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Enlarging the European Union and deepening its fundamental rights protection

Abstract

Respect for human rights is a value upon which the European Union is founded, and a precondition for an aspirant state to be considered as a candidate for membership. This European Policy Analysis looks back at the development of the fundamental rights discourse in the context of EU enlargement, particularly since the Union's eastern expansion in 2004, and confronts it to the situation within the EU. A key conclusion is that the externally projected image of fundamental rights as an element of the Union's constitutional identity is distorted. The analysis also sheds light on the on-going discussion to find ways to address this discrepancy between the internal and external EU fundamental rights regimes.

Introduction

Enlargement significantly affects the constitutional fabric of the European Union (EU). Successive rounds of expansion have mechanically modified the text of the EU's founding Treaties, while expanding the specific rules of accession they contain. Enlargement also represents a self-identification exercise of constitutional significance: by articulating what is required to be(come) a Member State, enlargement offers glimpses of the Union's constitutional identity.

This self-identification facet has been particularly patent in recent episodes of EU enlargement as the latter's normative basis has been considerably expanded. Not only have accession conditions been enunciated in greater detail, but the EU has also developed a *policy* whereby it spells out and monitors the administrative and judicial structures required to meet such conditions, and thus for the candidate to become a functioning EU Member State. Through the so-called "pre-accession strategy",[1] the Union has forged a *member-state making* policy which has articulated in considerable detail the putative attributes of membership. It has in turn disclosed what the EU stands for,[2] or at least how it wants to be perceived by the outside world.

A closer look at the obligations of membership formulated in the pre-accession context, however, shows that rather than being a genuine mirror of the EU's identity, enlargement is perhaps more the Chekov's *miroir déformant* that exposes a distorted image of EU membership.[3] A potent illustration of this distortion is

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1 M. Maresceau, 'Pre-accession', in: M. Cremona (ed.), *The Enlargement of the European Union*, Oxford: Oxford University Press, 2003, p. 9.

2 Further, see e.g. H. Sjursen, 'Enlargement in perspective. The EU's quest for identity' *Recon Online Working Paper* 2007/15; K. Smith, 'The conditional offer of membership as an instrument of EU foreign policy: reshaping Europe in the EU's image?' *Marmara Journal of European Studies* 33, 2000, p. 33.

3 Anton Chekhov, *Le miroir déformant*. *Conte de Noël* (1882).

provided by the accession conditionality in the field of minority protection,[4] but the same holds true for fundamental rights more generally:[5] the latter's reflected image as an attribute of EU membership is misleading, in that it does not correspond to the domestic constitutional reality of the EU in this domain.

The ensuing *décalage* between accession conditions and membership obligations has been a curse for the EU,[6] not only because it undermines the credibility of its message, both internally and externally, but more fundamentally because the EU's limited ability to react to domestic fundamental rights problems might hamper its very functioning.[7] The boomerang effect of the pre-accession fundamental rights discourse might thus be welcome, in that it might catalyse internal adjustment to address that discrepancy. This is borne out by the growing debate on the matter, both at academic and political levels, in the face of disquieting regression in some Member States.[8]

This paper first traces the fundamental rights discourse as it has developed in the EU pre-accession context, focussing on its considerable amplification since the "big bang" expansion of 2004 (1). It then turns briefly to the internal situation to substantiate the claim that the image of fundamental rights, as an element of the EU's constitutional identity, remains distorted (2). The last section briefly sheds light on the on-going debate on ways to address the distortion and adjust internal arrangements (3).

1 Increasing significance of fundamental rights in EU enlargement policy

While expressly required since the Treaty of Amsterdam, respect for human rights has always been a condition for accession to the EU. This condition was bolstered in the context of the Union's enlargement to the east, and has been further entrenched ever since. Three steps could indeed be identified in the strengthening of the human rights conditionality since the 1993 European Council meeting in Copenhagen: First, the introduction of EU monitoring of the Copenhagen political criteria, including human and minority rights protection, through the pre-accession strategy (1.1), second, the establishment of a specific chapter in the area of fundamental rights in accession negotiations (1.2), and third, the elaboration of a "new approach" in relation to this particular chapter (1.3).

1.1 An eligibility condition subject to EU monitoring

Respect for democracy and fundamental rights is a *conditio sine qua non* for an aspirant state to be considered as a *candidate* for membership. Implicit at first, such an eligibility condition was elaborated and codified by the European Council at its Copenhagen meeting in 1993. Thus, according to the so-called "Copenhagen criteria", membership requires that the candidate country demonstrates "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities".[9]

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4 M. Maresceau, 'The EU pre-accession strategies: a political and legal analysis' in: M. Maresceau & E. Lannon (eds), *The EU's Enlargement and Mediterranean Strategies: A Comparative Analysis*, Basingstoke: Palgrave, 2001, p. 3.

5 The terminology used by the EU in this domain is somewhat patchy, oscillating between *fundamental* rights, as per the EU Charter of Fundamental Rights, or *human* rights, as per e.g. the Preamble and Article 2 of the TEU. In the remainder of this paper, the notion of fundamental rights is mostly used. Further on this distinction: A. Williams, 'Respecting fundamental rights in the new union' in: C. Barnard (ed.), *The Fundamentals of EU Law Revisited – Assessing the Impact of the Constitutional Debate*, Oxford: Oxford University Press, 2007, p. 71.

6 Further on the discrepancy, see e.g. A. Williams, 'Enlargement of the Union and human rights conditionality: a policy of distinction?' *European Law Review* 25, 2000, p. 601, P. Alston and J.H.H. Weiler, 'An ever closer Union in need of a human rights policy: the European Union and human rights' in P. Alston (ed.), *The EU and Human Rights*, Oxford: Oxford University Press, 1999.

7 See e.g. A. Von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei and M. Smrkolj, 'Reverse Solange – Protecting the essence of fundamental rights against EU Member States' *Common Market Law Review* 49(2), 2012, p. 489.

8 See Letter by the Foreign Ministers of Denmark, Finland, Germany and The Netherlands to President of the European Commission Manuel Barroso, calling for "a new and more effective mechanism to safeguard fundamental values in Member States"; *Associated Press*, 8 March 2013. See also Council Conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union; Justice and Home Affairs Council meeting, Luxembourg, 6–7 June 2013.

