

Post-accession conditionality: support instrument for continuous pressure?

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Post-Accession Conditionality

Support Instrument for Continuous Pressure?

Eli Gateva

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POST-ACCESSION CONDITIONALITY

SUPPORT INSTRUMENT FOR CONTINUOUS PRESSURE?

Eli Gateva

Abstract

The establishment of a Cooperation and Verification Mechanism for monitoring Bulgaria's and Romania's progress in the areas of judiciary and fight against corruption not only confirms the evolutionary nature of EU conditionality, but introduces a new feature, that of post-accession conditionality. More than three years after accession, neither Bulgaria nor Romania have managed to tackle the remaining issues and the scrupulous monitoring mechanism is still maintained. What are the main features and limitations of post-accession conditionality? Why does the effectiveness of EU conditionality deteriorate after accession? The article outlines a conceptual framework for comparative study of pre-accession and post-accession conditionality. On the basis of a stage-structured conditionality model, it discusses the transformations of the main elements of conditionality before and after accession and argues that the absence of accession advancement rewards combined with toothless explicit threats for sanctioning non-compliance produce very weak negative incentive structure which undermines the effectiveness of post-accession conditionality. The study, which draws on extensive interviews with senior EU officials and examination of key EU documents, highlights the growing application of differentiated and targeted conditionality and concludes with a reflection on the future of the mechanism and its implications for the ongoing enlargement of the Union with countries of the Western Balkans and Turkey.

The Author



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1. Introduction¹

The accession of Bulgaria and Romania to the EU on 1 January 2007 marked the completion of the fifth enlargement of the Union with countries of Central and Eastern Europe (CEECs), Cyprus and Malta. Although Bulgaria and Romania were “part of the same inclusive and irreversible enlargement process” (Council of the European Union 2003) their accession was subject to unprecedented safeguards and monitoring. Unlike new member states which joined the Union on 1 May 2004, Bulgaria and Romania had to accept an additional “super safeguard” clause which allowed the EU to postpone their accession by one year. Although the clause was not activated, the Commission concluded that further progress was still necessary in the area of judicial reform and the fight against corruption and set up the Cooperation and Verification Mechanism (CVM) in order to monitor progress in these areas after the accession of Bulgaria and Romania. The new measures not only confirm the evolutionary nature of EU conditionality, but introduce a new feature, that of post-accession conditionality. More than three years after accession there is a growing sense of frustration in Brussels as neither Bulgaria nor Romania have managed to tackle the remaining issues. The Commission has systematically criticized the new members over the slow speed of the reforms and the lack of tangible results.

The 2008 Progress Reports confirmed that “progress has been slower and more limited than expected” and that “the need for verification and cooperation will continue for some time” (European Commission 2008c: 2, 2008d: 2). The July 2009 Progress Reports concluded that “continuous pressure for delivery is needed” and that the CVM “will be maintained until these reforms are achieved” (European Commission 2009c:8, 2009d: 8f). Although the safeguard clauses (which empower the Commission to sanction non-compliance and lack of sufficient progress) expired on 1 January 2010, the Commission did not decide to remove the application of the mechanism. The latest reports, which were published on 20 July 2010, highlighted “important shortcomings in Romania’s efforts to achieve progress under the CVM” and confirmed that “important deficiencies remain in judicial practice” in Bulgaria (European Commission 2010c:3, 2010d: 2).

Despite the growing body of literature on EU conditionality, the CVM and post-accession conditionality remain undertheorized. What are the main features and limitations of post-accession conditionality? Why does the effectiveness of EU conditionality deteriorate after accession? In order to address these questions, the article elaborates on the existing literature on EU conditionality and outlines a conceptual framework for comparative study of pre-accession and post-accession conditionality. The article draws on extensive interviews with senior EU officials and examination of key EU documents.

1 This paper was prepared for the Kolleg-Forschergruppe (KFG) Conference “The Transformative Power of Europe”, 11-12 December 2009. I would like to thank University Association for Contemporary European Studies for their generous support of my field trip to Brussels. Between May 2009 – August 2009, I conducted more than 80 interviews with Members and Heads of the Van der Broek Cabinet, Verheugen Cabinet, Rehn Cabinet, Deputy Director-General; Directorate Directors, Heads of Units and Members of the Directorate General for Enlargement; Directorate-General for Justice, Freedom and Security; Directorate-General for External Relations and General Secretariat of the European Commission; Members of the European Parliament Committee on Foreign Affairs (AFET); Members and Heads of the General Secretariat of the Council of the European Union; National officials from the permanent representations of existing member states and missions of candidate countries to the EU. Most of the respondents preferred not to have their names attached to specific quotations. The interviews demonstrated a virtual consensus that Bulgaria’s and Romania’s progress towards meeting the Cooperation and Verification Mechanism (CVM) benchmarks has been slower and more difficult than expected. The article uses quotations from three senior EU officials who have been directly involved in the process of the creation and the regular monitoring of the CVM.

The article is structured in three parts. The first part highlights key features of EU conditionality and outlines a theoretical framework for comparative examination of pre-accession and post-accession conditionality. On the basis of a *stage-structured conditionality model*, the second part discusses the transformations of the main elements of conditionality before and after accession and argues that the absence of *accession advancement rewards* combined with toothless *explicit threats* for sanctioning non-compliance produce very *weak negative* incentive structure which undermines the effectiveness of post-accession conditionality. The third part highlights the growing application of targeted and differentiated conditionality and reflects on the future of the CVM and its implications for the ongoing enlargement of the Union with countries of the Western Balkans and Turkey.

