

DEMOCRATIC CONDITIONALITY IN THE EUROPEAN UNION

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Abstract:

This paper aims at investigating the European Union's (EU) role in defending democracy both before and after the enlargement round. It connects the literature on Europeanisation and conditionality with the reconstruction of the contemporary EU's legal instruments at the disposal of democracy defence in the member states. The topic is highly valid from the point of view of the most recent developments in many Central Eastern European countries which are scrutinised by the supranational institutions by their illiberal democracy practices.

Keywords: Conditionality, Europeanisation, European Union, democracy

Introduction

The objective of the paper is to investigate the EU's role in defending liberal democracy standards in its member states and aspiring candidate countries. The European Union's transformative impact on its direct neighbourhood was obvious in the case of 2004, 2007 and 2013 waves of enlargement. Both the political as well as the economic reforms of Central and East European states were partly induced by the motivation stemming from the so called 'waiting room syndrome'. Whether the EU can effectively defend the liberal democracy standards after the enlargement, when the accession motivation diminishes is debatable.

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A highly controversial issue is the European Union's position concerning democracy. Many times the Union was certified to have a democratic deficit, which thus makes it impossible for it to promote and protect this form of government. Moreover, the 28 Member States might all be democratic, but still, from an institutional point of view, many different kinds of democracy exist: constitutional monarchies, republics, federal or centralized states etc. In addition, not just formally, but as well substantially, there are diverting perspectives on fundamental aspects like the parliamentary sovereignty or individual rights. The question arises, whether there is truly a common European understanding of democracy. Keeping in mind the ongoing critique about the Union's deficit and the variety between the Member States, the promotion of democracy gains a superficial character. It does not matter whether this is towards third states, within the framework of enlargement or even within the Union.

"Besides elections, there is the need for a system of checks and balances, i.e. the separation of powers, as well as a strong protection of fundamental rights."¹ The experience of the interwar period, where the unlimited rule of majority paved the way for dictatorships, forced western European decision-makers to strengthen institutions limiting the sovereignty of the people, for example with the introduction of a constitutional court. These democracies thus created the EU, which by far, especially in its economy-oriented beginning, had no democratic dimension. Nevertheless, parallel to this, other organizations were founded which did support a liberal character of democracy and were supported by the EU. The Council of Europe and the European Convention of Human Rights are fully recognized. Other developments like the Charter of Fundamental Rights of the European Union point towards a liberal understanding of state-citizen relationship.

Conditionality as an element of Europeanisation

Both from empirical knowledge and from deliberative speculation, we can identify the differentiated influence of Europeanization. Its major instrument, conditionality, sometimes works more efficiently, sometimes less. It is usually determined by the domestic costs of rule adoption in the aspiring state and its alternatives, but also on the phenomena within the EU. It is

¹ Jan-Werner Müller, *Wo Europa endet. Ungarn, Brüssel und das Schicksal der liberalen Demokratie*, Berlin, 2013, p. 39.

highly politicized process on both sides, therefore it is also unpredictable to a large extent. Also *post factum*, difficult to measure as the speculations on the EU impact are difficult to be proved in many cases (especially the political ones). There is always the path-dependency factor in the politics of domestic transitions that need to be calculated, rather than exclusively the conditionality emanating from the EU.

It is also important to remember that the term 'conditionality' does not refer exclusively to the phenomena taking place within the EU's gravitational pull but also, for example, in the case of states, international and supranational organizations which require respect for human rights and democracy from third countries in development aid and trade. The recipients, in order to sustain the inflowing assistance, must take into account the donors' preferences. They may also prefer tied transfers because they do not want to simply be treated as poor relations. They prefer transfers justified by some higher purpose – for example transition, innovation, adjustments to world standards, etc. It is rather rare that developed countries or their organizations give support without conditions, more often taking the form of negotiated aid. OECD's Development Aid Committee (DAC), also reflects on common criteria for the attribution of public funding for development. The European Community does not hesitate to take rapid measures in suspending aid to certain countries, in a manner similar to the World Bank and other international and supranational organizations.

Europeanization is not a new theory – it is rather a new way of organizing the European studies agenda, a phenomenon that needs to be explained and which orchestrates existing concepts rather than 're-inventing the wheel'. One might ask why it is so trendy nowadays, –as opposed to in the 1950's. Obviously this explosion of literature must be associated with the growing importance of the impact of the EU on different dimensions of domestic politics. Consequently Europeanization is required for a comprehensive understanding of the integration process².

