

**EVALUATING GOVERNANCE
AND CORRUPTION RISKS
IN BULGARIA**



CENTER FOR
THE STUDY OF
DEMOCRACY

**EVALUATING GOVERNANCE AND
CORRUPTION RISKS IN BULGARIA**

CASE STUDIES ON

**THE PUBLIC PROCUREMENT MARKET
IN THE CONSTRUCTION SECTOR**

AND

**THE IMPACT OF
EU CONDITIONALITY**



**CENTER FOR
THE STUDY OF
DEMOCRACY**

Corruption continues to be one of the main social problems for Bulgaria a decade after the country's EU accession. The Bulgarian public is one of the few in Europe, which trusts EU institutions more than its own government to find a sustainable solution to this problem. Making sure the mechanisms of EU conditionality and public procurement support deliver on these high expectations is of paramount importance for delivering a lasting solution to Bulgaria's rule of law problems. As part of the largest ever team of social sciences and humanities in Europe – ANTICORRP.eu, CSD has developed two case studies, which help explain the key risks of corruption in the public procurement market in construction and the way the EU has impacted Bulgarian progress on anti-corruption.

The Bulgarian Public Procurement Market: Corruption Risks and Dynamics in the Construction Sector

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Improving governance in Bulgaria: Evaluating the Impact of EU Conditionality through Policy and Financial Assistance

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This project is co-funded by the Seventh Framework Programme for Research and Technological Development of the European Union



This publication has been produced thanks to the support of the European Union's Seventh Framework Programme for Research – Socio-economic Sciences and Humanities theme (EU Grant Agreement number: 290529).

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ISBN: 978-954-477-310-6

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**THE BULGARIAN PUBLIC PROCUREMENT MARKET:
CORRUPTION RISKS AND DYNAMICS
IN THE CONSTRUCTION SECTOR**

ACRONYMS

| | |
|-------------|--|
| CAE | Contracting authority entity (in TED database) |
| CPV | Common procurement vocabulary |
| CVM | Cooperation and Verification Mechanism |
| EC | European Commission |
| EU | European Union |
| GDP | Gross domestic product |
| GVA | Gross value added |
| LLP | Law on Public Procurement |
| NAO | National Audit Office |
| PFIA | Public Financial Inspection Agency |
| PP | Public procurement |
| PPA | Public Procurement Agency |
| PPR | Public Procurement Registry |
| RIA | Road Infrastructure Agency |
| RSPP | Regulation on Small-Scale Public Procurement |
| TED | Tenders Electronic Daily |

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ABSTRACT

The Bulgarian public procurement market constituted 9 % of national GDP on average between 2009 and 2013, making it a key public resource for allocation and an object of corruption pressure. Approximately a third of the total construction sector and half of the Top 40 companies' turnover in 2013 came from public procurement. Similar concentration is also evident on the supply side, with public works reaching above 50 % of the value of all public procurement contracts the same year, implying an increase in corruption risks. The firm-level analysis of the public procurement contracts awarded to the Top 40 construction companies by turnover included in the paper, confirms the trend of concentration. Using public procurement data on Bulgaria from the EU's TED database we find that single bidding, the foremost corruption risk red flag in public procurement, is more prevalent in public procurement involving national than EU funds. In addition, linking the database of the Top 40 construction companies to the TED database, we discover that politically connected companies win a higher share of the single bidding public procurement contracts involving national funds than EU funds. The risk reduction effect of EU funds in single bidding contracts diminishes with the value of the contract. While the data does not conclusively uncover specific types of favouritism, it points to increased corruption risks, especially involving large-scale construction projects in infrastructure and energy.

INTRODUCTION¹

Bulgaria has been repeatedly defined as a high corruption risk country, in which the resources and opportunities for corruption are high, while deterrents and constraints remain low (Mungiu-Pippidi, et al. 2011, pp. 40-41). Its governance regime has been described as moving gradually from patrimonialism to open access order, with most of its features still in the competitive particularism stage (Mungiu-Pippidi, et al. 2014, p. 25). Hence, if the normative ideal of good governance is equated with open access order,² Bulgaria is still far from achieving good governance. Widespread bribery persists in the country (CSD, 2014), and the allocation of public resources remains particularistic and unpredictable. EU membership, however, brought some transparency and accountability with it. As one of the main channels for transferring public resources to the private sector, studying the functioning of the public procurement market in Bulgaria and focusing on construction can provide important insights into the opportunities and constraints to corruption or favouritism in Bulgaria. We start by presenting the material stake or the available resources for distribution through public procurement. Then test what is the character of their allocation based on the single bidding red flag for corruption risks, using TED data for Bulgaria and a database of the Top 40 construction companies, specifically constructed for this paper. We conclude with some recommendations for public policy in Bulgaria and the EU.

¹ This is an updated and revised version of two different earlier papers published as part of the FP7 research project ANTICORRP – the country report on Bulgaria, analyzing corruption risks in construction sector of the country (available online at <http://anticorpp.eu/publications/report-on-bulgaria/>) and the chapter on “The Bulgarian Public Procurement Market: Corruption Risks and Dynamics in the Construction Sector”, published in Mungiu-Pippidi, A. (ed.) 2015. Volume 3: Government Favouritism in Europe, Barbara Budrich Publishers, Berlin, 2015. (available online at <http://anticorpp.eu/publications/volume-3-government-favouritism-in-europe/>). The authors would like to thank Professor Alina Mungiu-Pippidi and Dr. Ramin Dadasov, Hertie School of Governance, Dr. Mihaly Fazekas, University of Cambridge, and Mr. Munir Podumljak, Partnership for Social Development for the comments and suggestions offered to earlier versions of the paper.

² For a detailed discussion on how good governance relates to a taxonomy of governance regimes and to corruption and anti-corruption, please see Mungiu-Pippidi, et al. (2011), Contextual Choices in Fighting Corruption: Lessons Learnt, Hertie School of Governance and NORAD, Berlin, 2011.

1. MATERIAL STAKE: THE BULGARIAN PUBLIC PROCUREMENT MARKET IN CONSTRUCTION

1.1. GENERAL PUBLIC PROCUREMENT MARKET

The term “public procurement market” is defined in this paper as the supply of goods, services and construction works³ for the public sector and the utilities, for which the legislation prescribes specific procurement procedures. This definition excludes the supply of goods, services, and works below certain (minimum) threshold values,⁴ which according to Bulgarian law do not require such specific procedures. In this context, the public procurement market includes most of the current and investment consumption of the central and local government bodies, the legal entities they finance and/or manage (“conventional” contracting authorities), as well as the “sectoral” contracting authorities (energy, water supply, etc.).⁵

On average, public procurement made up 9 % of Bulgaria’s gross domestic product (GDP) from 2007 to 2013.⁶ (see Figure 1) While small by EU standards, public procurement grew steadily from €1 billion in the early 2000s to a peak of just above €5 billion in 2009 before dropping to €3 billion in 2010 in the wake of the Eurozone economic crisis. (see Figure 2) Both peak years of public procurement contracting since Bulgaria’s EU accession – 2009 and 2013 coincided with parliamentary elections. In both years, the non-cyclical spike in public procurement came in the months just before the elections, clearly indicating the intent of incumbent governments to win voter support through the allocation of public funds. The rise in public procurement contracts in pre-election months has been documented also before EU accession, before the 2001 and 2005 parliamentary elections (CSD, 2006).

EU funds have been playing an increasingly important role in the public procurement market, providing for roughly a quarter of all public procurement announcements in 2013. This has added pressure on the

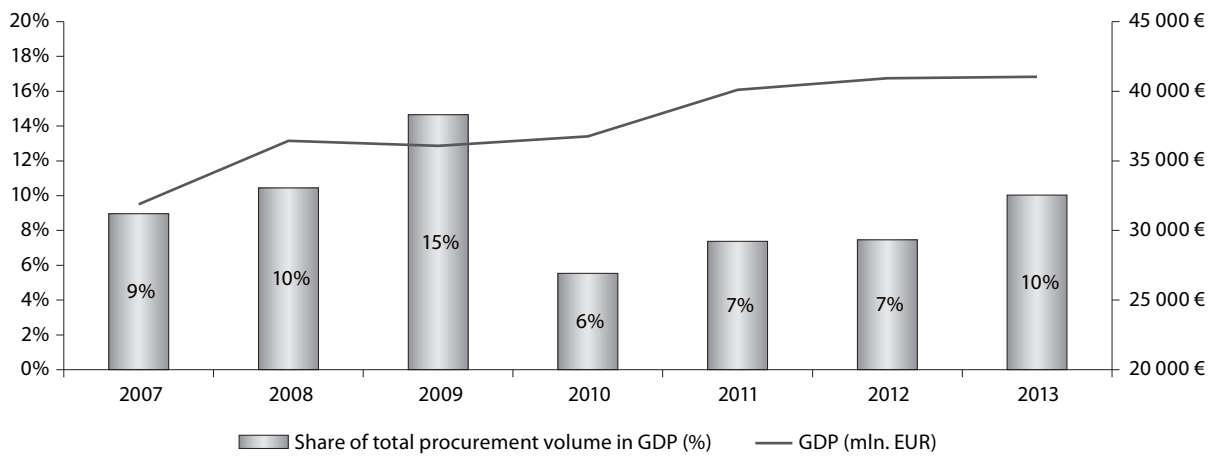
³ There are different terms in the literature describing “construction works”, such as “public works” or just “works”. This paper uses the term “construction works” as this is the terminology used by the Bulgarian Public Procurement Agency. It is assumed that the construction sector has carried out the total value of the contracts classified by the PPA under “construction works”.

⁴ As of January 2015 the minimum thresholds, under which the application of the public procurement procedures prescribed by the Law on Public Procurement is not obligatory are: BGN 264,000 (app. € 142,254) for works and BGN 66,000 (app. € 35,564) for goods and services.

⁵ The division between “conventional” and “sectoral” contracting authorities is used here as provided in the Bulgarian Law on Public Procurement

⁶ The authors have taken all due care to ensure that the provided data is comparable across years. No changes were detected in the reporting system or legislation, which might bias the comparability of the data over time. If not mentioned otherwise all PP data refers to values without VAT.

FIGURE 1. SHARE OF THE TOTAL PUBLIC PROCUREMENT VOLUME TO GDP IN BULGARIA (2007 – 2013)



Source: NPA, NSI, 2014.

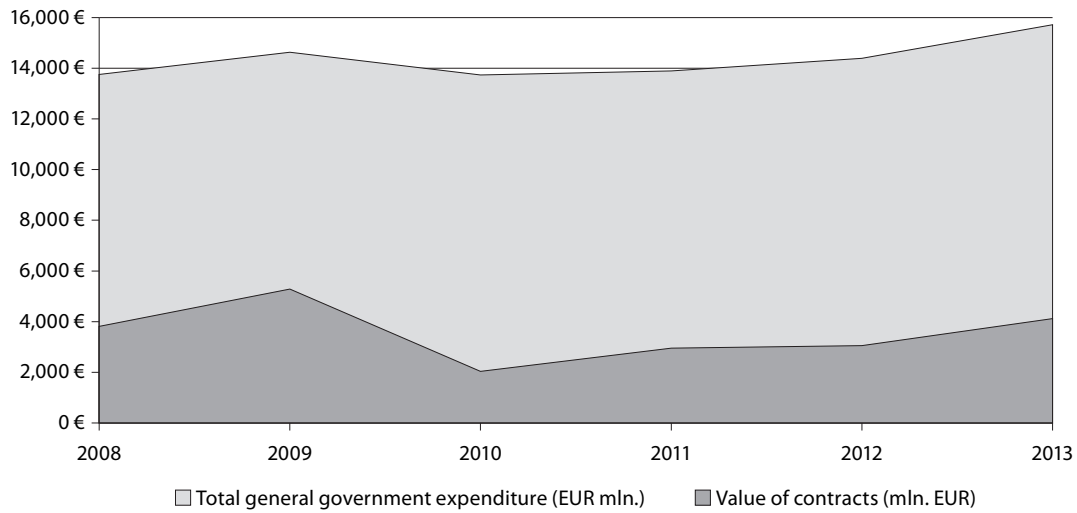
Bulgarian authorities to spend funds at any cost before their eligibility period runs out, leading to spikes in EU funds' financed public procurement in the years 2009 and 2013. EU funds are disbursed at 7-year budget cycles (2007 – 2013) under the so-called “n+2” rule, meaning that money has to be contracted at the latest by the year n (e.g. 2013) and invoiced by the year n+2 (e.g. 2015) or has to be returned to the EU budget. The European Commission's (EC) actions against Bulgaria have pointed out the continuing inability of the country to properly manage EU funds.⁷ In 2008, the EC forfeited €220 million from one national pre-accession PHARE programme, and froze EU funds earmarked for road infrastructure development in 2008 citing irregularities in the management of EU assistance programmes, and the lack of adequate systems of ex-ante and ex-post controls (Vachudova, 2009).

The 2008 measures taken by the EC against Bulgaria were triggered by the uncovered conflicts of interest in the Road Infrastructure Fund, which had awarded tenders to companies controlled by relatives of its executive director at the time. The director was acquitted at first instance in April 2015, with the court ruling that the said contracts had not been signed by the head of the agency, but by its regional directors.⁸ Thus, the Bulgarian government was forced to spend the money designated for the years 2007 and 2008 in 2009 (an election year) (CSD, 2009). A similar or even higher peak of EU funds-related spending is expected to occur in 2014 – 2015, as funds have been frozen and unfrozen again in 2013 – 2014, and 2015 is the last year, for which invoicing is allowed for the EU's 2007 – 2013 budget period.

⁷ Report from The Commission to the European Parliament and the Council On the Management of EU-funds in Bulgaria Brussels, 23.7.2008 COM(2008) 496 final.

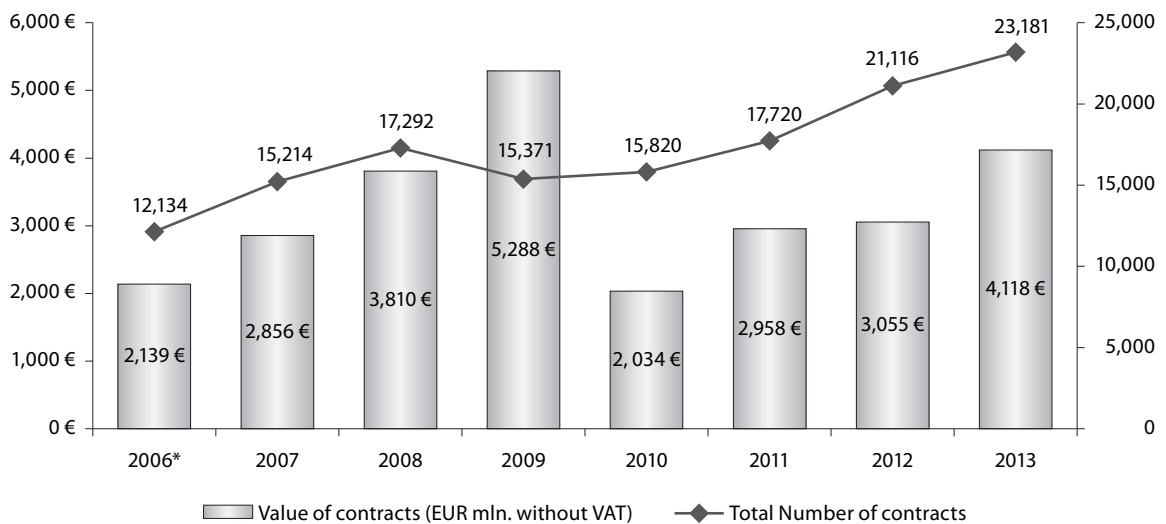
⁸ Bulgarian National Television. (30 April 2015) Former Road Infrastructure Chief Acquitted in 'Big Brother and Brother' Case. [WWW]. Available at: http://bnt.bg/en_news/former-road-infrastructure-chief-acquitted-in-big-brother-and-brother-case [Accessed July 1, 2015].

FIGURE 2. SHARE OF THE TOTAL VALUE OF PUBLIC PROCUREMENT (PP) CONTRACTS IN TOTAL GENERAL GOVERNMENTAL EXPENDITURES (2008 – 2013)



Source: Eurostat, PPA, 2014.

FIGURE 3. NUMBER AND VALUE OF PUBLIC PROCUREMENT CONTRACTS IN BULGARIA (2007 – 2013)

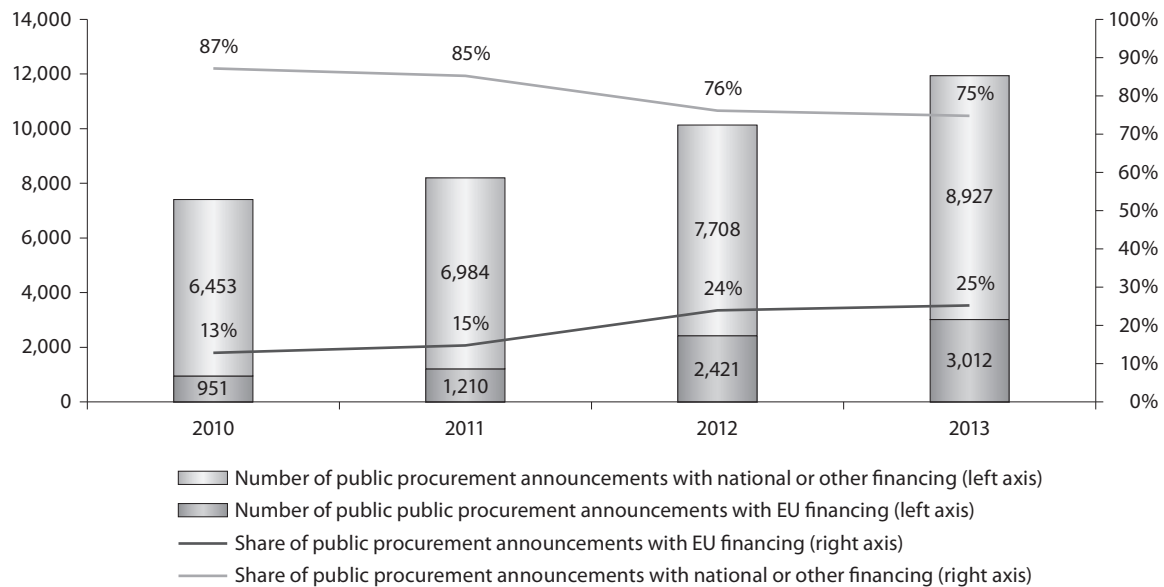


Source: PPA, 2014.

The case of 2009 is of particular interest as the increase in volume has come on the backdrop of stagnant (and even declining from 2008 to 2009) numbers of public procurement contracts, indicating a rise in the value of individual public procurement contracts (Figure 3). Since then, the number of public procurement contracts has increased by some 50 %, reaching 23,181 in 2013, which might signify some opening

up of the market and stricter adherence to public procurement rules with the increase of the share of EU funds-related public procurement spending. EU funds have been playing an increasingly important role in the public procurement market, providing for roughly a quarter of all public procurement announcements 10 in 2013 (Figure 4).

FIGURE 4. NUMBER OF PUBLIC PROCUREMENT ANNOUNCEMENTS BY SOURCE OF FINANCING: NATIONAL VS. EU (2010 – 2013)



Source: PPA, 2014.

The substantial financial EU assistance to Bulgaria in the 2007 – 2013 period coupled with the increased social pressure on the national budget expenditures due to the economic crisis have made it critical to the Bulgarian government to do its best to spend the available EU funds in their entirety. However, as the first EU budget cycle for Bulgaria drew to an end in 2013, and financial penalties and corrections imposed by the European Commission started to increase, the government resorted to two practices which are likely to have increased corruption risks in this domain: covering withdrawn EU funds because of penalties and/or freezes with funds from the national budget, and over-contracting the available EU funds. (See Table 1) In this manner the government wanted to guarantee that the whole amount of EU funds available to the country would be invoiced by 2015 even if some of the projects had delayed, not approved or altogether scraped by the EC (43rd National Assembly of the Republic of Bulgaria, 2014). This practice grants additional discretionary power to the government and the public administration as they get to decide, which projects (and respectively contracting authorities and contractors) receive national funds to compensate for the loss of EU subsidies, and which not.

The findings of the main control bodies of public procurement in Bulgaria – the Public Procurement Agency (PPA), the National Audit Office (NAO)

TABLE 1. EU STRUCTURAL FUNDS (OVER)CONTRACTING 12 (DECEMBER 2014)

| Operational Programme | Programme budget | | Contracted amount |
|----------------------------|-----------------------|---------------------|-----------------------|
| | EU funding (EUR mln.) | Number of contracts | EU funding (EUR mln.) |
| OP Transport | 1,624 | 116 | 1,628 |
| OP Environment | 1,466 | 524 | 2,322 |
| OP Regional Development | 1,361 | 1,187 | 1,421 |
| OP Competitiveness | 988 | 3,153 | 1,018 |
| OP Technical Assistance | 48 | 120 | 51 |
| OP Human Resources | 1,032 | 5,213 | 1,076 |
| OP Administrative Capacity | 154 | 1,446 | 175 |
| TOTAL | 6,674 | 11,759 | 7,692 |

Source: Information System for Management and Monitoring of EU Structural Instruments in Bulgaria – public module, December 2014.

and the Public Financial Inspection Agency (PFIA) – seem to confirm the existence of high risks of corruption in the procurement process given that the violations of the public procurement laws and procedures, according to PFIA, remain very high: In 2013 out of 2,333 checked contracts 918 were discovered to contain violations. The ex-ante control performed by the PPA on EU financed public procurement also showed a high number of violations. As of 2014 some 30 % of the checked procedures were not fully compliant with the law. Progress reports under the Cooperation and Verification Mechanism (CVM)⁹ (EC COM (2014) 36 final) of the EC underline that the ex-ante checks by the PPA are limited in scope, which raises questions as to their effectiveness. There are also doubts about the effective enforcement of rules and the application of sanctions.

Bulgaria has introduced an electronic database for all public procurement contracts in the country since 2006 to monitor and control the allocation of public funds. Although the register is constantly updated, the PPA refuses to make it public despite the fact that doing so involves only very low transaction costs. This, in turn, hinders the opportunities for better monitoring and policy advice. This decision also casts doubt on the adopted new legislative provisions for transparency from 2014, which establish two new platforms: an “E-Monitoring”¹⁰ platform to collect, archive and ensure online access to awarding committee protocols, contracts and annexes, framework agreements, subcontracting documents, etc.; and an “E-Audit”¹¹ platform to allow physical persons and institutions to

⁹ The CVM was introduced by the EC for Bulgaria and Romania upon their accession to the EU for monitoring their progress in tackling corruption and organized crime, and on judicial reform to achieve EU justice and home affairs standards.

¹⁰ Art. 126(a) LPP.

¹¹ Art. 126(b) LPP.

present, in a structured way, signals of deviation from the legal procedures established in the Bulgarian Law on Public Procurement (LPP) and in contract implementation (Markov M., Dimova E., Aleksandrov A., 2014).

At the same time the risks of corruption are exacerbated by the frequency and the high number of legislative changes introduced to the LPP citing EU legal approximation as the underlying reason. While the EU has enacted only two major changes in public procurement in the past decade, Bulgarian lawmakers have introduced a total of 27 sets of amendments to the public procurement law since 2005. The 2014 CVM report (EC COM(2014) 36 final) notes that in the area of public procurement, a complex and ever changing legislative framework has made it even more difficult to create a culture of objectivity and rigour. This confirms the observation that while EU accession apparently led to the creation of new legal constraints to corruption, its implementation remains problematic.

1.2. KEY INDICATORS OF THE BULGARIAN CONSTRUCTION SECTOR

The share of the construction sector in the gross value added (GVA) of the Bulgarian economy averaged 7 % in the 2007 – 2013 period. Following the onset of the European economic crisis, its turnover has slumped by more than 30 %, compared to its peak in 2008, reducing the share of the sector in total GVA to 5 % in 2013.¹² This has increased the dependence of construction companies, in particular larger ones, on public procurement contracts. By 2013 the number of active enterprises in the construction sector decreased by a fifth from when compared to its maximum level achieved in 2009. (See Figure 5)

Between 2008 and 2013, the top 100 construction companies¹³ in Bulgaria concentrated on average 31 % of the total turnover of the sector (see Figure 6). Less than 1 % of the construction companies in the country have a combined average turnover of EUR 2.5 billion. The firm level analysis, based on a sample of the Top 40 construction companies (see Section 3.2.2. below), shows that they controlled 15 % of the total turnover of the sector in 2013. While this does not seem like a high concentration rate, it certainly implies that there are not many construction companies in Bulgaria that can handle larger public procurement contracts.

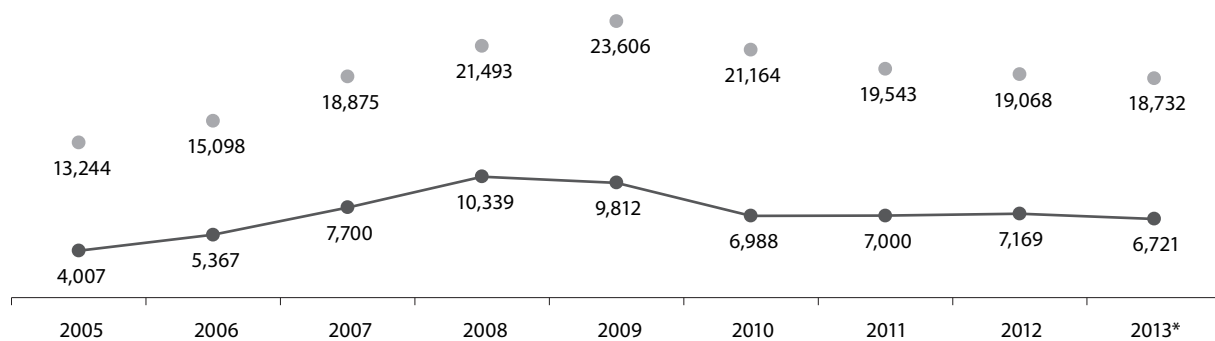
It should also be noted that the sector is highly regulated, with its main sub-industries having their own industrial associations, which lobby openly both for legislative changes and for specific construction projects. For example in 2014 the Bulgarian Construction Chamber and the Bulgarian Branch Chamber “Roads” opposed the decision of the Bulgarian government to build a 15 km tunnel on one of the EU transport corridors

¹² Based on PPA and NSI data for the period 2007 – 2013.

