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## **The EU's conceptualisation of the rule of law in its external relations : case studies on development cooperation and enlargement**

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## 1. INTRODUCTION

In words similar to those found in the EU's development cooperation policy, the rule of law is 'central to the enlargement process',<sup>1</sup> and 'a key priority'<sup>2</sup> which needs to be addressed at an early stage of the accession process. Strengthening it 'remains a key challenge'<sup>3</sup> for all countries wishing to join the Union, and the both the Council<sup>4</sup> and the Commission<sup>5</sup> continue to attach a high priority to all aspects of rule of law in the enlargement countries. In the light of this repeated acknowledgement of the notion's pivotal role in this policy area, a clear and comprehensive definition would be expected in order to guide the applicant states on the way to Membership, if for no other reason than the fact that as future Member States, the countries are themselves expected to safeguard, consolidate, and promote the rule of law.<sup>6</sup> In this light, the present chapter purports to assess whether, and if so, to what extent, the EU has developed such a conceptualisation of the rule of law in its enlargement policy. More particularly, in a similar manner to the previous case study, the analytical framework established in at the end of part I will be tested against the EU's practice in this external policy area.

To this end, the chapter begins by providing a brief overview of the accession rounds to date, followed by an introduction into the policy area. It will be shown that the rule of law has come to play an increasingly important role in enlargement. More particularly, it will be demonstrated that,

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1 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 2.

2 Commission Communication on Enlargement Strategy and Main Challenges 2009-2010, COM(2009) 533, 14 October 2009, p. 5.

3 See for example Consideration 9 of the Preamble of Regulation (EU) No 231/2014 of the European Parliament and the Council of 11 March 2014 establishing an instrument for pre-accession assistance for the period 2014-2020 (IPA II), OJ[2014] L77/11; Commission Communication on Enlargement Strategy and Main Challenges 2014-2015, COM(2014) 700, 8 October, 2014, p. 11.

4 Council Conclusions 'Enlargement and Stabilisation and Association Process', General Affairs Council, Doc. 10555/18, 26 June 2018, pnt. 5.

5 Commission Communication on Enlargement Strategy and Main Challenges 2014-2015, COM(2014) 700, 8 October, 2014, p. 12.

6 Articles 3(1), 21(2)(b), and 21(2)(a) TEU respectively. On the different functions of the rule of law in the EU see the Introduction to this thesis.

based on the experiences of earlier enlargement rounds, progress in the area of the rule of law needs to be demonstrated more thoroughly and earlier than ever before. Following this, the EU's legal framework will be explored in order to provide the background against which the analysis of the different rule of law elements will take place. The chapter continues by examining the three categories of elements established in the analytical framework for the purpose of ascertaining whether these elements are validated by the EU's practice. It will be shown that the formal element of legality has not only remained underdeveloped, but that it is actually undermined by the enlargement methodology's focus on quantity in the legal approximation process – to the detriment of legality's requirements of quality of legislation. Furthermore, it will be asserted that the elements of impartiality and judicial efficiency have increasingly been addressed in the annual reports, thereby gradually becoming core procedural elements of the rule of law. However, it will be also demonstrated that this prominence has not resulted in detailed standards for the applicant states to follow and apply. Following this, it will be claimed that the EU's conceptualisation of the rule of law in enlargement is perceived to a large extent in terms of institution and capacity-building, more particularly judicial reform. It will be shown that this institutional orientation has led to a particular emphasis on the institutional element of judicial independence. Against this background, the chapter will conclude by summarising the general findings of the exploration of the notion of the rule of law in this policy field.

A final note on methodology must be provided here. Since initial accessions were predominantly based on political decisions without clearly defined criteria,<sup>7</sup> the chapter will focus on the accession of 2004 based on the elaboration of the 1993 Copenhagen criteria, and the subsequent rounds, including the negotiations with the current candidate and potential candidate states. In this way, if and where possible, a comparison can be drawn between the rounds in order to demonstrate the evolution of the EU's conceptualisation in its enlargement policy. Considering the fact that there is only a single provision in the EU Treaty serving as the legal basis for the enlargement (Art. 49 TEU), the policy has developed over the years through Commission Opinions on the application for Membership of the EU, Strategy Papers, annual progress reports, Accession and European Partnerships, complemented by Presidency and Council Conclusions.<sup>8</sup> It is in these Copenhagen related documents that the rule of law elements in enlargement can be found.

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7 Wolfgang Nozar 'The 100% Union: The Rise of Chapters 23 and 24' (2012), available at: <https://www.clingendael.nl/sites/default/files/The%20100%25%20Union.%20The%20rise%20of%20Chapters%2023%20and%2024.pdf>.

8 For reasons of readability, references to the annual reports and Accession and European Partnerships will be abbreviated (year and country). The full references can be found in the table of documents.

## 2. THE RULE OF LAW AND ITS RELATION TO EU ENLARGEMENT: EU POLICY AND THE TOOLBOX FOR RULE OF LAW PROMOTION

Before venturing into the central part of the case study, it is necessary to provide some background to the EU's enlargement policy to date and to set out the relationship between this policy area and the rule of law on the basis of the legal and policy framework within which this connection is shaped. For this reason, this section will provide the setting for the examination of the EU's conceptualisation of the rule of law in this particular external policy area. After a brief overview of the previous accession rounds, it will be shown that the EU has progressively concentrated on the rule of law as a central condition for development in the applicant states. More particularly, it will be pointed out that it is a condition for eligibility and one of the four Copenhagen political criteria, the non-compliance with which can constitute a potential case for suspension throughout the process. Moreover, by way of Chapter 23, it is also an issue to be tackled early on in the negotiations, lack of progress in the implementation of which can potentially halt the entire negotiations. Following this, the focus will turn to the rule of law in the enlargement's legal framework. The main aim of the section will be to provide insight into the legal instruments that underpin the enlargement policy and the significance of the rule of law therein. The section will conclude by demonstrating that this legal framework mirrors the increasing importance of the rule of law in this external policy field.

### 2.1 Brief overview of the enlargement process to date

The founding Treaties and all subsequent amending Treaties have continually allowed for enlargement, and the European Communities always envisaged the possibility of more states than the original six (Germany, France, Italy, the Netherlands, Belgium, and Luxembourg) joining in the project of integration.<sup>9</sup> A mere four years after the conclusion and signing of the Treaty of Rome, the first applications for enlargement were made by the United Kingdom, Ireland, Denmark and Norway. Due to French concerns over the British application, this request was denied, prompting a second attempt by the same four countries in May 1967.<sup>10</sup> After a second French

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9 Kirstyn Inglis 'EU Enlargement: Membership Conditions Applied to Future and Potential Member States' in Steven Blockmans & Adam Lazowski *The European Union and its Neighbours* The Hague: TMC Asser Press (2006), pp. 61-94 at p. 67.

10 See Jean-Pierre Puissechot *The Enlargement of the European Communities: A Commentary on the Treaty and the Acts concerning the Accession of Denmark, Ireland and the United Kingdom* Leiden: Sijthoff (1975).

intervention the Council shelved the request<sup>11</sup> until the opening of negotiations in 1970 and the signing of the first Accession Treaty on 22 January 1972.<sup>12</sup> After a negative popular vote Norway withdrew its application.<sup>13</sup>

The second enlargement round consisted of Greece. The application was made in June 1975, a year after the country had shed the colonels' rule. The Accession Treaty was signed on 28 May 1979.<sup>14</sup> The restoration of democracy also clearly played an important role in the positive outcome of the accession applications made by Spain and Portugal.<sup>15</sup> Having applied for membership in 1977, the two countries concluded the third round<sup>16</sup> of enlargement and the accession Treaty was signed on June 12, 1985.<sup>17</sup>

The applications for the fourth enlargement round came within three years of each other in the period 1989-1992. The negotiations and subsequent signing of the Accession Treaty with Austria, Sweden, Finland, and Norway on 24 June 1994<sup>18</sup> did not pose many obstacles, apart from the failure to ratify the Accession Treaty by Norway due to a second negative referendum.<sup>19</sup> In 1993 accession perspective was granted by the European Council meeting in Copenhagen to the newly created countries in Eastern

11 De Gaulle vetoed the first request on grounds of economic suitability. He then expressed a second veto during a press conference on 27 November 1967. Notwithstanding official support from the other EEC Member States, the Council of Ministers decided in December of the same year to shelve all four applications: 'One Member State considered that the re-establishment of the British economy must be completed before Great Britain's request can be considered.' See Christopher Preston *Enlargement and Integration in the European Union* London: Routledge (1997).

12 Treaty of Accession of Denmark, Ireland and the United Kingdom, OJ[1972] L73/5.

13 Allan F. Tatham *Enlargement of the European Union* The Hague: Kluwer Law International (2009), p. 22.

14 Treaty of Accession of Greece, OJ[1979] L291/9.

15 See Commission Opinion on Spain's Application for Membership, COM(78) 630, 30 November 1978, p. 9; Commission Opinion on Portuguese Application for Membership, COM(78) 220, 23 May 1978, p. 7.

16 The German reunification of 20 October 1990 after the fall of the Berlin wall in 1989, while considered a *de facto* enlargement of the Communities, is not considered as a separate enlargement round. It found its legal basis in national law (Article 23 of the German Basic Law), not the Treaties. See for example Michael Bothe 'The German Experience to meet the Challenges of Reunification' in Alfred Kellerman, Jaap de Zwaan & Jenő Czuczai (eds) *EU Enlargement: The Constitutional Impact at EU and National Level* The Hague: T.M.C. Asser Press (2001).

17 Treaty of Accession of Spain and Portugal, OJ[1985] L302/9.

18 Treaty of Accession of Austria, Finland, and Sweden, OJ[1994] C241/9.

19 Within the same timeframe, Switzerland has also faced the consequences of a negative referendum. After taking part in the negotiations and signing of the EEA Agreement, the Swiss government submitted an application for accession to the EU in May 1992. During a referendum, held in December of the same year, the EEA membership was rejected. Consequently, since the EEA Agreement was regarded as a precursor to EU membership, the Swiss government suspended negotiations for EU accession. The application of Switzerland has remained dormant until the Swiss parliament voted on 15 June 2016 to officially withdraw the application for membership. Further, see <https://www.dfae.admin.ch/missions/mission-eu-brussels/de/home/aktuell/news.html/content/dea/de/meta/news/2016/10/26/EU-Beitrittsgesuch>.

Europe. This decision led, over time, to the fifth 'big bang' enlargement, which consisted of eight new democracies from Central and Eastern Europe and two Mediterranean states: The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Cyprus, and Malta. An amalgamation of several political issues played in the background of this enlargement round. It started with the application of Turkey in 1987, which was put on hold by the Commission in its Opinion when it considered that it would 'not be considered useful to open accession negotiations with Turkey straight away.'<sup>20</sup> The Turkish application was followed by the membership applications of Cyprus and Malta in July of 1990 as well as the applications of the ten countries of Central and Eastern Europe (the CEECs) in the period 1994-1996.<sup>21</sup> At the Luxembourg European Council of December 1997, taking into consideration the positive Commission assessment in its Agenda 2000,<sup>22</sup> it was decided that negotiations would be opened with Cyprus, the Czech Republic, Estonia, Hungary, Poland, and Slovenia.<sup>23</sup> At the Helsinki European Council in 1999 it was decided that the six countries that were left out would be included at the table<sup>24</sup> and formal negotiations were opened with Bulgaria, Latvia, Lithuania, Malta, Romania, and Slovakia in February 2000.

The fifth enlargement round was formally concluded with the signing of the Accession Treaty on 16 April 2003.<sup>25</sup> Because of concerns over the lack of progress made with the implementation of reform measures, Bulgaria and Romania were given a later date of accession. Their joined signing of the Accession Treaty on 25 April 2005<sup>26</sup> formed the sixth round of enlargement. The Commission itself considers the latter to be the second phase of the fifth enlargement round.<sup>27</sup> However, because both enlargements concerned two different Accession Treaties and involved two different sets of transitional measures, they will be treated as separate rounds in the present study.

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20 Commission Opinion on Turkey's Request for the Accession to the Community, SEC(89) 2290 final/2, p.8.

21 Hungary – 31 March 1994; Poland – 5 April 1994; Romania – 22 June 1995; Slovakia – 27 June 1995; Latvia – 13 October 1995; Estonia – 24 November 1995; Lithuania – 8 December 1995; Bulgaria – 14 December 1994; Czech Republic – 17 January 1996; Slovenia – 10 June 1996.

22 Commission Communication on Agenda 2000: For a Stronger and Wider Union, COM(97) 2000 final, 15 July 1997.

23 Presidency Conclusions, Luxembourg European Council, 12-13 December 1997, pnt. 27.

24 Presidency Conclusions, Helsinki European Council, 10-11 December 1999, pnt. 10.

25 Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Slovenia and Slovakia, OJ[2003] L236/17. On this Accession Treaty see, for example, Kirstyn Inglis 'The Union's Fifth Accession Treaty: New Means to Make Enlargement Possible' 41 *Common Market Law Review* (2004); Christophe Hillion 'The European Union is Dead. Long Live the European Union. A Commentary on the Treaty of Accession 2003' 29 *European Law Review* (2004), pp. 583-612.

26 Treaty of Accession of the Republic of Bulgaria and Romania, OJ[2005] L157/11.

27 See for example the Commission Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania, COM(2006) 549 final, 26 September 2006.

The Santa Maria da Feira European Council of June 2000 made it clear that the countries of the Western Balkans would be 'potential candidates' for membership.<sup>28</sup> In February 2003 Croatia made its formal application for membership and was confirmed by the Council as a candidate country in June of 2004.<sup>29</sup> The Accession Treaty was signed on 9 December 2001,<sup>30</sup> and Croatia's single state accession to the Union on 1 July 2013 marked the seventh enlargement round.

The list of officially recognised candidate countries includes at present Albania,<sup>31</sup> the former Yugoslav Republic of Macedonia (FYROM),<sup>32</sup>

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- 28 Presidency Conclusions, Santa Maria da Feira European Council, 19-20 June 2000, pnt. 67. This has been repeatedly confirmed by subsequent European Council Conclusions, most vocally at Thessaloniki in 2003; Presidency Conclusions, Thessaloniki European Council, 19-20 June 2003, para. 40. For more on the term 'potential candidate' see for example Lykke Friis & Anna Murphy 'Enlargement of the European Union: Impacts on the EU, the Candidates and the "Next Neighbours"' 14 *ECSA Review* (2001), pp. 2-7.
- 29 Presidency Conclusions, Brussels European Council, 17-18 June 2004, pnt. 31.
- 30 Treaty of Accession of Croatia, OJ[2012] L112/10. On the Accession Treaty see for example Adam Łazowski 'European Union Do Not Worry, Croatia is Behind You: A Commentary on the Seventh Accession Treaty' 8 *Croatian Yearbook of European Law and Policy* (2012) pp. 1-39.
- 31 Albania applied for EU membership on 24 April 2009. In its Opinion of 9 November 2010, the Commission assessed that before negotiations could be opened, Albania had to achieve a greater degree of compliance with the membership criteria and meet 12 key priorities identified in the Opinion. In its 2012 Progress Report, the Commission recommended that Albania receive candidate status, subject to completion of key measures, particularly in the area of judicial and public administration reform. In June 2014, the Council granted Albania candidate status, which was endorsed by the European Council a few days later (Presidency Conclusions, Brussels European Council, 26-27 June 2014, pnt. 34).
- 32 FYROM applied for membership on 22 March 2004. The Commission issued a favourable Opinion on 9 November 2005 after which the country received candidate status on 16 December 2005 (Presidency Conclusions, Brussels European Council, 15-16 December 2005, pnt. 25). Negotiations have not started yet.

Montenegro,<sup>33</sup> Serbia,<sup>34</sup> and Turkey.<sup>35</sup> Two more countries are potential candidates: Bosnia and Herzegovina,<sup>36</sup> and Kosovo (as defined by UN Security Council Resolution 1244 of 10 June 1999).<sup>37</sup> In its 2018 Western Balkans Strategy, the Commission holds out the prospect that both Serbia and Montenegro could potentially be ready to join the EU by 2025.<sup>38</sup> The newest Strategy lays down a roadmap after Commission President Juncker had signalled an increased openness toward EU enlargement in his 2017 State of the Union speech.<sup>39</sup> Finally, Iceland, having gained candidate status

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33 Montenegro applied for membership on 15 December 2008. Following the Commission Opinion of 9 November 2010 in which seven key priorities were identified that would need to be addressed before negotiations could be opened, the European Council confirmed Montenegro's candidate status in December of the same year (Presidency Conclusions, Brussels European Council, 16-17 December 2012, pnt. 10) after which accession negotiations started on 29 June 2012 (the European Council endorsed the Council decision thereto during its Brussels summit in June 2012; Presidency Conclusions, Brussels European Council, 28-29 June 2012).

34 Serbia applied for EU membership on 22 December 2009. Following the Commission Opinion of 14 October 2011, the European Council confirmed Serbia's candidate status in March 2012 (Presidency Conclusions, Brussels European Council, 1-2 March 2012, pnt. 39). In line with the June 2013 decision of the European Council to open accession negotiation, the latter started in 21 January 2014.

35 On 1 April 1987 Turkey has applied for membership of the European Communities. After the Helsinki European Council of December 1999 declared Turkey a candidate country (Presidency Conclusions, Helsinki European Council, 10-11 December 1999, pnt. 12), negotiations were formally opened in October 2005. Due to Turkey's non-compliance with the additional protocol of the Ankara Association Agreement in relation to Cyprus, it was decided that negotiations on eight chapters are not to be opened. At the time of writing they still remain closed.

36 After having been identified by the European Council as a potential candidate in Santa Maria da Feira in June 2000 along with the other countries in the Western Balkans, Bosnia has applied for membership in February 2016.

37 In its Communication 'A European Future for Kosovo', the Commission indicated that the 'European perspective' for the Western Balkans, as confirmed in the Thessaloniki declaration of the European Council of June 2003, is also open to Kosovo; Commission Communication on A European Future for Kosovo, COM(2005) 156 final, 20 April 2005. For the explicit acknowledgement of the Western Balkan countries' membership potential see Presidency Conclusions of the European Council meetings in Lisbon (pnt. 47) of 23-24 March 2000, and Santa Maria da Feira (pnt. 67), 19-20 June 2000, as well as the Declaration of the Zagreb Summit of 24 November 2000, made by the Heads of State or Government of the EU Member States, Albania, FYROM, Bosnia and Herzegovina, Croatia and the FRY, as well as the Foreign Minister of Slovenia, and the President of the European Commission, in the presence of the Secretary General/High Representative for the CFSP, the Special Representative of the United Nations Secretary General, the Special Representative of the EU to act as Coordinator of the Stability Pact for south-east Europe and the High Representative for Bosnia and Herzegovina, pnt.4.

38 Commission Communication on A Credible Enlargement Perspective for and enhanced EU engagement with the Western Balkans, COM(2018) 65 final, 6 February 2018, pp. 7-8.

39 Jean-Claude Juncker 'State of the Union Address 2017', SPEECH/17/3165, 13 September 2017, available at: [http://europa.eu/rapid/press-release\\_SPEECH-17-3165\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm).

in 2010, requested in March 2015 that it should no longer be regarded as a candidate country.<sup>40</sup>

## 2.2 The policy framework: the increasing importance of the rule of law

There is abundant scholarly literature discussing the development of the enlargement process and its legal framework from various angles.<sup>41</sup> The purpose of this section, therefore, is not to replicate this, but to sketch out the framework within which accession takes place, while highlighting the increasing importance of the rule of law in the context of the policy.

Until the European Council's decision to acknowledge the membership perspective of the Countries from Central and Eastern Europe,<sup>42</sup> the enlargement process had by and large been covered by the same basic rules, set out in the Treaty.<sup>43</sup> It was, however, during the fifth enlargement round that the expansion process progressed from an *ad hoc* procedure into a fully-fledged enlargement policy on EU eligibility and on Member State-

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40 Iceland formally applied for EU membership on 16 July 2009. The Commission delivered its positive Opinion on 24 February 2010 after which the European Council decided to open negotiations in June 2010, Presidency Conclusions, Brussels European Council, 17 June 2010, pnt. 24. The negotiations had already been put on hold since June 2013, at the Icelandic government's own request.

41 See for example Christophe Hillion 'EU Enlargement' in Paul Craig & Gráinne de Búrca (eds) *The Evolution of EU Law* Oxford: Oxford University Press (2011), pp. 187-216; Tatham (2009); John O'Brennan *The Eastern Enlargement of the European Union* New York: Routledge (2006); Helene Sjursen (ed) *Questioning EU Enlargement: Europe in Search of Identity* New York: Routledge (2006); Christophe Hillion (ed) *EU Enlargement: A Legal Approach* Oxford: Hart Publishing (2004); Neil Nugent (ed) *European Union Enlargement* Basingstoke: Palgrave Macmillan (2004); Marise Cremona (ed) *The Enlargement of the European Union* Oxford: Oxford University Press (2003); Andrea Ott & Kirtyn Inglis (eds) *Handbook on European Enlargement* The Hague: T.M.C. Asser Press (2002); Marc Maresceau & Erwan Lannon (eds) *The EU's Enlargement and Mediterranean Strategies, A Comparative Analysis* Basingstoke: Palgrave (2001); Victoria Curzon Price, Alice Landau & Richard G. Whitman (eds) *The Enlargement of the European Union. Issues and Strategies* London: Routledge (1999); Phedon Nicolaïdes, Sylvia Boean, Frank Bollen & Parlos Pezaros *A Guide to the Enlargement of the European Union: A Review of the Process, Negotiations, Policy Reforms, and Enforcement Capacity* Maastricht: EIPA (1999); Heather Grabbe & Kirstyn Inglis *Eastward Enlargement of the European Union* London: Royal Institute of International Affairs (1998); Graham Avery & Fraser Cameron *The Enlargement of the European Union* Sheffield: Sheffield Academic Press (1998); Marc Maresceau (ed) *Enlarging the European Union: Relations between the EU and Central and Eastern Europe* London: Longman (1997); Christopher Preston *Enlargement and Integration in the European Union* London: Routledge (1997).

42 Presidency Conclusions, Copenhagen European Council, 21-22 June 1993.

43 Legally speaking, however, as the EU has gradually expanded and the body of enlargement rules and principles has developed in its wake, no enlargement round is identical to the previous one. For a brief analysis of the differences in procedure in the aforementioned Articles, see Frank Hoffmeister 'Changing Requirements for Membership' in Andrea Ott & Kirtyn Inglis (eds) *Handbook on European Enlargement* The Hague: T.M.C. Asser Press (2002), pp. 90-102 at 91-91. Also see Hillion (2011), pp. 188-193.

building,<sup>44</sup> including yearly monitoring rounds during which progress is measured on the road to accession. Nonetheless, the Treaty text does not convey much of the 'pre-accession strategy'<sup>45</sup> – the strategy by which the EU 'will continue to follow closely progress in the associated countries towards filling the conditions of accession'<sup>46</sup> – that lies behind it and which forms the basis for the Union's enlargement policy. Currently, Article 49 TEU provides:

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Next to proscribing the procedure, the current provision is connected to the rule of law in two ways. First, Article 2 TEU refers to the rule of law as one of the founding values of the Union – a *conditio sine qua non* for third states to be considered as a candidate for membership. Secondly, the Article mentions the conditions of eligibility agreed upon by the European Council in Copenhagen in 1993.<sup>47</sup> In relation to the latter, the rule of law has been

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44 Further on this argument see Christophe Hillion 'The Creeping Nationalisation of the EU Enlargement Policy' *Swedish Institute for European Policy Studies* No. 6 (2010) and the subsequent commentary by Marise Cremona, available at [http://sieps.se/sites/default/files/Commentary\\_cremona\\_2010\\_6\\_1.pdf](http://sieps.se/sites/default/files/Commentary_cremona_2010_6_1.pdf); Frank Emmert & Siniša Petrović 'The Past, Present, and Future of EU Enlargement' *37 Fordham International Law Journal* (2014), pp. 1349-1419 at 1379.

45 Council Conclusions, Essen European Council, 9-10 December 1994, Annex IV. The idea of a pre-accession period can be traced back to the Commission's conclusions in its Opinion on Greece's application for membership in 1976. Further, see Tatham (2009), p. 31; Alan Mayhew *Recreating Europe. The European Union's Policy towards Central and Eastern Europe* Cambridge: Cambridge University Press (2002), chapter 6.

46 Presidency Conclusions, Copenhagen European Council, 21-22 June 1993.

47 Fulfilment of which will lead to a country's admissibility for accession negotiations. Christophe Hillion 'Enlargement of the European Union: A Legal Analysis' in Anthony Arnall & Daniel Wincott (eds) *Accountability and Legitimacy in the European Union* Oxford: Oxford University Press (2002), pp. 401-418 at 412.

inserted as one of the four ‘political conditions’<sup>48</sup> for accession. According to the first of the three ‘Copenhagen criteria’, membership requires that the candidate country demonstrates ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.’<sup>49</sup>

Following the formulation of these accession conditions, the European Council, with the help of the European Commission, has progressively elaborated their normative content. This has been done in a rather *ad hoc* manner, taking into account the circumstances of both the state of the Union, and the candidate states. Thus, the Commission developed the policy framework through various Communications,<sup>50</sup> addressing the concerns on the mutual dependency of widening and deepening EU enlargement<sup>51</sup> that arose out of the applications for membership by the CEECs. At the same time, the European Council has refined the accession conditions, notably at the summits of Madrid in 1995<sup>52</sup> and Helsinki in 1999.<sup>53</sup> Specific condi-

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48 The first set of Copenhagen criteria is frequently referred to in the literature as the ‘political conditions’ for membership – in this thesis, the same term is used. See, for example, Hillion (2011), p. 195; Bruno de Witte ‘Enlargement and the EU Constitution’ in Marise Cremona (ed) *The Enlargement of the European Union* Oxford: Oxford University Press (2003), pp. 209–262 at 228–233; Heather Grabbe ‘A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants’ *EUI Working Papers RSC* No. 12 (1999).

49 The Copenhagen criteria furthermore cover the shape and state of the economy – ‘the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union’ – and the country’s ability to take on the *acquis communautaire* – ‘the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.’ Presidency Conclusions, Copenhagen European Council, 21–22 June 1993.

50 For further detail see for example Commission Communication on The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession, COM(1994) 320 final, 13 July 1994; Commission White Paper on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM(95) 163 final, 3 May 1995; Commission Communication on Agenda 2000: For a Stronger and Wider Union, COM(1997) 2000 final, 15 July 1997.

51 Emmert & Petrović (2014), p. 1379.

52 The Madrid European Council defined that the initiated pre-accession strategy would have to be intensified ‘in order to create the conditions for the gradual, harmonious integration of those States, particularly through the development of the market economy, the adjustment of their administrative structures and the creation of a stable economic and monetary environment.’ Since without these reinforced administrative structures, implementation of the *acquis* proved to be very difficult. Presidency Conclusions, Madrid European Council, 15–16 December 1995.

53 At Helsinki and in the wake of the Kosovo crisis, the European Council urged the candidate states to resolve their outstanding border disputes and other related bilateral issues, if need be through involvement of the International Court of Justice, before entering the EU. Presidency Conclusions, Helsinki European Council, 10–11 December 1999.

tions in relation to the Western Balkans followed<sup>54</sup> – after their ‘European perspective’ was acknowledged in 2002.<sup>55</sup>

In contrast to previous accessions where candidate countries had to fulfil the admission conditions without EU interference, and, which, thus, afford only limited insight into the Union’s rule of law conceptualisation,<sup>56</sup> a more detailed and coordinated pre-accession approach was unavoidable, particularly because of the number and diversity of candidates both among themselves, and as compared to previous applicants, as well as to the EU Member States.<sup>57</sup> Since the Copenhagen European Council left the content of admission conditions quite vague, elaborating upon them has been left largely to the institutions<sup>58</sup> and the Member States.<sup>59</sup> The first step towards this was provided by Agenda 2000 (July 1997), which contained the Commission’s opinions on the membership applications of the CEECs.<sup>60</sup> This document and the accompanying opinions are noteworthy for three reasons. First, they provide an insight into the Commission’s early conception of the rule of law. In this initial attempt at fleshing out the criterion of the rule of law, the Commission provided the rather pithy analysis that ‘[a]ll the applicant countries have flaws in the rule of law which they need to put right.’<sup>61</sup> The Agenda then indicated the areas under examination supporting this conclusion: ‘There is a lack of suitable qualified judges and guarantees for their independence. Police forces are poorly paid and require better training and discipline. The autonomy of local government

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54 See the Council Conclusions ‘The Application of Conditionality with a view to developing a Coherent EU-Strategy for the Relations with the Countries in the Region’, Annex to Annex III, 2203<sup>rd</sup> General Affairs Council, 29-30 April 1997; Council Conclusions ‘The Thessaloniki Agenda for the Western Balkans: Moving towards European Integration’, Annex A, 2518<sup>th</sup> External Relations Council, 16 June 2003. Further see Steven Blockmans ‘Raising the Threshold for Further EU Enlargement Process and Problems and Prospects’ in Andrea Ott & Ellen Vos (eds) *50 Years of European Integration: Foundations and Perspectives* The Hague: TMC Asser Press (2009), pp. 203-220.

55 See for example the Presidency Conclusions, European Council Santa Maria de Feira, 19-20 June 2000; Presidency Conclusions, European Council Copenhagen, 12-13 December 2002.

56 Hillion (2010), p. 11.

57 Kirstyn Inglis ‘The Pre-accession Strategy and the Accession Partnerships’ in Andrea Ott & Kirstyn Inglis (eds) *Handbook on European Enlargement* The Hague: T.M.C Asser Press (2002), pp. 103-112 at 103.

58 The Court of Justice of the EU has however refrained from giving further indications on the membership conditions; Case 93/78 *Lothar Matthues v Doego Fruchthof und Tiefkühlkost eG* [1978] ECR 2203. See also Karen E. Smith ‘The Evolution and Application of EU Membership Conditionality’ in Marise Cremona (ed) *The Enlargement of the European Union* Oxford: Oxford University Press (2003), pp. 105-140 at 115.

59 Further see Hillion (2010).

60 Commission Communication on Agenda 2000: For a Stronger and Wider Union, COM(97) 2000 final, 15 July 1997.

61 *Ibid.*, p. 40.

also requires a firmer legal basis in several cases.<sup>62</sup> Without entering into a detailed analysis at this juncture since this is the focus of the second half of the case study, it suffices to say here that within the initial framework, the Commission seemed to consider the rule of law from the perspective of the functioning of the (wider) judicial system – specifically in terms of quality of personnel, and the legal underpinnings of the separation of powers.

Secondly, Agenda 2000 and the Opinions, as well as the subsequent endorsement of their set-up by the European Council, introduced the Commission's methodology for its analysis of the CEECs' fulfilment of the conditions, providing a first insight into the rule of law elements that would be considered critical in order for applicant countries to be able to accede.<sup>63</sup> Instead of examining the developments related to the four political criteria separately, the Commission initially adopted a binary approach, whereby on the one hand democracy and the rule of law, and on the other hand, human rights and minority protection, were bundled together. In relation to the first category, the examination was subsequently classified into three sections: the structure and functioning of the parliament (legislature), the structure and functioning of the executive, and the structure and functioning of the judiciary.<sup>64</sup> In the Regular Reports of the following years a fourth category, anti-corruption measures, was added.<sup>65</sup> Overall, this categorisation suggests that the Commission views the rule of law in terms of the

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62 *Ibid.*

63 The European Council, upon a positive assessment of Agenda 2000, endorsed the methodology and recommended the Commission follow it in its future evaluation of applicant States' ability to meet the criteria; Presidency Conclusion, Luxembourg European Council, 12-13 December 1997, pnt. 29.

64 In relation to the monitoring process on the countries of the Western Balkans, this sub-categorisation has been added to over the years. The 2005 Albania Progress Report, for example, discusses developments in the area of democracy and the rule of law under the sub-headings of Parliament, Government, Public Administration, Judicial System, and Anti-Corruption Policy. The Progress Report of Serbia and Montenegro of the same year also includes a discussion of Defence reforms, whereas, for example, the 2006 Bosnia and Herzegovina Progress Report has an additional section on reform of the constitutional framework. During the 2013 and 2014 rounds of Progress Reports, three more subcategories are added to the section: Ombudsman, Civil society, and the Fight against organised crime; see for example the 2013 Montenegro Progress Report.

In the 2015 and 2016 rounds of reporting, the Commission has opted for a different approach, particularly in relation to the rule of law. In order to reflect its 'fundamentals first'-approach and with the aim to further increasing the quality of the assessments in the reports as well as providing greater transparency, the assessment of the political criteria is split into five components: democracy, public administration reform, rule of law, human rights and the protection of minorities, and regional issues and international obligations. The section on the rule of law is then further split into issues of the functioning of the judiciary, fight against corruption, and fight against organised crime, including the fight against terrorism. See for example, the 2015 Bosnia and Herzegovina Report, pp. 12-20.

