

Rule of Law and Judicial Independence in the EU: Lessons from the Union's Eastward Enlargement and Ways Forward

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1 Introduction¹

The question of respect for the rule of law in the Member States of the European Union (EU) has come up high on the agenda of EU institutions. The background is well known and relates to the disturbing political trend of nationalist and populist forces either rising to power, or gaining increasing political influence across the European continent.² While this trend can be discerned in a number of EU Member States such as Italy, France, Finland and recently even Sweden, it has been most prominently visible in the ascent of self-proclaimed ‘illiberal democracies’ in Hungary and Poland.³ The governments in these two countries have consciously engaged in a quest of undermining the constitutionally established system of checks and balances and have launched an assault on independent institutions, such as the media, educational establishments and notably the judiciary. As a result, in 2020, Freedom House for the first time qualified Hungary as a ‘transitional or hybrid regime’, while Poland slipped back into the group of semi-consolidated democracies.⁴ What particularly sets apart Poland and Hungary is that the ruling governments in these countries have abandoned even the pretence of following European rule of law standards and have taken a course of open confrontation with EU institutions.⁵

¹ This chapter builds on my contribution ‘The Eastward Enlargement as a Driving Force and Testbed for Rule of Law Policy in the EU’, in A Bakardjieva Engelbrekt, A Moberg and J Nergelius (eds) *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Oxford, Hart Publishing, 2021) 181-228.

² On this development see J-W Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’ (2015) 21(2) *European Law Journal* 141–160. L Pech and K Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3–47. On Hungary, see András Jakab, ‘Institutional Alcoholism in Post-socialist Countries and the Cultural Elements of the Rule of Law: The Example of Hungary’ in: Bakardjieva Engelbrekt and Groussot (eds) *The Future of Europe: Political and Legal Integration Beyond Brexit* (Oxford, Hart Publishing, 2019) 209. On Poland see, among others, W Sadurski, ‘Constitutional Design: Lessons from Poland’s Democratic Backsliding’ (2020) 6 *Const Stud* 59; L Pech, P Wachowiec, D Mazur, ‘Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action’ (2021) 13 *Hague Journal on the Rule of Law* 1.

³ See Victor Orbán’s speech at Băile Tuşnad (Tusnádfürdő), available at: <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

⁴ See the democracy index put together by Freedom House at <https://freedomhouse.org/> and the scores for Hungary at <https://freedomhouse.org/country/hungary/nations-transit/2020>. In 2022, the country’s democracy score fell from 3,71 to 3,68 after evidence of further deterioration of media freedom and no improvement on other counts. Poland’s democracy score declined from 4.57 to 4.54. See also D Kelemen’s analysis of what he calls the EU’s autocratic equilibrium in RD Kelemen, ‘The European Union’s authoritarian equilibrium’ (2020) 27 *Journal of European Public Policy* 481. Among the EU Member States from CEE, in 2022, Freedom House qualified three other countries as ‘semi-consolidated democracies’: Bulgaria, Romania and Croatia.

⁵ See judgement of the Polish Constitutional Tribunal Nr. K/21 of 7 October 2021, available in English translation at: <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>; cf. Statement of the European Commission on the decision of the Polish Constitutional Tribunal of 14 July, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_3726.

The judiciary has emerged as a preferred target of illiberal governments. The ruling PiS and Fidesz parties in Poland and Hungary have at different points in time launched judicial reforms tending to eliminate essential constitutional guarantees for judicial independence. While the reforms have on the surface declared to pursue pragmatic goals such as improving the staffing or functioning of national courts, the incumbent governments' intention of replacing or silencing inconvenient judges and packing the courts with party-loyal individuals has been poorly concealed.⁶

In the face of the potentially devastating effects of such rule of law backsliding⁷ for the mutual trust on which European integration builds, and hence for the very survival of the European project, all EU institutions have felt bound to act to uphold the EU value of the rule of law in the Member States. Indeed, the Commission, the European Parliament, the Council and the Court of Justice of the European Union (hereinafter, the Court, or CJEU) have each within its respective sphere of competence, weighed in on the question of rule of law compliance and, albeit with differing resolve, undertaken specific measures to bolster the rule of law in EU Member States more generally, and address developments in Poland and Hungary more specifically. The avenues for action have been manifold and intersecting, prompting scholars to search for a suitable taxonomy that would enhance the understanding for the various tools and measures, and for their implications and relative importance. Classifications have been offered along different lines: according to the institutional actor undertaking the respective measure (Council, Parliament, Commission, Court, new bodies)⁸, according to the functional sphere within which the respective tool is situated (political, legal, financial)⁹, or according to the character of the governance approach employed (proceduralization, conceptualisation, judicialization).¹⁰

The number and variety of such measures notwithstanding, it becomes increasingly evident, that there is no silver bullet to successfully handle the rule

⁶ See Sadurski (n 2).

⁷ The term 'backsliding' is by now well established in the legal and political science literature, although it has been criticised on a number of counts. Rule of law backsliding has been defined as 'the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party': L Pech and K Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3–47, 10. Some have pointed out that while the term implies a regression from a previous state of consolidated democracy, for many countries in CEE the truth has rather been that they were not truly consolidated democracies at the time of accession in the first place. See L Cianetti and S Hanley, 'The end of the backsliding paradigm' (2021) 31 *Journal of Democracy*, with reference to T Carothers, 'The End of the Transition Paradigm' (2002) *Journal of Democracy* 5–21.

⁸ See C Closa, D Kochenov and J H Weiler, 'Reinforcing Rule of Law Oversight in the European Union', EUI Working papers (2014) RSCAS 2014/25 at 20–23.

⁹ A Södersten, 'Rule of Law Crisis: EU in Limbo Between Federalism and Flexible Integration' in Bakardjieva Engelbrekt et al (eds) *EU Between Federal Union and Flexible Integration, Interdisciplinary European Studies* (Cham: Palgrave MacMillan, 2023) 51–73.

¹⁰ Bakardjieva Engelbrekt (n 1).

of law crisis. Instead, a response has to be sought through careful calibrating, portioning and combining of the individual instruments so that each instrument is used at the right time and with clear idea about its potential strengths and weaknesses. A natural point of reference in this search for the right strategy are the lessons learned from past experiences. While the remarkable rule of law mobilization which we are currently observing, is a relatively recent phenomenon, the question of the rule of law in the context of European integration is far from new. It can be detected in the very early debates on the essence of the European Community and its legal order and in the well-known conceptualisation of European integration as Integration Through Law.¹¹ Importantly, since the beginning of the 1990s, the Union has been closely involved in the efforts to reinstate democracy and the rule of law in Central and Eastern Europe – initially, in the form of international assistance programmes, and then in the course of EU accession of these countries. This involvement has been a process of mutual learning, the full scale and implications of which are still to be appreciated.

In this contribution, I explore the question of what, if anything, can be learned from the Eastward Enlargement of the Union and the way the obligation of ensuring respect for the rule of law and judicial independence in the Central and Eastern European (CEE) candidate states was handled in this process. The reasons for looking closer into the Eastward Enlargement are multiple. First, although incidences of rule of law deterioration can be observed in many countries within and outside Europe¹², it is quite obvious that the risk for backsliding is more imminent in the new, still immature democracies from CEE that came out of the grip of authoritarian rule after the fall of the Berlin Wall in 1989. To be sure, there is a considerable variety in the political paths of the individual CEE Member States and not all of them are showing the same tendency of open disrespect for institutional checks and balances and for international commitments as Hungary and Poland. Yet, there seems to be broad agreement among initiated observers that the quality of democracy and the rule of law in the region is deteriorating.¹³

¹¹ M Cappelletti, M Seccombe and Joseph H. Weiler, *Integration Through Law: Europe and the American Federal Experience*, Vol. 1 Methods, Tools and Institutions (Berlin, Walter De Gruyter, 1986).

¹² In its annual report 'Freedom in the World 2023', Freedom House found that global freedom declined for the 17th consecutive year, where Russia's war of aggression on Ukraine constituted a particularly grave attack on freedom and human rights, available at: <https://freedomhouse.org/report/freedom-world/2023/marketing-50-years>. Still the 2023 report marked certain improvement compared to the report of 2020, when the organization warned that democracy and pluralism were under assault and noted that 'the reversal has spanned a variety of countries, from long-standing democracies like the United States to consolidated authoritarian regimes like China and Russia. See Freedom House, Freedom in the World 2020, available at: https://freedomhouse.org/sites/default/files/2020-02/FIW_2020_REPORT_BOOKLET_Final.pdf.

¹³ See the introduction by Cianetti et al to the special issue of *East European Politics* on 'democratic backsliding' in CEE: L Cianetti, J Dawson and S Hanley, 'Rethinking "democratic backsliding" in Central and Eastern Europe – looking beyond Hungary and Poland' (2018) 34 *East European Politics* 243. Cf also contributions by Dawson and Dimitrova, in the same special issue.

Secondly, EU policy in the field of the rule of law, in particular seen as a requirement vis-à-vis Member States, stems to a large extent from the process of Eastward Enlargement that has unfolded in the 1990s and the beginning of the 2000s. At this juncture, democracy, the rule of law and fundamental rights protection were set out unequivocally in the EU Treaties as shared values and conditions for Union membership. More generally, the evolving framework for ensuring respect for the rule of law and judicial independence in the Union has been noticeably influenced by the critique of double standards and the ambition of closing the gap between external and internal standards in this domain.¹⁴

Thirdly, in the context of Enlargement, EU institutions, notably the Commission, started to flesh out the broad concept of the rule of law through more detailed positive and negative requirements and obligations. Crucially, it began developing a toolbox for screening and assessing the state of the rule of law in individual candidate states, adjusting the various instruments in the toolbox as experience from their application accumulated. A closer insight into this process can thus, arguably, help improve the efficiency and effectiveness of current EU rule of law policy.

The chapter proceeds as follows: In the next section, I go back to the beginnings of European integration and enquire into the status of the rule of law as a Community/Union value in the early days of the European project. I then trace the growing formalization and codification of the rule of law in the EU legal framework and the Treaties, taking place largely in anticipation of the Union's Eastward Enlargement.

In a subsequent section I address the process of preparing the Candidate Countries (CCs) from Central and Eastern Europe (CEE) for accession into the Union, focusing on respect for the rule of law as part of the Copenhagen criteria for membership. Particular attention is paid to the evolving Commission toolbox of instruments for screening the status of the rule of law in the CCs and guiding them towards building the necessary safeguards for the protection of the rule of law and judicial independence in their national legal and institutional systems. After this review, the chapter turns to the crisis of the rule of law in some of the CEE Member States of the Union post accession. The current multi-track mobilisation of Union institutions to respond to the rule of law backsliding is assessed against the benchmark of the lessons learned in the Eastward

¹⁴ The link between rule of law policy in the EU and the Eastward Enlargement is widely acknowledged in the scholarly literature. See E Wennerström, *The Rule of Law and the European Union* (Uppsala, Iustus förlag, 2007); D Kochenov, *EU Enlargement and the Failure of Conditionality* (Alphen aan den Rijn, Kluwer, 2008); G de Búrca, 'Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union' (2003) 27(3) *Fordham International Law Journal* 679–714; W Sadurski, 'EU Enlargement and Democracy in New Member States', in W Sadurski, A Czarnota and M Kryiger (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht, Springer, 2006) 27–49; W Sadurski, 'Charter and Enlargement' (2002) (8)(3) *European Law Journal* 340–362; W Sadurski, 'Accession Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe' (2004) 10 *European Law Journal* 371–401; C Hillion, 'The Copenhagen Criteria and their Progeny' in C Hillion (ed), *EU Enlargement: A Legal Approach* (Oxford, Hart Publishing, 2004); C Hillion, 'Enlarging the European Union and Deepening its Fundamental Rights Protection' (2013) 11 *SIEPS European Policy Analysis*.

Enlargement. In a concluding section, the chapter identifies the challenges ahead, gauging the relative weight of different instruments and outlining possible strategies for rendering the enforcement of Member States obligations in the domain of the rule of law and judicial independence more effective.

2 The Rule of Law in the EU Legal Framework prior to Enlargement

In recent academic debate, it is argued that there is a sufficiently firm common understanding of the meaning and scope of the principle of the rule of law in the EU. According to Pech, ‘there is now a broad legal consensus in Europe on the core meaning of this principle, its minimum components, and how it relates to other key values such as democracy and respect for human rights’.¹⁵ While this statement may be correct as a reflection of the current state of affairs, at the time when the Eastward Enlargement first came into sight as a political option for the EU, the situation was quite different. As most commentators agree, there was at that juncture a relatively thin express normative basis for the rule of law as a condition for EU membership, and scarce detail as to the exact content of the rule of law as an EU law principle.¹⁶

Indeed, if we try to trace the evolution of the concept of the rule of law in Community/Union law, we must start by acknowledging that in the course of the four decades of legal history preceding the process of Eastward Enlargement the concept appears only rarely in legislative documents and in European Court of Justice (ECJ) jurisprudence.

2.1 Rule of Law in the Original Treaties

The original treaties of the European Communities contained no solemn declarations or formal commitment to the rule of law, democracy and fundamental rights.¹⁷ There is no consensus in the literature as to the reasons for this conspicuous silence. Some seek the explanation in the fact that the United Kingdom (UK) was not among the founding Members of the European Communities. Since ‘the rule of law’ is a very central concept in UK law, it is seen as not surprising that the concept does not appear in the founding Treaties of the European Communities, while, in contrast, it occupies a prominent place

¹⁵ L Pech and J Grogan, ‘Unity and Diversity in National Understandings of the Rule of Law in the EU’, *Reconnect*, WP 1 D, April 2020, available at <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf>, 6 (hereinafter ‘Unity and Diversity’); see also L Pech and J Grogan, ‘Meaning and Scope of the EU Rule of Law’, *Reconnect*, WP 7 D2, April 2020, available at <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf> (hereinafter ‘Meaning and Scope’).

¹⁶ See Kochenov (n 14); Wennerström (n 14); Hillion, ‘Enlarging the European Union’ (n 14) 10.

¹⁷ On the original provision of Art 31 ECSC Treaty and the controversies around the correct translation of the concept ‘respect du droit’ used therein, see L Pech, ‘The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox’ (2020) *Reconnect*, WP 7, available at <https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf> (hereinafter ‘The Rule of Law in the EU’) 7.

in the Statute of the Council of Europe (CoE) and the European Convention on Human Rights (ECHR).¹⁸ At the same time, it is argued that by defining the function of the ECJ as being to guarantee ‘that the law is observed’, the legal system of the EU has from its inception been solidly based on the rule of law. Certainly, the very existence of the ECJ and the bold scope of its jurisdiction, including a mandate to review the legality of the acts of EU institutions, are in themselves robust evidence of the importance of the rule of law in the legal and institutional system of the EU.¹⁹ However, this can hardly be equated to the prominent commitment to the rule of law, as, for example, in the Statute of the CoE, nor to an explicit requirement of respect for the rule of law addressed to the Member States.

A more plausible explanation for the silence is in my view to be sought in the different approaches to European cooperation represented by the two major European organisations established in the aftermath of the Second World War. Whereas the CoE was conceived as an intergovernmental organisation with the main mission of upholding human rights in its Member States, the European Coal and Steel Community and, later on, the European Economic Community (and Euratom) were set up as international organisations of a hybrid type, with a substantial degree of delegation of sovereignty to supranational institutions and centered around the idea of a Common Market. This approach, aptly referred to as ‘functionalist’, relies on achieving political unity through the logic of market integration.²⁰ It envisages pragmatic steps towards intertwining the economies of the Member States, while avoiding a debate over ‘the political’.²¹ If this view is correct, the absence of a reference to the rule of law in the original Treaties should not be seen as an unfortunate omission but rather as a conscious choice that followed logically from the model of European cooperation pursued by the Communities.

Certainly, the absence of an explicit rule of law clause in the original treaties did not mean that the founding members were tolerant or indifferent towards the rule of law. Quite to the contrary, the minimalist approach was partly possible due to the lack of sharp incongruences in the original Member States’ understanding of fundamental constitutional values.²² The traumatic heritage of the Second World War, and the living example of the detriments caused by

¹⁸ See Art 3 Statute of the Council of Europe. As to the corresponding German and French concepts, namely *Rechtsstaat* and *état du droit*, the emphasis on statehood in these concepts is considered a plausible explanation for their avoidance in the founding Treaties and in subsequent ECJ jurisprudence. See Pech, ‘The Rule of Law in the EU’ (n 17) 8–9.

¹⁹ See Pech, ‘The Rule of Law in the EU’ (n 17) 8 et seq; Wennerström (n 14).

²⁰ See EB Haas, *Beyond the Nation-State: Functionalism and International Organization* (Stanford, CA, Stanford University Press, 1964).

²¹ As succinctly put by Grabbe, ‘This is the heart of the “Monnet method” of European integration: focus on practical economic integration and knit interests together so that people will stop paying so much attention to nationalist claims.’ See H Grabbe, ‘Six Lessons of Enlargement Ten Years on: The EU’s Transformative Power in Retrospect and Prospect (2014) 52 (Annual Review) *Journal of Common Market Studies* 46.

²² See I Damjanovski, C Hillion and D Preshova, ‘Uniformity and Differentiation in the Fundamentals of EU Membership: The EU Rule of Law Acquis in the Pre- and Post-accession Contexts’ (2020) *EU IDEA Research Papers No 4*, available at www.iai.it/sites/default/files/euidea_rp_4.pdf, 5.

authoritarian rule in the European countries within the Soviet sphere, had the effect of limiting, if not eliminating, the basis for political movements questioning the values of democracy, the rule of law and human rights in Western Europe. Moreover, all founding Member States of the European Communities were Members of the CoE. One might say that the rule of law, understood as a fundamental limitation on the exercise of state power, had been taken for granted among existing Member States.²³ The fact that countries like Greece, Spain and Portugal, which went through periods of military juntas and authoritarian rule in the decades following World War II, were not considered for membership until their clear return to democracy and the rule of law, also testifies to this tacit assumption.

