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Uniformity and Differentiation in the Fundamentals of EU Membership: The EU Rule of Law Acquis in the Pre- and Post-accession Contexts

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Abstract

The paper discusses the nexus between the EU pre-accession conditionality and membership obligations to guarantee respect for the rule of law as a founding value of the EU, common to the Member States. It does so through the prism of the notions of legal uniformity and differentiation. The paper examines how the EU's rule of law promotion in the accession process converges with and potentially inspires the progressive EU articulation of standards applicable to the Member States. By focusing on the judicial dimension of the rule of law, it is argued that while a certain diversity is conceivable in the manner in which the rule of law is observed, and more specifically in how judicial independence is achieved at the national level, there is a functional rationale for the EU to circumscribe the heterogeneity of national judicial systems – and accordingly, for elaborating common rule of law standards in the EU.

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Introduction

The successive enlargements of the European Union have partly contributed to increasing differentiation in the integration process.¹ At one level, each wave of accession has involved transitional arrangements enabling new Member States (MS) to opt out of certain EU policy obligations for prolonged periods of time (Schimmelfennig 2014), and/or temporarily preventing them from enjoying certain privileges of membership. Transitional periods relating to the free movement of persons, and/or to the Economic and Monetary Union, epitomise this type of enlargement-related differentiation (Hillion 2004, 2007). At another level, the EU enlargement policy itself is based on accession conditions which, at least for some, entail substantively richer and normatively stricter obligations for (potential) new MS than those binding existing ones as a matter of EU law. As this paper contends, the rule of law and particularly the organisation of the national judiciary is a case in point.

While revealing different (viz. pre- vs. post-accession) conceptions of EU membership requirements, this type of enlargement-related differentiation becomes more problematic where Member States no longer comply with the standards they were asked to observe as conditions of their accession, particularly when these standards relate to their “capacity to effectively apply and implement the *acquis*”.² Such a situation, which is no longer theoretical as evidenced by the deterioration of the rule of law in Poland and Hungary (Pech and Scheppele 2017), ultimately requires more normative pre- and post-accession congruence, in the sense of elaboration and enforcement of internal EU rule of law standards (Hillion 2016, 2017) so as to safeguard the essential operation of the Union’s legal order (European Commission 2019b).³

This paper indeed argues that the distinctly active rule of law promotion which the EU has developed in the pre-accession context, seemingly inspires the progressive articulation and enforcement of rule of law obligations applicable to MS as a matter of EU law. This is particularly remarkable with respect to the functioning of national judicial systems, an area that traditionally falls within the province of states’ competence, and which has been characterised by a high diversity across the Union as a result.⁴ The EU is thus becoming more active not only in *preventing increased internal differentiation* regarding the rule of law on the ground, under the logic that too much differentiation could impede the functioning of its legal order. It is also *articulating common standards* for the rule of law, as a founding value of the EU common to the Member States (Article 2 TEU), whose observance is a *conditio sine qua non* for the effective and uniform application

1 We employ the EU IDEA project’s conception of differentiation broadly defined as “any modality of integration or cooperation that allows states (members and non-members) and sub-state entities to work together in non-homogeneous, flexible ways” (Lavenex and Križić 2019: 3).

2 As per the so-called Copenhagen (accession) criteria, see further below.

3 See in this respect the speech of French President Emmanuel Macron (2017) at La Sorbonne: “the values of democracy and the rule of law [are] non-negotiable, there can be no cherry-picking. On values, there can be no two-speed Europe. They are the catalyst for our unity and freedom.”

4 Judicial systems in the EU vary from models based on more flexible interpretations of separation of powers such as the ones in Germany and Austria where the Ministry of Justice has a more prominent role in the judiciary; more rigid models that can be found in Italy, France, Belgium, Spain and Portugal which empower judicial councils to secure judicial independence; to judicial systems such as the ones in Denmark, the Netherlands and Ireland where the role of the judicial councils is weaker.

of the EU *acquis* as a whole (European Commission 2018, 2019b).⁵ Thus, while enlargement has allegedly heralded further (legal) heterogeneity and differentiation in the European integration process, it is in effect contributing to the articulation of a common EU *acquis* as regards the rule of law (Hillion 2014), and thereby to the firming up of the fundamentals of EU membership.

The proposed analysis thereby offers a distinct contribution to the general discussion on differentiation in the EU, and specifically in answering the question of “how much and what form of differentiation is [...] compatible with [...] a more effective, cohesive and democratic EU”.⁶ In particular, it casts further light on possible *limits*, both normative and practical, to the use of differentiation to preserve and deepen the integration process in a Union of more numerous and heterogeneous members (Pirozzi et al. 2017). It may further substantiate the general claim that “[d]ifferentiation is [...] desirable as long as such flexibility is compatible with the core principles of the EU’s constitutionalism”.⁷ Incidentally, the analysis presented in this paper may provide additional elements to the discussion on the “organisational component of differentiated integration” by shedding further light on the “modality of integration or cooperation that allows states (members and non-members) and sub-state entities to work together in non-homogeneous, flexible ways” (Lavenex and Križić 2019: 3).

The paper first maps the recent articulation and significance of EU standards regarding national judiciaries in (1) the pre-accession and (2) intra-EU contexts, respectively. Based on a legal analysis of provisions of the Treaty on European Union (TEU), institutional practice, case law of the Court of Justice of the EU (CJEU), and secondary sources, it attempts (3) to cast light on the progressive congruence of those standards, both as functional limits to a potentially disruptive heterogeneity for the EU legal order, and as common constitutional prerequisites for membership.

1. Rule of law, judicial independence and the EU accession process: Towards EU uniformisation of the candidates’ judiciaries?

EU promotion and protection of the rule of law has traditionally been a matter of EU external relations and enlargement policy;⁸ observing the rule of law is indeed a prerequisite for a state to accede to the Union (Article 49 TEU). Through the promotion of the rule of law as well as other values enshrined in Article 2 TEU, the EU

⁵ See also, CJEU (2014: para 168).

⁶ EU IDEA website: *The Project*, <https://euidea.eu/?p=58>.

⁷ Ibid.

⁸ In the TEU in 1992 the rule of law was referred to in the context of the Common Foreign and Security Policy (CFSP), Article J.1(2).

has significantly built its normative power, and the European Commission (EC), with the support of the MS, has steadily increased its leverage notably in promoting the rule of law towards the former candidate countries from Central and Eastern Europe (CEE) (see Section 1.1). This normative approach has profoundly evolved. The EU has become increasingly specific in terms of what it requires from the candidate states in the area of the rule of law in general, and with respect to their judicial organisation in particular. Nevertheless, since the specificity of these requirements is not shared among all the MS as a common standard or model, the EU's approach in the enlargement policy leads to a certain level of differentiated integration. Accordingly, all of the candidate countries and some of the "old" and "new" MS form a group which have a shared or more aligned/integrated judicial structure in contrast to the other MS (see Section 1.2).

