Ukrainian Private Law and the European Area of Justice

Edited by
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and RAINER KULMS

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Mohr Siebeck

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(Private) Law in Transition

The *Acquis Communautaire* as a Challenge for East European Lawmakers

Rainer Kulms

I. The *acquis communautaire* – A challenge for rational accession-seekers

1. Introduction

In view of Ukraine, the European Neighbourhood Policy[1] has evolved into the EU-Ukraine Association Agenda.[2] The EU–Ukrainian Association Ag-

[1] See the official homepage of the European External Action Service on the EU Neighbourhood Policy, available at <https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp_en>, and *Van Elsuwege/Petrov,* in: Van Elsuwege/Petrov (eds.), Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union – Towards a Common Regulatory Space?, Abingdon 2004, pp. 1 et seq., on the export of the *acquis communautaire* to the EU's East European neighbours.

[2] See EU–Ukraine Cooperation Council, EU–Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement, Luxembourg 24 June 2013, available at <https://cdn4-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/rI4Tjq_6fO-UOiDPO9UeI7F8IHqJmh7x-u17p2WR3LA/mtime:1471517765/sites/eeas/files/eu_ukr_ass_agenda_24jun2013.pdf>.

reement[3] is committed to "progressively closer links between the Parties", based on common values, the rule of law and the principles of a free-market economy. The instrument for paving Ukraine's way towards gradual integration in the EU is "progressive approximation" of legislation,[4] guided by the principle of conditionality. "Conditionality"[5] translates the EU's Copenhagen criteria into a sequence of Progress Reports[6] and Association Implementation Reports on integrating the *acquis communautaire* into national legal orders.[7] But there are also ad hoc conditions attached to specific loans from the International Fund (IMF) or the EU's macro-financial assistance programme, both of which go beyond the mere transposition of EU law.[8]

Accession and association agreements are based on the assumption that both the entrant country and the EU have a joint interest as, respectively, "rational accession-seeker" and "rational accession-provider".[9] Nonetheless, the bargaining power is asymmetric.[10] This asymmetry has enabled the EU to insist on far-reaching reforms during the pre-accession phase although it is unclear to what extent a potential political backlash in the applicant countries will be accommodated. Negotiators of accession agreements tend to emphasise the gains

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[3] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ 2014 L 161/3 of 29 May 2014.

[4] Art. 1(2)(d) of the Agreement.

[5] For a survey see *Papakostas,* Deconstructing the Notion of EU Conditionality as a Panacea in the Context of Enlargement, L'Europe en Formation 2012/2, No. 364, p. 215 (221 et seq.) (Centre international de formation européenne).

[6] See European Commission Press Release, Enlargement package: Commission publishes reports on the Western Balkans partners and Turkey, Brussels 17 April 2018, IP/18/3342, available at <http://europa.eu/rapid/press-release_IP-18-3342_en.htm>; and European Commission, 2018 Communication on EU Enlargement Strategy, Strasbourg 17 April 2018, COM(2018) 450 final, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417_strategy_paper_en.pdf>.

[7] See, e.g., European Commission, High Representative for the Union for Foreign Affairs and Security Policy, Joint Staff Working Document, Association Implementation Report on Ukraine, Brussels 14 November 2017, SWD(2017) 376 final, available at <https://eeas.europa.eu/sites/eeas/files/association_implementation_report_on_ukraine.pdf>.

[8] See, e.g., European Commission, Report on the implementation of macro-financial assistance to third countries, Brussels 29 June 2018, COM(2018) 511 final, sub-sections 2.2. and 2.3., discussing the international financial package for Ukraine, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0511&from=EN>.

[9] See *Bakardijeva Engelbrekt,* in: Weatherill/Bernitz (eds.), The Regulation of Unfair Commercial Practices under EC Directive 2005/29, Oxford and Portland 2007, p. 47 (81 et seq.) on rational "accession-seekers" and the rational "accession-provider" in the context of EU enlargement, and *Bakardijeva Engelbrekt,* in: Cafaggi/Muir Watt (eds.), Making European Private Law – Governance Design, Cheltenham 2008, p. 98 (129 et seq.).

[10] *Schellbach,* Why the EU Should Differentiate More Within the Eastern Partnership, C A Perspectives 2014, No. 1, p. 1 (2), available at <https://www.files.ethz.ch/isn/184855/CAPerspectives-2014-01.pdf>.

after joining the EU.[11] A cost-benefit analysis informs the adjustment policies of the applicant country.[12] Politicians and public officials of the "accession-seeker" want to demonstrate rapid progress as the European Commission has an interest in measuring and monitoring the pre-accession period.[13] Ultimately, the technique of conditionalities supports a rewards-based system where accession is the prize for accelerating adjustment policies in the applicant country.[14]

Under the Stabilisation and Associations Agreements (SAA's), the EU's approach has added sophistication to its Western European accession templates:[15] The Commission has refined its conditionalities,[16] tailored to the specific needs of post-Communist transition economies and the adaption costs of the *acquis communautaire*.[17] This appears to exclude a generalising approach towards the analysis of the current generation of SAA's as the motives of rational accession-seekers and rational "accession-cheaters" are likely to vary from country to country. Closer inspection suggests that compliance with a conditionality is more complicated. An OECD study on the "conditionality in practice"[18] illustrates the shortcomings of a mere cost-benefit methodology which imposes policy choices on the recipient of international loans. In fact, the scrutiny of the costs and benefits of implementing the *acquis communautaire* is meaningless unless the institutional framework in the applicant country is assessed.[19] What looks like rational "accession-cheating" might be the outcome of (institutional) deficiencies in the decision-making processes within the political system of the applicant country. In this context, the expe-

[11] See, e.g., *Vilpišauskas,* The Final Stage of the EU-accession Game: The Baltic States – the likely victims of their own success?, Draft Paper 2003, available at <http://aei.pitt.edu/2967/1/169.pdf>.

[12] Ibid., and *Vilpišauskas,* The management of economic interdependencies of a small state: assessing the effectiveness of Lithuania's European policy since joining the EU, Paper Vilnius 2011, available at <https://ams.hi.is/wp-content/uploads/old/Vilpisauskas%20Lithuania%20economy.pdf>.

[13] *Bakardijeva Engelbrekt,* in: Cafaggi/Muir Watt, supra n. 9, p. 130.

[14] *Schimmelfennig/Sedelmeier,* Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe, Journal of European Public Policy 2004, Vol. 11, No. 4, p. 661 (663 et seq.).

[15] *Sedelmeier,* After conditionality: post-accession compliance with EU law in East Central Europe, Journal of European Public Policy 2008, Vol. 15, No. 6, p. 808.

[16] See on the concept of political conditionalities: *Goss,* Generous or Just? – An Introduction to and Examination of the Consequences of Political Conditionality in the Accession of Serbia to the European Union, Tulane Journal of International and Comparative Law 2012, Vol. 21, p. 159 (172 et seq., case study on Serbia).