2.2 *The Rule of Law in the Court's Jurisprudence*

Given the absence of an explicit reference to the rule of law in the original Treaties, it famously fell to the ECJ to painstakingly educe the rule of law as a general principle and undergirding value of the EU legal order. Some scholars see already the seminal judgments of *Costa v ENEL* and *Van Gend en Loos* as early recognition of a vision of the Communities as bound by law and constituting a separate legal order with a clear hierarchy of norms, where EU law prevails over conflicting rules of national law and citizens can derive individual rights directly from EU law and enjoy judicial protection of these rights.²⁴

The Court also gradually developed other principles that constitute essential components of the rule of law, such as the principles of legality, legal certainty, separation of powers (or, in the EU context, of functions), prohibition of retroactivity, and judicial review of administrative acts.²⁵ Notably, in a line of creative jurisprudence, the ECJ recognised fundamental rights as constituting general principles, and thus an integral part, of EU law. In early cases such as *Stauder* and *Internationale Handelsgesellschaft*, the Court developed its sophisticated methodology of identifying individual fundamental rights in the common constitutional traditions of the Member States or in the ECHR, to which all Member States were signatories, and elevating these rights to general principles of EU law.²⁶ But it was in the seminal decision in '*Les Verts*' that the ECJ recognised most prominently the principle of the rule of law as a general principle of EU law. The Court famously referred to the principle of legal community (*Rechtsgemeinschaft*), or a community under the rule of law.²⁷

²³ *ibid.*

²⁴ See Wennerström (n 14) 117 et seq. Cf Case 6/64 *Costa v ENEL*, ECLI:EU:C:1964:66; Case C-26/62 *Van Gend & Loos*, ECLI:EU:C:1963:1.

²⁵ For a detailed account of the ECJ case law, see Wennerström (n 14) 117 et seq; see also Pech (n 17).

²⁶ Case C-29/69 *Stauder*, ECLI:EU:C:1969:57 and Case C-11/70 *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114. For the methodology, see de Búrca (n 14); and K Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 *ICLQ* 873.

²⁷ Case C-294/83 *Parti écologiste 'Les Verts' v Parliament*, ECLI:EU:C:1988:94. See also Opinion 1/91 *EEA*, ECLI:EU:C:1991:490; cf Pech (n 17) 10.

No doubt, this jurisprudence contributed greatly to consolidating the self-perception and the international standing of the European Community as a Community of law, cherishing the principles of legality and the rule of law and guaranteeing respect for fundamental rights. Based on the analysis of individual Treaty provisions and of relevant ECJ case law, scholars have argued that the concept of the rule of law was at the end of the 1980s considerably developed in Community law, in both its formal and its substantive dimensions, as a declaratory and a procedural concept.²⁸ However, it is also admitted that the case law has predominantly been spurred by concerns about safeguarding the supremacy of EU law, rather than by substantive ambition about raising the level of respect for the rule of law and human rights in the Community. As aptly formulated by de Búrca, the jurisprudence has been ‘reactive’, and one might even say defensive, in character.²⁹ On the other hand, the Court has been rather cautious about acknowledging general Community competences in the field of human rights.³⁰ As a consequence, Member States have been subject to EU or ECJ jurisdiction in matters of the rule of law and fundamental rights only ‘in highly circumscribed contexts’.³¹

In sum, the approach of the Communities/Union to the constitutional question, including the rule of law and fundamental rights, has from the outset been one of minimalism and incrementalism. Whenever the rule of law and fundamental rights were pronounced as general principles, this was done indirectly, with reference to the common constitutional traditions of Member States or to the ECHR, and in a reactive, or defensive manner. The tension has systematically stemmed from Member States’ claiming higher levels of protection of constitutional principles and fundamental rights in their national constitutional legal order, and voicing concerns that the same high levels could not be guaranteed by the EC/EU. As we shall see in the following, exactly the reverse concern has become the driving force behind the next stage in the development of the rule of law in the Union, a development propelled largely by the prospect of Eastward Enlargement of the Union.

3 Reinforcement of the EU Rule of Law Framework in Anticipation of Enlargement

Against the background sketched out above, it is fair to say that the principle of the rule of law made its true entry into the Treaties and EU constitutional law only after the collapse of communism in CEE and when the prospect of a closer relationship with the CEE countries came within reach. Prior to that, the contours of the rule of law as a general principle were rather fuzzy. The situation changed quite dramatically in the decade following the fall of the Berlin Wall.

²⁸ On the different dimensions of the rule of law, see Wennerström (n 14) 154–57.

²⁹ de Búrca (n 14).

³⁰ See Opinion 2/94, ECLI:EU:C:1996:14, para 27.

³¹ de Búrca (n 14). For an even more fundamental critique on the rule of law in the EU see D Kochenov, ‘The Missing Rule of Law’, in C Closa and D Kochenov (eds) *Reinforcing Rule of Law Oversight in the EU* (Cambridge, Cambridge University Press, 2016) 290.

3.1 *The Entry of the Rule of Law into the Treaties*

The first mention of the rule of law in the Treaties was in the Treaty of Maastricht, where the principle was expressly acknowledged as an EU concept. Member States officially confirmed ‘their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’.³² However, this was done only in the Preamble, in relatively vague or, to use Pech’s word, ‘symbolic’, terms, and with no specific definition or obligations attached.³³ It is notable that in the Preamble, the clause on the rule of law came immediately after a clause recalling ‘the historic importance of the ending of the division of the European continent’. Thus, the link between elevating the status of the rule of law in the Union and the end of the Cold War was openly acknowledged.

Surely, at the time of drafting of the Maastricht Treaty, the exact fate of the relationship between the former socialist states from CEE and the EU was still not conclusively decided. In a Commission Communication from August 1990, the Commission outlined the immediate way forward as being one of Association Agreements with the countries of CEE.³⁴ Still, the prospect of opening the EU to new members from CEE was already on the table, something confirmed by the fact that a special article on the procedure for accepting new members was included in the Treaty on European Union (TEU) (Article O Maastricht Treaty, now Article 49 TEU). More importantly, the context in which the Maastricht Treaty was drafted was starkly shaped by the dramatic events in CEE. It was exactly within this historical timespan that democracy, the rule of law and fundamental rights received world-wide attention and recognition as never before.³⁵

Against this backdrop, it is surprising that while the Maastricht Treaty included a provision on accepting new Members, clearly in anticipation of such applications from the CEE countries, it did not set out any specific criteria for membership and did not mention the rule of law as such a criterion. This only comes to confirm that the rule of law has been a concept in the making, the content and importance of which were evolving in parallel with the process of Eastward Enlargement.

3.2 *The Crucial Role of the Copenhagen Criteria*

Only a year after the entry into force of the Maastricht Treaty, at the Copenhagen European Council of June 1993, the EU declared that ‘the associated countries

³² See Maastricht Treaty, Preamble, third indent.

³³ Pech (n 17) 12.

³⁴ Communication from the Commission to the Council and the Parliament on Association agreements with the countries from Central and Eastern Europe: a general outline, COM(90) 398 final, 27 August 1990, Brussels.

³⁵ See Conclusions of the Dublin European Council of 20 April 1990. See also the Paris Charter signed in 1990 by the Heads of State or Government of the CSCE (Commission on Security and Cooperation in Europe) states, further committing themselves to democracy, the rule of law, and respect for human rights and fundamental freedoms.

in Central and Eastern Europe that so desire shall become members of the European Union'. The Council also famously defined the conditions required for the associated countries to join the Union. These conditions, or criteria are divided into three groups:

- (a) Political conditions, requiring that 'the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities';
- (b) Economic conditions, requiring 'the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union';
- (c) *Acquis* criterion, that is, the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.³⁶

Importantly, the Madrid European Council in 1995 complemented the third criterion by stressing the necessity not only of formally transposing the *acquis*, but also of implementing it effectively through appropriate administrative and judicial structures. Some analysts treat this addition as a separate, fourth criterion requiring (d) institutional and administrative capacity to implement the *acquis*.³⁷ This is in my view a useful distinction, since the organisation of administrative and judicial structures had been, at least at the beginning of the accession process, a matter reserved for the Member States, with very few binding *acquis*.

Students of EU Enlargement have been adamant to point out that the Copenhagen criteria should not be regarded as a novelty at the time but rather as a consolidation and codification of the experience and practice of previous enlargements.³⁸ At the same time, it is also acknowledged that among the criteria there were many new elements in both substantive and institutional terms. For one, the political conditions for membership were formulated in greater detail, extending to areas where the Union itself had at the time limited competence (see below). Secondly, they were set out in more straightforward, even 'command' terms.³⁹ Thirdly, whereas in previous accessions, candidate states were expected to fulfil the EU admission conditions without much interference from the Union, in the conclusions from the Copenhagen European Council the EU declared its intention to engage actively in preparing the CCs for membership, steering and monitoring the process.⁴⁰ This design of the accession process had the effect of giving considerable leverage to the political and economic conditions for membership.

³⁶ Copenhagen European Council, Presidency conclusions.

³⁷ See Wennerström (n 14) 64.

³⁸ See Hillion, 'The Copenhagen Criteria and their Progeny' (n 14) with reference to the Declaration on Democracy, Annex C, Copenhagen European Council, Final text, 20 April 1978, *EC Bulletin* 3-1978; cf Kochenov (n 14) 24. See also Pech and Grogan, 'Meaning and Scope' (n 15) 7.

³⁹ See Hillion, 'The Copenhagen Criteria and their Progeny' (n 14) 3, 10–11.

⁴⁰ Hillion, 'Enlarging the European Union' (n 14) 3; R Janse, 'Is the European Commission a Credible Guardian of the Values? A Revisionist Account of the Copenhagen Political Criteria during the Big Bang Enlargement' (2019) (17)(1) *I.CON* 43, 47.

3.3 *Increased Formalisation of the Principle of the Rule of Law in the Treaties*

The prominent place awarded to the rule of law in the Copenhagen criteria had notable political repercussions for the Union. Very soon, the principle found expression in the texture of the EU Treaties. The Amsterdam Treaty, which was signed in 1997, when the official negotiations on the CEE countries' membership of the EU had already taken off, stipulated this time more clearly in the Treaty text that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the *rule of law*, principles that are common to the Member States (Article F(1), now Article 2 TEU, considerably amended, *my italics*).

The most obvious provision preparing for the future Eastward Enlargement was the amended Article O (now Article 49 TEU), which through reference to Article F(1) finally cemented the political conditions for membership as known from the Copenhagen criteria, namely democracy, the rule of law and fundamental rights (minus minority rights), elevating them into Treaty requirements. At this juncture, it was also considered important to introduce an insurance against possible future democratic and rule of law backlash in a Member State through the setting up of a sanctioning mechanism in case of serious and persistent breach of the values and principles laid down in Article F(1) TEU (see Article F.1, now Article 7 TEU).

As acknowledged by the Commission in subsequent accession documents, through the Treaty of Amsterdam 'the political criteria defined at Copenhagen were essentially enshrined as constitutional principles in the Treaty on European Union'.⁴¹ Scholars speak of codification of the Copenhagen criteria.⁴²

3.4 *Consolidating Fundamental Rights Protection in the Union*

Similar and even more revolutionary development can be traced in the closely related domain of human rights and fundamental freedoms. The Eastward Enlargement of the EU can also in this area be seen as providing a powerful impetus for the advancement of a genuine human rights agenda for the Union. The evolution followed a parallel trajectory to the one regarding the rule of law, anchoring the commitment to fundamental rights in the Treaties as a general principle of EU law through Article F Maastricht Treaty (now Article 6 TEU), codifying in this way the doctrine developed by the ECJ, on the one hand, and setting it out as a condition for membership through the Amsterdam Treaty, on the other. These changes were clearly intended to 'signal to the candidate countries that membership comes out of the question before it is certain that they have legislation which protects and guarantees citizens' rights'.⁴³

⁴¹ See eg Regular Report Bulgaria (2002), at 18, note 3.

⁴² de Búrca (n 14) 696; cf Hillion, 'Enlarging the European Union' (n 14) 3.

⁴³ See speech by Sweden's Minister of Justice Laila Freivalds, 'Rule of Law in an Enlarged European Union' (1998) *Europarättslig tidskrift* 15; in a similar sense, Sadurski, 'Accession Democracy Dividend' (n 14).

Decisively, the Union's commitment to human rights and fundamental freedoms received solemn recognition and reinforcement through the European Union Charter of Fundamental Rights (hereinafter, CFR or the Charter) signed in 2000. This move was undertaken clearly as a safeguard and insurance against unwanted backlash in the CEE candidate countries post accession. Less conspicuously, it was prompted by the criticism that had started to mount against EU institutions for applying double standards in the ongoing Enlargement process, setting stricter requirements in respect of the CCs than what the Union could demand from its own Member States.⁴⁴ The Charter can thus be conceived as a step towards strengthening the integrity and trustworthiness of the Union's fundamental rights policy, closing the gap between external and internal standards.⁴⁵

Still, despite the bold step that the Charter undoubtedly constituted in the direction of bolstering fundamental rights in the EU, it did not fully succeed in placing internal and external standards on the same level. As is well known, the scope and impact of the Charter are limited in several respects, notably through the horizontal clauses confining the application of the Charter to the European institutions and to Member States only when they apply and implement EU law, and assuring that it does not accord new powers to the Union.⁴⁶

4 Screening the Candidate Countries for Rule of Law Compliance

As seen in section 3 above, the Eastward Enlargement worked as a powerful force, raising the status and visibility of the rule of law in the constitutional framework of the EU. The question to be discussed in this section is how the Union approached the rule of law in its pre-accession policy; a discussion which inevitably is centered around the notion of 'conditionality'.

4.1 General Approach: The Rise of Rule of Law Conditionality

In the legal and political science literature on EU Enlargement, the concept 'conditionality' has acquired almost canonical status.⁴⁷ Interpreted narrowly, conditionality implies that the CEE countries are allowed to become Members only after certain political and legal conditions are fulfilled. Conceived more

⁴⁴ For the academic critique, see J Weiler and P Alston, 'An "Ever Closer Union" in Need of a Human Rights Policy' (1998) 9 *EJIL* 658; A Williams, 'Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?' (2000) 25 *EL Rev* 601; cf de Búrca (n 14).

⁴⁵ See Sadurski, 'Charter and Enlargement' (n 14). In de Búrca's words, 'The EU ... has been hoisted on its own petard.' See de Búrca (n 14) 680.

⁴⁶ According to de Búrca, a number of Member States met the prospect of having a full-fledged Union human rights policy with anxiety, and sought to limit the application of the Charter, see de Búrca (n 14) 702.

⁴⁷ On accession conditionality, see F Schimmelfennig and U Sedelmeier, 'Governance by Conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe' (2004) 11 *Journal of European Public Policy* 661; F Schimmelfennig and U Sedelmeier (eds), *The Europeanization of Central and Eastern Europe* (Ithaca, NY, Cornell University Press, 2005) 210–28.

broadly, conditionality represents the key component of EU institutions' approach to accession, seeking to engender change in the laws and institutions of the CCs by applying continuous pressure on them through a system of specific targets and tangible rewards, with the aim of bringing the countries closer to EU standards and requirements. The concept captures well the asymmetric relationship between the parties involved – the EU (the Commission) setting the conditions for entry 'into the club' and the CCs striving to meet those conditions.⁴⁸

The term 'conditionality' first entered the enlargement discourse with the conclusions of the Copenhagen European Council of 1993 and the stipulation of the Copenhagen criteria. The years before that, that is the initial phase in the relations between the CEE countries and the EU, had the character of a traditional diplomatic exchange. The emphasis had been on 'meetings of an advisory nature' and the tone – one of 'co-operation and assistance'.⁴⁹ Once the conditions for membership were set out in unambiguous and non-negotiable terms, the approach changed palpably, and the relationship became increasingly skewed and formalised.

Still, the true rise of conditionality is associated not with the Copenhagen criteria, but rather with the Commission Communication 'Agenda 2000' from 1997. In this document, the Commission presented a comprehensive vision for a reinforced pre-accession strategy.⁵⁰ The main tenet of the strategy was advancing conditionality by setting specific priorities and intermediate targets adapted to each CC's particular problems and challenges, and enhancing the scrutiny of these countries' progress towards meeting the Copenhagen criteria.⁵¹ Consequently, positive evaluation by the Commission became decisive for the start, and thereafter the progress, of accession negotiations. Most analysts therefore consider Agenda 2000 to be the point when rule of law conditionality 'acquired teeth' and a real 'bite'.⁵²

4.2 *The Toolbox of Conditionality: Regular Country Reports and Accession Partnerships*

The enhanced strategy comprised a myriad of documents and policy instruments, two of which stand out as particularly important: individual country assessments and Accession Partnerships.⁵³

⁴⁸ On asymmetry in EU accession policy, see K Engelbrekt, 'Multiple Asymmetries: The European Union's Neo-Byzantine Approach to Eastern Enlargement' (2002) 39 *International Politics* 37.

⁴⁹ Williams (n 44).

⁵⁰ See European Commission, 'Part II: The Challenge of Enlargement' and 'Enhanced Pre-accession Strategy', in Agenda 2000 Volume I – Communication: For a stronger and wider Union, COM(97) 2000 final, Brussels, 15 July 1997.

