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THE RULE OF LAW IN THE CONTEXT OF THE EUROPEAN UNION'S WESTERN BALKANS ENLARGEMENT POLICY

POLITICAL THOUGHT
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Introduction

The major project of European unification that led to the creation of the European Union as a unique European construct was developed in a lengthy and multi-layered integration process. The creation and maintenance of peace and security in Europe after World War II is the *raison d'être* of this complex European integration process that was initiated with the foundation of the *European Communities*. The *idea of peace* was envisioned to be realised by means of economic integration of the member states, which would subsequently lead to mutual solidarity. The convergence of the member states' economic policies implied the necessity to unify policies in other areas, too, which led to a spillover effect concerning integration beyond economy and a gradual development of political union as a following stage of integration. The European Union is actually the result of a unification process based on certain values that set the ground for developing common policies to achieve common goals and realise common interests. In that context, the rule of law is recognised as one of the European Union's basic values.[1]

In science, rule of law is defined as "superiority of the law", meaning that all actions and decisions need to be in compliance with rules that have been laid down and acknowledged, without any discretionary interventions.[2] Emanating from the *rule of law* as a basic value, the primary law of the European Union is comprised of the Founding Treaties which have been unanimously adopted by all member states, so that every action of the Union needs to be based on a provision of the Founding Treaties. Those treaties are legally binding documents signed by the EU member states. Based on them, goals of integration are determined, policies and actions are defined, the rules of procedure of the EU institutions are established, and the process of decision-making as well as the relationship between the Union and its member states are outlined. The Treaty of Lisbon foresaw a more active engagement of the EU within, based on the respect and promotion of European values. The commitment to freedom, democracy, basic rights and the rule of law was now featured in the form of a legally binding provision, having evolved from the level of political will expressed in the preamble.[3]

The process of fostering and deepening internal EU integration has been accompanied by the process of enlargement by new member states. The conditions for membership are also stipulated by the Founding Treaties that constitute primary EU law. The

1 According to Article 2 of the Treaty on European Union, according to the Treaty of Lisbon: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

2 Black, Henry C. *Black's Law Dictionary*, 6th ed., St. Paul, Minn: West Publishing Co., 1990, p. 1332, цитирано според Leas-Arcas, Rafael. "Essential Elements of the Rule of Law Concept in the EU." *Queen Mary School of Law Legal Studies Research Paper No. 180/2014* pp. 1-6 (Aug 20,2014): 1. Academia.edu.

3 Petruševska, Tatjana and Ognjanoska, Leposava. „Poglavjata 23 i 24 od *acquis communautaire* vo kontekstot na politikata na uslovuvanje zaradi integriranje vo Evropskata Unija: političkiot i teoretskiot kontekst". In: *Godišnik na Pravniot fakultet vo Skopje*, ed. Pandeva P., Irena, pp. 1-23, vol. 57. Skopje: Univerzitet "Sv. Kiril i Metodij", 2018.

consecutive EU enlargement processes have had an impact on the Founding Treaties of the EU, i.e. they have modified them with regard to specific rules that they contain. The first accessions to the European Union were based on political decisions, without any clear criteria having been established. However, in the case of the Central and Eastern European states, the political and institutional relationship framework for EU accession can be characterised as *conditionality policy*.[4] At the European Council meeting held in Copenhagen in June 1993, it was clearly stated that the states that express the will to do so should become part of the European Union. At the same time, certain membership criteria were established: the so-called *Copenhagen criteria* that set the ground for conditionality policy. These criteria are not legally binding, however they are contained in the political documents of the European Council, the highest political body of the European Union. Based on the Copenhagen criteria, an entire system of monitoring compliance with imposed conditions was developed, whereas the criteria themselves were inevitably embedded in a legal framework: the *acquis communautaire*. According to the Treaty of Lisbon, Article 49 of the Treaty on European Union (TEU) stipulates that every European state that respects the values referred to in its Article 2 (basic values of the EU) and is committed to promoting them may apply to become a member of the European Union. This statement leads to the conclusion that the enlargement of the Union will be based on achieving and respecting certain values: the fundamental values of the EU. Thus, Article 49 of the TEU implicitly reflects the Copenhagen criteria. Additionally, Article 49 stipulates that "the conditions of eligibility agreed upon by the European Council shall be taken into account," alluding to the Copenhagen criteria.

Introducing the Copenhagen criteria also meant placing certain key areas such as the rule of law high on the enlargement agenda. Hence, with the Treaty of Lisbon, the commitment to respecting the rule of law was introduced into the conditionality policy regarding EU membership. This rule is also applied to the accession of the Western Balkan states. The concept of rule of law in the EU enlargement process[5] is covered by Chapter 23 (judiciary and fundamental rights) and Chapter 24 (Justice, freedom and security) of the *acquis communautaire*. These chapters reflect the second pillar of the European Union, Justice and Internal Affairs, and contain the most significant elements

4 In a broader sense, conditionality policy is a process during which protagonists of international law impose conditions on states by which the latter achieve benefits, and during which the level to which the conditions are fulfilled is monitored and evaluated. In the framework of its enlargement to the East, the EU introduced a fostered and complex conditionality policy against the background of the future member states' different former political and economic system, but also due to the explicit scepticism with regard to the enlargement within the Union based on insufficient preparedness for the accession on both sides. Apart from the requirement for the state to be European (to be situated on the European continent), another formal condition for accession is introduced, namely respect for the principles of freedom and democracy as well as respect for human rights, the rule of law and the principles common to the member states.

