

## **CARROTS, STICKS, AND THE RULE OF LAW. EU POLITICAL CONDITIONALITY BEFORE AND AFTER ACCESSION**

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*Le istituzioni europee non hanno ancora saputo trovare soluzioni efficaci alle crisi costituzionali in Ungheria e Polonia. La UE si scontra con un 'dilemma di Copenaghen': fino al momento dell'adesione è in vigore un robusto sistema di condizionalità politica, ma da quel momento in avanti la UE non ha più a sua disposizione meccanismi di 'carota e bastone'. Il ruolo delle istituzioni UE rimane oggetto di contestazioni e gli altri meccanismi esistenti si sono dimostrati inadeguati. Ulteriori discussioni sulla possibile estensione di meccanismi di condizionalità politica dopo l'allargamento paiono necessarie.*

*EU institutions have so far failed to find effective answers to the backsliding of Hungary and Poland. The EU faces a 'Copenhagen dilemma': while before accession it has put in place a robust system of political conditionality, after accession the EU does not have at its disposal 'carrot and stick' mechanisms. The role of EU institutions is still contested and existing procedures have proved inadequate. Further reflections on the possible extension of political conditionality schemes after accession are necessary.*

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## 1. Introduction

Since its adoption in April 2011, the Hungarian Basic Law has been the subject of much international scrutiny. According to several observers, the new constitutional text contributed to the transformation of the country into an «illiberal democracy».<sup>1</sup> Other European states,<sup>2</sup> the Council of Europe,<sup>3</sup> and even the United States<sup>4</sup> expressed their concerns. This development raised complex dilemmas for the “European Constitutional Area”<sup>5</sup> and in particular for the European Union. EU institutions were forced to reflect on how they could uphold the rule of law and other EU values<sup>6</sup> when a Member State takes measures threatening or breaching them. After more than six years, the EU has yet to find a convincing answer to the question. Indeed, despite the activation of infringement proceedings and the adoption of several European Parliament resolutions,<sup>7</sup> Viktor Orban and his government have not backed down from their illiberal project,<sup>8</sup> as the approval, in Spring

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<sup>1</sup> On the concept of «illiberal democracies», see e.g. ZAKARIA, *The Rise of Illiberal Democracies*, in *Foreign Affairs*, 1997, 22.

<sup>2</sup> EUOBSERVER, *Germany to Hungary: New constitution breaches EU values*, 19-04-2011, [www.euobserver.com/justice/32208](http://www.euobserver.com/justice/32208), last accessed on 20-10-2017.

<sup>3</sup> See e.g. Venice Commission, Opinion no. 621/2011 on the new Constitution of Hungary, 17–18 June 2011, CDL-AD(2011)016 and Opinion no. 70/2013 on the Fourth Amendment to the Fundamental Law of Hungary, 17 June 2013, CDL-AD(2013)012.

<sup>4</sup> REUTERS, *Clinton concerned about democratic freedoms in Hungary*, 30-06-2011, <http://www.reuters.com/article/us-hungary-clinton-idUSTRE75T2IY20110630>, last accessed on 20-10-2017.

<sup>5</sup> VON BOGDANDY – SONNEVEND (eds.), *Constitutional Crisis in the European Constitutional Area – Theory, Law and Politics in Hungary and Romania*, Oxford, 2015.

<sup>6</sup> See Article 2 TEU: «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».

<sup>7</sup> See in particular: European Parliament, Resolution of 5 July 2011 on the Revised Hungarian Constitution, Doc. P7TA(2011)0315; Resolution of 16 February 2012 on the recent political developments in Hungary, Doc. P7\_TA(2012)0053; Report of 25 June 2013 on the situation of fundamental rights: standards and practices in Hungary, Doc. A7-0229/2013; Resolution of 17 May 2017 on the situation in Hungary, Doc 2017/2656(RSP)).

<sup>8</sup> Orban himself argued that his project entails the creation of “an illiberal state, a non-liberal state”: see Viktor Orban, Speech at the 25th Bálványos Summer Free University and Student Camp’, 26 July 2014, [www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp](http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp), last accessed on 20-10-2017.

2017, of the so-called “CEU law” and of restrictive measures against foreign-funded NGOs show.<sup>9</sup>

Furthermore, Hungary has not remained an isolated case. Romania has experienced a “constitutional crisis” in 2012 and another intense political crisis in January 2017.<sup>10</sup> Perhaps most significantly, the other great success story of EU enlargement, Poland, has seen its Constitutional Tribunal paralyzed and later “packed” by the new Law and Justice majority, which has then attempted to push forward a full-scale reform of the judicial system.<sup>11</sup> In several EU Member States, therefore, the foundation of the European project on democracy, the rule of law, and human rights seems to be threatened.<sup>12</sup>

The key question for the EU today is less one of institutional commitment to the protection of the values - this has been strengthened in many respects - and more one of EU *capacity* to achieve concrete results. While EU institutions<sup>13</sup> took action against both Hungary and Poland, the outcome of EU’s intervention is widely considered disappointing.<sup>14</sup> The grasp on power of Fidesz and PiS seem consolidating, rather than declining, with key institutions dismantled or captured by the leading parties.

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<sup>9</sup> REUTERS, *Hungary passes law targeting Soros-founded university, thousands protest*, 04-04-2017, [www.reuters.com/article/us-hungary-soros-parliament-idUSKBN17619Q](http://www.reuters.com/article/us-hungary-soros-parliament-idUSKBN17619Q), last accessed on 20-07-2017.

<sup>10</sup> On the 2012 crisis: VON BOGDANDY – SONNEVEND (eds.), *supra* fn. 5.

<sup>11</sup> On Poland, see *infra* Section 5.

<sup>12</sup> This paper does not aim to analyze the *reasons* of these threats, but the emergence of “populism” may certainly be seen as one of the key elements in this respect. On the concept of populism, see MULLER, *What is Populism?*, Philadelphia, 2016; on the effects of the populist growth on European values, see PINELLI, *The Populist Challenge to Constitutional Democracy*, in *European Constitutional Law Review*, 2011.

<sup>13</sup> The exceptions are the Council and the European Council, which have mostly remained silent: see OLIVER – STEFANELLI, *Strengthening the Rule of Law in the EU: The Council’s Inaction*, in *JCMS*, 2016, 1075. It is a positive sign, however, that in May 2017, for the first time, the Council held a discussion on the rule of law developments in Poland: see General Affairs Council, Outcome of the Council Meeting, Brussels, 16 May 2017, Doc. 9299/17.

<sup>14</sup> In this sense, almost all the contributions in CLOSA - KOCHENOV (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, 2016; JAKAB – KOCHENOV (eds.), *The Enforcement of EU Law and Values*, Oxford, 2017. See also the editorials of leading EU (constitutional) law journals: CMLR – EDITORIAL COMMENTS, *Safeguarding EU values in the Member States – Is something finally happening?*, in *Common Market Law Review*, 2015, 619; EUPAPERS – EDITORIAL COMMENTS, *Enforcing the Rule of Law in the EU. In the Name of Whom?*, in *European Papers*, 2016, 711; EUCONST – EDITORIAL COMMENTS, *Talking about European Democracy*, in *European Constitutional Law Review*, 2017, 207.