1.1 The rule of law in the Copenhagen criteria

With the articulation of the Copenhagen criteria in 1993 and specifically the political conditions requiring the stability of institutions which would guarantee rule of law, among other values, the EC soon started translating these general criteria into more specific standards and requirements (European Council 1993). Accordingly, the EU undertook to define the notion of the rule of law, despite its lack of expertise on the matter, given that the rule of law had been taken for granted among existing MS.

From early on, the focus was placed on the judiciary, on its independence and efficiency, thus demonstrating a rather narrow understanding of the rule of law (Council of the EU 1997, also see Louwerse and Kassoti 2019). Such an approach is explained by the fact that most accession candidates were emerging from decades of socialist rule, where the principle of unity of power and subordination of the judiciary to the political powers and the communist party created difficult preconditions for establishing and strengthening the rule of law. Notably, the judiciary was perceived as the exponent of the ruling elites without a true tradition or culture of independence among judges.⁹

Since the EC itself had no elaborate proficiency in this specific domain, it heavily relied on the expertise of international and regional organisations in designing its approach to promoting standards of good judicial governance, that would guarantee judicial independence. Thus, during the accession negotiations with the CEE countries, the influence of the Council of Europe (CoE) and its consultative bodies became visible in the EC's promotion of two specific institutions (Bobek and Kosař 2015, Coman 2017). The first one is a strong judicial council which would have substantial powers over the judicial career, court management, budgetary issues, judicial accountability, etc. The second institution is a specialised body for training of judges usually seen in the form of a judicial training academy. This strong emphasis on the institutional structures and adoption and strengthening of formal rules in the candidate countries enabled the EC to measure the level of judicial independence, as such structures are much easier to quantify than cultural and other societal changes needed for genuine

9 For more on the problems of judicial independence in the former socialist countries see for instance Seibert-Fohr (2012).

judicial reforms (Bobek and Kosař 2015, Coman 2017).

The EU approach focusing on judicial governance to guarantee judicial independence, as articulated notably by the EC, has not truly evolved through the years. The manner in which this approach to judicial independence – which progressively developed into a model – is promoted towards the respective groups of candidate countries has however changed. In the case of the CEE countries, promotion took the form of recommendations, sometimes even presented in contradictory terms among different candidate countries. The contrasting experiences of Slovakia (where the EU has been promoting this institutional approach) and the Czech Republic (where there was no reference to such an approach), concerning the EC's stance to judicial independence and governance in the respective national reports, are telling examples.¹⁰

Such *soft* conditionality generated rather divergent outcomes in terms of the institutional structure of judicial governance in these countries.¹¹ The success in recommending a particular model of judicial self-government during pre-accession was limited, and the EU had to envisage special post-accession mechanisms such as the Cooperation and Verification Mechanism, and stricter requirements regarding the judiciary, anti-corruption and organised crime in the case of Bulgaria and Romania considering the two countries' poor track-record of reforms in these areas.¹²

1.2 The new approach

Unlike in the case of the CEE countries, EU's accession policy towards the Western Balkans had to be initially conflated with EU-sponsored state-building processes in the aftermath of the conflict in former Yugoslavia. These state-building strategies have had very limited success (Bieber 2011, Keil 2013), especially in relation to the rule of law. This notion, combined with the lessons learned from the 2004 and 2007 rounds of enlargement, led to a more profound change in tackling the challenge of achieving sustainable judicial reforms in the case of the Western Balkan countries. The first changes were already introduced with Croatia in 2005. The Negotiating Framework (European Commission 2005b) adopted by EU ministers thus included two specific rule of law chapters, Chapter 23 (judiciary and fundamental rights) and Chapter 24 (justice, freedom and security). Through the introduction of these chapters, requirements for establishing a particular model of judicial governance

10 See for instance European Commission (1999: 14, 2001b: 17-18, 24, 2000: 19-21, 2001a: 18-20, and 2002: 22). For more on this also see Kosař (2016: 135, 165-166), and Spáč et al. (2018).

11 Ultimately, this endeavour resulted in a modest level of homogeneity, as only a few CEE countries (Slovakia, Slovenia, Romania and Bulgaria) opted for the implementation of a loose version of the European model promoted by the EU. See different contributions in Seibert-Fohr (2012), and also OSI (2001: 40-45).

12 See for instance the EC website: *Cooperation and Verification Mechanism for Bulgaria and Romania*, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en.

intensified.¹³ In particular, the more specific model of judicial governance would be implemented through the “new approach” to accession negotiations, introduced in 2012¹⁴ (European Commission 2012), which tied the overall progress of the negotiations with compliance in the rule of law chapters.

The novel rule of law conditionality has tried to streamline and integrate a set of procedural and institutional criteria which have been uniformly imposed on the candidate countries. However, this endeavour has been exceptionally challenging especially with regard to the determinacy of the criteria on the judiciary in Chapter 23 in view of the very limited EU legislation in the area. Apart from various Treaty articles (Articles 2, 7 and 10 TEU) and provisions of the Charter of Fundamental Rights of the European Union (CFR) (Articles 47-50), which are all generic, the EU accession requirements regarding the state judiciary have heavily relied on external sources such as the United Nations or the CoE.

This externally inspired normative framework of the Chapter 23 *acquis* has been introduced in the accession negotiations with Croatia, Montenegro and Serbia, while most recently it has been formally presented in the explanatory screening with Albania and North Macedonia (European Commission DG Justice 2018). Furthermore, for the first time in the explanatory screening for the latter two countries the EC introduced the case law of both the CJEU and European Court of Human Rights (ECtHR), directly related to judicial independence, as part of the European standards on judiciary within the framework of Chapter 23.

The *judiciary acquis* in Chapter 23 is organised around four particular sets of standards: independence, professionalism/quality, impartiality and efficiency of the judiciary. The *independence of the judiciary* is the most robust cluster and is centred around a combination of United Nations (1985) and CoE (Council of Europe 1998, 2000, 2010, 2014, CCJE 2001, 2010, Venice Commission 2015) standards and recommendations that provide minimal mechanisms for safeguarding the independence of the judiciary in the system of separation of powers. Arguably, the most emphasised aspect of EU pre-accession conditionality in this cluster is the reform of the councils for the judiciary (see Preshova et al. 2017), which should be independent from the legislative and executive powers (CCJE 2010: para. 1-13) and provide a mixed composition where the majority of the council’s members and its president should be judges chosen by peers from its own ranks, while other members should be elected by the Parliament (Council of Europe 2010: para. 27, Venice Commission 2010: para. 50).

