

Is the EU's Accession Conditionality Paving the Way for a More Integrated Rule of Law Policy in the EU?

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EU enlargement has been one of the principal vectors of differentiation in the process of European integration due to transitional opt-outs from some obligations (and privileges) of membership (Schimmelfennig 2014). Also, EU accession conditionality has demanded compliance with conditions which in some cases have entailed much stricter obligations for the (potential) new Member States in comparison to the obligations that bind existing Member States (Hillion 2004, 2014). This in turn has increased variation in application of the EU acquis, enhanced the tension between growing heterogeneity and the requirement for legal uniformity, and raised the risk of a dysfunctional Union. This strain has been especially visible in the EU stance on the rule of law in general and on Member States' judiciary in particular. On the one hand, the rule of law is a founding value of the EU (Article 2 TEU) that is also deemed common to all Member States, and that they should fully respect as prerequisite for their full enjoyment of membership rights. On the other hand, the rule of law in general, and the organisation of a Member State's judiciary in particular, remains characterised by a high level of heterogeneity in view of the limited EU acquis in the field.

As the rule of law became a *conditio sine qua non* for successful accession to the EU, the Union has been extremely active in articulating and advocating rule of law standards in the "pre-accession" context. This process, which started during the accession of the Central and Eastern European Countries, has culminated with the EU's enlargement strategy for the Western Balkan candidates. By extensively borrowing legal standards from external sources such as the various bodies of the Council of Europe, the EU has progressively articulated a specific set of EU standards epitomised by the two accession negotiation chapters related to the rule of law, chapters 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security).

Within this accession conditionality framework, particular attention has been devoted to judicial governance and independence. In the past two decades, the standards regarding judicial governance have profoundly evolved, to the extent that a particular



model of this type of governance (Bobek and Kosar 2015, Presova et al. 2017), centred around institutional empowerment of strong and independent judicial/prosecutorial councils and training academies, has been promoted as a key criterion for advancement in the accession process. Compliance with this conditionality has produced a high level of homogeneity of judicial governance across the Western Balkan candidate states.

Internally, on the other hand, a high level of heterogeneity remains across existing Member States' judicial systems, given the absence of EU rules governing the matter alongside long-lasting and well entrenched legal traditions, and cultures. This heterogeneity is particularly noticeable among the so-called "old democracies". Judicial systems vary, from models based on more flexible interpretations of separation of power to more rigid models similar to those favoured by the EU in its pre-accession approach. For many years, these differences did not catch the attention of the public. However, controversial judicial reforms in some Member States have eroded trust in the judiciary, and prompted questions over the necessity for a more coherent approach to rule of law in the EU.

The EU has indeed been compelled to act, to uphold the rule of law in the Member States and thereby safeguard the integrity of its legal order. Recent policy developments in the EU point towards a process of consolidation of membership obligations in the area of rule of law, which to a certain extent mirror the conditionality framework that the EU has used in the accession process. In order to promote and safeguard the rule of law as one of the foundational values, EU institutions have notably started to devise mechanisms for increased scrutiny of Member States' respect for rule of law and judicial independence that are reminiscent of the pre-accession instruments. Several recent judgments by the Court of Justice (CJEU) have effectively articulated certain standards, especially in the realm of judicial independence, which partly rely on sources that have been used in the pre-accession framework. In addition to the important case law of the CJEU, monitoring mechanisms, such as the European Commission-led Rule of Law Review Cycle, are being established that resemble the methodology applied in the accession context. They involve peer review mechanisms and annual reporting applicable to all Member States. This nexus between the external and internal rule of law promotion is having an influence on the former as well. Namely, the European Commission is increasingly referring to CJEU case law in setting the relevant standards regarding judicial governance and independence in the accession talks with the Western Balkan countries. The ongoing processes in the EU suggest a convergence between the pre-accession and membership approaches to the rule of law; and could in turn foreshadow a more integrated approach towards rule of law.

While it could be argued that a deepened or more integrated rule of law policy will reduce the level of heterogeneity among the Member States, it remains to be seen whether it will eventually produce more uniformity in the area of judicial governance, or will focus on a result-driven approach to respect for the rule of law by the Member States regardless of their specific institutional structures. The rule of law as the underlying requirement for the functioning of the EU necessitates a higher level of convergence among the Member States, nevertheless it seems that differences are to be tolerated as long as respect for the law is secured. While conditionality in these cases will not be as strong as in the case of the accession process, a more integrated policy will almost certainly put additional pressure on Member States.

References:

Hillion, "Enlargement of the European Union: The Discrepancy Between Accession Conditionality and Membership Obligations", in *Fordham International Law Journal*, Vol. 27 (2004), 715-740

Hillion, "Enlarging the European Union and Its Fundamental Rights Protection", in I. Govaere, E. Lannon, P. van Elsuwege and S. Adam (eds), *The European Union in the World – Essays in Honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff publishers, 2014, 557-574

Preshova, I. Damjanovski and Z. Nechev, "The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms", in *Asser Institute CLEER Papers*, No. 1 (2017)

Schimmelfennig, "EU Enlargement and Differentiated Integration: Discrimination or Equal Treatment?", in *Journal of European Public Policy*, Vol. 21, No. 5 (2014), 681-698

Bobek and D. Kosar, "Euro-products' and Institutional Reform in Central and Eastern Europe: A Critical Study in Judicial Councils", in M. Bobek (ed.), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited*, Oxford, Hart Publishing, 2015, 165-196

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