



EU Enlargement Policy Goes East: Historical and Comparative Takes on the EU's Rule of Law Conditionality vis-à-vis Ukraine

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Abstract

The article discusses a unique case of the EU's application of rule of law conditionality vis-à-vis Ukraine, while the latter is in active war with Russia. It is demonstrated that the EU utilized momentum, created by the confluence of the invasion and Ukraine's EU candidatureship, to apply ambitious rule of law conditionality in its relations with Ukraine. Despite the unique strategic and political context, the conditionality is path-dependent, strongly relying on the achievements and outstanding tasks of the EU's pre-war rule of law promotion in Ukraine. Also, both the design and substance of EU conditionality vis-à-vis Ukraine strongly resemble the one the EU applied vis-à-vis Western Balkans. This concerns specifically the contents of conditionality, focusing on building effective anticorruption institutions and judicial reform. Current geostrategic pressures have not yet led to major changes in the philosophy behind the enlargement process or the EU's framing of the rule of law concept. Yet, changes to be underscored include the EU's focus on specific benchmarks within pre-defined realms and strong alignment between political and financial instruments.

Keywords EU · Ukraine · Conditionality · Rule of law · Western Balkans

1 Introduction

On 24 March 2022, a month after Russia's full-scale invasion of Ukraine, the High Representative of the European Union for Foreign and Security Policy (HR/VP) announced the EU's "geopolitical awakening".¹ In his programmatic article, Borell called for the EU to become more security-cautious and mobilize its capabilities to

¹ Borrell 2022.

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be able to “think and act in terms of power” and achieve its political goals on the international arena.² The war and the EU’s strive to reinvent itself as a geopolitical actor led to the revival of the Union’s enlargement policy.³ This reaction is comparable to how the EU utilized the enlargement process following the Balkan wars in the 1990s, and thus the current enlargement agenda can be understood as bearing both a geopolitical and a stabilization / security-building component.⁴ The latter aspect is critical for both Ukraine and Moldova, that were granted EU candidate country status in June 2022, and for Georgia, which acquired the perspective of EU membership and to whom the Commission recommended granting candidate status in its 2023 Communication on EU Enlargement Policy.⁵ Nevertheless, there is a consensus among Member States that, despite initial talks over “fast-track” accession, the process will be merit-based, and will also require efforts on EU side, meaning the EU’s institutional reform.⁶ Conducting such a reform is a challenge for the Union, since it may require treaty amendments that require unanimity, i.e. all EU Member States should agree on changes to the EU’s institutional design. Other notable issues the EU should consider, according to analysts, is the danger of competition between the “old” and “new” candidate countries and -last but not least- danger of frustration with the lengthy enlargement process – the phenomenon, well known to the Balkans.⁷ Disappointment of expectations is particularly dangerous as regards Ukraine, which defends militarily, at its existential peril, the option for Euro-Atlantic integration. The key instrument the EU has traditionally used to ensure the merit-based nature of the accession process is conditionality. The design, effectiveness and implications of EU conditionality for partner countries has been thus extensively explored in the literature on EU enlargement process, in most detail, when it comes to Central and Eastern Europe’s EU accession, accession of Romania and Bulgaria and EU-Western Balkans relations.⁸ A considerable number of works also explored the operation of EU’s conditionality in the ‘integration without membership’ context of the EU’s relations with Ukraine, Moldova and Georgia prior to the former ones acquired EU candidacy country status and the latter one an EU membership perspective.⁹ Yet, what currently lacks from the debate is an insight into the design and operation of EU conditionality vis-à-vis Ukraine, Moldova and Georgia amidst the new geopolitical realities. To address this lacuna, this article will concentrate on the legal design of and the logic behind the EU’s rule of law conditionality vis-à-vis Ukraine in 2022-2023. My choice of Ukraine as a case study stems from the fact

² *Ibid.*

³ E.g. Buras and Marina, 2023.

⁴ Anghel and Dzankic 2023.

⁵ European Council, ‘Conclusions on Ukraine, the membership applications of Ukraine, Moldova and Georgia, Western Balkans and external relations’, 23 June 2022 (‘2022 Opinion on Ukraine/Moldova/Georgia membership application’); European Commission, ‘2023 Communication on EU enlargement policy’ COM(2023)69final of 8.11.2023 (‘2023 Enlargement Communication’).

⁶ Besch and Ciaramella 2023; Calliess 2023.

⁷ E.g. Parandii 2023; Jović and Uvalić 2023.

⁸ Schimmelfennig and Sedelmeier 2004; Haughton 2007; Zhelyazkova et al 2019; Richter and Wunsch 2020.

⁹ Sasse 2008; Burlyuk and Shapovalova 2017.

that it enables us to explore the EU's application of conditionality both in the context of a new enlargement wave and an immediate war. Additionally, I chose to focus on the rule of law (RoL) conditionality, given the 'essentially contested' nature of the RoL as a concept and, at the same time, its firm role as a fundamental in the EU accession process and, potentially, also Ukraine's post-war reconstruction.¹⁰

The paper explores the EU's wartime RoL conditionality vis-à-vis Ukraine through the combination of a historical and comparative law perspectives. Historical analysis is utilized to demonstrate the path-dependent nature of the EU's current RoL conditionality vis-à-vis Ukraine, largely building on conditions the EU set to Ukraine in the post-Euromaidan era (since 2014) under the European Neighbourhood Policy (ENP). Notably, such conditions have been also coordinated with other international organizations and bodies, active in Ukraine, such as the International Monetary Fund (IMF) and the World Bank.¹¹ Using comparative law method, I find that the EU's conditionality vis-à-vis Ukraine largely follows the patterns, utilized by the EU during the negotiations with Western Balkans (North Macedonia, Montenegro, Serbia, Albania and, most recently, Bosnia and Herzegovina (BiH)). Yet, compared to the EU's conditionality vis-à-vis the Western Balkans, both the conditions Ukraine should fulfill and the ways the Parties will follow them are formulated more precisely, yet offer the EU and its Member States much leeway over the tempo of negotiations and the accession process. Also, as invoked by Nedim Hovic (Hovic 2024, this issue) with respect to the Western Balkans, EU RoL conditionality vis-à-vis Ukraine is marked by a strong focus on formal standards and institutions, whereas social and economic underpinnings of the RoL are ignored.¹² Current geostrategic pressures have not so far led to major changes in the philosophy behind the enlargement process or the EU's framing of the RoL concept. Yet, changes to be underscored include the EU's focus on specific benchmarks, strong alignment between political and financial instruments, and the EU's strive for greater role of private finance and investment in incentivizing RoL reforms in candidate countries.

2 Understanding RoL in the Accession Context

The RoL is widely regarded as an "essentially contested" concept, with its conceptualizations addressed in literature as often conflicting and thus leading to analytical unclarity.¹³ There is, however, little doubt that, currently embodying the formal approach to RoL, the idea of the "government by laws and not of men" lies in the DNA of the canonical concept.¹⁴ The formal approach to the RoL is well-captured

¹⁰ For the role of anticorruption conditionality in Ukraine's post-war reconstruction, see Richter 2023.