¹³ According to the National Classification of Economic Activities.

in Southwest Bulgaria, while the Bulgarian Association for Geotechnical and Tunnel Construction lobbied in favour of such a solution.¹⁴

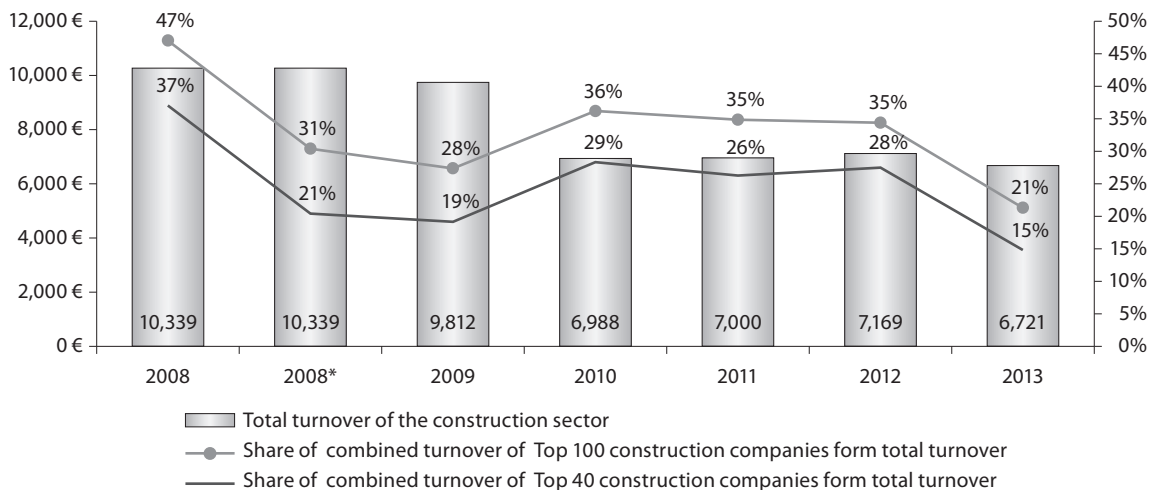
FIGURE 5. TOTAL TURNOVER AND NUMBER OF ENTERPRISES IN THE CONSTRUCTION SECTOR (2005 – 2013)



* the number of enterprises for 2013 is provisional.

Source: Eurostat, 2014.

FIGURE 6. SHARE OF THE TOP 100 AND TOP 40 CONSTRUCTION COMPANIES BY TURNOVER IN THE TOTAL TURNOVER OF THE CONSTRUCTION SECTOR (2008 – 2013)



Note: In 2012 the Bulgarian government repealed the regulation on so called small public procurement (under certain threshold), which led to the inclusion of such contracts in the Public Procurement Registry, which diluted nominally the concentration of the sector.

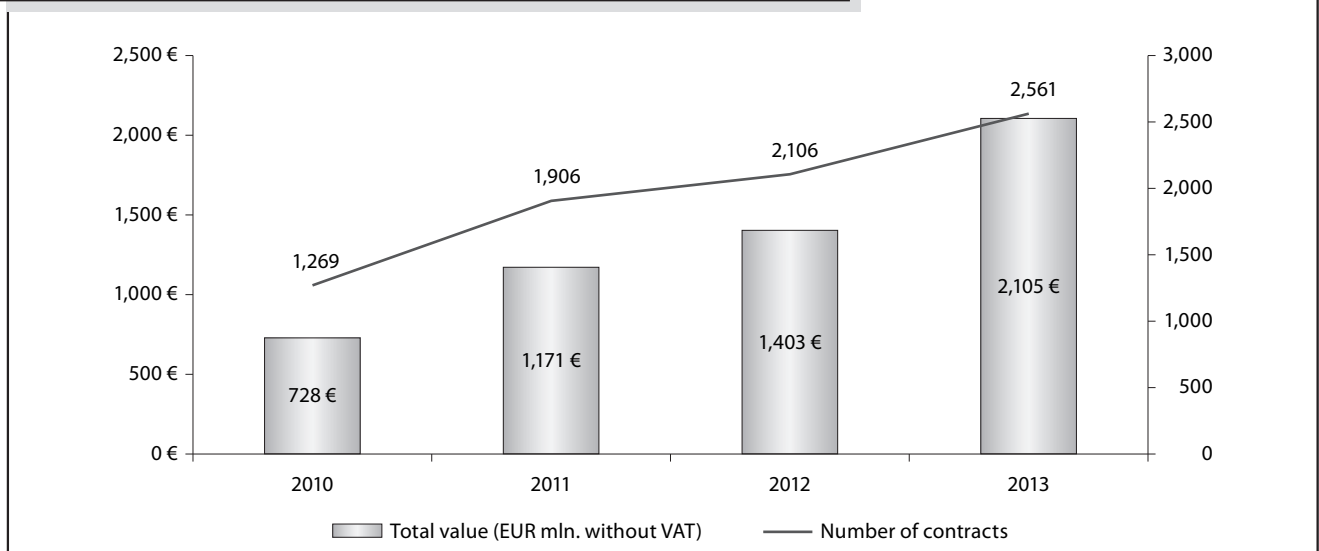
Source: Eurostat, APIS, 2014; CSD calculations.

¹⁴ The Bulgarian Construction Chamber is by far the largest industrial association in the sector. It was created by a special law adopted on the last day before Bulgaria's EU Accession (Law on the Chamber of Construction Companies (Закон за камарата на строителите), promulgated in State Gazette 108/29.12.2006.). As of 2015 it assembles 1689 companies, 16 education organisations, and 7 non-governmental organisations. The chamber has 27 regional representations in the country. The chamber acts as a gatekeeper to the sector as it runs the Central Professional Registry. Among its main activities are: aiding the development of industry standards on health and safety; developing a Code of Professional Ethics; participating in the trilateral cooperation at branch and national level, and signs the collective labour contract; etc.

1.3. PUBLIC PROCUREMENT TRENDS IN THE BULGARIAN CONSTRUCTION SECTOR

Both the number and value of public procurement contracts for construction works registered a significant increase between 2010 and 2013. Their numbers rose from 1,269 in 2010 to 2,561 in 2013. The respective increase in the total value was from €728 million to €2,105 million. The very low volume of public procurement of construction works in 2010 is attributable to the aftermath of the economic recession in Bulgaria and the subsequent tightening of fiscal policy. In 2011 and 2012 there has been a significant rise in the public procurement contracts in the construction sector. This increase is related to the rush for absorption of EU funds – for which 2013 was the last year before decommissioning them – and to higher pre-election spending and a fiscal loosening by the newly elected majority, following the parliamentary elections of May 2013. (See Figure 7) The data analysis shows that the increase in the number of contracts, on the one hand, and in their value on the other, is asymmetrical, signifying an increase in the value of individual contracts. In the four-year period construction works public procurement contracts increased their total value by close to 300 %, while the number of contracts went up by 200 % from 1,269 in 2010 to 2,561 in 2013.

FIGURE 7. NUMBER AND VALUE OF PUBLIC PROCUREMENT CONTRACTS FOR CONSTRUCTION WORKS (2010 – 2013)

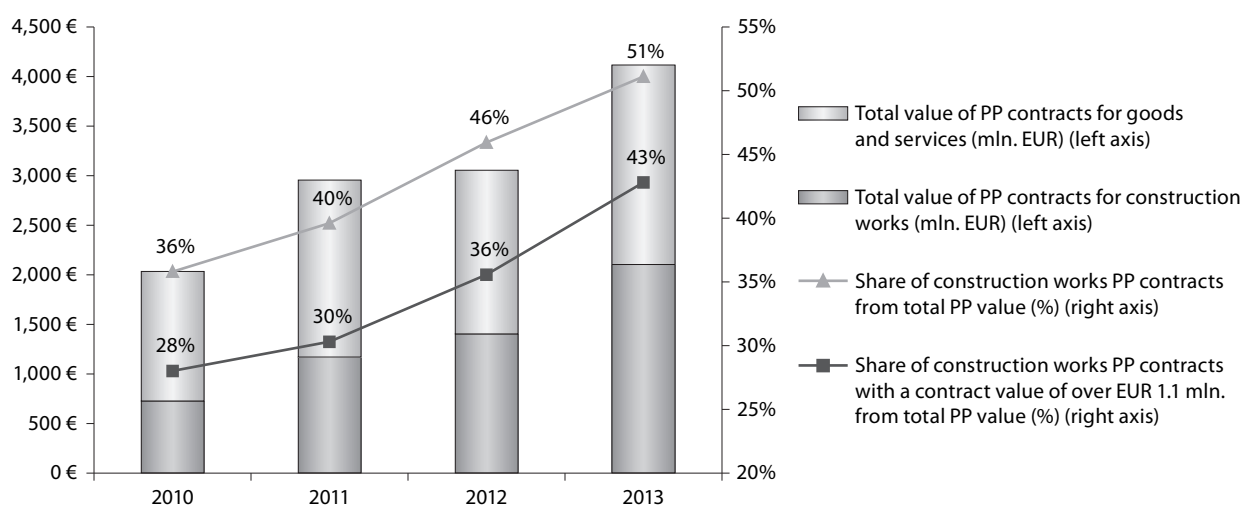


Source: PPA, 2014; CSD calculations.

In the 2010 – 2013 period, there was a clear trend of concentration of public procurement contracts in construction works vis-à-vis the supply of goods and services, and of larger value construction contracts. While in terms of numbers the share of the construction works contracts has remained relatively stable, their value as a share of total public procurement contracts has increased steadily to over 50 % in 2013. (See

Figure 8) This rising concentration of public procurement in construction works has been attributed entirely to the rise of large-scale construction contracts:¹⁵ construction works with values above €1.1 million have risen to 43 % of the total public procurement value in Bulgaria. The total value of all large-scale contracts for construction works increased to EUR 1,763 million in 2013, with the average value of a single contract exceeding EUR 6 million.

FIGURE 8. SHARE OF TOTAL PUBLIC PROCUREMENT CONTRACTS FOR CONSTRUCTION WORKS AND PUBLIC PROCUREMENT CONTRACTS FOR CONSTRUCTION WORKS OVER EUR 1.1 M. FROM TOTAL PUBLIC PROCUREMENT VALUE (2010 – 2013)



Source: PPA, 2014; CSD calculations.

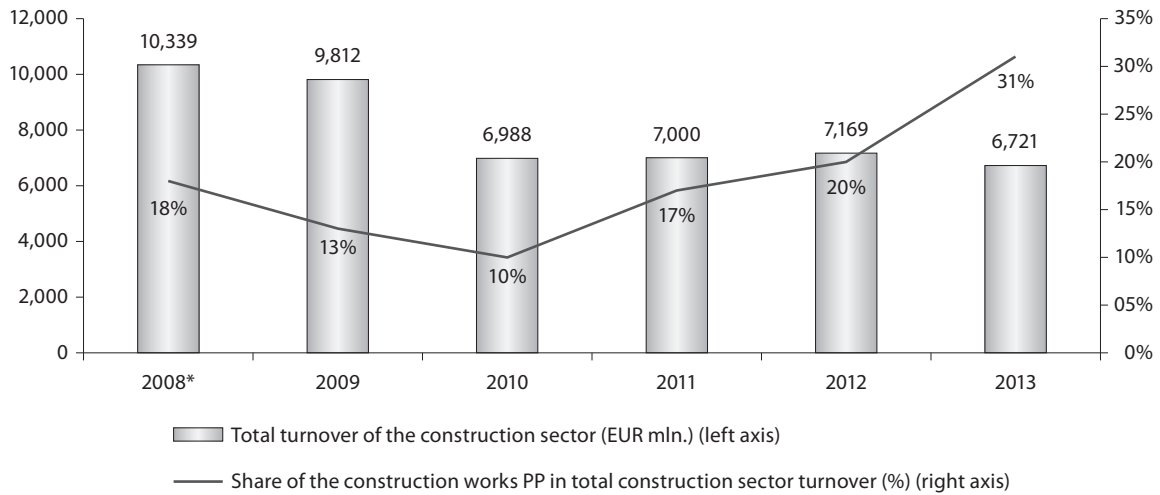
During this same period, the concentration of public procurement on the supply side coincided with an increase in the importance of public procurement for the construction sector or a concentration on the demand side too. In 2013 the total public procurement value for construction works reached 31 % of the total construction sector turnover, transforming the public administration into the largest single customer of the industry (see Figure 9). The leverage power of the public administration over the resources available to construction companies increased substantially, which in the absence of higher deterrence to corruption, implied rising risks of corruption and/or favouritism. There have been numerous media reports showing a concentration of public procurement among larger companies,¹⁶ and different practices the public administration uses to

¹⁵ The PPA uses the following thresholds for classifying the size of public procurement contracts in goods, services, and construction works in Bulgaria: EUR 0 – EUR 102,258; EUR 102,258 – EUR 1.1 mln.; above EUR 1.1 mln. The latter are considered large contracts and undergo a specific pre-screening by the PPA.

¹⁶ See for example Koycheva, Maria. Eight companies have split among themselves public procurement construction contracts for 1.4 billion leva (Осем фирми са си поделили поръчки за 1,4 млрд лв. в строителството). *Sega daily online edition*. Available from: http://www.segabg.com/article.php?id=663140&utm_source=flip.bg [Accessed on 20 March 2015]. The article quotes a Bulgarian MP noting that in 2013, eight companies won public procurement contracts worth 1.35 billion Bulgarian lev from a total of 2 billion lev available for the construction sector.

channel specific public procurement contracts to specific companies besides wide interest among many competitors.¹⁷

FIGURE 9. SHARE OF CONSTRUCTION WORKS PUBLIC PROCUREMENT IN TOTAL CONSTRUCTION SECTOR TURNOVER (2008 – 2013)



Source: PPA, 2014; CSD calculations.

The concentration in the public procurement of construction works in recent years seems to contradict a trend of opening up of the public procurement market in terms of number of contractors and awarding entities. Although more in-depth analysis is needed to validate this statement, the macro level data shows that the number of awarding entities doubled in the period 2009 – 2013, while the number of contractors increased by 25 to 30 % (Table 2), which is normally associated with a rising and vibrant market and competition. While this has improved the value for money proposition in competitive markets, it has also made it more difficult for compliance and control authorities to check for irregularities (CSD, 2014). One should also take into account legislative changes, which have increased the requirements for open tendering among private recipients of EU funds, without any direct effect on the transparency and accountability of public sector contracting.

Municipalities, predominantly though ESIF financing, have become some of the biggest contracting authorities for construction works. Naturally, among them, Sofia municipality, also acting through Metropolitan EAD, which is the public company in charge of the Sofia metro construction, redistributes the largest number and value of public procurement contracts in the construction sector. Highly ranked in terms of number and value of awarded contracts are also public entities, specializing in construction, such as the National Railway Infrastructure Company and the Road

¹⁷ See for example Georgiev, Ognian. (20 February 2015). Theory and Practice of Manipulation (Теория и практика на манипуляцията). Capital Weekly online edition. Available from: http://www.capital.bg/politika_i_ikonomika/bulgaria/2015/02/20/2476819_teoriia_i_praktika_na_manipulaciata/ [Accessed 20 March 2015].

TABLE 2. PUBLIC PROCUREMENT CONTRACTORS, ANNOUNCEMENTS AND CONTRACTS IN BULGARIA (2010 – 2013)

| | 2010 | 2011 | 2012 | 2013 |
|--|--------|--------|--------|--------|
| Number of awarding entities | 2,585 | 3,217 | 4,662 | 5,302 |
| Number of contractors | 14,700 | 16,347 | 18,257 | 20,490 |
| Total number of public procurement announcements | 7,404 | 8,194 | 10,129 | 11,939 |
| From this sum: above the EU threshold | 1,599 | 2,022 | 2,570 | 3,653 |
| From this sum: with EU funding | 951 | 1,210 | 2,421 | 3,012 |
| Public procurement announcements in construction works | 1,056 | 1,177 | 1,552 | 1,791 |
| Public procurement announcements in supplies | 3,463 | 4,025 | 4,679 | 5,162 |
| Public procurement announcements in services | 2,877 | 2,989 | 3,888 | 4,986 |
| Number of contracts | 15,755 | 17,579 | 20,813 | 22,779 |

Source: PPA, 2014.

Infrastructure Agency (RIA). The dependency on EU funding for public procurement in the construction sector is further evidenced by the fact that the above mentioned four public entities alone are the largest ESIF beneficiaries with a total of 152 projects amounting to EUR 3.7 billion.¹⁸ The distribution of ESIF projects among public bodies, in particular municipalities, to further contract them out to the private sector has created risks for favouritism – picking up only contracting authorities, which fall in line with the political majority of the day.

¹⁸ The data is for all ESIF programmes in Bulgaria, as of 14 December 2014. More information is available from: <http://umispublic.government.bg/> [Accessed 14 December 2014].

2. DETECTING CORRUPTION RISKS IN PUBLIC PROCUREMENT IN CONSTRUCTION

So far the analyses of corruption risks in public procurement in Bulgaria have been primarily based on two traditional economic models: (a) the principal-agent model; and (b) the classical individual behavioural model, using case studies. These traditional models regard corruption as an individual trait, and as a deviation from the norm, which is typical for well-established western democracies. The classical models assume difference between the procurer, the winning company, and the controlling/law enforcement system. They are less helpful in guiding anti-corruption reform policies in captured states and societies, in which corruption is still so widely spread that individuals believe it is the norm, which is the case in most new EU member-states, (Mungiu-Pippidi, 2011). Hence, governance-based models seem more appropriate for detecting corruption risks in Bulgaria as they view this phenomenon as stemming from a set of institutional characteristics, which either provide resources/opportunities for corruption or deterrents/constraints to control it (Mungiu-Pippidi, 2013). A paramount characteristic is the political embeddedness of certain firms, which are endogenous to the setting and implementation of the rules of the game, including the full procurement life cycle (from needs assessment and feasibility studies, to the drafting of ToRs, and to subsequent control). This is primarily due to the dysfunctional control, judicial and political systems, which do not prevent, disclose and prosecute shadowed conflict of interests. Studies suggest that the odds for a (politically) networked firm to influence laws are five times higher than a firm, which is not, and similarly wins more public contracts than the not connected (Yalamov, 2012). Grødeland (2006, 2007) reaches similar conclusions based on content analysis of in-depth interviews of elite groups in Bulgaria, Romania, Slovenia and the Czech Republic.

With its EU membership Bulgaria has shown its willingness to embark on a course towards open access order (or a good governance model), which EU funds and peer pressure from other EU members are supposed to help bring along faster. However, the majority of international and national assessments concur that Bulgaria's distribution of resources remains particularistic, with citizens perceiving corruption as the norm, which has impacted the very mechanisms meant to curtail it, such as the EU funds (Stoyanov, Stefanov, and Velcheva, 2014).

We use two firm-level data-bases to map the frequency of occurrence of the most important red flag capturing the probability of government favouritism occurring in public procurement (particularistic distribution of resources) – single bidding (Fazekas, Toth, & King, 2013). We identify the companies in the two databases, which are likely to be politically connected through media content analysis and expert interviews. Then, we test how politically connected companies fair in single bidding

procedures vis-à-vis non-connected ones in EU and nationally financed public procurement to detect corruption risks.

2.1. DATA AND METHODOLOGICAL NOTE

The firm-level analysis presented in this paper is based on two datasets – first, a database with 4928 procurement contracts between 2009 and 2014 from the TED structured dataset (TED, 2008 – 2014) and second, a manually constructed database using a sample of the Top 40 construction companies, ranked according to their total turnover for the period of 2008 – 2013.¹⁹

The TED based dataset includes records with primary or additional CPV codes 44, 45 and 71,²⁰ and was further cleaned to allow higher reliability and validity of data for subsequent hypothesis testing. Identification data for contracting authority (CAE) and winning entity include name, national identification number, and address. The recoding lead to a reduction of the 475 different contracting authorities, available in the original database, down to 300 organizationally independent contracting authorities, as for example some organisations were present with more than one branch. Similarly, in terms of winning entities in the original database there were 3573 unique names, which were reduced to 2321 unique entities.²¹

The Top 40 database includes information on the number of public procurement contracts for construction works, awarded to the selected companies, based on CPV codes 44, 45 and 71. The data was manually extracted from the Public Procurement Registry based on the companies' national identification number. For a more comprehensive analysis firm level data encompasses the construction procurement contracts for public works awarded to third companies (hereafter referred to as linked companies), in which the selected sample of Top 40 firms have equity ownership. The value of each public procurement contract, awarded to a linked company is recalculated depending on the percentage of ownership of the respective primary company included in the sample. Other (softer) types of dependency between Top 40 construction companies and third parties (e.g. participation in the board of directors or similar governance structures) are not considered.

The variable for political connectedness was constructed on the basis of screening of the Top 7 and Top 40 companies, and the top 40

¹⁹ Despite repeated requests under the Access to Public Information Act and the sending of several official letters for obtaining specific indicators for all public procurement contracts in the construction sector, the Bulgarian Public Procurement Agency (PPA) has not responded, and has effectively refused to provide the requested information.

²⁰ These three CPV codes relate most closely to construction. They have been used also in other ANTICORRP analyses, see Fazekas, M., Toth, 2014.

²¹ We consider the 2321 entries as relatively independent centers. But some 41 % of them were consortiums of more than one company, which sometimes have different capital control relationships to the individual winners elsewhere in the database. The next step and case for further research would be to decompose the winners to ultimate beneficial owners and their decision making power.

most-frequent contractors in the TED data- base by a) media content analysis and b) a panel of experts in corruption, state capture and construction. We consider a company to be connected not just when there were media articles on this, but when there were solid family, corporate or party ties between the owners of the company and mayors, ministers or the respective municipal council chairs according to long-term media reports originating from competing media outlets, and/or when more than two experts agreed on that. The process resulted in a total of 35 companies (including linked through capital control) that are direct contractors in public procurement in the TED database and 126 consortiums between some of those 35 companies and others.²² The variable is named POLITIC coded with 1 if connected and 0 if not (see section 3.2.1. below). The way the variable is constructed implies that it measures only the strongest connectivity, without accounting for smaller, locally or more loosely connected companies.

2.2. ECONOMIC DEPENDENCIES AND CORRUPTION RISKS IN THE BULGARIAN CONSTRUCTION SECTOR: FIRM LEVEL ANALYSIS OF PUBLIC PROCUREMENT

2.2.1. Single bidding as an indicator of corruption risks

Public procurement with single bidding is a serious red-flag for corruption due to at least two factors: a) entry barriers – contracting authorities may have designed such tender specifications especially for a specific company or a combination of companies (which is more often the case) – and b) political embeddedness, i.e. tacit knowledge and relationships that allow politically connected firms to bid in tenders with difficult or impossible requirements that will later be amended or ignored through low implementation controls. Large sized contracts usually facilitate single bidding, as larger bids might have explicitly high thresholds that can be met only by a reduced number of companies, usually the biggest ones. Thus, once you are “in” the market of public procurement, you have privileges against the others. We will look for the effect on single bidding of European funding (contracts with EU funding) and of political embeddedness.

We tested altogether eleven models of competitive versus single bidding using the TED database: one on the whole database, four per quartile of size of contracts, one only with national contracts (all reported in Table 3) and four more to compare the odds for single bidding over time (2009 – 2011 and 2012 – 2014) and by funding source (all contracts and only national), and one to account for the effect of the contract size directly. Single-bidding in construction gradually decreased over time from 27 % in 2009 to 17 % in 2014.

²² The list could be obtained by the authors for academic purposes only.

In the main model (Model 0) our two independent variables, EU funding and political connections (which are not correlated to one another) show a statistically significant impact ($p=0.000$) on our dependent variable, i.e. competitive bidding (coded 1 for competitive bids and 0 for single bidding). The positive coefficient for EU funding means that this variable fosters competition, while the negative coefficient for political connection means that its existence reduces competition. If only nationally funded contracts are considered, the political connectedness increases the odds of single bidding (Model 5).

Models 1-4 divide the contracts included in the database into quartiles according to their size and show that although the size of the contract (especially if in the top quartile) contributes to single bidding, and is statistically significant ($p=0.006$), the correlation, albeit weak, ($r=0.043$) between the number of offers provided and the size of contracts and the existence of EU funding counteracts this relationship. The average public procurement contract with EU funding is 3.6 times bigger than the average nationally funded contract. The positive impact of EU funding could be seen in Model 1, where the odds for competition are highest among all models and even political connections are not statistically linked to single bidding. This is most probably possible because of the close EU monitoring of larger EU projects. As the size of the projects goes down, the monitoring is weaker and political influence increases (in Model 4 it is the only statistically significant variable).

