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Democratic Conditionality in the Eastern Enlargement: Ambitious Window Dressing

ELINE DE RIDDER* & DIMITRY KOCHENOV**

Abstract. This article addresses the promotion of democracy in the enlargement process of the central and eastern European countries (CEECs). We start by outlining EU democracy promotion during accession, with a particular focus on political conditionality. In a subsequent part, we argue that the European Commission did not make a clear substantive distinction between the concepts of rule of law and democracy. In addition, various drawbacks are identified, which demonstrate the vagueness and inconsistencies that characterize the EU's application of democratic conditionality. A final part illustrates these points by focusing on the EU's democratic conditionality towards the Czech Republic and Slovakia. The conclusion reads that the EU did not have a well-defined view and approach to the promotion of democracy and the rule of law in the eastern enlargement.

I Introduction and the Structure of the Argument

Enlargement is often considered to be the European Union's (EU's or hereinafter 'Union's') most successful foreign policy tool.¹ The integration of third countries allows the EU a unique leverage over their domestic developments. This leverage provides the EU with a wide array of possibilities to impact upon the development of democracy in the candidates for membership.

In this article, we examine which kind of democracy that the EU has tried to promote during the eastern enlargement. While a wide range of scholars² have analysed how the EU has supported democracy in the central and eastern European candidate countries, systematic examination of the substance of EU

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¹ J. Zielonka, *Europe as an Empire* (Oxford: Oxford University Press, 2006); E. De Ridder, A. Schrijvers, & H. Vos, 'Civil Power Europe and the Eastern Enlargement: The More the Merrier?', in *Europe's Global Role: External Policies of the EU*, ed. J. Orbie (Aldershot: Ashgate, 2008), 240.

² For example, G. Pridham, *Designing Democracy: EU Enlargement and Regime Change in Post-Communist Europe* (Basingstoke: Palgrave Macmillan, 2005); M. Vachudová, *Europe Undivided: Democracy, Leverage and Integration after Communism* (Oxford: Oxford University Press, 2005).

pre-accession democracy promotion enjoyed much less scholarly attention.³ In the article, we contribute to bridging this research gap by classifying the EU's democracy promotion in the central and eastern European countries along the various regimes (electoral regime, political liberties, civil rights, horizontal accountability, and effective power to govern) and external conditions (stateness, civil society, and socio-economic context) of democracy promotion. (see Figure 1 in the introductory paper).

In our contribution, we focus primarily on the principle of conditionality, which played a central role in the promotion of reform in central and eastern Europe (CEE).⁴ Two facets of pre-accession conditionality have been identified: democratic conditionality and *acquis* conditionality.⁵ While the latter concerns the transposition of the specific rules of the Union's *acquis* (then *communautaire*), the former involves compliance with the Union's criteria on democracy, the rule of law, and human rights, the majority of which, and particularly democracy, have never been part of the *acquis*. Notwithstanding the fact that they make part of the principles on which the Union is built according to Article 2 Treaty of European Union (TEU), the Union is not empowered to legislate in these fields, which are reserved for the Member States to regulate.⁶ In our article, we focus on the content of democratic conditionality applied by the EU to promote the consolidation of democracy in CEE.

While Europeanization researchers⁷ have come to the conclusion that democracy promotion through conditionality was most effective compared with available alternatives,⁸ regrettably, the majority of them failed to question the Commission's

³ For example, D. Kochenov, 'Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', *European Integration Online Papers* 8, no. 10 (2004); *id.*, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (The Hague: Kluwer Law International, 2008).

⁴ See also Kochenov, 2008, *supra* n. 3 (and the literature cited therein); A. Schrijvers & E. De Ridder, 'EU Accession Policy', in *The EU and Global Governance: A Handbook*, eds J. Wunderlich & D. Bailey (London: Routledge, 2010), 168 et seq.

⁵ F. Schimmelfennig & U. Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe', *Journal of European Public Policy* 11, no. 4 (2004): 669–673; F. Schimmelfennig & U. Sedelmeier (eds), *The Europeanization of Central and Eastern Europe* (Ithaca, NY: Cornell University Press, 2005); D. Kochenov, 'Why the Promotion of the *Acquis* Is Not the Same as the Promotion of Democracy and What Can Be Done in Order to Also Promote Democracy instead of Just Promoting the *Acquis*', *Hanse Law Review* 2 (2006).

⁶ Kochenov, 2006, *supra* n. 5. Article 4(1) TEU is clear on this issue: 'competences not conferred upon the Union in the Treaties remain with the Member States'.

⁷ A. Dimitrova & G. Pridham, 'International Actors and Democracy Promotion in Central and Eastern Europe: The Integration Model and Its Limits', *Democratization* 11, no. 5 (2004); Schimmelfennig & Sedelmeier, 2004, *supra* n. 5, and 2005, 210.

