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Post-accession compliance with EU law in Bulgaria and Romania: a comparative perspective

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Abstract

This paper takes stock of academic literature and official sources on post-accession compliance in Bulgaria and Romania, the only new member states where the Commission has preserved the right to monitor key reforms beyond accession. The data used in the analysis suggests that the formal compliance with EU law has not decreased since their accession, quite the contrary. Bulgaria and Romania have performed well with regard to the transposition of EU law, yet signs of shortcomings appear at the enforcement level, most likely even on a greater scale than in other CEECs. Moreover, it is argued that in the first two years of membership the EU's extended conditionality did not yield the same results in Bulgaria and Romania. While Romania managed to convince the Commission of its good will and determination to meet the benchmarks set by the EU, Bulgaria failed to do so and faced conditionality sanctions. The analysis concludes by presenting some directions for further research.

General note:

*Opinions expressed in this paper are those of the author
and not necessarily those of the Institute.*

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1. INTRODUCTION¹

Bulgaria and Romania, which joined the European Union on 1 January 2007, were widely regarded as the two laggards of the Eastern Enlargement. Their accession process differed in some respect from the one of the Central and Eastern European countries (CEECs) of the 2004 enlargement. Depending on the point of view, the two countries can be considered as being “either the last to benefit from the old enlargement policies, or the first to experience the novel, and expectedly more restrictive, stance of the EU to the admission of new member states” (Smilov 2006: 161). Despite emerging discussions on the EU’s ‘absorption capacity’ and a growing enlargement fatigue, the two countries were allowed to accede the EU in the pre-scheduled date of 1 January 2007, yet on the basis of stricter conditions than any other candidate country before. Beyond accession, the Commission has preserved the right to monitor the countries’ judicial systems and the fight against corruption and may invoke ‘safeguard measures’ against Bulgaria and Romania. The extension of EU conditionality to a post-accession stage was an unusual procedure which marked the final point to a pre-accession process in which EU officials frequently complained that there would be strong discrepancy between rhetoric and action over EU conditionality issues (Pridham 2007: 170).

The particular characteristics of their pre-accession process turn Bulgaria and Romania into interesting case studies for research on post-accession compliance. While it is widely acknowledged that their transformation was more difficult and lengthier than other states of the Central and Eastern European group (Noutcheva and Bechev 2008; Vachudova 2005), the Commission has at present more avenues of external leverage for encouraging compliance than in other CEECs. How does the extended conditionality impact the post-accession compliance in Bulgaria and Romania? How successful are Bulgaria’s and Romania’s records of transposition? Are there signs for a gap between transposing and applying EU law? These are the questions this paper seeks to address.

¹ I would like to thank Gerda Falkner who commented on earlier versions of the paper.

The analysis proceeds in three steps: firstly, the literature on compliance with EU law in Central and Eastern Europe is reviewed and discussed in view of the guiding research interest. Secondly, the paper analyses the patterns of rule adoption in Bulgaria and Romania's pre-accession process and asks what kind of information they may give with regard to their post-accession compliance. Finally, the paper elaborates on the countries' compliance with EU rules in the two first years of their membership. In addition to the secondary literature, the analysis draws on three sets of sources: the EU's transposition and infringement data, the Commission's monitoring and verification reports and Eurobarometer data. The aim is to provide a comprehensive overview of what we know concerning post-accession compliance in Bulgaria and Romania, on the basis of extant empirical knowledge. Rather than testing theory-guided variables, the overall objective is to take stock of the still under-researched cases of Bulgaria and Romania and to present some directions for further research.

2. COMPLIANCE WITH EU LAW IN A PRE-ACCESSION AND A POST-ACCESSION CONTEXT

The section elaborates on what is known concerning the practice of EU law in a pre- and in a post-accession context in Central and Eastern Europe. The emphasis is placed on the question of whether the Central and Eastern European states can be expected to comply with EU law once they have managed to shift their status from an applicant state to a new member state.

Regarding the pre-accession context, a rich body of literature emerged dealing with issues of rule adaptation, transformation and compliance in Central and Eastern Europe (for an overview, see Sedelmeier 2006a). The rational institutionalist argument proved to have particularly strong explanatory power by emphasizing that adherence to EU rules prior to accession is mainly driven by rational cost-benefit calculations and actors in pursuit of maximising their own power (Schimmelfennig and Sedelmeier 2004; Dimitrova 2002; Grabbe 2003; Vachudova 2005). The crucial mechanism employed by the EU to make candidate countries accept its rules is the use of conditionality, meaning that the EU sets its rules as conditions which the applicant country has to fulfil in order to receive rewards (see Schimmelfennig, Engert and Knobel 2003: 496f). This incentive-based governance model, however, gives a rather pessimistic outlook for compliance with EU law in a post-accession setting. “The absence of these incentives should significantly slow down or even halt the implementation process” (Schimmelfennig and Sedelmeier 2005: 226). Similarly, Steunenberg and Dimitrova showed that EU conditionality loses its effectiveness once the accession date for an applicant state is set. “This can lead to potential problems with the transposition of EU directives just before and after accession” (Steunenberg and Dimitrova 2007: 1).