TABLE 3. BINARY LOGISTICAL MODELS EXPLAINING SINGLE BIDDING

| Dependent variable: Single bidding | | | | | | | | | | | | |
|------------------------------------|--------------------------|---------|-------------------------|---------|----------------------------|---------|---------------------------|---------|----------------------------|---------|-------------------|---------|
| | Model 0 All contracts | | Model 1 Top quartile | | Model 2 Second quartile | | Model 3 Third quartile | | Model 4 Lowest quartile | | National funding | |
| Independent variables | B sig | EXP (B) | B sig | EXP (B) | B Sig | EXP (B) | B sig | EXP (B) | B sig | EXP (B) | B sig | EXP (B) |
| EU funding | 0.746 (0.000) | 2.108 | 1.317 (0.000) | 3.732 | 0.607 (0.002) | 1.835 | 0.681 (0.004) | 1.975 | -0.160 (0.496) | 0.852 | | |
| Political connection | -0.80 (0.000) | 0.449 | 0.250 (0.245) | 1.284 | -0.907 (0.000) | 0.404 | -1.919 (0.000) | 0.147 | -1.493 (0.000) | 0.225 | -1.001 (0.000) | 0.368 |
| Constant | 1.544 (0.000) | 4.681 | 0.807 (0.000) | 2.241 | 1.731 (0.000) | 5.647 | 1.828 (0.000) | 6.223 | 1.863 (0.000) | 6.441 | 1.577 (0.000) | 4.841 |
| Observations | 4876 | | 1006 | | 1006 | | 1010 | | 1013 | | 3345 | |
| Pseudo R ² | | | | | | | | | | | | |
| Cox and Snell | 0.024 | | 0.063 | | 0.024 | | 0.064 | | 0.030 | | 0.020 | |
| Nagelkerke | 0.041 | | 0.100 | | 0.045 | | 0.112 | | 0.052 | | 0.032 | |

Notes: Unstandardized and exponential coefficients provided, standard error in parenthesis. *** $p<0.01$, ** $p<0.05$, * $p<0.10$. The observations in models 1 to 4 do not sum up to total observations in model 0 due to missing information on size of contracts in some cases.

Source: Authors' calculations based on TED, 2015 extraction.

In the 2012 – 2014 model of competitive bidding the contribution of EU funds to competition measured by the exponential coefficient increased by 55 % from 1.574 in the 2009 – 2011 model to 2.44. Simultaneously, the role of political connectedness decreased by 31 %. This seems to be entirely due to the higher control over European funds management procedures (including limiting the practice of eliminating competition through administrative tricks leading to single bid opening), which share has increased in overall public procurement. If we consider only the nationally funded projects, then the single bidding situation with political connectedness deteriorated by 32 % in the last three years compared to the first period, signifying increasing corruption risks.

Competition in bidding can be analysed from two more perspectives – one is that of companies, which engage in single bidding, and the second is that of contracting authorities, which procure through single bids. Slightly above a fifth of all winning entities have been engaged at least once in a single bidding tender. Out of them a privileged share of 59 % have been winning only single-bidding tenders, and 76 % have won more than half of their bids as single-bidders. Single bidders are domestic firms or consortiums dominated by domestic firms (with the notable exception in the field of energy where foreign companies dominate); they are linked to one contracting authority – 66 % of single bidders work with only one CAE; and on average they get 85 % from their total procurement turnover from a single CAE.

Common sense has it that corruption risks increase with lower competition or with lower diversification of procurement contracts to different contractors. While, there might be highly specialized tenders, which legitimately call for limited competition, it is unlikely that contracting authorities will always run such specialised construction procurement, in particular as the market deepens and CAEs experience grows. Hence, we built the Herfindahl-Hirsch index of concentration for CAEs based on relative shares of contractors. And there is a statistically higher average concentration for CAEs weighted through the contracts for single-bidding (index=0.32) compared to two or more bids (index=0.24), with level of significance $p=0.000$. Pearson correlation between the number of offers per contract and the associated concentration of CAE is low ($r=-0.134$), but significant ($p=0.000$), and suggests, as expected, that the higher the competition (at the stage of offers), the lower the concentration (at the stage of implementation). Other things being equal lower concentration should mean lower prices. This result suggests that reducing single bidding is a valuable policy option, which could lead to competition and public funds savings. The TED database does not contain information on how many bidders were found non-eligible due to the bidding requirements, hence competitive procurement bids (seen at the time of submission of offers) might turn out to be single bids (at the end) due to administrative issues and subject to discretion of the procurement committee. Although policy-makers could not artificially create more competition they are advised to limit administrative discretionary power to reject bidders the right to propose offers.

At the same time, correlation analysis on the side of contractors suggests that the higher the frequency of single bidding, the higher the number

of awards per company ($r=0.998$, $p=0.000$, $R^2=0.996$). This implies very high efficiency of single-bidders. Many CAEs are highly dependent on one contractor – 28 % of all CAEs had a single procurement partner in construction during 2009 – 2014, and 70 % had a single contractor responsible for more than 50 % of the spending on construction by the respective CAE. Such CAEs would be considered as “captured” (Doroftei & Dimulescu, 2015). We tested this model for captured agencies, using two measures of capture: first is a dichotomous divide between those contracting entities, which have a single contractor that received more than 50 % of all procurement funds (“captured”) and all others (“uncaptured”); and second, a continuous measure of the concentration index for CAE. Table 4 shows the two models using the different capture measurements. The first uses binary logistic regression with dependent variable being the dichotomous variable used by Doroftei and Dimulescu (2015) and the second using linear regression. The data suggests that political connectedness is not significant and does not explain the “capturing” of the agency, while it does contribute to the concentration index. It seems that the rationale why this is so could lie in the specifics of the CAEs and suggests that the threshold of 50 % for one company is too broad (70 % of contractors labelled as captured) but also because capturing in Bulgaria often follows a different (more coalitional) pattern compared to Romania. We tested if specialised winners (measured through the concentration index based on shares of contracts with different contracting authorities) would tend to work with captured contracting authorities. The test was negative. This also confirms the coalitional capture model where politically connected firms would join forces with each other and sometimes with non-connected firms to obtain procurement contracts from highly concentrated contracting authorities (41 % of all contracts are with consortiums).

TABLE 4. ANALYSIS OF DIVERSIFICATION OF CAE PARTNERS IN PROCUREMENT

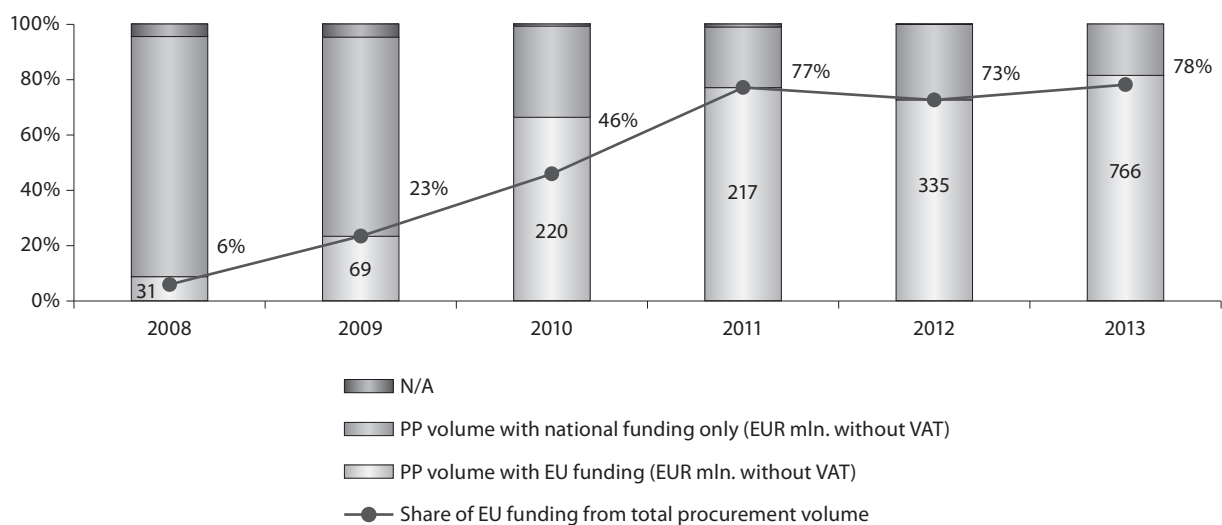
| Dependent variable | Agency capture (binary logistic) | | Concentration of CAE (linear regression) | | |
|--|----------------------------------|---------|---|-----------|--------|
| | B sig | EXP (B) | B sig | STAND (B) | T |
| Independent variables | | | | | |
| Single bidding | -0.586 (0.000) | 0.556 | -0.078 (0.000) | -0.114 | -7.961 |
| Political connection | 0.185 (0.065) | 1.203 | 0.036 (0.002) | 0.045 | 3.154 |
| Concentration of winner | -0.140 (0.167) | 0.869 | 0.13 (0.243) | 0.17 | 1.168 |
| Constant | 0.056 (0.753) | 1.058 | 0.383 (0.000) | 2.241 | 18.331 |
| Pseudo R ² Cox and Snell Nagelkerke | 0.011 0.017 | | R = 0.129 R ² = 0.17 Adjusted R ² = 0.16 ANOVA F = 27.436 | | |

Source: Authors' calculations based on TED, 2015 extraction.

2.2.2. The Top 40 construction companies: analysis of performance and corruption risks

Concentration of public procurement is also visible at below sector levels. The top 40 procurement winners from TED database account for 62 % of the total procurement volume in construction. Four companies account for 23 % of all TED records and the list of top 40 companies compiled by the authors controlled 23 % of the total value of the public procurement market in Bulgaria, which was more than double their share compared to 2008, the last year before the European economic crisis. After the crisis began, EU funding replaced national funding in large-scale public procurement of construction works (see Figure 10), which, according to the single bidding analysis of the TED database presented above, would have been expected to reduce the risks of corruption. However, other things being equal, with the rise of the EU funding share in their turnover, one can expect incumbent companies to become more accustomed to the rules governing EU funding and gaining the confidence to try and find ways of capturing EU funds in similar ways as they did with the national ones.

FIGURE 10. WEIGHT OF THE EU FUNDING IN THE PUBLIC PROCUREMENT MARKET VALUE OF THE TOP 40 CONSTRUCTION COMPANIES*



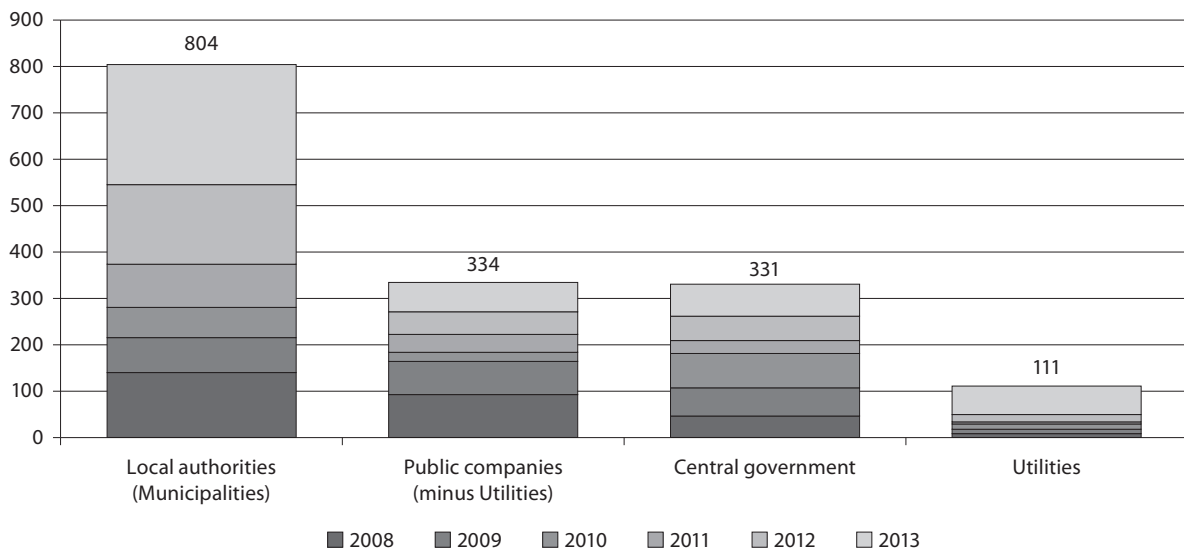
* excluding duplicates, i.e. large scale public procurement contracts, in which two companies from the selected sample took part.

Source: PPA, CSD calculations.

There are also other emerging governance problems likely to dim the better performance of EU funds in terms of less corruption risks than national funds. In the period of 2011 – 2013 the share of municipalities among the contracting authorities with EU funds increased steadily (see Figure 11). Bearing in mind that most Bulgarian municipalities depend on the central budget for financing their operations, they are unlikely to be able to cover for any financial corrections imposed by the EC or national authorities on their EU projects. There have already been cases

reported in the media that financial corrections on EU funded projects imposed by the EC and/or delays in reimbursement of funds have led to the deterioration of the financial viability, and have even triggered insolvency procedures, of smaller municipalities. This in turn has made them even more dependent on central budget subsidies to keep their functions going.

FIGURE 11. TYPE OF CONTRACTING AUTHORITIES, WHICH HAVE AWARDED PUBLIC PROCUREMENT CONTRACTS TO THE TOP 40 CONSTRUCTION COMPANIES (EUR MLN. WITHOUT VAT)

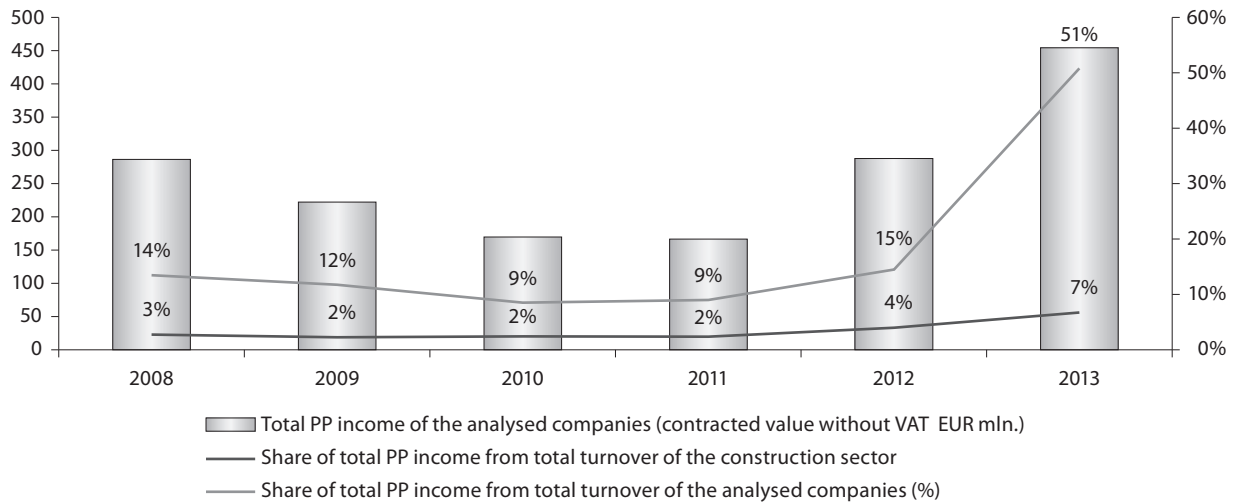


Source: PPA, CSD calculations.

The Top 40 construction companies have grown increasingly dependent on public procurement for their turnover in the period of 2008 – 2013 (see Figure 12). This implies an increase in their motivation to apply pressure on the public administration to secure such contracts. The stagnation in the private construction market has, on the other hand, empowered the public administration to influence the profits of the construction companies, which has in turn provided it with additional leverage to extract corrupt payments. Extracting rents from this concentration can take very different forms. For example, provided the overall inefficiency of administrative control over the implementation of mushrooming infrastructure projects in Bulgaria, companies can more easily lower quality standards, thus both saving money and creating artificial demand for their services in the future, as badly built infrastructure deteriorates at faster rates. The country might in this manner drag itself into an infrastructure trap, maintaining high infrastructure expenditures as a share of GDP, yet continuously lagging behind average European levels in terms of both quality and quantity (CSD, 2009).

The analysis of the data demonstrates that the Top 7 construction companies in terms of awarded public contracts commanded more than

FIGURE 12. SHARE OF PUBLIC PROCUREMENT REVENUE FROM CONSTRUCTION WORKS IN THE TOTAL TURNOVER OF THE TOP 40 CONSTRUCTION COMPANIES (2008 – 2013)



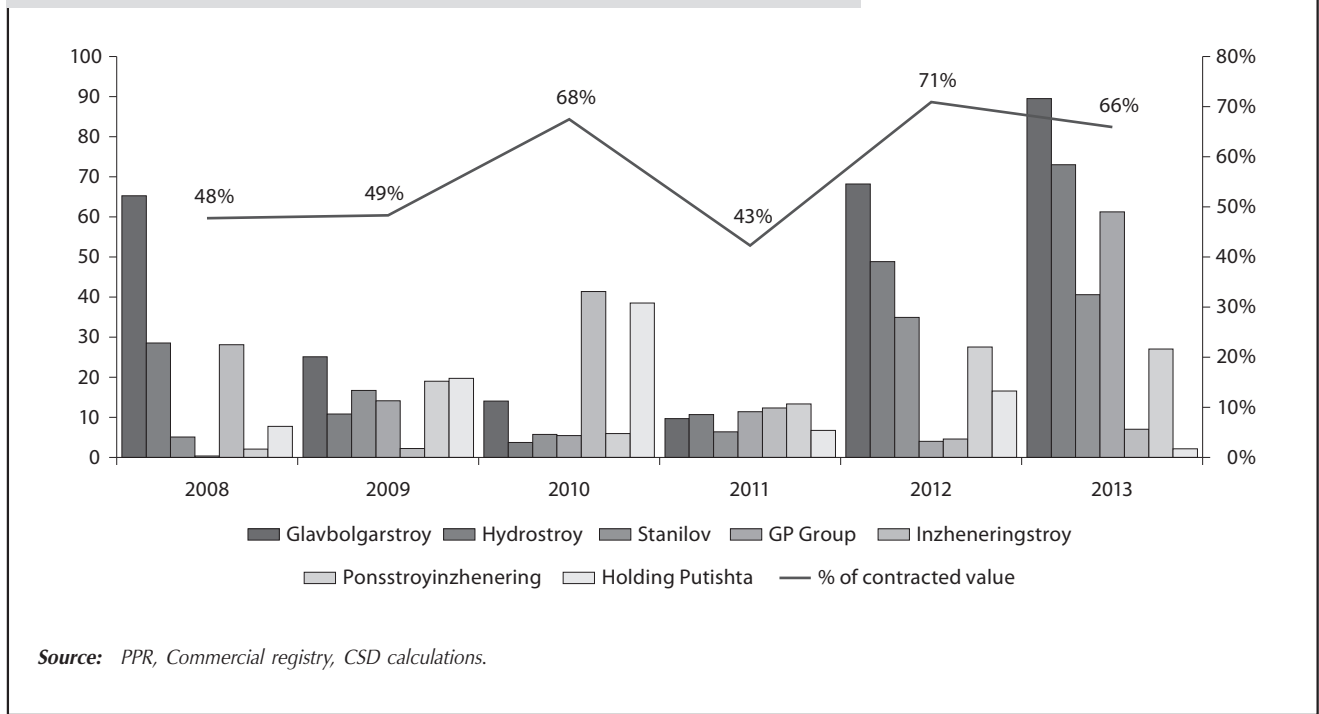
Source: PPR, Commercial registry, CSD calculations.

two-thirds of the public procurement contracts for construction awarded to the Top 40 companies. The top seven companies move significantly above the average Top 40 sample values, both in terms of number of contracts awarded and, especially, with regard to overall contracted value (see Figure 13).

The data from the Top 40 revealed slightly lowered average ratio between forecasted and contracted prices. This coupled with the limited number of restricted tenders and the competitive number of offers (5 on average) indicate higher levels of competition among companies for winning public procurement contracts, which is also associated with higher leverage on the side of the public administration, as its monopsony power rises. Hence, other things being equal, the opportunities for rent seeking have increased on the part of the administration, while they have decreased on the part of the participating companies, potentially producing a better overall outcome for society compared to the situation prior to the economic crisis.

The Top 7 construction companies have seen relatively stable performance vis-à-vis government changes. However, market concentration has been visible even there with three of the Top 7 (Hydrostroy, GP Group, and Stanilov in this order) being the biggest gainers in the 2010 – 2013 political period (right of centre minority government) compared to the 2008 – 2009 period (centre-left coalition government). While the conclusions might deserve reasonable doubt based on various issues with available data, cases of big road and energy infrastructure development projects have demonstrated that political patronage continues to play a major role in winning larger public procurement contracts and contracts funded by the national budget in Bulgaria (CSD, 2012).

FIGURE 13. PUBLIC PROCUREMENT REVENUE FROM CONSTRUCTION WORKS OF THE TOP 7 CONSTRUCTION COMPANIES (EUR MLN. LEFT AXIS) AND THEIR SHARE IN TOP 40 CONSTRUCTION COMPANIES' PUBLIC PROCUREMENT REVENUE (RIGHT AXIS) (2008 – 2013)



Source: PPR, Commercial registry, CSD calculations.

We have further analysed the political connectedness of the Top 7 Bulgarian construction sector companies for the period 2008 – 2013, ranked by total value of public procurement revenue, via content analysis of electronic media articles. While the resulting data set was not sufficient to perform a comprehensive statistical analysis, some noteworthy patterns of political connectedness related to corruption risks have emerged. It seems that the largest infrastructure companies in Bulgaria are likely to try to have good connections to all ruling parties at any given government. This is related to constant “revolving door” practices, with former managers of state-owned construction companies becoming owners after privatisation, then moving into the public sector, only to return to the private sector, depending on the position of their party patrons. One of the more prominent cases in the media is that of Hydrostroy-Varna. During the socialist-led coalition government of 2005 – 2009 the company’s director served as a senior advisor to the Minister of Regional Development. The firm’s director used to be in charge of the road administration during the term of the previous centrist government of 2001 – 2005 and managed one of the biggest public construction companies in the Northeast Bulgaria (Inzhstroyinzheniering) before its privatization in 1999. With the shift of political power in 2009 towards a right of centre government the said director appointed a member of the new ruling party and of the Varna Municipal Council as CEO of the company.

3. NATIONAL PROCUREMENT LEGISLATION AND PRACTICE

3.1. EVOLUTION OF THE BULGARIAN LEGAL FRAMEWORK: LEGISLATIVE EFFORTS FOR INCREASED TRANSPARENCY VERSUS CORRUPTION PRACTICES

The Law on Public Procurement in Bulgaria identifies three major principles underlying the legal framework of public procurement, all related to anti-corruption and elements of the good governance regime: openness and transparency; free and fair competition; equal treatment and non-discrimination. These criteria serve as a point of departure in the evaluation of the corruption risk level, as well as in the identification of the most vulnerable aspects of the legal framework in the public procurement sphere.

After 1999 the legal framework of public procurement in Bulgaria has been mostly influenced by harmonization with the changing European legislation. The Law on Public Procurement (LPP) from 1999 has been replaced by a new one from 2004 following the adoption of two new directives on public procurement in the EU in 2004.²³ Upon EU accession Bulgaria had to repeatedly adjust its legislation to the developing *acquis communautaire*. The public procurement regime of Bulgaria was considerably liberalized. For instance, the scope of application of the LPP was narrowed and the value thresholds, above which the law's prescriptions became obligatory, were almost trebled. The contracts below the thresholds became subject to easier procedural rules set out in the Regulation on Small-Scale Public Procurement (RSPP), which was later abolished in 2012.²⁴ In 2006 Bulgaria embarked on a major overhaul of the main control mechanism over public procurement – the public internal financial control. The then existing unitary centralised body for inspecting public procurement of all state institutions and companies has been decentralised, with a much smaller central authority – the Public Financial Inspections Agency, and many independent internal audit units within the respective state authorities, e.g. municipalities. The reform has considerably weakened oversight in the short-term but has laid the ground for a more modern, risk-based approach to uncovering public procurement irregularities.

On 11 February 2014 the European Parliament and the Council adopted a revision of Directives 2004/17/EC and 2004/18/EC, as well as a

²³ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (often referred to as “the Public Sector Directive”) and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procedures of entities operating in the water, energy, transport and postal services sector (often referred to as “the Public Services Directive”)

²⁴ Regulation on Small-Scale Public Procurement. (Prom. SG. No. 84 of 27 September 2004, repealed SG. No 17 of 28 February 2012). Available from: <http://lex.bg/bg/laws/ldoc/2135492182>

directive on concession contracts.²⁵ The Member States have until April 2016 to transpose the new rules into national law. In 2014 LLP was amended, with several of the changes claiming to address particular corruption risks. A key role in the new legislative texts is attributed to the development of electronic platforms for e-public procurement. For instance, contracting authorities are now required to maintain a full electronic dossier on their websites, including tender documentation, but also records of the meetings of the tender commission, contract and annexes.²⁶

Several of the 2014 legislative amendments more directly affect the public procurement practice in the construction sector. Actions have been undertaken to restrict the weight of the “lowest price” criteria in awarding contracts,²⁷ as selection will be based on indicators for comprehensive assessment, publicly available in the announcement of the public procurement procedure (Boneva, K., 2014). Lowest price criteria is completely prohibited for certain design and construction public procurement.²⁸ Requirement for publication of forecasted value in the public procurement announcements²⁹ is a complementary transparency measure against operators bidding with artificially lowered prices. Changes also affect the format of the evaluation committees, which, in the case of public procurement for construction works equal or above the threshold of EUR 5 million, will include one external expert, randomly selected from a list of pre-approved experts.³⁰ Measures were also taken with regard to the vicious practice of companies suspending contracts with their sub-contractors close to the end of the project, in order to avoid payments. The amendments provide guarantees that the contractual agreements between the parties involved will be kept.

The Bulgarian Construction Chamber has publicly voiced disagreement with the enacted changes, which the chamber will seek to overturn in a new drive for LPP changes in 2015.³¹ The Bulgarian Construction Chamber has sent an official letter to the Deputy Prime Minister in charge of the economy and EU matters, in particular objecting to the law’s requirements not to change sub-contractors and contract clauses in the implementation phase. Both changes to the law have been enacted in 2014 to preclude the use of what has been seen as two major venues for legal corruption (Kaufmann and Vicente, 2005) in public procurement. Before the enactment of the changes, administrations often awarded construction works based on the lowest price offered only but then changed the contract post factum during the implementation phase by signing addendums, and effectively increasing the cost of the works. The

²⁵ Official Journal of the European Union L 94/1. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0023&from=EN> [Accessed 10 December 2014].