⁸ Socialization or persuasion could be regarded as such alternatives, which enable the EU to convince the target country of the intrinsic value of its rules. Socialization and persuasion take place when national elites engage in increased interaction with the different EU institutions or when

assumption that conditionality was actually workable in the context of the promotion of democracy, human rights, and the rule of law. The works of those scholars who take exception to this mainstream position should be mentioned here.⁹ This article aims to contribute to the latter camp by scrutinizing the main lines of the pre-accession democracy promotion developments with a critical eye. This is particularly important in the light of the lessons to be learned by the EU from the earlier democracy promotion experience to be applied both in the context of future enlargements and the European Neighbourhood Policy.¹⁰

The article starts off with an outline of the general context of pre-accession democracy promotion during the eastern enlargement. It proceeds to identify key drawbacks that question the applicability of conditionality for the promotion of democracy during pre-accession. Here, based on a broad array of examples, we demonstrate that democracy promotion by the EU was not based on any standard of democracy and was lacking in substance and clarity of vision and drawing on ad hoc sporadic approaches. These arguments are further illustrated in the third part, where we analyse the EU's enlargement policy applied to the Czech Republic and Slovakia. This analysis, together with our critical assessment of pre-accession conditionality, allows us to draw conclusions on the substance of democracy promoted by the EU in the accession process of the CEECs.

II EU Democracy Promotion during the Eastern Enlargement

In the run-up to the eastern enlargement, the EU could rely on several mechanisms to promote democracy in the CEECs. In the immediate aftermath of the fall of communism, the EU and its Member States exerted a passive influence by serving as role models for the reforms that were carried out. In addition,

they take up membership in transnational party federations. See also U. Sedelmeier, 'Europeanisation in New Member and Candidate States', *Living Reviews in European Governance* 6, no. 1 (2011): 1–34; Pridham, 2005, *supra* n. 2, Ch. 5.

⁹ D. Kochenov, 'The Summary of Contradictions: Outline of the EU's Numerous Approaches to Minority Protection', *Boston College International and Comparative Law Review* 31, no. 1 (2007); *id.*, 2008, *supra* n. 3; J. Hughes & G. Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs', *Journal of Ethnopolitics and Minority Issues in Europe* 1 (2003): 1–37; H. Grabbe, 'EU Conditionality and the *Acquis Communautaire*', *International Political Science Review* 23 (2002): 264–268; M. Maresceau, 'The EU Pre-accession Strategies: A Political and Legal Analysis', in *The EU's Enlargement and Mediterranean Strategies: A Comparative Analysis*, eds M. Maresceau & E. Lannon (Basingstoke: Palgrave, 2001), 18.

¹⁰ L. Delcour & E. Tulmets (eds), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood* (Baden-Baden: Nomos, 2008); D. Kochenov, 'The Eastern Partnership, the Union for the Mediterranean and the Remaining Need to Do Something with the ENP', *Centre for Russian, Central and East European Studies Working Papers* 1 (2009); A. Magen, 'The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?', *Columbia Journal of European Law* 12 (2006).

conditionality was used, which allowed the European Union a wider scope of influence. From the very beginning of the transformation process in CEE, the EU made the development of institutional links and the provision of financial and technical aid, as well as, crucially, the possibility of membership itself, conditional upon compliance with its basic democratic principles.¹¹

It is clear that the EU has been built on the assumption that its members are democratic rule of law states. The same goes for the Union itself, which is reflected in Article 2 TEU, as it stipulates that ‘the Union is founded on the values of respect for human dignity, democracy, equality, the rule of law and respect for human rights’. This realization, however, first existed at the level of principle and was only gradually incorporated into the written sources of primary law of the Union,¹² equally receiving reflection in the treaty instruments governing enlargements.¹³ This does not alter the essence of the Union, which is built, according to Article 5 TEU, on the principle of conferral: inclusion of the principles of democracy and the rule of law, among many others, in Article 2 TEU thus does not alter the powers of the Union. As an organization based on delegated powers, the EU cannot regulate these issues going beyond ensuring that they are safeguarded in the most general terms.¹⁴ It is thus no surprise that the EU’s legal framework on democracy is very limited. The regulation of such issues as the organization of elections, media independence, the organization of national judiciaries, the fight against corruption, the promotion of civil society, local government, and many more remain virtually entirely in the realm of national power of the Member States. Consequently, regardless of the recent increase in attention to the democratic nature of the EU, its Member States and candidate countries, which one can observe through the latest treaty revisions, the EU has never reached any conceptual clarity on what constitutes a consolidated democracy.

In the eastern enlargement, however, the EU came to view itself as a legitimate actor to deal also with those issues that did *not* fall within the scope of the *acquis* internally and thus were entirely outwith the scope of the EU’s powers in

¹¹ Maresceau, 2001, *supra* n. 9; Schimmelfennig & Sedelmeier, 2004, *supra* n. 5, 669, and 2005, 211–212.

¹² For the gradual evolution of the reflection of the principle in written and unwritten EU law, see Kochenov, 2008, *supra* n. 3, 21–62.

¹³ While the Treaties formally applied a condition of being a democratic state to all the candidate countries only from the Amsterdam revision (1999), the Copenhagen political criteria (1993) and the practice of the first enlargements point to the fact that the introduction of the democratic criterion into the text of the Treaties did not alter the essence of the enlargement process, merely codifying an unwritten criterion that has always been assumed: Kochenov, 2008, *supra* n. 3, 33–36. The (then) European Economic Community refused to discuss membership with the Spanish dictatorial regime and suspended an agreement with Greece when the colonels junta came into power precisely for this reason: no formal mention of democracy in the Treaties was necessary.