The absence of accession conditionality and an altered cost-benefit calculation at the domestic level are not the only factors that may negatively influence the new member states’ compliance with EU law. A lack of societal activism and limitations of the state bureaucracies are two other factors (Sedelmeier 2008: 809-10). The litigation and pressure activities of private actors or supportive interest groups, at times in combination with the Commission’s outside

pressure, played an influential role for the application and enforcement of EU law (see, inter alia, Börzel 2006; Slepcevic 2008; Cichowski 2007). The fact that private actors are less organized and that the civil society is rather weak in the new member states (Howard 2003) therefore may have a negative impact on the compliance of these states. Other studies point to the importance of an efficient administration for the successful implementation of EU law. “The functioning and the quality of the domestic bureaucracy constitute crucial pre-conditions for effective alignment with EU policy requirements” (Hille and Knill 2006: 382). In his analysis of the implementation of social policy directives in the new member states, Toshkov (2007) equally underpins that administrative efficiency is of strong explanatory power vis-à-vis party political preferences and institutional capacity. Due to the legacies of the communist era, the reform of the public administration in Central and Eastern Europe was regarded as a key to implement - as opposed to only adopt - the *acquis communautaire*, yet it is questionable if the reforms undertaken have created sufficient capacities to ensure full compliance in the accession aftermath (Emmert 2003; Curtin and von Ooik 2000).

In view of these assumptions, the question remains whether compliance with EU law has indeed reduced now that the CEECs shifted from a pre-accession to a post-accession context. In the JEPP Special issue 15(6) of September 2008, a group of scholars provided a first insight on the reverberations of the EU in post-communist Europe “beyond conditionality” (Epstein and Sedelmeier 2008). Their guiding research interest was whether or not the incentive-based ‘conditionality hypothesis’ is right in predicting that the influence of international institutions has decreased after the Eastern Enlargement and in the presence of less significant membership incentives. Among these studies that cover a broad range of issues in Central and Eastern Europe (Vachudova 2008; Johnson 2008; Sasse 2008; Epstein 2008; Orenstein 2008) and beyond this geographical setting (Schimmelfennig 2008; Lavenex 2008), Ulrich Sedelmeier elaborates on the compliance of the eight new member states in Central and Eastern Europe with the *acquis communautaire*. By drawing a comparatively positive picture on post-accession compliance with EU law, the author argues that the EU is far from having an “Eastern problem” with “virtually all of the new member states outperform[ing] virtually

all of the old members during the first four years of membership” (Sedelmeier 2008: 806). According to infringement and transposition data published by the European Commission, the new member states have done reasonably well in implementing EU law since early 2005, with better transposition rates, significantly less reasoned opinions than the EU-15 and only one fifth of their ECJ referrals. Moreover, in case an infringement procedure was opened, the countries have settled them, on average, at an earlier stage than the EU-15 (Ibid: 811-814). To explain this rather unexpected outcome, Sedelmeier suggests looking at two factors that are “a greater susceptibility of the new member states to shaming and an institutional investment in legislative capacity” (Sedelmeier 2008: 806). Processes of socialization could have left their traces in the new member states by making them more sensible about public shaming and by making them consider good compliance as appropriate behavior. Moreover, the substantial investment into the institutional capacity and the maintenance of pre-accession implementation practices could explain why EU law is transposed in the new member states timely and formally correctly (Ibid: 820-822). The author emphasized, however, that his findings should constitute only a starting point for further research, since the data used focused on the *formal* implementation of EU law, thus leaving aside the practical application and enforcement.

One of the few studies that also takes into account these stages of the implementation procedures was presented by Falkner, Treib and Holzleithner (2008). The scholars elaborated on the transposition and implementation record of Slovenia, Hungary, Slovakia, and the Czech Republic in three EU social law directives. Their findings suggest that the four states did comparatively well in transposing the directives into their domestic legislation regardless of the fact that most “reform processes were politically highly contested” (Treib and Falkner 2008: 162). The main reason why incumbent governments overcame political contestation at the transposition stage was “accession conditionality” and the “Commission’s pre-accession pressure” (Treib and Falkner 2008: 164). The social law directives were transposed in a relatively timely and correct manner. A less positive implementation record was achieved with regard to the enforcement and application stage, however. A range of problems, in particular

regarding the possibilities of individual litigation and the inefficient monitoring activities by labor inspectorates, hindered the efficient enforcement of the adopted EU directives. “As a result of the societal and institutional difficulties associated with the transposition from Socialist rule, the Czech Republic, Hungary, Slovakia and Slovenia are all plagued by a multitude of problems that have so far largely prevented the legislation from being realized in practice” (Treib and Falkner 2008: 165). In terms of theoretical implications, the scholars conclude that the four Central and Eastern European countries form a separate “world of dead letters” within the EU’s “worlds of compliance”. The “worlds of compliance” typology was developed by Falkner, Treib, Hartlapp and Leiber (2005) in a comprehensive research in the field of labor law in the EU-15. It maintains that member states can be clustered in three different worlds, each of which reveals an “ideal-typical patterns of how member states handle the duty of complying with EU law” (Falkner, Treib, Hartlapp and Leiber 2005: 320). With regard to the “world of dead letters”, the implementation process is seen to be typically characterized by a politicized yet relatively successful transposition and systematic shortcomings at the enforcement and application stage (Treib and Falkner 2008: 172). These shortcomings are based on malfunctioning structures (courts, labor inspectors, civil society) that cannot be expected to improve in a short-time perspective, even after accession.

To sum up, the research so far suggests that compliance with EU law in the new member states does not significantly decrease after accession, at least with regard to the formal implementation. Regarding enforcement and practical application, however, the new member states face several problems that prevent the European law from being efficiently put into practice.