[17] *Schellbach,* supra n. 10.

[18] OECD, Conditionality in practice: Emerging lessons for public investment, 2018, on the risks of conditionality (pp. 12 et seq.) and the case studies (pp. 25 et seq.).

[19] See the assessment by *Kochenov,* in: Van Elsuwege/Petrov, supra n. 1, p. 45 (52 et seq.), of "values versus rules", claiming that the *acquis* will not guarantee the enforcement of values and their promotion.

riences of South-East European SAA countries might be instructive as the EU and Ukraine embark on a journey towards approximation and implementation of the *acquis communautaire.*

Under the current SAA's, the European Commission applies a policy mix of suasion and sanctions. This calls for an analysis asking under what circumstances conditionalities are enforced or, if applicable, relaxed in order to accommodate institutional problems of the applicant country. As soon as compliance with an SAA has produced approximation and as soon as a rational accession-seeker has been received into the club of Member States, monitoring turns into ex-post scrutiny. The EU Commission will have to ascertain whether legal transplants remain dead-letter law and to what extent further institutional reforms are apposite. As adherence to EU standards no longer produces additional rewards, there appears to be a disincentive to comply with the *acquis communautaire.* At first sight, EU law seems to employ reputational mechanisms in order to sanction breaches of pro-Union discipline. It is an empirical exercise to assess whether the European Commission is able to maintain a credible threat by policing breaches of EU law by infringement proceedings in spite of potential political backlash. Moreover, requests for a preliminary ruling from the Court of Justice of the European Union (CJEU) originating from a new Members State might indicate how well EU law has become rooted among the judiciary of the (former) "rational accession-seeker".

2. The Copenhagen criteria after 25 Years

a) The EU's post-1989 approach is consolidated

Late in 1991, the European Community and Hungary, Poland and then Czechoslovakia concluded "Europe Agreements" which included an express reference to a future accession.[20] A year later, these countries lodged a joint request with the Community to commence formal accession negotiations.[21] In May 1993, the European Council adopted formal criteria for determining whether an applicant country is ready to initiate formal membership negotiations (the "Copenhagen criteria").[22] With the benefit of hindsight, these criteria foreshadowed[23] what has become Arts. 2 and 49 of the Lisbon Treaty.[24]

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[20] European Commission Press Release Database, IP/91/1033, available at <http://europa.eu/rapid/press-release_IP-91-1033_en.htm?locale=en>; *Hillion,* in: Hillion (ed.), EU Enlargement: A Legal Approach, Oxford and Portland 2004, p. 1 (fn. 2).

[21] Id.

[22] European Council in Copenhagen 21–22 June 1993, Conclusions of the Presidency (sub "Relations with the Countries of Central and Eastern Europe"), available at <https://www.consilium.europa.eu/media/21225/72921.pdf>.

[23] *Hillion,* supra n. 20, pp. 3 et seq.

[24] Art. 2 of the Lisbon Treaty acknowledges that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for

The original Copenhagen criteria condition membership on political stability, including democratic structures and the rule of law, the existence of a functioning market economy and the ability to withstand competitive pressures from other Member States.[25] Fulfilment of this conditionality will pave the way into the European Union while, as the Council openly states, "maintaining the momentum of European integration".[26] The political, economic and legal thinking behind the original Copenhagen criteria is informed by a cost-benefit analysis.[27] It is also unclear whether a cost-benefit analysis – properly applied to accession- or association-seeker – will induce the Commission to relax some of the Copenhagen criteria if the political and economic costs of strict adherence are too high.

b) Copenhagen – As modified by Zagreb and Thessaloniki

Late in 2002, the European Council met in Copenhagen to reflect, inter alia, on the criteria for enlarging the European Union after ten years of implementing the "Copenhagen criteria".[28] While there was agreement that the criteria were politically still viable, there was also acknowledgment that the terms of their implementation needed to be modified.[29] The Commission introduced cooperation models with "rational accession-seekers" and other partners, allowing for a much longer adaptation phase.[30] As a negotiator from an East

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. – Art. 49 of the Lisbon Treaty stipulates that any European State which respects the aforementioned values and is committed to promoting them may apply to become a member of the Union. …The conditions of eligibility agreed upon by the European Council shall be taken into account.

[25] For a survey over the EU Commission's attitude towards implementing the Copenhagen criteria see EU Commission, Communication on the Enlargement Strategy and Main Challenges 2013–2014, Brussels 16 October 2013, COM(2013) 700 final, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf>.

[26] European Council in Copenhagen 21–22 June 1993, Conclusions, supra n. 22.

[27] For a cost-benefit analysis with respect to Serbia's and Montenegro's Stabilisation and Association Agreements: *Simidjiyska,* From Milosevic's Reign to the European Union: Serbia and Montenegro's Stabilization and Association Agreement – Note, Temple International and Comparative Law Journal 2007, Vol. 21, p. 147 (151 et seq.).

[28] See Council of the European Union, Presidency Conclusions on the Copenhagen Council 12 and 13 December 2002, Brussels 29 January 2003, 15917/02, available at <https://www.consilium.europa.eu/media/20906/73842.pdf>.

[29] See also the address of the Danish Statsminister on "Priorities of the Danish Presidency – From Copenhagen to Copenhagen" of 14 June 2002, foreshadowing the assessment of the original Copenhagen criteria, available at <http://www.stm.dk/_p_7374.html>.

[30] For an assessment of the underlying theory of pre-accession conditionality: *Veebel,* Relevance of Copenhagen Criteria in Actual Accession: Principles, Methods and Shortcoming of

European accession-country put it, the Commission had come to practise a strategy of "increasing asymmetry, complexity and differentiation".[31] The recalibration of enlargement policies produced a strategy for the Western Balkans which combines the distribution of the *acquis communautaire* with a specific regional policy.[32] The Final Declaration of the November 2000 summit in Zagreb had already endorsed a stabilisation and association process which relied, inter alia, on reconciliation and cooperation on the Western Balkans and on regional aid. With respect to the long-term perspective of association, the Zagreb Declaration expressly calls for an "individualised approach" in accordance with the needs and specificities of the potential candidate country.[33] The EU–Western Balkans summit in Thessaloniki conditioned rapprochement with the Union on the development of regional cooperation.[34] It would seem that the Thessaloniki Summit Declaration adds a political conditionality to the conditionality under the Copenhagen criteria: The Thessaloniki Declaration reiterates adherence to the values of democracy, the rule of law, the respect for human and minority rights and the market economy. Moreover, it provides for enhanced cooperation in the areas of political dialogue, a Common Foreign and Security Policy, parliamentary cooperation, support for institution building and financial support.[35] Although the Declaration does not part with the *acquis communautaire,* it envisages a gradual (slower) approximation towards European Union standards.[36] What is described as "preparation for integration into European structures and ultimate membership into the European Union through adoption of European standards"[37] is obtained at the expense of ongoing controls by European Union

EU Pre-accession Evaluation, Studies of Transition States and Societies 2011, Vol. 3, No. 3, p. 3 (6 et seq.), available at <https://www.ssoar.info/ssoar/bitstream/handle/document/36378/ssoar-stss-2011-3-veebel-Relevance_of_Copenhagen_Criteria_in.pdf?sequence=1>.