¹¹ As discussed by Barnes (2015), particularly the IMF pioneered in the use of anticorruption conditionality in Ukraine, also with the technical support on the Venice Commission under the auspices of the Council of Europe. More information on the role of Venice Commission in supporting RoL reforms in Ukraine is provided by Iancu (2019).

¹² Hovic 2024.

¹³ Waldron, 2002; Burgess 2017.

¹⁴ Ellis 2010, p. 192.

by Burgess' brave attempt to overcome the concept's contentedness and create an easy way to identify (non-)compliance with the RoL. His "theory agnostic" elemental conceptualization of the RoL contains two overlapping elements, namely comprehension and procedural pellucidity.¹⁵ Comprehension means that "an individual [should] be able to comprehend the nature, content and operation of the rules to which he or she is subject".¹⁶ Such an understanding makes it close to the traditional legality and legal certainty sub-concepts of the RoL.

In turn, "procedural pellucidity" is consonant with several features of the formal RoL, as distinguished by Raz, namely the openness, stability and clarity of law-making rules, guaranteed judicial independence and review powers of courts.¹⁷ In more concise terms, Burgess (2017) writes that it should mean that "the creation and application of any rules must be in terms capable of being clear and obvious to all concerned".¹⁸ A feature that unites Burgess' elemental approach to RoL with the classical formal RoL concept is the lack of attention to the scope of the rules, whose mode of creation, nature, content and application should be understandable to everyone.¹⁹ By contrast, the proponents of "thick" approaches to the RoL emphasize the content of legislation, in particular as regards human rights and "frame[s] the concept within broader human development discourse".²⁰ "Thick" approaches to the RoL are widely utilized by international organizations in their assessments of the application of this concept in various parts of the world.²¹ Its formal characteristics, focused on procedures of laws' adoption and application, are also inalienable from such assessment exercises.²²

Recent developments in the EU legal system are directed towards overcoming the fog of conceptual relativism, traditionally covering the RoL principle.²³ The RoL can be thus addressed as "a well-established constitutional principle of EU law which is furthermore well-defined not least because of the Court of Justice's extensive case law and the European Commission's definitional codification efforts in the past decade".²⁴ Respective efforts of both the Court of Justice (CJEU) and the Commission can be seen as a response to the RoL backsliding in Poland and Hungary.²⁵ The

¹⁵ Burgess 2017, p. 2.

¹⁶ *Ibid.*, p. 5; See also Venice Commission of the Council of Europe "Report on the rule of law" (25-26 March 2011), no 512/2009, p.4. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e). Accessed 16 December 2023.

¹⁷ Raz, 1979.

¹⁸ Burgess 2017, p. 5.

¹⁹ *Ibid.*

²⁰ Tommasoli (2012).

²¹ United Nations Secretary General, 'The rule of law and transitional justice in conflict and post-conflict societies', S/2004/616 of 23 August 2004. <http://archive.ipu.org/splz-e/unga07/law.pdf>. Accessed 16 December 2023; the World Justice Project "Methodology", 2023, <https://worldjusticeproject.org/rule-of-law-index/downloads/Index-Methodology-2023.pdf>. Accessed 16 December 2023.

²² *Ibid.* See also Venice Commission of the Council of Europe, 'Rule of Law Checklist', 2016, https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf. Accessed 16 December 2023.

²³ Pech 2022

²⁴ *Ibid.*, p. 109.

²⁵ *Ibid.* See also Kochenov, Magen and Pech 2016.

roots of this backsliding stem from two intertwined phenomena, namely the lack of a Treaty definition of the RoL and the insufficiency of mechanisms to monitor and defend the RoL within the Union.²⁶ The Commission made the first attempt to offer a consensual working definition of the RoL for internal use with the 2014 RoL Framework.²⁷ Commonly presented as a “pre-Article 7 TEU procedure”²⁸, the Framework distinguished six consensual elements of the RoL, such as (1) legality; (2) legal certainty; (3) prohibition of arbitrariness of the executive powers; (4) independent and impartial courts; (5) effective judicial review including respect for fundamental rights and (6) equality before the law.²⁹ The scope of these principles was nuanced in further secondary documents and legislation (e.g. the Commission’s Annual Rule of Law Report, first published in 2020, and the Rule of Law Conditionality Regulation)³⁰, as well as a plethora of the CJEU decisions on the RoL backsliding cases.³¹

A question that arises in this vein is whether and, if yes, to which extent the EU’s internal efforts towards consolidating the understanding of the RoL and codifying it will influence the EU’s RoL promotion in the enlargement context. Such an influence is hard to avoid since both the intra-EU RoL protection efforts and its external promotion originate from and take place within the EU legal system as a unified whole. EU primary law establishes a link between the internal and external aspects of the EU’s RoL concept by Art. 49(2) of the Treaty on the European Union (TEU), requiring countries that apply for membership to respect and be committed to promoting its fundamental values, as listed in its Art. 2 and including the RoL.³² In legal terms, such a link is also reflected in the CJEU jurisprudence that constitutes a necessary part of the EU *acquis* to which EU candidate countries are required to approximate their domestic laws. For instance, the EU-Ukraine Association Agreement (AA) required Ukraine to consider evolving CJEU jurisprudence in its dynamic law approximation under the ‘integration without membership’ context and continues doing so as the key framework of relations between the parties amidst the enlargement process.³³ In policy terms, the EU’s experience with monitoring and fostering the RoL internally is found to have informed its attempts to reinvigorate the accession process.³⁴ There is, however, also evidence that learning between the two policy areas

²⁶ Ibid; See also Schmalenbach 2020.

²⁷ European Commission, ‘A new framework to strengthen the rule of law’ COM(2014)158final of 11 March 2014.

²⁸ E.g. Pech 2022, p. 112.

²⁹ See fn. 24.

³⁰ European Commission, ‘2020 Rule of Law Report: The Rule of Law Situation in the European Union’ COM/2020580final of 30 September 2020; Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget”. *OJ L* 4331 of 22.12.2020, p. 1-10.

³¹ For the examples of CJEU decisions, taken to address to the RoL backsliding trend in the illustrative case of Poland and nuancing the principles of judicial independence and impartiality, see: CJEU (General Court (GC)), Case C-619/18, *Commission v Poland (I)*, 24.6.2019, ECLI:EU:C:2019:615; CJEU (GC), Case C-192/18, *Commission v Poland (II)*, 5.11.2019, ECLI:EU:C:2019:924; CJEU (GC) Case C-791/17, *Commission v Poland (III)*, 15.7.2021, ECLI:EU:C:2021:596.

³² Consolidated version of the Treaty on European Union. *OJ C* 326/13 of 26.10.2012.

³³ Van der Loo and Van Elsuwege 2022.