This difficulty in exercising post-accession oversight has been defined as the EU “Copenhagen dilemma”.<sup>15</sup> The reference is to the system of political conditionality based on the Copenhagen criteria – in particular, the political criterion - applicable in the enlargement policy.<sup>16</sup> This paper reflects on this dilemma and on the difficulties currently faced by the Union by contrasting the experience of post-accession oversight with the comprehensive and intensive system of scrutiny in place in the enlargement policy. Whereas pre-accession political conditionality is based on a “carrot and stick” approach (or rather carrots and sticks), the same framework is not applicable once a country has joined the Union. After accession, it is questionable whether we can at all speak of *political conditionality*, as will be showed later.

This paper begins therefore with an overview, presented in Section I, of the framework of political conditionality created by Art.49 TEU and the Copenhagen criteria. Then, the focus shifts in Section II on the post-accession context and the emergence of the Copenhagen dilemma. This work argues that two are the main difficulties faced by the EU in upholding values after accession: first, the *role* of the EU is contested (Section III); secondly, existing *mechanisms* present significant weaknesses (Section IV).<sup>17</sup> Finally, the conclusive part of the paper (Section V) discusses whether and how the system in place in the enlargement policy could be translated to the post-accession phase, whether it can inspire further reforms of the system aimed at strengthening the ability of the EU to uphold its values in its Member States.

## 2. Political conditionality, carrots, and sticks in the enlargement policy

Originally, membership of the European Economic Community was regulated simply by a geographic criterion: “Any *European* state” could apply to become a EEC member.<sup>18</sup> The original Treaties did not provide explicit political conditions to be fulfilled by present or future members of the organization, reflecting the “silence” of the EEC Treaty in terms of

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<sup>15</sup> See e.g. VIVIANE REDING, *Safeguarding the rule of law and solving the "Copenhagen dilemma": Towards a new EU-mechanism*, Luxembourg 22 April 2013, SPEECH/13/348.

<sup>16</sup> See *infra* Section 2.

<sup>17</sup> There is a third issue which will not be touched in this paper and may be common to the pre-accession phase: the difficulty to agree on a shared understanding of the concepts of democracy and the rule of law and to develop clear standards.

<sup>18</sup> See Article 237 EEC.

human rights and other political values.<sup>19</sup> It was only the Southern round of enlargement towards Greece, Portugal, and Spain to trigger for the first time questions on the stability of candidate countries' political systems. The first reaction of EEC Member States was the adoption of the "Declaration on Democracy," which stated that "respect for and maintenance of representative democracy and human rights ... are essential elements of membership".<sup>20</sup> Then, the Commission Opinions on the applications for membership, for the first time, examined the democratic situation in the countries.<sup>21</sup> As a whole, however, the scrutiny of the candidates' political systems was minimal. The Commission considered sufficient that the three countries had put in place a more or less stable democratic structure<sup>22</sup> and improved human rights conditions, but did not set up true system of conditionality, including for example a procedure to monitor progresses of the candidates.

Later, when the geopolitical shifts of the late 1980s and early 1990s sparked the discussion on membership of Central and Eastern European states, the newly-created European Union finally started to build a stronger and stricter mechanism of conditionality in its enlargement policy. Despite the fact that the Maastricht Treaty had not formally amended the membership provisions of the TEU, the Commission confirmed in several documents the commitment of the EU to overseeing democratic conditions and respect for human rights in the candidate countries.<sup>23</sup> Famously, this commitment was then formalized by the Copenhagen European Council in 1993, which created the three-folded Copenhagen criteria: a political criterion, demanding "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"; an economic criterion, requiring to develop a "functioning market economy and the capacity to cope with competition and market forces"; and an *acquis communautaire* criterion, according to which candidate countries should

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<sup>19</sup> On the topic, see DE BURCA, *The Road Not Taken: The EU as a Global Human Rights Actor*, in *American Journal of International Law*, 2011, 649.

<sup>20</sup> European Council, Declaration on Democracy, Copenhagen, 7-8 April 1978.

<sup>21</sup> See e.g. EU Commission, Opinion of 23 May 1979 on the application for accession to the European Communities by the Hellenic Republic, OJ 1979 L291/3.

<sup>22</sup> The stability of the Spanish system was called into question by the failed military coup d'état. European Parliament, Resolution on the attempted coup d'état in Spain, Strasbourg, 8 March 1981, OJ 77/85.

<sup>23</sup> See Commission, Communication - Europe and the Challenge of Enlargement, 24 June 1992; Communication - Towards a closer association with the countries of Central and Eastern Europe, Brussels 18 May 1993, SEC(93) 648 final.

have demonstrated the ability to “take on the obligations of membership” and “effectively implement the *acquis*”.<sup>24</sup> The focus of this paper is on the first of these three criteria, the political one.

A system of conditionality, which following the definition by Smith should be understood as “the linking, by a state or an international organization, of benefits desired by another state to the fulfillment of certain conditions”,<sup>25</sup> was thus set up only in Copenhagen in 1993. Specifically, this was a form of *political* conditionality: membership – the main benefit deriving from accession process - was explicitly linked to the fulfillment of *political* conditions.

Having established the system in Copenhagen, the following challenge was to operationalize the general commitment candidate countries had to undertake, giving concrete content to the political values affirmed by the Union and developing procedures and instruments to monitor candidate countries’ commitments. The Commission did so in its Country Reports, adopted between 1997 and 2002. It preferred to follow a case-by-case approach, focusing on different issues for each candidate, rather than developing a general set of detailed criteria, standards, and benchmarks. The analysis under the Copenhagen political criteria covered specifically two sub-sections: “Democracy and the Rule of Law” and “Fundamental Rights and the rights of minorities”.<sup>26</sup>

It is at this stage that the “carrot and stick” approach was created. As for the incentive element, there is of course the final goal of gaining membership of the Union, but several “carrots” were also available at different stages of the process, in the form of financial assistance offered by the EU to support the process of political, economic, and legal transformation undertaken by the candidate countries.<sup>27</sup> In parallel, the EU

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<sup>24</sup> European Council, Conclusions of the Presidency, Copenhagen, 21-22 June 1993, SN 180/1/93 REV 1.

<sup>25</sup> SMITH, *The Evolution and Application of EU Membership Conditionality*, in CREMONA (ed.), *The Enlargement of the European Union*, Oxford, 2003, p 109.

<sup>26</sup> The system has been extensively described for example by SMITH, *supra* fn. 25; HILLION, *The Copenhagen Criteria and their Progeny*, in HILLION (ed.), *EU Enlargement: a legal approach*, Oxford, 2004. For a more critical analysis: KOCHENOV, *EU Enlargement and the Failure of Conditionality*, Alphen aan den Rijn, 2008.

<sup>27</sup> See in general Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships. Objectives, priorities, and concrete financial resources were established in the specific Accession Partnerships with each candidate. See also EU Commission, *EU Enlargement and the Accession Partnerships*, Brussels, 27 March 1998, Doc Memo 98/21.

put in place a system of sanctions, including the suspension of financial assistance. The ultimate, most severe stick was obviously the suspension of accession talks. The Commission was in charge of constantly monitoring national developments, delivering the financial and technical carrots, and where progresses were not adequate, requesting to the Council to use its “sticks”, including the suspension of pre-accession assistance.<sup>28</sup>

The Eastern Enlargement was finalized between 2004 and 2007, while Croatia joined later in 2013. It is Art.49 TEU to regulate the accession process after the entry into force of the Lisbon Treaty. The provision makes the commitment to political values an explicit condition for membership, by saying that “Any European State which *respects the values* referred to in Article 2 and is committed to *promoting them* may apply to become a member of the Union” and that “The conditions of eligibility agreed upon by the European Council shall be taken into account”, a reference to the Copenhagen criteria. Currently, political conditionality is exercised in three different ways.