65 See for example the 1998 Poland Regular Report; 1999 Czech Regular Report.

structure and functioning of the judicial system in ways similar to the previous point made above.<sup>66</sup>

Thirdly, Agenda 2000 laid the groundwork for a reinforced accession strategy in order to bring the different forms of support provided by the Union within a single framework. Formally launched as the 'enhanced pre-accession strategy' by the 1997 Luxembourg European Council, new instruments included the so-called Accession Partnerships (APs) in which the Copenhagen criteria were progressively spelled out in short, medium, and long term priorities,<sup>67</sup> to be met by the candidate states as a condition to their accession, detailed assessments of each candidate's performance in implementing the APs through annual reports,<sup>68</sup> as well as increased

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66 This view is reinforced by the Commission later on in Agenda 2000, where it stressed the importance of the administrative and, in particular, judicial capacity for the application of the *acquis* (as formulated initially by the 1995 Madrid European Council). After all, '[t]he applicant countries' administrative and judicial capacity is of crucial importance for the adoption, implementation and enforcement of the *acquis* and for the efficient use of financial support... It is vital that Union legislation be transposed into national law. But this is not sufficient to ensure its correct application ... The applicants' judicial systems must be capable of ensuring that the rule of law is enforced. This requires the retraining, and in some cases the replacement of judges to ensure that courts are able to operate effectively in cases involving Community law.' For further analysis of this issue, particularly on the relationship between the strengthening of the rule of law and judicial reform, see section 3.3.2.

67 According to the Council's framework AP regulation, the Commission drafted individual country APs covering the priorities, principles, intermediate objectives, and conditions on which preparations for accession must concentrate in view of the political and economic criteria, as well as the financial resources for assistance (Article 1). Following this proposal by the Commission and after adoption by the Council by qualified majority voting, the APs were submitted to the candidate countries (Article 2). Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, OJ[1998] L85/1.

A similar methodology has been applied in relation to the countries of the Western Balkans. Within the framework of the stabilisation and association process with these countries, the EU has set up partnerships with Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro, and Serbia, including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999. For the Council's framework regulation see Council Regulation (EC) No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the stabilisation and association process, OJ[2004] L86/1.

68 On the intensified review procedure, the 1997 Luxembourg European Council decided that '[f]rom the end of 1998, the Commission will make regular reports to the Council, together with any necessary recommendations for opening bilateral intergovernmental conferences, reviewing the progress of each Central and East European applicant State towards accession in the light of the Copenhagen criteria, in particular the rate at which it is adopting the Union *acquis*. ... The Commission's reports will serve as a basis for taking, in the Council context, the necessary decisions on the conduct of the accession negotiations or their extension to other applicants.' Presidency Conclusions, Luxembourg European Council, 12-13 December 1997, pnt. 29.

pre-accession aid linking financial support to progress and compliance.<sup>69</sup> This strategy effectively meant that the EU institutions, particularly the Commission,<sup>70</sup> had far-reaching powers to shape the enlargement policy and monitor the candidate's developments and progress on the way to accession. In relation to the rule of law, this also meant that the fulfilment of the accession conditions became subject to systematic EU monitoring.

Over the following years adjustments have been made to the enlargement policy, which has progressively concentrated on the rule of law as a central condition for development in applicant states. Introduced as 'fair and rigorous conditionality'<sup>71</sup> by the renewed consensus on enlargement,<sup>72</sup> the Commission expanded on the accession methodology starting with its 2006-2007 accession strategy. Agreed in the aftermath of Romania and Bulgaria's accession and in order to waylay misgivings about the incongruity between accession conditions and membership obligations,<sup>73</sup> the strategy linked progress in the EU's values, including the rule of law, to advancement in the negotiations through the introduction of opening and

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69 For a legal appraisal of the pre-accession strategy and its components see Tatham (2009), pp. 287-299; Marc Maresceau 'Pre-accession' in Marise Cremona (ed) *The Enlargement of the European Union* Oxford: Oxford University Press (2003), pp. 9-42; Inglis (2002), pp. 103-112; Karen E. Smith *The Making of EU Foreign Policy: the Case of Eastern Europe* Basingstoke: Palgrave Macmillan (1999), pp. 122-134.

70 Brigid Laffan 'From Policy Entrepreneur to Policy Manager: The Challenge Facing the European Commission' 3 *Journal of European Public Policy* (1997) 4, pp.422-438.

71 Commission Communication on 2005 enlargement strategy paper, COM(2005) 561 final, 9 November 2005, p. 3.

72 The Commission's approach, which envisaged the new principles to govern the accession policy and methodology, was based on consolidation, conditionality, and communication. Consolidation of the EU's commitments on enlargement, extended use of fair and rigorous conditionality throughout the negotiations phase, and better communication of the enlargement policy towards citizens, both within the Member States and the applicant states. This 'renewed consensus on enlargement' was endorsed by the European Council. Presidency Conclusions, Brussels European Council, 14-15 December 2006, pnt. 4.

73 Bulgaria and Romania are still formally under post-accession monitoring under the Cooperation and Verification Mechanism, see Council Conclusions 'Cooperation and Verification Mechanism', Doc. 7118/16, 15 March 2016. For the latest round of progress reports see: Report from the Commission on Progress in Bulgaria under the Co-operation and Verification Mechanism, COM(2017) 43 final, 25 January 2017; Report from the Commission on Progress in Romania under the Co-operation and Verification Mechanism, COM(2017) 44 final, 25 January 2017.

For the legal basis of the mechanism see Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, OJ[2006] L354/58, and Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ[2006] L354/56.

closing benchmarks of the chapters of the *acquis*.<sup>74</sup> This meant that the rule of law not only forms an eligibility condition (enlargement rules state that a country is eligible for membership if it is European and if it respects the EU's values), but also that non-compliance therewith could constitute a case for suspension of the process.<sup>75</sup>

Next to the continuous monitoring of the rule of law as an EU value and the possible consequences of lack of progress for the opening and pace of the negotiations, the rule of law dimension of the pre-accession process has also expanded in scope. In order to take on board the experiences of the 2004 'big bang' accession and considering the state of the Western Balkan applicants with their legacy of relatively recent armed conflict and bilateral disputes, the 2005 negotiating frameworks for Croatia<sup>76</sup> and Turkey<sup>77</sup> introduced two specific negotiating chapters meant to assist enlargement countries to establish a society based on the rule of law: Chapter 23, including judiciary matters, and Chapter 24, entitled Justice, Freedom and Security.<sup>78</sup> In this manner, the EU made it clear that it conceives the rule of law as an integral part of the *acquis*,<sup>79</sup> whereby parts of the notion are, thus, also considered under the third Copenhagen criterion (the candidates' ability to take on the obligations of membership).

Including rule of law issues as a chapter of the *acquis* enabled the EU to further cement the notion's place as a focal point of enlargement. Against the background of continued shortcomings in the areas of judicial reform, the fight against corruption and organised crime in Romania and Bulgaria,<sup>80</sup>

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74 The Commission proposed the introduction of benchmarks, defined by the Council, which the candidate state has to meet in order for the Union to consider opening and/or closing a particular negotiating chapter. According to the strategy, the purpose of benchmarks is 'to improve the quality of the negotiations, by providing incentives for the candidate countries to undertake necessary reforms at an early stage.' Moreover, benchmarks 'are measurable and linked to key elements of the *acquis* chapter.' Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649 final, 8 November 2006, p. 6.

75 *Ibid.*, p. 6. See also the Negotiating Framework for Turkey, 3 October 2005, pnt. 5; Negotiating Framework for Iceland, 26 July 2010, pnt. 17; Negotiating Framework for Croatia, 3 October 2005, pnt. 12; Negotiating framework for Montenegro, 29 March 2012, pnt. 4; Negotiating Framework for Serbia, 17 December 2013, pnt. 22.

76 Negotiating Framework for Croatia, 3 October 2005.

77 Negotiating Framework for Turkey, 3 October 2005.

78 Technically, chapter 23 is a new chapter introduced in 2005 in the negotiations with Croatia and Turkey, entitled in full 'judiciary and fundamental rights', whereas chapter 24 has previously existed (under the former title of 'cooperation in the field of justice and home affairs').

79 See also the Negotiating Frameworks for Montenegro, Serbia, and Iceland.

80 See the Commission's stocktaking of the work undertaken in the context of the Cooperation and Verification Mechanism over the past ten years, Commission Report on progress in Bulgaria under the Co-operation and Verification Mechanism, COM(2017) 43 final, 25 January 2017; Commission Report on progress in Romania under the Co-operation and Verification Mechanism, COM(2017) 44 final, 25 January 2017.

as well as the lessons learned from Croatia's accession,<sup>81</sup> the 2011 Enlargement Strategy makes it clear that issues related to the judiciary and fundamental rights and to justice and home affairs, *i.e.* Chapters 23 and 24, would be tackled early in the accession process on the basis of national Action Plans.<sup>82</sup> This 'new approach' was subsequently endorsed by the Council,<sup>83</sup> and implemented in the negotiations with Montenegro, as reflected in its negotiating framework of June 2012.<sup>84</sup> According to the Commission, the new approach 'maximises the time countries have to develop a solid track record of reform implementation, thereby ensuring that reforms are deeply rooted and irreversible.'<sup>85</sup>

The current Commission again emphasised the importance of the rule of law as one of the pillars<sup>86</sup> of its enlargement policy by underlining, in the outline of its medium-term strategy for enlargement, the need to reaffirm a strong focus on the 'principle of fundamentals first' in the accession process.<sup>87</sup>

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81 Commission Communication on Enlargement Strategy and Main Challenges 2011-2012, COM(2011) 666 final, 12 October 2011, pp. 2-3.

82 *Ibid.*, p. 5. The instrumental significance of Chapters 23 and 24 within this strategy is best evidenced by Montenegro's negotiating framework, in which it is stated that '[g]iven the link between the chapters 'Judiciary and fundamental rights' and 'Justice, freedom and security' ... as well as their importance for the implementation of the *acquis* across the board', should progress under these chapters significantly lag behind progress in the negotiations overall, the Commission on its own accord or on the request of one third of the Member States can propose to withhold its recommendation to open and/or close other negotiating chapters 'until this equilibrium is addressed'. See the Negotiating framework for Montenegro, 29 March 2012, pnt. 6.

83 Council Conclusions, 3132<sup>nd</sup> General Affairs Council, Doc. 18089/11, 5 December 2011. See also Presidency Conclusions, Brussels European Council, 9 December 2011.

84 Negotiating framework for Montenegro, 29 March 2012, pnt. 6.

85 Commission Communication on Enlargement Strategy and Main Challenges 2013-2014, COM(2013) 700 final, 16 October 2013, p. 2.; Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p.3. Also see General EU Position – ministerial meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union, AD 23/12, 27 June 2012.

In addition, the Commission proposed to strengthen the use of benchmarks, through the introduction of interim benchmarks of the *acquis* chapters in addition to the opening and closing benchmarks. This 'new approach' to the enlargement policy, furthermore, included the use of screening reports, which establish the discrepancies between EU law and the candidates' legislation over the whole range of the *acquis*, and the use of actions plans, drawn up by the candidate countries. Such action plans operate as guidance documents for both the opening and interim benchmarks, as well as for the subsequent negotiations. Commission Communication on Enlargement Strategy and Main Challenges 2011-2012, COM(2011) 666 final, 12 October 2011, p. 5; Negotiating framework for Montenegro, 29 March 2012, pnt. 22.

86 Commission Communication on Enlargement Strategy and Main Challenges 2013-2014, COM(2013) 700 final, 16 October 2013, p. 6.

87 Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015, p. 3.

According to this principle, the core issues of the rule of law, fundamental rights, strengthening of democratic institutions, as well as economic development remain key priorities in the enlargement process, since these issues 'reflect the importance the EU attaches to its core values and general policy priorities.'<sup>88</sup> The 2018 Western Balkan Strategy as well as the Enlargement Strategy of the same year reinforce the pivotal importance of rule of law reform in the applicant states and reconfirm the fundamentals first-approach.<sup>89</sup> According to the latter, addressing reforms in the area of the rule of law 'remains the most pressing issue for the Western Balkans'; not only that, it is also '*the* key benchmark against which the prospects of these countries will be judged by the EU.'<sup>90</sup> However, the former adds that '[e]fforts should be intensified to guide rule of law-related reforms in the region, to support the ambitious steps to be taken by the countries themselves,'<sup>91</sup> indicating the importance of the notion as well as the continued struggles and need for more developments in this area.

This section showed that the EU has progressively concentrated on the rule of law as a central condition for development in the candidate states. It was demonstrated that the rule of law is not only a condition for eligibility and a Copenhagen political criterion – the non-compliance with which can constitute a potential case for suspension throughout the process. In addition, it is now also the first hurdle to overcome in the enlargement negotiations by way of Chapter 23; lack of progress in the rule of law can reduce the speed of or effectively halt the entire enlargement process. Next, the focus of this chapter will turn to the instruments that form the basis for the EU's rule of law promotion in its accession policy.

### 2.3 The EU's toolbox for rule of law promotion in its enlargement policy

The EU's legal framework of its enlargement policy, *i.e.* its toolbox for rule of law promotion, mirrors the increasing importance of the rule of law as presented above. This section will show that the rule of law has become an important element in the legal framework. The basic aim here is to provide insight into the legal instruments that underpin the EU's enlargement policy and the significance allocated to the consolidation and strengthening of the rule of law therein.

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88 *Ibid.*, p. 5. See also Commission Communication on 2016 Communication on EU Enlargement Policy, COM(2016) 715 final, 9 November 2016, p. 2.

89 Commission Communication on 2018 Communication on EU Enlargement Policy, COM(2018) 450 final, 17 April 2018, p. 1.

90 *Ibid.*, p. 2 [emphasis added].

91 Commission Communication on A Credible Enlargement Perspective for and Enhanced Engagement with the Western Balkans, COM(2018) 65 final, 6 February 2018, p. 10.

The relations between the applicant countries and the EU are regulated by their individual association agreements. In the case of the CEECs this meant the so-called Europe Agreements (EAs). For Turkey, Malta and Cyprus the relationship was based on the Association Agreements concluded in 1963 and in the early 70s.<sup>92</sup> In relation of the countries in the Western Balkans the association is covered by the Stabilisation and Association Agreements (SAAs) within the broader context of the Stabilisation and Association Process.<sup>93</sup>

All agreements contain references to the rule of law, and, thus, clearly demonstrate the notion's increasing significance. After the collapse of the Soviet Union and the subsequent signing of Trade and Cooperation Agreements with the newly independent countries in Central and Eastern Europe, the European Council, meeting in Strasbourg in 1989, affirmed that the Community was ready to strengthen bilateral relations beyond the existing trade agreements.<sup>94</sup> Subsequently, Europe Agreements<sup>95</sup> were signed over a period of seven years – starting in 1991 with Poland,<sup>96</sup> Hungary,<sup>97</sup> and Czechoslovakia – before the articulation of the Copenhagen criteria, and with the Czech Republic<sup>98</sup> and Slovakia<sup>99</sup> separately, Estonia,<sup>100</sup> Latvia,<sup>101</sup>

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92 Agreement establishing an Association between the EEC and Turkey, OJ[1964] P217/3687; Agreement establishing an Association between the EEC and Malta, OJ[1971] L61/2; Agreement establishing an Association between the EEC and the Republic of Cyprus, OJ[1973] L133/2.

93 Commission Communication on The Stabilisation and Association Process for the Countries in South-Eastern Europe, COM(1999) 235 final, 26 May 1999. See further Steven Blockmans 'Consolidating the Enlargement Agenda for South Eastern Europe' in Steven Blockmans & Sacha Prechal (eds) *Reconciling the Deepening and Widening of the European Union* The Hague: T.M.C. Asser Press (2008), pp. 59-86.

94 Presidency Conclusion, Strasbourg European Council, 8-9 December 1989, p. 10.

95 For a comprehensive study of Europe Agreements see Peter-Christian Müller-Graff (ed) *East Central Europe and the European Union: From Europe Agreements to Member Status* Baden-Baden: Nomos (1997); Peter-Christian Müller-Graff 'Legal Framework for Relations between the European Union and Central and Eastern Europe: General Aspects' in Marc Maresceau (ed) *Enlarging the European Union. Relations between the EU and Central and Eastern Europe* London: Longman (1997), pp. 27-40.

96 Europe Agreement establishing an association between the EC and the Republic of Poland, OJ[1993] L348/2.

97 Europe Agreement establishing an association between the EC and the Republic of Hungary, OJ[1993] L347/2.

98 Europe Agreement establishing an association between the EC and the Czech Republic, OJ[1994] L360/2.

99 Europe Agreement establishing an association between the EC and the Republic of Slovakia, OJ[1994] L359/2.

100 Europe Agreement establishing an association between the EC and the Republic of Estonia, OJ[1998] L68/3.

101 Europe Agreement establishing an association between the EC and the Republic of Latvia, OJ[1998] L26/3.

Lithuania,<sup>102</sup> Slovenia,<sup>103</sup> Bulgaria,<sup>104</sup> and Romania<sup>105</sup> after the acknowledgement of the CEECs membership perspective. While in the Preamble of all Europe agreements the rule of law is mentioned as one of the values underpinning the new political order, none of the EAs contain an explicit reference to the rule of law in the main body of the agreement.<sup>106</sup>

Similar to the pre-accession process for the CEECs, the Stabilisation and Association Process (SAP)<sup>107</sup> is the broader strategic framework for the EU's relations with the countries in the Western Balkans, designed to promote stability and bring the countries, each at their own pace, closer to the Union.<sup>108</sup>

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- 102 Europe Agreement establishing an association between the EC and the Republic of Lithuania, OJ [1998] L51/3.
- 103 Europe Agreement establishing an association between the EC and the Republic of Slovenia, OJ[1999] L51/3.
- 104 Europe Agreement establishing an association between the EC and the Republic of Bulgaria, OJ[1994] L358/3.
- 105 Europe Agreement establishing an association between the EC and Romania, OJ[1994] L357/2.
- 106 All but the earliest Europe Agreements contain an essential elements clause in which reference is made to 'respect for democratic principles and human rights, established by the Helsinki Final Act and in the charter of Paris for a New Europe, as well as the principle of market economy...'. Even though the latter, drawn up in the context of the OSCE, highlights human rights, democracy, and the rule of law in equal measure, it is just the first two that made their way into the essential elements clause of the EAs explicitly.
- 107 Borrowing its 'regional approach', with elements of political and economic conditionality, from its practice under the Lomé conventions, the EU's approach towards South East Europe as a region was initiated at the multilateral Royaumont summit in 1995, during which the foreign ministers of the Member States, representatives of the former Yugoslav countries, representatives of the neighbouring countries, including Albania, met with delegations from Russia and the USA, as well as representatives from the Council of Europe and the OSCE. The 'regional approach' to support the implementation of the Dayton Peace Agreements and facilitate political stability and economic prosperity was adopted by the Council thereafter (see Council Conclusions and Declaration on former Yugoslavia of 26 February 1996). The approach was open to those countries in the region for which the Council had not yet adopted negotiating directives for an association agreement. Effectively, this meant the countries of former Yugoslavia and Albania. The EU offered financial assistance, trade preferences and contractual relations and progressive compliance with the conditions established by the Council is to be rewarded with intensified bilateral cooperation. In case of serious and repeated non-compliance with the conditions underpinning the respective level of cooperation, however, trade preferences might be withdrawn, financial assistance may be frozen and, where applicable, an agreement may be suspended. For a detailed account of these measures see Christian Pippan 'The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality' *European Foreign Affairs Review* (2004) 9, pp. 219-245 at 229-238.
- 108 Council Conclusions 'The Thessaloniki Agenda for the Western Balkans: Moving towards European Integration', Annex A, 2518<sup>th</sup> External Relations Council, 16 June 2003; Commission Report on The Stabilisation and Association Process – First Annual Report, COM(2002) 163 final, 3 April 2002, p. 4.

Originally, the SAP stipulated that establishing SAAs would 'depend on the willingness of the countries concerned to work towards consolidating peace and to the respect of human rights, the rights of minorities and democratic principles.'<sup>109</sup> However, the General Affairs Council elucidated that rule of law conditionality has also always been part and parcel of the conditionality applied to the Western Balkans.<sup>110</sup> This conclusion is reinforced by, amongst others, the feasibility studies prepared by the Commission for the negotiation of the SAAs, in which, for example in the case of Bosnia and Herzegovina, it is stated that: 'Respect for democratic principles and human rights as proclaimed in key international documents such as the Universal Declaration of Human Rights, and respect for the principles of international law and *rule of law in general* should form the basis of the domestic and external policies of parties to a SAA.'<sup>111</sup> Qualified by the Commission as a new type of contract,<sup>112</sup> Stabilisation and Association Agreements have been

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- 109 Council Conclusions and Declaration on former Yugoslavia of 26 February 1996. See also the Commission Communication on Common Principles for Future Contractual Relations with certain Countries in South-Eastern Europe, COM(96) 476 final, 2 October 1996, p. 1, which limits itself to these three principles.
- 110 Council Conclusions 'The Application of Conditionality with a view to developing a Coherent EU-Strategy for the Relations with the Countries in the Region', Annex III, 2203<sup>rd</sup> General Affairs Council, 29-30 April 1997.
- 111 Commission Report on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union, COM(2003) 692 final, 18 November 2003, p. 6 [italics added]. Also see Commission Communication on the preparedness of Serbia and Montenegro to negotiate a Stabilisation and Association Agreement with the European Union, COM(2005) 476 final, 12 April 2005, p. 4; Commission Report on the feasibility of negotiating a Stabilisation and Association Agreement with the Republic of Croatia, COM(2000) 311 final, 24 May 2000, pp. 4-5; Report from the Commission on the feasibility of negotiating a Stabilisation and Association Agreement with Albania, COM(1999) 599 final, 24 November 1999 p. 16; Commission Report on the feasibility of negotiating a Stabilisation and Association Agreement with the Former Yugoslav Republic of Macedonia, COM(1999) 300 final, 16 June 1999.
- 112 Commission Communication on the Stabilisation and Association Process for countries of South-Eastern Europe, COM(1999) 235 final, 26 May 1999, p. 3. Phipan has called the SAAs a 'sui generis type of EU agreement' the primary aim of which is the establishment of a formal association with the EU over a transitional period, during which the Western Balkan countries gradually adopt their laws to the core standards and rules of the single market. Phipan (2004), p. 233. See, however, Phinnemore's article on the SAAs' considerable similarities with the earlier Europe Agreements, David Phinnemore 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?' 8 *European Foreign Affairs Review* (2003), pp. 77-103. For more on the SAAs see Steven Blockmans *Tough Love. The European Union's Relations with the Western Balkans* The Hague: T.M.C. Asser Press (2007), pp. 253-268; Tatham (2009) pp. 167-170.

signed since 2001 with FYROM,<sup>113</sup> Croatia,<sup>114</sup> Albania,<sup>115</sup> Montenegro,<sup>116</sup> Serbia,<sup>117</sup> Bosnia and Herzegovina,<sup>118</sup> and Kosovo.<sup>119</sup>

The SAAs clearly emphasise the importance of the rule of law. Next to a reference in the preamble,<sup>120</sup> the notion is included in Article 2 as an essential element, the non-compliance with which can, depending on the suspension clause in the agreement, be a reason for suspending the agreement<sup>121</sup> or can give rise to 'appropriate measures'.<sup>122</sup> It should be noted, however, that no further details as to the interpretation of the essential elements, and, thus, to the EU's understanding of the rule of law in the specific context of the SAAs has been forthcoming so far. Furthermore, all SAAs' aims (but for the earliest ones with Macedonia and Croatia) include support to the efforts of the country to strengthen democracy and the rule of law.<sup>123</sup> More particularly, the agreements frame the strengthening efforts of the rule of law in terms of the specific focus of the reinforcement of institutions. Accordingly, particular importance is attached 'to the consolidation of the rule of law, and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement

113 Stabilisation and Association Agreement with the former Yugoslav Republic of Macedonia, OJ[2004] L84/13.

114 Stabilisation and Association Agreement with the Republic of Croatia, OJ[2005] L26/3.

115 Stabilisation and Association Agreement with the Republic of Albania, OJ[2009] L107/166.

116 Stabilisation and Association Agreement with the Republic of Montenegro, OJ[2010] L108/3.

117 Stabilisation and Association Agreement with the Republic of Serbia, OJ[2013] L278/16.

118 Stabilisation and Association Agreement with Bosnia and Herzegovina, of the other part, OJ[2015] L164/2.

119 Stabilisation and Association Agreement with Kosovo\*, OJ[2016] L 71/3.

120 Exceptionally, the Preamble of the SAA with Kosovo pays specific attention to the commitment of the parties to *institutions* based on the rule of law, to good governance and democratic principles, thereby diverging from the other SAAs on this particular paragraph.

121 See for example Article 133 of the Stabilisation and Association Agreement with Serbia, which provides that '[e]ither Party may suspend this Agreement, with immediate effect, in the event of the non-compliance by the other Party of one of the essential elements of this Agreement.'

122 See for example Article 126(2) of the Stabilisation and Association Agreement with Albania, in which it is stated that '[i]f either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before doing so, except in cases of special urgency, it shall supply the Stabilisation and Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.' According to the Joint Declaration concerning Article 126, attached to the Agreement, the parties agree that the cases of special urgency referred to in the Article mean 'cases of material breach of the Agreement by one of the two Parties.' Violation of the essential elements, including the rule of law, is provided as an example of such a material breach. See also the Joint Declaration concerning Article 120 attached to the Stabilisation and Association Agreement with Croatia.

123 See for example the Article 1(2)(a) of the Stabilisation and Association Agreement with Montenegro.

and the administration of justice in particular.<sup>124</sup> This specific aim is further divided into the elements for cooperation: strengthening judicial independence, improving judicial efficiency, improving the functioning of the police and other law enforcement bodies, providing adequate training, and fighting corruption and organised crime. The SAA with Kosovo adds to this list two more areas of cooperation: improving judicial impartiality and accountability, as well as developing adequate structures for the police, prosecutors and judges and other judicial and law enforcement bodies to adequately prepare them for cooperation in civil, commercial and criminal matters, and to enable them to effectively prevent, investigate, prosecute and adjudicate organised crime, corruption and terrorism.<sup>125</sup> Overall, the text of the SAAs makes it abundantly clear that the objective of assistance under the agreements is focused on institution building and shall, thus, contribute to 'the democratic, economic and *institutional reforms*'<sup>126</sup> of the countries covered by the Stabilisation and Association Process.

Next to the bilateral Europe Agreements and Stabilisation and Association Agreements, the EU's legal arsenal for rule of law promotion in the pre-accession process and the Stabilisation and Association Process consists of Accession Partnerships (APs) in the case of the CEECS, and the similar instrument of European Partnerships (EPs) for the Western Balkans, as well as a number of financial regulations which create the framework for financial and technical cooperation. Below, the APs, EPs, and the financial regulations will be briefly discussed, in so far as they relate to the rule of law.

While the Europe agreements formed the basis for the relations between the EU and the applicant states, it is the APs that guided the work of the candidates during the pre-accession process.<sup>127</sup> Originally based on Regulation 622/98 of 16 March 1998,<sup>128</sup> the individual Partnerships were used as the framework in which the priorities, objectives, and conditions for each country are set out, including all forms of EU assistance.<sup>129</sup> They define the priorities to be observed for adopting the EU *acquis*, formulated as short

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124 See for example Article 80 of the Stabilisation and Association Agreement with Serbia; Article 75 of the Stabilisation and Association Agreement with Croatia; Article 74 of the Stabilisation and Association Agreement with Macedonia; Article 78 of the Stabilisation and Association Agreement with Albania; Article 80 of the Stabilisation and Association Agreement with Montenegro.

125 Article 83 of the Stabilisation and Association Agreement with Kosovo.

126 Cf. Article 105 of the Stabilisation and Association Agreement with Macedonia [emphasis added].

127 Inglis (2002), p. 107.

128 Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, OJ[1998] L85/1.

129 Maresceau (2003), p. 31.

and medium-term objectives. As a process of permanent adaptation,<sup>130</sup> the APs were prepared, reviewed and updated by the Commission on the basis of its annual progress reports and subsequently proposed to the Council.<sup>131</sup> As such, they form unilateral decisions by the Council and are, thus, legally binding on the Council and the Member States only.<sup>132</sup> However, in direct response to their country AP, every applicant has had to adopt a National Programme for the Adoption of the Acquis (NPAA) – a detailed, multi-annual plan for the alignment of domestic legislation with EU regulations.<sup>133</sup> Because of the fact that they are unilateral instruments, the APs were more comprehensive than the Europe Agreements, in principle reaching all areas of the *acquis*, including those areas that were not included, or even in existence, at the time of the conclusions of the earlier EAs. Annual reports on each country's progress in meeting the objectives spelled out in the APs were included in the Commission annual reports.<sup>134</sup>

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130 For the first round of the Accession Partnerships of the ten CEECs see Decisions 1998/259-1998/268, OJ[1998] L121/1-L121/46. Revisions occurred in 1999 (see Decisions 1999/850-1999/859, OJ[1999] L335/1-L335/61) and 2002 (see Decisions 2002/83-2002/94, OJ[2002] L44/1-L44/101). For Bulgaria and Romania a further revision followed in 2003 (Decision 2003/396, OJ[2003] L145/1 and Decision 2003/397, OJ[2003] L145/21 respectively).

The APs for Malta and Cyprus were introduced in 2000 on the basis of Council Regulation (EC) No 555/2000 13 March 2000 on the implementation of operations in the framework of the pre-accession strategy for the Republic of Cyprus and the Republic of Malta (see Decision 2000/248, OJ[2000] L78/10 for Cyprus and Decision 2000/249, OJ[2000] L78/17 for Malta). Both APs were updated together with the CEEC APs in 2002, see above.

In the case of Turkey, Council Regulation (EC) No 390/2001 of 26 February 2001, on assistance to Turkey in the framework of the pre-accession strategy, and in particular on the establishment of an Accession Partnership, formed the basis for the adoption of Turkey's initial AP (Decision 2001/235, OJ[2001] L85/13). Revisions followed in 2003 (Decision 2003/398, OJ[2003] L145/40), 2006 (Decision 2006/35, OJ[2006] L22/34), and 2008 (Decision 2008/157, OJ[2008] L51/4).

Even though Malta, Cyprus, and Turkey were, and are in case of the latter, covered by a separate legal regime from the CEECs, scholarly literature has pointed out that the all candidates in the fifth and sixth enlargement round were treated in essentially the same manner. See for example Inglis (2002), p. 107; Blockmans (2007), pp. 278-279; Tatham (2009), pp. 289-290.

131 In the Commission's original proposal presented in Agenda 2000, the APs were intended to be Commission decisions, Commission Communication on Agenda 2000: For a Stronger and Wider Union, COM(97) 2000 final, 15 July 1997, pp. 63-64.

132 Kirstyn Inglis 'The Europe Agreements Compared in the Light of their Pre-accession Reorientation' 37 *Common Market Law Review* (2000) pp. 1173-1210 at 1184.

133 Inglis (2002), p. 108; Tatham (2009) pp. 291-293.

134 See for example Section D on 'Accession Partnership and National Programmes for the Adoption of the Acquis: Global assessment' in the 2001 Poland Regular Report, pp. 108-112.