[31] *Maniokas,* Methodology of the EU Enlargement: A Critical Appraisal, Paper prepared for the Lithuanian Foreign Policy Review (2015), available at <http://lfpr.lt/wp-content/uploads/2015/07/LFPR-5-Maniokas.pdf>.

[32] See generally on the EU's enlargement policy with respect to the Western Balkans: *Letica,* Europe's Second Chance: European Union Enlargement to Croatia and the Western Balkans, Fletcher Forum of World Affairs 2004, Vol. 28, No. 2, p. 209 (211 et seq.), and *Mišović,* in: Popović (ed.), Legal Implications of Trade Liberalization under SAAs and CEFTA, Belgrade 2018, p. 261 (264 et seq.).

[33] European Commission, Zagreb Summit 24 November 2000, Final Declaration, available at <https://www.esiweb.org/pdf/bridges/bosnia/ZagrebSummit24Nov2000.pdf>.

[34] EU-Western Balkans Summit, Declaration, Thessaloniki 21 June 2003, 10229/03 (Presse 163), available at <https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/misc/76291.pdf>.

[35] Ibid.

[36] This will invariably lead to a differentiated integration of neighbouring countries: *Gstöhl,* in: Van Elsuwege/Petrov, supra n. 1, p. 87 (97 et seq.).

[37] Ibid.

officials. The progress reports[38] reflect a specific type of evaluating legislative work, from both an ex-ante and ex-post perspective.[39] Although the European Union controls the pace of accession of the Western Balkan states, the incentive structure is likely to change dramatically if the reward for approximation becomes too distant.[40]

II. Stabilisation and Association Agreements[41]

1. Regulatory technique

On 1 April 2016, the Stabilisation and Association Agreement with Kosovo was as yet the latest instrument in the EU's agenda for the Western Balkans to enter into force. The EU commissioner for enlargement policies emphasised that the Agreement "will keep Kosovo on the path of reform and create trade and investment opportunities".[42] Under art. 74 of this Stabilisation and Association Agreement, Kosovo endeavours "to ensure that its existing law and future legislation will gradually be made compatible with the EU *acquis*".[43] Moreover, Kosovo undertakes to "ensure that existing law and future legislation will be properly implemented and applied".[44]

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[38] See supra n. 20 and infra sub II.2.

[39] See generally: *Bozzini/Hunt,* Bringing Evaluation into the Cycle: CAP Cross Compliance and the Defining and Re-defining of Objectives and Indicators, European Journal of Risk Regulation 2015, Vol. 6, No. 1, p. 57 (59 et seq.); *van Golen/van Voorst,* Towards a Regulatory Cycle? – The Use of Evaluative Information I Impact Assessments and Ex-Post Evaluations in the European Union, European Journal of Risk Regulation 2016, Vol. 7, No. 2, p. 388 (393 et seq.); *Bussmann,* Evaluation of Legislation: Skating on Thin Ice, Evaluation 2010, Vol. 16, No. 3, p. 279 (282 et seq.) (on evaluations of statutes in Switzerland); European Commission, DG Market Guide to Evaluating Legislation, Brussels March 2008, pp. 8 et seq.

[40] Cf. *Mišović,* in: Popović, supra n. 32, p. 265.

[41] For a survey over the EU's enlargement processes in the context of Stabilisation and Association Agreements: *Marko/Wilhelm,* in: Ott/Inglis (eds.), Handbook on European Enlargement – A Commentary on the Enlargement Process, The Hague 2002, pp. 165 et seq.

[42] See European Commission Press Release, Stabilisation and Association Agreement (SAA) between the European Union and Kosovo enters into force, Brussels 1 August 2016, IP/16/1184, available at <http://europa.eu/rapid/press-release_IP-16-1184_de.htm>.

[43] Council of the European Union, Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community and Kosovo, Brussels 2 October 2015, Interinstitutional file 2015/0095 (NLE), available at <http://www.consilium.europa.eu/en/press/press-releases/2015/10/27-kosovo-eu-stabilisation-association-agreement/>.

[44] Ibid.

The regulatory technique of the Stabilisation and Association Agreements with Western Balkan states is unique.[45] They seek to enact the Copenhagen criteria, especially the principles of a free market economy,[46] with a firm focus on the rule of law. The SAA's are committed to the free exchange of merchandise without tariff barriers, but they do not automatically grant freedom of movement for workers and freedom of establishment. Instead, a transition phase is applicable before individuals, companies and self-employed persons can enjoy the privilege of unrestricted work or business activities.[47] The concept of an "internal rule of law" includes an institutional approach which goes well beyond the mere judicial protection of rights.[48] In view of the approximation of national legal systems towards the *acquis communautaire,* the SAA's allow for various legislative and regulatory techniques. This includes a pro-European interpretation of an existing law, but it may also mean enactment of new legislation.

The EU Commission has explained that it will scrutinise the impact of legislation, its potentially beneficial effects and the impact on the addressees of legislation.[49] While positive welfare effects are to be expected, they will materialise neither evenly nor immediately.[50] It is as yet an open question whether the side effects will push national legislators on the West Balkans towards a temporary relaxation of the approximation process in order to reduce the immediate political cost of the *acquis communautaire.*[51] In devising a meaningful approximation strategy, both accession-seekers and the Commission

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[45] *Stafaj,* From Rags to Riches: Croatia and Albania's EU Accession Process through the Copenhagen Criteria and Conditionality, Fordham International Law Journal 2014, Vol. 37, p. 1684 (1695 et seq.).

[46] See, e.g., on the Competition provisions in the EC-Croatia Stabilisation and Association Agreement: *Vrcek,* Croatian and EC Competition Law: state aid and problems of the adjustment process, European Business Organization Law Review 2004, Vol. 5, No. 2, p. 363 (383 et seq.).

[47] Cf. *Jevremović Petrović,* in: Popović, supra n. 32, p. 61 (62 et seq.).

[48] Cf. *Appicciafuoco,* The Promotion of the Rule of Law in the Western Balkans: The European Union's Role, German Law Journal 2010, Vol. 11, p. 741 (766).

[49] See supra n. 39.

[50] See for Albania: *Zahariadis,* The Albania-EU Stabilization and Association Agreement: Economic Impact and Social Applications, Overseas Development Institute London – Economic and Statistics Analysis Unit Working Paper 17 (February 2007), available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2527.pdf>.

