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Beyond Charlemagne's Legacy:
Normative Empire and the Independence of the Judiciary in Conditionality

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Abstract

Accession negotiations to the EU since 2004 brought significant changes to European enlargement customary law and exacerbated the reliance of the Commission on conditionality to impose its leverage on present and prospective member states. The subsequent development of European norms in the pre-accession phase was transposed onto current member states and led to the edification of a Normative Empire. This research reformulated the concept of Normative Empire while resting on factual and contemporary evidence. It investigated why the increasingly significant role in conditionality of the principle of independence of the judiciary contributed to the metamorphosis of the EU into a Normative Empire. The argumentation of this research rested on the study of Bulgaria, Croatia and Romania. In addition to their geographical kinship, these three cases share issues of rampant corruption, notably in the political and judicial structures, which remain the main obstacles to their accession or full membership. The analysis of the Commission's influence in judicial reforms during the pre and post-accession phases was supported by a thorough study of the Cooperation and Verification Mechanism and the progress reports from 2004 till present. In conclusion, the Commission's post-accession monitoring in Bulgaria and Romania and the accession negotiations in Croatia led to a redefinition of the European norms and strengthened the Commission's authority on normative matters. Moreover, the CVM assumes the possible establishment of an obligatory passage through a transitory phase for the future acceding members until recognised full compatibility with the European norms. The expansion of the EU's normative platform increased the potential for intervention of the Commission in state governance. The case of transposition of the principle of independence of the judiciary onto Bulgaria and Romania demonstrated the aspirations of the Commission to enlarge and administer the EU through the systematic use of norms.

Keywords:
Normative Empire, conditionality, judiciary, Bulgaria, Romania, Croatia, Co-operation and Verification Mechanism, progress reports, European Commission, enlargement.

Jednání o přistoupení k EU od roku 2004 přinesl významné změny do rozšíření Evropské zvykového práva a zvýšeníl závislost Komisi o podmíněnosti při uložit jejich vliv na současné i budoucí členské státy. Následný vývoj evropských normy v pre-vstupní fáze byla provedena na stávajících členských státech a vedl k povznesení Normativní Říše. Tento výzkum přeformuloval pojem Normativní současné říše v literatuře, zatímco odpočívá na věcné a současný důkaz. Výzkum se zabýval, proč se stále významnější roli v podmíněnosti principu nezávislosti soudnictví přispěl k metamorfóze EU do Říše Normativní. Argumentace tohoto výzkumu se opírala o studium Bulharska, Chorvatska a Rumunska. Kromě své geografické příbuznosti, těchto třech případech podíl otázky bující korupci, zejména v politické a soudní struktury, které zůstaly z hlavních překážek jejich přístupu nebo plné členství.
Analýza vlivu Komise v oblasti soudní reformy během pre a post-vstupu fáze byla podporována důkladnou studii o mechanismus spolupráce a ověřování a zprávy o pokroku z roku 2004 až po současnost. Na závěr, Komise po přistoupení-monitoring v Bulharsku a Rumunsku, a jednání o přistoupení v Chorvatsku vedla k redefinici evropských norem a posílila Komise orgánu o normativní otázky.
Kromě toho, že CVM předpokládá případné vytvoření povinného průjezdu přechodné fázi budoucích přistupujících členů, dokud nebude uznána plná kompatibilita s evropskými normami. Rozšíření EU normativní platforma zvyšuje možnosti zásahu Komise v řízení státu.
V případě provedení zásady nezávislosti soudní moci na Bulharsko a Rumunsko demonstroval úsilí Komise pro zvětšení a spravovat EU prostřednictvím systematické používání norem

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Organisation of the Judiciary in Bulgaria, Croatia and Romania

Bulgaria:

Supreme Administrative Court and Supreme Court of Cassation
Supreme Judicial Council (SJC)
- *Inspectorate to the SJC*
- *National Institute of Justice*

Prosecutor Office
National Security Agency: in charge of investigating high-level corruption and organised crime.

Croatia:

Supreme Court
State Judicial Council (SJC)
- *Disciplinary Council*
- *Judicial inspectorate*
- *Judicial Academy*

State Prosecutor Council
Prosecutor Office
USKOK: anti-corruption unit
National Council for Anti-corruption
Committee for the prevention of Conflicts of Interest

Romania:

High Court of Cassation and Justice (HCCJ)
- *Prosecutor Office*

Superior Council of Magistracy (CSM)
- *National Institute for Magistracy (NIM)*
- *National School for clerks*

National Integrity Agency (ANI)
National Anti-corruption Directorate

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The only stable state is the one in which all men are equal before the law.
-- Aristotle (384-322 BC)

The European Union recalls the multi-cephalous mythical creatures of antiquity. It remains a mysterious entity for its citizens and the complexity of its internal organisation an interrogation for scholars. The Union has become the trendy subject for testing a multitude of experimental models and this study is no exception to the rule.

A nova of definitions and theories has attempted to define the EU in a tailor-made conceptual framework, the most renown being Moravcsik's Liberal Intergovernmentalism or the theories of European integration Historical and Sociological Institutionalism[1]; yet, no satisfying terminology has pinpointed the exact nature of this overarching institution in perpetual movement. Each consecutive enlargement adds a particular shade of colour to the existing patchwork therefore refuting past theories. As each additional growth spurt distances the union from its original ancestor dating back to 1957, nothing is more natural but the attempt to understand the contemporary nature of the EU and the ongoing evolution of its power.

The traditional literature on the EU is still largely alimented by a debate between intergovernmentalists, federalists, and unitarists. The theories advocated by these three schools look into the layout of the constituent member states and fail to encompass the deep changes brought to the core of the EU by the eastern enlargements. Yet, more recent theories have brought new insights on this topic and understand the EU as an entity evolving through enlargement and whose leverage reaches outside its physical borders; one of the most convincing theoretical analyses associates the EU with the idea of Empire.

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[1] Ober, A. in Bache, Ian and Stephen George. Politics of the European Union; Oxford: Oxford University Press, 2nd Ed. ,2006, pp. 1-77.

The concept of European Empire rises as a direct response to the enlargements in Central and Eastern Europe (further: CEE). The works by Zielonka draw a polycentric political organisation for the EU in reaction to the increasing diversification of its member states. The relations between the centre and the periphery transposed in this context allow the periphery into the decision-making circle in exchange for constrained sovereignty. The main means of control of the centre -- the EU bodies -- remain economic and bureaucratic. A more progressive theory developed by Laïdi pictures the EU as a normative empire, an entity imposing its power by setting internal and external norms, especially in the economic sphere and with regards to the entrance to the common European market.

The aforementioned theories touch upon the imperial side of enlargement, still relatively unexplored, and the political aspect of normative weight when regulating internal and external European affairs. In line with this, the concept of Normative Empire will be developed and redefined throughout this study, in order to demonstrate the normative power exerted by the European bodies and the European Commission in particular, in the processes of administrating and enlarging the European Union's Empire.

This concept is two-fold and attributes different constrains depending on whether the norms are applied to the administration or to the enlargement of the union. The administration of the Normative Empire relies on the legitimate priority of implementation of European norms over national ones. The European Commission (further: EC) plays a primordial role as the guardian of the founding treaties and is responsible for certifying the compatibility of European norms within the EU. The EC also constrains the member states in complying with a specific regulatory framework by devolving some sovereignty at the EU level and most particularly to the EC, being the only full time European body. This devolution of power endows the EC with the

necessary powers to maintain the normative balance of the EU by infiltrating areas under national governance and imposing pressure on the member states to keep their legislation in line with the treaties or the *acquis*. Although the EC leverage enjoys considerable legitimacy and success, the EC heavily depends on the willingness of the member states to comply with the EC's pressures and guidance.

On the contrary, the leverage of the Commission is unilateral and indisputable during the accession negotiations and the enlargement process. The asymmetry of power between European bodies and the acceding state favours the EC and the imposition of changes with regards to the transfer and implementation of the *acquis* and the full compliance with the Copenhagen criteria. However, the failure to curb the spread and damages of corruption and organised crime in Bulgaria and Romania generated and increased the sentiment of enlargement fatigue in the EU, in particular amongst its western members. In addition, it underlined the lack of experience and professionalism of the EC to guarantee the compatibility of the member states acceding and its inefficiency to deal with tougher cases[2]. The facts point out towards a different interpretation: since the first enlargement in Central and Eastern Europe in 2004, accession has been characterised by an incremental instrumentalisation of the use of conditionality. Croatia is now undergoing a thorough examination of the compatibility of its national norms with the EU legislation and is strictly monitored by the EC in the implementation of the *acquis*. The extensive use of conditionality by the EC in Croatia aims at reassuring the old member states of its ability to protect the EU from the accession of unprepared and incompatible candidates. Enlarging the EU to the Balkans is a major challenge for the European institutions and its outcome could result in either a historic success or fatal failure.

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[2] Kochenov Dimitry, EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law, Kluwer Law International European Monographs, New York, 2008, p. 51.

The structure of the Normative Empire is erected on the mutation over time of the inclusive norms at the very basis of the EU. The EU is a normative entity by essence[3], as only norms can replace the binding force of a European demos between the members. As a consequence, norms are enshrined in all the founding treaties and have becomes inherent features of the EU.

The first enlargements on the path to the present EU -- starting from the ECSC and the European Communities-- were based on sentiments of common inheritance, share of geographical proximity and democracy and on a somewhat recognisable European identity. The member states were in full control of the enlargement process and accession bore then the overtone of inclusion, based on the feeling of legitimate belonging to a certain group sharing common inherited features. These inclusive norms still define the union and have been transposed into article 6 of the Treaty of the European Union.

Norms of accession ceased to be inclusive with the enlargement in 2004 and with the entrance of states geographically, politically, economically and culturally different from one another and from the older members. The accession of post-soviet states advertised as the long-awaited return to Europe did not conceal the concerns of the existing members, which put an end to the reliance of common identity and values as a road map for enlargement. Inclusive norms were replaced by exclusive norms, closer to rules than to values. The instauration of the Copenhagen criteria in 1993 represents the first step in this direction; the candidate to European membership must now comply with a list of predetermined criteria and the ever deepening

[3] Bretherton Charlotte and John Vogler, The European Union as a Global Actor, 2nd , Routledge Taylor and Francis Group, London and New York, 2006, p. 37.

harmonization and expansion of European legislation. The EU has thus become more legalistic and uses norms as barrier for incompatible candidates[4].

Moreover, the use of norms goes beyond the formal application ascribed in the treaties and touch upon a growing number of areas in a narrower fashion, as for instance in the economic readiness or the independence of the judiciary in the acceding and existing member states.

The present work will focus on the importance of the independence of the judiciary in European conditionality. This is a topical theme especially since the 2007 enlargement and an appropriate example of administrating and enlarging through the use of exclusive norms. The necessity for the member states to guarantee the independence of the judiciary was first mentioned discreetly under the Rule of Law section in the political criterion of the Copenhagen criteria. It gained importance over time and became a section in itself before being included in a dedicated chapter with its own subsections in the most recent progress reports for Croatia. The priority set by the EC to establish an independent judiciary in Bulgaria, Romania, Croatia and in the whole of the western Balkans triggered the evolution and sophistication of European norms with regards to the independence of the judiciary. This elaboration is visible through the efforts of the EC to define and revise its definition of the independence of the judiciary, by spelling its key features, by defining European standards in this matter, by monitoring the reform process and by overlooking the conduct of judicial affairs within the states. The introduction of the independence of the judiciary as a criterion for complete European membership upon accession and to a certain extent for the existing member states, demonstrates the exclusive character of European norms and the increasing reliance of the EU on the aforementioned norms.

[4] Kochenov, D., 2008, p. 53.

This dissertation is based on qualitative researches and develops the concept of Normative Empire by relying on the study of the evolution of accession conditionality to the EU. The methodology draws upon a literature review of the related theories in academia and on an extensive analysis of the Cooperation and Verification Mechanism reports (further: CVM) -- mechanism designed to monitor the establishment of an independent judiciary after accession-- (2007-present) and the Progress reports (2004-present) published by the European Commission.

The bottom argumentative line of the dissertation aims at demonstrating that the EU qualifies as a Normative Empire for it administers its members and enlarges through the use of norms. Norms are here defined in a narrower, exclusive, more legalistic fashion and cover a greater scope than the norms usually associated with the EU in Art 6 of TEU (human rights, democracy and so on). The research is also a case study of the building of an independent judiciary in Bulgaria, Romania and Croatia. Subsequently, the idea of Normative Empire will be tested against the judicial reforms undertaken in the aforementioned three states. It is expected that the convergence between pre and post-accession phases will increase the leverage of the Commission in all normative areas of European affairs. The results of this research come at a very critical moment for the rest of the Balkans and set the possibility for the establishment of a permanent transitory phase after accession. Enlargement is on its way to become a laboratory for norms.

These three cases are representative examples demonstrating the evolution of conditionality and the increasing role of the Commission in imposing reforms in the pre and post accession period. Romania and Bulgaria are the newest member states and thus, account for the latest evolutionary changes in conditionality. These early findings must be studied in line with

the ongoing accession negotiations in Croatia and together they draw a picture of systematic use and reliance on conditionality in the enlargement process. In addition to their geographical kinship, these three cases share some structural features: the rampant corruption as the main obstacle for their accession. One of the most efficient manners to curb this problem is by guaranteeing the independence of the judiciary and by enabling it with the sufficient capabilities and powers to check on the branches of power and the societal strata. The study of the independence of the judiciary -- the space dedicated in the application of conditionality and the accession negotiations -- will delimit the power of the Normative Empire in pre and post-accession when dealing with issues similar in scope.

The structure of the chapters will address the following themes in this order. The first chapter will provide a more extensive introduction to the topic of the research. It will cover the enlargement process in the Balkans and demonstrate the normative attachment of the European Commission to the accession of Croatia. A discussion of the respective theories of Laïdi and Zielonka will follow next. Their arguments will be reviewed and will serve as a necessary basis to understand the concept of Normative Empire and its shortcomings as it stands. The legalistic weight of European norms will be restated further in this chapter and the mutation of norms will be illustrated by the debate stirred by the enlargement of the Schengen zone to Bulgaria and Romania, and the ongoing uproar against the Hungarian media law.

The second chapter will present a revised form of the concept of Normative Empire: its structure and internal functioning, the role of the European Commission behind the systematic use of regulatory and structural norms, and the administrating and enlarging scope of the Empire.

The last chapter will demonstrate the existence of this Normative Empire in the establishment of an independent judiciary in Bulgaria, Romania and Croatia. The first subsection will study the space devoted to the independence of judiciary over time, the sophistication of the formulation of EU standards on this matter and the evolutionary concordance between the Cooperation & Verification Mechanism and the accession negotiations in Croatia. The second subsection will focus on the incremental changes in implementation of the recommendations and on the detail of the instrumentalisation of conditionality. The last subsection will discuss the successes and shortcomings of the strategies adopted by the EU as a Normative Empire when administrating and enlarging the union.

This research presents several points of academic interest. The concept of Normative Empire is a basis for re-conceptualisation of the European Union, its role, its power, its limits and its potential in administrating an enlarging union with a growing range of discrepancies. The role of the European Commission is here redefined and should be taken as a basis for understanding the enlargement process and for making the enlargement process more secure for the EU. Finally, the study highlights a reorientation of European policy towards a heavier reliance of the European institutions on legalistic norms and laws in order to penetrate into areas traditionally under strict national governance and to maintain a normative equilibrium in the union. This equilibrium is fragile and the most important constituent feature of the EU. The evolution of the EU into a Normative Empire is not motivated by colonial instincts but rather by efforts to maintain a functioning union between states different in many aspects.

Part I: Definition of the topic

The first chapter touches upon different ontological areas in order to acclimatise the reader to the topic. It will thus underline the necessity of the enlargement of the European Union in the Balkans, interpret the academic conversation between Laïdi and Zielonka on the Normative Empire and will define the scope of the European norms.

1) EU's gourmandise in the Balkans

a) An unpopular prospective

The EU's appetite for the inclusion of the Balkans in the union brings many of its constituent members close to indigestion. Hence, the arguments opposing the accession of Croatia or of any more Balkan country are views that deserve to be presented in order to set the decor in which the present accession negotiations are taking place. These arguments are two-fold: first, they relate

to the insecure political, economic and social atmosphere in the region and secondly, they reflect the general enlargement fatigue resented amongst the old member states and in the institutions.

The Balkans is renowned for its difficult history: bearing the title of powder keg of Europe a century ago, the consecutive Balkan wars, the lack of unification amongst its leaders, the assassination of the Austrian Archduke Franz Ferdinand in Sarajevo and its dramatic consequences, up to the Yugoslavian wars, the region is scared by its history. In this context, unresolved interethnic tensions stand against the principle of transnational cooperation established in the EU. Rampant corruption, organised crime, arms, drugs and human trades [5]pose major issues to the integration of the region in the union. The EU heavily depends on the health of the political, economic and social system of its members; consequently, allowing the accession of states with these kinds of unsolved issues would open the gate to a Trojan horse, corrupting the EU from inside.

The aforementioned regional particularities feed in a greater source of opposition to the enlargement of the EU in general and in the Balkans: the fatigue of the member states[6]. The accession of Bulgaria and Romania and the current issues of corruption and organised crime left damaging impressions on the integration of Balkan states and demonstrated the inability of the EU to protect the union from unprepared candidates. Moreover, the political motivations behind the 2007 enlargement are highly criticised, as the resulting derogated accession fostered instability[7] in the EU, encouraged distrust between the older and newer member states and the preservation of sleeper cells of corruption and organised crime within its borders slowed down the development of the union.

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[5] Bugajski Janusz, ‘Facing the Future: The Balkans to the Year 2010’, Center for European Integration Studies, 2001, pp. 3-4.
[6] Hillion. C. in Graig& de Burca, 2011, pp. 200.
[7] Schimmelfennig Frank, ‘The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union’, International Organization, 55:1, 2001, p. 71.

In addition, there is the general reticence to expand the union to more hostile and underdeveloped regions whose integration would result in heavier costs for the EU notably for the richer member states to build a state administration compatible with European legislation and impose a mode of governance guaranteeing future economic benefits and contributions to the union. Moreover, the member states are unwilling to take such risks when all attention is now focused on maintaining or re-establishing economic growth and the economic protection of the national citizens in the present context of post-economic crisis. As a consequence, there is an increasing support for settling EU's borders[8], demonstrating again the reluctance to consider seriously new enlargements. The last point is built on the technical difficulty to manage a union representing a broad scope of different national interests and the belief is maintained that the EU is close to its maximal capacity.

b) An impossible exclusion

Despite the aforementioned reasoning, the definitive exclusion of the Balkans from the EU is unthinkable or rather its inclusion is inevitable according to the normative nature of the EU. On this basis, the following arguments advocating the necessity to extend European membership to the Balkans rests on the prevalence of the common European identity over the opposing individual preferences of the member states[9].

