 3% of GDP in 2012, they came at the expense of living standards: by 2010, the share of people at risk of poverty was of 45.4% for the unemployed and 29.8% for inactive persons, compared to the national average of 21.4%<sup>775</sup>. While the unemployment rate decreased from 7.8% in 2009 to 5.6% in 2012, the high number of Romanian emigrants which according to official figures reached 2.5 million between 2002 and 2012<sup>776</sup>, as well as a high number of unregistered workers, defined as working without legal forms, an individual labour contract or being paid without a payroll, which in 2015 was estimated at 1.5 million<sup>777</sup> are two aspects which need to be considered when evaluating the effects of austerity measures upon the Romanian labour market.

When turning to the Europe 2020 Strategy, the Romanian government committed in its National Reform Programme 2011-2013 to a 70% employment rate among the age group 20-64, while in terms of education, the country assumed to reduce early school leaving by 11.3% and to increase participation in tertiary education by 26.7%.

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<sup>773</sup> L. Voinea (coord.) (2012): *Mobilitatea Forței de Muncă și Aspecte privind Incluziunea Socială/Labour Force Mobility and Aspects Regarding Social Inclusion* (Bucharest, National Trade Union Block).

<sup>774</sup> D. Bohle, B. Greskovits (2012): *Capitalist Diversity on Europe’s Periphery* (Ithaca, Cornell University Press), p. 253.

<sup>775</sup> V. Stoiciu (2012): “Austerity and Structural Reforms in Romania. Severe Measures, Questionable Economic Results and Negative Social Consequences”, *FES Working Paper* (Bucuresti, Friedrich Ebert Stiftung), p. 6.

<sup>776</sup> Institutul Național de Statistică (2014): *Migrația Internațională a României/The International Migration of Romania* (Bucharest, The National Statistics Institute), p. 4.

<sup>777</sup> Capital.ro (2015): “Munca la Negru: Peste 1,5 Milioane de Români Lucrează fără Forme Legale”/“Black Labour: Over 1.5 Million Romanians Working Without Legal Forms”, (Capital.ro, 2<sup>nd</sup> of August), available at <http://www.capital.ro/munca-la-negru-pest-15-milioane-de-romani-lucreaza-fara-forme-legale.html>.

Europe 2020 targets	Situation in Romania in 2009	Romanian Europe 2020 targets
3% of EU GDP invested in R&D	0.48%	2%
75% of 20-65 year-old to be employed	63.5%	70%
Reducing early school leaving to below 10%	16.3%	11.3%
At least 40% of 30-34 year-old population completing tertiary education	16%	26.7%
At least 20 million fewer people in/at risk of poverty/exclusion	9.1 million people at-risk-of poverty or exclusion 3.9 million at risk of poverty	Reduction by 580.000 persons
20% increase in energy efficiency		Reduction of 10 Mtoe
20% reduction in greenhouse gas emissions (from sources not covered by Emissions Trading System)	+1%	+19%
20% of Energy from renewable sources (share of renewable energy in gross final energy consumption)	20%(Eurostat 2008)	24%

**Figure 10 Europe 2020 & Romania targets**

**Source:** Government of Romania (2011): National Reform Programme - 2011-2013, (Bucharest, April).

In order to reach the employment target, besides introducing the Social Dialogue Law and amending its Labour Code in order to “promote the flexibility on the labour market”<sup>778</sup>, Romania put forward a wide variety of short and medium term measures. At the institutional level, the government committed to improving the professional and administrative capacity of the National Agency for Employment (ANOFM) responsible for implementing the state’s labour policies and strategies (vocational counselling, professional training, provision of unemployment benefits, entrepreneurship advisement etc.). Thus,

<sup>778</sup> Government of Romania (2011): *National Reform Programme 2011-2013*, (Bucharest, April), p. 66.

programmes budgeted with a total of RON 47.8 million for the training of the institution's staff were devised either to familiarise them with new legislative provisions in the field or simply to adapt their vocational services to labour market requirements. Infrastructure projects were also put forward with a total value of RON 50.5 million. Through these, new self-service centres for public employment services were to be established throughout the country, and modernisation works would be made for 8 regional vocational training structures. Studies, analyses and forecasts of the labour market tendencies were also to be funded by an estimated RON 22.5 million.

In terms of active employment measures, the National Reform Programme pointed to a total allocation over the period 2011-2013 of RON 793 million under the Unemployment Insurance Budget. While no details as to the nature of these active measures were provided in the Reform Programme besides employment targets for elder and young workers as well as women, the majority of spending under the Employment Programme was concentrated on various forms of employment subsidies. The implementation report of 2012 showed that during the course of 2011 over 981.000 persons had benefitted of active measures, but that the rate of beneficiaries that were employed as a result hovered at 39%<sup>779</sup>. Moreover, while 50.000 jobseekers were trained by means of continuous vocational training (services for which investments had been made in order to increase their efficiency), again the rate of beneficiaries employed was of only 35%. The same situation was recorded for 2012, out of over 1.700.000 persons benefitting of some form of aid funded through the Unemployment Insurance Budget, 689.000 were recorded as employed, while for 2013 the number falling to 380.000. While the country's unemployment rate (6.8%) stood fairly at an acceptable level – below in fact the EU average in 2012 (at 10.5% according to Eurostat figures), the European Commission commented however, that certain problems such as youth (20-29 years) employment and activity rates remained among the lowest in the EU (of 60.2% compared to 66.5% in the Czech Republic or 67.1% in Estonia), had the highest share of employment in low productive subsistence or semi-subsistence farming (28.6% in 2011), and that difficulties for certain disadvantaged minorities such as Roma ethnics to access the formal labour market was still a concerning issue<sup>780</sup>. These comments came despite some steps taken by the Romanian authorities to address these problems, such as funding

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<sup>779</sup> Government of Romania (2012): *National Reform Programme 2011-2013. Implementation Report*, (Bucharest, 15<sup>th</sup> of March), p. 8.

<sup>780</sup> European Commission (2013): *Assessment of the 2013 National Reform Programme and Convergence Programme for Romania* (Brussels, European Commission), SWD(2013)373 final, p. 16.

through the European Agricultural Fund for Rural Development (EARDF) the setting-up and development of businesses in non-agricultural sectors which resulted in 2012 in 2.168 new SMEs and 4.260 new jobs<sup>781</sup>. Through emergency ordinance no. 6/2011 the Romanian government also put forward a financial instrument to encourage young citizens (up to 35 years) to establish their own small businesses by co-financing up to 50% (maximum Euro 10.000) of the costs for starting-up and an exemption from paying social security contribution for 4 employees<sup>782</sup>. A closer look at the results registered under this particular programme managed by the Agency for the Implementation of Projects and Programmes for Small and Medium Enterprises (AIPPIMM) shows that between 2011 and 2014 an average of 35.5% of the total received dossiers have obtained funding (representing a total of 1806 beneficiaries), while the total number of new jobs created in this period was of 8.817<sup>783</sup>. When comparing the outcomes with the allocated funds for the programme, which for the reference period reached RON 94 million, the national impact can only be deemed as lukewarm. The same institution has been attributed with the administration of the National Programme for the development of entrepreneurship among female managers in the SME sector. Through this line of action, the state funded in 2014 business plans put forward by women, but the results again were quite weak: out of 105 applicants, only 44 were accepted, 12 were funded and a total of 24 positions were created at the national level. Finally, the START Programme designed to encourage the establishment of new SMEs and to sustain the improvement of economic performances of existent ones through financing the acquisition of equipment, reached a similar conclusion: between 2012 and 2014, 1.953 applications had been registered, 519 were funded, and 1.618 positions were created, while the total funding for the period was of approximately RON 55 million<sup>784</sup>.

Whilst below European average, the unemployment rate in Romania continued to hover at 7% between 2012 and 2014. The European Commission observed that despite the above

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<sup>781</sup> Government of Romania (2012): *National Reform Programme 2011-2013. Implementation Report*, (Bucharest, 15<sup>th</sup> of March), p. 9.

<sup>782</sup> Government of Romania (2011): Emergency Ordinance No. 6/2011 - "Stimulating the Establishment and development of Micro-Entities by Apprentice Entrepreneurs", *Official Gazette* no. 103/09.02.2011.

<sup>783</sup> Ministerul Energiei, Întreprinderilor Mici și Mijlocii și Mediului de Afaceri / The Ministry of Energy, SMEs and the Business Environment (2015): *Situația Implementării Programelor Naționale în Perioada 2009-2014/The Situation regarding the Implementation of National Programmes between 2009-2014*, (Bucharest, MEIMMMA), p. 6.

<sup>784</sup> Ministerul Energiei, Întreprinderilor Mici și Mijlocii și Mediului de Afaceri / The Ministry of Energy, SMEs and the Business Environment (2015): *Situația Implementării Programelor Naționale în Perioada 2009-2014/The Situation regarding the Implementation of National Programmes between 2009-2014*, (Bucharest, MEIMMMA), p. 3.

mentioned programmes, spending on active labour market policies as a share of GDP in Romania (at 0.02% in 2012) remained very low compared to the EU 27 average (0.54% in 2009). Most of the spending went, as we have seen, on various forms of employment subsidies, while training, guidance, job counselling remained underdeveloped. In this sense, national experts have deemed the activity of the National Agency for Employment (ANOFM) as weak, the institution focusing more on its role as administrator of unemployment benefits, while its overly centralised vocational training policies remained unsynchronised with market requirements<sup>785</sup>. This situation is emphasised in ANOFM's Strategy for 2014-2020 as well, where a SWOT analysis revealed deficient personnel and administrative capacity for assuring vocational counselling for target groups comprising long-term unemployed and members of vulnerable groups (with disabilities, elderly, Roma ethnics etc.), very limited capacity of medium and long-term forecasting of trends on the labour market and of developing analyses which in turn translates into programmes and measures uncoordinated with the market, having limited efficiency, and no preventive lines of action<sup>786</sup>. All of these problems have translated from 2010 onwards into a hovering of the unemployment rate at around 7%, despite an expansion of the economy that picked up in 2011 and that reached 3.5% in 2013 in the context of a strong export performance on the back of robust industrial output and an abundant harvest.

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<sup>785</sup> HotNews (2012): Interview with Suzana Dobre, expert in social policies (HotNews, 23<sup>rd</sup> of May), available at <http://www.hotnews.ro/stiri-esential-12329454-politicile-salariale-fantome-sau-realitate-suzana-dobre-expert-politici-sociale-expert-forum-discuta-online-joi-ora-13-30.htm>.

<sup>786</sup> Ministrul Muncii, Familiei, Protecției Sociale și Persoanelor Vârstnice/Ministry of Labour, Family, Social Protection and Elderly (2015): *Strategia Agenției Naționale pentru Ocuparea Forței de Muncă 2014-2020/The Strategy of the National Agency for Employment 2014-2020* (Bucharest, MMFPSPV), approved through Administration Council Decision No. 11/17.06.2015, pp. 11-13.



**Figure 11 Unemployment rate Romania 2008-2014**

**Source:** National Statistics Institute, Labour Time series, available at <http://statistici.insse.ro/shop/>.

In its most recent assessment, the European Commission acknowledged that the Romanian authorities have achieved progress in revising active labour-market policies, albeit modest<sup>787</sup>. The regulative regime was modified, a new law on unemployment insurance and employment stimulation<sup>788</sup> being passed in 2013 introducing free non-formal competences evaluations, access to mobility aid for the long-term unemployed, and new facilities for companies hiring from vulnerable groups or inactive youth. The country had also launched two Youth Guarantee pilot schemes supported through the European Social Fund leading to the creation of 27 youth centres (aimed at identifying young people not in education, employment or training or NEETs and providing them with packages of personalised services) which have facilitated employment for over 59.000 NEETs. The country's involvement in an European network of Public Employment Services benchmarking and mutual learning exercise was also appreciated as another step forward in terms of improving job search and retraining services. Even so, the Romanian labour market was deemed as "characterised by persistently low employment and high inactivity rates coupled with a shrinking working-age population due to population ageing and outward migration",

<sup>787</sup> European Commission (2015): *Country Report Romania 2015 including In-depth Review on the Prevention and Correction of Macroeconomic Imbalances* (Brussels, European Commission), SWD(2015)42 final, p. 58.

<sup>788</sup> Romanian Parliament (2013): Law no. 250/2013 for modifying and completing Law no. 76/2002 regarding the unemployment insurance system and the stimulation of employment and modifying Law no. 116/2002 regarding the prevention and the fight against social marginalization, *Official Gazette* no. 457/24.07.2013.



public spending on labour-market policies was criticised as insufficient, with passive measures absorbing the highest share and vocational education and training not being well aligned with market needs<sup>789</sup>.

In terms of the targets relating to smart growth, Romania committed in 2010 to lowering the dropout rate from 18.4% in 2010 to 11.3% in 2020, and to increase the share of people aged 30 to 34 in tertiary education from 18.1% in 2010 to 26.7% in 2020<sup>790</sup>. The main legislative step towards these targets was the adoption in January 2011 of a new National Law on Education<sup>791</sup>. However, the law profoundly stirred spirits in the Parliament and was not in the end adopted through ordinary procedure, but by the Emil Boc government assuming responsibility for the framework regulation in October 2010<sup>792</sup>. In turn, the opposition led by PSD and PNL have contested the constitutionality of the law by requesting in this sense for a decision from the Romanian Constitutional Court. Among its provisions, the law increased the duration on the one hand of the primary cycle to 5 years by introducing a preparatory grade, and on the other of the lower secondary education (grades V-IX) in order to synchronise and streamline education cycles with similar practices in the EU. In reality, this process revealed a fundamental flaw in the implementation of public policies in the country: namely legislative modifications seldom reach their end objective as they do not take into account a clear situation in the territory. For the 2012-2013 school year, when the preparatory grade was introduced, authorities struggled to accommodate into an already overcrowded public education infrastructure over 127.000 children<sup>793</sup>. The law also provided for a more decongested school curriculum, based on the development of eight key competences: communication in the mother tongue and foreign languages, mathematical skills and basic competences in science and technology, digital abilities, social and civic competences, sense of initiative and entrepreneurship, cultural awareness and “learning to learn” competences. However, implementation was again slow, one such

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<sup>789</sup> European Commission (2013): *Country Report Romania 2015 Including an In-Depth Review on the Prevention and Correction of Imbalances* (Brussels, European Commission), SWD(2015)42 final, pp. 57-59.