For the countries in the Western Balkan, the European Partnerships<sup>135</sup> fulfil a largely similar role<sup>136</sup> to the Accession Partnerships.<sup>137</sup>

Analysing the financial regulations underlying the Accession Partnerships and European Partnerships, it becomes apparent that the rule of law is emphasised in an incremental fashion, mirroring the EU's enlargement policy's increasing acknowledgement of its importance, as outlined above. From the beginning, Regulation 622/98, establishing the Accession Partnerships, linked financial assistance to respect of the commitments contained in the Europe Agreements and to progress towards fulfilment of the Copenhagen criteria, including the rule of law.<sup>138</sup> The so-called 'coordinating' Regulation 1266/99, subsequently ensured for applicant countries with an Accession Partnership that the PHARE regulation – the original financial regulation for economic aid to the CEECs<sup>139</sup> – was reoriented to a fully

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- 135 Council Decisions 2004/515/EC, 2004/528/EC, 2004/518/EC, 2204/519/EC, 2004/520/EC, and 2004/648/EC, OJ[2004] L221/10, L222/20, L223/20, L227/21, and L297/19, respectively. These acts were repealed and replaced in 2006 by Council Decisions 2006/55/EC, 2006/57 EC, 2006/54/EC, and 2006/56/EC, OJ[2006] L35/19, L35/57, L35/1, and L35/32, respectively, and once more in 2008 by Council Decisions 2008/211/EC, 2008/212/EC, 2008/210/EC, and 2008/213/EC, OJ[2008] L80/18, L80/32, L80/1, and L80/46, respectively. After declaring its independence on 3 June 2006, it was appropriate to establish a separate European Partnership with Montenegro, which was done on 22 January 2007, see Council Decision 2007/49/EC, OJ[2007] L20/16.
- 136 For a comparison on the framework in relation to the Accession Partnerships with the CEECs, the framework covering Malta and Cyprus, and the regime that applies to Turkey, see Inglis (2002), pp. 106-107. For an analysis of the European Partnerships in the light of the Accession Partnerships, see Tatham (2009), pp. 324-325; Blockmans (2007), pp. 278-279.
- 137 Introduced by the Commission as a means of bolstering the SAP on the basis of past experiences, particularly the enhanced pre-accession process, the first round of EP's with Bosnia-Herzegovina, FYROM, Albania, Serbia and Montenegro (including Kosovo as defined by UN Security Council Resolution 1244 of 10 June 1999), and Croatia was approved by the Council in March 2004 on the basis of Council Regulation 533/2004. See Commission Communication on The Western Balkans and European Integration, COM(2003) 285 final, 21 May 2003, pp. 2-4. Also see the Declaration adopted at the EU-Western Balkans Summit adopted at Thessaloniki, Doc. 10229/03, 21 June 2003, pnt. 4.
- 138 Article 1 Regulation (EC) No 622/98. Also see Article 1 of both Regulation (EC) 555/2000 and Regulation (EC) 390/2011 on the Accession Partnerships and the pre-accession strategy for Cyprus and Malta, and Turkey, respectively.
- 139 Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic, OJ[1989] L375/11. From 1990 onwards, Yugoslavia, amongst others, was a recipient of PHARE assistance, see Council Regulation (EEC) 2698/90 of 17 September 1990, OJ[1990] L257/1. Until 2000 PHARE assistance was extended to Albania (Council Regulation (EEC) No 3800/91 of 23 December 1991, OJ[1991] L357/10); Bosnia-Herzegovina (Council Regulation (EC) No 753/96 of 22 April 1996, OJ[1996] L103/5); Croatia (Council Regulation (EC) No 1366/95 of 12 June 1995, OJ[1995] L133/1); Former Yugoslav Republic of Macedonia (Council Regulation (EC) No 463/96 of 11 March 1996, OJ[1996] L65/3).

accession driven approach in line with the priorities, objectives and conditions set out in the APs.<sup>140</sup>

The identification of priority areas for each candidate state is based on the analysis of the states' ability to fulfil the Copenhagen criteria. However, the first two rounds of APs show that the objectives within the political criteria are jumbled together, treated in a very condensed manner, and specific rule of law aims, short-term or medium-term, are virtually absent.<sup>141</sup> Be that as it may, the 2002 Accession Partnerships manifest an increased focus on the rule of law, in line with the enlargement's policy focus on the rule of law, and the functioning of the judiciary in particular. Following the structure of the Regular Reports, the objectives under the political criteria have been made explicit and are divided on the basis of the binary approach of democracy and rule of law on the one hand, and human rights and the protection of minorities on the other.<sup>142</sup> It is clear that in relation to the rule of law, the emphasis is heavily on the reform of the judicial system, with such objectives as the alleviation of courts' workload,<sup>143</sup> the review of the degree of immunity of members of the judiciary to ensure it is in line with international standards,<sup>144</sup> and the continued training of specialised judges and prosecutors including in *acquis*-related matters.<sup>145</sup>

In contrast to the financial instruments covering the CEECs, the framework for assistance to the Western Balkans has provided more detail on the topic. Already in the earliest financial regulation on the countries in the area, with aid allocated to the restructuring process, the objective of consolida-

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140 Article 4(2) Council Regulation (EC) No 1266/1999 of 21 June 1999 on coordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation (EEC) No 3906/89, OJ[1999] L161/68.

141 The only exception is the 1998 Accession Partnership with the Slovak Republic in which mention is made of the necessity of guaranteeing the independence of the judiciary as a medium-term objective under the political criteria. However, in all 1998 and 1999 Accession Partnerships the functioning, efficiency and reinforcement of the judiciary is discussed under the heading of 'Reinforcement of institutional and administrative capacity' (1998) or 'Reinforcement of administrative and judicial capacity' (1999). See for example the 1999 AP of the Czech Republic, which states as one of the short-term objectives under the latter heading 'begin implementing a programme to reform the judiciary (judges and state prosecutors) by filling vacancies, simplifying procedures, stepping up training of judges to EC law.'

142 See for example Council Decision 2002/87/EC of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with Hungary, OJ[2002] L44/37.

143 Council Decision 2002/88/EC of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with Latvia, OJ[2002] L44/45.

144 Council Decision 2002/83/EC on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with Bulgaria, OJ[2002] L44/1.

145 Council Decision 2002/89/EC on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with Lithuania, OJ[2002] L44/54.

tion of democracy and civil society is included.<sup>146</sup> Furthermore, not only is respect for the rule of law expressly identified as an essential aspect for aid, the essential elements clause also includes fulfilment of the ‘specific conditions laid down by the Council for the implementation of cooperation with former Yugoslavia’ as a precondition for financial assistance<sup>147</sup> – going further than the comparable provisions of the framework for the CEECs. The term ‘specific conditions’ referred to the February 1996 Council Conclusions and the simultaneously adopted Declaration on former Yugoslavia, in which value conditionality was introduced, albeit, however, in very broad and opaque terms.<sup>148</sup> The General Affairs Council alleviated this indeterminacy in April 1997 with its adoption of specific conditionality governing the EU’s relations with the Western Balkans. According to the Conclusions, the EU intends to develop its relations with the countries of the region ‘within a framework which promotes democracy, the rule of law, higher standards of human and minority rights, transformation towards market economies and greater cooperation between countries.’<sup>149</sup> Furthermore, adding some level of specificity, rule of law benchmarks are introduced and include effective means of redress against administrative decisions, access to courts and right to fair trial, and equality before the law and equal protection by the law.<sup>150</sup>

Against this background, it can be shown that the subsequently adopted financial regulations underpinning the reform in the applicant states have augmented the rule of law’s importance both by making it a primary objective of cooperation and assistance as well as by adding more specific indicators and benchmarks. Thus, the CARDS Regulation enumerated the creation of an institutional and legislative framework for the rule of law and the strengthening of legality as the second aim in the list of the Union’s assistance objectives,<sup>151</sup> and the latest Instrument for Pre-accession Assistance (IPA II) called attention to the strengthening of the rule of law as a ‘key challenge’<sup>152</sup> and a specific objective for the beneficiary countries, including an independent and efficient judiciary as well as the improve-

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146 Article 4(2) Regulation (EC) No 1628/96, the so-called OBNOVA Regulation. This inclusive approach to aid was already apparent from the Commission’s initial proposal on the topic, see Commission Communication on The European Union’s Financial Contribution to Reconstruction in Former Yugoslavia, COM(95) 581 final, 18 December 1995, p. 2.

147 Article 2 Regulation (EC) No 1628/96.

148 Pippan (2004), pp. 223-224; Tatham (2009), p.319.

149 Council Conclusions ‘The Application of Conditionality with a view to developing a Coherent EU-Strategy for the Relations with the Countries in the Region’, Annex to Annex III, 2203<sup>rd</sup> General Affairs Council, 29-30 April 1997.

150 *Ibid.*

151 Article 2(2)(b) Council Regulation (EC) 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, repealing Regulation (EC) No 1628/96 and amending Regulation (EEC) No 2906/89 and (EEC) No 1360/90 and Decisions 97/256/EC and 1999/311/EC, OJ[2000] L306/1.

152 Paragraph 9 of the Preamble of Regulation (EU) No 231/2014.

ment of law enforcement.<sup>153</sup> Moreover, in addition to this specific purpose of cooperation, the rule of law also forms a horizontal aim, to which particular attention should be paid throughout all actions in the policy areas covered by the Regulation.<sup>154</sup>

The greater emphasis – for example, ensuring full respect for the rule of law is a ‘key short-term priority’ for Kosovo in its 2008 European Partnership<sup>155</sup> – and level of detail of rule of law benchmarks are also reflected in the European Partnerships. Following the two-pronged approach of the structure of the political criteria, as introduced in the pre-accession process covering the CEECs, the section on democracy and the rule of law in the EPs has continued to provide a detailed list of rule of law related objectives in need of improvement, demonstrating the EU’s interpretation of the notion. To highlight one example in relation to the strengthening of the judicial system taken from Croatia’s European Partnership:<sup>156</sup>

Develop and implement a comprehensive strategy for judicial reform in consultation with interested bodies, including the adoption of necessary new legislation and the establishment of a career management system which also includes an open, fair and transparent system for recruitment, evaluation and mobility. Enhance professionalism in the judiciary by ensuring adequate State funding for the training institutions for judges and other judicial officials, allowing it to develop high-quality training for judges, prosecutors and administrative staff. Provide for adequate initial and vocational training schemes. Address the problem of backlog in courts. Take measures to ensure proper and full execution of court rulings.

Finally, in addition to the legal framework for rule of law promotion in enlargement described above, mention should be made of the judicial dialogues on rule of law or rule of law related matters. Initiated with three of the Western Balkan countries under the Stabilisation and Association Process, the dialogues were set up with the aim of advancing structured relations on the implementation of the rule of law with aspiring member countries prior to the SAAs entering into force. The Structured Dialogue on Justice with Bosnia-Herzegovina, launched in 2011, attempts to ensure an independent, effective, impartial and accountable judicial system.<sup>157</sup> It is a platform for discussing the reforms necessary to allow Bosnia-Herzegovina

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153 Article 2(1)(a)(i) Regulation (EU) No 231/2014.

154 Article 3(2) Regulation (EU) No 231/2014.

155 Council Decision 2008/213/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC, OJ[2008] L80/46.

156 Council Decision 2004/648/EC of 13 September 2004 on the principles, priorities and conditions contained in the European Partnership with Croatia, OJ[2004] L297/19.

157 Stefan Füle, European Commissioner for Enlargement and European Neighbourhood Policy, ‘Friends of Bosnia and Herzegovina’, SPEECH/11/730, 8 November 2011, available at: [http://europa.eu/rapid/press-release\\_SPEECH-11-730\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-11-730_en.htm).

to progress in the alignment of its judicial system with the *acquis* and relevant standards.<sup>158</sup> At the end of each plenary session, the European Commission issues a set of recommendations in which necessary reform measures of, mostly, the judiciary sector are outlined.<sup>159</sup>

In order to address the rule of law early on in Kosovo's pre-accession process, the Commission jointly with the Kosovo authorities launched a Structured Dialogue on the Rule of Law in May 2012. The Dialogue takes place twice a year and proves a context in which to regularly assess Kosovo's progress on the judiciary, the fight against organised crime, and the fight against corruption.<sup>160</sup> With the opening of accession negotiations blocked by Greece for some years from 2009 onwards, the EU devised the so-called High Level Accession Dialogue as a mechanism with the intention to maintain the tempo of the reforms that the Former Yugoslav Republic of Macedonia was carrying out under its National Programme for the Adoption of the Acquis, adopted in response to its European Partnership. The Dialogue covers five issues, including the rule of law.<sup>161</sup> Stressing the importance of the Dialogue, the Commission noted in its 2013-2014 Enlargement Strategy that: 'The High Level Accession Dialogue has contributed to progress in most priority areas, including the elimination of court backlogs and progress in the fight against corruption. The country has already reached a high level of alignment relative to where it is in the accession process and has made further progress in improving its ability to take on the obligations of membership.'<sup>162</sup>

Against the background provided in this section, in which the Union's enlargement policy was set out and the positioning of the rule of law within the framework of the policy was explained, the following section will turn to the testing of the analytical framework of the rule of law, established in Part I on the basis of an examination of the common rule of law elements found in the national rule of tradition (chapter 1) and in legal theory (chapter 2), against the EU's practice in the field of enlargement.

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158 See for example the first set of preliminary recommendations from the European Commission, of 6 June 2011, available at [http://europa.ba/wp-content/uploads/2015/05/delegacijaEU\\_2012022712220919eng.pdf](http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2012022712220919eng.pdf).

159 For an overview of the recommendation adopted so far see the site of the EU's Delegation to Bosnia-Herzegovina: [http://europa.ba/?page\\_id=553](http://europa.ba/?page_id=553).

160 See for example, European Commission 'Structure Dialogue on the Rule of Law with Kosovo: Conclusions' Press release, Brussels, 30 May 2012, available at: [http://ec.europa.eu/archives/commission\\_2010-2014/fule/docs/news/20120530\\_rol\\_d\\_conclussions\\_30\\_may.pdf](http://ec.europa.eu/archives/commission_2010-2014/fule/docs/news/20120530_rol_d_conclussions_30_may.pdf); European Commission 'Third meeting of the Structured Dialogue on the Rule of law – Operational conclusions, Brussels, 16 January 2014, available at: <http://md.rks-gov.net/desk/inc/media/7BAF7A77-014B-4509-8D27-09A084C932D3.pdf>.

161 The other themes are the freedom of expression, ethnic relations, challenges for electoral reform, public administration reform, strengthening of the market economy, and good neighbourly relations.

162 Commission Communication on Enlargement Strategy and Main Challenges 2013-2014, COM(700) final, 16 October 2013, p. 17.

### 3. RULE OF LAW ELEMENTS IN THE EU'S PRACTICE IN ENLARGEMENT

In this part of the chapter, the Union's practice in its enlargement policy will be tested against the framework on the rule of law, established in Part I of the thesis. It should be recalled that the common rule of law elements found on the basis of an examination of the national rule of law traditions and legal theory were categorised in the framework along the lines of *formal*, *procedural*, and *institutional* elements. It was demonstrated in the first part of this thesis that to the first category belong those elements that are concerned with the qualifications for the validity and quality of law itself, encapsulated by the notion of legality. However, in order for the rule of law to exist, those laws must be applied and enforced in a way that is procedurally just, and, moreover, in a judicial system that effectively supports their application. Therefore, to the second category belong those elements that have to do with the procedures of how the law is applied in practice, including impartiality, efficiency, and access to justice. Finally, the analysis undertaken in the first part showed that for a state to function under the rule of law some form of the doctrine of the separation of powers must be established. Moreover, the point was made that legal scholars have concentrated their scrutiny of the rule of law on the ways of separation and the powers of one branch in particular, that of the judiciary. Consequently, the third category of institutional elements includes the notion of the separation of powers, with a particular emphasis on judicial independence. In this light, section 3.1. will focus on *formal* elements, section 3.2 on *procedural* elements, and section 3.3 will cover the *institutional* elements of the rule of law.

#### 3.1 Formal elements of the rule of law

The present section is concerned with the examination of the EU's practice in its enlargement policy in relation to the principle of legality. The main argument advanced here is that, in line with the findings in the case study on development cooperation, the EU has little consideration for the element of legality in its conceptualisation of the rule of law in enlargement. It will be argued that the examination of the legal framework and the Copenhagen related policy documents shows that the Union not only values *institutional* aspects of the rule of law over *formal* ones, but also that the demands of legal approximation in combination with the qualitative methodology underlying the enlargement policy actually threaten formal elements such as stability and the coherence of law.

To this end, the section is divided into three subsections. Subsection one will focus on the definition of the rule of law proffered in Europe Agreements concluded with the countries in central and Eastern Europe, the Association Agreements with Cyprus, Malta, and Turkey, the Stabilisation and Association Agreements underlying the EU's relations with the countries in South-eastern Europe, as well as the financial framework pertaining to the enlargement policy. It will be shown that the earlier Europe and

Association Agreements provide little towards the EU's definition on the rule of law. Moreover, while the Stabilisation and Association Agreements expressly include support for the rule of law as an aim of association, it will be demonstrated that the areas of cooperation listed are again only *institutional* in nature, thereby neglecting the formal element of the rule of law. It will furthermore be argued that the financial framework underpinning the EU's enlargement policy provides a similar picture, whereby the early Regulations underpinning the Europe Agreements, such as PHARE, do not expressly include the rule of law, and the later financial Regulations covering the countries in South-eastern Europe offer financial aid for *institutional* rule of law reform, legislative approximation, and capacity building.

Subsection two will then continue by testing these findings against the policy's main documents, including the Enlargement Strategy's and the annual regular/progress reports. It will be argued that the Copenhagen documents confirm the *institutional* focus of the legal framework, with little attention for the rule of law's formal element of legality. However, it will also be shown that the EU's demands for legislative approximation in combination with the accession methodology has led to a quantitative approach, whereby alignment with the *acquis* is described in terms of quantity, not quality. In the third subsection it will be demonstrated that the EU's quantitative approach, whereby progress assessment of the implementation of the *acquis* is measured on the basis of numbers rather than on the basis of legislative quality, has given rise to problems of legality at the domestic level, including stability, coherence, and compliance. It will be shown that even though there is growing evidence that for law to be effective local 'adaptation' is preferred over 'adoption', the nature of the *acquis* is such that it precludes alterations by the applicant states, thereby leaving little to no room for considerations of the quality of the transposed laws within the overall domestic legal framework. Moreover, the literature confirms the findings of the preceding subsections that the EU's 'more is better' mindset encourages a quantitative assessment to the detriment of legality and its requirements for the quality of law.

### 3.1.1 *The lack of formal legality in the legal framework underpinning enlargement*

The EU's legal framework for enlargement (Article 49 TEU, including the Copenhagen criteria, the bilateral agreements underpinning the relations with the applicant countries, and the financial framework) offers limited insight into the element of formal legality. While Article 49 TEU, without further elaboration, refers to Article 2 TEU and the European council conclusions, including the Copenhagen criteria, the latter merely provides that in order to become a Member State, the candidate country has achieved 'stability of institutions guaranteeing ... the rule of law....' As discussed in the section on the EU's toolbox for enlargement,<sup>163</sup> the Europe Agreements,

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163 See section 2.3.

as well as the Association Agreements covering the relations with Cyprus, Malta, and Turkey, did not provide much clarity on the notion's understanding, merely mentioning the significance of the rule of law for the political system of the candidate countries in the Preamble.

In this respect, the Stabilisation and Association Agreements are slightly more illuminating. Incorporating support for the strengthening of the rule of law as a principal aim of the association, the agreements thereupon place the rule of law under the Title on 'Justice and Home Affairs' or, in the later agreements, 'Justice, Freedom and Security', the relevant provision of which lists a number of rule of law elements as the aims of cooperation. In line with the heading of the Article, namely, 'Reinforcement of institutions and the rule of law', the included elements comprise the quality and functioning of the institutions involved in the judicial sector, such as the judiciary, the police and other enforcement bodies.<sup>164</sup> As such, the Article closely follows the formulation of the Copenhagen political criteria of 'stability of *institutions*' guaranteeing the rule of law. As demonstrated by the formulation of this particular provision, the institutional focus does not include a reference to the quality requirements for law itself.

It has to be mentioned that, notwithstanding this institution-centric interpretation of the rule of law, there is one reference in the later SAAs to a particular requirement of legality, namely, stability. The 'strengthening of the rule of law in the business area through a stable and non-discriminatory trade-related legal framework',<sup>165</sup> is incorporated as a particular goal in the context of cooperation in the area of economic and trade policy. However, considering the consensus among legal philosophers on the relevance of the requirements of formal legality, it would be expected that stability is a desired quality of the entire legal framework, not merely of the trade area. It should be recalled that stability of the legal framework features prominently as a rule of law requirement put forward by Fuller and most other legal philosophers. After all, as it was argued in chapter 2,<sup>166</sup> in the absence of both stability and predictability in law, citizens have difficulty managing their affairs effectively, putting law's guiding function under pressure. Moreover, legal stability also has moral value insofar as it assures that like cases will be treated equally. Therefore, particularly in the context of the enlargement policy with its heavy emphasis on the implementation of the entire EU *acquis*, the issue of stability of the legal framework would be expected to be especially pertinent. After all, both the Europe Agreements and the Stabilisation and Association Agreements stipulate that the major

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164 See for example Article 80 of the Stabilisation and Association Agreement with Serbia.

165 See Article 87 of the Stabilisation and Association Agreement with Albania; Article 89 of the Stabilisation and Association Agreement with Montenegro; Article 89 of the Stabilisation and Association Agreement with Serbia; Article 87 of the Stabilisation and Association Agreement with Bosnia and Herzegovina; Article 94 of the Stabilisation and Association Agreement with Kosovo.

166 See chapter 2, section 3.2.

precondition for the applicant countries' economic integration into the Community, now Union, is the approximation of the existing and future legislation to that of the EU.<sup>167</sup>

However, examination of the reports confirms the initial findings on this requirement. In line with the Stabilisation and Association Agreements, the basic statement made in the reports is that weaknesses in the judiciary and subsequent lack of stability, or legal certainty, hamper a fully functioning market economy.<sup>168</sup> For example, in the 2009 Progress Report on FYROM, the Commission offers that 'in general, legal procedures are still slow and sometimes the quality of court decisions is low. This is continuing to have a negative impact on legal certainty and is impeding the proper functioning of market mechanisms, with an adverse impact on the business environment and the country's attractiveness to foreign investment.'<sup>169</sup>

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167 See for example Article 68 of the Europe Agreement with Poland. According to Article 69, the approximation of laws would extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport, and the environment. Later Europe Agreements have added other areas such as insurance law, rules on public contracts and public procurement, nuclear law and regulation, telecommunications, public procurement, statistics, product liability, labour law, and entrepreneurial law. See for example the Europe Agreements with Lithuania, Latvia, and Estonia respectively.

For the SAAs, see for example 72(1) of the Stabilisation and Association Agreement with Montenegro, which states that: 'The Parties recognize the importance of the approximation of the existing legislation in Montenegro to that of the Community and of its effective implementation. Montenegro shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*. Montenegro shall ensure that existing and future legislation will be properly implemented and enforced.'

168 2005 Progress Report Croatia, p. 80; 2005 Progress Report Kosovo, p. 57; 2006 Progress Report Bosnia and Herzegovina, p. 25; 2006 Progress Report Croatia, p. 28; 2006 Progress Report Former Yugoslav Republic of Macedonia, p. 21; 2007 Progress Report Former Yugoslav Republic of Macedonia, p. 22; 2008 Progress Report Former Yugoslav Republic of Macedonia, p. 26; 2008 Progress Report Albania, p. 22; 2008 Progress Report Kosovo, p. 37; 2009 Progress Report Bosnia and Herzegovina, p. 35; 2009 Progress Report Montenegro, p. 24; 2010 Progress Report Croatia, p. 29; 2010 Progress Report Former Yugoslav Republic of Macedonia p. 30; 2011 Progress Report Albania, p. 37; 2011 Progress Report Croatia, p. 28; 2013 Progress Report Bosnia and Herzegovina, p. 31; 2013 Progress Report Former Yugoslav Republic of Macedonia, p. 46; 2014 Progress Report Albania, p. 45; 2014 Progress Report Former Yugoslav Republic of Macedonia, p. 11; 2014 Progress Report Serbia, p. 45; 2015 Report Serbia, p. 53; 2016 Report Bosnia and Herzegovina, p. 42; 2016 Report Serbia, p. 16.

169 2009 Progress Report Former Yugoslav Republic of Macedonia, p. 28. Also see Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649, 8 November 2006, p. 25; Commission Communication on Enlargement Strategy and Main Challenges 2007-2008, COM(2007) 663 final, 6 November 2007, p. 38; Commission Communication on Enlargement Strategy and Main Challenges 2008-2009, COM(2008) 674 final, 5 November 2008, p. 39; Commission Communication on Enlargement Strategy and Main Challenges 2010-2011, COM(2010) 660, 9 November 2010, p. 38.

Furthermore, while in the later enlargement strategies legal certainty is described as an outcome of the strengthening of the rule of law, it remains firmly entrenched only as a requirement for the proper functioning of the business environment.<sup>170</sup> Apart from this very singular interpretation of this particular requirement of legality, presented in the specific legal framework of the SAAs, it can, at this point, merely be concluded that the element of legality is not a predominant feature in the EU's conceptualisation of the rule of law in enlargement. Further examination of the financial framework underpinning enlargement seems to substantiate this conclusion.

As already outlined above, the original PHARE Regulation and the Regulations relating to the accession partnerships do not provide further clarity on the rule of law elements the applicant states are expected to comply with.<sup>171</sup> Even though the provision of aid is linked to respect of the commitments contained in the Europe Agreements/ Association Agreements and to progress towards fulfilment of the Copenhagen criteria, from the above examination it is clear that neither bring further detail to the table in terms of insight into the EU's understanding of the rule of law in this context. Where the rule of law is mentioned, for example in the Coordinating Regulation in its reorientation of the PHARE Regulation, it again closely follows the formulation of the Copenhagen political criteria by stating that funding under the PHARE Programme shall focus on the main priorities for the adoption of the *acquis*, which is then phrased in terms of 'building up the administrative and institutions capacities of the applicant States...'.<sup>172</sup>

The same institutional focus of rule of law reform can be observed in relation to the Western Balkans in the aims of cooperation of the CARDS Regulation.<sup>173</sup> Similarly, the second Instrument for Pre-accession Assistance (IPA II) Regulation and its predecessor stipulate that assistance should be programmed and implemented, *inter alia*, in relation to institution- and

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170 According to the 2015 Strategy, '[t]he rule of law and economic development can be seen as two sides of the same coin. Strengthening the rule of law increases legal certainty, encourages and protects investment and contributes significantly to supporting economic development and competitiveness. Conversely, economic reforms and integration have the capacity to stabilise countries in the longer term.' Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015, p. 5. Further see, Commission Communication on Enlargement Strategy and Main Challenges 2013-2014, COM(2013) 700 final, 16 October 2013, p. 6; Commission Communication on Enlargement Strategy and Main Challenges 2014-2015, COM(2014) 700 final, 8 October 2014, p. 10.

171 See for example Article 6 of Regulation (EC) No 555/2000 on the pre-accession strategy for Cyprus and Malta which stipulates that: 'Where an element that is essential for continuing to grant pre-accession assistance is lacking, in particular when the commitments contained in the Association Agreements are not respected and or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to any pre-accession assistance granted to Cyprus or Malta.'

172 Article 2(3) Regulation (EC) No 1266/99.

173 Article 2(3) Regulation (EC) No 2666/2000.

capacity building.<sup>174</sup> However, where the CARDS Regulation at least considered the generic legislative angle next to the strengthening of institutional capacity by stipulating that assistance should *inter alia* be for ‘the creation of an institutional and *legislative framework* to underpin ... the rule of law...’,<sup>175</sup> this component has disappeared in the later financial instruments for pre-accession assistance. Moreover, the reference in the CARDS Regulation to the ‘strengthening of legality’,<sup>176</sup> inserted almost as an afterthought under the aims of cooperation in the same section that includes the rule of law and without further elaboration, has not been transposed to the later framework of the IPA Regulations.

After having examined the legal framework, it can be concluded that the EU’s understanding of the rule of law in enlargement does not consider formal legality as a main component. While the requirement of stability is put forward in the Stabilisation and Association Agreements in relation to the business environment, it is not regarded as a focal element for the overall legislative framework. Against this backdrop, the next section will focus on the Union’s implementation of this framework through the relevant Copenhagen related documents, including the Commission’s enlargement Strategies and the annual progress reports.

### 3.1.2 *The lack of the element of formal legality in the Copenhagen criteria related documents in the light of the EU’s quantitative approach*

Exploring the relevant documents, it appears that the Commission has attempted to create the impression of having constructed a pre-accession procedure that examines not just law in the books, but, rather, rule of law in action. For example, in the very first composite paper, the Commission stressed that concerning democracy and the rule of law it has looked at ‘the way democracy functions in practice instead of relying on formal descriptions of the political institutions.’<sup>177</sup> In 2010, then EU enlargement Commissioner Füle, during his presentation of the yearly Enlargement strategy, underscored that: ‘The EU expects a convincing track record in

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174 Article 3(1)(a) Regulation (EU) No 231/2014. According to the overall institutional approach, the specific objectives pursued under the Regulation framed the rule of law in terms of an independent and efficient judiciary as well as capacity-building measures for improving law enforcement, see Article 2. For the previous IPA Regulation see Article 3(1)(a) Regulation (EC) No 1085/2006. Also see paragraph 13 of its Preamble, which states that: ‘Assistance for candidate countries as well as for potential candidate countries should continue to support them in their efforts to strengthen democratic institutions and the rule of law... and it should therefore be targeted at supporting a wide range of institution-building measures.’ [emphasis added]

175 Article 2(2)(b) Regulation (EC) 2666/2000 [emphasis added].

176 *Ibid.*

177 Commission Composite Paper on progress towards accession by each of the candidate countries, COM(98) 712 final, 17 December 1998, p. 3.

the fulfilment of these benchmarks, in particular regarding judiciary and fundamental rights. Accession negotiations do not simply involve ticking boxes about legislative approximation. Countries must build a credible track record of reform and implementation, in particular in the area of rule of law.<sup>178</sup> This suggests that the European Union in its enlargement policy has not merely adopted an approach towards its rule of law reform that would focus on creating functioning institutions, the adoption of EU legislation and a quantitative progress analysis thereof during the pre-accession process, but a process that examines the quality of laws, of how law is applied in practice and of how law both guides peoples behaviour and sets the boundaries for institutions. However, already just one paragraph further down in the same 1998 composite paper, the Commission couched what needs to change in the applicant countries in purely *institutional* terms by stating that in the area of the rule of law '[a] common problem for all the candidate countries remains the inherent weakness of the judiciary, from the training of judges to procedural reforms aimed at overcoming excessive delays in court cases.'<sup>179</sup>

This institutionally oriented approach towards the rule of law is confirmed in the later Enlargement Strategies, for example in 2001 when the Commission remarked on the progress achieved by the applicant countries so far: 'Further progress was made in reforming and strengthening the judicial system, as a vital element in ensuring respect for the rule of law and in the effective enforcement of the *acquis*.'<sup>180</sup> Similarly, the 2006-2007 Strategy states that the Commission 'will pay particular attention to the establishment of the structures needed to ensure the rule of law. This includes administrative and judicial capacity...'<sup>181</sup> Also on the level of the individual candidate states the implementation of the *acquis* is formulated with reference to effective implementation capacity, as evidenced, for example, by the following in relation to Bulgaria:

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178 Stefan Füle, European Commissioner for Enlargement and the Neighbourhood Policy, 'Press point on enlargement package', SPEECH/10/639, 9 November 2010, available at: [http://europa.eu/rapid/press-release\\_SPEECH-10-639\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-10-639_en.htm).

179 Commission Composite Paper on progress towards accession by each of the candidate countries, COM(98) 712 final, 17 December 1998, p. 3.

180 Commission Strategy Paper & Report on the progress towards accession by each of the candidate countries 'Making a Success of Enlargement, COM(2001) 700 final, 13 November 2001, p. 10. See also Commission Enlargement Strategy Paper & Report on progress towards accession by each of the candidate countries, COM(2000) 700 final, 8 November 2000, p. 17; Commission Strategy Paper & Report on the progress towards accession by each of the candidate countries – Making a Success of Enlargement, COM(2001) 700 final, 13 November 2001, p. 12.

181 Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649 final, 8 November 2006, p. 22.

Overall, Bulgaria has now achieved a reasonable degree of alignment with the *acquis* in the large majority of areas. It is also on track in developing adequate administrative capacity to implement the *acquis* in a considerable number of fields. Bulgaria has established most of the necessary institutional structures. Nevertheless, in some sectors, further efforts and resources are required to strengthen the capacities of these institutions and to ensure their effective functioning.<sup>182</sup>

More importantly, in relation to the element of formal legality, as the above example shows, alignment with the *acquis* and changes made to domestic legislation are described in terms of quantity, not quality. Legal approximation, that is the harmonisation of national legislation to the Union's *acquis*, is a critical component of the pre-accession process; alignment leads to credibility of reforms, and, thus to progress in the arduous and lengthy transition process in candidate countries to make them fit for accession. The logic behind this process assumes that the EU model brings with it a comprehensive quality and density of regulation that is superior to the existing legislation in the applicant states. Thus, according to Commission officials, 'adopting the EU *acquis*, irrespective of any imperfections, would still represent an improvement over the status quo.'<sup>183</sup> Indeed, the *acquis* comprises a ready-made corpus of rules that needs to be accepted *en bloc*,<sup>184</sup> and which will be difficult to develop in the absence of effective domestic policy-making and legislative processes.<sup>185</sup> Accordingly, the Commission sets the transposition of and the alignment with the *acquis* in all areas of EU law as the short and medium-term objectives in the Accession Partnerships.<sup>186</sup>

Inevitably, this approach encourages the setting of benchmarks and an appraisal of progress on the basis of a quantitative evaluation of transposed legislation. Indeed, progress is measured 'on the basis of decisions actually taken, legislation actually adopted, international conventions actually ratified (...) and measures actually implemented.'<sup>187</sup> In other words, according to the Commission, progress is measured on what is actually happening on

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182 Commission Communication on 2005 Enlargement Strategy Paper, COM(2005) 561 final, 9 November 2005, p. 10.

183 Michaela Dodini & Marco Fantini 'The EU Neighbourhood Policy: Implications for Economic Growth and Stability' 44 *Journal of Common Market Studies* (2006), pp. 507-532 at 513-514.

184 Guy Harpaz & Lior Herman 'Approximation of Laws by Non-EU Countries to the EU *Acquis*' 9 *European Journal of Law Reform* (2007), pp. 357-360 at 357.

185 Andreas Herdina 'Approximation of Laws in the Context of the European Neighbourhood Policy' 9 *European Journal of Law Reform* (2007), pp. 501-504.

186 See for instance the 1999 Accession Partnership with Hungary, which requests for example the complete transposition and enforcement of legislation in the area of nature protection under the environmental chapter. Similarly, the 2002 Accession Partnership with Poland stipulates that the country continue its legal alignment in the field of transport, while taking into account the latest developments.

