Understanding Constraints

An analysis of varieties in the pace of legal approximation to the Acquis Communautaire in Latvia, Bulgaria and Romania

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Abstract

The aim of this study is to explain why some applicant countries are much more efficient than others in adopting and implementing the Acquis Communautaire. In Latvia, Bulgaria and Romania the pace has varied strongly in this respect since they started membership negotiations in 2000, despite the fact that their governments during the same period have had EU membership as their highest priority. The study focuses on constraints in the policy process as a potential determinant for this variation, with the assumption that law adoption is facilitated by few constraints, while the implementation process demands constraints to be successful.

Problem & Motivation

The imminent enlargement of the European Union has once again put the question of why some former East-bloc countries have been more successful than others in the reform process high on the research agenda. According to the European Commission's most recent evaluation (Strategy Paper 2001 & Regular Report 2001), eight of the ten Central and East European applicant states are assessed as having good chances of being admitted to the EU no later than 2004, while two countries, Bulgaria and Romania, are considered not to have come far enough in the accession process to be able to meet the membership criteria by that date. This assessment came as no surprise for those familiar with the results of previous progress reports, in which Bulgaria and Romania, ever since the first report in 1997, had been ranked as number nine and ten respectively, in terms of readiness for EU membership. The somewhat less favourable position at the onset of the reform process in 1990 and the fact that governments with quite low reform ambitions dominated the first half of the 1990s, are two probable explanations to this outcome.

When Bulgaria and Romania in 1997 and 1996 respectively, elected reform-minded governments with EU membership as their highest priority, one would expect that they would keep the same pace in the accession process as the other applicant countries and at least keep the same distance in relation to the others. That has not been the case, however. On the contrary, Bulgaria and Romania, have fallen further behind, in terms of adoption and implementation of the Acquis Communautaire[1], which is one – and perhaps the most important – condition for membership[2], after membership negotiations started in early spring 2000. This stands in stark contrast to the development in Latvia, Lithuania and Slovakia, who started membership negotiations at the same time as Bulgaria and Romania (the so called Helsinki group), but who by the end of 2001 had reached the same level or on some accounts even overtaken those applicants who started negotiations in 1998 (the Luxemburg group).[3] Moreover, during the last two years the gap between Bulgaria and Romania has increased, leaving Romania distinctly last in the applicant field.[4] This will be further discussed below.

The widening of the gap is all the more surprising, given the way the accession negotiations are carried out. Firstly, the negotiations start with the policy areas – or chapters in EU-jargon – to which it is quite easy to adapt, because the body of EU-legislation is limited or the legislation demanded is not costly. Consequently, it would be relatively easy to close quite a

[1] Which is the European Union's common legislation

[2] The membership criteria are: "Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union, the conditions for its integration through the adjustment of its administrative structures, so that European Community legislation transposed into national legislation implemented effectively through appropriate administrative and judicial structures."
(www.europa.eu.int/comm/enlargement/intro/criteria.htm)

[3] Estonia, Poland, the Czech Republic, Hungary and Slovenia.

[4] One indicator is the number of closed chapter, i.e. policy areas more or less in line with EU legislation. In May 2000 Latvia and Romania had closed five chapters each and Bulgaria four (Enlargement Weekly 26/05/2000: www.europa.eu.int/comm/enlargement/docs/weekly_0506_files/weekly2605.htm, downloaded 2001-08-14). By the end of 2001Latvia had closed 23 chapters, Bulgaria 14 and Romania only nine (www.europa.eu.int/comm/enlargement/negotiations/chapters/index.htm, downloaded 2002-01-04).

large amount of chapters within a short period of time, thereby closing the gap in this respect to the front-runners. Secondly, one would expect the Helsinki group to be faster than the Luxemburg group, simply because of increasing negotiation experience and skills of behalf of the EU. This is also what happened in Latvia, Lithuania and Slovakia, but not in Bulgaria and Romania.

It is thus obvious that the pace in adopting and implementing EU legislation has varied strongly between the applicant countries during the last couple of years, although the external conditions, in terms of membership criteria and conditions for negotiation, as well as internal ones, such as EU friendly governments in control, are similar for all applicant countries. *The aim of this study is to find the causes behind these variations in progression pace.*

Apart from the empirical relevance of this particular case, the theoretical implications are just as important. Efficient governance and decision-making are crucial components in any polity and popular and elite perceptions of failure in these respects have time and again resulted in democratic breakdowns and authoritarian take-overs. From a democratic point of view, efficiency is to some extent a prerequisite for the popular will – or at least the majority's will – to have any impact. A system in which a government cannot pursue the policies promised, despite the ambition to do so, could not be regarded as democratically viable and it will most likely lose its legitimacy if changes do not occur. Efficiency could at the same time, however, also be a threat to the core idea of democracy, if it severely reduces the scope for debate, scrutiny and accountability. In sum efficiency is a two-edged sword, which could be both conductive and detrimental for democratic procedures.