Europeanization is conventionally understood as a phenomenon of domestic adaptation to European integration. This functions domestically, in the member states, but also beyond the European Union's territory, sometimes going much further and embracing distant lands where the

² Paulo Graziano, Marten Vink (eds.), *Europeanization. New Research Agendas*, Palgrave Macmillan: London, 2007, pp. 8-9.

political and economic gravity of the EU is strong enough. This suggests that the EU is gradually expanding its sphere of influence beyond the circle of member states. Consequently, academic attention highlights this phenomenon to describe, explain and interpret this 'regulatory intervention'. Being mainly a regulatory polity, the EU uses regulation as a tool to influence and, in a number of cases, even to authoritatively prescribe the desired behaviour of public and private actors³. Not surprisingly, scholarly attention has shifted from the emergence of supranational institutions, and accompanying topics, to the impact of European integration. However, it is vitally important to remember that although the EU has enormous potential influence, caution is needed in assuming the extent to which the EU has shaped governance, polities, policies, and politics overall. Originally the research on Europeanization was almost exclusively concerned with domestic change in EU member states. Additionally, if one would like to track the development trajectories of this research agenda, it is apparent that together with the 'big' enlargement (2004), conditionality as a concept became an important part of the scope of Europeanization⁴.

Within this scope, three different steering mechanisms of Europeanization have been identified by Michael W. Bauer, Christoph Knill and Diana Pitschel in their important contribution to this strand of academic discourse — compliance, competition and communication. 'Governance by compliance presupposes the existence of legally binding and common European rules that have to be implemented at the domestic level, conceding only marginal levels of discretion to national bureaucracies. Compliance-based regulations typically appear in policies of positive integration, i.e. they are aimed at establishing a sound environment for the participants of the European common market. They impose constraints on national actors in order to safeguard certain standards for the protection of workers, consumers and the environment, as well as cultural assets'⁵. This perspective assumes a far-reaching impact on the national institutional system, its organization

³ It is a process that impacts upon members of the European Union and those aspiring to join, and even wider neighbourhood.

⁴ Before, it was also present in the public discourse, see for example: Accession Partnership 1997.

⁵ Michael Bauer, Christoph Knill, Diane Pitschel, "Differential Europeanization in Eastern Europe: The Impact of Diverse EU Regulatory Governance Patterns", *Journal of European Integration*, Vol. 29, No 4, 2007, p. 408.

and its working practices. This is why new institutionalism⁶ is so crucially important as a theoretical vehicle. When analyzing the potential impact of compliance-based policies on non-EU states, the obligatory nature of the respective policy is a decisive aspect. In order to ensure that regulatory policies have an effect, it is crucial that the EU has legislative authority in the respective country, for example it must be able to enforce its rules and should have tools at its disposal to sanction eventual non-compliance. With candidate countries this precondition is assured since the EU insists on the implementation of the *acquis communautaire*⁷, as a condition for EU membership⁸. In this context it is important to remember that within the phase of candidacy the responses of states to compliance measures may vary according to the phase of their application. At the very beginning of the application process, applicants normally make great efforts to demonstrate their maturity to become full members and adhere to even very restrictive EU measures. When the accession negotiations proceed and the fear of exclusion diminishes, national bureaucracies or negotiators may exhibit indications of fatigue or even resistance in reference to the implementation of EU-based rules, especially when the adjustment of EU norms is accompanied by high costs. This trend could be observed in Bulgaria and Romania shortly before the EU finally decided on their membership⁹.

The second mechanism applied in EU regulatory policy is competition between national administrative systems to achieve EU requirements. Competition-based regulations aim at ensuring the functioning of the common market by gradually abolishing distorting factors such as national regulatory barriers¹⁰. The rationale behind institutional change in the context of competitive measures differs fundamentally from the logic of compliance: not the self-preserving interests of bureaucracies, but rather market competition that

⁶ James March, Jochan Olsen, *The New Institutionalism: Organizational Factors in Political Life*, New York: Free Press, 1989.

⁷ The compilation of about 80,000 pages of legislation

⁸ Michael Bauer, Christoph Knill, Diane Pitschel, "Differential Europeanization in Eastern Europe: The Impact of Diverse EU Regulatory Governance Patterns", *Journal of European Integration*, Vol. 29, No 4, 2007, p. 409.

⁹ Frank Schimmelfennig, Ulrich Sedelmeier, "Governance by conditionality: EU rule transfer to the candidate countries of Central and East Europe", *Journal of European Public Policy*, No 4 11 (4), 2004, p. 216.

¹⁰ 'Negative integration' – amounting to deregulation (in contrast to positive integration, in which the EU performs a redistributive functions or builds its own policies)

constitutes the driving mechanism. Additionally another factor is considered to be of major importance: the interest of the non-member state in participating in the common market and the potential gains they expect from their participation. 'Candidate countries are (at least partly) involved in the common market long before they accede to the EU. On the one hand, they are subject to market-related conditionality. They have to ensure that their institutional structures fit the requirements of the market system of the EU and that they adopt the provisions set up for the Single European market'¹¹.