3. COMPLIANCE WITH EU LAW IN BULGARIA AND ROMANIA

“The mode of pre-accession rule transfer is a first key factor that affects post-accession compliance” (Sedelmeier 2006b: 157). Before analyzing post-accession compliance in Bulgaria and Romania, this section therefore starts with a brief analysis of the patterns of EU rule adoption which prevailed in the two countries’ accession process to the EU.

3.1. Patterns of EU rule adoption in the accession process of Bulgaria and Romania

Scholarly writing holds that, following the end of Communist rule, an illiberal democracy took hold in both Romania and Bulgaria (Vachudova 2005: Chapter 2). In the absence of a liberal opposition, the non-opposition governments (meaning governments that had not opposed Communisms) “wrapped democratic institutions, sabotaged economic reform and fostered intolerance in their efforts to concentrate and prolong their power” (Vachudova 2005: 38). They signed up for reform in rhetoric, but refrained from doing so in action. Despite the EU treating them in equal terms as the other CEECs and including them in all programmes in support of the postcommunist states, the “passive leverage”² of the EU in the early transformation stages did not yield the same results. The two countries did not start sincere reforms “before they were sanctioned either by the market and/or by the exclusion effects of the EU’s conditionality machine” (Noutcheva and Bechev 2008: 119-20). From 1995 onwards, the EU increasingly applied “active leverage”³ and was no longer satisfied with reforms on paper (see detailed Vachudova 2005: Chapter 5). Bulgaria and Romania were not invited to start accession negotiations in the 1997 Luxembourg European Council. A group of member states tried not to invite them at the 1999 Helsinki summit as well, but pressure from key member states such as Great Britain and geopolitical factors, in particular the Kosovo crisis and the EU’s efforts to stabilise South-Eastern Europe, turned the balance in favor of Bulgaria and Romania (Noutcheva and Bechev 2008: 122).

² Milada Anna Vachudova defines passive leverage as “the traction that the EU has on the domestic politics of credible candidate states merely by virtue of its existence and its usual conduct” (Vachudova 2005: 5).

³ Active leverage can be understood as the “deliberate policies of the EU toward candidate countries” (Ibid).

The begin of accession negotiations created a momentum for reform in both Bulgaria and Romania (Spendzharova 2003),⁴ yet the two states did not manage to catch up with the other CEECs. When the European Council decided in the 2002 Copenhagen summit to clear the way for the ‘big bang’ enlargement, Romania and Bulgaria were not among the states which were allowed to accede the EU in 2004. The EU called for further progress in meeting the membership criteria in general and in reforming the administration and judiciary in particular. However, the Copenhagen summit conclusions confirmed that “the objective is to welcome Bulgaria and Romania as members of the European Union in 2007” (European Council 2002). In the years that followed, the EU-Bulgarian and Romanian relations were a seesaw, with the EU calling for enhanced reform efforts and the two countries reacting to it. “Bulgaria and Romania accelerated reform when they felt the ‘stick’ of EU conditionality. Every time the EU penalised the two laggards, their governments would rapidly respond by presenting revised reform strategies and making pledges for additional measures” (Noutcheva and Bechev 2008: 124). In this way, the two countries gradually came closer to the objective of joining the EU. After the two countries had provisionally closed all *acquis* chapters, the Brussels European Council of 16-17 December 2004 confirmed the accession date of 2007, yet introduced the instrument of ‘safeguard clauses’ that may withhold the benefits of membership before accession or in the three years after accession, if certain reforms (in particular but not only) in the policy fields of justice and home affairs and competition (in Romania) are not completed (European Council 2004).

On 25 April 2005, Bulgaria and Romania signed the Accession Treaty with the EU, according to which they would become EU member states on 1 January 2007. In Article 39, the treaty included a postponement provision, however, which provided the EU with the power to delay the accession date for one year in case unsatisfactory progress was noticed with regard to key issues like the judicial reform or fighting corruption. Even though the application of the

⁴ On sectoral reforms and the EU’s influence exerted through conditionality see e.g. Guido Schwellnus (2005) who elaborates on the adoption of non-discrimination and minority protection rules in Romania, Hungary and Poland, Lora Borissova (2003) who deals with the adoption of the Schengen and the justice and home affairs *acquis* in Bulgaria and Romania and Gallina Andronova Vincelette (2004) who analyses the challenges to Bulgarian monetary policy on its way to the EU.

postponement provision was regarded as unlikely, the possibility for using it increased in the aftermath of the negative referenda on the European Constitution in France and the Netherlands. The climate for further enlargement became less favorable resulting in the application of stricter conditionality. In June 2005, the Commission sent a “yellow card” to Sofia and Bucharest complaining about the “insufficient speed” of reforms. Germany went even further by threatening not to ratify the accession treaty with the two countries, thus effectively blocking their EU accession (see Smilov 2006: 162-63). In September 2006, when the Commission (2006) released its final monitoring report, it became clear that the postponement clause would not be activated. In the report, the Commission recommended against a delay of the accession date and concluded that the countries were sufficiently prepared for accession. At the same time, remedial measures were proposed to ensure the functioning of EU policies after accession, in particular in the areas of food safety, air safety, EU agricultural funds and the judiciary and fight against corruption (Ibid: 9).

