

## **Eli Gateva**

### **Post-accession conditionality – instrument for continuous pressure?**

The accession of Bulgaria and Romania to the EU on 1 January 2007 marked the completion of the fifth enlargement of the Union with countries of Central and Eastern Europe, Cyprus and Malta. Although, Bulgaria and Romania were ‘part of the same inclusive and irreversible enlargement process’ (Council of the European Union, 2003) their accession was subject to unprecedented safeguards and monitoring. Unlike new member states which joined the Union on 1 May 2004, Bulgaria and Romania had to accept an additional ‘super safeguard’ clause which allowed the EU to postpone their accession by one year. Although, the clause was not activated, the Commission concluded that further progress was still necessary in the area of judicial reform and the fight against corruption and set up the Cooperation and Verification Mechanism (CVM) in order to monitor progress in these areas after the accession of Bulgaria and Romania. The new measures not only confirm the evolutionary nature of EU conditionality, but introduce a new feature, that of post-accession conditionality. Almost three years after accession there is a growing sense of frustration in Brussels as neither Bulgaria, nor Romania have managed to tackle the remaining issues. The Commission has systematically criticised the new members over the slow speed of the reforms and the lack of tangible results. The 2008 monitoring reports confirmed that ‘progress has been slower and more limited than expected’ (European Commission, 2008c; 2008d) and that ‘the need for verification and cooperation will continue for some time’ The latest monitoring reports, published in July 2009, concluded that ‘continuous pressure for delivery is needed’ and that the CVM will be ‘maintained until these reforms are achieved’ (European Commission, 2009c; 2009d).

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

The article is structured in three parts. The first part highlights key features of EU conditionality and outlines a theoretical framework for comparative examination of pre-accession and post-accession conditionality. On the basis of a stage-structured conditionality model, the second part discusses the transformations of the main elements of conditionality before and after accession and argues that the limitations of the mechanisms for sanctioning non-compliance after accession undermine the effectiveness of EU's transformative power. The third part reflects on the future of post-accession conditionality and its implications for the ongoing enlargement of the Union with countries of the Western Balkans and Turkey.

### ***Revisiting EU Conditionality in the Context of Post-accession Conditionality***

The concept of conditionality is one of the main theoretical approaches, which has been applied to examining the enlargement policy of the EU towards the applicant countries of Central and Eastern Europe. Conditionality is a broad concept and it varies according to the context. Enlargement conditionality (Hughes, Sasse and

Gordon, 2004), membership conditionality (Smith, 2003; 2004), accession conditionality (Grabbe, 2002; 2006), *acquis* conditionality (Grabbe, 2002; Schimmelfennig and Sedelmeier, 2004), democratic conditionality (Pridham, 2002, Schimmelfennig, Engert, and Knobel, 2003; Schimmelfennig and Sedelmeier, 2004) political conditionality (Smith, 1998) are some of the categories of conditionality defined in the theoretical literature on European integration.

Pridham notes that democratic conditionality is a special version of conditionality which emphasizes respect for and the furtherance of democratic rules, procedures and values. (Pridham 2002: 956). Other researchers argue that democratic conditionality is “the core strategy of the EU to induce non-member states to comply with its principles of legitimate statehood” (Schimmelfennig and Sedelmeier, 2004; Schimmelfennig, Engert, and Knobel, 2003: 495). Karen Smith claims that “Political conditionality entails linking by a state or international organisation, of perceived benefits to another state (such as aid) to the fulfillment of conditions relating to the protection of human rights and the advancement of democratic principles”(Smith, 1998: 256).

James Hughes, Gwendolyn Sasse and Claire Gordon argue that EU conditionality is not “a uniformly hard rule-based instrument, but rather a highly differentiated [instrument]” (2004: 256). They distinguish two main categories of conditionality: formal and informal conditionality. Furthermore, Hughes, Sasse and Gordon specify that formal conditionality includes “the publicly stated preconditions as set out in the broad principles of the Copenhagen criteria and the legal framework of the *acquis*”, whereas, informal conditionality refers to “the operational pressures and

recommendations applied by actors within the Commission during interactions with their CEEC counterparts in the course of the enlargement” (2004: 526). Schimmelfennig and Sedelmeier develop a theoretical framework based on a rationalist approach. According to the external incentives model, conditionality is a “bargaining strategy of reinforcement by reward, under which the EU provides external incentives for a target government to comply with its conditions” (Schimmelfennig and Sedelmeier, 2004: 662).