A first scrutiny of the political and constitutional framework takes place at the moment in which a country submits its membership application, hence before the start of official membership talks. It is the Council, at unanimity, to decide on the opening of accession negotiations, after consulting the Commission and receiving consent of the European Parliament. At this first stage, the scrutiny is minimal and would only serve to rule out very obvious cases of illiberal regimes. It shows however that the political criterion has an implicit priority over the other two.

Once membership talks are officially opened, the Commission begins its regular assessment of candidate countries’ performances in terms of “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”, as affirmed in Copenhagen. It is at this stage that the carrots and sticks approach becomes applicable. The 2015 Enlargement Strategy<sup>29</sup> presented by the Juncker Commission has changed the structure of the Reports, which currently contain five more detailed headings: (a) democracy; (b) the rule of law; (c) fundamental rights including protection of minorities; (d) public administration reforms and (e) regional issues and international obligations.

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<sup>28</sup> See Article 4 of the Regulation 662/98.

<sup>29</sup> See EU Commission, Communication - EU Enlargement Strategy, Brussels, 10 November 2015, Doc. COM(2015) 611 final.

The new Strategy underlines the “focus on the fundamentals linked to core EU values”, which are to be considered the “backbone” of enlargement.<sup>30</sup>

Finally, rule of law and human rights issues comes into consideration under the *acquis communautaire* criterion too. There is indeed a growing *acquis* in EU secondary law imposing specific fundamental rights obligations - for example in EU anti-discrimination law<sup>31</sup> or data protection<sup>32</sup> - but also setting requirements for independent institutions or for judicial proceedings.<sup>33</sup> Here, the Commission monitoring focuses therefore on concrete EU law obligations. Since the beginning of negotiations with Croatia and Turkey, the scrutiny of the *acquis communautaire* is divided into different chapters.<sup>34</sup> Chapter 23, on the “Judiciary and fundamental rights”<sup>35</sup> and Chapter 24 on “Justice, Freedom and Security”<sup>36</sup> are particularly relevant in this respect. The “new approach” presented in the 2012 and 2015 Enlargement Strategies, complemented by the “focus on the fundamentals”, requires that the two Chapters are opened at an early stage of membership talks and closed only at the last moment, in order to ensure a thorough analysis. The Commission moreover identified interim benchmarks, which guide the entire process, and established a system of sanctions to be deployed when severe issues threaten the accession talks.

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<sup>30</sup> Ivi, pp. 3 – 4.

<sup>31</sup> See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>32</sup> See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; in 2018, a new Data Protection Regulation will enter into force: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

<sup>33</sup> The above-mentioned directives for example contain provisions imposing a shift of the burden of proof in certain discrimination cases, or demand the creation of anti-discrimination and data protection offices in the Member States.

<sup>34</sup> The systems of chapters, and the identification of opening and losing benchmarks, through which the Commission assess candidate countries’ performances, has been used for the first time to conduct negotiations with Croatia, and is now used with the five official candidates (Albania, Macedonia, Montenegro, Serbia and Turkey). Chapters 23 and 24 were introduced in 2005.

<sup>35</sup> Chapter 23 includes: the judiciary; fight against corruption; fundamental rights, including freedom of expression; EU citizens’ rights.

<sup>36</sup> Chapter 24 deals with *acquis* in the Area of Freedom, Security and Justice, containing several provisions dealing with fundamental rights and the rule of law.

Hence, over the last 25 years, the EU has developed a robust system of political conditionality in its enlargement policy, which applies to all the steps of the accession process and covers a growing range of substantive issues. The system provides for both incentives (carrots) and sanctions (sticks) along the entire process, with obviously the biggest incentive being the acquisition of full membership - and conversely the threat of suspension of accession talks, if progresses are not achieved or there is backsliding. The steps taken in the recent Enlargement Strategies have the objective to further strengthen this system of incentives and sanctions, developing more concrete benchmarks to objectively measure progresses along the way. There is therefore a constant, intense and even intrusive monitoring by the Commission, supported by the carrots and sticks instruments. It is clear which institution is responsible for the procedures - the Commission - and which role is to be played by the other ones. The legitimacy of the system is not questioned because candidate countries willingly accept to undergo this form of oversight, in order to be accepted in the EU club.

### **3. The Copenhagen dilemma**

The context radically changes after accession, however. Once a country joins the Union – or to be more precise, when all the chapters of accession negotiations are closed – the Commission interrupts its monitoring activities. More generally, the very basis of the conditionality framework before accession is not applicable any more: the main incentive, becoming a EU Member, has been achieved, while obviously the most extreme sanction, interruption of membership negotiations, will not be available after accession. It is the analyzed “linking” between membership and respect for the values of Art.2 TEU to vanish after accession. Participation to the Union and the enjoyment of membership rights do not explicitly depend on fulfillment on precise political conditions. This, in a nutshell, is the “Copenhagen dilemma” of the EU.

The architects of the system seemed to be persuaded that once countries had fulfilled the political criterion of Copenhagen, they would have constantly respected the values of Art.2 TEU and that breaches would have been only extremely exceptional. In other words, the system is based on the idea that once countries have achieved the standards required in the accession phase, there is no necessity of general oversight and there is a presumption that Member States respect the common values on the EU. This

may also explain the emphasis on institution-building during the enlargement process, with the Commission focusing by and large on constitutional structures and procedures: it is creating robust state structures that candidate countries can guarantee the long-term commitment to democracy, the rule of law, and human rights, as well as resolving domestic conflicts, so the EU suggests by focusing mostly on the institutional transformation of applicants.<sup>37</sup> In Opinion 2/13 on EU accession to the ECHR,<sup>38</sup> the Court of Justice has accepted the existence of a presumption according to which Member States should in ordinary circumstances be considered as complying with the values of Art.2 TEU. This presumption works as a constitutional basis for mutual trust.<sup>39</sup>

In abstract, this would not create a true “dilemma” for the EU. Constant monitoring of Member States performances and a strict conditionality system would be superfluous if the constitutional structures of all Member States would prove solid enough to prevent widespread violations of human rights or rule of law and democratic backsliding. For a relatively long period, between 2004 and 2011, the system seemed to work. There was little, if any, talk on the topic, as the pre-accession system apparently had guaranteed a smooth transition and consolidation of democratic systems in Central and Eastern Europe. In addition, even if a problematic situation had arisen, existing crisis mechanisms could have proved sufficient and effective in addressing it. As noted by Sadurski,<sup>40</sup> it was precisely in the context of the Eastern enlargement that the Member States decided to introduce, first, and then strengthen<sup>41</sup> Art.7 TEU, in order to complement pre-accession procedures with post-accession mechanisms. However, it appears today that

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<sup>37</sup> This approach has been increasingly criticized however: see e.g. KOCHENOV, *supra* fn. 26 NICOLAIDIS - KLEINFELD, *Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma*, in *Sigma Paper – OECD*, 2012; BLOKKER, *New Democracies in Crisis?*, Oxford, 2013.