⁵¹ See previously the Conclusions of the Madrid European Council, Bulletin of the European Communities, No 12/1995. See also Williams (n 44) 608.

⁵² Williams (n 44) 608; see also Sadurski, 'Accession Democracy Dividend' (n 14) 375.

⁵³ For the different types of documents that made the Copenhagen principle workable, see Kochenov (n 14) 76-77.

The Commission kept producing regular and individualised assessments of the level of compliance of the CCs with the criteria for membership throughout the pre-accession process. The first round of such assessments comprised the so-called Country Opinions attached to Agenda 2000, giving an initial appraisal of the situation in the applicant countries, also in respect of the political conditions for accession. These initial opinions were then followed up by annual country reports (so called Regular Reports (RRs)) measuring the applicant countries' progress toward meeting the conditions for membership. The RRs were drawn up and published simultaneously for all CCs, introducing in this way a strong comparative and competitive element in the procedure and amplifying the level of scrutiny and pressure on the applicants.

The second instrument in the 'toolbox' of conditionality was the so-called Accession Partnership (AP). Such partnerships, between the Council, on the one hand, and each of the CCs, on the other, were signed following a proposal from the Commission, and were thereafter regularly revised and updated. The instrument allowed the Commission to break down the otherwise daunting task of preparing the CCs for membership into more specific short-term and intermediate objectives, and to adapt its assessments and recommendations to the situation and performance of each applicant.

The most important dimension of the instrument was, however, that it offered a framework for enforcing 'strict conditionality' in allocating technical and financial assistance to the CCs.⁵⁴ Throughout the pre-accession process, the CEE countries had been able to benefit from considerable financial and structural aid, notably through the PHARE programme, but also through twinning programmes and access to Community programmes such as SAPARD.⁵⁵ With the introduction of APs this much-needed assistance was made conditional upon compliance with the objectives and commitments specified in the APs. Failure to respect these conditions and commitments could lead to a decision by the Council to suspend financial assistance.⁵⁶ Thus, the instrument gave EU institutions, and the Commission in particular, powerful leverage in micro-steering reforms in the CCs and enforcing accession conditionality. According to Kochenov, the APs laid the ground 'for a fully-fledged conditionality of sticks and carrots'.⁵⁷

A less-observed aspect of the AP instrument is that it was conceived, as the name indicates, as a partnership, that is, as a framework of common engagement, with priorities and precise objectives set up in collaboration between the EU and the CCs. While conditionality is usually analysed as building on one-sidedness

⁵⁴ See Agenda 2000 (n 50) 53.

⁵⁵ The assistance was in Commission statements compared to the Marshall Plan. For a critical view on this proposition, see M Ivanova, 'Why There Was No "Marshall Plan" for Eastern Europe and Why This Still Matters' (2007) 15(3) *Journal of Contemporary European Studies* 345.

⁵⁶ See Art 4, Council Regulation (EC) No 622/98 on assistance to the applicant States in the framework of the pre-accession strategy, and on the establishment of Accession Partnerships.

⁵⁷ Kochenov (n 14) 74. The Commission admits that such linking of individual countries' progress with the degree of financial assistance is quite unprecedented; however, it defends this approach by citing the enormous task involved in preparing the CCs for membership. See Agenda 2000 (n 50) 89.

and asymmetry, the active engagement of EU institutions in preparing the CCs contributed to gradually transforming Enlargement into a common project in which both the CCs and the Union institutions, notably the Commission, had a stake.⁵⁸

4.3 *Methodology of Assessment*

In Agenda 2000, the Commission described the methodology applied for the individual country assessments as going beyond formal indicators and seeking to establish how democracy and the rule of law ‘actually work in practice’.⁵⁹ At the same time, when looking at the sources of information on which the Commission relied, it appears that the assessment has been ‘largely paper based’.⁶⁰ Central place among the sources was awarded to a questionnaire that was sent out to each of the applicant countries. According to commentators who have looked closely into the process, the questionnaire was composed of numerous but often rather scattered and arbitrary questions, which were then left to the self-assessment of the candidate states’ governments.⁶¹ Other sources that are named explicitly are assessments by the Union Member States, European Parliament reports and resolutions, and more broadly ‘the work of various international organisations, non-governmental organisations and other bodies’.⁶²

The questionnaire method was complemented by bilateral meetings held with each of the applicant countries. The information gathered through those meetings is apparently processed in an informal manner, without employing any quantitative or qualitative methods established in social sciences.⁶³

4.4 *The Rule of Law as a Moving Target*

The preceding admittedly cursory review of EU’s pre-accession strategy and the methodology for assessment provides an insight in the modalities of the Commission’s rule of law screening and assessment exercise. However, the most important variable in this assessment is the very benchmarks against which the performance of the CCs was measured. Following the Copenhagen European Council, it was clear that commitment to the rule of law was one of the political

⁵⁸ The perception of Enlargement as a joint project is visible in other Commission documents as well. See eg European Commission, ‘Making a Success of Enlargement’, Strategy Paper and a Report, COM(2001) 700 final, Brussels, 13 November 2001, 5. See also S Grimm, ‘Democracy promotion in EU enlargement negotiations: more interaction, less hierarchy’ (2019) 26 *Democratization* 851, who argues that the process of accession is more interactive and less one-sided than usually believed.

⁵⁹ See Agenda 2000 (n 50) vo. 1, 42.

⁶⁰ See Williams (n 44) 609. See also Wennerström (n 14) 179 et seq.

⁶¹ See Janse (n 40) 54–55.

⁶² Agenda 2000 (n 50) 39; cf Williams (n 44) 609.

⁶³ For criticism on this point, see the analysis by K Nicolaïdis and R Kleinfeld, ‘Rethinking Europe’s “Rule of Law” and Enlargement Agenda: The Fundamental Dilemma’ (2012) *NYU School of Law, Jean Monnet Working Paper Series*, available at www.JeanMonnetProgram.org.

conditions for membership of the Union. Yet, the precise meaning and contents of this condition remained vague. According to one of the early critics of EU enlargement policy and rule of law conditionality, the concepts of the rule of law and democracy were undetermined in the EU legal framework and thus open to interpretation and contestation. They were ‘almost impossible to measure’ – something making their use as conditions for membership precarious.⁶⁴

Given this indeterminacy, the role of EU institutions, and notably the Commission, for defining the standards, establishing compliance thresholds and assessing individual CCs’ performance looms large. The Commission was well aware of the exceptional character of its mission. In Agenda 2000, it described its task not merely as difficult, but as unprecedented. The two main challenges as the Commission saw it were (i) that the broadly defined political criteria went far beyond the *acquis communautaire* and (ii) that the *acquis* had expanded since previous enlargements, including, among others, the area of justice and home affairs (JHA).⁶⁵ Both concerns were highly relevant for the rule of law component of political conditionality.

Concerning the first point in particular, at the beginning of the accession process there was little in terms of binding EU *acquis* in the area of the rule of law, as well as concerning administrative and judicial structures. Importantly, given competence limitations stemming from the principle of conferral, the Union was not considered to be itself in a position to set out general requirements as to the regulation of these domains in the EU Member States.⁶⁶ Correspondingly, there were no tools for systematic monitoring and assessment of these fundamental features of Member States’ constitutional orders. Hence, the Enlargement process inevitably had to be one of learning by doing, and the resulting methodology - vacillating and eclectic.

Probably the most fundamental challenge to the accession process was that the legal and administrative systems in the CCs were in a process of major rehaul as part of their post-communist transformation. This process ran parallel to EU accession, which made keeping track of relevant legislation and practice difficult. The Commission thus found itself in the precarious position of having considerable leverage in shaping rule of law institutions and legislative frameworks in the CCs, while having no firm ground for offering advice and guidance.

The EU institutions approached the challenges in a pragmatic manner. The Commission proceeded to put more flesh on the bones of political conditionality through general policy documents, such as Agenda 2000, composite and strategy papers, as well as country-specific documents such as APs and RRs. The screening and assessment documents were typically structured following the Copenhagen criteria, namely considering the rule of law (i) as constituting a political condition for membership, (ii) as being decisive for the administrative and judicial capacity of the candidate states, but also gradually as (iii) binding *acquis* as the Union advanced its competence within the area of Justice and

⁶⁴ See Kochenov (n 14) 2.

⁶⁵ Agenda 2000 (n 50) 39.

⁶⁶ See de Búrca (n 14); Kochenov (n 14) 80–81.

Home Affairs (JHA). Given the fact that these areas of scrutiny were in constant flux, a dividing line between them was not always easy to draw.⁶⁷

4.4.1 The Rule of Law as Part of the Political Conditions for Membership

Concerning the political criterion for membership, Agenda 2000 drew up three thematic fields to be examined under this point:

- (a) democracy and the rule of law;
- (b) human rights; and
- (c) respect for minorities.

Within the rule of law field, on the basis of the RRs, scholars elicit five main areas that were part of the Commission's scrutiny: (i) supremacy of law, (ii) the separation of powers, (iii) judicial independence, (iv) fundamental rights and (v) the fight against corruption. It has been argued that these areas broadly correspond to the rule of law concept as it had evolved in the internal legal order of the Community/Union, probably with the exception of the fight against corruption, which was still a novel domain for the EU.⁶⁸ Yet it is also acknowledged that the Commission never ventured to offer an analytical definition of the rule of law. If anything, a definition could be derived from the individual elements and indicators included in the RRs, but there was no attempt to explain how these elements fit together into a coherent concept.⁶⁹

In the individual country Opinions attached to Agenda 2000 and the subsequent RRs, the rule of law was mostly analysed through the main institutions representing the different branches of power, principally the executive and the judiciary in the respective state. The Opinions contained descriptive details about the organisation of public administration, the laws governing civil service and the organisation of the judiciary. Particular attention was paid to the relevant institutional structures, such as constitutional courts, ombudsmen, supreme courts, the hierarchy of the court system, the position of the public prosecution, etc.

4.4.2 The Rule of Law as Part of Administrative and Judicial Capacity

The second basis for the Commission's scrutiny of the rule of law in the CCs was the fourth Copenhagen criterion, putting emphasis on the capacity of administrative and judicial structures to apply the *acquis*. Scrutinising the rule of law under this criterion highlighted its importance not only as a political, but also as a highly pragmatic condition of vital importance for the functioning of all other Union policies, and notably for giving full effect to the Internal Market *acquis*.⁷⁰

⁶⁷ See Wennerström (n 14) 179.

⁶⁸ *ibid* 213.

⁶⁹ *ibid* 180. On the EU's reluctance to conceptualise the rule of law, see Nicolaïdis and Kleinfeld (n 63) 16. See also Kochenov (n 14) 110.

⁷⁰ See European Commission, White Paper, COM(95)163 final, section 2.30.

Throughout the Enlargement process, the ‘capacity’ criterion has been used as a basis for demanding substantial reforms of the public administration and the judiciary in the CCs, with a view to making them independent, professional, accountable, and up to the task of applying the *acquis* and participating in processes of administrative and judicial cooperation.⁷¹ Since the institutional structure of public administration and the judiciary, as well as enforcement, was at the time of Enlargement largely governed by the principle of national procedural and institutional autonomy, requirements under this point constituted another way of expanding the external mandate of the Commission vis-à-vis the CCs beyond the scope of its internal mandate in respect of the Member States.⁷²

4.4.3 From Political Condition to Binding Rule of Law *Acquis*

Finally, with the advancement of European integration, specific EU rules and standards relating to certain aspects of the rule of law (for instance concerning the judiciary, or the fight against corruption) were gradually enshrined in the Treaties, in the CFR or in legislative acts, thus becoming part of the increasing corpus of binding EU *acquis*. For instance, with the Amsterdam Treaty, the Union policy in the area of JHA moved from the third to the first pillar as defined by the Maastricht Treaty, opening for new legislative instruments and requirements, and formally creating the Union’s area of freedom, security and justice (AFSJ). Development in this policy area intensified with the Tampere and Haag programmes of 1999 and 2004.⁷³ This internal development translated almost immediately into changes in EU Enlargement policy, transforming certain issues from political conditions for membership into binding *acquis* forming novel chapters of the negotiations framework.

4.4.4 External Sources for Rule of Law Assessment

Over and beyond the three internal bases for the Commission’s rule of law assessment of the CCs, and partly due to the rather limited and vague content of the requirements derived on this ground, the Commission has been working with various external sources of authority. The most natural such sources have emanated from the CoE’s work in the field of the rule of law and fundamental rights. Although the CoE is only occasionally mentioned in EU pre-accession documents, at the time the Union embarked on its Eastward Enlargement, the CoE had just finalised, or was in the process of finalising, its own enlargement to the East, involving massive screening of applicant states and assessment of their eligibility for membership based on adherence to democracy, the rule of

⁷¹ See eg A Dimitrova, ‘Europeanisation and Civil Service Reform in Central and Eastern Europe’ in F Schimmelfenning and U Sedelmeier (eds), *The Europeanisation of Central and Eastern Europe* (Ithaca, NY, Cornell University Press, 2005) 84.

⁷² See M Avbelj ‘National procedural autonomy: concept, practice and theoretical queries’ in A Lazowski and S Blockmans (eds), *Research Handbook in EU Institutional Law* (Cheltenham, Edward Elgar, 2016) 421.

⁷³ See HE Hartnell, ‘EUstitia: Institutionalizing Justice in the European Union’ (2002-2003) 23 *Northwestern. Journal of International Law and Business* 65.

law and respect for fundamental rights.⁷⁴ The CoE could claim expertise and authority in the field, and could in many respects be considered the antechamber to the EU.⁷⁵ Importantly, the CoE had been quick to establish the Venice Commission on Democracy Through Law and a plethora of informal expert networks that provided valuable normative input regarding rule of law and fundamental rights standards, also in the course of EU Enlargement.⁷⁶ Given the considerable synergies between the CoE and the EU in respect of their policies vis-à-vis the CEE, steps towards formalizing and structuring the cooperation between the two organisations were gradually undertaken.⁷⁷

Summing up, the evolution of EU's pre-accession rule of law policy suggests that the policy took shape somewhat hesitantly and intuitively, but gradually gained momentum and was equipped with increasingly powerful tools for inducing follow-up and compliance on the part of the CCs. The strong attraction of EU membership in combination with non-trivial financial and technical assistance coupled with short-term and medium-term targets, has given conditionality a powerful leverage in steering law and institution building in the CEE countries. At the same time, the content of the rule of law standard that the Union projected has remained poorly defined, relying on external sources for filling the gaps.

5 A Closer Look at Judicial Independence as Part of Rule of Law Reform

The judiciary is one of the three branches of power included in the EU assessment of political conditionality, emphasised in the pre-accession strategy as a central institution for guaranteeing the rule of law in the CCs. The importance of an independent and efficient judiciary for the success of democratic transition in the CEE countries and for their membership of the EU had become apparent relatively early on in the Enlargement process.

As in many other respects, the challenge lay in the fact that EU accession ran parallel to a comprehensive transformation seeking to recast the post-communist judiciary in the CEE countries. The legacies from decades of monolithic authoritarian rule, with no conception of a separation of powers whatsoever, had left a heavy mark on the judicial systems of these countries. The judiciary was typically perceived as part of the ruling elite, wanting in both competence and

⁷⁴ On the screening procedure of the Parliamentary Assembly of the Council of Europe see T Kleinsorge (ed), *Council of Europe* (Alphen aan den Rijn, Kluwer Law International, 2015) 85 et seq.

⁷⁵ See the Council of Europe's self-description at www.coe.int/en/web/yerevan/the-coe/about-coe/overview. See also D Tarschys, 'The Council of Europe as an Antechamber of the EU', in: Bakardjieva Engelbrekt et al (eds) *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Oxford, Hart Publishing, 2021) 143-146.

⁷⁶ On the role of the Venice Commission, see I Cameron, 'The Role of the Venice Commission for Strengthening the Rule of Law' in Bakardjieva Engelbrekt et al (eds) *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Oxford, Hart Publishing, 2021), 147-180.

⁷⁷ See Joint Declaration Council of Europe and the European Commission, 2001. Cf D Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Farnham, Ashgate, 2010) 62.

integrity,⁷⁸ making it ill-fit for the needs of a democratic society with an open market economy. Therefore, in all CCs, thorough institutional reforms of the judicial branch were rolled out after the collapse of the old regime. Importantly, the judiciary had to be placed on a new footing, with constitutional and institutional guarantees of independence and responsibility.

This dynamic made it challenging for the European institutions to actually assess progress. The task of steering judicial reform was further confounded by the fact that formal constitutional assurances often proved rather ephemeral, as courts were drawn into fierce battles for political control and ensuing attempts at tweaking the institutional design of the judiciary to suit the interests of changing governments. In these highly politicised struggles, European institutions often assumed the role of unwilling arbiters, expected to pronounce a verdict as to the compatibility of intended reforms with European standards.⁷⁹

5.1 Between Judicial Independence and Judicial Accountability

In terms of substance and guiding principles, initially, strong emphasis was put on judicial independence in the context both of post-communist transformation and of Enlargement.⁸⁰ This emphasis is not surprising. It is widely noted in the literature on democratic transition that reforms of the judiciary following periods of authoritarian rule almost exclusively focus on securing judges' independence from political influence in their substantive decisions. Security of tenure and insulation from the executive appear paramount from this perspective.