The value basis of the EU puts common norms and principles at the heart of the European political decisions and leading thus according to Schimmelfennig to a rhetorical entrapment

[8] Bretherton., C &J. Vogler, 2006, pp. 53.
[9] Schimmelfennig. F., 2001, pp. 72.

fuelling the enlargement process[10]. The European founding values can be summed up as ensuring and protecting peace, liberty, democracy, the rule of law, the respect for human rights and to a certain extent fostering social solidarity, anti-discrimination, sustainable development and good governance[11]. The superiority and legitimacy of these norms is recognised by all member states and their adoption and respect are fundamental requirements for membership. As a consequence, together, they form the core elements of European identity[12]. The active promotion of these norms [13]outside the European borders embodies an additional particularity of the role of norms in the EU. Exportation of norms is highly visible in the accession negotiations, but also in the financial aid conditionality with third party countries and the stance of the EU as a normative champion on the international arena especially in area related to environment protection: global warming and reduction of productions of dioxide of carbon account for the most famous struggles in this area.

Normative proximity or compatibility constitute a crucial asset for a successful candidacy to European membership and make the task difficult for the member states to advance refuting arguments against the accession of a new member state, as even self-interested attitudes must comply with some normative legitimacy[14]. As a matter of facts, the Treaty of the European Union suggests that a European state fulfilling the criteria of common values and European identity can apply and be considered eligible for membership[15]. The EU holds thus the same responsibilities and obligations towards the Balkans to commit to the founding norms as she did by accepting Central European claims for membership on the basis of a return to Europe and the

[10] Ibid., pp.17.
[11] Manners in Bretherton., C &J. Vogler, 2006, pp. 37.
[12] Ibid., pp. 37, 42.
[13] Ibid., pp. 56, 60. & Schimmelfennig. F., 2001, pp. 16.
[14] Schimmelfennig, F, 2001, p. 128
[15] Manners in Bretherton., C &J. Vogler, 2006, p. 50.

share of common values[16]. Accordingly, the EU is entrapped in a dynamic of including states whose identity corresponds with the European common norms and is condemned to carry the enlargement process to its fullest if it remains committed to its normative structure[17].

The actual delimitation of the areas eligible for European membership on a normative basis is difficult to determine, however, the Balkans conversely to farther regions are logically to be inserted into the union, allowing a smooth continuity of the European borders. Firstly, besides the geographical logic to establish a continuous domination of the EU over this relatively small area[18], the Balkans is a cumbersome enclave in the south-east of the EU. Neglecting the Balkan states would only foster the concentration of criminality, corruption and illegal immigration on the border of the EU and along the borders of consolidating member states (Romania and Bulgaria) and would create a zone of instability that could endanger the internal balance of the EU in the long-run. European membership to the Balkans and the imposition of pre-accession reforms would fasten the cleansing of criminality under all its forms from the region and would increase stability and security in the EU[19]. Furthermore, the Balkans as a safe zone holds a non-negligible potential to become a secure energy supply channel to the EU[20].

Secondly, the Balkans represents a daring challenge holding big promises for the projection of EU's power on adjacent regions and for the recognition of its international leverage. Its successes in CEE comforted it in its role of regional actor capable of managing its borders and maintaining security within its borders and strengthened its incentives to carry a

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[16] Schimmelfennig Frank, 'EU political accession conditionality after the 2004 enlargement: consistency and effectiveness', Journal of European Public Policy, 15:6, 2008, pp. 120-1.
[17] Bretherton., C &J. Vogler, 2006, pp. 25, 59 & Schimmelfennig. F., 2001, pp. 17, 59, 68, 75.
[18] Bretherton., C &J. Vogler, 2006, p. 159.
[19] Smelev, 2005, p. 13.
[20] Manners in Bretherton., C &J. Vogler, 2006, pp. 160, Schimmelfennig, 2001, p. 54.

similar reform process to the Balkans[21]. The asymmetrical power of the EU over the candidate state guarantees the accountability of the state to the EU and its compliance with reforming measures. The Balkans represents a tough credibility test for the EU as powerful international actor[22] relying exclusively on the use of norms. Although Croatia's accession in the near future is an encouraging start and could inspire other Balkan states to follow the same path, the region is constituted of weak states[23] and the bulk is still far away from being considered as potential candidates[24].

The above arguments help understanding the broad context of enlargement in the Balkans, as well as the advantages and concerns it raises. Subsequently, the next chapters will demonstrate how the EU aims at responding to the challenges posed by the inherent regional discrepancies by strengthening its normative power onto the region and by addressing issues such as corruption and criminality.

2) The Normative Empire in the literature

Few works expose in detail the concept of Normative Empire as such; Zielonka's works are only partly related to this topic and Laïdi's understanding of the normative empire applies to the hegemonic power of European market legislation rather than to the European leverage in

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[21] *Ibid,* pp. 158, 160.
[22] *Ibid*., pp. 220, Heisbourg, 2005, p.2 & Rupnik, p. 7.
[23] Panebianco Stefania and Rosa Rossi, 'EU attempts to export norms of good governance to the Mediterranean and Western Balkan Countries', working paper, Jean Monnet Centre EuroMed, 2004, p.20
[24] Smrkolj Maja, 'Difficult Steps to the Enlargement of the EU (Some Legal Aspects): The EU's Foreign and Enlargement Policy for the Western Balkans', EUSA Biennal Conference, Montreal, 2007, p. 4

managing its internal and external politics. Both authors contribute to understanding the EU in a different yet complementary manner by focusing in turn on the imperial structure of the EU and the weight of norms in political decisions. A discussion of their conceptions will introduce the idea of Normative Empire that will be developed in the second chapter.

The structure and the nature of the empires is the first point of dispute between the two authors studied. Zielonka defines Europe as neo-medieval empire characterised by the arrangement of a heterogeneous population in a polycentric political system whose borders between the core and the periphery are porous and faded. The heterogeneity of the populations leaves way to the emergence of different legal systems and scopes of citizen rights, distinct army and police institutions, as well as economic and social disparities between the regions[25]. The concept of empire here retraces the present state of the EU by focusing the amalgam of different population under a weak encompassing imperial ruling structure leaving much power in the hands of the periphery (non-European institutions). The polycentric organisation divides the decision-making power and European authority along different functional spheres, as it is already done at the Council of Ministers and at the Commission levels between the different directorates: judiciary, environment, competition and so on. Conversely, no specific structure of the EU occupies Laïdi's thesis.

The empire has a two-ward focus: an internal concentration for Zielonka and an external focal point. Zielonka's empire exerts disparate pressures on the member states depending on its control over each functional area. The presence of the EU's oversight in all sectors is not motivated by the desire to constrain the member states but rather to maintain the cohesion within

[25] Zielonka Jan, Europe Union as Empire, The nature of the Enlarged European Union, Oxford University Press, 2006, p. 12

the union. European neo-medieval empire is peculiar in the fact that it provides to rather than exploits the periphery[26]. As a consequence to this inward logic, the EU's influence over the external environment and the neighbouring regions aims at building stability and security for the EU[27]. The same concerns for stability and security are present in Laïdi's theory, however, with the exception that the EU's external influence is the core pillar of the normative empire. In this context, European imperial approach is outward looking and refers to the European imposition and exportation of its norms, standards and rules to external players[28], such as for instance, trade barriers for foreign goods to enter the common market.

These two visions provide complementary aspects, yet as it has been demonstrated, alone they fail to develop and analyse the full scope of European action. Laïdi does not provide insights on the internal structure of its empire, whereas, Zielonka does not provide explanations concerning a binding force between the regions that could make up for the erosion of sovereignty.

The respective works are diametrically opposed with regards to the organisation of power. The polycentric decision-making structure recalls the system of multi-level of governance according to which the authority of European leverage fluctuates between the territorial divisions and the area of governance[29]. The European institutions headed by the European Council [30]form the core of Zielonka's empire and represent a soft European emperor, as the natural fragmentations of European regions and the diffuse character of the European public space including the weakness of supranational level of decision-making reinforce the use of indirect democracy in European institutions in order to maintain control and cohesion over the EU and its

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[26] Ibid.
[27] Ibid, pp. 143.
[28] Laïdi, Z., 2008, pp.2.
[29] Zielonka., J. 2006, pp. 164.
[30] Ibid, pp.60.

public space[31]. European institutions also play a key role in Laïdi's conception but remain subordinated to the authority of the member states in concordance with intergovernmentalists' views. The institutions' crucial role lies in the power of constructing and legitimising European norms[32] used to guide the relations between the member states and external actors.

As a consequence, although Zielonka underlines better the intrinsic and fluctuating power relations between the European institutions and the member states, he does not explore the reasons behind the devolution of power from the states to the institutions and the tools used by these institutions to administer internal affairs. Possible tools could refer for instance to the application of European norms (not solely values, but also laws) onto the management of internal and external affairs, as suggested by Laïdi.

National state sovereignty is considered as an obstacle by both theories and its erosion in favour of devolution of power to the European level is necessary and inevitable. Zielonka emphasizes the interlinked power relations between the member states and the European institutions: despite the overall superiority of the EU as a supranational entity over its constituent members, the states retain enough room of manoeuvre to keep the upper hand in certain areas[33] such as defence and education. This is the particular point that Laïdi addresses as the main obstacle to the development of the EU into a full-fledged normative empire. National sovereignty encourages self-interested behaviours that inherently undermine the development of European community causing a decrease in inter-states cooperation, giving way to an economic brake-down and closed borders. The pursuit of national interests leads to unproductive attitudes and breeds unpredictability and conflict[34].

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[31] Ibid., pp. 116.
[32] Laïdi, Z., 2008, pp.68.
[33] Zielonka., J. 2006, pp. 12.
[34] Laïdi, Z., 2008, pp. 65.

Nevertheless, issues related to national sovereignty seem to lose momentum in European decision-making, as Western Europe already conceded in privileging economic interdependence over sovereignty and conditionality for European membership eroded the newly re-acquired sovereignty of Central and Eastern European states. Conditionality is here described as a potent tool eroding the basis for sovereignty and discouraging self-interested attitudes before acceding to the level of European decision-making. As Zielonka interprets it, conditionality is 'the willing imposition of norms on states with the illusion of self-determination'[35]. Laïdi adds a subtlety to this interpretation by endowing norms with the ability to establish the supremacy of European rules over national ones and thus to bypass national sovereignty without threatening it completely and guaranteeing the support of the member states in the implementation of EU law[36]. The author also raises an interesting question that will not be explored in this research concerning the contradiction between the efforts of the EU to downgrade sovereignty for more devolution of power and its attempts to acquire state attributes as a way to increase the credibility of its international leverage[37].

European preferences and aspirations are characterised by a pursuit of stability and security for the EU through the maintenance of EU's asymmetrical power over the states and increasing reliance on norms for Laïdi. Security and stability on European borders is built through economic integration and soft conflict prevention[38]. The EU takes on the role of mediator in Laïdi's opinion in order to refrain from dominating directly the external environment[39], which would then involve the use of non-civilian measures and force. Subsequently, the maintenance of a security buffer on the outskirt of the EU will condemn the

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[35] Ibid, & Zielonka., J. 2006, pp. 56.
[36] Laïdi, Z., 2008, pp. 3.
[37] Ibid., pp. 268.
[38] Ibid., pp.3, 27 & Zielonka., J. 2006, pp. 153.
[39] Laïdi, Z., 2008, pp.2.

EU to enlarge perpetually, as the every enlargement pushes back the European borders towards increasingly instable areas[40].

Both concepts rely on EU's asymmetrical power over the member states and abroad in order impose European authority, European norms and standards necessary to the construction of the aforementioned security buffer. However, reliance on asymmetrical power to support European leverage could prove to be lethal for the existence of the Union as a whole. Zielonka fears unilateral decisions by the member states and their non-compliance to EU rules. The ambiguities of conditionality allowing manipulations by the candidates and the lack of grand project for the enlarged EU denote the lack of supervision by the European institutions and encourage discretionary implementation of European law[41]. Laïdi foresees the decline of European asymmetrical power upon the European involvement in areas where the EU does not hold the dominant geopolitical position[42], especially with reference to eastern enlargements and its relations with Russia.

Laïdi attaches a particular importance to the role of norms in guiding foreign policy and as the only tool for international action. The EU is here assimilated with its feature of common interdependent market relying on norms countering self-interested behaviours slowing down cooperation and breeding unproductive instability. There is thus the general conviction to rely on the socializing strength of trade and on the export of European norms and economic interdependence abroad in order to maintain and create security and stability instead of betting on Realpolitik[43]. Norms modify the external environment: the imposition of European rules in order to access the European market and the consequent cohesion and stability around the

[40] Zielonka., J. 2006, pp. 165.
[41] Ibid.,pp. 58.
[42] Laïdi, Z., 2008, pp. 168.
[43] Laïdi Zaki, 'the Normative Empire: the Unintended Consequences of European Power', Garnet Policy Brief, 6, 2008, p.4.

union[44] are blatant evidence. Nevertheless, the author's views are perhaps too restrictive, if only considering the access to the common market as the main nucleus for the spread of norms and the reform of the political and judiciary systems of neighbouring states. The imposition of norms externally remains discreet in this analysis and does not account for issues of non-compliance in areas disconnected to trade relations.

The perspectives about enlargement are divided along the same dialectic of inward and outward focus as previously mentioned. Zielonka understands the enlargement process as a civilian expansion of the Empire through sending invitations for membership and diplomatic bargain[45], whereas, Laïdi argues that the attractiveness of the European market fuels the incentives of external actors to seek membership[46]. Enlargement is thus two-wards: a colonising entity whose membership is actively sought.

In both theories, conditionality is a key component to the unilateral projection of European power onto acceding states. According to Zielonka, conditionality reinforces European economic credibility and political legitimacy abroad and therefore constitutes an argument of force sustaining European involvement and political control over acceding members [47](only since 2004 enlargement). Laïdi adopts more liberal views and associates the coercion of candidate states to adopt and implement European (market) norms as part of the socializing force of trade and for the benefit of all parties[48]. Subsequently to these two views, conditionality is synonym of systematic imposition of norms having for purpose to shape the aspiring candidates into structures satisfying membership criteria.

[44] Laïdi, Z.,2008, pp. 12-3, 64-5, 97.
[45] Zielonka., J. 2006, pp. 170-1.
[46] Laïdi, Z., 2008, pp. 45.
[47] Zielonka., J. 2006, pp. 54-6, 170.
[48] Laïdi, Z., 2008, pp. 41-45.

Further enlargement of the union means for both authors an eventual loss of authority and dislocation of power. The increase of differences and thus disparities in Zielonka's opinion will lead to a greater diffusion and disorganisation of power because of the number and distance between members ruling the polycentric power structure. Widening will be then at the expense of the full implementation of EU law[49]. The lack of complete application of EU law is according to Laïdi due to the threat imposed by ever further developing and stricter rules/laws on national sovereignty. Reticence of the member states to abide to sovereignty infringing laws will lead to a fatal erosion of the supremacy of the normative empire. Deepening in his views is as much of a threat as incomplete widening, inasmuch as building a ring of cooperative states around the EU without prospective of membership would remove the incentives for the implementation of European norms[50]. Both views concord on the same conclusion: the EU is incapable of conducting dramatic further widening or deepening of the union without endangering its authority and survival.

The debate between Zielonka and Laïdi draws an overview of the structure and external power of the EU in its quality of normative/ empire, as it stands in the literature. In addition to the shortcomings pointed out throughout the discussion, it is important to keep in mind for later, their final conclusion about the inadequacy and inability of the EU to develop its power and administer the diversity of the union on EU law platform. The purpose of this research disagrees with this conclusion and will elaborate its argumentation in the second and third chapters.

3) Mutation of Norms

[49] Zielonka., J. 2006, pp. 167, 170.
[50] Laïdi, Z., 2008, pp. 56, 168-9, 174.

a) Norms and the EU

Norms are pivotal constituent elements in Laïdi's work and have been defined in universal terms that can be used for the introduction of the mutation of European norms in this study. The spread of norms presents the following features: negotiation over imposition, legitimization by international bodies, enforceability on all actors disregarding their rank in the international system, identification of set standards and set objectives, and capacity to be observed over time. The use of norms aims at creating stable and predictable interactions between several actors and relies on the internalization and legitimization of these norms by all actors.

The reliance of the EU on norms intends to bind the member states around common principles and to foster cooperation without threatening national sovereignty directly. Norms prevent the emergence of zero-sum games and impose discipline in inter-state relations while reinforcing the domination of the European bodies. The EU's commitment to norms and normative justification of its action enhance the European leverage internationally, unless its actions infringe national sovereignty in a region where the EU does not dominate the geopolitical situation.

Nevertheless, the scope of European norms goes beyond the market regulations and norms have evolved and formed over time a core pillar in European decision-making. This section will incorporate Laïdi's definitions which provide further precisions on the nature and role of norms in the EU.

As previously mentioned the EU is a normative entity: norms have been used to shape a common European identity before representing an integral part of European decision-making.

European norms can be found in the preamble of most of the founding treaties and more concisely under the Article 6 of the TEU. The core principles of European identity rest thus on a common sharing of democracy, liberty, respect for human rights and individual/fundamental freedoms and the rule of law. Subsequently, values and norms have supplanted the absence of European *demos* and have become a substitute for identification with European common inheritance[51].

The unequivocal commitment of the member states to these principles and their internalization constitute a strong binding force among the members and legitimize the devolution of power to the European bodies. This common normative practice also guides European civilian foreign policy (being deprived of a common armed force) which acts primarily through the exportation of its norms. The formula adopted by the EU in the Balkans to build security and stability in the region through principles of good governance demonstrates the EU's commitment and reliance on norms[52].

b) From Inclusive to Exclusive

The last enlargements waves have uncovered a peculiar dynamic in European norms, which have grown from inclusive to increasingly exclusive.

It has been highlighted that the early forms of the European Union have been built on a basis of inclusion and enlargements motivated (outside of the economic and political incentives) by feelings of common European identity, share of norms, values and democracy. This self-focus

[51] Bretherton., C &J. Vogler, 2006, pp. 38-40.
[52] Rossi &Panebianco, 2004, pp. 13, 18.

reinforced the sentiment of belonging by juxtaposition to the definition of and distancing from the 'others', in the post-WWII context, the Communist Bloc.