³⁴ Basheska, 2022, p. 227.

was a two-way process, as the EU's internal RoL monitoring also bears the features of the EU's promotion of the RoL as a fundamental of the accession process.³⁵

The EU's enlargement to the Western Balkans is, however, "a perfect example of the imperfect and highly politicized enlargement process".³⁶ One of its key flaws has been the lack of predictability, as the process "depend[ed] more on domestic policies and EU circumstances than on the actual reforms of candidate countries in line with the established enlargement criteria".³⁷ Coupled with politicization, the lack of predictability has undermined the merit-based nature of the EU's accession process, whereby "conditions must be clear from the onset [...] [and] must be objective, precise, detailed, strict and verifiable".³⁸ Despite such a recognition, the EU neither immediately exported the consensual criteria under the 2014 RoL Framework to the enlargement process, nor came up with an enlargement-specific conceptualization of the RoL. To some extent, the EU's reluctance to do so can be explained by its institutions' awareness about the dysfunctionality of the "one-size-fits-all" approach in a sensitive RoL domain and previous criticisms the EU encountered in this respect.³⁹ An insight into the RoL-related parts of the EU's enlargement reports on individual Western Balkan countries, produced between 2020 and 2023, demonstrates the EU's preoccupation with the institutional design, capacity and effectiveness of judicial and anticorruption systems. Conversely, limited if any attention was paid to substance and context, namely, to the socio-economic foundation of the RoL or even to the relationship between specific RoL standards and the status of the EU's own economic relations with Western Balkans.⁴⁰ Expectedly, judiciary and anticorruption reforms were frequently selected as case studies by scholars focusing on the Western Balkans, who generally agree on the lack of genuine progress towards EU conditions in these sub-fields among the partner countries.⁴¹ The granting of EU candidate country status to Ukraine and Moldova, and of a European perspective to Georgia in 2022 naturally fueled the debate as to the adequate design of the conditionality, to avoid the flaws of the politicized and unpredictable enlargement process in the Western Balkans. This question is of pertinent importance, given the geopolitical and security complexities of the new Eastern enlargement, as well as partial successes of the EU's RoL promotion efforts in the region.⁴² Answering it thus

³⁵ Louwerse, 2023, pp. 299–337.

³⁶ Basheska, 2022, p. 225.

³⁷ *Ibid.*

³⁸ European Commission, 'Enhancing the accession process—A credible EU perspective for the Western Balkans' COM (2020) 57 final, p. 5.

³⁹ E.g. Börzel and Risse 2004.

⁴⁰ E.g. European Commission, 'North Macedonia 2020 Report. Commission Staff Working Document accompanying the 2020 Communication on EU Enlargement Policy' SWD(2020)351final of 6.10.2020, pp.16-35; European Commission, 'North Macedonia 2023 Report. Commission Staff Working Document accompanying the 2023 Communication on EU Enlargement Policy', SWD(2023)693final of 8.11.2023. See also Hovic 2024.

⁴¹ E.g. Hoxhaj 2021, Kmezić, 2021 and Djordjevic and Stone, 2023 demonstrate that, though having managed to create a 'façade' of the RoL norms and institutions, Western Balkan countries continue being plagued by state capture, leading to a gap between RoL norms and practices.

⁴² Using the cases of Ukraine and Moldova, Králiková, 2022 and Minzarari 2022 showcase the limitedness of these countries' achievements in the RoL domain.

requires an in-depth insight into exploring the current design of the EU RoL conditionality vis-à-vis Ukraine.

Before proceeding with it, it should be summarized that both the EU's defense of the RoL internally and its external promotion have been hampered by conceptual relativism surrounding this notion. Undoubtedly, the EU's efforts to create a consensual RoL model and RoL toolbox for internal use offer a fruitful starting point for policy learning in the enlargement context. Though the Commission attempted to make the enlargement process for the Western Balkans more structured and predictable, *inter alia*, through policy learning, its overall scope remains undefined and, thus, continues offering significant room for political maneuver.

3 Typology of the EU's Wartime RoL Conditionality vis-à-vis Ukraine

Although Ukraine was putting high hopes on the fast-track “accession through war”⁴³, the 2023 Enlargement Package, adopted by the European Commission, emphasized the importance of keeping the accession process merit-based.⁴⁴ Ukrainian authorities reiterated their understanding of the process as merit-based, stressing that Ukraine will not ask for any concessions on its way to the Union, despite the ongoing war.⁴⁵ In reality, however, the EU started actively applying RoL conditionality vis-à-vis warring Ukraine long before assurances were made. Thus, “structural reform conditions”, including those in the domains of anticorruption and judicial reform, were specified in the memorandum of understanding (MoU) on the EU's first wartime package of macro-financial assistance (MFA) to Ukraine of 3 March 2023.⁴⁶ Since then, the EU has applied three types of RoL conditionality instruments towards Ukraine, often supporting one requirement with several incentives, available under different instruments. These conditionality instruments are formulated in Table 1.

The analysis, presented in Table 2, demonstrates the multiplicity of incentives the EU can offer to Ukraine both in the wartime and after the hostilities. Some of them, such as the seven conditions already did, can not only influence the government's cost-benefit calculations but reinforce societal pressure on the government.⁴⁷ Their ability to do so depends on the clarity and legitimacy of EU conditions, the consequences of (non-)compliance, as well as civil society's and media attention to the matter. Due to their connection to the enlargement agenda and potential opening

⁴³ The notion of “accession through war” was introduced by Petrov and Hillion 2022 in their guest editorial for the *Common Market Law Review*.

⁴⁴ European Commission, ‘Commission adopts the 2023 Enlargement package, recommends to open negotiations with Ukraine and Moldova, to grant candidate status to Georgia and to open accession negotiations with BiH, once the necessary degree of compliance is achieved’, press release of 8 November 2023, https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5633. Accessed 16 December 2023.

⁴⁵ E.g. Tyschchenko, 2023.

⁴⁶ EU-Ukraine (2022) Macro-financial assistance to Ukraine of up to EUR 1.2 billion. Memorandum of understanding between the European Union as Lender and Ukraine as Borrower, 3 March, https://economy-finance.ec.europa.eu/system/files/2022-04/ukraine_mou_emergency_mfa_signed.pdf.

⁴⁷ For an insight into the role of conditionality in pro-EU societal mobilization, see Burlyuk and Shapovalova 2017.