Yet the process has been convoluted to say the least. The obvious challenge was having to carry through a major rehaul of the judicial system with staff trained and socialised in the profession during the times of authoritarian rule, when direct intervention in the work of the judiciary was commonplace. In well-established democracies, judicial independence builds on hard-won trust in the competence, professional ethic and integrity of judges. It is often undergirded by long legacies of a judiciary that is cognizant of the enormous responsibility falling on its institutional shoulders. In the transition democracies of CEE, such professional ethic and integrity were in scarce supply. Therefore, as the reform process evolved, there was an increasing need to complement the guarantees for judicial independence with mechanisms for ensuring the efficiency and quality of the administration of justice.

5.2 The Challenge of Eliciting an EU Standard for Judicial Governance

The dilemma for EU institutions was that, in a way similar to that with the general rule of law criterion, there were, prior to the process of Eastward Enlargement, hardly any EU rules on the organisation of the judiciary in the Member States. Although the ECJ had started to develop doctrines of effectiveness and equivalence of national remedies and procedures for ensuring

⁷⁸ See Damjanovski et al (n 22) 5.

⁷⁹ For analysis of some of these challenges of judicial reform in CEE see Piana (n 77).

⁸⁰ Piana (n 77) 54, calls judicial independence 'the most evaluated aspect of judicial systems'.

the *effet utile* of EU law, the principle of the procedural and institutional autonomy of the Member States was still well acknowledged.⁸¹ The scarce case law developed in the context of the preliminary reference procedure, defining the concept of “a court or tribunal of a Member State” as set out in Article 267 TFEU, certainly contained references to judicial independence. The interpretation has, however, been guided not by the ambition of setting out standards for judicial independence, but rather by the telos of Article 267, seeking to guarantee a broad right of national judicial bodies of all kinds to put questions before the CJEU, and participate in the judicial dialogue.⁸²

Thus, in the course of preparing the CEE countries for EU accession, standards had to be formulated without a blueprint. At the same time, this domain was undergoing a dynamic evolution, partly through Treaty changes and partly through new and expanding EU law and policy. Consequently, the area of judicial governance experienced the same, and probably even more visible, fluctuations as other rule of law domains.

5.2.1 Internal bases for assessment

In terms of basis for assessment, the judiciary was first and foremost scrutinized under the first Copenhagen criterion, i.e. as a political condition for accession.⁸³ The emphasis here was placed principally on providing institutional guarantees for judicial independence. Given the centrality of the separation of powers under the rule of law notion, ensuring the insulation of the judiciary from political influence, and mostly from the executive, has been treated as paramount. In the RRs, the Commission proceeded along two main tracks. The first track concerned the legislative foundations of the judiciary, that is, verifying that basic legislation on the organisation of the judiciary and administration of justice was in place. The second track related to the institutional framework for the judiciary, that is, making sure that institutional structures such as supreme courts, constitutional courts or judicial councils were set up and functioning.

Secondly, under the fourth Copenhagen criterion of administrative and judicial capacity, the emphasis was on the efficiency and competence of the judiciary in the CCs to apply the *acquis*. The importance of a functioning judiciary for the smooth operation of the Internal Market was underlined in Agenda 2000,⁸⁴ and especially in the White Paper of 1995, describing the consolidation of judicial reform as a basis for ‘the mutual confidence between all participants on which the internal market depends’.⁸⁵ Establishing the link

⁸¹ See *Avbelj* (n 72).

⁸² See cases 61/65 *Vaassen-Göbbels*, ECLI:EU:C:1966:39; C-54/96 *Dorsch Consult*, ECLI:EU:C:1997:413 and as to independence and impartiality Case 14/86 *Pretore di Salò v Persons Unknown*, ECLI:EU:C:1987:275, para 7; Case 338/85 *Pardini*, ECLI:EU:C:1988:194, para 9; Case C-17/00 *De Coster*, ECLI:EU:C:2001:651, para 17.

⁸³ See D Bozhilova, ‘Measuring Successes and Failures of Europeanization in the Eastern Enlargement: Judicial Reform in Bulgaria’ (2007) 9 *European Journal of Law Reform* 285.

⁸⁴ European Commission, Agenda 2000 (n 50) 46.

⁸⁵ White Paper COM(95) 163 final, 2.12; Annex, White Paper COM(95) 163 final/2, 2.

with the Internal Market arguably emboldened the Commission to spell out specific requirements concerning judicial training, the number and staffing of courts, the length and efficiency of judicial proceedings, and the resources devoted to the administration of justice.⁸⁶

Finally, as the Union advanced its policy in the domain of JHA, and later on AFSJ, specific requirements concerning the national judiciary were gradually elaborated as binding *acquis*, albeit with greater autonomy for Member States to choose the mode of implementation. This development prompted adjustments in the accession negotiation framework. Following the Amsterdam Treaty, a new Chapter 24 on JHA was introduced, setting out requirements as to the role of the national judiciary in specific policy fields, such as border control, the fight against corruption, fraud and other criminal activity directed at the Internal Market, where the judiciary is treated as a policy actor and participant in European judicial cooperation.⁸⁷ Starting from the negotiations with Croatia, further differentiation has taken place, adding a separate chapter (Chapter 23) entitled ‘Judiciary and fundamental rights’, comprising more general requirements as to judicial independence. This shift indicates that some questions regarding the judiciary are now treated as part of the Union *acquis* under the third Copenhagen criterion, and not only as part of the political conditions for membership.⁸⁸

In sum, an increasing corpus of binding *acquis* has been taking shape as the accession process progressed. Nevertheless, even after Chapter 23 was introduced in the negotiation framework of EU enlargement, there have not been many clear and unambiguous Union rules, or ‘hard *acquis*’ in respect of Member States’ judiciaries.⁸⁹

5.2.2 External Benchmarks

While the EU could offer very few normative inputs, or ‘hard *acquis*’ in the judicial field, the 1990s and 2000s saw a proliferation of soft-law instruments in this domain, elaborated mostly within the auspices of the CoE.⁹⁰ The CoE was ahead of the EU both in terms of time, having started a formal procedure of

⁸⁶ See European Commission, Agenda 2000 (n 50) 46.

⁸⁷ Piana (n 77) 74.

⁸⁸ Chapter 23 stresses the paramount importance of an independent and efficient judiciary, and defines judicial independence as a binding EU *acquis* and in more specific terms as including a commitment to eliminating external influences, ensuring adequate resources, providing legal guarantees for fair trial procedures, etc. Chapter 24 is renamed as ‘Justice, freedom and security’. See Hillion, ‘Enlarging the European Union’ (n 14) 4. For a list of the chapters in the current negotiation framework for Enlargement, see https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/conditions-membership/chapters-acquis_en.

⁸⁹ According to Nozar, ‘Due to the limited amount of “hard *acquis*” in many of these areas, the requirements to be met are mainly to be found in general principles and European standards. This sometimes makes it difficult to determine exactly what the target to be reached is and how to measure progress.’ W Nozar, ‘The 100% Union: The Rise of Chapters 23 and 24’ (2012) *Clingendael Paper*, available at www.clingendael.org/publication/100-union-rise-chapters-23-and-24, 2.

⁹⁰ Piana (n 77) 70.

expansion to the East before the EU, and in terms of competence, having unquestioned authority on issues of the rule of law and fundamental rights, notably through the work of the Venice Commission.

In the area of judicial governance, the CoE has produced a number of authoritative soft-law instruments, most prominently Recommendation No R (94) 12 on the independence, efficiency and the role of judge adopted by the Committee of Ministers of the CoE in 1994,⁹¹ the European Charter on the Statute for Judges, adopted in 1998,⁹² and Recommendation 12(2010), replacing and enhancing Recommendation R(94) 12.⁹³ While the Recommendations are formally adopted by the Committee of Ministers, they result from the work of several European judicial networks and associations either composed exclusively of judges, or in which judges have a decisive influence.

Indeed, the 1990s saw the rise of judicial networks under the auspices of the CoE, and later on the EU. A particularly influential network has been the Consultative Council of European Judges (CCEJ), founded in 2000 and composed of judges from all member states of the CoE⁹⁴, coming chiefly from the higher ranks of the judiciary in these states. The Charter is likewise an emanation from many years of work on the organisation of justice carried out in the CoE. With the advancement of Enlargement and of EU policy in the area of JHA, the EU has promoted its own web of judicial networks, such as the European Network of Judicial Councils (ENJC), which started in 2002,⁹⁵ and the Network of the Presidents of the Supreme Courts of the EU.⁹⁶ These networks have been instrumental in reforming the judiciaries of the CEE countries. As we shall see, they have also been essential for EU pre-accession policy in respect of judicial governance.

5.3 Two Ways of Compensating for Uncertain Rules and Standards

The scarcity of common rules and binding EU standards as to judicial governance made eliciting clear benchmarks and formulating recommendations in this domain a precarious task. The Commission employed two main strategies for compensating for this deficiency: (i) to project, or emulate, a common European standard for the judiciary based mainly on external sources, an approach that may be described as vertical and ‘top-down’; (ii) to engage the judiciary in the CEE countries in various programmes and networks, working as platforms for socialisation, where standards and best practices were diffused

⁹¹ Recommendation No R (94) 12 on the independence, efficiency and the role of judge.

⁹² European Charter on the Statute for Judges, July 1999, available at <https://rm.coe.int/16807473ef>.

⁹³ Recommendation CM/Rec(2010)12, Judges: Independence, efficiency and responsibility, and Explanatory Memorandum, available at <https://rm.coe.int/16807096c1>.

⁹⁴ The Council has currently 46 Member States, after the Russian Federation was excluded from the Council in March 2022, as a consequence of its unprovoked war of aggression against Ukraine.

⁹⁵ Information on the network is available at <https://www.encj.eu/>; cf Piana (n 77) 170.

⁹⁶ Information on the network is available at <https://network-presidents.eu/>.

through professional exchange, an approach that may be described as horizontal and ‘bottom-up’.

5.3.1 Projecting Common European Standards for the CEE Countries

Within the first strategy, concerning in particular the institutional guarantees for judicial independence, the Commission gradually elicited a model of judicial governance, an alleged European standard, which served as a basis for its assessments and recommendations. Scholars who have studied closely EU influence on judicial governance in the CEE countries identify two institutional components of this model: (i) a strong Judicial Council (JC) as the main institution for self-governance of the judiciary; and (ii) a centralised and specialised body or institute for the training of the judiciary.⁹⁷

Concerning the first institutional component, the JC model promoted by the Commission is in the literature described as comprising the following non-exhaustive features:

1. The JC as the main organ of judicial self-governance enjoying constitutional status.
2. The JC should be composed predominantly (more than 50 per cent) of judges nominated and elected by their peers.
3. The JC should have representative and administrative functions, and control all mechanisms for the recruitment, promotion and evaluation of judges.
4. The JC should be in charge of the budget for the judiciary.
5. The JC should be chaired by the President of the Supreme Court or an independent Head of State.⁹⁸

To be sure, this model was not announced openly and explicitly, but rather transpires when putting together the many bits and pieces of criticism, praise and recommendations of specific solutions in the CCs, scattered across various documents produced in the course of accession.⁹⁹ For instance, where a JC reform had not yet been undertaken, the RRs would recommend such a reform or would praise the creation of a JC as the optimal institutional solution for guaranteeing judicial independence. In a similar vein, a high degree of judicial autonomy and self-governance received consistently positive Commission evaluations. Piana therefore speaks of an implicit view of judicial independence.¹⁰⁰

⁹⁷ See Piana (n 77) 75, Table 2.10; M Bobek and D Kosar, ‘Global solutions, local damages: A critical study in Judicial Councils in Central and Eastern Europe’ (2014) 15 *German Law Journal* 1257–92, 1263.

⁹⁸ See Piana (n 77) 75; Bobek and Kosar (n 97) 1263; D Kosar, *Perils of Judicial Self-Governance in Transitional Societies* (Cambridge, Cambridge University Press, 2018) 128 et seq. The last feature is not mentioned explicitly by Piana.

⁹⁹ Bobek and Kosar (n 97) 1262; Kosar (n 98) 126.

¹⁰⁰ See Piana (n 77) 77; cf. Kosar (n 98) 126 et seq. The model is apparently actively promoted by the Commission in accession negotiations with the countries from the Western Balkans, especially after the introduction of Chapter 23; see Damjanovski et al (n 22) 6–7.

The problem with promoting the JC model is that in actual fact it is far from being the only, and at the beginning of the accession process was not even the dominant, approach to judicial governance in Europe. Quite to the contrary: according to Piana, the coexisting models of judicial governance in Europe revealed a ‘spectacular variety of institutional solutions’.¹⁰¹ In an ambitious study on judicial self-governance, Kosar identifies as many as five models of court administration in Europe: (i) the ‘Ministry of Justice’ model, represented by Austria, the Czech Republic, Finland and Germany; (ii) the JC model, nowadays followed by a majority of EU countries;¹⁰² (iii) the courts service model, followed by the Nordic countries except Finland;¹⁰³ (iv) hybrid models, including a mix of countries with idiosyncratic approaches; and, historically, (v) the socialist model.¹⁰⁴ Although the socialist model no longer exists in Europe, Kosar insists that discussing it is important, since its legacies of strict hierarchy and excessive power of higher courts’ presidents can still be traced in the organisation of the judiciary in CEE.¹⁰⁵

Thus, as critically analysed in the literature on judicial governance, the JC model was not anchored in common or converging European legal traditions and solutions. Instead, the model was apparently influenced by the constantly increasing body of soft law produced within the auspices of the CoE and with the active involvement of the professional networks previously mentioned. Already the first Recommendation R (94)12 stressed the need for a special authority that is independent from the government and the administration, and which takes decisions on the selection and career of judges. It highlighted the importance of ensuring that the members of the authority are selected by the judiciary.¹⁰⁶ The follow-up Recommendation 12(2010) also builds on self-governance as the preferred way for organising the judiciary. This is also the vision advanced in the European Charter on the Statute for Judges.¹⁰⁷ The model

¹⁰¹ D Piana, ‘Beyond Judicial Independence: Rule of Law and Judicial Accountability in Assessing Democratic Quality’ (2009) 9 *Comparative Sociology* 40.

¹⁰² In his study from 2018, Kosar finds that the model exists with variations in Belgium, Bulgaria, France, Hungary (until Orbán’s 2011 judicial reform), Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. Kosar (n 98) 132.

¹⁰³ It could be noted that in Sweden currently, a reform of the system of judicial appointments and governance is under debate with proposals to increase the element of judicial self-governance by introducing a so-called Judicial Board (Domstolsstyrelse) which is a new institutional unit with predominant participation of judges, but still not a full-fledged Judicial Council. See Government Commission of Inquiry, *Strengthened Protection for Democracy and Judicial Independence (Förstärkt skydd för demokratin och domstolarnas oberoende)*, SOU 2023:12.

¹⁰⁴ Kosar (n 98) 131–33.

¹⁰⁵ According to Kosar, the model is characterised by the dominance of three institutions: ‘the Chief Prosecutor, the Supreme Court, and court presidents – which are then themselves controlled by the Communist Party’. See *ibid* 133.

¹⁰⁶ See Principle I Independence of the judiciary, sec 2, lit c, Recommendation No R (94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges.

¹⁰⁷ See European Charter on the Statute for Judges (1998), paras 1.2, 1.3, 3.1, 4.1, 7.2. Piana (n 77) 75–76; Bobek and Kosar (n 97) 1263.

has been further advocated in special reports and opinions of some of the CoE and EU judicial networks.¹⁰⁸

The active promotion of the JC model in the EU's pre-accession strategy was probably driven by the fact that the model developed originally as a reaction to authoritarian regimes in Southern Europe, and Italy in particular, in an effort to provide safeguards against abuse of political power. Therefore, the model can be perceived as fitting the particular needs of the transition societies of CEE. Yet, as critically noted by Bobek and Kosar, this choice can at least partly also be explained by certain biases in the way in which the standard was elicited and diffused.¹⁰⁹ I will return to this issue in section 5.4.1 below.

5.3.2 Enhancing Judicial Accountability and Efficiency

Whereas the JC model was advocated as the European 'golden standard' for institutionally guaranteeing judicial independence, with time, the focus of the Commission was being increasingly redirected to strengthening judicial accountability and efficiency in the CEE countries. This shift of attention had been prompted by mounting evidence of poor performance of the judiciary in CEE, not only in terms of the excessive time it took for cases to be decided, but also in terms of the poor quality of administration of justice, widespread corruption and low public confidence. Much of the pre-accession activity in this domain took place under the fourth Copenhagen criterion on strengthening administrative and judicial capacity. The attention here has been not on the macro level but on the micro and meso levels, or on what Piana denotes as 'managerial accountability', requiring courts to comply with benchmarks for efficiency and effectiveness borrowed from other professions, such as public administration.¹¹⁰

The modes for communicating EU requirements have also been different, with a predominance of bottom-up or socialisation approaches.¹¹¹ One surreptitious avenue for influence has been the systematic monitoring and performance evaluation of the judicial systems in the CCs, which included massive data gathering, processing and reporting, on the basis of which benchmarks were elaborated and progress measured. Furthermore, much emphasis was placed on the financing of twinning projects promoting the transfer of know-how and expertise coming from the old Member States, for instance on the development of court management tools. In addition, judicial training has played a key role in the promotion of European standards for the

¹⁰⁸ See CCJE, Opinion no 10 (2007) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society (Strasbourg, 21–23 November 2007); European Network of Councils for the Judiciary, Councils for the Judiciary Report 2010–2011.

¹⁰⁹ Bobek and Kosar (n 97) 1270.

¹¹⁰ Piana (n 77) 5.

