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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 following accession. The data used in the analysis suggests that 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 have appeared at the enforcement level, possibly on a greater scale than in other CEECs. Moreover, it is argued that in the first years of membership, the Commission's post-accession monitoring did not yield the same results in Bulgaria and Romania. While Romania has managed to convince the Commission of its good will and determination to meet the benchmarks set by the EU, Bulgaria has failed to do so and has faced sanctions in relation to the EU's extended conditionality. The analysis concludes by presenting possible directions for further research.

Keywords: administrative adaptation; benchmarking; Bulgaria; European law; implementation; post-Communism; Romania; political science

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1. Introduction

Bulgaria and Romania, which joined the European Union (EU) on January 1, 2007, were widely regarded as the two laggards of the Eastern Enlargement. Their accession process differed in some respects from that 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 to the EU on the pre-scheduled date of January 1, 2007, though with the provision that stricter conditions would be applied than on any other candidate country before. Following accession, the Commission preserved the right to monitor Bulgaria’s and Romania’s judicial systems and the fight against corruption and organized crime, and may invoke “safeguard measures” against the two countries. The extension of EU conditionality to the post-accession stage was an unusual procedure; It marked the final point of a pre-accession process in which EU officials frequently complained that there would be a strong discrepancy between rhetoric and action over EU conditionality issues (Pridham 2007, 170).

The particular characteristics of their pre-accession process make Bulgaria and Romania interesting case studies for research on post-accession compliance in the EU’s new member states. While it is widely acknowledged that their transformation was lengthier and more difficult than other states of the CEE group (Noutcheva and Bechev 2008; Vachudova 2005; Papadimitriou and Gateva 2009), the Commission has, at present, more avenues of external leverage for encouraging compliance than in other CEECs. Does extended conditionality impact post-accession compliance in Bulgaria and Romania? How successful are Bulgaria’s and Romania’s records of transposition? Are there signs of a gap between transposing and applying EU law?

These questions provide guidance to the present article, although the countries’ short time period of EU membership and the limited availability of official data require that the findings be treated with caution. This paper’s ambition is to provide the reader with a first comprehensive overview of what we know concerning post-accession compliance in Bulgaria and Romania, on the basis of existing 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 potential directions for further research.

The analysis proceeds according to the following 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 type of information these patterns might give with regard to their post-accession compliance. Finally, the paper elaborates on the countries’ compliance with EU law in the first years of their membership, drawing particularly on the EU’s transposition and infringement data and the Commission’s monitoring and verification reports.

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 et al. 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, 809-810). 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 sensitive 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 transposition 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 et al. 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 transposition stage. 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 Communism) “wrapped democratic institutions, sabotaged economic reform and fostered intolerance in their efforts to concentrate and prolong their power” (Vachudova 2005, 38). 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”(1) 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, 119-120). From 1995 onwards, the EU increasingly applied “active leverage”(2) 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).

The begin of accession negotiations created a momentum for reform in both Bulgaria and Romania (Spendzharova 2003)(3), 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 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. At the same time, the Accession Treaties codified the safeguards clauses, meaning that the Commission was given the right to invoke safeguards measures up to three years after accession if serious shortcomings were 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 safeguard measures may result in the suspension of EU funds or in export food bans. 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).

Moreover, in Article 39, the treaties included a postponement provision, 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 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, 162-163). 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).

According to a Commission official employed at the DG Enlargement in 2006, the European Commission recognized that the shortcomings of Bulgarian and Romanian law enforcement structures and governance standards jeopardized the countries' ability to correctly apply EU law in the post-accession phase; However, they also noticed a lack of political alternatives. If the Commission suggested the activation of the postponement clause, it was believed that

Bulgaria and Romania would further slow down the pace of reform due to an increasing frustration with the EU accession process⁽⁴⁾. As noted by Dimitris Papadimitriou and Eli Gateva (2009, 22), the decision of the EU to grant full membership to Bulgaria and Romania was hence to some extent “a reflection of wider security imperatives which led the EU to allow the accession of ‘imperfect’ new member states instead of risking the unpredictable costs of their exclusion.”

