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BOLSTERING THE RULE OF LAW IN THE EU ENLARGEMENT PROCESS TO- WARDS THE WESTERN BALKANS

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This Policy Brief argues that the processes of enlargement and deeper European integration are not mutually exclusive. Adoption of a new long-term enlargement strategy for the western Balkans is likely to increase the credibility of the enlargement process and the potential for delivering results regarding the accession countries' performance. The limitations of the EU's capacity to absorb the accession of these countries have already been clearly outlined, while the need to bolster their rule of law is still persistent. An enlargement strategy that focuses on the rule of law is of added value, particularly in these times of crisis of confidence and identity provoked by the economic downturn. The downturn has already invoked a debate on the quality of rule-of-law provisions within current EU member states. However, it should not keep the prospect of EU membership at arm's length, since this would jeopardise the even greater necessity to stabilise the western Balkans through enlargement.

Introduction

Enlargement is often named one of the EU's most successful policies and a powerful foreign policy tool in expanding the zone of freedom, peace and economic stability in Europe. The EU's expansion with the Central and Eastern European countries (CEECs) has become a convenient scapegoat for the current enlargement crisis. Enlargement fatigue exists, especially since the accession of Bulgaria and Romania, when most member states held the widespread perception that progress still had to be made in the fields of judicial reform, corruption and organised crime prior to entering the Union. The Union's largest expansion since its creation made enlargement procedures more lengthy and the negotiation process to accede to the EU more

cumbersome. This was because potential members have to implement a much larger body of EU laws than those that acceded in previous accession rounds, but also because the rise of Euroscepticism, which demands close scrutiny and strict criteria for further enlargement of the EU. Notwithstanding the remaining challenges, enlarging the Union has helped to spread and entrench democracy and the rule of law across the European continent.

By the same token, some senior EU officials relate the enlargement process to the current economic crisis. According to the German Board Member of the European Central Bank (ECB), Jörg Asmussen, in order to focus on the creation of a politically integrated euro zone, the EU should abandon, at least temporarily, its expansion plans in the

Balkans and Turkey.¹ At the same time, German Chancellor Angela Merkel and European Commission President José Manuel Barroso have called for reinforcing political union. Although they do not openly question whether further enlargement to the western Balkans would be at odds with this objective, their emphasis upon deepening the integration process seems to suggest that enlargement is not a priority.

Instead, this Policy Brief argues that deepening and enlargement are not incompatible, and that a longer-term strategic view should be developed regarding an enlargement policy towards the western Balkans. This would avoid destabilisation of the region, which could potentially also jeopardise EU efforts to strengthen political union within its borders. Therefore, the unequivocal support for the European perspective of the western Balkans and its privileged relationship with the Union, as stated in the Thessaloniki agenda from 2003,² should be reiterated, and clear benchmarks for full-fledged membership should be set, specifically in times when the issue of further enlargement is not so imminent. Of the seven countries within the region, Croatia has concluded the negotiation process, with accession to the Union in July 2013; Montenegro has just started the long negotiation journey; Serbia is expected to start negotiation talks in January 2014, depending primarily on the normalisation of its relations with Kosovo; and the others are still sitting in the waiting room with a rather vague current status and an even more unreliable perspective.

This Policy Brief will look at the interrelation between the process of enlargement and integration in a period when the debate has taken on a new intensity. It argues that increasing the enlargement process's credibility by putting the emphasis on rule-of-law issues will increase the member states' confidence with regard to the process, making the whole debate about expansion and/or

consolidation fallacious. This will finally create a win-win situation, where the accession countries will be sufficiently equipped to enter the Union, but at the same time the member states will be convinced of the accession countries' level of preparedness to meet the standards expected from them. The latest developments and criteria introduced to accession countries are elaborated upon by analysing the enlargement policy in the cases of Croatia, Montenegro and Macedonia. Finally, based on the research conducted, a number of recommendations for a more credible and tangible enlargement process are proposed.

The current state of play on enlargement

Membership of the EU family is becoming more difficult. The rules of the game are becoming more stringent as the body of existing EU law – or *acquis communautaire* – continues to grow further. The total volume of the *acquis* that an accession country has to transpose and implement has doubled since the last enlargement wave. According to those involved, the 90,000 pages³ of the *acquis* that Bulgaria and Romania – the most recently acceded countries – needed to comply with has increased to 170,000 pages in the negotiations with Croatia.⁴

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1. In a text entitled 'Eurozone Should Form Political Union, Says Germany's ECB Firefighter', published in the *Guardian* on 21 May 2012, Jörg Asmussen, the former Deputy German Finance Minister and current German board member at the European Central Bank.
 2. See the Thessaloniki Declaration from the EU-Western Balkans Summit, 2003, available online at <http://www.stabilitypact.org/regconf/030621-thessaloniki/declaration.asp>.
 3. Communication from the Commission, 'Comprehensive Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania'.
 4. Data obtained from an interview with the permanent representation of Croatia in Brussels.