However, this institutional requirement does not correspond to the legal traditions of older democracies in many EU MS which have long-lasting established mechanisms of judicial appointment by the executive and legislative powers. Although the

13 A telling example is the case of North Macedonia which up until 2005 had a model of judicial governance very similar to that of Slovenia where the Parliament had a prominent role in the appointment of judges. While the model in Slovenia was evaluated as one that guarantees a high degree of independence (European Commission 2001c: 16), in North Macedonia the identical model had to be reformed towards one that totally eliminates the role of the Parliament in the appointment of judges.

14 This new approach was reflected in the negotiation process for Montenegro and Serbia.

Venice Commission has acknowledged the existence of various judicial systems in Europe, it has however argued that due to the lack of legal culture and tradition enabling old democracies to maintain separation of power despite such practices of judicial appointment, the new post-communist democracies in Europe should adopt explicit constitutional and legal provisions for the prevention of political abuse in the appointment of judges (Venice Commission 2007). The EU has seemingly subscribed to this argumentation. It has thus promoted the establishment of independent Judicial Councils as one of the primary conditions for progress in the accession process of the Western Balkan candidate countries, despite the nonexistence of an integrated approach towards this institutional aspect of judicial independence within its internal legal framework.¹⁵

Another aspect of EU conditionality in the judiciary is the *professionalism and quality of the judiciary*. Within this framework, states are supposed to provide the necessary infrastructure and resources for continuous training of judges and prosecutors (Council of Europe 2000: para. 7, 2010: para. 56-58, 2014: para. 58). In this context, states are advised to pursue an institutional solution to this requirement centred around an autonomous body responsible for organising training curricula and implementation of training programmes. In this sense, the EU has further streamlined this institutional dimension, as the establishment of uniformed autonomous academies for the training of judges and public prosecutors has become a key condition for progress in rule of law compliance for every candidate country since the inception of the EU's enlargement strategy towards the Western Balkans.¹⁶

With respect to the *impartiality of the judiciary*, this principle mainly amounts to the imposition of minimal standards of duties and responsibilities of judges (Council of Europe 2010: para. 59-77) and prosecutors (Council of Europe 2005, 2000: para. 72-74), while the *efficiency of the judiciary* is mainly related to policies on management of court proceedings including allocation of appropriate resources, infrastructure and equipment to courts to ensure efficiency of their proceedings (Council of Europe 2010: para. 20-41).

In retrospect, the EU's approach towards rule of law compliance in the Western Balkans has been centred around the generic legal frameworks and sets of standards of the Chapter 23 *acquis*. However, the EU has been increasingly using the assistance of the CoE in streamlining the reform of the judiciary in the Western Balkans in order to meet European standards. A good example is the "Horizontal Facility" joint co-operation initiative of the EU and the CoE for the Western Balkans

15 In this sense, the EC's screening reports for Montenegro and Serbia require the respective countries to align their constitution with the European standards in preventing political influence over the Judicial and Prosecutorial Councils (European Commission 2012, 2014c). Also, much of the criticisms in the EC's country progress reports on judicial independence in the Western Balkan candidates has been related to the lack of autonomy of the Judicial and Prosecutorial Councils due to interference in their work from the executive and legislative branches of government. For examples, see European Commission (2005a: 20-21, 2014d: 40, and 2019a: 14).

16 Since the establishment of the training academies for the judiciary in the Western Balkan candidates ("Judicial Training Centre" in Montenegro, "School of Magistrates" in Albania), the EC has provided assessments of their work in virtually every Country Report it has produced.

and Turkey, which envisages a more profound role of the CoE monitoring bodies in providing guidance for the Western Balkan candidates to improve their compliance records with the European standards also within the framework of the EU accession process.¹⁷ This trend is also evident in the EC's country progress reports which have increasingly referred to the Venice Commission's opinions and recommendations as a reference point for compliance in the judiciary portfolio as well as encouraging further consultation with this consultative body.¹⁸

In sum, following the recognition of the CEE countries' vocation to accede in the 1990s, the EU established an *EU Member State-building framework* in the form of the "pre-accession strategy" with the ambition to secure compliance with the EU membership requirements, notably and increasingly in terms of respect for the rule of law. In this context, and as set out by this section, the EU became increasingly inquisitive as regards the structures and operation of the candidates' judicial systems and processes, promoting certain European standards of good judicial governance to secure judicial independence.

Borrowing from external sources, notably from the CoE, and relying on the expertise of various transnational judicial networks, the EU thus progressively articulated a corpus of substantive and institutional standards of judicial governance. These in turn have been practically enforced through the accession conditionality and using the leverage that the promise of membership entailed. In the context of the pre-accession strategy and as part of its MS-building exercise, the EU has in effect initiated an embryonic *rule of law policy*, which to some extent standardised the judicial structures of future MS.

While initially specific to the enlargement context, the EU rule of law policy has nevertheless become increasingly significant in the internal context as well, as will be seen below, notably in reaction to the differentiated conception of the principles of membership which some MS have been practicing, the Hungarian and Polish governments in particular. In this sense, while a degree of judicial differentiated integration could be conceived as means of meeting membership conditions for potential MS and, arguably, securing judicial independence, the very compliance and respect of the rule of law, as the founding value of the Union and an underlying goal, is not something over which flexibility and differentiated conceptions are tenable. Thus, the pre-accession policy has inspired the "internalisation" of certain instruments in securing institutional preconditions which should be conducive to the protection and safeguard of rule of law in the EU as the general aim of its rule of law policy. The process of internalisation aims at bridging the inconsistency between the internal and external EU policies on the rule of law manifested through the divergences between accession conditions and membership obligations, referred to as the "disconnect problem" (Pech 2016), which has been perceived as one of the causes for the unsustainability and reversibility of judicial reforms (Hillion 2014).

17 This initiative, which ran from 2016 to 2019, has been recently extended through the Horizontal Facility II programme for the period 2019–2022. See official website: <https://pjp-eu.coe.int/en/web/horizontal-facility>.

18 For example, see European Commission (2014a: 11, 2019a: 15).

2. Rule of law, judicial independence and membership: Towards less differentiation among Member States' judiciaries?

Upon accession to the EU, new MS are presumed to offer guarantees of compliance with the rule of law. In particular, their judicial systems are supposed to provide uniform protection of the rights derived from the EU legal order (see also CJEU 2014: para. 168). The presumption also entails that potential defects regarding the rule of law ought first and foremost to be addressed at the national level, which in turn explains the limited role the EU has traditionally played on this terrain in relation to the MS (European Commission 2014b, 2019b).