The post-accession monitoring of governance standards was a new element introduced in the accession process and tailored to Bulgaria and Romania. The Commission established a cooperation and verification mechanism (CVM) 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. Bulgaria and Romania remained under the scrutiny of the European Commission beyond the date of accession.

3.2. Post-accession compliance: What do we know from the academic literature?

The extension of conditionality beyond accession indicates that post-accession compliance with EU law may not decrease in Bulgaria and Romania. On the basis of research on Romania’s compliance with the EU’s political conditions preceding accession, Geoffrey Pridham extrapolates 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.

What is more, Philip Levitz and Grigore Pop-Eleches (2009) develop the argument that not only the extended conditionality and a growing importance of EU funding for Bulgarian and Romanian economy but also a third factor prevent the backsliding of reform efforts post-accession: migrants. The increasing migration of Eastern workers to Western democracies is a likely antidote against the backsliding of post-accession governance in Bulgaria and Romania as well as in the other new member states. The East Europeans who work and travel in Western Europe are turning into an electorate which becomes more sensitive to rule of law standards and corruption which, in turn, is likely to have a positive and important impact on the political culture in their home countries (Ibid, 19-23). In their research, Levitz and Pop-Eleches comprehensively assessed whether, in the views of Bulgarian citizens, political reforms have slowed down after EU accession. They commissioned from the Bulgarian survey firm Alpha Research a survey consisting of a sample of 1.200 face-to-face interviews that focus on four priority areas of political reforms: democracy, minority rights, corruption control and the rule of law (unfortunately, a comparable survey is not available for Romania). The data suggests that the reform process has indeed slowed down, yet that the assumption of a systematic backsliding of political reforms post-accession cannot be maintained (Ibid).

Table 1 about here

That said, there are some scholars who have a considerably less optimistic view on Bulgaria and Romania’s willingness and capacity to complying with EU conditions and law. Tom Gallagher (2009) questions, at a fundamental level, if Romania deserves EU membership since the country “tricked” the EU into offering full membership in return for far-reaching reforms, which Romanian politicians have refused to carry out in the post-accession stage. The Romanian political elite is believed to have “converted” to EU principles, though mainly in rhetoric alone (Mungiu-Pippidi 2008). Also, Svetlozar A. Andreev (2009) analyses the peculiarities of Bulgaria and Romania that may set them permanently apart from other CEECs, notably the “unfinished political and socio-economic transformation of both countries, accompanied by the consolidation of certain ‘reserve domains’ occupied by the former secret

services and semi-mafia structures” (Andreev 2009, 375).

There are indeed a number of factors that point to problems in enforcing and applying 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, 120-121). 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 (Hinþea et al. 2004). Also, Dimitris Papadimitriou and David Phinnemore (2004; 2008) 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 2004, 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 that undermine public trust in state institutions and hamper economic development and the creation of a favorable business climate. The issue of corruption has become a particularly salient political theme in both countries, contributing to the paralysis of the Romanian cabinet during the first year of membership and to the growth of powerful populist parties in Bulgaria (Andreev 2009). According to data from Transparency International, Bulgarians and Romanians perceive their homelands as the most corrupt in the EU. The two countries topped an EU-wide corruption 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, 448-449).

3.3. Official statistics: The transposition and infringement data

A valuable indicator for assessing post-accession compliance is the Commission’s transposition and infringement data, although this dataset has met with criticism in various

forms (Börzel 2001; Knill 2006; Falkner et al. 2005: 19-20). According to the transposition data, Bulgaria and Romania have done very well with regard to the 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 2008e, 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 2 about here

The good transposition performance of Bulgaria and Romania corresponds to what has already been found in other new member states of the Eastern enlargement (Falkner et al. 2008; Sedelmeier 2008). According to research interviews with Bulgarian and Romanian politicians, the transposition of EU rules has so far taken place in a rather standardized way, with political controversies about the advantages and disadvantages of the EU rules being rather exceptional. According to a Romanian MEP, legislation that comes from Brussels is often conceived in the public point of view as “much better than what comes from Bucharest”, a point which would facilitate the transposition(6). In the case of Bulgaria, the claim that national bills have to be drafted “for the country’s successful EU integration” is used not only with regard to the transposition of EU law but also for the adoption of all kinds of other national bills and regulations (Ivanova 2009, 28), at times even for those that serve primarily “corrupt private interests” (Ibid).