9 Further, e.g. M. Cremona, 'Accession to the European Union: membership conditionality and accession criteria' *Polish Yearbook of International Law* 25, 2001, p. 219; F. Hoffmeister, 'Earlier enlargements' in: A. Ott and K. Inglis (eds), *Handbook on European Enlargement*, The Hague: TMC Asser Press, 2002, p. 90; C. Hillion, 'The Copenhagen criteria and their progeny' in C. Hillion (ed.), *EU enlargement: a legal approach*, Oxford: Hart Publishing, 2004, p. 17, A. Tatham, *Enlargement of the European Union*, Alphen aan den Rijn: Kluwer Law International, 2009, pp. 202ff.

Initially crafted in reaction to the aspirations of central and eastern European countries to become members, the "Copenhagen criteria" have endured in their essentials, and they remain the key benchmarks against which the readiness of a third country to accede is assessed.[10] The latest formulation of Article 49 TEU, which sets out the accession procedure, reflects these eligibility conditions. Though it does not include an explicit mention or a reiteration of the Copenhagen criteria, paragraph 1 provides that: "Any European State which *respects the values* referred to in Article 2 and is committed to promoting them *may apply to become a member* of the Union" (emphasis added).[11] It also stipulates that "The conditions of eligibility agreed upon by the European Council shall be taken into account", thus alluding to the conditions crafted in Copenhagen.

In codifying and elaborating accession conditions, the European Council also laid the groundwork for what has become a proactive and meticulous pre-membership policy, namely the 'pre-accession strategy'.[12] In contrast to previous accessions, where the aspirant state had simply been expected to fulfil the EU admission conditions without any interference from the Union,[13] the post-Copenhagen approach to enlargement has entailed a pro-active engagement of the EU to steer and monitor the process whereby candidates prepare for membership.

Throughout the latter part of the 1990s, new instruments were added to "enhance" the pre-accession strategy.[14] Hence, following the 1997 Luxembourg European Council, the Copenhagen criteria were progressively spelled out in short-, medium- and long-term priorities, compiled in "accession partnerships" (APs) adopted by the EU, and which the candidates would have to meet with a view, and as a condition, to their ultimate admission to the Union.[15] The Commission was also requested to produce detailed evaluations on each candidate's performance in implementing its AP,[16] through the publication of annual progress reports, on the basis of which the (European) Council would determine the pace of accession negotiations. In particular, the pre-accession financial assistance could be reviewed if progress in meeting the Copenhagen criteria was deemed insufficient.[17]

The fulfilment of the EU accession conditions, and particularly the respect for fundamental and minority rights, thus became subject to systematic EU monitoring. Relying on a variety of external sources, the Commission provided an evaluation of the situation. It also formulated

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10 See e.g. Conclusions of the General Affairs Council, 29 April 1997; also the 'Thessaloniki Agenda for the Western Balkans: Moving towards European integration'. Further: S. Blockmans, *Tough Love – The European Union's Relations with the Western Balkans*, The Hague: TMC Asser Press, 2007, pp. 241ff; S. Blockmans, 'Raising the threshold for further EU enlargement: process and problems and prospects' in: A Ott and E Vos (eds), *50 Years of European Integration: Foundations and Perspectives*, The Hague: TMC Asser Press, 2009, p. 203.

11 The values referred to in Article 2 TEU, on which the EU is founded, consist of "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. [They] are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

12 Presidency Conclusions, European Council, Essen, 9–10 December 1994. Further: A. Mayhew, *Recreating Europe. The European Union's Policy towards Central and Eastern Europe*, Cambridge: Cambridge University Press, 1998, esp. Chapter 6.

13 The Commission had proposed a pre-accession period in relation to Greece (European Commission's Opinion on Greek Application for Membership, Bull. EC Suppl. 2-1976, 7), however it was rejected by the Council of Ministers which opted for immediate accession negotiations (Bull EC 1-1976, pts 1101-1111, 6-9).

14 Based notably on the proposals made by the European Commission in its Agenda 2000, 'The challenge of enlargement' COM(1997) 2000. Further, see Mayhew, *op. cit*.

15 Council Regulation 622/98 (*OJ*, 1998, L85/1). For recent examples of APs: see Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC (*OJ*, 2008, L51/4).

16 Presidency Conclusions, Luxembourg European Council, 12–13 December 1997, pt. 29.

17 On the pre-accession strategy, see e.g. Maresceau in: Cremona, *op. cit*., and P. Nicolaides, 'Preparing for accession to the European Union: how to establish capacity for effective and credible application of EU rules' in: M. Cremona (ed), *The Enlargement of the European Union*, Oxford: Oxford University Press, 2003, pp. 9 and 43, respectively; K. Smith, *The Making of EU Foreign Policy: The Case of Eastern Europe*, Basingstoke: Palgrave, 1999, p. 122; Tatham, *op. cit*., p. 287; Mayhew, *op. cit.*

recommendations as regards measures that ought to be taken by the candidate to address possible deficiencies, and ultimately to meet the admission conditions.[18]

For instance, in order to monitor the candidate's fulfilment of the Copenhagen criterion relating to minority protection, the Commission referred to the European Framework Convention on the Protection of National Minorities and drew on the expertise of the OSCE High Commissioner for National Minorities to provide their own assessment of the candidate's progress, and guidance for further action.[19] The broad Copenhagen political criteria were thereby filled with contents that may have been lacking in view of the limited, if not non-existent, EU norms in the field concerned.[20] In that enlargement provided a platform for the development of an EU fundamental rights policy,[21] at least vis-à-vis the candidates.

1.2 Fundamental rights as a new chapter of accession negotiations

The fundamental rights dimension of the pre-accession strategy has developed strikingly since the "big bang enlargement" of 2004.[22] The start of accession negotiations with Croatia and Turkey was a milestone in this respect. The evolution that is perhaps the most noticeable was the addition of a new chapter 23 on "judiciary and fundamental rights"[23] to the list of accession negotiations chapters.[24] As a result, respect for human rights is no longer regarded solely as an *eligibility condition* (i.e. prerequisite for starting accession negotiations) as suggested by Article 49(1) TEU. Fundamental rights are also conceived as an *integral part* of the EU *acquis* which the candidate has to assimilate and,[25] as such, considered under the third Copenhagen criterion relating to the "candidate's ability to take on the *obligations of membership*" (emphasis added). It thus suggests the existence of a normative basis for the EU in the field.