The case of law approximation in the applicant countries, further, is a very suitable one, when the mechanisms behind efficient governance is in focus, since all the governments in the region are committed to EU membership, have more or less the same legislation to adopt and implement and, finally, have full information of what is needed to reach the goal. Lack of reform ambition could thus not be the reasons behind the differences. Apart from differences in the starting conditions, the applicant states are similar in many respects, both in terms of their communist past and in terms of the policies the EU has pursued toward the candidate countries. Since the legal approximation process, moreover, is a quite straightforward one – at least the adoption process in contrast to the implementation process – it is regarded as a good case for measuring and comparing efficiency. Similar, simple and comparable conditions, in short, make this case theoretically appropriate.

Politically, the case is no less relevant. The importance of keeping a good pace in the accession process cannot be overestimated. No applicant country will be admitted to the EU until the accession criteria are fulfilled and a slow pace in adopting and implementing EU legislation could therefore result in a failure to be accepted in the first round of enlargement, due to take place in 2003 or 2004. There is also the risk of a second round of enlargement being postponed, due to difficulties in managing a wider union financially and institutionally.

For governments who invested much prestige in the accession process, together with the inhabitants at large, who increasingly think they have paid high enough a price in economic and social terms for adjusting to EU conditions, being left out could increase frustration as well as the feeling that all efforts have been in vain. Drawing on historical experiences, such situations tend to increase support for authoritarian or even outright anti-democratic forces, putting the democratic system under severe strain.

The fact that governments do fail in their reform efforts, although they are committed to EU membership and are fully aware of the preconditions for reaching that goal, poses the question to what extent the governments or the executives in the applicant countries really have the necessary capacity to carry out and implement their reform agendas. Since the legal approximation process is about adopting and implementing EU legislation, failure must logically indicate that there are some kind of constraints in the policy process[5] - halting, delaying or amending necessary pieces of legislation - which the government was unable to overcome. Even in systems where effective governance has the highest priority, there could still be restraining factors, making the policy process less straightforward than might otherwise be expected according to the laws and rules governing those processes (Hay, 1995:189-190).

It should therefore be of great importance to understand how constraints determine the outcome of the reform process in order to know how to make these processes more efficient in the future if necessary. Hence, to find an explanation behind success and failure or - to put less provocatively - differences in outcome in this process is an urgent task, both from a political and a scientific point of view. Consequently, this study takes its point of departure in the decision-making structures in the applicant countries, in order to clarify how, when and why different types of constraints effect the policy process and with what consequences. How these questions have been dealt with in the previous research, will be the subject of the next section.

Previous research

There has been a virtual explosion of research in the social science fields dealing with aspects of the East European transition and increasingly, studies with distinguished theoretical focuses are making inroads in the transition literature, where descriptive approaches still dominate. The question of success and failure in the reform process belongs to the former category and it has been dealt with extensively during the last decade, but mainly with either macro-economic indicators such as inflation, budget deficit, growth, FDI:s etc or political ones, such as level of democratisation, as dependent variables (Nørgaard, 2000; Fish, 1998; Hellman, 1998). Common explanations for the varieties in reform outcome have centred around the different starting points, economically and politically and the reform ambition and reform strategy of the governments and to some extent also the importance of political culture.

Explicitly or not, different types of constraints are often brought up as explanations for differences in outcome, although the authors would not use that terminology. The economic initial conditions, from which the reform process departed, for instance, are considered to constitute important constraints (Roland, 1997).

Not surprisingly, the neoinstitutionalist perspectives have made a great inroad to the transition research. There are in fact many different approaches to the neoinstitutionalism (Peters, 1999), but the common denominator is of course the focus on the importance of institutions and their constraining character. Following Peters' classification, the two most frequently applied neoinstitutionalist approaches in the transition research are the historical and the empirical ones. The first emphasises the importance of the historic legacy in bringing about reform, with the focus on the features of the previous socialist system (Linz & Stepan, 1996; Bunce, 1999), but other scholars even take us as far back as to the late Roman Empire (Gerner, Hedlund &

[5] That is the legislative and implementation processes.

Sundström, 1995). Path-dependency is the catchword summarising this perspective, a term that implies that previously made choices frame the alternatives of choice at a later stage. In claiming that some countries never will succeed in their efforts to democratise and establishing a functioning market economy, due to previous choices leading in on fatal pathways impossible to alter, there is an implicit determinism in some of the research in this perspective, though by no means in all.