²⁶ Chapter II, Art. 22(b) LPP.

²⁷ Art. 37 LPP.

²⁸ Art. 37 (2) LPP.

²⁹ Art. 25(2) and Art. 25(3) LPP.

³⁰ Art. 34(2) and Art. 34(b) LPP.

³¹ The letter is available in electronic format on the web-site of the Bulgarian Construction Chamber here: <http://www.ksb.bg/images/NOVO1/PredlojeniaKSB.pdf>

risks of legal corruption seem to be confirmed by the very high number of legislative changes introduced to the Bulgarian public procurement legislation citing EU legal approximation. Although the EU has enacted only two major changes in public procurement in the past decade, Bulgarian lawmakers have introduced a total of 27 sets of amendments to the public procurement law since 2005.

3.2. CONTROL MECHANISMS

Checks by the PPA, the National Audit Office (NAO) and the Public Financial Inspection Agency (PFIA) are the key instruments in ensuring transparency in public procurement. The violations of the public procurement law and procedures uncovered by the PFIA remain very high, signifying high corruption risks (Table 5). The capacity of the Agency to tackle problematic public procurement increases, but its deterrence and prevention effects are very limited and violations continue to be widespread. One reason is the constant political interference in the work of the agency, in particular in bigger public procurement contracts. In addition, it remains unclear what the role and impact of the decentralised internal financial control bodies is, which have inherited 9/10ths of the personnel of the former centralised stated internal financial control after the 2006 reform (see above). The NAO has sweeping audit authority but lacks investigative powers (Stoyanov A., Stefanov R., Velcheva, B., 2014).

TABLE 5. INSPECTION RESULTS OF THE PUBLIC FINANCIAL INSPECTION AGENCY (2007 – 2013)

| Year | Volume of the inspected public procurement contracts (EUR million) | Number of public procurement contracts with discovered violations | Volume of the public procurement contracts with discovered violations (EUR million) |
|------|--|---|---|
| 2013 | 2,333 | 1,376 | 918 |
| 2012 | 1,045 | 1,235 | 761 |
| 2011 | 746 | 821 | 54 |
| 2010 | 1,126 | 807 | 609 |
| 2009 | 554 | 724 | 337 |
| 2008 | 325 | 706 | 156 |
| 2007 | 527 | 776 | 307 |

Source: PPA Annual Reports; PFIA Annual Reports, 2013.

The ex-ante control performed by the PPA shows similarly high number of violations as in the PFIA case. Some 30 % of the checked procedures

were not fully compliant with the law (Table 6). After the recent LPP amendments, the ex-ante control performed by the PPA encompasses not only ESIF-funded procedures over EUR 1.3 million but also nationally financed public procurement for construction works equal to or above the threshold of EUR 5 million. Additionally, though not required by European legislation, contracting authorities in Bulgaria have been obliged to publish the notifications for opening negotiated procedures without notice, another major corruption risk area. The electronic Public Procurement Registry (PPR) makes these documents available for public scrutiny.³² In parallel, the PPA is required to perform ex-ante control of the documentation in all cases of public procurement involving negotiated procedures without notice.³³

TABLE 6. RESULTS FROM PPA'S EX-ANTE CONTROL OF DOCUMENTS FROM NEGOTIATED PUBLIC PROCUREMENT PROCEDURES WITHOUT NOTICE

| | Number of procurement documents |
|---|---------------------------------|
| The selected procedure is fully compliant with the law | 2,513 |
| The selected procedure could be considered compliant with the law if the Contractor presents sufficient additional evidence | 695 |
| The selected procedure cannot be considered compliant with the law or the evidence is not sufficient | 461 |
| The selected procedure is not compliant with the law | 159 |
| No position available (suspended procedure) | 127 |
| Total | 4,351 |

Source: PPA, 2014.

The new legislative provisions from 2014 establish two distinct platforms with a view of facilitating full access to information necessary for carrying out control activities on the part of the competent authorities. An "E-Monitoring"³⁴ platform will collect, archive and ensure online access to the protocols from all committees related to carrying out of public procurements, the framework agreements, the contracts between the contractors and the service providers, the additional agreements annexed to the contracts, and the subcontracting documents. An "E-Audit"³⁵ platform will allow physical persons and institutions to present in a structured way signals for deviation from the legal procedures of the PPL and the implementation of the contracts (Markov M., Dimova E., Aleksandrov A., 2014).

³² National Strategy for Development of Procurement 2014 – 2020, available from <http://www.strategy.bg/FileHandler.ashx?fileId=4826>

³³ Art. 20(b) LPP.

³⁴ Art. 126(a) LPP.

³⁵ Art. 126(b) LPP.

From a policy perspective, the 2014 Co-operation and Verification Mechanism report of the European Commission (EC COM(2014) 36 final) notes that in the area of public procurement, a complex and ever changing legislative framework has made it even more difficult to create a culture of objectivity and rigour. The e-procurement system still has limited functionalities. Some business voices are losing confidence that the tide of manipulation of tenders can be stemmed. The report also underlines that the ex-ante checks by the Public Procurement Agency are limited in scope, which raises questions as to their effectiveness. More importantly, however, there are doubts about the effective enforcement of rules and the application of sanctions. At the same time companies and industrial associations complain of job losses and bankruptcies (for example in the construction sector) due to rigged public procurement contracts that leave no work for the smaller or law-abiding companies.

To address these challenges, a governmental strategy for the development of the public procurement sector for the 2014 – 2020 period foresees centralized procurement for central and municipal public structures and electronic procurement in various spheres.³⁶ A new framework law on public procurement, expected in the first half of 2015, is also in preparation with the aim of fully reflecting the newly adopted EU requirements.³⁷

³⁶ National Strategy for Development of Procurement 2014 – 2020, available from <http://www.strategy.bg/FileHandler.ashx?fileId=4826>

³⁷ Action plan for the implementation of the National Strategy for Development of Procurement 2014 – 2020, available from http://www.aop.bg/fckedit2/user/File/bg/novini/Plan_OP.pdf

CONCLUSION AND RECOMMENDATIONS

Public procurement in Bulgaria remains trapped in the wider governance problems of the country, which still display the main features of a particularistic regime. Declining private sector opportunities in the wake of the Eurozone crisis in 2009 and the rising pressure on the Bulgarian authorities to deliver full EU funds absorption by the end of the EU funding cycle in 2013 have led to concentration of public procurement resources and market leverage in the public administration. Construction works have continuously increased their share in total public procurement of the country, and their importance for construction companies' turnover further contributing to higher corruption risks. The main counterbalancing trend has been associated with the steady rise in EU financing in the procurement of construction works, associated with more and better controls. The implementation of the Bulgarian legal public procurement framework remains haphazard and riddled with corruption risks, and changes in the legislation remain frequent. Limitations exist in terms of capacity and effectiveness of the controlling authorities of the procurement system. Detected violations are also high, hinting at the lack of proper preventive capacity.

The firm level analysis of public procurement contracts from the TED database using single bidding as a proxy for corruption risk has shown that EU funds contribute to higher competition and national funds tend to increase the negative impact of political connectedness of the construction companies. This effect of the EU funds recedes as the tenders' size decreases. In-depth analysis of contracts to the Top 40 construction sector companies introduced in this paper confirms the trend of concentration of the public procurement contracts to the Top 7 companies. The data does not confidently project specific type of favouritism (i.e. conflict of interests, endogenous lobbying, etc.) but suggests that some companies' performance in securing public contracts is more linked the government in office than to performance.

The public procurement process cannot be decoupled from the overall progress in transition from particularistic to an open access or good governance regime in Bulgaria. First and foremost, the country needs to tackle its endemic lack of trust of citizens in public institutions through strengthened law enforcement in particular as concerns higher level, political corruption. Simultaneously, the government of the country and its European partners can work to reduce the opportunities and increase constraints to corruption in public procurement in the construction/infrastructure sector through adopting several groups of tools:

- Discontinue the practice of awarding single public procurement contracts worth more than a certain threshold, which is aligned with the current management capacity of contracting authorities; a reasonable approach would be to limit single tender procedures to

5 % of the average annual total public procurement market value for the past three years. Investigate long-standing single bidding practices of certain contracting authorities;

- Optimize the legal framework towards increased transparency and competition in public procurement through the more aggressive introduction of e-tools;
- Enhance the effectiveness of legal remedy and control mechanisms, as well as more active prevention of market concentration;
- Strengthen the administrative capacity and more stringent requirements to the professional ethics of the responsible officials in the contracting authorities;
- Increase the effectiveness of criminal prosecution, in particular in cases involving larger public financial resources;
- Introduce effective control over the property and income affidavits submitted by senior officials but also over conflicts of interest, which might hint at more subtle forms of corruption such as favouritism;
- Optimize the legal framework regulating the financing of political parties and election campaigns, including independent candidates and lobbying to include non-monetary contributions such as employment, hidden subsidies, etc.

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**IMPROVING GOVERNANCE IN BULGARIA:
EVALUATING THE IMPACT OF EU CONDITIONALITY
THROUGH POLICY AND FINANCIAL ASSISTANCE**

ACRONYMS

| | |
|---------------|---|
| AA | Audit Authority |
| AGS | Annual Growth Survey |
| AMR | Alert Mechanism Report |
| BAC | Bulgarian Academy of Sciences |
| NAO | Bulgarian National Audit Office |
| CA | Certifying Authority |
| CCU | Central Coordination Unit |
| CEC | Commission of the European Communities |
| CF | Cohesion Fund |
| CMRs | Comprehensive Monitoring Reports |
| CMS | Corruption Monitoring System |
| CSD | Center for the Study of Democracy |
| CVM | Cooperation and Verification Mechanism |
| EARDF | European Agricultural Fund for Rural Development |
| EC | European Commission |
| EDP | Excessive Deficit Procedure |
| EFF | European Fisheries Fund |
| EIP | Excessive Imbalance Procedure |
| ERDF | European Regional Development Fund |
| ESF | European Social Fund |
| ESIF | European Structural and Investment Funds |
| EU | European Union |
| FEIs | Financial Engineering Instruments |
| FP7 | Seventh Framework Programme for Research |
| GDP | Gross Domestic Product |
| ISPA | Instrument for Structural Policies for Pre-Accession |
| JHA | Justice and home affairs |
| MAAs | Managing Authorities |
| MIP | Macroeconomic Imbalances Procedure |
| MSs | EU Member States |
| MTO | Medium-term budgetary objective |
| NRP | National Reform Programmes |
| NSRF | National Strategic Reference Framework |
| OP | Operational Programme |
| OPAC | OP "Administrative capacity" |
| OPC | OP "Development of the Competitiveness of the Bulgarian Economy" |
| OPE | OP "Environment" |
| OPFSD | Operational Programme Fisheries Sector Development |
| OPHRD | OP "Human resource development" |
| OPRD | OP "Regional development" |
| OPT | OP "Transport" |
| OPTA | OP "Technical Assistance" |
| PAJC | Public Administration and Judicial Capacity |
| PAs | Priority Axes |
| PP | Public Procurement |
| RDP | Rural Development Programme |
| RRs | Regular Reports |
| SAPARD | Special Accession Programme for Agriculture and Rural Development |
| SCPs | Stability or Convergence Programmes |
| SCRs | Specific-country recommendations |
| SGP | Stability and Growth Pact |

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ABSTRACT

The paper examines the impact on Bulgaria's anti-corruption performance of the interrelation between EU policy conditionality and EU financial assistance, with a focus on post-accession developments. Although the EU never formally linked EU assistance to progress on anti-corruption, the disbursement of funds has tended to peak around critical deadlines for accession progress, e.g. the signing of the accession treaty in 2005, and the expiration of the Cooperation and Verification Mechanism's (CVM) safeguard clauses in 2010. Both years also marked the lowest levels of corruption experienced by Bulgaria's citizens. This suggests that the combined effect of EU anti-corruption conditionality and development assistance on governance in Bulgaria was positive – but temporary.

Moreover, the 2015 CVM monitoring report suggests that, eight years after EU accession, Bulgaria still faces three key governance challenges – combatting high-level corruption, building an institutional approach to anti-corruption, and judicial independence. In 2014, public experience of corruption reached its highest level since the first comparable research in 1998. The lack of anti-corruption conditionality or credible enforcement mechanisms since 2010 has seen Bulgaria backslide in the fight against corruption. The current EU approach and development assistance for anti-corruption reforms have been insufficient to put Bulgaria on a virtuous circle path to open access order (or a good governance model), and has not been able to compensate for the lack of domestic political commitment to anticorruption reform. The paper's findings suggest that the EU and Bulgarian anti-corruption stakeholders need to find new strategies for bringing about lasting governance change.

INTRODUCTION: BULGARIA AND THE EU

The current paper seeks to evaluate the impact of EU policy and funds aimed at improving governance in Bulgaria. It examines the interrelation between EU policy conditionality, as expressed in different policy and programmatic documents, and the financial assistance provided by the EU to Bulgaria in the area of justice and home affairs, including anti-corruption. The focus is on post-accession developments, although the paper begins with a brief review of Bulgaria's path into the EU. The paper then tracks how the anti-corruption discourse features in policy documents and funding priorities, highlighting the EU conditionality mechanisms applied and the development assistance provided, and evaluates these in the light of Bulgaria's anti-corruption performance during this period. The paper draws conclusions as to the effectiveness of EU policy and financial assistance in the area of anti-corruption. The paper informs the ongoing policy debate on how best to strengthen EU leverage in improving anti-corruption efforts and governance in aspiring, new and existing member-states.

Bulgaria became a Member State (MS) of the European Union (EU) in January 2007, as part of the second wave of the EU's fifth enlargement. Ten countries from Central and Eastern Europe had joined in 2004 (Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Czech Republic, Slovakia and Slovenia) while Bulgaria and Romania acceded in 2007. The fifth enlargement was the first to be largely based on political rather than economic motives, as the European Community was pursuing wider and sustainable political stability in Europe (Breuss, 2008).

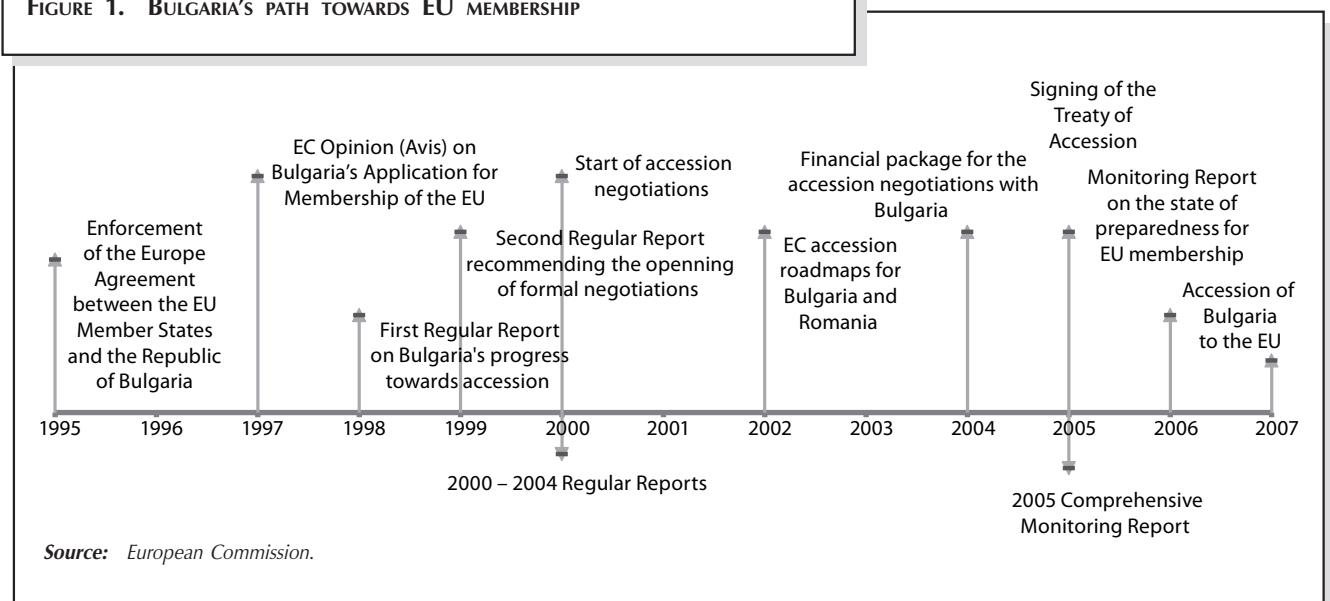
Although Bulgaria had initiated diplomatic relations with the EU prior to 1989, the country's path to accession began only after the fall of the communist regime. The legal basis for relations between Bulgaria and the Union was the 1995 Europe Agreement (Official Journal of the European Communities, 1994). The goal of the Europe Agreement was to gradually integrate and prepare Bulgaria for future membership through providing a framework for political dialogue, promoting the expansion of trade and economic relations, and providing a basis for Community technical and financial assistance. To these ends, Bulgaria was required to meet certain conditions, the so-called Copenhagen political and economic criteria, and to harmonise its legislation with the 31 Chapters of EU law, the '*acquis communautaire*'. The Commission tracked the country's compliance with these criteria and progress towards specific reforms via a monitoring system. The latter was initiated in 1998 with the publication of the First Progress Report (PR) on Bulgaria's advancement towards accession (CEC 1998) and continued with additional Progress Reports and a series of Regular Reports (RRs). Financial support for the necessary reforms was provided under pre-accession assistance, through three major programmes: PHARE, SAPARD (Special Accession Programme for Agriculture and Rural Development)

and ISPA (Instrument for Structural Policies for Pre-Accession)¹ (Hubbard, C., Hubbard, L. 2008).

Bulgaria's Accession Treaty was signed in Luxembourg on 25 April 2005, granting the country EU membership from 2007, providing it complied with all the membership criteria by that date (Official Journal of the European Union 2005). Also in 2005, the European Commission (at that time referred to as the Commission of the European Communities (CEC)) published a Comprehensive Monitoring Report (CMR), followed by a final Monitoring Report in 2006 (CEC 2005, 2006). The latter confirmed that Bulgaria was sufficiently prepared to meet the political, economic and *acquis* criteria by 1 January 2007.

However, Bulgaria's accession was clouded by a lack of progress in a few key areas. It had failed to attain EU standards in the area of justice and home affairs – in particular, in reforming the judiciary, and in fighting high-level corruption and organised crime. Hence, upon accession, the EU took the additional step of introducing a special post-accession monitoring mechanism on these outstanding areas for Bulgaria (and Romania), in effect seeking to prolong pre-accession conditionality after accession. In 2015, eight years after Bulgaria's accession to the EU, the Cooperation and Verification Mechanism (CVM), which tracks the country's progress on the above mentioned rule of law issues in annual reports, is still in force. This suggests a lack of significant progress, despite a decade of increasing EU financial support. This paper seeks to understand why the efforts of the EU appear to have achieved so little in the case of Bulgaria, so as to provide an evidence base for policy suggestions on how to improve the impact of EU conditionality and assistance for countering corruption.

FIGURE 1. BULGARIA'S PATH TOWARDS EU MEMBERSHIP



¹ Additional specialised programme was introduced to aid Bulgaria's adoption of the *acquis* – "National Programme for the Adoption of the Acquis" (NPAA).

1. THE STATE OF EU CONDITIONALITY AND DEVELOPMENT ASSISTANCE

1.1. LEGISLATIVE PROVISIONS AND INSTITUTIONAL SETTING OF EU FUNDS IN BULGARIA

The extent of EU funds available and the institutional arrangements for their management changed upon Bulgaria's access to the Union. Prior to accession, Bulgaria was eligible for three types of EU funds: PHARE (for economic and social development); ISPA (for infrastructure); and SAPARD (for agriculture). After accession, EU assistance became much wider and more complex. In the 2007-13 programming period, the first in which Bulgaria participated fully as a member state, the country became eligible for the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Cohesion Fund (CF) (Council of the EU 2006).² In addition, Bulgaria received assistance from the European Agricultural Fund for Rural Development and the European Fisheries Fund.

In terms of management, the EU delegation in Sofia gradually ceded control over the management of EU funds as the accession date drew closer. After accession, responsibility for managing and monitoring EU funds was transferred to the Bulgarian authorities, with the EU legal framework transposed into national law in the National Strategic Reference Framework (NSRF). The NSRF provides for further elaboration and clarification of policy and funding priorities through seven Operational Programmes (OP) in which funds could be contracted throughout 2007-13, with two more years allowed to complete spending.³ A Monitoring Committee⁴ is assigned to oversee the implementation of the NSRF. The Committee is responsible for:

- discussing and approving any amendments to the Framework;
- evaluating and approving, on an annual basis, the information and reports of the OP Managing Authorities (MAs); and
- reviewing the contribution made by European financial assistance to the priorities of the NSRF.

The NSRF Monitoring Committee oversees an additional seven monitoring committees, responsible for supervising, reviewing and assessing the work of the OP MAs. The Monitoring Committee and the OP Monitoring Committees report their strategic supervision and conclusions to the

² General provisions for their implementation were set out in Council Regulation (EC) No 1083/2006 of 11 July 2006.

³ These were OP Transport (OPT); OP Environment (OPE); OP Human Resource Development (OPHRD); OP Development of the Competitiveness of the Bulgarian Economy (OPC); OP Administrative Capacity (OPAC); OP Regional Development (OPRD); and OP Technical Assistance (OPTA).

⁴ Council of Ministers' Decision CoM(a) 2006.

Central Coordination Unit (CCU) in Bulgaria and the European Commission (EC) in Brussels. Located within the Council of Ministers, the CCU takes the lead at central level to manage and oversee the operations of all EU assistance programmes in Bulgaria, and to ensure that the objectives of the EU Cohesion Policy and the national investment policies are followed (CoM 2005). The CCU runs the Unified Management Information System holding the data of all projects implemented with EU assistance in Bulgaria, including details of the budget, status of implementation and beneficiaries.

The Certifying Authority (CA) and the Audit Authority (AA) at the Ministry of Finance exercise ultimate financial control on EU assistance spending in Bulgaria (OPRD(a) 2011). The Bulgarian National Audit Office (NAO) also oversees EU funds and programmes, including the management bodies and final beneficiaries. This part of its annual audit is provided to the European Court of Auditors and the EC (OPRD(b) 2011).

Each MA is responsible for managing and implementing its OP, with guidance from the CCU. The MA should:

- ensure that operations are selected for funding in accordance with the relevant criteria for that OP;
- check that they comply with applicable Community and national rules;
- verify that the financed products and services are delivered in time and up to standard;
- verify that the expenditures declared by the beneficiaries for operations have actually been incurred;
- perform (if necessary) on-the spot checks of individual operations;
- ensure that OPs are evaluated according to the legislation, etc. (Council of the EU, 2006)

Although the MA may delegate its financial and accounting tasks to an Intermediate Body (IB), it retains final responsibility.

Before any funds could be entrusted to Bulgaria, the EU had to formally certify or license the operational capacity of each institution with responsibility for overseeing the spending of EU funds. It continues to monitor their performance and has the power to ask for corrections or, in certain circumstances, even to withdraw their certification. Additional monitoring on the part of the EU is exercised for example through the European Court of Auditors, OLAF and the country units of the various Directorates General of the EC. Thus, the overall framework for administering EU assistance in Bulgaria appears to provide a number of important checks and balances. Nonetheless, the general lack of administrative capacity in Bulgaria proved to be a considerable hindrance to the successful absorption of EU funds in the early years of membership. Moreover, the arrangements for the implementation and monitoring of the OPs fail to specifically address corruption challenges, despite the European Commission and other member states having identified corruption controls as a key area where Bulgaria continues to fall short of EU standards.

2. EU CORRUPTION CONTROL CONDITIONALITY AND DEVELOPMENT ASSISTANCE

One can discern three groups of EU conditionality requirements related to the control of corruption in the 2007-13 period:

- The institutional framework for managing EU Funds, as well as administrative and financial compliance rules for the 2007-13 programming period.
- The EU macroeconomic governance conditions introduced in the wake of the global financial crisis in 2008 through the European Semester and the Stability and Growth Pact.
- The Cooperation and Verification Mechanism rules for monitoring Bulgaria's progress in countering corruption and organised crime, and reforming the judiciary, introduced upon accession.

These are discussed in turn below. However, none of these explicitly links EU development assistance with the attainment of specific anti-corruption targets.

2.1. CONTROL OF CORRUPTION PROVISIONS WITHIN THE GOVERNANCE OF EU FUNDS

The EU has not made the provision of funds in the 2007-13 programming period conditional on the attainment of specific anti-corruption targets. The NSRF contains only general references to Bulgaria's anti-corruption strategy. Even where it outlines key areas relevant to the control of corruption, such as overall administrative capacity issues and public procurement, it does not offer a 'theory of change' as to how EU funds might be expected to improve the control of corruption. There are no indicators related to anti-corruption used or foreseen in the NSRF.⁵

Three operational programmes include tackling corruption among their goals – OP Administrative Capacity, OP Technical Assistance, and OP Development of the Competitiveness of the Bulgarian Economy – but without stipulating indicators of achievement. OPAC is the primary operational programme tasked with tackling corruption, and it contains an extensive analysis of the corruption-related challenges and policies of Bulgaria as of 2007. It cites Bulgaria's ranking on the Transparency International Corruption Perceptions Index as evidence that the country is performing poorly in terms of corruption control, and posits a link

⁵ Based on the review of the texts of the National Strategic Reference Framework (downloadable in Bulgarian from: <http://www.eufunds.bg/archive/documents/1259309981.pdf>).

between poor control of corruption and weak GDP growth, referencing the World Bank Worldwide Governance Indicators. However, it once again fails to specify how progress in controlling corruption might be measured. In addition, its Annual Implementation Report 2014, published in October 2015, which reviews programme implementation since inception, contains reference only to a limited number of individual projects with an anti-corruption orientation, making no overall assessment of achievements in this regard.⁶

In the texts of the NSRF and the OPs there is only one recurring reference to anti-corruption goals, and it concerns the process of absorption of EU funds itself. That is, although not a form of conditionality per se, corruption could stall EU funding if it led to a failure to comply with technical and financial requirements during programme implementation. Council Regulation (EC) No 1083/2006 stipulates that administrative irregularities in the implementation of the OPs can lead to the suspension of payments and financial corrections. Interim payments at the level of priority axes (PAs) or programmes can be suspended if management and control obligations⁷ are breached and payment certification procedures are affected⁸ (Council of the EU 2006). Financial corrections, imposed on the part of the EC, are enforced when the Commission considers already allocated contributions to be at risk owing to management and control deficiencies or when MSs fail to enforce corrections on their own.⁹ The EC has on such grounds suspended programme funds to Bulgaria on several occasions, with regard to OPE in 2013 and OPRD in 2014. In both instances, the deficiencies involved public procurement (PP) procedures (Mediapool 2015).¹⁰ This has created incentives for national authorities to focus on the form rather than the substance of EU funds management.