2. Revisiting EU Conditionality in the Context of Post-Accession Conditionality

Following the completion of the fifth enlargement, research focus has gradually shifted to studying new member states' compliance with EU rules. Post-accession compliance has been addressed by a growing number of academic studies, which cover a wide range of policy areas from minority protection (Sasse 2008; Schwellnus et al. 2009) and gender equality (Sedelmeier 2009) to working time and equal treatment in the workplace (Falkner/Trieb 2008) and Euro-zone conditionality (Johnson 2008). However, most of the existing literature focuses on the eight new member states which acceded to the EU in 2004 with very few studies on Bulgaria and/or Romania (Trauner 2009; Levitz/Pop-Eleches 2010; Pridham 2007; Primatarova 2010). It is not only Bulgaria's and Romania's lengthier and more troublesome accession process (Papadimitriou/Gateva 2009) which makes the newest members of the Union intriguing case studies. More importantly the establishment of the CVM to monitor progress towards meeting the sets of benchmarks has singled out Bulgaria and Romania as the only two countries subject to continuous scrutiny by the Commission after their accession to the Union. Furthermore, Bulgaria's and Romania's mixed record of post-accession compliance poses a very interesting puzzle. On one hand, the EU data shows that "Bulgaria and Romania have done very well with regard to the transposition of EU legislation" and that "Bulgaria was actually the first member state to achieve a transposition deficit of 0% in 2008" (Trauner 2009: 8). These findings correspond to Steunenberg and Toshkov's comparative research on transposition in all 27 member states which confirms that "new member states do no worse than the old and more experienced member states in transposing directives on time" (2009: 952). On the other hand, both Bulgaria and Romania have continuously been criticized by the Commission for lack of sufficient progress and tangible results in addressing the CVM benchmarks.

In order to address Bulgaria's and Romania's post-accession compliance record, it is important to distinguish compliance with EU legislation in terms of transposition, implementation and enforcement of EU law (*general compliance*) from compliance with the CVM benchmarks (or *CVM compliance*). Although both types of compliance are interlinked (the effectiveness of the judiciary will inevitably affect the implementation and enforcement of EU law), *general compliance* and *CVM compliance* operate within different frameworks. We can outline several important differences with respect to applicability and scope of conditions; monitoring and sanctions. Unlike the transposition and implementation of EU legislation with which all member states have to comply, the CVM is exclusively designed for and aimed at Bulgaria and Romania. Furthermore, the CVM benchmarks cover particular policy areas (fight against organized

crime and corruption and the efficiency of the judicial system) which lack internal EU consensus and firm legal basis in contrast to the application of EU law – which requires the transposition and implementation of EU legislation. Another important difference is the mode of monitoring compliance. It is possible that non-compliance with EU law is not detected (Börzel 2006) as the EU applies a decentralized monitoring mechanism, which relies heavily on private actors to raise complaints (Sedelmeier 2008). However, this is not the case with the CVM, as Strategic Objective Security and Justice Unit of the Commission’s Secretariat-General is responsible for monitoring and reporting on Bulgaria’s and Romania’s progress towards meeting the CVM benchmarks every six months. Last but not least, the EU relies on different sanctions. If a member state fails to comply with EU law, the Commission is entitled to initiate an infringement procedure against the relevant member state pursuant to Article 258 (Treaty of Lisbon) and may refer the case to Court of Justice of the European Union. According to the Commission’s decisions establishing the CVM “the Commission may apply safeguard measures based on articles 37 and 38 of the Act of Accession” if Bulgaria and/or Romania fail to address the benchmarks adequately (European Commission 2006d: 3, 2006e: 3).

On the basis of the comparative differentiation, we can define the CVM as individual sets of conditions, which Bulgaria and Romania must meet after their accession to the Union, linked to particular sanctions and operationalized in a framework of rigorous monitoring. By establishing the CVM, the Commission has not only confirmed the evolutionary nature of EU enlargement conditionality, but also extended its scope by introducing a new significant development – post-accession conditionality. As the aim of the article is to look at the main features, limitations and effectiveness of post-accession conditionality, it is important to note that effectiveness of the CVM is used interchangeably with effectiveness of post-accession conditionality. Therefore, the examination of post-accession conditionality is limited to the conditions and sanctions established in the framework of the CVM. The article measures effectiveness in terms of the progress of the Bulgarian and Romanian governments towards meeting the CVM benchmarks for the first three years of the application of the mechanism – 2007-2009. Although some research suggests that the mechanism is very effective at the level of public opinion and civil society (Primatarova 2010), the national governments, for which the mechanism was specifically designed, have not managed to meet the CVM benchmarks.

2.1 *Stage-Structured Conditionality Model for Comparative Examination of EU Enlargement Conditionality*

In order to identify the key features of post-accession conditionality and to evaluate (in comparative perspective) their effectiveness, the article follows an inclusive approach to EU enlargement conditionality. Membership conditionality (Smith 2003, 2004), accession conditionality (Grabbe 2002, 2006), enlargement conditionality (Hughes et al. 2004), *acquis* conditionality (Grabbe 2002; Schimmelfennig/Sedelmeier 2004), democratic conditionality (Pridham 2002; Schimmelfennig et al. 2003; Schimmelfennig/Sedelmeier 2004) and political conditionality (Smith 1998) are some of the categories of conditionality defined in the theoretical literature on European integration. However, the conceptual model does not distinguish between different categories of EU enlargement conditionality on the basis of the context of their application. The *stage-structured conditionality model* establishes a framework for comparative examination of EU pre-accession and post-accession conditionality by relating the examination of EU enlargement conditionality to the stages of the accession process.

Although the European Union has not formally established the stages of the process, some of the achievements on the way to accession are regarded as key turning points. The first step which has strong political significance is the formal agreement of the European Council on the membership perspective of the potential candidate country. The next milestone which intensifies the relations between the EU and the aspiring member state is the opening of the accession negotiations. The conclusion of the accession negotiations is another turning point, which is central to the dynamics of the process. Finally, the accession of the new member state to the EU marks the completion of the process. On the bases of these achievements, the theoretical model outlines the following four distinct stages of the accession process:

- Pre-negotiation stage;
- Negotiation stage;
- Accession stage;
- Post-accession stage.