Table 1 Classification of the EU wartime RoL conditionality vis-à-vis Ukraine

	Conditionality immediately linked to the accession process	Conditionality attached to MFA	Conditionality attached to reconstruction funds
Rationale / mechanism	<ul style="list-style-type: none"> • <i>Intergovernmental bargaining</i>: using progress in enlargement negotiations (e.g. opening of enlargement negotiations) to incentivize Ukrainian government to comply with the RoL requirements. • <i>Societal mobilization</i>: stimulating public pressure on the government for it to comply with EU conditions 	<p>A more technical instrument, using access to MFA as an incentive and directed to intergovernmental bargaining, rather than societal mobilization</p>	<p>An instrument, linking Ukraine's access to reconstruction funds to its compliance with EU RoL requirements with the potential to combine the logics of intergovernmental bargaining and societal mobilization</p>
Political / legal framework	<p>Political documents, issued by the Commission, i.e. its 2022 Opinion on Ukraine's membership application and the 2023 Enlargement Package^a</p>	<ul style="list-style-type: none"> • The European Parliament's and Council's decisions on making exceptional MFA available to Ukraine^b • Bilateral MoUs attached to MFA packages 	<ul style="list-style-type: none"> • In mid-term perspective: Regulation of the European Parliament and the European Council as to the establishment of the Ukraine Facility (2024-2027, up to 50 Bn EUR)^c
Scope	<ul style="list-style-type: none"> • Initial seven conditions, including those on the Constitutional Court reform, judicial reform, anticorruption, fight against money laundering and media legislation reform. • Additional four conditions, including those on anticorruption and lobbying legislation 	<ul style="list-style-type: none"> • RoL conditions, mirroring and/or adding detail to seven conditions, e.g. on ensuring independence and effectiveness of anti-corruption bodies, finalizing integrity vetting of candidates to judicial self-government bodies • Separate conditions at the crossroads between RoL and governance, e.g. "approving methodology and criteria for evaluating candidates for the positions of independent members of the supervisory boards of state-owned banks"^d 	<p>General reiterations as to the use of common values conditionality in the Commission's framework documents on the EU contribution to Ukraine's reconstruction</p>

Table 1 (continued)

Results of application (if available)	Conditionality immediately linked to the accession process	Conditionality attached to MFA	Conditionality attached to reconstruction funds
<p>• Significant achievements concerned with the seven conditions, e.g. establishing the transparent merit-based system for electing Constitutional Court members^e</p> <p>• No results yet in connection with recently adopted four conditions</p>	<p>• Significant achievements, when it comes to seven conditions, as well as others, e.g. the adoption by the Cabinet of Ministers of Ukraine of new regulations on reforming selection procedures of supervisory board members and the selection of their heads for biggest state enterprises.^f</p>	<p>No results yet, as the development of the Ukraine Plan to underwrite the Ukraine Facility is still ongoing</p>	

^a2022 Opinion on Ukraine's membership application; 2023 Communication on enlargement policy

^bE.g. Decision (EU) 2022/1628 of the European Parliament and of the Council of 20 September 2022 providing exceptional macro-financial assistance to Ukraine [...] PE/49/2022/REV/1 OJ L 245 of 22 September 2022

^cRegulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility, PE/10/2024/REV/1, OJ L 2024/792 of 29 February 2024

^dEU-Ukraine (2022) Macro-financial assistance to Ukraine of up to EUR 5 billion. Memorandum of understanding between the European Union as Lender and Ukraine as Borrower, 30 September (Kyiv) and 3 October (Brussels), <https://economy-finance.ec.europa.eu/system/files/2022-11/Memorandum%20of%20Understanding%20-%20EUR%205%20billion%20exceptional%20MFA%20to%20Ukraine.pdf>. Accessed 16 December 2023

^e2023 Communication on enlargement policy, pp. 22–23

^fCabinet of Ministers of Ukraine, 'The Government made amendments to ordeals on reforming selection procedures for supervisory boards of state enterprises and the selection of their heads', 01 December 2023, <https://www.me.gov.ua/News/Detail?lang=uk-UA&id=056142ff-eeffe-4202-834d-1118ae6b3961&title=ReformuvanniaPratseduriVidboruNagliadovikhRad>. Accessed 16 December 2023

Table 2 The legal framing of EU conditionality instruments prior to the war and in the wartime

Category	Explanation	Examples prior to the war	Operation / equivalent since 2022
“Soft” legal instruments	Political and policy dialogue instruments, by their nature not creating legal effects for the Parties, yet often utilized by the EU to define the RoL conditions partner countries should comply with	Bilateral political dialogue EU-Ukraine Visa Liberalization Dialogue and Action Plan on Visa Liberalization ^a	Continuous political dialogue, shifting to the realm of accession negotiations
EU’s unilateral financial and technical assistance instruments within or outside the ENP scope	EU’s legal documents (most commonly, regulations or decisions) that set the basis for the conclusion of MoUs on financial assistance or the EU’s launch of technical assistance projects	2014 and 2016 Special Measures in Favour of Ukraine ^b Five pre-war MFA packages to Ukraine ^c	Emergency and exceptional MFA packages ^d Ukraine Facility ^e
Bilateral instruments	Bilateral agreements and MoUs	EU-Ukraine Association Agreement (AAs) MoUs underlying five pre-war EU MFA packages for Ukraine	EU-Ukraine AA continues operating, despite the war and the granting of EU candidate country status to Ukraine ^f MoUs underlying wartime emergency and exceptional MFA packages

^aSee fn. a.

^bSpecial Measures in favour of Ukraine represented state-building measures, introduced by the EU to help Ukraine overcome instability and turmoil following the Euro-aidan and the start of Russian aggression in Crimea and Donbas by Commission Implementing Decision of 29 April 2014 on a Special Measures 2014 in favour of Ukraine to be financed from the general budget of the European Union, C(2014)2907/final. https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-11/C_2014_2907_FI_COMMISSION_IMPLEMENTING_DECISION_EN_V3_P1_768868.PDF. Accessed 16 December 2023; Commission Implementing Decision of 12 December 2016 on the Special Measure III 2016 on Support to the Rule of Law Reform in Ukraine (PRAWO) to be financed from the general budget of the Union. C(2016)8266/final. https://neighbourhood-enlargement.ec.europa.eu/system/files/2017-03/eni_2016_sm_iii_decision.pdf. Accessed 16 December 2023

^cE.g. the last pre-war MFA package (EUR 1.2 bln) the EU provided to Ukraine was based on the Decision (EU) of the European Parliament and the Council 2020/701 of 25 May 2020 on providing MFA to enlargement and neighbourhood partners in the context of the COVID-19 pandemic. PE/11/2020/REV/1 of 27 May 2020 and EU-Ukraine (2020) Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower, 23 July 2020. https://economy-finance.ec.europa.eu/system/files/2020-09/ukraine_memorandum_of_understanding_eu_version.pdf. Accessed 16 December 2023

^dGiven the scale of EU wartime MFA to Ukraine, its largest package (18 bln) was adopted by the regulation, rather than a decision. See: Regulation (EU) 2022/2463 of the European Parliament and of the Council of 14 December 2022 establishing an instrument for providing support to Ukraine for 2023 (macrofinancial assistance +). OJ L 322 of 16 December 2022