The examination of the theoretical literature highlights some important aspects of EU conditionality. Firstly, there is no commonly agreed definition of EU (enlargement) conditionality. However, the literature tends to agree that the concept of conditionality entails the linkage between fulfilling particular tasks (conditions) and receiving particular benefits (rewards); and that conditionality operates in an environment of power asymmetry. Secondly, most of the theoretical discussion of EU conditionality focuses on the Copenhagen criteria and the *acquis*. It is important to note that EU conditionality is not limited to the membership conditions established at the Copenhagen European Council, as the Community started to apply conditionality towards the Central and Eastern European countries (CEECs) in the late eighties. The Trade and Cooperation agreements, which officially established the relations between the Community and the CEECs, as well as the Association (Europe) agreements were made conditional on satisfying certain criteria, including democracy, the rule of law, human rights, respect for and protection of minorities. Furthermore, the establishment of sets of benchmarks which Bulgaria and Romania must address after their accession to the Union introduced a new feature of EU enlargement conditionality - post-accession conditionality. Another distinctive characteristic is that most of the

theoretical literature examines EU conditionality in the context of the fifth enlargement of the Union with the countries of Central and Eastern Europe by focusing on the period between the early 1990's and 2002 (when the accession negotiations with the first group of applicant countries<sup>1</sup> were concluded). The establishment of the Cooperation and Verification mechanism for Bulgaria and Romania, and its implications for the ongoing enlargement of the Union highlight the evolutionary nature of EU conditionality and introduce new important developments in its application.

***Theoretical framework for Comparative Examination of EU Enlargement Conditionality: Stage-structured Conditionality Model***

In order to identify the key features of post-accession conditionality and to evaluate (in comparative perspective) their effectiveness, the article follows an inclusive approach to EU enlargement conditionality. The theoretical model does not distinguish between different categories of EU enlargement conditionality on the basis of the context of their application. However, the stage-structured conditionality model establishes a framework for comparative examination of EU pre-accession and post-accession conditionality by relating the examination of EU enlargement conditionality to the stages of the accession process.

Although the European Union has not formally established the stages of the process, some of the achievements on the way to accession are regarded as key turning points. The first step which has strong political significance is the formal agreement of the

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<sup>1</sup> Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Estonia, Latvia, Lithuania, Cyprus and Malta

European Council on the membership perspective of the potential candidate country. The next milestone which intensifies the relations between the EU and the aspiring member state is the opening of the accession negotiations. The conclusion of the accession negotiations is another turning point, which is central to the dynamics of the process. Finally, the accession of the new member state to the EU marks the completion of the process. On the bases of these achievements, the theoretical model outlines the following four distinct stages of the accession process:

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

The pre-negotiation stage starts with the formal agreement of the European Council on the membership perspective of the potential candidate country and ends with the start of the accession negotiations. Although making a formal application for EU membership is considered to be the first step of the accession process, the EU's experience of the fifth and the ongoing enlargement indicates that this is not always the case. The relations between the Union and the countries of Central and Eastern Europe as well as the Western Balkan countries started to develop in a framework of enlargement conditionality after the confirmation of their membership perspective, which was prior to their formal applications. As the accession negotiations intensify the dynamics of the relations between the EU and the candidate country, the theoretical model specifies that the second stage of the enlargement process coincides with the negotiations. The third stage includes the period after the conclusion of the membership talks and before the formal accession of a country to the Union. The

accession stage includes the signing of the Accession Treaty and its ratification and it is characterised by thorough examination of the would-be-member compliance with EU conditions. The fourth stage refers to the period after the accession of a candidate country to the EU. However, defining the exact timeframe of the post- accession stage is difficult. The safeguard clauses, included in the Act of Accession for the countries which became members in 2004, attached significant relevance to the post-accession stage by specifying that the safeguard measures may be applied ‘until the end of a period of up to three years after accession’ (Official Journal, 2003a) . Although the Act of Accession for Bulgaria and Romania included the same safeguard clauses (with the exception of the postponement clause), the establishment of the CVM and the conclusions of the latest reports that the Mechanism ‘needs to be maintained until these reforms are achieved’ (European Commission, 2009c; 2009d) extended the post-accession stage beyond the period of three years after accession. Therefore, the model specifies that the post-accession stage starts with accession of a state to the EU and ends with the suspension of any post-accession monitoring mechanism or in the lack of post-accession monitoring mechanism with the expiry of the applicability of the safeguard measures included in the Treaty of Accession.