¹⁴ See Art. 7 TEU and W. Sadurski, ‘Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider’, *Columbia Journal of European Law* 16 (2010): 385.

dealing with the actual Member States. The lack of internal competence, conceptual clarity, and know-how thus did not prevent the Union from stepping in. The task of preparing accession was interpreted very broadly, leading to the explosion in the reach of the conditionality principle: not a single aspect of the functioning of the candidate countries was to be regarded as immune from EU scrutiny.¹⁵ This development is clearly reflected in the Copenhagen criteria¹⁶ laid down in 1993¹⁷ and the administrative capacity criteria added by the Madrid European Council in 1995. The accession criteria established in 1993 and 1995 are very general and vague,¹⁸ which is particularly acute in the case of democracy, the rule of law, the protection of human rights, and the respect for and protection of minorities. All of them are all-encompassing concepts that lack a single definition and therefore do not allow for a clear classification along one particular regime or context of democracy promotion.

The application of pre-accession conditionality roughly splits into three periods.¹⁹ During the first (1989–1993), the focus lay on the democratic stability in general. Political conditions (i.e., respect for democratic principles and human rights), to this end, were integrated in the trade and cooperation agreements and the association agreements, which the European Communities concluded with the different CEECs. The most significant events with regard to the EU's conditionality policy took place at the end of the first period, namely the establishment of the Copenhagen criteria in June 1993 and the official opening up of EU membership prospects for the CEECs.

While democratic and human rights criteria remained a crucial component also during the second period (1993–1997), the EU paid increasingly more attention to the internal market *acquis*, as well as the promotion of domestic change in CEE by criticizing national policy choices and institutional developments. The most influential instrument at its disposal was the *démarche*, a strong diplomatic note that publicly criticizes a breach of democratic and human rights

¹⁵ D. Kochenov, 'EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?', *European Integration Online Papers* 9, no. 6 (2005).

¹⁶ Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities, the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership, including adherence to the aims of political, economic, and monetary unions.

¹⁷ See also Maresceau, 2001, *supra* n. 9; C. Hillion, 'The Copenhagen Criteria and Their Progeny', in *EU Enlargement: A Legal Approach*, ed. C. Hillion (Oxford: Hart, 2004); De Ridder, Schrijvers, & Vos, 2008, *supra* n. 1, 244 et seq.

¹⁸ Pridham, 2005, *supra* n. 2, 40; Kochenov, 2004, *supra* n. 3, 2.

¹⁹ A. Dimitrova, 'Europeanization and Civil Service Reform in Central and Eastern Europe', in *The Europeanization of Central and Eastern Europe*, eds Schimmelfennig & Sedelmeier (Ithaca, NY: Cornell University Press, 2005), 75.

principles in a third country.²⁰ Two *démarches* were issued, both concerning Slovakia.

The third and last period of EU conditionality started in 1997 and lasted until the conclusion of the enlargement process. During the third period, accession conditionality became more complex due to the application of new instruments of conditionality by the Union. During the accession process of the CEECs, the EU elaborated new tools and approaches compared to those applied in previous enlargement rounds. An elaborate system of legal-political tools, which has been referred to as *Copenhagen-related documents*,²¹ was created to ensure the day-to-day monitoring of the candidate countries' compliance with the Copenhagen criteria and to compensate for the broad and over-encompassing character of the latter. Copenhagen-related documents are references to several types of instruments, including general reports issued by the Commission, which offered an annual analysis of the progress of the whole bulk of the candidate countries towards accession; annual individual Country Reports of the Commission, that is, the Opinion and Regular Reports; and the Accession Partnerships in the form of Decisions of the Council, which outlined the main priorities to be met by each candidate country individually. All types of documents were strictly connected, as the Accession Partnerships were largely drawing on the Reports. Such system of monitoring, analysed elsewhere in great detail,²² was deemed sufficient, once filled with substance, for the effective implementation of the principle of conditionality.

Inserted into the framework of conditionality, the provision of financial aid became an important incentive for CEECs' transformation, the main one being the prospect of EU membership. The bulk of financial help was distributed through the Poland and Hungary Assistance for Restructuring of Economies (PHARE) programme, which aimed to stimulate political and economic reforms in CEE and also included assistance in the preparation of new legislation and the development of new administrative structures and institutions.²³ However, most importantly, the provision of financial aid was conditional upon compliance with the Copenhagen criteria as interpreted in the Copenhagen-related documents. In order to be eligible for PHARE support, the following criteria had to be met: commitment to the rule of law, respect for human rights, establishment of multiparty systems, holding of free elections, and implementation of economic liberalization.²⁴ While the latter criterion refers to the socio-economic context of

²⁰ H. Grabbe, 'How Does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity', *Journal of European Public Policy* 8, no. 6 (2001): 1021; Pridham, 2005, *supra* n. 2, 55.

²¹ Kochenov, 2004, *supra* n. 3, 6–10, and 2008, 67–79.

²² Kochenov, 2008, *supra* n. 3, 67, and 2004, 6.

²³ ISA Consult, Final Report: Evaluation of the PHARE and TACIS Democracy Programme – 1992–1997, European Commission, ref. 951432 (1997), 8.