^eSee fn. e

^fFor an insight into the operation of the EU-Ukraine AA under the confluence of war and Ukraine’s EU candidatureship, see Van der Loo and Van Elsuwege 2022

of accession negotiations, seven conditions received unprecedented media coverage in Ukraine, and the government's action to comply with them has been closely monitored by several think tanks.⁴⁸ The confluence of intergovernmental bargaining and societal mobilization mechanisms behind the seven conditions pushed the Ukrainian government to comply with sensitive RoL conditions, set by the Union. Ukraine's acute dependence on the EU's MFA, stemming from the economic effects of the war, also contributes to the EU's bargaining power over the government. Similar effects are likely to arise in the case of the reconstruction funds. Yet, as discussed above, the success of RoL reforms, promoted through EU conditionality, will depend on the predictability of the enlargement process, including the clarity of benchmarks and the consequences of Ukraine's (non-)compliance with them.⁴⁹

With this, my analysis confirms that war circumstances in Ukraine have not prevented the EU from insisting on RoL reforms. In contrast, economic and military needs, brought about the war, coupled with Ukrainian population's support for EU integration created a momentum for the EU's application of conditionality in Ukraine. Below I show that the EU utilized this momentum to insist on the finalization of several reforms it had been promoting in Ukraine prior to the war.

4 EU Wartime Conditionality vis-à-vis Ukraine: Completing the Outstanding Tasks

This part of the analysis will rely on historical analysis to demonstrate the path dependent nature of the EU's wartime conditionality vis-à-vis Ukraine, when it comes to both the EU's toolbox and the scope of the RoL requirement. The EU's current conditionality may be seen as path-dependent in broader terms, e.g. with respect to the EU's pre-accession conditionality for CEE countries or even post-accession conditionality the EU applied to Bulgaria and Romania (Cooperation and Verification Mechanism, CVM).⁵⁰ In this section of the paper, I will, however, address path dependency in narrower terms, comparing the scope of current EU's RoL conditionality vis-à-vis Ukraine and the one it had been applying vis-à-vis Ukraine within the framework of the European Neighbourhood Policy (ENP).

Between 2004 (launch of the ENP) and 2022 (the granting of a candidate country status to Ukraine), the EU had developed "a comprehensive toolbox for the rule of law promotion in Ukraine, combining 'soft' and 'hard' instruments", with conditionality lying at its heart.⁵¹ This toolbox had been largely built on the experiences of the accession process, raising scholars' concerns as to the feasibility of incentivizing a partner country to conduct ambitious RoL reforms in the absence of a membership perspective.⁵² Yet, being aware of this structural weakness of the ENP,

⁴⁸ E.g. Sydorenko 2023.

⁴⁹ For the role of predictability in the accession process, see Basheska, 2022, For the role of benchmarking in the accession process, see Kacarska and Imeni 2019.

⁵⁰ More on the experience of CVM

⁵¹ Rabinovych 2023.

⁵² E.g. Langbein and Wolczuk 2012; Langbein and Börzel 2013.

the Union also used alternative incentives to promote compliance with its RoL conditions among the ENP countries, including Ukraine, with visa liberalization dialogues as a salient and example.⁵³

Following the classification of EU external RoL promotion instruments, introduced by Laurent Pech⁵⁴, the EU's pre-war conditionality vis-à-vis Ukraine was embedded into three categories of instruments. As presented in Table 2, all these instruments either continue existing during the wartime, or their close equivalents were introduced by the EU:

Alongside the legal framing, these are also the focus points and key EU demands under pre-war conditionality that build on the EU's pre-war reform promotion efforts in the country. The most evident example of such a case deals with judicial reform (meant generally, except for the anti-corruption-related tasks). Judicial reform with the focus on the courts' independence and impartiality, as well as effectiveness of the judicial review has been a priority of the EU's RoL promotion in Ukraine since the 2004 EU-Ukraine Action Plan that aimed to prepare Ukraine for AA negotiations.⁵⁵ The Plan and other pre-Euromaidan "soft" documents, presenting the outcomes of political dialogue, largely focused on substantive matters, such as the reform of Ukraine's civil, criminal and administrative codes, based on EU standards, or creation of the legal basis for effective implementation of judgments by the European Court of Human Rights (ECHR) and international judicial cooperation in civil and criminal matters.⁵⁶ With time, especially following the Euromaidan and the conclusion and subsequent entry force of the AA, the EU shifted from conditions pertaining to substantive legislation to using conditionality as a tool for building specific systems and institutions in the judicial domain. The former part of this statement can be exemplified by conditionality under MFA III (2015, up to 1.8 billion EUR), requiring Ukraine to strengthen the enforcement of judicial decisions and adopting the methodology to assess courts', rather than individual judges' performance.⁵⁷ The focus on institutions is salient in two complicatedly formulated conditions under MFA 2020-2021:

“– the creation of a new High Qualification Commission of Judges of Ukraine [HCQJ] through a transparent selection procedure with international participation;

And

the creation of an Ethics Commission with international participation, which would have the mandate to 1) carry out a one-time assessment of the integrity and

⁵³ Factual information on the EU's visa liberalization dialogue with ENP countries can be found on the webpage: https://home-affairs.ec.europa.eu/policies/international-affairs/collaboration-countries/visa-liberalisation-moldova-ukraine-and-georgia_en.

⁵⁴ Pech, L. (2012/2013).

⁵⁵ 2004 EU-Ukraine Action Plan, available at: <https://europavarietas.org/csdp/files/pauekraine.pdf>.

⁵⁶ Ibid, p.6. E.g. see also European Commission, High Representative (2011) Joint Staff Working Document "First progress report of the implementation by Ukraine of the Action Plan on Visa Liberalization. SEC(2011)1076final of 16 September 2011. https://home-affairs.ec.europa.eu/system/files/2020-09/ua_vlap_1st_progress_report_sec_2011_1076_f_en_document_travail_service.pdf. Accessed 16 December 2023.

⁵⁷ EU-Ukraine (2015) Macro-financial assistance for Ukraine Loan Facility from the European Union of up to 1.8 billion EUR. Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower. https://ec.europa.eu/economy_finance/international/neighbourhood_policy/doc/mou_ukraine_en.pdf. Accessed 16 December 2023.

ethics of members of the High Council of Justice and recommend their dismissal to the electing (appointing) authorities in those cases when the members of the High Council have been found non-compliant with the standards, and 2) establish a pool of pre-selected candidates from which the electing (appointing) authorities for members of the High Council of Justice [HCJ] will draw their nominations”.⁵⁸