The pre-negotiation stage starts with the formal agreement of the European Council on the membership perspective of the potential candidate country and ends with the start of the accession negotiations. Although making a formal application for EU membership is considered to be the first step of the accession process, the EU's experience of the fifth and the ongoing enlargement indicates that this is not always the case. The relations between the Union and the CEECs as well as the Western Balkan countries started to develop in a framework of enlargement conditionality after the confirmation of their membership perspective, which was prior to their formal applications.² As the accession negotiations intensify the dynamics of the relations between the EU and the candidate country, the *stage-structured conditionality model* specifies that the second stage of the enlargement process coincides with the negotiations. The third stage includes the period after the conclusion of the membership talks and before the formal accession of a country to the Union. The accession stage includes the signing of the Accession Treaty and its ratification and it is characterized by thorough examination of the would-be-member's compliance with EU conditions. The fourth stage refers to the period after the accession of a candidate country to the EU. However, defining the exact timeframe of the post-accession stage is difficult. The safeguard clauses, included in the Act of Accession for the countries which became members in 2004, attached significant relevance to the post-accession stage by specifying that the safeguard measures may be applied "until the end of a period of up to three years after accession" (Official Journal 2003a). Although the Act of Accession for Bulgaria and Romania included the same safeguard clauses (with the exception of the postponement clause), the establishment of the CVM and the conclusions of the latest reports that the mechanism "needs to be maintained until these reforms are achieved" (European Commission 2009c, 2009d) extended the post-accession stage beyond the period of three years after accession. Therefore, the model specifies that the post-accession stage starts with accession of a state to the EU and ends with the suspension of any post-accession monitoring mechanism or, in the absence of any post-accession monitoring mechanism, with the expiry of the applicability of the safeguard measures included in the Treaty of Accession.

2 The EU confirmed the membership perspective of the applicant countries of Central and Eastern Europe at the Copenhagen European Council in June 1993. Hungary submitted its application for membership in March 1994, followed by Poland in April. Romania, Slovakia, Latvia, Estonia, Lithuania and Bulgaria applied in 1995. The Czech Republic and Slovenia submitted their applications in 1996. The European Council in Santa Maria da Feira in June 2000 stated that all Stabilisation and Association Process (SAP) countries were potential candidates for EU membership. Croatia submitted its application in February 2003, Former Yugoslavian Republic of Macedonia (FYROM) in March 2004.

Before we move on to compare pre-accession and post-accession conditionality, we need to outline the key elements of EU enlargement conditionality. The theoretical literature highlights the significance of the conditions laid down by the EU as well as the particular benefits (rewards) which the applicant states receive as a result of their compliance (Smith 1998; Schimmelfennig/Sedelmeier 2004; Schimmelfennig et al. 2003; Grabbe 2006). However, the completion of the fifth round of enlargement with the countries of Central and Eastern Europe has proved that there are other elements which are also essential for the application of EU conditionality.

The *stage-structured conditionality model* specifies that EU enlargement conditionality has three key elements (see Table 1). The first element includes the conditions set out by the EU with which the country aspiring to membership needs to comply. The Copenhagen European Council in June 1993 laid down the broad framework of membership conditions which must be satisfied before a country can join the Union. Since then, the EU has not only elaborated on the scope and the nature of conditions but also established strong links between fulfilling certain conditions and the advancement in the accession process. During the pre-negotiation stage the potential candidate country must satisfy two sets of conditions: *conditions for applying for membership* (or conditions of accession) and *conditions for opening of accession negotiations*. Article 49 of the Treaty on European Union (TEU) sets out the conditions for enlargement by stating that any European state which respects principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law may apply to become a member of the Union. The Helsinki European Council in December 1999 concluded that “compliance with the political criteria laid down at the Copenhagen European Council is a prerequisite for the opening of accession negotiations” (Council of the European Union 1999). However, it is possible that the EU decides on country specific conditions. In addition to the fulfillment of the political criteria, the opening of negotiation with Bulgaria was conditional on the decision by the Bulgarian authorities on the closure dates for units 1-4 in the Kozloduy Nuclear Plant and economic reform progress, whereas the start of the negotiations with Romania was conditional on structural reform of child care institutions and implementation of appropriate measures to address the macro-economic situation (European Commission 1999a). In order to complete the accession negotiations, the candidate country needs to fulfill all the Copenhagen criteria.

However, the provisional closure of each chapter depends on credible commitments concerning the alignment of legislation with the *acquis* and the administrative capacity to apply it properly. Additionally, the EU can establish specific conditions for closing a chapter, also known as closing benchmarks.³ During the accession stage the EU urged the acceding countries to fully meet all the commitments and requirements arising from the accession negotiations and used intensified monitoring to highlight areas of serious concern. Furthermore, the date of the accession of Bulgaria and Romania was conditional on “the state of preparations for adoption and implementation of the *acquis*” (Official Journal 2005a). The establishment of CVM set a precedent as for the first time the EU decided on sets of conditions which must be fulfilled after accession. The Commission specified that Bulgaria must address six benchmarks and Romania four benchmarks.

3 In addition to the closing benchmarks, the EU introduced the application of opening benchmarks (certain conditions which must be satisfied before the opening of chapters) as essential element of the renewed consensus on enlargement (with the Western Balkans and Turkey).

Table 1: Stage-Structured (EU Enlargement) Conditionality Model

| Stages | Conditions | Incentive structure | | Monitoring |
|------------------------|--|--|---|-------------------------------------|
| | | Rewards | Threats | |
| Pre-negotiation | <ul style="list-style-type: none"> - Conditions for applying for membership (conditions of accession); - Conditions for opening Accession Negotiations; - Additional (country specific) conditions. | <p>Accession advancement rewards:</p> <ul style="list-style-type: none"> - Providing membership perspective; - Signing Association Agreement; - Implementing Association Agreement; - Granting Candidate country status; - Opening Accession Negotiations. <p>Financial rewards</p> | <p>Explicit threats:</p> <p>Financial sanctions</p> <p>Implicit threats (delays of the accession advancement rewards)</p> | Regular Progress Reports |
| Negotiation | <ul style="list-style-type: none"> - Copenhagen criteria; - Opening benchmarks (conditions for opening chapters); - Closing benchmarks (conditions for closing chapters); - 31/35 chapters; - Areas of serious concern – highlighted in the monitoring reports. | <p>Accession advancement rewards:</p> <ul style="list-style-type: none"> - Opening chapters; - Closing chapters; - Credible membership perspective; - Completion of Accession Negotiations; - Signing Accession Treaty. <p>Financial rewards</p> | <p>Explicit threats:</p> <p>Financial sanctions</p> <p>Implicit threats (delays of the accession advancement rewards)</p> | Regular Progress Reports |
| Accession | <ul style="list-style-type: none"> - Copenhagen criteria; - Areas of serious concern – highlighted in the monitoring reports. | <p>Accession advancement rewards:</p> <ul style="list-style-type: none"> - Accession <p>Financial rewards</p> | <p>Explicit threats:</p> <p>Preventive and remedial sanctions:</p> <ul style="list-style-type: none"> - Internal Market Safeguard Clause; - JHA Safeguard Clause; - Super Safeguard Clause; - Additional clause(s). | |
| Post-accession | <ul style="list-style-type: none"> - Benchmarks – individual country specific conditions. | <p>Financial rewards</p> | <p>Explicit threats:</p> <p>Preventive and remedial sanctions:</p> <ul style="list-style-type: none"> - Economic Safeguard Clause; - Internal Market Safeguard Clause; - JHA Safeguard Clause. | Progress Reports Interim Reports |