The articulation of an EU *acquis* on fundamental rights in the context of accession has also been fostered by the new *methodology* introduced in the negotiations, following the so-called "renewed consensus on enlargement".[26] Agreed in the aftermath of the signature of the Accession Treaty with Bulgaria and Romania, and drawing lessons from the related pre-accession experience, the new consensus foresees the strengthening of conditionality in accession negotiations with a view to enhancing the credibility of the candidates' preparation for membership.

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18 As regards EU scrutiny of political conditionality, see e.g. A. Williams, 'Enlargement of the Union and human rights conditionality: a policy of distinction?', *European Law Review* 25, 2000, p. 601, K. Smith, 'The evolution and application of EU membership conditionality' in: M. Cremona (ed), *The Enlargement of the European Union,* Oxford: Oxford University Press, 2003, p. 105; E. Tulmets, 'La conditionnalité dans la politique d'élargissement de l'Union européenne à l'Est: un cadre d'apprentissages et de socialisation mutuelle?' (2005) PhD thesis, Science-Po, Paris (http://ecoledoctorale.sciences-po.fr/theses/theses_en_ligne/tulmets_scpo_2005/tulmets_scpo_2005.pdf); E. Lannon, T. Haenebalcke & K. Inglis, 'The many faces of EU conditionality in pan-Euro-Mediterranean relations' in: Maresceau and Lannon, *op. cit.*, p. 97.

19 G. Sasse, 'The politics of conditionality: the norm of minority protection before and after EU accession', *Journal of European Public Policy* 15, 2008, p. 842; O. De Schutter, 'The Framework Convention on the Protection of National Minorities and the law of the European Union' *CRIDHO Working Paper* 2006/01; P. Van Elsuwege, 'Minority protection in the EU – challenges ahead' in K. Inglis and A. Ott (eds) *The Constitution for Europe and an Enlarging Union: Unity in Diversity?*, Groningen: Europa Law Publishers, 2005, p. 259, C. Hillion, 'The Framework Convention for the Protection of National Minorities and the European Union', Strasbourg: Council of Europe Report, 2008; G. Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward,* Budapest: LGI Books, 2004.

20 H. Grabbe; 'A partnership for accession? The implications of EU conditionality for the Central and East European Applicants' *European University Institute Working Papers* RSC no 99/12; A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe,* Cambridge: Cambridge University Press, 2005, pp. 46ff.

21 G. de Búrca, 'Beyond the Charter: How enlargement has enlarged the human rights policy of the EU' *Fordham International Law Journal* 27, 2004, p. 679.

22 This section elaborates on some of the points made in Editorial Comments: 'Fundamental rights and EU membership: Do as I say not as I do!' *Common Market Law Review* 49(2), 2012, p. 481.

23 Admittedly, some aspects of this chapter (e.g. independence of the judiciary, fight against corruption) were covered by the specific chapter on Justice and Home Affairs, included in previous accession negotiations.

24 See e.g. Negotiating Framework for Croatia; Luxembourg, 3 October 2005.

25 Chapter 23 consists of four main components: judiciary, fight against corruption, fundamental rights including freedom of expression, and EU citizens' rights.

26 Presidency Conclusions, European Council, Brussels, 15 December 2006.

In practical terms, most negotiation chapters are to be opened and closed only once the candidate has met, respectively, the "opening" and "closing benchmarks" defined by the EU. The Commission is in charge of proposing such benchmarks to the Member States, and of gauging whether these are met by the candidate, or not. On the basis of that assessment, Member States ultimately decide to open and/or close each of the negotiation chapters. For instance, one of the closing benchmarks relating to chapter 23 required that Croatia strengthen the independence, accountability, impartiality and professionalism of its judiciary. It was also expected to strengthen its protection of minorities, notably through effective implementation of a Constitutional Act on the Rights of National Minorities.[27]

The inclusion of a specific chapter on the matter, combined with the articulation of benchmarks, considerably strengthened the significance of fundamental rights in EU accession negotiations, both in substantive and normative terms. In effect, the role of the Commission was substantially reinforced, both in articulating their substance, and in monitoring compliance. Hence, in assessing fulfilment of the above mentioned benchmarks, the Commission considered, early in 2011, that Croatia had not yet established a convincing track record of recruiting and appointing judges and state prosecutors based on the application of uniform, transparent, objective and nationally applicable criteria. It also held that there had been no tangible improvement in the level of employment of national minorities as required by the Constitutional Act on the Rights of National Minorities (CARNM), and thus exhorted Croatia "to set out long term plans, backed by statistics, for fully meeting its obligations under the CARNM as regards minority employment, and [to] adopt a plan to tackle the shortcomings … on the under representation of minorities in the wider public sector".[28] In the event, the Commission considered that chapter 23, which turned out to be one of the most difficult chapters to negotiate,[29] could not yet be closed.[30]

Negotiations ended a few months later, as the Hungarian presidency of the EU Council, which was eager to complete the whole negotiation process with Croatia, came to an end. However the ensuing Act of Accession (AA)[31] foresees in its Article 36 that the Commission's monitoring of commitments undertaken in the context of accession negotiations *continues*, notably in the field of fundamental rights and judiciary,[32] and possibly *even after accession*.[33] Annex VII, attached to the Treaty of Accession, enunciates the "specific commitments undertaken by the Republic of Croatia in the accession negotiations", mentioning *inter alia* its commitments to continue "to improve the protection of human rights", "to strengthen the independence, accountability, impartiality and professionalism of the judiciary", "to strengthen the protection of minorities". Moreover, Article 36 (2) AA stipulates that non-fulfilment of such broad commitments would open the possibility for the Council, on the basis of a Commission proposal, to take "all appropriate measures if issues of concern are identified

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27 Interim Report from the Commission to the Council and the European Parliament: *Reforms in Croatia in the Field of Judiciary and Fundamental Rights (Negotiation Chapter 23)*, COM(2011) 110, 2 March 2011, pp. 3 and 5.