187 See for example the Commission's description and justification of its methodology in the 2002 Report on Slovenia, p. 9.

the ground and not just on the basis of promises made by the negotiating partners. However, the analysis in the annual progress reports and remarks made in the annual reports of the financing instruments,<sup>188</sup> show that this has led to a quantitative approach of crunching data and numbers. For instance, in the 2000 Regular Report on Romania's progress towards accession it is mentioned that '[i]n 1999, only 59 of the 453 draft laws, ordinances and emergency ordinances submitted to Parliament were adopted by the end of the year. This represents a significant decrease in comparison to previous years.'<sup>189</sup> In a similar fashion, Turkey's 2005 Regular Report states that '[a]fter the intensive reforms of the previous two years, Parliament continued its regular legislative work. A total of 184 draft laws have been submitted to Parliament since October 2004. Between October 2004 and June 2005 Parliament adopted 166 new laws.'<sup>190</sup> The 2018 reporting round show that the Commission still relies on its quantitative approach albeit not only in terms of critique; the increase of legislative output is praised<sup>191</sup> as much as the slowdown of reform pace is criticised.<sup>192</sup>

The reports also demonstrate that, in the essentially top-down EU driven process of legal approximation, compliance with the *acquis* is equated with success in legal reform.<sup>193</sup> However, measuring the outcome of law transplants in terms of compliance is an 'over-simplification', which remains short of capturing the reality of legal change.<sup>194</sup> While the enlargement success story of the fifth enlargement round comports with quantitative studies examining the behaviour of new members – finding that they transpose and comply with EU law at rates similar to older Member States,<sup>195</sup> in contrast, qualitative studies talk of a 'world of dead letters'<sup>196</sup>

188 The annual reports on the PHARE Regulation in particular discuss progress of the candidate states in terms of 'the momentum reached in transposing legislation' and 'significant progress in legislative harmonization', see for example Commission Report on The Phare Programme – Annual Report 1998, COM(2000) 183 final, 31 March 2000, p. 25; Commission Staff Working Paper Annex to the 2002 Report on Phare and the pre-accession instruments for Cyprus, Malta and Turkey, SEC(2003) 910, 11 August 2003, p. 26.

189 2000 Romania Regular Report, p. 15.

190 2005 Turkey Progress Report, p. 10.

191 2018 Albania Report, p. 9; 2018 Former Yugoslav Republic of Macedonia Report, p. 11.

192 2018 Bosnia and Herzegovina Report, p. 4.

193 Rilka Dragneva 'CIS Model Legislation and its Contribution to Company Law Reform and Harmonization' in Rilka Dragneva (ed) *Investor Protection in the CIS: Legal Reform and Harmonization* Leiden: Martinus Nijhoff (2007), pp. 1-44 at 1-2.

194 Randall Peerenboom 'What Have We Learned about Law and Development? Describing, Predicting, and Assessing Legal Reforms in China' 27 *Michigan Journal of International Law* (2006), pp. 823-871 at 834-836.

195 Ulrich Sedelmeier 'Is Europeanisation Through Conditionality Sustainable? Lock-in of Institutional Change after EU Accession' 35 *West European Politics* (2012), pp. 20-38; Bernard Steunenbergh & Dimitar Toshkov 'Comparing Transposition in the 27 Member States of the EU: The Impact of Discretion and Legal Fit' 16 *Journal of European Public Policy* (2009), pp. 951-970.

196 Gerda Falkner, Oliver Treib & Elisabeth Holzleithner *Compliance in the Enlarged European Union: Living Rights or Dead Letters?* Surrey: Ashgate (2008).

– pointing to problems of legality<sup>197</sup> as well as issues of compliance.<sup>198</sup> The EU's 'more is better' mindset<sup>199</sup> in combination with conditionality and the compliance paradigm has led to a methodology that emphasises quantity over quality, whereby no consideration is given to legality's requirements at the domestic level. As it will be shown in the next section, there is growing evidence that the quantitative approach followed by the EU in actual fact often undermines the element of legality by not considering the requirements for the quality of laws at the domestic level.

### 3.1.3 *The quantitative approach in enlargement and problems with the element of legality*

The previous section confirmed that the element of legality does not form part of the conceptualisation of the rule of law in enlargement, thereby corroborating the conclusion reached on the basis of the examination of the legal framework. In this section it will be shown that the quantitative progress analysis of the implementation of the *acquis* and the concomitant changes to domestic legislation adopted by the Commission comes with a specific set of problems that actually undermine legality. It is submitted that in combination with the speed of reforms,<sup>200</sup> the demonstrable struggle of the applicant countries with administrative and judicial capacity, and the necessity of establishing a 'solid track record', the demand for more laws has potentially fostered legal inflation, instability, lack of generality of law, as well as problems of enforcement.<sup>201</sup>

197 Marko Kmezić *EU Rule of Law Promotion – Judiciary Reform in the Western Balkans* London: Routledge (2017); Martin Mendelski 'The EU's Pathological Power: The Failure of External Rule of Law Promotion in South Eastern Europe' 39 *Southeastern Europe* (2015), pp. 318-346; Martin Mendelski 'The EU's Rule of Law Promotion in Central and Eastern Europe: Where and Why Does It Fail, and What Can be Done About It?' *Bingham Centre for the Rule of Law Global Rule of Law Exchange Papers* (2016); Martin Mendelski 'Europeanization and the Rule of Law: Towards a Pathological Turn' 40 *Southeastern Europe* (2016), pp. 346-384.

198 Jonathan B. Slapin 'How European Union Membership can Undermine the Rule of Law in Emerging Democracies' 38 *West European Politics* (2015), pp. 627-648.

199 Mendelski (2016b), p. 11.

200 Also coined the 'hasty transplant syndrome', explained by Grabbe in the context of the countries in central and Eastern Europe: 'It took Greece well over a decade to adapt to the EU's single market norms. By contrast, prospective CEE members are expected to have oriented their institutions and policies to the EU prior to membership, which means less than a decade in practice. Moreover, they have done so from a much lower starting-point and with very limited scope for negotiating transitional periods.' Heather Grabbe 'Europeanisation Goes East: Power and Uncertainty in the EU Accession Process' in Kevin Featherstone & Claudio M. Radaelli (eds) *The Politics of Europeanization* Oxford: Oxford University Press (2003), pp. 303-330 at 306.

201 For empirical evidence on these so-called 'pathologies of Europeanization' see Mendelski (2016a), pp. 353-357.

The Commission has recognised, in a number of reports throughout the years, that there are problems of legislative quality arising from the tension between the need to attain the agreed to targets and the impact on the quality of the implemented legislation at the domestic level. For example, FYROM's 2007 Progress Report states: '[A] backlog of EU-related legislation built up in the second half of 2006. The government, in pursuit of its stated objective of having all the legislation for 2006 and 2007 adopted by the end of the summer, stepped up its efforts on legislative drafting. It managed to catch up partially, but without always giving sufficient attention to *the quality and enforceability of legislation*.'<sup>202</sup> Moreover, lack of expertise on EU issues at the domestic level may also hamper the harmonisation of legislation, as evidenced for example by the 2007 Progress Report on Albania in which it is stated that '[t]he level of expertise available to the parliament, including on EU integration issues, remains low. This is reflected in the quality of legislation.'<sup>203</sup>

Furthermore, because of the quantitative agreements underlying the adoption of the *acquis*, minority governments often need to resort to other legislative options in order to ensure that targets are met, thereby severely undermining the stability of the law. For example, since the ruling coalition lost its majority in Romania in 2000, one of the mechanisms used by the government to bypass this has been the issuing of ordinances and emergency ordinances. These ordinances enter into force immediately and only need retrospective approval by the Parliament. However, while the Commission on the one hand pushes for more 'progress', on the other hand Romania's 2000 Report continues to state that this practice is a matter of concern 'since legislation can be adopted before adequate consultation has taken place and because Parliament's powers to modify or reject the ordinances, without a time limit being set for the examination of the ordinances, can lead to legislative instability.'<sup>204</sup>

Moreover, it is acknowledged that hasty adoption and the subsequent lack of quality can also lead to problems further down the road, as demonstrated by the Progress Reports on FYROM. In 2011 the Constitutional Court increased the number of annulments of new legislation by 5% to nearly 30% of all laws.<sup>205</sup> In 2014, this trend showed no sign of diminishing with visible complications for the coherence of the legal framework: 'The

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202 2007 FYROM Progress Report, p. 7 [emphasis added]. Also see 2018 Kosovo Report, p. 7.

203 2007 Albania Progress Report, p. 6. See also Serbia's 2009 Progress Report, which highlights a related problem: 'There has been increased legislative output from the parliament. There is, however a need to improve ex ante compatibility checks with EU standards before legislation is adopted. There has, moreover, been insufficient public consultation on content and impact of draft laws.' 2009 Serbia Progress Report, p. 7.

204 2000 Romania Regular Report, p. 15. In a similar vein, the Commission has criticised FYROM's and Serbia's use of the shortened/urgent legislative procedure, see 2018 FYROM Report, p. 12; 2018 Serbia Report, p. 6.

205 2011 FYROM Progress Report, p. 11.

number of constitutional challenges received and handled annually remains on par with previous years, but there still have not been any steps taken to improve legal certainty as regards legislation which has been annulled due to unconstitutionality, and this often creates gaps in the legal framework.<sup>206</sup> In addition to this, the reports frequently mention that monitoring implementation<sup>207</sup> and compliance<sup>208</sup> of new legislation with the *acquis* remains a difficult task.

The acknowledgement that the legal approximation process undertaken by the candidate states has led to questionable developments in relation to the requirements of formal legality such as stability, generality, and coherence,<sup>209</sup> has recently gained traction in political science literature but has so far not been recognised in legal literature. Political science scholarship has been building on the critical law and development literature and the growing realisation that 'law is not a kitchen appliance that we can unplug in the United States or Germany and simply plug in again in Russia,'<sup>210</sup> and that introducing the right laws is insufficient to create incentives for the correct behaviour in developing and transition countries.<sup>211</sup> Generally speaking, for law to be effective, it must be meaningful in the context in which it is applied so citizens have the incentive to use the law and institutions will enforce and develop the law. Moreover, information about the existence of a norm and its contents is a prerequisite for any impact of the law beyond a shelf life.<sup>212</sup> In addition to this, judges, lawyers, politicians, and other legal intermediaries that are responsible for developing the law 'must be able to increase the quality of law in a way that is responsive to demand for legality.'<sup>213</sup> Interestingly, the origin of the law *per se* is not necessarily the crux of the problem, rather, complications stem from 'law reform processes that generally do not permit users to participate in adapting the draft – whatever its origin – to local conditions. ... Lack of local input, not transplantation is the problem.'<sup>214</sup> After all, legal rules must

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- 206 2014 FYROM Progress Report, p. 5. The problem of gaps in the legislative framework is a recurring worry across various reports, see for example the 2013 Bosnia and Herzegovina Progress Report, p. 20; 2016 Kosovo Report, p. 28.
- 207 2016 Montenegro Report, p. 5.
- 208 2016 Albania Report, p. 7; 2016 Turkey Report, p. 15; 2004 Turkey Regular Report, p. 160.
- 209 See the work undertaken by Mendelski and Slapin.
- 210 Stephen Holmes 'Can Foreign Aid Promote the Rule of Law?' *68 East European Constitutional Review* (1999), pp. 68-74 at 71.
- 211 Rilka Dragneva & Kataryna Wolczuk 'EU Law Export to the Eastern Neighbourhood' in Paul James Cardwell (ed) *EU External Relations Law and Policy in the Post-Lisbon Era* The Hague: T.M.C. Asser Press (2012) pp. 217-240 at 220.
- 212 Katharina Pistor 'The Standardization of Law and its Effect on Developing Economies' *G-24 Discussion Paper* No. 4 (2000), p. 8.
- 213 Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard 'Economic Development, Legality and the Transplant Effect' *47 European Economic Review* (2003), pp. 165-195 at 167.
- 214 Wade Channell 'Lessons not Learned about Legal Reform' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad – In Search of Knowledge* Washington: Carnegie Endowment for International Peace (2006), pp. 137-159 at 140.

be understood to be effective; something that is a serious constraint for legal transplantation since the meaning of legal statements is a function of social norms, not of the speaker's intentions.<sup>215</sup> Accordingly, because the impact of any law is ultimately determined by how it is understood by law makers, law enforcers, and law users at the receiving end,<sup>216</sup> domestic participation is indispensable.<sup>217</sup> Consequently, it is emphasised that 'adaptation' is preferred over 'adoption', *i.e.* without taking local conditions into account, attempting to use a pattern of law outside the environment of its origin entails the risk of rejection.<sup>218</sup> However, the EU's model is one of adoption rather than adaptation because of the specific nature of the *acquis*.

The *acquis* is a unifying concept that needs to ensure its self-preservation and continued coherent development.<sup>219</sup> Its rationale encompasses 'ensuring the continued coherence, integrity and viability of the Union edifice, by preventing incompatible foreign bodies from violating the communal corpus politikum.'<sup>220</sup> In scholarly literature on the nature of the *acquis*, there is general agreement on the fact that a legal order, which seeks to preserve its 'genetic code',<sup>221</sup> must refer to some type of acquired characteristics as 'guarantees of its integrity'.<sup>222</sup> The specific nature of the *acquis* has, by necessity, two corollaries. Not only is it a unifying Union concept, which, through its collective nature, should provide a shared standard for Member States and acceding states alike, it is, moreover, an objective standard over which

215 Cass R. Sunstein 'On the Expressive Function of Law' 144 *University of Pennsylvania Law Review* (1996), pp. 2021-2053 at 2050.

216 Pistor (2000), p. 8.

217 In the past decade, adaptation to local circumstances and taking into account existing legal tradition have increasingly been recognised as crucial elements of sustainable legal reform. See for example, Cheryl Gray 'Reforming Legal Systems in Developing and Transition Countries' 34 *Finance and Development* (1997), pp. 14-16; Dragneva (2007), p. 6.

218 Otto Kahn-Freund 'On Uses and Misuses of Comparative Law' 37 *Modern Law Review* (1974), pp. 1-27 at 27.

219 Amichai Magen 'Transformative Engagement through Law: The *Acquis Communautaire* as an Instrument of EU External Relations' 9 *European Journal of Law Reform* (2007), pp. 361-392 at 370. For an overview of the role of law the *acquis* throughout earlier enlargement rounds see Grabbe (1999), pp. 6-7. Further see José Luís da Cruz Vilaça *EU Law and Integration. 20 Years of Judicial Application of EU Law* Oxford: Hart Publishing (2014), pp. 34-35; Loïc Azoulay 'The *Acquis* of the European Union and International Organizations' 11 *European Law Journal* (2005), pp. 196-231; Antje Weiner 'The Embedded *Acquis Communautaire*: Transmission Belt and Prism of New Governance' in Karlheinz Neunreither & Antje Weiner (eds) *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* Oxford: Oxford University Press (2000), pp. 318-342; Horst Günther Krenzler & Michelle Everson 'Preparing for the *Acquis Communautaire*: Report of the Working Group on the Eastward Enlargement of the European Union' Robert Schuman Centre Policy Paper (1998) No. 6; Pierre Pescatore 'Aspects judiciaires de l'*acquis communautaire*' *Revue Trimestrielle de Droit Européen* (1981), pp. 617-651.

220 Magen (2007), p. 377.

221 Christine Delcourt 'The *Acquis Communautaire*: Has the Concept had its day?' *Common Market Law Review* 38 (2001), pp. 829-870 at 840.

222 Azoulay (2005), p. 197.

the EU has exclusive control.<sup>223</sup> Accordingly, it is projected by the EU not only as the 'right' legal template for development but also as the exclusive and comprehensive legal template from which deviations or opt-outs are not permitted for the aspiring Member States. However, this absence of the possibility of engagement limits from the outset its potential for becoming 'living law' in the applicant states.<sup>224</sup> Indeed, 'the effort to plough through reform blueprints ... resembles a form of dependent development, to the point of precluding the 'organic' development of accountable domestic policies.'<sup>225</sup> In the same vein, the suitability of the *acquis* can be questioned as a template for post-communist reforms during the enlargement preparations of the CEECs. The EU regulatory framework was never designed as a development agenda; instead the rules are the incremental result of negotiations, compromises, and agreements between the Member States over decades of European integration.<sup>226</sup> Thus, in the light of the critique and the Commission's own acknowledgement of the pathological effects, *i.e.* negative reinforcing effects, at the very least questions arise as to the extent to which the EU's method of legal approximation in the enlargement policy is bound to undermine legality by its very nature.

### 3.1.4 Conclusions

Despite the promises made by former Commissioner Füle, that the accession negotiations would not simply involve a ticking of boxes on the issue of legislative approximation, it was shown in this section that the accession framework is set up in such a way to do just that – with its emphasis on support for rule of law institutions and the quantitative progress analysis of the implementation of the *acquis*. Whereas it was shown in chapters 1 and 2 that the national concepts of the *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law, as well as legal theory place legality and its requirements of stability, coherence, generality, and congruence at the centre of their understanding of the rule of law, from the above examination it is clear that in enlargement, legality – in the sense of the quality of domestic laws – is not considered. In this way, the findings of the previous case study on the EU's development cooperation policy are confirmed here. Furthermore, apart from the fact that the requirements of legality are wholly neglected in the EU's understanding of the rule of law in development, on the basis

223 Next to these two features, Magen has identified three more characteristics of the *acquis*, that of aiding of bureaucratic coherence and Commission domain expansion in external relations; extraordinary rule scope, determinacy, and flexibility; and the *acquis'* instrumental nature through which intrusive change can be couched in technocratic, de-politicized language. Magen (2007), pp. 382-391.

224 Dragneva & Wolczuk (2012), p. 219.

225 Anna Grzymala-Busse & Abby Innes 'Great Expectations: The EU and Domestic Political Competition in East Central Europe' *17 East European Politics and Societies* (2003), pp. 64-63 at 66.

226 Grabbe (2003), pp. 306-307.

of careful analysis of the relevant Copenhagen documents, it was demonstrated that the nature of enlargement together with its methodology even has the potential of jeopardising the rule of law's formal element of legality in the applicant states. Consequently, by choosing quantitative progress analysis over qualitative scrutiny of the applicant states' headway in their process of legal approximation, the EU has put legality, and thus, the rule of law, at risk in the new Member States. The next section will continue the study into the *procedural* elements of the rule of law in enlargement.

### 3.2 Procedural elements of the rule of law

In the present section, the focus will turn to the *procedural* elements of the rule of law. Four elements will be presented here. First the section will tackle the issue of impartiality. In relation to this notion, it will be argued that the assessment of the Copenhagen related documents demonstrates its increasing importance, whereby the Commission's reporting has progressed from generic statements to providing actual guidance for improvement in this area. More particularly, it will be asserted that impartiality is perceived to consist of two sets of sub-elements. On the one hand, the legal framework, including the incorporation of international ethical standards, and the procedures for the internal organisation of courts can be distinguished. On the other hand, there is a subset of elements that highlights a particular aspect of impartiality, but only in the reports of a single country. However, it will also be demonstrated that in spite of the element's incremental importance, there is evidence of conceptual confusion between impartiality and judicial independence. It will be shown that impartiality is only infrequently addressed in its own right. Furthermore, even when it is, the presented analysis in the reports very often touches upon issues of independence, rather than impartiality, demonstrating a persistent level of conceptual indeterminateness.

Secondly, it will be argued that the pre-accession process shows that efficiency and quality of the judiciary, while not necessarily obstacles to accession, did become issues of major concern in the Commission's analysis of the functioning of the judiciary. It will be asserted that these topics have been considered as prime rule of law elements from the very beginning, not in the least because of the role of Member States courts in the application of EU law. It will be argued that the Commission has conceptualised procedural efficiency in terms of its underlying impediments, namely problems of enforcement, low clearance rates and backlogs, excessive length of proceedings, and lack of procedural legislation. However, it will also be shown that the Commission has not provided a standard for efficiency the applicant countries can introduce into their systems, leaving the countries sufficient space to introduce their own.

Thirdly, it will be asserted that the Copenhagen documents demonstrate that the Commission has taken a rather fragmented approach regarding the pivotal task of the judiciary, namely judicial reform. Whereas it was shown

in chapters 1 and 2 that judicial reform is related to the overall checks and balances between the three branches of government, the monitoring reports bear out the view that the focus is on the individual components of the judicial system, such as the establishment of courts and capacity-building, rather than on the judiciary's actual task and the functioning of the review process itself.

Fourthly, it will be shown that for the EU, access to justice is one of the preconditions in order to safeguard the right to a fair trial; a right, which the applicant countries as future Member States of the EU have to guarantee. More particularly, it will be asserted that access to justice is mainly interpreted to contain two aspects, namely access to court and access to legal aid. Furthermore, the section will also address the fact that the Copenhagen documents do not distinguish between access to justice as a rule of law or as a human rights element, evaluating the element in both sections, demonstrating the Commission's understanding of the interrelatedness of both notions in relation to this element. Finally, the section will conclude by asserting that, even though the monitoring reports evidence the inclusion of access to justice as a rule of law element, the Commission's general lack of critique in situations where there was little to no progress seems to suggest that access to justice does not fulfil a central role as a procedural element in the understanding of the rule of law in enlargement.

### 3.2.1 *The growing importance of the element of judicial impartiality*

In relation to the notion of impartiality it is manifest from the examination of the Copenhagen documents that its importance has increased over time. While references to the notion are scattered throughout the rounds of reports relating to the fifth enlargement, from 2005 onwards impartiality is clearly included as a rule of law element in Chapter 23 on the functioning of the judiciary and fundamental rights. Not only that, across the reporting rounds, reports have gone from including generic statements on the need for improvement, such as in the 2002 Regular Report on Slovakia which states that '[t]here is still concern about the level of professional impartiality and political neutrality amongst part of the judiciary',<sup>227</sup> to providing guidance on what should be done in order to enhance this particular element. To give an example of the latter, the 2010 Progress Report on Croatia discusses the ethnic bias against Serbs in local courts in the context of war crimes trials in domestic courts. The Report points to the existing problems but goes on to provide the solution in order to remedy the situation: 'Problems persist in certain localities. Insufficient use is being made of one powerful weapon

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227 2002 Slovakia Regular Report, p. 23. Also see for example the 2002 Turkey Report in which it is stated that '[s]ubstantially more work is needed to strengthen the impartiality and independence of the judiciary', without, however, any indication as to the criteria of improvement. 2002 Turkey Regular Report, p. 122.

for impartial prosecution of war crimes – the specialised courts, although an increased willingness to use this possibility is evident recently.<sup>228</sup>

Throughout the annual reports and the screening reports on Chapter 23 on the functioning of the judiciary in the countries in South-eastern Europe, two sets of sub-elements of the notion of impartiality can be distinguished. First, there is the subset of elements that includes the necessary legal framework underpinning impartiality. In the screening reports it is verified whether impartiality, or rather its outcome – equality before the law – is enshrined in the law.<sup>229</sup> In the analyses in the the annual reports it is checked whether or not the international framework on ethical standards has been implemented both for judges and prosecutors and whether there are effective mechanisms to monitor compliance.<sup>230</sup> The first subset furthermore includes rules dealing with the internal organisation of the courts in order to remove doubts as to the impartiality of judges and prosecutors, such as conflict of interest rules in combination with rules on asset declarations,<sup>231</sup> rules on the random allocation of cases,<sup>232</sup> and rules regulating the withdrawal/recusal,<sup>233</sup> disciplinary proceedings,<sup>234</sup> dismissal,<sup>235</sup> and disqualification.<sup>236</sup> Secondly, there is a subset of elements that highlights a particular aspect of impartiality, but only in the reports of specific countries: the prevention of ethnic bias in relation to war crimes in

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228 2010 Croatia Progress Report, p. 49.

229 Croatia Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 16473/07, 18 December 2007, p. 19; Iceland Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 12975/11, 19 July 2011, p. 4; Montenegro Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 17785/12, 14 December 2012, p. 20; Serbia Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 12003/14, 16 July 2014, p. 23.

230 See for example the 2005 Turkey Report: 'In order to raise awareness of international ethics standards, the High Council of Judges and Prosecutors disseminated the United National Bangalore Principles of Judicial Conduct to all judges and prosecutors.' 2005 Turkey Progress Report, p. 104. Further see 2006 Croatia Progress Report, p. 49; 2006 Turkey Progress Report, p. 58; 2008 Croatia Progress Report, p. 52; 2011 Albania Progress Report, p. 11; 2011 FYROM Progress Report, p. 58; 2014 Montenegro Progress Report, p. 37.

231 See for example 2007 Croatia Progress Report, p. 48; 2010 Croatia Progress Report, p. 47.

232 See for example 2011 Albania Progress Report, p. 11; 2011 FYROM Progress Report, p. 58; 2011 Montenegro Progress Report, p. 11; 2012 Serbia Progress Report, p. 10; 2013 Serbia Progress Report, p. 39; 2014 Montenegro Progress Report, p. 37; 2015 Albania Report, p. 13; 2015 Kosovo Report, p. 13; 2015 Turkey Report, p. 15; 2016 Albania Report, p. 15; 2016 Kosovo Report, p. 14.

233 See for example 2014 FYROM Progress, p. 40; 2014 Montenegro Progress Report, p. 37; 2015 FYROM Report, p. 13; 2015 Bosnia and Herzegovina Report, p. 13.

234 See for example 2008 FYROM Progress Report, p. 56; 2008 Croatia Progress Report, p. 51; 2010 Croatia Progress Report, p. 47.

235 See for example 2011 FYROM Progress Report, p. 58; 2013 FYROM Progress Report, p. 39.

236 See for example 2015 Bosnia and Herzegovina Report, p. 13; 2015 Montenegro Report, p. 13.

Croatia;<sup>237</sup> and the recurring issue of military judges in the civilian Constitutional Court,<sup>238</sup> as well as problems of subjective impartiality, *i.e.* public statements on cases made by members of the judiciary,<sup>239</sup> in Turkey.

However, in spite of the element's incremental importance, it has to be pointed out that across all the annual reports throughout the years, in relation to both the CEECs and the Western Balkans, there is evidence of conceptual confusion between impartiality and judicial independence. In a nutshell, the difference between the notions lays in the fact that judicial independence safeguards the judiciary against interference by state organs or private persons in the performance of judicial duties. This independent status in relation to others rests in objective conditions and involves both individual and institutional relationships, as reflected in such matters as the security of tenure and the institutional/administrative relationships to the legislative and executive branches of government, respectively.<sup>240</sup> In contrast, impartiality implies that judges must not harbour any preconceptions about the matters put before them, and that they must not act in ways that promote the interest of one of the parties;<sup>241</sup> it reflects the attitude of the tribunal in relation to the issues in a particular case. According to the case-law of the ECHR, the notion of impartiality contains both a subjective and an objective element; not only should 'no member of the tribunal holds any personal prejudice or bias', but the tribunal must also 'be impartial from an objective viewpoint', in that 'it must offer guarantees to exclude any legitimate doubt in this respect'.<sup>242</sup>

Even though the concepts are closely linked, more clarity could have been provided had assessment criteria on impartiality been articulated.<sup>243</sup> Almost always mentioned in the same breath as the latter,<sup>244</sup> impartiality is only infrequently addressed in its own right. Even when it is, the analysis very often touches upon issues of independence, rather than impartiality.

237 See for example 2005 Croatia Progress Report, p. 104; 2006 Croatia Progress Report, p. 49; 2010 Croatia Progress Report, p. 49.

238 See 2010 Turkey Progress Report, p. 13; 2011 Turkey Progress Report, p. 15.

239 2008 Turkey Progress Report, p. 67; 2009 Turkey Progress Report, p. 69; 2010 Turkey Progress Report, p. 13.

240 Council of Europe Report 'Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe', SG/Inf(2016)3 rev, 24 March 2016, pp. 7-10.

241 Human Rights Committee, Communication No. 387/1989 (*Karttunen v. Finland*), UN Doc. CCPR/C/46/D/387/1989, para. 7.2.

242 See for example ECtHR, *Daktaras v. Lithuania*, Appl. No. 42095/98, para. 30; ECtHR, *Morice v. France*, Appl. No. 29369/10, paras. 73-78.

243 For possible indicators, see for example the ECtHR's Guide on Article 6 of the European Convention on Human Rights, 31 December 2017, pp. 39-43, available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf).

244 See for example the 2003 Report on Cyprus: 'Under the constitutions judges are obliged to be impartial. They are independent from the government.' 2003 Cyprus Comprehensive Monitoring Report, p. 12-13. Similarly, in relation to Turkey: 'With regard to strengthening the impartiality and independence of the judiciary, no concrete steps can be reported.' 2002 Turkey Regular Report, p. 119.

For instance, in the 2011 report on Kosovo the question of a secure working environment for judges is raised: 'There are still reports of threats and intimidation against judges, especially in sensitive cases such as on property rights. This is a serious concern as regards impartiality of judiciary.' However, the report then continues by linking the need for a secure working environment to problems of judicial independence rather than impartiality, by stating that: 'Political interference in the work of the judiciary is still a concern.'<sup>245</sup> Similarly, the 2010 Report on FYROM examines the efforts the country has undertaken to combat corruption in order to ensure impartiality. However, in the same section the report proceeds with an analysis of the role of the Minister of Justice within the Judicial Council, which raises 'serious concerns about the interference of the executive power and political control in the work of the judiciary.'<sup>246</sup> As it will be demonstrated in more detail in section 3.3, the latter is much more concerned with the separation of powers and judicial independence than impartiality.

Thus, despite this procedural element's significance for the rule of law, and the common subset of elements found throughout the reports related to the countries in South-eastern Europe, the reports demonstrate a persistent level of conceptual indeterminateness. In this respect it is noteworthy that while the reports make mention of the international ethical standards, which, like the United Nations Bangalore Principles of Judicial Conduct, include a definition of impartiality,<sup>247</sup> the reports fail to present a particular EU definition of impartiality, or even discuss the existing European standards as set out by the European Court of Human Rights under Article 6 of the ECHR.<sup>248</sup>

### 3.2.2 *Judicial efficiency and quality as crucial elements underpinning the EU's procedural understanding of the rule of law*

Despite the fact that issues such as judicial impartiality and independence are often seen as the bedrock of a well-functioning judiciary, the pre-accession process shows that judicial efficiency and quality were, and are, at least as great a stumbling block for applicant countries to be able to guarantee procedural safeguards for the rule of law. It will be demonstrated that the elements of judicial efficiency and quality did become issues of major concern in the Commission's analysis of the functioning of the judiciary.

The legal foundation for the efficiency of the judicial process is stipulated in Article 6(1) ECHR and Article 47 of the Charter of Fundamental Rights. Article 6(1) ECHR reads that '[i]n the determination of his civil

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245 2011 Kosovo Progress Report, p. 12.

246 2010 FYROM Progress Report, p. 57.

247 See Value 2 of the UN Bangalore Principles of Judicial Conduct which outlines both a definition of the principle of impartiality and guidelines for its application,

248 See for example the ECtHR's standard formulation of judicial impartiality in Case ECtHR, *Micallef v. Malta*, Appl. No. 17056/06, paras. 93-101.

rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time...'.<sup>249</sup> In requiring cases to be heard within a reasonable time, the ECHR has underlined the importance of administering justice without delays which might jeopardise its effectiveness and credibility.<sup>250</sup> A growing caseload on the issue of 'reasonable time', *i.e.* the problem of extensive delays in court proceedings, against the member states of the Council of Europe has made this topic from the very beginning one of the prime rule of law elements to be considered in the EU's enlargement policy, not in the least because of the role of Member States courts in the application of EU law. After all, as highlighted in the Introduction, from the date of accession, the EU becomes dependent on the way the national courts of the new Member States function.<sup>251</sup> In fact, because of the doctrine of direct effect,<sup>252</sup> the obligation to refer,<sup>253</sup> as well as the principle of sincere cooperation,<sup>254</sup> the EU legal order as a whole, and the CJEU in particular, is dependent on their effectiveness. Moreover, for the principle of mutual trust between the Member States to operate, particularly in the light of a common and reliable Area of Justice,<sup>255</sup> a well-functioning effective judicial system is an essential requirement, indispensable for membership.<sup>256</sup>

249 The Council of Europe Committee of Ministers Recommendation No R(94) 12 on the Independence, Efficiency and the Role of Judges provides further clarification.

250 See for example Case ECtHR, *H. v. France*, Appl. No. 10073/82, para. 58; Case ECtHR, *Klatte Klitsche de la Grange v. Italy*, Appl. No. 12539/86, para. 61.

251 Dimitry Kochenov *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* The Hague: Kluwer Law International (2008), p. 228.

252 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

253 In relation to the preliminary ruling procedure, the Court has stated that the procedure 'requires the national court and the court of justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision.' Case 16/65 *Firma G. Schwarze v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1965] ECR 877.

254 As the Court ruled in *Unión de Pequeños Agricultores*, 'in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty [current Article 4(3) TEU], national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act. Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 42.

255 Daniela Piana 'New Legal Instruments in a Changing World: Legal Political and Cultural Developments in EU Judicial Cooperation' *International Spectator* (2012), pp. 49-66.

256 Commission Communication on Towards the Enlarged Union – Strategy Paper and Report of the European Commission on the Progress towards Accession by Each of the Candidate Countries, COM(2002) 700 final, 9 October 2002, p. 11. Cf. Opinion 2/13 *ECHR II*, EU:C:2006:81, 18 December 2014, para. 191.