<sup>38</sup> CJEU, Opinion 2/13 on accession of the EU to the ECHR [2014] ECLI:EU:C:2014:2454.

<sup>39</sup> Ivi, para 168: “This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected”. See also paras 191-192.

<sup>40</sup> SADURSKI, *Constitutionalism and the Enlargement of Europe*, Oxford, 2012.

<sup>41</sup> With the Nice Treaty, after the so-called “Haider affair”. On the Austrian crisis, see MERLINGEN – MUDDE – SEDELMEIER, *The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria*, in *JCMS*, 2001, 59.

on the one hand, constitutional systems are under attack in several Member States, and on the other that the system of Art.7 has failed to provide the EU with adequate answers to cases of threats or breaches of the values, as will be shown later.<sup>42</sup>

The EU has yet to find a convincing answer to the Copenhagen dilemma and to remedy current threats to its founding values. The incapacity of the institutions to obtain concrete results is increasingly undermining the idea of the EU as a “Union of values”, puts obstacles to the functioning of legal instruments based on mutual trust, and undermines the effectiveness of EU’s external action. The difficulty of the EU is not only a matter of procedures, however. After accession, EU institutions are called to operate in a radically different context in which the very possibility of a system of political conditionality may be called into question. There are significant constitutional challenges to be addressed, in terms of horizontal division of tasks between EU institutions as well as when it comes to vertical relationship between the EU and the Member States, to be explored in the following sections.

#### **4. The contested role of the EU**

The first obstacle the EU is confronted with, when exercising post-accession oversight, is that there continues to be disagreement on what exactly should be the role exercised by the EU and its institution. There are at least two profiles in which this disagreement clearly emerges, in contrast to the widely accepted and formalized system existing before accession.

In the first place, there is disagreement and contestation about whether the EU possesses any competence to act. It must not be forgotten that, for many decades of the integration process, the institutional and constitutional structure of Member States was not a matter of concern for the common institutions. Issues such as the composition and functioning of a constitutional court, or the organization of the judiciary were considered as falling within the sovereign domain of the Member States and therefore outside any sphere of control by the EU institutions. Even the extension of EU’s fundamental rights scrutiny over Member States activities was

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<sup>42</sup> *Infra*, Section IV.

affirmed only relatively late in the process of integration.<sup>43</sup> It was then during the Eastern Enlargement process that institutions and Member States began to reflect not only on pre-accession mechanism to guide the constitutional transformation of CEE countries, but also on how to guarantee that commitment post-accession.<sup>44</sup>

However, the extension of EU oversight over these often very sensitive areas challenged traditional understandings of the EU constitutional framework. European integration had traditionally took place “within limited fields”,<sup>45</sup> precisely delimited by the Treaties and by the principle of conferred competences. Until 1992, these competences were first and foremost of economic nature and therefore they did not require any direct intervention over national constitutional systems, if not indirectly.<sup>46</sup> Even successive amendments of the Treaties did not confer to the EU a general competence to harmonize national constitutional frameworks and institutions. For example, in the field of human rights, the EU does not have a general competence to adopt human rights norms,<sup>47</sup> but only specific fundamental rights legal basis – as in the case of data protection<sup>48</sup> and non-discrimination<sup>49</sup> – as well as an obligation to take into account fundamental rights when legislating under other competences.<sup>50</sup> According to the principle of conferral therefore, the EU does not have competence to adopt harmonization measures, imposing its own version of democracy or the rule of law over national actors.

Along with the principle of conferred competences, there is another norm of the TEU which may be read as posing a barrier to EU’s oversight:

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<sup>43</sup> CJEU, C-5/88 *Wachauf v Germany* [1989] ECLI:EU:C:1989:321 on Member States implementing EU law and C-260/89 *ERT* [1991] ECLI:EU:C:1991:254 on Member States derogating from EU law.

<sup>44</sup> See SADURSKI, *supra* fn. 40. See also DE WITTE, *The Impact of Enlargement on the Constitution of the European Union*, in CREMONA, *supra* fn. 25.

<sup>45</sup> CJEU, C-26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1; C-6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66.

<sup>46</sup> The Court had already affirmed the primacy of EU law over national constitutional norms in CJEU C-11/70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114,

<sup>47</sup> This was clarified by the CJEU in Opinion 2/94 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECLI:EU:C:1996:140, and the situation has not changed since, despite the reforms of Article 6 TEU.

<sup>48</sup> Article 16(2) TFEU.

<sup>49</sup> Article 19 TFEU.

<sup>50</sup> See Article 51 of the Charter. Yet, this obligation does not confer to the EU a competence to take direct action.

Art.4(2) TEU, the national and constitutional identity provision.<sup>51</sup> This has been subject of intense discussions since its introduction by the Lisbon Treaty. The CJEU, on the one hand, and constitutional courts, on the other, have offered contrasting views of the concept and there is some anxiety over the possibility that national identity is used as a cover-up for anti-European positions, with the effect of undermining the overall integration process.<sup>52</sup> The clause has been evoked quite frequently in the *rule of law debate* as well. Hungarian and Polish actors referred to the idea of national and constitutional identity in order to escape EU oversight, arguing that the provision authorizes them to take decisions such as the adoption of a new constitution or Constitutional Courts reforms purely according to national preferences.<sup>53</sup> These arguments suggest diverging views in the interpretation of Artt.2 and 4(2) TEU. For EU institutions, the former has priority, and constitutional identity is only acceptable if it respects the common framework of values. National actors propose almost the opposite interpretation. As they are autonomous in organizing their institutional and constitutional structure, they determine what is common according to Art.2, with EU institutions being unable to impose on them any allegedly common standard.

At this first level, therefore, the very existence of a EU *mandate* in values' oversight is contested. There are also more nuanced versions of the argument, however, which relates to the internal and external division of tasks between EU institutions and between the EU and the CoE. The question is not whether the EU has a mandate, but rather who should be in charge for exercising such a mandate and how it should use it. CoE bodies have argued for example that EU intervention should "avoid duplication" and that any new initiative should not "[undermine] the role of the Council of Europe or of the Convention system in the pan-European human rights architecture".<sup>54</sup> There are also proposals for "outsourcing" the oversight to

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<sup>51</sup> Article 4(2) TEU: "The Union shall respect the equality of Member States before the Treaties as well as their *national identities*, inherent in their fundamental structures, political and *constitutional*, inclusive of regional and local self-government".

<sup>52</sup> The decision of the CJEU in C-208/09 *Sayn Wittgenstein* ECLI:EU:C:2010:806 can be contrasted with the judgment of the Hungarian Constitutional Court, Decision 22/2016 (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law.

<sup>53</sup> On Hungary, see SZENTE, *Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them*, in JAKAB – KOCENOV (eds.), supra fn. 14.