Given that accession countries are subject to conditionality entrenched in the Copenhagen criteria for accession,⁵ the EU enlargement policy towards the western Balkans follows the roadmap applied during the accession of the CEECs. In an attempt to recognise the realities related to the region, the EU *political* conditionality moreover takes into account specific criteria to start the negotiations. These criteria arise from the Stabilisation and Association Agreements, various peace agreements,⁶ as well as those related to various political issues such as cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the return of refugees.

In addition, the EU Enlargement Strategy 2012⁷ outlined a new, more structured approach to, in particular, rule-of-law issues and emphasised the importance of having a sustainable track record of reform implementation in this area. Substantial changes were made in this regard to the chapter on judiciary and fundamental rights (chapter 23) and the chapter on justice, freedom and security (chapter 24). They refer mainly to the establishment of an independent and efficient judiciary, an effective fight against corruption, and respect for fundamental rights and freedoms, as guaranteed by the *acquis* and by the Charter of Fundamental Rights of the European Union. In addition, issues such as border control, visas, external migration, asylum, police cooperation, the fight against organised crime and terrorism, cooperation in the field of drugs, customs cooperation, and judicial cooperation in criminal and civil matters are also stressed as essential for safeguarding the rule of law. This is vital not only for safety and stability, but also for a well-functioning economy and an attractive investment climate in these countries. Another reason for bringing the rule of law to the centre of the enlargement process is the establishment of certain policies that are primarily based on mutual trust among the member states – the Schengen agreement being one of those. The process is designed in

such a way that rule-of-law provisions will be deeply entrenched in society and policy, with the aim of irreversibility.

This approach was initially applied in the negotiations with Montenegro. Putting the emphasis on the rule of law reinforces the process of gradual integration. The added value of this approach is the immense political influence that the Union can exercise over accession countries on topics that are politically highly sensitive. The effects of this political dimension could evolve into two possible scenarios: *If used wisely*, it will be recognized as a means of resolving long-standing bilateral problems in this region of Europe, such as the case of Serbia and Kosovo. *If not used wisely*, the lack of action on the fair side of the quotation or reaching a hard decision once the results are delivered could lead to diminishing the process's credibility, the case of Greece versus

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5. European Council in Copenhagen, 'Conclusions of the Presidency', 21–22 June 1993, SN 180/1/93, p. 12. The Copenhagen Criteria represent the following: Political – stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; Economic – existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union; Acceptance of the Community *acquis* – ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union. The fourth condition is the one for enlargement: The Union's capacity to absorb new members, while maintaining the momentum of European integration. For more details please visit the official website of the EU – http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_en.htm
 6. UN resolution 1244, Dayton, Ohrid, Kumanovo and Belgrade agreements.
 7. 'Communication from the Commission to the European Parliament and the Council: Enlargement Strategy and Main Challenges 2012–2013', see online at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/strategy_paper_2012_en.pdf.

Macedonia being the classical example, where an individual EU member state is using the accession process to impose additional bilateral conditions. Striking a balance between providing incentives to keep the enlargement investment worthwhile and ensuring the sustainability of rule-of-law reforms is crucial.

The EU political context

If we follow Croatia's lengthy path towards the EU, one cannot expect any other country from the western Balkans to join the EU in the next decade, giving the EU sufficient time to come out of the present crisis stronger. In order not to be used to stall enlargement and make its provisions even more cumbersome than they already are today, this sabbatical could be even more useful if used to reflect on whether the demands made on accession countries are in line with current practices *within* the EU, especially those associated with the rule of law. In this respect, a letter was recently sent to Commission President Barroso by the ministers of foreign affairs of Germany, the Netherlands, Denmark and Sweden.⁸ They urge for greater emphasis on promoting a culture of respect for the rule of law within *current* EU member states. Only when additional mechanisms are introduced and respected would EU member states truly set an example to accession countries, thus rejecting the questions of double standards in the application of the EU values and principles and finally levelling the European playing field. The negotiations with Croatia are considered an interesting point in case. As an accession country, Croatia was required to meet conditions that are not expected even from an existing member state. The list of fundamental rights that a member state should respect, associated with the Charter of Fundamental Rights of the European Union,⁹ is narrower and the monitoring system for its implementation is weaker than the criteria and monitoring mechanisms that were introduced during the negotiating process with

Croatia.