The third mechanism – communication - refers to the communication between national regulatory agents grouped together in EU legal or institutional networks¹². The authors of this classification, Bauer, Knill and Pitschel, suggest that '(...) applying the governance approach of communication, the EU stimulates information exchange and mutual learning between national policy makers. Furthermore, it aims to promote the development of innovative forms and models of problem solution that can be integrated in the member states' regulatory systems.

Communication-based measures abstain from setting legally binding rules. Instead they are designed to support national policy makers looking for regulatory models and concepts to tackle policy problems (Bauer, Knill, Pitschel, 2007: 414). Soft modes of governance may act as illustrative examples of governance by communication, for instance the open method of coordination (OMC), where integration pressure does not function through compliance logic and strength, but in accordance with interactions, acts as a community building factor. This mechanism is crucially important in all cases, usually beyond the first pillar, where supranational regulatory intervention cannot be effective due to the lack of binding legislation.

Taking into account that both candidate countries and other non-members are involved in network relationships with the EU, regulatory EU policy based on a communication approach is likely to have an impact on both groups of states. The method is usually that the Commission sets up benchmarks in particular policy areas and provides examples of best practice.

¹¹ Bauer., Knill, Pitschel, *op. cit.*, pp. 413-416.

¹² Member states communicate with third states within the framework of numerous associations, partnership agreements and other platforms.

Other authors¹³ suggest different set of mechanisms as far as Europeanization is concerned: institutional compliance, changing domestic opportunity structures, and framing domestic beliefs and expectations. The mechanism of Europeanization by institutional compliance is particularly, but not exclusively, pronounced in policies of so-called 'positive integration'. This strongly correlates with the previously mentioned logic, in which it is not market mechanisms but rather political actors that set up decision making structures in the supranational domain and make certain policies 'EU exclusive'. Examples of Europeanization by changing domestic opportunity structures can be found in particular in many market-making policies of the EU (negative integration). These policies basically exclude certain options from the range of national policy choices, rather than positively prescribing distinctive institutional models to be introduced at the national level. Europeanization by framing domestic beliefs and expectations is particularly likely when the EU decision-making context, above all the underlying conflicts of interests between the member states, only allows it to adopt policies which are vague and more or less symbolic¹⁴.

There is one basic assumption present in the studies of EU conditionality: that it exists and functions as there is a power asymmetry which enables the Commission to impose the adoption of the *acquis* on the CEECs as a precondition of their entry to the Union. Therefore conditionality is usually understood as a strategy of 'reinforcement by reward'¹⁵. Consequently, academic literature indicates that there are clear causal relationships in the use of conditionality to ensure policy or institutional outcomes. The majority of existing studies of conditionality are connected with enlargement conditionality, which also analyses its correlation with macro-level democratization and marketization¹⁶. The power asymmetry

¹³ Bauer, Knill, Pitschel, *op. cit.*

¹⁴ Christoph Knill, Dirk Lehmkuhl, "The national impact of European Union regulatory politics: Three Europeanization mechanisms", *European Journal of Political Research*, No 41, 2002, pp. 255-259.

¹⁵ Facilitated by material bargaining and low domestic political costs. The administration of a candidate state to which the conditionality policy is implemented, in the process of a permanent profit and loss calculation, decides if the costs of compliance are not too high compared with the expected benefits.

¹⁶ James Hughes, Gwydelon Sasse, Claire Gordon., „Conditionality and Compliance in the EU's Eastward Enlargement: Regional Policy and the Reform of Sub-national Government", *Journal of Common Market Studies*, No 42 (3), 2004, p. 26.

was painfully obvious in the case of the last two phases of enlargement (2004, 2007). The absence of alternative ideological or systemic paradigms for the Central and East European candidate countries, other than EU membership, has tended to reinforce the widespread perception of a power asymmetry in favour of the EU during the enlargement process.

Among the mechanisms of conditionality identified by Heather Grabbe in her extensive study of the effects of Europeanization before the last waves of enlargement, she underlines the most important categories as follows:

- Gate-keeping: access to negotiations and further stages in the accession process,
- Benchmarking and monitoring,
- Models: provision of legislative and institutional templates,
- Money: aid and technical assistance,
- Advice and twinning.

The gate-keeping mechanism conditions access to negotiations and further stages in the accession process, accordingly to the advancement of fulfilling certain criteria.