<sup>790</sup> Government of Romania (2011): *National Reform Programme 2011-2013*, (Bucharest, April), p. 115.

<sup>791</sup> Romanian Parliament (2011): Law no. 1/2011 on National Education, *Official Gazette* no. 18/10.01.2011.

<sup>792</sup> L. Pârvu (2010): “Guvernul și-a Asumat Răspunderea în Parlament pe Legea Educației. Emil Boc: Această Lege Schimbă din Temelii Educația Românească”/ “The Government has Assumed Responsibility in Parliament for the Education Law. Emil Boc: This Law Fundamentally Changes Education in Romania”, HotNews.ro (HotNews.ro, 28<sup>th</sup> October), available at <http://www.hotnews.ro/stiri-politic-7982162-emil-boc-birourile-permanente-nu-pot-amana-angajarea-raspunderii-este-decizie-suverana-guvernului.htm>.

<sup>793</sup> E. Gheorghică (2012): “Clasa Pregătitoare – Un Experiment pentru Copii, Părinți și Dascăli, din 10 Septembrie”/ “The Preparatory Grade – An Experiment for Children, Parents and Teachers from the 10<sup>th</sup> of September”, *Mediafax* (Mediafax, 29<sup>th</sup> of August), available at <http://www.mediafax.ro/social/analiza-clasa-pregatitoare-un-experiment-pentru-copii-parinti-si-dascalii-din-10-septembrie-9993606>.

example being the delays in providing students with textbooks in the 2014-2015 school year when new digitalised 1<sup>st</sup> and 2<sup>nd</sup> grades were meant to be introduced<sup>794</sup>. After organising the public tenure process in order to establish which publishing houses will be responsible for the printing of the textbooks and of their digital versions, contestations regarding the transparency and fairness of process were put forward and in one case, the Court of Appeal in Bucharest decided the annulling of one contract in the case of a 1<sup>st</sup> grade digital textbook which meant that schools opting for it would not benefit of state deduction<sup>795</sup>. The need to improve vocational education and training (VET) was also addressed by providing for the gradual re-founding of state training schools and by offering low-secondary education graduates who had previously left school the possibility to complete free of charge at least one training programme. Social programmes such as “School after school” (providing support teachers, education counselling and remedial training) and “Second chance” (supporting the return to school of early school leavers) were also devised as means to limit the dropout rate. Annually based social support programmes such as School supplies (over 700.000 pupils and students benefiting in 2015 of a RON 30 package), Money for high-school (over 60.000 students receiving in 2014 social bursaries of RON 180/month) and Euro 200 (over 17.000 pupils and students receiving in 2015 Euro 200 in order to purchase a computer) were also implemented to facilitate primary and lower-secondary education attainment. These social programmes have been to a certain extent restricting, conditioning support to a somewhat prohibitive number of documents regarding the economic status of potential beneficiaries (only in the case of the School Supplies programme, 6 to 7 different categories of official documents being required for the support package). Some results were visible though, in 2013 the indicator for early dropout from school registering relative improvement to 17.3%, thus continuing a gradual downward trend<sup>796</sup>. Three other countries, namely Spain, Portugal and Italy have registered higher early school leaving rates.

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<sup>794</sup> E. Gheorghită (2014): “Anul Școlar Începe Fără Manuale la Clasa Mică, dar cu Mai multe Obligații pentru Profesori și Elevi”, *Mediafax* (Mediafax, 15 September), available at <http://www.mediafax.ro/social/analiza-anul-scolar-incepe-fara-manuale-la-clasele-mici-dar-cu-mai-multe-obligatii-pentru-profesori-si-elevi-13264864>.

<sup>795</sup> A. Ofițeru (2015): “3 Ani cu Ponta. Cum Arată Imaginea Sistemului de Învățământ din România după Patru Schimbări ale Legii Educației”/“Three years with Ponta. How the Educational System in Romania Looks like after Four Modifications of the National Education Law”, *Gândul.info* (*Gândul.info*, 6th of March), available at <http://www.gandul.info/stiri/3-ani-cu-ponta-cum-arata-imaginea-sistemului-de-invatamant-din-romania-dupa-patru-schimbari-ale-legii-educatiei-14160441>.

<sup>796</sup> Romanian Ministry for National Education (2014): *Romanian Education for All. Review Report* (Bucharest, MEN), p. 13.

Yet, when looking at Romania's level of expenditure on education and training, measured through the indicator of public expenditure on education as percentage of GDP, the country's spending is neither consistent with the EU benchmark, nor with other Eastern European countries' trends. The latest Eurostat comparative data registered for 2011 for example shows that if in the case of Romania the percentage of spending on education was of 3.1% of GDP (decreasing from 2006), in the case of Bulgaria it was situated at 3.8%, the Czech Republic at 4.5%, Estonia at 5.2%, Latvia at 5%, Lithuania at 5.2%, Hungary at 4.7%, Slovenia at 5.7%, and Slovakia at 4.1%<sup>797</sup>. In 2014, public expenditure on education in Romania was further reduced to 2.8% of GDP, compared to 5% the EU average<sup>798</sup>. This in turn is detrimental to participation in education, the reduction of disparities, to the quality of education and to potential economic growth<sup>799</sup>. Starting from the premise that education has become a decisive factor in the future of European economic progress in the context of fiscal constraints, challenging demographic developments and alarming high levels of youth unemployment, a recent study undertaken by the European Commission's Joint Research Centre using a new econometric model revealed that Romania's probability of reaching its national target for early school leaving given the policy measures implemented and their continuity was quite low (between 20% and 35%)<sup>800</sup>. Comparatively, in the case of Bulgaria the model revealed that based on the country has a quite high probability (between 65% and 80%) to meet its national target regarding early school leaving by 2020. The low expenditure on education and training, the incoherent policy shifts, outdated teaching methodology<sup>801</sup> and unmotivated teachers are some of the reasons that led to concerning results in international testing. The PISA 2012 tests revealed that in the case of Romania, 40.8% of pupils encountered difficulties in using basic algorithms, formulae, procedures or

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<sup>797</sup> Statistical Office of the European Union (2011): *Educational Expenditure Indicator* (Brussels, Eurostat), available at [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Expenditure\\_on\\_educational\\_institutions\\_2006\\_and\\_2011\\_%28%C2%B9%29\\_YB15.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Expenditure_on_educational_institutions_2006_and_2011_%28%C2%B9%29_YB15.png).

<sup>798</sup> European Commission (2015): *Education and Training Monitor 2015. Romania Report* (Brussels, European Commission), SWD(2015)199, p. 2.

<sup>799</sup> P. Varly, C. Iosifescu, C. Fartuşnic, T. Andrei, C. Herţeliu (2014): *Cost of Non-Investment in Education in Romania: Final Report for UNICEF* (Bucharest, UNICEF), p. 26.

<sup>800</sup> C. Dragomirescu-Găina, A. Weber (2013): *Forecasting the Europe 2020 Headline Target on Education and Training. A Panel Data Approach* (Ispra, European Commission Joint Research Centre), p. 15.

<sup>801</sup> I. Albulescu, M. Albulescu (2012): "Romanian Education System Syncope's Revealed by PISA Tests. Causes of School Failure and Possible Ameliorative Interventions", *Studia Universitatis Babeş-Bolyai Psychologia-Paedagogia Journal*, Vol. 57, No. 2, pp. 3-15 consider that the educational framework used in Romania which is based to a large extent on theoretical contents, the assessment methods that emphasizes the quantity of acquired information, and a curricula that is overlooking the importance of interdisciplinarity are important contributing factors to disappointing results.

conventions to solve problems involving numbers<sup>802</sup>. Moreover, 73% of participating students responded to questionnaires regarding the sense of belonging that they felt lonely at school. In terms of national-level assessments, the year 2012 saw the worst deterioration of Baccalaureate results (the comprehensive examination at the end of the secondary education cycle, mandatory to be passed in order to transition to higher education), with one in every two students taking the examination not being able to pass it. The graduation rate for the secondary education cycle thus was of only 44.3% in 2012, compared to 81.4% in 2009. While the graduation rate has in recent years started to increase, reaching 56.4% in 2013, 60.6% in 2014 and 66.4% in 2015, circumspect views questioning the extent and nature of the measures implemented by the Education Ministry in order to correct this trend have come to light<sup>803</sup>.

As regards to the higher education system, the National Education Law introduced for the first time a two-tier classification mechanism based on an identification stage and a consolidation one whereby universities would assume their own missions, provide supporting data and information and be included in an institutional evaluation that differentiated between advanced research universities, teaching and research universities and teaching oriented universities. A first classification was done in 2012 undertaken by the European University Association in collaboration with the Romanian Executive Agency for Higher Education, Research, Development and Innovation Funding. The results of the classification exercise showed that Romania had only 12 research-intensive universities, 30 teaching and research universities and 48 teaching oriented higher education institutions<sup>804</sup>. The effect of this classification meant that universities in the first category would benefit of a 20% budget raise in order to fund more available places for Masters of Arts and doctoral degrees. But as this process was highly contested by stakeholders, mainly due to the methodology of data processing not being made public, the link between such

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<sup>802</sup> Organisation for Economic Co-operation and Development (2014): *Programme for International Student Assessment 2012 results in Focus. What 15-year-olds Know and What They Can Do with what They Know* (Paris, OECD), p. 5.

<sup>803</sup> R. Pantazi (2015): "Raluca Turcan: Ministerul Educației a Urmărit Cosmetizarea Rezultatelor la Bacalaureat prin Subiecte Ușoare"/"Raluca Turcan: The Education Ministry has Sought to Polish Baccalaureate Results by Accessible Assessments", *HotNews.ro* (Hotnews.ro, 7<sup>th</sup> of July), available at <http://www.hotnews.ro/stiri-politic-20282869-bac-2015-raluca-turcan-ministerul-educatiei-urmarit-cosmetizarea-rezultatelor-bacalaureat-prin-subiecte-usoare.htm>.

<sup>804</sup> R. Pantazi (2011): "Clasamentul Universităților din România, realizat după Standarde Europene. Toate Universitățile Particulare sunt în Ultima Categorie Valorică"/"The Classification of Romanian Universities, Based on European Standards. All Private Universities are Placed in the Last Category", *HotNews.ro* (HotNews.ro, 6<sup>th</sup> September), available at <http://www.hotnews.ro/stiri-esential-10047509-live-text-ora-15-00-daniel-funeriu-sustine-conferinta-presa-are-tema-rezultatele-inregistrate-bacalaureat.htm>.

instruments and the funding methodology was abandoned. Moreover, its credibility was further eroded by a decision<sup>805</sup> of the Victor Ponta government two weeks after its instatement to make funding independent of the evaluations. Yet the need for an objective assessment of state and private universities remained an issue, albeit on the background, as starting with 2012 accusations of plagiarised doctoral works occurred, among them even Prime Minister Ponta being subject of such claims<sup>806</sup>.

A further blow to the higher education system came in 2013, when the Romanian government decided to cut between 40% and 55% of the funds for over 300 ongoing research projects which in 2012 had been evaluated and selected for funding provided through various national research and innovation programmes<sup>807</sup>. While government funding for research for 2014 and 2015 was frozen to 0.31% of GDP, several ongoing projects saw their budgets arbitrarily cut, decision which triggered protests in March 2015. The 2015 Innovation Union Scoreboard in fact revealed that the relative performance of Romania on this sector has significantly declined from 46% in 2007 to 37% in 2014<sup>808</sup>.

While tertiary education attainment rate has been steadily increasing over the past years, reaching 25% in 2014 (placing the country on track to meeting the Europe 2020 national target of 26.7%), the 2015 Education and Training Monitor observed that the employment rate of recent tertiary graduates (74.2% in 2014) has been decreasing since 2009, revealing mismatches between university curricula and labour market requirements<sup>809</sup>. In fact, skills shortages remain acute in sectors such as healthcare, the construction sector and information and communications technologies (ICT), despite promised policy developments concerning career guidance<sup>810</sup>.

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<sup>805</sup> Government of Romania (2012): Emergency Ordinance no. 21/2012 regarding the modification of the National Education Law no. 1/2011, *Official Gazette* no. 372/31.05.2012.

<sup>806</sup> BBC (2012): "Romanian PM Victor Ponta rejects plagiarism Claim", (BBC, 19<sup>th</sup> of June), available at <http://www.bbc.com/news/world-europe-18505325>.

<sup>807</sup> R. Pantazi (2013): "Reacție Dură a Universității București față de Reducerea Fondurilor din Cercetare: Redistribuirea Fondurilor s-a Făcut Ignorând Criteriile de Performanță și Rezultatele Dovedite"/"Strong reaction from Bucharest University regarding the Reduction in Funding for Research: The Redistribution of Funds was Done by Ignoring Performance Criteria and Proven Results", HotNews.ro (HotNews.ro, 23<sup>rd</sup> of April), available at <http://www.hotnews.ro/stiri-esential-14675823-reactie-dura-universitatii-din-bucuresti-fata-reducerea-fondurilor-alocate-unor-proiecte-cercetare-redistribuirea-fondurilor-facut-ignorand-criteriile-performanta-rezultatele-dovedite.htm>.

<sup>808</sup> See European Commission (2015): *Innovation Union Scoreboard – Romania Chapter* (Brussels, DG Internal Market, Industry, Entrepreneurship and SMEs).

<sup>809</sup> European Commission (2015): *Education and Training Monitor 2015 –Romania* (Brussels, DG Education and Culture), SWD(2015)199, p. 8.

<sup>810</sup> European Commission (2016): *Country Report Romania 2016 Including in-depth Review on the Prevention and Correction of Macroeconomic Imbalances* (Brussels, European Commission), SWD(2016)91 final, p. 59.

Overall, in the area of education, whilst acknowledging the efforts made by Romania so far, the Council expressed serious concerns in its most recent recommendation regarding a continuously high early school leaving rate, limited access for children in rural areas and from the Roma community to early childhood education and care services, and inadequate relevance of higher education training in regards to the labour market. Despite the adoption of several national strategies, the most recent ones concerning lifelong learning, early school leaving and on tertiary education, the Council observed that “little visible end-effects” have so far been observed and emphasised the need to efficiently implement the objectives set in strategic documents<sup>811</sup>. Comparatively, in the case of Bulgaria the Council observed that delays in reforming the School Education Act have affected the formal training system’s ability to generate skills and competences relevant to the labour market<sup>812</sup>.