[51] This is likely to re-ignite the debate on a Europe "à deux vitesses": see the prescient report presented to the French Assemblée Nationale at the time of the 2002 Copenhagen Council: *André,* Rapport d'information déposé la Délégation de l'Assemblée Nationale pour l'Union Européenne sur l'élargissement de l'Union européenne à dix pays candidats, No. 773, Douzième Législature, Paris 8 April 2003, pp. 8, 80, <available at http://www.assemblee-nationale.fr/12/pdf/Europe/rap-info/i0773.pdf>.

are facing economic, institutional and cultural constraints.[52] Obviously, there is also the risk of capture by vested interests.[53] Ill-designed privatisation processes have entrenched legal monopolies and other dominant players with bargaining power.[54] Approximation processes are hampered by political constraints.[55] Approximation processes will also be disturbed if corruption equilibria are stable and law enforcement is weak.[56]

The SAA's provide for warning mechanisms by establishing Association Councils which are to monitor whether the obligations under the agreements are faithfully observed.[57] The Association Council is supported by an Association Committee which drafts Council decisions and, after approval, implements them.[58] Neither the Association Council nor the Committee is explicitly charged with developing a leniency scenario. But they appear to offer sufficient discretion in addressing the need of a rapprochement country which might be facing negative costs in implementing the *acquis.* Similarly, the progress reports[59] constitute a warning system when unforeseen institutional deficiencies occur during the rapprochement or when political costs for the accession-seeker increase.[60]

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[52] See *Buccirossi/Ciari,* in: Begović/Popović (eds.), Competition Authorities in South Eastern Europe – Building Institutions in Emerging Markets, Heidelberg 2018, p. 7 (17 et seq.) on the design of effective competition law in Western Balkan countries.

[53] *Buccirossi/Ciari,* supra n. 52, p. 24.

[54] *Buccirossi/Ciari,* supra n. 52, p. 18.

[55] This may mean that the creation of a market as such has a greater priority than the protection of competition: *Buccirossi/Ciari,* ibid., p. 19.

[56] *Rose-Ackerman,* The Law and Economics of Bribery and Extortion, Annual Review of Law and Social Science 2010, Vol. 6, p. 217 (226 et seq.). See on "state capture" in Eastern Europe the study by the World Bank: Trends in Corruption and Regulatory Burden in Eastern Europe and Central Asia, Washington, D.C. 2011, pp. 16 et seq., available at <https://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-8671-2>.

[57] See the description of the functions of the EU–Ukrainian SAA council ("Bilateral institutions of the Association Agreement between Ukraine and the EU") on the homepage of the Ukrainian government, available at <https://www.kmu.gov.ua/en/yevropejska-integraciya/ugoda-pro-asociacyu/dvostoronni-ustanovi-ugodi-pro-asociaciyu-mizh-ukrayinoyu-ta-yes>.

[58] Cf. Government of the Republic of Macedonia, Secretariat for European Affairs, Press Release of 15 June 2016, 13th Meeting of the Committee for Stabilisation and Association between the Republic of Macedonia and the European Union, available at <http://www.sep.gov.mk/en/content/?id=1949>; Albanian Ministry of Foreign Affairs, Press Release of 13 July 2010 on the Stabilization and Association Agreement, available at <http://arkiva.mfa.gov.al/index.php?option=com_multicategories&view=article&id=5599%3Amsa-ja&Itemid=65&lang=en>.

[59] For details see infra sub II.2.

[60] See on Croatia's public opinion during the accession negotiations: *Letica,* supra n. 32, Fletcher Forum of World Affairs 2004, Vol. 28, No. 2, p. 209 (213 et seq.).

2. *Institutional analysis – The progress reports*

At the outset, the concept of conditionality is to generate cooperative efficiency between the European Union and an SAA or Association country.[61] However, the Copenhagen criteria are by far too general to assure a meaningful assessment.[62] The progress reports build on a list of specific criteria which translate into an institutionalist attitude towards the political and judicial governance structure of a rapprochement country.[63] Arguably, this allows for an assessment methodology which balances the interests of "gainers" and "payers" and costs.[64]

a) Albania[65]

In November 2016 the Commission cleared the way for accession negotiations but also requested that Albania should comply with "five key priorities".[66] In analysing Albania's progress under the SAA, the Commission has emphasised the need to de-politicise the country's public administration and to enhance professionalism in merit-based public service.[67] The Commission's 2018 report devotes considerable attention to the implementation of the justice reform.[68] Fighting corruption and a re-evaluation of Albania's judiciary are of utmost importance. This extends to scrutinising the personal assets of high-ranking judges and prosecutors.[69] The Commission's assessment focuses on not only the introduction of the necessary legislative framework but also its day-to-day

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[61] *Veebel,* supra n. 30, Studies of Transition States and Societies 2011, Vol. 3, No. 3, p. 3 (7).

[62] Ibid., p. 5.

[63] This includes a compatibility analysis under the standards of the Venice group, i.e. the European Commission for Democracy through Law, which was established by a committee of ministers from member states of the Council of Europe (see the Revised Statute of the European Commission for Democracy through Law of 21 February 2002, available at <http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute>).

[64] See *Veebel,* supra n. 30, Studies of Transition States and Societies 2011, Vol. 3, No. 3, p. 3 (12).

[65] For a survey of Albania's rapprochement with the EU from the perspective of the Albanian government see the homepage of the Ministry for European Integration at <http://historiku.integrimi.gov.al/en/program/eu-albania-history>.

[66] Specifically, public administration reform, assuring independence and efficiency of the judicial institutions, the fight against corruption, the fight against organised crime and the protection of human rights: see Albania's National Plan for European Integration (2014), available at <https://shtetiweb.org/wp.../L2-National-Plan-for-European-Integration-2014-2020.doc>.

[67] European Commission Staff Working Document, Albania 2018 Report, Strasbourg 17 April 2018, SWD(2018) 151 final, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf>, pp. 3, 7 et seq.

[68] Ibid., pp. 16 et seq.