From the outset, the conclusion must be drawn that from the early start of the pre-accession process both in the countries in central and Eastern Europe and in the countries of the Western Balkans, a wide array of issues of judicial effectiveness, such as lack of legislation on procedures, clearance rate and backlogs, enforcement, and length of proceedings, have hampered the judicial process. Indeed, the Commission's Opinion on the Slovenia's Application for Membership illustrates the Commission's analysis of the *status quo* at the beginning of the fifth enlargement round: 'The main problems facing the Slovenian judiciary are inefficiency and the amount of time it takes to hand down judgements: it can take up to five years before a civil case is brought before the courts. ... This situation should be improved as a result of the programme to equip courts with computers and the planned procedural reforms.'<sup>257</sup> The early regular and progress reports of the countries in both central and Eastern, and South-eastern Europe confirm this picture. Poland's 1999 Regular Report, for example, adds that '[a]lthough some progress has been recorded ... significant further efforts are expected... In particular, the level of enforcement of judicial decision and the length of judicial proceedings, particularly in commercial matters, require significant further improvements.'<sup>258</sup> Similarly, the 2005 Report for Croatia states that '[i]mproving the functioning of the judiciary remains a major challenge',<sup>259</sup> with little improvement in the problems highlighted in the Opinion, such as the inefficiency of courts, the excessive length of court proceedings, and difficulties with the enforcement of judgments. Furthermore, '[t]hese structural difficulties have contributed to an increase in the already very large backlog of cases before the Croatian courts, thus further weakening judicial capacity.'<sup>260</sup> Notwithstanding the fact that EU law was already applied by a number of courts in the candidate countries of central and Eastern Europe before accession,<sup>261</sup> it is clear from the reports that the issue of efficiency of judicial procedures has been at the focus of attention early on, and is a recurring issue in the pre-accession process of the Western Balkans. In order to understand their importance for the Commission's understanding of the rule of law in enlargement, the underlying obstacles to procedural effectiveness, namely problems of enforcement, low clearance rates and backlogs, excessive length of proceedings, and lack of procedural legislation, will be briefly sketched out and illustrated on the basis of the relevant Copenhagen documents below.

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257 Commission Opinion on Slovenia's Application for Membership of the European Union, COM(97) 2010 final, 15 July 1997, p. 14.

258 1999 Poland Regular Report, p. 15.

259 2005 Croatia Progress Report, p. 15.

260 *Ibid.*

261 See Albi's comprehensive assessment on this issue, Anneli Albi *EU Enlargement and the Constitutions of Central and Eastern Europe* Cambridge: Cambridge University Press (2005), pp. 52-56. Further Zdeněk Kühn 'European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central European Candidate Countries' *Croatian Yearbook of European Law and Policy* (2005), pp. 1-14.

Both the Accession Partnerships and the European Partnerships acknowledge concern over the effective enforcement of court decisions and, accordingly, it is among the main priorities in all rounds of partnerships.<sup>262</sup> The reports reveal that problems of enforcement afflict all levels of the judiciary, including the Constitutional Courts of candidate countries.<sup>263</sup> In order to address this problem,<sup>264</sup> the Commission recommended that court judgements be more effectively enforced, mostly through the introduction of the profession judicial executors or bailiff services,<sup>265</sup> including the adoption of relevant legislation on bailiffs ‘without delays’.<sup>266</sup>

In relation to the issue of backlogs of cases and the concomitant problem of length of proceedings, the 2013 Serbian Progress Report is exemplary for the situation throughout the years, across all the reports: ‘The size of the backlog of cases continue to raise concern. There are still major imbalances in the workload of judges and the length of proceedings remains excessive in many cases.’<sup>267</sup> Backlogs were and are found in all courts,<sup>268</sup> however, as Kochenov has pointed out in relation to the fifth enlargement, the judiciaries were quite unequally affected.<sup>269</sup> In some countries certain regions tended to be more overburdened than others;<sup>270</sup> while in other countries the majority of backlogs were concentrated at certain levels.<sup>271</sup> In the countries of the Western Balkans the same trend is visible,<sup>272</sup> including backlogs in particular courts.<sup>273</sup>

The fact that this problem is not so easily tackled, particularly in the light of the enlargement methodology, is demonstrated by the 2009 Croatian Report, which highlights that the overall backlog as well as the number of unresolved cases remains high. However, the report then addresses the fact that without more far-reaching reform, continued reduction might not be sustainable, ‘especially if judges have focussed on ‘easier’ cases to

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262 For the Accession Partnerships, see for example 1999 Accession Partnership Romania; 2002 Accession Partnership Estonia; 2002 Accession Partnership Latvia. For the European Partnerships, see for example, 2004 European Partnership Croatia; 2004 European Partnership Serbia and Montenegro including Kosovo.

263 1998 Slovakia Regular Report, p. 10.

264 See the 2009 Progress Report on the Situation in Croatia, in which it is stated that ‘problems with the enforcement of court rulings constitute a major obstacle to the efficiency of the judicial system.’ 2009 Croatia Progress Report, p. 52.

265 See for example, 2002 Czech Republic Regular Report, p. 23. On Bailiffs see for example 1999 Slovenia Regular Report, p. 59; 2000 Romania Regular Report, p. 92; 2001 Latvia Regular Report, p. 17; 2010 FYROM Progress Report, p. 57; 2013 Serbia Progress Report, p. 40; 2016 Albania Report, p. 40.

266 2002 Latvia Regular Report, p. 22. Cf. Montenegro 2013 Progress Report, p. 37.

267 2013 Serbia Progress Report, p. 9.

268 See for example 2016 Albania Report, p. 16.

269 Kochenov (2008), p. 291.

270 2000 Poland Regular Report, p. 17; 2002 Estonia Regular Report, p. 24.

271 1999 Hungary Regular Report, p. 12; 2001 Hungary Regular Report, p. 17.

272 See for example the 2013 Report on Serbia in which the backlog of the constitutional Court is of particular concern, 2013 Serbia Progress Report, p. 40.

273 2013 Montenegro Progress Report, p. 37.

meet output targets.<sup>274</sup> On the same topic, but from a different angle, both the reports on the countries in central and Eastern Europe, as well as the reports on the South-eastern European countries, address the problem of accurate data.<sup>275</sup> Without having provided a central definition of backlog,<sup>276</sup> the Commission questions the reliability of statistics and the soundness of the methods used, thereby even calling attention to the fact that this creates 'problems with the consistency of data and effective follow-up.'<sup>277</sup> Moreover, apart from providing an analysis of the yearly *status quo* on the basis of unclear data, the Commission has failed to shed light on what is an acceptable backlog situation and what is not. Furthermore, even though the reduction of backlogs is a concern in all rounds of Accession and European Partnerships,<sup>278</sup> it is still an issue at the time of the accession, as demonstrated by the Comprehensive Monitoring Reports.<sup>279</sup>

As a result of the persistent problem of backlogs, the issue of length of proceedings was, and still is, high on the agenda,<sup>280</sup> with the reports noting, more often than not, that 'the overall length of court proceedings from initiation to final judgment remains a concern'.<sup>281</sup> Not in the least because of the number of cases on the violation of the right to a speedy trial dealt with by the ECtHR.<sup>282</sup> By including in its analysis the case law of the latter, the Commission circumvented having to provide its own standards on this

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274 2009 Croatia Progress Report, p. 52.

275 See for example 2000 Estonia Regular Report, p. 16; 2001 Slovenia Regular Report, p. 17; 2002 Lithuania Regular Report, p. 23; 2008 Kosovo Progress Report, p. 14; 2009 Montenegro Progress Report, p. 11.

276 It should be pointed out that the Commission did not refer to the existing Council of Europe's Recommendation R (86) 12 of 16 September 1986 Concerning Measures to Prevent and Reduce the Excessive Workload in the Courts or Council of Europe Recommendation R(95) 12 of 11 September 1005 on the Management of Criminal Justice. It did, however, in the later reports on the Western Balkans, come back to this issue by referring to the Guidelines of the European Commission for the Efficiency of Justice (CEPEJ) and the instruction for collecting statistical data therein. See for example 2015 Report Montenegro, p. 51.

277 Montenegro 2011 Progress Report, p. 11.

278 See for example, 2002 Accession Partnership Estonia; 2002 Accession Partnership Latvia; 2008 Accession Partnership Croatia; 2006 European Partnership Bosnia and Herzegovina; 2006 European Partnership Serbia and Montenegro including Kosovo.

279 See for example 2003 Latvia Comprehensive Monitoring Report, p. 12; 2012 Croatia Comprehensive Monitoring Report, p. 6.

280 The Commission regularly pointed to problems arising from this issue, as in the 2000 Report on Slovakia, in which it outlined that '[a] recent survey, produced at the request of the government, indicated that about one fifth of the parties involved in court proceedings would have experienced corrupt behaviour from judges. Bribes were given either to influence the outcome of the cases or to accelerate their proceedings.' 2000 Slovak Regular Report, p. 17.

281 2015 FYROM Report, p. 15.

282 On the requirement of 'reasonable time' as mentioned in Article 6 ECHR in relation to the applicant states, see, for example, ECtHR, *Tričković v. Slovenia*, Appl. No. 39914/98; ECtHR, *Bočvarska v. The Former Yugoslav Republic of Macedonia*, Appl. No. 27865/02; ECtHR, *Oršuš and Others v. Croatia*, Appl. No. 5766/03.

point.<sup>283</sup> It did push, however, for the development of the legislative basis of procedures applied by the courts. Progress, or lack thereof, on the implementation of civil and criminal procedural legislation, including the reduction of pre-trial detention time, received ample mention in the reports.<sup>284</sup>

Examination of the reports shows that the Commission did not (in relation to the CEECs) and does not (in relation to the countries in the Western Balkans), provide a blueprint for improvements the applicant countries can introduce to their systems. While this creates unclarity, is also leaves the countries sufficient space to introduce their own. The Commission, has, however, proposed a number of improvements in order to enhance the overall quality of the judicial process.<sup>285</sup> As described in the 2013 report on the Former Yugoslav Republic of Macedonia:<sup>286</sup>

As regards quality of justice, improvements are needed to ensure that the way in which the court system and the career structure of judges are organised does not drive them towards formalistic decision-making in order to reach short-term productivity targets, rather than actually solving disputes, building a stable jurisprudence, issuing clear, well-reasoned judgments and providing long-term legal certainty in the interest of the citizen.

In a nutshell, these improvements relate to the following four sub-elements:<sup>287</sup> training of judges, prosecutors, and court staff, particularly in information technology, EU law and ECtHR jurisprudence;<sup>288</sup> monitoring of judicial activities through the introduction of a so-called case-management system;<sup>289</sup> open access electronic availability of decisions in order to

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283 See for example Croatia's 2006 Report in which it is reported that '[t]he European Court of Human rights delivered 25 judgements (sic) concerning Croatia in the reporting period. The majority of judgments issued against Croatia continue to concern violations of the right to a fair trial and the length of proceedings, under Article 6 of the European Convention for the Protection of Human Rights', 2006 Croatia Progress Report, p. 8. Further see, 1999 Poland Regular Report, p. 14; 2000 Slovakia Regular Report, p. 17; 2006 FYROM Progress Report, p. 12.

284 See for example 1999 Bulgaria Regular Report, p. 12; 2000 Czech Republic Regular Report, p. 18; 2001 Estonia Regular Report, p. 17; 2002 Poland Regular Report, p. 25; 2009 Montenegro Progress Report, p. 11; 2015 FYROM Report, p. 52; 2015 Albania Report, p. 15.

285 For an examination of the quality of the judicial process in each of the Western Balkan countries individually, see Kmezić (2017), pp. 105-118.

286 2013 FYROM Progress Report, p. 11.

287 The elements are outlined in a more systematic fashion from the 2015 round of reports onwards, however, all elements can be found throughout all the reports from the very beginning.

288 See for example 2000 Latvia Regular Report, p.17; 2000 Hungary Regular Report, p. 16; 2000 Czech Republic Regular Report, p. 20; 2002 Turkey Regular Report, p. 22; 2002 Slovakia Regular Report, p. 24; 2002 Poland Regular Report, p. 25.

289 See for example 2000 Czech Republic Regular Report, p. 21; 2002 Slovakia Regular Report, p. 24; 2009 FYROM Progress Report, p. 13; 2009 Montenegro Progress Report, p.11.

enhance transparency and consistency<sup>290</sup> of jurisprudence; and the availability of alternative dispute resolution.<sup>291</sup> Since all of these issues need sufficient budget in order to be realised, the Commission annually considered the applicant countries' budgetary allocations.<sup>292</sup> Coming from a situation of 'manual registration and administrative processing',<sup>293</sup> the computerisation of courts took up a large part of the analysis. However, irrespective of, or perhaps because of, the fact that the Council of Europe has been monitoring developments in this field for decades,<sup>294</sup> the Commission, much like in the area of judicial effectiveness, did not go much further than examining developments and advocating the need for improvements, thereby failing to provide detailed recommendations or standards to which the applicant countries should adhere.<sup>295</sup>

### 3.2.3 *The fragmented approach to the element of judicial review*

In chapter 1 it was established that in order to comply with the rule of law, the judiciary branch of government is endowed with the possibility of judicial review of both legislative and executive action. Moreover, it was shown that to rule on the propriety of government behaviour, courts must rely on the ability to review legislation and actions under a higher authority, generally the constitution. Examination of the Copenhagen documents shows that the Commission has taken a rather fragmented approach regarding this pivotal task of the judiciary – related to the overall checks and balances of the three branches; it focusses on the individual components that make up the judicial system, rather than on the actual execution of the judicial review process itself.

For judicial review of administrative acts, this has meant, at a very basic level, that a number of applicant countries, both from Central Eastern Europe as well as from South-Eastern Europe, first needed to establish some of the requisite judicial organs. Early reports on the Czech Republic's progress towards accession, for example, noted and later criticised that the Supreme Administrative Court stipulated in the Constitution was non-existent.<sup>296</sup> Similarly, the 2006 Progress Report on the Former Yugoslav Republic

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290 See for example 2015 Albania Progress Report, p. 14; 2015 Bosnia and Herzegovina Progress Report, p. 14.

291 See for example 2015 Bosnia and Herzegovina Progress Report, p. 14; 2015 FYROM Progress Report, p. 14.

292 See for example 2005 Serbia and Montenegro Progress Report, p. 15.

293 2001 Bulgaria Regular Report, p. 18.

294 See for the latest documentation for example the Council of Europe's CEPEJ 2016 Thematic report on the use of information technologies in courts, available at: [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/REV1/2016\\_2%20-%20CEPEJ%20Study%2024%20-%20IT%20Report%20-%20EN.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/REV1/2016_2%20-%20CEPEJ%20Study%2024%20-%20IT%20Report%20-%20EN.pdf).

295 Also see Kochenov (2008), p. 295.

296 1998 Czech Republic Regular Report, p. 9; 1999 Czech Republic Regular Report, p. 13.

of Macedonia highlighted the necessity of the creation of administrative courts for first instance judicial review of administrative decisions, a task that up till then overburdened FYROM's Supreme Court.<sup>297</sup>

In addition, the various rounds of reports address issues of capacity (the filling of judicial posts),<sup>298</sup> and issues of effectiveness of judicial procedure. It was, however, demonstrated in the previous section that quality of the judicial process is understood by the Commission in terms of modernisation through case-management systems and electronic availability of decisions, as well as training (particularly in EU/ECHR law and jurisprudence) of employees in the judicial sector. While these elements are undoubtedly meant to ensure that qualified personnel works in an effectively and efficiently organised modern(ised) judiciary, the reports rarely go beyond a descriptive approach chronicling the 'existence' of each individual element on a yearly basis. By doing so, they fail to give insight into a preferred minimum standard or to provide a comprehensive update as to the actual practice of judicial review, *i.e.* how the judicial institutions fulfil their roles as opposed to institutional questions such as those related to qualified staff.

Regarding judicial review of individual rights, the analysis of the judicial system in the Commission Opinions on the Application for Membership of the CEECs and SEECs indicates a predilection for the existence of the protection of such rights through Constitutional Courts.<sup>299</sup> However, while a more substantive analysis and examples of best practices of rights adjudication of particular rights are occasionally provided in the section on human rights,<sup>300</sup> the reports again do not produce a clear picture of the preferred modalities of constitutional judicial review. Some applicant states have constitutional complaint proceedings,<sup>301</sup> however, the lack of criticism in relation to states that do not afford this opportunity demonstrates that this is not a requirement. Similarly, in relation to legislative review, examples can be found of *ex post* control or *ex ante* review,<sup>302</sup> abstract (adjudication on the constitutionality of a legislative act without the need for a specific case) or concrete (in a particular case on the basis of referral by an

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297 2006 FYROM Progress Report, p. 9.

298 See for example 2000 Lithuania Regular Report, p. 16; 2002 Romania Regular Report, p. 26; 2013 Albania Progress Report, pp. 38-39.

299 See for example the Commission Opinion on Poland's Application for Membership of the European Union, COM(1997) 2002 final, 15 July 1997, p. 14; Commission Opinion on Hungary's Application for Membership of the European Union, COM(1997) 2001 final, 15 July 1997; Commission Opinion on Croatia's Application for Membership of the European Union, COM(2004) 257 final, 20 April 2004, p. 17.

300 See for example, 2000 Poland Regular Report, p. 19; 2008 Montenegro Progress Report, p. 13.

301 See for example 2002 Czech Republic Regular Report, p. 22.

302 See for example 2014 Albania Progress Report, p. 39

ordinary court) review,<sup>303</sup> with the Commission abstaining from indicating its own preferences. Along the same lines, examination of the reports does not demonstrate a predisposition on the side of the EU as to who can commence constitutional proceedings. Abstract review can be initiated by the President,<sup>304</sup> but also a group of parliamentarians.<sup>305</sup> Additionally, it seems that abstract review can be initiated by the Supreme Court<sup>306</sup> or the Ombudsman.<sup>307</sup>

It was argued in chapter 1 that the rule of law allows for various modalities of judicial review. Accordingly, the fact that the Commission does not provide a concrete outline of its preferred institutional set-up can be in line with the rule of law. After all, as demonstrated previously, the national traditions of *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law display their own similarities and differences. Even the Council of Europe, in its Recommendation (2004)20 on Judicial Review of Administrative Acts, provides a broadly defined concept by merely stating that '[a]ll administrative acts should be subject to judicial review'.<sup>308</sup> However, particularly in relation to this form of judicial review, it seems that by adopting the outlined fragmented approach whereby the courts main task is not directly addressed but, rather, the emphasis is on a descriptive yearly overview of the institutional set-up of judiciary bodies whereby the judicial process is divided into quantifiable sub-elements, the Commission displays a lack of understanding of the ways through which it could truly promote and further consolidate this rule of law element.

### 3.2.4 *The auxiliary element of access to justice*

Access to justice is one of the prime procedural rule of law elements through which states can ensure that all citizens have effective means of recourse to their rights. It enables individuals to protect themselves against infringements of their rights, to hold executive power accountable, to remedy civil wrongs, and to defend themselves in criminal proceedings; it is crucial for individuals seeking to benefit from their procedural and substantive rights.<sup>309</sup> Moreover, access to justice is one of the preconditions in order to

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303 See for example 2001 Poland Regular Report, p. 20; 2001 Czech Republic Regular Report, p. 21; 2007 Montenegro Progress Report, p. 36.

304 See for example 2012 Bosnia and Herzegovina Progress Report, p. 38.

305 See for example 2013 Montenegro Progress Report, p. 9.

306 See for example 2016 FYROM Report, p. 55.

307 See for example 2009 Montenegro Progress Report, p. 10; 2010 Serbia Progress Report, p. 9; 2013 Turkey Progress Report, p. 10.

308 Council of Europe Recommendation Rec(2004)20, 15 December 2004, under B(1)(a).

309 *Handbook on European Law Relating to Access to Justice* Prepared jointly by the European Union Agency for Fundamental Rights and the Council of Europe (2016), p. 16.

safeguard the right to a fair trial; a right, which the applicant countries as future Member States of the EU have to guarantee.<sup>310</sup>

On the basis of the examination of the Copenhagen documents, three conclusions can be drawn. First, access to justice is mainly interpreted to contain two aspects: access to court and access to legal aid, in particular for disadvantaged groups. Secondly, the way the Commission has addressed these two aspects of this procedural element – both under the rule of law and under human rights – in the different sections of the report, reflects the nature of these two aspects and the underlying interrelation on this issue between the rule of law and human rights. Thirdly, from the analysis of the monitoring reports, it is clear that even though access to justice is included in the EU's rule of law conceptualisation in its enlargement policy, it only plays an auxiliary role, since the absence of developments in relation to the consolidation of this element does not lead to lack of progress in the negotiations, or even accession. Below, these three conclusions will be address in turn.

The first conclusion relates to the two aspects that make up the more generic term of access to justice, namely access to court and legal aid. Both aspects are referred to in the documents pertaining to the fifth enlargement round of the countries in central and Eastern Europe, as well as in the annual reports covering progress in the countries in South-eastern Europe. To give a few examples of the first aspect, the Polish 1999 Report discusses the lack of improvement in relation to the provisions of access to courts;<sup>311</sup> the Romanian report of 2002 analyses the problems of prisoners and their lack of access to a court in order to review the final outcome an administrative procedure;<sup>312</sup> the 2007 report on the Former Yugoslav Republic of Macedonia criticises the lack of access to possibilities for appeals against acts and decisions by civil servants;<sup>313</sup> Croatia's 2011 report describes progress regarding access to justice in the area of administrative law, with the introduction of four first instance court as well as a Higher Administrative Court;<sup>314</sup> the 2014 report on the situation in the Former Yugoslav Republic of Macedonia goes as far as to examine actual physical access to the Basic Court in Skopje, in terms of lifts for people with special needs.<sup>315</sup>

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310 See Article 47 of the EU Charter of Fundamental Rights, which reads: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.' Also see Article 6 and 13 ECHR.

311 1999 Poland Regular Report, p. 14.

312 2002 Romania Regular Report, p. 28.

313 2007 FYROM Progress Report, p. 12.

314 2011 Croatia Progress Report, p. 50.

315 2014 FYROM Progress Report, p. 42.

The second aspect of access to legal aid covers rather more issues than access to court. It includes the general set up of a free legal aid system in the applicant states<sup>316</sup> and the concomitant problem of lack of funding,<sup>317</sup> access to a lawyer in both criminal and civil cases,<sup>318</sup> difficulties with the realisation of legal aid in the rural areas of Turkey in particular,<sup>319</sup> problems with legal aid in a language other than the main language spoken in the country,<sup>320</sup> as well as strengthening legal aid for particular groups of people, such as women and children,<sup>321</sup> minorities,<sup>322</sup> asylum seekers,<sup>323</sup> victims of domestic abuse,<sup>324</sup> trafficking,<sup>325</sup> and war crimes.<sup>326</sup>

The second conclusion – the connection between the rule of law and human rights in the area of access to justice – is supported by the way the issue is addressed over the years and across reports and Accession/European Partnerships in the same year, *i.e.* the placement of the element under different headings. To start with, the 1999 and 2002 rounds of Accession Partnerships with the CEECs list ‘facilitat[ing] access to legal advice and representation’,<sup>327</sup> ‘widen[ing] the availability of legal aid’,<sup>328</sup> and ‘promot[ing] access to justice’,<sup>329</sup> as priorities or short-term objectives under the political criteria of democracy and the rule of law, and more particularly, under judicial reform. However, most 2002 Regular Reports examine the situation in relation to the facilitation of legal aid within the section of civil and political rights under the Copenhagen political criteria of human rights and the protection of minorities. Indeed, Romania’s Report of that year even stresses the lack of legal aid in relation to certain crimes as a human

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316 For example, 2005 Serbia and Montenegro Progress Report, p. 19; 2007 Albania Progress Report, p. 12; 2009 Croatia Progress Report, p. 12; 2009 Serbia Progress Report, p. 14; 2011 Montenegro Progress Report, p. 16; 2013 Bosnia and Herzegovina Progress Report, p. 13; 2016 Serbia Report, p. 4.

317 For example, 2011 Turkey Progress Report, p. 24; 2011 Kosovo Progress Report, p. 15; 2013 Albania Progress Report, p. 40; 2014 Montenegro Progress Report, p. 39.

318 For example, 2001 Turkey Regular Report, p. 16; 2002 Turkey Regular Report, p. 26; 2007 Turkey Progress Report, p. 14; 2009 Bosnia and Herzegovina Progress Report, p. 16.

319 2002 Turkey Regular Report, p. 27; 2007 Turkey Progress Report, p. 14; 2009 Turkey Progress Report, p. 16; 2011 Turkey Progress Report, p. 24.

320 2005 Turkey Progress Report, p. 23; 2013 Montenegro Progress Report, p. 38; 2014 Kosovo Progress Report, p. 14.

321 2011 Turkey Progress Report, p. 24; 2013 Kosovo Progress Report, p. 12; 2014 Turkey Progress Report, p. 47.

322 2001 Hungary Regular Report, p. 22.

323 2011 FYROM Progress Report, p. 16.

324 2011 Albania Progress Report, p. 16; 2013 Albania Progress Report, p. 40; 2014 Montenegro Progress Report, p. 39.

325 2013 Albania Progress Report, p. 40; 2013 Kosovo Progress Report, p. 12; 2014 Kosovo Progress Report, p. 14.

326 2015 Montenegro Report, p. 53.

327 1999 Accession Partnership Romania.

328 2002 Accession Partnership Lithuania; 2002 Accession Partnership Hungary; 2002 Accession Partnership Romania; 2002 Accession Partnership Estonia.

329 2002 Accession Partnership Latvia.

rights issue that needs to be tackled: 'In crimes where the maximum sanction is less than 5 years imprisonment, ... there is no mandatory legal aid provided. This is a limitation to the right to legal representation [and] is a human rights issue that needs to be addressed.'<sup>330</sup>

The later Accession and European Partnerships show a similar picture. The 2003 AP with Bulgaria includes ensuring 'implementation and sufficient budgetary resources to ensure access to justice and legal aid' under the heading of human rights and the protection of minorities,<sup>331</sup> the 2003 AP with Romania discusses the extension of access to free legal aid as a priority under judicial reform,<sup>332</sup> and Turkey's 2003 AP lists the further development of the legal aid system 'to ensure that all citizens enjoy access to justice' as a medium-term priority in the *acquis* section of justice and home affairs.<sup>333</sup> While the 2004 European Partnerships discussed ensuring 'the viability of a comprehensive legal aid system'<sup>334</sup> as an objective of reinforcing the judicial system under the political criteria of democracy and the rule of law, the 2006 and 2008 European Partnerships (and Accession Partnership in the case of Croatia, Turkey and the FYROM) again show the placement of access to justice under both the rule of law<sup>335</sup> as well as the section on human rights.<sup>336</sup> The 2008 European Partnership with Serbia including Kosovo is a case in point, with the strengthening of access to justice included as an objective for Serbia under civil and political rights, and as a target for Kosovo under the judicial system and the rule of law.<sup>337</sup> The annual progress reports further blend the categorisation of this procedural element by not following the positioning outlined in the APs/EPs,<sup>338</sup> switching the placement across years,<sup>339</sup> and sometimes also mixing it up within a year.<sup>340</sup> It should also be noted that the available screening reports on Chapter 23 demonstrate the same approach by dealing with the issue of access to justice and/or legal aid both under the rule of law, more par-

330 2002 Romania Regular Report, p. 32.

331 2003 Accession Partnership Bulgaria.

332 2003 Accession Partnership Romania.

333 2003 Accession Partnership Turkey.

334 2004 European Partnership Serbia and Montenegro including Kosovo. See also the 2004 European Partnership with the Former Yugoslav Republic of Macedonia; 2004 European Partnership Croatia.

335 See for example 2006 Accession Partnership Croatia; 2008 European Partnership Serbia including Kosovo.

336 See for example 2006 Accession Partnership Turkey; 2008 European Partnership Albania.

337 2008 European Partnership Serbia including Kosovo.

338 While the 2004 European Partnerships locate the objective under judicial reform, the 2004 and 2005 rounds of annual reports discuss the issue under civil and political rights. See for example 2004 Bulgaria Regular Report, p. 22 or 2005 Turkey Progress Report, p. 23.

339 For example, the annual reports of 2013 and 2014 clearly locate the analysis of access to justice under the heading of the functioning of the judiciary. However, the 2015 and 2016 reports more often than not examine the issue in the section on human rights.

340 In the 2011 round of annual reports access to justice is discussed under the heading of civil and political rights, however, FYROM's report addresses the issue under the section on the functioning of the judiciary. 2011 FYROM Progress Report, p. 60.

ticularly, the reform of the judiciary, as well as under fundamental rights.<sup>341</sup> In sum, the examination of the Accession and European Partnerships and the monitoring reports of both the CEECs and the SEECs, demonstrates an understanding by the Commission of the close interrelatedness of the rule of law and human rights in relation to this particular element. The lack of clear placement under either heading could have led to unequal treatment under the new approach and the Commission more recent commitment to the principle of 'fundamentals first'.<sup>342</sup> However, since Chapter 23 includes both the judiciary and fundamental rights, this has so far not been an issue.

Against this background, the focus will next turn to the third conclusion. It is argued here that the inclusion of access to justice as a procedural element of the conceptualisation of the rule of law in enlargement, is only in a supplementary manner. This conclusion is supported by the findings on the analysis of the way in which the Commission has reported on this issue over the years. To start with, access to justice only became an issue from 2000 onwards.<sup>343</sup> Subsequently, after it had made its way into the Accession and European Partnerships and the reports, it is clear from the latter that the attention paid to it is uneven, with some years, such as 2002, 2005, and 2014 devoting quite some space to it, and other years, including 2007, 2011 and 2015 barely attributing more than a few lines to the examination of progress in relation to this element.

However, and more importantly, it is the way in which progress is analysed over the years that diminishes this element's significance. Simply put, year after year, the documents report on lack of progress, and demonstrate limited or simply no criticism of the situation. Moreover, no minimum standards are articulated in this area. To give some examples, 'there appears to be no improvement in the problems of access to legal aid'<sup>344</sup> in Bulgaria in 2000, '[n]o changes have been made to the legal aid system during the reporting period'<sup>345</sup> in Romania in 2002, and in Turkey 'in some town, no legal council is available'<sup>346</sup> in the same reporting year. In relation to the countries in South-eastern Europe the picture remains the same: Serbia's 2005 report states that 'there is a lack of coherent planning and management of legal aid, with the result that laws are not being applied and there is no clear mechanism for ensuring the quality of legal aid'.<sup>347</sup> Similarly '[a]ccess to justice is still hampered by the lack of a comprehensive system of legal aid'<sup>348</sup> in Croatia in 2007, '[f]ree legal defence is not recognised in

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341 See for example Serbia's screening report of Chapter 23 on pp. 17 (fair trial rights) and 24 (judiciary).

342 For the recent affirmation of the latter, see Commission Communication on 2018 Communication on EU Enlargement Policy, COM(2018) 450 final, 17 April 2018, p. 1.

343 The issue is almost whole excluded from the 1998 and 1999 Accession Partnerships.

344 2000 Bulgaria Regular Report, p. 17.

345 2002 Romania Regular Report, p. 25.

346 2002 Turkey Regular Report, p. 27.

347 2005 Serbia and Montenegro Progress Report, p. 19.

348 2007 Croatia Progress Report, p. 11.

the High Court of Justice<sup>349</sup> of Albania, and ‘no progress has been made on adopting legislation and establishing a comprehensive system of legal aid’<sup>350</sup> in Serbia in 2009. Turkey’s 2011 report is especially damning: ‘With respect to access to justice, the legal aid provided is of inadequate scope and quality. Budgetary provisions are inadequate. There is no effective monitoring mechanism that would remedy long-standing problems.’<sup>351</sup> In the same way, more recent reports also expand on lack of or limited improvement.<sup>352</sup> On the basis of the fact that even in the Comprehensive Monitoring Reports of the countries of the fifth,<sup>353</sup> sixth<sup>354</sup> and seventh<sup>355</sup> enlargement round, drawn up half a year before the date of accession, progress on access to justice and legal aid is reported on as being ‘under-developed’,<sup>356</sup> ‘unsatisfactory’,<sup>357</sup> and ‘rather restricted’,<sup>358</sup> the conclusion must be drawn that, even though access to justice is incorporated as a procedural rule of law element in enlargement, its treatment in the reports would suggest that it is not an element of prime importance.

### 3.2.5 Conclusions

In line with a number of the reports, in which it is stated that ‘[i]mpartiality, integrity and high standards of adjudication by the courts are essential for safeguarding the rule of law’,<sup>359</sup> this section of the chapter showed that impartiality has increasingly become recognised as a fundamental procedural element of the rule of law in enlargement. However, it was demonstrated that in spite of this recognition, the Commission has refrained from clearly outlining the notion, particularly in relation to judicial independence. Furthermore, it was argued that next to impartiality, the elements of judicial efficiency and quality have become major issues of concern in the Commission’s assessment of the functioning of the judiciary. It was asserted that procedural effectiveness has been conceptualised in the reports mainly in terms of procedural obstacles, including such sub-elements as enforce-

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349 2007 Albania Progress Report, p. 12.

350 2009 Serbia Progress Report, p. 14.

351 2011 Turkey Progress Report, p. 87.