28 *Ibid.*

29 *Euractiv,* 7 June 2011; *EUobserver,* 13 December 2010.

30 Other deficiencies had been detected by the Commission that contributed to its negative assessment, see COM(2011)110, *op. cit.*

31 *OJ* 2012 L112.

32 According to Article 36(1): "The Commission shall closely monitor all commitments undertaken by Croatia in the accession negotiations, including those which must be achieved before or by the date of accession. The Commission's monitoring shall consist of regularly updated monitoring tables, dialogue under the Stabilisation and Association Agreement (…), peer assessment missions, the pre-accession economic programme, fiscal notifications and, when necessary, early warning letters to the Croatian authorities (...). Throughout the monitoring process, the Commission shall also draw on input from Member States and take into consideration input from international and civil society organisations as appropriate. The Commission's monitoring shall focus in particular on commitments undertaken by Croatia in the area of the judiciary and fundamental rights (Annex VII), including the continued development of track records on judicial reform and efficiency, impartial handling of war crimes cases, and the fight against corruption (…) As an integral part of its regular monitoring tables and reports, the Commission shall issue six-monthly assessments up to the accession of Croatia on the commitments undertaken by Croatia in these areas".

33 The phraseology of Article 36 AA is not entirely clear as regards the time span of the envisaged monitoring. See: A. Lazowski, 'European Union do not worry, Croatia is behind you: A commentary on the seventh Accession Treaty' *Croatian Yearbook of European Law & Policy* 8, 2012.

during the monitoring process", without specifying what form such measures could take, but adding that they would only be lifted "when the relevant issues of concern have been effectively addressed".

In line with this monitoring mandate, thus enshrined in EU primary law, the Commission produced a Comprehensive Monitoring Report in October 2012 that assessed Croatia's progress in its preparations for accession, notably in the field of the judiciary and fundamental rights.[34] While the acceding state was deemed generally to be meeting its commitments, the Commission nevertheless pointed out that "increased efforts [were nevertheless] needed to continue strengthening the rule of law, by improving administration and the judicial system, and to fight and prevent corruption effectively", and added that "prosecution of domestic war crimes, respect for human rights and the protection of minorities require continuous attention". The message of the candidate's unfinished preparation in the area of fundamental rights that transpires from the above assessment was partly reiterated in the last Commission monitoring report of March 2013.[35]

1.3 The "new approach" to fundamental rights in accession negotiations

Based on lessons learned from Croatia's accession process, particularly with respect to the judiciary and fundamental rights, the Commission suggested various adjustments to the negotiations of chapter 23.[36] The general purpose of what has been coined the "new approach", and which has since been endorsed by the European Council, is to invigorate the monitoring of the candidates' absorption of the EU fundamental rights *acquis* in the context of accession negotiations.[37]

Thus, chapter 23 is to be tackled *early* in the negotiations so as to allow maximum time for the candidate to establish the necessary legislation, institutions and solid track record of implementation before the negotiations are closed,[38] thereby demonstrating that such reforms are solidly embedded in its constitutional fabric, prior to admission. Moreover "screening reports", which establish possible gaps between EU law and the candidates' legislation over the whole range of accession chapters, must provide substantial guidance in relation to chapter 23, including on the tasks to be addressed in the action plans which the candidate state's authorities themselves have to adopt as "opening benchmarks".[39] It is also foreseen that the latter should comprise "related timetables and resource implications, setting out clear objectives, quantifiable indicators as appropriate, and the necessary institutional set up".[40] Such action plans should aim at full alignment of the candidate with the requirement of this chapter, and as guidance documents for the subsequent negotiations they may have to be amended or revised by the candidate if problems arise in the course of the negotiations under this chapter.

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34 The other fields monitored were competition policy and justice and security. Communication from the Commission to the European Parliament and the Council on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership [COM(2012) 601 final].

35 Communication from the Commission to the European Parliament and the Council, Monitoring Report on Croatia's accession preparations [COM(2013) 171 final]; see particularly paragraphs 2, 4, 5, and 6 under section 2.2. See also the conclusions on Croatia of the General Affairs Council of 22 April 2013.

36 The adjustments also concern chapter 24 (see Strategy paper of 12 October 2011).

37 Communication from the Commission to the European Parliament and the Council, *Enlargement Strategy and Main Challenges 2011-2012,* COM(2011) 666 final, 12.10.2011, p. 5. See also the General Affairs Council Conclusions on enlargement and stabilisation and association process, 5 December 2011, pt 4, and Conclusions, European Council, December 2011.

38 General EU position – ministerial meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union (AD 23/12, 27 June 2012).

39 See Outcome of Screening on Chapter 23 for Montenegro: Judiciary and fundamental rights (doc. 17785/12, 14 December 2012). Based on an examination of the candidate state's compliance with a patchy selection of human rights, the screening report, pointed out that "shortcomings persist in the practical implementation of the protection of human rights, including by judicial and law enforcement authorities", and considered that "administrative capacity and financial means to implement fundamental rights remain limited". It then recommended to the Montenegrin authorities that they adopt "one or more Action Plan(s)" notably in the areas "media freedom and respect for and protection of minorities", asking the Montenegrin authorities to ensure "the independence of the audio-visual regulator and of the public broadcaster", and that minorities have "equal access to economic and social rights and their adequate representation in public authorities".

40 *Ibid.*

Epitomising the increasing EU intervention in the candidate's preparation as regards the judiciary and fundamental rights, the new approach also requires the establishment of "interim benchmarks", which come in addition to the opening and closing ones, with the aim of identifying additional milestones in the candidate's absorption of the EU *acquis* in the area concerned. Such an additional requirement allows further articulation of steps to be taken by the candidate while offering supplementary possibilities for the EU Member State to hold up the negotiations process in case of dissatisfaction with reforms on the ground.