The extension of conditionality beyond accession indicates that post-accession compliance with EU law may not decrease in Bulgaria and Romania. By studying post-accession compliance with the EU’s political conditions in Romania, Geoffrey Pridham argues that the “extended conditionality could be significant in compelling further progress. As the poorest member state, Romania would find the blocking of EU funds a painful experience” (Pridham 2007: 186). His research finds little evidence of patterns of social learning, which point to “the continuing importance of external pressure in propelling change” (Ibid). Therefore, the Commission’s extended conditionality mechanism and continuing pressure on Bulgaria and Romania may produce further progress and efforts in complying with EU conditions and law.

That said, there are however some factors pointing to problems in enforcing EU law in Bulgaria and Romania. The administrations have serious shortcomings with key reforms “still pending” (Noutcheva and Bechev 2008: 132) regardless of the work done in the course of the accession process. These reforms in view of accession resulted mainly in the improvement of the capacities and working methods of the few departments specialized in European

integration matters, described in the literature as “island of excellence” (Pridham 2005: 120-21). In Romania, successive cabinets did not manage to outline a clear-cut policy and strategy for public administration reform, so that the EU conditions were at times the only real pressure towards reform (Hințea, Șandor and Junjan 2004). Also, Dimitris Papadimitriou and David Phinnemore (2004) showed by using Romania as a case study that the twinning programme, the EU’s main instrument to assist in the process of reforming public administration, had a very diverse effect on different corners of the administration. The success was dependent on several factors, including the design of the programme, the institutional fluidity the individual agency involved and the degree of politicization within the administrative branches involved in the project (Ibid: 141). With regard to Bulgaria, Giatzidis argues that “though significant success has been achieved in harmonizing Bulgarian legislation with the *acquis*, its application is still rather ineffective, whilst the public administration is considered unfit for the utilization of the pre-accession funds” (Giatzidis 2004: 449). He underlines that the shortcomings of the public administration are worsened by unusually close links between Bulgarian civil servants (and politicians) and organized crime. Political corruption and corrupt ties between the state apparatus and private business are serious problems which undermine the public trust in the state institutions and hamper economic development and the creation of a favorable business climate. According to data of Transparency International, Bulgarians and Romanians perceive their countries as the most corrupt ones in the EU. The two countries topped an EU-wide ranking with 3.6 and 3.8 on a scale from 0 to 10, with zero being the most corrupt and ten the least (Pop 2008).

Another factor which hints to a rather weak enforcement record is the dysfunctional judiciary. The judicial systems of both Bulgaria and Romania were considered as slow and inefficient with trials lasting for years and prisons being overcrowded. As a result, the Commission pointed out the reform of the judiciary in almost every Regular Report, even if the emphasis differed in the two countries. In Romania, the Commission pressured to ensure full independence of the judiciary from the executive, while Bulgaria was asked to introduce more accountability for the judiciary which, at times, used its independence to pursue political

purposes (Noutcheva and Bechev 2008: 133). The two countries have made some progress in meeting these demands. Nevertheless, the perceived need to further reform the judiciary was one of the major reasons why the EU decided to extend its conditionality mechanisms to the post-accession stage. A final factor which may create problems in enforcing EU law is the lack of societal activism. There is a widespread disbelief in the functioning of state institutions which contributes to a rather low engagement of Bulgarian and Romanian citizens in civic and political life. Moreover, due to limited faith in the system as a whole, people consider unofficial ways to solve problems frequently more efficient than the official ones. To bribe a government official, a policeman, university administration and the like may prove more cost-effective than taking somebody to trial or doing the official procedure. "Bribery has become the principal mode of solving problems [in Bulgaria] while the law no longer serves as the chief regulator of society" (Giatzidis 2004: 448-49).

3.2. Post-accession compliance in Bulgaria and Romania

By focusing on the first two stages of the implementation process, that is transposition and enforcement, this section analyses post-accession compliance in Bulgaria and Romania. While the transposition can be studied relatively easily through the Commission's transposition and infringement data - although this dataset also met with criticism in various forms (Börzel 2001; Knill 2006; Falkner, Treib, Hartlapp and Leiber 2005: 19-20) - the assessment of the actual enforcement of EU law is a more challenging task. The article contacts two sets of sources (the Commission's monitoring and verification reports and Eurobarometer data) and discusses their value as indicators of compliance.

3.2.1. Transposition and infringement data

The Commission's transposition data suggests that Bulgaria and Romania have done very well with regard to the formal transposition of EU legislation. With regard to the internal market legislation, Bulgaria was actually the first member state to achieve a transposition deficit of 0% in 2008 (Commission of the European Communities 2008d: 7). This means that Bulgaria has transposed all directives on internal market within the predefined deadlines. Romania

achieved a transposition deficit of 0.4% in the first six months of 2008, placing it second together with Slovakia (Ibid: 11). The two countries had already been well placed in the previous scoreboard which was the first to integrate data on them.⁵ The results on the internal market legislation reflect a broader trend. According to the tables of the European Commission about the progress of the respective member states in notifying the transposition of EU directives, Bulgaria and Romania have improved steadily. While in March 2007 Romania was the weakest country of the EU-27 with only 91.4% transposition rate, it was able to gradually improve its performance. In January 2009, it reached 99.30% transposition rate, which made the country rank in ninth place of all member states. Bulgaria reached a better transposition rate right from the start, so that its improvement in notifying the transposition of EU directives has been less considerable. The country improved its transposition rate from 98.46% in March 2007 to 99.39% in January 2009, putting it in sixth place of the EU-27.