The 2014-20 ESIF programming period introduces a more concrete regime of conditionality for EU member states, through three mechanisms.

First, the introduction of thematic and general, 'ex-ante conditionalities' is aimed at the efficient achievement of certain priorities. Bulgaria, as well as other EU member states, has to meet these new requirements before being able to access funds. Bulgaria's Partnership Agreement with the EU assesses compliance with the ex-ante conditionalities and, in the case of non-compliance, sets a clear timeline for actions to be taken. If the deadlines are not met and the goals not achieved, there is now a legal basis for the partial or full suspension of "interim payments by the Commission to the priorities of the programme concerned" (EC(a) 2014). The EC is required to lift any such suspension either when the conditionalities are fulfilled or when/if they become irrelevant due to changes in programme priorities.

⁶ Based on a review of the texts of the Operational Programme Administrative Capacity (downloaded in Bulgarian from: <http://www.eufunds.bg/archive/documents/1372686568.pdf>)

⁷ Under Art. 70 (1) and (2).

⁸ Art. 92.

⁹ Art. 99.

¹⁰ See section 2.1 above.

Second, the 2014-20 ESIF includes a 'performance reserve',¹¹ aimed at increasing focus on Europe2020 objectives. The performance reserve is considered 'ex-post conditionality' since it provides for a total of 5 % of the national allocation for each fund to be transferred, during the mid-term review, to programmes that have reached their milestones. Failure to reach pre-set objectives can result in the suspension of funds, while serious underachievement could potentially lead to cancellation.

Third, there is also a new legal basis for including macroeconomic conditions,¹² whereby the EC can propose amendments to the Partnership Agreement and/or relevant programmes with a view to improving the economic governance of a MS. Such macroeconomic conditions could, as with the ex-ante and ex-post requirements, be enforced through suspension of payments if the MS concerned failed to take action in line with a Commission proposal. The initial suspension cannot affect more than 50 % of payments but an optional increase (up to 100 %) is possible for continued non-compliance.

2.2. EUROPE 2020 STRATEGY AND MACROECONOMIC GOVERNANCE CONDITIONALITY

Broader fiscal and macroeconomic conditions have been introduced in the EU in the aftermath of the economic crisis, providing a formal link between compliance and the provision of EU assistance. Two of Europe's flagship initiatives provide the policy framework for this – the Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth, and the Stability and Growth Pact (SGP). Under the 2020 Strategy, each MS has individual targets in the context of the overall EU goals. MSs are required to report their progress annually by submitting to the European Commission and the Council an update of their National Reform Programmes (NRPs), detailed annual pledges of reform plans. The Council responds to the NPRs with binding recommendations. The NPRs have been incorporated into the European Semester mechanism to ensure regular follow up and provide a basis for action should a Member State continuously fail to meet its recommendations (see below). A link to anti-corruption performance has been added since the 2014 NRPs, with the introduction of Council recommendations based on the first published EU Anti-corruption Report.

2.2.1. Stability and Growth Pact

The Stability and Growth Pact is the Union's mechanism for coordinating national fiscal policies. In the aftermath of the economic crisis, the SGP underwent a significant reform, referred to as the "six-pack",¹³ with

¹¹ Art. 20, Art. 21, Art. 22 of Regulation (EU) No 1303/2013.

¹² Art. 23 of Regulation (EU) No 1303/2013.

¹³ The six-pack includes six legislative texts: Regulation 1175/2011 amending Regulation 1466/97; Regulation 1177/2011 amending Regulation 1467/97; Regulation 1173/2011; Regulation 1176/2011; Regulation 1174/2011; Directive 2011/85/EU.

the aim of strengthening EU economic and fiscal governance.¹⁴ The SGP is primarily built around its ‘preventive’ and ‘corrective’ arms. The milestone of the preventive arm is attainment of country-specific medium-term budgetary objectives,¹⁵ which all MSs must reach (or be on an appropriate adjustment path towards) (EU Economic and Financial Affairs 2015). Compliance with the preventive arm of the SGP is assessed by the EC and the Council on an annual basis through the review of Stability or Convergence Programmes (SCPs),¹⁶ submitted in parallel with the National Reform Programmes by all EU member states (Ministry of Finance 2015).

The corrective arm of the Stability and Growth Pact makes sure that MSs introduce adequate measures to correct their excessive deficits.^{17,18} If the consequent review shows that the necessary corrections are not effectively implemented, the EC and the Council could decide to issue a new set of recommendations or to increase the EDP, potentially entailing a fine in the amount of 0.2 % of GDP for Eurozone countries.¹⁹ For the rest of the EU member states, such as Bulgaria, a serious breach of the embedded deficit benchmarks could lead to the suspension of cohesion funding. The latter can be enforced if an excessive government deficit exists²⁰ and the country does not take the necessary measures to correct it.²¹ In such cases, the Council could suspend “either the totality or part of the commitments from the Fund” (Official Journal of the European Union 2006).

Such macroeconomic conditionality, though only applied to the fiscal side of economic governance, has been available for the Cohesion Fund since the 2007-13 programming period. Bulgaria was subject to an ongoing EDP from 2010 to 2012 due to its general government deficit reaching 3.9 % of GDP in 2009, thus exceeding the 3 % of GDP reference value. The Bulgarian case did not include suspension of Cohesion Fund support.²² Thus, though weak, the link exists that poor public finances management, which can also be the result of corruption, would eventually be sanctioned by the Council of the EU with a suspension of EU development assistance.

¹⁴ Applicable only to Eurozone countries.

¹⁵ The MTO is part of the overall Multilateral Economic Coordination and Surveillance, which legal basis are provided for by Art. 121 of the Treaty (ex 99 TEC).

¹⁶ By April each year all EU countries outside of the EA are required to prepare Convergence Programmes, while Eurozone members submit Stability Programmes.

¹⁷ Here by “deficits” is meant the deficit or debt.

¹⁸ The Excessive Deficit Procedure becomes operational in case any EU country breaches the 3 % threshold of deficit to GDP and 60 % of debt to GDP thresholds. The respective values are embedded in Art. 126 of the Treaty (ex Art. 104 TEC), and in the accompanying the Treaty, Protocol 12.

¹⁹ Provisions for closer monitoring under the EDP were introduced with the adoption of the so-called “two-pack” legislation package, which increases the reporting obligations, as well as requires countries to draft economic partnership programmes (EPPs). It is however only applicable to euro area Member States and is thus outside the scope of the paper. For detailed information and legal basis concerning the “two pack”, see Occasional Paper 147 from May 2013 (EC 2013).

²⁰ It is up to the Council to decide, in accordance with with Article 104(6) of the Treaty.

²¹ in accordance with Article 104(8) of the Treaty that the Member State concerned has not taken effective action in response to a Council recommendation made under Article 104(7) of the Treaty.

²² Document dossier available at: http://ec.europa.eu/economy_finance/economic_governance/sgp/deficit/countries/hungary_en.htm

2.2.2. Alert Mechanism Report (AMR)/Macroeconomic Imbalances Procedure (MIP)

The adoption of the 'six-pack' in 2011 allowed for an additional surveillance instrument to be introduced. The Macroeconomic Imbalances Procedure runs in parallel to and follows the 'two-arm' logic of the Stability and Growth Pact. It aims at identifying, preventing and/or correcting potential and existing macroeconomic imbalances across the EU (Official Journal of the European Union (a), (b) 2011). The MIP framework starts with the preparation of an Alert Mechanism Report which, based on a scorecard of eleven indicators, assesses whether a particular member state is seeing the emergence of potential macroeconomic imbalances and thus requires in-depth review. The in-depth review process is the preventive arm of the MIP, while the initiation of an Excessive Imbalance Procedure (EIP) triggers the corrective mechanism, which could potentially bring sanctions of up to 0.1 % of GDP (EU Economic and Financial Affairs 2015).²³

Bulgaria has been consistently covered by the MIP in-depth review mechanism, signalling that the country is experiencing macroeconomic imbalances which, though not excessive, require policy action. According to the monitoring, Bulgarian competitiveness and labour markets are in need of increased attention (EU Economic and Financial Affairs 2015).

2.2.3. The European Semester

With the publication of the Alert Mechanism Report, the EC simultaneously adopts an Annual Growth Survey (AGS), which sets one-year economic priorities for the EU. The two documents are published annually in November and signal the start of the so-called European Semester. In its essence, the Semester is a coordination tool monitoring the compliance of EU countries with the two overall mechanisms of EU economic governance – the 2020 Strategy and the Stability and Growth Pact. The Semester is the Union's calendar for scheduling the majority of economic and fiscal instruments elaborated above.

An important milestone of the European Semester is the elaboration of specific-country recommendations (SCRs), which are then proposed by the EC for adoption by EU finance ministers. The Bulgarian experience shows that there are two concrete types of recommendations – those based on the country's Convergence Programme; and those based on the examination of the relevant Convergence and National Reform Programmes (Official Journal of the European Union 2011(b), 2014). In the case of Bulgaria, the latest SCRs have included specific governance-related recommendations, such as guaranteeing the independence of the energy regulator and transparency of the energy sector; and reducing corruption in public administration and public procurement system imbalances. The latter has been derived from recommendations on Bulgaria made in the first EU Anticorruption Report. The inclusion of such recommendations in the European Semester framework potentially creates anti-corruption

²³ Only applicable to member of the Euro Area.

TABLE 1. EUROPEAN SEMESTER TIMELINE

| Responsible actor | November | December | January | February | March | April | May | June | July | August | September | October |
|---------------------|---|---------------------------------------|---------|---------------------------|--|---------------------------|-------------------------------------|---|------|--------|-----------|--|
| European Commission | Annual Growth Survey (AGS) + Alert Mechanism Report (AMR) + Opinion on Draft Budgetary Plans (only EA MS) | | | Bilateral meeting with MS | In-depth reviews for MS under potential risk under the Macroeconomic Imbalances Procedure (MIP) | Bilateral meeting with MS | | Country-specific recommendations (CSRs) for budgetary, economic and social policies | | | | Bilateral meeting with MS |
| European Council | Discussion of the opinions on Draft Budgetary Plans (only EA MS) | MS adopt conclusions on the AGS + AMR | | | EU leaders adopt the economic priorities based on the AGS | | National ministers discuss the CSRs | The Council endorses the final CSRs | | | | |
| Member States | | MS adopt annual budgets | | | MS present their Stability/Convergence Programmes (SCPs) on budgetary policy + National Reform Programmes on economic policy | | | | | | | MS present draft budgetary plans (only EA MS) + Economic Partnership Programmes (only EA MS under EDP) |

Source: European Commission, 2014.

conditions linked to EU development assistance. However, as the link between the EU Anticorruption Report and the European Semester is not formally established, such conditionality might disappear in the future.

In practice, there has not yet been any evidence that the anti-corruption recommendations have been used to exert pressure on the Bulgarian authorities to deliver on specific reforms. The European Semester itself has been lacking in specific deadlines for achieving recommended reforms, as well as in consistent follow-up mechanisms. Hence, the anti-corruption domain remains effectively detached from EU conditionality involving development assistance, despite the Union’s increased focus on the issues of good governance. The anti-corruption policy area continues to lack formal and effective punitive mechanisms for MSs that repeatedly demonstrate lack of reforms.

2.3. THE COOPERATION AND VERIFICATION MECHANISM (CVM): EU ANTI-CORRUPTION CONDITIONALITY IN BULGARIA

The most immediate anti-corruption conditionality mechanism established by the EC for Bulgaria (and Romania) upon its accession in 2007 was the Cooperation and Verification Mechanism (CVM) (EC 2006). The CVM was possible under Art. 37 and Art. 38 of the Accession Treaty and largely resulted from a monitoring report by the EC from 2006 claiming that “further progress is still necessary in the area of judicial reform and the fight against organised crime and corruption” (Official Journal of the European Union 2005; CEC 2006). The CVM methodology comprises the periodic publication of progress reports, containing an assessment of progress in the area of Justice and Home Affairs and making recommendations for next steps.

In Bulgaria’s case, the evaluation and the progress reports are anchored to six benchmarks,²⁴ tailored to the country, as well as three safeguard clauses under the Accession Treaty, which could have been triggered in the first three years after EU accession (i.e., until 2010). The safeguard clauses have not been activated but progress reporting under the CVM mechanism continues even eight years after accession.

TABLE 2. COUNTRY-SPECIFIC BENCHMARKS FOR BULGARIA UNDER THE CVM

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

Source: Art. 1 of Commission Decision C (2006) 6570 final.

²⁴ Although the EC uses “benchmarks” as a term, these are rather policy objectives, and are thus softer than typical benchmarks.

TABLE 3. SAFEGUARD MEASURES ACCORDING TO THE ACCESSION TREATY

| Safeguard | Potential reasons for invoking |
|------------------------------|--|
| (1) Economic | to address serious economic difficulties in the current or new Member States after accession |
| (2) Internal market | when a new Member State causes, or risks causing, a serious breach of the functioning of the internal market |
| (3) Justice and home affairs | in case there are serious shortcomings or the risk thereof in the areas of justice and home affairs |

Source: EC, 2006, *Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*.

As discussed in the following sections, the CVM did not represent explicit conditionality regarding the disbursement of EU funds. Some critics suggest that the 'soft touch' design of the CVM and the lack of effective punishment mechanisms – at least, after the expiration of the safeguard clauses in 2010 – have contributed to the lack of significant progress on controlling corruption in Bulgaria.

3. OVERVIEW OF EU DEVELOPMENT ASSISTANCE FOR BULGARIA DURING THE 2007-13 PROGRAMMING PERIOD

Bulgaria's experience with EU development funds since accession largely confirms the above findings that the link between EU anti-corruption conditionality and development assistance has been weak. Most of the efforts in this first programming period were focused on developing the institutional capacity for managing and delivering EU assistance and guaranteeing that funds were spent according to administrative rules.

3.1. GENERAL PERFORMANCE OF EU DEVELOPMENT ASSISTANCE IN BULGARIA: EUROPEAN STRUCTURAL AND INVESTMENT FUNDS (ESIF)²⁵

Although the bulk of the management and control decisions concerning EU development funds shifted from the European Commission to the Bulgarian government upon accession, it soon emerged that Bulgaria was not completely ready to take on this obligation. The Bulgarian authorities faced a range of challenges at the beginning of the programming period, including:

- inconsistencies in information management;
- complex application procedures and increased administrative burden;
- lack of skilled human resources within the MAs and poor communication of programme priorities;
- slow integration of the required quality and control systems; and
- a lack of capacity on the part of the beneficiaries to prepare project applications in a timely manner, which often led to lengthy verification procedures causing payment delays (Paliova, I., Lybek, T. 2014).

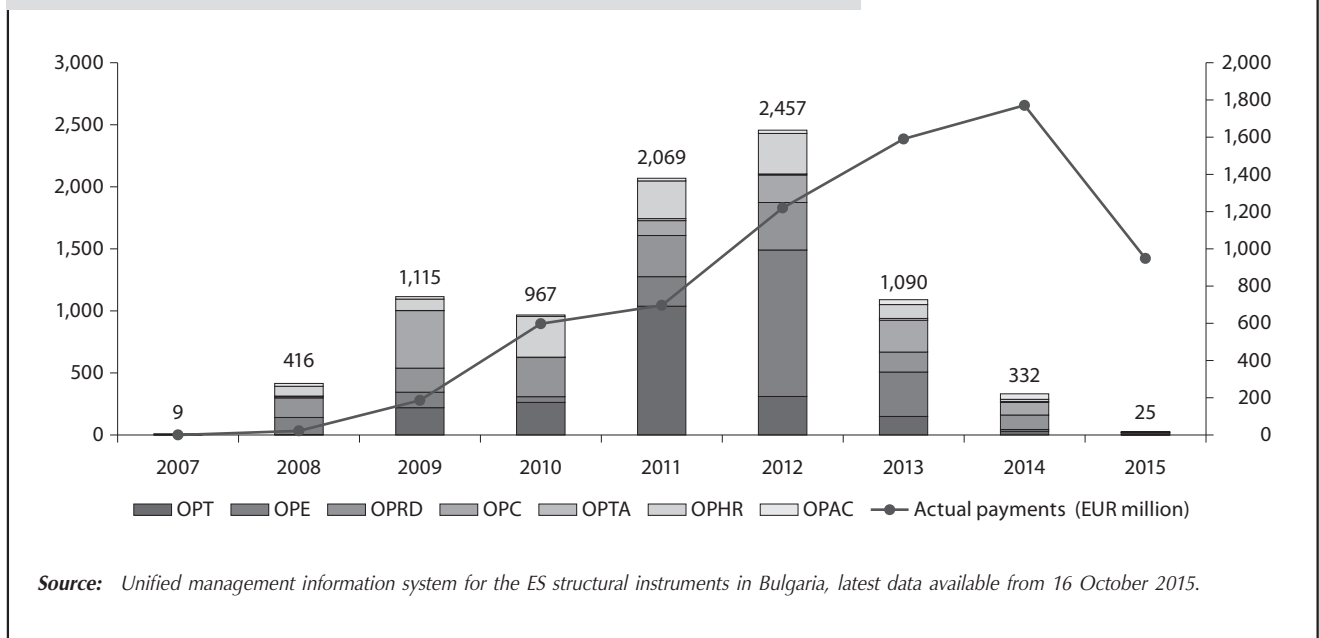
In 2008, the European Commission suspended several funding programmes to Sofia, an unprecedented move in EU history. The Commission made clear that the decision did not just reflect a lack of administrative capacity on the part of the Bulgarian authorities, but also the country's failure to meet its anti-corruption commitments under the CVM. Moreover, the move followed allegations that corruption and fraud were impeding the delivery of EU financial assistance. As there was no formal mechanism for

²⁵ ESIF includes the following 5 funds: the European Regional Development Fund (ERDF), European Social Fund (ESF), Cohesion Fund (CF), European Agricultural Fund for Rural Development (EAFRD), European Maritime & Fisheries Fund (EMFF). Due to their specific support, the EAFRD and EMFF are beyond the scope of the present analysis.

linking a suspension of EU assistance with the CVM,²⁶ the EC made the connection informally through its timing in publishing the two reports. The decision to freeze EU funds was announced one day after the CVM progress report, which detailed failures to act on countering corruption, was published (EC 2008).²⁷ At the same time, the European Anti-Fraud Office (OLAF) reported that procedural blockages, slow progress of cases through the judiciary, leaks of confidential information and alleged influence on the administration and judiciary were impeding the rapid and effective resolution of corruption and fraud cases involving pre-accession assistance funds (EC 2008).

These developments resulted in a considerable slowdown in the contracting of EU funds in Bulgaria during the first two years of accession, effectively delaying the absorption of EU funds into the economy. By the end of 2009, only EUR 200 million of payments had been disbursed, a sum below Bulgaria’s annual contribution to the EU budget. In 2008, following the suspension, Bulgaria appointed a dedicated Deputy Prime Minister in charge of EU funds, also charged with overseeing the delivery of Bulgaria’s anti-corruption strategy. The Bulgarian government accelerated the appointment in an attempt to placate the growing number of EU member states that were calling for the imposition of CVM’s safeguard clause before it was due to expire in 2010. The rate of both contracting and payments recovered from around 2010 (see Figure 2).

FIGURE 2. CONTRACTED FUNDS DURING THE 2007 – 2013 PROGRAMMING PERIOD, BY OP AND YEAR 2007 – 2015 (EUR MILLION)²⁸



²⁶ For in-depth discussion of the existing mechanism and their relation to EU assistance, see Sections III and IV.

²⁷ This has been revealed in a number of informal interviews with EU officials conducted by the authors back in 2008.

²⁸ Under an EU rule known as ‘n+2’ 2013 was the last year of the programming period, in which EU funds could be contracted out, while 2015 was the last year, in which funds could be paid out to beneficiaries. To provide time for adaptation the EC allowed for 2007 the ‘n+3’ rule.

The management of EU funds improved steadily after 2008. However, the initial slow absorption rate prompted the Bulgarian Managing Authorities to resort to a practice known as ‘overcontracting’, whereby they worked on the assumption that some projects would be suspended and/or a financial correction would be imposed by the EC, and sought to ensure that the country would still be able to use its full budget. As a result, in October 2015, the contracted amounts for all of the OPs exceeded their respective programme budgets – a total of 11,766 projects were contracted for nearly EUR 11 billion or 129 % of the total programme budget – but the contributions actually paid out averaged only 88 % (Table 4).

TABLE 4. IMPLEMENTATION OF OPs IN BULGARIA (EUR MILLION)

| OP | Programme budget | | | Contracted amounts | | | Paid amounts | | |
|-------|------------------|------------|------------------|--------------------|--------|------------|--------------|-------|------------|
| | Total | EC funding | Naitonal funding | Total | %* | EC funding | Total | %* | EC funding |
| OPT | 2,003 | 1,624 | 379 | 2,965 | 100.38 | 1,630 | 1,589 | 79.30 | 1,296 |
| OPE | 1,801 | 1,466 | 334 | 2,438 | 117.09 | 1,717 | 1,671 | 92.78 | 1,378 |
| OPRD | 1,601 | 1,361 | 240 | 1,742 | 104.13 | 1,417 | 1,387 | 86.60 | 1,212 |
| OPC | 1,162 | 988 | 174 | 1,712 | 101.47 | 1,002 | 1,066 | 91.73 | 911 |
| OPTA | 57 | 48 | 9 | 58 | 101.77 | 49 | 47 | 83.42 | 45 |
| OPDHR | 1,214 | 1,032 | 182 | 1,272 | 104.03 | 1,073 | 1,145 | 94.33 | 984 |
| OPAC | 181 | 154 | 27 | 193 | 106.83 | 164 | 154 | 85.31 | 139 |
| Total | 8,019 | 6,674 | 1,346 | 10,381 | 105.75 | 7,054 | 7,059 | 88.03 | 5,965 |

* % from programme budget (EC funding).

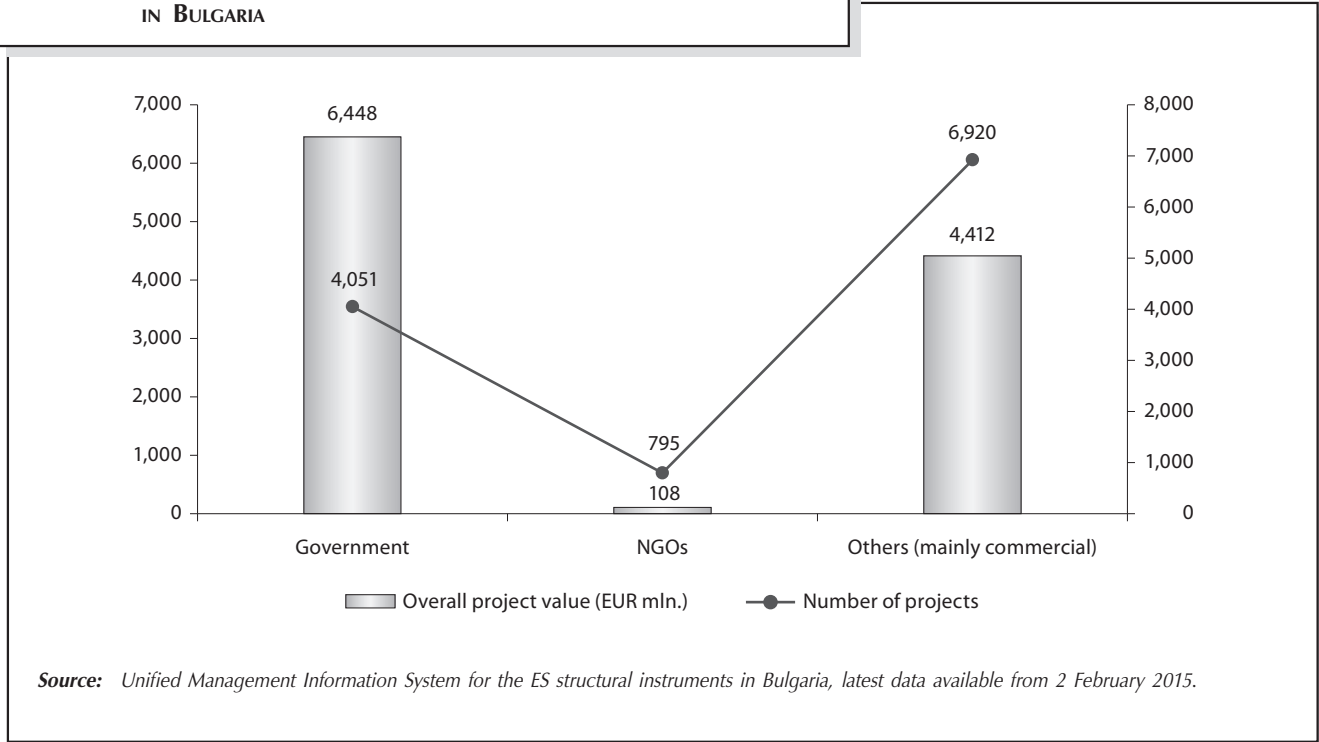
Source: Unified Management Information System for the ES structural instruments in Bulgaria, latest data available from 16 October 2015.