The EU has developed a wide range of incentives in order to induce compliance with its conditions. Although the Union has favored the use of carrots to sticks, it has established mechanisms for punishing non-compliance by introducing threats and the possibility of applying sanctions. The *stage-structured conditionality model* specifies that the second element of EU conditionality is the incentive structure, which examines the *reward-threat balance*. The model outlines two categories of rewards: *accession advancement rewards* which reflect the progress of the candidate country in the accession process and *financial rewards* (or financial assistance). The main *accession advancement rewards* include: granting

membership perspective; signing association agreement; implementing association agreement; granting candidate status; opening accession negotiations; opening a chapter; provisionally closing a chapter; credible membership perspective; completing accession negotiations; signing accession treaty; ratification of the accession treaty; accession to the European Union. The financial rewards refer to the financial assistance provided by the EU to the candidate country through the pre-accession financial instruments: PHARE, SAPARD and ISPA programs.⁴

The *stage-structured conditionality model* divides the threats into two groups: *implicit* and *explicit*. The *implicit threats* sanction non-compliance by delaying the receiving of the *accession advancement* rewards. Bulgaria's and Romania's failure to sufficiently meet the Copenhagen criteria delayed the start of their accession negotiations.⁵ Subsequently, the Commission did not consider Bulgaria's and Romania's progress towards meeting the accession criteria sufficient to recommend the conclusion of the negotiations in 2002 (European Commission 2002a, 2002b). Unlike *implicit threats*, *explicit threats* introduce specific penalizing measures. There are two types of *explicit threats* based on the nature of the measures which they introduce. The first type refers to *financial sanctions* which penalize non-compliance with EU rules by suspending or withdrawing funds. According to Article 4 of Council Regulation (EC) No 622/98 of 16 March 1998:

“Where an element that is essential for continuing to grant pre-accession assistance is lacking, in particular when the commitments contained in the Europe Agreement are not respected and/or progress towards fulfillment of the Copenhagen criteria is insufficient, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to any pre-accession assistance granted to an applicant State.”

The Accession Partnerships between the EU and the candidate countries, which were the key feature of the enhanced pre-accession strategy, further specified that “failure to respect these general conditions could lead to a decision by the Council on the suspension of financial assistance”.⁶ The second type of *explicit threats* refers to *preventive or remedial sanctions* which include specific precautionary measures (safeguard measures). The EU has developed numerous precautionary measures ranging from economic and internal market safeguard clauses to specific measures in the areas of food safety and air safety. The *preventive and remedial measures* will be discussed in greater detail in the second part of the article.

4 Poland and Hungary: Assistance for Reconstructing their economies (PHARE) was originally created in 1989 and expanded from Poland and Hungary to cover all CEECs. Special Accession Programme for Agriculture and Rural Development (SAPARD) and Instrument for Structural Policies for Pre-Accession (ISPA) were established in June 1999, with the aim of addressing specific priorities, identified in the Accession Partnerships between the EU and the CEECs. Since 2007, the EU introduced a single framework for financial assistance – Instrument for Pre-accession Assistance (IPA). Bulgaria and Romania (together with Latvia, Lithuania and Slovakia) failed to sufficiently satisfy the EU conditions for opening accession negotiations. The countries were excluded from the first group of countries which started the negotiations in 1998.

5 Bulgaria and Romania (together with Latvia, Lithuania and Slovakia) failed to sufficiently satisfy the EU conditions for opening accession negotiations. The countries were excluded from the first group of countries which started the negotiations in 1998.

6 This clause is included in all the Accession Partnerships between the EU and the twelve applicant countries of the fifth enlargement.

As the significance of monitoring applicants' compliance with EU conditions has increased substantially since the publication of the first Regular Reports in 1998, the *stage-structured conditionality model* specifies that monitoring is the third key element of EU enlargement conditionality. The rigorous approach of the Commission to reporting on the progress made towards accession by each of the candidate countries (which were part of the fifth round of enlargement) as well as potential candidate countries (since 2005) has transformed the scope and nature of the Regular Reports from brief general assessment into detailed evaluation analysis. More importantly, it has helped the Commission establish unquestioned expertise in providing objective comprehensive assessment of the EU hopefuls' compliance with EU conditions thus legitimizing the impartiality of the Commission's recommendations. The Commission significantly increased the relevance of monitoring reports as it started to use them not only as a basis for its recommendations (whether to grant a reward or impose a sanction), but as an instrument for prioritizing conditions and as well as an instrument for establishing new conditions and introducing new threats. On the basis of the functions which the monitoring reports fulfill, the *stage-structured conditionality model* distinguishes between two groups of reports: *evaluation reports* and *advanced reports*. The *evaluation reports* include the monitoring reports which assess progress and/or prioritize conditions. The *advanced reports* refer to the report which in addition to evaluating progress, establish new conditions and/or threats.

The next part of the article analyzes the transformations of the key elements of EU conditionality before and after accession. The first section examines the evolution of EU conditions, the second section looks at the development of monitoring instruments, the last section analyses the transformations of the incentive structure. The pre-accession stages are not discussed in detail as the focus of the article is on the effectiveness of the CVM for Bulgaria and Romania.