After the 1997 and 1999 European Councils, the EU implemented the following accession process: privileged trade access and additional aid, signing and implementing an enhanced form of association agreement (Europe Agreements for the current candidates, Stabilization and Association Agreements for south-eastern European non-applicants), opening of negotiations (explicitly dependent on meeting the democracy and human rights conditions since 1997), opening and closing of the thirty-one chapters, signing of an accession treaty, ratification of the accession treaty by national parliaments and the European Parliament, and finally the entry as a full member¹⁷ (Grabbe 2001: 1019). Benchmarking and monitoring is a more specific conditionality instrument that goes beyond gate-keeping. Due to the salience of EU accession in the political debates of Central European states, the EU could influence policy and institutional development through ranking the applicants' overall progress, benchmarking policy areas in particular, and providing examples of best practice that applicants seek to emulate.

¹⁷ Heather Grabbe, "How does Europeanization affect CEE governance?", *Conditionality, diffusion and diversity*, No 8 (6), 2001, p. 1019.

The EU establishes models, provision of legislative and institutional templates to guide, monitor and benchmark the aspiring parties on their way to the full membership. A key mechanism for this part of conditionality is the cycle of 'Accession Partnerships' and 'Regular Reports' published by the European Commission regularly (Grabbe 2001: 1022). Money obviously has a strong impact power: in applicant countries it is important in the sphere of aid and technical assistance. The EU is the largest external source of aid in the world and, in the case of Central Europe, it was also the case prior to enlargement. It provides funds administered by the European Commission and also bilateral programmes from individual member states. The last mechanism - advice and twinning - works through learning from member state experiences of framing the legislation and building the organizational capacity necessary to implement the *acquis*¹⁸.

Most studies of Europeanization and conditionality combine the above mentioned mechanisms and tend to focus on two cumulative levels of conditionality. Firstly, they attach great salience to the broad 'principled' conditionality established by the 'Copenhagen criteria' of 1993. Secondly, they highlight the 'technical' preconditions for the candidate countries to accelerate the adoption and adaptation to the *acquis communautaire* in order to fulfil all the responsibilities of membership. The Copenhagen Council of 1993 established four criteria for membership of an enlarged EU in the Presidency Conclusions: 'Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required. Membership requires that the candidate country has achieved 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. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union (European Council 1993).

Therefore it is also possible to understand the particular EU (enlargement) conditionality as 'powerful tools to shape institutions in the CEECs which made policymakers 'choose EU models because of the incentives and constraints imposed by the EU accession process' (Grabbe

¹⁸ Again in bilateral and multilateral constellations.

2002: 262). However, doubts on the precise understanding of conditionality were clearly expressed by James Hughes, Gwendolyn Sasse and Claire Gordon in this manner: 'If it is accepted that conditionality is an implicitly coercive instrument wielded by the Commission to secure compliance with certain desired policy or institutional outcomes, then we must also accept that the features of EU conditionality, in particular its rule-based prescriptive essence, are not well defined. Ambivalence and ambiguity are evident at both levels of conditionality identified above. In the case of the Copenhagen criteria it is obvious that the political conditionality for membership was highly politicized and operationalized in a selective manner. By the time enlargement negotiations accelerated from 1997, it is doubtful that the political conditionality as laid down in the Copenhagen criteria was a significant factor in the process, as the democratization of the CEECs was generally accepted as a reality and a starting-point for the other three Copenhagen conditions.'¹⁹.

Following these authors, the logic of EU conditionality is that it is not a uniformly hard rule-based instrument, but rather it is highly differentiated, its nature shifting and transforming depending on the content of the *acquis*, policy area, country concerned, and political context to which it is applied. Particularly in the case of 2004 and 2007 enlargements, the performance tasks set by the Commission were not easily devised, evaluated or benchmarked. This ambivalence and vagueness across policy areas significantly weakened their impact. The argument supports Olsen's observation that the EU's effectiveness in institution-building and policy change, even within the Union, has varied across institutional spheres such as competition policy, monetary affairs, external and internal security, culture, etc. Apart from this, clear causal relationships between the EU and domestic levels are difficult to trace since causation operates in both directions. Such processes are best studied as 'an ecology of mutual adaptation'²⁰. Unfortunately, this kind of flexible method of case study (with all its imperfections) is assumed to be the most appropriate method for analyzing the application of EU conditionality during enlargement.

Moreover, it very often distinguishes between the two main categories of conditionality. Formal conditionality covers the publicly stated preconditions as set out in the broad principles of the Copenhagen criteria and the legal

¹⁹ Hughes, Sasse, Gordon, *op. cit.*, p. 525.

