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Deconstructing the Notion of EU Conditionality as a Panacea in the Context of Enlargement

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Introduction

In 2004 and 2007 the European Union went through the most widespread expansion of its history with regards to population and number of countries incorporated into the Union: ten former communist Central and East European (CEE) and two Mediterranean countries. This created a series of challenges in terms of institutional structures, political equilibrium, economic development, etc. One aspect, however, that cut across each one of these challenges was corruption. Severe problems of new Member States with corruption triggered a wide, belated, but, much necessary debate on the EU's institutional position towards the phenomenon. This discussion, unsurprisingly, became part of the ontological debate on the scope of the European Union and the process and incentives of European integration and Europeanisation.

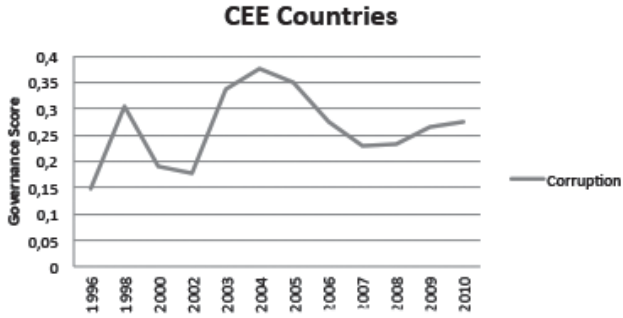
The discourse on corruption and the ways it could be curtailed, exemplified Member States unwillingness or unpreparedness to give up decision-making authority to supranational instruments on highly decisive issues. Despite the fact that it was recognized as a universal menace for all Member States, EU leaderships preferred to stress on their systemic divergences instead of their commonalities in order to refrain from giving up authority to supranational instruments and maintain the flexibility of their economic environments. Thus, despite pressures

deriving from supranational instruments for creating a comprehensive anticorruption framework, integration has moved forward by intergovernmental procedures, based on the lowest common denominator among implicated parties.

The European Union, in the context of the eminent 2004 and 2007 enlargements, exerted unprecedented pressure on candidate Member States for meeting EU accession criteria, that took the form of policy making directives, or what is commonly referred to as conditionality. The principle of conditionality was delivered well in most of the occasions and fostered massive reforms in terms of political and economic transition. The fight against corruption, as an intervening parameter of both transition processes, was a point of reference for EU's exercise of normative power. The outcome, in most cases, was largely satisfactory and according to INGOs' assessments, concrete progress took place as a result of EU's leverage (figure 1).

Corruption-related challenges, however, were rearoused and reinforced after EU pressure on candidate states was lifted. It then became apparent that the European Union's normative power was exhausted given that old Member States did not allow for it to be exercised within the Union. Rather, naturally, without EU's instruments breathing down their necks, new Member States lowered their guard and negative corruption assessments recurred.

This phenomenon directed the EU towards a reassessment of its policy against corruption in order to entrench its leverage of driving domestic developments in CEECs post accession. Bulgaria and Romania were the first Member States to experience this new form of EU's normative power through the Cooperation and Verification Mechanism (CVM), which rendered EU financial support and symmetrical participation in EU structures conditional upon the progress in reforming their judicial systems and combating corruption and organized crime.



The Evolution and Application of the Principle of Conditionality

The principle of conditionality is probably as old as politics itself. The relations between two parties are diachronically defined by their relative power to influence the decisions of one another. Therefore, the stronger party in a transaction is always in better position to influence the weaker one, *ergo*, to apply its conditionality. However, its application to EU membership is not as old a phenomenon as one would think. On the contrary, it has only started developing comprehensively in the mid-1990s. The reason for that should be looked for in what the European Union and, accordingly, membership to the European Union meant throughout the years.

In the first treaty that made mention to what membership required and implied, the Treaty of Rome, 'European Identity' was deemed as the sole criterion for accession.[1] Later on, in 1973, when the United Kingdom, Ireland and Denmark joint the EC, accession was realized without any particular pre-accession demands being made for new Member States.[2] The same was largely applied to the South European enlargements in 1981 and 1986. South European countries' accession was assessed by the only (un-institutionalized and ill-defined) criteria of having a pluralist democracy and respect for human rights;[3] while the functioning and regulation of the countries' market economies could be improved post-accession.[4]

To put it simply, EC membership functioned for newly reestablished democracies of South European countries as a stabilization project in terms of embedding democratic institutions, which imprinted EC Member States need for stability in South Europe. Therefore, it can be argued that the first two waves of enlargement had a strictly political character and underscored the lack of a particular institutional framework beyond the establishment of a free trade area, as well as, the lack of impetus for building such an institutional framework by Member States. At a theoretical level, it underlined the Realist world order of the Cold War and the universal conception of state structures as the only viable defender of constituencies' interests.

1. Patricia Szarek-Masson, *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries* (New York Studies in European Law and Policy, 2010), 138

2. Karen E. Smith, "The Evolution and Application of EU Membership Conditionality," in *The Enlargement of the European Union,* ed. M. Cremona (Academy of European Law, European University Institute/Oxford University Press, 2003*),* 109.

3. Ibid.

4. Patricia Szarek-Masson (2010). *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries* (New York Studies in European Law and Policy, 2010), 139-140. And Karen E. Smith, "The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?" *European Foreign Affairs Review,* (1998), 253-274.