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

**Table 1: Stage-structured (EU enlargement) conditionality model**

Stages	Conditions	Incentives Structure		Monitoring
		Rewards	Threats	
<b>Pre-negotiation</b>	-conditions for applying for membership; - conditions for opening Accession Negotiations; - additional (country specific) conditions	<b>Accession advancement:</b> - Providing membership perspective; - Signing Association Agreement; -Implementing Association Agreement; - Granting Candidate country status; - Opening Accession Negotiations.  <b>Financial assistance</b>	<b>Explicit threats:</b> Suspending funding  <b>Implicit threats</b> (referring to each of the accession advancement rewards)	Regular Progress Reports (annual)
<b>Negotiation</b>	- Copenhagen criteria; - opening benchmarks; - closing benchmarks; - 31/35 chapters; - areas of serious concern – highlighted in the monitoring reports)	<b>Accession advancement:</b> - Opening chapters; - Closing chapters; - Credible membership perspective; - Completion of Accession Negotiations; - Signing Accession Treaty  <b>Financial assistance:</b>	<b>Explicit threats:</b> Suspending funding  <b>Implicit threats</b> (referring to each of the accession advancement rewards)	Regular Progress Reports (annual)
<b>Accession</b>	- Copenhagen criteria; - areas of serious concern – highlighted in the monitoring reports)	<b>Accession advancement:</b> - Accession  <b>Financial assistance</b>	<b>Explicit threats:</b> - Internal Market Safeguard Clause; -JHA Safeguard Clause - Super Safeguard Clause - Additional clause(s)	Comprehensive Monitoring Reports
<b>Post-accession</b>	- individual country specific conditions - benchmarks	<b>Financial assistance</b>	<b>Explicit threats:</b> - Economic Safeguard Clause; - Internal Market Safeguard Clause; - JHA Safeguard Clause	Monitoring Reports (bi-annual)



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

concerning the alignment of legislation with the *acquis* and the administrative capacity to apply it properly. Additionally, the EU can establish specific conditions for closing a chapter, also known as closing benchmarks<sup>2</sup>. During the accession stage the EU urged the acceding countries to meet fully all the commitments and requirements arising from the accession negotiations and used intensified monitoring to highlight areas of serious concern. Furthermore, the date of the accession of Bulgaria and Romania was conditional on ‘the state of preparations for adoption and implementation of the *acquis*’ (Official Journal, 2005a). The establishment of CVM set a precedent as for the first time the EU decided on sets of conditions which must be fulfilled after accession. The Commission specified that Bulgaria must address six benchmarks and Romania – four benchmarks.

The EU has developed a wide range of incentives in order to induce compliance with its conditions. Although, the Union has favoured the use of carrots to sticks, it has established mechanisms for punishing non-compliance by introducing threats and the possibility of applying sanctions. The stage-structured model specifies that the second element of EU conditionality is the incentives structure, which examines the rewards-threats balance. The model outlines two categories of rewards: the first group includes the rewards which reflect the advancement of the candidate country in the accession process (accession advancement). The main accession advancement rewards include: granting membership perspective; signing association agreement; implementing association agreement; granting candidate status; opening accession negotiations; opening a chapter; provisionally closing a chapter; credible membership perspective; completing accession negotiations; signing accession treaty; ratification of the

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<sup>2</sup> In addition to the closing benchmarks, the EU has introduced the application of opening benchmarks for the accession negotiations between the EU and Croatia and Turkey.

accession treaty; accession to the European Union. The second group includes the rewards related to the financial instruments provided by the EU to the candidate country (financial assistance). The financial assistance rewards in the case of the countries of the fifth enlargement round refer to participation in the pre-accession instruments: PHARE, SAPARD and ISPA programmes.

The stage-structured model divides the threats into two groups: implicit and explicit. The implicit threats sanction non-compliance by delaying the receiving of the accession advancement rewards. Bulgaria's and Romania's failure to sufficiently meet the Copenhagen criteria delayed the start of their accession negotiations.<sup>3</sup> Subsequently, the Commission did not consider Bulgaria's and Romania's progress towards meeting the accession criteria sufficient to recommend the conclusion of the negotiations in 2002 (European Commission; 2002a; 2002b). Unlike implicit threats, explicit threats introduce specific penalising measures. There are two types of explicit threats based on the nature of the measures which they introduce. The first type refers to financial sanctions which penalise non-compliance with EU rules by suspending or withdrawing funds. According to Article 4 of Council Regulation (EC) No 622/98 of 16 March 1998 'Where an element that is essential for continuing to grant pre-accession assistance is lacking, in particular when the commitments contained in the Europe Agreement are not respected and/or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to any pre-accession assistance granted to an applicant State'.