[69] Ibid., p. 3.

application.[70] In this context, the Commission insists on a solid track record of proactive investigations and convictions in the fight against organised crime.[71] On a fundamental rights level, the Commission has emphasised the crucial importance of anti-discrimination and property rights.[72] While some progress is noted, Albania has been admonished to further the enforcement of human rights.[73] With respect to the general business climate, progress is acknowledged, but the Commission is concerned about the scope of the informal economy.[74] Moreover, despite enacting a new bankruptcy law, business activities are still suffering from cumbersome regulations and a lack of certainty for investments.[75] The Commission classifies Albania as moderately prepared for membership so that a considerable effort will have to be made to approach implementation of the *acquis communautaire*.[76]

b) Bosnia and Herzegovina

The SAA with Bosnia and Herzegovina entered into force on 1 June 2015.[77] As early as November 2003, the Commission had issued a report on the country's "preparedness … to negotiate a Stabilisation and Association Agreement" with the EU.[78] At that time, the EU Commission noted that the complicated constitutional structure of the country rendered approximation processes towards the *acquis communautaire* difficult.[79] The rule of law needed reinforcement.[80] A competition law regime had been enacted, but it was inoperative because the country's entities had not established units to liaise with the national Competition Council.[81] The 2003 Commission Report regrets widespread forgery and piracy, partly due to the absence of qualified enforcement personnel. With respect to representatives from civil society, the Report refers to consumer organisations emerging after the state had enacted

[70] Ibid., p. 24.
[71] Ibid., pp. 22 et seq.
[72] Ibid., pp. 24 et seq.
[73] Ibid., pp. 25 et seq.
[74] Ibid., pp. 47 et seq.
[75] Ibid.
[76] Ibid., p. 7.
[77] European Commission Press Release, Stabilisation and Association Agreement with Bosnia and Herzegovina enters into force today, Brussels 1 June 2015, IP/15/5086, available at <http://europa.eu/rapid/press-release_IP-15-5086_en.htm>.
[78] European Commission, Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union, Brussels 18 November 2003, COM(2003) 692 final, available at <https://europa.ba/wp-content/uploads/2015/05/delegacijaEU_201112143014088eng.pdf>.
[79] Ibid.
[80] Ibid.
[81] Ibid.

consumer protection legislation.[82] After the Stabilisation and Association Agreement had been ratified, the EU Commission started assessing whether the country had embarked on approximation efforts to comply with the Copenhagen criteria and the political conditionality.[83]

In February 2016, Bosnia and Herzegovina applied for EU membership.[84] The Commission is currently evaluating the country's answers to an EU questionnaire on the ability meet the accession criteria.[85] Due to the fragmentation of the decision-making regime of Bosnia and Herzegovina, the Commission notes major shortcomings in developing coherent policies, based on quality assessment and affordability studies.[86] As a consequence, the Commission has criticised the lack of a comprehensive scrutiny of government work. The 2018 report on Bosnia and Herzegovina refers to some progress in the functioning of the judiciary.[87] On the other hand, court proceedings experience massive delays. By the end of 2017, there was a backlog of 2.1 million cases.[88] Utility cases in particular have led to this backlog, and the enforcement of judgments generally remains a problem against the backdrop of incidences of political influence being exerted on the courts. Although the country has established an Anti-Corruption Agency, it suffers from extensive vacancies in key areas.[89] The country still has to address political-party financing as well as conflicts of interests, and it needs to intensify the fight against organised crime.[90] The Commission describes the creation of a functioning market economy as a major challenge for Bosnia and Herzegovina. Contract enforcement through court proceedings is problematic.[91] Moreover, the informal economy remains strong while direct state influence on the economy remains substantial in the face of incomplete privatisation processes.[92]

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[82] Ibid.

[83] See European Commission, European Neighbourhood Policy and Enlargement Negotiations, Bosnia Herzegovina, sub "Progress Reports", available at <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/bosnia-herzegovina_en>.

[84] European Commission Staff Working Document, Bosnia and Herzegovina 2018 Report, Strasbourg 17 April 2018, SWD(2018) 155 final, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-bosnia-and-herzegovina-report.pdf>.

[85] Ibid., p. 2.

[86] Ibid., pp. 6 et seq.

[87] Ibid., pp. 9 et seq.

[88] Ibid., p. 17.

[89] Ibid., p. 14.

[90] Ibid., pp. 14 et seq.

[91] Ibid., p. 32.

[92] Ibid.

c) Kosovo[93]

Kosovo is at an early stage of creating conditions for a functioning market economy.[94] With respect to the *acquis* on competition law, the country is underperforming in the sense that secondary legislation to implement the *acquis* has still to be enacted.[95] Central to the drawbacks in Kosovo's rapprochement towards the Copenhagen criteria and the political conditionality of the stabilisation and association process are the perceived deficiencies in the administration of justice and insufficient funding.[96] There are still serious concerns about the independence, accountability, impartiality and efficiency of judges and prosecutors.[97] In a country where considerable backlogs in dossiers have accumulated, an insufficient institutional capacity for legal enforcement, court delays and pervasive corruption constitute a formidable barrier to business development.[98] The latest progress report for 2017 diagnoses a slow implementation of the SAA and alignment with European standards. Kosovo continues efforts to develop a functioning market economy, but it still has to contend with the informal economy and tax evasion.[99]

d) Macedonia[100]

Macedonia was the first country to have signed a Stabilisation and Association Agreement with the EU.[101] The progress reports which the European Commission has published since 2012 demonstrate that the country has advanced fairly well in its rapprochement towards the *acquis.* But they also demonstrate that there is a considerable credibility gap between what is on

[93] See European Commission Staff Working Document, Kosovo 2018, Strasbourg 17 April 2018, SWD(2018) 156 final, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-kosovo-report.pdf>. (The Commission's designation in its Communication is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ opinion on the Kosovo declaration of independence.)

[94] Ibid., pp. 38 et seq.

[95] Ibid., pp. 55 et seq.

[96] Ibid., pp. 13 et seq.

[97] Ibid.

[98] Ibid., pp. 41 et seq.

[99] Ibid., pp. 4 et seq.

[100] The EU's SAA refers to the former Yugoslav Republic of Macedonia.

[101] Council of the European Union, Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the former Yugoslav Republic of Macedonia of the other part, Brussels 26 March 2001, 6726/01, available at <https://eeas.europa.eu/sites/eeas/files/saa03_01_en.pdf>, and Government of the Republic of Macedonia – Secretariat for European Affairs, Homepage, Stabilisation and Association Agreement, available at <http://www.sep.gov.mk/en/content/?id=17>.

the statute books and its actual enforcement.[102] In 2017, the European Commission appointed a group of independent experts to assess Macedonia's progress with respect to systemic rule-of-law issues.[103] Although the group took notice of the enactment of statutes in accordance with European and international standards, it criticised the lack of meaningful implementation.[104] The judicial system was found to be under the control of a small number of powerful judges serving and promoting political interests.[105] A lack of compliance by junior judges is "policed", amounting to "the capture of the judiciary and prosecution by the executive power".[106] Abuse of the judicial system is facilitated by the absence of an automated system for assigning judges to cases. Instead, there are indications that sensitive files will still be entrusted to particular judges.[107] Moreover, disciplinary instruments should not be used as to penalise judicial mistakes or differences in legal interpretation.[108]

e) Montenegro

As Montenegro continued implementing the SAA accession, negotiations were opened in June 2012.[109] Previously, the European Union had determined that Montenegro had made sufficient progress in the area of the rule of law to approach the various negotiating chapters for accession.[110] Nonetheless, the 2018 progress report notes that the country's public administration and judiciary require improvement.[111] The EU's current approach towards benchmarking Montenegro's approximation efforts focuses on institution-building. Rule-of-law weakness and unfair competition from the informal economy translate into a negative business climate.[112] The supervision system for

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[102] See the general remarks in: The former Yugoslav Republic of Macedonia: Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017, Brussels 14 September 2017, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf>.