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 most “letters of formal notice” of the EU-27 (namely 195)(7). 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 fact that the overwhelming majority of these letters were sent due to “non-communication” indicates that the non-compliant behaviour might be more because of a lack of institutional capacities and of internalising the EU’s procedural “ways of doing things” than because of altered cost-benefit calculations(8).

Also, it is worth mentioning that the letters of formal notice are not equally spread across all policy fields, pointing to cross-sectoral differences with regard to post-accession compliance. Romania, for instance, received 45 letters of formal notice alone in the policy field of “environment”(9). Bulgaria received most letters in the policy fields of “enterprise and industry” (12) and “justice, freedom and security” (13 letters) (Commission of the European Communities 2008b). 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)(10). 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 3 about here

3.4. 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. As mentioned, Bulgaria and Romania did not manage to remedy deficiencies particularly with regard to the judicial reform and the fight against corruption by the date of their EU accession so that the Commission was given the right to monitor the remaining areas of concern on a regular basis and to publish the results in special reports.

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. 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). 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. 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.

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 2008g, 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⁽¹¹⁾. It pointed at misuse under the SAPARD programme and presented evidence of one of the most serious cases of fraud, called the "Nikolov-Stoykov-Group"⁽¹²⁾.

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 2008g, 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 2008g, 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 2008f, 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 November 2008 (Agence Europe, November 25, 2008). Bulgaria was the first EU member state to lose EU funds due to ill-use (Ibid).

The loss of EU funds marked a low in the EU-Bulgarian relations, which prompted Bulgaria to step up efforts to reform. According to the interim report of February 2009, Bulgaria made “significant developments” in combating corruption and organized crime, and “some developments” in reforming the judiciary (Commission of the European Communities 2009a, 2). This progress was confirmed in July 2009 when the Commission noted a positive change of attitude and “a new momentum” of the country’s efforts to improve the judiciary and combat corruption. The question remains if these measures are sustainable given that they so far have been limited to a technical level and have lacked a broad political consensus. As the Commission noticed, fighting corruption and organized crime has yet to become a top political priority for Bulgaria in the country’s third year of membership (Commission of the European Communities 2009c, 8).

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 Pacuraru 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 2008c, 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 2008h). 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.

The lack of support across political parties in dealing with high-profile corruption has remained a major issue in EU-Romanian relations. In July 2009 the parliament was encouraged to “show its full commitment to pursuing the fight against high level corruption” meaning that it should refrain from protecting politicians from prosecution. However, on a positive note, the Commission mentioned the adoption of new Criminal and Civil Codes and a number of initiatives taken by the Romanian government in response to concerns expressed in the February 2009 report in which Romania had been criticized not to maintain the pace of reforms (Commission of the European Communities 2009b, 2). Romania was thought to have regained its “reform momentum” even if the positive results of reforms “remain fragmented, [...] have not yet taken firmly root and shortcomings persist” (Commission of the European Communities 2009d, 8).

In short, the Commission’s post-accession monitoring reports reflect that neither Bulgaria nor Romania were believed to have yet completed the unfinished preparations for EU membership. In the first years of membership Romania has performed better in terms of progress towards meeting benchmarks set by the EU. Contrary to Bulgaria, the Commission did not freeze EU pre-accession funding for Romania. However, Romanian institutions have problems creating a sufficient number of eligible projects. According to media reports, Romania may lose substantial portions of EU agricultural funds due to poor management (Vucheva 2008).

4. Conclusions

This paper has analyzed post-accession compliance with EU law in Bulgaria and Romania, on the basis of existing empirical knowledge.

The analysis has shown that Bulgaria and Romania have performed well 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 unusually 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 legislation into domestic law remains problematic. Moreover, the Commission’s monitoring and verification reports and academic research highlight the problems with regard to law enforcement structures and governance standards. Bulgaria and Romania have entered the EU with unfinished reforms in key sectors and have refrained from completing them in the first years of membership.