This strategy of inclusive enlargement was disrupted by two factors: the incremental expansion of the corpus of EU law and the fall of the USSR. The multiplication of EU law documents and the increasing place devoted to norms reinforced the weight of the European institutions over national states as supervisory organs. The consequent devolution of power to ensure the application of EU law across the Union led the states to eventually relinquish their control over the enlargement process to the European Council and more importantly to the European Commission, the only institution fully dedicated to European Affairs. The monitoring of the accession negotiations at the EU level became particularly visible after the fall of the communist regimes in Central and Eastern Europe and as the eventual accession of Central and Eastern Europe drew nearer. In a short time span between 1993 and 1995, the European institutions gained complete control over the monitoring of the pre-accession reforms and adopted a revolutionary attitude towards enlargement by introducing a broad range of normative tools. The year 1993 established the normative basis for the domination of the EU bodies over the membership negotiations and the infamous Copenhagen Criteria, then the Essen European Council in 1994 launched the first pre-accession strategy, and 1995 marked the peak of the reforms: first, the European Council in Madrid stipulated the political commitment to the implementation of the *acquis* and the reform of the administration to guarantee the implementation of the EU law as requirements for membership and secondly, the same year, the Commission launched its first reports on the application of the Copenhagen criteria and the pre-

accession strategy to monitor and guide the reforms in CEE[53]. Conditionality to European membership was born.

Despite the claims of return to Europe connoted with inclusion from the Czech Republic and taken up by the rest of the CEE, the enlargement in 2004 was characterized by a swift turn to exclusive norms in accession negotiations. The introduction of the Copenhagen criteria and the use of conditionality aimed at restricting the entrance to the union to those that were compatible with the organization of this value-based community[54]. The instrumentalisation of conditionality, studied at a later stage, distinguished the accession procedure as process of how to become more European[55].

The mutation of European norms did not end with the introduction of conditionality as the only procedure of accession, but also led to a reconfiguration of the role of norms in administrating European internal affairs. European norms undertook a legalistic transformation and moved away from their previous value basis. As a consequence, European norms in legal matters gained momentum and refined their standards. For instance, although no European definition of rule of law was officially published, the independence of the judiciary and the role of integrity agencies were stressed in the accession negotiations for Croatia and presently under the Cooperation and Verification Mechanism in Bulgaria and Romania.

Two recent debates in the European press illustrate the ongoing evolution of norms from value-centred to a greater reliance on legal aspects. The refusal from France and Germany to allow Bulgaria and Romania in the Schengen zone until the completion of the CVM demonstrates the concern of the European bodies and states to build a coherent legal system

[53] Hillion. C., in Graig& de Burca, 2011, pp. 190- 195
[54] Bretherton., C &J. Vogler, 2006, pp. 47, 50.
[55] Kahn-Nisser Sarah, 'Drawing the Line: The EU's Political Accession Criteria and the Construction of Membership', working paper 07/10, The Jean Monnet Programme, The Jean Monnet Center for International and Regional Economic Law and Justice, New York, USA, 2010, p.12.

resting on the rule of law. Moreover, there is no mention of the elements of the CVM benchmarks in the founding treaties besides the respect for the rule of law, hence, the recognition of the CVM and of its benchmarks by influent member states endows the soft mechanism with the responsibility and legitimacy to promote and monitor the implementation of European norms in the new member states and possibly to extend its role to further accessions. The CVM enhanced the importance of the judiciary in the EU and further defined the European judicial model.

The second event refers to the Hungarian law on the media which could have restrictive consequences on the freedom of expression in Hungary and a potential control of the media by the leading political party. The uproar throughout the EU amongst journalists taken up by several states called on the Commission to revise the law's compatibility with the founding treaties. On this note, although freedom of expression is not explicitly mentioned in any treaty, the transnational mobilization around this issue of breach of liberty demonstrates the unofficial and de facto commitment of the EU to the individual freedoms and the separation of power.

The mutated norms are by essence exclusive. They call for the compliance with the European normative core and appeal to a much lesser extent to a vague European identity. Compliance here designates the rightful attitude in the EU and excludes the ones disobeying to European norms. These new norms are thus endowed with moral superiority recognized by the member states and the European citizens inasmuch as they aim at protecting the EU from threats to its prosperity, stability, security and survival[56].

The sophistication of European norms results in a positive increase of the EU's international leverage and grants the Union with the title of norms hegemon. The EU's

[56] Bretherton., C &J. Vogler, 2006, pp. 43, 55, 57.

commitment to its normative essence augmented its credibility as a successful normative player; the twining programmes advocating the constructions of more efficient administration and judiciary, the specific funding programme for the Balkans imposing the respect of the rule of law as a requirement for access to the CARDS funds[57] are examples of EU's determination to rule with normative power.

This first chapter has demonstrated the important scope of action of the concept of Normative Empire. The discussion between Laïdi and Zielonka isolated key features of this empire and simultaneously pointed out the weaknesses of the concept as it stands, though already analyzed from two distinct perspectives. The additional sections on the process of enlargement in the Balkans and the mutation of norms underline the key role of norms in European decision-making and formulating rules of guidance for the regulations of European affairs.

Part II. The Normative Empire Redefined and Tested

The second part of this study will be dedicated to the readjustment of the concept of Normative Empire. It will define its organisational structure and functioning depending on whether internal or external affairs of the EU are discussed. The central place accorded to the Commission in this normative model will unravel another salient feature of the theory. Its decisive role is envisaged to grow increasingly more powerful over the next years due to the visible reliance of the EU on normative power.

[57] Rossi &Panebianco, 2004, pp. 10.

1) The Overarching Structure and Internal Organisation

The structure of the Normative Empire rests on the precedent literature analysis and develops Zielonka's multi-layered structure while elaborating on the role of norms in this structure. The theory here studied merges the opinions of these two authors in an innovative manner and refocuses the definition of the EU in line with its contemporary layout.

a. Multi-layered structure

The successive enlargement waves conglomerating diverse and distant states within a same organisation endowed the Union with an ad-hoc structure, fixing its institutions and organisation with each enlargement rather than re-building the whole system. The consequent diversification of its constituent parts enhanced the role of European institutions and the reliance by the latter on norms to administer the union and to interfere with legitimate means in the states' area of governance.

The polycentric structure of Zielonka's neo-medieval empire is inspired from the system of multi-level of governance and organises the division of power in functional areas of governance and along territorial layers. Nevertheless, the power division remains formal and does not qualify the power relations between the states and states'organs with the European institutions and the influence of each actor over the others.

A similar polycentric structure could be applied to the Normative Empire studied here, but such hypothesis will remain unexplored in this research because further explanation of this

hierarchal system only concerns the implementation of policies, legislation and is secondary to the purpose of this study. The relations between the states' institutions and the European ones emanates from the researches as primordial evidences of the increasing power of European institutions.

Subsequently, the Normative Empire addresses three levels of analysis: European, state and institutional. The European Commission, as developed in the next section, occupies the top of this pyramidal structure because of its control over policy formation and oversight over every policy area. The states while retaining decision-making power, transfer and pool considerable authority at the European level, creating an interdependent relation between these two strata. The retrospective power relations blur the division between the core and the periphery to take Zielonka's words.

However, interdependence does not make the exclusion of a state impossible. States should be thus compared to separate units forming a whole, the EU, and individually they can be isolated and to a certain extent dissociated from the group (rhetorically rather than practically) in case of non-compliance with European instructions jeopardising the EU as a whole. Similar logic is applied to intra-state institutions and state organs. Non-compliance of a state's institution will have severe consequences for the state and will legitimise European interference in the state's area of governance. The expansion of European leverage at the institutional level crosses the formal borders of state sovereignty and establish joint governance between the state and the European institutions over (some) national institutions. European governance and in particular of the European Commission in national institutions is visible through the work of reporting, policy monitoring, supervision of allocation of funds and twining projects.

The evolution of the EU into a Normative Empire only became indisputable with the introduction of the Copenhagen criteria and the enlargement in 2004. The domination of the European institutions became more visible in the newest member states, as the European Commission started monitoring state reforms on the road to accession in Central and Eastern Europe. The tendency grew and Bulgaria and Romania were the first to be threatened of the use of safeguard clauses if progress on the implementation of European law did not gain momentum. The imposition of the Cooperation and Verification Mechanism gave direct leverage to the European Commission on Bulgarian and Romanian judiciary and linked the states compliance with the European monitoring to the fate of their entrance in the Schengen zone. The increase of isolation sanctions and European monitoring in the new member states grew in comparison to the traditional infringement procedure applied on older members[58] and as a consequence eroded the state's monopoly on the governance of national institutions. The ongoing negotiations in Croatia illustrate the shift of power in favour of the European institutions operating since 2004. Until 2004, the European Union through the European Commission would rely on the state to implement the necessary reforms. Since 2005 and more especially in the context of Croatian accession, the European Commission addresses direct instructions to the state's institutions with regards to the implementation of the *acquis* and has developed its own monitoring system, meaning that it does no longer rely solely on reports emitted by the state to evaluate the progress of the negotiations.

In addition, the extension of conditionality to the CVM and the imposition of a transitory reform period for the new member states demonstrate the consolidation of the domination of the European institutions over states' organs after accession, especially with regards to the application of common norms.

[58] Zilmer., in Sadurki, 2006,pp. 189

Nonetheless, despite the increasing scope of governance of the EU, the union highly depends on the states and on their cooperation in supporting the pressures on the states institutions for the implementation of its policies. On a side note, the state's chief strategy to retain sovereign power is non-compliance or discretionary implementation of policies rather than the actual modification of the policy at the European level.

Moreover, further enlargements will reinvigorate states' unilateral power vis-a-vis the EU. In spite of concerns foretold by the ideas of rhetorical entrapment and the threat of an everlasting enlargement process in the literature studied above, state control over enlargement in the long-run will put an end to the imperial expansion of the EU. Referred to as the unofficial fourth Copenhagen criteria, the report in 2006 of the European Commission on the capacity to integrate new member states stipulates that further enlargements will depend on the absorption capacity of the EU, the strength of its budget, the efficiency of its institutions and the full implementation of European policies within the existing union[59]. This instrument will provide reluctant members to further enlargement with the necessary arguments to put an end to enlargement.

b. Regulatory and structural norms

The European norms constitute the main source of power and leverage of the EU. However, as the strength of the European leverage adjusts itself whether it is exerted in the pre and post-accession phases, the use and nature of norms varies accordingly.

The role of norms can be divided in two categories: structural during the pre-accession phase and regulatory upon accession. Structural norms refer to a larger extent to the norms

[59] Hillion. C., in Graig& de Burca, 2011, pp. 204-5.

imposed in order to make the candidate state normatively compatible with the European legislation. The bulk of structural norms are enacted through conditionality. Norms with regulatory purpose unlike their structural counterparts do not aim at edifying new institutions and designate all European legislation common to the whole community.

Structural norms represent key elements in the process of becoming a member state. Conditionality is composed of the Copenhagen criteria and its related documents and the *acquis communautaire*. Conditionality embodies thus the essence of the union and concentrates the European norms in a single package. The political criterion under the Copenhagen criteria beholds perhaps the strongest normative authority, as it defines the core principles of the EU and thus the meaning of membership. These normative instruments aim at changing the political and economic organisation of the state in order to fit European expectations.

Conditionality fulfils the role of watchdog of the EU in a certain respect and is the point of reference for determining the readiness of a candidate for accession. However, the absence of a European model leaves the candidate state responsible for building an institutional layout compatible with the aforementioned criteria.

The EU loses part of its unconditional leverage over the state once the latter accedes to the status of member state and start participating in European decision-making.

2) Dominance of the European Commission

The irony in the empires covered in the literature section lies in the absence of emperor or any equivalent bureaucratic figure. Zielonka endows the European Council with European

leadership, because it reassembles all the European leaders under a same roof. This logic cannot apply to the Normative Empire, as only the European Commission can guarantee the formation and supervision of the implementation of European norms.

a. Role of the European Commission

The European Commission is undoubtedly the key actor in the Normative Empire because it is the only institution that deals directly with the enforcement of norms both during the pre and post accession phases.

The European Council was traditionally in charge of leading the enlargement process[60] and the member states could unilaterally determine the outcome of the negotiations by encouraging or by blocking the entrance of certain candidates[61], France's veto against British accession is a memorable illustration. The refinement of the accession process with the Copenhagen criteria shifted the decision-making power to the European Commission[62]. Criteria defining the progress of a given candidate towards accession require a fairly important time-consuming monitoring and a level of supervision that the European Council could not undertake due to its lack of expertise in this area and time constrains. The European Commission was endowed with the daily management of the enlargement and with the responsibility to prepare drafts for the accession negotiations, to promote and supervise the implementation of the *acquis*, to define the direction of the reforms by preparing the criteria for opening or closing the chapters

[60] Kochenov Dimitry, 'EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?', European Integration Online Papers, 9:6, 2005, p. 17.
[61] Grabbe Heather, 'European Union Conditionality and the "Acquis Communautaire"', International Political Science review, 23: 3, 2010, p. 249.
[62] Kochenov, D., 2008, p. 55.

and the possible application of sanctions[63]. Close monitoring of the conditionality gave rise to a sophistication of the norms at play, as accession defines also the gradual transfer of European identity through norms, common principles, mode of governance and legislation to another state. The Commission's importance lies in its faculty to determine the course of implementation of the legislation highlighting in return what standards are valued by the EC and the EU and what is normatively compatible with the EU[64]. As a consequence for instance, the Commission imposed financial sanctions on Bulgaria and Romania as with regards to the access to pre-accession funds in 2008 (funds being part of the transition period these two member states are going though) based on a clause concerning the suspension of funds in case of shortcomings in democracy, respect for human rights and the Rule of Law[65].

In addition to the overall domination by the European Commission of the pre-accession phase, the results of this research have pointed out towards the increasing leverage of the Commission to interfere directly at the level of sub-state institutions. Although the CVM constitutes a particular mechanism and is denominated as an extension of conditionality in the post-accession, it demonstrates the ability of this European organ to infiltrate, check and recommend directly to state judicial bodies, which belong exclusively to the state area of governance. Its ability to pronounce an opinion on the shortcomings and successes of the institutional work of the member states grants the Commission with the function of a transnational judge. The amplification and diversification of EU norms and standards in almost

[63] Hillion. C., in Graig& de Burca, 2011, pp. 197-203.
[64] Borislavova Spendzharova Aneta, 'Bringing Europe in? The Impact of Conditionality on Bulgarian and Romanian Politics', Southeastern European Politics, 4:3, 2003, pp. 148.
[65] Trauner Florian, 'From membership conditionality to policy conditionality: EU external governance in South Eastern Europe', Journal of European Public Policy, 16: 5, 2009, p. 7 and Smrkolj, 2007, pp.9

all areas of expertise increases the surface accessible to European rule and to the Commission to impose its supervision.

Subsequently, the EC is comparable to a norm hegemon whose normative power stretches inside and outside the European borders. Norms originate in the Commission's womb, as it sets the norm agenda for the EU and retains some final checking power before implementation. More importantly than the creation of European norms, it is the protection of their (mythical for some) existence. The Commission can impose sanctions against the member states for non-compliance with EU norms or breach of the founding treaties by filling an infringement procedure or applying the safeguard clauses. The ongoing revision of the Hungarian media law demonstrates the Commission's power to revise the normative alignment throughout the EU. Laïdi's outer perspective of the normative empire is reinforced with the imposition of compliance with the European norms inside the EU.

Nonetheless, the legitimacy of the Commission's leverage is curtailed by its dependence on the devolution of power from the member states. Hence, the Commission can become in turn the instrument of the states by acting as a messenger between the institutions or between the member states. It can only fulfil its role of executive body and mediator when called upon by the states to regulate inter/intra state affairs. The example of the Hungarian law underlines the subordinate position of the Commission to the member states and the origin of its power in the trust accorded by the member states to take action against the infringement of presumed European norms.

The customary practice of imposition of EU norms has led on one hand to the self-identification of the union with these norms and on the other, to a visible effort to revise its administration of the EU. The CVM demonstrates the will of the Commission to promote actively the harmonisation of European norms among the member states and its proactive attitude in dealing directly with the institutions responsible for policy implementation within the state.

b. Enlarging and Administrating the EU

Reliance on normative power constitutes the EU's main preference for building security and stability within and outside the EU. The introduction of the CVM and the refusal this year to extend the Schengen zone to Bulgaria and Romania demonstrate the concerns of the EU on these matters. In addition, the successful previous enlargements and the construction of functioning systems of rule of law in candidate states for membership thanks to the introduction of conditionality have increased the international leverage and the credibility of the EU as a powerful normative actor, capable of managing its sphere of influence through civilian means.

This section bears the title 'enlarging and administrating' in reference to the main division of the EC's normative power and related functions. Enlarging refers to the activities of the Commission in the pre-accession phase and administrating to regulating the acceptance of European norms by the member states. The role of administrator is a by-product of the convergence of enlargement norms with the post-accession phase and of the consequent adjustments operated in the area of European norms. The redefinition of European norms led to the diversification and a rethinking of the EC as the guardian of European norms. Protection is

thus supported in theory by an active monitoring and supervision of the implementation of these norms in existing member states.

i) Path Dependent Projection of Power

Projection of power is central in Zielonka and Laïdi's understandings of European enlargement. Increasing EU's external leverage is the only way to maintain secure borders for the EU. In this optic, the EU is obliged to enlarge rather than decides the direction of enlargement. Schimmelfennig examines enlargement through another lens and argues that the EU's commitment to its normative core and the legacy of the previous enlargements have locked the EU into a rhetorical entrapment. The earlier enlargements in Central and Eastern Europe and the continuity of the Balkans with the European borders weaken any position against the accession of Croatia. Moreover, maintaining this regional enclave between Greece and Bulgaria contradict EU's principle of encouraging the development of democracy and good governance. Both conceptions involve thus the idea of path dependency.

The increasing reliance on norms to guide the process of enlargement is compatible and benefits from this path dependency and possibly amplifies the phenomenon to a certain extent. Enlargement shall thus be studied under this light in order to respond to the concerns in the literature and to explain the positive consequences of path dependent decisions on the instrumentalisation of conditionality. The essence of norms is to create regular and systematic paths of action. Applied to enlargement they brought path dependent obligations for the formation of EU policy on this matter. Norms gave thus a rigid structure that is constantly evolving and adapting to the candidate state. This tendency will accelerate with the accession of

Croatia: further requirements for accession have already been introduced such as cooperation with the ICTY and fight against corruption and organised crime. These norms are expected to tighten as the negotiations progress in the western Balkans. The enlargement scheme applied to Central and Eastern Europe needs revision in order to counter the new issues posed by the candidacy of Balkan states. Croatia is providing a demonstration *in vivo* of the potential of adaptation of the enlargement policies.