The inauguration of the Copenhagen criteria in 1993,[5] shortly after the fall of the Soviet Union and the watershed it implied for the theoretical conceptualization of politics, vastly contributed to the explicit recognition of accession prerequisites, as well as, to the exemplification of what the European Union represented and prioritized.[6] At the same time, it laid out a set of principles shared by Member States (at least rhetorically) thus providing for a qualitative difference of the scope of the Union beyond the common market. The Copenhagen Criteria were supplemented in 1995 in the Madrid European Council, where administrative capacity for fully applying the *acquis communitaire* was recognized as a fourth criterion for accession.[7]

Despite the fact that in the first post-Copenhagen accession in 1995, EU's leverage and accession criteria were next to irrelevant given that Sweden, Austria and Finland had all well-established democratic institutions and complied with the economic conditionality due to the participation in the European Economic Area, however, the same did not apply to CEECs. On the contrary, conditionality constituted a central feature of EU policy towards aspiring Member States, as well as a foundation of EU's institutional reinvention, through the gradual application of the 'carrots and stick' approach, which would be rendered the principal source of EU's normative power ever since.

EU's aspiration for integrating CEECs was never hidden and was articulated as early as 1989. That year, the Union signed the PHARE program of economic assistance with Hungary and Poland, in an effort to foster market reforms and a common trade area. PHARE was incrementally signed with all CEECs. Between 1991 and 1996, EU's involvement in restructuring former communist countries was strengthened by the *Europe Agreements*. They involved economic assistance for realizing political, institutional and market reforms.[8] Later, they were further evolved to include the implementation of political, economic and legal reforms. The particular importance of the *Europe Agreements* was that they were legally binding and, in that way, they institutionalized the relations between the European Union and candidate Member States.[9] Eventually, the gravity of the *Europe*

5. According to the Copenhagen criteria Member States should achieve: stability of institutions guaranteeing democracy, the Rule of Law, human rights and respect for and protection of minorities (political criteria), the existence of a functioning market economy and the capacity to cope with competitive pressures and market forces within the Union (economic criteria) and the ability to take on obligations of membership, including the adherence to the aims of political, economic and monetary Union, before entering the EU (European Council, 1993).

6. Copenhagen European Council, Presidency Conclusions (21 and 22 June 1993).

7. Madrid European Council, Presidency Conclusions (15 and 16 December 1995).

8. In particular, their application was conditional upon respect for the Rule of Law, human rights, multiparty system, free and fair elections and a market economy.

9. Patricia Szarek-Masson, *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries* (New York Studies in European Law and Policy, 2010).

Agreements for promoting EU enlargement and integration was increased and entrenched through the Essen European Council in 1994, which identified the Agreements as the main vehicle of EU enlargement.[10]

In 1997, the European Union published the *Opinions*, which identified the progress of candidate states at meeting political and economic accession criteria, attempted to underline potential problems for the European Union stemming from enlargement and assisted the Council at initiating accession negotiations. EU policy towards CEE countries was further elaborated upon and standardized through two further instruments, which aimed at promoting candidate countries' dual transitions on their way to European Integration: the *Regular Reports* and the *Accession Partnerships*. The former analytically monitored the progress of Candidate Member States in meeting accession criteria. The latter, set out and exemplified old and new criteria that needed to be met before accession. The most important feature of EU policy, however, was the interconnectedness of all of the instruments mentioned above. Thus, EU derived cash flow, through the PHARE program and the *Europe Agreements,* was conditional upon improved assessment in *Regular Reports* and the compliance with *Accession Partnerships*. Regarding the latter, it is important to note that they included areas that did not fall under EU competence for existing Member States. One of these areas was the fight against corruption and the stipulation of a number of measures for addressing the phenomenon before being granted EU funding.

The application of the principle of conditionality in the field of corruption constituted a central element of EU policy towards candidate states. This stemmed from the fact that levels of corruption were believed to be much higher than the respective ones in the EU, as well as the fact that the understanding of the phenomenon and its implications in candidate states was different and narrower than in EU countries. Indeed, corruption, in terms of liberal democracy, was a built-in phenomenon in all transition CEE countries. The role of the Party as the only employment provider had severely impacted the level of transparency of public affairs and had led to a combination of nepotism, favouritism and loyalty as a source of professional development. On the other hand, severe shortages and institutional weaknesses throughout the transition period had led the grey economy to grow at an unprecedented level and had rendered illegal transactions with public servants to be the only way of *"getting ones job done."*[11]

The principle of conditionality was a primary driver for the improved institutional framework of CEECs for fighting corruption. This is clearly imprinted in all international organizations' assessments of corruption levels in candidate

10. Essen European Council, Presidency Conclusions (9 and 10 December 1994).

11. Patricia Szarek-Masson, *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries* (New York Studies in European Law and Policy, 2010), 101-116.

World Bank: Governance Indicators – Control of Corruption (data on Slovenia have been included until 2004)

states. According to World Bank's estimation of the countries control of corruption, in five out of the eight CEECs countries that entered the European Union in 2004, the effectiveness at addressing corruption peaked in the year of EU accession, while Romania and Bulgaria's performances peaked on the year they signed the EU Accession Treaties (2005). Interestingly enough, the least progress at fighting corruption throughout the pre-accession period was recorded by the so-called front runners, that is, the countries that were deemed by the Accession Partnerships in 1998 as having met democratic conditionality: Hungary, Poland

and the Czech Republic. The rest of the countries significantly improved their performances with the exception of Slovenia, where corruption was not believed to be a major problem.