Indeed, the new approach includes a system of sanctions, in the form of possible "corrective measures" in case of problems during the negotiations. According to the negotiating framework for Montenegro

> should progress under [chapter 23] significantly lag behind progress in the negotiations overall, and after having exhausted all other available measures, the Commission will on its own initiative or on the request of one third of the Member States propose to withhold its recommendations to open and/or close other negotiating chapters, and adapt the associated preparatory work, as appropriate until this imbalance is addressed.[41]

It is then up to the Council to decide "by qualified majority on such a proposal, and on the conditions for lifting the measures taken". Based on the "importance of [chapter 23] for the implementation of the acquis across the board",[42] the EU could thus decide to suspend accession negotiations as a whole in case of difficulty in relation to this particular chapter. Progress in the areas of judiciary and fundamental rights has thus become the keystone of the advancement of the entire accession process.

Overall, the new approach typifies the consolidation of the fundamental rights discourse in the context of EU accession. In particular, the elaboration of benchmarking entails further articulation of fundamental rights standards and means to achieve their assimilation by the candidate. Both developments equally point towards a significantly strengthened EU monitoring, notably by the Commission, involving increased pressure through the possibility of corrective measures. In view of the worrying situation in some Member States, any initiative to ingrain EU values in future members' polity is commendable. Anticipatory measures to ascertain upstream assimilation of, and compliance with, fundamental rights might indeed contribute to them becoming a matter of course, and to reduce the risk of setback. Yet it remains doubtful that the new approach in itself is a guarantee of irreversibility.

2 But mind the gap between pre- and post-accession fundamental rights regimes

The invigorated promotion of fundamental rights in relation to candidates for membership has had a boomerang effect in that it has turned the spotlight, once again, on the EU internal fundamental rights regime and on its limits (2.2). The latter have become particularly conspicuous as the EU has had to react to contentious developments in some Member States, and with evident discomfort (2.1).

2.1 Apprehensive EU response to internal fundamental rights issues

Hitches in fundamental rights protection have increased, in old and newer Member States alike, as demonstrated by the persistent controversial treatment of Roma,[43] the encroachment upon media freedom,[44] or episodic calls for discriminatory treatment in relation to new Member States' migrant citizens.[45] Yet, in most cases, it appears that the fundamental rights *acquis*, vigorously promoted and monitored in the context of accession, has not proved as effective a remedy as more conventional elements of EU law.

Hence, the enforcement proceedings against Hungary triggered by the Commission in 2012 related respectively to the independence of the Hungarian central bank

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41 Paragraph 25, General EU Position, Ministerial meeting opening the Intergovernmental conference on the accession of Montenegro to the European Union, *op. cit.*

42 *Ibid.*

43 On the treatment of Roma, see e.g. the Report of the Commissioner for Human Rights, Human rights of Roma and Travellers in Europe, Council of Europe Publishing, 2012, available at: <coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf (accessed 15 May 2013). See also: http://www.coe.int/t/commissioner/activities/themes/Roma/RomaRights_en.asp (accessed 15 May 2013).

44 See e.g. the 2010 report of *Reporters Without Borders* on the freedom of the press: <http://fr.rsf.org/press-freedom-index-2010,1034.html > (accessed on 15 May 2013).

45 *EUobserver,* 14 February 2012.

(Articles 127(4) and 130 TFEU, Article 14 of the Statute of the European System of Central Banks and of the European Central Bank), the retirement age of judges, prosecutors and notaries (Directive 2000/78/EC), and the data protection supervisory authority (Article 16 TFEU and Article 8 of the EU Charter of Fundamental Rights).[46] Indeed, in a plenary debate at the European Parliament on the situation in Hungary, the Commission President conceded that "the issues at stake here may go beyond the European Union law matters that have been raised … In fact, beyond legal aspects, some concerns have been expressed regarding the quality of democracy in Hungary, its political culture, the relations between the government and opposition and between the State and the civil society".[47] Implicitly admitting the limited reach of EU law and of the Commission monitoring powers on this terrain,[48] the President pointed out that "the Council of Europe [was] considering other points of the Hungarian legislation which are under its remit" adding that the Venice Commission would play "an important role in this respect".[49]

Against the backdrop of the invigorated fundamental rights discourse in the pre-accession context evoked earlier, the Commission President's confession brought home the notion that a discrepancy endures between EU accession conditions and membership obligations. The EU still does not have vis-à-vis its members the powerful transformative leverage it enjoys in relation to candidates for accession. More recent episodes appear to disclose similar limitations in the EU fundamental rights machinery. Hence, in reaction to the controversial fourth Constitutional amendment adopted by the Hungarian Parliament, the Commission did not react alone, but through a joint statement of its President and the Secretary General of the Council of Europe.[50] Joining the Council of Europe's voice to that of the Commission adds weight to its message, yet it is ironic that this addition is felt desirable when addressing an EU Member State's fundamental rights problem while not deemed necessary when monitoring fundamental rights in candidate states.[51]

2.2 Structural weaknesses in EU domestic protection of fundamental rights

Such a discrepancy, which has undermined the credibility of the EU fundamental rights policy, is structurally multifarious. It finds its first expression in the *scope* of fundamental rights to be respected by candidates and by Member States, respectively. A cursory look at EU pre-accession documents (such as the so-called screening reports of the Commission in relation to chapter 23),[52] clearly illustrates that the EU fundamental rights *acquis* related to chapter 23 is broader, and indeed more open-ended, than the list connected to Article 2 TEU, or the EU Charter of Fundamental Rights. The issue of minority protection remains a case in point,[53] and so does media freedom.[54]

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46 The enforcement proceedings regarding the independence of the central bank were suspended following the promise by Hungary to amend its contentious legislation, after the EU had threatened not to continue negotiating balance of payments assistance to Hungary. The Court of Justice has since upheld the Commission enforcement proceedings regarding the compulsory retirement age of judges, prosecutors and notaries in its judgment of 6 November 2012 in Case C-286/12 *Commission v Hungary* (n.y.r). Further on these proceedings, see Editorial Comments, 'Hungary's new constitutional order and "European Unity"' *Common Market Law Review* 49(3), 2012, p. 871.

47 J. M. Barroso, 'A Europe of values and principles', Plenary debate on the situation in Hungary; European Parliament, Strasbourg, 18 January 2012.