## **5.4. Conclusions**

Bulgaria and Romania’s performance in progressing towards their national targets set under the Europe 2020 Strategy has been rather limited, the policy analysis done in this chapter showing that in both countries there are no clear long-term strategies that would be accepted and followed by different governments (irrespective of the political parties in power) in order to successfully coordinate the employment and education lines of action. Bulgaria faces today the highest percentage of population at-risk-of-poverty or social exclusion out of the country’s total population (48% according to Eurostat), an employment rate below the EU average (at 61% in 2014 according to Eurostat compared to the EU average of 64.9%), and a very low expenditure on research and development of 0.6% of the GDP. Romania is in a very similar situation, with public spending on research and development hovering at 0.3% of the GDP, 40.4% population at-risk-of-poverty or social exclusion and the employment rate as well below the EU average in the context of an emigration wave that saw the total population count fall from 21.700.000 in 2002 to

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<sup>811</sup> Council of the European Union (2015): *Council Recommendation on the 2015 National Reform Programme of Romania and Delivering a Council Opinion on the 2015 Convergence Programme of Romania*, Official Journal of the European Union C272, Vol 58, 18<sup>th</sup> of August, pp. 1-5.

<sup>812</sup> Council of the European Union (2015): *Council Recommendation on the 2015 National Reform Programme of Bulgaria and Delivering a Council Opinion on the 2015 Convergence Programme of Bulgaria*, Official Journal of the European Union C272, Vol. 58, 18<sup>th</sup> of August, pp. 28-31.

19.900.000 in 2014<sup>813</sup>. In both countries active employment policies have not been adequately constructed so that they would efficiently address the effects of the economic crisis, professional training and education opportunities have not been coordinated with labour market needs and so far steps taken to correct these shortcomings have not produced substantial effects. While the monitoring and evaluation undertaken under the Europe 2020 Strategy has been beneficial, country-specific recommendations providing the stage for naming and shaming, the visibility of these recommendation as well as of concerns has been limited at the national level. Moreover, policy coordination triggered by the Lisbon Strategy and continued by Europe 2020 has not been proven to have created permissive conditions for critical junctures to be facilitated. As mentioned in this chapter the possibility of using reprogramming conditionality on a continuous basis could give the strategy substantially more clout over Member States, and an overview of the Interreg Romania-Bulgaria funding lines as well as Romania's Operational Programme Human Capital for the 2014-2020 budgetary period has revealed a move towards funding projects that would contribute to the national Europe 2020 targets<sup>814</sup>. However, we contend that the Europe 2020 Strategy and its governance architecture could prove more efficient towards pushing Member States to effectively address development issues if its main evaluation means – the country-specific recommendations put forward by the Council would place a greater emphasis on the pace and trajectory of employment and educational policies. Moreover, greater visibility of these recommendations is necessary at the national level in order for naming and shaming to generate policy and political change.

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<sup>813</sup> Institutul Național de Statistică (2014): *Anuarul Statistic al României/ Romanian Statistical Yearbook* (Bucharest, INSSE).

<sup>814</sup> Ministry of European Funds (2014): *The Strategy for the Contribution of the Operational Programme towards the EU's Strategy for Smart, Sustainable and Inclusive Growth and towards Economic, Social and Territorial Cohesion*, (Bucharest, MFE), available at <http://www.fonduri-ue.ro/images/files/programe/CU/POCU-2014/POCU.pdf>.

## Chapter 6

### From soft law to hard law – evaluating Romania and Bulgaria’s compliance track records

Yet, despite increasing statements on its alleged obsolescence, hard law – embodied by regulations, directives and decisions - has remained the main legal instrument at the EU level, being generated through decision-making procedures such as the “Community Method” (the *ordinary legislative procedure* as it is referred to in art 294 in the Treaty on the Functioning of the European Union<sup>815</sup> or TFEU) or in some cases special legislative procedures (such as the consent or the consultation procedure). The Community method has been described by the European Commission as:

“(…) a means to arbitrate between different interests by passing them through two successive filters: The general interest at the level of the Commission, and democratic representation, European and national, at the level of the Council and European Parliament, together the Union’s legislature.

- The European Commission alone makes legislative and policy proposals. Its independence strengthens its ability to execute policy, act as the guardian of the Treaty and represent the Community in international negotiations.
- Legislative and budgetary acts are adopted by the Council of Ministers (representing Member States) and the European Parliament (representing citizens). The use of qualified majority voting in the Council is an essential element in ensuring the effectiveness of this method. Execution of policy is entrusted to the Commission and national authorities.
- The European Court of Justice guarantees respect for the rule of law”.<sup>816</sup>

The earliest Community method was based on a compromise solution between supranational and intergovernmental decision-making, with the Commission (the High Authority in the case of the European Coal and Steel Community) having right of initiative, the Parliament having advisory capacity (meaning it had the capacity to scrutinise, but not to determine proposals), the Council which was formed of representatives of Member State

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<sup>815</sup> European Union (2012): Consolidated Version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union* No. C326/26/10/2012, pp. 173-75.

<sup>816</sup> European Commission (2001): *European Governance: A White Paper*, (Brussels, European Commission), COM (2001)428 final, pp. 9-10.



governments, deciding (usually acting by unanimity) and the European Court of Justice adjudicating any disputes arising in relation to community law. After seven rounds of treaty reform and growing pressure to democratise policy processes in response to the EU's ever-growing policy responsibilities, the European Parliament (for which the first direct elections were organised in 1979) was given the role of co-decision maker with the Council, and the latter's usual voting rule changed from unanimity to qualified majority in the case of more than 90% of legislative proposals<sup>817</sup>. In its current form, the ordinary legislative procedure (formerly known as the codecision procedure) begins with the adoption by the College of Commissioners of a legislative proposal which is sent to the European Parliament and the Council. During its first reading, the European Parliament may adopt or amend the proposal by a simple majority vote. On its turn, the Council can either approve the European Parliament's wording or adopt its own position which is passed to the European Parliament along with explanations and the Commission's position on the matter. If the Council and the European Parliament are still at odds after a second reading, the proposal falls if the latter rejects it (by an absolute majority), and a conciliation committee composed of Council and an equal number of Members of the European Parliament (MEPs) has the task of reaching an agreement on a joint text, by a qualified majority of members representing the Council and by a majority of the MEPs within six weeks of its being convened. If the Conciliation Committee approves a joint text, both the European Parliament (acting by a majority of votes cast) and the Council (acting by qualified majority) have a period of six weeks to adopt the act in accordance with the joint text. On the contrary, if an agreement is not reached within the given timeframe, the act is deemed not to have been adopted<sup>818</sup>. Alongside the ordinary legislative procedure, the Treaty on the Functioning of the European Union also provides for special procedures such as the consent and the consultation (art. 289 paragraph 2). In essence, this presupposes that a regulation/directive/decision is usually adopted by the Council unanimously, combined with the requirement of the consent of the European Parliament (which in this case has the power to accept or reject the legislative proposal by an absolute majority vote, but it cannot amend it) or of consultation

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<sup>817</sup> L. Buonanno, N. Nugent (2013): *Policies and Policy Processes of the European Union* (New York, Palgrave Macmillan), p. 122.

<sup>818</sup> European Union (2012): Consolidated Version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union* No. C326/26/10/2012, p. 175.

with it (the Parliament submits an opinion regarding the proposal and it may approve, reject or propose amendments to it)<sup>819</sup>.

Taken together, these procedures emphasise the original nature of the European construction in regards to more traditional forms of international cooperation, not only in terms of the scope of the competences transferred to supranational institutions, but also in the manner in which powers are being exercised. In this sense, the European Commission's right of initiative has been equated by some with the institution itself being *de facto*, if not *de jure* a third branch of European legislative power<sup>820</sup>. More specifically, unlike in national democracies, the European Parliament and the Council of Ministers, where representatives of the Member States sit, cannot in principle, take any initiative at this level – if European law is deemed necessary, the two institutions must refer to the Commission to put forward a proposal in due form<sup>821</sup>. The Commission is formally responsible for overseeing the application and the enforcement of EU law as well, having the right to start the *infringement procedure* upon receiving information of non-compliance in a Member State's case. Recent practice dictates however, that before launching the formal infringement procedure, the Commission uses the EU pilot mechanism, a system launched in 2008. The EU pilot allows the Commission to refer correspondence and complaints it receives directly to the Member State for comment, giving governments a chance to remedy any breaches through voluntary compliance. Complainants who agree to make their identity known are placed in the loop with the Member State in question that in turn send them their observations directly. If the matter is not resolved at this stage, the Commission retains the power to take further action by launching the infringement process.

We must mention here, that together with the Pilot system, the Commission benefits of an additional source of information. This is the case of the implementation reports that the body receives from Member States, as most directives contain reporting obligations which examine the practical application together with the national legislative integration of the directive's aims<sup>822</sup>. Where early investigations thus show that a breach of EU law exists and

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<sup>819</sup> For an in-depth presentation see P. Craig, G. de Búrca (2015): *EU Law. Text, Cases and Materials* (Oxford, Oxford University Press), Sixth Edition, pp. 133-34.

<sup>820</sup> R. Dehousse (2008): "The 'Community Method': Chronicle of a Death too Early Foretold", in B. Kohler-Koch, F. Larat (eds.) *Efficient and Democratic Governance in the European Union*, CONNEX Report, Vol. IX (Mannheim, CONNEX), pp. 79-107.

<sup>821</sup> R. Dehousse (2008): "The 'Community Method': Chronicle of a Death too Early Foretold", p. 84.

<sup>822</sup> S. Grohs (2012): "Article 258/260 TFEU Infringement Procedures: The Commission Perspective in Environmental Cases", in M. Cremona (ed.) *Compliance and the Enforcement of EU Law* (Oxford, Oxford University Press) pp. 57-73.

has not been resolved, the Commission may decide to launch formal infringement procedures. The Commission operates with three main categories of infringement: non-communication, non-conformity, and bad application. Non-communication concerns a Member State's failure to respect the transposition deadline for a particular directive. Once the Member State communicates the new implementation legislation – providing coverage for the whole directive and all national jurisdictions, the case is closed. Non-conformity concerns cases where Member States adopt and communicate implementing legislation, but after conformity check, it becomes visible that areas of non-conformity or gaps still exist. Finally, the bad application category refers to cases where a directive has been transposed by a Member States which has communicated the national implementation instrument, but concerns exist over the incorrect application or the complete absence of implementation. As outlined by art. 258 of the Treaty on the Functioning of the EU (TFEU) the first step of this procedure is informal (not described in the TFEU), the Commission approaching the Member State in question with a Letter of Formal Notice (*lettre de mise en demeure*) which signals a possible violation of obligations under EU law and requests for an answer to be submitted, usually within two months. If the response is deemed unsatisfactory or is absent, the formal procedure is initiated with a Reasoned Opinion being sent. A similar deadline of two months is formulated, the Commission stating in its opinion where the exact breach of EU law exists and requiring the state in question to take all necessary steps in order to fully comply with the legislative act. Both the Letter of Formal Notice and the Reasoned Opinion are prepared by the relevant services of the Commission, and each formal step, including closure, requires a formal decision of the Commission sitting as a College. If the Commission deems the national response as insufficient, it can make a proposal to refer the Member State to the European Court of Justice (ECJ). If during the pre-1992 era, the EU lacked the appropriate means to react to persistent non-compliance, even ECJ judgements playing more the role of “naming and shaming” instruments (several ‘second judgements’ for one case being issued in the absence of sanctions), with the Maastricht Treaty fines were established as a new instrument in the Commission's armoury. Under Art. 260 TFEU (former Art. 171 Treaty on the European Union) and based on a Commission proposal for a lump sum or penalty payment, the ECJ may impose fines in ‘second proceedings’, not exceeding the amount specified by the Commission, if it finds that the Member State

concerned has not complied with the judgement of the first proceeding<sup>823</sup>. In 2005, the Commission updated its method of calculating penalties guiding it according to three main aspects: the seriousness of the infringement, its duration, and the need to ensure that the penalty itself is a deterrent to further infringements. The Communication also specified that sanctions needed to be foreseeable and respect the principles of proportionality as well as of equal treatment among the Member States. The calculation basis for daily penalty payments put forward by the Commission was thus formed of the multiplication of a standard flat-rate (revised by the Commission every three years) by a coefficient for seriousness and for duration. The result obtained would be again multiplied by an amount fixed by country (or the 'n' factor) which would be calculated by taking into account the capacity of a Member State to pay (its GDP) and the number of votes it has in the Council<sup>824</sup>. Together with the penalty by day of delay, the Commission reserved the right to impose a lump sum that would penalise the continuation of the infringement between the first judgement of non-compliance and the judgement delivered under Art. 260. With the 2005 Communication, the Commission decided that in cases where Member States would rectify the infringement after referral to the ECJ but before the delivery of the judgement (with the Court no longer being able to impose a penalty payment because such a decision would have lost its purpose), a lump sum payment penalising the duration of the infringement (up to the time the situation was rectified) would still be imposed. In 2015, this lump sum was set at Euro 839.000 for Bulgaria and of Euro 1.855.000<sup>825</sup>. However, the literature on EU law compliance has revealed that together with the slow development of the use of the 'hard' powers by the Commission, a clear tendency to make use of soft pressure in order to increase compliance can be observed<sup>826</sup>. As such, as Falkner observes, between November 1993 and November 2011, the overall number of ECJ judgements for infringement involving penalties did not surpass 10, and even in the case of less wealthy states (such as Greece which was involved in five of the cases of imposed fines), the penalties imposed did not

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<sup>823</sup> European Union (2012): Consolidated Version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union* No. C326/26/10/2012, p. 161.

<sup>824</sup> European Commission (2005): *Communication from the Commission – Application of Article 228 of the EC Treaty* (Brussels, European Commission), SEC(2005)1658.

<sup>825</sup> European Commission (2015): *Communication from the Commission – Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings* (Brussels, European Commission), C(2015)5511final.