²⁴ K. Smith, *The Making of EU Foreign Policy: The Case of Eastern Europe* (Basingstoke: Palgrave Macmillan, 2004), 70–71.

democracy promotion, the criterion on free elections clearly addresses the electoral regime. Regulation 622/98 established, in Article 4, a direct connection between the eligibility for PHARE funding and compliance with the Copenhagen criteria, including those of democracy, the rule of law, and human rights, thus moving the criteria from a purely political to a legal field.²⁵

In 1992, a PHARE programme was set up with the sole aim of promoting the development of pluralist democracy and the rule of law in the EU's partner countries. The most significant contribution of the *PHARE and TACIS Democracy Programme (PDTP)* has been the strengthening of the nongovernmental organization (NGO) sector in all countries involved. While the latter has supported the external condition of civil society, it is crucial to bear in mind that the sum of money at the disposal of the programme was relatively small, amounting to just 1% of the total PHARE and Technical Assistance for the Commonwealth of Independent States (TACIS) funding.²⁶

In sum, the EU has tried to promote democracy in CEE by applying conditionality and providing financial support during the accession process of the candidate countries. While part of the membership criteria and the PHARE support has primarily promoted the external conditions of democracy, the democratic accession conditions have been very general and vague. The European Commission, however, would, in the course of the eastern enlargement, claim its ability to specify and detail the Union's democratic conditionality – albeit with uncertain success²⁷ – as we will illustrate in the sections that follow. Building on the vagueness and legal-political fragmentation of conditionality, the Commission came to play the leading role in the pre-accession process, seriously augmenting its external powers without any explicit treaty authorization.²⁸

III Key Flaws of EU Democratic Conditionality in the Pre-accession Context

The European Commission deployed the famous principle of conditionality with a view to promoting democracy and related values during the eastern enlargement. Democracy and the rule of law, however, do not make part of the *acquis*, as

²⁵ G. Sasse, 'EU Conditionality and Minority Rights: Translating the Copenhagen Criterion into Policy', *European University Institute Working Papers* 16 (2005): 5.

²⁶ ISA Consult, Final Report: Evaluation of the ISA Consult, 1997, *supra* n. 23, 8, European Commission, ref. 951432 (1997), 8; Pridham, 2005, *supra* n. 2; Sasse, 2005, *supra* n. 25.

²⁷ For exhaustive analysis, see Kochenov, 2008, *supra* n. 3.

²⁸ K. Inglis & A. Ott, 'EU-uitbreiding en Toetredingsverdrag: verzoening van droom en werkelijkheid', *Sociaal Economische Wetgeving* 52, no. 20 (2004); K. Maniokas, 'Methodology of the EU Enlargement: A Critical Appraisal', *Lithuanian Foreign Policy Review* 5 (2000).

the EU is not empowered to act in these areas, which has direct implications for the application of conditionality in the context of enlargement.

The EU was in possession of a potentially functional system of the Copenhagen-related documents designed to make sure that the principle of conditionality becomes functional in practice throughout all the areas of pre-accession interest of the Union, thus including the promotion of the objectives set by the Copenhagen political criteria. In practice, however, the day-to-day application of this system of instruments was left very much to be desired, as it was never actually filled with any workable substantive idea of democracy to be promoted. Various deficiencies of pre-accession application of conditionality in the fields of democracy and the rule of law promotion can be outlined. Taken one by one, as well as cumulatively, they clearly point to the fact that the idea of conditionality that was supposed to guide the pre-accession process (the non-*acquis*-related areas included) did not, in fact, inform the Commission's conduct in the pre-accession period. Put differently, in the areas related to the Copenhagen political criteria, the conditionality principle remained without consistent application, a huge amount of documents dedicated to making it functional notwithstanding. Analysed in overwhelming detail elsewhere,²⁹ only a sketch of the failure of conditionality needs to be provided here in order to make the basic point clear: contrary to the Commission's claims, conditionality has never become a functional principle in the context of the pre-accession promotion of democracy and the rule of law in the candidate countries.

The first drawback concerned the low threshold of meeting the Copenhagen criterion of democracy and the rule of law. All the candidate countries at the time, with the exception of Slovakia, were acknowledged by the Commission to have met the criterion already in the first documents that the Commission released, which are dedicated to the systematic pre-accession country assessment, that is, in the Opinions of 1997. Taken into account the assessments of the same countries provided by the Commission in the Reports released in the pre-accession years that followed, this initial acknowledgement was largely meaningless due to a number of factors. Some countries deemed to have met the criteria had dysfunctional parliaments in place (Romania), did not have classical three-tier judiciaries (first instance, appeal, cassation) (Bulgaria), did not possess any independent professional civil service (all but Hungary) or established political party systems (all), lacked an independent well-trained judiciary (all), and had executives legislating instead of parliaments (made a problem in Romania but tolerated in Slovakia). In some countries, such as Latvia, Estonia, and Slovenia, minorities amounting to a huge share of population were not only deprived of citizenship but also of any political rights.³⁰ All these facts taken

²⁹ Kochenov, 2008, *supra* n. 3.

³⁰ J. Shaw, *The Transformation of Citizenship in the EU: Electoral Rights and the Restructuring of the Political Space* (Cambridge: Cambridge University Press, 2007), 329–342; Hughes & Sasse, 2003, *supra* n. 9; Kochenov, 2008, *supra* n. 3.

together make it clear that the candidate countries' readiness to meet the initial political criteria was a political question on the EU side rather than a result of any more or less serious assessment.³¹

The second, probably more important, drawback of application of pre-accession conditionality consisted in a total lack of any clarity as to what was actually expected of the candidates willing to accede. In other words, at the core of pre-accession conditionality lay a complete lack of standards of democracy and the rule of law to promote. This simple fact notwithstanding, the Commission was behaving as if it had such standards at hand throughout, constantly asking the candidate countries to comply with the Copenhagen political criteria without explaining what they actually meant. In the absence of any *acquis* on democracy and the rule of law, this de facto resulted in sending random and ad hoc demands around asking the candidate countries to comply with the unknown.