However, given the extreme normative power that was provided to the EU through the principle of conditionality, two questions arose: *did the European Union do all it could for enhancing CEE countries capacity at fighting corruption*? And *did its involvement secure implementation post-accession?*

Assessing the Principle of Conditionality

The principle of conditionality constituted the European Union's most powerful tool at stimulating reforms of Central and East European states primarily due to the asymmetrical relationship between EU instruments and the candidate countries.[12] While the European Union had manifold benefits to offer to CEEs in terms of economic and technical assistance, security, economic outwardness etc., CEE countries had little to offer to the EU given their backward economies and their small markets. Second, the position of CEE to influence EU agenda and prioritization in the process of integration was constrained by the fact that they were only receivers of EU norms and not co-creators. Third, the asymmetry of the two parties enabled the Union to extend its demands beyond formal EU prerequisites, while the vague phrasing of the Copenhagen criteria provided the Union with a high degree of discretion in applying its standards. Fourth, the CEE countries were deprived of the possibility of opt outs in the pre-accession process and, subsequently, were provided with a 'take it or leave it' kind of deal. Fifth, the candidate states did not have a say regarding the speed of reforms. Contrary to previous enlargements where acceding Member States were given a 'period of grace' for fulfilling criteria post-accession, CEE countries were not. Finally, CEE countries lacked an alternative model of development given their communist past. Thus, in relation to previous enlargements when candidate states' economic models specificities undermined EU penetration in certain fields, the same did not apply to CEECs.[13]

As Grabbe has successfully noted, the conditionality-driven process of Europeanisation of CEE countries was attempted in five distinct ways: access to negotiations and further stages in the accession process, benchmarking and monitoring, provision of legislative and institutional templates, aid and technical assistance

12. Heather Grabbe, *Partnership for Accession? The Implications of EU Conditionality for the Central and Eastern European Applicants* (Florence*, EUI Working Paper RSC No. 12*, 1999).

13. Heather Grabbe, "Europeanisation Goes East: Power and Uncertainty in the EU Accession Process," in *The Politics of Europeanisation*, ed. Kevin Featherstone and C.M. Radaelli (Oxford University Press, 2003), 303–327.

and advice and twinning.[14] Despite the undeniable gravity of all conditionality tools in the 2004 pre-accession process, in the present context, it is deemed more efficient to concentrate on the ones that carried the most leverage for the European Union and subsequently bared the most results at integrating Central and East European states in EU structures. Thus, the impact of "*access to negotiations and further stages in the accession* process" and "*benchmarking and monitoring"* will be analyzed. "*Provision of legislative and institutional templates"* will also be considered as part of EU's monitoring and benchmarking system since the legislative and institutional progress of candidate Member States were deemed in Regular Reports, which is a central evaluation mechanism of the EU. The reason for leaving out of the analysis the remaining two Europeanisation tools, have to do with their shifting impact at different phases in the accession process, as well as their limited direct influence on candidate states' domestic politics.

Access to negotiations and further stages in the accession process, constitutes a clearly defined line that determines the level of proximity of candidates to EU integration. It is probably the most straightforward conditionality tool of the European Union and it has had the strongest impact on National politics in CEECs. The reason for that is tangibly defined progress towards EU accession and it constitutes a very beneficial/costly political feature for governments in CEE countries,[15] given that progress towards meeting EU criteria constituted a shared vision among political elites, as well as a point of reference in domestic political debates.

Nevertheless, the application of this blunt conditionality instrument had two main shortcomings: on the one hand, the European Union did not articulate which criteria was definitive for entering further stages in the accession process until 1999[16] and, on the other, it required that the Union provided 'yes or no' answers, thus diminishing its room for maneuver. In that context, burdens for accession had to be handled carefully in order for the Union not to mitigate CEECs reform momentum (due to governments' and public's frustration or the potential raise of populist/nationalistic pressures to candidate states governments) and not be accused of applying double standards or political considerations in its assessments. Thus, decisions excluding particular countries from the negotiations' process (as for example Meciar's Slovakia due to its noncompliance to democratic standards in 2000) or the *démarches*[17] that applied the practice of 'naming and

14. Ibid.

15. Ibid.

16. Patricia Szarek-Masson, *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries* (New York Studies in European Law and Policy, 2010).

17. *Démarches* are serious public criticisms, issued as part of EU foreign policy after unanimous intergovernmental agreement between the member states.

shaming' were seldom used, thus depriving the 'gate-keeping' conditionality from making swift adjustments or promoting case-specific reforms.[18]

Benchmarking and monitoring primarily took place through the *Regular Reports* and the *Accession Partnerships.* Both these instruments carried increased political importance, but on the one hand, they were scrutinized in National Parliaments and impacted heavily on popular perceptions of governments' efficiency and, on the other, they set the framework for initiating Accession negotiations and signing Accession Agreements. Their main advantage was that they could put forward specific notifications for implementing targeted reforms while prioritizing the tasks that had to be fulfilled by candidate states each year. In that way, the European Union was given an efficient leverage tool for promoting its agenda, which by using CEECs undistracted commitment for being integrated in the Union, they could produce 'perfect Member States' by its increased competences for forming policy choices in relation to existing Member States.[19]

The main shortcomings of both *Regular Reports* and the *Accession Partnerships* had to do first, with the fact that they used a generic, universal phrasing for all assessments and they refrained from providing specific solutions and recommendations. Second, they were highly politically charged due to their impact on domestic politics, thus, necessitating that the Commission used a carefully balanced language.[20] Third, the *Regular Reports* and the *Accession Partnerships* were published throughout a period when massive vertical reforms were taking place in each candidate country, thus, barring the risk of being overtaken by developments. Finally, the *Accession Partnerships* and, consequently, the *Regular Reports* did not imprint a steady EU framework, which the CEEC should have implemented. Reversely, they imprinted the ever-changing nature of the European Union, thus being rendered a 'moving target' for candidates.[21]

Applying the Principle of Conditionality for Fighting Corruption: Merits and Shortcomings in the 2004-2007 enlargement Process

Positive Impacts of EU Conditionality at Fighting Corruption in CEECs

The application of EU conditionality at fighting corruption, as it was manifested earlier had increased significance for the improvement of CEECs perfor-

18. Heather Grabbe, *Partnership for Accession? The Implications of EU Conditionality for the Central and Eastern European Applicants*, (Florence, EUI Working Paper RSC No. 12, 1999).