5 According to the EU's Enlargement Strategy 2011/2012 developed by the European Commission which lists the areas included in the rule of law concept.

of democracy and the rule of law.[6] Chapters 23 and 24 are tightly linked to the *political* Copenhagen criteria; they are, as it were, the key to accession. They are opened first and closed last in the accession negotiations with every state that aspires to become a member of the European Union. For those states that have not started accession negotiations, the contents of Chapters 23 and 24 is becoming an increasingly important condition on their path towards EU integration; process catalyst, so to say.

The paper at hand analyses the introduction of the rule of law into the enlargement process as a result of fostering the conditionality policy for European Union membership as it has been the case in the relations with the Western Balkan states. We also address the concept of "Europeanisation" of candidate states and look at the growing volume and complexity of the *acquis communautaire*. In this context, we elaborate on the new approach to the enlargement process and the role of Chapters 23 and 24, with a special focus on the latest commitment to reforming the enlargement process by further fostering the importance of the rule of law as a fundamental value of the European Union, in its internal as well as external relations.

Theoretical Explanation of the "Europeanisation" Phenomenon

Initially, "Europeanisation" was analysed as a concept within the borders of the European Union, limited to the bilateral processes between its institutions and the member states.[7] Due to the process of new member states joining the EU and the development of the conditionality policy in the course of the enlargement to the East, the phenomenon of Europeanisation was expanded to the area of public policy. Thus, Europeanisation as a process mainly taking place in the member states, but also in the candidate states and some third states, can be basically described as an "institutional, strategic and normative adaptation [*of the system of a certain state*] induced by European integration".[8] Defined in more detail:

„Europeanisation involves processes of (a) construction, (b) diffusion and (c) institutionalisation of formal and informal rules, procedures, paradigms and policies, styles, "ways of getting things done" and shared values which are first defined and

6 In 2005, the EU decided to treat the following conditions as priority: independent judiciary system, respect for the fundamental rights, and fight against corruption. To this end, Chapter 23 "Judiciary and fundamental rights" was introduced, and the chapter "Justice, freedom and security" was renumbered Chapter 24.
Apropos, the EU's three pillar structure that was introduced with the Treaty of Maastricht in 1993 was formally abandoned when the Treaty of Lisbon that came into force in 2009.

7 Risse, T., Cowles, M.G. and Caporaso, J. "Europeanization and Domestic Change: Introduction." In *Transforming Europe: Europeanization and Domestic Change*, edited by Cowles, M. G., Caporaso, J. and Risse, T. Ithaca, NY: Cornell University Press, 2010, pp. 1-20.

8 Georgievski Sašo and Petruševska, Tatjana, Cenevska Ilina, Stamenković Nataša, Stojanovski Mihail. *Primena na pravoto na Evropskata unija vo Republika Makedonija vo periodot pred preistpuvanjeto kon EU*, Skopje: Univerzitet „Sv. Kiril i Metodij", Praven fakultet "Justinijan Prvi"-Skopje, p. 39.

consolidated in the framework of the political process in the EU and then incorporated into the logic of the domestic (national or subnational) discourse, identities, political structures, and public policies."[9]

The lengthy procedure of adapting the domestic order of the candidate states to EU law, i.e. adopting the *acquis communautaire*, is central to the Europeanisation process.[10] In the context of the enlargement of the European Union, the term *acquis communautaire* is often understood in a broader sense, as if it also included the "*acquis politique*, which *stricto sensu* is not part of the *acquis communautaire*."[11] However, the harmonisation process involves aspects of political criteria. According to some authors, there is a difference between formal changes as a result of transposing EU law, on the one hand, and a change of behaviour (change of practices)[12] which focuses on the actual implementation of the rules, on the other. EU law does not only represent a body of legal documents, but also a framework for establishing and implementing common policies and values. Hence, with regard to the EU candidate countries, the *acquis* also includes best practices of the member states concerning the founding principles of the EU, as well as *soft law*.[13] Soft law is the basis for interpreting legal documents, but it is not legally binding. In the process of harmonisation of the jurisdiction of a candidate state with EU law, the main focus has to be on primary law, secondary law and international agreements, while court rulings and soft law can be helpful for their interpretation.

Rationalists explain the process of Europeanisation and the mechanisms for its implementation by the "logic of consequences", while constructivists resort to the "logic of appropriateness".[14] Whereas the logic of consequences assumes that actors choose the behavioural option that maximises their utility under the circumstances, the logic of appropriateness stipulates that actors choose the behaviour that is appropriate according to their social role and the social norms in a given situation.

9 Radaelli, Claudio M. "The Europeanisation of Public Policy: Theory, Methods and the Challenge of Empirical Research." Oxford University Press (2003), cited *Ibid*, p. 39.

10 Translating *acquis communautaire* as "*acquis* of the Communities" or "*acquis of* the Union" can lead to different interpretations of the term (for details, see Jordanova R. Malinka, "Transponiranjeto na a*cquis communautaire* vo pravoto na Republika Makedonija: normativistička perspektiva", Doctoral thesis, Univerzitet "Sv. Kiril i Metodij", Praven Fakultet "Justinijan Prvi", Skopje 2010). In some languages, *acquis communautaire* is translated as "achievements" or "accomplishments" of the Communities/the Union, while in other languages, the translation of the term accentuates the notional element of "law" or "legal order" of the European Communities/European Union (Croatian, Slovenian, etc., as well as English, which also uses the phrase "the body of European Community law".) In Macedonian, the term *acquis* is mainly interpreted as "EU law". With the amendments to the Founding Treaties of the Union introduced by the Treaty of Lisbon, the phrase "*acquis communautaire*" was practically erased from the text of the treaties and replaced by the term "Union law".

11 Knud, Eric J. "The Social Construction of the acquis communautaire, a Cornerstone of the European Edifice." *European Integration On–line Papers*, Vol. 3, No. 5 (1999): стр. 11.