That said, the founding Treaties of the EU endow the Union's institutions with a significant mandate to safeguard the rule of law at the MS level, if and when national remedies become deficient (see Section 2.1). This mandate has become more evident and operational in the face of controversial judicial reforms in certain MS, seen as departing from the common standards of membership in this domain. The increasing EU scrutiny of Member States' rule of law performance in general, and of the organisation and operation of their judiciaries in particular, has indeed involved further *articulation of common judicial standards*, notably by the CJEU (see Section 2.2), occasionally using sources which EU institutions have referred to in the context of the pre-accession conditionality. The emerging internal EU "rule of law policy" (Barroso 2012) has also found expression in the setting up of monitoring mechanisms mooted by EU institutions (and MS), and which are increasingly reminiscent of the EU practice towards the candidates for membership (see Section 2.3).

2.1 EU mandate to safeguard the rule of law internally

As recalled in the previous section, any country aspiring to become member of the Union must respect and promote the founding values of the EU in general, and the rule of law in particular (Article 49 TEU). It is up to existing MS and EU institutions to determine whether candidates fulfil that condition. While accession presupposes *prior* fulfilment, the obligation to respect EU values, including the rule of law, nevertheless remains fully valid for MS. Membership is predicated on *continued* compliance with the common values of Article 2 TEU. As the CJEU forcefully held:

167. These essential characteristics of EU law have given rise to 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, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.

168. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected. (CJEU 2014: para. 167-168)

Indeed, the Treaty on European Union makes clear that the premiss that MS share common values, including the rule of law, is rebuttable. Thus, it envisages various mechanisms for the EU institutions to address potential regression, mechanisms which have been put to the test in the face of mounting defiance, on the part of some MS, of EU fundamental rules, particularly on the judicial terrain.

First, Article 7(1) TEU stipulates that a “clear risk of a serious breach” of those values by a Member State may be reprimanded by the Council on “a reasoned proposal” either by the EC, by the European Parliament (EP), or by other MS (preventive mechanism). Moreover, Article 7(2) TEU foresees that a Member State’s “serious and persistent breach” may lead to the *suspension*, by the Council, of “certain” of its “rights deriving from the application of the Treaties [...], including the voting rights of the representative of the government of that Member State in the Council” (corrective mechanism) (Sadurski 2010, Besselink 2017).

The TEU therefore foresees that the enjoyment of all membership rights is contingent upon each Member State effectively sharing, and thus observing, the common values of Article 2 TEU, including the rule of law. The latter underpins the process of integration and the “mutually interdependent legal relations [that it involves] linking the EU and its Member States, and its Member States with each other” (CJEU 2014: para. 167). The primary purpose of the quarantine which Article 7 TEU envisages is indeed to *protect the EU legal order* from being contaminated by a dysfunctional MS, and thus to preserve the integrity of the rights of other MS and Union citizens. But the procedure also makes clear that *EU institutions* have specific responsibilities to *secure Member States’ continuing compliance* with the rule of law,¹⁹ and notably to *prevent* any “clear and persistent breach”.

After a long period of foot-dragging (Hillion 2016, Pech 2020), the EC and the EP activated the above EU rule of law mandate by triggering the procedure of Article 7(1) TEU.²⁰ The two institutions separately submitted reasoned proposals to the Council

19 To be sure, EU Treaties endow the EU and its institutions to promote those values. Article 3(1) TEU thus stipulates that the Union is to “*promote* [...] its values”, while Article 13(1) foresees that the EU institutional framework “*shall aim to promote* [the Union’s] values” (emphasis added). It is indeed noteworthy that such value promotion spearheads the list of institutions’ duties, preceding the duties to advance the Union’s objectives and to serve its interests, those of its citizens and those of its MS. Promoting respect for the rule of law is mainstreamed into the activities of *all* EU institutions, informing the way in which they pursue the EU’s objectives and exercise its competences, and their powers, externally and internally.

20 It should be mentioned that in the meantime, the EC established and activated the so-called “Rule of Law Framework” with respect to Poland. The Framework is a mechanism that “seeks to resolve future threats to the rule of law in Member States before the conditions for activating the

regarding Poland (European Commission 2017) and Hungary (European Parliament 2018) respectively, considering that the far-reaching judicial reforms the two MS had undertaken amounted to systemic threats to the rule of law. In the case of Poland, the EC alleged *inter alia* that the “adoption by the Polish Parliament of the law on the Supreme Court, the law on Ordinary Courts, Organisation, the law on the National Council for the Judiciary and the law on the National School of Judiciary [...] contain[ed] provisions raising serious concerns as regards judicial independence, the separation of powers and legal certainty” (European Commission 2017: 40, emphasis added).

The activation of the preventive mechanism of Article 7 TEU is of high significance not only in terms of confirming that EU institutions do have a responsibility to guarantee Member States’ respect for the rule of law. Also, and more importantly for this discussion, the ensuing process, including the subsequent hearings of the two countries in the Council (Council of the EU 2018a, 2018b, 2018c, 2019b), has provided valuable insights into the way in which EU institutions and MS conceive of the rule of law as a common value under Article 2 TEU, in both substantive and normative terms. In effect, the various protagonists of the procedure have had to envisage, discuss and establish methods and standards to assess the impugned judicial reforms in the two MS concerned. As the process is still ongoing, it is obviously premature to draw definitive conclusions as to the effective contribution of Article 7 TEU to the elaboration of the EU rule of law *acquis*, but some preliminary observations can nonetheless be made.

Of particular interest is the EC’s formulation of the requirements regarding Poland’s national judicial structures. Acknowledging that EU MS have competence to determine their own justice system, the Commission (2017: para 182) underlined that “whatever the model [...] chosen, the independence of the judiciary must be safeguarded as a matter of EU law” (emphasis added). Moreover and reiterating that “It is up to the Member States to organise their justice systems, including whether or not to establish a Council for the Judiciary the role of which is to safeguard judicial independence”, it then emphasised that “where such a Council has been established by a Member State, as it is the case in Poland where the Polish Constitution has entrusted explicitly the National Council for the Judiciary with the task of safeguarding judicial independence, *the independence of such Council must be guaranteed in line with European standards*” (emphasis added).

For the EC, such standards are to be found in the “Case law of the Court of Justice of the European Union and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the European Commission for Democracy through Law (‘Venice Commission’) [which] provide a non-exhaustive list of [...] principles and hence define the core meaning of the rule of law” (European Commission 2017: para 2). As to the question of whether the system that Poland chose meets those standards, the EC again relied on external sources to substantiate its own assessment. References to recommendations and opinions of the Venice Commission litter its reasoned proposal, which also includes a long list of additional external sources, including from various transnational networks, it has

mechanisms foreseen in Article 7 TEU would be met” (European Commission 2014b: 3).

otherwise relied on in the context of the EU pre-accession strategy.