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<sup>3</sup> Bulgaria and Romania (together with Latvia, Lithuania, Slovakia) failed to sufficiently satisfy the EU conditions for opening accession negotiations, the countries were excluded from the first group of countries which started the negotiations in 1998

The Accession Partnerships<sup>4</sup> between the EU and the candidate countries, which were the key feature of the enhanced pre-accession strategy, further specified that ‘failure to respect these general conditions could lead to a decision by the Council on the suspension of financial assistance’<sup>5</sup>. The second type of explicit threats refers to preventive or remedial sanctions which include specific precautionary measures (safeguard measures). The EU has developed numerous precautionary measures ranging from economic and internal market safeguard clauses to specific measures in the areas of food safety and air safety. The preventive and remedial measures will be discussed in greater detail in the second part of the article.

As the significance of monitoring applicants’ compliance with EU conditions has increased substantially since the publication of the first Regular Reports (in 1997), the stage-structured conditionality model specifies that monitoring is the third key element of EU enlargement conditionality. The rigorous approach of the Commission to reporting on the progress made towards accession by each of the candidate countries (which were part of the fifth round of enlargement) as well as potential candidate countries (since 2005) has transformed the scope and nature of the Regular Reports from brief general assessment into detailed evaluation analysis. More importantly, it has helped the Commission establish unquestioned expertise in providing objective comprehensive assessment of the EU-hopefuls compliance with EU conditions thus legitimising the impartiality of the Commission’s recommendations. The commission increased significantly the relevance of monitoring reports as it started to use them not only as a basis for its

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<sup>4</sup> This clause is included in all the Accession Partnership between the EU and the twelve applicant countries of the fifth enlargement

<sup>5</sup> Ibid

recommendations (whether to grant a reward or impose a sanction) but as an instrument for prioritising conditions and as well as an instrument for establishing new conditions and introducing new threats. On the bases of the functions which the monitoring reports fulfill, the stage-structured conditionality model distinguishes between two groups of reports: evaluation reports and advanced reports. The evaluation reports includes the monitoring reports which assess progress and/ or prioritise conditions. The advanced reports refer to the report which in addition to evaluating progress, establish new conditions and/ or threats.

The next part of the article examines the transformations of the key elements of EU conditionality before and after accession. The pre-accession stages are not discussed in detail as the focus of the article is on the effectiveness of post-accession conditionality and particularly the effectiveness of the Cooperation and Verification Mechanism for Bulgaria and Romania. The second part examines how EU conditions and monitoring change depending on the stage of the process and then analyses the transformation of the incentives structure.

### ***Comparative examination of Pre-accession and Post-accession Conditions***

The Commission's decisions establishing the mechanism for cooperation and verification of progress in the areas of judicial reform and the fight against corruption and organised crime<sup>6</sup> in Bulgaria and Romania set a precedent for the Union. For the very first time the EU introduced a special mechanism for monitoring new member

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<sup>6</sup> Fight against organised crime was an area established only for Bulgaria

states' compliance with set criteria. The Commission specified that Bulgaria needs to address the following six benchmarks:

'(1) Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system.

(2) Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure codes, notably on the pre-trial phase.

(3) Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually.

(4) Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report on internal inspections of public institutions and on the publication of assets of high-level officials.

(5) Take further measures to prevent and fight corruption, in particular at the borders and within local government.

(6) Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas.'

The Commission established the following four benchmarks for Romania:

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

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

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

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

The benchmarks illustrate two important features of post-accession conditionality. First, compared to the uniform conditions for applying for membership or the Copenhagen criteria, post-accession conditionality is highly differentiated as the EU introduced individual country specific conditions for Bulgaria and Romania. Second, the distinguishing approach of the Commission to addressing similar issues, particularly the establishment of different benchmarks in order to remedy similar shortcomings in the efficiency of the judicial process, highlights the increasing application of targeted conditionality. The latest monitoring reports<sup>7</sup>, which set out two lists of task for the new members, provide further evidence for the growing significance of differentiated and targeted conditionality. The Commission recommended that Bulgaria must take up action in the areas regarding the fight against organised crime and corruption and the efficiency of the judiciary. The twenty-one tasks, which must be carried out, ranged from developing an integrated

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<sup>7</sup> Published in July 2009 ( See European Commission; 2009c, 2009d)

strategy against organised crime and corruption to establishing better administrative arrangements to safeguard whistle-blowers. In the case of Romania, the Commission invited the country to take up action in the areas regarding the new codes, the reform of the judiciary, the unification of the jurisprudence, the fight against corruption at the local level and high level corruption. The detailed list consisted of sixteen tasks from adopting new civil and criminal procedure codes to improving preventive measures against corruption in vulnerable sectors.