19. Alan Mayhew, *Enlargement of the European Union: An Analysis of the Negotiations with the Central and Eastern European Candidate Countries* (U.K. Sussex European Institute Working Paper No. 39, 2000). <http://www.sussex.ac.uk/sei/documents/wp39.pdf>. Accessed on 5 March 2012.

20. Patricia Szarek-Masson, *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries* (New York Studies in European Law and Policy, 2010), 179

21. Ibid., p. 142

mances. One reason for that is that the European Union successfully used its leverage for stimulating anticorruption law-making activity in candidate states. Throughout the pre-accession period, dozens of laws were passed which reformed the obsolete or non-existent anticorruption legal framework in CEECs. Even more importantly, EU conditionality was applied beyond formal criteria while CEEC were urged to instate measures which were not ratified by existing Member States. These requests were made under the competences provided to the EU by 'Copenhagen Mandate', which largely imprinted EU's enlargement policy.[22]

This ever more generalized use of conditionality tools by the European Union stemmed from the duly conception that in order for corruption to be successfully addressed, a more comprehensive policy, beyond the *acquis*, was required. Thus, apart from existing regulations outlawing bribery of public officials and the limited *acquis* on corruption prevention,[23] candidate Member States were requested to institutionalize a series of other conventions.[24] Moreover, they were strongly requested to upgrade the independence and the functionality of their judicial systems, the effectiveness of their public administration and the provisions for protection of EC financial interests, which also were well beyond the scope and mandate of the Union in existing Member States.[25]

Apart from explicit measures, the fight against corruption in CEE countries was also stimulated indirectly by conditionality in other fields. The continuous emphasis put by the *Regular Reports* to democratic and market reforms as the ultimate benchmark for entering consequent stages of pre-accession, severely impacted the countries' anticorruption performances. Reforms related to market openness, improvement of business environment and curtailing of political risk together with policies for inducing respect for the Rule of Law and democratic political order, the creation of functioning institutions or the establishment of

22. Copenhagen European Council, Presidency Conclusions (21 and 22 June 1993).

23. Primarily in the fields of public procurement, money laundering, auditing and accounting standards and terrorist finances.

24. In particular, beyond ratified conventions such as Council of Europe Convention on Money Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime, the UN Convention on Transnational Organised Crime and the enhancement of administrative capacities for effective international cooperation at the prosecution of corruption; CEECs were 'encouraged' to ratify and implement: the *Pre-Accession Pact on Organised Crime*, the "Ten Principles for Improving the Fight against Corruption in Acceding, Candidate and other Third Countries," *the Council of Europe's Criminal and Civil Law Conventions on Corruption and the OECD Convention,* all of which were not ratified by all existing Member States in Patricia Szarek-Masson, *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries* (New York Studies in European Law and Policy, 2010), 182-217.

25. Characteristically, according to the Council's decision on the acquis on JHA, candidate Member States were asked to comply with according COREPER: 1. those ratified by all Member States and therefore constitute the *acquis;* 2. those not ratified by all the Member States, but so important that they should be part of the *acquis,* as they express the values of the EU; and 3. those not falling within first or second category, but thought very important with a view to creating the area of freedom, security and justice.
Consultation, Council of the European Union (15 July 2005).

lively civil societies, all contributed to the mitigation of tolerance for corrupt practices.[26] Despite the fact that the impact of these applications of conditionality is difficult to measure, it is rather certain that they enhanced, to one extent or the other, the anticorruption performances of CEEC.

Finally, since 1999-2000, corruption was recognized by the *Accession Partnerships* as one of the most important challenges for CEEC.[27] Despite the controversial effectiveness of EU conditionality at fighting corruption, the increased gravity put on the issue resulted in close scrutiny by National Parliaments and rendered it a central element of political debates throughout the pre-accession period. In that way, the issue of corruption was highly publicized and, therefore, both political elites and the public could be better informed of its implications. Overall, it is safe to say that the application of the principle of conditionality, either directly or indirectly, bared multiple benefits for the CEEC fight against corruption. In the next chapter, however, EU policy's shortcomings will be presented in an effort to bring forward the potentials of the principle of conditionality, if they are more effectively applied, as well as its practical limitations at fully addressing endemic corruption.

Limitations of Conditionality at Fighting Corruption in CEECs

a. Structural Limitations

European Union's policy at addressing corruption started developing in the second half of the 1990s. Earlier than that, it was not identified as a challenge, but as a negative externality of the common market.[28] In particular, until the Maastricht Treaty when the competence to combat corruption was granted to the third intergovernmental pillar, it was identified and sanctioned only in cases when it impaired the Union's financial interests or the functioning of the internal market.[29] Despite the fact that the Maastricht Treaty enhanced the role of the Union and inaugurated channels of cooperation for addressing the phenomenon, the lack of mention to corruption *per se* impeded institutional progress and delayed the development of the related *acquis*. Starting from 1996, and more intensely after the ratification of the Amsterdam Treaty and the inauguration of the Area of Freedom, Security and Justice (that made explicit mention to corruption as a distinct challenge for the first time and improved supranational instruments competences in the field of Justice and Home Affairs), a number of instruments

26. Daniel Kaufmann, "Corruption: The Facts," (*107 Foreign Policy, 1997),* 114–131.

27. Tampere European Council, *Towards a Union of Freedom, Security and Justice: The Tampere Milestones Presidency Conclusions* (15-16 October, 1999).