Path dependency led to the evolution of norms in the context of enlargement and distinguishes itself by the redefinition of norms and the instrumentalisation of conditionality.

As already mentioned, enlargement underwent a revolution with the introduction of conditionality and was no longer or to a lesser extent based on political considerations about regional identity or market proximity. Conditionality redefined the norms as exclusive and exclusionary. This normative instrument established criteria of eligibility for membership, gave a legal outer aspect to the accession negotiations by setting relatively clear benchmarks and procedure of accession. The difference with the use of conditionality lies in the underlying meaning of sending invitations and receiving applications for the same membership.

The potential for adaptation and flexibility of conditionality is the essential quality of this normative framework. Subsequently, these qualities enable the EU to keep its foreign policy in line with its internal policy and to adapt to the situation of the acceding country by emphasizing certain issues over others[66] , for instance democracy and the rule of law. Flexibility also enables the member states to impose unilateral conditions on the accession of specific states, adding thus to the corpus of EU norms and to customary enlargement law. Croatia experienced such modifications of the core conditionality by the member states with the border issues raised by

[66] Borzel and van Hullen, 2011, p.11.

Slovenia and its required active cooperation with the ICTY[67]. Hence, there is a general correlation between the precision of the EU law and the rise of expectations towards the candidates. The earlier example of the rule of law as a precondition for the CARDS[68] funds illustrates the tightening of EU's expectations concerning the candidate's abidance to EU law and norms. In addition, although Laïdi rests his argumentation on the attractiveness of the common market as a basis for norm formation and implementation, European membership involves many more duties than just economic restrictions and reaches out far beyond the economic sphere.

ii) Instrumentalisation of Conditionality

The instrumentalisation of conditionality is another main consequence of path dependent enlargement. Identification with European norms and professionalization of enlargement policy are the visible impacts of the systematic application of conditionality. Norms are studied in this paper as tools enhancing the EU's leverage inside or outside its borders; however, their importance in forming a basis for a substitute of European identity deserves some attention. Hence, internalisation of the European norms results from the customary enlargement practice consisting in the systematic application of norms onto the candidate states. The repetitive presence of norms in policy anchors their weight as a legitimate tool for policy making and instrument for the transformation of acceding states[69].

Conditionality would not be such a powerful normative tool without an adequate scheme of implementation. As a consequence, instrumentalisation is the most important aspect of

[67] Hillion. C., Graig& de Burca, 2011, pp. 200-3.
[68] Rossi &Panebianco, 2004, pp. 10.
[69] Hillion. C., Graig& de Burca, 2011, pp. 196.

conditionality, as it determines the efficiency and professionalism of the enlargement process and of the EU in the long-term.

Each enlargement brings its modification to the scheme. The last years have seen the establishment of stages of accession, the division of the *acquis* into chapters (addition of Chapter 23 on judicial affairs in 2005 designed for Croatian accession), the evolution of the criteria of evaluation and the overall increase of detail of the progress reports. Instrumentalisation enhances the credibility and the value of European membership in several ways. Tight control of the compliance of the candidate with the *acquis* guarantees the normative compatibility of the state with the existing setting of the EU and its ability to adapt to the evolution of the EU, hence curbing actively the concerns fuelling the enlargement fatigue among the older member states at the European Council level[70]. Furthermore, instrumentalisation provides an objective basis for determining the readiness of the candidate and accession is mostly based on technical compliance and achievements. The European Commission, with the approval of the European Council and to a lesser extent the European Parliament, can and has already exerted its power to postpone or refuse accession if these criteria are not completely fulfilled disregarding the calendar set for accession. Croatia's accession was forecasted for the end of 2010 and has been postponed to 2012 due to lasting deficiencies in the judiciary and remaining efforts needed for curbing corruption. The danger looming over this objective accession procedure lies in the lack of objectivity of assessment; the EC will have to be careful in maintaining a clear line of evaluation and to refrain from the use of double standards of norms implementation, risking otherwise, like the Bulgarian and Romanian examples demonstrate, to undermine the credibility of the union and the effectiveness of transformation[71].

[70] Kahn-Nisser, 2010, pp.3.
[71] Hillion. C., Graig& de Burca, 2011, pp. 195-6.

The evolution of the implementation of the *acquis* into a complicated scheme of accession had a positive effect on the bargaining power of the EC over the rest of the European institutions and the European Council in particular[72]. The EC became de facto responsible for the course of enlargement, as it guides, controls and supervises the implementation of conditionality. By acquiring control over conditionality, it has earned the licence to change the internal organisation of the candidate state and thanks to its normative supremacy to bypass state sovereignty. Such interference with state sovereignty was unthinkable before 2004.

Bulgarian and Romanian accessions attest the significance of conditionality in determining the readiness of the state to enter the union. As Trauner and this research argue, the CVM represents a prolongation of conditionality after accession and constitute a transitory phase between accession and full membership[73]. The constant monitoring since 2007, the prolongation of the CVM after the initial deadline in 2009 and its transformation into requirements for entering the Schengen zone have temporally placed Romania and Bulgaria in a zone of second class membership. The imposition of a transitory phase for these Member States means in effect the obligation to assist to the monitoring of their internal affairs by the Commission and the deprivation (though just formally) of enjoying the benefits of belonging to the Schengen zone.

The continuation between the instrumentalisation of conditionality and self-identification of the EU with the norms promulgated leads to the constant revision and reformulation of the EU norms. The consequent reliance on customary practice to direct enlargement and the expansion of the EU norms corpus qualifies the accession procedure as a process of acquisition of European membership. As the use of norms gains momentum in enlargement policy, the future

[72] Ibid.
[73] Trauner, 2009, p.2.

enlargements will be characterized by the construction of the meaning European membership[74], the Ariadne's thread of the accession negotiations.

iii) Power asymmetry, a European sword of Damocles

Two additional factors stemming from the analysis of Zielonka and Laïdi' works remain to be addressed in order to clarify the scope of action of the Commission in the administration of the Normative Empire: the double-edged sword of asymmetrical power relationship and state sovereignty.

Asymmetrical domination of the European institutions over the member states is inherent to the definition of empire. However, the two authors studied above associate the European quest for international leverage and domination of its neighbouring regions by relying on relationships' asymmetries with a dynamic of perpetual and fatal enlargement. This dynamic is reinforced by the decrease of supranational authority over the member states after accession strengthening thus inexorably the compulsion to seek leverage outside of the EU. This research argues the contrary.

It is unconceivable for an entity with such a sophisticated institutional structure to rely solely on its pre-accession leverage to sustain the functioning of the union in the long-term. Hence, the deterministic approach to EU's asymmetrical leverage used only in the enlargement settings is too narrow; instead, a relative decrease of authority of the European Commission over the member states due to a revival of sovereignty after accession is more appropriate to define the power relations within the EU.

Norms play an essential role in establishing a hierarchical order between the EU and its constituent members. The redefinition of norms in narrower forms aims at professionalizing the

[74] Kahn-Nisser, 2010, p.3.

enlargement process and securing the candidate's readiness for accession. The increasing influence of norms on the accession negotiations sets precedence for their implication in the regulation of European affairs after accession. As a result, the quality of preparation of the acceding state and the successful implementation of the *acquis* in full will determine the efficiency of the administration of the EU based on shared norms.

The present work leaves room for further research and will not explore the following hypothesis in the limits of this study: it is believed that the role of the Commission as a main checking body for compliance with the common norms will increase with the reliance on normative power. Consequently, norms constitute an area over which the Commission will enjoy full legitimate power of action and will increase its power to penetrate in the states' affairs. Subsequently, as the internal organisation of the union will revolve around core norms, the union will cease to seek the expansion of its leverage abroad and will reassert its international leverage by focusing its normative power on building a normatively uniform internal administration. The EU will gain in credibility by strengthening its internal normative basis and by securing its borders. Only then the EU will be able to influence effectively its outer sphere of influence and the international arena.

iv) The decay of state sovereignty

State sovereignty is the last bastion against the domination of the European bodies over the member states: Zielonka's blurred frontier between the core and the periphery fosters the influence of the states at the EU level and qualify the core as a provider rather than as an exploiter. Laïdi maintains state sovereignty and argues that norms are used to achieve internal

changes without eroding sovereignty. Both authors underline thus state sovereignty as the only feature of the European empire that remains unchanged despite the evolution of the union.

The Normative Empire in this paper is based on the opinion that norms contribute to the willing erosion of state sovereignty and to the construction of an expanding normative platform of shared domination. Norms form a grey zone between supranational and national governance, to which the state has devolved its sovereign power of exclusive control. The EU is thus empowered to interfere, regulate and judge the areas concerned with the application of European norms. As mentioned previously, the multiplication of European norms expands the size of this common platform and has an exponential effect on the leverage of the EU over the member states. This intensification of the power relations do not induce a direct infringement of state sovereignty but sets the Commission, creator and guardian of norms, as the main dominant player. The imposition of conditionality reinforces this tendency among new member states and leads to a greater erosion of state sovereignty in favour of the Commission during the accession negotiations, which is likely to retain a central place after accession.

In line with the theoretical set-up of the Normative Empire, the Commission is believed to develop its platform for action and inference in state governance by relying on a broadly stretched definition of conditionality. As already mentioned, conditionality contributes to the bulk of European norms, which are then transposable to the post-accession phase and directly applicable to the member states. The Commission is thus expected to get more actively involved in the protection of norms in current and prospective member states and to monitor subsequent reforms by issuing normative recommendations to the states and state institutions.

c. Foreword to the findings

The concept of Normative Empire can only acquire conclusive credibility if tested against tangible facts; this research will thus answer to the question why the increasingly significant role of the independence of the judiciary in conditionality contributed to the transformation of the EU into a Normative Empire. The demonstration of such a transformation will retain influential consequences for the conduct of future enlargements and subsequently for the management of the EU as a whole. It will buttress the Commission's normative power as an administrator of the union endowed with direct legitimate leverage in state governance.

In line with the theoretical framework outlined above, the analysis will verify the subsequent hypothesis: the transposition of norms from the pre to the post-accession phase will lead the EC to enlarge and to administer the EU through the systematic use of norms. The Commission will respond to the lack of observance of European norms in current and prospective member states by enacting narrower normative definitions of the core European principles and will thus extend its scope of intervention in state governance in its capacity of guardian of European law. The Commission is currently split between its function of mediator calling for the instauration of common norms and its increasingly prominent role of administrator monitoring the observance of these norms in the states facing difficulties of implementation. The idea of administrator frustrates the enshrined intergovermentalist conviction of non-intervention from EU instances in states' affairs. Conversely, norms call for uniform application and compliance, therefore solving the dilemma in favour of the domination of the Commission over normative matters in the member states after accession. As a consequence, the elaboration of European norms resulting from the convergence of the pre and post-accession

phases will promulgate a change in the dynamic of the relations between the EC and the member states towards the uncontested dominance of the Commission over norm-specific areas.

The methodology draws upon an extensive analysis of the reports of the Cooperation and Verification Mechanism and the progress reports published by the European Commission. This reasoning will show the evolution of the normative leverage of the EU over two consecutive phases of enlargement and after accession. It will also shed light on the determinant role of the Commission in implementing and using norms as a main vector for policy-making. Henceforth, the conduct of the researches investigated the evidences supporting the existence of a European Normative Empire as well as its inward and outward perspective along the division enlargement and administration.

The study cases of Bulgaria, Romania and Croatia are acute for the demonstration of the evolution of conditionality and the increasing role of the Commission in imposing reforms in the pre and post-accession period. Romania and Bulgaria are the newest member states and consequently, account for the latest evolutionary changes in conditionality. Surprisingly, these two member states are amongst the rare members to have adopted formally the entire corpus of EU law. Romania attributes more value to European laws considering them of better quality than the ones presented by the Romanian parliament, whereas Bulgaria approaches the transposition of European laws into the domestic legal system as accelerating its full integration in the EU[75]. However, EU law is poorly enforced in both countries due to the deficiencies of the judicial systems[76].

These elements must be studied in line with the ongoing accession negotiations in Croatia as together they draw a picture of systematic use and reliance on conditionality in the

[75] Trauner, 2009, pp.8.
[76] Ibid. pp.7.

enlargement process. In addition to their geographical kinship, these three cases share issues of rampant corruption, notably in the political and judicial structures, remaining the main obstacles to their accession or full membership. Consequently, one the most privileged strategies adopted by the Commission to curb this problem consists in guaranteeing the independence of the judiciary and by enabling it with the sufficient capabilities and powers to check on the branches of power and the societal strata. Hence, studying the place dedicated to the independence of judiciary in the application of conditionality and during the accession negotiations/once in the union becomes a natural component aspect of the relations between Bulgaria, Romania, Croatia and the EU.

With regards to the methodology, this research aims at demonstrating the role of norms in administrating and enlarging the EU by studying the progress reports and the Cooperation and Verification Mechanism reports. The CVM is an instrument that has been added as part of the obligations for Romania and Bulgaria in the early years of membership. This instrument aims at remedying and monitoring the judicial reforms in these states and thus to compensate for the lack of readiness at the time of accession. The CVM reports are designed and enforced by the Commission in order to monitor the reform of the judiciary in these two member states and take into account the differences in the respective national institutional structures. The Commission assesses by means of these reports the progress in reforming law enforcement structures since accession[77].

For the purpose of this study, only the progress reports from 2004 onwards for Bulgaria and Romania have been studied in order to focus more specifically on the pre-accession achievements and shortcomings (of the state and of the Commission) in judicial matters. Conversely, it has used all the reports published for Croatia since the official opening of

[77] Ibid., pp.9

accession negotiations in 2005. In addition, the compilation of the progress reports ensued from the evolution of the progress reports for Romania and Bulgaria to the edition and expansion of the CVM have been analysed. Progress reports and CVMs share striking common features and coordinated pace of reforms, which gives way to shaping a European judicial model. Furthermore, although the CVM and the progress reports are drafted and compiled by different secretariats --General and Enlargement--, there exists a dynamic link between these two sets of reports and the CVM exerts some influence on the pace and tone of the negotiations with Croatia.

Official documents show the way European policy is drafted and meant to be implemented; they give thus a global understanding of the underlying obligations of membership. Consequently, the meaning of the common values is determined by the consistency of the development over time of policy. The Commission's reports provide comparable and objective material that decides the progress of the candidates towards the completion of EU standards, the internalisation of founding values and the final reward of membership[78]. The formulation of policy prevails here over the actual success of transformation of the judiciary.

The second section of this work has proposed a revised version of the concept of the Normative Empire inspired from earlier findings and theories of Zielonka and Laïdi and addressed the shortcomings of the aforementioned works. It has also aimed at exploring the inward and outward scopes of normative power by interpreting further the administrating and enlarging aspects of the EU. The key role of the Commission and its relations with norms and

[78] Khan-Nisser, 2010, pp.5-6, 14, 35-6.

conditionality constitute a significant addition to the literature and the revolving centre for the Normative Empire.

Part III. Building an Independent Judiciary in the Candidates and the Member States

This third chapter is the core of this research and the basis for the above theories. This section will demonstrate the process of metamorphosis of the EU into a Normative Empire and how the present situation in Bulgaria, Croatia and Romania reflects the importance of this concept in real settings. The study will focus on the building of an independent judiciary in order to expose the different sources of leverage and degrees of authority of the Normative Empire in the pre and post-accession phases. The chapter's argumentation will be divided in three subsections. The first subsection will introduce the evolution of the independence of the judiciary in European norms over the years by addressing the reformulation and sophistication of European standards in this matter and by investigating the evolutionary link between the CVM in Bulgaria and Romania with the accession negotiations with Croatia. The second sub-part will investigate the process of instrumentalisation of conditionality and will examine the incremental changes in the implementation of conditionality and the detail of the recommendations. The last section will assess the success of the parallel strategies (enlarging and administrating) to carry out fundamental changes towards an independent judiciary. It will compare the results achieved in Bulgaria, Romania and Croatia individually. This final analysis will rest on the relative successes and shortcoming of the reforms as well as their pace.

1) The Independence of the Judiciary in EU Law

European law borrows heavily from International Law principles, as defined under the diverse UN criteria, the Council of Europe and case law of the ECHR[79]. As a consequence, there are no clear definitions in EU law of the principles that are considered universally applicable. This is the case of the independence of the judiciary, a recognised essential attribute of a functioning legal system and of the separation of powers. However, implementation and customary practice is another source of definition and is better applicable to the case of European law. The independence of the judiciary in EU enlargement law is the product of incremental changes in accession negotiations and the redefinition of the focus of reforms necessary for European membership.

a. A newly born European Norm

i) The Independence of the Judiciary

The independence of the judiciary is not mentioned explicitly in any of the founding treaties but remains nonetheless anchored amongst the key European principles that member states and candidates to European membership must abide to in order to integrate the EU.

This principle originates in the spirit of the rule of law; both principles converge towards the liberation of the judges to make their decision based on facts and law, the application of law upon all and the power to check upon the executive and legislature[80]. The rule of law is a

[79] Kochenov, 2008, pp. 101.
[80] Prefontaine and Lee, 1998, pp. 2.

guarantee of freedom for all[81] since it constrains any exercise of power to conform to Law and thus suppresses arbitrary rule. According to Dicey, the rule of law bears the subsequent features: supremacy of the Law over arbitrary power, equality before the Law with disregard to class or social distinctions, application of individual rights as stated in the constitutions[82].

Consequently, an independent judiciary is the mark of a healthy political system enjoying full separation of powers and a functioning society. For this purpose, the judiciary must be supported formally and socially. The legal system must be enabled with the consequent power and means to perform its duties in the official documents and by the executive. It must also enjoy public confidence in the fairness of its judgements. Moreover, the independence of the judiciary stresses one of the core principles of the EU: the separation of power or *Trias Politicas*. This precept is a symbol of the democratic inheritance of the EU[83] and further raises the expectations concerning the set-up of the state to become a member state.