12 Schimmelfennig, Frank, and Sedelmeier, Ulrich. "Introduction: Conceptualizing the Europeanization of Central and Eastern Europe." In *Europeanization of Central and Eastern Europe,* edited by Schimmelfennig, Frank, and Sedelmeier, Ulrich. Ithaca, New York: Cornell University Press Cornell, 2005, pages 1-28.

13 Jordanova R. Malinka, "Transponiranjeto na a*cquis communautaire* vo pravoto na Republika Makedonija: normativistička perspektiva", Doctoral thesis, Univerzitet "Sv. Kiril i Metodij", Praven Fakultet "Justinijan Prvi", Skopje 2010, p. 48

14 March, J.G. and Olsen, J. "Rediscovering Institutions. The Organizational Basis of Politics." New York: Free Press (1989), цитирано според Schimmelfennig, F. and Sedelmeier, U. *The Europeanization of Eastern Europe: the External Incentives Model Revisited.* Paper for the JMF@25 conference, EUI, 22/23 June 2017, https://www.eui.eu/Documents/RSCAS/JMF-25-Presentation/Schimmelfennig-Sedelmeier-External-Incentives-Revisited-JMF.pdf [accessed 10 April 2020].

Combining the two dimensions, the external incentives model assumes that the EU drives Europeanisation by means of sanctions and rewards that change the cost-benefit calculations of domestic actors, while the social learning model posits that the authority of the EU and the legitimacy of its policies have the power to persuade domestic actors to proceed with Europeanisation.[15] Conditionality policy is the main mechanism for conducting Europeanisation of/towards candidate states, pursued with the aim to carry out reforms which would not be realised without that kind of policy. The logic inherent to conditionality policy is to "internalise" reforms within the system in the long run, which means transposing Union law into domestic law, restructuring the institutions in compliance with EU rules, and changing political practices according to European standards.[16] As the two sides in the enlargement process, the European Union and (potential) candidate states enter into an unequal partnership, due to the fact that the EU has the power to impose rules and conditions without any room for negotiations, to withdraw or suspend benefits in case of insufficient compliance, and because EU membership is usually more important to the candidate state than to the Union itself.[17] This process is also called "promoting democracy by integration".[18] However, the strategy of conditionality is effective only if the criteria are clearly defined and a credible EU membership perspective is determined as the final award, and if the threat of being excluded from the integration process in case of failure is serious enough.

According to this model and understanding of conditionality policy, its impact and influence are most distinct during the membership negotiations, but not towards the end of the accession process or after becoming a EU member state. Hence, conditionality policy is constantly developed and amplified in the context of the Western Balkans enlargement, and it has to be understood rather as a process than as a clearly defined variable.[19]

Amplifying the Conditionality Policy in the EU Enlargement Process With the Western Balkans States

The term "Western Balkans" has a geopolitical character. It was first used in the beginning of the 1990s to denote the former Yugoslav republics (but not Slovenia) and Albania.

15 Schimmelfennig, F. and Sedelmeier, U. "The Europeanization of Eastern Europe: the External Incentives Model Revisited." Paper for the JMF@25 conference, EUI, 22/23 June 2017.

16 Schimmelfennig, F. and Sedelmeier, U. "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe." *Journal of European Public Policy*, 2004, pages 661-679.

17 Ibid.

18 For further information, see Steunenberg, B. and Dimitrova, A. "Compliance in the EU enlargement process: The Limits of Conditionality." *European Integration Online Papers*, Vol. 11, 2007, pages 11-18.

19 Sasse, G. "The European Neighbourhood Policy: Conditionality Revisited for the EU's Eastern Neighbours." *Europe-Asia Studies*, Volume 60-Issue 2, 2008, pages 295-316.

In the context of EU integration, the denomination was introduced in 1996/7 when the respective regional approach was established. By applying the term "Western Balkans", the European Union introduced a distinction between the Western Balkan and Central and East European (CEE) countries, which actually include the Western Balkan countries. That distinction is also reflected in the EU accession process of the latter.

In a historical perspective, the European Community had established political and economic relations with the Socialist Federal Republic of Yugoslavia, set down in the Cooperation Agreement that entered into force in 1983. The legal basis for this agreement had been Article 310 of the Treaty establishing the European Community, which refers to agreements establishing an association. Before the fall of the Berlin Wall, there had not been any cooperation agreements between the Union and other CEE countries except Romania, with which an Agreement on trade in manufactured goods was signed in 1980.

The collapse of Yugoslavia had a crucial impact on the design of the EU's politics towards the Western Balkans. From 1990 to 1993, the European Community was involved in the dissolution process of Yugoslavia. In its Declaration on Yugoslavia as of December 1991 that deals with the recognition of states of the former Yugoslavia, the Community imposed certain conditions in addition to the ones established for the recognition of states and governments in CEE, which was a new practice with regard to recognition.[20] That conditionality concerning the establishment of relations with the states of former Yugoslavia had, in turn, a strong impact on the further development of events and on the relations of the EC (EU) towards the Western Balkans region and towards every state individually.[21] Based on the conclusions of the European Council in 1997, the EU shaped a unified approach towards the region. It is stated at the beginning of the document that "the task in the years ahead will be to prepare the applicant states for accession to the Union and to see that the Union is properly prepared for enlargement. This enlargement is a comprehensive, inclusive and ongoing process, which will take place in stages." Hence, conditionality was established as the basic characteristic of the approach towards the Western Balkan states. The text further specified that the concept applies to the former Yugoslav Southeast European states (except Slovenia) and Albania that do not have signed association agreements with the EU. It was also characteristic of the regional approach that there were individual conditions for every state.