²⁰ Hughes, Sasse, Gordon., *op. cit.*, p. 526.

framework of the *acquis*, whereas informal conditionality relates to the operational pressures and recommendations applied by actors within the Commission and other EU institutions to achieve particular outcomes during interactions with their CEEC counterparts in the course of enlargement. This is not to say that both types of conditionality are always clearly distinguishable, as they often operate in conjunction.

Generally, EU policy towards the Central European candidate states was widely regarded as predominantly being a policy of conditionality.

However, the mere use of conditionality by the EU does not necessarily tell us much about the underlying mode of governance and the conditions under which EU rules are transferred to third countries. EU conditionality might be all encompassing, but it might not be effective in achieving rule transfer in certain areas or countries. Furthermore, there is not necessarily a causal link between the presence of EU conditionality and successful rule transfer in particular areas. Thus, it is recommended by many authors to distinguish (analytically) between the use of 'conditionality' as a political strategy and its causal impact on domestic politics²¹. It is impossible to hypothesize about the past and we cannot answer the question of if conditionality-driven change was the vehicle of transition, consolidation and the transformation of economy. This doubt underpins the main logic of EU conditionality understood as a bargaining strategy of reinforcement by reward, under which the EU provides external incentives for a target government to comply with its conditions²². It is also possible to claim that these dominant features of conditionality might have been superseded by other mechanisms that could also lead to rule transfer.

For example, in the process of the systemic political and economic transformation that the Central European states were undergoing, they might have considered EU rules as effective solutions to domestic policy challenges and thus adopted these rules independent of EU conditionality and their desire to join. Additionally, while the EU might provide incentives for the adoption of its rules, the mechanism through which the Central

²¹ See for example: Andrew Massey, „Modernisation as Europeanization. The impact of the European Union on public Administration”, *Policy Studies*, vol. 25, No 1, 2004.

²² It is argued that among the applicants, only Poland has the luxury of being able to bargain hard, for Polish negotiators assumed that factors like the country's size and geo-political importance would prevent the EU from excluding the country from the first group of accessions (Grabbe 2001, *op. cit.*, p. 1015).

European governments adopt them might relate to processes of persuasion and learning in which EU actors socialize Central European actors rather than coerce them²³. A number of attempts have been made to combine the two strands of academic debate, with Europeanization on one side and transformation in the post-communist world on the other. These have a lot of potential but, however, still seem to be unexplored.

Which democracy?

Looking into the treaties of the EU, democracy seems to play an important role. It is a key word concerning the European Union's basic values, declared in the preamble, the Union's functioning itself and the character of the external actions and relations with third states.²⁴ The EU existed nearly 30 years until the Single European Act for the first time mentioned the promotion of democracy. But from that point on, the crucial position of democracy in its own development and enlargement was no longer neglected. In fact, there does not exist any official definition by the European Union to clarify what is meant by that term. This is a fundamental problem: the EU proclaims democracy as a key element of its structures and demands it as a precondition for becoming a Member State and as a basic aim in its external activities. But in the end, the question still prevails, which conditions have to be met to fulfill the Union's expectations on that concept. This raised a discussion with the EU, if there is a need to define basic aspects of a European understanding of democracy. At the request of the European Parliament (EP), the Office for the Promotion of Parliamentary Democracy (OPPD)²⁵ identified different definitions of international and regional organizations to underline their common key elements of democracy. Due to the danger of perceiving a EU-definition of democracy as an "unilateral imposition", the paper argues that the EU should not adopt an own definition.²⁶ Instead, the EU should "rely on an existing, comprehensive definition of democracy

²³ Schimmelfennig, Sedelmeier, *op. cit.* p. 626.

²⁴ European Union, *Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of the European Union*, 2010.

²⁵ European Parliament, *Supporting newly developed democracies*, 2010, [access: 14.08.15].

²⁶ Office for Promotion of Parliamentary Democracy, *Democracy revisited. Which Notion of Democracy for the EU's External Relations?*, Brussels, 2009, [access: 13.04.17], p. 5.

adopted by the largest possible group of countries, notably the UN General Assembly”.²⁷ Following “essential elements” of democracy are emphasized:²⁸

- *“Respect for human rights and fundamental freedoms, inter alia, freedom of association and peaceful assembly, freedom of expression and freedom of opinion*
- *The right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at a genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people*
- *A pluralistic system of political parties and organisations*
- *Respect for the rule of law*
- *The separation of powers and the independence of the judiciary*
- *Transparency and accountability in public administration*
- *Free, independent and pluralistic media”*²⁹

The definition is a normative one. There are no institutional or process-oriented components mentioned. This is logical, because the democratic systems within the EU are diverse, but are still considered to belong to one form of government. “This suggests, that it is not the formal nature of the democracy but its practice that determines its characteristics.”³⁰

*„Our European Union is more than a big common market. It is also a Union of shared values, which are spelled out in the Treaties and in the Charter of Fundamental Rights. Citizens expect their governments to provide justice, protection and fairness with full respect for fundamental rights and the rule of law. This also requires joint European action, based on our shared values.”*³¹

- Jean-Claude Juncker, President of the European Commission

²⁷ *Ibidem.*

²⁸ Office for Promotion of Parliamentary Democracy, *Democracy revisited. Which Notion of Democracy for the EU's External Relations?*, Brussels, 2009, [access: 13.04.17], p 6.

