

Stop further Schengenians

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 Schengenians 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 discussions 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 join¹, 3/4 of members of the EU Parliament² 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 Schengen³. 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

¹ https://home-affairs.ec.europa.eu/news/schengen-area-controls-air-and-sea-borders-bulgaria-and-romania-will-be-lifted-2024-01-03_en#:~:text=The%20Commission%20first%20confirmed%20that,conditions%20for%20becoming%20Schengen%20members

² <https://www.europarl.europa.eu/news/en/press-room/20230707IPR02431/bulgaria-and-romania-should-be-in-schengen-by-end-of-2023-says-parliament>

³ Council decision on the full application of the Schengen acquis in Bulgaria and Romania: <https://www.consilium.europa.eu/en/press/press-releases/2023/12/30/schengen-area-council-takes-move-towards-lifting-border-controls-with-bulgaria-and-romania/>

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.

However, the whole debate just distracts from the core problem, which is that: just one government can block an integration step against the will of a large majority of the EU Parliament and a vast majority of EU governments. The minority rules over the majority. This shouldn't be the case.

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.

Schengen started as various intergovernmental treaties that were made between states from 1985 onwards. In 1999, the sum of these treaties - the Schengen acquis - was made EU law. Thus, member states automatically become part of Schengen - except for Ireland and Great Britain which had opted out. However, when new countries joined the club after 1999, an extra layer of law was added that prevented them from joining Schengen immediately. This layer isn't found in EU law but somewhere else, namely: in the accession treaties.

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?

ARTICLE 4

1. The provisions of the Schengen acquis, referred to in Protocol No 17 to the Constitution on the Schengen acquis integrated into the framework of the European Union, and the acts building upon it or otherwise related to it, listed in Annex II, as well as any further such acts adopted before the date of accession, shall be binding on and applicable in Bulgaria and Romania from the date of accession.

2. Those provisions of the Schengen acquis as integrated into the framework of the European Union and the acts building upon it or otherwise related to it not referred to in paragraph 1, while binding on Bulgaria and Romania from the date of accession, shall only apply in each of those States pursuant to a European decision of the Council to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all parts of the acquis concerned have been met in that State.

The Council shall take its decision, after consulting the European Parliament, acting with the unanimity of its members representing the Governments of the Member States in respect of which the provisions referred to in this paragraph have already been put into effect and of the representative of the Government of the Member State in respect of which those provisions are to be put into effect. The members of the Council representing the Governments of Ireland and of the United Kingdom of Great Britain and Northern Ireland shall take part in such a decision insofar as it relates to the provisions of the Schengen acquis and the acts building upon it or otherwise related to it in which these Member States participate.