As the EU was moving eastward and as the pre-accession reforms needed depth, the independence of the judiciary became an inherent principle of conditionality and arose as a matter of priority in the judicial reforms during the last and present enlargements[84]. After the fall of Communism, the judiciary in Central and most particularly in Eastern and South-Eastern Europe was heavily damaged by corrupted practices decupled by the lack of means allocated to the judiciary. Establishing independent judiciaries became a mean to remedy to the spread of crime and corruption from the eastern borders and stimulated the democratisation process[85]. Strengthening the judiciary on the periphery is the only mean at hand to maintain the internal stability of the EU. The independence of the judiciary plays an important role in the existence of

[81] Hayek in Kochenov, 2008, pp. 98
[82] Kochenov, 2008, pp. 100.
[83] Kochenov Dimitry, 2005, p.3.
[84] Shimmelfennig, 2008, pp. 926.
[85] Kochenov, D., 2008, p. 53.

a functioning union by curbing corruption, allowing the prosecution of criminal organisation, and increasing public trust in the governments and the EU as a whole.

ii) Towards a European norm

Enlargement in the Normative Empire is understood as the development and application of common norms onto candidate states. In addition, enlargement has a retroactive effect on European norms: the process of accession isolates the lacunae of the candidates in the different policy sectors and hence helps towards the expansion and adjustment of EU law in the lacking areas. Enlargement gives thus the opportunity to the Commission to redefine European common norms and to adapt to the plurality of composition of the member states. The fact that the principle of independence was put at the forefront of the negotiations translates the Commission's concerns with the fight against corruption, as this issue gained momentum with the 2007 accession.

The prevalence of the rule of law among the European norms appeared for the first time in the Maastricht treaty under the Article 237 before being transposed as criterion for accession in the Copenhagen criteria[86]. The independence of the judiciary became a criterion of its own in 2005 with the opening of the negotiations with Croatia. This underlines the concern of the EU raised by the dysfunctional judiciaries in Central and Eastern Europe at that time. The absence of/flawed independent judiciary in post-communist societies pushed the Commission to develop a reform strategy that would enable the implementation of an overarching structure for the judiciary to become more efficient and independent.

[86] Kochenov, 2008, pp. 33, 104.

Kochenov in his critique of conditionality denounces the lack of guidance or common European model in conditionality. The lack of clear interpretation of the treaties and set criteria[87] increases the discretionary power of the member states and leads to a lowering of the quality of the European medium standards rather than to the creation of a union composed of heterogeneous members yet compatible with one another[88]. Nevertheless, although Konechov's work represents an extensive and recent study of conditionality, it ignores the recent enrichment of conditionality and the most recent enlargement negotiations with Croatia. The study was published in 2008 and remained on the bitter European failure to reform Bulgaria and Romania before their accession or rather their success in entering the union without having completed the Copenhagen criteria. Kochenov could not have taken into account the progress made by these two member states under the CVM and the subsequent adaptation of conditionality to Croatia.

The EU sets its criteria for judicial independence based on core principles retrieved from international and national law. Attention is particularly devoted to the security of the tenure, financial security of the judiciary, administrative independence notably of the Prosecutor's office[89], appointment of the judges by whom and based on what qualifications, duration of terms of office and the conditions for promotion, transfer, cessation of functions. As Kochenov points out, the Commission aimed at implementing the principle of meritocracy in the legal system, as a basis for an independent judiciary[90]. He mentioned three additional safeguards for the appointment of judges advocated by Kruijer and encouraged by the Commission: the implication of a third party such as a self-governing institution in the appointment process, the strict maintenance of objective criteria of selection and the addition of a special safeguard such as

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[87] Ibid., pp. 257.
[88] Grzymala-Busse Anna, 'Post-Communist Competition and State Development', working paper, Program on Central and Eastern Europea, 59, 2004, pp.3.
[89] Justice Ledain, Prefontaine, Lee, 1998, pp.4.
[90] Kochenov, D., 2008, p. 271.

status in order to guarantee the independence of the appointees[91]. The aforementioned criteria for independence aim at distancing the judiciary from the executive and at extracting as much power and self-sufficiency as possible from the other branches. This distrust of the executive is characteristic of the eastern enlargements, since the EU conveyed traditionally her directives through the executive, using it as a vector for reforms. As a consequence, in spite of the fact that the judiciary is appointed by the executive in most countries, this is seen as counter-productive in Central and Eastern Europe and undermining the establishment of an independent judiciary in these member states as a result of the politico-historical reasoning adopted by the Commission[92].

b. Elaboration and Formulation of European Standards of Independence of Judiciary

i) Sophistication of the Independence of the Judiciary in the Benchmarks

The importance of the principle of independence and the sophistication of this principle over time is better grasped when retracing chronologically the expansion of the space devoted to it in the reports.

The independence of judiciary was covered by the criterion of the rule of law in the Copenhagen criteria. The section dedicated to the political criterion as mentioned above carried the most weight from a normative perspective and it is under this heading that the rule of law was covered in a meagre subsection dedicated to the judicial system[93]. The independence of the judiciary was briefly referred to or implied until 2005. The subpart on the judicial system covered a total of two pages and an additional one on the fight against corruption in 2005. The maximum space reported for Bulgaria and Romania amounted to a total of five pages.

[91] Kochenov, 2008, pp. 271.
[92] Ibid., pp. 273.
[93] Kochenov,D., 2008, p. 87.

Conversely in 2005, Croatia's first progress report was organised differently and an inclusion of chapter 23 for judicial matter and fundamental rights was added to the assessment provided under the political criterion. A larger section was devoted to the independence of the judiciary, covered now in a separate section. The devoted space amounted to eight pages in total. A total of eleven to fifteen pages dedicated to the judicial system, its independence and to the fight against corruption is visually more impressive than three pages for the precedent enlargement.

The Cooperation and Verification Mechanism is entirely devoted to building an independent judiciary and translates concerns for the judiciary that never occurred outside twining projects for the previous enlargements. The CVM changed over time in line with the evolution of the progress reports. The first reports issued in 2007 were solid documents of twenty-five pages isolating the main issues to solve. In 2008, memos and technical updates were added to the reports. The technical updates provide detailed quantitative information about the reform which are then analysed in the reports. This year also presented an overview of the financial tools at hand and the amount allocated for specific reforms under each benchmark. There has been no further mention of the financial structure of the CVM in the other reports, which does not undermine their validity over time. 2009 and 2010 saw an acceleration in the monitoring of the CVM, reports and related documents were produced on a biannual frequency. Each report's length varied between seven and ten pages and provided an analytical synthesis of the technical updates, varying between seventeen and twenty pages. This normative instrument marked the devotion of unprecedented attention to the independence of the judiciary and the strong will of the Commission to complete this project.

Claims of sophistication of European norms are paradoxical and contradict the absence of European model often criticised in the literature. An immediate approach of the Copenhagen

criteria and the successful accession of Bulgaria and Romania with impaired judiciaries would underline rather the flexibility of the accession criteria, the vagueness of the treaties and the lack of systematic supervision of the accession negotiations[94]. However, the essence of enlargement and European norms does not lie in the formal appearance of the treaties but in their customary implementation. As a consequence, the nature of the accession negotiations is not static and enlargement broadens the horizons of issues the EU deals with[95]. As a result, the redefinition of the rule of law criterion set the independence of the judiciary as a priority under the political criterion[96].

Paradoxically, leniency and strictness qualify Bulgarian and Romanian accessions: the tolerated infringements to the Copenhagen criteria were soon followed by an unprecedented monitoring and the penetration of the Commission into state affairs with the CVM. Implementation of *acquis* is at the heart of the CVM, because the mere formal transposition of EU law to these member states had no effect on the lack of independence from the executive in Romania and the politicisation, the involvement in domestic politics and lack of accountability of the judiciary in Bulgaria[97].

The CVM is designed differently for each state and is adapted to the pre-accession situations; in Romania it aims at curbing corruption and in Bulgaria organised crime and corruption. The benchmarks are adapted to the different judicial systems and the various shortcomings at different stages.

Nevertheless, a preliminary examination of the CVM made possible to retrieve the dominant features of the two sets and to formulate the key criteria used by the Commission for

[94] Kochenov, 2008, pp.310 and 2005, pp.22.
[95] Kochenov, 2005, pp.24 and Kahn-Nisser, 2010, pp. 29.
[96] Kahn-Nisser, 2010, pp. 34.
[97] Trauner, 2009, pp.2, 7-8.

the assessment of the independence of the judiciary and the judicial system as a whole. The benchmarks tally on the following points. Independence and accountability of the judiciary is restated, implying legislative and financial independence from the executive and accountability to a third party such as a self-governing judicial institution responsible for the controlling the state of judicial proceedings. The latter is supported by more transparency and efficiency of the judicial system with a reinforcement of systematic internal inspections. A recurrent point in the reports is the lack of full-time trained inspectors that would maintain the system clean from corrupted practices. Realistic staffing models are essential in guaranteeing the functioning of the judiciary and preventing case overload of the courts. In both member states, too many positions for administrative staff, judicial advisors, prosecutors and judges are left vacant leading to a delay in judicial practices and encouraging the trade of influence. As important as the staff figures, financial autonomy and necessary means are essential to ensure the development of the judicial institutions: among which academic training and an inspectorate. Great breakthrough in both states has been the drafting of budget for the judiciary by judicial bodies (Supreme Judicial Council in Bulgaria and Supreme Council of Magistracy in Romania). Reporting on the monitoring and the results of the implementation of the legislation encourages the judiciary to take an active stance in the reform process alongside the Commission and later individually after completion of the CVM. The publication of evaluation of the reforms and track records of investigations encourages transparent practices in the system and fosters public trust in judiciary. The introduction of a code of ethics for judges and prosecutors represent formal guidelines judicial staff should abide to. Here again the discrepancy between formal application and implementation has been underlined by the Commission that denounces the lack of supervising mechanism and sanction in case of breach of ethics. Integrity agencies are a pure product from

the Commission designed for the eastern enlargements: these institutions aim at controlling conflict of influence and curbing corruption among judicial staff and political personalities. In Romania, the main issue is presently the veto by the parliament and the active legislative attack towards the integrity agency that proposes to review financial assets acquired by MP's during their term of office. On the same line, bodies in charge of the fight against corruption must be empowered and their action coordinated and followed by the judiciary. Anti-corruption bodies/agencies translate the adaption of European policy to national issues, as these bodies have not been required to such an extent anywhere before the implementation of the CVM. Fight against corruption must be supported by initiatives and measures at the local level. EU's leverage does not go as far as regulating sub-territorial strata but the EU is active through a remote monitoring nonetheless. The final core feature of the CVM touches upon the European character of the reforms and call for the implication of the other Member States in the reform process, fostering thus legal harmonisation within the union and inter-state cooperation.

As a result, the benchmarks, disregarding the monitoring of the reforms itself, move away from the conventional normative statements in the Copenhagen criteria and instead formulate relatively practical guidelines for reforming the judiciary. On a side note, the guidelines under the 'Guide to the main administrative structures for implementing the *acquis'* only focus on the implementation of the *acquis*, whereas the CVM aims at reforming the institutional structure.

Subsequent strengthening of the rules in Bulgaria and Romania is visible in the case of Croatia where the Commission focuses on judicial reforms and building independence in order to curb effectively the rampant corruption.

ii) CVM and Conditionality in Croatia

There exist obvious parallels between the CVM and the progress reports for Croatia. As the Commission was drafting the CVM, it seems that it adapted its strategy for Croatian accession in order to avoid repeating the same mistakes. As early as 2005, a new chapter was added to the progress reports, turning thus the focus of the negotiations around judicial matters, inasmuch Croatia faces a concentration of power in the hands of the executive[98]. Chapter 23 in the progress reports already encompassed several features of the CVM benchmarks launched in 2007. These two monitoring systems should be understood as intertwined rather than one preceding the other. As a consequence, the articulation of the chapter 23 evolved with the implementation of the CVM and at the same pace as the changes operated in its benchmarks over time.

In a chronological order, the progress report in 2005 concentrated on the independence and impartiality of the judiciary, the quality and efficiency of the judiciary, the access to the judiciary and legal guarantee and the implementation of anti-corruption measures. In 2007, the scope of focus increased and included professionalism, judicial reforms and expanded anti-corruption policy. The report fell in line with the monitoring of the CVM. The convergence between the two instruments reached its peak in 2009 with the addition to the already existing categories on independence, impartiality, professionalism and competency, subsections on the quality of the infrastructure and the equipment and inspections of the judiciary and the reform strategy. The two sets came to cover approximately the same issues and to encourage reforms similar in content. Two additional subparts gave some national flavour to the report and concerned the rationalisation of the court networks and the revision of the judicial codes.

The constant increase in depth and breadth of the monitoring of norms and EU principles in the reports brings stability and certainty to the enlargement process and ensures accession

[98] Bugajski, 2001, pp. 24.

once these benchmarks will be fulfilled, eroding the influence of the member states on the process of enlargement[99].

2) Instrumentalisation of Conditionality: Norms and Monitoring Recommendations

Conditionality refers essentially to the pressures for reform preceding accession. However, the CVM altered this definition and extended conditionality to after accession. The extension of conditionality originates in the lack of pre-accession reforms and are characterised by the exclusive power of the Commission to supervise the judicial reforms in these states[100]. In addition, the CVM is enacted after the spirit of the Copenhagen criteria and thus demarcates Bulgaria and Romania from the rest of the community, relegating them to the status of secondary member states or in a transitory category between candidacy and full-fledged membership.

The growing bulk of European norms does not only demonstrate the efforts by the EU to define its core principles but also implies the subsequent increase of the leverage of the Commission with their instrumentalisation. With regards to the latter, the instrumentalisation of conditionality refers to the systematic application and monitoring of the Copenhagen related norms, whereas instrumentalisation of norms defines the mode of governance applied on the member states upon accession. The following analysis is based on a thorough examination of the reports and the main arguments have been compiled in a working document attached in the annex. Due to the difficulty to refer to each report in the text, the facts mentioned below can be found in these tables. In addition, these were assembled for personal use only and analysis of the topic and therefore cannot be used in further work.

[99] Hillion. In C., Graig& de Burca, 2011, pp.202.
[100] Trauner, 2009, pp. 3, 7.

a. Addressees and legalistic dialogues

Politicisation of the accession negotiations have plagued the enlargement policy with an image of political favouritism prevailing over long-term strategic considerations for the functioning of the EU as a coherent whole. Instrumentalisation of conditionality refutes this idea and promulgates the conclusion of the negotiations on a legalistic basis, criteria becoming part of European law taking precedence over political arguments.

i) New partners in communication

The immediate visible sign of instrumentalisation is the increase of leverage of the Commission in areas and over institutions under state governance. Key institutions and defined state organs became the new addressees of the Commission's recommendations. In parallel, previous negotiations were rather characterised by the absence of interlocutor in the reports. The name of the state acceding constituted the only reference distinguishing the reports from one to the other. The Commission was thus not supervising directly the reform process in the candidate states and relied to a large extent on the reports compiled by the state on the progress of the reforms, discrediting its judgement on the actual readiness of any state to enter the union. In addition, this was inevitably accompanied with a concentration by the Commission's pressure on the executive to implement the recommendations and inexorably in an imbalance in domestic politics in favour of the executive.

The latest reports point out a diversification of the interlocutors addressed in the progress reports, most notably specific institutions responsible for reforming or in charge of a distinct section of the judiciary. The example of the reform of the judiciary demonstrates the inapplicability of sole reliance on the executive for carrying the reforms, as the essence of an

independent judiciary aims at distancing the two branches one from the other and not to empower the executive vis-a-vis the judiciary. This logic only appeared after the inadequacy of the judicial reforms in Romania and Bulgaria became obvious and their accession with flawed systems was confirmed.

The progress reports of 2005 mark a turning point in the matter of addressees. Some precursory steps were taken with Bulgaria and Romania before being fully developed with Croatia. The progress report for Bulgaria for the first time associated the main issues with a responsible institution whereas the report for Romania restated the structure of the judicial system in a descriptive optic and with no relations with any particular issues faced by the judiciary. In comparison, Croatia's first report not only defined the structure of the judicial system and the relations between the different bodies but also determined the main issues faced by Croatia especially with regards to corruption and the lack of independence of the judiciary, additionally, associated them with the respective judicial institutions and defined the area under their responsibility to be reformed. Specific institutions became thus the direct addressees of the Commission during the accession negotiations. The Commission still held accountable the executive --the Ministry of Justice-- for discrepancies in the results of the reforms but also directly instructed institutions such as the State Judicial Council, the Prosecutor's office, Committee for Prevention of Conflict of Interest (Integrity Agency), National Council for Anti-Corruption and the Judicial Academy.

The benchmarks for the CVM followed the same pattern of division of the dialogue. They are divided along set goals, core related issues and concordant institutions. The benchmarks for Romania are more targeted in general, as the second and third points concern

directly two specific institutions -- ANI (Integrity Agency) and DNA (Directorate for the fight against corruption) -- instead of specific issues.

As a consequence, the Commission adopted an active stance on the conduct of reforms by recommending, assessing and imposing tasks onto specific state institutions. Infiltration of the Commission in the governance of the state was never performed before Croatia's candidacy and the accession of Bulgaria and Romania. Pre-accession leverage of the EC reached a level never achieved before and set the Commission as the only dominant player in the negotiations. The Commission enjoys a much lesser enviable position in the CVM, as the power asymmetry characteristic to the pre-accession phase disappeared with the grant of membership and inasmuch as the association of the CVM with access to the Schengen zone is only a very recent matter. In addition, the interference of the EC in the state affairs is a lot more predominant in Bulgaria and Romania and directly constrains state sovereignty. The only possible explanation for the relative cooperation of the states with the CVM lies in the Commission's role of norms provider and protector. This status grants the EC legitimacy of action as a result of to the prevalence of European norms over state sovereignty.

ii) Political Vs Legal Documents

Rumours of Bulgaria and Romania entering the EU due to political considerations revived the ghosts of state control over accession. Furthermore, progress reports tend to be suspected of furthering the politicisation of the accession negotiations, as progress used to be determined on the basis of the pledges of the candidates states and the national analysis of the

reforms. Hence, it is presumed that the progress reports for Croatia would be more politically oriented than the CVM that deals directly with the obedience of the reforms with European norms.

After examination of the reports, the opposite trend became apparent and the years 2007, and most particularly 2009 and 2010 demonstrate the resurgence of a legalistic discourse in both the progress reports and the CVM. It is difficult in general to distinguish political arguments from the formal writing style of the reports and thus to categorise legal and political arguments. The distinction between political and legal arguments was based upon the sources of the reports, the addressees of the Commission's remarks, the place and the attitude of the EC towards the executive.

The progress reports of 2007 and 2008 contain mostly legal recommendations and focused on the issues at hand. The political touches that have been denoted did not refer to the accession of Croatia. Instead political pressures were directed at the conduct of domestic politics in order to stress the urgency of the pre-accession adjustments. The Commission intervened in the regulation of the relations between the executive and the State Judicial Council -- SJC -- constituting a direct interference with state governance. 2009 was a crucial year in all reports and was accompanied with a severe assessment of the reforms and a strengthening of the recommendations. Political condemnations accumulated against the states' political authorities that were called upon by the Commission to refrain from intervening in judicial matters in Croatia and to cooperate more actively in the case of Bulgaria and Romania.

