Stop Further Schengenigans

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Steffen Meyer



What potential new member states should learn from Romania's and Bulgaria's problems to join Schengen.

Europe's famed no-border-control-Schengen-area may get even larger with new EU candidates on the horizon. But if the accession procedure stays as it is, new EU countries may remain outside of the Schengen area for years to come, even after becoming an EU member and even if the majority of Europeans are in favor of it. Those Schengenigans have to stop, and in this article, I'll show you why they exist and how they can be prevented.

Six countries currently negotiate with the EU to access the club: Albania, Moldova, Montenegro, North Macedonia, Serbia and – since December 2023 – Ukraine. While there are many arguments to be made and discus-

sions to be held, joining the Schengen area should be regulated in another way than in the accession rounds before.

How bad the current system is, is revealed by the process of Romania and Bulgaria trying to join Schengen. Even though fact-finding missions by the EU Commission already confirmed in 2011 that the two countries may join, 3/4 of members of the EU Parliament agreed to it and almost all governments in the EU were convinced, they didn't gain any access for the last years. In a most recent farce in December 2023, Romania and Bulgaria were granted restricted access by inventing an Air & Water Schengen. This removed border controls for airplanes and ships but upheld controls for vehicles. In consequence, long lines of trucks are still standing at the Romanian and Bulgarian borders for hours, waiting for the pass control. This slows down trade in Europe and produces unnecessary exhaust fumes, hurting the European economy and the environment.

And all this nonsense happens because the Austrian government says Nein (the acting Dutch government, which had reservations against Bulgaria before, recently dropped its veto). Austria's government argues that by allowing both countries into Schengen, more migrants may come into Austria via the Balkan Route. Strange enough, in Hungary – in contrast to Austria, a direct neighbour to Romania -, the government doesn't oppose the Schengen accession of the two countries. At the same time, the Hungarian government isn't exactly famous for being migration-friendly, or even Europe-friendly that is. Even more strange is that Austria allowed Croatia to join, which also lies on the Balkan Route and which border is way closer to Austria's border than Romania's. Some reports conclude that the Austrian veto is driven by appealing to far-right voters rather than facts.

While there's almost no chance to change this procedure for Romania and Bulgaria now, there is hope for the new member states due to the judicial nature of the Schengen accession provisions. Now it gets tricky, but bear with me.

Accession treaties are made between the EU and new member states after accession negotiations are concluded. These treaties contain extra rules for individual member states, and for every new member state after 1999, Article 4 was written down in these treaties. This article states that the Schengen acquis will only apply to new member states if the members of the EU Council, consisting of each member state government's representative, reach a positive decision in unanimity, giving every national government in the EU an effective veto right. The EU Commission only provides evaluation and the EU Parliament only needs to be consulted, making the EU governments the sole deciders on the issue.

This archaic procedure resembles the early stages of European integration, when the EU Parliament was more of a consultative body and intergovernmental power-play was the norm. Today, most of the EU legislation process grew out of this infant phase and the EU Parliament has a strong say in making European decisions. This bolstered the general European

interest in comparison to singular national interests. However, by writing the Schengen access procedure into the accession treaties, the Council found a loophole to preserve its old privileges.

This loophole not only keeps the EU Parliament out but also grants the Council voting in secrecy. Since this decision-making process isn't written down in normal EU legislation, the standard rules don't apply, and voting records doesn't have to be made public. So Europeans just have to trust the country leaders that Austria is the culprit and no one else secretly votes No, too. Thus, this procedure not only gives national governments the sole power, but protects them from scrutiny as well. Archaic indeed.

However, the good thing about this extra layer of law is that new accession treaties may be drafted with a different Article 4, for example by replacing the unanimity vote by EU governments with the ordinary legislative procedure of the European Union. The ordinary legislative procedure is used for adopting most laws in the EU at the moment and only requires a simple majority by the European Parliament and a qualified majority in the European Council, meaning that 55% of EU governments have to vote in favor, while 65% of the EU population have to be represented in the Yes countries. This is still a hurdle, but far more democratic than the current one.

If Article 4 of the new accession treaties would contain this process, no government could single-handedly block countries from joining Schengen, no intransparent decision-making can take place and the best of all: You don't need to change the EU treaties to implement this process.

Thus, Albania, Moldova, Montenegro, North Macedonia, Serbia, and Ukraine would be wise to study the previous accession treaties and not only negotiate for good conditions but for good procedures as well – and prevent Europe from further Schengenigans.

/// Since there is some space maybe just insert Article 4?

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