The empirical institutionalism take a more contemporary approach, since they mainly focus on the political system in force and above all its main features, such as parliamentarism vs. presidentialism, proportional representation vs. plurality elections, uni- vs. bicameralism, and how these institutional choices structure politics (Stepan & Skach, 1993; Baylis, 1996; McGregor, 1993). Also recognising structural impediments to political action, they differ slightly, however, from the historical institutionalists in one crucial respect, namely by the tendency to vest a little more power in the individuals, at least in the initial period of building up the political systems.[6] In their view there also seems to be more political actors can do to overcome the constraints.

Although the accession process has been under intensive study for many years, there is, strangely enough, still very few studies, which systematically have compared the applicant countries varied progression towards a EU membership and fewer still, if any, who have analysed the law approximation process with the focus on explaining why the pace of progression differs. This lack is all the more surprising, given the links between democratic governance and efficiency in decision-making discussed above.

[6] This in turn has been criticised from the historical institutionalists who claim that there never was an institutional 'tabula rasa', i.e. a period of unconstrained decision-making. See for example Cox & Mason, 1999.

Drawing on research on efficient governance more generally, concentration in decision-making structures has been regarded as highly important for efficiency in reform processes in general and for law adoption in particular (Haggard & Kaufman, 1995; Tsebelis, 1999; Brusis & Dimitrov, 2001; Evans & Evans, 2001). To be efficient, a decision-making system should have as few actors as possible involved in the process, in order to avoid mediation and compromises between conflicting interests and to reduce the risk of giving potential opponents – called veto-players in the literature – the possibility to interfere in the process.

This approach has not been without its critics. In their already much quoted book *Postsocialist Pathways,* David Stark and Laszlo Bruszt challenge the predominant view that these types of constraints are detrimental to economic reform. They claim, to the contrary, that they in general have a very positive effect in the long run, since the reforms tend to be more cohesive and more widely accepted if there are constraints on executive decision-making, making bargaining and compromise necessities in securing the survival and stability of reform packages. The correlation between constraints and long-term reform cohesion is unfortunately not subject to a more detailed analysis. The authors admit though that it is highly unlikely that all types of constraints have these positive effects, but they nevertheless do not bother to ask the more fundamental questions, e.g. what types of constraints that matter and under what conditions they have positive and negative effects. It is of no help for constitutional engineers to learn that some constraints have positive effects, if you cannot single them out. Trial and error in this particular case is perhaps not a recommendable strategy.

The perspectives discussed above thus seem to arrive at very different answers to the question to what extent and with what consequences constraints on decision-making matter. As has

been hinted they seem to put their focus on different parts of the policy process, however, where the former approach tend to emphasis the adoption of laws, i.e. a short term perspective, whereas the latter approach focus on long term effects, i.e successful implementation.

This study takes this disagreement as its point of departure and aims at studying the effects of constraints in the policy process, in order to determine if they do have any effect at all regarding the efficiency in adopting and implementing the acquis communautaire. A reasonable assumption is that concentrated decision-making, with few constraints in the policy process, makes the adoption of EU legislation more efficient, whereas successful implementation demands a more diffused decision-making and hence more constraints. It is, moreover, highly unlikely that all types of constraints, which will be discussed in the next section, is equally important and it is therefore also the aim of this study to identify the critical constraints and determine under what conditions they do effect the policy process in one or the other directions. With this slightly different angle, this study will make a contribution to the broader debate about success and failure in the East European reform process as well as the discussion about efficient decision-making in general.

Method & Procedure

In order to answer the question posed above, a comparative design seems to be the most fruitful approach. As implied, there are three categories of applicant states in terms of pace in the law approximation process, of which the first consists of the eight front-runners, the second of Bulgaria and the third of Romania. Given this fact and in order to maximise the variance in the dependent variable, it seems natural to select one country from each category. Bulgaria and Romania is thereby given. From the first category, Latvia is chosen since they

started membership negotiations at the same time as Bulgaria and Romania and have been very successful during the last two years.

Talking of success and failure in the accession process could be regarded as a bit provoking, since it implies a superior West European model, which the applicant states should copy uncritically. There are god reasons for using that terminology, without being accused for Eurocentrism, however, simply because the political elites and the governments in the candidate countries actually have EU-membership has their highest priority. Consequently, the outcome is measured in relation to the ambitions of their own governments', not the EU members'. Thus, if there is a lack of will to adopt or implement some pieces of legislation, that particular case could not be regarded as a failure, but rather as a deliberate choice.