<sup>826</sup> See M. Hartlapp (2007): "On Enforcement, Management and Persuasion: Different Logics of Implementation Policy in the EU and the ILO", *Journal of Common Market Studies*, Vol. 45, No. 3, pp. 653-74.

represent a major strain for the concerned Member States' budgets<sup>827</sup>. The study also demonstrated that the hardest means at the EU's disposal to assure compliance are not effective enough, situation which has led the Commission to combine the hard instrument of fines with soft pressurising. Tactics such as 'naming and shaming' thus are deemed to be quite successful when the press and the electorate see precious tax money being spent on fines. The extent to which this strategy would be sufficient on the long term to uphold the EU's rule-of-law prestige however is debatable, as well as the tendency to recur more often to softer means of tackling non-compliance. In fact, in 2011 the Lisbon Treaty further strengthened the Commission's enforcement powers by introducing the 'fast track' penalisation option according to which the Commission can ask for a fine in the first proceedings for non-implementation of a Directive and no longer needs a reasoned opinion before Court seizure in second proceedings<sup>828</sup>. In 2012, the Commission referred 12 Member States (Poland, Slovenia, the Netherlands, Finland, Belgium, Cyprus, Germany, Bulgaria, Slovakia, Luxembourg, Portugal and Hungary) to the ECJ for the late transposition of directives with a request for financial sanctions under Art. 260 (3) TFEU (35 cases). In 2013, 9 Member States (Belgium, Bulgaria, Estonia, Romania, the UK, Austria, Cyprus, Poland and Portugal) were involved in 14 such decisions, while the number in 2014 dropped to 3 countries involved (Belgium, Finland, and Ireland). However, the Commission did not propose the Court to apply any lump sum payments, despite the institution observing in its 2014 Monitoring Report that by achieving complete transposition at a very late stage in the judicial procedure, the involved Member States benefit of an undue prolongation of the transposition deadline<sup>829</sup>.

### ***6.1. Non-compliance with EU laws – Romania and Bulgaria's track records in a larger context***

This section seeks to explore non-compliance patterns observed in the cases of Romania and Bulgaria since their EU accession up until 2015 and to contrast them to those pertaining

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<sup>827</sup> G. Falkner (2016): "Fines against Member States: An effective New Tool in EU Infringement Proceedings?", *Comparative European Politics*, Vol. 14, No. 1, pp. 36-52.

<sup>828</sup> S. Andersen (2012): *The Enforcement of EU Law. The Role of the European Commission* (Oxford, Oxford University Press), pp. 113-15.

<sup>829</sup> European Commission (2015): *Monitoring the Application of Union Law. 2014 Annual Report* (Brussels, European Commission), p. 21.

to a group of Member States that would be representative enough for the EU as a whole, enabling us to build a pertinent assessment. While the data allows us to build a comparative evaluation, we are interested in obtaining a better understanding of the transposition track-record of Romania and Bulgaria and not necessarily to put forward a set of variables that would explain implementation delay across all Member States. The academic literature focusing on the transposition and implementation of EU law is extensive<sup>830</sup> and while this study could offer some light concerning the track record of the two countries analysed here, its main objective is to provide an image of the extent to which Romania and Bulgaria have respected their membership obligations, analysis which is extended across various policy instruments ranging from soft to hard law.

In the theoretical chapter we have put forward a series of hypotheses that would aid us in obtaining a clear view of Romania and Bulgaria's compliance track-record after their EU accession and to place this record in a larger, comparative context. In this sense, we have created a database reuniting all infringement cases registered between 2007 and 2015 for Romania, Bulgaria, the United Kingdom, Germany, Sweden, Italy and Poland. Taking into consideration the extensive amount of information to be collected even for the restricted period of eight years, we did not have the possibility to put forward at this stage a cross-national analysis that would include all 28 EU member states. Nevertheless, in order to assure a representative sample, the dataset was constructed based on several criteria of state selection. The criteria account for the distinction between accession dates (i.e. founding, older and newer member states), the size of populations (differentiated according to the data provided by the European Commission<sup>831</sup>) type of legal system (i.e. civil law vs. common law), type of political system (i.e. federal vs. unitary structures) and evidenced compliance performance (relatively low vs. high numbers of infringements).

As we have discussed in the previous section, European hard law is sustained by monitoring and enforcement means, making an approach based on the logic of calculation on member states' side the natural theoretical framework to apply when assessing national transposition. As the main objective of the study is to evaluate domestic change as a response to Europeanization pressure in Romania and Bulgaria, the study will be based on a

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<sup>830</sup> For a review of the quantitative studies of compliance with EU law see D. Toshkov (2010): "Taking Stock: A review of Quantitative Studies of Transposition and Implementation of EU Law", *EIF Working Paper* No. 01/2010 (Vienna, Institute for European Integration Research).

<sup>831</sup> Eurostat (2013): Population on 1 January 2013, available at <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00001>.

dataset that clusters the population of instances of delay in transposition (translated as cases of non-communication) and incorrect application into national legislation of European directives (non-conformity and bad application) covered by the Annual Reports on Monitoring the Application of Community Law in the first eight years since having obtained EU membership (2007-2015). However, while restricting the dataset only to information on the transposition record of the two member states will allow us to test relationships between delay in integrating European directives into national legislation and different institutional variables (both EU directive specific variables and national implementing measure specific variables) in these two cases, we would not be able to extend our observations to the European level and to argue whether the proposed variables exert similar effects both in Romania and Bulgaria's case and the other EU member states. Thus, the objective in this case is to explore the impact of the selected variables upon transposition for the two study cases and not to put forward a theoretically grounded model that would explain transposition delay at the EU-level.

**Table 5 Selection criteria for representative Member States**

Member States	Romania	Bulgaria	United Kingdom	Germany	Sweden	Italy	Poland
Size	Big	Small	Big	Big	Small	Big	Big
Legal System	Civil law	Civil law	Common law	Civil law	Civil law	Civil law	Civil law
Political structure	Unitary	Unitary	Federate & devolved	Federal	Unitary	Devolved	Unitary
Accession	2007	2007	1973	Founding Member	1995	Founding Member	2004

When discussing non-compliance with European legislation, Börzel *et al.*<sup>832</sup> group rational choice perspectives into the category of enforcement approaches putting forward the essential linking assumptions and a set of hypotheses which they draw from power-based

<sup>832</sup> T. Börzel, M. Dudziak, T. Hofmann, D. Panke, C. Spungk (2007): "Recalcitrance, Inefficiency, and Support for European Integration: Why Member States Do (not) Comply with European Law", *Center for European Studies Working Paper*, No. 161 (Cambridge, Harvard University), p. 10.

theoretical claims. The leading premise of enforcement approaches is that states choose not to comply with international norms and rules because they are not willing to bear the costs of change. It follows that incentives for defection need to be offset by increasing external constraints in the form of institutionalised monitoring and sanctioning which will exert either material (economic sanctions or financial penalties) or immaterial costs upon states (loss of reputation and credibility)<sup>833</sup>. The response to these additional costs will be dependent either on the EU specific political power or the economic power of nation states, the expectation being that the less powerful EU member states are, the more sensitive they are to external enforcement constraints and the less likely they are to infringe EU legislation. Our analysis will explore this hypothesis, but will focus only on member states' direct EU specific political power, as Börzel et al. study shows that greater economic power did not substantially affect a country's compliance record<sup>834</sup>. The proxy for the EU specific political power will be the proportion of votes under QMV (qualified majority voting) in the Council of Ministers and alternatively we will also consider the relative frequency with which a Member State is in a pivotal position under QMV (i.e. in the position of turning a losing coalition into a winning one) or what is known in the literature as the Shapley-Shubik index. This latter figure will be taken from Barr and Passarelli's mathematical analysis of the distribution of power in the Council of Ministers under the voting rules established by the Treaty of Nice (50% of the member states vote in favour, at least 260 of the possible 352 votes are cast and the majority represents minimum 62% of the total population)<sup>835</sup>. The Shapley-Shubik country-specific power index calculated for the European Union comprising 28 Member States is also included in the table below, based on the estimations done by Antonakakis *et al* and taking into consideration the regime shift brought by the Treaty of Lisbon<sup>836</sup>. Hence, one of the hypotheses which will be tested in order to explore Romania and Bulgaria's transposition record will be the following:

Ha: The less powerful an EU member state is, the less likely it is to infringe EU legislation.

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<sup>833</sup> J. Tallberg (2002): "Path to Compliance: Enforcement, Management, and the European Union", *International Organization*, Vol. 56, No. 3, pp, 609-43, p. 612.

<sup>834</sup> T. Börzel, M. Dudziak, T. Hofmann, D. Panke, C. Spungk (2007): "Recalcitrance, Inefficiency, and Support for European Integration: Why Member States Do (not) Comply with European Law", p. 18.

<sup>835</sup> J. Barr, F. Passarelli (2009): "Who has the Power in the EU?", *Mathematical Social Sciences*, Vol. 57, No. 3, pp. 339-366.

<sup>836</sup> N. Antonakakis, H. Badinger, W. Reuter (2014): "From Rome to Lisbon and Beyond: Member States' Power, Efficiency and Proportionality in the EU Council of Ministers", *Department of Economics Working Paper* no. 175, (Vienna, Vienna University of Economics and Business), p. 38.



**Table 6 Number of Votes in Council and Shapley-Shubik Power Index**

Member State	Romania	Bulgaria	United Kingdom	Germany	Sweden	Italy	Poland
Votes	14	10	29	29	10	29	27
SSI	0.040	0.028	0.087	0.087	0.028	0.087	0.080
SSI (EU 28)	0.038	0.017	0.112	0.149	0.020	0.107	0.067

**Source:** J. Barr, F. Passarelli (2009): "Who has the Power in the EU?", *Mathematical Social Sciences*; N. Antonakakis, H. Badinger, W. Reuter (2014): "From Rome to Lisbon and Beyond: Member States' Power, Efficiency and Proportionality in the EU Council of Ministers", Department of Economics Working Paper no. 175.

According to this hypothesis we would expect that for the period under analysis, Bulgaria, Sweden and Romania to have the lowest number of infringement cases, and by extension the lowest number of ECJ referrals. However, as shown in the table below the number of infringement cases against Romania has been relatively high compared to that of older Member States with more votes in the Council of Ministers such as the United Kingdom and Germany. In this sense, the 2014 Monitoring Report for the Application of EU law also observed that while in 2014 the number of new complaints made against the country by members of the public fell compared to the previous year, it remained high, Romania being ranked the 9<sup>th</sup> Member State with 149 complaints and the 2<sup>nd</sup> in the group of countries from Central and Eastern Europe<sup>837</sup>.

<sup>837</sup> European Commission (2014): *Monitoring the Application of Union Law – Part II: Member States. 2014 Annual Report* (Brussels, European Commission), p. 153.

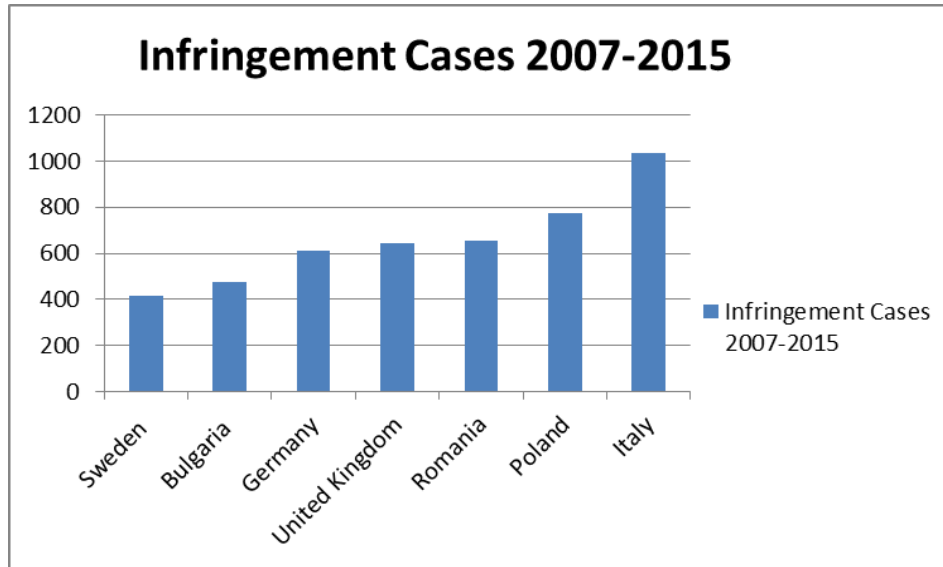


Figure 12 Infringement Cases 2007-2015

**Source:** Dataset comprising all infringement cases (excluding closed cases and withdrawals) registered between 2007-2015. Data based on the European Commission’s annual reports “Monitoring the Application of Union Law” and the European Commission’s platform for infringement proceedings.

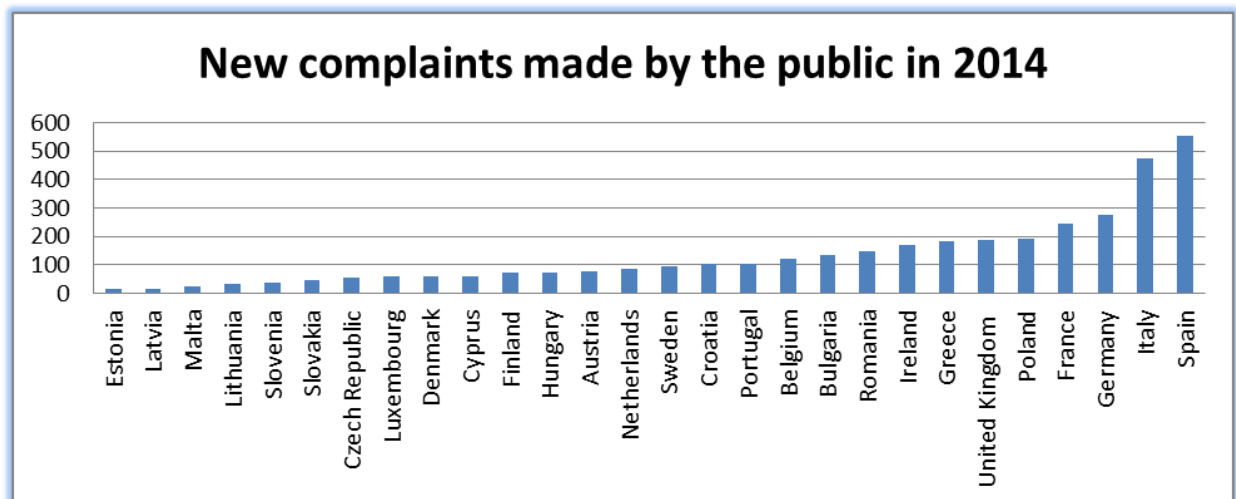
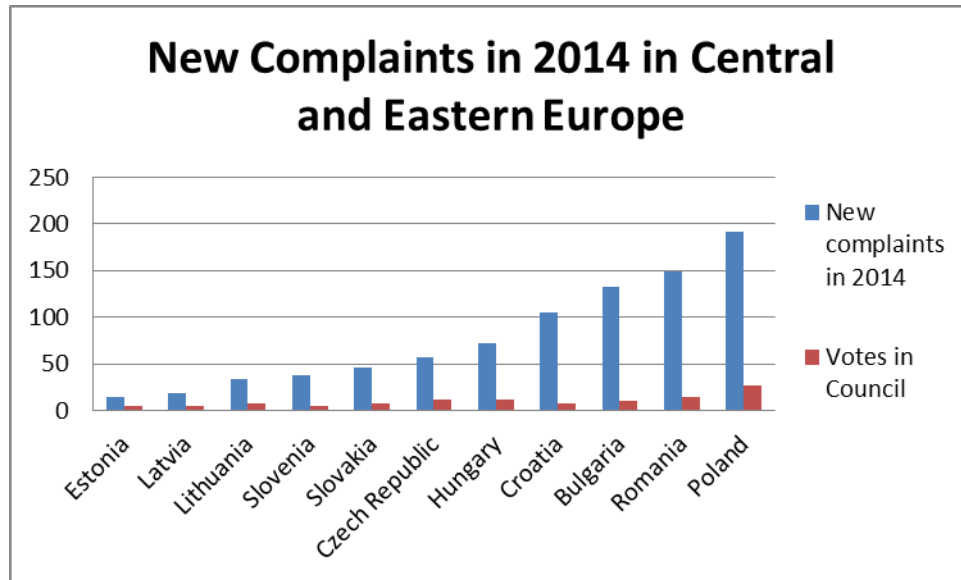