¹¹¹ See *ibid* 162. On social learning, see J Checkel, 'Why Comply? Social Learning and European Identity Change' (2001) 55 *International Organisation* 553.

judiciary.¹¹² Finally, judges from the CEE countries were readily included in the judicial networks listed above, apparently with the aim of using these networks as platforms for promoting standards and best practices concerning the quality of justice. According to Piana, within these networks, judges ‘developed stronger routines of interaction’, with an expectation of reinforcing mutual trust among network members.¹¹³

5.4 Contested Outcomes

In view of the considerable resources devoted to reforming the judiciary in the candidate states, the question of the long-term impact of the EU’s pre-accession policy in this domain appears as particularly pertinent. Have the required changes in legal rules and institutional structures been applied by the intended beneficiaries of the respective policies? Have these changes brought about a higher level of respect for the rule of law in those states? A glimpse of the aftermath of judicial reform in some of the new Member States, may illustrate the limits and opportunities of EU-induced legal and institutional change.

5.4.1 Judicial Independence through the European JC Model?

As demonstrated above, the JC model has been vigorously promoted in the course of Enlargement as the best institutional solution for guaranteeing judicial independence in the applicant countries. The model has therefore received considerable attention by legal and political science scholars, seeking to assess whether the institutional reforms introduced in the context of Enlargement, indeed improved the independence of the judiciary and the quality of justice. The analyses, some examples of which I briefly present below, suggest that the results from the reforms have been often disappointing, and at times paradoxical.

a. Judicial Reform in Slovakia

The first example is the reform of judicial organisation in Slovakia, where the Government, very much upon the insistence of the European Commission, introduced a version of the JC model in 2001. The reform had been carried through after repeated criticism in the Commission’s RRs on Slovakia. However, as demonstrated through careful empirical evidence by Kosar in his comparative study on judicial governance in Slovakia and the Czech Republic, very simplified, the JC has not had the desired positive effect.¹¹⁴ This disappointing result is, according to Kosar, to be explained chiefly by the fact that at the root of the problem of poor judicial governance in Slovakia, as in other CEE countries with post-communist legacies, was the excessive power enjoyed by presidents of higher courts. This power was not curbed but rather enhanced by the institutional arrangement with a JC. Conversely, in the Czech Republic, where

¹¹² It has been described as a ‘key leverage in the construction of the European legal space’. See Piana (n 77) 37.

¹¹³ *ibid* 37.

¹¹⁴ Kosar (n 98).

the Ministry of Justice retained considerable competences in the sphere of judicial governance, the power of High Court presidents was effectively constrained, and a better functioning system of judicial accountability was arguably put into effect.¹¹⁵

Kosar's study is of particular interest, since the comparison between Slovakia and the Czech Republic could be conducted almost as a natural experiment, with two polities having the same starting positions and institutional legacies but choosing different institutional solutions for judicial governance. The analysis shows rather convincingly that the JC model does not in itself constitute a guarantee for a higher level of independence or accountability in any judicial system. More mundane aspects of organisation of the judiciary, such as the position of the presidents of high courts, methods for court management and assignment of cases between judges, material conditions and division of labour, often proved to be of greater importance for the quality of administration of justice. Importantly for the purposes of this analysis, the study demonstrates the weakness of an accession policy that emphasises formal legal and institutional solutions without deeper insight into the institutional context and the actors involved.

b. Judicial Reform in Bulgaria

Another, even more traumatic example is the saga of judicial reform, or rather the failure of introducing such reform, in Bulgaria. The country has been plagued by poor governance at all levels of public institutions ever since the beginning of the post-communist transition, but the malaise has been particularly severe in the court system. From the very first Commission Opinion of 1997 through all the subsequent RRs in the pre-accession process and the post-accession Coordination and Verification Mechanism (CVM),¹¹⁶ and up to the present day, the state of the country's judiciary has been a soaring problem. A Supreme Judicial Council (SJC) was introduced as the main institution for governing the judiciary already before the launch of the accession process.¹¹⁷ Consequently, the bone of contention has not been the setting up of such a body, but rather the design, functions, and mostly the composition and the procedure for nomination and selection of the Council members.

Initially, a majority of the SJC members were nominated by Parliament, based on the structure of political representation in the legislative body. Following repeated recommendations from the European Commission, the model of nominations had been amended, giving predominance to judges and prosecutors nominated and elected by their peers. The Chief Prosecutor and the Presidents of the Supreme Administrative Court and the Supreme Court of Cassation are members of the SCJ *ex officio*, and the President of the Supreme Court of Cassation is Chair of the SCJ. Nevertheless, in a way similar to that in Slovakia,

¹¹⁵ Kosar's analysis is of course richer and much more sophisticated and is here presented in a simplified manner.

¹¹⁶ On the CVM, see Commission Decision 2006/928/EC on CVM for Romania and Commission Decision 2006/929 on CVM for Bulgaria. See Hillion, 'Enlarging the European Union' (n 14) 10.

¹¹⁷ The first Act on the Supreme Judicial Council dates from 1992.

these reforms have not produced convincing evidence of improved judicial governance. Both Kosar and Piana find patterns in Bulgaria of excessive power of High Court Presidents and of the Chief Prosecutor comparable to those in Slovakia, and poor guarantees of the independence of individual judges.¹¹⁸ According to reports by the Commission and the Venice Commission, the performance of the Bulgarian judiciary remains sub-standard. The confidence of Bulgarian society towards the judiciary is still strikingly low, and has even been deteriorating.¹¹⁹

c. Judicial Independence as a Double-Edged Sword

These examples seem to suggest that changes in formal laws and in the institutional design of the judiciary in the direction of the promoted European institutional model, often under the direct or indirect pressure of conditionality and under the close watch of the Commission, have only rarely translated into the intended long-lasting and sustainable improvement of judicial governance. They may have even caused ‘unintended’ negative effects. For instance, it is pointed out that the emphasis on judicial autonomy, or self-governance, does not necessarily strengthen judicial integrity and independence. According to Maria Popova, who has studied closely the protracted and largely unsuccessful judicial reform in Bulgaria, the high guarantees of the irremovability of magistrates, in combination with the lack of adequate mechanisms for judicial accountability, have not helped but rather hindered the fight against corruption and eroded the quality of justice.¹²⁰

Popova is not the only scholar who identifies the ‘double-edged sword’ effect of judicial independence in transition societies characterised by a weak state and serious corruption problems. In such an institutional context, strong guarantees of judicial independence may have the positive effect of shielding the judiciary from attempts at political or economic influence, but may likewise exacerbate corruption and shirking among magistrates, and may create fertile soil for collusion between politicians and judges.¹²¹ Smilov speaks of ‘judicial

¹¹⁸ See Piana (n 77) 43-44; Kosar (n 98) 393. The reform of the Public Prosecution has been another hard nut to crack. The existing system of ‘severe’ hierarchy and almost unchecked discretionary powers still bears the mark of Soviet legacies. The model has proved highly dysfunctional but is protected by the Constitution of 1991, and any change is staunchly resisted by the incumbent actors. See Bozhilova (n 83) 296-97.

¹¹⁹ See M Popova, ‘The Postcommunist Judiciary: One Step Forward, Two Steps Backwards’ in P Kostadinova and K Engelbrekt, *Bulgaria’s Democratic Institutions at Thirty* (Lanham, MD, Rowman & Littlefield, 2020) 241, 249-251. The limited success of pre-accession policy in reforming judicial governance in the CCs is also confirmed by the very need to introduce post-accession mechanisms in the form of the CVM for Bulgaria and Romania. Damjanovski et al (n 22) 6.

¹²⁰ She goes as far as claiming that ‘Bulgaria’s highly insulated magistrates seem to be more engaged in perpetrating corruption than in prosecuting it. In addition, judicial insulation reduces the incentives for the judiciary as a whole to strive for public support and legitimacy, which in turn undermines the possibility of strong self-policing of internal corruption.’ M Popova, ‘Why Doesn’t the Bulgarian Judiciary Prosecute Corruption?’ (2012) 59 *Problems of Post-Communism* 35, 46. About the links between politics and justice in Bulgaria, see Piana (n 77) 158.

¹²¹ Popova (n 119); Bobek and Kosar (n 97) 1288. See in this sense Sadurski (n 2) 69.

corporatism' in Bulgaria, whereas Bobek and Kosar describe outright the JC in Slovakia as a 'mafia-like' structure of intra-judicial oppression.¹²² This line of research suggests that it may be naïve to expect that any judicial reform that bolsters the judiciary's insulation from the other branches of power will automatically bring positive results.

The examples further indicate that accession-induced institutional reform of the judiciary in CEE has poor prospects of achieving lasting change if such change is against deeply ingrained institutional 'habits of the heart',¹²³ or against the interests of influential incumbent actors within and outside the judiciary. In the wake of judicial reform, old informal patterns of judicial governance linger on. Commentators also observe path dependence in the choices made in the early days of post-communist transition. Actors who have been empowered in the first round of judicial reform tend to preserve their power. The inputs from EU institutions are thus 'filtered' through the behaviour of such actors and their resistance to change of the status quo.¹²⁴ More disturbingly, there is evidence that networks of economic and political power find their channels for compromising judicial reform and, ultimately, the quality of justice.¹²⁵

5.4.2 Modes of Judicial Socialisation

A more optimistic story transpires in areas of judicial governance where EU standards and best practices have been diffused through non-hierarchical, horizontal modes of transfer based on coordination and inclusion, such as standard-setting, training, twinning programmes and networking. In her comprehensive study on judicial accountability in CEE, Piana finds these informal mechanisms of socialisation to be fairly successful in strengthening what she calls 'professional accountability'.¹²⁶ As particularly influential stand out mechanisms for standard-setting, that is, eliciting benchmarks for evaluating the performance of the judiciary.¹²⁷

In the area of training, EU pre-accession strategy has allegedly helped create patterns of judicial cooperation through judicial schools and training facilities, including judges from old and applicant states (or, post-accession, new Member

¹²² D Smilov, 'Populism, Courts and the Rule of Law: Eastern European Perspectives', 28 June 2007, *FLJS Policy Brief*, available at www.fljs.org/content/populism-courts-and-rule-law, 7.

¹²³ On the concept 'habits of the heart' in institutional theory, see J Elster, C Offe and U Preuss, *Institutional Design in Post-communist Societies. Rebuilding the Ship at Sea* (Cambridge, Cambridge University Press, 1998) 18.

¹²⁴ Piana (n 77) 163.

¹²⁵ On such networks as a factor obstructing the institutionalisation of EU-induced norms in CCs, see A Dimitrova, 'The New Member States of the EU in the Aftermath of Enlargement: Do New European Rules Remain Empty Shells?' (2010) 17 *Journal of European Public Policy* 137, also with reference to V Ganev, *Preying on the State: The Transformation of Bulgaria After 1989* (Ithaca, NY, Cornell University Press, 2007).

¹²⁶ According to Piana 'twinning, training and standard-setting are considered as 'true leverages of influence.' See Piana (n 77) 162.

¹²⁷ Such standards are typically developed through soft-law instruments of the transnational judicial networks mentioned in section 5.2.2 above.

States). Participation of magistrates from CEE in massive training programmes and socialisation through networks has arguably contributed to democratisation of the judiciary, raising competence in EU law and, importantly, socialising magistrates in legal values that are part of European constitutional principles.¹²⁸

On a related track, twinning projects and other forms of cooperation have been instrumental in enhancing managerial accountability. Through the financial support under the twinning programme, know-how and expertise from old Member States has been used for introducing court management tools in CEE courts, ensuring greater transparency and efficiency in the administration of justice. Interestingly, Piana notes that mechanisms for managerial accountability and control occasionally come into conflict with strengthened judicial independence, which can lead to tensions and internal resistance to such mechanisms.¹²⁹

In sum, the abundant research on the EU Enlargement policy in the area of the rule of law and judicial governance seems to suggest that EU influence has been more effectively diffused and internalised by relevant actors in the CEE candidate countries through mechanisms of 'socialization, international communication, imitation and policy transfer'.¹³⁰ These horizontal and bottom-up approaches have emerged as more influential forces than pressure to adopt formal laws and institutions under political conditionality. These findings should be highly interesting for the budding EU rule of law policy post accession.

6 What Lessons from Rule of Law Conditionality in the Course of Eastward Enlargement

The pre-accession strategy outlined in the preceding two sections and its enforcement in the area of the rule of law and judicial governance in the CCs have been the subject of intense debate in legal and political science scholarship, provoking both praise and criticism. My purpose here is neither to comprehensively map all the sides of this debate, nor to fully engage in it. Rather, my limited objective is to elicit some of the most widely agreed weak spots in order to enquire, what lessons can be drawn from these past experiences for the current and future EU rule of law policy.

A recurrent line of criticism levelled at EU institutions in their rule of law policy vis-à-vis the CCs has concerned the uncertain standards on which the requirements were built and the ensuing question about the legitimacy of EU Enlargement policy in this domain. Political scientists working in the area of Europeanisation, conceived as a transfer of norms from the EU to the candidate states, measure legitimacy by the quality of EU rules, the quality of the rule transfer and the quality of the rule-making process.¹³¹ Arguably, Enlargement rule of law policy, as a form of Europeanisation, exhibited problems on all three counts.

¹²⁸ On European systems of judicial training, see Piana (n 77) 176.

¹²⁹ See *ibid* 162.

¹³⁰ *ibid* 39.

¹³¹ J Checkel, 'Sanctions, Social Learning and Institutions' (1999) 11 *Arena Working Papers*.

6.1 Quality of EU Rules

The lack of clarity over EU rule of law standards is an important factor negatively influencing the quality of the rules. As already discussed above, at the time when the pre-accession process was launched, the rule of law had not been elaborated in much detail in the Treaties, nor in secondary legislation.¹³² Uncertainty was further added by the dynamics of constitutional developments in the EU, moving some of the relevant issues of the rule of law from the domain of political conditionality to the more specific chapters of binding *acquis*. Despite the many policy documents, EU institutions showed a reluctance to conceptualise the rule of law. The Commission never offered ‘a general and authoritative conceptual document on the EU rule of law’, opting for a ‘description-based’ rather than ‘analytically-based’ approach.¹³³ Even scholars who are generally positive of the Commission’s work in the area, agree that the individual country evaluations had a relatively ‘diverse and superficial nature’.¹³⁴

This uncertainty is by many perceived as undercutting the overall success of EU rule of law policy in the CEE countries. For one thing, it has inevitably given rise to information costs, since the CCs could not know what exactly was expected of them and what measures were required to satisfy the standard.¹³⁵ To put it in the provocative words of Kochenov, ‘the candidate states were told to comply, but not told with what’.¹³⁶ As a result, the standards have been difficult to explain to local stakeholders and have formed an unstable ground for inducing compliance.

An even more important aspect, from the perspective of legitimacy, is the extent to which the rules were also binding internally for the EU Member States.¹³⁷ In areas where the EU has strong competences and European institutions have accumulated considerable practice, for instance in the area of competition law, the requirements spelled out in the accession process have enjoyed high authority and legitimacy.¹³⁸ In the field of the rule of law, the Union lacked corresponding authority and legitimacy. The Commission itself admitted that in many respects, the screening of the CCs for rule of law and democracy compliance went far beyond any *acquis communautaire*, and hence beyond the requirements that could be directed internally to the Member States.¹³⁹

¹³² See Kochenov (n 14) 109; Hillion, ‘Enlarging the European Union’ (n 14) 4.

¹³³ See Nicolaidis and Kleinfeld (n 63) 16. In a similar sense, Kochenov (n 14) 110.

¹³⁴ Pech and Grogan, ‘Meaning and Scope’ (n 15) 11.

¹³⁵ See Sadurski, ‘EU Enlargement and Democracy in New Member States’ (n 14) 31; cf Nozar (n 89) 2.

¹³⁶ Kochenov (n 14) 315.

¹³⁷ Or as succinctly formulated by Sadurski, the legitimacy and effectiveness of the standards are influenced by ‘the seriousness and determination with which the EU has held its own member states to those standards’, Sadurski, ‘Accession Democracy Dividend’ (n 14) 378.

¹³⁸ See A Bakardjieva Engelbrekt, ‘Grey Zones, Legitimacy Deficits and Boomerang Effects: On the Implications of Extending the Acquis to the Countries of CEE’ in N Wahl and P Cramér (eds), *Swedish Yearbook of European Law* (Oxford, Hart Publishing, 2006) 1-36.

¹³⁹ Agenda 2000 (n 50) vol 1, 42.

A particularly conspicuous example of the gap between external and internal standards was the early requirement of respect for minority rights under the Copenhagen political criteria. At the time when the criteria were spelled out, none of the EU Member States were subject to a similar requirement.¹⁴⁰ But also in the area of the rule of law, the perception of double standards has plagued the Enlargement process on a number of issues. As the example of judicial governance shows, CCs were required to undertake changes in the organisation of their judicial systems while such requirements would have been impossible if applied to EU Member States.¹⁴¹ Hillion critically contends that the criteria applied to the CCs in the Enlargement process offer a distorted reflection of the EU's constitutional identity (*miroir déformant*).¹⁴²

The criticism of the vague and inconsistent standards on which rule of law conditionality built is widely shared in Enlargement scholarship, but it has not remained uncontested. On the basis of a comprehensive review of Commission pre-accession documents, Janse has argued that despite the many flaws in its work, the Commission has been consistent in articulating 'a clear vision on the core meaning of the political accession criteria'.¹⁴³ The documents produced by the Commission refer in his view to a set of elements that are adequately selected and indeed essential for securing democracy and the rule of law. Therefore, Janse contends that the Commission's work deserves more positive overall evaluation, with the important implication that it can also be entrusted with the task of monitoring rule of law compliance in the Member States beyond Enlargement. Janse's view is largely shared by Pech and Grogan, who, while admitting the many deficiencies in the Commission's approach, consider that the EU is not 'exporting' a vague or incoherent ideal' but instead seeks compliance with a set of specific sub-components of the rule of law.¹⁴⁴

The work of Janse, and of Pech and Grogan, adds an important nuance to the debate on rule of law conditionality and the role of EU institutions. Given the unprecedented task the Commission was faced with, and the condensed timeframe it had to develop and apply its pre-accession strategy, it would indeed be unfair to measure the success of the approach against too rigid standards. It is also true that once we put together the different jigsaw pieces from all Commission pre-accession documents, a more coherent conception of democracy and the rule of law would emerge than what might appear at first sight. Yet the lack of coherence in the Commission's vision of democracy and the rule of law has been only one line of criticism in the academic literature. The

¹⁴⁰ C Hillion, 'Enlargement of the European Union – The Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities' (2004) 27 *Fordham International Law Journal* 715–40, 716. Sadurski, 'EU Enlargement and Democracy in New Member States' (n 14) 31.