3. Comparative Examination of Pre-Accession and Post-Accession Conditionality

3.1 Comparative Examination of Pre-Accession and Post-Accession Conditions

The Commission's decisions establishing the Mechanism for Cooperation and Verification of progress in the areas of judicial reform and the fight against corruption and organized crime⁷ in Bulgaria and Romania set a precedent for the Union. For the very first time the EU introduced a special mechanism for monitoring new member states' compliance with set criteria. The Commission specified that Bulgaria needs to address the following six benchmarks:

“(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.

⁷ Fight against organized crime was an area established only for Bulgaria.

(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 organized crime, focusing 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.” (European Commission 2006d)

The Commission established the following four benchmarks for Romania:

“(1) Ensure a more transparent and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.

(2) Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.

(3) Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.

(4) Take further measures to prevent and fight against corruption, in particular within the local government.” (European Commission 2006e)

The benchmarks illustrate two important features of post-accession conditionality. First, compared to the uniform conditions for applying for membership or the Copenhagen criteria, post-accession conditionality is highly differentiated as the EU introduced individual country specific conditions for Bulgaria and Romania. Second, the distinguishing approach of the Commission to addressing similar issues, particularly the establishment of different benchmarks in order to remedy similar shortcomings in the efficiency of the judicial process, highlights the increasing application of targeted conditionality. The July 2009 Progress Reports, which set out two lists of tasks⁸ for the new members, provided further evidence for the growing significance of differentiated and targeted conditionality. In July 2010 the Commission “while recalling the outstanding recommendations” invited Bulgaria and Romania to address ten new recommendations (European Commission 2010c, 2010d).

The increasing application of differentiated and targeted conditionality highlights the evolutionary nature of EU enlargement conditionality. Furthermore, it reflects the Commission’s growing expertise in the candidate countries and new member states. More importantly, by establishing individual country specific

⁸ See European Commission 2009c, 2009d.

benchmarks, the Commission has managed to instrumentalize its knowledge. Benchmarking indicates that the Commission not only can identify a problem but it can provide detailed guidance on how the problem should be addressed. The increasing significance of targeted and differentiated conditionality for the ongoing enlargement round with the countries of the Western Balkans and Turkey confirms that these features of EU conditionality are definitely an improvement in EU enlargement policy, and therefore, they cannot explain the limited effectiveness of post-accession conditionality.

3.2 *Comparative Examination of Pre-Accession and Post-Accession Monitoring Instruments*

As Table 2 illustrates, during the pre-negotiation and the negotiation stage the Commission prepared and published seven annual Regular Reports on the progress of Bulgaria and Romania towards membership. The accession stage indicates an interesting change. Although the 2004 Enlargement Strategy Paper provided that “the Commission will issue yearly comprehensive monitoring reports”, the May 2006 Report did not make any recommendations on the accession date and confirmed that the Commission would prepare another report (European Commission 2004c, 2006c).

In the end, the Commission issued three monitoring reports on the state of preparedness for EU membership of Bulgaria and Romania instead of two (yearly) monitoring reports as had been envisaged. As one EU official recollected “[w]e were postponing the final decision on the effective date of accession as much as it was feasible until early autumn of 2006” (Interview 1 2009). The official noted that “[i]deally we would have pushed and kept the constructive uncertainty, if you would like, until December 2006 but in practice you cannot do that” (Interview 1 2009). The introduction of the CVM not only allowed the EU to continue to put political pressure on the two countries but intensified further the monitoring process. According to Article 1 of the decisions establishing the mechanism, the Commission would report “when required and at least every six months” (European Commission 2006d, 2006e). The Commission has published six sets of Progress Reports under the Cooperation and Verification Mechanism. Unlike the Progress Reports, the Interim Reports present a factual update of progress without providing a detailed assessment of results achieved under each of the benchmarks. Furthermore, the Commission has introduced additional supporting documents such as technical updates and funds management reports.

Another key development in the EU’s approach towards monitoring is the growing use of monitoring reports as instruments for introducing new conditions or threats. On the basis of the *stage-structured conditionality model*, we can refer to this process as growing use of *advanced reports*. Table 2 illustrates that during the pre-negotiation and the negotiation stage the Commission did not issue any *advanced reports*. The first reports to establish sets of conditions were the May 2006 Monitoring Reports. The Commission concluded that Bulgaria needed to address urgently 16 areas of serious concern, whereas Romania needed to address 14 areas of serious concern. The September 2006 Monitoring Reports highlighted six areas for Bulgaria and four areas for Romania and provided the basis for the establishment of the CVM benchmarks. The July 2009 Progress Reports and July 2010 Progress Reports, which set out lists of tasks and recommendations for the new members, provide further evidence for the growing use of *advanced reports*.

Table 2: Comparative Examination of Monitoring Instruments

| Stages | Reports | Bulgaria | | Romania | |
|-----------------|--------------------------------------|--------------------|------------------|--------------------|------------------|
| | | Evaluation Reports | Advanced Reports | Evaluation Reports | Advanced Reports |
| Pre-negotiation | 1998 Regular Report | √ | | √ | |
| | 1999 Regular Report | √ | | √ | |
| Negotiation | 2000 Regular Report | √ | | √ | |
| | 2001 Regular Report | √ | | √ | |
| | 2002 Regular Report | √ | | √ | |
| | 2003 Regular Report | √ | | √ | |
| | 2004 Regular Report | √ | | √ | |
| Accession | 2005 Comprehensive Monitoring Report | √ | | √ | |
| | May 2006 Monitoring Report | | √ | | √ |
| | September 2006 Monitoring Report | | √ | | √ |
| Post-accession | June 2007 Progress Report | √ | | √ | |
| | February 2008 Interim Report | √ | | √ | |
| | July 2008 Progress Report | √ | | √ | |
| | July 2008 Technical Update | √ | | √ | |
| | July 2008 Funds Management Report | | √ | | |
| | February 2009 Interim Report | √ | | √ | |
| | July 2009 Progress Report | | √ | | √ |
| | July 2009 Technical Update | √ | | √ | |
| | March 2010 Interim Report | √ | | √ | |
| | July 2010 Progress Report | | √ | | √ |
| | July 2010 Technical Update | √ | | √ | |