Figure 13 New Complaints made by Public in 2014

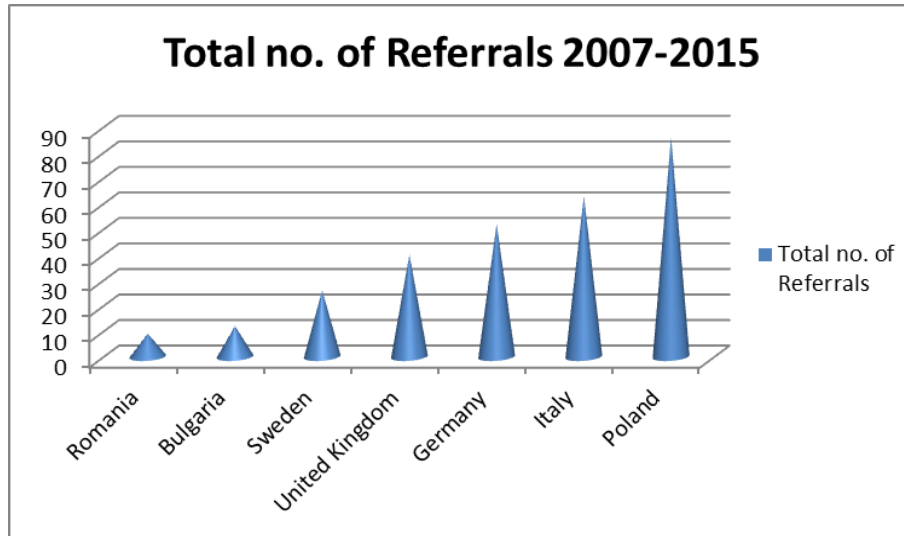
**Source:** European Commission (2014): Monitoring the Application of Union Law – Part II: Member States. 2014 Annual Report (Brussels, European Commission).



**Figure 14 New Complaints in Central and Eastern Europe 2014**

**Source:** European Commission (2014): Monitoring the Application of Union Law – Part II: Member States. 2014 Annual Report (Brussels, European Commission).

What needs to be observed here is that in contrast to Romania’s high number of infringement cases, when turning to the referrals to the European Court of Justice (ECJ) in the period under analysis, the European Commission referred Romania in only 9 instances since the country’s accession to the EU, 5 of which were in the policy field of environmental protection, 3 in the energy field and one in the area of Communication Networks, Content and Technology. Comparatively, Bulgaria was referred between 2007 and 2015 to the European Court of Justice on 12 instances, 5 cases being in the policy field of environmental protection, 3 in the energy field, one in the field of competition policy and one similar to Romania in the area of Communication Networks, Content and Technology.



**Figure 15 Total number of ECJ Referrals 2007-2015**

**Source:** Data based on the European Commission’s annual reports “Monitoring the application of Union Law” and the European Commission’s platform for infringement proceedings.

Both in the case of Romania and in that of Bulgaria the referrals concerning legislation in the Communication Networks, Content and Technology policy regarded the implementation of the Single European Emergency Number 112, with Romania facing difficulties in securing caller location information to emergency services for mobile calls, and Bulgaria not making the emergency number available nationwide. According to the Universal Service Directive<sup>838</sup>, Member States are obliged to ensure that users of fixed and mobile telephones (including payphones) are able to call 112 free of charge, that calls to this number are appropriately answered and handled, that national emergency services are able to establish the location of the person calling the 112 number and that citizens and visitors are informed of the existence of the emergency number. The European Commission has reported the launch of 17 infringement proceedings against Member States over the European Emergency Number, at the date of writing all closed following corrective measures<sup>839</sup>. Thus, the cases brought against Romania and Bulgaria did not mark a difference in terms of the implementation problems encountered by the other Member States in our sample. In this sense, both Poland and Italy were referred to the ECJ for the slow implementation of the

<sup>838</sup> Directive 2002/22/EC of the European Parliament and of the Council on Universal Service and Users’ Rights to Electronic Communications Networks and Services as amended by Directive 2009/136/EC.

<sup>839</sup> As reported by the Directorate General for Communications Networks, Content and Technology at <https://ec.europa.eu/digital-single-market/en/eu-rules-112>.

Emergency Number System. Subsequent European Commission reports have also revealed that both in the case of Romania<sup>840</sup> and of Bulgaria<sup>841</sup> the dismissal of the chairpersons of the National Regulatory Authorities raised concerns over the independence of the institutions. But probably the referrals that have generated the most public attention at the national level for both Romania and Bulgaria have been in the case of the two directives<sup>842</sup> that form the so-called Third Energy Package. The two directives<sup>843</sup> which were due to be transposed by Member States by March 2011, aimed at effective unbundling of energy production and supply interests from the network, increased transparency of retail markets and strengthening of consumer protection rules and more effective regulatory oversight by independent market watchdogs. For the first objective the energy package provides for three basic models for unbundling with Member States having the option to decide for one of the following: ownership unbundling, the independent system operator and the independent transmission system operator. Under the first model, all integrated energy companies would have to sell off their electricity and natural gas grids, no supply or production company not being allowed to hold a majority share in a transmission system operator. Under the second model, the supply company can still own the physical network, but it has to leave the entire operation, maintenance and investment to an independent company, and under the final one the supply company can own and operate the network, but its management must be done by a subsidiary that would make all financial and technical decisions independent from the parent company. In order to ensure an effective competition on the energy market, the package also put forward the third party access principle that requires operators of transmission networks to allow any electricity or gas supplier non-discriminatory access to the transmission network. In order to transpose the energy package, Romania opted for the independent system operator unbundling model, as its transmission system is in public property (its Transmission and System Operator for electricity being CNTEE Transelectrica SA, company where the state owns 58% of the

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<sup>840</sup> European Commission (2010): *15<sup>th</sup> Progress Report on the Single European Electronic Communications Market – Romania Chapter* (Brussels, European Commission), SEC(2010) 630 final.

<sup>841</sup> European Commission (2008): *13<sup>th</sup> Progress Report on the Single European Electronic Communications Market – Bulgaria Chapter* (Brussels, European Commission), SEC(2008)356.

<sup>842</sup> Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity and Repealing Directive 2003/54/EC; Directive 2009/73/EC concerning Common rules for the Internal Market in Natural Gas and Repealing Directive 2003/55/EC.

<sup>843</sup> On the impact of the Third Energy Package see P. Eikeland (2011): “The Third Internal Energy Market Package: New Power Relations among Member States, EU Institutions and Non-state Actors?”, *Journal of Common Market Studies*, Vol. 49, No. 2, pp. 243-63.

shares and the rest of 42% are traded on the Romanian stock exchange or owned by other investors). However, the implementation of the model has not been smooth, in 2013 the country being referred to the ECJ for not transposing into its national legislation among others the provision regarding the separation of the transmission company from the operation and maintenance of the grid. In this sense, Member States must ensure that the same person or persons are not exercising direct or indirect control over an undertaking performing any of the functions of production or supply and exercise, directly or indirectly control over a transmission system operator or over a transmission system. In order to implement this requirement the Romanian Government transferred Transelectrica from one minister to another (from the Economy to the Finance Ministry), but this shift did not translate into compliance with the spirit of the directive package, as suspicions that employees from the Finance Ministry were exercising direct control over some electricity companies were revealed<sup>844</sup>. Moreover, several other provisions from the electricity energy directive had not been transposed into national legislation: no regulations were in place that would stipulate that energy suppliers are required to inform customers of their rights, regarding the obligation of distribution operators to assure the long-term ability of the system to respond to electricity demands, regarding the procedures and criteria for the authorisation of new energy entities into the market, as well as technical safety criteria for energy generation installation, distribution systems and equipment for the direct connection to the network of consumers etc. The European Commission decided at the end of 2014 to withdraw the referral against Romania for both directives of the Third Energy package.

Bulgaria on the other hand opted for the Independent transmission system operator model, with one vertically integrated, fully state-owned company (The Bulgarian Energy Holding - BEH) retaining the central role, and its subsidiary, the National Electricity Company (NEK) holding generation assets representing 45% of the installed generation capacity. In 2013, the Commission referred Romania to the ECJ for failing to fully transpose the electricity and gas Directives, in particular the provisions relating to the protection of consumers and the

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<sup>844</sup> C. Pîrvoiu (2013): "Comisia Europeana vs. Romania: Autoritatile Romane au fost Actionate in Judecata pentru ca nu au Respectat Directivele privind Piata Energiei. Procesul se Afla pe Rolul Curtii Europene de Justitie, iar Amenda pe care o Risca Romania este de 60.000 Euro pe zi"/"The European Commission vs. Romania: The Romanian Authorities on Trial for not Respecting the Energy Market Directives. The Trial is Pending at the European Court of Justice, and the Fine that Romania risks is of Euro 60.000 per day", HotNews.ro (11 September), available at <http://economie.hotnews.ro/stiri-energie-15558804-comisia-europeana-romania-autoritatile-romane-fost-actionate-judecata-pentru-nu-respectat-directivele-europene-privind-piata-energiei-procesul-afla-rolul-curtii-europene-iar-amenda-care-risca-romania-hm>.

requirements for clearly specified tasks attributed to the Energy regulator (the Romanian Energy Regulatory Authority)<sup>845</sup>. Bulgaria, together with Estonia and the United Kingdom<sup>846</sup> (and later Poland) were referred to the ECJ in January 2013 for the partial transposition of the directives of the third energy package. Bulgaria's energy policy has marred by inefficient management practices and heavy political involvement in the decision-making of state-owned energy enterprises. As mentioned above, Bulgaria has opted for the Independent transmission system operator model, which meant that the ownership of the grid was to be transferred from the state-owned NEK to the Electricity System Operator (ESO). However, due to the mismanagement of the NEK (the company accumulating a debt of BGN 3.5 billion by the end of 2014) the transfer was inevitably delayed. Moreover, the independence of the state regulator – the State Energy and Water Regulatory Commission (SEWRC) has been affected in time through political pressure and frequent changes of leadership<sup>847</sup>. However, Romania and Bulgaria have not been the only Member States lagging behind in fully transposing the Third Energy Package. In 2011, the European Commission opened 38 infringement proceedings against 19 Member States. Because of the technical complexity as well as the sovereignty costs implied by the energy package, the Commission assumed a highly active role in ensuring the correct application of legislation by conducting its own systematic non-conformity assessment of national transposition measures for all 28 Member States, and has opened EU Pilot cases against several Member States in order to clarify and discuss potential non-conformity problems<sup>848</sup>. With these aspects in mind, we would conclude that again Romania and Bulgaria's track records are not distinctive from those of other Member States, even if the variables determining the transposition delay have mainly revolved around mismanagement of state-owned energy companies.

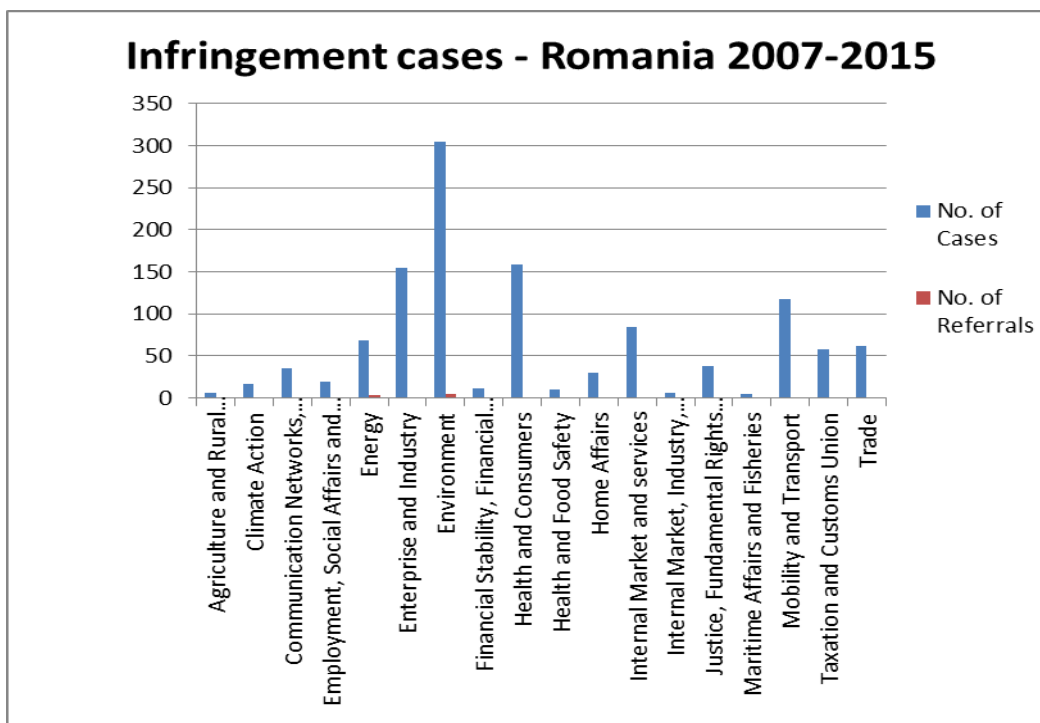
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<sup>845</sup> European Commission (2013): "Internal Energy Market: Commission refers Romania to Court for Failing to Fully Transpose Rules", Press Release IP/13/260 (Brussels, European Commission).