At the Vienna Summit in 1998, the introduction of a broader and more integrative approach towards the Western Balkan states was initiated, based on the common strategy according to the Treaty of Amsterdam concerning the Common Foreign and

20 Rich, Roland. "Recognition of States: The Collapse of Yugoslavia and the Soviet Union." *European Journal of International Law*, (1993).

21 Jordanova R. Malinka, „Politikata na uslovenost na Evropskata Unija kon državite aspiranti za členstvo", Master's thesis, Univerzitet "Sv. Kiril i Metodij", Filozifski fakultet - Skopje, Skopje 2006, p. 80

Security Policy. At the European Council meeting in Helsinki in December 1999, some changes were introduced into the dynamics of the enlargement process. According to the adopted conclusions, the pace of the negotiations would depend on the progress achieved by every state separately. The Chapters would be opened when the Commission assesses the state to be sufficiently prepared. Hence, besides conditionality, the feature of differentiation was introduced into the enlargement methodology, according to which a state that was better prepared could advance in the negotiations faster than other states in the same group. Even if a state would start accession negotiations later, it could outpace the states that have started earlier. Nevertheless, accession dates highly depend on the attitudes and interests of the EU member states. The feature of differentiation also became important later, in the accession process of the Western Balkan states. At that time, the main reason for changing the approach was the instability of the region, first and foremost the conflict in Kosovo. Based on the conclusions, in May 1999, the European Commissions issued a Communication on the future relations of the EU and the Southeast European countries,[22] pointing out that the "countries in the region have the prospect of increasing rapprochement with the EU, in the perspective of full integration into European structures", and that this process would take place by means of "a new kind of contractual relations, taking .into account the individual situation of each country, with a perspective of EU membership on the basis of the Amsterdam Treaty and once the Copenhagen criteria have been met". The key element of this strategy was the stabilisation and association process (PSA) with five countries from the region: Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Republic of Macedonia. The stabilisation and association process consists of Stabilisation and Association Agreements (SAA), financial support and autonomous trade measures. The SAA that are signed with every country separately are key instrument within the PSA, establishing mutual relations, rights, and duties.

The SAA as a legal mechanism of the PSA incorporate the "carrot", i.e. the EU membership perspective as a strong incentive, but at the same time, they impose complex political and economic conditions, strongly emphasising the requirement of regional cooperation. However, the SAA also show the individual approach towards every state, in line with the principle of differentiation. In order to develop closer relations with the EU, the states that sign SAA have to adapt their political and economic structures to the values and models supported by the EU: democracy, respect for human rights, and market economy. The membership perspective is conveyed in a so-called evolution clause[23] as a possible, but not entirely granted result of the process. With the introduction of the SAA, the EU's conditionality policy towards the Western Balkan states was not only approximated to the politics of the enlargement towards the Central and Eastern European countries initiated

22 European Commission. "Communication from the Commission to the Council and the European Parliament of 26 May 1999 on the Stabilisation and Association Process for countries of South–Eastern." Brussels, 26.05.1999.

23 Petruševksa, Tatjana. *Voved vo pravoto na Evropskata unija*, Skopje: Praven fakultet "Justinijan Prvi"-Skopje, 2011, p. 242.

earlier, but also expanded and amplified. At the same time, the fourth Copenhagen criterium was pointed out: absorption capacity. According to this approach, the Western Balkan states were subject to additional criteria within the PSA framework (the so-called Copenhagen plus criteria).[24] The additional criteria introduced new standards for assessing the level of preparedness for EU membership compared to the criterium of the EU's absorption capacity. At the same time, on 10 June 1999 the Stability Pact for South Eastern Europe was created by decision of the Council of Ministers. The Stability Pact represented an initiative for fostering regional cooperation, signed by over 40 states and organisations, including the EU member states, the European Commission, the USA, the UNO, the OSCE, the Council of Europe, NATO, the World Bank, the European Investment Bank, the Southeast European Cooperative Initiative and, of course, the countries of the region. The signatories declared their commitment to intensifying their efforts to foster peace and democracy.

At the Zagreb Summit in late 2000, it was repeated that EU accession would be based on the Treaty on European Union and the Copenhagen criteria, while the Stabilisation and Association Agreements would be used as starting points for establishing a EU membership perspective. At the Thessaloniki Summit in June 2003, the unambiguous support for of the European perspective of the Western Balkan states was reconfirmed, stating that "the future of the Balkans is in the European Union",[25] with the term "European perspective" meaning membership and full inclusion in the EU's institutional and political structures.[26] According to the conclusions of this summit, the EU agenda was clearly focused at providing an accession opportunity for the Western Balkan states, at the same time repeating that the European Union is based on democracy, the rule of law, respect of human and minority rights, and solidarity. In 2008, the European Commission adopted a document for evaluating the progress with regard to the implementation of the Thessaloniki agenda and the subsequent challenges, identifying certain benchmarks for the next phases of the accession process.[27] The promise given in Thessaloniki was repeated at the Ministerial Meeting on 2 June 2010 in Sarajevo, where the EU assured its "unambiguous commitment to the European perspective of the Western Balkan countries".[28]

The accession process of the Western Balkan states is characterised by the introduction of a reinforced monitoring of the rule of law and the development of an entirely new framework for analysing the enlargement process. Intensifying the process is necessary

24 Petrovic, Milenko, and Nicholas R.Smith. "In Croatia's Slipstream or on an Alternative Road? Assessing the Objective Case for the Remaining Western Balkan States Acceding into the EU." *Southeast European and Black Sea Studies* (2013): 560.

25 European Council. "Presidency Conclusions." Thessaloniki, 19.06.2003.

26 European Commission. "Communication from the Commission to the Council and the European Parliament: The Western Balkans and European Integration." Brussels, 21.05.2003.

27 European Commission. "Communication from the Commission - The Western Balkans on the Road to the EU: Consolidating Stability and Raising Prosperity." Brussels, 27.01.2008.