When we compare the conditions of the pre-accession stages to the post-accession benchmarks, it is evident that post-accession conditionality has benefited from the lessons learnt from the fifth enlargement. The growing application of differentiated and targeted conditionality illustrates that the EU and more precisely the Commission has gained a deeper understanding of the problematic issues. More importantly, the Commission's approach to establishing benchmarks indicates the Commission not only can identify a problem but it can provide detailed guidance how the problem to be addressed. The increasing significance of targeted and differentiated conditionality for the ongoing enlargement round with the countries of the Western Balkans and Turkey confirms that these features of EU conditionality are definitely improvement in EU enlargement policy and therefore they cannot explain the limited effectiveness of post-accession conditionality.

***Comparative examination of Pre-accession and Post-accession Monitoring Instruments***



**Table 2: Comparative examination of Monitoring Instruments**

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

The examination of pre-accession and post-accession monitoring highlights two key developments in the EU's approach towards monitoring and evaluating compliance with its conditions. First, the EU has significantly intensified monitoring and particularly post-accession monitoring. This process is reflected in terms of the

frequency and the number of the monitoring reports. As Table 2 illustrates, during the pre-negotiation and the negotiation stage the Commission prepared and published seven annual reports (two Progress Reports and five Regular Reports) on the progress of Bulgaria and Romania towards membership. The accession stage indicates an interesting change. Although, the 2004 Enlargement Strategy Paper provided that ‘the Commission will issue yearly comprehensive monitoring reports’, The May 2006 Report did not make any recommendations on the accession date and confirmed that the Commission would prepare another report. In the end, the Commission issued three monitoring reports on the state of preparedness for EU membership of Bulgaria and Romania in stead of two (yearly) monitoring reports as it was envisaged. As one EU official recollected ‘We were postponing the final decision on the effective date of accession as much as it was feasible until early autumn of 2006’ and noted that ‘Ideally we would have pushed and kept the constructive uncertainty, if you would like, until December 2006 but in practice you cannot do that’ (EU Official, interviewed by author, July 2009). The introduction of the CVM not only allowed the EU to continue to put political pressure but intensified further the monitoring process. According to Article 1 of the decisions establishing the mechanism, the Commission would report ‘when required and at least every six months’. The Commission has published five sets of progress reports under the Cooperation and Verification Mechanism. Unlike the Progress Reports, the Interim Reports present a factual update of progress without providing a detailed assessment of results achieved under each of the benchmarks. Furthermore, the Commission has introduced additional supporting documents such as technical updates and funds management reports.

Another key development in the EU's approach towards monitoring is the growing use of monitoring reports as instruments for introducing new conditions or threats. On the basis of the stage-structured model, we can refer to this process as – growing use of advanced reports. Table 1 illustrates that during the pre-negotiation and the negotiation stage the Commission did not issue any advanced reports. The first reports to establish sets of conditions were the May 2006 Monitoring Reports. The Commission concluded that Bulgaria needed to address urgently 16 areas of serious concern, whereas Romania needed to address 14 areas of serious concern. The September 2006 Monitoring Report highlighted 6 areas for Bulgaria and 4 areas for Romania and provided the basis for the establishment of the CVM benchmarks. The latest monitoring reports<sup>8</sup>, which set out two lists of task for the new members, provide further evidence for the growing use of advanced reports.

The comparative analysis of pre-accession and post-accession monitoring indicates that the EU has significantly intensified monitoring after the accession of Bulgaria and Romania. The CVM establishes a comprehensive framework for rigorous post-accession monitoring but more importantly it provides an instrument for continuous political pressure. The examination of monitoring confirms that the thorough post-accession monitoring is a significant improvement and therefore it cannot account for the limited effectiveness of post-accession conditionality. The next section of this part analyses the transformation of the incentives structure.