With HCQJ and HCJ representing key judicial self-governance bodies in Ukraine, the abovementioned conditions pursued several intertwined objectives, such as finalizing lustration of judges, started after the Euromaidan, reducing political corruption in courts and overcoming the lack of staff in courts.⁵⁹ The latter issue had been urgent already in 2019–2020, as the non-operation of the HQCH and HCJ led to the non-appointment of new judges, so that the caseload per an acting judge exceeded 1500 per year.⁶⁰ Such a high caseload constituted a direct threat to citizens’ access to justice and RoL, influencing both the duration and quality of case consideration. Despite the urgency of the matter, the fulfillment of the conditions, set in the 2020–2021 MoU, did not go smoothly, with attempts by different institutions to undermine the activities of the Ethical Council and the lack of trust between the Ethical Council and acting members of the HCJ.⁶¹ Subsequently, as of the start of the war, neither the HCQJ, nor the HCJ was formed and started operating. Building on its 2020–2021 MFA conditionality, the Commission thus included condition as to finalizing the integrity vetting of candidates for HCJ membership and the selection of candidates to form the HCQJ to its Opinion on Ukraine’s EU membership application.⁶² Noteworthy, the conditionality attached to the Commission’s Opinion was reinforced by MFA conditionality, stipulated in 2022 July and October MoUs.⁶³ The 2023 MoU on 18 billion EUR MFA also incorporated the requirement to reestablish the HQCH and HCJ “based on the current work of the Ethics Council and the Selection Commission”, mentioning Q3 as a deadline.⁶⁴ Eventually, Ukraine’s compliance with the

⁵⁸ EU-Ukraine (2020) Macro-financial assistance to Ukraine of up to EUR 1.2 billion. Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower, 23 July, p.5 https://economy-finance.ec.europa.eu/system/files/2020-09/ukraine_memorandum_of_understanding_eu_version.pdf. Accessed 16 December 2023.

⁵⁹ On the challenge of lustration in Ukrainian courts, see: Chernovol 2023.

⁶⁰ Judiciary of Ukraine (2020, 17 December) Due to the lack of staff, people cannot achieve justice in courts for years. <https://no.mk.court.gov.ua/sud1419/pres-centr/news/1042245/> Accessed 16 December 2023.

⁶¹ E.g. Ukrinform 2021; Perun 2022.

⁶² 2022 Opinion on Ukraine’s membership application.

⁶³ EU-Ukraine (2022) Macro-financial assistance to Ukraine of up to EUR 1.2 billion. Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower, 23 July, https://economy-finance.ec.europa.eu/system/files/2020-09/ukraine_memorandum_of_understanding_eu_version.pdf. Accessed 16 December 2023; EU-Ukraine (2022) Macro-financial assistance to Ukraine of up to EUR 5 billion. Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower, 3 October. <https://economy-finance.ec.europa.eu/system/files/2022-11/Memorandum%20of%20Understanding%20-%20EUR%205%20billion%20exceptional%20MFA%20to%20Ukraine.pdf>. Accessed 16 December 2023.

⁶⁴ EU-Ukraine (2023) Instrument for providing support to Ukraine for 2023 (macro-financial assistance +) of up to EUR 18 billion. Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower, 16 January. https://economy-finance.ec.europa.eu/system/files/2023-01/Memorandum%20of%20Understanding_EU-UA.pdf. Accessed 16 December 2023.

requirement to reestablish its judicial self-government bodies was confirmed by the Commission's 2023 Report on Ukraine.⁶⁵

A similar case can be made with respect to the EU's efforts to build anticorruption institutions in Ukraine, such as the National Anticorruption Bureau (NABU), Specialized Anticorruption Prosecutor Office (SAP) and the High Anticorruption Court (HACC). First conditionality clauses immediately engaged with the creation and ensuring the functionality of anticorruption institutions date back to the Commission's 5th progress report on the implementation of the EU-Ukraine Visa Liberalization Plan (VLAP), the 2014 Special Measure for Ukraine and pre-war MFA packages, e.g. the 2018 MFA IV demanding that Ukraine establishes the HACC.⁶⁶ In turn, the Commission included the further strengthening the fight against corruption, especially at the high level, and the appointment of SAP head and NABU heads into both the conditionality attached to the Opinion on Ukraine's membership application and wartime MFA packages.⁶⁷

Notably, alongside using the momentum to ensure that Ukraine completes outstanding tasks, the Commission also included entirely new RoL conditions to its Opinion on Ukraine's membership applications and MFA. The former part of this statement can be exemplified by the condition as to Ukraine's "enact[ing] and implement[ing] legislation on a selection procedure for judges of the Constitutional Court of Ukraine, including a pre-selection process based on evaluation of their integrity and professional skills, in line with the Venice Commission recommendations".⁶⁸ With this condition, the Commission consolidated international donors' prior primarily political efforts to 'reload' Ukraine's Constitutional Court following the 2020 crisis, when the Court attempted to 'undo' Ukraine's anticorruption reform.⁶⁹ As a relatively novel condition attached to MFA one can mention the "development and adoption of an overarching strategic plan for the reform of the entire law enforcement sector as part of Ukraine's security environment".⁷⁰ This

⁶⁵ European Commission (2023) Commission Staff Working Document "Ukraine 2023 Report" accompanying the document 2023 Communication on EU Enlargement Policy. SWD(2023)699final of 8 November 2023.

⁶⁶ European Commission (2015) Fifth Progress Report on the Implementation by Ukraine of the Action Plan on Visa Liberalization, COM(2015)200final of 8 May 2015; Commission Implementing Decision of 29 April 2014 on a Special Measures 2014 in favour of Ukraine to be financed from the general budget of the European Union, C(2014)2907final. https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-11/C_2014_2907_F1_COMMISSION_IMPLEMENTING_DECISION_EN_V3_P1_768868.PDF. Accessed 16 December 2023; EU-Ukraine (2018) Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower, 14 September 2018. https://economy-finance.ec.europa.eu/system/files/2018-09/mou_protocol_version_eu.pdf. Accessed 16 December 2023.

⁶⁷ 2022 Opinion on Ukraine's membership application; e.g. EU-Ukraine (2020) Macro-financial assistance to Ukraine of up to EUR 1.2 billion. Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower, 23 July. https://economy-finance.ec.europa.eu/system/files/2020-09/ukraine_memorandum_of_understanding_eu_version.pdf; Accessed 16 December 2023.

⁶⁸ 2022 Opinion on Ukraine's membership application, p. 20.

⁶⁹ On the 2020 Constitutional Court crisis in Ukraine, see: Channel-Justice 2020.

⁷⁰ EU-Ukraine (2023) Instrument for providing support to Ukraine for 2023 (macro-financial assistance +) of up to EUR 18 billion. Memorandum of Understanding between the European Union as Lender and Ukraine as Borrower, 16 January. https://economy-finance.ec.europa.eu/system/files/2023-01/Memorandum%20of%20Understanding_EU-UA.pdf. Accessed 16 December 2023.

condition can be, however, also seen as calling Ukraine to consolidate the achievements of previous reform efforts in the law enforcement domain, including those in connection with the visa liberalization process and support of the EU Advisory Mission to Ukraine (EUAM).

To sum up, both in terms of the legal framing and content, the EU's wartime RoL conditionality vis-à-vis Ukraine can be seen as building on the EU's pre-war conditionality efforts. An increase in the EU's leverage over Ukraine because of granting it an EU candidate status and Ukraine's dependence on Western military and economic aid enabled it to push Ukraine towards both completing its outstanding tasks in sensitive domains and launching entirely new sector-wide reforms in the RoL domain.