Moreover, in both cases, the second set of CVM reports placed more severe remarks towards the political sphere. Subsequently, the first set called for more dedication from the Bulgarian judiciary and executive to carry out the necessary reforms. In Romania, the political

message spread was more scathing and called for political consensus over lasting issues such as the formulation of the Criminal and Civil Codes, political cooperation with ANI --recommendation directed especially to the parliament--, refrains from interfering and pressuring the DNA and condemnation of the initiatives taken by the parliament to modify the nomination procedure for the Chief Prosecutor. These remarks warned against Romania's breach of obligations towards the European community at large. The second set followed suit on this tone: Bulgarian parliament attitude was condemned for blocking the introduction of legislations enabling the check of assets of civil servants in the context of the exercise of their functions and the Commission further criticised the adoption of recent changes in the legislation by the government, underlying that these were in contradiction with the commitment of Bulgaria towards the EU. The commission emphasized that establishing an independent judiciary should be the main goal for policy formation and that adhering to the CVM only provided a guiding path; hence cooperation between political and judicial actors as well as stronger commitment to the reforms and the refrain from the executive from adopting contradictory legislation were necessary steps towards guaranteeing the independence of the judiciary after termination of the CVM.

If the Commission incriminated the executive in the Bulgarian case, it targeted Romanian political party politics and parliament for its attacks. The main threat to the independence of the judiciary in Romania originates from the politicisation of the judiciary by the parliament. The Commission thus called for an unequivocal commitment of the parties to the fight of high-level corruption and consistency in the legislative process accompanying the reform of the judiciary.

The reports of 2010 mark an overturn in the presumptions: the progress reports reinforced its legal optic while the reports for the CVM kept their political added value. The progress report

retraced principally the various achievements and shortcomings of the reforms carried out by the different institutions and did not address any political body or the state. This report is considered to be more legally oriented because the recommendations and assessment of the Commission chiefly addressed the results of the reforms and to a lesser extent their conduct. Conversely, the CVM reports fell under the political category due to the extent the Commission interfered with the state's internal politics, and most prominently in Romania. The latest CVM report at the time of the writing, dating from Autumn 2010, applauded the commitment of the executive to the reforms while emitting some reserves about the efforts of the judiciary to implement the aforementioned reworking of the legislation on the ground. The Commission was here primarily concerned with the internal politics of the judiciary and its relations with the executive rather than the reorganisation of the institutional framework.

The political scope of the CVM is more obvious in the Romanian case, as the Commission went even as far as examining and condemning specific legislation adopted by the parliament. The second report condemned the law passed on ANI that blocks in effect the development and activity of the integrity agency. ANI's legislation established a framework enabling the check on the state actors' financial assets and laid down the legislation for their confiscation in case of discordance with the declaration and the imposition of appropriate sanctions. As a consequence, the EC reiterated its call for political commitment and cooperation between the judiciary and the political actors, here the parliament.

As a result, the CVM was established on a legal basis as a continuity of conditionality and demonstrated over time high political value by interfering in the conduct of domestic politics. The Commission's political claims are legitimized by the authority endowed by its role of norms protector. The resulting bypassing of state sovereignty by the CVM and during pre-accession

negotiations (on the basis of the Copenhagen criteria) feed into the idea exploited in this study about the increasing leverage of the Commission and subsequent interference of the Normative Empire at the sub-state level. The Copenhagen criteria have thus far reaching consequences on the gradual erosion of sovereignty.

b. Adaptation of the Recommendations to the Recurrence of the Issues

Another major aspect of instrumentalisation of conditionality is the evolution and adaptation of the recommendations to address new issues but also to remedy to recurrent and long-lasting imperfections. The similarities between dysfunctions affecting Croatian, Bulgarian and Romanian judiciaries influenced the Commission to adopt a single strategy for both the CVM and the accession negotiations.

i) Consistent monitoring

An inherent strength of the reports is their consistency of analysis over time thanks to which it is possible to retrace the recurrence of certain issues chronologically and to draw parallels between related problems in different documents. For instance, the benchmarks for the CVM were set with regards to problems recurring before accession such as the shortage of staffing, the lack of professionalism, the inadequacy of infrastructures, the lack of accountability and transparency of judicial practices, the inefficiency and insufficiency of the prosecution of high level corruption and the general lack of independence for the judiciary.

The benchmarks could be criticised for constraining the adjustment of the Commission's strategy to respond effectively to unsuspected issues. The fixed nature of the benchmarks and their subparts could then favour consistent analysis of the reforms at the expense of address the evolution of the judiciary. Nevertheless, this reasoning is erroneous. Flexibility of observation is guaranteed with the Technical Updates. Their subsequent analysis, which is always done with reference to the original benchmarks, extrapolates the investigations and the scope of the recommendations. The formulation of the recommendations perpetrates the continuity of the observations and existing pressures from the previous reports.

The progress reports for Croatia respect the same consistency over time outlined for the CVM and isolate the recurrent issues determining the direction of the reform strategy. Croatia is thus criticised for the lack of transparency of its appointment procedure, the promotion and transfer of judges and prosecutors and the standards for judicial trainees, the lack of adequate training for judges, prosecutors and judicial advisors, politicisation of the system, a lack of understanding of the term conflict of interest, the lack of impartiality in prosecution of war criminals and focuses on the good functioning of the integrity agency and USKOK (the organ in charge of the fight against corruption). The organisation of the reports revolves around these core themes and in 2009 they were classified under separate sub-categories. As a result, the constant effort to match the scope of the issues faced by the candidate contributes to a deepening of the reporting mechanism.

Moreover, although no direct cross-reference between the CVM and the accession of Croatia exists, the similarities between the reporting and the nature of the issues investigated is unmistakable. Hence, while taking into account the variation in scope due to national

particularities, the common focus of the Commission's reporting contributes towards a definition for the EU of the core features of an independent judiciary.

ii) Recommendations and the evolution of European norms

The recommendations are the keystone of the instrumentalisation of conditionality since they guide the future path of the reforms and since their main function is to digest the European norms into applicable measures.

Diplomatic writing style and political correctness make the strict categorisation of the recommendations a difficult task. Subsequently, this study looked into different aspects of the recommendations in order to grasp their intended effect and explain the variations in achievements. The Commission's arguments have been studied under the lenses of normative weight, tone, burden of change and the European-domestic spectrum.

The normative weight of the recommendation is the most salient aspect, because it shows the ability or incapability of the Commission to formulate clear guidelines that will promulgate the implementation of European norms.

The initial division of norms in normative and practical categories revealed to be unsatisfying due to the lack of clarity of the texts and left out a majority of the hidden recommendations. The hidden recommendations appear quite easily to a logical mind reading the reports, but remain implied and difficult to place in either category. The normative category encompasses normative statements restating European norms and principles without giving further guidance as how to transform these norms into reality. Conversely, practical recommendations appear to be too restrictive and would imply the existence of European models

as for instance of independent judiciary and would provide the candidate state with a set of strict criteria and rules to comply with. Yet, there is no such thing as a determined European model due to the diversity of judicial systems in Europe and to the reluctance of the member states to sacrifice sovereignty and accept such a level of harmonization.

The categorisation of recommendations along a normative-practical scale opened more possibilities. Consequently, semi-normative recommendations represent a majority of the instructions found in the reports. This type of guidance combines normative formulation with further explanation for implementation, most often with regards to a specific institution or describing the relations between the institution and the political sphere to be achieved. However, the suggestions do not go as far as giving precise numbers or detailed recipes for a successful implementation. This attitude may have negative impact on the conduct of the reforms and may encourage discretionary formal implementation of the Commission's recommendations. Nevertheless, vagueness must also remain an inherent feature of the instructions in order to maintain the necessary feeling of state sovereignty over the reform process and to guarantee the capability of the state to ensure the functioning of its judicial system after the end of the CVM or upon accession. In this way, the recommendations are composed of direct and implied instructions that allow implementation to remain flexible and balance the political relations. Subsequently, the implied recommendations refer to the use of negative language to underline the lack of or the necessity to implement certain measures or to remedy to a recurrent issue.

In line with the argumentation of this research, the guidance in the progress reports for Croatia are more direct and clearer than in the pre-accession reports for Bulgaria and Romania. The larger space devoted for Croatia allows the insertion of statistics and details, whereas the constricted analysis of the judicial systems in Bulgaria and Romania and the more detached

attitude of the Commission towards the accession negotiations led to the scarce inclusion of implied and semi-practical recommendations.

The first years of the CVM and concordant progress reports for Croatia demonstrate the same cautious attitude of the Commission as highlighted above. Although the CVM benchmarks set goals and the direction of the reforms, direct recommendations remain absent from the text. Similar situation in Croatia, very few direct recommendations were put forward and the Commission relied on implied suggestions underlining the lack of progress in specific sectors or the recurrence of a particular issues, chiefly the lack of objective criteria for appointment and promotion in the judicial system.

The turning point in reports published in 2009 was the change of tone of the EC. The definition of tone is somewhat subjective but on the whole can be interpreted as encouraging, condemning, positive or negative without needing to go into much detail. The apparent lack of progress achieved over the first two years of the CVM's existence led the EC to revise its strategy and to adopt a tougher stance towards Bulgaria and Romania that eventually was echoed in Croatia. The reports for the CVM included an extensive assessment of the results of the reforms introduced since 2007 and for the first time provided a list of recommendations. The list restated the normative objectives of the CVM and the recommendations were divided in separate subsections addressing individual issues. In the case of Romania, the list was more extensive and the scope of the issues narrowed down into digestible segments. For both states, the tone of the reports was clearly condemning and threatening, referring to the imposition of safeguard clauses in case of non-compliance with the recommendations. Call for immediate results and clear commitment of the state to its pledges towards the EU demonstrated the growing concerns of the EC and the imposition of heavier pressure on the pace of the reforms. In parallel, although

Croatia had achieved reasonable progress with regards to the recommendations sent the previous year, a similar tone as for Bulgaria and Romania was adopted in the course of the negotiations. The tightening of the pressures on Croatia to a certain extent finds its origin in Bulgaria and Romania and is due to the state of the reforms there. The year 2009 is also remembered for the postponing of the accession of Croatia.

The reports of 2009 marked the shift from reporting to assessing and as a consequence of the direct involvement of the Commission in the reform in all the three states. Despite the harsh tone and the incriminating remarks, the EC put forward a pedagogic strategy that was carried on in the reports of 2010. Hence, incriminations are accompanied with a restatement of the European norms and most importantly of the benefits for the state to implement these norms, amongst which establishing an independent judiciary. Nevertheless, it has to be noted that these recommendations -- few direct-- failed to provide guidance as how these objectives should be achieved.

This pedagogic strategy was followed and further explored in the 2010 reports. The Commission undertook to underline the shortcoming, to isolate the issues and to provide concrete example of the present shortcomings, further addressed specific institutions and provided a significantly more detailed analysis. As it has been highlighted above, Romania faced in 2010 most of the criticism and the wrath of the Commission; conversely, it was also the state to receive the most detailed recommendations and to benefit from the aforementioned pedagogic guidance. In comparison, Croatia was in a more difficult position. Although the Commission applauded once more the success of its reforms, it also condemned in the same breath the lack of progress in certain areas and pointed out new issues. As a consequence, despite the conclusive and cooperative attitude of Croatian authorities, the Commission showed less patience towards

Croatia and required it to do subsequently more efforts in order to remedy to all the discrepancies of its judicial system before accession, discrepancies that will still take few years before being solved in Bulgaria and Romania.

iii) Better domestic situation or becoming a better member state?

Interestingly enough, the Commission combined in its argumentation, rhetoric on the commitment of the state to European membership and the benefits of the reforms domestically. The European scope is often put forward in the CVM and aims at stimulating Bulgaria and Romania to become better member states. Hence, they are regularly called upon to abide to European standards, implement member states best practices and honour their commitment to the EU. Nonetheless, the domestic level is not left out and plays an important role in supporting reforms incentives. Public trust in the judiciary and visibility of the reforms by the population are the main references to domestic affairs and pressures the governments to be accountable to both European authorities and the citizens. Comparatively, the progress reports for Croatia did not translate any European-domestic debate and the affinities of these two spheres. Judicial reforms are part of the greater scheme of accession negotiations and represent milestones on the way to membership. The domestic impact is left out. This constitutes a major difference between the CVM and the progress reports that could be interpreted as the volition to determine the prevalence of European recommendations over national considerations.

Nevertheless, the Commission's recommendations can be criticised on two points disregarding pre or post accession monitoring. Firstly, the burden of change is often to a large extent at the costs of the state. The description of the budget and allocation of funds figured in

2008 CVM reports and in every report for Croatia (extensive explanation given in 2005). The redistribution of the funds depends on the state and no scheme of implementation was provided by the Commission. Although such an approach puts a lot of trust in the state and respects in all point state sovereignty and its ability to manage its own budget, the lack of adequate funds and monitoring remain problematic. In times of crisis or high expenditures as pre-accession reforms, budget for reforms is a sensitive nerve with large impact on other sectors. Moreover, admitting that the state has the financial capabilities to undertake the reforms, the lack of monitoring encourages diversion of the funds, as for instance, corruption in public procurement swallowing by far most of the European funds.

Secondly, reform is based on an ad-hoc pace. States move forward by isolating what not to do rather than by knowing where to go. Moving forward walking backward results from the cautiousness of the Commission to exert measured interferences on sovereignty while refraining from infringing state self-determination. The controversy lies in the determination of the Commission to assert its normative weight and to encourage the states to respond satisfactorily to its normative concerns without giving any precise stipulations.

As a consequence, the lack of narrow standards and ad-hoc reforms slow down the development of full-fledged European norms. According to Laïdi's definition of norms, norms must be legitimised, observable over time, oriented towards a distinct objective, encompassing certain expected results and identifiable with particular standards. The latter is incomplete in the present state of the recommendations, despite some clear progress with regard to this matter over the last years.

3) Inter-influential Relations between Parallel Strategies: Administer Vs Enlarge

This final section will synthesise the achievements of the Commission with regards to the progress made towards an independent judiciary in Bulgaria, Croatia and Romania. It will allow the comparison of the results achieved under the respective strategies of enlargement and administration of the Normative Empire, and of the transposition of enlargement elements to administration of post-accession.

The leverage of the Commission fluctuates according to whether the state is a candidate or a European member state and decreases considerably after closure of the negotiations[101]. Although the strength of the leverage is not a negligible aspect of the Normative Empire as demonstrated by the extensive literature on the topic[102], the exercise of leverage provides more insights on the functioning of the Normative Empire. It is thus necessary to examine how the application of European norms in systematic patterns, the similarities between the CVM and the progress reports and the instrumentalisation of conditionality fit in the dichotomy between administration and enlargement.

a. Administer and Enlarge

In the logic of the Normative Empire, norms are the foundations and source of power of the EU. However, their nature and purposes vary with accession. Pre-accession normative pressures are administered through a carrot and stick strategy, compliance holding the key to a fast access to

[101] Grabbe, H. 2010, pp. 249-50.
[102] Schimmelfennig, F., 2001, p. 63 & Sadurski Wojciech, Jacques Ziller and Karolina Žurek, Après Enlargement: Legal and Political Responses in Central and Eastern Europe, Robert Schuman Center for Advanced Studies, European University Institute, Florence, Italy, 2006, p. 187.

membership. Upon accession, the choice of tools for pressuring the states is limited and is confined to the application of financial sanctions, safeguard clauses or isolation. Subsequently, it is assumed in the logic of the Normative Empire that after accession, the EC is relegated to the role of administrator and its power lies in the protection of norms. Recalling Zielonka's imperial structure, the Commission's main function is to supervise the implementation of EU law. The EC retracts to the form of minimal authority core of the Normative Empire and exerts its sprawling power over a broad range of areas spreading through the polycentric structure of EU law.

Consequently, norms fall in line with this additional role of the Commission. As demonstrated by the CVM, instrumentalisation of conditionality is uniform in the pre and post accession phases, norms differ thus in nature and ends. Recapitulating points mentioned above, conditionality is used to a large extent in the context of enlargement, the CVM is particular in this sense because it extends conditionality to the sphere of 'administration', after accession. Conditionality regroups structural norms that aim chiefly at the construction of new institutions and at making the candidate state compatible with the bulk of EU law and the machinery of the European institutions. Secured compatibility ensures the protection of the EU and the respect of its norms. The application of conditionality goes hand in hand with the Commission's asymmetrical power. Their symbiosis is characterised by the necessity to justify in the European treaties the imposition of the EC dominance onto acceding states with regards to the implementation of conditionality. In parallel, the implementation of conditionality rests on the necessity to rely on this asymmetry. This duality accelerated the evolution of the EU's normative power and consequently the leverage of the Commission from being confined to the role of reporter during earlier accessions to the one of judge assessing results, setting tasks, giving recommendations and more recently interfering at the state level.

Norms involved in the administration of the community have regulatory purposes. Accession assumes the compatibility of the state with the other member states and with the European institutions. Subsequently, norms implemented in this setting aim at protecting the normative balance of the union. Regulation intervenes early after accession and concerns the balance between the branches of power or the protection of the European norm of the *Trias Politicas*. Until 2005, most pressures during pre-accession were exclusively put on the executive resulting in tilting the balance of power in its favour. Efforts to maintain the balance between the branches are visible with the recent reorientation of the enlargement policy and post-accession monitoring in the CVM. The independence of the judiciary is a crucial aspect of the preservation or creation of a system of *Trias Politicas*.

b. Independence of the Judiciary, a work in progress

The extension of conditionality to post-accession blurs the line between administrating and enlarging the EU and leads to some contradictory moves in practice. Premature accession forced the Commission to carry out structural reforms while dealing with Bulgaria and Romania as member states capable of contributing to the union as such. The controversy is most prominent with regards to the independence of the judiciary. Parts of the CVM monitor the building and empowerment of institutions guaranteeing the independence of the judiciary while others balance the judiciary against the legislature and the executive, as proven by the critics against the parliament in Romania and the government in Bulgaria. An independent judiciary relies on the preservation of the *Trias Politicas,* which protects the judiciary from the influence of the executive. As pointed out, that is only if the judiciary is capable and has the necessary

resources to function independently. Yet, the creation and empowerment of judicial institutions heavily depends on the two other branches and only once enabled to carry their functions, can they guarantee the independence of the judiciary. As a result, the Commission called upon the parliament and executive to depoliticise the judiciary and to refrain from interfering in judicial affairs, while encouraging the diverse judicial bodies to proclaim their independence from the executive, notably by acquiring budgetary power, conducting internal inspections, controlling appointment and promotion procedure, encouraging developments of the Prosecutor's office, the integrity agency and the anti-corruption body. The slow pace of the reforms under the CVM is thus explained by the contradiction that exists in practice between the aims of the recommendations and the protection of a principle still making its first steps.