The distribution of projects funded through EU assistance shows that the Bulgarian authorities focused in this first programming period on developing management and administrative capacity for handling EU funds within the public sector. The OPTA was specifically dedicated to developing capacity for the delivery of EU funds assistance in Bulgaria, whereas OPAC was designed to address general administrative capacity issues, as well as the CVM-related anticorruption and judicial reforms. Of the total, 34 % of contracts were directed to public entity²⁹ beneficiaries, with a project value of 59 % (EUR 6.4 billion). This partly reflects the programmes’ focus on infrastructure projects, making public entities major beneficiaries. Another 59 % of the total number of projects went to commercial entities, amounting to 40 % (EUR 4.4 billion) of

²⁹ Including ministries, agencies, commissions, regional administrations, municipalities, and judiciary.

the overall value. The non-governmental sector secured only a marginal portion of the total funds (Figure 3).³⁰

FIGURE 3. NUMBER OF PROJECTS AND TYPES OF BENEFICIARIES FOR OPs IN BULGARIA



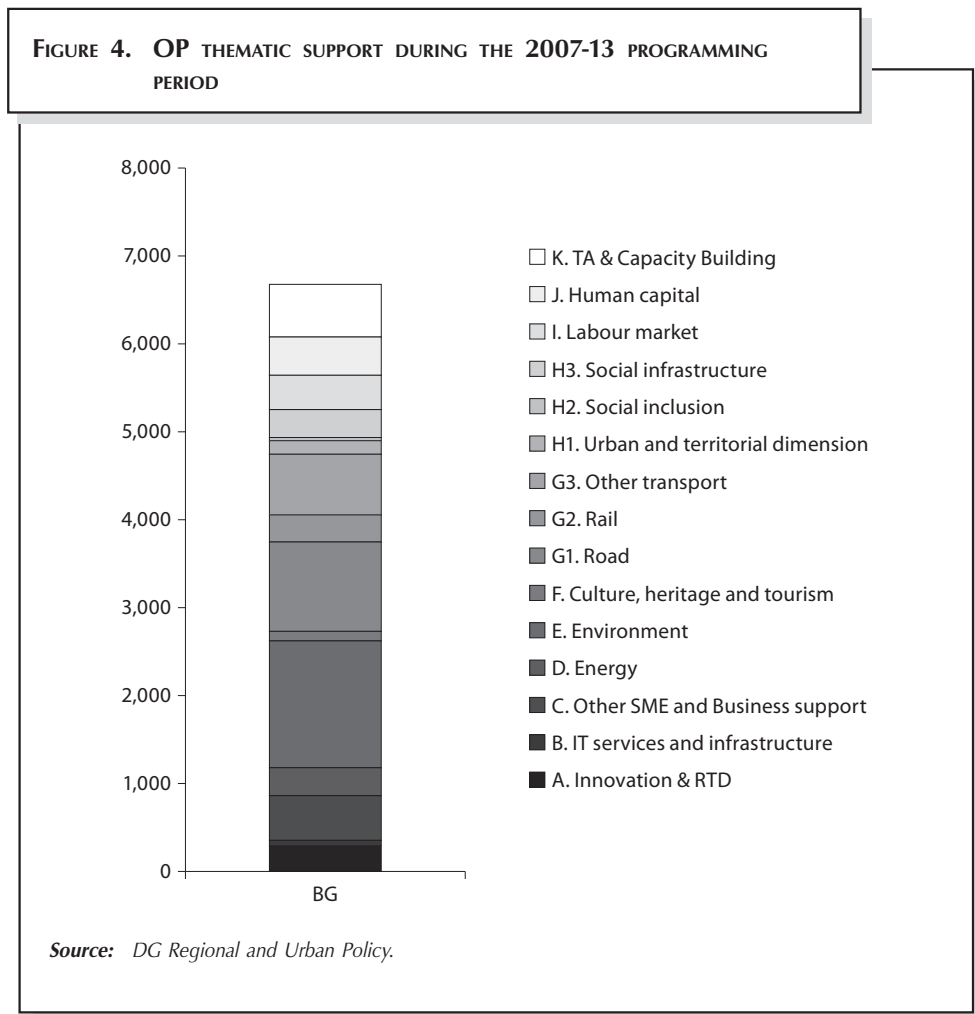
During the 2007-13 programming period, Bulgaria also received support from the European Agricultural Fund for Rural Development (EARDF) and the European Fisheries Fund (EFF) under two additional OPs – Rural Development Programme (RDP) with an overall budget of EUR 3.2 billion and the Operational Programme Fisheries Sector Development (OPFSD), for which EUR 96.4 million were indicatively planned. These OPs also practiced overcontracting (EC 2015).

3.2. THEMATIC DISTRIBUTION OF EU ASSISTANCE AND PUBLIC PROCUREMENT ISSUES

The thematic priorities of the OPs reveal that governance issues were not included as a separate theme and, while there was a secondary focus on improving governance in several areas (e.g. Technical Assistance & Capacity Building, Human Capital, Innovation & RTD, Social Infrastructure), this was mostly limited to building administrative and technical capacity to manage EU funds, rather than aiming at achieving policy impact in

³⁰ In addition, as of February 2015, acting as sub-contractors, 14,324 entities have signed a total of 36,163 contracts. The vast majority of them (92 %) have five or less contracts, while 171 commercial companies have twenty or more contracts. For the larger part, this 1 % of the total contractors consists of consultancy companies, as well as firms providing supplies (e.g. office supplies).

the anti-corruption domain. Funding focused rather on two particular sectors – environment and transport – with a view to overcoming gaps in Bulgaria’s basic communication and environmental infrastructure. Within the separate OPs, there was a focus on anti-corruption only in OP Administrative Capacity, and then largely indirectly through other areas.

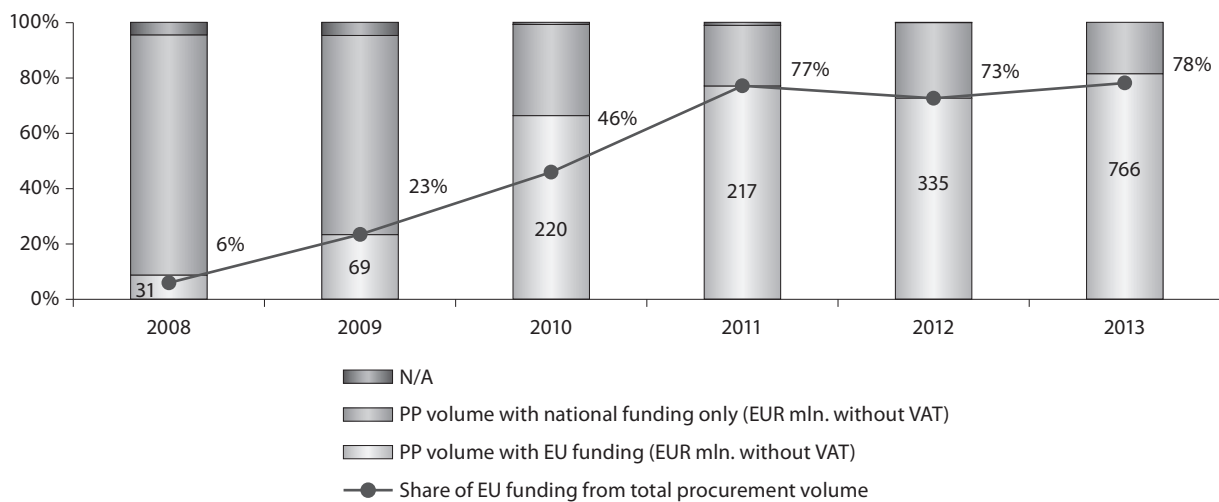


3.3. IMPACT OF EU DEVELOPMENT ASSISTANCE ON PUBLIC PROCUREMENT

One of the horizontal priorities of the National Strategic Reference Framework related to anti-corruption has been to improve the governance of public procurement. Since large infrastructure projects, the thematic priority of EU assistance to Bulgaria in 2007-13, are predominantly financed through public funds, there has as a result been a concentration of EU funds in infrastructure. Together with the impact of the financial crisis on national public funds, this has meant that the public procurement market in general, and infrastructure construction in particular, have become increasingly dependent on EU financing. By 2013, the contract value of the Bulgarian public procurement market exceeded EUR 4 billion,

reaching 10 % of the gross domestic product (GDP) and the highest number of contracts on record: 23,181 (Stefanov, R., Karaboev, S. 2015). The number of public procurement announcements involving EU funds more than tripled in the 2010-13 period. Firm-level analysis³¹ has shown that the weight of EU financing in the Bulgarian public procurement construction market has increased excessively. In fact, 78 % of the public procurement contracts for construction works were financed with EU funds in 2013 amounting to an overall PP value of EUR 766 million (Stefanov, R., Karaboev, S. 2015).

FIGURE 5. WEIGHT OF EU FUNDING IN THE CONSTRUCTION SECTOR PUBLIC PROCUREMENT MARKET*



* Excluding several large scale public procurement contracts existing two times in the database due to participation of two companies from the selected sample.

Source: Public Procurement Registry, CSD calculations.

The concentration of EU funds, together with the fact that public procurement is traditionally associated with high levels of corruption risk, focused EU attention in this area. Detecting numerous irregularities in the management of funds, the Commission has suspended programmes on several occasions:

- Before accession, citing management irregularities relating to the PHARE and SAPARD pre-accession funds, a lack of adequate systems of ex-ante and ex-post controls and the weak response of the Bulgarian government, the Commission froze EU funds earmarked for road infrastructure development, leading to the forfeiture of EUR 220 million from the national PHARE programme (CSD 2009).

³¹ Firm-level analysis is based on manually constructed database using a sample of the top 40 construction companies, ranked according to their total turnover for the period of 2008-13. The database includes complete information on the number of construction public procurements, awarded to the selected companies, using Common Procurement Vocabulary (CPV) classification codes 44, 45 and 71; forecasted value; contracted value; year of award; type of procedure; type of funding; information on subcontracting; number of received offers; name of contractor; and type of public procurement (classical or sectoral).

- At the beginning of 2014, the Commission temporally suspended payments to OP Environment, owing to irregularities with public procurement systems and the oversight exercised. The decision particularly noted the lack of transparency in overall procedural implementation, specifically with regard to selection criteria, as well as the absence of sufficient evidence for equal treatment of bidders. Payments re-commenced on 14 November 2014,³² at a cost of EUR 81.3 million in financial corrections and specific measures required to reduce the risk of irregularities.
- Similar irregularities in the public procurement process also led to a temporary freezing of OP Regional Development payments on 3 June 2014,³³ costing an additional EUR 68 million in financial corrections (Mediapool 2015). The EC restarted OPRD payments on 23 February 2015.³⁴

Based on statistical analysis of the EU public procurement TED database for Bulgaria Stefanov, R., Yalamov, T., Karaboev, S. (2015) show that corruption risks in public procurement are lower with EU-financed contracting than when national funds are involved, despite the fact that on average EU construction public procurement contracts have been almost four times larger in terms of value than national ones. Moreover, the authors have demonstrated that single bidding, one of the foremost corruption risk indicators in public procurement, has declined from 27 % of contracts in 2009 to 17 % in 2014. This suggests that the EU's focus on public procurement standards has reduced the risk of corruption in the management of EU funds, perhaps offering avenues to explore in developing future anti-corruption conditionality.

³² EC – Press Release. (14 November 2014). Bulgaria: Commission restarts payments under the Environmental Operational Programme. [WWW]. Available from: http://europa.eu/rapid/press-release_IP-14-1745_en.htm

³³ EC – Press Release. (23 February 2015). Bulgaria: Commission restarts payments under the Regional Development Operational Programme. [WWW]. Available from: https://ec.europa.eu/commission/content/bulgaria-commission-restarts-payments-under-regional-development-operational-programme_en

³⁴ Ibid.

4. BULGARIA: STATE OF GOVERNANCE AND THE CHALLENGE OF CORRUPTION

4.1. STATE OF GOVERNANCE

Bulgaria has been repeatedly defined as a high corruption-risk country, in which the resources and opportunities for corruption are high, while deterrents and constraints remain low (Mungiu-Pippidi, et. al., 2011, pp. 40-41). Its governance regime has been described as moving gradually from patrimonialism to open access order, with most of its features still indicative of the competitive particularism stage (Mungiu-Pippidi, et. al. 2014, p. 25). If the normative ideal of good governance is equated with open access order,³⁵ Bulgaria is still far from achieving this goal. Widespread corruption persists (CSD 2014), and the allocation of public resources remains particularistic and unpredictable, although EU membership has improved transparency and accountability.

It is difficult to argue that Bulgaria has improved its governance as a result of EU conditionality following the country's accession. In this regard, the country seems to follow a general pattern in Central Europe, which has demonstrated that control of corruption is difficult to build and sustain (Mungiu-Pippidi, A. 2013). World Bank indicators on control of corruption³⁶ demonstrate that the greatest improvement in the scores of Central European countries was achieved prior to EU accession. The expectation was that conditionality and technical assistance would improve corruption control both during accession negotiations (which started in the late 90s) and after accession (completed in 2004 and 2007). However, none of the ten EU new member countries recorded any significant progress after being invited to join in 1998 – 2000. Further, once the EU membership offer had been made, progress often slowed, while some countries demonstrated backsliding after accession. The mechanism which seems to work here is selectivity rather than conditionality: countries striving for EU accession work hard to achieve progress, particularly by enhancing their institutional environment, but once invited to join, the pace of reform slows, even when conditionality is in place (Mungiu-Pippidi, et. al. 2011).

The latter finding is confirmed by analysis of the post-accession Cooperation and Verification Mechanism in Bulgaria and Romania. While helping to increase transparency in Bulgaria, the CVM largely failed to address the key governance and rule of law challenges. The CVM's failure to bring about rapid change at least partly reflects the lack

³⁵ For a detailed discussion on how good governance relates to a taxonomy of governance regimes and to corruption and anticorruption, please see Mungiu-Pippidi, et. al. (2011), *Contextual Choices in Fighting Corruption: Lessons Learnt*, Hertie School of Governance and NORAD, Berlin, 2011.

³⁶ Part of the Worldwide Governance Indicators, developed by the World Bank.

of formal EU conditionality and enforcement options relating to the disbursement of EU funds. According to the *Corruption Monitoring System (CMS)*,³⁷ developed by the Center for the Study of Democracy (CSD) in 1999 and implemented, both nationally and regionally since then, 2014 saw the highest levels of involvement of the Bulgarian population in corrupt transactions on record. Data showed an average of around 158,000 corruption transactions on a monthly basis (Center for the Study of Democracy(b) 2014).

Progress in anti-corruption, although moderate, does appear to fluctuate according to the political cycle but also as a result of meeting milestones in the EU integration process. Reported corruption prevalence drops in the first 1-2 years of every new government, only to bounce back to higher levels in the second half of the term. Similarly, corruption drops before major EU-related milestones, such as accession or the threat of suspension of EU funds (Center for the Study of Democracy(b) 2014).

4.2. INSTITUTIONAL (IN)EFFECTIVENESS

Historically, external forces have driven change in the anti-corruption environment in Bulgaria. Most recently the main external agent of change has been the EU, but it seems to have been unable to bring about sustained improvement in this area despite specific attention to this policy domain. Bulgaria has acceded to major international anti-corruption conventions (e.g. the United Nations Convention against Corruption), adjusted its legislation to the recommendations of international institutions (e.g. the Council of Europe Group of States against Corruption), and aligned its laws with those of the EU. Bulgaria has also developed a multitude of anti-corruption institutions in the executive (EC 2015). However, the country has not seen the emergence of a prominent politician or private sector leader ready to champion the anticorruption platform and drive the sustained long-term action necessary to effect change (Stoyanov A., Stefanov R., Velcheva, B. 2014).

Two institutions in particular demonstrate the institutional inconsistencies, limits and shortcomings of EU conditionality and development assistance in the area of anti-corruption.

Commission for the Prevention and Combating of Corruption

Created in 2006, to assure EU partners that Bulgaria takes anti-corruption seriously, the Bulgarian Commission for the Prevention and Combating of Corruption (CPCC) has a considerable mandate and comprehensive

³⁷ Designed by the CSD, the CMS has been recognised by the UN as a best practice in corruption monitoring. CMS's indexes are based on different types of surveys and summarise the most important aspects of corruption behaviour patterns. The main indicators of the CMS describe corruption using three groups of sub-concepts: experience, attitudes and perceptions. For more information, please refer to (Center for the Study of Democracy 2014).

powers to coordinate anticorruption policy.³⁸ By design, the Commission is chaired by the Deputy Prime Minister and Minister of Interior and the organization, work, administrative and technical services are provided by the General Inspectorate of the Council of Ministers. The implementation of decisions is vested in the central authorities of the executive (CPCC 2012).

In practice, however, the CPCC has remained an inter-ministerial coordination body, without independent powers, which depends entirely on the energy and political priorities of the responsible Deputy Prime-Minister and Minister of Interior. Its secretariat, the General Inspectorate of the Council of Ministers, lacks the necessary capacity, human, and financial resources to effectively perform its functions. This has been most visible on the strategic level, with respect to the implementation of the 2009 Integrated Strategy for Prevention and Countering Corruption and Organised Crime. It proved very difficult for the CPCC to integrate the Strategy's various action plans and implementation reports into a strong, synergetic approach against corruption. The CPCC's integrated action plans and audit reports failed to provide a clear picture of the state of implementation or impact of the Strategy. A similar lack of coordination is evident in the 28 regional councils on anticorruption. Although the majority of regional administrations have adopted separate action plans and produced implementation reports, inconsistencies and weaknesses in reporting have hindered results (CSD(c) 2014). Though it is still formally in place, the CPCC practically ceased to function around 2010, coinciding with the expiry of the CVM safeguard clauses.

Centre for Prevention and Countering Corruption and Organised Crime

The Centre for Prevention and Countering Corruption and Organised Crime (BORKOR) is the second specialized national anti-corruption institution, established as a response to CVM recommendations, which has largely failed to develop its potential or make an impact. BORKOR was initially announced in 2009 as a bold new executive agency with sweeping powers to tackle high-level corruption and organised crime, only to be downgraded in 2010 to an analytical centre within the Council of Ministers to assess, plan and advance preventive anticorruption measures. BORKOR claimed its first project would be the application of a specialized software to identify weak spots and develop a network of measures against corruption, specifically in public procurement. The software would embed six electronic platforms (e-registry, e-auctioning, e-catalog, e-tender, e-monitoring and e-audit) covering the entire procurement procedure, including pre-award planning and post-award contract implementation. In addition, BORKOR was to analyse PP legislation, coordinate with the control authorities and integrate various datasets so as to detect linkages and dependencies between economic

³⁸ In general, the CPCC's functions include, among others analyzing corruption and conflict of interests and proposing policies to counteract them; proposing to the Council of Ministers the anticorruption priorities of the government on an annual basis; analyzing regulatory acts, potentially vulnerable to corruption and proposing amendments; preparing strategic documents and coordinating their implementation; developing measures for more effective preventive mechanisms for countering corruption and conflict of interests in the decision making process.

operators. However, BORKOR never developed the software, producing only an analysis of the main corruption risks in public procurement. The ongoing lack of results and opacity of its mission, despite spending more than EUR 5 million in the first three years of its existence, have drawn repeated criticisms from civil society and the media (BORKOR 2014). The new anti-corruption strategy adopted in early 2015 has slated BORKOR for merger with other anti-corruption institutions but as of early 2016 this has not materialized owing to a lack of parliamentary support.

The fate of these two anti-corruption institutions demonstrates the interplay between two factors – the political cycle in Bulgaria and the country's EU accession milestones. These lead to intermittent pressures to demonstrate commitment to anti-corruption, but without sustained attention, there is no substantive progress. The CPCC was launched in 2006 in the wake of Bulgaria's final push to convince EU partners it was ready for membership. Then in 2009, a new government produced BORKOR to appease EU partners and prevent the imposition of the CVM's safeguard clause. Following the expiry of the safeguard clause in 2010, both institutions quickly fell out of favour with the political leadership. Thus a potentially potent combination of BORKOR's focus on developing necessary instruments for fighting corruption and monitoring progress, and the CPCC's responsibility for their implementation, failed to produce results as political interest and motivation waned. Other Bulgarian anti-corruption institutions have also been discredited, as in the case of the Commission for Prevention and Ascertainment of Conflict of Interest, whose first chairman was prosecuted for using the institution to exert political pressure. No new chairperson has been elected, rendering the institution defunct.

In recent years, especially in the aftermath of the economic crisis, controversies over corruption allegations have contributed to mounting political tensions and polarization. In 2013, following a rushed and non-transparent vote in the parliament, a controversial politician and businessman with substantial economic and media influence was appointed to chair the State Agency for National Security, a critical institution in terms of combating high-level corruption. The Agency, which has significantly enhanced law-enforcement powers, was thus placed in the control of a political figure without relevant experience. The appointment was withdrawn following a mass public outburst, but it sparked protest rallies which ran for over a year, demanding the resignation of the government and calling for early general elections. The protests escalated to a siege of the Bulgarian Parliament, resulting in clashes with police forces, leaving several injured, and further destabilizing the political situation in the country (CSD 2015). During this crisis, the anticorruption functions of the two most powerful anti-corruption institutions within the executive – the Ministry of Interior and the State Agency for National Security – were effectively incapacitated, further hindering the implementation of anti-corruption policies.

The freefall of the anti-corruption system has resulted in a collapse in public confidence towards the government and state institutions, and perhaps contributing to a record low turnout during the 2014 general

elections (CSD 2015). In addition, the frequent political shifts as a result of early parliamentary elections in 2013 and 2014 have produced far-reaching changes at the administrative level, which hinder the fight against corruption (EC(c) 2014). In its 2015 CVM progress report, the EC once again noted the ineffective pursuit and prosecution of high-level corruption cases, and has recommended that Bulgaria create yet another new anti-corruption institution, capable of coordinating the government's anti-corruption policy (EC 2015).

4.2.1. Continuing opposition to anti-corruption reforms

The implementation of the 2009 Integrated Strategy for Preventing and Countering Corruption and Organised Crime was flawed in many respects. The implementation reports covered a long list of activities undertaken by the respective ministries, executive agencies and regional administrations, but lacked any integrated analysis as to how these contributed to the implementation of the measures set out in action plans. Despite the Strategy's stated focus on control mechanisms, there were few sanction mechanisms against non-compliance (CSD(c) 2014).

Facing continuing criticism under the CVM, in 2015, Bulgaria adopted a new National Strategy for Prevention and Countering Corruption for 2015-20 (CPCC 2015). The Strategy explicitly incorporates the implementation of the 2014-15 round of CVM recommendations: (a) creating a national coordinating body on anti-corruption in the executive, which is to integrate a number of currently ineffective institutions in pursuit of greater coordination and impact; (b) addressing high-level corruption through a joint anti-corruption unit led by the prosecution, including the State Agency National Security, and police investigators; and (c) focusing on vulnerable sectors, such as public procurement (EC 2015, CPCC 2015). Experts commended the Strategy, but raised concerns about its implementation.

Indeed, implementation of the Strategy was sabotaged at the very beginning. A Law on Preventing Corruption among Persons Occupying High Public Offices was drafted as a first step (National Assembly of the Republic of Bulgaria 2015). The draft law provides for the establishment of a National Bureau for Preventing Corruption as a powerful new independent anti-corruption body, chaired by an anti-corruption professional appointed for a term longer than the government's to ensure his/her independence. The law envisaged that the Bureau would succeed and combine the powers of the Conflicts of Interest Commission, BORKOR, the national asset forfeiture commission, and the unit of the National Audit Office dealing with asset declarations of high-ranking officials. The Bureau would have sweeping authorities to cross-check asset declarations submitted by persons occupying high public offices, as well as to review indicators of irregularities and rule on conflict of interest cases. The Bureau is to be held to account through periodic external audit and integrity checks (including through polygraph) on its inspectors. In addition, new regulations on declaring assets and conflicts of interest will apply to a larger scope of circumstances and public office roles. The draft law

also included the following provisions: new regulations on post-public employment for high public officials; protection for whistleblowers; and the development and implementation of risk assessment methodologies for corrupt conduct.

Though some aspects of the draft law need more precision (e.g. the definition of corrupt conduct, the function of external audit, the protection of whistleblowers, as well as a methodology for filtering anonymous complaints), the legislation is seen as an important step towards resolving the deadlock in Bulgaria's anti-corruption efforts since 2010. However, Bulgarian MPs sabotaged the draft law, rejecting it at first reading, and not returning to it at all within 2015. The main arguments for the rejection were overly general and varied from privacy intrusion, which is at stake in any anti-corruption law, to possible misuse of the powers of the National Bureau for Preventing Corruption. The Parliament thus seems disinclined to take seriously the anti-corruption conditionality that the EU has introduced through the CVM and the EU Council National Reform Programme Specific Country Recommendations from 14 July 2015.³⁹ The ambassadors to Sofia of 14 EU member states and Norway and Switzerland signed a special declaration to the Bulgarian Parliament, noting that the rejection of the law is against the agreed principles of the CVM.⁴⁰

Another sign of the weakness of CVM conditionality has been the very slow progress in judicial reform since accession, which is another critical condition for the success of wider anti-corruption efforts. In 2014, the Bulgarian Parliament adopted an Updated Strategy to Continue the Judicial Reform (Ministry of Justice 2014), outlining goals and measures for the next seven years. The strategy aims at:

- overcoming the institutional prerequisites for exerting illicit influence on and through the Supreme Judicial Council;
- restricting possible administrative influences on the independence of the courts, enhancing the responsibility and efficiency of court administration; and
- corruption prevention within the judiciary (CSD(c) 2014).

The strategy required constitutional changes necessitating a three-quarters majority in parliament. The difficulty of obtaining such widespread support led to an ongoing dilution of the Strategy throughout 2015, until it was finally adopted at year end. The adopted version was so severely crippled that the Minister of Justice who had proposed the initial package resigned in protest during the vote.