352 See for example 2014 Albania Progress Report, p. 43; 2014 Bosnia and Herzegovina Progress Report, p. 14; 2015 Serbia Report, p. 4; 2016 Kosovo Report, p. 27.

353 See for example 2003 Latvia Comprehensive Monitoring Report, p. 13.

354 Romania’s Monitoring Report states that ‘[t]he reform of the legal aid system needs to be carried out.’ 2007 Romania Monitoring Report, p. 7.

355 Croatia’s Monitoring Report simply states that ‘[t]he legal framework for free legal aid has to be improved to enable better access to legal aid and to foster the role of NGOs as legal aid providers.’ 2012 Croatia Comprehensive Monitoring Report, p. 37.

356 2003 Poland Comprehensive Monitoring Report, p. 16.

357 2003 Lithuania Comprehensive Monitoring Report, p. 13.

358 2003 Hungary Comprehensive Monitoring Report, p. 14.

359 2005 Turkey Progress Report, p. 103. Also see the Analytical Report for the opinion on the application from the former Yugoslav Republic of Macedonia for EU membership, SEC(2005) 1425, 9 November 2005, p. 105.

ment, backlogs, length of proceedings, and general lack of procedural legislation. It was, however, also pointed out that the Commission has refrained from providing a detailed standard for the applicant countries to take into account in their improvements. Following this, the third element in this section highlighted the Commission's fragmented approach towards the element of judicial review. It was argued that the Copenhagen documents address this element from an institutional angle rather than an examination of how judicial review is organised in the candidate countries, *i.e.* judicial review is interpreted in terms of the organisation of courts, rather than the functioning of those courts. Finally, the section examined the element of access to justice, acknowledged as one of the preconditions for a fair trial. It was asserted that access to justice is mainly interpreted in two ways, access to court and access to legal aid. Furthermore, it was demonstrated that the Commission places this element both under the heading of rule of law as well as human rights, indicating an understanding of the close connection between both notions in relation to this element. The section concluded by arguing that even though the reports evidence the inclusion of access to justice as a rule of law element, the Commission's lack of critique in situations when there has been very little to no progress in the yearly monitoring reports, gives the impression that this element at the very least does not fulfil a central role as a procedural element in the understanding of the rule of law in enlargement.

### 3.3 Institutional elements of the rule of law

This section will focus on the assessment of the EU's practice in enlargement in order to substantiate the third category of institutional rule of law elements of the analytical framework established in Part I. It will be argued that the EU's understanding of the rule of law in its accession policy is largely oriented towards institutional reform measures. More particularly, it will be demonstrated that rule of law reform is envisaged as judicial reform, mainly in terms of the proper functioning of courts. It will be asserted that this institutional approach is reflected both in the legal framework and in the Copenhagen documents underlying the enlargement policy. Moreover, in relation to the separation of powers – found in chapters 1 and 2 as the notion through which the power-balance of the three branches of government is levelled and the rule of law is reinforced – it will be shown that while the Copenhagen documents seem to be structured in such a way as to support the doctrine, in actual fact they do not provide any insight into the Commission's ideas on this *per se*. Instead, it will be demonstrated that in early reports, the three branches of government are addressed individually, without regard to how they interrelate.

Subsequently, turning to the issue of judicial independence, it will be demonstrated that within the EU's institution-centric approach, the element of judicial independence is one of the main components of the rule of law in the pre-accession process. More particularly, it will be shown that the

Commission, despite frequently mentioning the existence of 'European standards' in this area, has failed to articulate a detailed comprehensive common standard on this issue. Instead it has chosen to address it along the rudimentary lines of institutional and personal independence. Furthermore, the reports show that judicial independence is increasingly combined with judicial accountability, whereby it will be demonstrated that in relation to the latter, the Commission has adopted a one-dimensional approach that focuses on sub-elements that can be easily quantified, such as the number of cases in a particular area, rather than tackling the question of whether the judiciary is also perceived to be accountable. Finally, the section on judicial independence will conclude by addressing the question whether the understanding of these rule of law elements in enlargement in such an elementary way has in actual fact provided the applicant states with the opportunity to grapple to some extent with their own ideas of protecting the independence of the judiciary and its judges, allowing them to develop models of independence of their own. In the light of the findings in chapter 1, where it was argued that the constitutional traditions of the Member States have shaped their own particular model of judicial independence, it will be asserted that the Commission's approach might, however unintentionally, be more in line with the rule of law than hitherto perceived in the literature.

### 3.3.1 *The pervasive institutional rule of law approach: the EU's understanding of the rule of law as judicial reform*

The legacy of the EU's earlier attempt at providing clarity on the rule of law as a condition for accession to the Union by the applicant states, *i.e.* the *stability of institutions that guarantee ... the rule of law*,<sup>360</sup> is not to be underestimated. Conceived by the European Council in 1993, this original formulation has permeated the EU's conception of the rule of law in enlargement from the beginning, so much so, in fact, that the rule of law in enlargement has come to be synonymous with institutional reform ('a great deal of institution building is required')<sup>361</sup>, and more specifically judicial reform. Furthermore, the often pre-modern state of the judicial system in the countries of central and Eastern Europe, whereby several countries did not even have the basic judicial structure required by their own newly adopted Constitutions, enhanced the perceived necessity of the institutional focus. The legal framework as well as the Copenhagen documents, *i.e.* the Commission's Enlargement Strategies and the country specific reports, support this argument, as will be further explained below.

After the 1994 Essen European Council had designated PHARE as the main financial instrument in the pre-accession strategy,<sup>362</sup> the Commission

360 Presidency Conclusions, European Council Copenhagen, 21-22 June 1993.

361 2001 Poland Regular Report, p. 110.

362 Presidency Conclusions, Essen European Council, 9-10 December 1994. Also see the Presidency Conclusions, Amsterdam European Council, 16-17 June 1997.

introduced a refocusing of the financial programme.<sup>363</sup> In its Guidelines for PHARE Programme Implementation, the Commission identified 'institution building'<sup>364</sup> as the first of two priorities (the other being 'investment in the *acquis*'<sup>365</sup>), since 'the reinforcement of institutional and administrative capacity of candidate countries is a key requirement of enlargement, if the countries are to be in a position to adopt, implement and enforce the *acquis* as required by membership of the Union.'<sup>366</sup> More particularly, the Commission outlined that this will require modernisation of the judiciary.<sup>367</sup> The same institutional focus is also discernible in the CARDS Regulation,<sup>368</sup> as well as in the later IPA Regulations.<sup>369</sup> Where the legal framework in rela-

363 See Commission Communication on Agenda 2000: For a Stronger and Wider Union, COM(97) 2000 final, 15 July 1997, pp. 52-53.

364 Defined in the Guidelines as 'helping the candidate countries to develop the structures, human resources and management skills needed to put in place economic, social and regulatory systems equal to the task required for approximation of laws and implementation of the *acquis communautaire*, and an inclusive democratic civil society capable of fulfilling the requirements of the 'Copenhagen Criteria'.' Commission Decision on the Guidelines for PHARE Programme Implementation in Candidate Countries, 1998-1999, SEC(1998) 1012 final, 15 June 1998, p. 5. Also see Commission Decision on the Guidelines for the PHARE Programme Implementation in Candidate Countries for the Period 2000-2006, in Application of Article 8 of Regulation 3906/89, SEC(1999) 1596 final, 13 October 1999; Commission 2002 Report on PHARE and the pre-accession instruments for Cyprus, Malta and Turkey, COM(2003) 497 final, 11 August 2003.

365 This second priority is meant essentially that the candidate countries need to invest in adapting their enterprises and main infrastructure to respect Community norms. According to the Guidelines, 'the only alternative to long transitional periods is a major investment effort by the applicant countries to adapt to Community norms and standards.' Commission Decision on the Guidelines for PHARE Programme Implementation in Candidate Countries, 1998-1999, SEC(1998) 1012 final, 15 June 1998 p. 9.

366 *Ibid.*, p. 9.

367 *Ibid.*, p. 5.

368 According to Article 2(2) of Council Regulation (EC) No 2666/2000, financial aid is aimed at 'the creation of an institutional and legislative framework to underpin ... the rule of law.' Moreover, the assistance shall be implemented by financing investment and institution-building programmes.

369 According to para. 13 of the Preamble of IPA I Regulation (EC) No 1085/2006, assistance for candidate countries should 'be targeted at supporting a wide range of institution-building measures. Accordingly, Article 2 stipulates that the scope of assistance covers the 'strengthening of democratic institutions, as well as the rule of law, including its enforcement', which, according to Article 3, shall be implemented by *inter alia* institution building. The IPA II Regulation (EU) No 231/2014 has the same institutional focus (Article 3), and lists as its specific objective not only the strengthening of institutions, but highlights at the same time that, in the case of the rule of law, this implies 'an independent and efficient justice system' (Article 2(1)(a)(i) and 2(2)(a)). Not only that, in Annex II, covering the thematic priorities for assistance, the Regulation stipulates that in relation to the rule of law the following priorities will be addressed: 'Establishing and promoting from an early stage the proper functioning of the institutions necessary in order to secure the rule of law. Interventions in this area shall aim at: establishing independent, accountable and efficient judicial systems, including transparent and merit-based recruitment, evaluation and promotion systems and effective disciplinary procedures in case of wrongdoing.'

tion to the fifth enlargement round gave little 'actual substance'<sup>370</sup> to the rule of law,<sup>371</sup> more effort was put into outlining the notion in relation to the countries in South-eastern Europe. Hence, in its 1997 Conclusions, the General Affairs Council indicated the elements of examination for compliance with the rule of law as well as the other political criteria in order to advance the countries' bilateral relation with the EU in the context of the Stabilisation and Association Process. For the rule of law (taken together with human rights) there is a clear focus on the judicial process, as it is stipulated that countries need to demonstrate effective means of redress against administrative decisions, access to courts and the right to fair trial, equality before the law and equal protection by the law, and freedom from inhuman or degrading treatment and arbitrary arrest.<sup>372</sup> Furthermore, the Stabilisation and Association Agreements, as already outlined previously,<sup>373</sup> epitomise the institutional judicial focus of the notion by including as an aim of cooperation the consolidation of the rule of law through the 'reinforcement of institutions', including *inter alia* the strengthening of independence of the judiciary and improving its efficiency, and improving the functioning of the police and other law enforcement bodies.<sup>374</sup>

The Commission's own approach of rule of law reform as institutional reform, and more specifically as judicial reform, is seen clearly throughout its Enlargement Strategies. Arguing for the necessity of its institutional emphasis in 1999 – 'institution building helps the candidates meet the importance challenge of strengthening their ... judicial capacity to enforce and implement the acquis'<sup>375</sup> – the Commission tied this focus explicitly to the rule of law, amongst others in its 2006 Strategy, by stating that it will pay 'particular attention to the establishment of the structures needed to ensure the rule of law. This includes administrative and judicial capacity...'.<sup>376</sup> In line with these intentions, also the later strategies confirm that reinforcing the rule of law is seen not only as institution-building in general, but as judicial reform in particular. In the words of the 2014 and 2015 strategies: 'Strengthening the rule of law is a key challenge for most of the countries in

370 Päivi Leino 'Rights, Rules and Democracy in the EU Enlargement Process: Between Universalism and Identity' 7 *Austrian Review of International and European Law* (2002), pp. 53-90 at 81.

371 Marks has criticised the Commission's attempt at outlining what it would look for in the Copenhagen political criteria in Agenda 2000 as a 'simplistic sum', see Susan Marks *The Riddle of All Constitutions. International Law, Democracy and the Critique of Ideology* Oxford: Oxford University Press (2000), p. 74.

372 Council Conclusions 'The Application of Conditionality with a view to developing a Coherent EU-Strategy for the Relations with the Countries in the Region', Annex to Annex III, 2203<sup>rd</sup> General Affairs Council, 29-30 April 1997.

373 See section 2.3.

374 See for example Article 80 Stabilisation and Association Agreement Montenegro.

375 Commission Composite Paper – Reports on Progress towards Accession by Each of the Candidate States, COM(1999) 500 final, 13 October 1999, p. 9.

376 Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649 final, 8 November 2006, p. 22.

the enlargement process, in particular in terms of improving the functioning and independence of the *judiciary*.<sup>377</sup>

Additional support for this line of argumentation can be found in the regular and progress reports. From the first reporting round onwards, the Commission has tackled the analysis of the Copenhagen political criteria in two parts, democracy and the rule of law on the one hand, human rights and the protection of minorities on the other. Under the former, the examination has been divided into four sections: parliament, executive, judiciary, and anti-corruption matters.<sup>378</sup> It is submitted that the Commission's rule of law analysis is concentrated solely on the judiciary branch.<sup>379</sup> Indeed, in the 2015 and 2016 reports, in which the Commission has addressed for the first time democracy and the rule of law separately, the evaluation of the rule of law section focused almost exclusively on the functioning of the judiciary.<sup>380</sup> Additionally, while the structure of this section has changed marginally over the years,<sup>381</sup> the basic analysis and the elements contained therein has not.

Next to the Copenhagen European Council's institutional formulation of the rule of law, the necessity of creating a basic institutional judicial environment even before the question of judicial reform could be tackled, added to the institutional-centric focus of the Commission's rule of law conceptualisation. Several of the applicant states' Constitutions stipulated a lay out of a judicial system that had yet to materialise, both in terms of the creation as well as the abolishment of judicial bodies. To name a few example in order to provide an insight into the magnitude of this undertaking, in Bulgaria, a three-tier jurisdiction, courts of appeal throughout the country and the supreme court of appeal, as well as the supreme administrative court were introduced.<sup>382</sup> In the Czech Republic a supreme administrative court needed to be created.<sup>383</sup> In Hungary a fourth level of courts, the high courts

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377 Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015, p. 5, [emphasis added]. The Communication moreover continues further down the same page that '[t]here have been some positive developments on the rule of law over the past years. This has been primarily in terms of putting in place legal frameworks and institutional structures. Also see Commission Communication on EU Enlargement Strategy and Main Challenges 2014-2015, COM(2014) 700 final, 8 October 2014, p. 11.

378 See for example, 1999 Slovenia Regular Report.

379 For the argument that anti-corruption matters should not be understood to form part of the Commission's rule of law conceptualization, see section 4.3.

380 See for example 2016 FYROM Report, pp. 12-19; 2015 Montenegro Report, pp. 12-19.

381 In relation to the countries in South-eastern Europe, the basis breakdown of parliament, government, public administration, judicial system, and anti-corruption policy, has only expanded in the 2013 and 2014 reporting rounds.

382 1998 Bulgaria Regular Report, 8; 2000 Bulgaria Regular Report, p. 16.

383 In accordance with Article 91 of the Czech Constitution. 1998 Czech Regular Report, p. 9. Much to the annoyance of the Commission, the supreme administrative court as foreseen by the Constitution, did not materialise; rather, a system of administrative senates in regional courts was initiated. 1999 Czech Regular Report, p. 13.

of justice, was to be inserted between regional courts and the Supreme Court.<sup>384</sup> In Lithuania, apart from a four-tier judicial system that was introduced, special arbitration tribunals were set up and the Commercial Court was abolished.<sup>385</sup> In Poland, a new layer of jurisdiction was introduced dealing with petty cases, in order to unburden the backlogged system.<sup>386</sup> In the light of these examples it becomes apparent that the frequent lack of a basic judicial court structure has intensified the Commission's emphasis on the institutional set-up in the applicant states, even before it could start to discuss the functioning of these institutions.

Against this background of the Commission's understanding of the rule of law as judicial reform, the rest of this section will further dissect the institutional elements of the rule of law.

### 3.3.2 *The lack of articulation of the element of separation of powers*

For an institution so much vested in state-building, it is striking to note that the Commission, at the strategic level, has not put forward its understanding on the doctrine of the separation of powers.<sup>387</sup> Notwithstanding the fact that the structure of the analysis of the political criteria of democracy and the rule of law in the annual reports followed the separation of powers rationale,<sup>388</sup> *i.e.* the subdivision of parliament, executive, and judiciary, this structural approach has not provided any insights into the Commission's idea of the doctrine *per se*. Since within each sub-section the analysis concentrated on the developments of that particular topic only, without providing an assessment of the ways in which these branches of government interrelate or how their separation is organised in practice, such an analysis does not actually cover the separation of powers. After all, the fact that they are analysed separately does not support the conclusion of their actual separation in the legal systems in question.<sup>389</sup>

384 1998 Hungaria Regular Report, p. 9.

385 1998 Lithuania Regular Report, pp. 8-9; 1999 Lithuania Regular Report, p. 12.

386 2000 Poland Regular Report, p. 17.

387 Of course, at the internal level of the EU there is the principle of institutional balance, as recognized by the Court as a fundamental principle of the EU legal order. See the line of case-law starting with Case 9/56 *Meroni & Co., Industrie Metallurgische, SpA v High Authority* [1958] ECR 11. Despite the fact that it has been argued that this principle corresponds to the separation of powers recognized in the constitutional orders of the Member States, one should not be confused with the other. See Jean-Paul Jacqué 'The Principle of Institutional Balance' 41 *Common Market Law Review* (2004), pp. 383-391. Further, see Alexander Fritzsche 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' 47 *Common Market Law Review* (2010), pp. 361-403; Sasha Prechal 'Institutional Balance: A Fragile Principle with Uncertain Contents' in Ton Heukels, Niels Blokker & Marcel Brus (eds) *The European Union after Amsterdam – A Legal Analysis* The Hague: Kluwer Law International (1998) pp. 273-294; Koen Lenaerts 'Some Reflections on the Separation of Powers in the European Community' 28 *Common Market Law Review* (1991), pp. 11-35.

388 Kochenov (2008), p. 112.

389 *Ibid.*, p. 113.

Examining the legal and strategic framework as well as the annual reports, it is evident that the Commission barely touches upon the separation of powers and the interrelation of the three branches of government. None of the Agreements, financial instruments, strategies or reports confront the issue, let alone provide a definition. To give an example, the 2012-2013 Enlargement Strategy, which is the Commission's main strategy document in terms of 'putting the rule of law at the centre of enlargement policy', appears to tackle the separation of powers by addressing the three branches of government. According to the Strategy, the applicant states 'have to establish and promote from an early stage the proper functioning of the core institutions necessary for democratic governance and the rule of law, from the national parliament through government and the judicial system....'<sup>390</sup> However, no actual explanation of the separation of powers is provided, *i.e.* an answer to the question what is meant by the 'proper functioning' of the institutions, what their scope of competences ideally should be, or how their interactions should be shaped and defined.

It is submitted that the Copenhagen documents do not provide clarity on this issue either. The Commission's Opinions on the application for membership do not go beyond a pithy statement in line with the formulation of the Copenhagen political criteria. For example in the case of one of the Baltic States, the Commission's *avis* states that 'Latvia's political institutions function properly and in conditions of stability.'<sup>391</sup> Similarly, in the case of Croatia, focussing on the functioning of Parliament, the Opinion offers that the institutions 'functions satisfactorily, its powers are respected....'<sup>392</sup> The annual reports related to the countries in central and Eastern Europe merely supply their assessment of progress on the basis of the aforementioned sub-division: the parliament and the legislative process, the executive and public administration reform, and the functioning of the judicial system and processes.<sup>393</sup> Their interrelation is not taken into account.

While the annual reporting rounds on the countries in central and Eastern Europe revealed almost nothing on the Commission's interpretation of the doctrine of the separation of powers,<sup>394</sup> the reports on the Western Balkans are more forthcoming, if only in relation to the problem of undue political interference. Although the Commission does not set out any preferences for the organisation of the separation of powers of the various institutions, it heavily criticises the instances of political interference in the other branches. For example, in the 2007 Report on Croatia, such involvement in the public administration is condemned: 'The civil service continues to be

390 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4.

391 Commission Opinion on Latvia's Application for Membership of the European Union, COM(1997) 2005 final, 15 July 1997.

392 Commission Opinion on Croatia's Application for Membership of the European Union, COM(2004) 257 final, 20 April 2004, p. 13.

393 See for example 2002 Slovenia Regular Report, pp. 19-23.

394 For one of the few examples, see the 2002 Romania Regular Report, p. 25.

politicised. Policy implementation often remains in the hands of political advisors. Undue political influence, even in the recruitment of technical staff continues.<sup>395</sup> Analysis of the reports shows that political interference in the other branches of government is a particularly endemic problem in most of the countries in the Western Balkans. The 2016 Report on the situation in Kosovo serves as just one illustration: 'The recent allegations of political interference in recruitment to and decision-making processes in public bodies, based on leaked telephone intercepts, raise concern and should be fully investigated.'<sup>396</sup>

Two closely related arguments can be made to mitigate the Commission's lack of specificity in relation to the separation of powers. First, the nature of the doctrine does not lend itself to an easy breakdown into elements. As it was argued in chapter 1, all three national rule of law traditions require some form of a separation of powers in order to ensure that the government is bound by the law alone. It was furthermore shown that there are many differences in the ways in which the division of tasks between the judicial, legislative, and executive branches can be organised, allowing for institutional leeway in the EU Member States, and thus, one would expect, also in the applicant states. As it was argued in chapter 2,<sup>397</sup> even though it is a collective 'desideratum',<sup>398</sup> there is no commonly agreed-on institutional design.<sup>399</sup> Accordingly, it is doubtful whether 'the doctrine is specific enough to be a useful constitutional standard.'<sup>400</sup> In a way, by addressing the separation of powers only marginally and by concentrating on the functioning of the three branches in their own right, *i.e.* separately, the Commission seems to allow for the separation of powers to develop over time in each of the applicant states, while at the same time providing guidance by criticising the instances in which it is clear that one of the governmental branches has abused its powers. While this seems far from ideal, addressing the legislature, executive, and judiciary separately might be the only way in which the Commission has found it possible to formulate quantifiable benchmarks; which leads to the second point.

Secondly, the methodology of enlargement can hardly be said to be suited to the promotion and/or consolidation of the doctrine of the separation of powers. In the light of the domestic room for manoeuvre, it should be pointed out that, particularly for such a malleable concept as the separation of powers, there is an inherent paradox embedded in the EU's

395 2007 Croatia Progress Report, p. 8.

396 2016 Kosovo Report, p. 8. Also see 2016 Serbia Report, p. 11.

397 See chapter 2, section 4.

398 Robert S. Summers 'Legal Institutions in Professor H.L.A. Hart's Concept of Law' 75 *Notre Dame Law Review* (2000), pp. 1807-1828 at 1814.

399 Martin Krygier 'Rule of Law' in N.J. Smelser & P.B. Baltes (eds) *International Encyclopedia of the Social and Behavioral Sciences* New York: Elsevier (2001), pp. 13404-13408 at 13404.

400 William B. Gwyn *The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution* The Hague: Martinus Nijhoff (1965), p. 128.

enlargement policy based on the methodology of conditionality. Progression towards accession, and the accompanying financial assistance,<sup>401</sup> is based on headway made towards achievement of the objectives set out, amongst others, in the Accession Partnerships, which, according to Article 2(2) of the IPA II Regulation, 'shall be monitored and assessed on the basis of pre-defined, clear, transparent and, where appropriate, country-specific and measurable indicators.'<sup>402</sup> This methodology plainly requires at the very least the setting of minimum benchmarks. However, while the ideal of the separation of powers could be formulated as a rule of law related objective, common benchmarks that apply to all applicant states in order to measure progress on how to achieve this are very difficult to set. Furthermore, it was argued in section 3.1 on the missing rule of law element of legality, that enlargement's methodology of quantitative progress measurements has undermined a number of the requirements of legality itself. Here, it is submitted that the EU's enlargement methodology has forced the Commission to concentrate only on those issues of the rule of law for which benchmarks could be formulated.<sup>403</sup> Clearly, in relation to the general doctrine of the separation of powers, benchmarks or minimum requirements have not been articulated. The reports address the institutions related to the three branches but fail to also include standards in relation to the question of how the EU sees these branches should interconnect.

In sum, the above analysis has demonstrated that in its enlargement policy, the EU assesses the separation of powers only marginally. Judging from the analysis of the Reports, it does not see the doctrine *per se* as an element of the rule of law.

### 3.3.3 *The emphasis on the element of judicial independence and the later addition of judicial accountability*

As demonstrated above, the doctrine of the separation of powers is largely absent from the enlargement framework. At this point, it should, however, be recalled that it was argued in chapter 2 on the common features of the rule of law in legal theory, that, notwithstanding their acknowledgement of the importance of the separation of powers for the proper functioning of the rule of law, legal scholars have concentrated almost exclusively on what the doctrine prescribes for the functioning of the legal institutions, namely the particular issue of judicial independence. It seems that the Commission has done the same.

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401 Article 4 Regulation (EU) No 231/2014.

402 Article 2(2) Regulation (EU) No 231/2014.

403 See for example the 2010 Enlargement Strategy, in which it is stated that '[t]he use of benchmarks in the accession negotiations serves as an important catalyst for reforms and gives a clear message that rule of law issues must be addressed seriously before accession. Commission Communication on Enlargement Strategy and Main Challenges 2010-2011, COM(2010) 660, 9 November 2010, p. 7.

Since the Commission's understanding of the rule of law is informed by the institutional angle, and, more particularly, the perspective of judicial reform,<sup>404</sup> this is hardly surprising. Judicial independence is one of the few specific rule of law elements mentioned in the legal framework<sup>405</sup> and can be found as an objective throughout all rounds of the Accession and European Partnerships.<sup>406</sup> Its relevance is highlighted across all years, albeit in fairly generic terms, in the Enlargement Strategies,<sup>407</sup> and the annual reports allocate a significant amount of space to the assessment of progress in this area.

As rightly noted by Scott, only if the judiciary is independent from the other branches of government, 'can we say that we live in a society where the rule of law is able to flourish.'<sup>408</sup> Indeed, for any society to be based on the rule of law, there must be an institution charged with the responsibility of ensuring that it is the law that rules.<sup>409</sup> As seen in chapter 1, Dicey argued that it is the role of the courts to keep the state, and its citizens, from arbitrary government, and to ensure equality by law.<sup>410</sup> The notion of judicial independence is widely accepted and Article 6 ECHR enshrines the right to a fair trial by an independent and impartial tribunal established by law.<sup>411</sup> In the *Sunday Times* case, the ECtHR described the relationship between this right and the rule of law, by stating that Article 6 'reflects the fundamental principle of the rule of law.'<sup>412</sup>

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404 See section 3.3.1.

405 As was already analysed above, the Europe Agreements provide no substantive input for the EU's definition of the rule of law. The Stabilisation and Association Agreements, however, in their institutional approach on the rule of law, zoom in on judicial independence. See for example Article 74 of the Stabilisation and Association Agreement with the Former Yugoslav Republic of Macedonia. See also Article 2(2)(a) of Regulation (EU) No 231/2014.

406 See for example the 1999 Accession Partnership Bulgaria; 2002 Accession Partnership Slovakia; 2003 Accession Partnership Romania; 2008 European Partnership Serbia including Kosovo.

407 See for example the 2006 Strategy, in which it is stated that the Commission 'is promoting greater awareness of how best to ensure the independence, impartiality and effectiveness of the judiciary and to prevent corruption.' Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649, 8 November 2006, p. 5.

408 Richard J. Scott 'Accountability and Independence' 45 *University of New Brunswick Law Journal* (1996), pp.27-36 at 27. Further, see Simon Shetreet & Jules Deschênes (eds) *Judicial Independence – the Contemporary Debate* Dordrecht: Martinus Nijhoff (1985), p. xv; John Reitz 'Export of the Rule of Law' 13 *Transnational Law & Contemporary Problems* (2003), pp. 429-486 at 437.

409 Antonio Lamer 'The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change' 45 *University of New Brunswick Law Journal* (1996), pp. 3-18 at 6.

410 Albert Venn Dicey *An Introduction to the Study of the Law of the Constitution* London: MacMillan Press (1959).

411 See for example ECtHR *Lauko v. Slovakia*, Appl. No. 4/1998/907/1119, para. 63.

412 ECtHR *Sunday Times v. United Kingdom*, Appl. No. 6538/74, para. 55. See also ECtHR *Stan Greek refineries v. Greece*, Appl. No. 13427/87, para. 46; ECtHR *Salbiaku v. France*, Appl. No. 10519/83, para. 28.

Within the EU's institution-centric approach, the promotion of judicial independence was, and is, one of the main issues addressed by the Commission in the pre-accession process.<sup>413</sup> The 2015 Enlargement Strategy formulates the consolidation of the rule of law particularly in terms of 'improving the functioning and independence of judiciary....'<sup>414</sup> Considering the cultural and historical context of the applicant countries, both for the countries in central and Eastern Europe<sup>415</sup> and the Western Balkans,<sup>416</sup> strong institutional guarantees of judicial independence are required. However, even though various legal instruments acknowledge the importance of judicial independence,<sup>417</sup> it was already pointed out in the previous case-study<sup>418</sup> that there is an abundance of legal and political documents,<sup>419</sup> including those by the UN Human Rights Committee,<sup>420</sup> the International Bar Association (IBA),<sup>421</sup> the International Commission of Jurists,<sup>422</sup> and

413 It can be found as an objective in a great number of Accession and European Partnerships, see for example 2003 Accession Partnership Bulgaria; 2003 Accession Partnership Turkey; 2002 Accession Partnership Estonia. Also see the 2008 European Partnership Bosnia and Herzegovina; 2008 European Partnership with Albania.

414 Commission Communication on EU Enlargement Strategy, COM(2015) 611, 10 November 2015, p. 5.

415 See the Report of the Open Society Institute on Judicial Capacity, in which it is stated that '[i]n the candidate States in particular, the legacy of the judiciary's subordination and dependence and, more broadly, the lasting cultural effects of political dictatorship, may require institutional separation and institutional guarantees of judicial independence that are more far-reaching than in countries with an entrenched culture of judges' independence or a tradition of decision-making based on consensus and negotiation.' Open Society Institute (2002) *Monitoring the EU Accession Process: Judicial Capacity*, p. 15, available at: [https://www.opensocietyfoundations.org/sites/default/files/1judicialcapacity\\_full\\_20030101\\_0.pdf](https://www.opensocietyfoundations.org/sites/default/files/1judicialcapacity_full_20030101_0.pdf).

416 See the analysis of the legacies of the past as obstacles to EU rule of law promotion in Kmezić (2017), pp. 39-47.

417 See for example Article 14 ICCPR. Further, see the Council of Europe, European Charter on the Statute for Judges, DOC(98) 23, July 1998, available at: <https://rm.coe.int/16807473ef>; Council of Europe Recommendation No. (94) 12, on the Independence, Efficiency and Role of Judges, 13 October 1994.

418 See section 3.3.3.

419 See the overview compiled by the International Commission of Jurists, available at: <https://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/international-standards/>.

420 United Nations Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice) Equality before the Court and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984, para. 3, available at: <http://www.refworld.org/docid/453883f90.html>.

421 International Bar Association, Minimum Standards of Judicial Independence, adopted in 1982, available at: [https://www.icj.org/wp-content/uploads/2014/10/IBA\\_Resolutions\\_Minimum\\_Standards\\_of\\_Judicial\\_Independence\\_1982.pdf](https://www.icj.org/wp-content/uploads/2014/10/IBA_Resolutions_Minimum_Standards_of_Judicial_Independence_1982.pdf).

422 International Commission of Jurists, Policy Framework for Preventing and Eliminating Corruption and Ensuring Impartiality of the Judicial System, available at: <https://www.icj.org/wp-content/uploads/2015/04/CIJL-Policy-Framework-for-preventing-and-eliminating-corruption-and-ensuring-impartiality-of-the-judicial-system-2000.pdf>.

the European Network of Councils for the Judiciary (ENCJ).<sup>423</sup> These documents approach judicial independence from various angles and present rather diverse views of the notions substance, making it difficult to rely on one standard over another.

Notwithstanding the fact that the Council of Europe has produced a number of key (non-binding) documents on the topic,<sup>424</sup> which, together with the ECtHR's case law on Article 6 ECHR, provides an insight to its own understanding of judicial independence, it is submitted that neither the EU nor the Council of Europe has a clearly defined, precise, clear-cut standard on judicial independence which is applied in the enlargement process. Indeed, as Smilov has argued, among the Member States of both there is a plurality of models of judicial independence, with 'no prospect of convergence among them on the key issues.'<sup>425</sup>

The Court of Justice of the European Union itself has provided a generic view of judicial independence in its case-law when it stated that '[i]t should be remembered that the expression 'court or tribunal' is a concept of Community law, which, by its very nature, can only mean an authority acting as a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings.'<sup>426</sup> Later case-law has added, *inter alia*, that a tribunal or court should give judgement without receiving any instructions, giving it a *status aparte* from the authorities that took the decision under appeal.<sup>427</sup> Or, in the words of the Court in the recent case *Associação Sindical dos Juízes Portugueses*,<sup>428</sup>

423 European Network of Councils for the Judiciary, Report on Independence and Accountability of the Judiciary 2013-2014, available at: [https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj\\_report\\_independence\\_accountability\\_2014\\_disclaimer.pdf](https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_2014_disclaimer.pdf).