Consequently, the extent of achievements in constructing independent judiciaries in these countries draws out the borderline of the normative power in administering and enlarging. The counterproductive pace of the reforms is underlined by the relative success of the reform of the judiciary in Croatia in comparison to the ones undertaken by the CVM: creation of an integrity agency whereas the idea was just touched upon in the 2010 report for Bulgaria, a new judicial academy with a updated training for all professions and more independent from the executive (which can no longer appoint the judicial trainees), a more competent judicial inspectorate and a effective anti-corruption body, USKOK. However, case backlog and rationalisation of the court system slow down the functioning of the judiciary. Moreover, although the pressures of the Commission to contain the executive's influence on the judiciary bore some fruit especially with regards to the judicial academy, the Commission has reiterated its demands for complete self-regulation and autonomy of the State Judicial Council and the State Prosecutor Council. Success is thus very relative.

Building independence in the absence of factual means resulted in fewer results in the CVM and clashes between the Commission and the states over sovereignty. Bulgaria's Prosecutor office remains weak and subordinated to political decisions resulting in too few prosecution or indictments of cases of high level of corruption despite clear condemning evidences. The same applies to the cases of conflict of influence and the procedure of indictment for these cases. Romania is also pointed out for the loopholes in the legislation protecting conflicts of interest. The law against ANI, the integrity agency, stirred considerable discontent in the Commission's ranks and Romania is called to reverse the trend at once. Severe delays in the negotiations of the Criminal and Civil Codes (and their procedural codes) still remained and long-lasting issues regarding the management of human resources and optimal working conditions/ infrastructures still remain the focus of the recommendations. In spite of the development of a constructive method of assessment in the CVM, the implementation of changes through structural norms still collides with the reluctance of the member states to abide to the Commission's directives, resulting in abandoning individual discretionary power over policy implementation. It has to be noted that all the three states suffer from the same evils: the overly powerful place of the executive (or legislative for Romania) in the state arrangement finding no counter balance in the lack of initiative and involvement of the judiciary.

Moreover, the absence of reward after accession does not stimulate the states to find national solutions to EU's normative concerns. Sanctions also remain inadequate and are confined to financial matters. Although the interruption of the pre-accession funds in 2008 proved to have positive effects on Bulgaria[103], financial sanctions remain unproductive when aimed at stimulating expensive reforms. Change can only occur through open cooperation with the Commission's efforts.

[103] Trauner, 2009, pp.10.

c. Mixed results in perspective

The results of the reforms are mitigated and do not give justice to the efforts and the drastic evolution of European norms since the first eastern enlargement. The recent developments in the instrumentalisation of conditionality underlined throughout this study have given rise to a sophistication of the European mode of normative governance. Norms have gained importance in the conduct of European affairs and the CVM points out the volition of the EC to administer member states through the exclusive use of norms. The commitment of the EU to form policies based on the European founding principles and values marks the complete internalisation of norms not solely at the EU level but also the necessity for the aspiring and existing member states to commit to these core values[104]. The redefinition of the Copenhagen criteria and European norms through the instrumentalisation of conditionality led to a better coordination of the Commission's activity and monitoring. Consequently, the prioritisation of the independence of the judiciary in the region shows the willingness of the EU to explore tangible and practical solutions to corruption and to prepare the states to European membership. Enlarging and administrating the EU are becoming thereupon increasingly intertwined with the spread of structural norms in the administration of the member states. European norms are broken down into a multitude of narrower norms directly applicable by the states. The CVM is the most flagrant example of the ramification of a web of norms since the volume of normative recommendations advocated by the Commission is skyrocketing. This tendency affects the ongoing accession of Croatia as well as the conduct of European affairs, such as the Hungarian media law.

[104] Kahn-Nisser, 2010, pp.30.

Moreover, the normative power conferred to the EC in the CVM, empowered the latter to affirm its position and to take an active stance in state affairs, which is almost unconceivable in traditional intergovernmentalist schemes. By setting a foot in every institution and by openly criticising political bodies, the Commission reasserted its place of dominant actor and capability to monitor, if only formally, the changes operated in the judiciary. In line with the previous demarcation between regulatory and structural norms, the diversification of addressees allowed the EC to get directly involved in domestic affairs and state governance and to attempt to balance the relations between the power branches by making political and normative condemnations. The Commission imposed itself as a dominant normative authority whose power prevails over national sovereignty. At last, it is worth noting that the recent development in the enlargement of the Schengen zone adds to the credibility of the European normative governance. The CVM has become recognised, formally and perhaps ephemerally, as a barrier to the spread of corruption and as an efficient tool for transmitting European norms.

The idea of Normative Empire lies in the spread of norms in all domains of European activity, enlargement being one of the most visible and covered in the media. Instrumentalisation of these norms, here their implementation and their contribution to policy formation, constitutes the central pillar of this empire. Without the development of strategies using norms systematically as a main source of power and legitimacy, the EC would lose its influence and the idea of Normative Empire would vanish. The outcomes presented by this paper demonstrate quite the opposite. The EU is moving away from its intergovernmental origins due to the dysfunctions accumulating with the growing number of members and national discrepancies, and thus experiments with normative strategies in order to keep the European machinery rotating while maintaining state sovereignty.

It has to be noted that the strong leverage of the Commission in the pre-accession phase is essential in order to facilitate post-accession administration. After accession, recalling Zielonka's polycentric structure, the Commission should confine itself to supervising the respect of EU law and only conduct changes with regards to the application of new common legislation. The transitory phase, close to political quarantine, in which Romania and Bulgaria are left in, should remain of extraordinary resort. If normative power is to become the fuel of European leverage domestically and internationally, normative compatibility between European member states is crucial.

Conclusion

The comparison of the EU to an empire is not new and neither is the idea of European normative power. The novelty of this research lies in the interweaving of these two components to form a coherent definition of the contemporary European Union. The literature review left many blank spaces between the respective theories of Laïdi and Zielonka. The revisited concept of Normative Empire aimed on one hand at filling the empty spaces and on the other at clarifying and exploring the relation between the ideas associated to an imperial Europe and the weight of norms in European decisions.

Preliminary researches on the role of norms in the EU demonstrated a positive tendency in the expansion of the network of European norms and of their sophistication. This trend became particularly visible throughout the most recent enlargement negotiations dating back to

2004 with the gradual insertion of the independence of the judiciary as a requirement for membership and with the development of an extended system of pre-accession monitoring. Since the enlargement wave in 2004, European norms have multiplied exponentially and have become more specific. Henceforth, the recent interest devoted to the construction of an independent judiciary in acceding states has two main implications for the Normative Empire.

Firstly, it sets precedence for the domination of the Commission over the conduct of all European affairs. The shift of power resulting from the deepening of the enlargement norms endowed the EC with full supervising and monitoring powers over the enlargement process. The expansion of the corpus of EU enlargement law contributed to strengthening the role of the Commission as the guardian of the treaties and European norms. Its function of guardian developed into the capacity of principal administrator of the union. Norms formally enacted in the enlargement negotiations have been transposed to the post-accession phase and carried the monitoring leverage of the Commission onto the new member states. The elaboration of norms established continuity between enlarging and administrating the EU through norms laying the foundations for the Normative Empire.

Secondly, the incremental deepening of enlargement customary law ensued in response to the accession of Central and Eastern European states orientates now the focal point of the Normative Empire towards the Balkans. The independence of the judiciary is crucial to the idea of Balkan membership, because its enactment aims not only at curbing corruption but is also an integral part of the overall process of democratisation. As a consequence, the study of the judicial reforms in Bulgaria, Romania and Croatia comes when the rest of the Balkans is preparing its candidacy. The outcome of these reforms and the increasing interest of the Commission in the independence of the judiciary will have significant repercussions on the

Balkan states and on the conduct of future enlargement negotiations. Alternatively, the focus on the rule of law can perhaps be interpreted as the elaboration of the normative measures designed to respond to issues specific to the Balkans. This specificity will augment the definition of European norms in size and in content for the whole of the Community bringing further European normative power internally and externally of the Union.

With regards to these first conclusions, this work analysed why the growing interest of the Commission in the independence of the judiciary contributed to the transformation of the EU into a Normative Empire. The independence of the judiciary occupies a determinant place in the European normative framework and its official inclusion in the corpus of EU law is not solely a legal headway but also reiterates the commitment of the EU to the promotion of democracy through the principles of the rule of law and the separation of power. The matter of judicial independence represents thus an interesting and pivotal paradigm to assess the imprint of the Normative Empire on tangible and real issues. Subsequently, the research verified the hypothesis that the transposition of norms from the pre to the post-accession phase would lead the EC to enlarge and to administer the EU through the systematic use of norms. Consequently, the Commission would respond to the lack of observance of European norms in current and prospective member states by enacting narrower normative definitions of the core European principles and thus, extending its scope of intervention in its quality of guardian of European law. This work has tested these hypotheses against the cases of Bulgaria, Romania and Croatia, and verified the plausibility and consistency of the theory of Normative Empire with regards to the ongoing restructuring of these states' judiciary under the guidance of the Commission. The redefined concept of Normative Empire along the main conclusions of this study can be summed up as following.

The European Union is a Normative Empire composed of sovereign state units abiding to a set of common rules, the European norms. EU's normative power is placed under the aegis of the European Commission that occupies the virtual top of the Empire. Power in the EU is diffused: it is shared between the European institutions and the member states and grows simultaneously from their interactions[105]. With regards to the European normative power, it is concentrated in the hands of the Commission. The EC is responsible for the protection of the founding treaties enshrining the core European principles and norms in the EU, and to a large extent for the formulation of new European norms by virtue of its ascendance on agenda-setting. In addition, the Commission has become the dominant player in accession negotiations and the main monitor of enlargement, increasing thus its capacity of supervision of the due application of European norms.

The Normative Empire is both inward and outward looking. The power capacity of norms is more visible during enlargement, the outward projection of the EU, than during the administration of the EU due to the resilience of the member states to accept the domination of the Commission. The implementation of norms comes up against state sovereignty. It has to be noted that the erosion of sovereignty is not the chief end of normative rule, but a mere consequence of the concentration of normative power in a single institution, and what is more, in which state sovereignty holds the least influence. Consequently, administration through norms is better carried out through the protection of the existing European norms, formally adopted with the ratification of the founding treaties by the states. The difficulties posed by state sovereignty separates European norms in two categories: structural and regulatory.

Structural norms result from the evolution of norms induced by previous enlargements. They were born through enlargement and serve enlargement. Customary enlargement law

[105] Bache, I. And Stephen George., 2006, pp. 12, 61.

expanded the scope of European norms and redefined core European principles, such as the *Trias Politicas*, into digestible legalistic normative sections such as the independence of the judiciary today. These new norms are absent from the treaties and belong to customary practice of pre-accession negotiations. The purpose of structural norms aims at facilitating the complete embracement of the European founding norms by the acceding state. Structural norms carry the transformation of the state towards compatibility with the normative milieu of the EU.

Regulatory norms, conversely to their structural counterparts, do no bear any seed for change and aim at maintaining the status quo, the normative balance of the EU. Accession assumes the normative compatibility of the new member state; hence, post-accession administration aims at preventing any reverse of attitude and at supervising the observance of the European norms, as present in the treaties, amongst the member states.

Nevertheless, the distinction is not so well clear-cut in reality and enlargement has influenced the management of EU's internal affairs, leading to the insertion of structural norms into European administration. Two examples demonstrate the effects of the expansion of enlargement-related norms onto the evolution and maturation of European normative power. The CVM studied in this research shows the transposition of conditionality and of subsequent structural norms to the sphere of administration, since Bulgaria and Romania have acceded to the status of member states in 2007. Both states undergo significant normative pressure from the Commission to implement structural norms, such as the independence of the judiciary, the fight against corruption or the respect of minorities' rights. The task of administration is thus complicated by the protection of European norms in progress of being implemented. The mitigated results presented above highlight the clash between the necessity to transform the state

in accordance to European norms and the resilience of the states to surrender sovereignty after accession.

The second example pertains to the maturation of European norms copying from structural norms adepts of breaking down European norms into narrower segments. The chain of reactions triggered by the Hungarian law on media placed the freedom of expression among the core European norms. However, no such freedom is explicitly present in the founding treaties despite its presence in most European constitutions. The core of European norms is thus expanding into sets of more comprehensible norms adapted to the reality of the facts. The regulatory role of the Commission augments accordingly and extends the EC's zone of intervention to a greater array of cases.

A last important feature of the Normative Empire lies in the potential held by norms to facilitate European intervention in state governance. Norms allow the Commission, in particular, to infiltrate state affairs with regards to the application of European rules. Both the CVM and the Hungarian law demonstrate the increasing intervention of the EC in the state's branches of power.

The CVM and the progress in Croatia have demonstrated this tendency of increase of the Commission's aspirations and the influence of structural norms. The instrumentalisation of conditionality will have long-lasting effect on the management of European affairs, externally and internally due to the growing significance of norms in the EU-states relations. It resulted in the establishment of direct communications between the Commission and sub-states institutions, here judicial bodies. Such a dialogue is unconceivable in intergovermentalist opinions. Hence, norms are carrying the EC's power forward and beyond state sovereignty, and foster the creation of normative European governance in other areas.

Customary enlargement practice and the instrumentalisation of conditionality add to the definition of European membership and of the EU as a whole. They determine the intrinsic features, obligations and values that membership entails. Definition of 'Europeanness' reinforces the exclusivity of membership and to the consequent exclusion of normatively incompatible candidates. Moreover, the CVM holds the imperceptible meaning of a second class membership or a transitory phase towards full-fledged membership. Although Croatian authorities attempt to respond to the Commission's demands in order to avoid similar fate as Bulgaria and Romania, the possibility is not completely dismissed.

This research aimed at providing a reformulation of the concept of Normative Empire while resting on factual and contemporary evidence. The case of the independence of the judiciary in relation to the evolution of European norms reasserted the influence of norms in the EU, the evolution towards legalistic redefinitions of the founding treaties and the growing normative leverage of the Commission over internal European affairs. The determination of the EU to strengthen its normative foundations and internal normative harmony will certainly have positive consequences on its leverage at the international level. The EU needs to maintain its normative equilibrium in order to pose itself as the champion of norms for the rest of the world.

Annex:

Table 1. Independence of the Judiciary in the CVM and Progress reports

This is a working document, the following abbreviations stand for:
Judi: Judiciary
J: Judges
P: Prosecutor
JA: Judicial Act
Corr: Corruption; AC: anti-corruption; HL corr: high level corruption
CoI: Conflict of Interest
MoJ: Ministry of Justice
RoL: rule of law
Appt: appointment; amdt: amendment; cmt: commitment; compet: competition; discip: disciplinary

The sections highlighted for Croatia are topic referred to under the benchmarks of the CVM.
A colour code was used in the original document to trace the recurrence of issues over time; the edited version however is in plain in order not to confuse the reader.

		Bulgaria Candidate			Romania Candidate			Bulgaria MS			Romania MS			Croatia		
		Issues	Recommendations	Achievement	Issues	Recommendations	achievements	Issues	Recommendations	Achievements	Issues	Recommendations	Achievements	Issues	Recommendations	Achievements
Ministry of Justice	2004		*new procedure code *revise JSA, Min of Interior act.		*appointment judicial assistants *appt President of courts (decide what judge on each affair) * Attends sessions SJC									*appointment Judicial trainees		
	2005		*new procedure code *revise JSA, Min of Interior act. *curb organized crime			*Fight corruption	*Board decides where judge will sit. *Action plan for revision of Judi.(guarantee independence personnel and institutions)							*inefficiency of courts: proceedings too long *weakness in selecting judges *difficult to enforce judgments *backlog *reforms not implemented *appt President of courts *Pdt of supreme court appt by Plt upon proposal of President *appt judicial trainees *impartiality in war trials	*improve Judicial system *case mgt *transparent recruitment and training *rationalization of courts *financial capacity *administrative capacity *financial support for Judicial Academy *impartiality of judges *reduce backlog	*purchase new buildings *increased budget
	2006									Missing report			Missing Report	*lack political will to investigate High Level corruption cases. *shortcomings in reforms *coordination of Anti-Corruption programme *weak rationalization of court *backlog and added by state *enforcement *equipment in municipal courts	*improve imposition of appt procedures, training and disciplinary sanction in Judiciary (**determine entry in EU**) *adopt code of ethics	*structural changes and reduction of backlog
	2007								*follow up allegation of HL Corr *adopt pending	*constitutional amdt *inspectorate (all under BM1)			Missing report	*little progress on accountability, imp, professionalizat	*more staff *more poli dedication *sanction in law	*inspections continue, good results. [also in BM] *transfer of invest powers to P