²⁹ *Ibidem.*

³⁰ Office for Promotion of Parliamentary Democracy, *Democracy revisited. Which Notion of Democracy for the EU's External Relations?*, Brussels, 2009, [accessed 13.04.17], p 7.

³¹ Jean-Claude Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change*, Brussels 2014, p. 8.

Each enlargements signifies for the Union the spread of peace and democracy on in Europe, by taking in new member states. Especially within the accession process, thresholds concerning democracy and fundamental rights are stipulated. Article 49 TEU names as a basic requirement for applying for membership the respect and the willingness to promote the democratic values of the EU.³² Furthermore, the Copenhagen Criteria established in 1993 from the Council specify that possible candidates must provide stable institutions, which are able to guarantee democracy, rule of law, human rights and the respect for and protection of minorities.³³ Throughout the association process, the criteria is monitored and bound to a sharp conditionality. But as the quotation of J.C. Juncker says, these values are not only important during the enlargement process, but are the basis for the existence and acting of the Union and the single Member States. These shared values are anchored in Article 2 TEU and Article 6 TEU. They are the legal ground for a twofold responsibility of the Union towards its members. Article 2 TEU encompasses a larger scope of influence of values as it addresses areas falling outside EU competence.

Article 6 is the foundation for a narrower domain meaning the obligations imposed on and by the EU, so incidents affecting the EU law.³⁴

Article 2 states that the

“Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”³⁵

³² European Union, *Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of the European Union*, 2010, [access: 30.08.15].

³³ European Commission, *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*, 2014, [access: 30.08.15].

³⁴ European Union Agency for Fundamental Rights, *The European Union as a Community of values: safeguarding fundamental rights in times of crisis*, 2013, p. 7.

³⁵ European Union, *Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of the European Union*, 2010, [access: 13.04.17].

These are the values referred to in Article 49 TEU, but implicates as well that Member States are obliged to stay compliant to these fundamentals.³⁶ Article 6 TEU names three different legal sources resulting in obligations for the Member States. The first one is the Charter of Fundamental Rights of the European Union, which is not part of the Lisbon treaty but does have the same legal value. The second mentioned source for guiding the Union's actions is the European Convention on Human Rights.

Finally, the common constitutional traditions of the Member States concerning fundamental rights shall be general principles of EU law.³⁷ It is outlined in the article that these provisions are not supposed to extend the competences of the Union. The EU clearly addresses its responsibility as a value community in cementing fundamental principles in the Union's primary law. They are the basis for taking action in cases of infringement.

Article 2 TEU demands compliance of the Member States when they act on behalf of the EU, but as well in any other, for example national, context. When the outlined values are concerned, there is no distinction between the European level and matters of national sovereignty. In contrast, Article 6 TEU is limited to incidents that fall within the scope of EU law.³⁸

The expression 'value community' is not just a European self-perception or a well-promoted image. The Union dedicated itself legally to democratic values and their defense. Regarding the developments in Hungary since 2010, it becomes clear that an infringement of the European values and a transformation to an illiberal state is not acceptable within the European context. Therefore the instruments available to defend democracy and fundamental rights will be examined, as well as the so far taken steps of the EU to prevent Hungary's backsliding. This aims at assessing their success, while proposed mechanisms by scholars and institutions will be discussed. The mechanism directly established for the protection of fundamental values stated in Article 2 TEU is Article 7 TEU. It is frequently called the 'nuclear option' as it is the severest instrument in defending fundamental rights. The article provides the possibility for the Council to decide by qualified majority

³⁶ European Union Agency for Fundamental Rights, *The European Union as a Community of values: safeguarding fundamental rights in times of crisis*, 2013, p. 7.

³⁷ European Union, *Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of the European Union*, 2010, [access: 13.04.17].