### ***Comparative examination of Pre-accession and Post-accession Incentives Structure***

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<sup>8</sup>Ibid

**Table 3 Comparative Examination of Incentives Structure**

Stages	Bulgaria		Romania	
	Rewards	Threats	Rewards	Threats
<b>Pre-negotiation</b>	<p><b>Accession advancement:</b></p> <ul style="list-style-type: none"> <li>- Providing membership perspective</li> <li>- Signing Association Agreement</li> <li>- Implementing Association Agreement</li> <li>- Granting Candidate country status</li> <li>- Opening Accession Negotiations.</li> </ul> <p><b>Financial assistance</b></p>	<p><b>Explicit threats:</b></p> <p>Suspending funding</p> <p><b>Implicit threats</b> (referring to each of the accession advancement rewards)</p>	<p><b>Accession advancement:</b></p> <ul style="list-style-type: none"> <li>- Providing membership perspective</li> <li>- Signing Association Agreement</li> <li>- Implementing Association Agreement</li> <li>- Granting Candidate country status</li> <li>- Opening Accession Negotiations.</li> </ul> <p><b>Financial assistance:</b></p>	<p><b>Explicit threats:</b></p> <p>Suspending funding</p> <p><b>Implicit threats</b> (referring to each of the accession advancement rewards)</p>
<b>Negotiation</b>	<p><b>Accession advancement:</b></p> <ul style="list-style-type: none"> <li>- Opening chapters</li> <li>- Closing chapters</li> <li>- Credible membership perspective</li> <li>- Completion of AN</li> <li>- Signing AT</li> </ul> <p><b>Financial assistance:</b></p>	<p><b>Explicit threats:</b></p> <p>Suspending funding</p> <p><b>Implicit threats</b> (referring to each of the accession advancement rewards)</p>	<p><b>Accession advancement:</b></p> <ul style="list-style-type: none"> <li>- Opening chapters</li> <li>- Closing chapters</li> <li>- Credible membership perspective</li> <li>- Completion of AN</li> <li>- Signing AT</li> </ul> <p><b>Financial assistance:</b></p>	<p><b>Explicit threats:</b></p> <p>Suspending funding</p> <p><b>Implicit threats</b> (referring to each of the accession advancement rewards)</p>
<b>Accession</b>	<p><b>Accession advancement:</b></p> <ul style="list-style-type: none"> <li>- Accession</li> </ul> <p><b>Financial assistance:</b></p>	<p><b>Explicit threats:</b></p> <ul style="list-style-type: none"> <li>- Internal Market Safeguard Clause;</li> <li>- JHA Safeguard Clause</li> <li>- Super Safeguard Clause</li> </ul>	<p><b>Accession advancement:</b></p> <ul style="list-style-type: none"> <li>- Accession</li> </ul> <p><b>Financial assistance</b></p>	<p><b>Explicit threats:</b></p> <ul style="list-style-type: none"> <li>- Internal Market Safeguard Clause;</li> <li>-JHA Safeguard Clause</li> <li>- Super Safeguard Clause</li> <li>- Additional postponement clause</li> </ul>
<b>Post-accession</b>	<p><b>Financial assistance:</b></p>	<p><b>Explicit threats:</b></p> <ul style="list-style-type: none"> <li>- Economic Safeguard Clause;</li> <li>- Internal Market Safeguard Clause;</li> <li>- JHA Safeguard Clause</li> </ul>	<p><b>Financial assistance:</b></p>	<p><b>Explicit threats:</b></p> <ul style="list-style-type: none"> <li>- Economic Safeguard Clause;</li> <li>- Internal Market Safeguard Clause;</li> <li>- JHA Safeguard Clause</li> </ul>

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

The comparative examination of the nature and the scope of threats highlights another interesting distinction. After accession, the EU does not rely on the use of implicit threats to induce compliance with its conditions. However, the lack of implicit threats is compensated by the establishment of a wide range of explicit threats. It is important to note that some of the explicit threats are not features of post-accession conditionality but standard regulations and procedures applicable to all member states. The most serious sanction which the EU can apply to any member state is the activation of Article 7 of the TEU. According to the provisions of the article in the event of a clear threat of a serious breach of the founding principles of the Union ‘the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question,

including the voting rights of the representative of the government of that Member State in the Council.’ Other measures applicable to any member state include financial correction of EU funds and infringement procedures. Before we examine the implications of the impositions of financial sanctions on Bulgaria and Romania (after their accession) for the effectiveness of EU post-accession conditionality, we will look at the range of preventive and remedial sanctions.

The Treaty of Accession includes three safeguard clauses: one general economic safeguard clause and two specific safeguard clauses: internal market and justice and home affairs (JHA) safeguard clause. The economic safeguard clause<sup>9</sup> allows member states to apply for authorisation to take protective measure with regard to Bulgaria and Romania in the event of serious economic difficulties<sup>10</sup>. Article 37 of the Act of Accession specifies that the Commission may establish appropriate measures if Bulgaria or/and Romania causes, or risks causing, a serious breach of the functioning of the internal market. This safeguard clause refers not only to the internal market but also all sectoral policies which concern economic activities with cross-border effect (e.g. competition, agriculture, transport, telecommunications, energy, environment etc.) According to Article 38 of the Act of Accession, the Commission may establish appropriate measures if there are serious shortcomings or any imminent risk of such shortcoming in the transposition and implementation of the acquis in the area of justice and home affairs. The safeguard clauses can be activated ‘until the end of a period of up to three years after accession’ (Official Journal, 2005a). However, the internal market and the JHA safeguard clause ‘may be invoked even before accession’ (Official Journal, 2005a). The establishment of the CVM further specifies that if