Latest developments

Lessons learned from previous waves of enlargement prompted the introduction of a number of innovations and principles governing the negotiations with Croatia. It negotiated 35 subject-related chapters. In regard to the rule of law, the former justice and home affairs chapter was divided into judiciary and fundamental rights (chapter 23) and justice, freedom and security (chapter 24).

Another mechanism that was introduced in the Croatian negotiation process was the benchmarking system.¹⁰ Introduced in order to assist the accession country in meeting the criteria, the benchmarking methodology represented a novelty in assessing the country's preparedness to open and/or close a negotiating chapter.

To apply fair and rigorous conditionality, the EU declared in its 2005 Enlargement Strategy that it is prepared to recommend suspension of negotiations (and propose the conditions for eventual resumption) in cases of a serious and persistent breach of the EU's fundamental principles, or if a country fails to meet essential requirements at any stage. Such requirements include *inter alia* cooperating with the ICTY.

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8. In Europe, countries that have kept their triple AAA rating are Germany, the Netherlands, Finland, Norway and Sweden. See the BBC website at <http://batshiitinsane.appspot.com/www.bbc.co.uk/news/world/europe/>, accessed on 2 May 2013.
 9. See the Charter of Fundamental Rights of the European Union, available online at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.
 10. In addition to Croatia, Turkey and Iceland, the remaining two countries which were in the process of negotiations at that point in time also have opening and closing benchmarks for chapters.

Accordingly, decisions on both the suspension and resumption of negotiations are going to be taken by the European Council by a qualified majority upon a recommendation of the European Commission acting either on its own initiative or on the request of one-third of the member states.¹¹

In order to prevent a retreat from progress after negotiations are closed, and to avoid imposing post-accession conditionalities, as in the cases of Bulgaria and Romania, the European Commission continued to apply a strong monitoring mechanism after the accession treaty with Croatia was signed and EU member states had initiated the ratification procedures. Calling upon article 36 of the Act of Accession, during the interim period until accession, the Commission continued to monitor closely all of the commitments undertaken by Croatia in the accession negotiations, particular focusing on three chapters: judiciary and fundamental rights; justice, freedom and security; and competition policy.¹²

In the case of Montenegro, most of the innovations introduced during the negotiations' process are related to having a sustainable implementation track record in the area of the rule of law. In accordance with the new approach emphasising the rule of law, the Commission structured the negotiations' process in such a way that the chapters on judiciary and fundamental rights, and justice, freedom and security, are opened in the early stages of negotiations and will be among the last chapters to be closed, thus allowing Montenegro maximum time to establish the necessary legislation, institutions and solid track record of implementation. At the same time, this arrangement provides the Commission with sufficient time to assess the country's preparedness, therefore endorsing its recommendation in each of the phases of the negotiations' process.

Retaining the credibility of the enlargement policy is vital for maintaining the momentum

for reform in the accession countries on the one hand, and public support for enlargement on the other. In view of this, a modified version of the suspension clause was also introduced in the negotiating framework with Montenegro. While keeping the original connotation of the suspension clause, an additional meaning was added that an overall balance in the progress of negotiations across chapters should be ensured. Again, the importance of the rule-of-law chapters was emphasised. If there is no sufficient progress made in these two chapters, Montenegro would not be allowed to open and/or close other chapters. The Commission – on its own initiative or on a request by one-third of the member states – could propose withholding its recommendation to open and/or close other negotiating chapters until this imbalance is addressed.

The reasoning behind the new approach outlined above is to emphasise the importance and central role of the rule of law, as well as to avoid political pressure for closure of the rule-of-law chapters if the majority of the other chapters are provisionally closed.

For chapters 23 and 24, action plans adopted by the Montenegrin authorities will constitute the opening benchmarks. The tasks that need to be addressed in these action plans were included in the Commission's screening report for the rule-of-law chapters. A modified benchmarking system was also introduced that encompasses interim benchmarks.

11. 'Negotiating Framework' with Croatia, Luxembourg, 3 October 2005, available online at http://ec.europa.eu/enlargement/pdf/croatia/st20004_05_hr_framedoc_en.pdf.

12. See 'Accession Treaty: Treaty Concerning the Accession of the Republic of Croatia', available online at <http://www.delhrv.ec.europa.eu/files/file/articles-Copy%20of%20st14409.en11-1330425931.pdf>.