28. Patricia Szarek-Masson, *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries* (New York Studies in European Law and Policy, 2010), 132.

29. EC Treaty (Treaty Establishing the European Community) (Rome, 1957).

were advanced by the European Parliament and the European Commission in order to bind Member States into forming a common legal framework and a common anticorruption policy which would be oriented beyond prosecution towards common prevention standards.[30]

However, all these instruments suffered from Member States minimal political will, which was imprinted in the late or, more commonly, lack of ratifications that effectively blocked supranational instruments' initiatives. The primary reason for that is that corruption related issues have diachronically been considered sovereignty related and, therefore, have been jealously guarded by Member States. In that context, the institutional framework has evolved through the lower common denominator rationale. Only a limited number of measures regarding cooperation on Justice and Home Affairs have been agreed upon, primarily in the field of international cooperation for fighting transnational corruption, while measures for preventing the occurrence of corruption within Member States have been minimal.[31]

This can be largely attributable to EU's relative delay at comprehending potential threats deriving from corruption, as well as Member States' lack of political will for integrating their domestic anticorruption frameworks. This delay had two negative institutional externalities: first, the level of discretion of Member States at charting their individual anticorruption frameworks remained high and, respectively, the *acquis* on the matter remained narrow. This resulted in EU's supranational instruments lacking effective benchmarks for assessing Member States or instruments for securing and promoting implementation. On the other hand, third pillar structures, due to their highly political nature, refrained from making judgements regarding National instruments effectiveness and extending common standards to further preventive anticorruption measures.[32] Second, fighting corruption was not included in the Copenhagen criteria. In that way, the institutional leverage of the European Union for fighting corruption in the pre-accession context was diminished while precious time was lost until the explicit mention to CEEC problems with corruption necessitated effective action.

The *1997 Opinions* of the European Union on the political and economic status of candidate Member States were the first instrument to mention corruption as a distinct challenge. However, the *Opinions* refrained from making explicit mention to corruption as an impediment to meeting accession criteria and

30. Among them, the First Protocol and Second Protocols, the Anticorruption Convention and the Joint Acton for fighting Corruption in the private sector were the most far reaching and important.

31. The most important corruption prevention tools were agreements on confiscation of assets destined for terrorism financing, public procurement, money laundering, auditing, common accounting standards and mutual recognition judgements and pretrial orders.

32. Such as the financing of political parties, the establishment of anticorruption bodies, the protection of whistle-blowers, the compensation of individuals suffering damage as a result of corruption.

referred to it implicitly, as an impediment to democratic transition. Moreover, the 1998 *Accession Partnerships*, which were the first EU instrument to identify corruption as an obstacle to EU enlargement, only referred to its implications in some of the candidate States, while the *Europe Agreements,* signed with Poland, Hungary, Slovakia and the Czech Republic did not make clear mention to corruption as a stumbling block to accession. Overall, the lack of a timely perception of the implications of corruption both within the Union and in the enlargement context, deprived EU institutions from valuable time while sending mixed signals to candidates, at least in the early pre-accession phase.

A second main obstacle for the application of the principle of conditionality in the pre-accession process was the fragmented *acquis.*[33] The European Union has two definitions of corruption: one as 'bribery', that is for the prosecution of corrupt practices, and one as 'abuse of power for private gain', which opens the way for a more comprehensive policy that would include prevention of corruption as well. Despite the fact that the Union has officially opted for the latter, the *acquis* in the field of corruption has so far been largely legalistic in nature.[34] This has to do with old Member States unwillingness to institutionalize standards that could bind them for reforming their legal frameworks. This would minimize the flexibility of their business environments and it would arguably not imprint the specificities of each country's perception of corrupt practices and extend EU competences in hard-core sovereignty issues.

As it was mentioned earlier, the European Union tried to apply standards beyond the *acquis* for CEECs. Nevertheless, the effectiveness of these standards is highly debatable given that they had a nonobligatory character while being further undermined by the lack of experience, competences and effective instruments of the European Union for going forward with such a comprehensive corruption prevention oriented strategy. Finally, the relative ineffectiveness of corruption prevention measures stemmed from the fact that they were not applied in a consistent way and were spread among different instruments and institutions, thus, rendering CEECs compliance as well as monitoring of the Union extremely difficult while leaving a high degree of discretion to candidate states for embedding and implementing them.[35]

33. Patricia Szarek-Masson, *The European Union's Fight Against Corruption: The Evolving Policy Towards Member States and Candidate Countries* (New York Studies in European Law and Policy, 2010).

34. Ibid., pp. 5–40.

35. Ibid.

b. Monitoring and Benchmarking Limitations – Regular Reports and Accession Partnerships

Both *Regular Reports* and *Accession Partnerships* consistently relied on the criminal law character of the *acquis* in order to make their assessments and they did not strive for a comprehensive analysis of the phenomenon. They concentrated candidate Member States' attention in taking the necessary legal measures without looking at the specific root causes of corruption, as well as the best ways of countering them. Thus, we had the phenomenon of legal frameworks being set, but the essential transposition lagging far behind. Furthermore, the *Regular Reports* used a single phrasing without articulation of particularities of different countries. The reason for this generic form of assessment had to do with the highly charged nature of the issue of corruption. The Reports used carefully balanced language in order to avoid political reactions within Candidate States or against EU instruments. However, these considerations ended up obstructing the production of 'in depth' assessments.

