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**The new member states of the EU in the aftermath of enlargement: Do new
European rules remain empty shells?**

Antoaneta L. Dimitrova ¹

Abstract

During the enlargement negotiations with the post communist states from CEE, the EU required sets of rules to be established creating independent administrations, judiciary, competition regulators and other key institutions. This article argues that the fate of these institutional rules adopted in response to the EU's conditions for membership is an important, under-researched part of the post enlargement research agenda. The key question is whether informal rules and practices will also change following the change in formal rules and lead to institutionalization, or alternatively, whether the imported rules will be reversed or remain empty shells. To account for divergent patterns of institutionalization, I propose a framework focusing on the preferences of key actors bargaining over the new institutions. I identify issue specific veto players and non-state actors linked to them as the key actors that will affect the outcome of the post enlargement round of bargaining over the new rules.

Key words:

Enlargement, CEE, new formal rules, institutions

1. Introduction: EU rules in the new member states

As the post communist states from Central and Eastern Europe (CEE) prepared to join the European Union (EU), economic restructuring and political and administrative reforms were synonymous with Europeanization. A few years after the last enlargement, some obvious cases of backsliding have taken place (World Bank, 2006), which have led observers to question whether EU driven reforms would last. Slovakia and Poland abolished their newly created Civil Service Authorities, The Czech republic postponed implementation of civil service reform (*The Economist*, 2006), and Poland slid down to the bottom of the European Commission's transposition scoreboard (European Commission, 2009). Practical implementation of formally adopted EU policies in the new member states has also been questioned by analysts (Falkner and Treib, 2008).

The EU has been successful in stimulating CEE states to introduce reforms while they were preparing for accession by setting reform objectives as conditions for membership. Consensus has emerged that EU conditionality has had a considerable impact – mediated by domestic institutions – on successful EU rule adoption in candidate states (Schimmelfennig and Sedelmeier, 2005). Conditionality, however, expired with CEE accession to the EU. The question arises, would reforms endure after conditionality? Or, to paraphrase it in terms of the enlargement literature debate, would formal rule adoption lead to behavioural changes (Schimmelfennig and Sedelmeier, 2005)? The new puzzle that defines a large part of the post enlargement research agenda is why the formal adoption of EU rules has led, in some cases, to real institutional and policy change and in

other cases to reversal or neglect ? To address this puzzle, this article proposes a theoretical framework that shifts attention from international to domestic actors and their influence on the post accession institutionalization of formal EU rules.

2. Beyond formal rules: defining institutionalization

Before discussing the framework, I will define the central concepts of institutions, formal and informal rules and institutionalization. Consistent with a rational choice approach, institutions are defined here as a set of man-made rules guiding the behaviour of actors (Héritier, 2007:6). These rules are *both* formal and informal and together they comprise what Ostrom (1999:38) calls the ‘rules-in-use’, which define practices on the ground.

Formal rules are written down and subject to third party resolution, while *informal* rules are neither written down nor subject to outside enforcement. Informal rules, as Héritier has pointed out, can emerge in the daily application of a formal rule and can be of an efficiency increasing or distributive nature (2007:46). Institutionalization is, therefore, defined here as a process whereby a new formal rule is supported by supplementary informal rules (Helmke and Levitsky, 2004:728) and both become the new rules-in-use.

To elucidate this further, it is important to point out what is *not* institutionalization. When new formal rules are introduced from a different arena, as is the case with EU enlargement, they can be challenged by actors or simply ignored, while other, informal rules define practices on the ground. If formal and informal rules remain different and do not align, institutionalization will not take place. In this case, the newly adopted formal

rules will remain rules-on-the-books rather than rules-in-use and will not affect the behaviour of actors. And vice versa, when formal and informal rules align together and are used by actors, we can speak of institutionalization of the new formal rules.

This does not completely resolve the difficult question of how, in operational terms, we recognize an institution. The difficulty stems from the realisation that institutions are fundamentally shared concepts, existing in the minds of participants and therefore, in a certain sense, invisible (Ostrom, 1999:36-37). Ostrom suggests focusing on rules-in-use rather than the formal rules in order to identify the presence of an institution (1999:38). As research in rules-in-use is difficult to carry out on a large scale, I suggest an intermediary indicator for institutionalization, namely, the creation of supporting and supplementing rules. The supporting rules can be formal, such as secondary legislation, or informal, such as action plans, strategies or manuals.