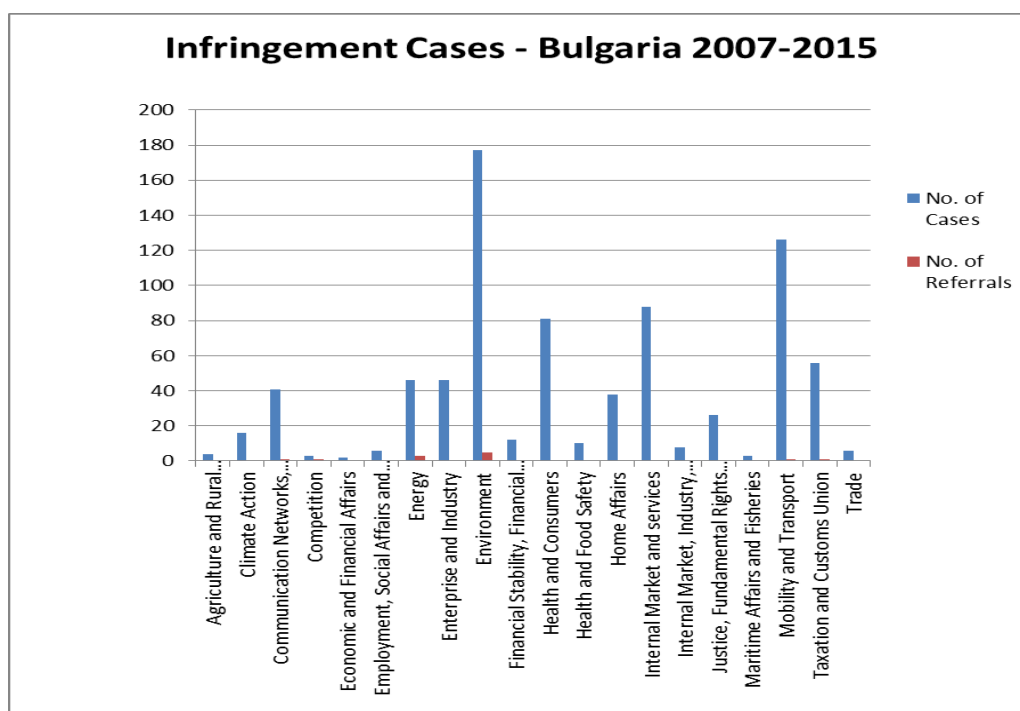
<sup>846</sup> European Commission (2013): "Internal Energy Market: Commission Refers Bulgaria, Estonia and the United Kingdom to Court for Failing to fully Transpose EU Rules", Press Release IP/13/42, (Brussels, European Commission).

<sup>847</sup> R. Stefanov, T. Galev, M. Tsanov, M. Vladimirov, N. Gantcheva (2014): *Energy Sector Governance and Energy (In)Security in Bulgaria* (Sofia, Center for the Study of Democracy), p. 15.

<sup>848</sup> European Commission (2014): *Enforcement of the Third Internal Energy Market Package* (Brussels, European Commission), SWD(2014) 315 final, pp. 3-5.



**Figure 16 Infringement cases - Romania 2007-2015**



**Figure 17 Infringement Cases - Bulgaria 2007-2015**

**Source Fig. 16 & 17:** Data based on the European Commission’s annual reports “Monitoring the Application of Union Law” and the European Commission’s platform for infringement proceedings.



During the reference period, both Romania and Bulgaria were referred to the ECJ on 5 instances (each) for the delayed transposition or bad application of directives in the environmental protection policy area. Similar to the infringement track records of the other Member States included in the sample, the two countries had the largest number of infringement cases in the environment policy filed. Representatives of the Romanian institution of the Governmental Agent for the Representation of Romania to the European Court of Justice have cited in this sense that the high costs of transposition and correct application as well as the highly technical character of European legislation in this sphere have been identified as the main factors that induce longer periods of time for the assimilation of EU law at the national institutional level<sup>849</sup>. Thus, both Romania and Bulgaria follow the same European pattern of implementation when looking at directives in the environmental policy, all countries in our sample for example with the exception of Italy registering the largest number of infringement cases in this area.

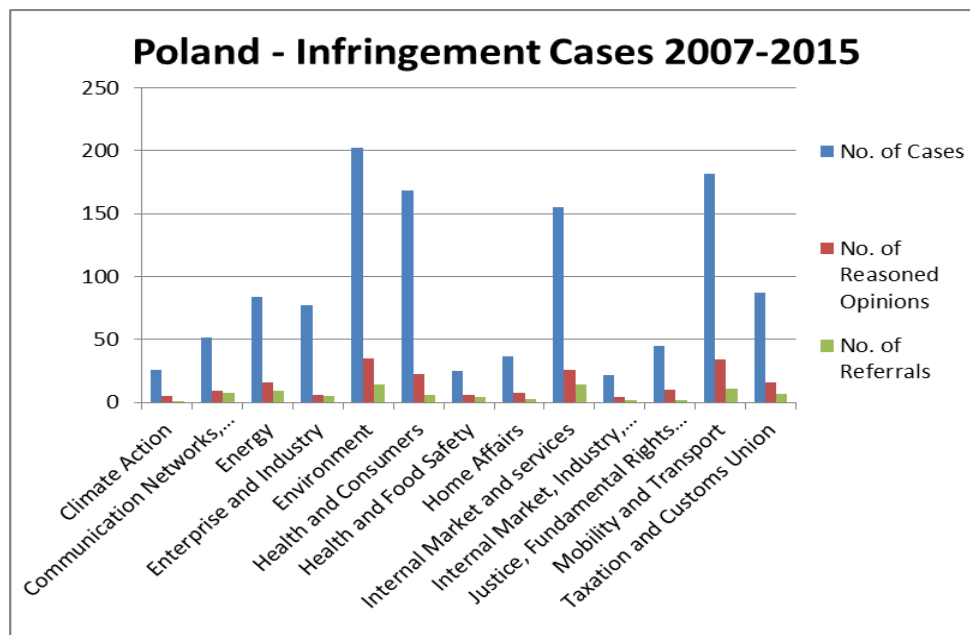
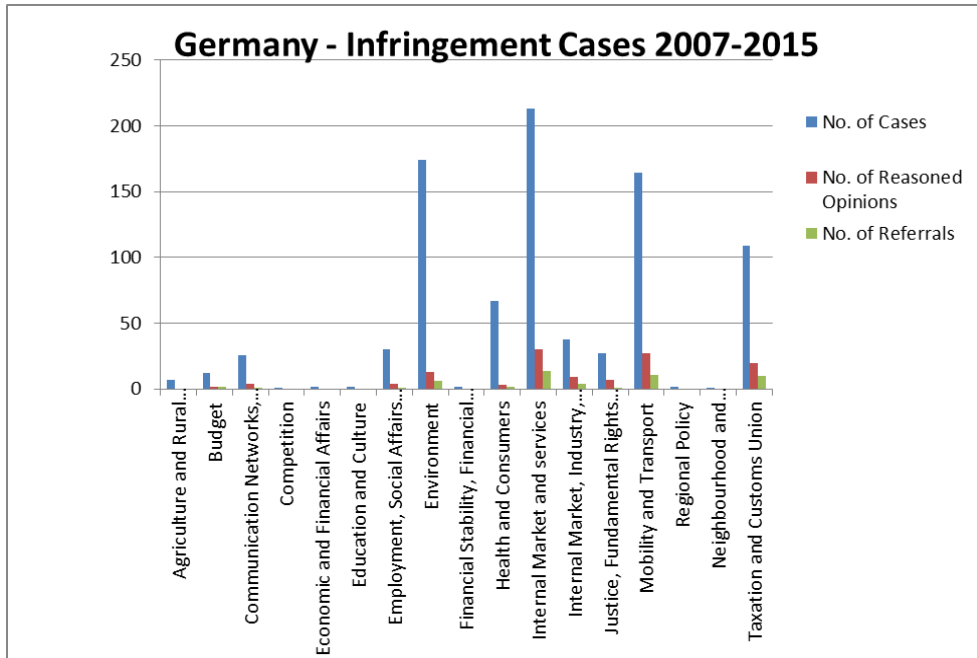


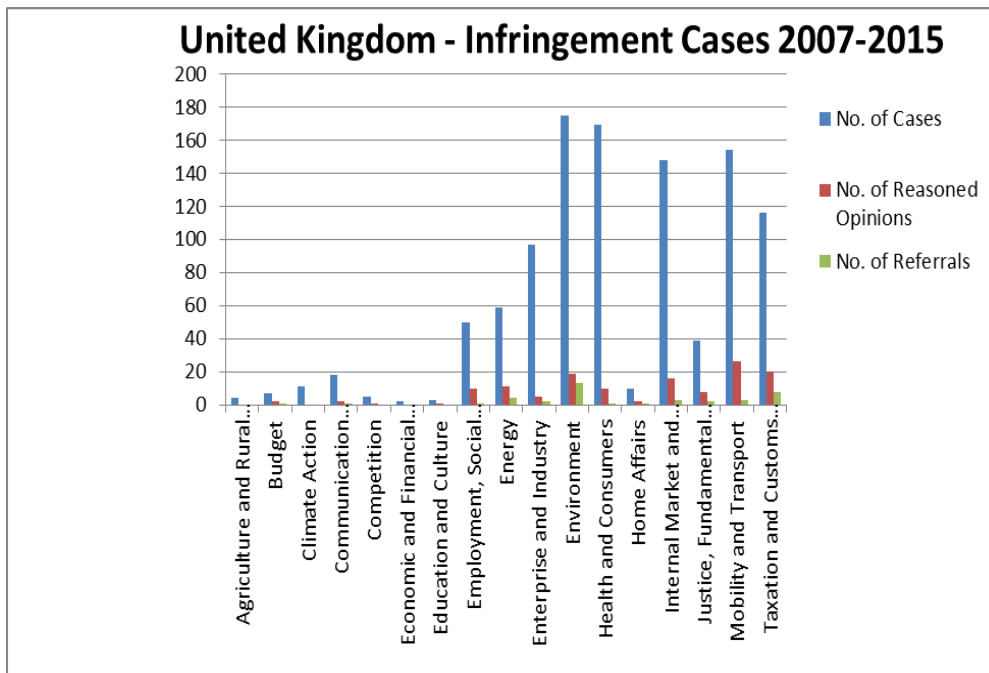
Figure 18 Poland - Infringement Cases 2007-2015

Source: Data based on the European Commission’s annual reports “Monitoring the Application of Union Law” and the European Commission’s platform for infringement proceedings.

<sup>849</sup> Author’s interview with the Departmental Chief within the institution of the Governmental Agent for the Representation of Romania to the European Court of Justice on the 6<sup>th</sup> of December 2013.



**Figure 19 Germany - Infringement Cases 2007-2015**



**Figure 20 United Kingdom - Infringement Cases 2007-2015**

**Source Fig. 19 & 20:** Data based on the European Commission’s annual reports “Monitoring the Application of Union Law” and the European Commission’s platform for infringement proceedings.

Returning to our initial hypothesis that less powerful EU Member States are less likely to infringe EU legislation, when tested on our sample and on the total number of infringement proceedings during the reference period, we could not find enough evidence to be able to sustain a correlation. What has been observed at this point is the fact that despite an increase in the number of proceedings initiated by the European Commission, Romania has been referred to the ECJ for infringement of EU law less frequently than any other country in our sample. A similar situation has been observed in the case of Bulgaria as well. Considering however, the fact the Romanian and Bulgarian national media have followed with great attention the referred cases, in some instances the potential penalties that the countries would be obliged to pay per day of delay being communicated as well, we could assume that the electorate pressure has played a role in keeping the numbers down. Moreover, in the case of Romania the monthly reporting by the institution of the Governmental Agent for the Representation of Romania to the European Court of Justice of the number of infringement cases initiated and their stages has somewhat contributed to sustaining this transparency which in turn has led to a so far relatively good track record. If we were to consider the impact of internal variables such as the number of veto points or of more technical factors such as the goodness of fit, a rational choice institutionalist theoretical framework would start off by assuming that strategic and rational of actors pursue exogenous and fixed policy interests operate in an institutionalised environment which can either constrain them (e.g. through monitoring and sanctioning mechanisms for free-riding) or enable them (e.g. minimise transaction costs for cooperation)<sup>850</sup>. As mirrored by hypothesis Ha, domestic institutional change will vary across member states and this phenomenon can be accounted for by the degree of economic vulnerability and political capacity. However, there is a third factor identified by Schmidt in the form of misfit that represents an important part of the driving force for institutional change<sup>851</sup>. Rational actors will attempt to upload their policies to the EU level with the aim of lowering the costs of adaptation which they will suffer when implementing ('downloading') norms and procedures established as mandatory by supranational structures. If member states are not successful in uploading their preferences, they will oppose the high costs of adaptation with both the correctness and timeliness of the transposition process being affected.

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<sup>850</sup> See F. Scharpf (1997): *Games Real Actors Play. Actor-Centered Institutionalism in Policy Research* (Boulder, Westview Press).

<sup>851</sup> V. Schmidt (2002): "Europeanization and the Mechanism of Economic Policy Adjustments", *Journal of European Public Policy*, Vol. 9, No. 6, pp. 894-912.

A caveat must be introduced here, noting that not only rational choice institutionalism uses this variable, but the historical branch of institutionalism as well, the assumption substantiating the concept being that the 'stickiness' of deeply entrenched national policy tradition and administrative routines will impede reforms aiming to alter them<sup>852</sup>. The difference between the two perspectives on 'misfit' is also highlighted by the estimated probability for domestic change to occur, with the historical institutionalist conceptualisation focusing more on the limited capacity that the EU would have in breaking path dependent national structures.

In line with investigations of non-compliance that account for this factor<sup>853</sup>, we will thus test the goodness of fit variable, translated as a proxy that distinguishes between situations where transposition is realised through a completely new national implementing measure versus transposition through the modification of existing national legislation. The thought behind the addition of this variable is that amendments will display a higher fit between directives and national legislation.

Hb: Evidence of a certain degree of fit will lower transposition delay.

