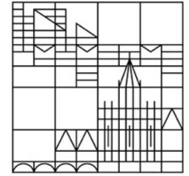

Master Thesis

Upholding the Rule of Law in the EU – Enlargement Policy as a Credible Guardian?

by

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Abstract

Since over a decade the EU is holding accession negotiations with the Western Balkan countries and monitoring their compliance with the Union's core values like democracy, the rule of law and human rights. At the same time, its own member states, namely Hungary and Poland have been seriously undermining these very principles. How does this affect the current enlargement process? This contribution argues that due to systemic differences there are more chances at the moment for the EU to uphold rule of law by its enlargement policy than by the mechanisms it has at hand to deal with violations by its member states. Due to a more flexible approach, the Commission constantly reviews its strategy and adapts it to the specific needs of the countries and outer circumstances. A case study comparing the accession process of Montenegro, a current applicant, and Slovakia, part of the Eastern enlargement in 2004, shows that today's negotiations and monitoring indeed are stricter, more diversified, and with an higher focus on the respect for the rule of law. However, this change cannot be directly traced back to the rule of law crisis, and thus needs further research to fully understand the Commission's motivation behind its enlargement strategy.

Keywords: Rule of Law Crisis, EU Enlargement, Copenhagen Criteria, Western Balkans

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1 Introduction

In its recent Nations in Transit Report published in May 2020, Freedom House states: “A growing number of leaders in Central and Eastern Europe have dropped even the pretense of playing by the rules of democracy. (…) These politicians have stopped hiding behind a facade of nominal compliance. They are openly attacking democratic institutions and attempting to do away with any remaining checks on their power. In the region stretching from Central Europe to Central Asia, this shift has accelerated assaults on judicial independence, threats against civil society and the media, the manipulation of electoral frameworks, and the hollowing out of parliaments, which no longer fulfill their role as centers of political debate and oversight of the executive” (Freedom House, 2020). Looking at the selected countries is a heavy blow for the EU. Not just Hungary and Poland, two Member States of the EU, but also Montenegro and Serbia, the countries the EU is holding accession negotiations with, are mentioned. They were reclassified as “semi-consolidated democracy” in Poland’s case and “transitional/hybrid regime” in the other three countries’ case. The first term relates to electoral democracies that exhibit weaknesses in their defense of political rights and civil liberties like a weak system of checks and balances. The second term refers to one level worse, so a system where democratic institutions are fragile, elections not free and fair anymore, and political rights and civil liberties substantially challenged (Freedom House, 2020).

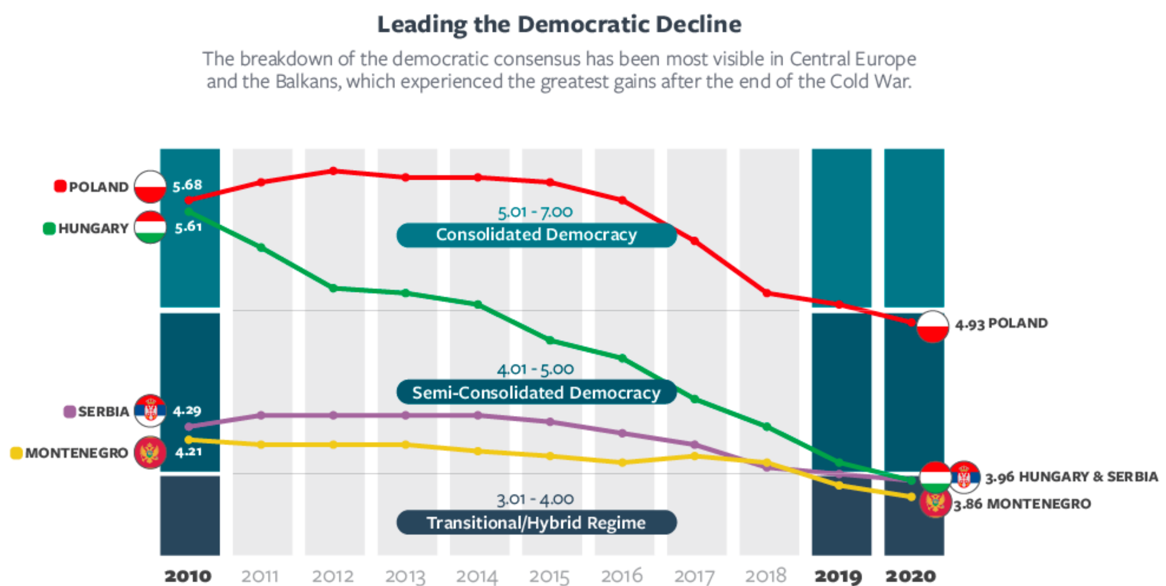

Figure 1: Situation in Poland, Hungary, Serbia, and Montenegro for the time period of 2010-2020, derived from Nations in Transit Report 2020, Source: Freedom House, 2020

The results for Hungary and Poland only confirm in cold print the rule of law crisis the EU is in since quite some time. “Hungary’s decline has been the most precipitous ever tracked in Nations in Transit; it was one of the three democratic frontrunners as of 2005, but in 2020 it became the first country to descend by two regime categories and leave the group of democracies entirely” (Freedom House, 2020). Since 2011 its leader, Viktor Orbán, has been, centralizing power, taking over much of the media and controlling more and more areas of public life. The PiS government in Poland, albeit to a smaller extent, has been disrespecting democratic institutions as well, mostly waging a war against the judiciary.

Even though the decline is not as sharp for the two applicant countries than for Hungary and Poland, their results just as much shed a bad light on the EU, in particular its enlargement policy. The procedures are going on since over a decade. But against the background of this report, the Commission’s plan to end the accession procedure successfully for Montenegro in 2025 seems very unlikely (Brzozowksi, 2019b). EU public opinion is getting increasingly negative towards further EU enlargement and these results are not helping. According to Eurobarometer in 2018, a majority of the European population, in numbers 46%, opposes a future enlargement of the EU. Only 42% support it (European Commission, 2018d). When confronting the European Commission with the latest Nations in Transit Report, EU Enlargement Commissioner Oliver Varhelyi stated in an interview: “I think that it is not for Freedom House to run the enlargement process. The [European] Commission is responsible for the enlargement process and we will come up with a very serious, thorough, and well-based assessment on both countries” (Jozwiak, 2020).

There is truth in both of Varhelyi’s statements. Freedom House’ results should be, just as any other index, interpreted carefully. Its only one out of many democratic ratings and they all do it differently following different understandings, and have shortcomings in their measurement. Nevertheless, Freedom House has a long tradition, a good reputation, a big audience and thus, the report is at least gnawing at the EU’s reputation, which brings me to the second statement. Given the results and the overall low public support for its enlargement, a proper and transparent accession procedure is key to rule out doubts, regain the public’s trust and ensure a successful enlargement, which is the very subject of this research. How does EU enlargement contribute to the upholding of the rule of law? And how has the enlargement process evolved since the accession of ten Eastern countries, including Hungary and Poland, in 2004? That was the first time the Copenhagen Criteria, a milestone in the EU’s enlargement policy, were applied. They outline conditions an applicant country needs to fulfill including political and economic

principles as well as an overall ability to implement EU law. Based on the countries' backslidings, what went wrong back then and how did the Commission reflect on it? In recognition of the recent developments within the EU and the experiences it collected with past enlargements, I investigate in this thesis the following research question:

In light of the recent rule of law backsliding within the EU, in what way has the application of the Copenhagen Criteria to candidate countries changed?

With the research question, different sub-question come along that are answered throughout the paper. A first and obvious one is what the EU's understanding of the rule of law is. This is answered in Chapter 2 together with the question how this fundamental value is protected by different mechanisms. Since there are two dimensions to this protection, Chapter 2 outlines the internal one, focusing on Art. 7 TEU, Art. 258-260 TFEU and non-binding initiatives all controlling the compliance of Member States. After demonstrating flaws to this mechanism by describing the current rule of law crisis in the EU, the external dimension in form of the EU's enlargement policy is evaluated in Chapter 3. It asks how the EU's enlargement policy is designed, what the Copenhagen Criteria (CC) are, how they were applied in the Eastern enlargement and in what way they have changed since then by introducing the accessions after 2004. After that, Chapter 4 questions from a systemic perspective, how responsive the EU is to unprecedented developments like a crisis. Again, a distinction is made between the internal and external angle. While internally, the EU is somewhat paralyzed due to power struggles between the European Institutions and the Member States, externally, on the basis of learning, the Commission is more flexible and can reflect properly in its enlargement strategy on earlier mistakes and external circumstances. Based on the legal analysis and theoretical framework, the hypotheses are introduced in Chapter 5. The subsequent section, chapter 6, outlines the empirical approach divided into the case selection, its operationalization and the data collection. A causal case study is conducted, comparing the accession procedure of a recent candidate country, Montenegro, to one of a Member State which entered the EU earlier, Slovakia. A qualitative content analysis of the accession documents for both cases is used to identify differences in the enlargement policy. In light of the hypotheses, Chapter 7 presents the findings. This is followed by a last section, chapter 8, answering the research and sub-questions once again, highlighting the key points made, identifying methodological limitations, concluding with potential avenues for future research and giving an outlook.

Therefore, the aim of this research is to assess whether the EU changed its accession procedure in response to the critique of the Eastern enlargement and the non-democratic developments in Hungary and Poland. The results will lay bare whether the EU today follows a stricter and more extensive application of the Copenhagen Criteria and hence contributes to the upholding of the Rule of Law in the Union. If there is tightening in the accession process and a greater emphasis on the fulfillment of the criterion, this would add positively to the debate on the effectiveness of the Copenhagen criteria as well as the credibility of the EU in the process.