³⁸ European Union Agency for Fundamental Rights, *The European Union as a Community of values: safeguarding fundamental rights in times of crisis*, 2013, pp. 7-8.

to suspend certain treaty rights of the concerned Member State, including its voting rights. But before this option can be considered, two conditions have to be fulfilled before. The preventive mechanism in article 7 (1) TEU consists mainly of a warning of the Council towards a Member State, where “a clear risk of a serious breach” was determined.³⁹ Article 7 (2) TEU provides the prerequisite for the sanctioning mechanism in Article 7 (3) TEU, which demands the identification of “the existence of a serious and persistent breach by the Member State”.⁴⁰ Only if these two steps are made, political sanctions can follow. These common provisions are clearly disconnected from EU legislative competences, as Member States are as well liable under Article 2 TEU where they do not act under EU law.⁴² The three modes of intervention are bound to very demanding majority requirements, which could be one reason why the article was never used so far. Until now, Article 7 TEU seemed “to be designed to threaten but not to actually apply”.⁴³

Besides Article 7 TEU, there are three alternative instruments against democratic backsliding within the EU context:

- Use of the infringement procedure of the Articles 258 and 260 TFEU⁴⁴;
- Exert social pressure on the concerned Member State;
- Use of issue linkage;⁴⁵

In contrast to Article 7 TEU, the first instrument aims at the infringement of obligations under the Treaties. In the context of fundamental rights, Article 258 and 260 TFEU can be applied when a Member State is non-compliant with specific values of Article 2 TEU that are separately anchored within the Treaty or EU secondary law, for example the non-discrimination on the grounds of gender, age etc. The European Commission can launch

³⁹ European Union, *Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of the European Union*, 2010, [accessed 13.04.17].

⁴⁰ European Union, *Consolidated Version of the Treaty on the European Union and the Treaty on the Functioning of the European Union*, 2010, [accessed 13.04.17].

⁴¹ See the full text of Article 7 TEU.

⁴² European Union Agency for Fundamental Rights, *The European Union as a Community of values: safeguarding fundamental rights in times of crisis*, 2013, p. 7, [accessed 13.04.17].

⁴³ European Union Agency for Fundamental Rights, *The European Union as a Community of values: safeguarding fundamental rights in times of crisis*, 2013, p. 8.

⁴⁴ See the full text of the Articles 258 and 260 TEU.

⁴⁵ Ulrich Sedelmeier, „Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession”, *Journal of Common Market Studies*, vol. 52, 2014, p. 113.

such a procedure on its own, which can lead to a proceeding before the European Court of Justice (ECJ) possibly fining the concerned Member State for steady non-compliance. These two instruments are the only ones explicitly mentioned in the treaties to intervene in breaching liberal democratic principles. But another measure frequently used by international institutions is increasing social pressure on the country in question. This implies mainly to publicly criticize and shame the concerned government for its non-compliance. This instrument can be used through media or open letters to the government. As well the threat of opening an infringement procedure can cause a change in the Member State's actions. Social pressure includes less public statements, too, as for example an exchange between the EU institutions and the country to persuade the government of the "normative appropriateness of compliance".⁴⁶ Issue linkage describes the connection of demanding to obey democratic standards with a possible suspension of rewards in another area. This can be expressed explicitly or in an indirect way. This is mostly effective if the concerned Member State has strong preferences to get to an agreement in a certain domain, which requires high majority ratios. In contrast to the so far mentioned tools, issue linkage is a rather unofficial means to enforce compliance.

There are many suggestions of enlarging the toolkit to be more effective in stemming democratic backsliding. The Tavares Report calls for three other instruments in addition to the Article 7 TEU to cope with the situation in Hungary. Firstly, a Article 2 alarm agenda should be introduced, which demands from the European Commission to only address issues related to this Article until the Hungarian government complies with the critical points addressed in the report. This would suspend any other issues between the European Commission and Hungary. Secondly, a new monitoring committee for the Hungarian case should be created, consisting of members of the EP, the Council and the Commission. Thirdly, a Copenhagen Commission should be established consisting of independent experts, which mainly functions as a post-accession monitoring body. As a reference compliance with the Copenhagen Criteria would be used. This last tool should not act exclusively on the Hungarian case, but on the part of any member state.⁴⁷

⁴⁶ Sedelmeier, *op. cit.*, p. 113.

⁴⁷ Kim Lane Scheppele, *In the Praise of the Tavares Report: Europe finally says No to Viktor Orbán*, 2013, [access: 13.04.17].

This idea comes from the political scientist Jan-Werner Müller, who examines as well other possible instruments. A stronger role of national courts to protect fundamental rights is discussed, which mostly raises concerns of balancing out the relationship between the ECJ and national constitutional courts and primary legalistic responses to political challenges.⁴⁸ Another possibility raised by Müller is to extend Article 7 TEU with a provision making it possible to expel a Member State completely.⁴⁹

This would be a strong form of deterrence, but considering that the European community is reluctant to even use the preventive mechanism of the Article, this proposal is not that close to reality. As Sedelmeier puts it, the main question concerning the effectiveness of all the actual and suggested instruments is, if the EU can anchor democracy from above. His comparative analysis of Hungary and Romania suggest a mixed success.