424 See for example Council of Europe, European Charter on the Statute for Judges, DOC(98) 23, July 1998, available at: <https://rm.coe.int/16807473ef>; Council of Europe Recommendation No. (94) 12 of 13 October 1994 on the Independence, Efficiency and Role of Judges. Also see the important work of two of its other bodies, the Venice Commission (European Commission for Democracy through Law) and the Commission for the Efficiency of Justice (CEPEJ).

425 Daniel Smilov 'EU Enlargement and the Constitutional Principle of Judicial Independence' in Wojciech Sadurski, Adam Czarnota & Martin Krygier *Spreading Democracy and the Rule of Law?* Dordrecht: Springer (2006), pp. 313-334 at 314. For a comparative study on the institutionalisation of judicial independence see Carlo Guarnieri & Patrizia Pedersoli *The Power of Judges: A Comparative Study of Courts and Democracy* Oxford: Oxford University Press (2002).

426 Case C-24/96 *Corbiau* [1993] ECR I-1277, para. 15. See further, Case C-393/92 *Almelo v Energiemaatschappij IJsselmeer* [1994] ECR I-1277 para. 21; Case 109/88 *Handels-og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1989] ECR 3199, paras. 7-8; Case 14/86 *Pretore di Salò* [1987] ECR 2545, para. 7; Case 338/85 *Fratelli Pardini* [1988] ECR 2041, para. 9.

427 Case C-407/98 *Abrahamsson* [2000] ECR I-5539, paras. 36-37.

428 Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, EU:C:2018:117, 27 February 2018, para. 44.

The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is just protected against external interventions or pressures liable to impair the independent judgment of its members and to influence their decisions.

It must be pointed out that the CJEU's rudimentary view of judicial independence has been informed by the legal framework in which it pronounced on the question, that of the preliminary reference procedure (Article 267 TFEU). This was reiterated in the abovementioned case, in which the importance of judicial independence and its relationship to the rule of law was explicitly placed in the context of the role of Member State courts in ensuring effective judicial review for individual parties in fields covered by EU law.<sup>429</sup> Furthermore, the independence of national courts and tribunals is, according to the Court, particularly 'essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism...', in that 'that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.'<sup>430</sup> However, while this limited formulation provides enough guidance to assess whether referring courts and tribunals are entitled to ask a preliminary reference, it clearly falls short of providing a comprehensive standard on the issue. Turning to Strasbourg's human rights protection system, judging from the line of case law on the topic, including the case of *Holm v Sweden*<sup>431</sup> which combined both personal and institutional guarantees, it can be said that judicial independence is interpreted broadly, covering a variety of difference components.<sup>432</sup> As it has been analysed in the literature,<sup>433</sup> the latter has as a consequence that

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429 *Ibid.*, paras. 34, 42.

430 *Ibid.*, para. 43.

431 The European Commission on Human Rights ruled that '[i]n determining whether a body can be considered to be an independent tribunal, regards must be had to the manner of appointment of its members and the duration of their term of office, the existence of regulations governing their removal or guarantees for their irremovability, law prohibiting their being given instructions by the executive in their adjudicatory role, the existence of legal guarantees against outside pressures, the question whether the body presents an appearance of independence and the attendance of members of the judiciary in the proceedings.' European Commission on Human Rights *Holm v Sweden* Application Nos. 6878/75 and 7238/75, para. 55.

432 See for example the *Langborger* case in which the Commission held that '[i]n order to establish whether a body can be considered 'independent' regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.' ECtHR, *Langborger v. Sweden*, Appl. No. 11179/84, para. 32. See further ECtHR, *Procola and others v. Luxembourg*, Appl. No. 14570/89, para. 43; ECtHR, *Bryan v. United Kingdom*, Appl. No. 19178/91, para. 37; ECtHR, *Steel and Morris v. United Kingdom*, Appl. No. 68416/01, para. 73.

433 Martin Kuijer *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* Leiden: E.M.C. Meijers Instituut (2004), p. 213.

the Strasbourg case-law is context-based and flexible, without, however, providing a comprehensive clear-cut standard.

It would go beyond the scope of this thesis to go into a detailed, lengthy, and critical analysis of the Commission's assessment of judicial independence throughout the reports in order to point out all the divergences. Such analysis of the effectiveness and consistency of the Commission's evaluations has already been undertaken in the existing literature, both in relation to the countries in central and Eastern Europe,<sup>434</sup> and to the Western Balkans.<sup>435</sup> Nonetheless, on the conceptualisation of this particular element in enlargement across the documents regarding all the applicant countries concerned, three points should be made in relation to judicial independence and the rule of law.

First, the Commission has organised its assessment of judicial independence mainly along the lines of the prevailing approach<sup>436</sup> of institutional and personal independence,<sup>437</sup> or, in the words of the ENCJ's report on Independence and Accountability, the independence of the judiciary as a whole and the independence of the individual judge.<sup>438</sup> The 2001 Regular Report on Estonia serves a good example of the Commission's assessment since it demonstrates both aspects of judicial independence.

All judges are appointed for life and the Constitution and legislation explicitly safeguard the independence of judges. However, there is a need to further reinforce the institutional independence of the courts particularly in the context of the ongoing court reform. The close administration of the courts (with the exception of the Supreme Court) by the executive (Ministry of Justice), and the courts' limited financial autonomy, threaten judicial independence.<sup>439</sup>

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434 For an analysis of judicial independence in the reports of the fifth round of enlargement in the light of conditionality and the questionable coherence of the Commission's approach see Kochenov (2008), pp. 252-275; Smilov (2006), pp. 313-334.

435 For a normative and empirical analysis of judicial independence in the Western Balkans, see Kmezić (2017), pp. 65-84.

436 Shetreet has stated that 'a modern conception of judicial independence cannot be confined to the individual judge and to his substantive and personal independence, but must include collective independence of the judiciary as a whole.' Shimon Shetreet 'The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration' in Shimon Shetreet & Jules Deschênes (eds) *Judicial Independence: The Contemporary Debate* The Hague: Martinus Nijhoff (1985), pp. 393-402 at 393.

437 This division is rather rudimentary; there are diverging views on the placement of sub-elements within this divide, such as the question whether the arrangements for selecting, appointing, evaluating, and disciplining of judges is part of either institutional independence, or individual independence. However, considering the differences in the various instruments, for present purposes it is not necessary to go into a more detailed outline.

438 European Network of Council's for the Judiciary 'Independence and Accountability of the Judiciary – ENCJ Report 2013-2014' adopted in Rome, 13 July 2014, available at: [https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj\\_report\\_independence\\_accountability\\_adopted\\_version\\_sept\\_2014.pdf](https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_adopted_version_sept_2014.pdf).

439 2001 Estonia Regular Report, p. 18.

In relation to institutional independence, the Commission's focus included (in relation to the CEECs), and includes (regarding the SEECs), the following sub-elements: the existence of a legal framework that guarantees and regulates judicial independence; the governance structure in terms of self-regulation; and the budgetary arrangements both in terms of quantity and level of independence in allocation. Whereas the reports on the countries in central and Eastern Europe demonstrate that the first sub-element of Constitutional guarantees is little more than a legislative check,<sup>440</sup> in relation to the countries in the Western Balkans the assessment takes the actual application of the rules in practice into account. Indeed, as the Montenegro Screening Report of Chapter 23 shows, the Commission, after evaluating the relevant Constitutional provisions, warns that 'existing rules present a number of shortcomings and create risks for undue political influence.'<sup>441</sup> This shows that in the area of judicial independence the Commission increasingly found ways to go past legislative window-dressing, in order to address the actual application of rules.

On the second sub-element of the governance structure, the assessment focuses mainly on the underlying legal framework allowing judicial self-government, the composition of the self-governing body, *i.e.* the Judicial/Prosecutorial Council, and the relations with the Minister/Ministry of Justice. According to the 2002 authoritative report by the Open Society Institute on judicial capacity in relation to the countries in central and Eastern Europe, self-governance has become one of the focal points of judicial reform, since an autonomous judiciary 'will better be able to respond with flexibility to its perceived needs than will one that is directed by an external authority.'<sup>442</sup> The underlying idea is that judges who feel that they are responsible for or can influence the administration of their own affairs have more incentive for acting independently and protecting their independence.<sup>443</sup> However, the problem of insufficient institutional independence was, and still is,<sup>444</sup> acute in the applicant states and the Commission has actively promoted a greater degree of independence in the organisation of the judicial sector's self-governance, criticising too much involvement of the

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440 The early reports included simply the check whether the Constitution provides for both institutional and personal independence of judges, see for example 2001 Poland Regular Report, p. 20; 2001 Hungary Regular Report, p. 16.

441 Montenegro Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 17785/12, 14 December 2012, p. 18.

442 Open Society Institute *Monitoring the EU Accession Process: Judicial Capacity* (2002), p. 41, available at: [https://www.opensocietyfoundations.org/sites/default/files/1judicialcapacityfull\\_20030101\\_0.pdf](https://www.opensocietyfoundations.org/sites/default/files/1judicialcapacityfull_20030101_0.pdf).

443 Open Society Institute *Monitoring the EU Accession Process: Judicial Independence* (2001), p. 23, available at: [https://www.opensocietyfoundations.org/sites/default/files/judicialind\\_20011010.pdf](https://www.opensocietyfoundations.org/sites/default/files/judicialind_20011010.pdf).

444 Commission Communication on 2016 Communication on Enlargement Policy, COM(2016) 715 final, 9 November 2016, p. 3.

executive and legislature,<sup>445</sup> the failure to adopt the necessary legislation,<sup>446</sup> and the composition of the Judicial Councils.<sup>447</sup>

In relation to the budgetary arrangements, while the ultimate power may lay with the legislature, it is vital that the judiciary itself participates in the drafting and application of its own budget in order to ensure that the judges' legitimate interests are protected from indirect economic pressure.<sup>448</sup> This is all the more so in the case of the applicant countries where the courts came from a situation of underfunding and executive opposition to budget increases. Accordingly, the Commission has criticised decreases in the judiciary budget in terms of amount/percentage GDP,<sup>449</sup> but also in terms of executive intervention in the budget adoption procedure.<sup>450</sup> From the phrasing of the reports, it is apparent that the Commission must have had some general judiciary budgetary standards in mind – '[t]he number of judges and prosecutors in Montenegro is above the EU average in relation to the size of the population, as is the percentage of the budget spent on staff.'<sup>451</sup> However, the reports do not indicate what these percentages are and how salary expenses relate to the overall expense of judicial build-up and reform. Thus, even though budgetary management is clearly included as a sub-element of institutional judicial independence, the Commission has refrained from offering a minimum standard.

On the issue of personal independence, the comments here can be brief. The Commission looked at the same elements across all the years, both in relation to the CEECs and SEECs. These include appointment and irremovability,<sup>452</sup> transfer,<sup>453</sup> probation,<sup>454</sup> selection proceedings,<sup>455</sup> and remuneration.<sup>456</sup> It is interesting to see, however, that only in some of the later reports concern is expressed over the need to ensure protection mechanisms of both external (external pressure on individual judges in relation to their individual decision-making) and internal (judicial peer pressure) independence of judges, a subdivision of personal judicial independence

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445 See for example 2001 Estonia Regular Report, p. 18; 2001 Latvia Regular Report, p. 19; 2002 Latvia Regular Report, p. 21; 2012 Serbia Progress Report, p. 10.

446 See for example 1998 Bulgaria Regular Report, p. 8; 2001 Slovakia Regular Report, p. 17; 2008 Montenegro Progress Report, p.11.

447 See for example 2001 Romania Regular Report, p. 20; 2008 Montenegro Progress Report, p.11; 2012 FYROM Progress Report, p. 10.

448 Open Society Institute *Monitoring the EU Accession Process: Judicial Capacity* (2002), p. 46.

449 See for example 2001 Hungary Regular Report, p. 17; 2002 Hungary Regular Report, p. 25; 2016 Montenegro Report, p. 14.

450 See for example 2002 Bulgaria Regular Report, p. 24; 2016 Serbia Report, p. 13.

451 2016 Montenegro Report, p. 14.

452 See for example 2001 Hungary Regular Report, p. 16; 2001 Bulgaria Regular Report, p. 18; 2008 Montenegro Progress Report, p. 11.

453 See for example 2016 Turkey Report, p. 64.

454 See for example 2008 Croatia Progress Report, p. 51; 2010 Turkey Progress Report, 14; 2010 Iceland Progress Report, p. 7.

455 See for example 2006 Croatia Progress Report, p. 49; 2016 Serbia Report, p. 55.

456 See for example 2001 Lithuania Regular Report, p. 18.

as proposed in the ENCJ Report on the Independence and Accountability of the Judiciary.<sup>457</sup> Thus, for example in FYROM's 2016 Report, the Commission condemns the situation that although high ranking judicial officials have pointed publicly to the need to respect the independence of the judiciary, 'there is no framework in place to protect judges against external pressures.'<sup>458</sup> Furthermore, as an illustration of internal personal independence, Montenegro's 2015 report highlights the Commission's awareness of the fact that such independence may be undermined by the Supreme Court's possibility to adopt legal positions of principle and by the supervisory powers of higher courts *vis-à-vis* lower courts.<sup>459</sup>

The second point that should be made in relation to judicial independence is the fact that it is increasingly mentioned in combination with judicial accountability. While the latter is hardly a matter of concern in the reports on the fifth enlargement round, it is clearly on the agenda in the reports on the Western Balkans, as, for example, the 2014-2015 Enlargement Strategy demonstrates.<sup>460</sup>

[N]umerous challenges remain. Independence of state judicial councils needs to be ensured, more sound procedures for the appointment of judges and prosecutors put in place and judicial independence needs to be safeguarded whilst ensuring accountability.

The addition of judicial accountability comes in recognition of the fact that judicial independence and judicial accountability are complementary concepts.<sup>461</sup> After all, as was already pointed out in the previous case study, the judiciary has been granted a limited measure of autonomy for a particular common purpose, and an independent judiciary must therefore be accountable for its decisions and operations.<sup>462</sup>

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457 European Network of Council's for the Judiciary 'Independence and Accountability of the Judiciary – ENCJ Report 2013-2014' adopted in Rome, 13 July 2014, pp. 11-12.

458 2016 FYROM Report, p. 13.

459 2015 Montenegro Report, p. 13.

460 Commission Communication on Enlargement Strategy and Main Challenges 2014-2015, COM(2014) 700 final, 8 October 2014, p. 11.

461 In the previous case study in the concomitant section, it was pointed out that, although they are intertwined, judicial independence and judicial accountability are two distinct concepts, describing competing visions of the relationship of the judiciary /judges to the rest of society. It was highlighted that judicial independence covers both institutional and decisional independence, keeping the judiciary separate from other branches of government and judicial decision-making free from undue influence. Judicial accountability describes the ideal that the judiciary, much like the legislature and the executive, should be held accountable for their work. Also see Open Society Institute *Monitoring the EU Accession Process: Judicial Independence* (2001), pp. 18-19; Kmezić (2017), p. 84.

462 See section 3.3.3. Further, see Open Society Institute *Monitoring the EU Accession Process: Judicial Capacity* (2002), p. 16.

The Commission has not indicated what it means by judicial accountability, however, most of the reports concentrate on the existence and functioning of a disciplinary system for judges and prosecutors<sup>463</sup> and the issue of immunities.<sup>464</sup> While the formulation of the assessment occasionally indicates that stronger procedures need to be put into place – ‘[t]he current system of disciplinary responsibility for judge and prosecutors result mostly in mild disciplinary sanctions and therefore fails to produce a deterrent effect’<sup>465</sup> – the Commission does not outline its own particular standards, often merely providing a quantitative overview of the number of cases against judges and prosecutors in a reporting year.<sup>466</sup> Moreover, the Commission pays very little attention to issues of transparency, for example by way of freely accessible data that could enhance accountability,<sup>467</sup> thereby demonstrating that it has a one-dimensional approach that focuses on quantitative specifics, rather than tackling the question of whether the judiciary is also perceived to be accountable. In order for the rule of law to exist, citizens’ faith in the judicial system and its workings is of the utmost importance;<sup>468</sup> only concentrating on the functioning of an institution will not necessarily generate such confidence as a corollary.

Thirdly, in relation to judicial independence, the Commission has been heavily criticised for relying on ‘European standards’ in this area,<sup>469</sup> without clarifying what this concept entails.<sup>470</sup> Taking this argument one step further, Smilov has argued that the Commission has wilfully developed a ‘myth of a common European theory of judicial independence’<sup>471</sup> since the advancement of such a theory served the EU’s own interests for

463 See for example 2012 Serbia Progress Report, p. 10; 2014 Kosovo Progress Report, p. 13.

464 2005 Croatia Progress Report, p. 84; 2012 Montenegro Progress Report, p. 45.

465 Serbia Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 12003/14, 16 July 2014, p. 23. See for a similar formulation on judicial immunity (‘the scope of application of these provisions and the procedures for removing functional immunity are not fully clear and need to be reviewed to ensure full accountability of judges and prosecutors under criminal law’) Montenegro’s Screening Report, Montenegro Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 17785/12, 14 December 2012, p. 20.

466 See for example 2012 FYROM Progress Report, p. 50; 2014 Montenegro Progress Report, p. 37; 2015 FYROM Report, p. 52.

467 One of the few exceptions is the 2016 Albania Report, p. 58.

468 As Krygier has noted, ‘successful attainment of the rule of law is a social outcome, not a merely legal one’, Martin Krygier ‘The Rule of Law: Legality, Teleology, Sociology’ in Gianluigi Palombella & Neil Walker *Relocating the Rule of Law* Oxford: Hart Publishing (2008), pp. 51-79 at 64.

469 See for example 2011 Bosnia and Herzegovina Progress Report, p. 13; 2014 FYROM Progress Report, p. 40.

470 Kochenov (2008), pp. 256-257; Denis Preshova, Ivan Damjanovski & Zoran Nechev ‘The Effectiveness of the ‘European Model’ of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms’ *Cleer Paper* No.1 (2017).

471 Smilov (2006) p. 314.

bureaucratic, normative, and pragmatic reasons. After all, the whole process of measuring progress on the basis of standards and other benchmarks is dependent on the existence of these; the myth is instrumental in the self-creation of the EU as a polity based on common principles and standards; and during negotiations the existence of a 'common European standard' forms an almost unbeatable argument for reform.<sup>472</sup>

The critique is right in stating that the Commission has repeatedly failed to formulate a 'European standard' in the area of judicial independence. However, the argument put forward here is more nuanced. What the literature fails to take into account in its considerations is the fact that the rule of law has an inherent flexibility in its institutional design, which undercuts the idea of a common European standard. As it was argued in chapters 1 and 2, the rule of law does not come with an institutional blueprint and allows for many different ways through which it can be guaranteed.<sup>473</sup> Accordingly, the critique is misguided in attempting to push the Commission to formulate common standards regarding this particular rule of law element, *i.e.* to put flesh on the bones of the 'European standards' in the area of judicial reform. Rather, it is argued here that it would be more in line with the rule of law to acknowledge the fact that there are very few generally applicable standards in this area. Indeed, as already outlined above, the Commission would have been hard pressed to provide an overview of common sub-elements, since such a consistent set of common standards concerning judicial independence does not exist, neither in the various instruments and documents mentioned, nor in the EU Member States. To be sure, the Report on Judicial Capacity of the Open Society Institute states that judicial reform will 'inevitably always have a highly particular, national character, given the strongly domestic focus and divergent traditions of different States' legal systems. Indeed, ... there will always be broad scope for choice in how States wish to organise their judiciaries – even to the point

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472 *Ibid.*, pp. 326-330.

473 On the different models of judicial independence generally, see Shimon Shetreet 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in Shimon Shetreet & Jules Deschênes *Judicial Independence: The Contemporary Debate* The Hague: Martinus Nijhoff (1985), pp. 590- 681 at 644; Sergio Bartole 'Alternative Models of Judicial Independence: Organizing Judiciary in Central and Eastern Europe' *7 East European Constitutional Review* (1998), pp. 62-69 at 62.

On the issue of self-governance see the 2002 Open Society Report on Judicial Capacity which highlights at least three models of self-governing ranging from total independence to increasingly hybrid forms of executive involvement in the CEECs: the independent model (autonomous governance by the judiciary); the power-sharing model (the governance and administration of the judiciary are to a certain degree shared between an autonomous judicial council and another executive body); the executive-centred model (the judiciary is not a separate entity, but rather an agency subordinated to the Ministry of Justice). Open Society Institute *Monitoring the EU Accession Process: Judicial Capacity* (2002), pp. 42-46. Also see the Open Society Institute's report on *Monitoring the EU Accession Process: Judicial Independence* (2001).

that what may be seen as essential to a just system in one may be thought antithetical to justice in another.<sup>474</sup> This is particularly the case for such a pliable concept as judicial independence. Moreover, the legacy of communism and the unsettled political transition may require solutions that would be unacceptable in the Member States<sup>475</sup> – stretching the boundaries of the element of judicial independence even further.

This does not mean that the EU should not put forward a minimum standard of judicial independence – the creation of a union of shared values necessitates the articulation of the minimum standards of the various rule of law elements which membership requires – candidate states cannot reasonably be expected to align their judiciaries to standards that are themselves not defined. However, it does imply that the Commission's uneven approach towards reforms in the area of judicial independence has given the applicant states the opportunity to grapple to some extent with their own ideas of protecting the independence of the judiciary and its judges – bringing the pre-accession practice, however unintentionally, to some extent in line with the rule of law. The point is that by focussing on the Commission's approach in the light of its puzzling emphasis on non-existent 'European standards', the critique displays in its analysis an unjustified tendency to precarious generalization<sup>476</sup> – instead of allowing for national specificity there is a trend to generalise to all countries against the background of a predisposition to find proof of Europeanisation as a success story.<sup>477</sup> By doing so, it has bypassed the actual room for manoeuvre the Commission has afforded the individual applicant states. Indeed, the actual practice debunks the Commission's own narrative of 'European standards' while, at the same time, allowing room for more organic approaches by the candidate states to the development of this element – in line with the flexibility inherent in the concept of the rule of law. The advantage of this perspective change is that it shifts the focus in the area of judicial reform

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474 Open Society Institute *Monitoring the EU Accession Process: Judicial Capacity* (2002), p. 21.

475 Open Society Institute *Monitoring the EU Accession Process: Judicial Independence* (2001), p. 28.

476 Cf. Georgi Dimitrov 'The Europeanization of the Countries in South-East Europe through Enhancement of the Rule of Law: A Mission in Progress' 39 *Southeastern Europe* (2015), pp. 277-293 at 288; Michael Hein 'Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford 2012: Oxford University Press). A Comment' 39 *Southeastern Europe* (2015) pp. 421-430.

477 See, for example, Antoaneta Dimitrova 'The New Member States of the EU in the Aftermath of Enlargement: Do New European Rules Remain Empty Shells?' 17 *Journal of European Public Policy* (2010), pp. 137-148; Antoaneta Dimitrova (ed) *Driven to Change: The European Union's Enlargement Viewed from the East* Manchester: Manchester University Press (2004); Heather Grabbe *The EU's Transformative Power. Europeanization through Conditionality in Central and Eastern Europe* New York: Palgrave Macmillan (2006); James Hughes, Gwendolyn Sasse & Claire Gordon (eds) *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe. The Myth of Conditionality* New York: Palgrave Macmillan (2005).

from the exact delineation of standards applicable in the pre-accession process to all candidate states, to the question of what is necessary in order to consolidate judicial independence in the candidate states. This more nuanced understanding, allows for a better insight into the effectiveness of the consolidation of the rule of law in the acceding states.<sup>478</sup>

### 3.3.4 Conclusions

This section explored to what extent the legal framework and practice of the EU's enlargement policy confirmed the institutional rule of law elements established in the previous chapters. It was demonstrated that following the formulation of the Copenhagen political criteria, the rule of law is perceived in terms of reform of the rule of law institutions. Following this, it was asserted in relation to the doctrine of the separation of powers that the Commission, by addressing the three branches of government separately in the annual reports, has omitted setting out its thoughts on the doctrine *per se*. However, it was demonstrated that the reports show a particular focus on judicial independence, thereby confirming the findings of chapters 1 and 2 on this topic. More particularly, it was asserted that the legal framework and the reports manifest a focus on judicial independence, making it one of the main institutional elements addressed in the pre-accession process.

## 3.4 Interim conclusions

This part of the chapter tested the analytical framework of the three categories of rule of law elements against the EU's legal framework and practice in its enlargement policy. For each of the three categories, the question was examined whether, and if so to what extent, the elements established previ-

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478 In the literature on the Western Balkans in particular, it has been highlighted that progress on the issue of the effective consolidation of judicial independence in the applicant states has so far been quite problematic. In the light of the recent developments in Poland, Hungary, and Romania – the Member States have come under close scrutiny related to judicial independence and the rule of law. It is apparent that the strengthening of the rule of law, at least in the area of judicial independence, leaves a lot to be desired. However, further research into the effectiveness of the EU's rule of law promotion efforts fall outside the ambit of this thesis. For an analysis of issues related to the EU's promotion of judicial independence in the Western Balkans, see for example Kmezić (2017), pp. 65-84; Denis Preshova, Ivan Damjanovski & Zoran Nechev 'The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms' *Cleer Paper* No.1 (2017). On the Member State mentioned, see Commission Recommendation of 20 December 2017 regarding the rule of law in Poland, complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, C(2017) 9050 final, particularly section 2; European Parliament resolution of 16 December 2015 on the situation in Hungary, 2015/2935(RSP), pnt. F; Joint Statement of European Commission President Juncker and First Vice-President Timmermans on the latest developments in Romania, 24 January 2018, STATEMENT/18/423.

ously were reflected in practice. It was shown that the formal element of legality, which lies at the heart of the rule of law debate of legal scholars, does not appear in the legal and policy framework and is hardly considered by the Commission in its reporting. Instead, the examination demonstrated that, because of the chosen enlargement methodology, which quantifies progress in the legislative approximation process instead of also focussing on legislative quality, legality is actually undermined. More particularly, the findings in the reports attest to the fact that by stressing quantity over quality, problems have arisen in relation to various requirements of legality including stability, generality, and coherence. This was shown to be the case across all enlargement rounds and also in the current enlargement process regarding the Western Balkan countries.

Furthermore, it was asserted that four particular procedural elements have been fleshed out in the Commission's reporting during the pre-accession period, namely impartiality, judicial efficiency and quality, and access to justice. With regard to the first element, it was argued that in spite of impartiality's increasing importance from one enlargement round to the other, the documents display a distinct lack of clarity of the notion in relation to the institutional element of judicial independence. On the issues of judicial efficiency and quality, it was demonstrated that they have been conceptualised mostly in terms of their underlying obstacles, including problems of enforcement, low clearance rates and backlogs, and excessive length of proceedings. In relation to the third element of judicial review, it was argued that the Commission views this rule of law element mostly through an institutional lens, interpreting it in terms of the organisation of courts and their capacity, instead of focussing on the ways these bodies function and what are the necessary steps in order to strengthen this. In relation to the fourth element of access to justice, it was asserted that this element is mainly interpreted in terms of access to court and access to legal aid. Furthermore, it was shown that the evaluation of this element takes place under the headings of both the functioning of the judiciary and fundamental rights. The section concluded by arguing that even though the reports evidence the inclusion of access to justice as a rule of law element, the Commission's lack of critique in situations when there has been very little progress in the yearly monitoring reports, gives the impression that this element is not at the core of the procedural elements in the understanding of the rule of law in enlargement.

Lastly, it was argued that the EU perceives the rule of law in its accession policy mainly in terms of institutional reform, more particularly judicial reform. It was shown that this conclusion is supported by both the legal and the policy framework. Moreover, it was demonstrated that judicial independence, as the main component of the separation of powers, has been acknowledged as a main element through which the rule of law is guaranteed, lending evidentiary force to the findings on this issue in the first two chapters of the thesis.

#### 4. GENERAL FINDINGS

In this section, the general findings on the EU's conceptualisation of the rule of law in the pre-accession process will be discussed. As already explained in the previous case study, these are the findings in relation to the conceptualisation of the rule of law in enlargement that transcend the individual categories of the analytical framework. More particularly, the general findings are concerned with the overall picture of the definition of the rule of law in this policy area. The first section of the general findings will outline the definition of the rule of law in this policy area, weighing the elements in each of the three categories, as well as analysing the relative weight of each of the categories individually. It will be shown that the conceptualisation of the rule of law in enlargement, while largely devoid of the formal element of legality, relies heavily on both procedural and institutional elements. More particularly, it will be demonstrated that the strong institutional focus of the policy has led to an emphasis on judicial reform, which, in turn, has also influenced the understanding of some of the procedural elements, such as, for example, judicial review. Furthermore, it will be asserted that, regarding the evolution of the conceptualisation of the rule of law across the enlargement rounds and the current pre-accession process, it is apparent from the examination conducted throughout this chapter that most of the elements appear in the accession rounds under review. However, for three of these, the *procedural* element of judicial impartiality, and the *institutional* elements of the separation of powers and judicial independence and accountability, the analysis will demonstrate a slight change of focus, or rather, a more nuanced understanding which has taken place during the pre-accession process in relation to the Western Balkans.

The chapter will continue by offering an explanation for the EU's particular focus on judicial reform. It will be argued that in its conceptualisation of the rule of law in enlargement, the EU tends to interpret its strengthening efforts in this area in the applicant states mostly in the light of their role and functioning as future Member States. More particularly, it will be shown that the EU's rule of law efforts centre around judicial reform because of the pivotal role of national courts in the EU legal order. Next to this, the section will turn to a last observation stemming from the analysis undertaken in part 3 of this chapter. From the examination of rule of law elements undertaken in section 3 it is apparent that there is an overlap in the monitoring reports between the two sections dealing with the rule of law, *i.e.* the rule of law under the first of the Copenhagen criteria and the rule of law under Chapter 23. This last section will examine the question whether the rule of law as a value is interpreted differently from the rule of law as part of Chapter 23 of the *acquis*. For reasons outlined below, it will be demonstrated that a trend can be established in the reports towards increasing substantive overlap of rule of law elements and analysis thereof to the extent that it can be said that the part of Chapter 23 concerned with the functioning of the judiciary to a large extent codifies the political criterion of the rule of

law. Moreover, it will be demonstrated that the recent rounds of reporting confirm this trend.

#### 4.1 The conceptualisation of the rule of law in enlargement: strong emphasis on judicial reform

The above examination has shown that the rule of law increasingly occupies a central place in the EU's enlargement policy. Starting with its inclusion as one of the Copenhagen political criteria, demonstration of progress in this area has been steadily pushed to the forefront of the pre-accession process, from the renewed consensus on enlargement<sup>479</sup> and the Commission's 'new approach'<sup>480</sup> to the strategy of 'fundamentals first'.<sup>481</sup> Addressing reforms in the area of the rule of law 'remains the most pressing issue' and is 'a key benchmark'<sup>482</sup> for the enlargement countries. From the outset, the treatment of the rule of law has been done in a rather opaque manner, by evaluating the developments together with one of the other Copenhagen political criteria, either democracy or fundamental rights. However, having analysed the various Europe Agreements, Stabilisation and Associations Agreements, Accession and European Partnerships, Enlargement Strategies, Council Conclusions, and Parliamentary reports and resolutions, the yearly rounds of monitoring reports have provided the most insight into the EU's conceptualisation of the rule of law. Below, the definition of the rule of law in this policy area will be addressed, and the relative weight of the elements within each of three categories (*formal*, *procedural*, and *institutional*), and these categories in relation to each other, will be assessed. In the various sections the interpretation of the various rule of law elements in the enlargement rounds (the countries of Central and Eastern Europe) and the current pre-accession process (the Western Balkan countries) was highlighted. While not repeating the comparative analysis, this section, in so far as possible, will set out to provide an overview of those similarities and difference in order to paint the overall picture of the possible evolvement of the rule of law in enlargement.

The analysis of the *formal* rule of law elements in section 3.1, has made it immediately apparent that the all-important issue of the consolidation of legality is largely absent from the enlargement framework and monitoring reports, both in relation to the big bang enlargement of 2004 and in the pre-accession process thereafter. It was shown that in the field of legal approximation, the adopted methodology has led to a quantitative evaluation of

479 Commission Communication on 2005 enlargement strategy paper, COM(2005) 561 final, 9 November 2005.

480 Commission Communication on Enlargement Strategy and Main Challenges 2011-2012' COM(2011) 666 final, 12 October 2011, p. 5.

481 Commission Communication on Enlargement Strategy and Main Challenges 2013-2014, COM(2013) 700 final, 16 October 2013.

482 Commission Communication on 2018 Communication on EU Enlargement Policy, COM(2018) 450 final, 17 April 2018, p. 2.

progress with regard to further alignment with the *acquis*. Moreover, it was posited that because of the particular nature of the *acquis* as a ready-made corpus of rules which the applicant states have to adopt without much negotiating space, there is only a small margin for local engagement with those rules. More particularly, it was asserted that this approach has had an impact on various sub-elements of legality, with examples across all enlargement rounds demonstrating the detrimental effect on such issues as legislative quality and stability.

Turning to the *procedural* category of the rule of law, the following four elements were examined: judicial impartiality, judicial efficiency and quality, judicial review, and access to justice. Three general findings can be observed. First, in relation to their relative weight, it was shown that the elements of judicial efficiency and access to justice have been part and parcel of the pre-accession process from the very beginning. However, while judicial impartiality has made its appearance particularly in the pre-accession process from 2005 onward, it was asserted that the EU's approach towards judicial review has been fragmented at best. Unlike the previous case study, wherein it was argued that access to justice is omnipresent throughout the legal framework and reports, none of the *procedural* elements presented in this chapter has been found to be present to that same extent.