The standards and references which supported the EC's reasoned proposal – and that of the EP in the case of Hungary – did frame the subsequent discussions among MS in the context of the Council hearings foreseen by Article 7(1) TEU. The reports of those hearings indicate for instance that Poland undertook to establish how the “model [it had] chosen [...] complied with [the invoked] European standards” (Council of the EU 2018c: 3), thus in response to the EC's allegations, and its invoking of such standards. The interventions of various MS representatives conveyed by those reports (Council of the EU 2018a, 2018b, 2018c), despite their paucity, also provide some hint as to the degree of commonality and difference in the EU institutions and Member States' understanding of those norms and their origins. References to the CoE's bodies and resources are, though not numerous, nonetheless noticeable, particularly the Venice Commission and the Group of States against Corruption (GRECO), suggesting a recognition, including by the MS under review, that these standards have relevance in the EU context also for the purpose of operationalising the terms of Article 2 TEU, as applicable in the context of the procedure of Article 7 TEU.

Indeed, the contents of the two reasoned proposals, and those of the hearing reports, make clear that the rule of law standards to be observed by MS on the basis of Article 2 TEU, and controlled under Article 7 TEU, entail requirements going beyond the strict delimitation of EU competence. This is indeed the commonly accepted legal interpretation of these provisions, including that of the legal service of the Council, always prone to circumscribe the reach of the EU Treaties (Scheppele et al. 2018). This, in hindsight, makes it legally possible, and justifies that the EU accession conditionality relating to the values of Article 2 TEU also entails obligations beyond EU competence.

In addition to that specific procedure, the activation of other EU procedural frameworks and legal tools has further contributed to the articulation of the rule of law standards in the EU, including with respect to Member States' judicial systems, notably in the face of mounting defiance from several MS.

Since the entry into force of the Treaty of Lisbon (2009), Article 19 TEU foresees that MS must “provide remedies sufficient to ensure *effective legal protection* in the fields covered by Union law” (emphasis added). In the same vein, the now binding EU Charter of Fundamental Rights comprises a “Justice” Title that includes Article 47 (“Right to an effective remedy and to a fair trial”) alluded to above, which stipulates that “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.” It also foresees that “Everyone is entitled to a fair and public hearing within a reasonable time by *an independent and impartial tribunal previously established by law*” (emphases added).

EU law has therefore made Member States' obligations to respect the rule of law, and specifically to provide effective judicial protection, legally more explicit. As a consequence, EU oversight has become more significant, and operational (Schmidt and Bogdanowicz 2018). As guardian of the Treaties, the EC has indeed launched

several infringement proceedings against MS, and notably Poland and Hungary, for having violated these provisions, while several MS courts (e.g., from Ireland, Malta and Portugal) have requested interpretation of those provisions by the CJEU. Like the two above-mentioned Article 7 actions and even more, the EC's and national courts' initiatives, whilst criticised (Closa 2019), have nonetheless laid the groundwork for enunciation of authoritative rule of law standards applicable to the MS, particularly on the terrain of judicial process.

2.2 Judicial articulation of Member States' obligations regarding the independence and impartiality of their respective judiciaries

Securing effective judicial protection to guarantee full observance of EU law has indeed been central to the increasing, albeit subsidiary, EU monitoring of and influence on Member State's judicial processes. The CJEU's case law has made clear that since national judiciaries are key to the effective application of EU law at the MS level, their operation and processes must comply with EU law, and are thus not immune from EU oversight. Echoing the EC, the Court thus found that:

although it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, the Member States are, however, responsible for ensuring that those rights are effectively protected in every case, compliance with the right to effective judicial protection of those rights as enshrined in Article 47 of the Charter. (CJEU 2019b: para 115)

Precisely because national courts are integrated in the EU judicial system, their operation must meet the EU requirements of effective judicial protection. As the CJEU emphasised: "Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice *but also to national courts and tribunals*" (CJEU 2018a: para 32, emphasis added). It has also underlined that the very existence of effective judicial protection "is of the essence of the rule of law", as per Article 2 TEU (CJEU 2017: para 73).

The contentious judicial reforms which the Hungarian and Polish governments have undertaken over the past years have also provided an opportunity for the CJEU to operationalise further the EU principles of judicial protection and, indirectly, of the rule of law. The ensuing case law contains a remarkable elaboration of standards of judicial process based on Article 19 TEU and Article 47 CFR, which MS must observe as part of their EU obligation to ensure effective judicial remedies, under EU control.

It is not the purpose of this study to provide a detailed and critical account of the relevant and fast-expanding case law. The following will instead flag examples of the latter's critical contribution to the development of the EU *acquis* in the field, in

turn giving more substance to the emerging internal EU rule of law policy which circumscribes the heterogeneity of MS' judicial processes.

Building on its previous case law regarding the notion of Member States' "courts or tribunals" in EU law, and inspired by the case law of the ECtHR, the CJEU has notably insisted on guarantees of independence and impartiality of national courts, as requirements of EU law. Also, it has enunciated various standards that national judicial processes must observe to provide such guarantees. In a case concerning the Polish judiciary, and confirming its earlier case law, the Court thus held that:

121. The requirement that courts be independent has two aspects to it. The first aspect, which is external in nature, requires that the court concerned exercise its 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, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions [...].

122. The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law [...].

123. Those *guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it* [...].

124. Moreover, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive. (CJEU 2019b: para 121-124, emphasis added; see also CJEU 2019b)

In a previous case, the Court also held that the requirement of independence equally means that:

the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary. (CJEU 2018c: para 67, emphasis added)

The EU conception of effective judicial protection thus articulated has laid the grounds for an expanding and more meticulous EU monitoring of national judicial processes. While MS do remain competent regarding the organisation of their judicial systems, the CJEU makes clear that they are nevertheless bound by several standards of EU law that it is progressively enunciating, regarding for instance “the composition [of a court] and the appointment, length of service and grounds for abstention, rejection and dismissal of its members”, or the “disciplinary regime” applicable to judges (CJEU 2019a: para 111, 114). The Court thereby contributes to the elaboration of those “European standards” that the EC invoked in its reasoned proposal on Poland of 2017 (European Commission 2017).

It is indeed noteworthy that in this exercise, the Court as well as the Commission have referred to various external and notably European sources which have been critical in the EU rule of law policy in the pre-accession and Article 7(1) TEU contexts, respectively, for the purpose of *internalising* them. For example, in the case of the Polish judiciary referred to above, the Court extensively invoked the relevant case law of the ECHR (CJEU 2019c, in particular paras 126-145), both as inspiration and as further support for articulating EU standards of judicial independence. In other cases, it has referred to the Venice Commission to substantiate its own views on contentious rules governing Member States’ judicial processes (CJEU 2019b).