The initial version of the Strategy, which was in line with the CVM recommendations, foresaw, among other things: the division of the

³⁹ Council of the European Union. (14 July 2015). Council recommendation of 14 July 2015 on the 2015 National Reform Programme of Bulgaria and delivering a Council opinion on the 2015 Convergence Programme of Bulgaria. [WWW]. Available from: http://ec.europa.eu/europe2020/pdf/csr2015/csr2015_council_bulgaria_en.pdf

⁴⁰ British Embassy in Sofia, Bulgarian anti-corruption law: joint statement from Ambassadors, 7 September 2015. [WWW]. Available at: <https://www.gov.uk/government/world-location-news/bulgarian-anti-corruption-law-joint-statement-from-ambassadors>

Supreme Judicial Council into two chambers – one for judges and one for prosecutors; the election of judges' chambers with a majority from the professional community, and of prosecutors' chambers on parity principle (half from the relevant professional community, and half from the parliament); the creation of a body independent from the Prosecutor General to prosecute high-level corruption; the establishment of an annual hearing for the Prosecutor General at the parliament; the introduction of anonymous voting by the Supreme Judicial Council chambers on magistrates' evaluation and career development (Ministry of Justice 2015).

In the version introduced to parliament, the Council of Ministers omitted the proposal to create an independent body to prosecute high-level corruption, but retained the plans for the separate Supreme Judicial Council chambers for judges and prosecutors and the possibility for the prosecutors' chamber to propose disciplinary actions against the Prosecutor General (National Assembly of the Republic of Bulgaria 2015). The final version adopted by parliament through constitutional amendments includes only the separation of the SJC into two chambers. Most notably, it failed to support any of the foreseen accountability mechanisms for the Prosecutor General, with last-minute amendments during the vote introducing a clause guaranteeing a majority for the prosecutors (*vis-à-vis* the parliament) in the composition of the prosecutors' chamber of the new Supreme Judicial Council.

Overall, Bulgaria's progress on anti-corruption and judicial reforms is haphazard. On the surface, with EU membership the country seems to have embarked on a course towards open access order (or a good governance model), which EU funds and peer pressure from other EU members are supposed to help bring along faster. But the overall environment, as well as the majority of international and local assessments concur that Bulgaria's distribution of resources remains particularistic, with citizens perceiving corruption as the norm. Indeed, corruption inhibits even the development of mechanisms intended to curb corruption, as in the case of the institutions tasked with managing EU funds (Stoyanov, Stefanov, and Velcheva, 2014). As we will argue below, part of the reason is that EU financial support is inconsistent with the Union's increasing ambitions in the good governance domain, particularly with regard to the objectives of the EU's 'soft' post-accession conditionality in the form of the CVM mechanism and, most recently, the EU Anti-Corruption Report.

During the 2007-13 programming period, financial assistance to Bulgaria was largely driven by the economic rationale of focusing on infrastructure development. In seeking to provide a more definitive insight as to the impact of EU conditionality and financial assistance on Bulgaria's governance and anti-corruption drive, as well as the justice and home affairs (JHA) area, the discussion below will evaluate the EU pre- and post-accession financial support in terms of its consistency and integration with the Union's policy conditionality.

5. IMPROVING GOVERNANCE THROUGH EU FINANCIAL ASSISTANCE: ASPIRATIONS VERSUS REALITY IN THE GOOD GOVERNANCE DOMAIN

5.1. SHORT METHODOLOGICAL NOTE

This analysis reviews the EU assistance provided in three distinct periods of Bulgaria's relationship with the EU:

- financial resources under the Union's pre-accession programmes (more specifically PHARE);
- funding during the initial years of membership (mainly concerning the 2007 Transitional Facility and remaining payments under PHARE); and
- allocations under the 2007-13 ESIF programming period, focusing on Operational Programme Administrative Capacity (OPAC).

The first observation is that the amount of support earmarked for anti-corruption is insignificant relative to the priority accorded governance in the overall discourse on EU-Bulgaria relations. For this reason, our analysis also considers the financing of projects indirectly related to anti-corruption, including those in justice and home affairs (JHA). Projects aimed at increasing the overall capacity of the public administration are only considered in relation to wider discussions on good governance.

The analysis is largely based on project-level data provided by the Managing Authorities of the seven Operational Programmes, implemented in Bulgaria during 2007-13. Telephone interviews with the respective MAs were used for additional clarifications and discussions. Cooperation was established in particular with the Council of Ministers, acting as MA of OPAC, due to the programme's high relevance to the present paper. Additional insights and qualitative data were collected during face-to-face interviews conducted with representatives of the Central Coordination Unit (CCU), responsible for the ESIF management in Bulgaria, and of the General Directorate 'European Funds for Competitiveness' at the Ministry of Finance, acting as MA for OPC.⁴¹

⁴¹ The authors would like to thank these Bulgarian institutions for their readiness for discussion and for the provided data and information. The data provided in the paper and its interpretation though are entirely the responsibility of the authors of the paper and can in no way be attributed to the Bulgarian authorities in general or any of the administrations mentioned here in particular.

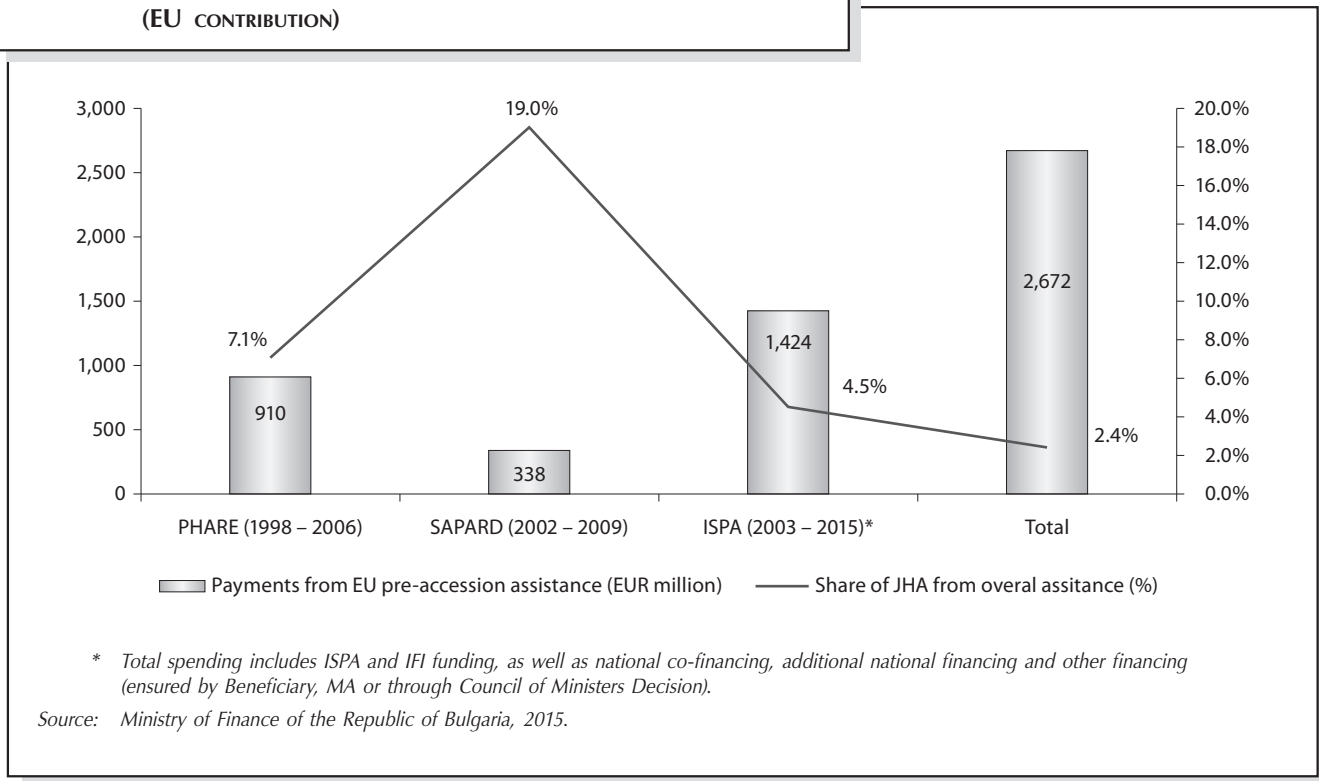
5.2. EU PRE-ACCESSION ASSISTANCE FOR JUSTICE AND HOME AFFAIRS AND ANTI-CORRUPTION

The EC has highlighted Bulgaria’s problems with corruption and the wider justice and home affairs area consistently throughout the EU accession negotiation process, as evidenced by EC progress reports in the 1998 – 2006 period.⁴² The overall support provided through the Union’s pre-accession programmes totaled over EUR 2.5 billion in actual payments. The latter were distributed across three major programmes:

- PHARE, designed to aid actions linked to the transposition of the EU *acquis* and institution building across all sectors;
- ISPA, supporting environmental and transport infrastructure projects; and
- SAPARD, focusing on agricultural and rural development measures.

Support for reforming JHA, including anti-corruption, was integrated into the PHARE programme, which amounted to roughly one-third of all assistance paid to Bulgaria from pre-accession funds. Although PHARE funds do not seem to provide substantial resources, these were the only funds available for public sector reform, at a time when the public sector was under considerable financial strain.

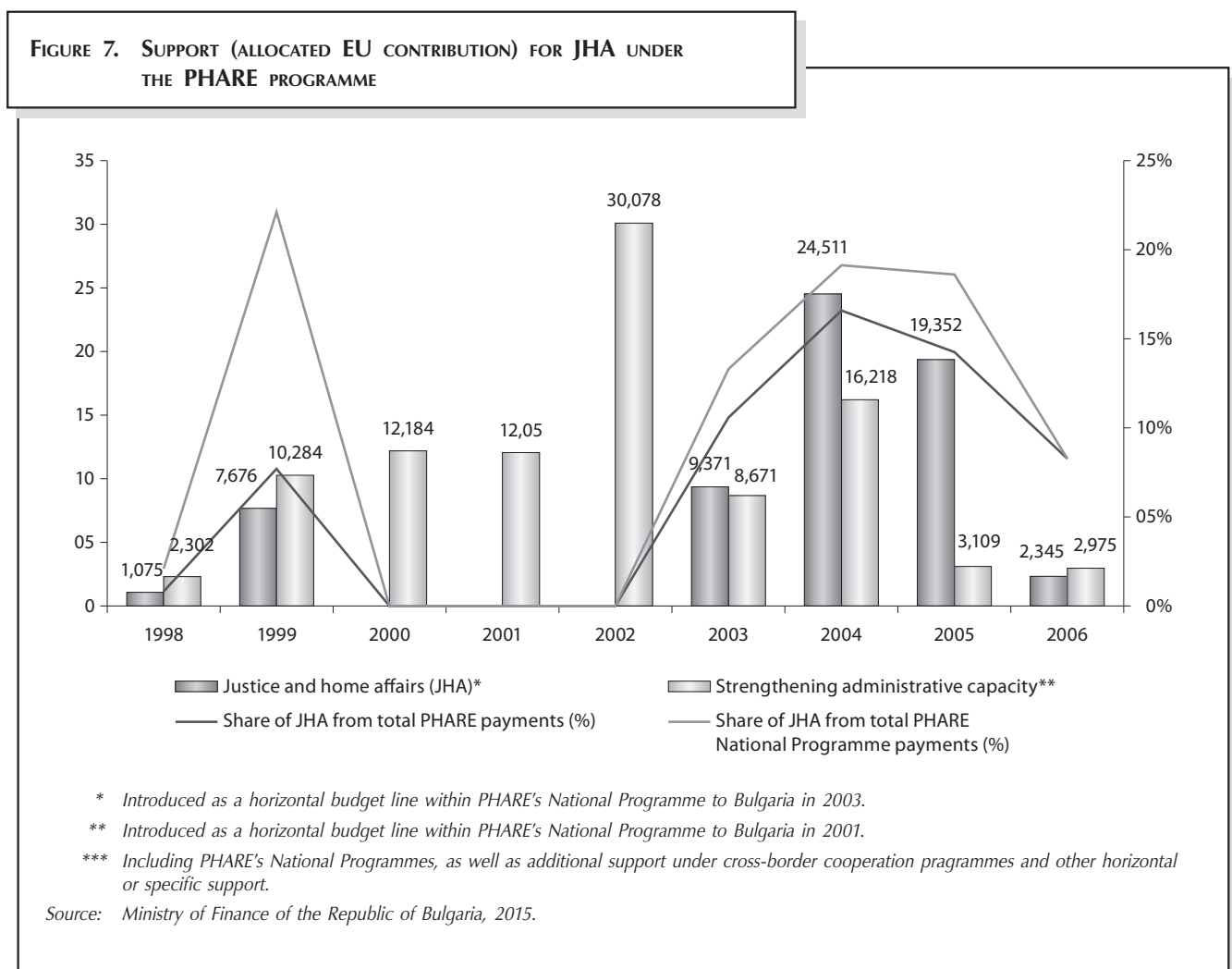
FIGURE 6. PAYMENTS FROM EU PRE-ACCESSION PROGRAMMES (EU CONTRIBUTION)



⁴² The Regular and Progress Reports on Bulgaria are available at http://ec.europa.eu/enlargement/archives/bulgaria/key_documents_en.htm

It is interesting to observe the evolution of JHA support within the PHARE programme. Actual payments in the respective domain totaled EUR 64.3 million in the 1998 – 2006 period. Two separate ‘waves’ of support can be distinguished – a smaller one at the beginning and more substantial one towards the end, while the 2000-02 period did not have a specific JHA budget. Since 2002, with the introduction of horizontal support for JHA (and administrative capacity), the priorities of the programme have shifted from amending the legislative framework to issues of implementation and enforcement. For JHA in particular, this meant increased efforts to enhance inter-ministerial cooperation, measures geared towards ensuring the independence in practice of the magistracy and/or judiciary (ECOTEC 2006).

PHARE support for enhancing administrative capacity is also relevant. In that regard, the EC allocated nearly EUR 100 million in actual payments. Added to the nearly EUR 65 million in JHA support, this comprises a strong commitment to supporting good governance on Bulgaria’s accession path towards the EU.



Although it was not specified as a separate budget line, and there was no overall JHA development strategy or explicit PHARE project support

(ECOTEC 2006), it is possible to establish a connection between the governance progress of the country, based on the EC's comprehensive monitoring reports (CMRs) and regular reports (RRs) over 1998 – 2006, and the financial support provided in specific areas (see Table 5). Moreover, the successive recommendations of the CMRs and RRs that more attention should be paid to measures supporting the fight against corruption appear to have been one of the main reasons for the enhanced status of the issue in PHARE programming since 2002.

TABLE 5. CORRELATION BETWEEN SPECIFIC CMRs/RRs RECOMMENDATIONS IN THE JHA AREA AND THE NUMBER OF RELATED PHARE PROJECTS

| Year of recommendation | Specific JHA and anti-corruption issue | Substantial progress | | Limited progress | |
|------------------------|---|---|----------------------|--------------------------------|----------------------|
| | | Phare Support – Year of National Programme (No of projects) | No Phare Support (X) | Phare Support (No of projects) | No Phare Support (X) |
| 2002 | Judicial structure, including investigation modalities and the immunity issue | | | 2001 (1) 2002 (1) | |
| | Concerted efforts to fight corruption | | | | X |
| 2003 | Re-organisation of the investigative service | | | 2002 (4) | |
| | Adequate budgetary resources for the judicial system | | X | | X |
| 2004 | Continued efforts to fight high level corruption | | | 2002 (3) | |
| | Efficiency of penal structures (especially pretrial procedures) | | | 2003 (1) | |
| | Improving capacity to fight organised crime and judicial and police corruption | | | 2002 (1) | |
| 2005 | Further reform of the pre-trial phase | | | 2004 (1) | |
| | Addressing the accountability of the judicial system and speeding up its workings | 2004 (3) 2005 (5) 2006 (4) | | | |
| | Addressing weaknesses in the investigation and prosecution of high level corruption cases | | | 2005 (1) 2006 (1) | |

Source: ECOTEC, 2006.

Nonetheless, the PHARE support provided for JHA (and administrative capacity) proved ineffective in sustainably reducing corruption, although it has helped to sensitise Bulgarian citizens to the topic. On the one hand, despite the effort to link the EC's monitoring process with the assistance provided, the lack of a formal funding relationship between the two hindered Bulgaria's progress in a number of areas, including JHA and the fight against corruption. PHARE evaluation reports also suggest that the introduction of horizontal support for JHA (and administrative capacity) should have started earlier than 2002, in order to achieve better results. However, a lack of capacity in the Bulgarian public administration also impeded progress, resulting in an unsatisfactory rate of PHARE project implementation. According to an independent thematic evaluation of the PHARE programme, of the 38 public administration and judicial capacity (PAJC)⁴³ projects, 79 % were rated positively for relevance but only about half were rated 'satisfactory' or 'highly satisfactory' for efficiency and effectiveness. In addition, a large proportion (46 %) received a negative rating for efficiency (ECOTEC 2006). Additionally, an average of 10 % of the contracted JHA PHARE funds were lost owing to the weak absorption capacity of the public administration.

Bulgaria became a Member State of the EU despite serious inconsistencies and lack of progress in its anti-corruption and justice system reforms. More importantly, the country lacked the necessary mechanisms to solve these problems. This forced the EU to introduce the CVM post-accession mechanism, but that has proved ineffective largely because it failed to introduce any conditionality linked to EU assistance.

5.3. SUPPORT FOR ANTI-CORRUPTION ISSUES AND THE TRANSITION TO EU MEMBERSHIP

Despite the existing benchmarks and safeguard clauses, the CVM has not proved effective in reducing corruption as it lacks enforcement mechanisms and concrete sanctions for non-compliance. The Commission's benchmarks under the CVM tend to be targets or tasks that Bulgaria should complete, rather than standards against which progress might be measured (Center for the Study of Democracy 2010). According to the EC, the safeguard clauses were "not punitive measures to take in case of non-delivery but measures of last resort in order to protect the interests of the EU" (EC 2007).⁴⁴ Such an approach has allowed the EC room for manoeuvre in terms of proposing new and more concrete objectives in its progress reports, but it also provided the national government with ways of evading compliance. In the absence of effective punitive

⁴³ The term Public Administrative and Judicial Capacity has never been formally/explicitly defined by the EC. The working definition of PAJC used in: "The creation and maintenance, within a system of governance, of all the organisational structures, competencies and resources required of a national public administration and judicial if they are to be able to take on the obligations of the Copenhagen membership criteria".

⁴⁴ The CVM reports on Bulgaria can be found from: http://ec.europa.eu/cvm/progress_reports_en.htm

measures, Bulgaria has repeatedly failed to meet or even deliberately ignored these recommendations.⁴⁵

The CVM was further weakened once the safeguard clauses expired in 2010. The continuation of the CVM, now in its eighth year, has increasingly transformed it into an instrument of political rather than technical pressure. The Bulgarian authorities face no formal consequences, besides public shaming, even if they completely disregard the reports' findings.

Arguably the biggest shortcoming of the CVM framework is the fact that there is no direct link to EU funding conditionality. The EC does stipulate four types of technical requirements for providing funds, where failure to comply can prompt financial corrections and/or the suspension of funds. As provided for by the *acquis*, these requirements are:

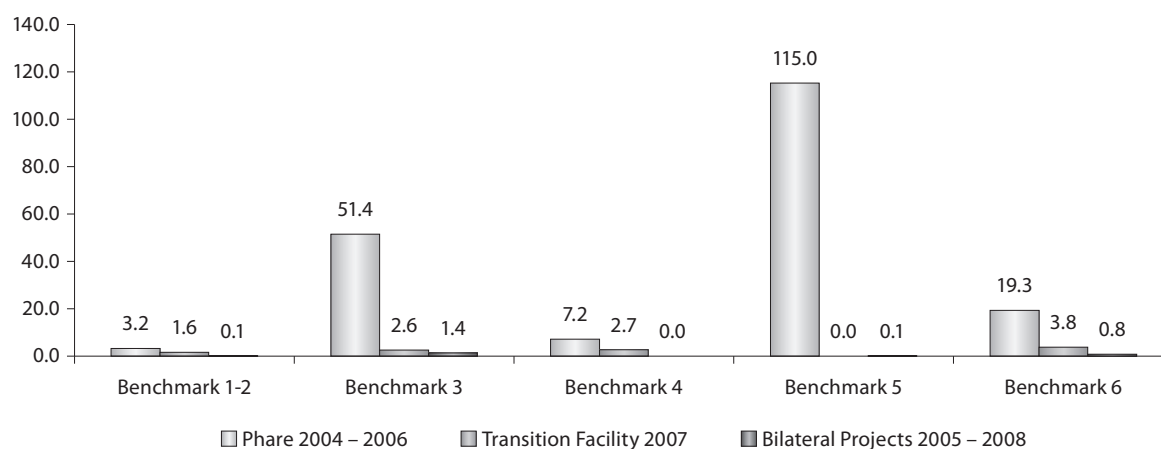
- National authorities must submit operational programmes for EC approval, describing how the funds are to be spent (including on sectoral level).
- National authorities must demonstrate that efficient management, certification and audit authorities are well established.
- If irregularities, fraud or corruption practices, are revealed, the EC can interrupt, suspend or cancel the disbursement of funds.
- If systemic irregularities are discovered in the process of regular ex-post control, this could also result in financial corrections (EC 2006).

Despite the absence of a formal link between CVM conditionality and EU development assistance, three instruments have provided project support for anti-corruption during Bulgaria's transition to EU membership. Lagging behind on its implementation and receiving some additional financing in 2006, the PHARE programme was able to contribute to compliance with the CVM benchmarks. Selected bilateral projects under PHARE were also partially related with the post-accession mechanism. The one (and to this date only) financial mechanism, which comes closest, though only partially, to supporting concrete CVM objectives was the Transition Facility in the Republic of Bulgaria for 2007 (EC(b) 2007).

The 2007 Transition Facility initially foresaw the provision of EUR 31.5 million to Bulgaria (EC(b) 2007). According to the EU progress report from 2008, less than 10 % (EUR 2.7 million) of these funds were committed to supporting anti-corruption actions, mainly those contained in CVM benchmark 4 on high-level corruption. The areas of judicial reform (benchmark 3) and organised crime (benchmark 6) also received funding (EC 2008). Beyond those projects related to the CVM benchmarks, the overall allocation of Transition Facility funds in support of JHA amounted to EUR 8.2 million in actual payments. Similar to the PHARE case, the Bulgarian administration proved unable to fully absorb both the preliminary budget and the contracted resources. The final payments from the Facility were made at the end of 2011, leaving the actual rate of implementation at 88 %.

⁴⁵ For example, repeated recommendations of the CVM progress reports for the establishment of independent anticorruption agency or for solid track record of high-level corruption sentences remain unattended since the launch of the monitoring mechanism.

FIGURE 8. OVERVIEW AND AGREED BUDGET SUPPORT FOR THE CVM'S SIX BENCHMARKS ON BULGARIA (EUR MILLION)



Note: Benchmark 4 concerns high level corruption and Benchmark 5 – local level and corruption at the borders. The EUR 115 million allocated for Benchmark 4 are not corruption related though as they concern the modernization of border crossings not necessarily linked to anti-corruption. Hence, they have not been taken into consideration in the analysis any further.

Source: EC 2008.

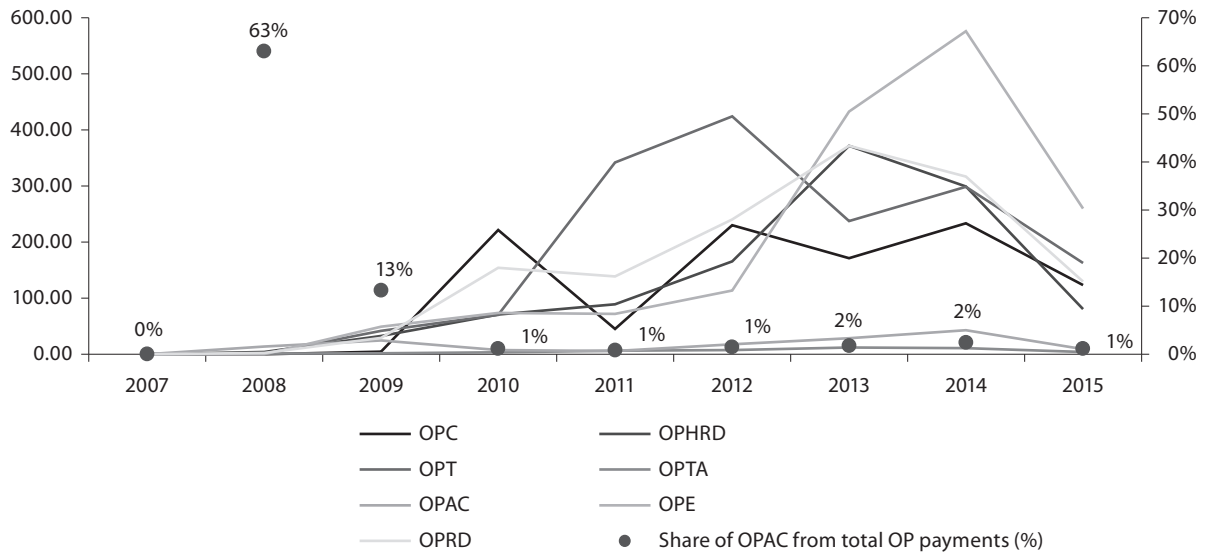
5.4. IMPROVING GOVERNANCE AND ANTI-CORRUPTION VIA THE EUROPEAN STRUCTURAL AND INVESTMENT FUNDS (EFIS) DURING THE 2007-13 PROGRAMMING PERIOD

The continued existence of the CVM mechanism in Bulgaria in 2016, although its safeguard clauses expired in 2010, is testament to the fact that the country has not yet achieved EU standards in governance, and is yet to demonstrate a satisfactory track record of anti-corruption and judicial reforms. It also suggests that the development assistance provided by the EU through the pre-accession PHARE programme (nearly EUR 65 million for JHA in actual payments in total) and the subsequent transitional facility (EUR 8 million for JHA in actual payments) have not produced lasting improvement in the anti-corruption area nor in JHA as a whole.