Two very different bodies of literature inspire and inform the framework proposed below. First, the discussion of institutionalization draws on the insights of scholars that identify the differences between formal and informal rules as a source of endogenous institutional change (Farrell and Héritier 2003; Héritier 2007). This approach is inspired by a distributional rational choice theory that sees institutions as the outcome of a power oriented bargaining process (Knight, 1992). Second, the conceptualization of pre-accession reforms as EU rule adoption is consistent with the approach of studies of conditionality and Europeanization East (Schimmelfennig and Sedelmeier, 2005). Bringing the two together, it is clear that institutional change conceptualized as the

interplay between formal and informal rules can be seen in a different light when analyzing EU enlargement. Whereas Farrell and Héritier (2003) and Héritier (2007) analyse a process where new institutions arise as a result of changes in *informal* rules that later are followed by changes in *formal* institutional rules, enlargement brings changes in *formal* rules which may later be followed by changes in *informal* rules.

In empirical terms, the rules adopted during EU enlargement pertain to a broad range of issues related to specific policy areas, political, administrative and judicial processes and the setup and competences of state organizations (Schimmelfennig and Sedelmeier, 2005:7). More specifically, candidate countries were required to adopt the Union's *acquis communautaire* which mostly consists of rules harmonizing policies. In addition, specific conditions arose during the enlargement process, prescribing additional reforms: the 'enlargement *acquis*'. The latter aimed to strengthen the CEE democracies and markets by supporting administrative and judicial reform and the setting up of new bodies such as competition authorities. These conditions did not focus on a specific policy, but required the creation of a general institutional framework supporting the functioning of EU policies, defined by the European Commission as 'institution building' (Dimitrova, 2002).

Observers have not been very optimistic about the real impact of the adopted formal rules and many have suggested that the new legislation would exist only on paper, would remain 'formal structures without substance' (Bugaric, 2006). We do not, however, have sufficient empirical evidence to support the view that formal rule adoption would not be

followed by behavioural adoption. Theoretically, we can expect that the EU rules which have been created for a different set of preferences and economic conditions and have been ‘exported’ to candidate states, may not fit with the preferences of domestic actors or domestic economic conditions. Furthermore, departing from a power distributive rational choice approach, we can expect that, given a choice between different rules in implementation procedures, actors would seek to find the rule that maximizes their influence (Héritier, 2007:50) Therefore, post conditionality, we can expect that domestic veto players and their preferences would determine the shape of the new rules.

Therefore, the framework outlined below uses an actor based approach that takes into account external monitoring and the weak state environment in CEE states in order to explain the variation in institutionalization of formal rules. The framework builds on the power distributive rational choice approach as well as on research on post communist weak states and on EU policy implementation.

The process of institutionalization I focus on here is clearly similar to processes of implementation which have been studied extensively in the public policy literature. The main difference between implementation and institutionalization as conceptualized here is that the former examines rules related to policies and the latter rules related to institutions.² Even though the terms can be used interchangeably, it is important to give separate attention to the fate of *institutional* sets of rules as they have considerable impact as institutional foundations for the implementation of the *acquis*.

This article will proceed as follows: in the next section I will explore existing research on CEE reforms ‘post conditionality’ as well as the broader implementation literature and establish to what extent they can identify factors that can influence institutionalization. Next, I will argue that a perspective that emphasizes the weak post communist state and its specific constellation of actors can explain better institutionalization dynamics. In the following sections, I will outline the framework focusing on the role of domestic actors that determine the fate of the new institutions and specify potential outcomes and hypotheses for further research.

3. Perspectives on implementation from the Europeanisation literature

Before addressing the question why some formal rules adopted pre-accession do not become institutions, but remain only law-on-the-books, it is useful to draw attention to what is missing in the existing scholarship on post accession adoption of EU rules. I turn first to contributions which focus on the new member states and then to broader insights from Europeanization and implementation literature. Several key points summarize the insights from this research and illustrate the need for seeking further theoretical explanations for the puzzle outlined above:

- The mechanisms underlying pre-accession conditionality, namely social learning or external incentives, are expected to influence the fate of the new rules, yet limited empirical evidence of rule transfer through social learning makes this approach difficult to use.