									JSA *demonstrate results in AC *political commitment to curb org. crime *strengthen all levels of Judi	*MoJ no right to inspect arrangement in inst.				ion, competition of Judi *backlog *weak rationalization of courts *corr in Judi *action plan for reform not enough detailed *unit for monitoring understaffed and no adjustment of measures	And CoI: more effective.	
	2008							*not enough convincing results in reforms *no results in fight Corr *slow progress of cases in Judi and leaks of info *outdated penal code +no differentiation in degrees of crime	*contain CoI and influence *strengthen Adm &equipment	*establish SANS=AC agency *JSA (judicial system Act)	*contradiction btn political and legal initiatives *uneven reforms by key inst *politicisation of fight Vs corr	*more comt from judicial inst *more administrative capacity in Judi		*weak administration *too few inspections *inexistent culture of political accountability *lack inspection at Prosecutor's Office *only 5 part time inspectors *lack measurable objectives in new action plan *lack of ownership and responsibilityi n reforms *no IT directorate	*+professionalisation, accountability, competition needed	*inspection=good results *implementation AC legal framework *revised action plan addressing major reform issues
	2009							*missing reform on Penal Code *decrease non partisan investigation; Killings continue and not apprehended	1st report *reform Penal code Procedure 2nd report: *strategy Vs org crime and corr *ad hoc invest team: permanent *structure for prosecuting HL corr *efficient implementation CoI law and reporting structure *monitor legislation Vs Corr and CoI		1st report *Plt Vs Gov *low political cmtmt *no uniform jusrisprudence *low accountability of Judi *shortcoming in staffing *step backward 2nd report Despite political declaration *4 codes for 2011 *low political comt to	1st report *depoliticization *adopt codes(plt) ***need progress by end 2009!!** Capable of sanctioning corr and maintain RoL *adopt remaining laws to modernize system + independence and efficient implementation *successful implementation depends on financial resources, recruitment and allocation	*new legislation *finalized amdnt to draft code Civil/crim codes +procedures *some reaction snce report 1 09	*Min of interior and Judi involved in contract killings *no inspection of the P office *lack budget and ambition to rationalize court system *selection of J and P deficient, not transparent, uniform, objective criteria. *new amndt to court acts: MoJ interview in appt Pdt of courts *lack of monitoring and assessment of new measures *intimidation of police and P in	*depoliticisation: reduce role of executive and plt in appt *more accountability, independence, professionalism and competition of Judi	*reinforced the inspectorate with 20 part time inspectors *new legislation: judicial trainees, law on courts and misdeamour (for backlog) *better rationalisation of courts *proposal for opening a new school for Judi officials *reduction of backlog, but easy cases

									and amend where necessary *freeze, confiscate criminal assets (better system) *strengthen inspectorates and encourage proactivity (mandate) *administrative arrangements for whistle blowers *redraft Penal code *implement law *and Penal procedure codes more efficiently *objective assessment of performance of J and objective criteria of appt of SJC *analyse and address contradictions in disciplinary sanctions proceed by SJC *follow up on findings of inspectorate		AC	of staff 2nd report Plt should support executive in judi reforms *careful that no unproductive amdt are added *more budget for human resources strategy !!! *get 4 codes adopted *depoliticisation and cmt of parties *follow up on ANI *ensure efficiency in trial of HLcorr		war crimes *corr in Public Procurement *unchanged penal immunity:lack of transparency and accountability *no inspection of P		
	2010							1st report *poor results in investigation and prosecution of HLcorr = more indictments , less prosecution 2nd report *judi process lacks	1st report *improve judi practice= more proactive and responsibility *need to follow up on Commission concerns before next report (killings	1st report *Penal code reformed upon recommendations of Commission *proposal to amend JSA to give more disciplinary power to SJC 2nd report *strong reform momentum= Reform of	1st report *lost momentum of reforms *lack political Comt *delays in adopting 4 codes 2nd report *few results and low comt from political	1st report * **more coordination btn politics and Judi=priority** *adopt the 4 codes 2nd report *Plt should be consistent in supporting efforts of Judi and executive *strengthen AC :political coordination	2nd report *preparation of "Small Reform Law" and involvement of magi in process	*too few results *backlog *difficult enforcement *inadequate infrastructure, and equipment of court and case system managment *criteria for J and P *no inspection in P *lack system evaluation of new legislation	*SJC &SPC independent and accountable for effective self regulation *depoliticisation	*no longer appt by Pdt *end of 5years probation for J *better organization of inspectorate Reorganisation of MoJ *amdt of Constitution :more independence of Judi *JA independent from MoJ *better procedure to select J and P *established School for Judi officials *reduction backlog *development check list for inspectorate *more political will to fight corr

								initiative and profession al capacity *shortcom ings in preventing corr/CoI *inability to pronounce deterrent sanctions for serious crimes *few cases of CoI identified since 2008 law *no effective procedure to detect CoI and communic ate to P	and corr in JSC) 2nd report *amdt JSA should strengthen SJC !!! new Judi strategy, adopt changes JSA, strict sanction of corr and CoI *better practice Vs HL corr: from other MS, proactive investigatio n strategy, investigate systematica lly links btn cases/org crimes/adm inistrative authorities, protection of witnesses *** POLI COMTMT**	penal procedures, seriously tackled org crime: indictments/s evere sentences, reform of JSA -Joint team against financial offences Vs EU	and Judi *new law Vs ANI and developme nt *legal &legislatio n loopholes for CoI	on basis of impact assessment &protection Vs Fraud and CoI in procurement !!!!! * correct law in line w/h Ro cmt to EU=effective contribution of ANI to prevention and protection V corr, +dissuasive sanctions, correct procedural deficiencies in new laws, and promote role of ANI *monitor consistency and dissuasiveness of Vs corr sanctions, promote findings on individual penalties *evaluate impact of AC policies over last 2 y *evaluate effectiveness of legal framework of public procurement *consider prohibition for senior civil servants to benefit contracts in name of inst/ full transparency *establish performance Benchmarks for control/prevent activities, sanction CoI, &cooperation with Judi authorities 1*performance review of Judi :reduce capacity		*public doesn't know about final execution of public procurement		*revised action plan AC

												imbalance 2*transition to new SCM 3*increase capacity of NIM: standards for all magistrates + training 4*revise HCCJ ad database 5*reform disciplinary system and inspectorate focus on disciplinary sanctions, adapt sanctions 6*correct ANI 7*sanction HL corr 8*strengthen AC policies 10*evaluate authorities responsible for implementatio n of public procurement				
Supreme Court	2004															
	2005															
	2006															
	2007													*not clear how breaches to Ethics will be punished *no Ethics code for P		*more power in appt Pdt of courts *framework criteria for performance J and help appt and disciplinary proceedings *2006 code of ethics *transfer of cases to reduce backlog *system transfer of J allowed but not in place
	2008															*new code of Ethics for attorneys *reduction of backlog
	2009										*cumberso me procedures for appeals	1st Report *must be a better guardian of jurisprudence 2nd report *take into account findings of working groups on individuality of penalties for corr !!!!* follow up recommendatio ns working groups *unify jurisprudence				

												*guidelines				
	2010										1st report *no publication of court decisions *burdensome procedures for appeals in interest of law 2nd report *guidelines Vs Corr not really amended	1st report *reform HCCJ *publish motivation for judgements *final version of guide should be more precie *no criteria for data protection/ consistency for types of decisions 2nd reports !!!!* reduce competence to try cases in 1st instance, * more legal unification *publication of full jurisprudence of courts in accessible database	*draft guide V Corruption			*Pdt more control on court management *improved publication/access to court decisions, dev of case law and public dissemination
SJC/SMC	2004	*too many extraordinary appts +poli consideration														
	2005				*budget under MoJ *low training of Lawyers *competition not a success	*competition held to fill vacant position *transfer budget from MoJ to SCM *progress in school for clerks	*reinforced secretariat *appt reform team *curricula improved and +tutors							*lack of objective, trans criteria of selection for J, P *appt by PLT *Disciplinary proceeding launched by Courts Pdt and MoJ	*consider compet &examination for entering Judi *transparent standard for J and trainees	
	2006									*appt reform team for NIM				*lack trans of complain process for private parties *incapable Judges/poli considerations *lack trans, objective, uniform assessment of j and judicial trainees to enter profession *appt on written application	*more impartiality *review selection criteria *accessible process complaint *review appt proc of Pdt of courts and Judi trainees by MoJ	*disciplinary Council *better selection criteria *Judicial inspection
	2007							*missing training at NIM for appt	*establish Judi inspectorate under	*fired corr P *Judges from practicing lawyers	*Only partial implementation of			*lack of objective, transparent criteria of		*possibility to interview applicants for J

								*no competition for promotion J,P, I	pending JSA *independence staffing of inspectorate *progress in recruitment procedure		measures of SCM *fast track recruitment procedure, less quality, concerns			selection for J, P *impossibility to interview all candidates		
	2008							*no convincing results	*take responsibility in reform process *contain CoI *publish complaint on appt/promotion			*must take position Vs corr disregarding political debate.	*budget reinforced	*lack of objective, transparent criteria of selection for J, P- diff to interview candidates *disciplinary proceedings only by courts Pdt and MoJ *quota in 5 y probation period		*reinforced and more budget *imp SJC to select J (amdt on Acts) *evaluation of J's work
	2009								*follow up on inspectorate	*many prosecution but ad hoc *inspectorate operational	<u>1st report</u> *translate intentions into deeds *transparency and account *not appropriate HR emergency measures= staff shortage <u>2nd report</u> *need money for human resources strategy	<u>1st report</u> *reallocation of staff btn courts to counter pressing shortfalls *publication of judgements on e *deeper investigation (including P office) <u>2nd report</u> ***need reorganisation of P office, because shortage in P !!!** * implement flexible priority driven HR strategy =transfer btn court levels/ transfer administrative tasks to auxiliary staffs/develop personnel schemes: forecasts of appt/retirement /transfers *transparency/ accountability of SCM: especially	*general inspection of judi bodies *new HR strat *appt and compet procedures in line with obj & qualification *good track record of inspectorate & incr discip proceedings Vs magistrates	*lack of objective, transparent criteria of selection for J, P *insufficient administrative capacity	*review appt procedure=limit poli influence in SJC and SPC	*new law on trainees= bar exam, and practice *disciplinary proceedings continue

												council responsible for promotion/appt : publish reasoned decision + :accessibility				
	2010							*few results in high level corr *sanctions too lenient *corr in SJC officials *results of inspectorate not followed up *sanctions too lenient *delays in cases *lacked legal basis for disciplinary proceedings	*improve selection procedures, create career incentives and appt procedures *amdt should strengthen SJC: prepare annual analysis of workload, rebalance personnel, open/close court on basis of workload, +transparent in appt *+more accountability :open vote and detailed reasoning of decision *all disciplinary powers to SJC →*show more initiatives after amdt JSA	*good results *joint working group btn SJC and inspectorate : unify jurisprudence and into appt *measures Vs corr in SJ C *Inspectorate identified weaknesses + recommendations to head of courts	1st report *no application of Commission's HR recommendations →net staff losses →no results in rebalancing staff *unconvincing results in disciplinary proceedings: leniency *new inspection challenged by P:0 objectivity 2nd report *shortcoming in discip proceeding *no application of Comm recomm for HR or new measures	1st report *smooth transition to new council *review guidelines for inspection *increase capacity for judicial inspection and focus on discip cases 2nd Report !!!!! *structural HR adjustments :transfer magistrates, reduce capacity imbalances, fill vacant position *transition to new council *reorganise disciplinary system=appropriate sanctions, consistent, dissuasive, proposition; annual evaluation of Judi	1st report *pilot analysis to rebalance workload *revised recruitment procedures of inspectorate *comt to publish all court decisions 2nd report *increase yearly intake from NIM (with 5 y practice)	* lack of objective, transparent criteria of selection for J, P *insufficient capacity *transparency of disciplinary proceedings *oral exams vague. *0proceeding by SPC	*careful mgmt of 2 election procedures (SJC and JA)	*better selection of J andP, based on school of judi officials (under JA) And written and oral exams *appt Pdt of Courts *candidates for J&P:exam to enter school for officials (2y initial training and exam) *+ more transparent methodology for local judi councils to evaluate J for promotion
Prosecutor Office	2004				*power for extraordinary appeal		*lost power for extraordinary appeal									
	2005	*10% vacancies *no step modernising P. *investigated less cases in HL corr	*more transparent and accountable				*can only allocate cases according to defined criteria *no intervention in lower P									
	2006															
	2007													*2MPs in SPC *does not employ USKOK for high level corr		*more objective criteria of state P and internal supervision *investigative power in criminal proceedings

	2008															*obligation to report annually on disciplinary proceedings v P
	2009								*follow up on inspectorate and take corrective measures	*new team on EU fraud, org crime, corr and money laundering at Supre Cass P Office	*lack of P to ensure duties	*review guidelines to recruit inspectors	*manual of best practices *results in lower courts to counter corr	*intimidation of P *few prosecution of HL corr		*investigative capacity in Organised crime and Corr
	2010							1st report *lack account Chief P *deficiencies in P *no effective detection of CoI 2nd report *deficiencies in P *reluctance to start invest despite obvious signs:rare application of search warrants (cases of fraud)	1st report *improve P office 2nd report !!! *improve practice thru detailed analysis of shortcomings, manual of best practices, training programmes, syst supervision of courts and P offices	*5 investigative teams vs corr and high profile cases			*results in the country more indictments Vs officials	*lack disciplinary proceed in P	*strengthen prosecution of money laundering	
Integrity Agency	2004															
	2005															
	2006															
	2007															
	2008										*not operational	*demonstrate operational capacities to sanction unjust assets, incompatibilities, CoI	*legal framework	*director resigned *limited staff *misunderstand CoI *limited staff *limited invest and proceeding		
	2009										*ambiguous legal situation	*keep up with good results *need to invest in logistics, equipment, case mngt software, HR !!*continue track record of assets	*good results in following results *reached staff goals *fine for missing declaration/court case	*no progress in preventing CoI *CoI within very structure	*need admin support *CoI further explained	
	2010								*establish an integrity Agency		***IT still to be fully implemented** ***law on ANI unconstitutional= threat to ANI**	*make new law for ANI in order to keep performing duty of control organ	*good results *recognized by P	*weak supervision of the law *lack oversight trans n public procurement *CoI misunderstood		*restructured so less influence from the PLT

Anti-Corruption Agency	2004															
	2005						*Director and 3 Dep dismissed							*lack personnel	*improve administrative capacity	*act for cooperation with police *action plan prevent and combat corr in enforcement agencies
	2006													*too few results *uniform application of law *cases not followed up		*strengthened
	2007															*mandate for abuse of office *declaration of assets for J and P
	2008							*under Council of ministers		*+competencies in invest HL corr ad org crime			*investigation Vs P *good track record *invest Vs a former Min	*reactive law enforcement and not proactive	*efforts in tackling HL corr in public procurement	*more active
	2009							*decrease in non-partisan investigations			*PLT blocks investigations *lengthy trials, leniency of courts, inconsistency of jurisprudence		*good results BUT	*poli influence	*follow up prosecution *more compet in invest Fraud, public procurement	*more proactive and invest of HL corr
	2010							*plan still to be implemented	*strengthen inspectorate	*ambitious 09 National AC strategy	*delays in HL corr trials, inconst/leniency in penalties (courts), not dissuavive enough	*asks for convincing results *results to be followed up	*increase of final convictions and high profile but still low	*unchanged budget *lack track record of effective invest 8unsuffi scrutiny	*improve checks on accuracy of declaration of assets of J and P *strengthen prosecution of $ laundering	*handles more cases
Judicial Academy	2004															
	2005	*under the MoJ *rely on foreign donors *training on ad hoc basis	*more training and specialization *training for lawyer		*rely on foreign donors	*progress in school for clerks	*curricula improved and more tutors							*not fully operational: too few mentors, and premises *training now only by courts and P offices: no framework of supervision	*continue funding *preserve indep of academy *more specific training on eco crimes money laundering, corr *on the job training for trainees jandP *objective, uniform system of ongoing professional evaluation	

															:efficiency /competition -career adv	
	2006														*improve staffing *funding *move away from ad hoc curri to medium/long term *train systematically and regularly all strata, J, P, Ad, court staff	
	2007								*training on new procedural codes					*no multi annual curricula designed *no progress on pre service training *decrease budget *no full time director		*senior advisory board :direct and training *programme committee
	2008													*lack staff *lack adequate permises		*full time director *increased budget *adaptation of training to EU leis
	2009													*understaffed *lack permanent premises *inadequate budget *initial training for J&P		*in service training *initial training fro jdui traineed and advisers
	2010								*need to improve curricula &legal training, change appraisal system			!!!*increase capacity for initial continuous training *consistent professional standards for magistrates *yearly projection of recruitments &training needs				*independence from MoJ *own budget and staff *permanent premises and renovation *prof training programmes and initial trainings and on Eu law *establish school for Judi officials
Security of Tenure	2004															
	2005						*3 law package: independence personnel &institutions									
	2006															
	2007									*immunity only during official duties						

	2008															
	2009															
	2010															
Financial Security	2004															
	2005	*budgetno t enough		increased	*salaries not increased											
	2006															
	2007															
	2008															
	2009															
	2010															
Administr ation	2005			N problem with understaff ing							09 *low staffing			05*insufficient administration *too many judges and too few P		
IT	2005				*limited access to Pc											
	2007							*limited computeris ation			09=limited access to IT	8IT tool needed			06*imp IT	

Table 2. Legal Vs Political and European Vs Domestic discourse

This working document however does not quote literally the reports and was used in order to keep a clear thread of thought during the analysis of the reports.

		Bulgaria Candidate		Romania Candidate		Bulgaria MS		Romania MS		Croatia	
Legal Vs Political arguments	2004										
	2005										
	2007				Govs should carry reforms	Mostly legal arg- recommendations all about the functionality of judi					
	2009						1)But political bc call for functioning Judi+ calls upon BG to reform. 2)refer to plt blocking legislation on confiscating assets -critique legislation and points out contradictions between government attitude and legislature with the objectives set -CVM a tool not an end in itself- cannot replace BG commitment. To Eu standards - recommendation= initiatives not backed up by	1)Legal matter 2) legal orientation of CVM - successful initiative on technical side Recomm= half legal and half poli	1)Call for political agreement on drafts CC -call for poli cooperation with ANI -call for plt to let DNA alone, and initiative from plt to change nomination chief P= challenge system 2) call on gov: condemn unequivocal commitment of poli parties. And plt to be more consistent and committed to fight HL corr -Special recommendation to plt And call for depoliticisation	-call on executive and plt to hold back to their place	Focus on legal arguments,

							political support - call on legislature and involvement of legislative/executive Call for poli commitment -more commitment from Judi -condemn contradictory legislation from executive				
	2010					1)comm. Influences internal politics on Judicial appt 2) strong political will , applauded moves by gov	2) mostly legal recommendations	2) condemn lack of poli will and reluctance of judi to take part in reforms -poli arg especially concerning the law on ANI -call for poli support for the reforms And insertion in judi 's politics -cooperation btn Judi and Polical spheres	1)legal instructions and explanation of consequences of legislation		Legal arg
European Vs Domestic arg	2004	European arg: Independence of Judi action needs to be pursued as guarantee of RoL → Copenhagen criteria	Judi assistant to other courts too -premises preventing public access and Journalists Prevale	Rule of Law						No major distinction between domestic and european	

			nce of arg about efficiency, few about accession								
	2005		- increase accountability of Judi and trust of citizens							Functioning of Judi a challenge for C	
	2007										
	2009					CVM a tool for improving BG—to be more European, to be a better member plus taken up in Schengen debate -procedure Vs org crime sends message to public -need public trust	CVM European decision- emphasize benefit for BG but mostly bc Commission highlighted issue -align with EU practices and standards	Rom needs to demonstrate functioning Judi: to whom if not EU	Changes not visible for public		
	2010					-step up fight vs HL corr- consider MS best practice – as in adapt to EU's best practice		Com to EU undermined by ANI law	Independence Judiciary- good for public finances and economic and social development		

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