28 Council of the European Union. "Press Release, 3023rd Council meeting on Foreign Affairs." Luxembourg, 14.06.2010.

in order to boost the EU's credibility in the region, but it is also indispensable to express the transformative power of the EU with regard to the candidate states. Chapters 23 and 24 will be crucial within this approach and will additionally contribute to amplifying the conditionality policy.

The Introduction of Chapters 23 and 24 Into the Process of EU Enlargement

During the fifth EU enlargement in 2004 and the enlargement by Romania and Bulgaria in 2007, Union law was divided into 31 chapters. However, during the negotiations with Croatia and Turkey, a division into 35 chapters was introduced. The comprehensive chapters and the ones that were harder to harmonise had been split into separate chapters, so that some policies were now included in several chapters. While Bulgaria and Romania had to harmonise their legislature with about 90.000 pages of *acquis communautaire*,[29] Croatia had to deal with 170.000 pages during its accession negotiations.[30] The Union established that meeting the conditions of an independent and efficient judiciary, respecting the fundamental rights and fighting corruption should be treated as a priority and therefore introduced Chapter 23 (Judiciary and fundamental rights). Meanwhile, the chapter "Justice, freedom and security" was renumbered Chapter 24. Both Chapters 23 and 24 contain the concept of rule of law. EU policies in the area of judiciary and fundamental rights are aimed at maintaining and further developing the Union as a space of freedom, security and justice. The member states have to fight corruption effectively, since it represents a threat to the stability of democratic institutions and the rule of law. An independent and efficient judiciary system with impartial and upright judges is essential for protecting the rule of law. Respecting the fundamental and citizen's rights is an inalienable element of European identity.

The strategic decision to introduce Chapter 23 was taken in 2005 and subsequently applied during the negotiations with Croatia and Turkey, and it was also reflected in the position that was presumed during the negotiations as well as the structure of the negotiation framework itself. In case of serious and continuous violation of the principles of freedom, democracy, respect for human rights and freedoms and the rule of law, i.e. the fundamental values that the Union rests upon, the Commission, on its own initiative or by request by one third of the member states, can recommend to discontinue the accession negotiations and suggest conditions under which they can be continued. The new structure of Union law, including the additional chapters, was contained in the

29 Communication from the Commission. "Comprehensive Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania." Brussels, 25.10.2005.

30 Nechev, Zoran. "Bolstering the Rule of Law in the EU Enlargement Process towards the Western Balkan." Working paper no. 22. The Hague, Netherlands: Netherlands Institute for International Relations "Clingendael", 2013.

Annex to the Negotiation Framework with Croatia[31] and Turkey.[32] In the Enlargement Strategy 2005, the Commission introduced a reinforced monitoring system with regard to the rule of law into the accession process for every Western Balkan state.[33] The enlargement policy was based on consolidation, conditionality and communication, while the carefully managed enlargement process was aimed at fostering peace, stability, prosperity, democracy and the rule of law throughout Europe. According to the conclusions of the European Council summit in Brussels in 2006, the updated consensus on the enlargement process enhanced the importance of the rule of law in the accession process: "Accordingly, difficult issues such as administrative and judicial reforms and the fight against corruption will be addressed at an early stage.".[34] Although Chapter 23 was introduced during the accession negotiations with Croatia, it was not opened first and closed last at that stage yet. That approach was first applied during the negotiations with Montenegro.

The experience from the enlargement negotiations with Bulgaria and Romania who joined the EU in 2007 had a significant impact on the development of the negotiation structure. The accession talks with those two states had shown that shortcomings in key areas such as judiciary and the fight against corruption had not been entirely overcome. In order to overcome them, the new Chapter, Judiciary and fundamental rights, was introduced into the future enlargement process, while the accession of Bulgaria and Romania was supported by the Mechanism for Cooperation and Verification. This instrument was introduced in order to continue monitoring respective reforms in these two countries even after their officially becoming EU member states,[35] thus taking pre-accession control beyond the borders of enlargement policy. The Mechanism of Cooperation and Verification included a set of benchmarks (six for Bulgaria and four for Romania) to be regularly (twice a year) monitored by the European Commission.[36] Inconsistency with regard to the criteria would lead to sanctions such as freezing the EU's financial support and unilateral discontinuation of the bilateral cooperation with other member states on judiciary issues. The accession agreements with Bulgaria and Romania both contain a specific "postponement clause".[37] Croatia had managed to avoid the

31 European Commission. "Croatia Negotiating Framework." Luxembourg, 3.10.2005.

32 European Commission. "Turkey Negotiating Framework." Luxembourg, 3.10.2005.

33 Commission of the European Communities. "Communication from the Commission 2005 Enlargement Strategy Paper." Brussels, 09.11.2005.

34 European Council. "Presidency Conclusions." Brussels, 15.12.2006.

35 Steunenberg, Bernard, and Dimitrova, Antoaneta. "Compliance in the EU enlargement process: The Limits of Conditionality." *European Integration Online Papers*, Vol. 11 (2007): pp. 11-18.

36 European Commission. "Commission Decision of 13 December 2006 Establishing a Mechanism for Cooperation and Verification of Progress in Romania to Address Specific Benchmarks in the Areas of Judicial Reform and the Fight Against Corruption C(2006) 6569." Brussels, 13.12.2006.