<sup>54</sup> COE, Parliamentary Assembly Recommendation 2027/2013 - European Union and Council of

the Venice Commission of the CoE.<sup>55</sup> Internally, what seems the most controversial aspect of the post-accession scheme is the role to be played by the European Commission. Traditionally, the Commission has a key function in ensuring the *rule of EU law*, acting as “the guardian of the Treaties”.<sup>56</sup> This function is exercised mainly through the infringement procedure of Art.258 TFEU as well as the pre-contentious phases preceding the formal activation of 258. The question is whether this paradigm can be extended from enforcement of EU law *stricto sensu* to the oversight of EU values as a whole. The Commission has indeed attempted to take up a central role in this field, both rhetorically and with the creation and deployment of a new procedure, the Rule of Law Framework.<sup>57</sup> The new mechanism encountered resistance both within EU institutions and in (some) Member States. In particular, the Legal Service of the Council delivered a negative opinion on the new Framework, considering it outside the scope of the Treaties.<sup>58</sup> This opinion led the Council to adopt yet another instrument, the Rule of Law Dialogue.<sup>59</sup> The key question is therefore not *whether* the EU should act, but *who* should act, and specifically if it should be the Commission to take up oversight functions as it does both in the pre-accession phase and in the enforcement of ordinary EU law.

Compared to the rather stable system in place in the accession policy since the early 1990s, the scrutiny of EU Member States is still very much subject of heated discussions. There is uncertainty on whether the EU should act, when it should do it, what it should do, and who should be in charge. It is true that some of the arguments brought forward are clearly based on an

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Europe Human Rights Agendas: Synergies not Duplication!, Strasbourg, 2 October 2013 D.13321. See in particular the Explanatory memorandum of rapporteur McNamara, stating that “The situation in Hungary should not become a precedent for duplicating the work of the Council of Europe and that reinventing existing norms and setting up parallel structures creates double standards”. Therefore, “any future mechanism should take into account the existing monitoring bodies in the Council of Europe”. See also COE, Committee of Ministers, Reply to the Parliamentary Assembly Recommendation, Strasbourg, 24 February 2014 CM/AS(2014)Rec2027final.

<sup>55</sup> TUORI, *From Copenhagen to Venice*, CLOSA - KOCHENOV (eds.), supra fn. 14.

<sup>56</sup> According to Article 17 TEU, The Commission “shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union”.

<sup>57</sup> EU Commission, Communication - A new EU Framework to strengthen the Rule of Law, Brussels, 19 March 2014, COM(2014)158 final/2.

<sup>58</sup> Council, Opinion of the Legal Service, Brussels, 27 May 2014, Doc 10296/14.

<sup>59</sup> Council, Note from the Presidency - Ensuring the respect for the rule of law - Dialogue and exchange of views, Brussels, 9 November 2015, Doc 13744/15.

instrumental view of the situation. Nonetheless, even the most radical arguments are telling in the sense that there is a full denial of the possibility of EU intervention, which is simply not the case in pre-accession policies. Even once these arguments are discounted, and it is accepted that there a EU mandate exists, the precise content of this mandate is still hard to grasp.

## 5. The shortcomings of current post-accession mechanisms

The second prong of the Copenhagen dilemma, perhaps the most evident and discussed one, relates to the inadequacy of existing mechanisms and procedures. The instruments that have been deployed by the institutions in order to tackle democratic and rule of law backsliding have proved unable to achieve the desired results and to trigger a change on the ground. Art.7, on the other hand, has remained a “dead letter”.<sup>60</sup> So, while the previous paragraphs have showed that the decision to take action is contested, this section addresses the “next” point: once action is taken, does the EU possess mechanisms capable of resolving threats to the rule of law and its founding values?

Unfortunately, the answer at the moment seems to be a negative one. The two main constitutional crises the EU has been facing – Hungary and Poland - show clearly all the weaknesses of current procedures and strategies. Institutionally, the Commission and the EP have been the main actors on the scene, while the Council and the European Council have remained mostly silent<sup>61</sup> and procedures before the CJEU have been triggered in only two occasions. As for the EP, it has mostly attempted to exercise political pressure via the adoption of Resolutions.<sup>62</sup> While this is possibly the main instrument in the hands of the EP, the Parliament would also have the power to call for the activation of Article 7(1) TEU, the preventive mechanism, which can lead to the determination that there is “a clear risk of a serious breach” of Art.2 in a Member State. Despite several references to the procedures of Art.7 TEU both in the case of Hungary and of Poland, the EP decided to formally trigger the procedure only in May 2017 in adopting a

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<sup>60</sup> WILLIAMS, *The indifferent gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's invasion of Iraq*, in *European Law Review*, 2006, 27.

<sup>61</sup> See OLIVER – STEFANELLI, *supra* fn. 13.

<sup>62</sup> See fn 7 for Resolutions on Hungary; on Poland, see e.g. European Parliament, Resolution of 13 April 2016 on the situation in Poland, Doc. 2015/3031(RSP).

resolution on Hungary after the adoption of the CEU law and of the NGOs financing's norms.<sup>63</sup> It is still to be seen whether and how the procedure will develop, as Art.7 TEU has remained until today a taboo within EU institutions.

The Commission has instead followed two different approaches in reacting to Hungarian and Polish developments. *Vis-à-vis* Hungary, it has addressed critical profiles of constitutional reforms and other institutional choices through the infringement procedure of Art.258 TFEU. The system of Article 258 allows the Commission to bring an action if it considers "that a Member State has failed to fulfill an obligation under the Treaties". This is traditionally read as requiring a link between the alleged infringement and a specific piece of EU law. In other words, the prevailing interpretation, shared by the Commission,<sup>64</sup> is that an Art.258 action *cannot* be based directly on an infringement of the rule of law or other EU values in Art.2 TEU.<sup>65</sup> Regardless of the arguments supporting one or the other interpretation, until today the Commission has only initiated Art.258 where one of the contested developments raised questions of compatibility with specific pieces of EU law. The Commission initiated three procedures in 2012, following the entry into force of the Hungarian Basic Law and other institutional reforms. Those procedures concerned (a) provisions on the age of retirement for judges; (b) the independence of the data protection supervisor; and (c) the independence of the Central Bank. More recently, the Commission took action against the new Hungarian asylum law,<sup>66</sup> as well as on the CEU and the NGOs laws.<sup>67</sup>

The experience of the first set of actions, however, sends a note of skepticism on the use of the infringement procedure in order to tackle systemic threats to democracy and the rule of law. The Commission may have won all the three battles – the provisions on the Central Bank were modified in order to comply with the Commission demands, while the CJEU

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<sup>63</sup> See fn 7.

<sup>64</sup> See Commission, *supra* fn. 57, p 5: "infringement procedures can be launched by the Commission only where these concerns [rule of law concerns] constitute, at the same time, a breach of a specific provision of EU law".

<sup>65</sup> There are however different views: HILLION, *Overseeing the rule of law in the EU: legal mandate and means*, and SCHEPPELE, *Enforcing the basic principles of EU law through systemic infringement actions*, in CLOSA – KOCHENOV (eds), *supra* fn. 14

<sup>66</sup> EU Commission, Press Release - Commission follows up on infringement procedure against Hungary concerning its asylum law, Brussels, 17 May 2017, IP/17/1285.

