



Bulgaria and Romania's Accession to the EU: Postponement, Safeguards and the Rule of Law

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I. Introduction

On the day before the European Commission's decision on the fitness of Bulgaria and Romania to become EU members on 1 January 2007 (due to be delivered 16 May 2006), it is becoming increasingly evident that the EU has fallen into its own 'rhetorical trap' from which there is no easy way out. Most EU officials and politicians would agree that the governance standards in the two Balkan candidates are not up to EU level yet, but everyone knows that there is not much the EU can do about it at this point.

The accession stories of Bulgaria and Romania are an excellent illustration of the EU being caught unawares when making important (legal and political) commitments to two future members while taking in good faith the commitments pledged by the same members-to-be. When the EU announced its 'big-bang' enlargement decision in 2002, Sofia and Bucharest sought reassurance that they would not be kept waiting for a long time. And they were successful in getting the EU to officially agree to a very concrete accession timetable against promises to improve their judiciary systems and to reduce the level of corruption, among other reforms.

In 2006, a year before the fixed accession date, the EU is no longer convinced that Bulgaria and Romania qualify to join the club judging by their governance standards only. Corruption and organised crime have not been reined in by either of the two, although Bucharest has recently impressed Brussels with its political courage to take brave last-minute initiatives to that end. To be sure, the situation in the two countries has not become worse in the years following the EU's decision on their accession.

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The reality, however, is that Bulgaria and Romania may have become EU-compliant on paper only and that the image projected to Brussels by their political leaders differs from the situation on the ground.

That Brussels is finally waking up to the real facts is not so bad. Better later than never. What is not so good is that the EU finds itself in a trap of its own making. On the one hand, the EU cannot renege on previous pledges. If the EU shirks its own obligations, it would do damage to its own reputation. On the other hand, the EU cannot let two unprepared candidates in without serious costs. If the EU lowers the accession threshold, it would not only threaten its own internal functioning, but it would also send a wrong message to all the other accession hopefuls waiting at the EU door.

The question is what to do in the remaining months before the end of the year in order to avoid the damage that could be done. In the last months the European Commission has desperately been looking for instruments to regain leverage over the political leaderships in Sofia and Bucharest while realising that it will be politically harmful for the EU to renege on its own commitments. It is in this context that the discussion about the safeguard clauses inserted in the Accession Treaty started.

II. Accession postponement

The postponement clause (see Appendix 1) is the one that has provoked most media speculation in the last weeks. The possibility for delaying Bulgaria and/or Romania's entry by one year, however, does not give the EU much space to manoeuvre. First, both 2007 and 2008 are very soon, whereas the type of reforms Brussels expects from the two countries takes a longer time to deliver results. The postponement clause works only as a *credible threat of delay* and the European Commission in particular has been good at creating the political atmosphere for achieving this credibility effect. If the real concern is how to keep up the pressure on Bulgaria and Romania so that they continue with domestic reforms, not much can be gained by just one year's postponement of their accession.

2 | Gergana Noutcheva

Second, the postponement clause is more difficult to activate in the case of Bulgaria, which is currently considered less ready. Unanimity in the Council is needed for postponing Bulgaria's accession date, whereas a qualified majority vote is sufficient to delay Romania. This difference is a reflection of the perceived state of readiness of the two countries at the time of closing accession negotiations with them in 2004. The perceived gap between the two opened up in the course of 2006. Yet the legal instruments at the EU's disposal were designed to hold off Romania more easily than Bulgaria.

The main dissimilarity between Bulgaria and Romania at the moment is not so much a matter of differences in their governance standards but a question of perceived political will of their respective governments to tackle the problems singled out by the EU. Against the background of the determined actions of the current government in Bucharest, the leadership in Sofia appears unconvincing. In general, the EU is reluctant to penalise pro-reform political forces because they are the ones driving the Europeanisation agenda in each domestic context. Given the perceived gap in the reform credentials of the Popescu-Tariceanu and Stanishev governments in Bucharest and Sofia, respectively, the EU finds it difficult to reward one and punish the other while treating them as a 'couple' lagging behind.

III. Safeguards post-accession

What can the EU do, post-accession, to discipline disinclined political elites? There are three provisions in the Accession Treaty that provide the legal basis for taking protective measures against Bulgaria and/or Romania in matters of the economy, the internal market and in the area of justice, security and liberty, for three years after accession (see Appendix 2 for the exact legal text). These safeguard clauses form part of the Accession Treaties of the new member states from Central and Eastern Europe too, but the possibility for invoking them in the context of the 'big bang' enlargement was never seriously discussed. For Bulgaria and Romania's imminent accession, this has changed.