37 "If (...) there is clear evidence that the state of preparations for adoption and implementation of the acquis in Bulgaria or Romania is such that there is a serious risk of either of those States being manifestly unprepared to meet the requirements of membership by the date of accession of 1 January 2007 in a number of important areas, the Council may, acting unanimously on the basis of a Commission recommendation, decide that the date of accession of that State is postponed by one year to 1 January 2008. Act Concerning the Conditions of Accession of the Republic of Bulgaria and Romania and the Adjustments to the Treaties on which the European Union is Founded, Official Journal of the European Union L157, 21.06.2005.

establishment of this instrument for monitoring post-accession relations with regard to the rule of law. Nevertheless, based on the lessons learned, the European Union assumed a stricter position in the negotiations vis-à-vis Croatia with regard to closing Chapters 23 and 24. The EU's Accession Agreement with Croatia contained "specific commitments undertaken by the Republic of Croatia in the accession negotiations", i.a. the commitment to strengthen the independence, responsibility, impartiality and professionalism of the judiciary and to foster the protection of human rights. Additionally, Article 36 stipulated that the Council, acting by qualified majority on a proposal from the Commission, may take *all appropriate measures* if issues of concern are identified during the monitoring process, whereas the measures are not further specified. According to this approach, compliance with the criteria from Chapters 23 and 24 remained subject to monitoring even after accession. The conditionality of the process regarding these two chapters is particularly evident in the case of Turkey. Blocking the negotiations on Chapter 23 in 2010 led to a discontinuation of the entire process, since, subsequently, hardly any other chapter could be opened. This example makes it clear that the Europeanisation process is inevitably also a process of democratisation and incorporation of the fundamental values of the Union in a society - a condition that was later transferred into the so-called new approach in the enlargement process.

The mechanisms of protection and rule of law represent a pressing issue within the borders of the European Union, too. During the last few years, the EU has faced a series of events in different member states that disclose systemic threats to the rule of law. Hence, in 2014, the EU presented a new mechanism for dealing with systemic threats to the rule of law in EU member states. The goal of the EU framework for strengthening the rule of law[38] is to provide the European Commission with an instrument/mechanism for the prevention of systemic threats to the rule of law in member states that could develop into "a clear risk of serious violation of the fundamental values of the Union" according to Article 7 of the TEU, as well as for the introduction of sanctions against member states in which systemic and continuous tendencies towards violating the rule of law have been identified. The new EU framework for strengthening the rule of law is based on four principles: to focus on a solution to the identified problem in a structured dialogue with the respective member state, to ensure an objective and thorough assessment of the situation at stake, to respect the principle of equal treatment of all member states regardless of any peculiarity, and to indicate swift and concrete actions which could be taken to address the systemic threat and to avoid the use of Article 7 TEU mechanisms, the last and most severe instrument to resort to.

38 European Commission. "Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law." Brussels, 19 .03.2014.

The New Approach Within the Enlargement Process

The increasing significance of the rule of law in the EU's Western Balkans enlargement process is evident and can be seen from the documents adopted in the course of this process. According to the EU's institutional setup, the European Commission is authorised to prepare proposals on the development of the enlargement policy, upon which the Council of Ministers of the EU for General Affairs and the European Council adopt conclusions. Each year, the Commission adopts an "enlargement package": a set of documents that explain its proposals on the EU's enlargement policy. The enlargement package contains reports on the situation according to the Copenhagen criteria and the chapters of Union law. In these reports, the Commission presents its evaluation of the progress in the respective areas achieved by each state involved in the enlargement process, as well as enlargement strategies that pave the way for the future development of the enlargement policy.[39] Since the rule of law was introduced into the accession process according to the Enlargement Strategy as of 2005, its role within the conditionality policy has advanced gradually and been strengthened continuously. The "new approach in the enlargement process" was officially introduced with the Enlargement Strategy for 2011/2012,[40] which clearly stated that the rule of law is reflected in Chapter 23, Judiciary and fundamental rights, and Chapter 24, Justice, freedom and security. Those two chapters are the key to accession. The new approach focuses on expanding the time frame for negotiating Chapters 23 and 24 and the introduction of periodical benchmarks in order to provide enough time for the candidate states to prove that the introduced reforms are being implemented. Thus, the Commission is provided with a better guarantee that the candidate states have functional and efficient systems in place before EU accession, which lowers the probability of the process being reversed after the state has become an EU member state. One of the main novelties is that Chapters 23 and 24 are opened first and closed last in the accession negotiations with every candidate state. For states which are not yet negotiating, the contents of Chapter 23 is becoming an increasingly important condition for progress on the path towards EU integration, practically a process catalyst. The chapters are subject to the so-called screening process, followed by a notification from the candidate state on fulfilling the benchmarks. The new approach to negotiations suggests the adoption of European standards before officially becoming part of the EU. The Enlargement Strategy 2015-2019[41] clearly states that the accession process will be conducted according to the

39 According to the official explanation by the European Union, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/strategy_paper_2010_en.pdf, [accessed 27.05.2016]

40 European Commission. "Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2011–2012." Brussels, 12.10.2011.

41 European Commission. "Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2015–2019." Brussels, 10.11.2015.

principle "fundamentals first", with the aim of achieving genuine results with regard to the key chapters. The development of the conditionality policy as incorporated in the Commission's accession strategies was continuously approved by the Council of Ministers of the EU and the European Council, as can be seen from their conclusions.