<sup>67</sup> EU Commission, Remarks of First Vice-President Frans Timmermans after the College discussion on legal issues relating to Hungary, Brussels, 12 April 2017, SPEECH/17/966.

found an infringement of EU law in the other two cases<sup>68</sup> - but can hardly be seen as winning the war. As signaled by several reports, but also EP Resolutions and ultimately the decision to call for the activation of Art.7 TEU, the situation in the country has further deteriorated despite the successful actions brought by the Commission.<sup>69</sup> The key problem is that infringement actions, framed in the traditional way, can only cover specific fields related to EU law but does not address the overall situation, leaving to national authorities the possibility to comply with the Court's judgment by engaging in what has been defined as "creative and symbolic compliance".<sup>70</sup>

Similar concerns about the effectiveness of EU's action, however, have been expressed in relation to the Rule of Law Framework, which the Commission has used to monitor developments in Poland, specifically on the issues of the composition and functioning of the Constitutional Tribunal.<sup>71</sup> The Commission delivered an Opinion in June 2016 and three Recommendations in the following months.<sup>72</sup> The process foreseen by the Framework is one of structured political dialogue between the Commission and the national government of the Member State and it is built on the idea that dialogue can lead to a successful resolution of the systemic threat to the rule of law identified by the Commission. The Polish case is however showing that the presumption at the basis of the mechanism may be misplaced. Poland refused to implement the measures suggested in the two Rule of Law Recommendations, denying that the EU and the Commission have any business in intervening on the national provisions regulating the Constitutional Tribunal.<sup>73</sup> The Polish crisis is showing the inherent weak

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<sup>68</sup> CJEU, C-286/12 *European Commission v Hungary* [2012] ECLI:EU:C:2012:687. CJEU, C-288/12 *European Commission v Hungary* [2014] ECLI:EU:C:2014:327.

<sup>69</sup> See the mentioned resolutions of the EP, and also NGOs reports, such as FIDH – International Federation for Human Rights, *Hungary: Democracy under Threat – Six Years of Attacks against the Rule of Law*, November 2016.

<sup>70</sup> BATORY, *Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU*, in *Public Administration*, 2016, 685. See also SCHEPPELE, *supra* fn. 65

<sup>71</sup> EU Commission, College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers, Brussels, 13 January 2016.

<sup>72</sup> EU Commission, Opinion regarding the Rule of Law in Poland, Brussels, 1 June 2016; Recommendation regarding the Rule of Law in Poland, Brussels, 27 July 2016, Doc. C(2016) 5703 final.; Recommendation Regarding the Rule of Law in Poland, Brussels, 21 December 2016, Doc. C(2016) 8950 final.; Recommendation regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146, Brussels, 26 July 2017, Doc. C(2017) 5320 final.

<sup>73</sup> Minister of Foreign Affairs of the Republic of Poland, 'MFA statement on Poland's response to European Commission's complementary Recommendation of 21 December

nature of the Rule of Law Framework, which does not provide for any form of carrot or stick, to go back to the metaphor used for pre-accession mechanisms.<sup>74</sup>

The natural follow-up to the Rule of Law Framework, if dialogue cannot resolve the threat, would be the system of Art.7 TEU. Yet, Art.7 has not been considered a viable option in most of the institutional debates taking place over the past few years. It has become to be known as the “nuclear option”,<sup>75</sup> a label both unhelpful and mistaken. Unhelpful, because it *de facto* deprives the EU of the only Treaty procedures available when contested measures are taken outside the scope of EU law:<sup>76</sup> nuclear options serve only a deterrent effect, but are not to be actually deployed. But also mistaken, as the label fails to capture in particular the nature of Art.7(1), the preventive part of the system, and more generally the graduated range of response available even under Art.7(2) and (3).<sup>77</sup> What would be the only possible stick and the basis of system of EU post-accession oversight becomes an “empty gesture”,<sup>78</sup> and conditionality seems to dissolve completely in the absence of both carrots and sticks.

In conclusion, existing mechanisms have not worked well enough. While EU institutions may have won some battles, the general sense is that they are losing the war against the Hungarian and Polish governments. Infringement procedures have proved unable to capture the overall threats to EU values and to force the national government to a comprehensive shift of its

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2016’, 20 February 2017, <[www.msz.gov.pl/en/c/MOBILE/news/mfa\\_statement\\_on\\_poland\\_s\\_response\\_to\\_european\\_commission\\_s\\_complementary\\_recommendation\\_of\\_21\\_december\\_2016](http://www.msz.gov.pl/en/c/MOBILE/news/mfa_statement_on_poland_s_response_to_european_commission_s_complementary_recommendation_of_21_december_2016)>, last accessed on 20-10-2017.

<sup>74</sup> On the weak nature of the framework: KOCHENOV – PECH, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, 2015, 512.

<sup>75</sup> REDING, *supra* fn. 15; BARROSO, State of Union Address 2013, Strasbourg, 11 September 2013, SPEECH/13/684. This label has been used by the new Commission President as well: see Le Soir, *Jean-Claude Juncker au «Soir»: «Il y a un sérieux problème de gouvernance en Europe*, 05-11-2016, <[www.lesoir.be/1360084/article/actualite/union-europeenne/2016-11-04/juncker-au-soir-il-y-un-serieux-probleme-gouvernance-en-europe](http://www.lesoir.be/1360084/article/actualite/union-europeenne/2016-11-04/juncker-au-soir-il-y-un-serieux-probleme-gouvernance-en-europe)>, last accessed on 20-10-2017.

<sup>76</sup> Article 7 is “not confined to areas covered by Union law” but have a horizontal and general scope: Commission Communication to the Council and the European Parliament on article 7 TEU “Respect for and promotion of the values on which the Union is based”, Brussels 15 October 2003, COM/2003/0606 final.

<sup>77</sup> See BESSELINK, *The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives*, in JAKAB – KOCHENOV, *supra* fn. 14.

<sup>78</sup> WILLIAMS, *supra* fn. 60.

institutional choices, while the Rule of Law Framework lacks “bite” when national authorities are unwilling to truly cooperate with the Commission. With the mechanisms of Art.7 TEU outside the picture, as seems realistic in the current institutional and political climate, the EU system misses its ultimate stick and any linkage between respect for the values and the enjoyment of membership’s benefits disappears.

It should not be forgotten, furthermore, that another key element of the pre-accession conditionality system is not replicated after accession: there is no overall monitoring scheme, evaluating the performances of current Member States in the fields of democracy, the rule of law, and human rights. It is true that the Commission, on the one hand, monitors respect for concrete obligations deriving from EU law, and on the other has developed specific schemes for certain areas, such as the functioning of justice systems monitored under the EU Justice Scoreboard<sup>79</sup> and corruption efforts under the Anti-Corruption Report.<sup>80</sup> However, the range of matters covered by these monitoring activities falls well short of the comprehensive analysis conducted under the Copenhagen political criterion. For example, the EU Justice Scoreboard does not cover criminal justice systems nor does it offer an analysis of how the justice systems concretely protect human rights.

Furthermore, the monitoring competences of the Fundamental Rights Agency (FRA) are mostly directed towards the activities of EU institutions, while they cover Member States’ actions only when they are implementing EU law, following the limitation of Art.51(1) of the Charter.<sup>81</sup> The scope of FRA activities is also narrower than the Copenhagen criteria from a substantive point view, as it covers only one of Article 2 values: human rights. It does not therefore have the same reach of the Network of Independent Experts on Fundamental Rights, which was set up in 2020 as a response to the European Parliament 2000 Fundamental Rights Report.<sup>82</sup> The Network elaborated Annual country reports, covering the whole range of

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<sup>79</sup> See EU Commission, Communication, ‘The EU Justice Scoreboard A tool to promote effective justice and growth’, Brussels, 27 March 2013, Doc COM/2013/0160 final.