Even in a situation where the standards were lacking, the Commission could theoretically use its position of an informed actor in a wise way in order to create the badly needed standards in the course of the assessment.³² This has not happened: the demands it was sending to the candidate countries were often contradictory and almost entirely unpredictable. To provide just several examples: while Slovakia was allowed to legislate by decree, Romania was not; while the Czech Republic could get positive assessments of its pre-accession progress having no civil service law in place, Slovakia, also lacking such law, saw its accession to the EU being made conditional upon its adoption; while creating an organ responsible for the civil service reform in Latvia was regarded by the Commission as a positive development, Romania was criticized for having done just that; while Romania was supposed to ensure that the institution responsible for the training of the judges was fully independent, the Czech Republic was praised for a decision to train the judges in the auspices of the Ministry of Justice.

Such situation was a direct result of the Commission's apparent inability to provide any quality assessment of the situation on the ground in the candidate countries and de facto meant a move away from the proclaimed conditionality idea, which presupposed, *inter alia*, that the candidate countries 'were destined to join the Union on the basis of the same criteria and ... on equal footing'.³³ Simply put, no serious assessment of any issues falling outside the scope of the *acquis communautaire* has ever been provided by the Commission, democracy being obviously excluded from the scope of the *acquis*. The standards that the Commission failed to set from the very beginning were not only left without

³¹ Grabbe, 2002, *supra* n. 9, 264.

³² For an attempt of discovering some standards behind the Commission's reports in the areas lying outside the scope of the *acquis*, see, e.g., Kochenov, 2004, *supra* n. 3 (in the area of democracy and the rule of law), and Hughes & Sasse, 2003, *supra* n. 9, and Kochenov, 2007, *supra* n. 9 (in the area of minority protection).

³³ Presidency Conclusions, Luxembourg European Council (12, 13 Dec. 1997), para.10.

concretization but also became even more deluded, as every reporting year meant further piling up of contradictions in the Commission's demands. As a consequence of the lacking standards, no benchmarks were available to the EU and the candidate countries in order to judge whether the Copenhagen political criteria or further Commission's demands were actually complied with. Any reliable assessment was made impossible, just as any predictable movement towards democracy and the rule of law ideals by the candidate countries. So even if the standards were presumably met, it was impossible to check it or to be certain about it.

In the absence of serious analysis, standards, and assessment benchmarks, the Commission, nevertheless, remained faithful to the conditionality rhetoric, presuming its own ability to differentiate among the candidate countries, praising some of them for compliance while criticizing others. Consequently, those candidate countries not reforming certain sectors *at all* were left alone (like the Czech Republic, with no progress at all with the adoption of civil service law, or Latvia, with the ratification of the international human rights instruments), while others, especially Romania and Bulgaria, trying to follow the recommendations from the Commission, ended up being constantly criticized. The non-transparent and truly byzantine labyrinth of conditionality application was ultimately turned into a window-dressing mechanism for the public justification of political choices having little to do with the candidate countries' actual performance.

IV Democracy Promotion in the Czech and Slovak Pre-accession Process

In what follows, we examine the pre-accession path of Slovakia and the Czech Republic. This analysis serves a dual goal: to define the substance of EU pre-accession democracy promotion and to illustrate our findings of the previous chapter. The countries have been selected on the basis of the *most similar* method. Although Prague and Bratislava were united in one country until 1993, their democratic development varied widely after the split of Czechoslovakia. While the Czech Republic became a democratic frontrunner in the eyes of the Union, Slovakia was clearly struggling to establish the basic principles of democracy. Bratislava, however, made a remarkable U-turn after Prime Minister Mečiar was ousted from power in October 1998 and was replaced by a pro-reform oriented government headed by Mikuláš Dzurinda. Democratic reforms were implemented at a very high pace, and Slovakia succeeded in catching up with the remaining applicant countries. By the turn of the century, when the country received official candidate status and the accession negotiations took off, Slovakia's performance in various democratic domains equalled or even slightly surpassed that of its neighbouring country.³⁴

³⁴ For data on the fight against corruption, civil society development, and media independence in both candidate countries, see E. De Ridder, 'The EU, a Promotor of Substantive Democracy? EU

The diverging development of democracy in both countries was clearly reflected in their EU accession process. The Czech Republic and Slovakia were initially classed by the Commission as belonging to the opposing extremities of the spectrum of compliance with the pre-accession standards.³⁵ As a result, the Czech Republic was among the first to get a candidate status in 1997 while Slovakia was the only country whose status was withheld because of its failure to meet the Copenhagen political criteria. Only after Prime Minister Mečiar was replaced by a liberal government in 1998 and necessary reforms were carried out Slovakia was officially recognized as a candidate country in December 1999. In the mid 1990s, the EU had issued two *démarches* on Slovakia, which denounced the authoritarian behaviour of the Mečiar government.³⁶ While the first *démarche* remained general and vague, expressing the hope that Slovakia would consistently follow the way of democratic reforms,³⁷ the second was harsher in its wording. It voiced misgivings about the contemporary political and institutional tension in the country, denounced the concentration of power in the hands of the government, called for the restoration of opposition representation in government bodies, and expressed concern about the deepening conflict between the Prime Minister and the President.³⁸ The demands and concerns primarily reflect the EU's growing worries about the horizontal accountability in Slovakia. The EU's *démarches* were very country-specific, which also shows from the fact that until now, the EU has not issued a single *démarche* to any other candidate country.