- Studies of post accession adoption of EU rules shed light mostly on transposition, that is, the formal adoption of EU rules, but do not explain institutionalization beyond this point.
- The broader implementation literature stresses the importance of domestic administrative traditions as filters for EU rules, but domestic administrations in post communist states are in flux.

Conditionality and Europeanization East

It seems logical when following the fate of the EU rules adopted by candidate states under the influence of conditionality to examine the mechanisms which underpinned conditionality and facilitated rule transfer. If the adoption of EU rules by domestic actors is influenced by social learning or the social context (Epstein, 2008), then we can expect that compliance with these rules would last beyond conditionality. Such a post-conditionality approach has been proposed by several scholars (Sedelmeier 2006; Epstein, 2008; Pridham, 2008). Sedelmeier (2006:157) argues that when rules have been adopted by social learning they would have a broader societal base and can be defended against political actors who challenge them. Pridham (2008) uses a similar theoretical framework to study post accession compliance with EU political standards in Latvia and Slovakia. There are, however, serious methodological difficulties of specifying *a priori* observable implications of social learning. Another problem is the lack of sufficient empirical evidence of pre-accession cases of rule transfer through social learning (Schimmelfennig and Sedelmeier, 2005).

Transposition as formal rule adoption

Several scholars investigating the fate of reforms after accession have focused on the transposition of directives by the new member states. The rate of transposition of directives is a useful measure of the level of adoption of formal EU policy rules.

Sedelmeier's analysis of the record of the new member states shows that they have not slowed down their efforts to adopt EU directives in the first post-accession years (2008: 822). Another study of transposition of EU directives in the new member states, combining Commission data and case studies (Toshkov, 2008, 2009) reaches the same conclusion. Based on Sedelmeier (2008) and Toshkov's work (2008, 2009), we can say that the new member states have continued to adopt the European Union's formal policy rules into their legislative systems. These studies provide important insights in post accession compliance, but do not say much about institutionalization or implementation beyond the formal rules.

Administrative capacity

Several pre-accession studies identify administrative capacity in a broader sense, including institutional rules, civil service systems and financial resources as the key factors influencing the success of CEE in adjusting to EU requirements (Verheijen, 2000). In-depth research of Poland's enlargement preparations by Zubek (2005, 2008) reaches conclusions that stress the importance of institutional capacity *and* political coordination for timely transposition. Hille and Knill (2006) found that the transposition of the *acquis* in the candidate states was a question of bureaucratic capacity to carry out

administrative reforms. Their focus, however, was on the pre-accession period when veto players played only a small role (Dimitrova 2002; Schimmelfennig and Sedelmeier, 2005), a situation which has changed post accession as the incentive of membership expired.

Research by Falkner *et al* (2005:302) also highlights the significance of capacity in terms of administrative and financial resources. The conclusions of their implementation study in the EU-15 member states include capacity as an important factor. Falkner *et al* conclude that the national cultures of responding to adaptation requirements create patterns of implementation (2005:319). These patterns create several ‘worlds of compliance’ in which different factors and variables play a role. A study of the new member states by Falkner and Treib (2008), focusing on social policy directives, concludes that they exist in a world of ‘dead letters’ where formal rules do not get implemented in practice. This research addresses a question similar to the central question of this article, but deals with only one policy area. Furthermore, their framework implies strong country specific patterns in implementation (Treib, 2007), while the Commission’s scoreboards show that CEE’s transposition record varies considerably across sectors (see also Toshkov, 2009), which provides a strong argument for seeking further explanations.

Europeanization

Last but not least, issues of implementation have been extensively explored by the vast literature on Europeanisation. A key insight that emerges from this literature is the

importance of veto players, their preferences and configuration (Haverland, 2000). Steunenberg (2006) developed a model that identifies political and administrative actors whose configuration and preferences influence the transposition of EU directives. Following this work, political and administrative actors will be identified as the important veto players whose preferences shape institutionalization.

Numerous Europeanization studies have also identified domestic administrations and administrative traditions as key factors filtering the transmission of EU rules in the Union's member states (Knill, 2001). There are, however, good reasons why these studies are lacking when we try to explain post accession dynamics in CEE. Administrative traditions as explanations are rooted in West European context of institutional stability, but the core state institutions in the CEE states have been in profound transformation after the collapse of communism. In the next section, I argue that it is this state of transformation that should be taken into account if we want to understand the conditions under which new institutions may take root.