The EU's approach to the enlargement process develops and advances with every enlargement. As we have seen above, Chapter 23 was introduced during the negotiations with Croatia, but the new approach was first used in the negotiations with Montenegro. At the December Summit of the European Council in 2011,[42] Montenegro's progress during 2010 according to the Progress Report of the European Commission was welcomed,[43] but the start of the negotiations was postponed until June 2012, based on the Commission's positive opinion on the progress achieved by then. In all its conclusions, the European Council stated that the accession negotiations would be led according to the "renewed enlargement consensus" emphasised in the 2006 conclusions, the established practice, but also according to the "new approach" with regard to Chapters 23 and 24. At the same time, the Council called on the Commission to prepare a draft negotiation framework and to start the analytical overview of the situation in Montenegro with regard to Chapter 23 and 24. In May 2012, based on the adopted conclusions, the Commission prepared a report on the additional progress by Montenegro since 1 September 2011 with regard to implementing the reforms in the key priority areas, with a special focus on judiciary, fundamental rights, and the fight against corruption and organised crime.[44] Based on this report, at a meeting in June 2012, the EU Council decided to set a date for opening the accession negotiations, 29 June 2012.[45] Thus, the Commission emphasised once again that the experience from previous accession negotiations would be taken into account, and that the new approach concerning Chapters 23 and 24 would be applied, meaning that they would be opened in the early phase of the negotiations in order to provide maximum time for establishing the legal and institutional framework and a subsequent successful implementation. The Conclusions of the Council of the EU were adopted by the European Council at its meeting on 29 June 2012.[46]

The negotiation framework for Montenegro was introduced with a modification of the suspension clause in order to provide a balanced progress during the negotiations on the individual chapters. Should the progress on Chapters 23 and 24 lag behind considerably compared to the other chapters, the Commission would be authorised, on its own initiative or by request by one third of the member states, to withdraw the recommendation to open or close any other chapter as long as the backlog would

42 European Council. "Conclusions." Brussels, 9.12.2011.

43 European Commission. "Commission Staff Working Paper Montenegro 2011 Progress Report." Brussels, 12.10.2011.

44 European Commission. "Report from the Commission to the European Parliament and the Council on Montenegro's Progress in the Implementation of Reforms." Brussels, 22.05.2012.

45 Council of the European Union. "3180th Council meeting General Affairs Conclusions." Brussels, 26.06.2012.

46 European Council. "Conclusions." Brussels, 29.06.2012.

prevail. The Council would decide on a respective proposal with a qualified majority, and the member states would have to respect the decision, regardless of the principle of unanimosity on decisions of the Intergovernmental Conference. In the approach established in the framework of the negotiation process with Montenegro, there were also differences in terms of defining the benchmarks. Chapters 23 and 24 would be opened based on the adoption of action plans. With the aim to better monitor and harmonise these chapters, the Commission introduced periodical benchmarks with regard to the adoption of appropriate legislation and strengthening the public administration structures, in order to achieve medium-term results. Thus, the Commission was provided with the possibility to change the benchmarks during the process, as well as the action plans and other correction measures. Subsequently, the system for monitoring the harmonisation was strengthened. It was foreseen for the Commission to submit progress reports on Chapters 23 and 24 to the Council twice a year. The new approach was also applied to the phase of analytical analysis of Chapters 23 and 24 in Montenegro. The screening was initiated even before the official starting date of the negotiations. In addition to being applied during the accession negotiations with Montenegro, the new enlargement process approach was also consequently applied in the negotiations with Serbia.

The Rule of Law and the Proposal on a New Negotiation Methodology in the Enlargement Process

The EU's transformative power is at its strongest during accession negotiations. The case of our state shows that a standstill can have a very negative impact on the entire Europeanisation process. Given that the name issue was considered as the main process catalyst, compliance with the Copenhagen criteria was compromised.[47] Due to the course of events, the implementation of reforms in key areas was put into question, and internal problems with regard to democracy and the rule of law were disclosed, which, meanwhile, have became more important factors for the future integration of our state in the European Union than the name issue with Greece. However, even in October 2019, when the name issue was solved and key area reforms were implemented, the European Council did not reach an agreement on assigning a date for the start of EU accession negotiations.[48] If we analyse this event against the background of compliance with the Copenhagen criteria and the new approach to the enlargement process with a forstered conditionality policy with regard to the rule of law, this time, the decision was made

47 Jordanova R., Malinka and Jovanoski, Aleksandar, Stojanoska, Biljana: *Izveštajot na Evropskata komisija za napredokot na Republika Makedonija za 2012 godina pod lupa: Ista preporaka, nova poraka.* Skopje: Institut za evropska politika, 2012, p. 6.

48 According to the published conclusions from the European Council meeting on 17 and 18 October 2019, the European Council will revisit to the issue of enlargement before the EU-Western Balkans-summit planned to be held in May 2020. For further information, see: https://www.consilium.europa.eu/media/41123/17-18-euco-final-conclusions-en.pdf.

rather due to the "absorption capacity of the Union", i.e. the capability to include new members.[49] The introduction of this condition provides the possibility to diverge from the procedure and make a political decision in case a country fulfils the membership criteria while the Union itself, for different reasons, is not prepared for further enlargement. The increased importance of this condition is partly due to the slow pace of the stabilisation and transformation process, but also to inner limitations within the EU and disunity with regard to its further enlargement.

The EU institutions, particularly the Commission, committed themselves to finding a way to renew the dynamics of the enlargement process within a short time. Its efforts were preceded by the French non-paper on reforming the EU enlargement process drafted in November 2019. The renewed approach was to be based on the following four principles: gradual accession (association), strict conditions, essential benefits, and reversibility. The enlargement approach confirmed in December 2011 that we discussed above was hereby reaffirmed, i.e., the rule of law and fundamental rights are essential conditions from the moment of opening negotiations, but with a strengthened requirement that they be included as criteria at every stage of the process, up to the official conclusion of the negotiations and the subsequent accession of the state. With regard to the negotiation process, the progress criteria need to be defined in more detail in order to allow for a monitoring of the entire adoption process, as well as an efficient and sustainable implementation of the acquis relevant to the area at stake and the policies created. Meanwhile, progress has to be based on sustainable and irreversible improvement of the rule of law. This proposal served as a basis for the subsequent proposal of nine EU member states, their contribution to reforming the EU enlargement process, in which the importance of Chapters 23 and 24 and the rule of law was also highlighted.[50]