48 See also the letter of Commissioner Viviane Redding to Hungarian Vice-Prime Minister Tibor Navracsics, and its annex, 12 December 2011 (available on the Commissioner's official website).

49 J. M. Barroso, *op. cit.* Indeed, the Venice Commission issued a critical report on Hungary's laws, overhauling the country's organisation of its judiciary: CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary (Venice, 16-17 March 2012).

50 Statement from the President of the European Commission and the Secretary General of the Council of Europe on the vote by the Hungarian Parliament of the Fourth amendment to the Hungarian Fundamental Law; MEMO/13/201, 11 March 2013.

51 Even if the "close and efficient cooperation between the ... Commission and the Council of Europe, particularly with regard to the implementation of of the Copenhagen political criteria" has recently been underlined by the Commission. See e.g. S. Füle, Address to the Parliamentary Assembly of the Council of Europe, SPEECH/13/50, 24 January 2013.

52 Outcome of Screening on Chapter 23 for Montenegro: Judiciary and fundamental rights (doc. 17785/12, 14 December 2012).

53 See e.g. C. Hillion, 'The Framework Convention for the Protection of National Minorities and the European Union', Strasbourg: Council of Europe, 2008.

54 Von Bogdandy *et al., op.cit.*

Beyond this substantive inconsistency, the *obligation* to respect fundamental rights appears to vary depending on whether a country is situated in a pre- or post-accession context. In principle, the fundamental rights enshrined in the Charter of Fundamental Rights and as General Principles of Union Law, only bite Member States when they act within the scope of EU law.[55] While the case law of the European Court of Justice has been rather permissive in its interpretation of such a condition so as to allow maximum protection within the EU,[56] such protection still falls short of the one envisaged in the pre-accession context, as *any conduct* of a candidate is considered for the purpose of evaluating its compliance with fundamental rights.

Admittedly, Article 7 TEU provides an EU mechanism for controlling Member States' behaviour when they act outside the context of EU law. Yet, it presupposes a higher threshold of breach for any sanction to materialise ("a clear risk of a serious breach … of the values referred to in Article 2"), compared with the potential for swift EU reaction in the pre-accession context, particularly under the new approach. Indeed, triggering the procedure of Article 7 TEU is more demanding than what is envisaged in recent negotiating frameworks. While the former requires a unanimous decision of the European Council and the consent of the European Parliament to establish the existence of "a serious and persistent breach … of the values referred to in Article 2", the latter foresees that the Council decides by ordinary qualified majority voting to suspend negotiations, based on the Commission's initiative, or on the request of one third of the Member States.[57] Similarly, the adoption of corrective measures in the form of possible suspension of negotiations in case of slow progress in the field covered by chapter 23 requires only the qualified majority of Member States.

A third level of incongruity concerns the EU's *monitoring* of fundamental rights. The latter significantly differs whether it concerns a candidate state or a Member State. In the former case, monitoring is systematic, based as it is on the regular reporting of the Commission, and involving a considerable EU leverage on the candidates' behaviour. By contrast, the EU's monitoring of Member States' compliance with fundamental rights appears at best circumspect, despite the substantial know-how to monitor compliance with Article 2 TEU acquired by the Commission in the context of pre-accession, the presence for the first time of a specific Commissioner for Justice, Fundamental Rights and Citizenship,[58] and the establishment of an EU Fundamental Rights Agency. While this may reveal the actually limited normative basis for providing such an assessment, reluctance to undertake such monitoring internally, through available tools, cannot be excluded.[59]

Despite considerable changes in EU constitutional law as regards human rights, the Union thus seemingly remains ill-equipped domestically to monitor and guarantee respect of the fundamental values on which it prides itself to be founded. Paradoxically, this might prolong the discrepancy outlined above: as the internal EU fundamental rights system still lacks teeth, the leverage derived from the pre-accession conditionality is used to push for ambitious adaptations essential to the proper functioning of the EU legal order, because such adaptations are difficult to enforce in a post-accession context. However, it is illusory to assume that the new approach is sufficient to prevent post-accession regressions of the kind witnessed in today's EU, all the more since the value of the pre-accession fundamental rights discourse of the Union diminishes, notably as a result of the double standard phenomenon it reveals. More consistency thus ought to be secured between the EU's values and accession criteria to reverse this hazardous spiral. Such consistency is essential to preserve the full transformative dimension of the EU pre-accession policy and the authority of the EU external rhetoric more generally and, perhaps primarily, to secure the foundations and very functioning of the European integration project, based as it is on trust and mutual recognition.

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55 Article 51(2) EU Charter of Fundamental Rights. See also the Commission's Report on the Application of the EU Charter of Fundamental Rights, COM(2013) 271.

56 See e.g. Case C-617/10, *Fransson,* judgment of 26 February 2013, n.y.r.

57 See pt. 17, Negotiating Framework for Iceland, doc. 12228/10, and pt. 12, Negotiating Framework for Croatia, 3 October 2005.

58 See in this regard the so-called "EU Justice Scoreboard" of the Commission (COM(2013) 160 final) which "seeks to provide reliable and objective data on the justice systems in all 27 Member States, and in particular on the quality, independence and efficiency of justice": <http://ec.europa.eu/justice/newsroom/news/130327_en.htm > (accessed 15 May 2013).

59 Further, see e.g. J.-W. Müller, 'Safeguarding democracy inside the EU – Brussels and the future of liberal order', *Transatlantic Academy Paper Series,* February 2013.

3 Enlargement as catalyst for enhancing EU domestic protection of fundamental rights?

While enlargement has exposed the internal/external discrepancy in the EU fundamental rights regime, it may in turn catalyse internal adaptations in the field, as it has in the past (3.1), albeit unsatisfactorily. To be sure, political momentum is seemingly building up to further consistency in EU fundamental rights protection (3.2).