2 Rule of Law in the European Union

"The rule of law is part of Europe's DNA, it's part of where we come from and where we need to go. It makes us what we are."

Frans Timmermans, Vice-President of the European Commission, Keynote speech at Tilburg University 2015

Together with respect for human dignity, freedom, democracy, equality and respect for human rights, including the rights of persons belonging to minorities, rule of law (RoL) is one of the core values the EU is founded on, as highlighted in Art. 2 TEU. Lately, it's this very fundamental ideal that has been heavily undermined by some EU Member States putting the EU as a whole in a tight spot. The following section gets to the bottom of this matter, first of all asking what the EU's understanding of rule of law is and whether its conception changed over the time. Secondly, the legal framework dealing with breaches of Art 2 TEU is analyzed in order to see how the EU upholds its values. By outlining the recent happenings in Hungary and Poland major weaknesses in the implementation are identified.

2.1 Conception

Even though RoL is "part of Europe's DNA" (Timmermans, 2015) and is referred to multiple times in the treaties, there is no provision of the treaties or EU legislation defining what it actually means and how it relates to the other core values included in Art. 2 TEU. The notion of RoL is elusive, contested, and with a "susceptibility to conceptual overstretch" (Magen, 2016). There is widespread support for the concept and consensus about its standard in most democratic countries, but disagreement and varying interpretations in the legal traditions of the Member States. For example, the British *rule of law*, the German *Rechtsstaat* and the French *État de droit* all refer to the very same concept, but have different origins. "Generally speaking, the undeniable high degree of consensus on the rule of law is 'possible only because of

dissensus as to its meaning'", concludes Laurent Pech (2010). There is also no widely-used definition among scholars, but "thick" and "thin" interpretations. Basically, "there is only rule of law if the law is generally and widely observed and is effective in actually guiding the conduct of persons, both in their official capacities (if they have them) and as private persons" (von Bogdandy & Ioannidis, 2014). This is a rather "thin" definition, aiming at an outcome that meets certain criteria in order to be *just*. It is a procedural notion of rule of law focusing on the system, the mechanisms and the procedures at work, but not on the substance of the law. The inclusion of the latter makes it a "thick" definition. A "thick" conception of RoL reflects on existing international treaties on human and social rights for example, giving it a "norm-promoting character" (van Veen, 2017).

Which stand does the EU take on this principle? For the Union it is even more challenging to find a community term, since RoL lays "at the crossroads of different constitutional traditions" (Kochenov, 2004) and thus needs to respect the Member States' plurality and be applicable to their different political and legal systems (Janse, 2019; Poptcheva, 2015). A first definitional attempt was made in 1986 in the case of *Les Verts*. There, Advocate-General Mancini equated rule of law with judicial protection: "The Community was said to comply with the rule of law because it allegedly offered (…) legal remedies and procedures in order to ensure (i) that its institutions (…) adopt measures in conformity with the primary sources of Community law and (ii) that natural and legal persons are able to challenge (…) the legality of any act which affects their Community rights and obligations" (Pech, 2010). This shows that in the beginning the Court of Justice of the European Union (CJEU) had a rather "thin", procedural understanding of the concept related to legality, judicial protection and judicial review (Pech, 2010). Since then, the CJEU as well as other EU institutions have progressively redefined the Union's notion of RoL. During the Eastern Enlargement, the first time the Copenhagen Criteria were applied, the Commission failed to directly articulate the meaning of RoL in Agenda 2000 (see Chapter 3). However, different analyses show that the Commission looked at a wide range of issues, including formal and substantive elements (Janse, 2019), and intertwined the concept with other notions like democracy (Kochenov, 2004), when checking for compliance. Therefore, the Commission demonstrated a multifaceted legal principle, that goes beyond a "thin" definition and insists that the EU's foundational principles are interdependent and must be assessed in light of each other (Magen, 2016; Pech, 2010). Yet, there was still no definition formally written down.

This changed in 2014, when the Commission published its Rule of Law Framework. For the first time, a comprehensive conceptualization of rule of law by an EU institution was published, attaching great constitutional significance to the Framework. It includes six components (Commission of the European Communities, 2014; Magen, 2016):

- **Legality** which implies " a transparent, accountable, democratic and pluralistic process for enacting laws";
- **Legal certainty** requiring that "rules are clear and predictable and cannot be retrospectively changed"
- **Prohibition on arbitrariness** of the executive powers "involving, in essence, respect for private spheres of people's lives and 'protection against arbitrary or disproportionate intervention'"
- **the right to a fair trial** and the **separation of powers** meaning specifically the 'right to a **tribunal that is independent** of the executive power in particular'
- **Effective judicial review** including respect for **fundamental rights**
- **Equality before the law**

This conceptualization is far from being flawless. Yet, it is a tangible one which is composed of other constitutive principles proofing the multifaceted notion mentioned earlier, and serves until today as a workable tool to assess EU rule of law policies.

2.2 Legal Framework for Protection of Art. 2 Values

How are these values protected? Or in other words, what mechanism does the EU provide to ensure compliance with the rule of law, democracy, and equality? There is a two-fold protection for these values from both the internal and the external dimension (Poptcheva, 2015). While the external angle in form of the Copenhagen accession criteria for new candidates will be outlined in Chapter 3, this section focusses on the internal perspective and describes mechanisms to ensure adherence to these principles by Member States. Namely, Article 7 TEU, Article 258-260 TFEU and non-binding initiatives like the Commission's Rule of Law Framework and the Council's Rule of Law Dialogue.

2.2.1 Article 7 TEU

Article 7 TEU was introduced with the Amsterdam Treaty and slightly revised with the Nice Treaty. It marked the beginning of a new phase where not only candidate countries would be

subject to monitoring of their compliance with shared values, but also Member States (Toggenburg & Grimheden, 2016).
There are two mechanisms involved in the Article: a preventive and a sanction mechanism. Under article 7 (1) TEU the Council "may determine that there is a clear *risk* of a serious breach by a Member State of the values referred to in Article 2". It can be activated by a third of the Member States, the European Parliament or the Commission. In addition, the decision adopted by the Council needs the Parliament's consent. The second arm, the sanction mechanism, is independent of the preventive one and includes two phases itself, Art. 7 (2) and (3). Here, the Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after the consent of the European Parliament, "may determine the *existence* of a serious and persistent breach by a Member State of the values referred to in Article 2". Where a determination under paragraph 2 has been made, the Council may decide to suspend certain membership rights of the Member State like voting rights (Art. 7 (3)). For this, the Council needs a qualified majority.

Until today, it was been used twice despite the notable procedural requirements and high thresholds (see Chapter 2.3). They show that Art. 7 was designed as ultima ratio procedure. Member States hoped (in vain) that its mere existence would act as a sufficient deterrent (Pech & Scheppele, 2017). It is also unique since it is the only article in the Treaties giving power to the EU over matters *outside* the scope of EU law, thus, going beyond simply violations of the acquis (Lavelle, 2019). However, the violations needs to be *systemic*. An individual violation is not sufficient, the breach needs to demonstrate "a track record of violating fundamental values" (Lavelle, 2019).The mechanism also demonstrates the political nature of Art. 7. While the CJEU has a rather limited role, which is in Art. 269 TFEU restricted to reviews of procedural requirements only, the Council is vested with a lot of power. This is often justified by its particular circumstances. Establishing whether a Member State is in breach of the Union's foundational principles "essentially calls for a political judgment rather than a legal one" (Pech, 2010).

2.2.2 Article 258-260 TFEU

Another possibility for the EU is the infringement procedure listed in Article 258 – 260 TFEU. Art. 258 TFEU gives the Commission the chance to bring Member States to court if they failed to fulfil an obligation under the Treaties. Art. 259 TFEU gives the same opportunity to Member States who think that others don't comply with the treaty. If a member state failed to comply

with a judgement of the CJEU, under Art. 260 TFEU, the Commission can take further action against that Member State and bring it to court again. If the court agrees, it may impose a fine in the form of a lump sum or penalty payment or both.

Whether Article 2 values are justiciable under these proceedings remains contested among experts. They have been used by the Commission for some aspects in this regard (see Chapter 2.3), but with mixed results. Legal principles like rule of law are broad and therefore hard to pinpoint. Hence, some argue the infringement procedure is "too case-specific and restricted solely to violations of the EU acquis" (Lavelle, 2019). However, others think that "infringement action may serve not only to address a specific violation in a Member State but also the rule of law crisis", since it is a tested procedure, capable of delivering results fast and more legitimized since the CJEU is the ultimate decision-maker (Schmidt & Bogdanowicz, 2018). Either way, it is not the most appropriate, effective tool to tackle such issues. This was a reason for former president of the Commission, José Manuel Barroso, to call for a new instrument "that would fill the space between the Commission's infringement powers (…), and what he referred to as the 'nuclear option' of collective sanctions laid down in Article 7 TEU" (Barroso, 2013; Pech & Scheppele, 2017).

2.2.3 Non-binding Initiatives

This new and "less formal 'pre-Article 7' tool" was introduced in 2014 in form of the new Rule of Law Framework published by the Commission (Lavelle, 2019). Already mentioned in Chapter 2.1, for the first time the concept of rule of law was elaborated. In addition, it includes the opportunity for the Commission to launch a structured dialogue with a Member State violating the EU's fundamental principles. It consists of three phases: An assessment phase, a recommendation phase, and a follow up phase, where the Commission assesses the situation in the country concerned, draws a recommendation, enters into discussion with the country and follows up on the recommendation made. If the dialogue fails, the Commission may proceed to make a reasoned proposal in order to invoke Article 7 (European Commission, 2014a). In a nutshell, it is a non-legally binding, "discursive, soft law approach" (Pech & Scheppele, 2017), serving as an early warning tool (Kochenov & Pech, 2016).