However, noting the previous studies that have underlined that the goodness of fit is not decisive (and thus not sufficient as a stand-alone variable) in explaining the implementation of individual directives<sup>854</sup>, we will refer to the realm of domestic politics and a number of national implementing measure specific variables will be used in order to explore the factors that have either a positive or negative impact upon the transposition process. The motivation behind this option is again theory-led, rationalist approaches to Europeanisation drawing attention to mediating institutional characteristics such as the number of veto points in a country's institutional structure and the presence of supporting formal institutions as increasing, respectively decreasing national resistance to change.

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<sup>852</sup> K. Thelen, S. Steino (1992): "Historical Institutionalism in Comparative Politics" in S. Steinmo, K. Thelen, F. Longstreth (eds.) *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge, Cambridge University Press), pp. 1-32; E. Immergut (1998): "The Theoretical Core of New Institutionalism", *Politics and Society*, Vol. 26, No. 1, pp. 5-34.

<sup>853</sup> F. Duina (1997): "Explaining Legal Implementation in the European Union", *International Journal of the Sociology of Law*, Vol. 25, No. 2, pp. 155-79; C. Knill (1998): "European Politics: The Impact of National Administrative Traditions", *Journal of Public Policy*, Vol. 18, No. 1, pp. 1-28; T. Börzel, T. Risse (2000): "When Europe Hits Home: Europeanization and Domestic Change", *European Integration Online Papers*, Vol. 4, No. 15.

<sup>854</sup> M. Haverland (2000): "National Adaptation to European Integration: the Importance of Institutional Veto Points", *Journal of Public Policy*, Vol. 20, No. 1, pp. 83-103; G. Falkner, O. Trieb, M. Hartlapp, S. Leiber (2005): *Complying with Europe? The Impact of EU Minimum Harmonisation and Soft Law in the Member States* (Cambridge, Cambridge University Press), pp. 289-291.

More concretely, it is expected that the presence at the national level of multiple veto points within the institutional structures and decision-making processes can empower actors with diverse interests to avoid constraints and adaptation costs leading to increased resistance to change. By way of alternative, the existence of formal institutions that would provide actors with the material and ideational resources to exploit new opportunities will increase the likelihood of change<sup>855</sup>. In order to translate these claims into variables, we consider the type and the number of the legal instruments that are used to implement European directives into national legislation as explanatory factors for variance as well as probability of compliance. The study is particularly interested in understanding and accounting for compliance variation across EU policy areas in Romania and Bulgaria and in integrating the observed direction/tendency into the larger European context, especially as we remark a fairly wide range of legislative acts, with legislative delegation to the government being allowed in Romania, but not in Bulgaria.

Hc: Delay in transposition will decrease as the number of actors (veto points) involved in the making of the instrument of national implementation decreases;

Hd: More implementing measures used to transpose EU directives will make delays in transposition larger.

We consider hypotheses Hb, Hc and Hd to be interrelated, our assumption being that a wider number of national implementation measures implies a larger number of actors involved in the legislative process. Applied to our sample, this assumption was observable for directives being transposed through more than 5 national implementation measures. In the case of Bulgaria we have observed that the number of days of delay for a directive transposed into national legislation through one national implementation measure was of roughly 189. For instances where more than 10 national implementation measures were quoted as transposing a directive our sample indicated that the average number of days of delay spiked to 1210 days. For Romania, the average number of days of delay in cases involving one national implementation measure was of 165, while for directives transposed through more than 10 national implementation measures the average number of days was of 681. However, in Romania's case variation was substantially higher than in the case of Bulgaria, with instances where a directive transposed only through 2 national

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<sup>855</sup> T. Börzel, T. Risse (2000): "When Europe Hits Home: Europeanization and Domestic Change", p. 3.

implementation measures registered 1958 days of delay<sup>856</sup> and at the other end where only 9 days of delay were registered for the transposition of a directive through 8 national implementation measures<sup>857</sup>. While indeed, more implementation measures statistically add to the number of days of delay – and this has been visible in our sample as well, we also need to take into account the complexity of the transposed legislation as well as the salience of the subject of each directive. But referring back to the outliers identified in our sample for Romania, in the case of the Directive 2004/113/EC implementing the principle of equal treatment among service providers from any EU member state was transposed through 2 measures of implementation, the latest one being adopted in 2013, an independent study revealed that the internalisation of this piece of legislation followed a ‘copy-out’ approach which resulted in abstract and confusing legislative provisions<sup>858</sup>. As such, the Romanian legislator did not consider the content of the recitals of the Directive (which do not have an independent legal value, but set important guidelines for determining the scope of the provisions), and merely transposed the provisions without defining the concepts of ‘goods’ and ‘services’ (the directive providing the definition in recital 11 ).

When turning to the cases referred to the ECJ, out of Romania’s 9 referrals, 4 directives required more than 5 national implementation measures (varying from 6 to 50 quoted measures) and the average delay in these instances reached 1487 days. Out of Bulgaria’s 12 ECJ referrals, in 4 cases directives were transposed through more than 5 national implementation measures (varying from 6 to 20 quoted measures) and the average delay for these cases reached 1793 days. Based on the facts so far presented, we would argue that while we have observed a pattern of larger delays for directives transposed through more than 5 national implementation measures, and in the majority of cases involving more actors, we also need to consider the outliers. Thus, a more qualitative approach for a smaller sample would offer a clearer image of the correlation between the number of actors involved in the legislative process, the number of implementation measures and the duration of transposition delay. In terms of the hypothesis tying political power with the proclivity towards delayed or bad application of EU law, we have observed that for the

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<sup>856</sup> This was the case of Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

<sup>857</sup> This was the case of Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

<sup>858</sup> S. Burri, A. McColgan (2009): Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC (Utrecht, European Network of Legal Experts in the Field of Gender Equality).

reference period we could not find substantial evidence to sustain it. Whilst having good track records in terms of the ECJ referrals compared to the rest of the Member States in the sample, we would also need to consider the tendency towards direct assimilation of EU legislation in both countries and the low frequency of Romanian and Bulgarian lobbying at the EU level (explained in the theoretical chapter of this study).

So far, our hypotheses have had a rational choice institutionalist foundation. However, rational choice institutionalism is not without its critics, a number of drawbacks are frequently emphasised by the academic literature. Firstly, because of the over-reliance on a functionalist understanding of institutions – regarded as effective means for facilitating international cooperation (as actors rely on each other to achieve their goals) by preventing short-term defections that might jeopardise long-term interests (leading to suboptimal outcomes) – it is hard for the theoretical perspective to account for ‘dysfunctional institutions’<sup>859</sup>. Secondly, while the deductive nature of this approach makes it a useful framework for capturing the range of reasons individual actors would normally have for action in an institutional setting and the likely outcomes of these actions, it finds anomalies (instances when actors depart from an incentive-based logic) problematic to explain<sup>860</sup>. In this regard, placing itself in opposition to the methodological individualism and to the restricted understanding of institutions that create the fundament of rational choice analyses, sociological institutionalism – as well as the normative approach to the new institutionalism – have gradually provided an alternative theoretical account of the political and social world. In cases of national compliance with supranational norms in the absence of an external enforcement mechanism to prevent free-riding, sociological institutionalism assumes that individuals unconsciously enact cognitive templates as they are guided by a common understanding of what socially accepted behaviour is. Hence, for sociological institutionalists, compliance and enforcement *appear* to be nonissues. We emphasise ‘appear’ as recent rationalist contributions provide new avenues for theoretical explanation of incremental institutional change, Mahoney and Thelen arguing for a distributional approach that would envisage institutions as having built in the dynamic tensions and

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<sup>859</sup> P. Hall, C. Taylor (1996): “Political Science and the Three New Institutionalisms”, *Political Studies*, Vol. 44, No. 5, p. 952.

<sup>860</sup> See F. Scharpf (1997): *Games Real Actors Play. Actor-Centered Institutionalism in Policy Research* (Boulder, Westview Press).

pressures for change<sup>861</sup>. The new modes of change proposed by the authors take the form of displacement (removal of existing rules and the introduction of new ones), layering (new rules introduced alongside existing ones), drift (changed impact of existing rules due to shifts in the environment), and conversion (changed enactment of existing rules due to their strategic redeployment) and they allow for more flexibility in accounting for the differences in veto possibilities and the extent of discretion in institutional enforcement<sup>862</sup>. Nevertheless, it is the sociological branch that introduces complex explanatory variables such as coercive, mimetic and normative isomorphism (with a specific interest in the latter mechanism of policy transfer)<sup>863</sup> in order to explain the domestic effects associated with Europeanisation. We thus turn now to a brief discussion of the main theoretical claims of this perspective.

In this sociological reading, the EU is regarded as a platform for new ideas, meanings, rule and norms that member states are to absorb/internalise. To facilitate this process two mediating factors have the capacity to encourage change: norm entrepreneurs and co-operative informal institutions. The former act as 'change agents' either lobbying for new ideas and norms deriving from the EU level (advocacy groups) or by developing and circulating causal ideas that help create state interests and preferences (epistemic communities). The latter are embodied by co-operative political cultures which ease consensus-building in the decision-making process. The impact of co-operative informal institutions will be tested in our analysis of the transposition record in Romania and Bulgaria by starting from the assumption that the degree of compliance relates with the extent to which "rule addresses accept the legitimacy of the rule of law and consider compliance with legal norms as demanded by a logic of appropriateness". The hypothesis will thus be:

He: The lower the support for the rule of law, the larger the delay in transposition will be.

In order to operationalise this variable we will use the World Bank Rule of Law dimension of the Worldwide Governance Indicators. The Rule of Law index captures "perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as

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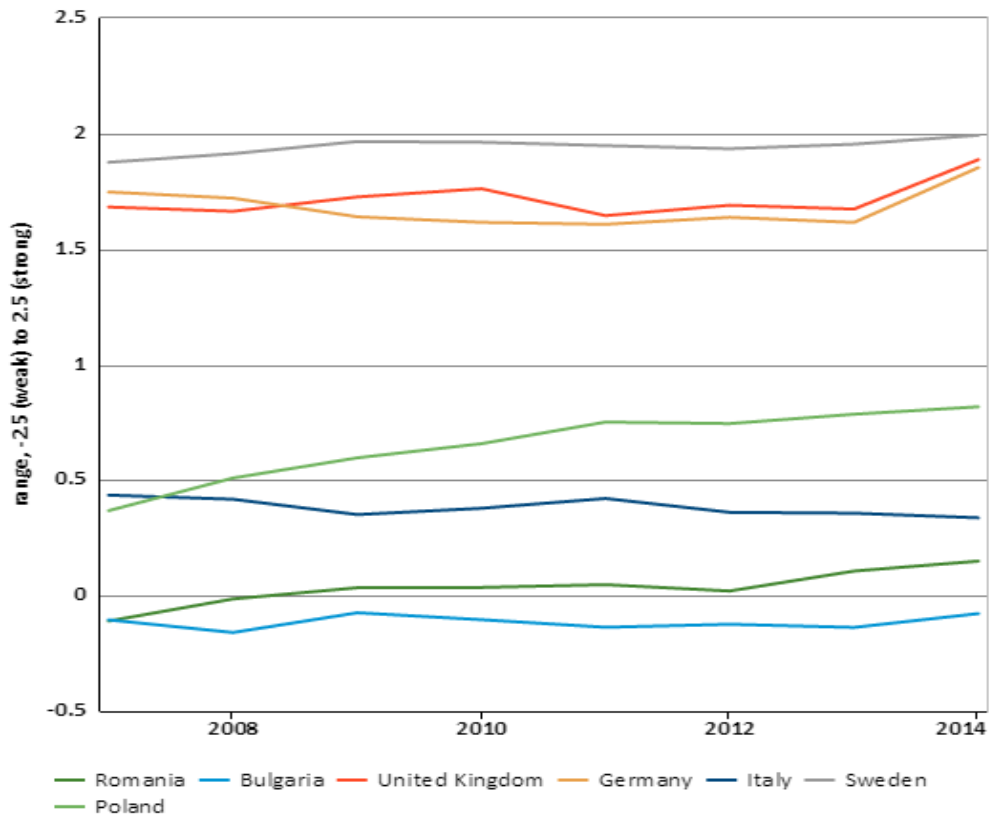
<sup>861</sup> J. Mahoney, K. Thelen (2010): "A Theory of Gradual institutional Change" in J. Mahoney, K. Thelen (eds.) *Explaining Institutional Change. Ambiguity, Agency, and Power* (Cambridge, Cambridge University Press), p. 10.

<sup>862</sup> J. Mahoney, K. Thelen (2010): "A Theory of Gradual institutional Change" in J. Mahoney, K. Thelen (eds.) *Explaining Institutional Change. Ambiguity, Agency, and Power*, p. 18.

<sup>863</sup> C. Radaelli (2000): "Whither Europeanization? Concept Stretching and Substantive Change", *European Integration Online Papers*, Vol. 4, No. 8.



well as the likelihood of crime and violence". We opt for this particular indicator as it assures inclusiveness by aggregating data collected from surveys of firms and households, as well as from assessments of a variety of commercial business information providers, non-governmental organisations and public-sector bodies.



**Figure 21 Rule of Law indicators 2007-2014**

**Source:** World Bank, Worldwide Governance Indicators – Rule of Law – 2007-2014 values, ranging from -2.5 (signalling low degree of confidence in and of adherence to the rules of society, in the quality of contract enforcement, property rights, the police, and the courts) to 2.5.

From the table above we can observe that we have three performance clusters with Sweden, the United Kingdom and Germany registering for the reference period positive values ranging from 1.6 to 2 for the Rule of Law indicator, Poland and Italy (cluster two) ranging from 0.3 to 0.8, and Romania and Bulgaria (cluster three) from negative values to 0.1. According to hypothesis He we would expect to observe fewer infringement cases for Sweden, the United Kingdom and Germany, and substantially more for Romania and Bulgaria. The data gathered in our sample has shown that compared to Romania, Poland and Italy, the three countries in the first cluster indeed have had better compliance track-records. When extending the comparison between cluster two and three, we observe in fact a reversed situation, the countries registering a better values for the Rule of Law indicator having more infringement cases initiated against them by the European Commission. Moreover, if we were to take into consideration the number of ECJ referrals, the hypothesis

is again challenged with cluster one and two registering more referrals than the countries in cluster three. Here again, we would need to consider the impact of transposition in the absence in some cases of an inter-institutional dialogue that would assure the adaptation of the spirit of directives to the existing legal and institutional context. Thus, we would consider that attention paid to this particular aspect would lead to a fruitful research avenue that would better contextualise the compliance track-record of Romania and Bulgaria.