Table 1: Bulgaria and Romania's progress in notifying national measures implementing all EU directives

| | March 2007 | July 2007 | November 2007 | April 2008 | August 2008 | October 2008 | January 2009 |
|----------|------------|-----------|---------------|------------|-------------|--------------|--------------|
| Romania | 91.4% | 97.4% | 99.73% | 99.45% | 99.33% | 99.65% | 99.30% |
| Bulgaria | 98.46% | 99.09% | 99.63% | 99.77% | 99.55% | 99.68% | 99.39% |

Source: Secretariat-General of the European Commission; National implementation measures notified to the Commission (different tables).

Romania and Bulgaria have so far been included only in one Annual Report on infringements (Commission of the European Communities 2008a). This document, which outlines the infringement data for 2007, casts a shadow on the good transposition rates of the two countries, however. It maintains that Romania was the member state which received by far the

⁵ In the December 2007 scoreboard, Bulgaria and Romania had an average transposition deficit of 0.8% (Commission of the European Communities 2008c: 12). To be exact, the first time Bulgaria and Romania were mentioned was in the July 2007 scoreboard. It stated that the two countries had a strong transposition deficit (5.2%), which would not be surprising however, "given the enormous task that they faced in transposing the whole Community acquis in time for accession on 1 January 2007" (Commission of the European Communities 2007a: 11). Therefore, the document did not integrate Bulgaria and Romania's transposition data into the scoreboard figures.

most ‘letters of formal notice’ of the EU-27 (namely 195), yet overwhelmingly due to non-communication.⁶ Receiving 80 letters of formal notice, Bulgaria did better than Romania, but Bulgaria still ranks among the poorest performing EU-12 countries in this regard. The letter of formal notice is the first step in the infringement procedure and implies that the Commission demands the respective member state to submit its observation on an identified legal problem. If the case remains unsettled, the next stages represent the reasoned opinion and the referral to the European Court of Justice (ECJ).⁷ With regard to Bulgaria and Romania, the numbers of reasoned opinion and referral to the ECJ are low, yet the time period of examination has been too short for these numbers to be significant.

Table 2: 2007 infringement data for Bulgaria and Romania

| | | Total | Non communication | Non conformity | Bad application |
|----------|-----------------------|-------|-------------------|----------------|-----------------|
| Bulgaria | Formal Notice | 80 | 70 | 3 | 3 |
| | Reasoned Opinion | 2 | 2 | 0 | 0 |
| | Referral to the Court | 0 | 0 | 0 | 0 |
| Romania | Formal Notice | 195 | 186 | 1 | 2 |
| | Reasoned Opinion | 5 | 4 | 0 | 0 |
| | Referral to the Court | 0 | 0 | 0 | 0 |

Source: European Commission (2008a: Annex 1)

3.2.2. EU conditionality beyond accession: the Commission’s monitoring activities

While infringement data have so far been of limited significance, another source of information possibly helps shed light on Bulgaria and Romania’s post-accession compliance: the Commission’s monitoring activities. According to their Accession Treaties, the Commission has the right to invoke safeguards measures up to three years after accession if serious shortcomings are observed in three areas of the *acquis*, i.e. the economic (Art. 36), the internal market (Art. 37) and the justice and home affairs areas (Art. 38). The activation of the

⁶ Italy was second with 101 letters of formal notice.

⁷ In a reasoned opinion, the member state has to give a detailed legal statement on the reasons why the implementation of the EU law has failed or took place in an incorrect way. By referring the case to the ECJ, the Commission opens the way for the litigation procedure.

safeguard measures may result in the suspension of EU funds or in export food bans. Moreover, the Commission is allowed to take remedial measures in the areas of food and air safety, agricultural funds, the judiciary and the fight against corruption in order to ensure the functioning of EU policies and institutions after the two countries' EU accession.

Technically speaking, the safeguard clauses for Bulgaria and Romania were nothing new: they had already been included in the Accession Treaties of the other Central and Eastern European countries. Still, the possibility for invoking them was never seriously discussed in the context of 2004 enlargement (Noutcheva 2006: 2). An additional new element for Bulgaria and Romania was the post-accession monitoring of governance standards. The Commission established a cooperation and verification mechanism which defined benchmarks for the fight against corruption, organised crime and the reform of the judiciary against which the progress of Bulgaria and Romania should be measured. These areas of concern have been monitored on a regular basis and the results published in special reports of the European Commission.

Due to their precisely defined focus, the Commission's post-accession monitoring reports do not allow assessing the countries' general performance in terms of transposing or enforcing EU law. Still, in almost every monitoring report it is underlined that "without irreversible progress on judicial reform, fight against corruption and organized crime [these countries run] the risk of being unable to correctly apply EU law" (see, for instance, the Commission's first monitoring report on Bulgaria 2007b: 3). Therefore, the monitoring reports are useful indicators for assessing the Commission's view as to how the Bulgarian and Romanian law enforcement structures and governance standards have developed since their EU accession. They help analyse developments at the second stage of the implementation process, that is enforcement. Shortcomings at the domestic systems of enforcement may significantly lower the chances of efficiently applying the adopted EU law (Treib and Falkner 2008). However, it is important to note that the Commission's monitoring reports do not provide us with conclusive insight on a causal linkage between transposition and enforcement of EU law in Bulgaria and Romania.