3.1 Enlargement as stimulus for EU constitutional reform

Enlargement has often stimulated Union's domestic reforms. Not only have most episodes entailed the emergence of new policy demands on the EU because these are important for new entrants, but also pre-accession practices have, occasionally at least, been integrated in EU's primary law, or fed into its institutional operation. This has partly been the case in the field of fundamental rights.[60]

Thus, as evoked earlier, the eligibility conditions articulated by the European Council have partly been codified in Article 49(1) TEU, which now explicitly requires the aspirant's respect of EU values and its commitment to promoting them. In addition, the content of these values has been adjusted, notably to ensure some degree of correlation with the Copenhagen criteria. In particular, a reference to the protection of the rights of persons belonging to minorities was introduced in Article 2 TEU, partly on the suggestion of some members of the Convention on the Future of Europe.[61] Moreover, the procedure of Article 7 TEU was introduced into primary law against the backdrop of the eastern enlargement of the Union, as a mechanism to address possible democratic regression in the new Member States.[62]

The proven potential of enlargement to stimulate EU constitutional change could also concern *monitoring*. Indeed, a pre-accession type of scrutiny has spread beyond the confines of the enlargement policy: a system of *post*-accession monitoring was established, on the basis of the Accession Treaty with Bulgaria and Romania (the so-called 'Cooperation and Verification Mechanism' [hereinafter 'CVM'])[63] through which the Commission has supervised the continuing reform process of new Member States in the areas of judicial reform and the fight against corruption and organised crime.[64] A pre-accession-like monitoring has also appeared in the EU's relations with its neighbours, as typified by the European Neighbourhood Policy.[65] But the Commission's supervisory role is equally developing internally, notably in relation to the internal market (cf. Communication on Better Governance for the Single Market),[66] the Economic and Monetary Union (cf. the so-called "two-pack" of regulations aimed at further

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60 As aptly recalled by de Witte: "some important intra-EU constitutional reforms, particularly in the field of fundamental rights protection, might not have occurred, or at least not in the same form, if it had not been for the EU's strong affirmation of these fundamental values in the pre-accession context": B. de Witte, 'The impact of enlargement on the Constitution of the European Union' in: Cremona, *op. cit.,* p. 209.

61 Suggestion for amendment of Article I-2, by Péter Balázs, József Szájer, Pál Vastagh, Hannes Farnleitner, Alain Lamassoure, Jens-Peter Bonde, Kimo Kiljunen, Evripidis S. Styliandis, Péter Gottfried, István Szent-Iványi, António Nazaré Pereira, Jürgen Meyer <http://european-convention.eu.int/EN/amendments/amendments3a7a.html?content=2&lang=EN> (accessed on 15 May 2013). The proposed amendment envisaged the inclusion of the phrase 'respect for *and protection of* human rights *and those of minorities*" (emphasis added), with the following explanation: "the proposal adds and refers to the missing element of the Copenhagen criteria, which makes an important part of the acquis'.

62 W. Sadurski, 'Adding bite to the bark: the story of Article 7, EU enlargement, and Jörg Haider' *Columbia Journal of European Law* 16(3), 2010, p. 385; see also De Witte, *op. cit.,* p. 235, and the literature cited therein.

63 See e.g. Commission Decision 2006/929/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime (*OJ* L 354, 14.12.2006, p. 56).

64 See the Commission report to the European Parliament and the Council, 'On Progress in Romania under the Co-operation and Verification Mechanism' (COM(2013) 47 final). Further: e.g. A. Spendzharova and M.A. Vachudova, 'The EU's Cooperation and Verification Mechanism: Fighting corruption in Bulgaria and Romania after EU accession' *SIEPS European Policy Analysis* (2012:1epa).

65 M. Cremona & C. Hillion, *'L'Union fait la force?* Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy', *European University Institute Law Working Paper* No 39/2006 http://cadmus.iue.it/dspace/bitstream/1814/6419/1/LAW-2006-39.pdf

66 Commission Communication, 'Better Governance for the Single Market', COM(2012)259 final.

improving economic governance in the euro area,[67] and the Treaty on Stability, Coordination and Governance) and in relation to the Member States' judiciary (cf "EU Justice Scoreboard" in which the efficiency, quality and independence of their justice systems are reviewed, as part of the European Semester process).[68]

The EU monitoring power, and particularly that of the Commission,[69] is thus being strengthened including beyond the scope of the EU Treaties. While Member States' tolerance vis-à-vis such increased intrusion may partially be explained by the precariousness of the EU economic and financial situation and the imperative of safeguarding the eurozone and the internal market, it might also be related, more structurally, to the fact that several Member States (and a growing proportion thereof) are used to the Commission's playing such a role, given their pre-accession experience. To be sure, if such EU supervision is accepted as regards Member States' fiscal powers and justice systems, both deeply intertwined with their domestic democratic life, it may be wondered whether their compliance with fundamental rights, whose protection has been constitutionally emboldened by the Lisbon Treaty, could equally be subject to EU monitoring, in coherence with what is being done in the context of enlargement.

3.2 Doing justice to the EU fundamental rights regime?

Momentum appears to be building for strengthening mechanisms of fundamental rights protection within the EU. As the negotiations of the EU accession to the European Convention on Human Rights were being finalised,[70] the foreign ministers of Germany, Denmark, Finland and The Netherlands wrote a letter to the President of the European Commission in which they emphasise that "The credibility of the European project depends on us living up to the standards we have given ourselves". They call for "a new and more effective mechanism to safeguard fundamental values in Member States", in view of the fact that "there are limits to our institutional arrangements when it comes to ensuring compliance. Neither the procedures enshrined in the Treaties nor the EU fundamental rights charter provide for sufficiently targeted instruments". Practically, they "propose that the Commission as the guardian of the Treaties should have a stronger role [t]here".[71]

Speaking on the future of human rights in the European Union, the Director of the Fundamental Rights Agency, Morten Kjærum, also pointed out that:

> If the EU suspects unfair competition in the markets, it initiates infringement procedures. If Member States fail to comply with directives, the same happens. These are powerful tools to bring errant companies and countries back on track. Until now, they have been used more often to regulate economic performance than ensure human rights compliance. But EU fundamental rights legislation is equally binding, whether the issue at hand is the deportation of Roma or the laying off of judges […] Nations cannot stay in the EU if they do not respect these guarantees. Perhaps Member States should be asked to undergo an annual check-up on their fundamental rights and democracy compliance. This could then result in an annual report of the situation in all EU countries. Compliance with the EU's Charter of Fundamental Rights must be the minimum standard. In addition, no EU country should take lightly the so-called Copenhagen Criteria once

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67 Regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (PE-CO_S 5/13, 26 April 2013); Regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (PE-CO_S 6/13, 26 April 2013).