The economic safeguard clause provides the legal basis for taking protective measures against a member state (old or new) in the case of temporary economic difficulties experienced by one or more sectors as a result of the inclusion of new members in the single market. While such situations are not impossible, there is not much one can do to avoid them. This mechanism is not well suited to apply pressure on Bulgaria and Romania to advance domestic reform post-accession. Besides, the problematic areas for the two countries are predominantly in the political domain and this is where the EU would like to have more post-accession leverage.

In the internal market area, there are both hard instruments to penalise a member state and soft devices to entice a member state to comply with the EU *acquis*. Most of them do not require the activation of the internal

market safeguard clause, which itself is vaguely defined and unclear as to what punitive measures it could trigger. As regards permanent instruments in place for old and new members, the infringement procedure, for instance, allows the Commission to take a member state to the European Court of Justice, if it deems that there are serious breaches of the functioning of the single market. The publishing of the Internal Market Scoreboard is another example of how peer pressure and public exposure of mediocre achievement can encourage corrective action. Once members, Bulgaria and Romania will be subject to the same mechanisms of internal control as the old member states. In addition, there is the big disincentive of discontinuing certain projects supported by the Structural Funds, if, for example, the two have not complied with the EU public procurement norms or have not fulfilled the regional policy requirements. Bulgaria and/or Romania cannot expect big financial transfers from the EU budget, if they mishandle EU money as a result of corrupt practices.

In the area of justice and home affairs, the EU institutional machinery has only soft instruments at its disposal to influence member state behaviour. This is a reflection of the largely intergovernmental nature of the policy area and the relatively weaker role of the EU layer of governance in it. Cooperation in this domain is all about trust between the member states and if Bulgaria and/or Romania fail to reassure their EU counterparts in the efficiency of their judicial systems and law enforcement organs, they might easily feel the effects of exclusion from the EU club. What form might that take? If confidence in the Bulgarian or Romanian judiciary is low, decisions of their courts on EU law cases may not be recognised in the rest of the EU. If trust in the Bulgarian or Romanian police structures is not there, it is highly unlikely that other member states will act upon European Arrest Warrants issued at the request of Bulgarian or Romanian prosecution organs. On a more symbolic political level, the two countries might be denied access to some common initiatives and future policies in the area of police and judicial cooperation, but this could only concern initiatives outside the legal basis of the EU treaties. In short, there are ways to make them feel that they are getting a 'second-class' treatment from their European peers.

IV. Monitoring the rule of law post-accession

Mechanisms to try to influence the reform patterns of the two countries post-accession exist, but they are much weaker compared to the conditionality applied prior to accession and it remains to be seen how effective they will prove to be. To keep an eye on respect for the rule of law in Bulgaria and Romania, the area in which both countries appear most vulnerable and where there is room for improvement, the EU has both legal means and political authority to monitor internal developments within the two countries after their accession to the EU.

On the hard side of measures, the Treaty on European Union provides the legal basis for sanctioning member states that are found to be in breach of “the principles of liberty, democracy, respect for human rights and fundamental freedoms, and *the rule of law*, principles which are common to the member states” (Art. 6 of the Treaty on European Union reproduced in Appendix 3). Art. 7 of the Treaty (see also Appendix 3) lays out the procedure for penalising a member state by its peers for falling short in upholding the common values on which the Union is founded. The legal provisions allow for suspension of the voting rights of a member state government in the Council, a decision that can be taken by qualified majority by the Heads of State or Government. For the procedure to be activated, there has to be “a serious and persistent breach” of any of the principles mentioned above. *The rule of law* reference is very important in this context. Undoubtedly, the drafters of these treaty articles hardly envisaged situations similar to the one in which the EU finds itself with regard to Bulgaria and Romania's accession. They were nevertheless farsighted in equipping the Union with instruments for sanctioning its members in order to deter misconduct. Now these legal texts could be put to work in the event of malpractice in a new member state, provided that considerable political will within the rest of the community is mobilised to condemn the wrong-doer. Therefore, if the EU doubts the capacity or willingness of Bulgaria or Romania to fully uphold the rule of law, and if the rest of the member states are consensual in taking measures against either of the two governments, it could conceivably make it politically costly for new member state leaders who remain inactive or inefficient in fighting corruption and organised crime even after accession.