[103] Ibid.

[104] Ibid.

[105] Ibid.

[106] Ibid.

[107] Ibid.

[108] Ibid.

[109] See chronology of Montenegro and EU relations, published by the Montenegrin government at: <https://www.eu.me/en/key-dates-text>.

[110] European Commission Press Release of 12 October 2011, European Commission recommends moving onto next stages towards EU entry, IP/11/1182, available at <http://europa.eu/rapid/press-release_IP-11-1182_en.htm?locale=en>.

[111] European Commission Staff Working Document, Montenegro 2018 Report, Strasbourg 17 April 2018, SWD(2018) 150 final, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-montenegro-report.pdf>, pp. 10 et seq., 14 et seq.

[112] Ibid., pp. 43 et seq.

banks is in need of reinforcement.[113] The functioning of the Agency for Competition should be more vigorously supported.[114] Legal proceedings suffer from a lack of legal certainty and predictability.[115] Moreover, Montenegro's legislature, which is crucial for transposing the *acquis communautaire* into domestic law, is hampered by opposition boycott.[116] Although progress has been made in strengthening the independence and professionalism of the judiciary, political interference remains a problem.[117] Cases are now randomly allocated to judges, but smaller courts find it difficult to observe this practice. To a certain extent, randomised allocation is imperilled by the ad-hoc redistribution of cases due to substantial backlogs.[118] Judicial independence still needs reinforcement as disciplinary sanctions should be confined to scenarios where the judge has failed to recuse himself at least three times.[119] The Commission's 2018 assessment demands a stepping up of anti-corruption measures, which should also extend to public procurement.[120]

f) Serbia

Serbia's accession negotiations began in January 2014.[121] The EU Commission conditions the pace of these negotiations on the country's progress on the rule of law and the normalisation of its relations with Kosovo.[122] Since 2013, the Commission has been supervising Serbia's compliance with the SAA.[123] The 2018 progress report notes some progress in Serbia's judicial system. While the backlog of cases was reduced and evaluation criteria for the judiciary became more professional, the potential for political influence over the judiciary has remained unabated.[124] The 2018 report is critical of the operational capacity of anti-corruption authorities as they need to police high-level

[113] Ibid., p. 44.
[114] Ibid., pp. 57 et seq.
[115] Ibid., p. 43.
[116] Ibid., p. 3.
[117] Ibid., pp. 15, 27, 43.
[118] Ibid., p. 15.
[119] Ibid.
[120] Ibid., p. 55.
[121] See European Commission Staff Working Document, Serbia 2018 Document, Strasbourg 17 April 2018, SWS(2018) 152 final, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf>, p. 3.
[122] Ibid.
[123] See first report: European Commission Staff Working Document, Serbia 2013 Progress Report, Brussels 16 October 2013, SWD(2013) 412 final, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/sr_rapport_2013.pdf>.
[124] European Commission, Serbia 2018 Report, supra n. 121, pp. 3, 13, 17, 43.

corruption cases in an unbiased and operationally independent manner.[125] Although Serbia is classified as moderately prepared in establishing a market economy system, the private sector is underdeveloped in the face of state-owned enterprises, weaknesses in the rule of law and inadequacies in unfair competition law.[126] Business laws still need to be enacted and implemented. This applies especially to the enforcement of property rights and to the restitution of property, which overburdened courts have to handle.[127] As in other Western Balkan countries, the informal economy is detrimental to a truly competitive scenario.[128] In a Serbian context, unpredictable and unjustified para-fiscal charges are not conducive to stabilising business.[129] The report identifies specific areas of economic activities which remain particularly vulnerable to corruption.[130]

III. Compliance with the *acquis communautaire* – Ex-post

Once Croatia had become a full member of the European Union, conformity checks were initiated in order to verify whether the country's laws were in full compliance with the *acquis communautaire.*[131] After a period of scrutiny of almost two years, the Commission moved to initiate fourteen infringement cases which have not yet reached the Court of Justice of the European Union.[132] The Croatian experience shows how pre-accession analysis (an ex-ante study on compatibility) turns into an ex-post scenario once the "rational accession-seeker" has joined the Union. Ex-post sanctions for non-compliance should send a message to outsiders that adherence to the *acquis* is an ongoing duty which is not relaxed after accession. It is in this context that the case law of the CJEU will also inform "outsiders" whether "cheating" or "shirking" pays off. Under the SAA's, the failure to achieve compatibility or

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[125] Ibid., p. 19.

[126] Ibid., pp. 13, 41, 43, 59 et seq.

[127] Ibid., p. 43.

[128] Ibid., pp. 43, 69.

[129] Ibid., pp. 43, 47.

[130] Ibid., p. 21.

[131] See EU Commission, Communication, Monitoring report in Croatia's accession preparations, Brussels 26 March 2013, COM(2013) 171 final, available at <http://old.hnb.hr/medjunarodna_suradnja/dokumenti/e-izvjesce-o-monitoringu.pdf>.

[132] See list of cases before the Court of Justice of the European Union where Croatia is a defendant: <http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=C%2CT%2CF&page=1&dates=&pcs=Oor&lg=&parties=croatia&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=5352346> (November 2018).

approximation triggers a negative assessment from the Commission and delays the accession process.[133] Alternatively, the Commission might urge the signatory under the Stabilisation and Association Process to adopt institutional changes to comply with the conditionality.

1. Infringement of the acquis

a) From reputation mechanisms to formal proceedings

In support of its ex-post monitoring approach, the Commission publishes annual "Single Market Scoreboards". These scoreboards are based on empirical data on potential delays in transposing Directives into national law and on infringement proceedings initiated by the European Commission. The scoreboards for the new Member States in Eastern Europe demonstrate how these countries have fared in the aftermath of joining the Union. The scoreboards do not incorporate empirical data on proceedings before the Court of Justice where a Member State court requests a preliminary ruling on the compatibility of national law with the *acquis communautaire.* These proceedings for a preliminary ruling typically originate in litigation brought by private citizens who assert the non-conformity of a Member State statute before a national judge.

During the 2016/2017 period, Estonia was below the EU threshold for transposition deficits with an average delay of 6.9 months.[134] With respect to the compliance deficit, Estonia was still among the top four Member States in terms of having the fewest incorrectly transposed Directives. As a corollary, Estonia was the Member State with the Union-wide minimum of formal infringement proceedings. With four pending cases Estonia was below the Union average of twenty-four Member State infringement cases. As for infringement cases settled before the initiation of formal proceedings before the Court of Justice, the average duration of Estonian cases was 39.2 months whereas the Union average was slightly higher at 39.8 months. There has been one infringement case which went up to the Court of Justice. It took Estonia 16.5 months to comply with the Court's ruling whereas the Union average was 23.6 months.