The textual analysis of the Commission Reports and Accession Partnerships³⁹ allows the examination of how the EU has detailed the general democratic conditions for membership in the accession process of the Czech Republic and Slovakia, enabling the delimitation of the substance of democracy (if any) promoted by the EU in the accession process of the Czech Republic and Slovakia.

Support to Fight Corruption, Develop Civil Society and Enhance Media Independence. A Political Science Analysis of the Accession Process of the Czech Republic and Slovakia to the EU', Ph.D. diss. Ghent University, Centre for EU Studies (Ghent, 2010).

³⁵ J. Scherpereel, *Governing the Czech Republic and Slovakia: Between State Socialism and the EU* (London: First Forum Press, 2009).

³⁶ The EU issued a first *démarche* on Slovakia on 24 Nov. 1994. A second *démarche* was delivered on 25 Oct. 1995.

³⁷ A. Duleba, 'Democratic Consolidation and the Conflict over Slovakian International Alignment', in *Slovakia: Problems of Democratic Consolidation and the Struggle for the Rules of the Game*, eds S. Szomolányi & J. Gould (Bratislava: Slovak Political Science Association, 1997), 215.

³⁸ E. Slivkova, 'Slovakia's Response on the Regular Report from the European Commission on Progress towards Accession', *Zentrum für Europäische Integrationsforschung Discussion Paper 57* (1999), 8; Vachudová, 2005, *supra* n. 2, 156 et seq.; Duleba, 1997, *supra* n. 37, 216.

³⁹ A textual analysis has been carried out of the Opinion Reports (1997) and subsequent Regular Reports (1998–2002) published by the European Commission on the Czech Republic and Slovakia. A similar analysis has been performed of the short- and medium priorities and objectives contained in the Accession Partnerships with both countries in March 1998 and their revisions of December 1999 and January 2002.

The structure of the Regular Reports dealing with the two countries is identical. In the first chapter of its Opinion and Regular Reports, the European Commission assesses the democratic development of a candidate country. This chapter is subdivided in two larger parts, addressing democracy and the rule of law, on the one hand, and human rights and the protection of minorities, on the other. In general, the first sub-chapter consists of an assessment of the structure and functioning of the parliament, the executive, and the judiciary and an evaluation of the anti-corruption measures implemented by the candidate country. When assessing the legislative power, the European Commission also briefly reports on the question of free and fair elections. Under the banner of democracy and the rule of law, the European Commission has thus focused on elections, horizontal accountability, and the external condition of stateness. When reporting on the separation of power in the candidate countries, the European Commission also touches upon civilian oversight over the secret services, the military, and the police, addressing the democratic regime of effective power to govern. These references, however, constitute but a very small part of the Commission's democratic assessment.

The sub-chapter on human rights and the protection of minorities primarily promotes the democratic regimes of political and civil rights. The assessment is subdivided in three larger parts: civil and political rights; economic, social, and cultural rights; and minority rights and the protection of minorities. In the first part, the European Commission assesses a wide range of civil and political rights in the candidate countries, such as the freedom of association and assembly, the freedom of expression, access to the courts, electoral rights, protection against arbitrary arrest, ownership rights, the respect for privacy, and the occurrence of inhumane or degrading treatment. The sub-chapter on economic, social, and cultural rights reports on the freedom to engage in trade union activity, the right to strike, the right to a minimum means of subsistence and social security, and the fight against racism. The final part on minority rights reports on the political representation of minorities and their right to maintain their own identity, to be educated in their own language, and to use their own language in contact with administrative authorities.

In its assessment of the democratic situation in the candidate countries, the European Commission frequently draws on reports of international organizations (Council of Europe, Organization for Security and Co-operation in Europe, United Nations) and, at times, relies on international instruments to assess progress. This is particularly evident in the case of the fight against corruption and the protection of human and minority rights, where the European Commission reports on the ratification of international conventions drawn up by the Council of Europe, the UN, or the Organisation for Economic Co-operation and Development. The EU's use of international instruments has been explained by the lack of own standards and models.⁴⁰

⁴⁰ E. De Ridder, 'EU Aid for Fighting Corruption in the Czech Republic and Slovakia: Where Did It Go Wrong?', *Journal of Contemporary European Research* 5, no. 1 (2009): Sasse, 2005, *supra* n. 25.