Moreover, the *Regular Reports* suffered from significant methodological limitations. The European Commission lacked a specific mechanism for evaluating progress of individual candidate states in relation to the criteria for membership. They relied on *ad hoc* parameterization and lacked coordination regarding the areas, which were most important and needed particular attention.[36] Moreover, they utilized diverse sets of evaluation practices and methodologies of other international organizations' evaluations (for example the Council of Europe's Group of States Against Corruption) with different competences and mandates, which, despite being helpful at charting an ever more comprehensive strategy, they simultaneously generated a notion of 'chaos' that induced candidate states governments' confusion and frustration.

Finally, the fact that CEECs governments were providing the bulk of data for assessing their progress and that there was no 'on the ground' verification mechanism severely undermined the reliability of Commission's reports.[37] Candidate States' efficiency at fighting corruption was deemed based on their law making activity. In that way, National Parliaments, given their shared aspiration for EU accession, ended up voting dozens of anticorruption laws without properly scrutinizing them. Consequently, as it was successfully noted by Grabbe (2003), the main recipients of policy changes and the responsible bodies for fighting corruption (national and regional authorities) were not properly informed on how these

36. As it is characteristically noted by Szarek-Mason, the need for civil society implication in the fight against corruption was only noted in Commission's progress Reports for Lithuania between 2001 and 2004 while corruption deriving from lobbying was only mentioned in particular Reports for Latvia and Lithuania; despite the fact that both predicaments constituted a shared problem for all CEECs.

37. Ibid., p. 165

laws could be implemented. As a further result, there was an inability of regional and national representatives to 'download' the scope and implications of these laws, thus rendering their application extremely difficult.[38]

Apart from the shortcomings of *Regular Reports* at effectively benchmarking and monitoring CEECs anticorruption strategy, the opening of pre-accession negotiations, as well as the signing of Accession Agreements also failed to look at problems of corruption in candidate states or their potential implications for the Union. This imprinted two things: the lack of efficient conceptualization of corruption and its potential vertical implications for politics, economies and societies; and the predominance of political considerations of intergovernmental bodies upon supranational ones. Despite the fact that the latter is clearly outside the scope of the present paper, it is essential to note that while important problems with corruption were noted in all 2002 Regular Reports on candidate states (with the exception of Slovenia, where corruption was not considered an important impediment to accession to begin with), the Accession Agreements were signed anyway.

Finally, arguably the most important shortcoming of the application of the principle of conditionality for fighting corruption in CEEC was the lack of provisions and mechanisms for securing implementation of anticorruption strategies after the accession. This oversight had certainly more than a little to do with CEECs backsliding at fighting corruption after their accession in the European Union and the loss of their anticorruption momentum. Overall, it can be argued that due to limited experience, institutional weaknesses or lack of effective instruments and proper planning, the European Union did not make full use of conditionality and the powerful drive it implied for promoting sustainable anticorruption results in CEECs. In the next chapter, an analysis of the post-2004 enlargement evolution of the principle of conditionality for fighting corruption will be provided in order to underline the level of readiness of the European Union to deal with similar challenges in future enlargements.

Assessing the Post-2004 EU Anticorruption Conditionality: A Case Study of Bulgaria

The story of the pre-accession period in Bulgaria was not different from the mainstream of CEECs in regards to the fight against corruption. Bulgaria has diachronically been prompt at ratifying measures requested by the Union, even

38. Heather Grabbe, "Europeanisation Goes East: Power and Uncertainty in the EU Accession Process," in *The Politics of Europeanisation*, ed. Kevin Featherstone and C.M. Radaelli (Oxford University Press, 2003), 303–327.

beyond the norms agreed upon by existing Member States.[39] However, as it was the case with other candidates, Bulgarian strategy emphasized on the criminal law aspect of the phenomenon and failed to look at corruption as a development-impeding issue with social, economic and political implications. At the same time, Bulgaria suffered from two further shortcomings that impaired implementation of its anticorruption strategy: the widespread corruption among judicial bodies that undermined the enactment of existing standards and corruption among political elites that impaired the quality of law-making.[40]

Bulgaria has diachronically been one of the late runners, both among candidates and EU Member States at fighting corruption.[41] At same time, it is the only country that has been subjected to the activation of the Cooperation and Verification Mechanism (CVM) inaugurated by the European Union in 2006 in order to prevent the backsliding of countries as regards to certain pre-accession criteria after becoming full Member States. The CVM provided for the EU assessment mechanisms staying in place after accession (in the particular fields) and a yearly progress report should be published indicating advances in the country's performance in the respective fields.

More specifically, through CVM, the Commission was empowered to sanction Bulgaria in case of imminent risks implied for the functioning of the internal market due to failure to implement its commitments.[42] These sanctions would take the form of suspension of "*Member States' obligation to recognize and execute, under the conditions laid down by the Community law, Bulgaria judgements and judicial decisions*" as well as the temporary freezing of EU funding. The benchmarks set out by the Commission for lifting CVM included Constitutional amendments regarding the independence and accountability of the judicial system, transparency and professionalism of the judiciary, conducting investigation of high level corruption, corruption prevention and fighting organized crime, as well as the periodic reporting on all these issues.[43]

The results of the Bulgarian government at implementing these reforms throughout the past five years have been mixed and despite that, concrete progress has taken place with regards to the criminal and civil law framework for fighting corruption, the country's overall performance at addressing the root causes of the

39. Boyko Todorov, "Anti-corruption measures as political criteria for EU accession: Lessons from the Bulgarian experience," (Sofia, Center for the Study of Democracy, 2008), accessed on 20 February 2012, <http://www.cmi.no/publications/file/2956-anti-corruption-measures-as-political-criteria-for.pdf>

40. Ibid.

41. See figure 5

42. European Commission, *Commission Decision of 13/XII/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* (Brussels, 2006).