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<sup>9</sup> Article 36 ( See Official Journal; 2005a)

<sup>10</sup> Bulgaria and Romania may also apply for the authorisation to take protective measures with regard to other member states

Bulgaria or/and Romania ‘fail to address the benchmarks adequately, the Commission may apply safeguard measures based on articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute, under the conditions laid down in Community law, Bulgarian judgments and judicial decisions, such as European arrest warrants’ (European Commission, 2006a; 2006b).

As most of the benchmarks set out for Bulgaria and Romania refer to certain shortcomings in the areas of judicial reform and the fight against corruption, failure to sufficiently address these issues would have resulted in the activation of the JHA safeguard clause. However, even when the monitoring report confirmed that ‘The assessment points to the serious difficulties which the Bulgarian authorities are facing in making real headway in judicial reform and the fight against corruption and organised crime’ and that ‘there are few results to demonstrate that the system is actually functioning correctly’, the Commission concluded that it ‘considers support to be a more effective than sanctions and will not invoke the safeguard provisions set out in the Accession Treaty’(European Commission; 2008c). These conclusions suggest that the mechanism and the sanctions introduced by the safeguards do not provide strong incentives for the new member states to comply with the EU’s conditions. Furthermore, the EU’s decision not to activate any of the safeguard measures indicates that the Commission uses the CVM not as a penalising mechanism but as an instrument for continuous political pressure.

There are two main arguments against the activation of the safeguard clauses. The first refers to the limitations of the sanctions included in the safeguards. As one EU official noted ‘it was never seriously envisaged to invoke the safeguard clauses because the clauses from the very beginning were considered not to be very

constructive’ (Interview 2; 2009). The activation of the justice and home affairs safeguard clause would have suspended cooperation in these areas and particularly the application of the European Arrest Warrant. Other EU official noted that ‘the discontinuation of cooperation in the judicial field would have contributed nothing to achieve the ultimate aim’ and concluded that JHA safeguard clause ‘is not a real threat’ and that ‘maybe for a government it is a sanction because it is not helpful for one’s prestige but apart from considerations of prestige, there is no real material penalty or sanction’ (Interview 1, 2009). Another EU official remarked that ‘compared to the political exposure, this [JHA safeguard] is a Mickey Mouse clause’ (Interview 3, 2009). The second argument reflects the difficulties activating the safeguards and the implications of their activation. As one EU official noted ‘The mechanism is a huge credibility issue for the Union’ and pointed out that ‘the disadvantages of activating outweigh the advantages’ (Interview 2, 2009).

Although, the sanction introduced by the JHA safeguard clause is considered limited and inadequate, some member states have pushed for its activation (Euobserver; 2008, 2009). The Dutch Minister of EU affairs Frans Timmermans, in an unprecedented move, sent a letter<sup>11</sup> to the Justice Commissioner Jacques Barrot, asking the Commission to consider activating the JHA safeguard clause should the reports fail to register sufficient progress (Euractiv; 2009). The latest progress reports concluded that ‘the conditions for invoking the safeguard clauses are not fulfilled’ and confirmed that the mechanism ‘needs to be maintained until the reforms are achieved’ (European Commission; 2009c; 2009d). It is worth mentioning that prior to the publication of

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<sup>11</sup> The letter was sent on 30 May 2009, prior to the publication of the latest sets of progress reports in July 2009



the reports; the EU considered introducing a new sanction for penalising non-compliance. There were discussions in the Commission for linking the removal of the CVM with Bulgaria's and Romania's accession to the Schengen Area. The opinions within the college diverged and the idea was abandoned. (Eurativ, 2009). However, progress in the areas highlighted by the Commission is essential new members' accession to borderless area, as one EU official noted 'If the mechanism continues and in particularly with negative assessment, it will be extremely difficult to achieve a consensus in the Council for Bulgaria and Romania to access to Schengen' (Interview, 2).