Another, less popular instrument is the Rule of Law Dialogue, which was announced by the Council in 2014, after the Council publicly showed its displeasure over the Rule of Law Framework since neither the Council nor the Parliament have important roles. It takes place

yearly between the Council and the Member States and is intended to be complementary to other instruments and expertise in the field (Oliver & Stefanelli, 2016). However, due to its excessively vague nature, it gives great concern “as to whether this dialogue was intended to be anything resembling an effective mechanism for ensuring respect for the values spelt out in Article 2 TFEU” (Oliver & Stefanelli, 2016).

This overview shows that the rule of law and other fundamental values are protected from different sides and with multiple tools ranging from discursive approaches to mechanisms with severe sanctions. Why an eruption of the rule of law crisis in multiple EU Member States could still not be prevented is analyzed below.

2.3 Political Reality: the EU’s Rule of Law Crisis

Scholars claim that one of the hopes in the Central Eastern European Countries (CEECs) when accessing the EU was that “accession to the Union will help improve and consolidate democracy, the protection of human rights, and the rule of law” (Sadurski, 2004). A glance at the happenings in Hungary and Poland, but also other members like Slovakia and Bulgaria, heavily questions this civilizational argument. Yet, it’s not just Eastern countries that have been challenging the EU’s fundamental values, the incident in Austria where the far-right Freedom Party under Jörg Haider joined the Austrian coalition government in 2000 and the planned expulsion of a thousand Roma individuals in France in 2010 undermined the Member States’ credibility just as much (Magen, 2016; Poptcheva, 2015). This section focusses on the happenings in Hungary and Poland, but not so much on the domestic developments leading to the “illiberal backsliding”. Instead, the EU’s reaction and use of its legal instruments are interpreted.

In short, both countries experience a heavy rule of law backsliding since 2010, when Viktor Orbán from the Fidesz party became prime minister in Hungary, and 2015, when the Law and Justice Party (known as PiS), led by Jarosław Kaczyński, won the parliamentary elections in Poland (Halmai, 2017). Pech and Scheppele define a *rule of law backsliding* as “the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party” (Pech & Scheppele, 2017). Both countries constantly seek to curtail judicial independence, dismantle democratic institutions and attack press freedom. In Hungary, Orbán

passed a new constitution in 2011, which heavily undermines checks and balances. He enacted laws that curb fundamental freedoms and increased governmental control over the judiciary as well as the media. Examples are the change of the nomination process for judges, the implementation of new media regulatory bodies lacking neutrality, and the appointment of partisans to non-partisan institutions in different areas (Halmai, 2017; Lavelle, 2019). The PiS government in Poland used Orbán as its role model and also enforced multiple laws affecting the structure of the entire justice system like the Constitutional Tribunal's decision-making power or the reduction of the compulsory retirement age for Supreme Court judges forcing nearly 40% of the bench into retirement. It also amended the media law, which enabled the government to appoint and dismiss the heads of the public television and radio (Halmai, 2017; Lavelle, 2019).

Both countries are on a collision course with EU law. However, the Union reacted very reluctantly. The Commission filed infringement procedures against both Member States for different breaches of EU law like gender discrimination, equal treatment in employment, academic freedom and judicial independence (Brzozowksi, 2019a; Schmidt & Bogdanowicz, 2018). In the case of Poland, the Rule of Law Framework was activated for the first time in January 2016, but to no avail. The situation in the country "has gone from bad to worse since and the multiple rule of law recommendations [in total 3] made by the Commission have not only been ignored but also openly and rudely dismissed by Polish authorities" (Pech & Scheppele, 2017). Hence, for the first time in history, in December 2017, the Commission decided to activate the preventive arm of Article 7 TEU against Poland and made a reasoned proposal to the Council for it to consider triggering Article 7 (1). In relation to the Hungarian Case, the Commission was more hesitant. Even though the Rule of Law Framework was originally designed for Hungary (Pech & Scheppele, 2017), the Commission did not activate it. It also did not trigger Art. 7. Instead, the European Parliament stepped in and adopted a resolution in September 2018 calling the Council to use Art. 7 (1) (Lavelle, 2019).
Since then, the dialogue under article 7 (1) is ongoing with both countries. In January 2020, the European Parliament passed a resolution about the state of the hearings with Hungary and Poland. It noted that "the reports and statements by the Commission and international bodies, such as the UN, OSCE and the Council of Europe, indicate that the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1) of the TEU" (European Parliament, 2020). It urges the Council to come to a final conclusion and asks the Commission to use infringement procedures for interim measures (European Parliament, 2020). However, even if

the Council comes to an conclusion determining "a clear *risk* of a serious breach" of the rule of law, the EU is now in a situation where two Member States are in violation of it, with always one being able to block the sanction mechanism under Article 7 (2) against the other, "effectively granting them veto power in each other's cases" (Lavelle, 2019).

It would go beyond the scope of this paper to further examine the failure of the EU and its single institutions. But there is to say, even though the EU legal framework has its deficiencies, in theory, the European institutions have different mechanisms at hand. But they were hesitant to use them. Determination and sanctioning of breaches are at least as much political issues as legal ones, in particular since the Council is in charge of Article 7 TEU, not the judiciary (Hegedüs, 2019). The advantages of it have already been mentioned, but there are also disadvantages. The institutions did not react at all or not fast enough, struggles between the Commission and the Council hampered an effective process, and party political biases in the Council as well as the Parliament hindered decisive responses (Hegedüs, 2019; Pech & Scheppele, 2017). Overall, this section showed that the RoL "maintenance tool", the internal protection of Art. 2 values, is not working. As a result, the European Union today faces a serious crisis of the rule of law and there is no sign of improvement.

2.4 The Crisis' Significance

"The 'values crisis' may not seem as urgent as the other crises on European plates, but it has the most far-reaching implications for the European project because without common values, there are fewer reasons for the EU to exist." (Pech & Scheppele, 2017) Deficient rule of domestic law automatically translates in deficient rule of EU law (von Bogdandy & Ioannidis, 2014).

Three consequences are to be mentioned: Firstly, if RoL, the EU's "normative glue that holds the entire political and legal edifice together" (Magen, 2016), crumbles, other legal principles founding on the compliance with Article 2 TEU are endangered as well. These include the principle of mutual trust by EU Member States in relation to the decisions and acts of other Member States as well as their institutions, mutual recognition of judicial decisions of other Member States, sincere cooperation, and the system of European Arrest Warrants (Magen, 2016; Oliver & Stefanelli, 2016; von Bogdandy & Ioannidis, 2014). The EU is slowly developing its rule of law legal framework, trying to take action and fill the gap in order to protect its foundational values. In 2018 the Commission suggested to make EU funding

conditional upon respect for EU fundamental values, implying to cut it where there are rule of law deficiencies (European Commission, 2018b). In 2019, the new European Commission published a communication to "further strengthening the Rule of Law within the Union", including a Rule of Law Review Cycle and an annual Rule of Law report, basically monitoring the rule of law performance across all member countries. The first annual report will be presented in September 2020 (European Parliament, n.d.). Whether this new toolbox will be more effective in protecting the rule of law remains to be seen.

Secondly, the ongoing crisis threatens the credibility of the EU in the eyes of its own citizens, but also undermines it in exchange with third countries, hence its reputation as a global actor. The internal integrity of rule of law and democratic conditions within the EU is intimately linked to its external ability to promote the rule of law abroad (Magen, 2016).

This leads to a third consequence: If Member States are 'allowed' to defy the most core values of the Union while reaping all the material benefits, others might be attracted and follow suit (Oliver & Stefanelli, 2016). This also applies to applicant countries. Why should illiberal leaders like in Serbia or Montenegro "allow an independent media, tolerate civil society, bolster institutional checks and balances, treat opposition parties fairly, or dismantle rent-seeking networks when others are up to even worse within the EU" (Vachudova, 2019)?

This is where the external protection of Art. 2 values comes into play – the EU's enlargement policy. "The current crises, (…) represent a failure of the pre-accession strategy and amount to a poignant vindication of those who feared that some candidates' commitment to EU values was incomplete or shallow at the time of accession and in its aftermath" (Magen, 2016). This apprehension only increases when looking at the latest nations in transit report. Hungary is not even seen as a semi-consolidated democracy anymore like Poland, but as a hybrid regime. It seems that the EU's accession strategy for the Eastern enlargement had its flaws contributing to the RoL crisis. Hence, the following chapter deals with the EU's enlargement policy in greater detail.

3 EU Enlargement in Theory and Practice

Founded by six countries in 1958, the European Union has expanded a number of times throughout history. Today, it counts 27 members with the latest one, Croatia, joining in 2013. Figure 2) shows the different admissions since the EU's foundation. Withdrawals like of the UK in January 2020 are not depicted. Further accessions are planned for the Western Balkans.

Negotiations are ongoing with Montenegro, Serbia and Turkey, while Albania and the Republic of North Macedonia are waiting for their proceedings to open.