Also noteworthy in the judicial construction of the EU rule of law *acquis*, the CJEU has established a framework within which MS courts themselves have a role in overseeing the judicial processes of other MS, and in particular the independence of their courts, notably when concerns are being raised by the EC in the framework of the procedure of Article 7(1) TEU. In the specific context of the implementation of the European Arrest Warrant, which is based on the mutual recognition of MS courts’ decisions on surrender of EU citizens, the CJEU held that

where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State’s judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State [...] there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State. (CJEU 2018a: para 79)

In sum, the fast-expanding case law of the CJEU regarding Article 19 TEU and Article 47 CFR is further fleshing out the rule of law referred to in Article 2 TEU (Van Elsuwege and Gremmelprez 2020), which the MS must observe as a common value. It has

notably set out operational requirements which national courts must fulfil for that purpose. This articulation of EU obligations regarding judicial protection elaborates the grounds for a more fine-grained EU monitoring of Member States' compliance, and potentially more engagement to secure their continued observance of the rule of law (Scheppele 2016). Several infringement proceedings and preliminary procedures are presently pending before the CJEU relating to the operation of the judiciary of several MS, which epitomises this dynamic.²¹

2.3 Establishment of (accession-like) oversight of Member States' rule of law compliance

The development of the EU rule of law policy (Pech 2020), involving both EU institutions and MS, progressively circumscribes the prevalent heterogeneity in the organisation and operation of Member State judiciaries, and thus contributes to instilling more commonality in judicial processes across the EU. The fact that these standards are progressively enshrined in EU rules and case law strengthens and facilitates the exercise of the EU mandate to oversee the rule of law, both in its preventive and corrective dimensions, as this subsection discusses.

The CJEU's case law has not only bolstered the task of the EC in establishing and addressing deficiencies in the MS judicial processes that are incompatible with the rule of law. It has also contributed to the elaboration of mechanisms to *prevent* such deficiencies. EU institutions, and notably the EC, have thus mooted various monitoring and conditionality mechanisms for the purpose of securing the rule of law in general, and in Member States' judicial processes in particular, in line with the standards established by the CJEU (European Commission 2019b). Remarkably, these initiatives are increasingly reminiscent of the EU practice towards the candidate countries. Two particular examples can be mentioned here.

A first element of the emerging EU toolkit is the development of monitoring mechanisms relating specifically to the rule of law (Pech et al. 2019). Monitoring already exists notably with respect to the MS judicial systems. Hence since 2013, the EC has published annual "Justice Scoreboards" that incrementally provide comparative data on the independence, quality and efficiency of national justice systems,²² which it intends to strengthen. Also, the EC has included data on MS judiciaries in its reporting linked to the European Semester (European Commission 2019b). Building on these existing reporting arrangements (Pech 2020), the EC now

21 E.g., pending case before the CJEU: Case C 791/19 *Commission v Poland* (<http://curia.europa.eu/juris/liste.jsf?num=C-791/19>); see also pending case before the CJEU concerning Malta: Case C-896/19, *Repubblika v Il-Prim Ministru* (<http://curia.europa.eu/juris/liste.jsf?num=C-896/19>), lodged on 5 December 2019, involving a preliminary question from the *Ġurisdizzjoni Kostituzzjonali* (Malta) on whether the Maltese Prime Minister's involvement in the process of appointment of members of the judiciary, as foreseen in the Maltese Constitution, is compatible with the provisions of Art 19 TEU and Art 47 CFR.

22 The Justice Scoreboards also involve contributions from the judiciary in MS, the European Network of Councils of the Judiciary, the Network of Presidents of the Supreme Judicial Courts of the EU and the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU.

intends to produce and publish specific annual rule of law reports on all MS, as a core element of a new *Annual Rule of Law Review Cycle* (European Commission 2019b). The proposed deeper monitoring of the rule of law is set to include assessment of each Member State's judicial systems, for the purpose notably of ascertaining that they provide "effective judicial protection by independent and impartial courts" (European Commission 2019b: 9). It is indeed envisaged that the "standards developed by the Court [of Justice] can serve as a compass to flag where reforms would have to be addressed with caution (for example reforms that can have a negative – and maybe unintended – effect on the independence of magistrates or regulatory authorities)" (European Commission 2019b: 11).

Replicating the pre-accession method of gathering information for compiling progress reports, the EC intends to involve "judicial networks [...] to share their expertise and present their views, including the European networks of the Presidents of Supreme Courts of the EU, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU and the European Network of Councils for the Judiciary" (European Commission 2019b: 11). Part of the Rule of Law toolkit proposed by the EC is also to promote a rule of law culture, notably by involving European judicial networks, and by strengthening the EU's cooperation with CoE bodies. At the time of writing the EC is producing its first batch of reports, based on a call to "stakeholders to provide written contributions to the Report [...]. The objective is to feed the assessment of the Commission with factual information on developments on the ground in the Member States."²³

The second initiative worth mentioning is the EC's intention, based on a call from several MS, to introduce conditionality in the allocation of EU funds based on compliance with *inter alia* the rule of law. While the principle of the proposal has been welcome, some of the modalities have been criticised (Blauberger and van Hüllen 2020). The EP has indeed proposed amendments, and the draft is still discussed in Council. As this is a proposal, suffice it to note for this discussion that the preamble of the draft regulation makes specific reference to the functioning of the MS judiciaries, indeed heavily drawing from the case law of the CJEU:

The independence of the judiciary presupposes, in particular, that the body concerned is able to exercise 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 thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The guarantees of independence and impartiality

23 European Commission website: *Rule of Law Report*, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-report_en. Interestingly, parallel to these enhanced efforts and initiative of the EC, the Council of Europe, clearly motivated by the Judicial Scoreboard, has announced the introduction of the "Dashboard for Western Balkans: Towards a Better Evaluation of the Results of Judicial Reform Efforts in the Western Balkans" for the purposes of the accession process. This clearly reveals that the interaction between pre-accession mechanisms and the developing EU rule of policy works in both directions; see Council of the EU (2019a) and Council of Europe (2019).

require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. (European Commission 2018: p. 6)

The conditionality mechanism could therefore empower the EC further to monitor the MS judiciaries and ascertain for instance their observance of the “independence” test which the CJEU established. More generally it would allow the EU to supervise and influence the operation of state structures, in a way that resembles the pre-accession methodology.

In sum, the entry into force of the Treaty of Lisbon and the controversial judicial reforms undertaken by some MS have both contributed to the exponential development of common standards governing the operation of national judicial systems, and notably to guarantee the independence of their courts. Initially reactive, the EU rule of law policy is set to include further monitoring and conditionality mechanisms not only to expose potential deficiencies in the MS judicial processes, but also to protect the Union’s constitutional and financial interests against negative implications of such deficiencies.

The substantive elaboration of principles like the rule of law and the effective monitoring of compliance thereof is indeed critical to secure the functioning – if not the existence – of the EU and its legal order. This *functional* argument has been predominant in the institutional discourse on the rule of law (European Commission 2019b, Council of the EU 2014), to underpin the normative mandate of the EU to oversee its observance: the existential threat that breaches to the rule of law (and the damaging of the operation of national judiciaries in particular) entail for the EU, prompts a more active role for the institutions to withstand such breaches. The increasing (substantive and normative) articulation of membership fundamentals by EU institutions, including by way of common standards for the operation of national judicial structures, is a remarkable development as this has traditionally been considered as falling within the Member States’ province.