Consequently, the proposal on a new methodology for the EU enlargement process that was prepared by the European Commission and presented on 20 February 2020 was focused on the rule of law.[51] As pointed out in the document, the proposal is about a balanced approach that should lead to a process which is more dynamic and credible, but, at the same time, focuses more on the role of the basic fundamental reforms which are indispensable on the path to the EU. Just like to date, the chapters relevant to the rule of law should be opened first and closed last, but it is foreseen to

49 An analysis of the public discourse on this decision leads to the conclusion that France was the main opponent. In an interview with The Economis published on 7 November 2019, President of France Emmanuel Macron said: "We can't make it work with 27 of us (...). Do you think it will work better if there are 30 or 32 of us?" And they tell me: "If we start talks now, it will be in ten or 15 years." That's not being honest with our citizens or with those countries. I've said to them: "Look at banking union". The crisis in 2008 with these big decisions; end of banking union in 2028. It's taking us 20 years to reform. So even if we open these negotiations now, we still won't have reformed our union if we carry on at today's pace.
For further information, see: https://www.economist.com/europe/2019/11/07/emmanuel-macron-in-his-own-words-english.

50 The proposal was submitted in December 2019 by Austria, the Czech Republic, Estonia, Italy, Latvia, Lithuania, Malta, Poland and Slovenia. For further information, see: https://europeanwesternbalkans.com/2019/12/11/nine-eu-members-release-a-new-proposal-for-the-reform-of-enlargement-process/.

51 The proposal on a new methodology for the enlargement process was presented by Enlargement Commissioner Olivér Várhelyi on 5 February 2020. For further information, see: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_208.

have "sign posts" on the rule of law and the functioning of the democratic institutions, as well as a stronger connection to the economic reforms. The new feature in the new enlargement methodology is an increase in conditionality and complexity of the process, from a political as well as technical point of view. The political nature of the process is reflected by regular summits and a tighter schedule of minsterial meetings, using the bodies that have been established during the stabilisation and association process, as well as the introduction of inter-governmental conferences. It should be pointed out that the additional emphasis on the rule of law is coupled with a division of the chapters into thematic clusters and the introduction of benchmarks for opening each cluster. Negotiations will be opened on each cluster as one entity instead of individually, while the closing benchmarks will be defined for each chapter separately. Meanwhile, not one single chapter can be closed, even temporarily, before the specific benchmarks with regard to the rule of law are fulfilled. To this aim, incentives are increased, such as access to EU programmes, financial support, investments in the implementation of reforms, as well as the Instrument for Pre-Accession Assistance that focuses on the reforms. At the same time, sanctions in case of "serious or continued stagnation or even regression" are enhanced, too. The proposed methodology would be applicable to the negotiation process with our country as well as Albania.

Conclusions

The ability of the European Union to impact the candidate states so that they carry out required reforms in order to create internal policies and sufficiently stable and strong institutions to handle the responsibilities that EU membership will impose on them is essential for a successful enlargement agenda. Conditionality policy is a key instrument of the EU's for achieving the necessary level of harmonisation in the framework of enlargement methodology. The transformative power of conditionality policy is particularly reflected in the accession process of the Western Balkan states. The Europeanisation of the candidate countries will have to lead to democratisation and acceptance of the fundamental values of the Union. Establishing and maintaining the rule of law is one of the biggest challenges on that path.

The key conditions for EU membership and the principle of rule of law are enshrined in the Copenhagen criteria. Amplifying the conditionality policy meant that political criteria were introduced into the EU membership negotiation process by means of differentiating two chapters within Union law: Chapter 23, Judiciary and fundamental rights, and Chapter 24, Justice, freedom and security, thus creating the basis for the new approach at the enlargement process according to the motto "fundamentals first". The reason for introducing this approach was the requirement to achieve results in the areas that represent the pillars of a democratic society and are an indispensable precondition for conducting the remaining reforms. This requirement is particularly reflected in the

latest proposal on a new enlargement methodology that followed the summit in October 2019, when appointing a date for the start of negotiations with Albania and our state was postponed and the accession process, again, reached a dead end. The proposed methodology focuses even more on the "fundamentals", taking into account that democratic institutions and economic criteria are also affected by the rule of law. Thus, political criteria are linked to economic criteria in one logical entity, as foreseen according to the Copenhagen criteria. The importance of the rule of law is even more emphasised by the fact that no chapter may be closed even temporarily if the standards of respect for the rule of law are not met, representing a fundamental value of the European Union. Institutional, normative and strategic convergence, which are aspects of Europeanisation, have to be accompanied by an approximation of the system's values and results "in the field". Otherwise, the process will hardly be irreversible.

However, the latest decisions on the EU enlargement process, mainly with regard to our state, have led to an update of the "neglected" fourth Copenhagen criterium: the absorption capacity of the Union itself, i.e. its capability to include new members. The introduction of this condition provides the possibility to diverge from the procedure and make a political decision in case a country fulfils the membership criteria while the Union itself, for different reasons, is not prepared for further enlargement, which is actually happening in the given case. Therefore, we can conclude that the decision to further enlarge the Union, nevertheless, is a question of political will. The mechanisms proposed to reform the enlargement process can be incorporated and can lead to the required results and achieve the desired effect only if they are applied, which, again, requires the political will of the stakeholders.

Finally, the importance of the rule of law as a fundamental value of the Union and an advancement of the mechanisms for its protection is increasing within the borders of the Union, too. The values that are promoted in the enlargement process also need to be strengthened inside the Union. First and foremost, the accession process has to serve as a means to strengthen the democratic institutions and the rule of law, but the reforms in these areas have to be continued beyond that process.

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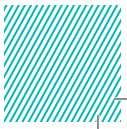

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