Returning to the dependent variable, it seems appropriate to give some additional supporting evidence for the claim that the legal approximation process actually has varied between Latvia, Bulgaria and Romania. Apart from the number of chapter closed 2000 through 2001, another indicator of efficiency is whether the states fulfil the priorities set out in their National Programmes for the Adoption of the Acquis (NPAA), and in the Accession Partnership, which is a condensed version of priorities, mutually agreed on by the EU and the applicant state. In the regular report, the EU commission each year evaluates to what extent the priorities have been met in the policy areas subject to negotiation and the analysis of the 2000 and 2001 reports found significant differences between the three countries. Measured on a four grade scale (0-3), Latvia scored 44 out of a maximum of 60, Bulgaria 35 and Romania 30.[7] In combination with the numbers of chapters closed during the same period, it indicates further

[7] In the regular report ten policy areas were mentioned each year. The maximum score (3) was given to countries which were considered to fulfil the priorities to a large extent, the score of 2, when they were partially met, 1, when they were met to a limited extent and 0 for not met.

that the Latvian government, despite much higher ambition, managed to be much more efficient than their fellow applicants, who had less ambitious priorities. This will suffice as evidence for the variance in the dependent variable at the moment.

The independent variable of the study is constraints in the policy process. They could be of many different kinds, however, and as previously discussed, most likely with different effects. In this study constraints are defined to consist of three components: veto-points, veto-procedures and veto-players. A veto-point is defined as an instance in the policy process, where either a clearance is needed to proceed (e.g. a decision by the cabinet or the parliament) or where there are possibilities to interfere in the process to halt, delay or amend the draft law under consideration (e.g. a presidential veto power). A veto-point could further be either formal, i.e. written down in laws or regulations or informal, i.e. when the conditions above exits, but where laws and regulations are missing (e.g. influences of organised interest groups). The more veto-points, the less concentrated decision-making. In sum a veto-point should be regarded as a necessary, but not a sufficient condition for failure in the law approximation process.

For a veto-point to have any effect it has to be activated. The veto-procedures tell us what is needed to have the veto-points activated, e.g. qualified majority vote or quorum rules, and secondly what actors who have the formal rights to interfere in the policy process. Thus, the veto-procedure determine the potential effect of a specific veto-point. The more demanding and exclusionary the veto-procedures are, the greater is the concentration of decision-making.

The actors mentioned in the paragraph above is called veto-players and that group is defined as every actor who have the mere possibility, whatever the likelihood, to interfere in the policy

process. For a failure in the law approximation process to occur then, veto-player(s) must use its (their) power, either by actively halt the piece of legislation under consideration or by inaction in case an active support is needed. Veto-player refers to either individuals or collectives (e.g. political parties or organised interest groups). A bunch of hostile veto-players is, hence, not necessarily a threat to the decision-making efficiency, as long as the veto-points are few and, more important, if the veto-procedures are very demanding.

In sum, neither of the three components discussed above are in themselves sufficient in analysing the constraints in the policy process. Explaining the outcome, an analysis of the interaction between them is demanded.

In the first step of the study, the formal decision-making structures in the three candidate countries will be compared, in terms of the number of veto-points, what the veto-procedures look like and who the potential veto-players are, in order to determine the level and type of constraints in decision-making.

The policy process will be divided into four phases: initiative, preparation, decision and implementation, which will be analysed as outlined above. To be efficient in the initiation phase, it has been pointed out in the literature, that concentration of decision-making power in the core executive, i.e. the prime minister and his office, is of great importance (Brusis & Dimitrov, 2001; Evans & Evans, 2001). Since the law approximation process demands a high degree of co-ordination, it sounds reasonable that the prime minister and his office are key players in the initiation phase.

It is one thing, however, to initiate legislation and quite another to make it presentable to the parliament. Where efficiency in the former is facilitated by concentration in decision-making, to be successful in the latter instance demands good co-operating conditions between the prime minister on the one hand the ministries on the other and also between the ministries. In addition a broad governmental consensus on the reform policy to be pursued is clearly a facilitating condition for the preparation phase to be efficient, thereby avoiding rows over priorities and financial provisions etc. A reasonable measurement of the cohesion of the cabinet is firstly the number of parties participating and secondly the ideological distance between the coalition parties. Following Tsebelis (1999), who have found correlations between the number of governmental parties and the ideological distance between them and efficiency in law production, this study will test whether this correlation holds in the cases dealt with. Moreover, the laws and regulations concerning the work of the cabinet will be analysed.