Since the beginning of the EU accession process, the EU structured the Regular Reporting on the progress of the Czech Republic and Slovakia identically. It is only with the move to the assessment of implementation of the Commission's demands combined with the reactions of the Commission to the progress reached that the actual lack of any standards the Commission claimed to promote becomes apparent. Generally more positive of the Czech Republic than of Slovakia, the Commission had a drastically different approach to the promotion of democracy in the two countries to which a large array of substantive issues ranging from minority protection to judicial reform and civil service legislation abundantly testifies. Where a mere promise on the part of the Czech authorities ignoring the Commission's demands was enough, Slovakia's actions were closely scrutinized. As a result, in drastic contrast to Slovakia, when the Accession Treaty was signed, the Czech Republic was the only acceding country without a civil service law in place and with no guarantees of the formal independence of the judiciary from the Ministry of Justice. In the area of minority protection, while the Commission turned a blind eye to the existence of segregated schooling for the Roma in the Czech Republic, Slovakia had to do a lot in order to satisfy its demands concerning the situation of the Hungarian minority. Such different approach hidden behind identical structures is also visible from the analysis of the relevant Accession Partnerships and the PHARE funding allocation.

In the course of the eastern enlargement, the EU has drawn up Accession Partnerships for the CEECs thrice.⁴¹ These documents, adopted by the Council on the proposal of the Commission, are routed in the Regular Reports and set up individual short- and medium-term priorities to be met by individual countries on their way towards accession. Reflecting the division between *acquis*-related and non-*acquis*-related conditionality discussed *supra*, the Union's main concern lies with an effective transposition and future implementation of Community legislation: four-fifths of the objectives identified in the agreements are linked to the third Copenhagen criterion of taking over the *acquis communautaire*.

The economic criteria, which for both countries accounted for 8% of the total number of objectives, contribute to a strengthening of the external condition of the socio-economic context. Also the administrative criteria, which amount to 5% to 6% of the priorities, promote a context condition, that is, the external condition of stateness. The *acquis*-related objectives, by default, address the adequate implementation of community rules. Various priorities established in the field of justice and home affairs (JHA) though touch upon issues of a more democratic nature, such as the functioning and independence of the judiciary, the

⁴¹ A first Accession Partnership has been drawn up in March 1998 for all the CEECs who are now members of the EU. For all these countries, an update has been presented in December 1999 and January 2002. Due to their later date of accession, the Partnerships for Bulgaria and Romania have been updated a third time, in May 2003.

strengthening of public financial control functions, and the development of an effective fight against corruption. While the first two priorities promote the democratic regime of horizontal accountability, the objective on fighting corruption relates to the external condition of stateness.

Only a minority of the objectives drawn up for both countries promote merely democratic criteria: 5% for Czech Republic and 9% for Slovakia. The bulk of the democratic criteria address issues of minority protection and the integration of the Roma population. Further reference is made to strengthening the media independence and laws that guarantee press freedom. While issues on minority protection may address both civil and political rights (see above), the latter two objectives promote the democratic regime of political liberties. The 2002 Partnerships on both countries also establish as political objectives the fight against corruption and the independence of the judiciary, issues that are by default treated in the agreements as *acquis*-related priorities.

For Slovakia, an additional democratic priority is outlined, which addresses the functioning of NGOs, which relates to the external condition of civil society. The first Slovak Accession Partnership also promotes the electoral regime when it urges Bratislava to provide free and fair presidential, national, and local elections. The latter two conditions on civil society and electoral democracy, which cannot be found in the agreements drawn up for the Czech Republic, are country-specific and reflect the domestic situation within Slovakia, which was, at the time of publication of the first Accession Partnership (March 1998), still governed by PM Mečiar. By the time the subsequent Partnership was issued (December 1999), Slovakia had largely caught up with its neighbouring country.

Our analysis of the Czech and Slovak Accession Partnerships shows that the EU has promoted various regimes and external conditions of democracy in these agreements. For both candidate countries, the Partnerships have supported the democratic regimes of political liberties, civil rights, and horizontal accountability, as well as the external conditions of stateness and the socio-economic context. In the case of Slovakia, which was struggling much more than its neighbouring country to establish the basic principles of democracy, the first Accession Partnership has, in addition, promoted the electoral regime and the context condition of civil society.

Both the Regular Reports and the Accession Partnerships clearly reflect the EU's lack of standards in the field of democracy and the rule of law. These Copenhagen-related documents were never filled with any workable substantive idea of democracy, as a result of which the EU receded to vague demands, such as to further work on the integration of Roma, fight against discrimination, foster and strengthen the independence of the media, continue public administration modernization, develop an effective fight against corruption and economic crime, improve the operation of the judicial system, and reinforce JHA institutions. Confronted with such vague demands, it remained unclear to the candidate countries what had to be done to meet the EU's democratic criteria of accession.

Financial support of reform was an important incentive built into the democratic conditionality structure. In order to assess the substance of democracy promoted by the EU *via* the provision of financial aid, we have analysed all PHARE projects⁴² that have been set up under the Czech and Slovak National Programmes.⁴³

Since various overlaps are to be found in the projects' objectives, many of them do not allow for a rigid classification along the lines of the four accession criteria. Nevertheless, some projects have been set up with the sole aim of promoting compliance with the political criteria for membership. In both countries, the majority of these projects are dedicated to the strengthening of civil society and the promotion of minority tolerance and the integration of the Roma community. While the European Commission had identified minority protection as an issue of concern in both countries, civil society in Slovakia proved to be less developed at the beginning of the accession process than in its neighbouring country. Nevertheless, the Czech third sector received in this period⁴⁴ more than four times the amount of money provided to the Slovak civil society, which suggests that the Commission did not adequately adapt its financial aid to the particular needs of the candidate countries in question. Besides supporting the two sectors mentioned above, democratic projects were set up in Slovakia with the aim to strengthening the judiciary, fighting corruption, and modernizing the state administration. While in the Slovak national programmes these sectors are supported in view of reaching the political criteria of accession, the same sectors are, in the case of the Czech Republic, supported as merely *acquis*-related or administrative criteria. This discrepancy illustrates that the lack of clarity and the ad hoc nature of the EU's pre-accession strategy are also present in the PHARE programme.