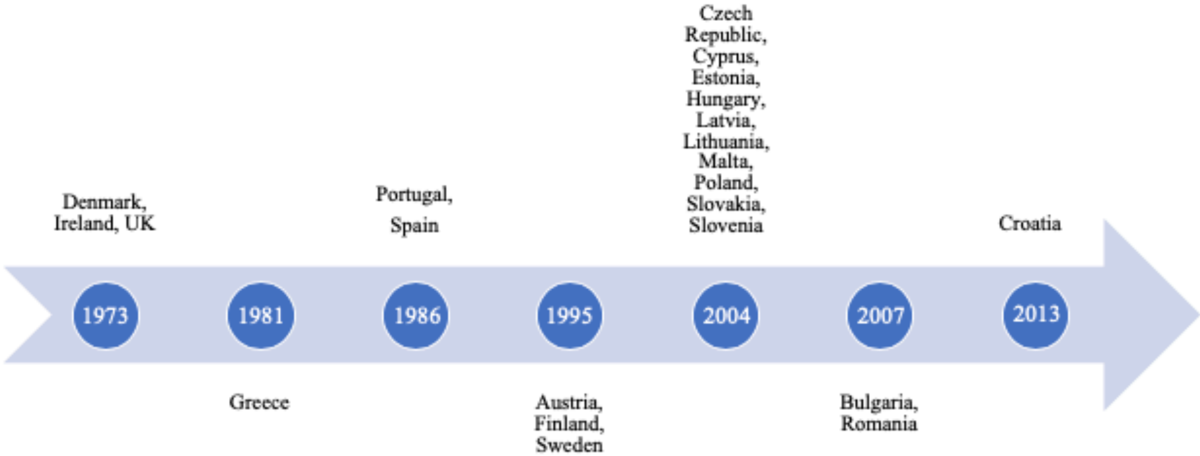

Figure 2: EU Enlargement Waves, Own Illustration, Source: (Council of the EU, 2020)

This chapter provides insights into the EU's enlargement policy, asking how it is designed and whether the accusations raised earlier about discrepancies between the framework and its application hold. Therefore, the EU's accession strategy is described with a special focus on the Copenhagen Criteria and its application to the Eastern Enlargement analyzed. In order to see developments of the strategy and todays state of play, Bulgaria and Romania's accession as well as Croatia's are examined against the background of the Eastern enlargement.

3.1 The Copenhagen Criteria: The entrance ticket to the EU?

According to the Treaty of the European Union (TEU), membership of the EU is open to "any European State which respects the values referred to in Article 2 and is committed to promoting them" (TEU Art. 49). The accession process follows a series of steps starting with the submission of the *applicants* country's application to the Council of the EU. After an evaluation by the European Commission, the Council decides whether the country becomes an official *candidate country*. The candidate then moves on to *formal accession negotiations*, which take place between ministers and ambassadors of the EU governments and the candidate country. Simultaneously, the European Commission *screens* the candidate country in greater detail based on the accession criteria. Once every criterion is fulfilled and every chapter of the *acquis* closed, the agreements are set out in an *accession treaty*, which needs to be signed by the candidate country and every EU Member State. It also needs the support of the European Parliament, the Commission and the Council. After the ratification in every individual EU

country and the candidate, ultimately, the acceding country becomes an EU Member State on the date specified in the treaty (European Commission, 2016c).

Since TEU Art 49 has no clear directions on the conditions of admission, the EU is able to supplement the Treaty provisions with individual requirements outside the primary law. "In practice, each enlargement has been an occasion for the Member States and the institutions to reflect and elaborate on the conditions of entry" (Hillion, 2014). This was also the case for the Eastern Enlargement in 2004 for which the Copenhagen Criteria, including three conditions, were established in 1993 by the Copenhagen European Council (European Council, 1993):

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

Even though formulated for the Eastern Enlargement, these requirements have deep roots in previous admission practices, where values like a representative democracy or human rights were essential (Hillion, 2014). However, they also brought innovations. One novelty is the "respect for and protection of minorities". Minority rights lacked a clear foundation in law and thus, their mentioning in the CC marked a significant disjuncture from their previous approach. Including it as a precondition for EU membership meant a "much higher standard of norm compliance" for new candidates (Hughes & Sasse, 2003). Moreover, it turned enlargement into a more systematic process with objective standards and compliance checks (Hillion, 2014; Janse, 2019). During successive European Councils in Essen 1994, Madrid 1995 and Luxembourg 1997, the criteria were extended and an enhanced pre-accession strategy was introduced containing aid and accession partnerships. It included monitoring and steering programs in which candidates prepared themselves for membership.

Today, they have become common practice and are an integral part of today's accession process – even though they are of political nature. Since they were established by a political institution, the European Council, and are not explicitly mentioned in Art. 49 TFEU, the Copenhagen Criteria remain a purely political tool that is not legally enforceable. Nonetheless, their

establishment sustainably changed the Union's enlargement policies. Together with the pre-accession strategy, it not just turned enlargement into a multiple step process (Steunenberg & Dimitrova, 2007), but gave it a transformative aim: "Enlargement became member-state building" (Janse, 2019)

3.2 The Big Bang Enlargement in 2004

Ian Ward stated in 2006: "Each expansion brings its own particular context" (Ward, 2006). This is notably true for the enlargement by the Central and Eastern European Countries (CEEC), which was unique in many respects, starting from its magnitude and political importance, it was also the first time the CC together with a system of conditionality and regular progress assessments from the Commission were used (Veebel, 2011).
Therefore, both the Commission and the Council had to articulate the meaning of the CC in greater detail and define standards by which the applicant country's adherence could be measured. This happened in July 1997, when the Commission published Agenda 2000, containing an extensive blueprint spelling out the criteria in more specific terms, each of them divided into indicators, and opinions on each application for membership of the applying CEEC (Janse, 2019). The result of these opinions show a differentiation between the applicant countries based on the accession criteria: The negotiations were only opened with five of the CEEC – the Czech Republic, Estonia, Hungary, Poland and Slovenia – and Cyprus (Maresceau, 2001). The others - Bulgaria, Latvia, Lithuania, Romania, Slovakia and Malta – did in the eyes of the Commission not fulfill the economic and/or political criterion yet. They followed in February 2000 (Maresceau, 2001). In particular Slovakia was a problem child not fulfilling the political conditions, e.g. free and fair elections, under the presidency of Vladimir Mečiar. Only after the creation of a new government after elections in 1998, the political climate between Slovakia and the EU improved putting the applicant back on track (Maresceau, 2001). This shows the multiple step process, as mentioned in Chapter 3.1., giving proof to the Presidency Conclusion of the Luxembourg Council in 1997, which stated: "Compliance with the Copenhagen political criteria is a prerequisite for opening of any accession negotiations" (European Council, 1997).

The EU's key instrument to monitor the applicants' progress and evaluate the fulfillment of the CC was the Commission's annual Regular Reports. In contrast to previous accession procedures where the Commission gave two opinions, the progress was assessed annually (Hillion, 2014), checking the candidate's "domestic process of legislative engineering" (Hughes & Sasse, 2003)

and intensively screening the implementation. The later also raised qualitatively. While in previous accessions, the requirement to have an established democracy was fulfilled if constitutional guarantees were visible, thus neglecting real situations, this time, the Commission aimed at "look[ing] at the way democracy functions in practice instead of relying on formal descriptions of the political institutions" (European Commission, 1998a).

All 10 countries joined the EU in 2004 as fully-fledged members, adding 85 million inhabitants to the population of the Union, which back then had 455 million, producing a 22% increase (Batorshina, 2011). This summary shows that the changes, introduced into the regulation of enlargement were enormous, but - according to different scholars- successful, describing it as "the EU's greatest foreign policy success to date" (Cirtautas & Schimmelfennig, 2010). Or, as former president of the European Council, Herman Van Rompuy, stated at the 10th anniversary of the enlargement in 2014: "finally Europe had become 'Europe' again" (Van Rompuy, 2014).

3.3 Shortcomings in the Application of the Copenhagen Criteria

However, when looking at the happenings described in Chapter 2 and the plenty critical voices that were raised, a different picture emerges. While "such an institutionalized monitoring of the candidates progress by the Commission *suggests* a more systematic and allegedly "depoliticized" process relying on more objective criteria" (Hillion, 2014), in reality, "the EU was not sufficiently thorough, explicit, and consistent in its demands – and not vigilant enough in its enforcement" (Vachudova, 2019). The following section summarizes this criticism of the Eastern Enlargement in greater detail.

For the first issue, *thoroughness*, different analyses of the reports find similar proof. Dimitry Kochenov assessed the regular reports with a focus on the political criterion and found "a record-low space in the Papers" reserved for it (Kochenov, 2004). The chapter dealing with the political criterion was usually only two pages long, which is, compared to a dozen of pages dedicated to the economic criterion, not a lot. Kochenov concludes, that it is obvious "that any analysis of the state of democracy, rule of law, protection of human rights and minorities in thirteen countries squeezed into two pages is deemed either to be purely superficial or to describe a situation in 13 ideal democracies" (Kochenov, 2004). Hughes and Sasses found the same superficiality when examining the text documents based on the protection of minorities. "In essence, the Reports are a patchwork of formulaic expressions and bureaucratic codes to

encapsulate 'progress' by the CEECs on the 'road map' to membership" (Hughes & Sasse, 2003).

Regarding Vachudova's second complaint, scholars criticize a too *vague wording* of the criteria. There is no single document clarifying the meaning of the conditions. Instead a content analysis of many documents is necessary to get an understanding (Kochenov, 2004). There is either no clear definition of the concepts, like "stability of institutions" or "functioning market economy", or concepts are mixed as it is the case with "democracy" and "rule of law" (Kochenov, 2004). They are "notoriously vague" (Ward, 2006), not quantitative or clearly measurable and hence do not work as a proper tool to govern the progress (Veebel, 2011). Scholars agree that the enlargement process suffered from this ambiguity. "With a wording so broad and overinclusive, neither the candidate countries nor the Commission really knew how to apply them in practice" (Kochenov, 2004). Paulina Rezler even sees in it the reason "why countries of such different levels of development and different levels of sophistication in governance have been allowed to become members of the European Union" (Rezler, 2011).