<sup>80</sup> EU Commission, Report - EU Anti-Corruption Report 2014, Brussels, 3 February 2014, COM(2014) 38 final. The instrument was meant to be bi-annual but has been discontinued in 2016.

<sup>81</sup> See Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, Article 2.

<sup>82</sup> European Parliament, Resolution on the situation as regards fundamental rights in the European Union (2000) (2000/2231(INI)), 5 July 2001.

Member States' actions,<sup>83</sup> and was directly linked to the procedure of Article 7, inasmuch the assessment of the situation in each Member State could provide other EU institutions sufficient and objective information for the exercise of their competences under Article 7. This type of monitoring was not replicated when setting up the FRA.

## 6. Post-accession conditionality? Challenges and future

The primary goal of this paper was to understand the root causes of the EU Copenhagen dilemma, by comparing the different realities of post-accession oversight and of political conditionality in the enlargement policy. In the latter context, what is in place is a proper system of *conditionality*: any progress in enlargement negotiations depends on the realization of certain objectives, with the Commission, supported by the other institutions, in charge of a robust and intensive system of scrutiny which allows for sanctions (the use of “sticks”) in cases of deviations from EU obligations. After accession, however, there is no explicit linkage between participation to the EU and enjoyment of the benefits deriving from membership, on the one hand, and respect for the basic values of Art.2, on the other. In other words, the carrots do not formally depend on Member States' respect for the common standards, in the absence of a comprehensive monitoring instrument, and the sticks are either not strong enough (as in the case of the Rule of Law Framework and infringement actions), or EU institutions have been too reluctant to deploy them (Art.7 TEU). Moreover, it is even contested whether the EU has any competence at all to exercise forms of scrutiny over Member States constitutional systems.

The last question to be addressed in this concluding section is whether the enlargement system may offer a valuable model to re-think and strengthen the post-accession framework. Of course, to simply translate the system is

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<sup>83</sup> This was possible because notwithstanding the limited scope of application of the Charter under Article 51, “the Network ... took the view that the Charter also constitutes a catalogue of common values of the Member States of the Union” and connected therefore monitoring to the application of Article 7 TEU. In other words, “it is Article 7 EU which explains the reliance on the Charter [by the network] even with regard to situations which, under Article 51 of the Charter, would in principle not fall under its scope of application”. DE SCHUTTER – ALSTON, *Addressing Challenges Confronting the EU Fundamental Rights Agency*, in ALSTON – DE SCHUTTER (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford, 2008, pp 6-8.

unthinkable, considering the different context which emerges once a country has acceded to the EU: the main incentive, membership, has already been achieved, and in the current framework the harshest sanction conceivable, expulsion, is not available.<sup>84</sup> The difficulties do not stop there, however. In the first place, a broader reflection on the effectiveness of conditionality as an instrument to achieve EU objectives – and the same may be true for other international organizations – is needed. The cases discussed in this paper show that while a system of conditionality may contribute to democratic and rule of law reforms, it does not necessarily ensure the long-term stability of those legal and institutional reforms if they are not internalized and more widely accepted by political actors and society at large. A purely instrumental view, in which democracy, the rule of law, and human rights are only upheld insofar as they bring economic benefits to a country may make Member States more prone to constitutional crises and backsliding, especially in a context of economic crises or when the benefits are not fairly re-distributed. Similarly, it is to a large extent still to be seen whether the “strict conditionality”<sup>85</sup> requirements in EU financial assistance schemes will ensure the achievement EU macro-economic objectives in the medium and long run.

Furthermore, the type of relationship existing between the Member States and the EU legal order is of a radically different nature than link between the EU and candidate countries in the accession process. While the latter is a functional one, which depends and ultimately relies of the willingness of candidates to comply with EU standards – political, economic, and legal – in order to join the Union and enjoy the benefits of membership, the former is based a complex and delicate constitutional equilibrium. This equilibrium is in many senses still unsettled and open to contestation at all levels.<sup>86</sup> This is to say that the exercise of oversight after accession creates a set of constitutional challenges which are simply not present in the enlargement process. A number of unresolved questions are still to be addressed. Who defines the common values? To what extent are Member States still free to determine their own constitutional arrangements? How can we identify clear standards under Art.2 TEU?? The complexity of the EU task has been

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<sup>84</sup> Article 7(3) clearly provides that only *certain* of the rights deriving from membership may be suspended, not all of them let alone expulsion. And Article 50 TEU does not have an equivalent.

<sup>85</sup> See Article 136 TFEU.

<sup>86</sup> See e.g. PERNICE, *Multilevel Constitutionalism and the Crisis of Democracy in Europe*, in *European Constitutional Law Review*, 2015, 541.

illustrated in Section III, underlining that national actors still contest whether the EU has any competence at all to intervene in domestic constitutional matters. The risk that the EU's "intrusion" may be actually counter-productive, bolstering Euro-skepticism in the country, especially if national governments are willing and able to present the conflict as one between "us" and "them" in a populist manner, is undeniable.<sup>87</sup>

A plain replication of pre-accession instruments would thus not be possible or desirable. Nonetheless, there are some elements of the enlargement system which may work as an inspiration for any reform aimed at improving the capacity of the EU to uphold values post-accession. As rightly pointed out by the Commission, it is crucial, in such a contested context, that EU's intervention is as objective as possible, avoids double standards, and grounded on concrete evidence.<sup>88</sup> In this light, the creation of an overall monitoring system post-accession, similar, but not identical to pre-accession monitoring, can therefore be considered a priority. In the first place, it would envisage a balanced and not excessively intrusive form of intervention, especially if it were not automatically linked to a system of sanctions. Moreover, it would guarantee more objectivity and contribute to avoiding the double standards often mentioned in the current debate, a criticism that is to some extent well-deserved: for example, it is hard to explain why the Commission has decided for example to activate the Rule of Law Framework against Poland, but not against Hungary, in the absence of a full assessment of the situation.

There are certainly many concrete questions to be addressed if the choice to set up an overall post-accession monitoring system is taken. The EP has developed a first proposal.<sup>89</sup> Some of the key questions concern who should be in charge of the monitoring – the Commission, the FRA, a new body similar to the Copenhagen Commission proposed by Muller<sup>90</sup> -, how it

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<sup>87</sup> The possibility of a backlash was already addressed by the three 'Wise Men' reporting on sanctions against Austria in 2000: AHTISAARI - FROWEIN - OREJA, *Report on the Austrian Government's Commitment to the Common European Values, in particular concerning the Rights of Minorities, Refugees and Immigrants, and the Evolution of the Political Nature of the FPO* ('The Wise Men Report'), 8 September 2000, in *International Legal Materials*, 2001.

<sup>88</sup> See Commission, *supra* fn. 57

<sup>89</sup> European Parliament, Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, Doc. 2015/2254(INL).