4. Weak state, strong actors: the post communist context

The institutional rules promoted by the EU during the accession negotiations aimed to establish competition authorities, independent civil services, anti discrimination commissions. The importance of such rules for good policy implementation is obvious. More importantly, however, these institutions themselves need a strong state framework in order to function.

Post communist states, however, as the literature on this topic agrees, are weak states that have been, since the collapse of communism, in transformation. As Grzymala-Busse and Jones Luong argue, they have been engaged in the project of creating new legal orders, impartial bureaucracies and networks of market regulation (2002: 529-530). The need to re-construct public authority, to re-build the state, has been the real common denominator across Central and Eastern Europe.

There has been a staggering failure of the early scholarship on democratization to appreciate the role of the state for successful reforms after communism. The subsequent shift in scholarly attention defined several aspects of the weak state which are relevant for the framework developed here. First, the process of state building can be conceptualized as a competition over institutions between post communist elites (Grzymala-Busse and Jones Luong, 2002:537).

Second, this process or reconstruction of public authority has as a consequence a weakened ability to implement policy visions and regulate society (Migdal, 1988, Krastev, 2002). When the state is too weak to support institutional rules with sanctions or administrative resources, the newly adopted EU rules are likely to remain ‘dead letters’. Such a mechanism of failure would be consistent with the findings of Falkner *et al* (2008) - sometimes the administrations they studied did not have the resources to implement and enforce the new rules.

Thirdly, when state institutions are weak, informal networks emerge to take over some of their functions. As Lake and Powell suggest, the density and quality of existing institutions has a positive influence on the informational structure for bargaining between actors (1999:8). Such informational advantages are lost when state institutions do not function properly. Networks of any kind in which actors might participate are then especially important – as alternative means for providing information. The informal networks that have emerged after the collapse of communism privilege some actors and disadvantage others in the renegotiation of the new rules (Ganev, 2007).

Fourth and linked to the previous, non-state actors have considerable influence on the further course of reforms and the state. Hellman has identified the early winners as *veto players* obstructing further reform and change: “Actors who enjoyed extraordinary gains from the distortions of a partially reformed economy have fought to preserve those gains by maintaining the imbalances of partial reforms over time” (Hellman 1998:233).

Ganev’s analysis (2007) sheds light on the actual mechanisms whereby early winners undermined not only further reforms, but also the state. He describes a two stage process of a clash between state agencies and (former communist) elite networks. These networks first ‘join’ forces with state agencies to transfer public assets and later clash with them when the state tries to reassert control (Ganev 2007). Thereby, they weaken the state and deprive it of assets, which it needs to support democratic governance.

This work has shed light on the early stages of post communist transformation, after which, post communist states have reasserted some of their control. However, it does not

require a great leap of the imagination to assume that networks which have come together to take advantage of state assets would attempt to capture the distribution of EU funds next. Institutionalization of the rules promoted by the EU has the potential to become the next arena for contestation for post communist entrepreneurs, especially when the institutions involved have distributive implications.

5. Institutionalization as political bargaining

Based on the above, I argue that different outcomes in the institutionalization of EU driven formal rules would be determined by the competition of actors that bargain over institutions in a weak state environment.

According to this framework, institutionalization would depend on the configuration and relative bargaining power of actors relevant to a certain new set of rules. To define the framework, I will discuss first the competition/bargaining aspect and then the relevant actors. State weakness is viewed as a strategic environment for this bargaining that, through the presence of networks, allows considerable influence of non-state actors on political decision-making that would reverse, support or neglect the new formal rules.

Before proceeding, it is important to clarify my expectation that the new rules adopted during enlargement preparation would be reviewed after accession. Examples of backsliding in reforms cited above suggest that, after enlargement governments can be tempted to reverse pre-accession reforms. Secondly, the speed with which candidate

states transposed vast amounts of EU rules at the pre-accession stage has led to little political and societal debate on their implications. Some rules needed to be changed to be adapted better to societal conditions. Thirdly, the strength of conditionality during accession negotiations was such that veto players did not play a role, but sometimes they tried to improve their position at the implementation stage. Focusing on implementation proper as opposed to adoption of formal rules, even in older member states the process has been shown to have different stages. Lang's (2003) study showed that some member states would first adopt structural funds rules consistent with Commission requirements and then isolate them, continuing to operate according to different, informal rules.