⁴² Since details on the financial aid provided by the Commission to the Czech Republic and Slovakia under the *PHARE and TACIS Democracy Programme* (PTDP) are no longer available, this programme could not be included in our analysis. A general evaluation report of the PTDP (ISA Consult, Final Report: Evaluation of the PHARE and TACIS Democracy Programme – 1992–1997, European Commission, ref. 951432 (1997), 8), however, does mention that Slovakia, along with Romania, represents particular successes with regard to the growth of the nongovernmental organization sector, which was identified as the main impact of the PDTP (see also Ch. 1 above).

⁴³ Our research on the Poland and Hungary Assistance for Restructuring of Economies (PHARE) financial aid provided to the Czech Republic and Slovakia is based on an analysis of the PHARE national programmes. PHARE funds have been distributed through several programmes, depending on the beneficiary countries involved. Most important were the national programmes that were developed for each candidate country separately and elaborated on the financial aid for the year in question. The bulk of the financial aid provided by PHARE was distributed through these programmes.

⁴⁴ Numerical data of Freedom House's Nations in Transit Study indicate that civil society development in Slovakia improved drastically in the years of EU accession and reached the same level of Czech civil society development in 2002. See also De Ridder, 2010, *supra* n. 34.

The large majority of the PHARE financial aid projects (86% in the case of the Czech Republic, 77% for Slovakia) support an effective transfer of the *acquis communautaire* and compliance with the EU's economic membership criteria. In addition, between 5% and 10% of the money was allocated to promote administrative and institutional reforms in the Czech and Slovak Republics. When supporting economic development, participation in the internal market, and economic and social cohesion, the EU has promoted the socio-economic context in both candidate countries. While the main objective of the *acquis*-related projects was to guarantee an effective transfer of Community law, some of them have actively contributed to the consolidation of democracy. This is particularly evident for JHA projects, which provide money to support the fight against corruption and economic crime and to strengthen the independence and operation of the judiciary. These projects have allowed the EU to support horizontal accountability and stateness in the Czech Republic and Slovakia. The latter context condition has also been promoted by the PHARE projects supporting administrative reform in the candidate countries.

Our analysis of the Czech and Slovak PHARE projects allows us to conclude that the pre-accession financial aid allocated by the European Commission to both Prague and Bratislava has primarily supported horizontal accountability, stateness, and the socio-economic context of democracy promotion. Large amounts of money have been allocated to support economic development and, to a lesser extent, administrative reform in both candidate countries. Various projects – democratic or *acquis*-related – have also contributed to the strengthening of the judiciary and the fight against corruption. While purely democratic projects have been set up, which primarily support minority protection and civil society development, these constitute but 4%–7% of the total amount of PHARE aid allocated to the Czech Republic and Slovakia.

V Conclusion

In the vagueness of the official membership criteria related to democracy, the Commission was de facto given a *carte blanche* to fill these with substance – a task that it failed to fulfil. Notwithstanding the fact that a very sophisticated system of reform-related performance testing has been established on paper and even seemed to be operational, the lack of democratic standards to go anywhere beyond the most basic, such as the requirement of alteration in power or the presence of regular elections, were not enriched in the course of the regular monitoring of the candidate countries' progress. In fact, the vagueness of the initial criteria simply came to be amplified, as a number of crucial drawbacks demonstrate. These consisted in the legal-political framing of democratic conditionality and, especially, in filling it with substance, de facto paralyzing the Union's efforts to come up with a coherent system of pre-accession democracy

promotion, which would go beyond the far-fetched rhetoric glorifying the Commission's dubious efforts. Although the EU seems to have supported the three democratic regimes of political liberties, civil rights, and horizontal accountability and the two external conditions of stateness and socio-economic context, since this has not been done in a consistent and coherent way, the overall picture of the EU's involvement in the pre-accession democracy promotion in candidate countries through conditionality is quite grim. The ad hoc nature of the Commission's vision is fully reflected in the Accession Partnership and the allocation of the PHARE funding. These conclusions are supported by the analysis of the application of democratic conditionality in the case of Slovakia and the Czech Republic. We therefore conclude that the general approach of the Union to the issue of democracy promotion needs to be seriously rethought.

AIMS

The aim of the *Review* is to consider the external posture of the European Union in its relations with the rest of the world. Therefore the *Review* will focus on the political, legal and economic aspects of the Union's external relations. The *Review* will function as an interdisciplinary medium for the understanding and analysis of foreign affairs issues which are of relevance to the European Union and its Member States on the one hand and its international partners on the other. The *Review* will aim at meeting the needs of both the academic and the practitioner. In doing so the *Review* will provide a public forum for the discussion and development of European external policy interests and strategies, addressing issues from the points of view of political science and policy-making, law or economics. These issues should be discussed by authors drawn from around the world while maintaining a European focus.

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