Both of these issues result in Vachudova's third criticism: *inconsistency*. Without clear definitions of the CC, the EU has more leeway in its enlargement policy. Veebel's comparison of the pre-accession assessment of different countries gives proof. He compared the EU's results of the applicant countries for the criteria with those of established indicators like Transparency International, Freedom House or IMF and found remarkable differences. Moreover, the evaluations tended to include additional categories outside the official criteria. He concluded that the "EU uses Progress Reports to inform applicant states that non-Copenhagen Criteria need to be fulfilled as well, as results in official criteria depend on the EU's general political will and attitude towards the applicant state" (Veebel, 2011). Beken Saatçioğlu raises the same accusation stating "EU admission depends on issues other than the Copenhagen Criteria" (Saatçioğlu, 2009). This shows that the criteria were applied inconsistently and the specific definitions of the terms made on a case by case basis, leaving not much room for the expected "depoliticized process" (Hillion, 2014; Rezler, 2011).

With respect to the last issue, *vigilant enforcement*, Janse criticizes, that contrary to the Commission's efforts to focus on the way democracy works in practice, see Chp. 2.2., it relied too much on information provided by the governments themselves (Janse, 2019). This questions at least partly the source's validity.

As Chapter 2 shows, there is another major shortcoming: the *lacking enforcement mechanism for the time after accession*. The EU's enlargement policy is designed to achieve compliance of applicant countries with the accession criteria, but there is no such mechanism once they enter. It was always "coupled with the presumption that any democratic or rule of law 'backsliding' would not be possible once the transformation was in place" (Kochenov & Bárd, 2018). However, studies on the Europeanization of the rule of law criterion in post-communist EU Member States show the opposite. *They do show legal* compliance with the CC during the process of accession, but it had neither fundamental nor lasting effects (Elbasani & Šabić, 2018). "The weakness of the Copenhagen criteria and the lack of their application after accession caused a discrepancy between EU accession conditions and membership obligations, which might be one of the reasons for non-compliance after accession in some of the new Member States" (Halmai, 2017). The eruption of the "rule of law crisis" in the EU, mostly caused by Hungary and Poland in the last ten years, gives proof. The shocking rate at which the deconstruction of the rule of law occurs in both countries demonstrates the "importance of a constitutional culture beyond black letter law including constitutions, institutions, and procedures" (Kochenov & Bárd, 2018). A successful accession does not necessarily imply a deep and durable liberal democracy (Vachudova, 2019).

3.4 Romania, Bulgaria, Croatia, and State of Play: Lesson learned?

What happened ever since? Was the EU able to learn from its mistakes and change its strategy in successive accessions?

Romania and Bulgaria could not keep up with the pace of reform of the other Eastern countries and hence joined the EU three years later in 2007. However, they still suffered from structural problems in the areas of judicial reform as well the fight against corruption and organized crime, setting them apart from other post-communist countries and the old EU Member States (Spendzharova & Vachudova, 2012; von Bogdandy & Ioannidis, 2014). For this reason, a system of post-accession monitoring was established, the so-called 'Cooperation and Verification Mechanism', on the basis of the Accession Treaty with Romania and Bulgaria. It allows the Commission to keep supervising the reform process. The Commission created benchmarks and evaluated regularly whether progress was made, based on their own assessment as well as reports the countries had to publish. Based on Article 38 of the Accession Treaty, safeguard clauses were included enabling the Commission to impose suspensions or freeze funding, as the EU did in 2008 with Bulgaria due to "mismanagement" (Carrera et al.,

2013; European Union, 2005). The CVM thus serves as a mechanism to extend conditionality and prolong the EU's leverage *after* accession. It is still in place and will end whenever the Commission decides that the countries have met their targets (European Union, 2005; Spendzharova & Vachudova, 2012). The evaluations of different scholars are mixed. Spendzharova and Vachudova rated it as positive and claimed that without it there would have been less reform. (Spendzharova & Vachudova, 2012). Others, like Hillion, see a good opportunity in the tool, but question the effectiveness of the sanctions: "The lack of serious consequences (…) has significantly hampered the transformative potential of the mechanism, and the latter's credibility" (Hillion, 2013). Lately, against the background of the last report on Bulgaria praising the country's progress and considering a termination of the CVM, the mechanism's credibility has been questioned heavily. Despite strong criticism by civil society and worrisome developments in the country, the Commission decided, "the benchmarks judicial independence, legal framework, and organized crime had been closed because of satisfactory progress" (Vassileva, 2019). Vassileva accuses the Commission of dual standards, complicity with Bulgaria's regime, a faulty methodology of evaluating progress and behind-the-curtain political deals. She stated, "The latest CVM report on Bulgaria not only confirms this [dual standards vis-à-vis the rule of law], but also leaves the impression that the Commission has given up on Bulgaria's rule of law" (Vassileva, 2019). For Croatia, it was not used and whether a similar tool, e.g. in form of the Rule of Law Review Cycle mentioned earlier, will be implemented for the Western Balkans remains to be seen.

At the Thessaloniki Summit in 2003, the EU granted all countries of the Western Balkans a perspective of EU membership. Croatia was the first to take the step. In the context of its enlargement, a new strategy regarding the political accession criterion was created. "Given the poor state of RoL across the region [Western Balkans], the EU enriched the standard Copenhagen criteria with a 'second generation' RoL promotion strategy" (Elbasani & Šabić, 2018), including a new chapter in the list of *acquis* chapters dedicated to the functioning of the judiciary and fundamental rights, and a benchmark system for the opening and closing of each chapter of the acquis with specific targets to be reached in order to monitor the progress more closely and make it more transparent (Hillion, 2013; Nechev, 2013). Member States and network experts got involved in the evaluation process supporting the Commission, and safeguards and corrective measures linked to pre-accession instruments, intensifying the conditionality (Dimitrova, 2016). This demonstrates the Union's reflection on previous enlargements and adaptation of its strategy to the conditions in the region.

The same applies to the upcoming accession with further Western Balkan countries. The EU sticks to the road map developed for the CEECs based on conditionality entrenched in the Copenhagen Criteria. But the emphasis on the political criterion and in particular the rule of law is even higher in its new enlargement strategy published in 2012 (Halmai, 2017; Nechev, 2013). The new chapter, mentioned above, is to be opened early in the negotiations and among the last to be closed in order to allow maximum time for the candidate to develop proper legislation (Dimitrova, 2016). Progress in this area has thus become the keystone of the entire enlargement procedure (Advisory Council on International Affairs, 2014). With this new design, the EU hopes for irreversibility and a regain of public support.

After the big enlargement in 2004, 'enlargement fatigue' has been the prevailing mood in Brussels as well as in Member States and among European citizens (Schimmelfennig, 2008). According to 2018's Eurobarometer highlighted in the introduction, this sentiment continues to prevail. Therefore, restoring credibility is crucial. Scholars agree that "this can be achieved only by bolstering the rule of law in the EU enlargement process" (Nechev, 2013). The changes directed at the Western Balkans demonstrate the Union's reflection on past wrongdoings and the development of its strategy. However, whether this new approach is not another "patchwork of formulaic expressions and bureaucratic codes" as Hughes and Sasse described the reports of the Eastern enlargement (Hughes & Sasse, 2003), but implies lasting changes remains to be seen. This section shows that scholars mostly focus on the domestic perspective of the CC's application, weak spots, as well as conditionality and how compliance based on it works (Cirtautas & Schimmelfennig, 2010; Sedelmeier, 2012; Steunenberg & Dimitrova, 2007). Aim of this paper is to analyze whether the scrutiny of the CC in relation to the new applicant countries has changed lately in response to the rule of law crisis, so focusing on the actions and motivations of the Commission.

4 Theoretical Insights

Before assessing the current enlargement process in light of the rule of law crisis, the question about the EU's general responsiveness to crises should be tackled. From a systemic perspective, how responsive are EU institutions to crises and unprecedented developments? The following analysis is twofold referring to the internal and external dimension of the EU's value protection. While the analysis in Chapter 2 shows that the EU institutions are somewhat paralyzed when it comes to triggering Art. 7 and taking action against its Member States, Chapter 3 suggests a

more dynamic and flexible picture in the EU's enlargement policy. The strategy was changed and adapted multiple times. These differences will be explained from a systemic perspective. While the EU is stuck in a "joint decision trap" when dealing with Hungary and Poland, on the basis of learning it is very reflexive in its accession policy.