The comparative analysis of pre-accession and post-accession monitoring instruments illustrates the increasing relevance of monitoring and also highlights the evolutionary nature of EU enlargement conditionality. The CVM intensifies significantly the monitoring process by establishing a comprehensive framework for rigorous post-accession monitoring. Furthermore, by increasing the scope and more importantly the frequency of the reports, the Commission provides an instrument for continuous political pressure. As national officials from the Permanent Representations of the member states to the EU pointed out, every six months, the publication of the Progress or Interim Reports attracts a lot of media attention not only in Bulgaria and Romania but also in old member states like the Netherlands and Germany. CVM exemplifies the complex evolutionary nature of the monitoring process. In addition to fulfilling the functions of assessment tools, the monitoring reports provide the basis for further recommendations; establish new conditions or introduce new threats; act as a means of communication between the EU and candidate countries (or new member states); and last but not least provide an instrument for continuous political pressure. The examination of monitoring underlines the advances of the thorough post-accession monitoring, thus confirming that monitoring cannot account for the limited effectiveness of post-accession conditionality. The next section analyses the transformation of the incentive structure.

3.3 Comparative Examination of Pre-Accession and Post-Accession Incentive Structure

Table 3 provides a summary of the incentive structure for Bulgaria and Romania. When we compare the pre-accession stages and the post-accession stage, there are several important differences. First, after the accession of the new member state, the rewards provided by the Union for compliance with its conditions are limited to *financial rewards*. It is important to note that most of the post-accession financial assistance is part of the financial assistance previously agreed upon and allocated in the framework of the pre-accession programs (PHARE, ISPA and SAPARD). During the post-accession stage, the EU is “stripped” of its strongest incentive for inducing compliance – the membership perspective. Furthermore, all the *accession advancement rewards* are no longer available as a result of the accession of the new member state to the Union. In contrast with the pre-accession stages, the EU provides few rewards for Bulgaria and Romania to comply with the benchmarks set by the CVM.

The comparative examination on the nature and the scope of threats highlights another interesting distinction. After accession, the EU does not rely on the use of *implicit threats* to induce compliance with its conditions. However, the lack of *implicit threats* is compensated by the establishment of a wide range of *explicit threats*. Before we examine the scope of the explicit threats established by the CVM, it is essential that we distinguish between the *preventive and remedial sanctions* established in the framework of post-accession conditionality and the sanctions which are applicable to all member states (e.g. infringement procedures).

The most serious sanction which the EU can apply to any member state is the activation of Article 7 of the TEU. According to the provisions of the article in the event of a clear threat of a serious breach of the founding principles of the Union:

“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.”

Other measures applicable to any member state include financial correction of EU funds and infringement procedures (European Commission 2006: 7). In order to differentiate these measures from the *financial sanctions* developed in the framework of EU enlargement conditionality, we classify them as *general financial sanctions*. Before we analyze the impact of the *general financial sanctions* imposed on Bulgaria and Romania, we will examine the range of the post-accession *preventive and remedial sanctions*.

Table 3: Comparative Examination of Incentive structure for Bulgaria and Romania

| Stages | Bulgaria | | Romania | |
|------------------------|--|--|--|--|
| | Rewards | Threats | Rewards | Threats |
| Pre-negotiation | Accession advancement rewards: <ul style="list-style-type: none"> - Providing membership perspective; - Signing Association Agreement; - Implementing Association Agreement; - Granting Candidate country status; - Opening Accession Negotiations. Financial rewards | Explicit threats: Financial sanctions Implicit threats (delays of the accession advancement rewards) | Accession advancement rewards: <ul style="list-style-type: none"> - Providing membership perspective; - Signing Association Agreement; - Implementing Association Agreement; - Granting Candidate country status; - Opening Accession Negotiations. Financial rewards | Explicit threats: Financial sanctions Implicit threats (delays of the accession advancement rewards) |
| Negotiation | Accession advancement rewards: <ul style="list-style-type: none"> - Opening chapters; - Closing chapters; - Credible membership perspective; - Completion of Accession Negotiations; - Signing Accession Treaty. Financial assistance | Explicit threats: Financial sanctions Implicit threats (delays of the accession advancement rewards) | Accession advancement rewards: <ul style="list-style-type: none"> - Opening chapters; - Closing chapters; - Credible membership perspective; - Completion of Accession Negotiations; - Signing Accession Treaty. Financial rewards | Explicit threats: Financial sanctions Implicit threats (delays of the accession advancement rewards) |
| Accession | Accession advancement rewards: <ul style="list-style-type: none"> - Accession Financial rewards | Explicit threats: Preventive and remedial sanctions: <ul style="list-style-type: none"> - Internal Market Safeguard Clause; - JHA Safeguard Clause; - Super Safeguard Clause. | Accession advancement rewards: <ul style="list-style-type: none"> - Accession Financial rewards | Explicit threats: Preventive and remedial sanctions: <ul style="list-style-type: none"> - Internal Market Safeguard Clause; - JHA Safeguard Clause; - Super Safeguard Clause; - Additional postponement clause. |
| Post-accession | Financial rewards | Explicit threats: Preventive and remedial sanctions: <ul style="list-style-type: none"> - Economic Safeguard Clause; - Internal Market Safeguard Clause; - JHA Safeguard Clause. | Financial rewards | Explicit threats: Preventive and remedial sanctions: <ul style="list-style-type: none"> - Economic Safeguard Clause; - Internal Market Safeguard Clause; - JHA Safeguard Clause. |

The Treaty of Accession includes three safeguard clauses: one general economic safeguard clause and two specific safeguard clauses: internal market and justice and home affairs (JHA) safeguard clause. The economic safeguard clause⁹ allows member states to apply for authorization to take protective measures with regard to Bulgaria and Romania in the event of serious economic difficulties.¹⁰ Article 37 of the Act of Accession specifies that the Commission may establish appropriate measures if Bulgaria and/or Romania cause, or risk causing, a serious breach of the functioning of the internal market. This safeguard clause refers not only to the internal market but also to all sectoral policies which concern economic activities with cross-border effect (e.g. competition, agriculture, transport, telecommunications, energy, environment etc.). According to Article 38 of the Act of Accession, the Commission may establish appropriate measures if there are serious shortcomings or any imminent risk of such shortcomings in the transposition and implementation of the *acquis* in the area of justice and home affairs. The safeguard clauses can be activated “until the end of a period of up to three years after accession” (Official Journal 2005a). However, the internal market and the JHA safeguard clause “may be invoked even before accession” (Official Journal 2005a). The establishment of the CVM further specifies that if Bulgaria and/or Romania

“fail to address the benchmarks adequately, the Commission may apply safeguard measures based on articles 37 and 38 of the Act of Accession, including the suspension of Member States’ obligation to recognise and execute, under the conditions laid down in Community law, Bulgarian judgments and judicial decisions, such as European arrest warrants” (European Commission 2006d: 3, 2006e: 3).