The European Commission tabled the first monitoring reports in July 2007. In Bulgaria's case, the Commission was cautiously positive and reported some progress in the area of veterinary and animal health. Moreover, the Bulgarian government was "committed to judicial reform and cleansing the system of corruption and organized crime" (Commission of the European Communities 2007b: 5). Bulgaria had adopted an amendment to its constitution aimed at ensuring the independence and accountability of the judicial system. While the Commission mentioned positively that some progress was achieved in improving the transparency of the judicial process, it called for more efforts with regard to the judicial treatment of high-level corruption cases. The progress in the fight against corruption was limited to preventing and fighting corruption at the border and within local government. Overall, the Commission judged that Bulgaria has made some – yet not enough – progress and, in general, that it needed more time for implementing the benchmarks set by the EU. The Commission recommended against the activation of the safeguard provisions.

In the second report on Bulgaria, published in February 2008, the Commission applied a less diplomatic tone and complained that "in key areas such as the fight against high-level corruption and organised crime, convincing results have not yet been demonstrated" (Commission of the European Communities 2008f: 9). The report indicated a growing impatience in Brussels towards the slow pace and insufficient reform efforts of Bulgaria and were accompanied by "uncharacteristically sharp on-the-record remarks" (Stoyanov *et al.* 2008: 255). In February 2008, the Commission therefore decided to impose first financial sanctions on Bulgaria. Following mismanagement and revelations of interest conflicts and corruption in the Bulgarian Road Agency, the Commission blocked funding from the Instrument for Structural Policies for Pre-Accession for Bulgaria (Ibid). After this case, the EU's anti-fraud office OLAF carried out a series of audits in Bulgaria and revealed mismanagement and corruption on a serious scale. The OLAF report was confidential yet was leaked to the media.⁸ It pointed at misuse under the SAPARD programme and presented

⁸ The OLAF report can be downloaded at: http://www.mediapool.bg/site/images/doklad_OLAF_en.pdf

evidence of one of the most serious cases of fraud, called the “Nikolov-Stoykov-Group”. This group, a network of around fifty Bulgarian enterprises, “who are said to have close links to the current Bulgarian government”,⁹ was set up for the purposes of tax fraud, document forgery, money laundering and the illegal importing of Chinese rabbit and poultry meat with falsified health certificates. OLAF estimated that the financial impact on the Community budget of these projects was more than € 30 million.

The OLAF report went public only days before the Commission presented its third monitoring report, published jointly with a report on the management of EU funds in Bulgaria. The third report was harsh in its assessment of Bulgaria’s reform efforts and stated that “progress has been slower and more limited than expected and the need for verification and cooperation will continue for some time. The judicial system and the administration need serious strengthening” (Commission of the European Communities 2008f: 2). The Commission criticized that investigations into corruption and organised crime rarely lead to arrests and prosecution. With regard to the functioning of the judicial system, it noticed that “institutions and procedures look good on paper but do not produce results in practice” (Commission of the European Communities 2008f: 5). Moreover, the separated report on the management of EU funds pointed to irregularities and fraud on part of Bulgaria. As a result, the Commission suspended €560 million from the Phare programme, €121 from the SAPARD programme and €144 million from the ISPA programme, resulting in a total of €825 million of suspended assistance. The Commission also withdrew the accreditation of two Bulgarian agencies responsible for the management of EU pre-accession funds (Commission of the European Communities 2008e: 3). On 25 November 2008, it became clear that Bulgaria would definitely lose a big amount of the frozen money. After an “in-depth analysis”, the Commission decided to keep the suspension in place. From the point of view of the Commission, the Bulgarian government had failed to take sufficient measures against the ill-use of the money. This had the direct consequence that €220 million of Phare pre-accession assistance were definitely withdrawn, as the deadline for applying for tenders expired on 30

⁹ Ibid, p. 2.

November 2008 (Agence Europe 2008). Bulgaria was the first EU member state to lose EU funds due to ill-use (Ibid).

In Romania's case, the Commission was more satisfied with the results produced. According to the first report, published in July 2007, "the Romanian Government is committed to judicial reform and cleansing the system of corruption. In all areas, the Romanian authorities demonstrate good will and determination" (Commission of the European Communities 2007c: 5). The Commission positively mentioned progress with the fight against local-government corruption and with the establishment of a national integrity agency, yet pointed to shortcomings in the judicial treatment of high-level corruption. Overall, the Commission concluded that "in the first six months of accession, Romania has continued to make progress in remedying weaknesses that could prevent an effective application of EU laws, policies and programmes" (Commission of the European Communities 2007c: 19). The fight against high-level corruption remained a salient issue, however. At the beginning of 2008, it went public that persecutors investigated several high politicians over allegations of corruption and gathered evidence against Prime Minister Adrian Nastase, former transport minister Miron Mitrea, the then labour minister Paul Pacurar and five other senior officials (see EurActiv 2008). Yet, the investigations were hindered by a ruling of the Romanian constitutional court which stated that the parliament must first approve the investigations against high-ranking politicians. The ruling was controversial and prompted the Romanian president Traian Basescu to label the constitutional court "a shield against corruption" (Ibid).

Against this background, the fight against high-level corruption was the most important issue for the Commission. In February 2008, it complained that with regard to the fight against high-level corruption "convincing results have not yet been demonstrated" (Commission of the European Communities 2008b: 7). The Commission, however, conceded that Romanian authorities displayed a "serious commitment" (Ibid: 2) towards implementing the benchmarks set by the EU. The Romanian government had swiftly prepared and adopted an action plan on how to meet the benchmarks and advanced the reform of the judiciary.