4.1 Internal Dimension: Crises as a Way out of the EU's Joint Decision Trap?

Looking at the internal dimension of Art. 2 value protection and the lockdown hampering the Council's work regarding the progress of Article 7, a familiar pattern of the relation between the EU institutions and the Member States emerges. Already in 1988, Fritz W. Scharpf identified a "joint decision trap" between the EU institutions and the Member States, which he defines as "an institutional arrangement whose policy outcomes have an inherent tendency to be sup-optimal – certainly when compared to the policy potential of unitary governments" (Scharpf, 1988). Sub-optimal because 1) Member governments are directly participating in central decisions causing a dependence of the central government on them and 2) unanimous decisions are needed, e.g. for further evolutions of the Treaty structure. This "purely intergovernmental perspective of rational-choice institutionalism" (Falkner, 2016) expects Member States to only agree if a joint solution is more advantageous than the status quo of separate decisions (Scharpf, 1988). Supranational institutions like the European Commission are dependent on intergovernmental institutions like the Council of Ministers or the European Council. Scharpf claims, "all possibilities of institutional transformation are entirely determined by the self-interests of national governments" (Scharpf, 1988). Twenty years later, this structural problem between EU institutions and the Member States was reaffirmed, but got a new title, "governance dilemma" (Eberlein & Newman, 2008):

> *"On the one hand, the growth of functional interdependence, as the EU has moved into additional policy areas, generates a greater need for policy coordination. On the other hand, political authority in an enlarging EU remains fragmented, since member states are reluctant to transfer regulatory powers to the EU level, fearing the supranational concentration of power."*

In light of the raising Euroscepticism which had its preliminary peek in the Brexit in 2020, this intergovernmental part of integration theories regained new attention. "With a requirement for unanimous or nearly unanimous decisions, be it formally or at least de facto, this structure

amounts to a ‘trap’ where even single or a few dissenting governments can easily block much-needed political reforms” (Falkner, 2016).
However, scholars agree that crises or external shocks can propel the EU out of its “joint-decision trap”. But not just any crisis. When comparing the outcome of the Euro and the Schengen crisis, Frank Schimmelfennig identified criteria the crisis needs to fulfill in order to produce joint decisions: transnational interdependence and supranational capacity. While high *transnational interdependence* and *supranational capacity* in the Euro crisis pushed Member States to more integration, weak interdependence and capacity in the Schengen crisis resulted in unilateral measures (Schimmelfennig, 2018). The first term includes common negative externalities induced by the membership in the eurozone or high exist costs. This led the EU Member States to put the survival of the Eurozone first, whereas in the Schengen crisis countries were able to help themselves and had no comparable incentive to support countries like Greece that were heavily affected. The second term relates to strong supranational institutions in the policy area concerned like the European Central Bank in case of the Euro crisis. Other scholars assessed the different outcomes as well and added time and high functional pressure as necessary conditions for a joint solution: “Tight deadlines and harsh alternatives in the sense of a tipping point towards the worst scenario (such as the breakdown of the eurozone or a domino effect of state bankruptcies) seem necessary and, most importantly, crises should produce pressures affecting all or almost all governments alike” (Falkner, 2016).

In relation to the current rule of law crisis a joint decision trap becomes clearly visible. Even though the Parliament and the Commission are part of the mechanisms described in Chapter 2, it is the Council who is vested with the most power and has the ultimate say in triggering Art. 7. Thus, it is a “judgement by peers upon a Member States through the fellow Member States assembled in the Council” (Schmidt & Bogdanowicz, 2018). This leads to a reluctant behavior since any Member State “fear that such action may ultimately rebound on itself” (Oliver & Stefanelli, 2016), classifying as a joint decision trap or a governance dilemma where the EU is stuck.
However, can the rule of law *crisis* lead to an effective EU response? An analysis of the different factors leads to a negative result. Relating to the first term, *transnational interdependence*, which can be combined with Falkner’s premise that all governments need to be affected, it becomes clear that other Member States are not impacted by these domestic developments. They should feel a detrimental effect since core principles like mutual trust and sincere cooperation are endangered by the happenings in their partner countries. However, this

effect is only indirect. The common negative externalities that come with a rule of law crisis in one country, are not felt directly by neighboring countries. With regard to *supranational capacity*, the great deal of power of the Council just outlined above needs to be noted again. “The European Council as the major political pace-setter still acts on a consensual basis and governments cannot be outvoted there” (Falkner, 2016). This becomes particularly visible in Art. 7 (2) which requires unanimity. Viktor Orbán already publicly promised to defend Poland should the EU try to adopt sanctions (Pech & Scheppele, 2017). The *time pressure* is also not high enough. Since Orbán’s Fidesz Party took over in 2010 and the polish PiS party in 2015, quite some time has passed. There was no one-time shock moment, but instead the transformation is a slow and steady progress that is still going on. Even though the Council eventually took action and started triggered Article 7, its process is still ongoing with the European Parliament trying to raise pressure. The *functional pressure* is also not felt sufficiently. Sadly, the vision of a breakdown of the Eurozone or a domino effect of state bankruptcies is way more tangible and calling for immediate action than the deterioration of fundamental rights in some Member States.

Oliver and Stefanelli summed it up perfectly: “In its way, the problem is just as severe as the crisis of the euro and the migration crisis, although it has received far less attention” (Oliver & Stefanelli, 2016). Even though the crisis has severe consequences (see Chapter 2.4), these are not felt by the Member States, which brings us back to the ‘joint decision trap’. Due to the systemic design of Art. 7 and the fact that two countries are being investigated, the European institutions are paralyzed and not able to adequately respond to the crisis.

4.2 External Dimension: The EU’s Enlargement Policy as a continuous Learning Process

When it comes to the external axis, the systemic design of the EU’s enlargement policy, a brighter picture appears. The following section will explain learning in theory and assess the changing enlargement strategies on the basis of it.

Offering an overall definition of “learning” is not easy since there are many, widely varying approaches. The following definition only presents one example out of many: “Learning in policy analysis can be defined as a process of exercising a judgement based on an experience or some other kind of input that leads actors to select a different view of how things happen (‘learning that’) and what courses of action should be taken” (Zito & Schout, 2009). Scholars

divide between different types of learning. Zito and Schout distinguish between four threads: organizational learning, policy learning, diffusion and international relations networks (Zito & Schout, 2009). Koch and Lindenthal identify five: policy learning, governance learning, social learning, institutional change and organizational learning (Koch & Lindenthal, 2011). They all differ in questions like "who learns", "what is being learned" and "what effects on resulting policies emerges as a result" (Bennett & Howlett, 1992). Nevertheless, the different conceptions have one thing in common: all of them explicitly emphasize change. To make it even more complicated, change also takes on different forms. It can range from Treaty revisions to institutional practices by EU's political institutions to complement and *informally* modify Treaty texts. De Witte calls the latter "interstitial change" or side agreements (De Witte, 2015).

Just as its umbrella term, there are varying definitions of organizational learning (Malek & Hilkermeier, 2001). Starting point is a "permanent interplay between organizations and their environment" (Koch & Lindenthal, 2011). The organizations increase "their understanding of reality by observing the results of their actions" and continually adapting themselves to their surroundings (Malek & Hilkermeier, 2001). Or to put it simple: Organizational learning can be defined as "the detection and correction of errors, and error as any feature of knowledge or of knowing that makes action ineffective" (Argyris, 1976). This is done by "learning new problem solutions, new strategies and designing better responses" (Koch & Lindenthal, 2011).Thus, organizational learning aims at both procedural as well as substantial changes in behavior.

Within the EU context, there is an interplay between these different forms of learning and "academia finds it hard to recognize and conceptualize these developments" (Zito & Schout, 2009). However, scholars agree about the Union's overall learning capacity. Systemic characteristics that foster learning include the EU's "diversity of members locked in repeated interactions", "multiple and multi-level leadership", and its "operational basis organized in networks" (Zito & Schout, 2009). Yet, it's also this diversity of actors, layers and phases posing obstacles to the EU's learning capacity. Inter alia, "member state central governments can act as significant constraints to such learning processes" (Zito & Schout, 2009). While this has been clearly seen in the previous section, it is not as heavy when it comes to enlargement policy. Certainly, the Council is involved in the process, but only to open and sign it off in the end. The main actor is the Commission, monitoring and evaluating the situation on site.

As addressed in Chapter 3, both Art. 49 and the Copenhagen Criteria are kept very broad. There are no further conditions for accession criteria in the treaty and the conditions set out in the

Presidency Conclusion in 1993 are also kept broad. It is important to underline the fact that it was a *presidency conclusion* and not a council conclusion. Since the first one only expresses the position of the presidency, while the second one needs to be approved by every Member State, it suggests a much faster and flexible decision process bypassing a consensus of all Member States.
This adds to the already very flexible process due to its political nature. Art. 49 gives the Council as well as the Commission plenty of scope outside the treaty. Due to general character of the CC, the conditions have been evaluated and amended multiple times by other presidency conclusions after 1993. While this vagueness has been criticized heavily (see Chapter 3), it also gives the Commission much leeway when developing its strategy for accession candidates. The Commission is even expected to use this leeway and adapt its blueprints, as this citation from the Committee on Foreign Affairs in the European Parliament shows (Committee on Foreign Affairs, 2008):

> *"Every enlargement must be followed by adequate consolidation and political concentration, that is to say, by a serious reassessment of the Union's policies and means in order to respond to the expectations of European citizens and to guarantee the viability of the Union as a political project."*

Besides the Council adapting the accession criteria, this "detection and correction of errors" is mostly done by DG NEAR, which is responsible for the monitoring, advising and preparing of candidate countries (Braniff, 2009). This reveals another systemic advantage. DG NEAR is one of the subunits in the Commission, taking care of and developing policies for a specific area, in this case the EU's neighborhood and enlargement policies. When scholars assessed the Commission's learning capacity, one constraining factor was when different DGs work together to find a solution, e.g. in the environmental field (Koch & Lindenthal, 2011; Malek & Hilkermeier, 2001). The enlargement policy has not such cross-sectional character, thus giving DG NEAR leeway and flexibility to tailor suitable strategies for each accession country.

While these factors lead to a flexible system allowing for change, one ingredient has not been analyzed: the error. Learning is "dependent on a perceived 'misfit' between organizational expectations and environmental requisition", or to put it simple a reality check (Malek & Hilkermeier, 2001). The shortcomings identified in Chapter 3.3 as well as the rule of law crisis in Hungary and Poland are proof enough that the EU's enlargement policy is in need of improvement. That the Commission reflected on previous accessions and adjusted its strategy

since the introduction of the Copenhagen Criteria shows the following depiction summarizing and visualizing Chapter 3.4.