If the findings are discussed in the context of the “world of compliance” typology (Falkner et al. 2005; 2008), the outlook for successfully enforcing and applying EU law - as follow-up stages to transposing - is rather bleak for Bulgaria and Romania. The unfinished transition of the countries could potentially have a strong impact on the political, cultural, and institutional factors that determine the compliance culture of a EU member state. Less favorable cultural factors include the widespread distrust in the functioning of the rule of law and the political and administrative system as a whole, fostered by the highly salient problem of corruption;

political factors such as the persisting dominance of an “old” political elite which signed up for (EU-oriented) reforms in rhetoric, but not in action; and institutional issues such as dysfunctional court-systems and deficiencies in administrations. Overall, the implementation process in Bulgaria and Romania seems to follow a pattern comparable to what has been observed as the “world of dead letters” (Falkner et al. 2008). As outlined, member states belonging to this group of the “world of compliance” typology typically transpose EU law in a compliant manner yet have substantial problems when enforcing and applying the legislation.

Due to a lack of significant data and the short period of membership, these findings should be regarded as tentative and should be complemented with small-n studies clarifying how problems at the enforcement level actually impact the application of EU law. A particularly promising avenue for further research is the analysis of cross-sectoral differences. The available infringement data points to the fact that transposition and enforcement problems differ across issue areas, begging the question of which factors account for these differences. Does the “world of dead letters” argument hold true only for certain policy fields and not for others? The present analysis might serve as a point of departure for a thorough empirical study of the transformation of selected EU provisions into practical policy. A second promising avenue of research relates to the differences between Bulgaria and Romania. The analysis has shown that in the first years of membership the EU’s extended conditionality did not yield the same results in both countries. 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 EU funds. Regarding Romania, the Commission was more convinced of the country’s good-will and determination to meet benchmarks set by the EU. So far, the Commission has advised against the activation of safeguard measures. 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 only a few years ago, the EU believed that Romania lagged behind Bulgaria in its accession preparations (Noutcheva and Bechev 2008, 124)(13).

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Endnotes

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(1) 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).

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

(3) On sectoral reforms and the EU’s influence exerted through conditionality see e.g. Guido Schweltnus (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.

(4) Confidential interview, European Commission, DG Enlargement, March 19, 2009. With the chosen compromise the Commission hoped to “maintain the momentum”, according to the EU official.

(5) In the December 2007 scoreboard, Bulgaria and Romania had an average transposition deficit of 0.8% (Commission of the European Communities 2008d, 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.

(6) Confidential interview, Romanian MEP, March 17, 2009.

(7) Italy was second with 101 letters of formal notice.

(8) In a research interview, a Bulgarian MEP supports such a view by stating that “in Bulgaria, we saw a strong discipline before accession. After accession we have – how to say – the feeling ‘ok, we managed it, we are in the club’. There remain things that have to be done, but the discipline was somehow relaxed” (author’s

interview, 18 March 2009).

(9) By contrast, Bulgaria received only 6 letters of formal notice in the policy field of environment .

(10) 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.

(11) The Nikolov-Skoykov Group, a network of around fifty Bulgarian enterprises, “who are said to have close links to the current Bulgarian government”, 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 can be downloaded at: http://www.mediapool.bg/site/images/doklad_OLAF_en.pdf (accessed on 4 December 2009).

(12) Ibid, p. 2.

(13) One 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 be permitted visa-free travel to the EU.

List of Tables

Table 1: Bulgarian perceptions of post-accession political reforms

	Democracy	Minority rights	Fighting corruption	Rule of law
Reforms have been reversed	5%	3%	15%	12%
Reforms have stopped	20%	11%	21%	24%
Reforms have continued at a slower pace	34%	26%	30%	28%
Reforms have continued at the same pace	32%	35%	22%	26%
Reforms have continued at a faster pace	9%	24%	13%	11%

Source: Levitz and Pop-Echeles (2009, 11)

Table 2: 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).

Table 3: 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 I)