<sup>90</sup> MULLER, 'Protecting the rule of law (and democracy!) in the European Union: the idea of a Copenhagen Commission', in CLOSA – KOCHENOV (eds.), *supra* fn. 14.

should relate to existing EU mechanisms, including Art.7 and the Rule of Law Framework, whether the analysis should be primarily quantitative (a “Scoreboard”) or qualitative, and on which legal basis it could be adopted. These questions cannot be tackled in detail in this work, but there is a point which may be worthy to underline as it shows a difference with pre-accession instruments: it is at least debatable whether the Commission should be in charge of the post-accession monitoring. Due to the politically contested nature of the exercise, it is questionable whether an increasingly political actor such as the Commission could exercise that role in a truly objective fashion and mostly be perceived as legitimate. Party divisions indeed are indeed playing a significant role in the current debate.<sup>91</sup>

A second element to be considered is the possible re-construction of a “linkage” between respect for the values and the enjoyment of membership benefits. In the current Treaty framework, it cannot be membership itself to be dependent on respect for the values, as expulsion of a Member State is clearly not allowed even under Art.7 TEU and an amendment of the Treaties in the sense of providing for expulsion does not seem a realistic solution at the moment. Thus, recent proposals have argued instead that cohesion or structural funds could (and should) be suspended if a Member State is breaching Art.2 values. For Member States such as Hungary and Poland, structural funds are of fundamental importance and indeed one of the main benefits deriving from EU membership.<sup>92</sup>

Kim Lane Scheppele was among the first to suggest exploring this route. In her proposal, the CJEU, following a final determination in a “systemic infringement action” case that a Member State does not comply with Art.2, could impose sanctions in the form of suspension of funds.<sup>93</sup> The suspension of structural funds is also conceivable as one of the rights suspended after an Art.7(3) decision by the Council. The idea of suspending EU funding was also evoked in a letter by four EU Ministers of Foreign Affairs in 2013<sup>94</sup> and more recently in a German position paper on the EU budget, arguing that “it would be worth exploring the possibility of making EU cohesion funding

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<sup>91</sup> KELEMEN, *Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union, Government and Opposition*, 2017, 211.

<sup>92</sup> Data on cohesion funds are available at [www.cohesiondata.ec.europa.eu](http://www.cohesiondata.ec.europa.eu).

<sup>93</sup> See SCHEPPELE, *supra* fn. 65.

<sup>94</sup> “As a last resort, the suspension of EU funding should be possible”, Letter of four Ministers of Foreign Affairs to President of the Commission, 6 March 2013: <[www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aaneuropese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme.pdf](http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aaneuropese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme.pdf)>, last accessed on 20-10-2017.

subject to compliance with the basic principles underpinning the rule of law”.<sup>95</sup> These proposals would certainly need further elaboration should the debate on political conditionality post-accession continue. As a form of sanction, either after a judgment under Art.260 TFEU or after an Art.7(3) proceeding, the impact of the proposal would not be groundbreaking. On the one hand, Art.260 TFEU already allows for the imposition of fines on Member States, thus the suspension of funding would only be technical instrument to receive the payment; on the other, the complexity of activating Art.7 would still be an obstacle to be addressed.

It is also conceivable, however, to make the conferral of funding conditional upon respect for the values not as a form of sanction under Art.7 TEU or 258 TFEU, but in the context of a strengthened monitoring scheme, as suggested above, or as a form of *ex ante* condition under the cohesion funding regulation itself. This proposal is at the same time more stimulating and more controversial and immediately raises several institutional and, once again, constitutional questions, which are however beyond the scope of this paper. What should be recalled, however, is that Regulation 1303/2013, setting the common provisions for all EU cohesion funds, already provides several conditions to be fulfilled by the Member States in order to get access to structural funds.<sup>96</sup> The expansion of the scope of those conditions could be an opportunity to be considered and would allow the EU to play a more active role in shaping Member States’ policies on human rights, inclusion, and non-discrimination, for example.

Another option would be to extend conditionality schemes to other areas of EU law, especially when the application of the piece of legislation in question may affect human rights or national rule of law systems. An example may be the European Arrest Warrant system. Already today, the EAW Decision provides that participation of a Member State to the scheme

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<sup>95</sup> Joint statement by the German government and the German Länder on EU Cohesion Policy beyond 2020, <http://www.bmwi.de/Redaktion/EN/Downloads/S-T/stellungnahme-bund-landes-kohaesionspolitik.html>, last accessed on 20-10-2017.

<sup>96</sup> See Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on structural funds. Some of these conditions require respect for specific fundamental rights and rule of law profiles. Conditions can be both general (general *ex ante* conditionality) and specific to the structural fund in question (thematic conditionality). For example, for the signature of “Partnership Agreement” between the EU and the national authorities, Member States must create partnerships with regional and local authorities and with “bodies representing civil society, including environmental partners, non-governmental organisations, and bodies responsible for promoting social inclusion, gender equality and non-discrimination”: See Article 5(1)(c) of the Regulation.

is suspended if there is a determination under Art.7(2) of a serious and persistent breach of EU values.<sup>97</sup> An option which could be considered is to lower such threshold, suspending the application of the EAW already when a EU monitoring body, or perhaps even actors external to the EU – for example, the ECtHR in a pilot judgment procedure – signals the existence of widespread rule of law or human rights problem<sup>98</sup>

These questions shall remain open for the time being, as the debate on political conditionality post-accession is still at an early stage and will require further research. While the proposals indicated would arguably strengthen the EU capacity to react to systemic threats in the Member States and reinforce the idea that the EU takes its values seriously, the impact on the current constitutional settlement would be significant. It has to be acknowledged that it seems at least unlikely that all the Member States would support such an extension of EU procedures for oversight in the current political climate. One may also wonder whether these proposals would not introduce in the EU legal order an element of “reciprocity”, which, while being typical in international law, is largely extraneous to EU law.<sup>99</sup> The impact over mutual trust schemes should also be taken into account. Ultimately, further reflection would be needed on whether political conditionality truly consolidates democracy, the rule of law, and human rights, in particular in the medium and long term, in the light of the recent crises in countries once considered successful models of transformation.

If the current debate on EU values’ oversight has mostly focused on strengthening judicial proceedings before courts<sup>100</sup> or on more political mechanisms,<sup>101</sup> the creation of political conditionality schemes *post-accession* would be a third avenue to take into consideration. Those three approaches can be seen as complementary rather than alternative and combined into an overall “Values Strategy”. In any event, while the EU

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<sup>97</sup> See consideration (10) of the preamble of the EAW Framework Decision.

<sup>98</sup> The recent decision of CJEU, Joined Cases C-404/15 & C-59/15 PPU *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198 shows how the existence of systemic problems in a Member State may disrupt the smooth functioning of the EAW system.

<sup>99</sup> As recognized by the CJEU case law, for example in CJEU C-5/94 *Hedley Lomas* [1996] ECLI:EU:C:1996:205.

<sup>100</sup> See in particular the “Reverse Solange” proposal of the Heidelberg group, the “systemic infringement action” of Scheppele, or the suggestion to make the CFREU applicable in purely domestic cases advanced by Jakab. These procedures are discussed in CLOSA – KOCHENOV (eds.) and JAKAB – KOCHENOV (eds.), *supra* fn. 14.

<sup>101</sup> The “Copenhagen Commission” of Muller would be an example, as well as suggestions to lower the requirements of Art.7 TEU, see *ivi*.

reflects on how to reinforce its instruments for the future, there is a parallel need to give responses to the current crises in Hungary and Poland. Reflection should therefore be accompanied by concrete actions, involving all EU institutions and making full use of the potential of current instruments, including Art.7 TEU.

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