¹⁴¹ On double standards in the domain of human rights, see Williams (n 45), calling EU human rights policy in the process of Enlargement 'a policy of distinction'. In a similar sense, P Maier, 'Popular Democracy and EU Enlargement' (2003) 17 *East European Politics and Societies* 58, 63.

¹⁴² Hillion, 'Enlarging the European Union' (n 14) 1; see also Nicolaidis and Kleinfeld (n 63) 52.

¹⁴³ Janse (n 40) 46. The analysis builds on a review of general policy documents such as Agenda 2000, as well as country-specific documents such as RRs.

¹⁴⁴ Pech and Grogan, 'Meaning and Scope' (n 15) 11.

more serious point has concerned the discrepancy between internal and external standards. Whether the rule of law conception advanced by the Commission is internally consistent has only limited bearing on the ‘double-standards’ critique.

6.2 *Quality of Rule Transfer*

Turning to the quality of rule transfer, the focus shifts to the process of eliciting common standards and the consistency and equality in the process of imposing such standards on candidate countries.

6.2.1 ‘Normative Harmonisation’

As illustrated by the case of judicial governance, one way used by the Commission to compensate for the lack of binding *acquis* in the field of rule of law policy, was to project an image of an alleged common European standard that the CCs were urged to adopt or approximate. In a study on the impact of Enlargement on judicial governance, Smilov conceives of such common standards as ‘myths’, with the Commission emulating unity where there is none.¹⁴⁵

His analysis is reinforced through a study by Bobek and Kosar who are highly critical of the procedure for eliciting the JC model as the European standard of judicial governance. They point in particular to the lack of transparency as to patterns of participation and representation in the consultative networks and bodies engaged in setting the JC standard that was subsequently imposed with considerable rigour upon the CCs. In their view, the standards elaborated within these networks reflect to a great extent the preferences of the judicial profession, and even more narrowly of the higher tiers of the judiciary, often court presidents, who typically represent the profession in the networks. A bias in favour of the JC model arguably also resulted from the strong activism of Italy and Spain, as main proponents of the model, within both judicial networks and twinning projects with CEE countries. Furthermore, once the model was adopted by some of the CEE countries, a self-generating logic was set in motion, whereby the model could be advanced as predominant in Europe. The influence was further institutionalised with the setting up of a network of judicial councils.¹⁴⁶

Certainly, the Commission was also advancing the JC model with the conviction of the model’s superiority, especially for guarding the CEE judiciary from the legacies of the socialist past. The approach thus, at least partly, represents what Smilov dubs ‘normative harmonization’. Under the notion of a common standard, the Commission promotes a desired normative model or

¹⁴⁵ D Smilov, ‘Enlargement and EU Constitutionalism in the Balkan Periphery’ in W Sadurski, J Ziller and K Zurek (eds), *Après Enlargement: Legal and Political Responses in Central and Eastern Europe* (Florence, Robert Schuman Centre, 2006) 161; D Smilov, ‘EU Enlargement and the Constitutional Principle of Judicial Independence’ in Sadurski, Czarnota and Kryiger (eds) *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht, Springer, 2006) 313.

¹⁴⁶ Bobek and Kosar (n 97) 1270 et seq.

solution.¹⁴⁷ However, and importantly for the quality of rule transfer, by insisting on one particular model of judicial governance without support in binding *acquis* or in a common European tradition, the Commission is narrowing the range of alternative institutional models for the CCs. The more serious danger of an approach building on ‘myths’ lies, according to Smilov, in the fact that such myths are inevitably unstable and provide shaky ground for building long-term relationships of trust. Once the lack of binding rules is discovered, the myth as a basis for mutual obligations collapses, and there is a risk of backlash and even regression into Euro-scepticism and nationalism.¹⁴⁸ This prediction is to a certain extent confirmed in the current open ‘double standards’ rhetoric of illiberal governments and their intellectual supporters.¹⁴⁹

6.2.2 Consistency and Equal Treatment

Concerning the quality of rule transfer, a main line of criticism, partly connected with the one above, is the lack of consistency in the Commission’s evaluations: between individual CCs, across policies and over time. Here only the first point will be addressed.¹⁵⁰ One of the distinctive features of the Eastward Enlargement has been the high number of states with similar historical legacies that applied for membership at approximately the same time. As a consequence, applications had to be reviewed, and accession negotiations carried out, simultaneously. This parallel treatment brought a great deal of political prestige in the project and has in the literature been aptly dubbed a ‘regatta’ approach.¹⁵¹ The EU institutions were well aware of this politically sensitive aspect of the Eastward Enlargement. In the individual Opinions attached to Agenda 2000, the Commission was adamant that while the analysis of each application was made on its merits, all applications were judged according to the same criteria.¹⁵²

Yet despite this assurance of equal treatment, evidence from systematic review of individual country opinions and RRs suggests otherwise. While the areas of rule of law assessment were broadly the same, the specific components addressed under each area differed considerably between countries. Scholars note with amazement the inclusion of certain elements and requirements in some country reports and their absence in others – without, moreover, providing any justifications for the different treatment.¹⁵³ Divergence is noted also in the rigour with which the Commission carries out its scrutiny of candidate states’

¹⁴⁷ Smilov, ‘Enlargement and EU Constitutionalism’ (n 145) 176 et seq.

¹⁴⁸ *ibid.* In a similar sense, Sadurski, ‘EU Enlargement and Democracy in New Member States’ (n 14) 33 with reference to formulas such as ‘EU model’ and ‘part of common constitutional traditions’.

¹⁴⁹ On this rhetoric, see Pech and Grogan, ‘Unity and Diversity’ (n 13) 68 et seq.

¹⁵⁰ As to inconsistencies across policy documents, see Wennerström (n 14) 213; Kochenov (n 14) 30–31.

¹⁵¹ On the ‘regatta approach’, see Engelbrekt (n 48).

¹⁵² A common text was used in this sense in all country Opinions. See eg Commission Opinion on Bulgaria’s Application for Membership of the EU, COM(97)2008 final, 2.

¹⁵³ See Nicolaïdis and Kleinfeld (n 63). In a similar sense, Janse (n 40) 54–55,

compliance with prescriptions and recommendations. Whereas some applicants were held strictly to account on all points of rule of law conditionality, others could gloss over individual criteria with little or no assurances of conditions being actually met. Furthermore, measures that in some country reports were assessed as steps in the right direction, were in other country reports criticised or not mentioned at all.

The unequal treatment is well illustrated by the Commission's approach to the question of judicial governance. While the Commission has promoted the model of JC as the best guarantee of judicial independence in respect of most CCs, it has not been entirely consistent in its approach. Thus, it has been widely observed that the introduction of a JC was spelled out as an almost non-waivable condition for EU membership vis-à-vis Slovakia.¹⁵⁴ Judicial independence was identified as a serious problem in this country at an early stage. As pre-accession conditionality tightened up, the Commission became increasingly assertive in advancing the JC model as a guarantee of judicial independence until a JC was ultimately introduced in 2001.¹⁵⁵ Similar pressure for setting up a JC was exerted towards Latvia, Estonia and Romania. In the case of Bulgaria, where a JC had been set up prior to the start of accession negotiations, the pressure was rather towards bringing the design of the JC, and its composition and functions, closer to the Euro-model previously outlined.¹⁵⁶

Yet the attitude was markedly different in respect of the Czech Republic. This country opted to preserve its institutional framework for judicial governance with important functions for the Ministry of Justice and did not institute a JC. Surprisingly, this choice did not prompt objections on the part of the Commission. In the RRs it is only noted that while formally judges and prosecutors could be recalled by the Minister of Justice, this had not happened in practice.¹⁵⁷

This divergence in approach has been problematic,¹⁵⁸ first, because it raises serious doubts as to the objectivity in the Commission's assessment and the credibility of the Commission's self-declared ambition to treat all applicant countries equally. Certainly, one could argue that a JC may be a desirable solution in one institutional and political context and not in another. However, in the case of the Czech Republic and Slovakia, there was much that spoke for identical treatment, given the common legal and institutional legacies of the two

¹⁵⁴ See European Commission, Regular Report Slovakia, COM(1999) 511 final, 14.

¹⁵⁵ In the RR of 2000, the Commission notes with dissatisfaction that a reform expected to shift the competence for judicial appointments to the JC has not yet been adopted. Regular Report Slovakia SEC(2001) 1754, 17. In the RR of 2000, the Commission expresses its approval of the legislative amendments setting up a JC, with broad administrative functions and competences regarding judicial appointments. At the same time, the pressure for further reforms in this direction is stepped up. See European Commission, Regular Report Slovakia (2000), 16.

¹⁵⁶ Particular problems have related to treating the investigation service as part of the judiciary, and thus being represented in the Supreme Judicial Council. The parliamentary quota is also seen as a concern. See Piana (n 77) 135; cf Bozhilova (n 83) 292.

¹⁵⁷ See European Commission, RR Czech Republic (1999), 13.

¹⁵⁸ For a critique of this differential approach, see Bobek and Kosar (n 97); Piana (n 77), Damjanovski et al (n 22).

countries. Moreover, the Commission did not provide any justifications for the different approach. Thus, the impression is formed that the countries had different leverage in the accession negotiations, and probably different self-confidence in their overall record as CCs, something giving the respective governments a different degree of audacity to defend national preferences and positions.¹⁵⁹

Second, the ease with which the Commission was able to drop certain requirements in respect of some countries does not strengthen the credibility and authority of these requirements, and goes against the very claim of a common European standard. Third, just as in the case of double standards, lack of consistency may lead to disillusionment among enlargement supporters and strengthen the positions of anti-European and nationalist forces. Bozhilova considers the most dramatic flaw of this approach to be that it gives national ‘veto players’ leeway to contest the desired reforms by accusing the EU ‘of subjectivity and favouritism, and an *a la carte* approach to accession’.¹⁶⁰

6.2.3 Focus on Formal Laws and Institutions

When explaining its methodology, the Commission, as already mentioned above, has been at pains to show that it was basing its assessment not on formal compliance but on the actual operation of laws and institutions. Yet in an extensive analysis of rule of law conditionality in the process of Eastward Enlargement, Nicolaïdes and Kleinfeld have criticised the Commission’s approach as being precisely formalistic. In their view, the Commission was paying disproportionate attention to formal legal and institutional indicators, while turning a blind eye to ‘law in action’ and deeper layers of legal and political culture.¹⁶¹

The focus on formal laws and discrete institutions is to a certain extent inevitable. It is partly predetermined by the compressed time-schedule of Enlargement and the enormous strain on scarce resources it exerted on both sides of the Union threshold. Another reason for this emphasis on institutional structures is what I have in a previous contribution called ‘the joint interest of the “rational accession seeker” and the “rational accession-provider”’.¹⁶² Whereas politicians and public officials of the CCs seek rapid accession and want to demonstrate visible progress, politicians and officials of EU institutions (notably the Commission) require palpable results that are easy to identify, measure and monitor. This dynamic unfolds partly as a result of the fact that the Commission, as mentioned before, gradually develops its own interest and stake in the success of Enlargement. Seen in this light, the preference for discrete

¹⁵⁹ For similar dynamic in other policy areas, see Bakardjieva Engelbrekt (n 138) 30.

¹⁶⁰ Bozhilova (n 83) 290; see also Smilov, ‘EU Enlargement and Judicial Independence’ (n. 145).

¹⁶¹ Nicolaidis and Kleinfeld (n 63) 16; of a different opinion, Janse (n 40).

¹⁶² A Bakardjieva Engelbrekt, ‘An End to Fragmentation? The Unfair Commercial Practices Directive from the Perspective of the New Member States of CEE’ in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Oxford, Hart Publishing, 2007) 47, 81 et seq.

interventions in the form of enacting specific legislation and setting up institutions corresponding neatly to EU policy compartments and requirements is well understood. For the CCs, on the other hand, formal laws and institutions are attractive because they can point to their existence in progress reports and when criticised for insufficient administrative capacity.

This strong legal-institutional focus has been identified systematically in analyses of Enlargement-induced reform of judicial governance.¹⁶³ As shown above, the model promoted by the Commission has revolved around the JC and the centralised body for judicial training. Over and beyond these two bodies, it was not unusual for CCs to point to ad hoc institutional solutions, in an apparent attempt to demonstrate progress. For instance, various special anti-corruption bodies, inspectorates and commissions were being invoked as evidence of the priority given to the fight against corruption. In addition, formal legislation, such as Acts on the Judiciary, but also policy documents such as Strategy on the Reform of the Judiciary, or National Anti-Corruption Strategy, typically received the Commission's approval.¹⁶⁴

An unfortunate consequence of such an approach is what Nicolaïdes and Kleinfeld call 'legal-institutional mimetism'. There is a proliferation of laws and institutions that are supposed to implement EU legislation, or legislation required by the EU, but which do not bring actual change in underlying social relations and practices. Moreover, such laws are often changed and institutions frequently refurbished. Paradoxically, a situation is created where pre-accession policy as applied by the Commission contributes to eroding legal certainty, the latter being a key goal of rule of law reform.¹⁶⁵

6.3 Quality of Rule-making in the Recipient States

The legitimacy of Enlargement cum Europeanisation can also be measured by its impact on the quality of the rule-making process in the applicant countries. In this regard, many critical analyses note the impoverishing effects 'external governance' has occasionally exerted on the legislative process, and ultimately on democracy and democratic institutions in the CCs. Such effects have been observed on several levels.

For one, the unquestionable priority of EU accession on the political agenda in the CEE countries in combination with the detailed steering of rule of law reform through specific short-term and intermediate targets and strict monitoring, has implied excessive pressure on the legislative process in these countries. Comparative research on Enlargement's effects in CCs provides evidence of a legislative process plagued by fast-track procedures, lack of information and insight, and poor, if any, consultation with affected stakeholders and civil society, where the role of parliament is reduced to rubber-stamping.¹⁶⁶

¹⁶³ See Bobek and Kosar (n 97); Piana (n 77); Damjanovski et al (n 22) 5. For other areas of pre-accession policy, see Bakardjieva Engelbrekt (n 138).

¹⁶⁴ See Regular Report Bulgaria, 2003, 19–20;

¹⁶⁵ Nicolaïdis and Kleinfeld (n 63) 19.

¹⁶⁶ H Grabbe, 'How does Europeanisation affect CEE governance? Conditionality, diffusion and diversity' (2001) 8 *Journal of European Public Policy* 1013, 1016.

A related effect of the pre-accession strategy is the priority given to government and state actors, who are chief interlocutors in accession negotiations and typically have the mandate of communicating EU requirements to domestic stakeholders and institutions. Intergovernmental negotiations are as a rule based on ‘informal contacts between negotiators on both sides, not easily subject to formal control’.¹⁶⁷ This limited insight exacerbates the power of government and public agencies at the expense of democratically elected parliaments, as well as of civil society participation. Thus, another paradox of accession conditionality is revealed: by giving priority to efficiency over legitimacy, the EU undermines its own efforts to promote democratic development in the CCs.¹⁶⁸

Finally, as observed by Nicolaïdes and Kleinfeld, a more subtle distorting effect for democratic law making comes with long-term prioritisation of implementing EU *acquis* and requirements over systemic domestic demands. Such law making steered by external governance may to some extent deprive the polities in the candidate states from the feeling of ownership over important democratic and rule of law transformation in their societies. Sajó warns, somewhat prophetically, that democratic reforms carried out with ‘an apparent lack of constitutional commitment and passion among the citizenry might become a problem in the event that a tyrannical or corrupt elite should ever attempt to govern’.¹⁶⁹

7 Turning Conditionality and Rule of Law Oversight Inwards to Curb Backsliding in EU Member States

The first two sections of this chapter described how the Eastward Enlargement prompted a major upheaval in EU rule of law policy, mostly in the form of raising the standards for membership and precluding the possibility for entry into the Union of polities with low respect for the constitutional principles of democracy, the rule of law and fundamental rights. Although this development was taking place through amendments in EU Treaties and legislation, the effects were mostly outward-bound, intended for the post-communist candidate states from CEE. However, after the fifth EU Enlargement was successfully completed, problems of rule of law backsliding in recently acceded states can no longer be treated as external to the Union. In the remainder of this chapter, I will look at how the lessons learned from Enlargement, could inform and strengthen the Union’s inward-bound rule of law policy.

Already in the course of preparing the CCs from CEE for membership into the Union, policy makers as well as legal and political science scholars pointed at the imminent risks post accession. Many feared that the reforms introduced in the course of Enlargement and under the pressure of conditionality were only weakly institutionalised in the CCs, and could easily suffer a backlash once

¹⁶⁷ Sadurski, ‘EU Enlargement and Democracy in New Member States’ (n 14) 383.