The political parties and organised interest groups are in focus in the decision phase. In accordance with the argument presented above, fragmentation in the party system and strong interest group influence, is found to be detrimental to efficient law adoption (Haggard & Kaufman, 1995). Thus, once again is concentration in decision-making considered to promote efficiency in the policy process. If interest groups do not have the formal right to take part in this process, the informal possibilities will be analysed.

To sum up, the previous research has mainly emphasised the veto-players in the process and thereby paid less attention to the institutional settings they have to operate within, which is considered to be of equally great importance. No matter how hostile to reform, veto-players cannot do much harm if the veto-procedures are unfavourable to them, let alone if there are no

or very few veto-points in the first place. This study therefore takes the above-mentioned studies as a departure point, but adds an institutional dimension to it.

The three phases discussed above (the legislative process) constitute the first stage in the policy process. The second being the implementation stage, which is also the fourth phase of the policy process. This will be dealt with in a moment. The decision-making structure in Latvia, Bulgaria and Romania will, initially be compared as outlined above and the differences that might appear will be subject to further analysis, in order to determine if they have any effect on the efficiency in the policy process. There might be the case, for instance, that there are big differences in the level of constraints in the decision-making in the core executive, without any differences in the number of draft laws initiated, which in that case would indicate that that particular level is irrelevant in the analysis.

To determine whether a causal relationship exists, the three first phases will be analysed both quantitatively and qualitatively. The quantitative aspects will be measured in terms of output from the different phases, i.e. the number of draft laws initiated, prepared and adopted, both in absolute number, but also in relation to the ambition of the respective government and to the priorities set out by the EU, which is readily available in the National Program for the Adoption of the Acquis, Accession Partnership and Regular Reports respectively. The qualitative analysis focuses on the interaction between the veto-points, veto-procedures and veto-players and aims at examining what the causal mechanism look like, i.e. what settings that are effecting the level of efficiency in the legislative process. Three important questions to be answered are, which veto-points, governed by which veto-procedures tend to bring draft laws to a halt, who are the veto-players who activate the veto-points and why do they activate it. Thus, the analysis of the legislative process will determine if - and to what extent, how and

why levels of constraints on decision-making effect the efficiency in adopting new legislation. The assumed outcome in this stage is that the less constraints, the higher the efficiency.

The implementation phase has to be treated a bit differently than the other phases, simply because the implementing structures differ from one policy area to another, within the same country. For the implementation phase to be relevant in the analysis then, the legislative process has to be successfully completed, otherwise there is not anything to implement. The choices of what policy areas to be studied will be based on the results of the first part of the study. Anyway, the analysis of the implementation phase will be carried out in the same manner as the previous phases discussed above.

As hinted above there are two aspects of the decision-making structures, one formal, which has been subject to the most discussions above, and one informal. It might be the case that the formal structures are found to have no effect whatsoever on the efficiency in the policy process. Although much more complicated in measuring, it is nevertheless necessary to add some informal aspects to the analysis, if the effects of the formal aspects turn out to be insignificant. It has been suggested that organisational culture – in the implementing institutions in particular, could be of equal importance in terms of efficiency as the formal structure (Risse et al, 2001). The informal aspects will accordingly be saved in case of a negative effect of the formal aspects and then mainly apply to the implementation phase. There will however be some informal aspects analysed also in the previous phases, e.g. interest organisations in the preparation and decision phases.

Concerning the time periods of this study, finally, the start will be in 2000, the year Latvia, Bulgaria and Romania started membership negotiations or perhaps in 1999 when the first

NPAAs and Accession partnerships were published. In accordance with the arguments through out this paper, the previous periods are not considered to be of importance in explaining the variance in terms of legal approximation. No end point has yet been decided, but it seems reasonable to cover at least the first half of 2003. Ideally the end point would be the accession date for the first applicant country.

Data

In the first phase of he study, data on decision-making structures will be used. Much of the laws and regulations governing these processes are to be found on Internet and often translated into English. Additional official data might also be obtained mainly on the net, e.g. draft laws, parliamentary and committee debates, opinions from interest groups, voting results, speeches, interviews and proclamations of intention on behalf of the government etc. The informal aspects of the system will be analysed through interviews with local decision-makers and EU representatives. When analysing the interaction between veto-points, veto-procedures and veto-players secondary literature and newspapers will be used, complemented by interviews.

Concluding remarks

By focusing on previously neglected aspects of the reform process in the applicant countries, this study will contribute both theoretically and empirically to the scholarly debate about the determinants of success and failure in the East European reform process as well as to the more general discussion about efficient democratic decision-making. Moreover, the study could hopefully give some recommendation to the decision-makers in the countries concerned.

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