These benchmarks are proposed in order to track accurately the legislative alignment with the *acquis*. Furthermore, they are introduced to assess the progress made in reference to the track record of implementing key elements of the *acquis*, demonstrating the existence of adequate administrative and judicial capacities. The novelty associated with this principle is the possibility to add additional measures in order to address identified shortcomings within a specific timeframe, including where necessary as a matter of urgency.

The emphasis on rule-of-law issues and the structure used in the negotiations with Croatia and Montenegro were replicated to the extent possible with other countries at different phases in the accession process. The Commission's recommendation in 2009 to start accession negotiations with Macedonia depended on the results of the 8+1 key priorities for progress in the accession process, as identified in the Accession Partnership. The key priorities consist mainly of rule-of-law issues such as promoting a constructive and inclusive political dialogue, establishing a sustained track record on the implementation of judiciary reforms and anti-corruption legislation, strengthening the independence of regulatory and supervisory agencies, and ensuring free, fair and transparent elections that meet international standards. The Commission assessed these key priorities as benchmarks following the introduction of the benchmarking system in the accession negotiations with Croatia. Drawing on this reasoning, in 2012, the same year when Montenegro started negotiations based on the new approach with the EU, the government of Macedonia and the Commission initiated the High-Level Accession Dialogue (HLAD). The HLAD mainly focuses on rule-of-law issues such as protecting freedom of expression in the media, reforming the public administration, improving the election process and developing the market economy.

Recommendations

The credibility of the enlargement process is crucial for its success. This can be achieved only by bolstering the rule of law in the EU enlargement process towards the western Balkans. The debate about expansion and/or consolidation will turn into a positive outcome only if all of the involved actors contribute to the final objective of the enlargement process. By bringing the rule of law to the centre of the process and reflecting upon the strict conditionality approach, the EU has created the necessary conditions for restoring credibility to the process. The following recommendations are intended for the European Commission, taking into consideration its central role in the enlargement process and aimed at increasing the credibility of the enlargement process as such:

- *Elucidate the importance of the newly established approach emphasising the rule of law and the reinforced negotiation scheme to western Balkans accession countries:* In order to create a new climate of mutual respect, the Commission has to familiarise the accession countries with the new approach and reinforced negotiation scheme and provide them with sufficient guidance through the process. Furthermore, the accession countries have to be convinced that this approach will lower the manoeuvring room for political interference as much as possible, and finally – supplemented by incentives within arms' reach – this approach will catalyse domestic reform and eventually lead towards further steps in the integration process. By the same token, the Commission has to convince the member states that the new approach will assist the EU in supporting the transformation of the accession countries of the western Balkans, would reinforce its stabilisation through integration in this part of Europe, and finally will strengthen the consensus-building efforts for reaching a decision on

the level of accession countries' preparedness to join the Union, thus securing continuous support for enlargement.

- *Keep the open-doors policy for potential new member states from the western Balkans region and nurture a culture for the rule of law within current EU member states:* The economic crisis provoked a dangerous, defensive and inward-looking response from the Union, damaging its strategic orientation as a producer of stability in the world by means of promoting and protecting its common values. The ambivalence in some EU member states as originators and promoters of human rights, democracy and the rule of law has currently blurred the values that created the magnetism and attractiveness of the EU. The development of a far-reaching series of measures by the Commission as the guardian of the Treaties, promoting the rule of law in member states will further strengthen the fundamental values on which the Union is founded and will restore its attraction for potential new member states. Keeping the open-door perspective for the western Balkans' countries, while introducing stricter criteria in line with the mechanisms established in the Union, will create a win-win situation for all parties. The re-embodiment of the EU's 'soft power' is only conceivable by setting an example and resolving problematic issues in the EU's

own backyard.

- *Encourage adoption of a new long-term enlargement strategy for the western Balkans' countries:* Ten years after the Thessaloniki agenda and seven years after the European Council's renewed consensus on enlargement, the time has come for the Commission to reiterate its unequivocal support to the European perspective of the western Balkans' countries by defining a new long-term European strategy for this region. If it lacks the political commitment, the EU may inadvertently put its long-term interests in greater jeopardy than the current enlargement calculus suggests. By incorporating institutional mechanisms that emphasise the importance of the rule of law in strengthening accountability and establishing well-functioning economies, while acknowledging the realities that the accession process remains at times negatively affected by bilateral issues, and by means of establishing institutional modes of engagement, the EU blueprint will pave the way for a successful and credible enlargement process with western Balkans' countries. Additionally, in order to secure public support, endorsement of the strategy by the new European Council and European Parliament, once they are constituted in 2014, is highly recommended.

About Clingendael

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