¹⁶⁸ Grabbe (n 166). For arguments in the same vein, see Maier (n 141) 63; Nicolaïdes and Kleinfeld (n 63) 26.

¹⁶⁹ A Sajó, ‘Constitution without the constitutional moment: A view from the new member states’ (2005) 3 *International Journal of Constitutional Law* 243, 249.

conditionality would be lifted.¹⁷⁰ At the same time, it was pointed out that the Union is constrained in its ability to curb such developments in at least two significant ways. First, the procedure for sanctioning Member States under Article 7 TEU is notoriously heavy-handed and has proven to be grossly inadequate to check illiberal developments in the Member States.¹⁷¹ Second, and more problematic, the EU's competences in the policy areas at the core of rule of law backsliding have been perceived as limited and uncertain. Rule of law conditionality in the process of accession included requirements that went beyond the scope of the EU *acquis*, and arguably even beyond the limits of the principle of conferral in EU constitutional law.¹⁷² Post accession, such stretching of competences becomes more problematic.¹⁷³ Hence, misgivings were expressed that should the new Member States lapse into political practices going against the rule of law, there would be little or no possibilities for the EU to counteract such a development effectively. With the illiberal turn in Hungary and Poland and the deteriorating quality of democracy in a number of other CEE Member States, such misgivings have indeed materialised.¹⁷⁴

To overcome the ensuing rule of law crisis, all EU institutions are currently engaged in an attempt to find a blueprint for a coherent multi-layered and multi-institutional EU rule of law policy, a philosopher's stone of sorts.¹⁷⁵ In this process one can partly observe how monitoring mechanisms, policies and standards developed in the course of Enlargement travel back to the Union and produce spill-over or boomerang effects.¹⁷⁶ Such effects can be said to work along several, partly intersecting, tracks, employing different modes of governance.¹⁷⁷ First, instruments for country-specific rule of law monitoring and

¹⁷⁰ U Sedelmeier, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession' (2014) 52 *Journal of Common Market Studies* 105.

¹⁷¹ For an analysis, see A Moberg, 'Can We Expect Compliance with the Rule of Law without the Rule of Law?' in Bakardjieva Engelbrekt et al (eds) *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Oxford, Hart Publishing, 2021) 341-364.

¹⁷² Hillion (n 140) 716.

¹⁷³ See Hillion, 'Enlarging the European Union' (n 14) 8. See section XX on the limitations of the scope of the EUCFR.

¹⁷⁴ On the illiberal turn, see the contributions by Halmai and Nergelius in A Bakardjieva Engelbrekt et al (eds) *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Oxford: Hart Publishing, 2021) 51-74 and 75-86. See also U Sedelmeier (n 170). Concerning the deteriorating quality of democracy in the region, see L Cianetti, J Dawson and S Hanley, 'Rethinking "democratic backsliding" in Central and Eastern Europe – looking beyond Hungary and Poland' (2018) 34(3) *East European Politics* 243.

¹⁷⁵ See European Commission, 'Strengthening the rule of law within the Union. A blueprint for action', COM(2019) 343 final.

¹⁷⁶ For the metaphor of 'boomerang effects' see my contribution 'Grey Zones, Legitimacy Deficits and Boomerang Effects', Bakardjieva Engelbrekt (n 138).

¹⁷⁷ I have previously classified the tools into three categories- proceduralisation, conceptualisation and judicialization. However, with the Budget Conditionality Regulation, rule of law policy in the Union takes a more classical approach, deserving its separate category. There is yet another instrument, namely the selective and time-limited post-accession conditionality associated with the CVM applied to Bulgaria and Romania. Since this mechanism is conceived as an exception, it will not be discussed here.

assessment developed in the course of Enlargement are refined and extended horizontally to apply to all Member States, leading to increased proceduralisation of EU rule of law policy in line with theories of experimentalist governance.¹⁷⁸ Second, the one-sided conditionality method, used in the context of Enlargement is transformed from a political tool into a legislative instrument of general application, albeit in the limited area of protecting the Union budget, allowing for strengthened enforcement based in great part on the classical ‘Community’ governance method.¹⁷⁹ Third, rule of law conceptualisations and systematisations precipitated in the course of Enlargement acquire increased sophistication and feed into new legislative instruments of EU-internal rule of law policy. Fourth, and probably most decisively, a process of enhanced judicialisation of EU rule of law policy is unfolding, whereby CJEU jurisprudence works as a bridge between pre-accession and post-accession standards and as a glue between different components of EU-internal rule of law policy. The question is whether these novel governance instruments are adequately informed by the achievements and flaws of rule of law policy in the course of Eastward Enlargement. Are the lessons identified above being integrated when the new governance framework is conceived and implemented? And what are the challenges ahead?

7.1 Proceduralisation and Experimentalist Governance of EU Rule of Law Policy

Along the first track, EU institutions seek to compensate for the limited competence and inadequate mechanisms for enforcing rule of law in the Member States by developing instruments for monitoring, data gathering and periodic country-specific rule of law assessments, expecting this benchmarking exercise to promote best practices and expose deficiencies. Early such mechanisms of experimentalist governance include the EU Justice Scoreboard, by which the efficiency, quality and independence of Member States justice systems are reviewed, as part of the European Semester.¹⁸⁰ In 2019, a full-blown Rule of Law Mechanism (RLM) was launched by the Commission.¹⁸¹ The Commission describes the instrument as a process for an annual dialogue on the rule of law between the Commission, the Council and the European Parliament together

¹⁷⁸ See Ch Sabel and J Zeitlin, ‘Learning from Difference: The New Architecture of Experimentalist Governance in the EU’ (2008) 14(3) *European Law Journal* 271–327. For an early analysis of Enlargement policy in terms of New Modes of Governance, see E Tumlets, ‘The Management of New Forms of Governance by Former Accession Countries of the European Union: Institutional Twinning in Estonia and Hungary’ (2005) 11 *European Law Journal* 657.

¹⁷⁹ On different modes of governance in the EU and the classical ‘Community’ method, see J Scott and D Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’ (2002) *European Law Journal* 1–18.

¹⁸⁰ Hillion, ‘Enlarging the European Union’ (n 14) 10. See European Commission, ‘The EU Justice Scoreboard A tool to promote effective justice and growth’, COM(2013) 160 final, Brussels, 27 March 2013.

¹⁸¹ See European Commission, ‘Rule of Law Mechanism. Further strengthening the Rule of Law within the Union’, COM(2019) 163 final, Brussels, 3 June 2019.

with Member States as well as national parliaments, civil society and other stakeholders. The basis of this dialogue is the Rule of Law Review Cycle with the annual Rule of Law Report, consisting of a general report and 27 country chapters with Member State-specific assessments. The first Annual Rule of Law Report was published in September 2020.¹⁸² The reports for 2021 and 2022 have likewise been released, establishing the mechanism as a permanent element of the Union's rule of law governance framework.¹⁸³

These instruments are apparently emulating those developed in the course of Enlargement and lead to increased proceduralisation of EU rule of law policy. When explaining the method for preparing the Annual Reports, in particular, the Commission describes a process very close to the one employed in its pre-accession strategy.¹⁸⁴ The methodology builds on questionnaires sent out to the Member States and on involvement of professional networks, civil society, other international organisations and expert bodies, etc. However, there are also major differences. Importantly, the instrument includes all Member States, thus seeking to avoid criticism of double standards and unequal treatment. The Commission is apparently acutely aware of the importance of equal treatment and consistency in the country reports. It is adamant to point out that it has ensured "a coherent and equivalent approach by applying the same methodology and examining the same topics in all Member States, while remaining proportionate to the situation and developments."¹⁸⁵ On the basis of the report the Commission is, since 2022, issuing individual country recommendations, which makes equivalent assessment even more important.

Regarding methodology, the Commission also adds that it is using qualitative methodology and explains in more detail the sources and data on which the report and the country chapters build. In particular, in contrast to the pre-accession approach, the Commission is now more transparent about the external sources and actors involved, and openly announces strengthened cooperation with CoE bodies.¹⁸⁶ The reports seem to rely on broad cooperation with non-governmental organizations on the ground seeking in this way to empower such actors and to contribute to the deeper embedding of rule of law values in Member States' polities. Importantly, the RLM aims not only, and even not predominantly, at elaborating and clarifying legal standards or imposing sanctions, but at promoting rule of law culture. Thus, it appears that some lessons are drawn from pre-accession monitoring.

Yet despite their stated ambition, the Annual Reports still repeat one major failure of the pre-accession strategy. The Reports tend to remain overly focused on formal laws and institutions in the Member States. The national chapters do not discuss major cases of corruption in the Member States and carefully avoid

¹⁸² European Commission, 2020 Rule of Law Report, COM(2020) 580 final, Brussels, 30 September 2020.

¹⁸³ European Commission, 2021 Rule of Law Report, COM(2021) 700 final, Brussels, 20 July 2021; European Commission, 2022 Rule of Law Report, COM(2022) 500 final, Luxembourg, 13 July 2022.

¹⁸⁴ Piana (n 77) 4–5.

¹⁸⁵ See Rule of Law Report, COM(2020) 580 final, 4.

¹⁸⁶ Damjanovski (n 22) 16–17.

confronting the political causes of rule of law failures.¹⁸⁷ In this, the RLM seems to sustain EU's traditional legalistic approach, shying away from uneasy questions of abuse of political power.

7.2 *Post-accession Inward-bound Conditionality*

Despite its many promises, the RLM lacks the most important element of the pre-accession rule of law strategy, namely, conditionality. While it can undoubtedly work as an early warning system and a welcome preventive instrument, it is less apt as an instrument for sanctioning and deterrence. Higher expectations in this respect are therefore vested in the other novel mechanism advanced by the Commission and adopted by Council and Parliament in 2020, namely, the Conditionality Regulation.¹⁸⁸ The Regulation introduces rule of law conditionality in the EU budgetary framework and the possibility to impose sanctions in the form of intercepted access to EU funds in the case of established breaches of rule of law in a Member State that 'affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way'. The Conditionality Regulation provides a detailed description of incidences that are considered indicative of breaches of the principles of rule of law.¹⁸⁹ It also contains a list of breaches that can trigger the sanctioning procedure.

This mechanism is certainly reminiscent of the coupling of pre-accession financial and structural assistance with strict conditionality assessment, introduced with Agenda 2000 and the APs as part of EU's pre-accession policy, although the Conditionality Regulation has a more narrow scope of application.¹⁹⁰ Damjanovski et al observe that the conditionality mechanism would 'allow the EU to supervise and influence the operation of state structures, in a way that resembles the pre-accession methodology'.¹⁹¹ But here as well, there are differences from pre-accession conditionality. For one, there is no asymmetry in the relationship, given that the modalities of the mechanism are defined jointly by, and apply equally to all EU Member States. Furthermore, the intervention on the part of EU institutions is expected to occur in reaction to specified incidences of rule of law infringement. This would make interventions targeted and concrete, in contrast to the often broad and abstract requirements formulated in the course of Enlargement, directed at institutional design and steered by ambitions of normative harmonisation.

¹⁸⁷ For a critical appraisal of the first Annual Rule of Law Report of 2020, see A Mungiu-Pippidi, 'Unresolved Questions on the EU Rule of Law Report' (2020) *Carnegie Europe*, available at <https://carnegieeurope.eu/2020/10/20/unresolved-questions-on-eu-rule-of-law-report-pub-82999>, pointing also at methodological flaws.

¹⁸⁸ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

¹⁸⁹ *ibid* Art 4.

¹⁹⁰ For critical analysis of the earlier proposal of the Commission, see M Blauburger and V van Hüllen, 'Conditionality of EU funds: an instrument to enforce EU fundamental values?' (2021) 43 *Journal of European Integration* 1–16.

¹⁹¹ Damjanovski et al (n 22) 16–17.

The drafting history of the Conditionality Regulation shows another difference of post-accession rule of law policy compared to the pre-accession one. The recalcitrant countries are now full-fledged members of the Union. On the positive side, this implies that the decision-making process is not characterized by the one-sidedness that was an intrinsic feature of pre-accession conditionality. On the negative side, backsliding countries have all the levers at their disposal for obstructing the introduction of formal rule of law standards and their effective monitoring. Predictably, the Regulation has been vehemently opposed by Hungary and Poland. To still advance the new legal regime the EU legislator, following European Council intervention, resorted to quite an unprecedented measure of postponing the legal effect of the act during the time of it being challenged by Hungary and Poland before the CJEU. This deviation from the normal course of procedure was probably an inevitable measure of last resort, seeking to break the deadlock and avoid the imminent veto of the draft Regulation by the two countries. However, it sets a disquieting precedent of corroding the rule of law in the Union for the sake of strengthening the rule of law.¹⁹²

The first experiences from the Conditionality Regulation are so far showing mixed results.¹⁹³ The Commission has activated the Regulation against Hungary and some funds have indeed been suspended. However, given the limited scope of the Regulation and the strict requirements of showing a sufficiently direct link with the sound financial management and protecting the financial interests of the Union, it is probably not surprising that the amount of suspended funds has so far remained relatively limited.¹⁹⁴ More unexpectedly, rule of law conditionality clauses have started to be applied and invoked by the Commission in connection with other EU budgetary instruments envisaging disbursement of funds to the Member States, notably the Regulation on the Recovery and Resilience Fund¹⁹⁵ and the Common Provisions Regulation¹⁹⁶ leading to interception of funds in significant proportions.¹⁹⁷ Interestingly, the latter Regulation is implemented

¹⁹² For a criticism of the unusual intervention of the European Council in the course of legislative decision-making, see K Scheppele, L Pech and S Platon, 'Compromising the Rule of Law while compromising on the Rule of Law' (2020) *Verfassungsblog*, 13 December 2020. See actions for annulment lodged by Hungary and Poland and judgments of the CJEU (full court) in the cases C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97 and C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

¹⁹³ See, critically, I Staudinger, 'The rise and fall of Rule of Law conditionality', in M Bonelli, M Claes, B De Witte and K Podstawa, *Usual and Unusual Suspects: New Actors, Roles and Mechanisms to Protect EU Values*, European Papers (2022).

¹⁹⁴ Only €3 billion were so far suspended in respect to Hungary. See K Scheppele and J Morijn, 'What price Rule of Law?' in: A Södersten and Edwin Hercock (eds) *Rule of Law in the EU: Crisis and Solutions* (2023) *SIEPS*, April 2023:1op 29-35.

¹⁹⁵ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17.

¹⁹⁶ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions [2021] OJ L231/159.

¹⁹⁷ According to Scheppele and Morijn, as of March 2023 more than €20 billion in EU funds allocated to Hungary have been frozen, and at least €10 billion have been withheld from Poland without the Conditionality Regulation ever being invoked. See Scheppele and Morijn (n 194) 31.

through so called Partnership Agreements between the Commission and each Member State, strongly reminiscent of the Accession Partnerships, to which horizontal principles (so called enabling clauses) referring among others to the Charter of Fundamental Rights, apply.¹⁹⁸

It remains to be seen whether the Union institutions involved in the enforcement of these instruments would show consistency and sustain the principles of legal certainty and equal treatment. In particular, giving too much leeway to the Council to tweak the enforcement of the Conditionality Regulation, depending on political vagaries, may jeopardize the legitimacy of this instrument and negatively influence its effectiveness. A noteworthy dynamic in this respect is the readiness of Judicial Networks to step in and hold the European legislator and the executive to account, when they are interpreting judicially-set standards in the context of country-specific implementing decisions.¹⁹⁹ The engagement of a broader range of actors can contribute to increased transparency and accountability of EU institutions.

More fundamentally, though, the Eastern Enlargement has shown that improvements in laws and institutions introduced under the sole pressure of conditionality can easily take the shape of “legal-institutional mimetism”, only mimicking change and not producing meaningful reform.²⁰⁰ The risk is even greater when conditionality is employed vis-à-vis illiberal governments, that are openly engaging in circumvention of existing legal obligations and a “catch-me-if-you-can” tactics.²⁰¹ Thus, there is considerable probability that the changes would remain rather “thin” and transitory, unless they are appropriated and internalized by actors on the ground who have genuine incentives and realistic chance to change the status quo.

7.3 *Enhanced Rule of Law Conceptualisation and Systematisation*

Probably the most significant rule of law dividend of Enlargement is that it has triggered a reflection over the fundamental values of the Union and set in motion a process of conceptualisation and systematisation of these values so that they fit into a coherent and sustainable constitutional framework. This ‘spill-over’ effect has been widely acknowledged in the area of judicial governance²⁰² and, more generally, in the domain of the rule of law.²⁰³ Looking at the concept of the rule of law, it is hard to deny that the concept has matured and is now much more developed and settled in EU law and policy. In the array of documents

¹⁹⁸ See Scheppele and Morijn (n 194) 32-34.

¹⁹⁹ See cases T-530/22, T-531/22, T-532/22 and T-533/22 *European Association of judges v Council* and T-116/23 *MEDEL v Commission*.

²⁰⁰ See Nikolaidis and Kleinfeld (n 63).

²⁰¹ See A Sajó, ‘On the difficulties of Rule of Law restoration’ in: A Södersten and Edwin Hercock (eds) *Rule of Law in the EU: Crisis and Solutions* (2023) *SIEPS*, April 2023:1op, 60-65.

²⁰² Piana (n 77) 4–5, seeing the process of rule of law promotion as a self-reflection.