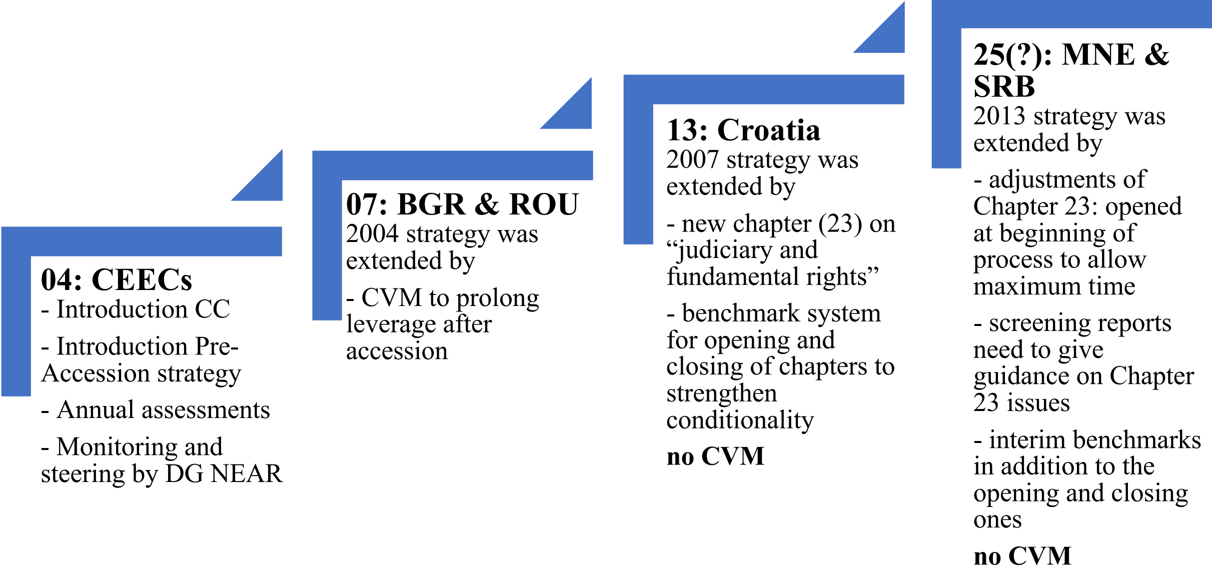

Figure 3: The EU's incremental learning process in accession policies; Own depiction

Source: (Carrera et al., 2013; Hillion, 2013)

It shows an incremental learning process in the EU's enlargement policy field. While the Copenhagen Criteria have proved their worth and been applied ever since their introduction, other mechanism like CVM were only used once. "The increasingly salient role that political conditionality plays in the enlargement process as well as the introduction of new mechanisms including benchmarks represent an indication that the agencies involved in the enlargement approach are reflexive and innovative" (Braniff, 2009). Based on the internal context of the EU and the situation within the candidate countries, it was particularly extended for the Western Balkans, starting with Croatia's accession. What also becomes visible is an emphasis on substantial as well as procedural changes. The addition of CVM and the benchmark system can count as additions to the process, while an emphasis on the political criterion of the CC and the new chapter focused fundamental rights indicate substantial changes.

Overall, it proofs that the systemic nature of the EU's enlargement policy allows for learning and an adaptation of its strategy or as Maire Braniff put it: "The process of learning was paramount and it was the lessons learned from previous enlargements" that "led to an

innovative policy adaptation and incremental change in how the EU enlargement approach works" (Braniff, 2009).

5 Hypotheses

Section 4 clearly illustrates the EU's transformability and capacity of learning in the enlargement field. But does this also apply to the current procedure? Is there a learning effect from the crisis detectable?

There are different premises in the current enlargement process that need to hold, in order for this expected change to happen. Regarding the institutions, the previous section illustrated by means of an systemic analysis the EU's transformability. While the EU is somewhat paralyzed in dealing with its Member States, the Commission's behavior after the Eastern Enlargements proofs its learning capacity and flexibility. When looking at the design of Art. 49 TEU, which has no clear directions on the conditions of admission, the broadness of the Copenhagen Criteria, and the high emphasis on RoL in the new strategy for the Western Balkans, the expectations are high that the current enlargement process' focus is on the political criterion and the rule of law. In detail this implies two results:
1) Keeping in mind the critique about the Eastern enlargement, in particular the superficiality in the Progress Reports and the little space dedicated to the political criterion, the first conjecture is:

H1: The space, time and thoroughness spent on the monitoring of the political criteria increased in the current enlargement compared to the enlargement of the Central and Eastern European countries.

2) The Rule of Law Framework published in 2014 and the strategy for the Western Balkans proposed in 2012, which introduces RoL as a keystone of the process, suggests:

H2: The assessment of rule of law turned into a priority in the ongoing enlargement and is more in-depth and extensively covering more issues than in the Eastern enlargement.

To see a connection between the RoL crisis and the current enlargement strategy, another conjecture needs to hold. The actions the EU has undertaken in the case of Poland and Hungry, including the activation of Art. 7 TEU and the emphasis on the new Commission on further strengthening the mechanism, show that the EU classified the happenings as a persistent threat.

Whether it transferred this problem to its enlargement policy to better protect EU values depends on the following hypothesis:

H3: The Commission reflected on the rule of law backsliding in EU Member States and in response changed its enlargement strategy for the Western Balkans

6 Methodology

To test the hypotheses and see whether the RoL crisis had an effect on the application of the Copenhagen Criteria in respect of the rule of law, a causal case study is conducted. By comparing the accession procedure of a recent candidate country to one of a Member State which entered the EU before rule of law backsliding, it is expected to be found a different behavior from the European Commission in scrutinizing the Copenhagen Criteria for current applicants, indicating another learning effect in its enlargement strategy. The following section introduces the cases, Montenegro as current applicant and Slovakia as control case, and a qualitative content analysis as the tool to gather the information. The chapter is completed by an outline of the data collection.

6.1 Case Selection and Variables

Against the background of the research question, the goal of this study is to test whether the rule of law crisis in the EU, in this case the independent variable, had an effect on the application of the Copenhagen Criteria in the EU's accession procedure, here the dependent variable.

In order to detect this possible causal mechanism, a case study is conducted. John Gerring defines it as "an intensive study of a single case or a small number of cases which draws on observational data and promises to shed light on a larger population of cases" (Gerring, 2017). Thus, case study research enables the researcher to examine "a spatially and temporally delimited phenomenon of theoretical significance" (the case) in depth (Gerring, 2017). "The fewer cases there are, the more intensively they are studied, the more a work merits the appellation case study" (Gerring, 2017). This allows for an detailed examination of the suspected causal mechanism. For this research two cases are used. Cross-case is a form of evidence where the "variation across studied cases provides essential and explicit evidence for reaching causal inferences" (Gerring, 2017). Therefore, a control case which ideally experiences no change or does not have the characteristics the researcher is interested in is added. For this research it means comparing the accession procedure of a country that happened

after the outbreak of the crisis to one that happened before it. To make them comparable, a most-similar case selection is used, which means that the countries are similar on specified background conditions (Z1...n), but have different values of X (independent variable) and Y (dependent variable and object of interest). This form of case study is a *estimating* research design whose goal it is to test a hypothesis or more by estimating a causal effect (Gerring, 2017).

A suitable current applicant is Montenegro: The country applied in 2008 for EU membership and became a candidate for accession in 2010. An entry is planned for 2025. Together with Serbia, it is the only country holding accession negotiations at the moment. But since Serbia's accession process came to a halt due to disagreements over the EU's demand of a normalization of relations with Kosovo, Montenegro seems to be a more suitable representation for the ongoing enlargement negotiations.

To find a country representing the Eastern enlargement, that had level playing field with Montenegro when applying for membership, different indices dealing with political and economic issues are evaluated and the results of Montenegro in 2008 with the results of CEEC countries in 1995 compared. This is the time when the respective country applied for membership, not when negotiations started. This is important since applicant countries already need to tackle certain issues before negotiations to start. Only the Eastern enlargement was taken into account since this was the round when Hungary and Poland entered the EU and the first time the Copenhagen Criteria were applied. Similar results for most of them were found in Slovakia, which makes it a convenient control case. The chart below shows the indices and the results for both countries.

	X[1]	GDP per Capita PPP **in U.S. $**	Globalization Index **(1-100, 100 = most globalization)**	Unemploy-ment Rate **in %**	Economic Freedom **(0-100, 100 = max. freedom)**	RoL Index **(-2,5 (weak) – 2,5 (strong))**	Political Stability **(-2,5 – 2,5)**	Corruption Perception Index **(0-100, 100 = no corrpt.)**	Civil Liberties **(7 (weak) – 1 (strong))**	Y [2]
MNE **2008**	1	14.559,2	67,39	17,15	58,2	-0,08	0,77	34	3	?
SVK **1995**	0	13.236,68	60,44	13,11	60,4	0,16 (1996)	0,88 (1996)	37 (2001)	3	?

Table 1: Case Selection with a most similar case design, Source: (TheGlobalEconomy.com, n.d.)

I use a wide range of factors to assure the comparability of the countries. Obviously it includes indices measuring rule of law and governance, since varying results would bias the comparison in the sense that there needs to be higher emphasis on RoL in the country with the lower result. However, to assure higher comparability, the work also includes factors from an economic perspective, since a deficit there might imply a higher focus on the economic criterion at the expense of the political one. Economic indices included are GDP per Capita measured in Purchasing Power Parity to avoid differences based on varying prices (measured by the World Bank), the Globalization Index covering the economic, social, and political dimension of globalization (measured by Swiss Institute of Technology in Zurich), the Unemployment Rate (measured by the World Bank) and Economic Freedom measuring the degree of government interference in the markets, but also the rule of law and regulatory efficiency (measured by Heritage Foundation). From a political perspective, a rule of law and a Political Stability index are included (both from World Bank), the latter measures the likelihood that a government will be destabilized or overthrown, the Corruption Perception Index (measured by Transparency International) and an index covering civil liberties (measured by Freedom House). Unfortunately for Slovakia the data was not always available for 1995. In that case the earliest result possible was used (indicated in the table).