Thus one might have expected EU development assistance for anti-corruption and JHA to be increased in the 2007-13 ESIF programming, particularly taking into account higher levels of support after accession. Yet anti-corruption was not included among the four major priorities of the National Strategic Reference Framework (NSRF). Anti-corruption was exclusively supported by Operational Programme Administrative Capacity through several of its sub-priorities focused on good governance, increasing judicial and administrative capacity, and e-government. OPAC was the smallest OP, and the level of EU assistance provided through it did not represent an increase in the level of support for anti-corruption

in comparison to pre-accession years. However, due to its relatively small size, OPAC was able to start actual implementation before other OPs. Thus, in the first two years of EU membership, payments under OPAC represented 63 % and 13 % respectively of total OP disbursements.

FIGURE 9. OVERALL DISTRIBUTION OF OP TOTAL ACTUAL PAYMENTS DURING 2007 – 2015 (EUR MILLION)



Source: Combined database provided by the Managing Authorities of the 7 OPs in Bulgaria. Note: the values for 2015 include total actual payments until 31.08.2015.

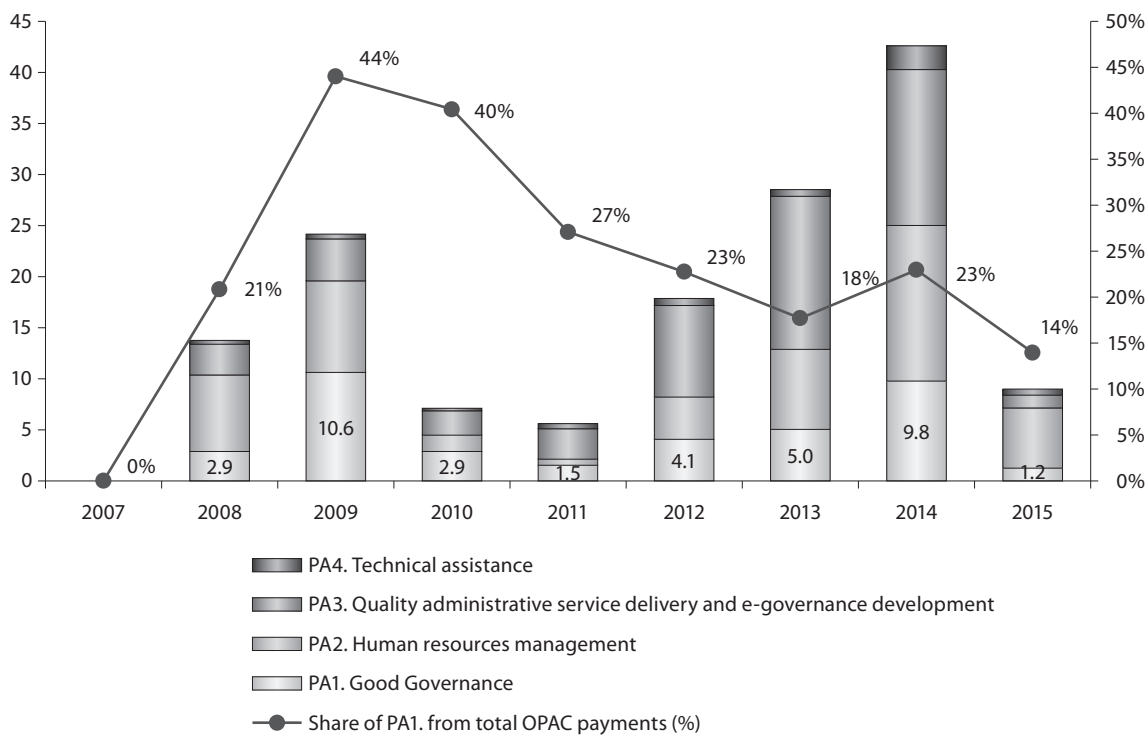
It is true that the large-scale infrastructure projects implemented by most other OPs required greater lead time for preparation, which contributed to their slow start. Additional problems also existed in the initial years of implementation, such as a lack of capacity and slow integration of the necessary control systems in the investment-heavy OPs.⁴⁶ However, a case can also be made that OPAC’s quick start was influenced by the pressure to introduce the CVM in the early years of EU membership, especially in light of the time-limited safeguard clauses. To a certain degree this is confirmed by looking into the implementation trend of the various priority axes (PAs) of the programme. Among the four PAs, ‘Good Governance’ (PA 1) comes closest to supporting projects with an anti-corruption focus.⁴⁷ Thus it is not surprising that actual payments under PA 1 were nearly half of the entire OPAC in 2009 and 40 % in 2010. In addition, the nominal value of PA 1 funds paid out in 2009 has been the highest yet for the programme (over EUR 10.5 million). After this dynamic start, the pace of the programme’s actual payments slowed

⁴⁶ Based on qualitative data during face-to-face interviews, conducted with representatives of the Central Coordination Unit (CCU), responsible for the ESIF management in Bulgaria, and of General Directorate “European Funds for Competitiveness” at the Ministry of Finance, acting as MA for OPC.

⁴⁷ It should be noted that a small number of projects with anticorruption focus are also found under other PAs, specifically related to judicial capacity. For more information see the discussion on project-level support below.

significantly in 2010 and 2011, before picking up towards the end of the programming period.

FIGURE 10. DISTRIBUTION OF TOTAL ACTUAL PAYMENTS FOR SUPPORT UNDER OPAC'S PRIORITY AXES (2007 – 2015) (EUR MILLION)



Note: the values for 2015 include total actual payments until 31.08.2015.

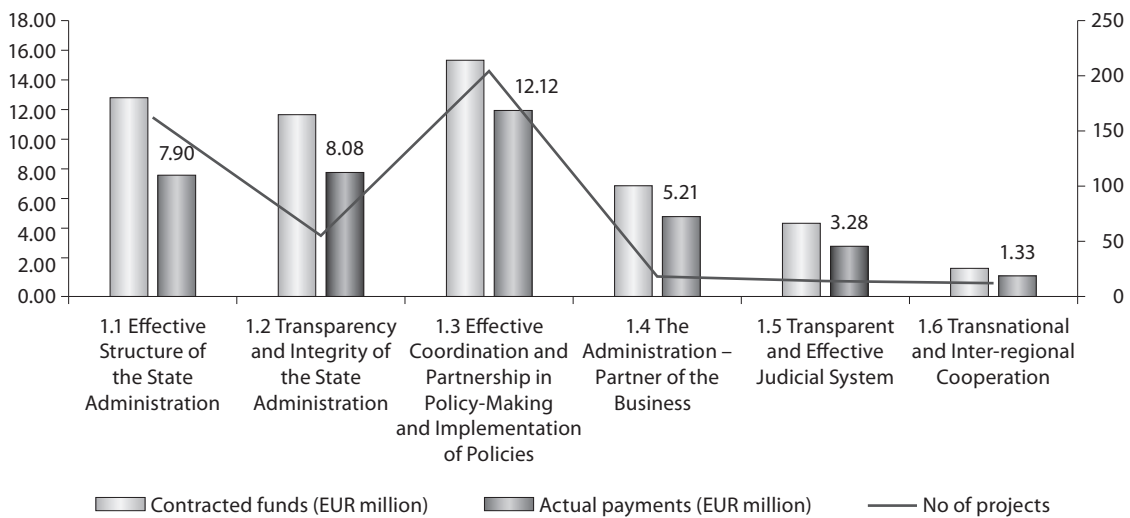
Source: Database provided by the Managing Authorities of OPAC.

Anti-corruption-related activities were not the main focus of PA 1. Of the many sub-priorities, the most relevant related to increasing the transparency and integrity of the state administration (sub-priority 1.2), as well as to creating a transparent and effective judicial system (sub-priority 1.5).⁴⁸ In the first instance, measures mainly involved increasing transparency and access to information; raising awareness and improving (or developing new) mechanisms for reporting corruption; disclosure of conflicts of interest; cooperation with civil society and the media. In the second case, the focus was largely on projects aimed at improving the mechanisms for identifying corruption cases and measures against them; creating and applying a transparent system for examining claims; developing and implementing mechanisms for independent oversight or investigation; and establishing productive cooperation between the judicial authorities and NGOs in the field of counteracting corruption (OPAC 2007).

⁴⁸ As additional anticorruption-related actions can be recognized under efforts for more efficient judiciary system through information technologies (sub-priority 3.3 in PA 3), as well as through increased anticorruption trainings for the administration and the judiciary (sub-priority 2.4 in PA 2).

In terms of actual payments, projects supported under the two sub-priorities relevant to anti-corruption received around 30 % of financial assistance. Support for the judicial system was lower (just over EUR 3 million), with only 14 projects financed for the period 2007-13. Combined, the two relevant sub-priorities demonstrated low absorption capacity (68 %).

FIGURE 11. ASSISTANCE AND NUMBER OF PROJECTS FOR OPAC PA 1 GOOD GOVERNANCE BY SUB-PRIORITY



Source: Database provided by the Managing Authorities of OPAC. Note: As of 31.08.2015.

5.5. IMPACT OF ANTI-CORRUPTION CONDITIONALITIES AND PROVIDED EU FUNDS ASSISTANCE: IMPROVING GOVERNANCE OR REAFFIRMING THE LACK OF POLITICAL COMMITMENT?

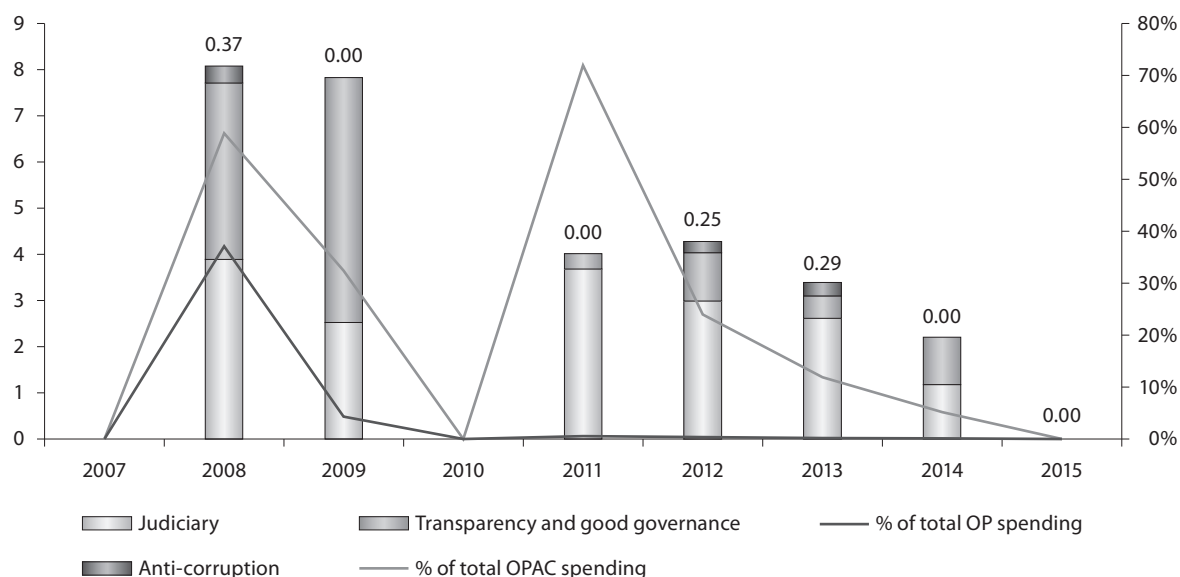
A more detailed look on the project level confirms a growing inconsistency in recent years between relatively little anti-corruption-related support through EU development assistance, on the one hand, and CVM recommendations that further progress is required, on the other. After 2009, the EU financial resources allocated for anti-corruption, judiciary, transparency and good governance projects⁴⁹ decreased significantly (Figure 12). Although the latest CVM progress reports have been increasingly negative (EC(c) 2014, EC 2015), funds allocated to

⁴⁹ Anti-corruption' includes specific projects containing the keywords "corruption" and/or "anticorruption", as well as projects related to organised crime and/or EU funds fraud. Judiciary' includes projects from the following sub-priorities on Judiciary from Priority Axes 1, 2 and 3 – 1.5; 2.4; and 3.3 Transparency and good governance' includes projects from the OPAC database, containing the keywords "good governance" and/or "transparency"; Duplicates are removed.

relevant projects have dropped off since around 2010, when the safeguard clauses expired.

The project-level data also indicate a lack of interest and/or capacity on the part of the public administration to implement anti-corruption projects. Absorption capacity is poor for many of the anti-corruption projects, falling below 60 % for many of them with some at only 30 %. This naturally led to financial corrections and the loss of dedicated funds.⁵⁰ Such problems were prevalent already in the implementation of pre-accession funds, suggesting that weaknesses in administrative capacity in these areas are deep.

FIGURE 12. SUPPORT IN TOTAL ACTUAL PAYMENTS FOR ANTICORRUPTION-RELATED ACTIONS DURING THE 2007 – 2013 PROGRAMMING PERIOD (EUR MILLION)

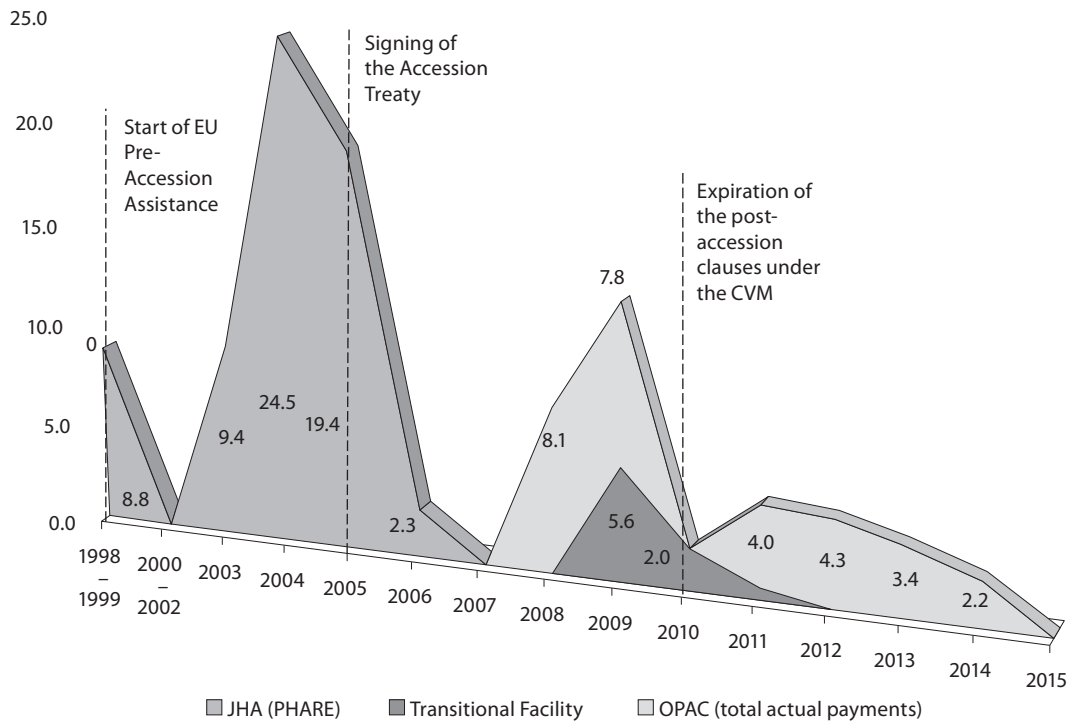


Source: Database provided by the Managing Authorities of OPAC. Note: As of 31.08.2015.

An overview of the provided EU financial support for anticorruption-related actions since the beginning of the PHARE programme in Bulgaria in 1998 reveals a telling trend. Irrespective of the actual amount of financial support through the years, Bulgaria seems to devote attention and resources to anti-corruption commitments only when approaching a major milestone towards EU accession or other related conditionality. Pre-accession, the allocation of anti-corruption-related support grew on two such occasions – at the very beginning of the PHARE programme and just before signing the Treaty of Accession in 2005. Post-accession, action through OPAC and the 2007 Transitional Facility peaked just prior to 2010, which coincided with the expiration of the CVM's safeguard clauses (Figure 13).

⁵⁰ It should be noted that some of these projects have started in 2013 and 2014 and there is still time for additional payments under the 'n + 2' rule, which is not the case for actions, which started in the 2008-2011 period.

FIGURE 13. DYNAMICS OF THE OVERALL PROVIDED SUPPORT FOR ANTICORRUPTION-RELATED ACTIONS TO BULGARIA DURING THE 1998 – 2015 PERIOD (ACTUAL EC PAYMENTS, EUR MILLION)

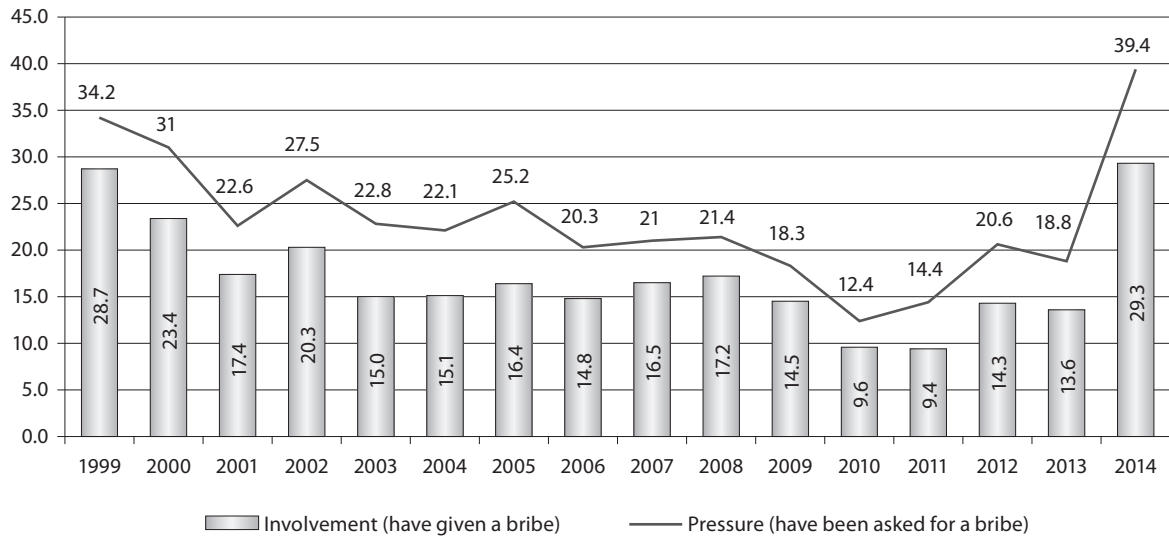


Source: Combined database provided by the Managing Authorities of the 7 OPs in Bulgaria. Note: the values for 2015 include total actual payments until 31.08.2015; Ministry of Finance, 2015.

The lack of progress in the areas of anti-corruption and judicial reform in Bulgaria despite the presence of EU conditionality and development assistance point to the fact that the country lacks genuine political will and commitment to undertake reforms. The 2015 Progress Report under the CVM mechanism confirms that corruption remains a major issue and observes that preventive measures seem in their infancy in most cases. Although prosecutions and convictions, especially concerning high-level corruption, are central to the credibility of any anti-corruption strategy, Bulgaria’s track record includes “very few final convictions in cases involving substantial corruption, despite the scale of the problem” (EC 2015). Frequent institutional changes are superficial, with a “tendency for these initiatives to run into problems or simply show no visible results” (EC(c) 2014). Nor have EU mechanisms for providing assistance and enforcing conditionality been adequately targeted or enforced to motivate officials to summon greater political will or make consistent efforts to overcome entrenched malaise in this area.

Data from the *Corruption Monitoring System* developed by CSD suggest that this pattern of intermittent political attention to countering corruption has been reflected in the experience of the population. The lowest levels of reported involvement in corruption were registered in 2010 (about 10 %), the year the CVM safeguard clauses expired

FIGURE 14. CORRUPTION PRESSURE AND INVOLVEMENT IN CORRUPTION IN BULGARIA (1999 – 2014)*



* % of the population 18+ who have been asked to give and have given a bribe (money, favour, gift) in the past year.

Source: Corruption Monitoring System, CSD, 2014.

and EU anti-corruption assistance peaked. Reported experience of corruption then increased in 2011 and 2012, before escalating in the 2013-14 period against the context of an unstable political environment, including the change of three successive governments, a series of integrity scandals, growing public discontent, and institutional paralysis in the anti-corruption area (Center for the Study of Democracy(a) 2014). In 2014, Bulgaria recorded the highest levels of citizens' experience of corrupt transactions in the last 15 years (Center for the Study of Democracy(a) 2014). In this context it seems pertinent to question whether the country has really made any progress in improving its record on controlling corruption and ensuring the independence of the judiciary during the last two decades, or has rather considered EU assistance as an increased opportunity for corruption (e.g. through manipulation of public procurement procedures) or a superficial tick-box exercise. The latter account gained credibility in 2015 as the parliament voted to reject the majority of proposed reforms in the judicial and anti-corruption domains.

CONCLUSION

In Bulgaria's case, pre-accession assistance and conditionality were not successful in terms of achieving sustainable improvements in anti-corruption and governance. This led, for the first time in the history of EU enlargement, to the introduction of a post-accession monitoring mechanism. Initially, this CVM instrument acted as a kind of soft EU conditionality, backed up formally by the existence of safeguard clauses and informally by the partial suspension of EU funding programmes following allegations of corruption and fraud affecting the delivery of EU financial assistance. However, the CVM's ability to incentivize continued cooperation was undermined by the lack of a formal link between progress on anti-corruption and EU development assistance, as well as the lack of sufficient resources specifically targeting CVM recommendations. No specific support for CVM recommendations was earmarked within the 2007-13 programming period.⁵¹ Thus, as the safeguard clauses expired in 2010, the CVM largely turned into a political instrument for naming and shaming, rather than a technical one for achieving change. It remains to be seen whether the EU Anti-Corruption Report mechanism introduced in 2014 in relation to the European Semester mechanism will function better in this regard.

Overall, the combined efforts of the pre-accession assistance, the EU membership, and the CVM improved Bulgaria's ability to control corruption only temporarily. The allocated support fluctuated, strengthening only as significant events throughout the accession negotiations approached (i.e. the start of the pre-accession assistance and the signing of the Treaty of Accession), accession itself in 2007, and the expiration of the CVM safeguard clauses (in 2010). The 2015 CVM monitoring reports suggest that the main reasons for introducing the mechanism – the need to address high-level corruption, build an effective institutional anti-corruption approach and ensure judicial independence – remain the priority concerns eight years later. The lack of progress is most starkly illustrated by data on the Bulgarian public's experience of corruption pressure: as monitored by the independent *Corruption Monitoring System*, this reached record levels in 2014. Against this backdrop, EU assistance for anticorruption has been surprisingly low in the years after 2010.

The lack of EU conditionality on anti-corruption in Bulgaria since 2010 has contributed to a lack of progress in JHA and particularly in the fight against corruption. In addition, thematic EU assistance for anti-corruption, JHA and good governance has been marginal, particularly relative to the prominence accorded these issues in the general discourse on Bulgaria-EU relations as well as the ongoing social, political and economic impact of corruption. There is a great inconsistency between the increased

⁵¹ Not directly linked to the post-accession instrument, an estimated total of EUR 29.8 million in actual OPAC payments were allocated for judiciary, transparency and good governance, and anticorruption.

EU focus on this issue during recent years and the decline in financial support for related areas, compared to pre-accession times and the initial years of the 2007-13 programming period. Thus, a case can be made that EU assistance and conditionality for anti-corruption-related reforms in Bulgaria has been insufficient and that it has failed to move the country much closer to the goal of achieving an open access order (or a good governance model). However, EU assistance is and can only be one part of this process. This paper also suggests that the lack of sustained political commitment for judicial and anti-corruption reforms in Bulgaria is far more responsible for the disappointing results.

Nevertheless, in the light of the increasing focus on good governance and anti-corruption at the EU level, a stronger and more direct link is required between the Union's high-level priorities for Bulgaria and the financial support that it provides. The priority areas for any such engagement include the prosecution of high-level corruption, reforms to improve judicial independence, and a focus on particularly vulnerable areas, such as public procurement.

In Bulgaria, the challenges, successes and failures of the 2007-13 ESIF programming period, the lessons from the CVM experience, as well as the mission of the EU Anti-Corruption Report, are being integrated into the new 2014-20 programming cycle.⁵² The broader macroeconomic and financial conditionality discussed in this paper could be further streamlined to better integrate recommendations from the EU Anti-corruption Report. These developments provide Bulgaria with a new chance to prioritise good governance and anti-corruption in the coming years, but there remains a need to design mechanisms that are better able to elicit a strong and sustained political commitment at the national level.

The EU's experience with Bulgaria (and Romania) and the CVM also has wider implications for future enlargements. It has already shaped the new EU approach to pre-accession negotiations with candidate countries, which explicitly identifies rule of law issues, including the fight against organized crime and corruption, as centre-pieces of enlargement policy (EC(b) 2014). Moreover, it has been recognised that reform of the judiciary and fundamental rights, justice, freedom and security matters (Chapters 23 and 24 of the *acquis*) must be tackled early in the enlargement process so as to facilitate the achievement of reforms that are sustainable and long-lived (SELDI 2013).

⁵² Based on qualitative data received during face-to-face interview with, conducted with representatives of the Central Coordination Unit (CCU), responsible for the ESIF management in Bulgaria.

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This publication has been produced thanks to the support of the European Union's Seventh Framework Programme for Research – Socio-economic Sciences and Humanities theme (EU Grant Agreement number: 290529).