²⁰³ Hillion, ‘Enlarging the European Union’ (n 14), although with a critical edge.

produced by EU institutions – Commission, Council and Parliament²⁰⁴ – in the course of Enlargement and post accession, gradually a consensual and increasingly sophisticated vision of the rule of law is transpiring. This vision also appears in the Commission’s approach to particular incidents of rule of law violations in the Member States.²⁰⁵ Remarkably, the recent Conditionality Regulation now contains a legislative definition of the rule of law.²⁰⁶ By including this definition in the Regulation, the Union’s approach to the rule of law has reached a new level. The jigsaw puzzle of rule of law bits and pieces that has been assembled in the course of Enlargement has ultimately resulted in a fairly coherent rule of law concept that now claims normative status, including vis-à-vis Union Member States. Obviously, this development leads to a higher quality of the EU rules in the domain of the rule of law, and consequently, of higher level of legitimacy that the concept can claim in the Union legal and institutional framework.

Still, it is important to be mindful of the different normative status of individual rule of law elements and standards and keep a distinction between commonly agreed binding legal standards, on the one hand, and standards as normative ideals, on the other. In this context, it is interesting to observe that in the part entitled “Recommendations” of the 2022 Rule of Law Report, the Commission recurrently refers to ‘European standards’ on a number of issues, such as resources for justice systems, access to official documents, secondment of judges, Councils for the Judiciary, independence and autonomy of the prosecution, public service media and funding for civil society.²⁰⁷ While such common standards have indeed been discussed and elaborated within various fora, not least in the process of Enlargement, in the area of rule of law and judicial independence, it may often be more convincing to make recourse to standards in a negative, rather than in a positive sense. This would imply identifying patterns of institutional conduct that are unacceptable rather than projecting uniform positive standards and falling into the trap of ‘normative harmonization’.²⁰⁸ Such “negative” approach would balance more successfully acceptance for institutional diversity in organising public administration and

²⁰⁴ On the actions of these institutions, see the contributions by A Perego, and L Stefani and M J Martín Iglesias in A Bakardjieva Engelbrekt et al (eds) *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Oxford: Hart Publishing, 2021), 291–312 and 313–340.

²⁰⁵ Pech and Grogan, ‘Meaning and Scope’ (n 15); Damjanovski et al (n 22).

²⁰⁶ See Regulation 2020/2092, Art 2(a): “‘the rule of law’ refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.”

²⁰⁷ See altogether 54 mentions of “European standards” in the 28-page document Annex to the European Commission, 2022 Rule of Law Report, COM(2022) 500 final, Luxembourg, 13 July 2022.

²⁰⁸ See Smilov ‘Enlargement and EU Constitutionalism’ (n 145) 176 et seq.

judicial governance, with rigorous requirements for safeguarding rule of law and judicial independence as constitutional principles.²⁰⁹

7.4 Judicialisation as a Bridge Between Pre-accession and Post-accession EU Rule of Law Policy

Finally, and potentially most decisively, Member States' obligations to respect the rule of law, and in particular the principles of judicial independence and impartiality, have become subject to judicial oversight, following broader interpretation by the CJEU of its own mandate to exercise such oversight. A central role in this evolution is played by Article 19 TEU and Article 47 CFR. In what can be defined as the single most revolutionary development in the Court's jurisprudence since the seminal judgements of *Costa v ENEL* and *Van Gend en Loos*²¹⁰, the Court has advanced an interpretation of Article 19 TEU as giving expression to the fundamental EU value of the rule of law, as laid down in Article 2 TEU. According to the Court, Article 19(1) second sub-paragraph TEU vests the responsibility for providing effective judicial protection not only in the EU Court itself, but also in national courts and tribunals, and this not exclusively when these courts apply EU law *stricto sensu* but also more broadly when they can potentially exercise responsibilities 'in fields covered by EU law'.²¹¹ The Court stresses the central role of national judiciaries in ensuring the effective application of EU law at the national level and for sustaining the mutual trust on which the EU legal order essentially builds. In the understanding of the Court, this is only possible if national judiciaries follow principles of the rule of law and judicial independence, and if they are 'not immune from EU oversight' for compliance with such principles.²¹²

Furthermore, once it has established its jurisdiction by way of a broader reading of Article 19(1) second sub-paragraph TEU, the Court proceeds to interpret this provision in conjunction with Article 47 CFR, thus opening the way for setting specific requirements vis-à-vis Member State courts as to their independence and impartiality, beyond the narrow scope of application of the Charter as defined in Article 51 CFR.²¹³ Importantly, this methodology has

²⁰⁹ For an example of such balanced position see Damjanovski et al (n 22) 13, with reference to Commission Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law COM(2017) 835 final, para 182. On the CJEU contribution in this direction see below, section 7.4.

²¹⁰ Case 6/64 *Costa v ENEL*, ECLI:EU:C:1964:66; Case C-26/62 *Van Gend & Loos*, ECLI:EU:C:1963:1.

²¹¹ See Case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, para 29; see already earlier in Case C-506/04, *Wilson v Ordre des avocats du barreau de Luxembourg*, ECLI:EU:C:2006:587. For an incisive analysis of the Portuguese Judges case and how it opened the way for setting EU requirements for the independence of Member States courts, see M Bonelli and M Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14(3) *European Constitutional Law Review* 622-643.

²¹² Damjanovski et al (n 22) 14.

²¹³ See Case C-64/16, *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 32. Cf Damjanovski et al (n 22) 12.

allowed the CJEU to develop a coherent concept of judicial independence, outlining its internal and external aspects, with reference to the case law of the ECtHR.²¹⁴ In this novel jurisprudence, the CJEU walks a fine line between paying due respect to the institutional autonomy of Member States and at the same time formulating constraints on the way this autonomy is exercised, notably in the field of judicial governance. Thus, in *Joined Cases AK and Others v Sąd Najwyższy*, the Court on the one hand reaffirms that where there are no EU rules governing the matter, ‘it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law’.²¹⁵ However, the Court insists, with reference to the right to effective judicial protection in Article 47 CFR, that ‘the Member States are ... responsible for ensuring that those rights are effectively protected in every case’.²¹⁶

In contrast to the Commission’s approach in its pre-accession policy, the CJEU is careful not to allege the existence of a common standard or a uniform normative vision as to the institutional design of Member States’ judiciaries. At the same time, the Court is more boldly relying on broad constitutional principles such as judicial independence, applying them in specific cases of encroachment on these principles in the Member States. This point of balance appears well founded. While the Commission in its pre-accession strategy works mostly prospectively, *ex ante*, and addresses questions of judicial governance in general terms, the CJEU decides *ex post* on concrete incidences of questionable law and practice in the Member States. The Court can set these incidences in their context and assess them against overarching principles of the rule of law and judicial independence. This presents one more example of setting ‘negative standards’, identifying institutional patterns that cannot be accepted, arguably rendering greater legitimacy to the Court’s rulings.

Commentators have observed that these judicial interpretations have quickly entered both the internal EU rule of law policy as well as the ongoing EU Enlargement policy, for instance when formulating accession requirements vis-à-vis the applicant countries from the Western Balkans.²¹⁷ The definitions of judicial independence developed by the Court in its jurisprudence have gradually received confirmation by the Union legislator, for instance through references in the Conditionality Regulation, as well as by the Commission in its soft law instruments.²¹⁸ Thus, in a dynamic process of cross-fertilisation, the standards

²¹⁴ See *Joined Cases C-585/18, C-624/18 and C-625/18, AK and Others v Sąd Najwyższy*, ECLI:EU:C:2019:982, paras 121–123.

²¹⁵ *ibid.*, para 115.

²¹⁶ *ibid.*, para 115. For similar reasoning in the context of the Polish legislation on lowering of the retirement age of Supreme Court judges, see Case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531, para 110; see also Case C-192/18, *Commission v Poland*, ECLI:EU:C:2019:924 on lowering of the retirement age of judges of the ordinary Polish courts, para 118.

²¹⁷ See Damjanovski et al (n 22).

²¹⁸ See references in Recital 3, Regulation (EU, Euratom) 2020/2092; cf. references to the Court’s case law on judicial independence and the rule of law in the Commission Rule of Law Report (2022), in particular references to cases as to the potential role of judicial councils for safeguarding judicial independence: C-824/18 *AB and Others*,

and interpretations developed by the CJEU feed back into the work of EU institutions. In the course of handling of particular cases and situations, the Court refines and fleshes out the general principles of the rule of law and judicial independence, and thereby contributes to sharpening the monitoring and benchmarking tools of European institutions, providing a bridge between internal and external EU rule of law policy.²¹⁹

This bold entry of the EU Court as an institutional actor in the domain of rule of law policy has been welcomed with enthusiasm by most commentators.²²⁰ At the same time, it would be naïve not to see the challenges ahead. It is well known that the incumbent institutions and political actors in the backsliding countries have met the Court's judgements with a mixture of scepticism, deliberate neglect and open resistance. The Polish Constitutional Tribunal notoriously held that the interpretations advanced by the EU Court concerning Articles 2 and 19 (1) subparagraph 2 should be considered *ultra vires* and in violation of the Polish Constitution, which the Tribunal proclaimed as having higher authority than the EU Treaties, in open violation of the principle of supremacy.²²¹ By this judgment, issued upon the request of the Polish Prime Minister, the Tribunal indirectly endorsed the Prime Minister's position that Polish courts should disregard the interpretations and judgments of the CJEU regarding the Polish judicial system. The Commission has sought and received a decision by the CJEU imposing daily periodic penalties on Poland for non-compliance with the judgements of the EU Court. This, however, cannot compensate for the fact that the mutual trust on which judicial dialogue in the EU builds, has been fundamentally shaken.

The other challenge is associated with the line of case law following the *Repubblika* judgement²²², where the CJEU steps in to defend national judges against wrongful appointments and removals in violation of the principles of judicial independence, instructing national courts to set aside and even consider verdicts of such unlawful courts non-existent. This turn in the jurisprudence is equally revolutionary and unsettling. In the follow up development, the EU Court is apparently trying to find a delicate point of balance between showing solidarity with national judges affected by unlawful removals and holding back

ECLI:EU:C:2021:153, paras.117, 119, 123; Case C-791/19, *Commission v Poland*, ECLI:EU:C:2021:596, paras. 98-108; Case C-896/19 *Repubblika and Il-Prim Ministru*, ECLI:EU:C:2021:311, para. 66; Joined cases C-585/18, C-624/18 and C-625/18 *AK et al* ECLI:EU:C:2019:982, paras. 137 and 138.

²¹⁹ See, for instance, para 2, European Commission, Reasoned proposal in accordance with Article 7(1) TEU regarding the Rule of Law in Poland, COM(2017) 835 final, Brussels, 20 December 2017. See in this sense and for a detailed analysis, Damjanovski et al (n 22), showing how the CJEU's case law is now explicitly integrated in the Commission's Enlargement strategy and documents.

²²⁰ See L Pech and D Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (2022) SIEPS, 2021:3.

²²¹ Judgement of the Polish Constitutional Tribunal Nr. K/21 of 7 October 2021 (n 5).

²²² Case C-896/19 *Repubblika and Il-Prim Ministru*, ECLI:EU:C:2021:311.

the rising trend of judges using references for preliminary ruling as a means of self-defence.²²³

In view of these challenges, it is probably too optimistic to expect that a triumph of Union values will obtain by way of increased judicialization. The Court's jurisprudence should rather be seen as providing a much needed frame of reference, giving continuous support to the other Union institutions in their quest to defend the EU values in the Member States through both dialogue and coercion.

8 Concluding Reflections

The purpose with this chapter has been to capture the intricate dynamic between the Eastward Enlargement and the evolving rule of law policy of the Union. As the first section of the chapter has demonstrated, the prospect of Eastward Enlargement that opened up immediately after the fall of the Berlin Wall has worked as a driving force for the advancement of the rule of law as a fundamental value and principle of EU law. The resulting development, through consecutive amendments of the Treaties and the enactment of the EU Charter of Fundamental Rights, can be considered a remarkable step in the evolution of the Union's constitutional framework.

More ambiguous have been the effects of EU's involvement in rule of law reform in the CEE candidate countries in the process of preparing these countries for membership of the Union. The chapter describes the conditionality approach adopted by EU institutions, building on strict monitoring and reporting obligations, and coupling financial assistance with evidence of progress in bringing the laws and institutions of the applicant states closer to EU standards. The chapter highlights the precarious position of the Commission in a domain where previously there had been very few legislatively set internal requirements in respect of EU Member States.

On the positive side, the EU's involvement has spurred the CCs to take rapid steps in the required direction of reinforcing the institutional framework of the rule of law, emboldening constitutional courts and introducing institutional guarantees of judicial independence. Although the process has been decidedly imperfect, it would be myopic not to see that significant improvements were made in many areas of law and governance in the CEE countries. On many counts – transparency, accountability, citizen participation and access to justice – the societies of the new CEE Member States of the EU have made considerable progress, especially bearing in mind their unenviable starting positions at the outset of the accession process. More importantly, through the engagement of NGOs, expert and professional associations, CoE institutions, such as the Venice Commission, the process has helped creating a local constituency of interlocutors in the CCs, who are ultimately those who can achieve long-lasting change in the mindsets and 'habits of the heart'.

On the negative side, the vague and indeterminate content of the rule of law concept and its sometimes inconsistent interpretation and application vis-à-vis

²²³ R Mánko and P Tacik, 'Sententia non existens: A new remedy under EU law?: Waldemar Žurek (W.Ž.)' (2022) 59 *Common Market Law Review*, 1169–1194; Case C-487/19, W. Ž., EU:C:2021:798.

individual CCs may have contributed to wearing away the already weak respect for the rule of law in the region. The outcome, in particular in the sphere of judicial independence, has often been more visible in setting up formal institutions, such as JCs and anti-corruption units, but less palpable at the level of true reform and the changing of informal practices. The implications and limits of governance by conditionality are arguably partly visible in the 'unfinished business' of judicial reform and the current rule of law backsliding in some of the new Member States.

While this development has quite understandably caused wide-spread concern and sober predictions, even questioning the future of European integration, one can also observe an unusual mobilisation of EU institutions, supported by Member States and civil society, in the direction of defining, explicating and asserting the EU's authority in the rule of law domain. This mobilisation proceeds along multiple and intersecting tracks relying on different modes of governance. Interestingly, in this process we can see how procedures and standards developed in the course of Enlargement serve as prototypes for new and bolder EU-internal rule of law policy tools, but also how hard-learned lessons from EU pre-accession policy help avoid some of the missteps in this policy.

To be sure, there is no easy way for the EU to address rule of law backsliding in the Member States and to intervene in political choices made by sovereign national governments. At the same time, it is increasingly acknowledged that the mutual trust on which the Union builds cannot function as a foundation for the common European project unless each Member State of the Union can depend on other Members' respect for commonly agreed commitments and values. As the EU Court famously held:

...these essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.²²⁴

The above described mobilization of EU institutions certainly shows that rule of law policy post accession is becoming firmly a part of this 'structured network of principles, rules and mutually interdependent relations'.²²⁵ In the area of the Internal Market, Kalypso Nicolaïdis succinctly observed that the principle of mutual recognition rests not on blind but on binding trust, which requires common standards, monitoring and engagement in one another's affairs.²²⁶ It is increasingly apparent that weaving such binding trust is also imperative in the more sensitive political domain of democracy and the rule of law.

²²⁴ Opinion 2/13 ECLI:EU:C:2014:2454, para 167.

²²⁵ Seen in this light, the open confrontation with the EU on the part of backsliding states can be understood as a failure of the incumbent governments to see their states as full-fledged and equal participants in this system of principles, rules and interdependent relationships, revealing an inability to conceptualize their countries' relationship with the Union as other than asymmetric and hierarchical. In this, paradoxically, we may still be seeing the long shadow of enlargement.

²²⁶ K Nicolaïdis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 *Journal of European Public Policy* 682–98.

In this respect, less optimistically, Enlargement has laid bare a major challenge, namely that EU institutions are reluctant to address the questions of power, which are at the core of the rule of law. As pointed out by Nicolaïdis and Kleinfeld, the rule of law is most often flawed because political leaders, governments or powerful economic actors do not want it to exist. Impediments to rule of law reform are thus typically to be sought not primarily at the level of formal laws or faulty institutional design, but at the level of political power and political culture.²²⁷ While avoiding the political by focusing on legal-technical issues has been at the very heart of Monnet's method of European integration, Grabbe reminds us of a fundamental downside to this approach – 'if the unsolved political question re-emerges, it can disrupt all the careful technical [and one might add legal] work'.²²⁸

This realisation leaves EU rule of law policy in an uneasy place. On the one hand, it requires audacity from EU institutions to confront political questions even when the latter are uncomfortable for those in power, and intervention may seem a delicate matter for Member State governments. Leaving such questions outside the scope of rule of law assessment and EU internal rule of law scrutiny would be irresponsible and even 'foolhardy'.²²⁹ On the other hand, it requires careful tailoring of EU interventions and humility, because sustainable change can only come from within.²³⁰

²²⁷ See Nicolaïdis and Kleinfeld (n 63) 28, with reference to T Carothers, 'The Rule of Law Revival' in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC, Carnegie Endowment for International Peace Washington, 2006) 4. This analysis resonates with Smilov's overarching criticism of the formalistic legalism that has come to dominate the European integration project, including Enlargement, and the reluctance to embrace European constitutionalism as an imperative of political morality. Smilov, 'Enlargement and EU Constitutionalism' (n 145) 176

²²⁸ Grabbe (n 21) 46.

²²⁹ Nicolaïdis and Kleinfeld (n 63) 36.

²³⁰ As pointed out by Bugaric, 'ultimately democratic political parties and social movements with credible political ideas and programs offer the best hope for the survival of constitutional democracy'. B Bugaric, 'Central Europe's Descent into Autocracy' (2018) *CES Open Forum Series Harvard* 33.