As the benchmarks set out for Bulgaria and Romania refer to certain shortcomings in the areas of judicial reform and the fight against corruption, failure to sufficiently address these issues would have resulted in the activation of the JHA safeguard clause. However, even when the monitoring report confirmed that “[t]he assessment points to the serious difficulties which the Bulgarian authorities are facing in making real headway in judicial reform and the fight against corruption and organized crime” and that “there are few results to demonstrate that the system is actually functioning correctly”, the Commission concluded that it “considers support to be more effective than sanctions and will not invoke the safeguard provisions set out in the Accession Treaty” (European Commission 2008c: 6). The Commission’s decision not to activate any of the safeguard measures is directly related to the scope of the explicit threats and more precisely to the penalizing power of the *remedial and preventive sanctions* established by the safeguard clauses.

There are two main arguments against the imposition of the safeguard clauses. The first refers to the limitations and the inadequacies of the sanctions included in the safeguards. As one EU official noted “it was never seriously envisaged to invoke the safeguard clauses because the clauses from the very beginning were considered not to be very constructive” (Interview 2 2009). The activation of the justice and home affairs safeguard clause would have suspended cooperation in these areas and particularly the application of the European Arrest Warrant. Another EU official noted that “the discontinuation of cooperation in the judicial field would have contributed nothing to achieve the ultimate aim” and concluded that the JHA safeguard clause “is not a real threat” and that “maybe for a government it is a sanction because it is not

9 Article 36 (See Official Journal 2005a).

10 Bulgaria and Romania may also apply for the authorization to take protective measures with regard to other member states.

helpful for one's prestige but apart from considerations of prestige, there is no real material penalty or sanction" (Interview 1 2009). Another EU official remarked that, "compared to the political exposure, this [JHA safeguard] is a Mickey Mouse clause" (Interview 3 2009).

The second argument reflects the difficulties activating the safeguards and the implications of their activation. In contrast with the pre-accession stages when the Council decides unanimously whether to grant rewards and/or impose sanctions, after accession, the Commission decides on the imposition of the safeguard clauses. A debate about the activation of the safeguard clauses and particularly the JHA safeguard clause is likely to polarize the opinions within the college, thus making it very difficult to reach a decision. The imposition of any of the safeguard provisions would have damaged severely not only the reputation of Bulgaria and/or Romania but also the reputation of the Commission. Furthermore, it would have discredited the EU's decision to let Bulgaria and Romania become members in 2007 and would have weakened the otherwise declining support for the ongoing enlargement with Turkey and the Western Balkan countries, which face similar problems in the areas of the efficiency of judiciary and the fight against corruption. As one EU official noted "[t]he mechanism is a huge credibility issue for the Union" and pointed out that "the disadvantages of activating [the JHA safeguard clause] outweigh the advantages" (Interview 2 2009).

Although the *remedial and preventive sanction* introduced by the JHA safeguard clause is considered limited and inadequate, some member states have pushed for its activation. Not only the Commission but also the member states have used the CVM to put political pressure on Bulgaria and Romania. The Dutch Minister of EU affairs Frans Timmermans, in an unprecedented move, sent a letter¹¹ to the Justice Commissioner Jacques Barrot, asking the Commission to consider activating the JHA safeguard clause should the reports fail to register sufficient progress (Euractiv 2009a). It is to be noted that Timmermans' letter was the first and the last attempt at imposing the safeguard clauses, as the applicability of their sanctions expired at the end of 2009 (three years after accession). The July 2009 Progress Reports concluded that "the conditions for invoking the safeguard clauses are not fulfilled" and confirmed that the mechanism "needs to be maintained until the reforms are achieved" (European Commission 2009c: 6-8, 2009d: 6-9). It is worth mentioning that prior to the publication of the reports the EU considered enhancing the penalizing power of the CVM by introducing new *explicit threats*. There were discussions in the Commission for linking the removal of the CVM with Bulgaria's and Romania's accession to the Schengen Area. The opinions within the college diverged and the idea was abandoned (Euractiv 2009b). However, progress in the areas highlighted by the Commission is essential for new members' accession to the borderless area. As one EU official noted "[i]f the mechanism continues and in particular with negative assessment, it will be extremely difficult to achieve a consensus in the Council for Bulgaria and Romania to access to Schengen" (Interview 2 2009).

The Commission neither invoked any of the remedial and preventive sanctions included in the safeguard provisions nor established new sanctions in the framework of the CVM. However, *general financial sanctions*, based on standard policy procedures, have been imposed against both Bulgaria and Romania. The publication of the Commission's most critical Progress Report on Bulgaria (in July 2008) was

11 The letter was sent on 30 May 2009, prior to the publication of the July 2009 Progress Reports.

accompanied by a separate report on Bulgaria's funds management which concluded that "[m]onitoring and audits show serious weaknesses in the management and control systems and point to a number of irregularities, suspected fraud cases and conflicts of interest between the programme administration and contractors" (European Commission 2008e: 3). As a result, the Commission withdrew the accreditation of the two implementing agencies in Bulgaria – the Central Financing and Contracting Unit (CFCU) and the Implementing Agency at the Ministry of Regional Development and Public Work (MRDPW) and suspended EU funds worth over €500 million (European Commission 2008e). The Commission decided not to reverse its decisions and Bulgaria irreversibly lost €220 million of pre-accession EU funding in November 2008, which was the final deadline for the contracting of PHARE funds (Euobserver 2008). Although the Commission did not publish a separate report on Romania, it suspended agricultural payments worth €142 million in June 2008 (Euobserver 2009). The suspension of the EU funds (in both countries) was related to general weaknesses in administrative and judicial capacity as well as high level corruption.