Thus, the institutionalization of previously adopted EU rules would be the outcome of *another round* of strategic bargaining of actors competing to shape institutions around the new formal rules. To identify the relevant actors I follow Steunenberg (2006), who suggested that the number of veto players in transposition of EU directives would depend on the *sectoral* or issue area configuration. Thus, the actors relevant for institutionalization are politicians and members of the administration. In the weak state environment, another group, non-state actors, linked to government through informal networks, can also be expected to play an important role.

Usually, veto players are identified in the literature by their position in the formal configuration of the political system (Tsebelis, 2002). However, as Grzymala-Busse and Jones Luong (2002:533) suggest, the institutional location of crucial actors in the post communist context cannot be assumed, but may vary from country to country and is

influenced by both *formal and informal practices*. As discussed above, veto players - for example political parties – are linked, through networks, with powerful non-state actors that become informal veto players. We already have some empirical evidence how such non-state actors use their access to state structures to influence the institutionalization of the new rules:

“In addition to capturing the top echelons of the executive power and the leadership of political parties, the oligarchs assign no lesser value on maintaining control over Members of Parliament, the state administration, and the court system. Such a nefarious symbiosis subsequently allows oligarchs to control state enterprises, to have access to unlimited lines of bank credit, to evade tax inspections, to “win” all their cases in court, to become beneficiaries of specially designed clauses in laws, etc” (Corruption Assessment Report, CSD, 2009)

Such developments seem far away from the process of implementation of EU rules, but the discussion above shows that they are closely connected. Only by taking into account formal and informal veto players in a weak state setting can we explain the different outcomes in institutionalization. Furthermore, as the next section will argue, the nature of the rules adopted pre-accession also plays a role.

6. Explaining different institutionalization outcomes

The variation in outcomes with respect to institutionalization of imported *non-acquis* rules is potentially larger than with regard to implementation of the *acquis*. Even after conditionality, the EU's mechanisms for monitoring and sanctions can influence actors' cost benefit calculations. Rules which are part of the EU *acquis* would be more costly to reverse (see also Sedelmeier, 2006). The situation is, however, different with enlargement conditions promoting rules which had no basis in the *acquis*. They can be reversed with relatively little cost.

Next to reversal, organizational sociology literature suggests another possible outcome. Brunsson and Olsen (1997) have shown that organizations faced with external reform demands can create two parallel sets of structures of formal and informal rules and continue to operate according to the informal rules while keeping the formal rules for external requirements.

Based on the above, three possible outcomes can be specified with regard to the adopted EU rules post accession³:

- *reversal* of the new rules,
- *institutionalization* (formal and informal rules align),
- '*empty shells*' (actors ignore the new rules, parallel informal rules are used)

Based on the framework proposed above, several hypotheses can be formulated and tested as a way to account for these different post accession outcomes.

1. When adopted formal rules are part of the EU acquis, the most likely outcomes are institutionalization or empty shells.

1.A When formal rules are part of the acquis, but the veto players preferences are against the new rules, two sets of rules will be established as parallel structures, leading to an 'empty shells' outcome.

2. When adopted formal rules are not part of the EU acquis reversal or institutionalization are equally possible based on the configuration of preferences of veto players.

2A. When adopted non-acquis rules are opposed by veto players, they will be reversed.

3. When veto players' preferences are configured in such a way that the new rules are preferable to the status quo, the old and new rules would align and there would be institutionalization.

We can already point to some evidence of all of the expected outcomes materializing, suggesting interesting possibilities for further research. As mentioned above, civil service legislation in several new member states has been amended, reversing the principles of civil service independence promoted by the EU (Meyer-Sahling, 2006). Research in progress by Dimitrova and Steunenberg has identified the existence of parallel sets of formal and informal rules in the area of cultural heritage in Bulgaria. Further comparative

research should aim to identify different constellations of actors in other sectors and countries to test the hypotheses proposed here.

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² Some examples can make this distinction clearer: when the rules pertain to policies, we can speak of implementation, e.g. the implementation of directives on working time. When the adopted rules pertain to institutions - e.g. independence of the civil service – I speak of institutionalization.

³ Other authors have also discussed potential outcomes, especially reversal (Pridham, 2008), but from an external incentives perspective. The outcomes identified here are rooted in a domestic perspective.