3. Connecting EU pre-accession and domestic rule of law: Towards convergence in the operation of Member States’ judicial systems?

The above sections have accounted for two significant developments in the EU approach to the rule of law in general, and national judiciaries in particular. First, the Union has reinforced the conditions and its monitoring regarding the organisation and operation of the candidate states’ judicial systems. The EU pre-emptive engagement

is to secure, as much as possible and prior to accession, a state's compliance with the EU rule of law requirements deemed critical to assume the rights and obligations associated with membership, and to prevent, so much as possible, future regression.

Second, the EU has been enhancing its oversight of Member States' respect for the rule of law in reaction to internal *backsliding* (Müller 2015). Based on various Treaty provisions and recent legal innovations, EU institutions have engaged more actively with States' breaches of the rule of law, triggering a virtuous cycle of enforcement–articulation–further enforcement–further articulation of standards of judicial process, contributing to the elaboration of an EU rule of law *acquis* binding to all MS.

Institutions have indeed undertaken to deepen, widen and systematise their monitoring of Member States' observance of rule of law standards in an attempt to prevent breaches of the rule of law in view of their disruptive effects for the functioning of the EU legal order. While the organisation of national judicial systems remains a matter of MS competence, the development of EU law nevertheless entails increasing constraints on the exercise of that competence, both in terms of circumscribing excessive heterogeneity of national systems and by requiring adherence to (now explicit) common standards of judicial protection, articulated as constitutive elements of membership.

The pre-accession approach alone could ultimately produce further differentiation in the judicial system across the enlarging EU, as a result of the strengthened conditionality as well as the ensuing discrepancy with internal rules, however evolving (see Section 3.1). However, should the internal rule of law policy further develop, notably in relation to the Member States' judicial systems, a process of further convergence might ensue (see Section 3.2). The degree to which those two concomitant developments ultimately relate to one another may thereby inform the discussion on unity and differentiation in the context of enlargement. While a disconnect between the two processes may well contribute to further (and ultimately disruptive) legal and political differentiation in the potentially enlarged EU, increased interactions and congruence between the two may, by contrast, nurture the narrative of legal and political unity underpinning the European integration process.

3.1 Pre-accession as vector of further differentiated integration in the enlarged EU?

Although the rule of law, including in its judicial aspects, is a founding value of the EU, it is also an area that relates to core state powers and policies (Genschel and Jachtenfuchs 2014), which are attached to state sovereignty. As these types of policies (such as security, foreign or fiscal policies) are susceptible to differentiation (Schimmelfennig et al. 2015, Duttler et al. 2017), it is therefore not surprising that there has been a high level of heterogeneity in judicial governance in the context of European integration, both internally (among the MS) and externally (in relation to the candidates for membership).



Apart from the internal differences between MS addressed in the previous sections, another layer of heterogeneity has appeared in the context of enlargement, namely between MS and candidates for membership (the *external* dimension). This differentiation stems from the EU's traditionally more active promotion of legal and institutional uniformity in judicial governance in the candidate states, which contrasts with the remaining divergence of Member States' judicial systems. As previously discussed, the EU's conditionality on the judiciary applied to the Western Balkans has been much more streamlined and centred around the European model of judicial organisation. The latter favours an enhanced autonomy of the judiciary from the other branches of government and a structured institutional framework centred around judicial and prosecutorial councils and training academies.

This new approach has already resulted in a high level of homogeneity in the system of judicial governance across all candidate countries from the Western Balkans and Croatia as a Member State. A potential consequence of this approach in the longer term is further differentiation in judicial governance across the potentially enlarged EU. In particular, it could generate a cluster of (new) MS with similar pre-accession-induced judicial structures (e.g., a homogenous block of Western Balkan countries, should they obtain EU membership in the future), alongside more diverse systems in the current EU MS considering the more limited EU competence and rules in the area. In this sense, the current pre-accession conditionality could indirectly produce differentiated integration in a core aspect of the rule of law, namely judicial governance.

Paradoxically, and as a consequence of the discrepancy between the limited internal EU competence in judicial matters and the EU proactive stance in the pre-accession context, accession would entail that the new MS recover a degree of autonomy and discretion in the organisation of their judiciaries. In principle, such a regained post-accession autonomy might be used for changing national judicial structures, potentially in ways that depart from the template advocated in the pre-accession context, and/or possibly from the principles it was deemed to guarantee. The ensuing differentiation might indeed become disruptive for the EU legal order as recent experience points to. The far-reaching judicial reforms in Poland and Hungary epitomise how far new MS may restructure parts of the state apparatus after accession, in ways that fall foul of the standards the EU had advocated in the pre-accession phase. It can be seen that the discrepancy between accession conditions and Member States' obligations potentially (if paradoxically) entails a degree of post-accession *dis-integration*, in the sense that the pre-accession-induced (differentiated) integration may be inverted in areas of, and possibly as a consequence of, missing corresponding EU rules and/or competences. While differentiation regarding for instance institutional arrangements to guarantee judicial independence (e.g., use of judicial council) might be tolerated, differentiation in respect to judicial independence itself (i.e., departure from the standards highlighted by the CJEU), as core elements of the rule of law as a foundation of the EU, could not be sustained.

As evoked in Section 2, some MS have gradually practiced alternative conceptions and application of EU rules, including with regard to critical principles underpinning membership, e.g., the rule of law in general and the independence of the judiciary in

particular. Arguably, this phenomenon itself embodies a specific, if disruptive, form of differentiation. As the opposite of the pre-accession differentiated integration from which it derives, it also departs from the more classic conception of differentiated integration (Lavenex and Križić 2019). While it may take this form too, the differentiation considered here does not primarily concern the state's participation in integrated policy areas such as Schengen or the Economic and Monetary Union. It instead involves different states' conceptions of rights and duties associated with membership more fundamentally: it relates to the structural (systemic) rather than substantive (policy) aspects of states' participation in integration. The mounting differences in the states' conceptions of membership and practice of integration are tellingly illustrated by the ongoing Article 7 procedures – including the high diversity of MS contributions in the Council hearings. That there should be different visions and practice of membership and integration in different MS is not new. What is new however is the nature, depth and thus impact of this difference for the functioning of the EU, and for integration more generally.

The lingering discrepancy between accession conditions and membership obligations allows for this regressive and disruptive differentiation, though it is not automatic. At the same time, it entails that the EU is in a weak position to address potential relapse in those very areas where it may have pushed for high integration prior to accession. As has been argued, that has notably been the case as regards the rule of law.