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[133] With respect to the transposition of the competition law *acquis: Popović,* in: Popović, supra n. 32, p. 175 (183), notes the "sanction" for slow transposition is a delay in the general negotiation process with the EU.

[134] The data on Estonia are taken from the European Commission Single Market Scoreboard (Performance per governance tool) – Infringements (Reporting Period 12/2016–12/2017), available at <http://ec.europa.eu/internal_market/scoreboard/_docs/2018/infringements/2018-scoreboard-infringements_en.pdf>, and the European Single Market Scoreboard (Performance per governance tool) – Transposition (Reporting Period 12/2016–12/2017), available at <http://ec.europa.eu/internal_market/scoreboard/_docs/2018/transposition/2018-scoreboard_transposition_en.pdf>.

With respect to speed of transposition and compliance, Hungary is still among the top Member States, although the number of incorrectly transposed Directives has slightly increased. In 2017, Hungary's transposition delay[135] was at an average of 6.8 months, whereas the EU average was 8.7 months. From December 2016 to December 2017, Hungary had twenty-two pending infringement cases. The average duration of infringement proceedings was 31.1 months, still below the EU average of 39.8 months. In four cases the CJEU ruled against Hungary, which needed an average of 17.7 months to comply with the court rulings.

According to the latest scoreboard Croatia's transposition delay is now at 7.9 months.[136] During the 2016/2017 period there was a 0.3% increase in incorrectly transposed Directives with three Directives overdue for transposition and an average transposition delay of 9.2 months. Although Croatia has the shortest duration of infringement proceedings in the EU, there was a modest three-month increase in the average duration. From December 2016 to 2017 no case was sent to the Court of Justice.

Slovakia experienced a stable backlog with respect to transposition delays.[137] In the 2016/2017 period Slovakia's transposition delay was at an average of 9.8 months, thus slightly above the Union average. Conversely, the country's conformity deficit (incorrectly transposed Directives) was 0.2%. Slovakia has witnessed the biggest increase in infringement proceedings, 5% up from the previous reporting period, with infringement proceedings taking on average 26 months. It took Slovakia an average of 8.3 months to comply with the two rulings handed down by the CJEU.

Lithuania's transposition deficit had increased since 2014. But in the 2016/2017 period the country's transposition deficit fell below the Union threshold.[138] In the same period, Lithuania's transposition delays were at 5.7 months, with a conformity deficit of 0.7%. There were no infringements proceedings nor rulings by the CJEU against the country.

In 2016/2017 Latvia's transposition deficit[139] was as low as Lithuania's. Latvia's transposition delays were at 5.6 months. The conformity deficit was at 0.3%. The infringements proceedings lasted an average of 31.7 months, and it took the country 8.5 months to implement a judgment from the CJEU.

Bulgaria's record is less positive.[140] The country has still not met the Commission's target criteria for transposition deficits. There were thirteen overdue Directives. The average delay for transposition was 13 months. Bul-

[135] The data on Hungary are taken from the most recent scoreboards (see supra n. 134).
[136] The data on Croatia are taken from the most recent scoreboards (see supra n. 134).
[137] The data on Slovakia are taken from the most recent scoreboards (see supra n. 134).
[138] The data on Lithuania are taken from the most recent scoreboards (see supra n. 134).
[139] The data on Latvia are taken from the most recent scoreboards (see supra n. 134).
[140] The data on Bulgaria are taken from the most recent scoreboards (see supra n. 134).

garia had fifteen infringement cases with an average duration of 49.3 months. The CJEU ruled twice against the country, which needed an average of 9.9 months to comply with the judgments.

In 2016/2017, Romania had a total of sixteen overdue Directives.[141] The average transposition delay was 9.1 months and there were twenty-one pending cases. Infringement proceedings lasted for an average of 31.5 months, but the CJEU had not ruled against the country during the reference period.

Slovenia's negative transposition record has improved.[142] In 2016/2017 the transposition deficit was at twelve Directives. The average transposition delay was at 9.3 months with a conformity deficit of 0.6%. Infringement proceedings lasted for an average of 28.1 months. It took Slovenia an EU-maximum average of 46.7 months to comply with two rulings of the CJEU.

b) Requests for preliminary rulings

A 2007 study on the Court of Justice subsequent to the enlargement of the European Community towards Eastern Europe analyses the role and the impact of the Court on the legal orders of the new Member States.[143] The study finds that in the early post-accession years there was a significant disproportion between the population size of the new Member States and the number of cases brought before the Court of Justice:[144] The courts in the new Member States were reluctant to request preliminary rulings, and the infringement proceedings were relatively scarce during the initial years of EU membership.[145] When the Commission did bring infringement proceedings to the Court of Justice, it chose the larger new Member States (Hungary, Poland and the Czech Republic) as defendants.[146] However, the most recent single-market scoreboards reveal that there is now less tolerance of non-conformity by new entrants than during the initial phase. It is unclear, though, whether the Commission in initiating formal proceedings before the Court of Justice pursues a certain policy agenda, thus exercising its discretion to settle other cases amicably or to disregard them by applying a *de-minimis* approach.

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[141] The data on Romania are taken from the most recent scoreboards (see supra n. 134).

[142] The data on Slovenia are taken from the most recent scoreboards (see supra n. 134).

[143] *S. Fischer,* Der Europäische Gerichtshof nach der Osterweiterung – Institutionelle Reformen nach der Osterweiterung und die Rolle der neuen Mitgliedstaaten, Diskussionspapier, November 2007, Deutsches Institut für Internationale Politik und Sicherheit, available at <https://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/EuGH_Endfassung_KS_formatiert.pdf>.

[144] Ibid.

[145] Ibid.

[146] Ibid.

The statistics published by the Court of Justice show that there has been an increase in requests for a preliminary rulings.[147] But it is unclear whether the courts in the new Member States (in Eastern Europe) have learnt "to talk".[148] In view of the total number of references for a preliminary ruling, Hungary, Poland, Bulgaria and Romania are now the "leaders".[149] However, if penetration of EU law in Eastern Europe is measured by comparing the absolute number of references to the CJEU with the size of the population of the respective country, the Baltic Member States and Hungary are in the lead.[150] Admittedly, a request for a preliminary ruling does not automatically allow a conclusion on the "market penetration" of EU law.[151] Lower courts in the new Member States have been seen to employ a reference to the CJEU as a mechanism for challenging a superior court with which they disagree.[152]

2. Messages for lawmakers

After 1989, "old" Member States had been accused of designing a model Member State as a one-size-fits-all template as a basis for authorising the Commission to embark on accession negotiations.[153] As the Copenhagen criteria came to be modified by the Zagreb and Thessaloniki Declarations, this was intended to accommodate the growing differences between accession and association candidates.[154] From a purely economic perspective, this turned some applicant countries into admissible "admission-seekers"; others were just eligible "admission-seekers".[155] Although this distinction translates into different conditionalities, any "rational accession-seeker" will still have to comply with the *acquis communautaire.* The progress reports on West Balkan countries demonstrate that "rational accession-seekers" who have barely mastered the "eligibility" threshold will have to undertake a cost-benefit analysis dramatically different from those (former) accession-seekers

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[147] See, e.g., the Annual Reports by the CJEU on Judicial Activity, 2016, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf>, and 2015, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf>.