43. Ibid.

phenomenon and presenting sustainable results has been minimal. The World Bank in its aggregate indicators of 'Control of Corruption' has noted only marginal progress in the past five years, since the CVM has been in place. Despite the fact that a micro-analysis of the performance of Bulgaria at fighting corruption is beyond the scope of this paper, it should be noted that the main reason for that is the wide implementation gap of Bulgaria's strategy. This gap has been apparent in the failure of both the Courts and the political elites to prosecute and, more importantly, implement indictments of high-level officials and in the process of restructuring the legal system and promoting independence and accountability of the judiciary, which has been slow and fragmented.

Through the inauguration of CVM, the EU was provided with an opportunity to correct some of the wrong-doings of its 2004 enlargement strategy. In particular, it secured that implementation commitments made in the pre-accession period would continue after the countries had acquired full EU membership. Moreover, it empowered the Union to extend its institutionalized competences to measures, which were not ratified by 'old' EU Member States in the post-accession period while monitoring the implementation of corruption prevention measures, (which are outside the scope of the EU for existing Member States.) In that way, the European Union introduced an additional 'gate keeping' conditionality tool that could potentially safeguard smoothest integration of the candidate countries.

However, the application of CVM was not without shortcomings and omissions. In particular, the downwards transposition of anticorruption measures was not ensured given that no proper mechanism was established for the involvement of intermediary bodies, such as local or regional institutions or NGOs, that would transfer EU norms to the public more efficiently. Consequently, it relied on the reporting and statistics of Bulgarian political elites, a body considered prone to corruption. Thus, the reliability of the data was undermined due to the lack of cross-checking and the Union's perception of the actual proportions and ramifications of corruption was ambivalent. Finally, the implementation of corruption related criteria of CVM, largely relied on governments' political will and targeted a top-down application of conditionality. As such, it failed to see the endemic implications of the phenomenon as well as the need for a change in mentalities as a precondition for reducing corruption.[44]

For these reasons, the results of the CVM, as well as the painful (both politically and economically) sanctions imposed by the European Union in 2008-2009 due to Bulgaria's lack of commitment to the implementation of benchmarks (ap-

44. Boyko Todorov, *Anti-corruption measures as political criteria for EU accession: Lessons from the Bulgarian experience,* (Sofia, Center for the Study of Democracy, 2008), accessed on 20 February 2012, <http://www.cmi.no/publications/file/2956-anti-corruption-measures-as-political-criteria-for.pdf>

plied by the freezing of EU funding)[45] were limited (see figure 5). *Does this mean that CVM is a failed instrument?* The answer is no. CVM has the potential of protecting the functioning of the common market and EU's institutions, while stimulating integration of policies and practices. The problem with CVM clearly lied on its implementation, which imprinted the limited experience of the European Union as well as its insufficient comprehension (improved slightly in relation to the 2004 enlargements) or its miscalculation of the full range of implications of endemic corruption and determination for meeting the respective challenges. Nevertheless, it is only fair to say that EU politics is a learning progress, as well as an incremental one and that the European Union through the CVM managed to correct one of the main shortcomings of the principle of conditionality, its non-application post-accession, while it imprinted an increased stress put by the Union on the issue of corruption, as well as a better understanding of its implications. Through more gravity put on corruption-related issues, there are two aspired outcomes: first, to diminish the consequences of enlargement and, second, to underline the necessity for integrating the institutional framework for existing Member States that would enable more effective cooperation. The latter will be briefly analyzed in the final chapter in order to underline the prospects of the European Union at constructing a more effective anticorruption framework in the post-CEE enlargement era.

EU Conditionality post-2007 Enlargement: The Way Ahead

The principle of anticorruption conditionality has been significantly developed throughout the past years. Using as a point of reference the backsliding of CEE countries at fighting corruption, the European Union has developed new mechanisms and has placed increasing emphasis on corruption related issues. The Union seems to have learnt the lessons provided by the omissions of the 2004 enlargement. The verification and the control over candidate and potential candidate Western Balkans states seem to be stronger, while the inauguration of the CVM has set a further 'gate-keeping' stage that could increase EU's leverage and competences over the post-accession phase. Despite the fact that 'on the ground' instruments (such as twinning programs and on the spot reporting and data collection) should be further strengthened, it appears that the gravity placed by the Union on corruption related issues is rising and that its capacity of defining the policy outcome through conditionality is stronger than ever.

Through the previous analysis of the pertinence of EU conditionality at fighting corruption, two main conclusions were reached: the capacity of the EU as

45. European Commission, *Report from the Commission to the European Parliament and the Council on Bulgaria's progress on accompanying measures following Accession* (Brussels, 2008).

an anticorruption promoter stumbled, first, on the lack of a respective binding framework for Member States (especially in the field of corruption prevention) and second, on the lack of mechanisms for securing ratification and implementation of decisions taken at supranational level from Member States. In that context, the effectiveness of EU's common anticorruption strategy largely relies on existing Member States and their willingness to transfer part of their authorities to supranational instruments. Should that be the case, a more comprehensive policy against corruption can be produced. The *acquis* and therefore the formal criteria for accession will be extended and strengthened while the EU anticorruption strategy will be tightened, given the Commission's strong emphasis on corruption prevention policies. However, it is largely debatable whether or not tangible alterations have taken place for Member States' governments perceptions of corruption in the post-2007 context or that they are more prone to policy transpositions than in the pre-enlargement context.