5 EU Wartime Conditionality vis-à-vis Ukraine: Learning from the Western Balkans experience

This part of the analysis will highlight similarities between the design and scope of the EU's wartime conditionality for Ukraine and conditionality the Union has been applying vis-à-vis Western Balkans between 2018 and 2023. It is shown that, despite challenges the EU has encountered, when promoting the RoL in the Western Balkans⁷¹, it extensively relied on conditionality frameworks, developed in this context, to shape its current conditionality for Ukraine. Moreover, I demonstrate that by 2023 the EU has come up with a general operationalization of the RoL it applies to assess progress of all candidate countries. Anticorruption and judicial reform, as well as fundamental rights' protection lie at the heart of the framework, while the socio-economic foundation of the RoL (e.g. higher education, digitalization, decarbonization) remains outside the scope of the EU's attention.

In its 2022 Special Report on the EU support for the RoL in Western Balkans, the EU Court of Auditors found that "EU action [in the region] has contributed to reforms, but has had little overall impact on progress in the rule of law".⁷² This finding is consonant with the insights from the literature on the EU-supported RoL reforms in the Western Balkans, whereas in the case of Serbia it was even argued that EU conditionality has contributed to the consolidation of dysfunctional? governance practices in the region.⁷³ In this view, there is an ongoing debate as to how the EU can design its RoL conditionality vis-à-vis Ukraine and Moldova, in order to avoid the pitfalls of the Western Balkans enlargement.⁷⁴ Yet, while the European Council it had been only recently agreed to open accession negotiations with

⁷¹ See Hovic 2024.

⁷² European Court of Auditors (2022) Special Report "EU support for the rule of law in the Western Balkans: despite efforts, fundamental problems persist". https://www.eca.europa.eu/Lists/ECADocuments/SR22_01/SR_ROL-Balkans_EN.pdf. Accessed 16 December 2023.

⁷³ Richter and Wunsch (2020).

⁷⁴ As an example of the contribution to this debate, see Naumenko, D., Bulana, O and S. Diachenko (2022) Western Balkans Accession to EU: Lessons for Ukraine. https://ucep.org.ua/wp-content/uploads/2022/11/western_balkans_accession_to_eu_lessons_for_ukraine_09.11.2022_final.pdf. Accessed 16 December 2023.

Ukraine, and the negotiating framework is still under development, the focal points of the EU's wartime conditionality vis-à-vis Ukraine resemble RoL conditions the EU has utilized vis-à-vis the Western Balkans.

Before starting with the comparison, it is important to underscore two key policy documents that constitute the basis for the EU current approach to RoL in the Western Balkans. They are the Commission's 2018 strategy on the "credible enlargement perspective" for the Western Balkans and its 2020 communication, seeking to put this perspective into effect through new enlargement methodology.⁷⁵ In the former Communication, the Commission stressed "Strengthened support to the rule of law" as the first one among six priorities in the accession process for the Western Balkans.⁷⁶ To ensure stronger credibility and better structure for the accession process, the latter Communication grouped negotiating chapters into six clusters.⁷⁷ Thereby the RoL got included into the 'fundamentals', bringing together chapters 23 – "Judiciary and fundamental rights", 24 – "Justice, Freedom and Security", 5 – "Public procurement", 18 – "Statistics" and 32 – "Financial control", as well as economic criteria, functioning of democratic institutions.⁷⁸ According to the Communication, the negotiations on fundamentals should be guided by "a roadmap for the rule of law chapters equivalent to the previous action plans" as the opening benchmark with interim benchmarks to be set; a roadmap on functioning democratic institutions and public administration reforms and "a stronger link with the economic reform programme process to help the countries meet the economic criteria".⁷⁹ Despite the substantive and procedural changes to the enlargement process with the above Communications, they neither offered concrete proposals to strengthen the RoL in the Western Balkans, nor revolutionized the approach to setting RoL benchmarks.⁸⁰ As discussed by Hoxhaj, the 2018 Communication can be rather seen as "a platform for the Western Balkans and the Commission to engage in a dialogue to transform the rule of law flagship initiative into a joint action plan".⁸¹ Yet, no joint RoL-focused plan came into being either bilaterally or regionally, with different Western Balkan states' having to fulfill divergent RoL preconditions to move towards EU membership.

The most challenging cases, in this vein, seem to be Albania and BiH. In March 2020, the European Council endorsed the opening of accession negotiations with Albania. In contrast to North Macedonia, with which the Commission also started accession talks at the same time, Albania was asked to fulfill fifteen conditions, with six of them to be met by the first Accession Conference (year), and nine after the second (year). Similar to the case of EU's conditionality attached to its Opinion on

⁷⁵ European Commission, 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans', COM/2018/065final of 6 February 2018; European Commission, 'Enhancing the accession process – A credible EU perspective for the Western Balkans', COM/2020/57final of 5 February 2020.

⁷⁶ European Commission, 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans', COM/2018/065final of 6 February 2018

⁷⁷ European Commission, 'Enhancing the accession process – A credible EU perspective for the Western Balkans', COM/2020/57final of 5 February 2020.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Hoxhaj 2021, p. 148.

⁸¹ *Ibid.*

Ukraine's EU membership application, the majority of such conditions concerned judicial and anti-corruption reforms, for instance:

“ensur[ing] the continued implementation of the judicial reform, including ensuring the functioning of the Constitutional Court and the High Court, taking into account relevant international expertise including applicable opinions of the Venice Commission”

“finaliz[ing] the establishment of the anti-corruption and organized crime specialized structures”

*“strengthen[ing] strengthen the fight against corruption and organised crime, including through cooperation with EU Member States and through the action plan to address the Financial Action Task Force (FATF) recommendations”.*⁸²

In contrast to the fifteen conditions for Albania that were included to Council conclusions to meet concerns of individual Member States⁸³ in connection with the opening of accession negotiations, the Commission made the opening of accession negotiations with BiH subject to its compliance with a set of 14 conditions.⁸⁴ In contrast to both the conditions for Albania and EU's wartime conditionality against Ukraine, these conditions are grouped into four groups that allows for distinguishing “Rule of Law” from “Democracy/Functionality” (merely dealing with the separation of power and operation of state institutions), “Fundamental rights” and “Public administration”. Two of the three RoL conditions under the Commission's Opinion on membership application by BiH are thematically close to those for Albania and Ukraine, and deal with judicial reform and strengthening the prevention and fight against corruption and organized crime.⁸⁵ However, the fact that the latter condition, containing numerous sub-conditions focusing on obligations to adopt substantive legislation (e.g. on conflict of interest and whistleblowers' protection, on anti-corruption bodies)⁸⁶ testifies to BiH's being behind Albania and Ukraine that already merely work on law implementation. Another interesting feature of the EU's RoL conditionality for BiH is the presence of the condition, dealing with “effective coordination, at all levels, of border management and migration management capacity, as well as ensuring the functioning of the asylum system”.⁸⁷

Though not present in other conditionalities we analyzed above, the presence of such a condition is, however, consonant with the scope of “Rule of Law and fundamental rights” parts of the Commission's assessment reports for Western Balkan countries. Comprised of chapter 23 “Judiciary and fundamental rights” and chapter 24 “Justice, freedom and security”, these chapters approach the RoL in a context-specific way but enable us to trace the following elements the EU model is based on: (Table 3).