Secondly, regarding a number of these elements and various of their sub-elements, it was argued that a general lack of articulation can be detected. In other words, neither in the legal framework, nor in the Commission's Enlargement Strategies or Council Conclusions can clear comprehensive definitions be found from which possible benchmarks could be deduced. For example, in section 3.2.1 on judicial impartiality, it was shown that in spite of the many available definitions, the EU has failed to indicate a preference for one of them, outline its own, or even to divulge whether it relies on the existing standards under Article 6 ECHR. In relation to judicial review, the lack of articulation has led the Commission to adopt a largely institution-based approach in which the focus has been put on the capacity and effectiveness of judicial organs, rather than an evaluation of the actual practice of judicial review.<sup>483</sup> Also regarding a number of sub-elements of judicial efficiency, such as backlog and enforcement, the lack of definition has led to unclarity concerning the data on which the Commission has based its progress assessment and has led to inconsistent findings across the years. Interestingly, it was demonstrated that, in contrast to the element of judicial impartiality, in relation to the sub-element of length of proceeding/reasonable time, the Commission relies on the standards found in the caselaw of the ECtHR in its critique of developments.<sup>484</sup>

Thirdly, in relation to two of the *procedural* elements identified in this chapter, namely judicial efficiency and access to justice, the Commission has adopted the somewhat paradoxical approach whereby the lack of progress

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483 See section 3.2.3.

484 See section 3.2.2.

has not prevented the applicant states from signing their accession treaties. For example, in the Comprehensive Monitoring Reports of the countries of the fifth,<sup>485</sup> sixth<sup>486</sup> and seventh<sup>487</sup> enlargement round, drawn up half a year before the date of accession, progress on access to justice and legal aid is reported on as being 'under-developed',<sup>488</sup> 'unsatisfactory',<sup>489</sup> and 'rather restricted'.<sup>490</sup> However, even with such a bad track record, the countries still acceded to the EU according to plan. Since none of the Western Balkan countries are in their final stages of negotiation it is as yet unclear whether, and if so to what extent, the same approach will be adopted in relation to them. While this certainly does not exclude the elements from being included in the EU's rule of law definition, it does somewhat diminish their importance, pushing them away from the core understanding of the notion in this policy area.

The examination of the third category of *institutional* elements, included judicial reform, the separation of powers, and judicial independence and judicial accountability. It was shown that the EU's strong focus on institution building follows from the objectives outlined in the Europe Agreement, the Stabilisation Agreements, as well as in the financial framework, which all prioritise the reinforcement of institutions in relation to the consolidation of the rule of law.<sup>491</sup> Following this, it was demonstrated that the Enlargement Strategies place a heavy emphasis on the development of judicial structures and capacity-building needed to ensure this. It was, furthermore, argued that in the EU's enlargement policy, the prominence of institution-building in which the rule of law has been continuously cloaked, has given rise to a prominent focus on judicial reform; a finding that was confirmed by the structure of the monitoring reports from the inception of the rule of law as one of the Copenhagen political criteria until the current rounds.

Interestingly, and comparable to the findings on the conceptualisation of the *institutional* rule of law elements under the previous case study, this pervasive judicial-institutional focus has not resulted in a clear articulation of the EU's understanding in the identified areas. Neither in relation to the separation of powers, nor to judicial independence or judicial accountability has it been clarified what standards will be relied on, or what, for example, the minimum requirements for the various sub-elements are. In the case of judicial independence, it was shown that, for instance, one of the results has been that the monitoring reports frequently demonstrate a level of

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485 See for example 2003 Latvia Comprehensive Monitoring Report, p. 13.

486 Romania's Monitoring Report states that '[t]he reform of the legal aid system needs to be carried out.' 2007 Romania Monitoring Report, p. 7.

487 Croatia's Monitoring Report simply states that '[t]he legal framework for free legal aid has to be improved to enable better access to legal aid and to foster the role of NGOs as legal aid providers.' 2012 Croatia Comprehensive Monitoring Report, p. 37.

488 2003 Poland Comprehensive Monitoring Report, p. 16.

489 2003 Lithuania Comprehensive Monitoring Report, p. 13.

490 2003 Hungary Comprehensive Monitoring Report, p. 14.

491 See section 3.3.1.

conceptual confusion with the *procedural* element of judicial impartiality.<sup>492</sup> Regarding the separation of powers, it was put forward that the lack of articulation has been amplified by the chosen structure and treatment of the Copenhagen political criteria in the monitoring reports, which follow the separation of powers-rationale by focussing on the three branches individually. Thus, instead of approaching the doctrine from the premise of how the three branches interact together, the emphasis is on their separate structure and capacity, mostly in isolation and without outlining minimum standards how to shape their balance of powers. However, it was subsequently also shown that this approach has somewhat evolved during the current pre-accession process by providing criticism in those instances where there has been evidence of undue political interference in the independence of the judiciary.<sup>493</sup>

In relation to the evolution of the rule of law elements over time, across the pre-accession monitoring rounds, a note has to be made on the EU's modification of its methodology. As was shown in section 2.2 on the increasing importance of the rule of law in the enlargement policy framework, the institutions have consistently underlined 'the importance of placing the rule of law even more at the heart of enlargement policy.'<sup>494</sup> As argued at the start of this section, this has resulted in the 'new approach' and, more recently, on a strategy of 'fundamentals first', which both place a high value on addressing the rule of law at the early stages of the process in order to afford candidates the opportunity to 'demonstrate their ability to strengthen the practical realisation of the values on which the Union is based at all stages of the accession process.'<sup>495</sup> While this has led, amongst others, to additional moments for measuring progress, for example, by way of interim benchmarks (next to the opening and closing benchmarks), the rule of law elements themselves, have, by and large, not substantively changed, other than the changes indicated above. Additionally, in 2015, the Commission introduced a strengthened approach to its assessments in the annual reports, with additional emphasis put on the state of play in the countries and where they stand in terms of preparedness on the basis of harmonised assessment scales.<sup>496</sup> The 'new style of reporting'<sup>497</sup> also includes guidance

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492 See section 3.2.1.

493 See sections 3.3.2 and 3.3.3.

494 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4. Also see, for example, Council Conclusions 'Enlargement and Stabilisation and Association Process', General Affairs Council, Doc. No.17604/12, 11 December 2012, pnt. 37, as well as the Council Conclusions 'Enlargement and Stabilisation and Association Process', General Affairs Council, Doc. 10555/18, 26 June 2018, pnt. 5

495 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4.

496 Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015, Annex 2.

497 *Ibid.*, p. 4.

on what the countries are expected to do for the following year. However, even though it has been indicated that these changes should not be understood as a narrow set of technical negotiations, but, rather, that they 'reflect more clearly that the European integration efforts of the enlargement countries should entail a steady and thorough process of political and economic reforms',<sup>498</sup> the elements on the basis of which progress is determined in the area of the rule of law have largely remained the same.<sup>499</sup> As has, in spite of its promises, the Commission's assessment.

In the light of the foregoing, it is clear that the conceptualisation of the rule of law in enlargement relies heavily on those elements of a *procedural* and *institutional* nature. It was argued that a number of elements of both these categories lack a clearly defined expression giving rise to some conceptual uncertainty, but also opening the door to a more institutionally-oriented approach, for example, in relation to the *procedural* element of judicial review, than is warranted. Furthermore, it was argued that not only are *formal* elements largely absent from the legal and policy framework, the specific nature of enlargement and the EU's adopted methodology in this policy area were shown to have had a detrimental effect on the quality and stability of national laws and regulations. Finally, in relation to the evolution of the conceptualisation of the rule of law in enlargement, the analysis made it clear that most of the elements make their appearance in all the accession rounds under review. However, regarding three of them, the *procedural* element of judicial impartiality, and the *institutional* elements of the separation of powers and judicial independence and accountability, some change has taken place starting with the pre-accession in relation to the Western Balkans, be it in terms of visibility (impartiality) or in terms of a widening of the existing interpretation (separation of powers and judicial accountability).

#### 4.2 The judicial focus of the rule of law in enlargement explained: the EU's understanding of the rule of law in the light of the applicant states' future role as Member States

From the previous section it is clear that the EU understands the rule of law in its enlargement policy predominantly in terms of reform of the judicial sector. As a possible explanation for this, it is argued here that the Union seems to be very much focussed on establishing the necessary judicial

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498 Commission Communication on 2016 Communication on EU Enlargement Policy, COM(2016) 715 final, 9 November 2016, p. 8

499 The 2018 Council Conclusions on Enlargement serve as an interesting example in this context. As one of the Council's most elaborate statements on the enlargement process to date, it actually offers only limited insights into the conceptualisation of the rule of law. While the value is highlighted as lying at the core of the EU's accession policy, the only element discussed is that of an independent, impartial, accountable and efficient judiciary. Council Conclusions 'Enlargement and Stabilisation and Association Process', General Affairs Council, Doc. 10555/18, 26 June 2018, pnt. 5.

machinery in the applicant states needed for their future role as Member States, thereby failing to consider other rule of law elements that are needed to ensure that the notion is truly embedded.

The EU's enlargement policy lays bare the difficulty of distinguishing between rule of law reform in the applicant states at the domestic level, and reforms which the states need to implement in preparation of their role as future Member States for the sake of the functioning of the EU itself. In its enlargement policy, the EU should primarily be concerned with strengthening and consolidating the rule of law domestically in the applicant states. Indeed, the states have to establish and promote 'the proper functioning of the core institutions necessary for democratic governance and the rule of law, from the national Parliament, through Government and the judicial system, including the courts and public prosecutor, and law enforcement agencies.'<sup>500</sup> However, that is not the only thing the Union is concerned with. As countries aspiring to join the Union, they 'must demonstrate their ability to strengthen the practical realisation of the values on which the Union is based.'<sup>501</sup> In relation to the rule of law, as it was argued in section 3.1.2 of the introduction on the function of the rule of law 'common to the Member States', this is so because of the EU legal order's dependence on mutual recognition and mutual trust between the Member States, as well as the all-affected principle. More particularly, as was asserted in the section on the procedural element of judicial efficiency,<sup>502</sup> the functioning of the domestic legal order and the role of courts within that, is crucial for upholding EU law within the Union. The EU is dependent on the effective operation of domestic courts because of the obligation to refer,<sup>503</sup> the doctrine of direct effect,<sup>504</sup> and the principle of sincere cooperation.<sup>505</sup> In the words of the Commission: '...[T]he actual implementation and enforcement on the ground of [EU] law, whether it is directly applicable in the Member States or transposed into national legislation, is based on the existence of appropriate judicial and administrative machinery in the Member States.'<sup>506</sup> Thus, the rationale of enlargement incorporates the fact that the aspiring Member States must adhere to the European Council's Copenhagen criteria not only for their own sake, but also with view to 'contributing to the well-

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500 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4.

501 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4.

502 See section 3.2.2.

503 Case 16/65 *Firma G. Schwarze v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1965] ECR 877.

504 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

505 Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 42.

506 Commission White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM(95) 163 final, 3 May 1995, p. 16.

functioning of the Union as a whole.<sup>507</sup> This dual construct gives rise to the following observation: in its conceptualisation of the rule of law in enlargement, the EU interprets the strengthening of the rule of law in the applicant states mostly in the light of their role and functioning as future participants in the collective of Member States. In other words, when attempting to consolidate the rule of law in the applicant states, it approaches rule of law reform from the perspective of the EU and what the EU requires of its Member States, with a particular emphasis on judicial reform.

In a way, this observation addresses the rationale of the rule of law under the first and third Copenhagen criteria. While the requirement to take on the obligations of membership by way of the effective implementation of the *acquis* clearly revolves around the functioning of the EU, the requirement of the stability of institutions guaranteeing the rule of law seems to be concerned with the performance of domestic institutions that need to buttress the rule of law at the national level. However, whereas according to Article 49 TEU, '[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union', the values referred to in Article 2 TEU are not just values, these are values that are 'common to the Member States' which must be respected in order to keep Membership rights intact.<sup>508</sup> Moreover, these are values that have inspired the EU's creation, which it intends to safeguard (Article 21 TEU). Accordingly, in the context of enlargement the EU has positioned the rule of law as a value that should be consolidated at the domestic level, but also as a common value of the EU edifice. The functioning of the EU as a legal and political system relies on the veracity of the assumption that its component parts are in compliance of these values.<sup>509</sup> As the Court of Justice put it, the Union is 'based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded...'.<sup>510</sup> After all, the EU is a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other.<sup>511</sup> In the light of this, it becomes apparent that during the pre-accession procedure, the EU

507 Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015.

508 Ronald Janse 'The Evolution of the Political Criteria for Accession to the European Community, 1957-1973' 24 *European Law Journal* (2018), pp. 57-76 at 75; Christophe Hillion 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Carlos Closa & Dimitry Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* Cambridge: Cambridge University Press (2016), pp. 59-81 at 60.

509 Amichai Magen 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' 5 *Journal of Common Market Studies* (2016) 5, pp. 1050-1061 at 1055.

510 Opinion 2/13 *ECHR II*, EU:C:2006:81, 18 December 2014, para. 168.

511 *Ibid.*, para. 167; Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117, 27 February 2018, para. 30.

focuses in particular on a conception of the rule of law with a view to the applicants' accession that will make them part of this interconnected and mutually dependent construct.<sup>512</sup> After all, European integration has led to a 'Community based on the rule of law',<sup>513</sup> which, at the very least, requires that the effectiveness of EU law is similar, if not the same, as that of domestic law in all the EU Member States.<sup>514</sup>

Against this background, the findings of section 3, and in particular section 3.1 and 3.3, lend further support to the argument that the EU has approached its rule of law activities primarily from the perspective of the requirements of its own functioning. In section 3.1 on the element of legality, it was demonstrated that the EU's main focus is on the implementation of the *acquis*, not on the quality of the domestic legislation and the adoption process. More particularly, it was shown that the EU's quantitative approach has actually undermined legality and has given rise to problems in terms of stability and generality of law. Furthermore, in section 3.3 on the institutional elements of the rule of law, it was asserted that the EU has framed its conceptualisation of the rule of law in enlargement predominantly in terms of institutional reform, notably reform of the judiciary. In the light of the importance of the role of national courts as EU courts this emphasis is understandable. As the early reports demonstrate in the section on judicial capacity,<sup>515</sup> improvements in the judiciary sector are needed not only for the applicants states themselves, but more so because of their role in the application of EU law. According to the 1998 Composite Paper on progress in enlargement, a well-developed judiciary is central to the candidate countries, and '[i]n order to effectively implement and enforce the *acquis*, existing institutions need to be strengthened and new institutions created.'<sup>516</sup> The Regular Reports show that the initial separate section on the assessment of judicial capacity (1999 round) has been merged with the section on judicial reform under the section on Democracy and the Rule of Law (2000 round onwards), thereby demonstrating that the Commission understands the rule of law in terms of judicial institutions and capacity-building. Not just because the rule of law dictates this at the domestic level of the applicant

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512 In light of the principle of sincere cooperation enshrined in Article 4(3) TEU, ensuring respect for the rule of law and being committed to its promotion in order to 'facilitate the achievement of the Union's tasks' will be incumbent on the applicant states from the moment of their accession.

513 Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para. 23.

514 Armin von Bogdandy & Michael Ioannidis 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' 51 *Common Market Law Review* (2014), pp. 59-96 at 63.

515 As highlighted in section 2, judicial and administrative capacity were added as an additional membership requirement by the 1995 Madrid European Council. Presidency Conclusions, Madrid European Council, 15-16 December 1995.

516 Commission Composite Paper – Reports on Progress Towards Accession by Each of the Candidate Countries, COM(1998) 712 final, 17 December 1998, p. 16.

states, but primarily because this is necessitated by the particular nature of the EU, since without it there can be no legal interdependence between the Member States.

In the light of the above, it becomes legitimate to pose the question to what extent the EU has actually been involved in domestic rule of law reform, or rather in Member State building in the name of rule of law reform. Regular reporting appears not to contain a general analysis of the state of the rule of law in the candidate states, but almost exclusively the analysis of the adaptation to the *acquis*.<sup>517</sup> Furthermore, the latest reporting rounds show that more institution and capacity building in the judicial sector has not necessarily lead to more or better rule of law,<sup>518</sup> and that 'structural shortcomings persist, notably in the key areas of rule of law'.<sup>519</sup> The situation in Montenegro in 2016 is particularly telling in this regard: 'The legal framework in the area of rule of law is largely complete and the institutional set-up is in place. The entire rule of law system now needs to deliver more results'.<sup>520</sup> This indicates that the EU seems to consider that from its own primary requirements, *i.e.* the adoption of legislation and the building of a judicial system, the rule of law will naturally follow. However, to consolidate and strengthen the latter is, as highlighted throughout this case study, far more complicated. This is also recognised more fully in the 2018 Western Balkan Strategy, which states that the rule of law must be strengthened significantly, as well as the fact that addressing reforms in this area 'remains the most pressing issue for the Western Balkans'.<sup>521</sup> As long as the Union approaches the rule of law primarily from its own vantage point and its own requirements that flow from EU Membership (*i.e.* the rule of law as a means to an end), without adjusting its conceptualisation to incorporate a more domestically oriented rule of law focus, the annual reports might not get more optimistic in tone.

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517 Dimitry Kochenov 'Why the Promotion of the *Acquis* Is Not the Same as the Promotion of Democracy and What Can Be Done In Order to Also Promote Democracy Instead of Just Promoting the *Acquis*' 2 *Hanse Law Review* (2006), pp. 171-195 at 172-173. Cf. Kleinfeld who argued that '[w]hen the EU pushes acceding countries to adopt the entire legal *acquis communautaire* [sic], it is not building the rule of law through all these legal changes; it is simply helping them create a legal system that can mesh with its own.' Rachel Kleinfeld 'Competing Definitions of the Rule of Law' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad – In Search of Knowledge* Washington: Carnegie Endowment for International Peace (2006), p. 57.

518 FYROM's 2016 report is just one of the reports, which state that in the area of judicial reform there has been either no progress or backsliding, 2016 FYROM Report, p. 12.

519 Commission Communication on 2016 Communication on EU Enlargement Policy, COM(2016) 715 final, 9 November 2016, p. 2.

520 *Ibid.*, p.11.

521 Commission Communication on A Credible Enlargement Perspective for and Enhanced Engagement with the Western Balkans, COM(2018) 65 final, 6 February 2018, p. 4.

### 4.3 The lack of conceptual differentiation between the rule of law as a political criterion and as part of Chapter 23 of the *acquis* under the third of the Copenhagen criteria

In section 2.2 it was shown that the EU's policy framework on enlargement has seen the addition of Chapters 23 and 24 of the *acquis* as 'rule of law-chapters'<sup>522</sup> during the negotiating process with Croatia and Turkey. In the light of the rule of law as one of the political conditions established by the European Council at Copenhagen, this addition gives rise to a particular question in relation to the pre-accession process concerning the Western Balkan countries: whether, and if so to what extent, has the Union, by introducing and relabelling Chapter 23 and 24, respectively, as rule of law-chapters, articulated in its enlargement policy different conceptions of the rule of law under the first (the rule of law as part of the political criteria) and third Copenhagen criteria (the rule of law as part of the *acquis*)? This issue consists of two sub-questions: that of scope – is the rule of law under the Copenhagen political conditions in the current pre-accession process more or less broadly defined than under the *acquis* chapters? – and that of substance – if similar rule of law elements exist under both conditions, are they approached and analysed in an identical manner, *i.e.* are they substantively similar? Below, these two sub-questions will be discussed in turn.

#### 4.3.1 *The scope of the rule of law under the first and third Copenhagen criteria*

From the outset, it seems that the scope of Chapters 23 and 24 is broader than what is tackled in the reports under the rule of law as a political condition. For a start, Chapter 23 includes, next to the functioning of the judiciary, which covers the *procedural* and *institutional* elements as discussed in section 3, sub-sections on anti-corruption measures and on fundamental rights. Chapter 24 covers issues of justice, freedom, and security. Whereas anti-corruption measures overlap with what is discussed under the Copenhagen political criteria in the section on Democracy and the Rule of Law, and the assessment of fundamental rights shows commonalities with the section on Human Rights and the Protection of Minorities, the topics contained in Chapter 24 do not have such complementing sections under the political criteria.

At first glance, this would suggest a widening of scope of the understanding of the rule of law. However, the argument advanced here is that the scope of the rule of law under both criteria is the same. Two arguments will be discussed to support this. Firstly, the labelling of both chapters as

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522 On the Commission's interpretation of these two specific chapters as 'rule of law-chapters' see for example Commission Communication on Enlargement Strategy and Main Challenges 2011-2012, COM(2011) 666 final, 12 October 2011, pp. 4-5; Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4.

'rule of law-chapters'<sup>523</sup> is a misnomer; the pairing of elements in Chapter 23 and 24 should not be seen as a broadening of scope of the rule of law, but rather testifies to the Commission's instrumental usage of the term 'rule of law' within the broader enlargement strategy. It was shown that, taking the experiences with the enlargements of Bulgaria and Romania, and Croatia, on board, the EU thought it prudent to address the functioning of the judiciary and human rights as early on in the negotiations as possible in order to allow the candidate states maximum time for their implementation.<sup>524</sup> This approach was thereafter reaffirmed by the enlargement strategy principle of 'fundamentals first' – prioritising reforms in the key areas of the rule of law, including the topics found in Chapters 23 and 24.<sup>525</sup> Declaring the components of justice, freedom, and security also as 'rule of law-topics' has allowed the Commission to strategically position these on the same exceptional pedestal alongside the functioning of the judiciary and human rights. From the fact that the EU has addressed Chapters 23 and 24 in this manner in the pre-accession process for strategic reasons, it cannot be concluded that it includes all of the elements mentioned therein in its understanding of the rule of law.

Secondly, looking in turn at the elements of human rights and justice, freedom, and security, there are a number of additional arguments supporting the conclusion that the EU has not broadened its scope of the rule of law under the third Copenhagen criterion. To start with human rights, the Copenhagen criteria related documents do not testify to a conceptual understanding of the rule of law that includes fundamental rights, and freedom, security, and justice issues. The protection of human rights is treated as a category in its own right under the Copenhagen political criteria. This finding is not diminished by the fact that the rule of law's connection to human rights is one of enabling, support and enforcement – the scope of the rule of law includes mechanisms set up to protect fundamental rights and the activities of bodies established to enforce this protection,<sup>526</sup> as was shown, *inter alia*, in the sections on the *procedural* rule of law elements of

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523 See for example the Commission 2012-2013 Strategy in which it discusses its new approach to enlargement and the 'screening of the key rule of law chapters' 23 and 24; Commission Communication on Enlargement Strategy 2012-2013, COM(2012) 600 final, p. 6. Further, see the Commission Communication on Enlargement strategy 2011-2012, COM(2011) 666 final, pp. 4-5; Commission Communication on Enlargement strategy 2013-2014, COM(2013) 700 final, pp. 6-7; Commission Communication on Enlargement strategy 2014-2015, COM(2014) 700 final, p. 2; Commission Communication on 2016 Communication on EU Enlargement Policy, COM(2016) 715 final, p. 2.

524 Commission Communication 'Enlargement Strategy and Main Challenges 2011-2012' COM(2011) 666 final, 12 October 2011, pp. 2-3.

525 Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015, p. 3.

526 Sergio Carrera, Elspeth Guild & Nicholas Hernanz 'The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU – Towards an EU Copenhagen Mechanism' *CEPS* (2013), p. 21.

judicial review and access to justice.<sup>527</sup> Moreover, neither the structure of Chapter 23, within which the two elements are treated separately, nor the substance of the analysis of either topic, give rise to the impression that the Commission has actively broadened the material scope of the rule of law in enlargement to include human rights.

In relation to the issues covered by Chapter 24, including, amongst others, migration, asylum, visa policy, police cooperation and the fight against organised crime, the fight against terrorism, and cooperation in the field of drugs, the point should be made that during the 2004 negotiations, (then) Chapter 24, which overlaps substantively with the current Chapter 24, has never been addressed within the context of the rule of law.<sup>528</sup> Furthermore, there is evidence stemming from other policy areas that the EU understands the relationship between the rule of law and issues of freedom, security, and justice to be of a causal nature rather than one of substantive overlap. The causality between the two is expressed, for example, in the 2003 European Security Strategy:<sup>529</sup>

Europe is a prime target for organised crime. This internal threat to our security has an important external dimension: cross-border trafficking in drugs, women, illegal migrants and weapons accounts for a large part of the activities of criminal gangs. It can have links with terrorism. Such criminal activities are often associated with weak or failing states. Revenues from drugs have fueled the weakening of state structures in several drug-producing countries. Revenues from trade in gemstones, timber and small arms, fuel conflict in other parts of the world. All these activities undermine both the rule of law and social order itself.

From this paragraph it is clear that security issues undermine the rule of law. Conversely, as was argued in the introductory section on the four functions of the rule of law in the Union, the EU attempts to tackle security issues through the strengthening of the rule of law.<sup>530</sup> Ever since the development and consolidation of the rule of law was a specific intention of the CFSP (ex Article 11 EU), the Union has connected, and as is asserted here, conflated, the strengthening of the rule of law to such issues as security, and the fight against terrorism and organised crime, *i.e.* the rule of law is understood as a means to the realisation of these security-related ends.<sup>531</sup>

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527 See sections 3.2.3 and 3.2.4 respectively.

528 See for example Poland's Regular Report of 2000, pp. 72-77.

529 European Council 'European Security Strategy – A Secure Europe in a Better World' 12 December 2003, p. 4.

530 Introduction, section 3.1.4.

531 Neil Walker 'The Rule of Law and the EU: Necessity's Mixed Virtue' in Gianluigi Palombella & Neil Walker *Relocating the Rule of Law* Oxford: Hart Publishing (2009), p. 120. For a wide-ranging discussion of the growth of legal instrumentalism, see Brian Z. Tamanaha *Law as a Means to an End: Threat to the Rule of Law* Cambridge: Cambridge University Press (2006).

This dual causal link, however, should not lead to the conclusion that the EU has extended its material scope of the rule of law to also include all those issues covered in Chapter 24 which either threaten the rule of law, or could be better tackled by strengthening the rule of law.

#### 4.3.2 *The converging substantive assessment of the rule of law under the first and third Copenhagen criteria*

Turning next to the second sub-question, the issue under examination is whether similar rule of law elements exist under the first and the third Copenhagen criteria and if so, whether there can be said to be substantive overlap. The analysis undertaken in part 3 of this chapter, shows that both sections deal with the elements of the functioning of the judiciary. In relation to this issue, it is submitted that a trend can be established towards increasing overlap of sub-elements and analysis thereof under both the Copenhagen political criteria and Chapter 23, without a clear distinction being drawn between the two. Since 2005 the rounds of monitoring reports include cross-references in the section on the political criteria to the specific chapters of the *acquis*. For example, the 2005 Regular Report on Turkey states in the section on the political criteria that it provides an assessment of developments in Turkey, 'seen from the perspective of the Copenhagen political criteria, including the overall functioning of the country's ... judicial system.' Indicating the connection between progress in these areas and the ability to implement the corresponding *acquis*, the report goes on to state that '[s]pecific information on progress in implementing the *acquis* in these fields can be found in ... Chapter 23 (Judiciary and fundamental rights) ... of the section dealing with the ability of Turkey to assume the obligations of membership.'<sup>532</sup> Similar cross-referencing is also apparent in Chapter 23 itself of reports across the years, which, in its progress overview, refers back to the analysis of developments under the Copenhagen political criteria.<sup>533</sup> The cross-referencing indicates that there is, at the very least, a substantive overlap of topics under both sections.

Moreover, having examined the sections on the functioning of the judiciary under the Copenhagen criteria and Chapter 23 in section 3, it is difficult to single out differences of assessment in the sub-topics covered in each section. Whereas the analysis of the functioning of the judiciary in Chapter 23 will, in general, be (a little) more elaborate, the same issues are covered in both sections including the institutional as well as the procedural

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532 2005 Turkey Regular Report, p. 10.

533 Particularly in relation to Chapter 23. See for example 2012 FYROM Progress Report, p. 49. Similar cross-references can also be found in the Accession/European Partnerships. See for example Croatia's 2008 Accession Partnership in which the section listing the priorities for Chapter 23, to be implemented and completed for the next few years, directly links back to the priorities set out under the section on the political criteria.

elements identified and analysed above.<sup>534</sup> This demonstrates that not only are the elements in both sections the same, the progress assessment undertaken in both sections actually overlaps to the extent that it can be said that the part of Chapter 23 concerned with the functioning of the judiciary to a large extent codifies the political criterion of the rule of law.<sup>535</sup>

The 2015 and 2016 progress reports provide further evidence of the approach of increasing convergence of assessment. Following the Commission's proposal for a more structured assessment,<sup>536</sup> the section on the rule of law under the Copenhagen political criteria and chapter 23 follow the exact same composition.<sup>537</sup> In their discussion on the functioning of the judiciary, both sections discuss the state of play in addition to shortcomings, revision, and areas of progress. Finally, the 2018 enlargement reporting round does away with the distinction altogether. Chapter 23 is removed from its place in between the other chapters of the *acquis* and discussed under the heading of the political criteria at the beginning of the reports – in line with the policy's priority of its 'fundamentals'.<sup>538</sup> This further supports the conclusion that the Commission has not only refrained from articulating a specific conceptualisation of the rule of law under the Copenhagen political criteria on the one hand, and under the third Copenhagen criteria on the other, but, moreover, that it has actually converged its analysis of the functioning of the judiciary as part of the rule of law under both sections.

## 5. CONCLUSION

This chapter examined the EU's definition of the rule of law in the EU's enlargement policy, by testing the analytical framework established in Part I of the thesis against the Union's practice in this area. After an introduction on the accessions to date, the legal framework and the relevant policy strategies were discussed in order to frame the analysis in the following sections. The chapter continued by focussing on the three categories of

534 See for example 2011 FYROM Progress Report, pp. 11-13 and 58-60.

535 Cf. Ann-Kristin Jonasson *The EU's Democracy Promotion and the Mediterranean Neighbours* (New York: Routledge (2013), p. 137.

536 The 2015 Enlargement Strategy provides that [t] Commission has introduced ... a strengthened approach to its assessment in the annual reports. In addition to reporting on progress, much more emphasis is put on the state of play in the countries and where they stand in terms of preparedness for taking on the obligations of membership.' The reports are supposed to provide 'even clearer guidance for what the countries are expected to do in both the short and long term.' To this end, harmonised assessment scales will be used to assess both the state of play and the level of progress, in order to increase comparability between the countries and provide greater transparency in the process. Commission Communication on EU Enlargement Strategy 2015, COM(2015) 611 final, 10 November 2015, p. 4.

537 Namely, strategic documents, management bodies, independence and impartiality, accountability, professionalism and competence, quality of justice, and efficiency.

538 See for example 2018 Montenegro Report, pp. 13-18; 2018 Turkey Report, pp. 22-27.

formal, procedural, and institutional rule of law elements. It was demonstrated that little attention has been paid to the element of legality, in spite of the fact that it forms the core of the rule debate in legal theory. Moreover, it was pointed out that the methodology of enlargement in relation to the process of legislative approximation is based on a mostly quantitative demonstration of progress. It was shown that as a consequence of this, legality's qualitative requirements (such as legal stability and coherence) have actually been undermined. Next, it was asserted that the elements of impartiality and judicial efficiency have increasingly been addressed in the annual reports as forming core procedural elements of the rule of law. However, it was highlighted that this has not led to a clearer articulation of EU standards in these areas, thereby actually making the assessment of whether the applicant states comply with these elements more difficult. Following this, it was shown that the formulation of the Copenhagen criteria and the relevant legal framework have been very influential in the EU's adoption of a mainly institutional focus in its activities to strengthen the rule of law in the applicant states. It was shown that the rule of law is conceptualised in terms of judicial reform with an emphasis on the structure and functioning of the courts. It was furthermore asserted that this has resulted in a particular emphasis on the institutional element of judicial independence.

The chapter continued by turning to the general findings of the rule of law elements in enlargement and three overall conclusions were drawn. First, it was concluded that the EU's conceptualisation of the rule of law in enlargement is strongly geared towards both procedural and institutional elements, with an almost total absence of the formal element of legality. It was shown that the extensive institutional focus of the policy has led to an emphasis on judicial reform, which has also permeated a number of the procedural elements, such as judicial review. Furthermore, it was demonstrated that there has been only a limited evolution of rule of law elements across the enlargement rounds, including the current pre-accession process. Secondly, it was argued that, even though the EU professes to domestic rule of law reform, its conceptualisation of the rule of law is heavily influenced by the fact that the applicant states are future Member States. It was further asserted that this has resulted in neglecting certain rule of law elements (legality) and disproportionately emphasising others (judicial independence). Finally, it was concluded that the Commission has refrained from clearly differentiating between the rule of law elements under the Copenhagen political criteria and as part of the *acquis*, and, moreover, that it has actually converged its analysis of the functioning of the judiciary as part of the rule of law under both sections, thereby codifying the political criterion of the rule of law.