Since the 2007 enlargement and the inauguration of CVM, two main internal differentiations have taken place with regards to EU framework for fighting corruption. First, the reconfiguration of Justice and Home Affairs (JHA) policies and competences through the Stockholm Program 2010-2014 and second, the ratification of the Lisbon Treaty that abolished the pillar structure and increased supranational and sub-national instruments authority for addressing corruption. The main input of the former for building a common anticorruption strategy stems from Member States' agreement on the creation of a reporting mechanism (activated in June 2011) that will enable the Commission to estimate Member States' progress at building sustainable anticorruption frameworks with particular stress on preventive measures. The latter, provided for the abolition of the pillar structure, the full jurisdiction of the European Court of Justice in JHA, it inaugurated Qualified Majority Voting decision-making on JHA and it instated the post of European Public Prosecutor with a fully-fledged mandate. Moreover, it extended competences of the European Parliament, the Commission and the National Parliaments by increasing legislative competences, enhancing discretion for taking law-making initiatives and strengthening the position for active involvement and scrutiny, respectively.[46]

Despite manifold improvements in EU's institutional framework for establishing a common strategy, the implementation of both the Stockholm Agreement and the Lisbon Treaty is highly unlikely to take place immediately or smoothly. In fact, not much seem to have changed in the perception of Member States on the roles of supranational or subnational institutions, while their aspiration of

46. Carrera S. and Geyer F., "The Reform Treaty and Justice and Home Affairs. Implications for the Common Area of Freedom, Security and Justice" *CEPS Policy Brief* No. 141, (2007), accessed on 24 February 2012. <http://www.libertysecurity.org/IMG/pdf_The_Reform_Treaty_Justice_ and_Home_Affairs.pdf>

decision making at intergovernmental level is as strong as ever. In that context, it is quite possible that the actual results of the Reform Treaty and the Stockholm Program will be minimal. Based on the previous experience of the Tampere and Hague Programs, where the strong rhetorical commitments of Member States was not coupled with support for binding instruments, the agreements on the inauguration of Commission's reporting provided in the Stockholm Program, is rather possible to take place under strong governmental pressures and have a narrow mandate. On the other hand, the loopholes of the Lisbon Treaty in the form of opt-out provisions or the quotas of qualified majority voting needed for initiating the legislative process can increase 'enhanced cooperation', rather than policy integration. [47]

However, it is also true that the European Union's perception and confrontation of corruption is currently significantly more comprehensive than a decade ago. But, is this enough? The answer is 'no' but it is 'as good as it gets'. Member States, despite progress towards policy integration that has been required by the internationalized nature of the challenges, have proved reluctant to move towards implementation of binding common standards for addressing the root causes of most challenges falling under the hard-core sovereignty issues, including corruption. Instead they have opted for a strong rhetorical support for integrating EU policy while posing impediments to any comprehensive measures that would permanently institutionalize their subjection to supranational instruments' control.

Member States, both internally and in the context of enlargement, are likely to proceed with policy integration stemming from the impediments corruption causes to the functioning of the common market and to sustainable growth and not a shared perception of the problems or mutual trust. While a change in the tempo of common policies might occur after the ratification of the Lisbon Treaty and the Stockholm Agreement, it is up to the effectiveness of supranational instruments at providing sustainable results in the short term to produce a thorough change in governments' perceptions. However, based on previous experience and considering Member States reservations, no one should hold their breaths for that. Finally, beyond institutional balance of powers, one thing can be safely claimed: EU's anticorruption policy has not sufficiently targeted bottom-up 'Europeanisation', which is imperative for its successful implementation, therefore, rendering minimal success and fragmentation a self-fulfilling prophecy. This is an aspect that definitely needs to be looked into in future research.

Abstract

The enlargement of the European Union in 2004 and 2007 created a series of challenges in terms of institutional structures, political equilibrium, economic development, etc. One aspect, however, that cut across each one of these challenges was corruption. The fight against corruption, as an intervening param-

47. Ibid.

eter of both the economic and political transition processes for Central and East European States, was a central element of EU's (conditionality driven) exercise of normative power. The outcome, in most cases, in the pre-accession period was largely satisfactory. However, the lack of readiness of the European Union at preserving the reform momentum post-accession, reheated the discourse on the pertinence of the existing institutional framework. It also exemplified Member States unwillingness or unpreparedness to give up decision-making authority to supranational instruments on highly decisive issues, while providing interesting insights for ontological debate on the scope of the European Union and the process and incentives of European integration and Europeanisation.

Résumé

L'élargissement de l'Union européenne en 2004 et 2007 a généré une série de défis en termes de structures institutionnelles, d'équilibre politique, de développement économique, etc. Cependant, un aspect transversal à chacun de ces défis a été la corruption. La lutte contre la corruption, comme paramètre à prendre en compte dans les processus de transition politique comme économique pour les États d'Europe centrale et orientale, fut un des éléments majeurs de l'exercice du pouvoir normatif de l'Union européenne (sur base de la conditionnalité). Le résultat, dans la plupart des cas, fut largement satisfaisant dans la période de pré-adhésion. Cependant, l'impréparation de l'Union européenne à maintenir la dynamique de réforme après l'adhésion relança le discours sur la pertinence du cadre institutionnel existant. Il démontra également le manque de volonté ou l'impréparation des États membres à transférer leur capacité de prise de décision à des instruments supranationaux sur des enjeux hautement décisifs, alors que dans le même temps, ces États participaient à des débats ontologiques sur la place de l'Union européenne ainsi que sur le processus d'intégration européenne et d'européanisation.