The overall assessment of the Commission also remained positive in the third Commission report on Romania, published in July 2008. The report was considerably less harsh than the one on Bulgaria. The Romanian government was praised for its efforts to reform the judiciary and to investigate corruption, two areas where “the institutional and procedural changes introduced in recent years [...] are starting to produce first results” (Commission of the European Communities 2008g). Yet, the Commission encouraged Bucharest to do more in several areas, in particular “to show that the judicial system works and that investigations into corruption lead to arrests, prosecution and, depending on the court’s judgment, convictions with dissuasive effect and seizure of assets” (Ibid: 6). From the Commission’s point of view, the country’s fight against corruption was clearly too politicised. Contrary to Bulgaria, the Commission did not freeze EU pre-accession funding. However, Romanian institutions have problems putting together enough eligible projects. According to media reports, Romania may lose substantial parts of its EU agricultural funds due to poor management (Vucheva 2008).

In short, the Commission’s monitoring reports showed that the progress towards meeting the benchmarks set by the EU differed between Bulgaria and Romania in the first two years of membership. So far, Romania has done better than Bulgaria. However, the question is if this is only a temporary snapshot. According to the rather short six-page interim reports of February 2009 (which did not include any recommendations), Bulgaria has made “significant developments” in corruption and organized crime and “some developments” in reforming the judiciary (Commission of the European Communities 2009a: 2), while Romania’s progress is “difficult to demonstrate” (Commission of the European Communities 2009b: 2). Evidently Bulgaria has stepped up efforts following the harsh summer 2008 assessment, whereas the progress of Romania has stagnated in some areas.

3.2.3. The view of Bulgarian and Romanian citizens

This section takes into account Eurobarometer data from 2006 to 2008 to elaborate on the views of Bulgarian and Romanian citizens on their national institutions and the European integration process. Similar to the Commission's post-accession monitoring, the Eurobarometer data provide indications for developments at the enforcement level, but do not help establish the actual level of enforcement or application with EU law. This task can only be accomplished by rigorous empirical research over a longer observation period.

Romanians and Bulgarians, together with Poles, are the European citizens who have the highest level of distrust in their national institutions. There are diverging trends in the two countries, however. Whereas in Bulgaria there is a growing discontent with the national government and parliament, in Romania the trust in the national institutions has increased, yet on a low level. In Bulgaria, the mistrust reached a new peak in 2008 with only 17 percent of the respondents trusting in the government and 12 percent in the parliament. The average in the EU-27 was 32 percent (trust in government) and 34 percent (trust in parliament), respectively. The trust is equally low for other national institutions. Bulgarians have the lowest trust (25 percent) and highest mistrust (65 percent) in their national police of all countries covered by the Eurobarometer poll. Only 28 percent of Bulgarians believe that, in general, things are going in the right direction in the country. The EU-27 average was 32 percent. In Romania, this value ranked at 53 percent, which made the country the third most optimistic one in the EU (only preceded by Malta and Poland). Compared to Bulgaria, Romanians also have more trust in the police (38 percent), yet still significantly under EU-average (63 percent). Trust in the domestic justice/legal system was low in both countries. In 2008, 63 percent of the Romanians, and 76 percent of the Bulgarians responded that they did not trust their national justice/legal system. The EU-27 average was 48 percent.

Table 3: Trust in national government and parliament

| | Bulgaria | | | Romania | | |
|------------------------------|----------|------|------|---------|------|------|
| | 2006 | 2007 | 2008 | 2006 | 2007 | 2008 |
| Trust in national government | 22%* | 22% | 17% | 27%* | 19% | 25% |
| Trust in national parliament | | 14% | 12% | | 19% | 22% |

Source: Eurobarometer 65, Spring 2006; Eurobarometer 67, Spring 2007; Eurobarometer 69, Spring 2008.

* In 2006, the question of the Eurobarometer poll did not concern "trust in national government" and "trust in national parliament" but whether the respondent was "satisfied with national institutions"

The high level of distrust of Bulgarian and Romanian citizens in national institutions seems to go hand-in-hand with a high level of trust in European institutions. Bulgaria and Romania are among the countries which share the most positive view on the European Union. Around 60 percent of the citizens of both countries perceive the EU as very or fairly positive. Moreover, 82 percent of the Romanians and 78 percent of the Bulgarians are convinced about the democratic nature of the Union. These were the highest values in the Union in 2007, shared only by Greece and Slovenia (both 78 percent). Still, there are differences between the two countries. In 2007, when both countries joined the EU, only fifty percent of the Bulgarians believed that their country would benefit from EU membership, which was a substantially lower value compared to Romania (69 percent, plus 19 points). In 2008, the percentage of Bulgarians who considered EU membership beneficial dropped under the fifty percent threshold, most likely because of the financial sanctions imposed by the European Commission on Bulgaria. In Romania, this value remained stable from 2006 to 2007 and even increased in 2008. In both countries, the trust in the EU was high and ranked above EU-average. Around two-third of all respondents in Bulgaria and Romania answered that they tended to trust in the EU.

Table 4: The view of Bulgaria and Romania on the European Union

| | Bulgaria | | | Romania | | |
|--|----------|------|------|---------|------|------|
| | 2006 | 2007 | 2008 | 2006 | 2007 | 2008 |
| Will benefit or benefited from EU membership | 54% | 50% | 47% | 69% | 69% | 77% |
| Positive Image of the EU | 59% | 59% | 60% | 64% | 67% | 58% |
| Tend to trust in EU | 57% | 54% | 63% | 68% | 65% | 66% |

Source: Eurobarometer 65, Spring 2006; Eurobarometer 67, Spring 2007; Eurobarometer 69, Spring 2008.