## ***6.2. Conclusions***

In this chapter we have attempted to explore how the two EU Member States have performed in implementing EU legislation since their accession date, to understand in which policy areas we are observing the largest number of infringement proceedings and ECJ referrals and how these track records compare to other EU Member States. We have also attempted to formulate a series of hypotheses grounded in rational choice institutionalism and sociological institutionalism in order to identify potential relevant variables that would account for the compliance track records. We have observed that the first hypothesis that contended that less powerful EU Member States are less likely to infringe EU legislation could not be sustained by the results generated by our sample. The number of actors involved in the legislative process and the overall number of national implementation measures to transpose a directive have had limited explanatory power as well. While we have observed a clear tendency of larger delay durations in cases where directives were transposed through more national implementation measures, we were able to identify outliers (especially for Romania) that provided relevant details regarding EU law assimilation practices. The overall analysis has demonstrated however, that the post-accession backslide effect that was foreseen by part of the academic literature did not materialise. A backslide effect – understood in the context of the current chapter - would presuppose both an increase in the transposition deficit of the country but more importantly an increase in the number of referrals to the European Court of Justice for incorrect or non-application of EU law. However, based on the dataset that includes all infringement cases between 2007 and 2015, we could observe the following:

- compared to older Member States with more votes in the Council of Ministers (such as the United Kingdom and Germany), the total number of infringement cases for Romania has been high over the period of study (being the third country in the dataset after Poland and Italy in terms of the number of infringement cases);
- when considering the number of Court referrals however (arising after a direct dialogue with the European Commission over the possible violations of obligations under EU law), both Romania and Bulgaria have registered the lowest number of instances of referrals (Romania for 9 cases and Bulgaria for 12, compare to over 80 for Poland, over 50 for Italy and over 40 for Germany) in the period of study out of all of the countries included in the dataset;
- the most numerous cases of infringement both for Romania and in Bulgaria are registered in the Environmental policy area, situation similar to nearly all Member States comprised in the dataset and explained by the large adaptation costs and complexity of EU law application in this area.

With these observations in mind, we would contend that the manifestation of backsliding would presuppose a corroboration of an increased number of infringement cases with a high number of Court referrals. We would also expect for an increase of Court referrals in cases involving directives politically sensitive for national governments (such as EU social policy directives to give one example). However, for Romania and Bulgaria the majority of Court referrals were for directives in the policy field of environmental protection, followed by directives in the energy field (a situation again common for all EU Member States). With these observations in mind, we would contend that no clear evidence of backsliding can be identified neither in the case of Romania, nor that of Bulgaria.

## Chapter 7

### Conclusions

#### *7.1. Empirical contributions*

The thesis has provided an assessment of the progress registered by the two countries in assuming their EU membership obligations. In order to reflect the complexity of these obligations, our analysis has included both soft and hard legal instruments. The first instrument taken as level of analysis was the Cooperation and Verification Mechanism. Here we have observed that despite similar political instability Romania has managed to perform substantially better than Bulgaria, its anti-corruption institutional framework being quoted in the EU Anti-Corruption Report as an example of good practices. In order to account for the difference in outcomes, we have elaborated a theoretical framework based on historical institutionalist concepts. In exploring the extent of post-accession Europeanisation, we have observed that Bulgaria and Romania's performance in progressing towards their national targets set under the Europe 2020 Strategy has been rather limited, the policy analysis done in this study showing that in both countries there are no clear and politically assumed strategies towards coordinating the employment and education lines of action. Bulgaria faces today the highest percentage of population at-risk-of-poverty or social exclusion out of the country's total population (48% according to Eurostat), an employment rate below the EU average (at 61% in 2014 according to Eurostat compared to the EU average of 64.9%), and a very low expenditure on research and development of 0.6% of the GDP. Romania is in a very similar situation, with public spending on research and development hovering at 0.3% of the GDP, 40.4% population at-risk-of-poverty or social exclusion and the employment rate as well below the EU average in the context of an emigration wave that saw to the total population count fall from 21.700.000 in 2002 to 19.900.000 in 2014<sup>864</sup>. In both countries active employment policies have not been adequately constructed so that

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<sup>864</sup> Institutul Național de Statistică (2014): *Anuarul Statistic al României/ Romanian Statistical Yearbook* (Bucharest, INSSE).

they would efficiently address the effects of the economic crisis, professional training and education opportunities have not been coordinated with labour market needs and so far steps taken to correct these shortcomings have not produced substantial effects. While the monitoring and evaluation undertaken under the Europe 2020 Strategy has been beneficial, country-specific recommendations providing the stage for naming and shaming, the visibility of these recommendation as well as of concerns has been limited at the national level. We have also attempted to explore how the two EU Member States have performed in implementing EU legislation since their accession date, to understand in which policy areas we are observing the largest number of infringement proceedings and ECJ referrals and how these track records compare to other EU Member States. We have formulated a series of hypotheses grounded in rational choice institutionalism and sociological institutionalism in order to identify potential relevant variables that would account for the compliance track records. We have observed that the first hypothesis that contended that less powerful EU Member States are less likely to infringe EU legislation could not be sustained by the results generated by our sample. The number of actors involved in the legislative process and the overall number of national implementation measures to transpose a directive have had limited explanatory power as well. While we have observed a clear tendency of larger delay durations in cases where directives were transposed through more national implementation measures, we were able to identify outliers (especially for Romania) that provided relevant details regarding EU law assimilation practices. The overall analysis has demonstrated however, that the post-accession backslide effect that was foreseen by the academic literature did not materialise.

## ***7.2. Theoretical and methodological contributions***

The present research endeavour has strived to put forward a new theoretical model attached to the concept of 'Europeanisation'. In this sense, the model starts off by setting a clear definition of the process to be explored, understanding it as a complex 'top-bottom' and 'bottom-up' process in which domestic polities, politics and policies are shaped by European integration and in which domestic actors use European integration to shape the domestic arena. We then differentiate between the pre-accession phase and the post-

accession stage, with the former implying the presence of EU directly influenced changes at the national level, while in the case of the latter change is to be expected as a consequence of the assumed responsibility of membership. In the phase of post-accession Europeanisation a wide range of variables can influence the depth and pace of domestic change such as the presence of national political elites open to EU influence, and where equilibriums are in place the presence of potential lock-in effects. Here, however our model proposes the inclusion of the variable nature of EU policy instruments, the theoretical chapter of this study showing that different modes of governance are likely to generate specific behaviours and hence outcomes. In this sense, Coman and Crespy argue that by modelling Europeanization as a process whose dynamics and temporality are shaped by actors (bias towards agency), domestic change - understood to occur as a result of external European pressure - has been deemed as short-termed, piecemeal or incremental. While recognising the value of this approach, the authors argue that the transition from incremental to structural change can only be accommodated by a research design that would take into consideration not only the ability and intentionality of national actors to adapt to Europe, but also the potential of EU policy instruments to lead to a more profound transformation<sup>865</sup>. The next step in the model is the identification of EU modes of governance and attributed modes of actor behaviour in connection to them. As such, one general categorisation reunites coercion, framework regulation, targeting and voluntarism. In this sense, we based the theoretical model on a starting premise that in the case of 'hard' adaptational pressure which is manifest in coercion and framework regulation modes of governance we would expect the rationale for domestic institutional change to range from persistence-driven (when the directives' level of detail is high) to performance-driven (when directives would allow for more freedom). In the case of 'soft' forms of governance (targeting and voluntarism) we would expect a more responsive mode of behaviour at the member state level, with exemplary performers in achieving the common benchmarks being identified as model-givers to be copied. When returning to our study cases, these abstract hypotheses translated into the assumption that under monitoring specific to the Cooperation and Verification Mechanism or the Europe 2020 Strategy, the most probable mode of behaviour would be responsive. In contrast, under monitoring for compliance with

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<sup>865</sup> R. Coman, A. Crespy (2014): "Still in Search of Europeanization: From Limited to Structural Change?", in R. Coman, T. Kostera, L. Tomini (eds.) *Europeanization and European Integration from Incremental to Structural Change* (Basingstoke, Palgrave Macmillan).

EU law, we would expect a persistence-driven behaviour. We specifically focus on the post-accession period, as we intend on differentiating between incentives for rule abidance associated with maximising gains (when the transformative power of the EU is strongly connected to the candidate countries' objective of obtaining EU membership during the pre-accession, the opening and the course of accession negotiations<sup>866</sup>) and constraints and incentives that generate specific patterns of behaviour which are determined by the institutional path taken by a state. Two sets of additional hypotheses are put forward in order to complete the theoretical model: one for soft and one for legally-binding instruments. As we are focusing on post-accession compliance with externally devised benchmarks and norms, we also need to address the backsliding hypothesis which considers that once within the European Union, the Member States analysed by this study would abandon or even reverse the reforms they have introduced in order to qualify for membership. An initial evaluation of the progress made by the two countries under the Cooperation and Verification Mechanism demonstrates that despite severe political instability in the period of reference (2007-2015), no institutional and legislative backsliding has been identified. This state of affairs produces a rather paradoxical situation whereby the country has improved its capacity to curb corruption year upon year, but has done so in a politically instable context. In order to explain this dissonance, we have put forward a historical institutionalist explanatory model. We postulate thus that European pressure exercised during the pre-accession period can create what the literature on critical junctures refers to as permissive conditions for substantial change to occur. Permissive conditions are understood as easing the constraints of structure (institutional stasis) and changing "the underlying context to increase the causal power of agency or contingency and thus the prospects for divergence"<sup>867</sup>. These conditions are generated through a range of pressure mechanisms that include increased monitoring, gate-keeping and differentiation strategies, provision of institutional models, financial assistance and twinning. However, while the emergence of these causal conditions is paramount, they are not sufficient for divergence from a previously set path. For a critical juncture to be triggered, we need productive conditions to be present as well. Productive conditions are aspects of a critical

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<sup>866</sup> T. Haughton (2007): "When Does the EU Make a Difference? Conditionality and the Accession Process in Central and Eastern Europe", *Political Studies Review*, Vol. 5, No. 2, pp. 233-246.

<sup>867</sup> H. D. Soifer (2012): "The Causal Logic of Critical Junctures", *Comparative Political Studies*, Vol. 45, No. 12, pp. 1572-97, p. 1574.



junction that “shape the outcomes that emerge and are locked in when the window of opportunity marked by permissive conditions comes to a close”<sup>868</sup>. As permissive and productive conditions are necessary, but insufficient if present individually, for a critical juncture to be triggered, we need both conditions to be present, while the absence of both types will translate into *status quo*, any change in this case being precluded. The presence of permissive conditions and the absence of productive ones will create crisis without change, or a case of “missed opportunity”. Finally, we contend that the absence of permissive conditions, but the presence of productive ones will mark a phase of incremental change<sup>869</sup>. However, while a critical juncture is expected to produce consequences in the form of a legacy, the unit of analysis critically affected can differ from each case. Thus, during a critical juncture while the macro structure can be affected, many other institutions can remain unchanged, the duration of the conjuncture being part of the reason for which variation across the levels of analysis is determined. The causal force of critical junctures is determined by their duration, their prolongation bearing the possibility that political decisions will be hindered or forced in other directions by structural constraints<sup>870</sup>. The same set of hypotheses can be used when analysing the domestic impact of the Europe 2020 Strategy. However, as we have observed in the chapter dedicated to this instrument, we have not found substantial evidence to consider policy coordination under the Lisbon and Europe 2020 Strategies to have created permissive conditions for critical junctures to be facilitated. Finally, in assessing the particularities of non-compliance in the case of Romania and Bulgaria, we have used a set of hypotheses grounded on rational choice and sociological institutionalism. While similar explorations of relevant variables that would explain the propensity of delay or timely transposition, grounding such an endeavour in a theoretical framework provides us with a starting point to testing the explanatory relevance of theory in such endeavours.

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<sup>868</sup> H. D. Soifer (2012): “The Causal Logic of Critical Junctures”, p. 1575.

<sup>869</sup> *Ibidem*, p. 1580.

<sup>870</sup> See M. Söyler (2015): *The Turkish Deep State. State Consolidation, Civil-Military Relations and Democracy* (New York, Routledge).

### ***7.3. Limitations of the study***

The study has been based on a mix-method approach that reunited the use of descriptive statistics, semi-structured interviews, and document analysis. The amount of collected data has meant that while the possibility of more in-depth testing of a wider set of hypotheses was possible, due to time constraints each analysis revolving around a policy instrument could only have a general character. Moreover, difficulties have been encountered in securing an equal amount of interviews for Bulgaria as for Romania. Language barriers as well as cabinet reshufflings during the period in which interviews were conducted meant that identified contact persons occupying key official positions, especially in the Justice Ministry, could not be reached. In order to correct this imbalance, alternative solutions were identified such as in the case of Bulgarian MEPs public speeches and interventions in the European Parliament regarding the Cooperation and Verification Mechanism were consulted.

### ***7.4. Future research avenues***

As very few studies have analysed the transposition record of Romania and Bulgaria since their accession, we consider that a future research avenue which could be explored would be the construction of a larger data set comprising all Member States and the extension of the number of variables to be tested in order to account for transposition delay at the EU level. Moreover the theoretical model put forward for Europeanisation could be further expanded and improved so that further contributions to the Europeanisation literature and the historical institutionalist theory would be done.

# Annex 1

## Interview List

- Laura Stefan, Anti-corruption expert, former director in Romanian Ministry of Justice, 27 November 2013 and follow-up interview
- Otilia Nutu, Policy analyst World Bank and Expert Forum - 26 November 2013
- Iulia Cospanaru, Deputy Director Transparency International - 7 January 2014
- Emilia Gane, Head Department EU Legal Service, Ministry of Foreign Affairs, 6 December 2013
- Madalina Manolache, Director in Romanian Ministry of Justice 12 November 2013
- Cristian Preda , Member of the European Parliament, 16 September 2014
- Daniel Buda, Member of the European Parliament , 16 September 2014
- Marian Jean Marinescu, Member of the European Parliament , 17 September 2014
- Norica Nicolai, Member of the European Parliament , 16 September 2014
- Philip Gounev, Former Deputy Minister of Interior, Expert Centre for the Study of Democracy, 29 January 2014
- Antoinette Primatarova, Former Deputy Minister of Foreign Affairs, Programme Director at Centre for Liberal Strategies, 4 February 2014

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