⁸² Council of the EU, ‘Enlargement and stabilization and association process. The Republic of North Macedonia and Albania. Council conclusions’, 7002/20 of 25 March 2020.

⁸³ Hoxhaj 2021, p. 156.

⁸⁴ European Commission, ‘Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union’, COM(2019)261final of 29 May 2019.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

Table 3 ‘Skeleton’ structure of the RoL and Fundamental Rights Chapter in the Commission’s progress assessments for Western Balkans

Chapter 23 “Judiciary and fundamental rights”	Judiciary	<ul style="list-style-type: none"> • Strategic bodies • Specialized bodies (e.g. dealing with corruption) • Judicial self-government bodies • Independence, impartiality, accountability • Professionalism and competence • Quality of justice • Efficiency
	Fight against corruption	<ul style="list-style-type: none"> • Strategic framework • Legal framework • Institutional framework for corruption prevention and law enforcement • Track record
	Fundamental rights	<ul style="list-style-type: none"> • Participation in international instruments, cooperation with the European Court of Human Rights (ECHR) • Promotion and enforcement of human rights (incl right to life, prevention of torture and ill-treatment, operation of the prison system, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, labour rights and trade unions, property rights, non-discrimination, procedural rights, gender equality, children’s rights, rights of persons with disabilities, LGBTIQ rights, minorities’ rights)

Table 3 (continued)

Chapter 24 "Justice, Freedom and Security	Fight against organized crime	<ul style="list-style-type: none"> • Strategic framework • Legal framework • Implementation and enforcement capacity • Domestic operational capacity • Thematic aspects, such as financial investigations, trafficking in human beings, trafficking in firearms, money laundering, witness protection
	Cooperation in the field of drugs? Combatting drug-trafficking?	<ul style="list-style-type: none"> • Institutional set-up and legal alignment • Implementation and enforcement capacity • Institutional set-up and legal alignment • Implementation and enforcement capacity
	Fight against terrorism	Cooperation in criminal and civil matters
	Judicial cooperation	<ul style="list-style-type: none"> • Institutional set-up and legal alignment • Implementation and enforcement capacity
	Legal and irregular migration	<ul style="list-style-type: none"> • Institutional set-up and legal alignment • Implementation and enforcement capacity
	Asylum	<ul style="list-style-type: none"> • Institutional set-up and legal alignment • Implementation and enforcement capacity
	Schengen and external borders	

Author's own elaboration based on 2020-2023 EU progress reports for Western Balkan countries⁸⁸

An in-depth reading of the 2023 Ukraine report, produced by the Commission, reveals its use of exactly the same structure, when it comes to assessing the state of Ukraine's preparedness with respect to chapters 23 and 24. Compared to the Western Balkans, it emphasizes several Ukraine-specific matters, such as the legal framework and Ukraine's operational capacity to handle atrocity crimes domestically, countering oligarchic influence, as well as asset confiscation and money laundering.

With this, it can be concluded that, notwithstanding the challenges of the two decades of its RoL promotion policy in the Western Balkans, the EU's approach to the design and scope of its RoL conditionality vis-à-vis Ukraine has so far mirrored the one it used in Western Balkans, largely focused on the formal and institutional aspects of the concept. By comparison with Albania and BiH, the conditions Ukraine got are, however, more precise and, thus, easier in terms of determining what should be considered as compliance. Put aside a rather specific Home Affairs-focused chapter 24 "Justice, Freedom and Security", the Commission's current RoL conditionality and progress assessment focuses on the judiciary, fight against corruption and fundamental rights. All the three elements are central to the seven conditions attached to the Commission's Opinion on Ukraine's membership application and the four further conditions Ukraine must fulfill to start with the adoption of negotiation framework.

6 Conclusion

The main finding of my contribution is that, notwithstanding the geopolitical nature of the current enlargement, the EU's approach to RoL conditionality is path-dependent. There are no concessions or adjustments so far that could have made EU RoL promotion in the region more effective or accelerate the enlargement process.

The case of EU's application of RoL conditionality to Ukraine, while the latter is in active war with Russia, is unique for the history of the Union, generally, and its enlargement policy, more specifically. Nonetheless, the war can be seen as an important catalyzer in the EU's shift from "integration without membership" to the active pursuit of actual enlargement in relation to Ukraine. Aware of both the geostrategic significance of further eastward enlargement and of its increased leverage in Ukraine, the EU extensively utilized political momentum to apply RoL conditionality vis-à-vis Ukraine.

My analysis revealed three key characteristics of this conditionality. First, the EU's wartime RoL conditionality vis-à-vis Ukraine is based on the combination of several instruments and incentives, namely political dialogue (and Ukraine's progress to EU membership), macro-financial assistance and reconstruction funds. Since the latter assistance type is still debated, it got least attention in the analysis. Secondly, the

⁸⁸ Enlargement reports 2021-2023 for all Western Balkans countries are available on the webpage: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/strategy-and-reports_en. Accessed 16 December 2023.

substance of EU wartime conditionality vis-à-vis Ukraine has been largely driven by the EU's previous RoL engagement with Ukraine. In the wartime, the EU focused on pushing Ukraine to complete outstanding and highly sensitive tasks in the domains of the judiciary, anticorruption and fundamental rights. In doing so, it often 'mirrored' key conditions in both political dialogue and MoUs attached to MFA, with the latter being slightly more detailed and technical. Thirdly, while serving as a logical continuation of the EU's pre-war RoL promotion efforts in Ukraine, EU wartime conditionality vis-à-vis Ukraine is close to the conditionality it utilizes in the accession context. Amidst EU institutions' strive for consolidating the EU's understanding of the RoL in connection to the internal EU RoL crisis, we witness the focus on judiciary, anticorruption, and fundamental rights as becoming central to the Commission's understanding of RoL. This path-dependency crystallized in the contexts of both the Western Balkans' monitoring/negotiations and the new candidate countries' accession processes. Thus, despite the uniqueness of strategic and political context, EU's wartime conditionality can be seen as driven by the confluence of the EU's pre-war engagement with Ukraine and the strongly formalized, currently dominant understanding of RoL accession preconditions. Minor changes to be underscored include the EU's focus on specific benchmarks within pre-defined realms and strong alignment between political and financial instruments. Nonetheless, current geostrategic pressures have not yet led to major substantive changes in the philosophy behind the enlargement process and the EU's application of the RoL conditionality or the Union's understanding of the scope of the concept.

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