However, the EU's decision not to activate any of the safeguard procedures but to apply financial regulations highlights the limitations of the *remedial and preventive sanctions*, established in the framework of post-accession conditionality. Although some member states asked for a strong link between failure to adequately address the benchmarks and the suspension of EU funds, the Commission refrained from establishing any legal links between the two. As one EU official commented "[w]e cannot legally punish Bulgaria and Romania by withdrawing funds" (Interview 2 2009). The recent developments in Bulgaria and Romania (since the suspension of the EU funds) suggest that *general financial sanctions* have a positive impact. One EU official noted that "[t]he decision to cut funding has been a very strong motivation for the Bulgarian government last year" and commented that "[i]t is only pressure and punishment that works, if you take the money away, they feel the heat" (Interview 2 2009). This is further evidence that during post-accession stage the *remedial and preventive sanctions* established by the CVM do not provide strong incentives for compliance with EU conditions.

The comparative examination of pre-accession and post-accession *reward-threat balance* highlights the significant transformation of the incentive structure. In stark contrast with the pre-negotiation and the negotiation stage, when the *reward-threat balance* is dominated by a wide range of *accession advancement and financial rewards* after accession *explicit threats* and particularly *remedial and preventive sanctions* prevail in the reward-threat balance. The alteration in the balance between rewards and threats illustrates the transformation from *positive* incentive structure to *negative* incentive structure. Furthermore, the analysis of the safeguard clauses highlights the limited penalizing power of the remedial and preventive sanctions which they included. On the basis of the limitations and the inadequacies of the sanctions, we can conclude that the post-accession *negative* incentive structure is very *weak*. The substantial transformation of the incentive structure – from *strong positive* incentive structure to very *weak negative* incentive structure – highlights the key weaknesses of post-accession conditionality, which limit its effectiveness.

4. Conclusion: Limitations of Post-Accession Conditionality and the Future of EU Enlargement Conditionality

Three years after their EU accession to the EU, Bulgaria and Romania are still subject to unprecedented post-accession monitoring. Although some steps have been taken, the pace of reforms in the areas of judiciary and fight against corruption is slow. The latest reports highlighted “important shortcomings in Romania’s efforts to achieve progress under the CVM” and criticized the country for the adoption of a new law on the National Integrity Agency (ANI) which “represents a significant step back in the fight against corruption and breaches commitments Romania has taken upon accession” (European Commission 2010d: 5). Although the Commission praised Bulgaria for “a strong reform momentum which has been established” since July 2009, the Progress Report detected “continuing shortcomings regarding the prevention of corruption and protection against conflict of interest”, concluding that “important deficiencies remain in judicial practice both at the level of the prosecution and at the level of the court” (European Commission 2010c: 3).

The comparative examination of pre-accession and post-accession conditionality on the basis of the *stage-structured conditionality model* highlights several important developments. Two of the key elements of EU enlargement conditionality – conditions and monitoring – have evolved significantly. The introduction of post-accession benchmarks and the intensification of monitoring process represent the logical steps in the evolution of EU enlargement policy based on the lessons learnt from the previous experiences. The growing application of targeted and differentiated conditionality and *advanced monitoring reports* confirms the usefulness of the EU’s improved approach towards establishing conditions and monitoring compliance. The examination of the third element of EU enlargement conditionality – the incentive structure – reveals the key weaknesses of post-accession conditionality. After accession, the EU is “stripped” of its attractive *accession advancement rewards* and can only rely on *explicit threats* to induce compliance. However, the limited penalizing power of the *remedial and preventive sanctions* established in the framework of the CVM produces very *weak negative* incentive structure which diminishes the effectiveness of post-accession conditionality.

The July 2009 Progress Reports confirmed that the Commission “sees all the benchmarks as closely interlinked” and that it “[d]oes not envisage removing the benchmarks one by one but rather working with Bulgaria [and Romania] to the point where the CVM in its entirety is ended” (European Commission 2009c: 2, 2009d: 2). Although neither Bulgaria nor Romania have fully satisfied the CVM benchmarks, the Commission and some member states have successfully used the CVM as an instrument for continuous political pressure. As one EU official noted “without the mechanism the situation would be much worse” (Interview 2 2009). The question about the future of the CVM is important not only to Bulgaria and Romania, but also to prospective and old members of the Union. The mechanism has become a credibility issue not only for Sofia and Bucharest and the Commission, but an argument against further enlargement. The applicability of the safeguard clauses expired on 1 January 2010 and the Commission did not introduce any new sanctions but the CVM was not revoked, despite lobbying from both capitals for an exit strategy. Whether the EU can induce far reaching judicial reform and strengthen the fight against corruption in the absence of *accession advancement rewards* and *remedial and preventive sanctions* remains to be seen.

The effectiveness of the CVM has implications not only for the enlargement policy of the EU but for the development of cooperation on Justice and Home Affairs. There have been proposals for the introduction of similar monitoring mechanism for all members in order to encourage judicial cooperation and ensure high standards of quality of justice systems. However, the extension of the post-accession monitoring mechanism to the next country to join the EU – Croatia – is not envisaged. The new Enlargement and Neighbourhood Policy Commissioner, Štefan Füle, confirmed that “[s]peculation about an eventual monitoring mechanism [for Croatia] does not have any place” (Euractiv 2010). As the support for the enlargement of the Union with Turkey and Western Balkan countries has declined significantly, it is very likely that EU conditionality will evolve further by establishing more demanding conditions, serious *explicit threats* and substantial *remedial and preventive sanctions* before the accession of any new member. The conceptual framework, established by the *stage-structured conditionality model*, allows us not only to compare pre-accession and post-accession conditionality but also helps us to trace key developments in EU enlargement conditionality. The model can be applied in a wider context, to examine comparatively different rounds of EU enlargement and to compliment research in the field of democratization and Europeanization studies.

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