On the soft side of measures, the Commission is also contemplating post-accession monitoring of key areas deemed insufficiently reformed in Bulgaria and/or Romania, such as the judiciary and/or the law enforcement organs. There are reputational costs involved in such peer review missions which the political leaders of any member state would try to avoid. For Bulgaria and Romania, the stakes are potentially even higher because they could be joining the club on different terms than the rest. Being singled out from the start as not exactly equals is not only going to be embarrassing for the respective governments in the European circles but will also provide fertile ground for their political opponents at home to challenge them.

Furthermore, if Bulgaria and/or Romania accede to the EU with safeguards, this is not going to send the right signal to the markets. Investors are watching closely how the accession story of the two countries is evolving. Needless to say, a clean and functioning judiciary is important for a favourable business climate and a negative mark from the EU on a country's judiciary record will have economic costs as well. The EU's evaluations of the candidates' performance during the pre-accession process have been important indicators for investors' strategies. Bulgaria and Romania would do a big disservice to their economic modernisation if they allow investors' confidence to wither away at this point.

What are the implications for future enlargements of the EU? The Western Balkan countries are also watching closely what is happening with their Eastern Balkan neighbours. They already know that the EU is getting very serious about full compliance with pre-accession conditions and that the strategy of promising and simulating EU-compliant change will not fly in Brussels any longer. They also feel the anti-enlargement political climate in some quarters of the EU. The message for them is to get ready for a long pre-accession process in the course of which the Commission will want to be convinced that domestic reforms do not only look good on paper but have real impact on the governance of future member states.

Appendices

1. Postponement Clause

Art. 39

1. If, on the basis of the Commission's continuous monitoring of commitments undertaken by Bulgaria and Romania in the context of the accession negotiations and in particular the Commission's monitoring reports, there is clear evidence that the state of preparations for adoption and implementation of the *acquis* in Bulgaria or Romania is such that there is a serious risk of either of those States being manifestly unprepared to meet the requirements of membership by the date of accession of 1 January 2007 in a number of important areas, the Council may, acting unanimously on the basis of a Commission recommendation, decide that the date of accession of that State is postponed by one year to 1 January 2008.

2. Notwithstanding paragraph 1, the Council may, acting by qualified majority on the basis of a Commission recommendation, take the decision mentioned in paragraph 1 with respect to Romania if serious shortcomings have been observed in the fulfilment by Romania of one or more of the commitments and requirements listed in Annex IX, point I.

3. Notwithstanding paragraph 1, and without prejudice to Article 37, the Council may, acting by qualified majority on the basis of a Commission recommendation and after a detailed assessment to be made in the autumn of 2005 of the progress made by Romania in the area of competition policy, take the decision mentioned in paragraph 1 with respect to Romania if serious shortcomings have been observed in the fulfilment by Romania of the obligations undertaken under the Europe Agreement (1) or of one or more of the commitments and requirements listed in Annex IX, point II.

Source: Protocol concerning the conditions and arrangements for admission of the Republics of Bulgaria and Romania to the European Union, OJ L 157/29, 21.06.2005.

2. Specific Safeguard Clauses

General Economic Clause

Art. 36

If, until the end of a period of up to three years after accession, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, Bulgaria or Romania may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the internal market.

In the same circumstances, any present Member State may apply for authorisation to take protective measures with regard to Bulgaria, Romania, or both those States.

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Internal Market Safeguard Clause

Art. 37

If Bulgaria or Romania has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative, adopt European regulations or decisions establishing appropriate measures.

...

Justice and Home Affairs Safeguard Clause

Art. 38

If there are serious shortcomings or any imminent risks of such shortcomings in Bulgaria or Romania in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the Treaty on European Union and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the Treaty establishing the European Community, and European laws and framework laws adopted on the basis of Sections 3 and 4 of Chapter IV of Title III of Part III of the Constitution, the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative and after consulting the Member States, adopt European regulations or decisions establishing appropriate measures and specify the conditions and modalities under which these measures are put into effect.

These measures may take the form of temporary suspension of the application of relevant provisions and decisions in the relations between Bulgaria or Romania and any other Member State or Member States, without prejudice to the continuation of close judicial cooperation.

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Source: Protocol concerning the conditions and arrangements for admission of the Republics of Bulgaria and Romania to the European Union, OJ L 157/29, 21.06.2005.

3. Articles 6 and 7 of the Treaty on European Union

On Fundamental EU Principles and Means in the Event of their Serious Breach

Art. 6

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall respect the national identities of its Member States.
4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Art. 7

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community.

This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 3.

6. For the purposes of paragraphs 1 and 2, the European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its Members.

Source: Consolidated version of the Treaty on European Union, OJ C 325, 24.12.2002.

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