The “EU might still have some hope of reversing democratic backsliding when faced with a pro-EU leadership with illiberal tendencies, but conversely, the EU’s influence on Eurosceptic illiberal leaders might be especially limited.”⁵⁰

Conclusions - Conditionality Limits and Risks

There are several traps in which researchers of the Europeanization phenomena, and especially the conditionality mechanism, can fall into. The first is connected with the democratic deficit debate. If we agree on the profound impact of Europeanization beyond the EU’s territory, we need to identify the key difference between the internal and the external dimension of governance. This is that while the former is concerned primarily with the *creation* of rules, as well as their implementation in national political systems, the external dimension is exclusively about the transfer of given EU rules and their adoption by non-member states. One needs to see this phenomenon in the prism of ‘democratic deficit problem’ context since transferring the rules outside and the impact of governance beyond the EU borders equates to exporting the ‘deficit problem’ as well⁵¹.

⁴⁸ Müller, *op. cit.*, pp. 146-147.

⁴⁹ Müller, *op.cit.*, p. 147.

⁵⁰ Sedelmeier, *op. cit.*, p. 120.

⁵¹ Schimmelfennig, Sedelmeier, *op. cit.*, p. 661.

Secondly, even the famous Copenhagen conditions are imperfect for a number of reasons. They are too broad and what constitutes meeting them is open to interpretation, giving the EU considerable freedom in deciding what has to be done before compliance is achieved and membership (or even advancement in the application and accession procedure) granted. Certain functions or characteristics of governance are included in the third condition on the ability to take on the obligations of membership. This condition can be interpreted broadly by the EU. For example, the capacity to implement and enforce the *acquis* means that the EU is concerned with the entire judicial system. The necessity to administer EU regional aid means that the conditions include the creation of administrative units of subnational government equipped with a certain absorption capacity. On the other hand the 'club membership rules' were clearly settled not that long before for the Union itself. Reference to the principles of liberty, democracy and respect for human rights as the 'grounds' of the EU was not included within EU primary law until the Amsterdam Treaty. The very fact that Article 6 of the treaty confirmed the Copenhagen criteria, although with the exception of 'respect for and protection of minorities', it has been viewed as an attempt to reduce the sharp contrast between the rules for the existing members and the admission criteria for prospective newcomers⁵². This may eventually generate frustration on the applicants' side, especially, when confronted with the potential neglect of the access⁵³. Additionally, the basic EU resource in external relations is its own credibility and this capital is at risk in this context⁵⁴. Certainly not everybody who meets the criteria will be admitted, as the enlargement capacity of the EU is limited.

This leads any analysis to the determinacy of conditionality issue or, as termed by Frank Schimmelfennig and Ulrich Sedelmeier: 'The *determinacy of conditions* and of the rules from which it is derived enhance the likelihood of rule adoption. Determinacy refers both to the clarity and formality of a rule⁵⁵.

⁵² Cesare Pinelli, „Conditionality and Enlargement in Light of EU Constitutional Developments”, *European Law Journal*, Vol. 10, No. 3, May, 2004, pp. 354–362.

⁵³ After 'consuming' the costs of adaptation, the potential lack of reward may create dissatisfaction both on the applicants' political elites as well as its citizens.

⁵⁴ The credibility of the EU's threat to withhold rewards in case of non-compliance and, conversely, its promise to deliver the reward in case of rule adoption. (Schimmelfennig, Sedelmeier 2004, p. 665).

⁵⁵ Schimmelfennig, Sedelmeier, *op. cit.*, p. 664.

However one needs to notice the uncertain linkage between fulfilling particular tasks and receiving particular future benefits.

The connection with rewards is much less clear than in other forms of international conditionality – for example, those used by the international financial institutions in investment decisions (International Monetary Fund or European Investment Bank) or development assistance (European Bank of Reconstruction and Development or World Bank) in the case of development agencies⁵⁶. The timing of costs and benefits also diffuses the impact strength and influence. The ultimate reward of accession is far removed from the moment at which adaptation costs are incurred, so conditionality is a blunt instrument when it comes to persuading countries to change particular practices⁵⁷. So not only the size but also the speed of the reward is an important determinant of conditionality. Additionally, the real alternatives of the aspiring candidate play an important role. As it is termed in the literature - cross-conditionality - must be absent or minor. EU conditionality would not be effective if the target government had other sources offering comparable benefits at lower adjustment costs.

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