68 Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, 'The EU Justice Scoreboard – A tool to promote effective justice and growth', COM(2013) 160 final.

69 See also 'Editorial Comments - A revival of the Commission's role as guardian of the Treaties?' *Common Market Law Review* 49(5), 2012, p. 1553.

70 See Final Report, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, 47+1(2013)008, Strasbourg, 5 April 2013.

71 *Associated Press,* 8 March 2013. The need for yearly EU review of Member States' respect for fundamental rights has also been emphasised by the Swedish EU Minister Birgitta Ohlsson; see: <http://www.regeringen.se/sb/d/12822/a/205400> <http://www.regeringen.se/sb/d/12822/a/208152> (accessed 15 May 2013).

> they have joined. These criteria are the rules a country must conform to in order to be eligible to join the European Union – and these include the requirement that a state must have the institutions to preserve democratic governance and human rights. Why not check current EU Member States against these criteria every year?[72]

Various arrangements are thus being mooted to strengthen the EU domestic protection of fundamental rights, and thus to enhance consistency with the pre-accession regime.[73] Exploring those is the subject for another day. Suffice to say that strengthening the role of the Commission as guardian of the Treaties and of the Charter,[74] as suggested in the above quote, could admittedly go some way in tackling the evoked weaknesses of the EU system. That said, several related adjustments would have to be considered for the Commission to take on that role seriously.

For instance, the Commission's scrutiny would have to be free from Member States' interference if the authority of its assessments is to be undisputed, save in court. This entails that the independence of commissioners would have to be firmly guaranteed, while further politicisation of the institution is avoided. Indeed, as compliance with, and enforcement of, EU norms is not contingent on Member States' support, the Commission's call for remedy addressed to a particular Member State should not depend on being "sufficiently supported by Member States", as suggested in the four ministers' letter; the mechanism would otherwise risk being hampered by "political expediency", and open the door to unequal treatment of Member States.[75]

Moreover, the elaborate means that monitoring requires would have to be made available. While the Commission has some resources at its disposal (e.g. a Commissioner for Justice, Fundamental Rights and Citizenship, supported by Directorate General (DG) 'Justice'), its domestic monitoring capacity as regards fundamental rights remains limited if compared to that of DG 'Enlargement', and the assistance the latter gets from EU delegations located in the monitored countries.[76] Clear indicators would also need to be identified, as well as a methodology to apply them. Cooperation with the Fundamental Rights Agency, whose mandate ought to be revised,[77] would thus be important in this respect, as would cooperation with other organisations, such as the Council of Europe, which indeed ought to be institutionalised, including in the pre-accession context, particularly in view of the possible EU accession to the ECHR.

Beyond the question of resources, EU monitoring would have to be buttressed by an appropriate system of sanctions. The CVM experience shows that while post-accession monitoring may usefully spell out required

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72 Speech of Morten Kjaerum, Director of the Fundamental Rights Agency, on the future of human rights in the European Union (10 September 2012) available at: http://fra.europa.eu/en/speech/2012/future-democracy-and-human-rights-europe (accessed 15 May 2013).

73 See also: Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the union is based, COM(2003) 606, Brussels, 15.10.2003. See, F. Hoffmeister, 'Monitoring minority rights in the enlarged European Union', in: Toggenburg, *op. cit.,* p. 85. Academic suggestions include the use of the open method of coordination to monitor Member States (De Búrca, *op. cit.*), or the "reverse *Solange*" system, using the potential of European citizenship to bolster the protection of fundamental rights internally (Von Bogdandy *et al., op. cit.*). A 'Copenhagen Commission' has also been suggested (Müller, *op. cit.*).

74 In this sense, the Commission had initially asked the ECJ to check the compatibility of the Anti-Counterfeiting Trade Agreement with the EU Charter of Fundamental Rights (http://trade.ec.europa.eu/doclib/docs/2012/may/tradoc_149464.doc.pdf), before withdrawing its application (<http://euobserver.com/tickers/118583> accessed 15 May 2013).

75 The letter points out that the new mechanism should be "independent of political expediency" and "would be non-discriminatory and applicable to all Member States in the same way".

76 The Commission's lack of resources to perform adequate internal monitoring might partly explain its recurrent reliance on the external expertise of e.g. the Council of Europe when dealing with internal fundamental rights issues, i.e. outside the remit of DG Enlargement. At present, it is essentially the Secretariat-General of the Commission that attempts to forge a joint effort with DG Home, DG Justice and (thinly staffed) EU Information Offices. I am grateful to a senior EU diplomat for pointing this out.

77 This mandate is presently established by Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (*OJ*, 2007, L 53/1); as implemented in regular multi-annual frameworks. The latest of those was adopted in 2013: Council Decision No 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights (*OJ*, 2013, L 79/1).

reforms to the Member States concerned, the lack of serious consequences if such reforms are not carried out has significantly hampered the transformative potential of the mechanism, and the latter's credibility. The suggestion made by the Foreign Ministers' letter to envisage the suspension of EU funding should the Member State concerned fail to remedy the situation, can be understood in this light.[78] However, such financial sanctions would have to be smart to lead to the desired outcome.[79] Indeed, the credibility of the sanction envisaged by Article 7 TEU, as last resort, also needs to be somewhat enhanced, perhaps even through an adjustment of its modalities.

In sum, the evolving pre-accession fundamental rights discourse might catalyse further internal adjustments to enhance the domestic EU fundamental rights regime. Enlargement and fundamental rights protection are thus significantly influencing one another: while the former contributes to enhancing the latter both externally and – by necessity – internally, enhanced domestic fundamental rights protection might in turn benefit enlargement,[80] and the Union's legitimacy more generally.

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78 I am grateful to a senior EU diplomat for pointing this out.

79 Consider in this regard the "ad hoc tax" which the Hungarian authorities initially envisaged – before abandoning it – to cover possible financial losses as a result of EU action; *EUobserver,* 17 April 2013.

80 A point also made in the letter signed by the four foreign ministers, cited above.

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