The analysis of the safeguard clauses illustrates the limitations of their application. Although, the Commission did not activate any of the clauses, when it published its most critical progress reports (in July 2008), it decided to apply financial sanctions against Bulgaria and Romania. It is important to note that the financial sanctions were not established in the framework of post-accession conditionality, as they were not based on the CVM but on standard policy regulations. The Commission published a separate report<sup>12</sup> on Bulgaria's funds management and concluded that 'Monitoring and audits show serious weaknesses in the management and control systems and point to a number of irregularities, suspected fraud cases and conflicts of interest between the programme administration and contractors'.(European Commission, 2008e). As a result, the Commission withdrew the accreditation of the two implementing agencies in Bulgaria – the Central Financing and Contracting Unit (CFCU) and the Implementing Agency at the Ministry of Regional Development and Public Work (MRDPW) and suspended EU funds worth over €500 million (European Commission, 2008e). The Commission decided not to reverse its decisions and Bulgaria irreversibly

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<sup>12</sup> In addition to the progress report under the CVM

lost €20 million of pre-accession EU funding in November 2008, when was the final deadline for the contracting of PHARE funds (Euoberver, 2008). Although, the Commission did not publish a separate report on Romania, it suspended agricultural payments worth €142 million in June 2008. The suspension of the EU funds (in both countries) was related to general weaknesses in administrative and judicial capacity as well as high level corruption. However, the EU's decision not to activate any of the safeguard clauses but to apply financial regulations highlights the limitations of the explicit threats, established in the framework of post-accession conditionality. Although, some member state asked for a strong link between failure to adequately address the benchmarks and the suspension of EU funds, the Commission refrained from establishing any legal links between the two. The recent developments in Bulgaria and Romania (since the suspension of the EU) suggest that financial sanctions have a positive impact. One EU official noted that 'The decision to cut funding has been a very strong motivation for the Bulgarian government last year' and commented that 'It is only pressure and punishment that works, if you take the money away, they feel the heat' (Interview 2, 2009). This is further evidence that during post-accession stage the only incentive, which the EU has to induce compliance with its conditions, is the application of financial sanctions.

The comparative examination of the incentives structure shows that after accession the EU does not offer any strong incentives for the new member states. The post-accession incentives structure is negative, as it consists predominantly of explicit threats, in contrast to the positive incentive structures of the pre-negotiation and the negotiation stage (which are dominated by a wide range of rewards). Furthermore, the post-accession negative incentives structure is very weak, because the sanctions introduced by the explicit threats are fairly limited and inadequate. The substantial

transformation of the incentives structure – from a strong positive incentive structure to a weak negative incentives structure – highlights the key weaknesses of post-accession conditionality, which limit its effectiveness.

***Conclusion: Limitations of Post-accession conditionality and the Future of EU Enlargement Conditionality***

Three years after their accession to the EU, Bulgaria and Romania are still subject to unprecedented post-accession monitoring. Although, some steps have been taken, the pace of reforms, in areas of judiciary and crime against corruption, is slow. There is a growing sense of frustration in Brussels and among the member states.

Why does the effectiveness of EU conditionality deteriorate after accession? The comparative examination of pre-accession and post-accession conditionality on the basis of the stage-structured conditionality model highlights several important developments. Two of the key elements of EU enlargement conditionality – conditions and monitoring – have evolved significantly. The post-accession conditions (benchmarks) and intensified monitoring represent the logical step in the evolution of EU enlargement policy based on the lessons learnt from the previous experiences. The growing application of targeted and differentiated conditionality and intensified monitoring confirms the usefulness of the EU's improved approach to setting out conditions and monitoring compliance. The examination of third element of EU enlargement conditionality – the incentives structure – highlights the limitations of post-accession conditionality. After accession, the EU is 'stripped' of its attractive rewards and can only rely on explicit threats to induce compliance.

Furthermore, the lack of any strong sanctions for punishing non-compliance is the key weakness of the post-accession incentives structure which in turn limits the effectiveness of post-accession conditionality.

How will the limited effectiveness of EU post-accession conditionality and particularly the effectiveness of the CVM affect the future enlargement of the Union? Will there be similar mechanism in place for the countries of the Western Balkans and Turkey or the EU will apply more rigorous conditionality before their accession to the Union? Although, the mechanism has limited leverage, it has been used successfully by the Commission and the member states as an instrument for continuous political pressure. As the support for further enlargement has declined, it is very likely that the EU will introduce more explicit threats and new sanctions even before the accession of any new member states. The theoretical framework, established by the stage-structured conditionality model, allows us not only to compare pre-accession and post-accession conditionality but it helps us trace key developments in EU enlargement conditionality. The model could be applied in a wider context for comparative examination of different rounds of EU enlargement conditionality and to complement research in wider field of democratisation and Europeanisation.

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