3.2 Pre-accession as laboratory for articulating common membership standards?

The phenomenon of differentiation accounted for above might also have the converse effect of stimulating, if not requiring, the consolidation of integration principles in those very areas. Enlargement may have indeed triggered and inspired further enunciation and consolidation of the common constitutional rules enshrined in Article 2 TEU (Hillion 2014).

As it has been argued, a multi-layered process of articulation of rule of law obligations is indeed at work within the EU, generating norms in an area traditionally considered a matter of national prerogatives. Hitherto assumed to be observed by MS by reason of their membership, explicit and enforceable common standards have become necessary in the face of regressive dynamics in some MS. Acknowledging the Member States' freedom to design their own justice systems, EU law requires observance of elaborated norms which ultimately constrain their discretion, in turn circumscribing heterogeneity in the EU, considering that such heterogeneity may upset the functioning of the EU legal order as a whole.

The internal rule of law crisis, which typifies excessive state heterogeneity in the EU, has triggered an internal process of identification and enunciation of the hitherto implicit fundamental norms of membership, beyond the strict confines of written EU law. It has also included the setting up of mechanisms to secure compliance. The ensuing explicit requirements as conditions for participation in the integration

process pervade areas of national competence. They influence and constrain (the evolution of) Member States' structures. The ultimate purpose of this development is to prevent and counter regression, thus circumscribing the differentiation alluded to above – and further, to instil thicker commonality among the MS and safeguard the EU legal order, and the framework for further integration (be it differentiated or not) that it underpins.

In this process of codification of the structural prerequisites for membership, the EU has been exercising a functional, if subsidiary, competence akin to the one it has used in the context of the enlargement policy. Section 2 indeed demonstrated that in this exercise, EU institutions have been referring to and have internalised the European standards elaborated within the CoE and at the ECtHR. The latter were indeed critical for the enunciation of pre-accession conditions, and for the EU Member State–building policy the pre-accession strategy embodied. The ongoing setting up of further monitoring and conditionality mechanisms also emulates and builds on the pre-accession arrangements. Conversely, the internal articulation of EU rule of law standards, and notably in the CJEU's case law, has in turn been fed into the pre-accession conditionality. In particular, the Court standards on independence and impartiality of the judiciary are now explicitly referred to in accession negotiations.

While the evolving enlargement policy may foster heterogeneity and differentiation in integration in a way that has been discussed above, it may also prompt further integration and unity in the elaboration and oversight of the prerequisites for membership. The discernible degree of substantive and methodological convergence between the accession conditionality and Member States' obligations in traditional areas of MS prerogatives in order to consolidate and preserve the constitutional fabric of the EU, is a case in point. That consolidation is arguably a *sine qua non* for making any further (differentiated) integration conceivable.

Concluding remarks

The paper discussed the nexus between the pre-accession conditionality and membership obligations to guarantee respect for the rule of law as a founding value of the EU, and as a value common to the MS. It looked specifically at the judicial dimension of the rule of law, and discussed some of the core standards that the EU expects candidates and MS, respectively, to observe to enjoy the full benefits of membership.

On the one hand, it was suggested that the EU has been promoting a distinct model of judicial governance through its pre-accession conditionality. This approach could foster differentiation in the future EU potentially enlarged to the Western Balkans. In particular, it was argued that the enlargement strategy includes an embryonic EU rule of law policy towards a group of potential MS, based on standards borrowed from, and elaborated through, flexible cooperation with international organisations such as the CoE, as well as various judicial networks. Through this (external) rule of law policy, the EC has insisted on candidates' establishing various structures

designed to foster judicial independence and secure observance with the rule of law enshrined in Article 2 TEU, beyond what EU law has traditionally required from MS on this particular terrain. At one level therefore, the EU enlargement policy may lead to deeper integration among candidate countries' judicial structures than inside the EU, a phenomenon that could prompt a form of differentiated integration in the potentially enlarged EU.

On the other hand, the analysis of recent developments in the EU points towards the emergence of an internal rule of law policy also, notably in response to the constitutional recessions evident in several MS. The new phenomenon, which has both substantive and institutional dimensions, is arguably reducing the gap between accession conditions and membership obligations as regards the rule of law in general, and national judicial processes in particular. EU institutions have been increasingly involved in articulating standards which are, at least partly, similar to the ones advocated in the pre accession context, by reference to the external sources. They are also engaging in the development of monitoring tools and conditionality mechanisms that emulate the approach the EU has applied in the enlargement strategy for the Western Balkans. The ensuing dynamic of convergence at play could foster a more homogeneous rule of law policy across the EU in the long run.

Based on an analysis of EU Treaty provisions, the case law of the CJEU, EU institutional practice and secondary sources, the paper thus depicted a progressive congruence of pre- and post-accession rule of law *acquis*. The EU appears to allow flexibility as to the *means* to observe the rule of law as a founding value of the Union, common to the Member States (Article 2 TEU). Yet, the developments examined in the paper point towards the EU setting *functional limits to the diversity* in ways to meet the rule of law requirement, considering this heterogeneity potentially disruptive for the EU legal order as a whole. More so, the EU has also articulated specific *EU rule of law standards* as constitutional prerequisites for membership, and indeed for (further) integration, be it differentiated or not.

If confirmed, those developments warrant a more nuanced approach towards the overall discourse on uniformity and differentiation in general, and differentiated integration in particular. The latter is not necessarily the immediate (democratic and efficient) panacea to ensure further integration in view of a more heterogeneous EU, but arguably presupposes a consolidated commonality in its foundations to be at all workable.

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EU Integration and Differentiation
for Effectiveness and Accountability

Differentiation has become the new normal in the European Union (EU) and one of the most crucial matters in defining its future. A certain degree of differentiation has always been part of the European integration project since its early days. The Eurozone and the Schengen area have further consolidated this trend into long-term projects of differentiated integration among EU Member States.

A number of unprecedented internal and external challenges to the EU, however, including the financial and economic crisis, the migration phenomenon, renewed geopolitical tensions and Brexit, have reinforced today the belief that **more flexibility is needed within the complex EU machinery**. A Permanent Structured Cooperation, for example, has been launched in the field of defence, enabling groups of willing and able Member States to join forces through new, flexible arrangements. Differentiation could offer a way forward also in many other key policy fields within the Union, where uniformity is undesirable or unattainable, as well as in the design of EU external action within an increasingly unstable global environment, offering manifold models of cooperation between the EU and candidate countries, potential accession countries and associated third countries.

EU IDEA's key goal is to address **whether, how much and what form of differentiation is not only compatible with, but is also conducive to a more effective, cohesive and democratic EU**. The basic claim of the project is that differentiation is not only necessary to address current challenges more effectively, by making the Union more resilient and responsive to citizens. Differentiation is also desirable as long as such flexibility is compatible with the core principles of the EU's constitutionalism and identity, sustainable in terms of governance, and acceptable to EU citizens, Member States and affected third partners.



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