[148] See the title of the article by *Bobek,* Learning to Talk: Preliminary Rulings, The Court of the New Member States and the Court of Justice, Common Market Law Review 2008, Vol. 45, pp. 1611 et seq., and the survey over the initial years of references for a preliminary ruling, ibid., pp. 1612 et seq.

[149] *Bobek,* Talking Now? – Preliminary Rulings in and from the New Member States, Maastricht Journal of European and Comparative Law 2014, Vol. 21, No. 4, p. 782 (784).

[150] Ibid.

[151] Ibid., p. 786.

[152] Ibid., p. 788.

[153] *Hillion,* in: Hillion, supra n. 20, p. 1 (12).

[154] Cf. *Hillion,* ibid., p. 19.

[155] *Hillion,* ibid.

where (impending) membership was an almost foregone conclusion. Where establishing a free market becomes more important than administering competition, a conditionality to operate an independent competition control agency might be seen as unhelpful, or at least premature.[156] Where the judiciary is exposed to capture by vested interests, the protection of judicial independence and job security is more vital than the transposition of a minimum stock of the EU's Directives. Once problems of regulatory capture have been overcome, politicians in an accession or association country still have come to terms with the fact that the political and monetary costs of approximation keep accruing whereas the "reward" (i.e. accession or a meaningful association) is unlikely to occur in the near future.[157]

"Conditionality" is devised to induce governments of the accession or association applicants into action. It is obvious that transition countries are striving for a new equilibrium. But in order to engineer transition and the implementation of the *acquis,* governments also have to disrupt existing equilibria (including corruption equilibria).[158] The traditional equation of the EU's enlargement policy whereby the abolition of traditional, pre-transition equilibria will rapidly pay off does not necessarily ring true in the West Balkans or in Ukraine, where the informal economy is still strong. In the context of international structural adjustment programmes, long-term compliance has produced mixed results.[159] Monitoring has been found to be weak,[160] and sometimes compliance was more cosmetic than real.[161] Frequently, persuasion and social learning in the recipient country might produce better effects.[162] This would also seem to apply to those accession or association-seekers where the EU's traditional reward structure will be overtaken by politics and economics.

Legal approximation and the integration of the *acquis communautaire* into the respective national legal order of a prospective accession or association country are also likely to disrupt pre-existing regulatory equilibria. This may translate into the preservation of pre-transition patterns for approaching legal issues. It may also mean that judges in reacting to the modernisation of the

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[156] See *Buccirossi/Ciari,* supra n. 52.

[157] See passim: *Mišović,* supra n. 32, p. 270, on the different types of incentives under the EU's approximation instruments, and The Economist, 23 March 2017, Reverse Balkanisation – With EU accession, Balkan countries find a substitute, available at <https://www.economist.com/europe/2017/03/23/with-eu-accession-distant-balkan-countries-find-a-substitute>.

[158] See supra n. 56.

[159] See OECD, Conditionality in practice, supra n. 18, pp. 12 et seq., and *Angelova/Dannwolf/König,* How Robust Are Compliance Findings?, A Research Synthesis, Journal of European Public Policy 2012, Vol. 19, No. 8, p. 1269 (1273 et seq.).

[160] OECD, Conditionality in practice, supra n. 18, pp. 12 et seq.

[161] Ibid., p. 14.

[162] Ibid., pp. 15 et seq.

judiciary stay faithful to positivistic thinking in order to protect themselves.[163] Moreover, citizens of transitions countries may prefer administrative action over private enforcement as courts have been found to be inefficient in reducing the considerable backlog of cases. There is a risk of duplication in policing breaches of law. But there is also a need for assuring the independence of administrative agencies lest politicians become too powerful.

The statistics of the CJEU reveal that the courts of the new Member States required some time to appreciate the impact of EU law on their respective legal orders and to initiate requests for preliminary rulings.[164] This delay might also be due to the fact that EU legal templates were copied into national laws during the accession process whereas the real impact has gone unnoticed up to that point. In this context, the transposition statistics may not reflect the exact picture of the *acquis communautaire* since compliance is difficult to measure and varies in terms of subject from country to country. It is noteworthy, though, that even after accession the EU Commission applies a policy of persuasion and learning before it initiates formal infringements proceedings before the CJEU. As an aside, this approach also assumes that Member States will continue to pay heed to the CJEU's jurisprudence and shy away from the negative reputational effects of losing an infringement case.[165]

The current state of EU enlargement and rapprochement policies holds a complicated message for those who supervise compliance and those who have to comply either as national legislators or as members of the Association Councils under the SAA's. Although national legislators may be inclined to comply with the approximation and the *acquis* requirements, they will nonetheless have to calculate the costs of compliance if accession is unlikely to happen soon. Experience from South-East European accession has shown that the EU's *acquis* brings a degree of regulatory sophistication which legislators, legal practitioners and scholars find difficult to appreciate in the immediate aftermath of accession.[166] This may trigger calls for leniency raised within the framework of

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[163] For an analysis of the practice of the Croatian Constitutional Court: *Rodin,* in: Bodiroga-Vukobrat/Sander/Rodin (eds.), Legal Culture in Transition – Supranational and International Law Before National Courts, Berlin 2013, p. 75 (86 et seq.). See also on the discrepancy between law and reality: *Mader,* L'évaluation legislative – Pour une analyse empirique des effets de la législation, Lausanne 1985, pp. 155 et seq.

[164] See the case lists accessible via the homepage of the CJEU, supra n. 147, and *Bobek,* supra n. 148 and n. 149.

[165] See the compliance study undertaken by *Hofmann,* Resistance against the Court of Justice of European Union, International Journal of Law in Context 2018, Vol. 14, p. 258 (262 et seq.), and passim on judicial disobedience in Member States: *De Werd,* Dynamics at Play in the EU Preliminary Ruling Procedure, Maastricht Journal of European and Comparative Law 2015, Vol. 22, No. 1, p. 149 (156).

[166] See the country studies in: *Jessel-Holst/Kulms/Trunk (eds.),* Private Law in Eastern Europe, Tübingen 2010.

the Association Councils under the SAA's. So far, however, the Commission has not succeeded in finding a credible policy which relaxes the *acquis* standards while maintaining the impetus for a rapprochement towards the EU. Lawmakers in the future accession or association countries will only be willing to disrupt pre-transition equilibria in favour of sophisticated EU rules if the EU offers credible incentives for eventually obtaining the prize – namely, full accession or a special association regime.