Also, the most important public concerns are not the same in Bulgaria and Romania. In Bulgaria, concerns about crime, alongside solving the problems of rising prices and inflation, represent the most important issues. In Romania, the salience of the issue 'crime' has decreased in recent years and ranked only in fourth place in 2008. By contrast, Romanians are more concerned about the economic situation in their country. The issue of rising prices and inflation gained importance in 2008 reflecting a broader European trend. In the EU-27, the percentage of respondents who consider rising prices to be an important issue has increased by 19 points from spring 2007 to spring 2008 (from 18 percent to 37 percent). In 2008, the most important issues for average Europeans were, together with rising prices, unemployment (24 percent), crime (20 percent) and the economic situation (20 percent).

Table 5: Most important public concerns in Bulgaria and Romania

| Most important public concerns | Bulgaria | | | Romania | | |
|--------------------------------|----------|------|------|---------|------|------|
| | 2006 | 2007 | 2008 | 2006 | 2007 | 2008 |
| Rising price/Inflation | 30% | 29% | 51% | 26% | 27% | 48% |
| Unemployment | 45% | 30% | 16% | 24% | 20% | 11% |
| Crime | 26% | 35% | 36% | 24% | 18% | 16% |
| Economic situation | 34% | 34% | 25% | 48% | 44% | 36% |
| Healthcare system | 21% | 24% | 20% | 20% | 27% | 25% |

Source: Eurobarometer 65, Spring 2006; Eurobarometer 67, Spring 2007; Eurobarometer 69, Spring 2008.

4. CONCLUSIONS

The paper has analyzed post-accession compliance with EU law in Bulgaria and Romania, on the basis of existing empirical knowledge. Its overall objective has been to take stock of the academic literature and official sources regarding compliance with EU law in these countries and to present some directions for further research.

The first promising avenue for further research is a closer elaboration on the extent to which the “world of dead letters” argument (Falkner *et al.* 2008) is applicable for Bulgaria and Romania. As outlined, this argument holds that in some CEECs (as well as in Italy and Ireland) the implementation process of EU law is typically characterized by a combination of politicized but successful transposition and serious shortcomings in enforcement and application (Treib and Falkner 2008: 172). The data used in the present analyses indicate that the implementation process in Bulgaria and Romania possibly follows a similar pattern. The two countries perform above average with regard to the transposition of EU law, with Bulgaria being the first EU member states to achieve a 0% transposition deficit in internal market legislation in 2008. Romania is also among the better performing member states, according to the Commission’s transposition data. However, the high number of ‘letters of formal notice’ sent by the Commission to Romania and, less frequently, to Bulgaria, point to the fact that the incorporation of European legalisation into domestic law is not uncomplicated. The Commission’s monitoring and verification reports and literature on the countries’ pre-accession performance also pinpoint problems with regard to law enforcement structures and governance standards. Bulgaria and Romania have not managed to finish key reforms in the course of their accession process, in particular with regard to the administration, the judiciary and the fight against corruption. The question of the causal linkages between shortcomings at the enforcement stage and the actual application of EU law therefore requires further clarification. In which ways and to what extent do they interrelate? Are there sector-specific differences? The present analysis might serve as a point of departure for a thorough empirical study on the transformation of selected EU provisions into practical policy.

The second promising avenue of research relates to the differences between Bulgaria and Romania. The analysis has shown that in the first two years of membership the EU's extended conditionality did not yield the same results in Bulgaria and Romania. Regarding Bulgaria, the Commission observed serious cases of mismanagement and high-level corruption which, together with insufficient reforms in the administration and judiciary, prompted it to freeze a substantial amount of pre-accession funding and to withdraw the accreditation of two Bulgarian agencies responsible for the management of the EU funds. Regarding Romania, the Commission was more convinced about the country's good will and determination to meet the benchmarks set by the EU. The Romanian authorities were believed to display more commitment, in particular towards reforming the judiciary and meeting the EU benchmarks. So far, the Commission has recommended against the activation of the safeguard measures. The Eurobarometer data show that not only the European Commission but also Bulgarian and Romanian citizens see that their countries are developing in different directions. Although there is a widespread disbelief in the functioning of state institutions in both countries, Romanians have increased their trust in national institutions (on a low level). By contrast, the discontent with national institutions has increased in Bulgaria in recent years. Still, the question for further research is to what extent these findings reflect a broader trend or whether they are only a temporary snapshot, also against the background that a few years ago the EU considered Romania to be behind Bulgaria in its accession preparations (Noutcheva and Bechev 2008: 124).¹⁰

In conclusion, the findings suggest that no negative changes occurred in terms of transposing EU law in Bulgaria and Romania, now that these countries are full-fledged member states. Yet, there appear signs of shortcomings at the enforcement stage, probably even on a greater scale than in other CEECs. Due to a lack of significant data and the short time-period of membership, these findings should be regarded as tentative and be complemented with small-n studies clarifying how the problems at the enforcement level actually impact the application of EU law.

¹⁰ An indication was that the Justice and Home Affairs Council removed Bulgaria from the Schengen negative visa list in April 2001, while Romania had to wait until January 2002 to get visa-free travel into the EU.

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