Needless to say, the results are not exactly the same, but they are close to each other and thus, server as an appropriate tool to determine Slovakia as Montenegro's control case.

[1] = 0 = Accession process was *before* the Outbreak of the Rule of Law Crisis; 1= Accession process was or is still ongoing *after* the Outbreak of the Rule of Law Crisis;

[2] = Revised application of CC with higher focus on political criterion

6.2 Operationalization

"Institutions are often difficult to observe and measure. As bundles of rules, they shape human behaviour and structure social, political and economic interaction; however, these regulatory forces remain themselves invisible unless they are made explicit in written form" (Beckmann & Padmanabhan, 2009). This written form is used to operationalize the dependent variable, since "documents provide a means of tracking change and development" (Bowen, 2009). To measure changes in the accession procedure, a document analysis in form of a qualitative content analysis (QCA) is conducted for Slovakia's and Montenegro's accession documents and the results compared afterwards. This seems as an appropriate tool, since the researcher is not expecting much of a procedural but a substantial change, which becomes visible through QCA.

QCA is "the process of organizing information into categories related to the central questions of the research" (Bowen, 2009). It is a method for describing the meaning of qualitative material, mainly by classifying material as instances of categories of a coding frame (Schreier, 2012). However, "the basic approach of qualitative content analysis is to retain the strengths of quantitative content analysis and against this background to develop techniques of systematic, qualitatively oriented text analysis" (Mayring, 2014). Thus, it is an systematic and rule bound procedure, where the rules of text analysis are laid down in advance and followed step-by-step. Nevertheless, it is also flexible in the sense that the categories or codes are tailored to the material and hence developed individually. Schreier see this as a great advantage since it makes QCA more valid. "In the methodological literature, an instrument is considered valid to the extent that it in fact captures what it sets out to capture" (Schreier, 2012). Another advantage of this methodology is its "lack of obtrusiveness and reactivity: Documents are 'unobtrusive' and 'non-reactive'—that is, they are unaffected by the research process" (Bowen, 2009). This basically means there is no influence of the investigator on the research as opposed to events or interviews for example which may proceed differently because they are being observed. An analysis of documents and texts "counters the concerns related to reflexivity (or the lack of it) inherent in other qualitative research method" (Bowen, 2009). Hence, QCA is a stable as well as exact tool.

At the heart of it lays the coding to extract categories and themes. To establish a coding frame there are two different ways: either inductively or deductively. While a inductive research design creates the categories based on the data by reading the documents, a deductive format offers a pre-defined set of codes based on which the data is assessed (Cardno, 2019). For this work an inductive approach, which is also called data-driven (Schreier, 2012) or explorative (Mayring, 2014), was chosen. In the case of an inductive category formation there still needs to be category definition beforehand determining "the aspects of the textual material taken into account. Following this criterion the material is worked through and categories are tentative and step by step deduced. Within a feedback loop those categories are revised, eventually reduced to main categories and checked" (Mayring, 2000). Here, this is the definition of the political criterion, which was originally defined as "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities" (European Council, 1993). From this, four main categories can be derived:

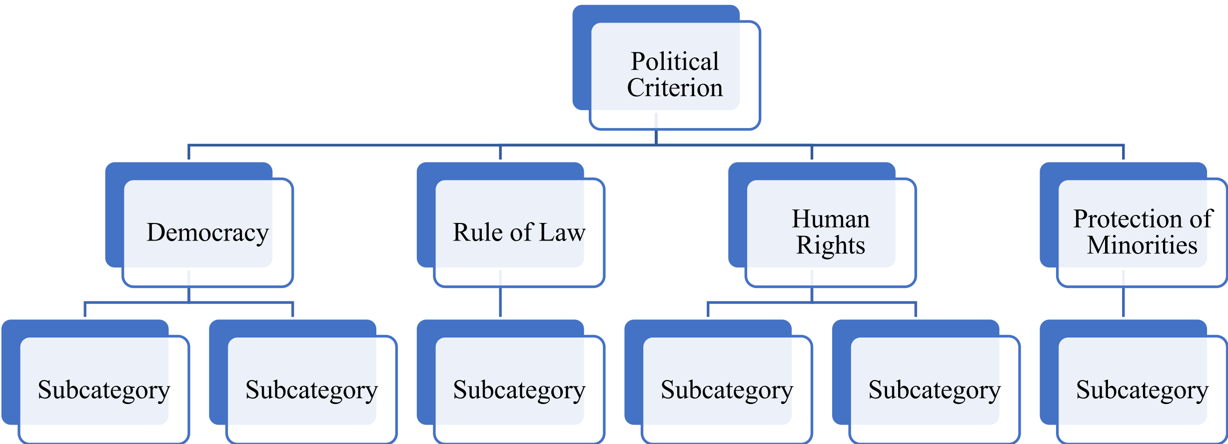

Figure 4: Category Definition for QCA; Own Illustration

One may wonder why notions besides rule of law are included, since this is the focus of this work. But since other scholars found out that the concepts are highly intertwined in the Commission's work and that the Rule of Law Framework suggest a broader conceptualization going beyond RoL (see Chapter 2.1), it cannot be separated from the other principles. Based on Figure 4, the textual material, in this case the reports of the European Commission on the acceding countries, is analyzed and the subcategories deducted. For the coding MAXQDA is used, which is an analysis software for qualitative data including text material, recordings, photographs, etc. The reports for Slovakia were analyzed first. The established set of codes is then used for Montenegro, but further adapted to the new material. While the whole documents were read, only the text passages containing a code served as the units of coding.

6.3 Data Collection

Another advantage content analysis has to offer is its rather simple access to data. This is particularly true for the documentation of EU policies. The relevant documents for the accession procedure are available for everyone in different document repositories in the internet.

The article search and gathering was conducted using the Document Repository of the Directorate-General for Neighbourhood Policy and Enlargement Negotiations and the archive of European Integration offered by the University of Pittsburgh. Every document that came up for the key words "Slovakia" / "Montenegro" was included. Press releases were excluded. This selection was further scanned for relevance, sorting out texts that were not directly dealing with the enlargement process or in the case of Montenegro mainly dealing with Croatia's accession which is not subject of this work. Out of these pieces no sample was taken, but every document analyzed. They include the European Commission's opinion paper and yearly progress report for the individual countries, composite and strategy papers for the overall enlargement process.

	Strategy for Enlargement	Com.'s Opinion Start	Regular/ Progress Reports	Composite / Strategy Paper	Com.'s Opinion End	Sum
MNE	3	1	12	12	-	28
SVK	1	2	5	5	3	16

Table 2: Results of the Data Selection

"Strategy for Enlargement" can be understood as textual material where the Commission outlines its overall enlargement policy, e.g. Agenda 2000 for the Eastern Enlargement. "Com.'s Opinion Start" stands for the document which is released by the Commission containing its opinion on the applicant country before negotiations start. "Regular Reports" or later also called "Progress Reports" are the country specific analyses published annually by the Commission. Every year, these were accompanied by a "Composite", "Strategy" or later "Communication on Enlargement and Main Challenges" document outlining the progress that has been made that year by all acceding countries and further challenges. "Com.'s opinion end" describes the documents published by the Commission at the end of the accession process when the negotiations are over. Obviously, this was not found for Montenegro, since its negotiations are

still going on. The progress report for 2019 was not published yet, so the latest document available deals with the developments in 2018.

Table 2 shows a higher amount of data for Montenegro's case, which at first sight seems odd for an comparing research design. However, this is a first indication for the assumption that Montenegro's accession procedure is a more thorough one. Hence, all documents from its case were analyzed.

7 Results

The following section presents the results of the QCA in light of the hypotheses and the Commission's learning capacity. The systemic differences outlined in the theory part become visible at various points throughout the analysis of the results. The first section covers the documents more broadly comparing the amount of pages spent on each CC, the structure of the political criteria and the frequency of using "rule of law". The other three sections introduce and compare the codes found for each value for both cases and assess changes within Montenegro's process. While the first two hypotheses can be confirmed, the evidence for the third is not sufficient. The scrutiny in applying the political Copenhagen Criteria increased and so did the monitoring of the rule of law proofing the Commission's learning capacity in the field of enlargement. Nevertheless, this cannot be clearly traced back to the rule of law crisis.

7.1 Frequency Analysis and Page Count

Before going into detail about the documents' content, the overall structure, amount of pages dedicated to the Copenhagen Criteria, and frequency of mentioning "rule of law" was compared to get a first impression. As table 2 suggests, the type of documents used was about the same. In the beginning, the enlargement strategy and the Commission's opinion on the applicant was given, accompanied by yearly regular/progress reports outlining the developments in a single applicant country together with strategy/composite papers reporting on the overall progress towards accession. However, as already mentioned, there were more documents found for Montenegro's accession procedure than for Slovakia's, mostly because the procedure is longer and still going on. Another reason is that the assessment of Montenegro (in form of progress and strategy papers) started already before their formal application and the opinion of the Commission in 2010. Since 2006, the country has been continuously evaluated. In total,

Slovakia was under scrutiny for seven years, whereas Montenegro's transformation is going on since 15 years.

There are no major differences visible in the structure of the documents. The regular reports which were renamed to progress reports in Montenegro's case assess the country's progress based on the three CC. The "Report on progress towards accession by each of the candidate countries", later communication on "Enlargement Strategy and Main Challenges" deals in both cases with the strategy, the overall progress of the countries involved and give recommendations. The biggest part was always the annex summarizing the regular/progress reports on the individual countries.

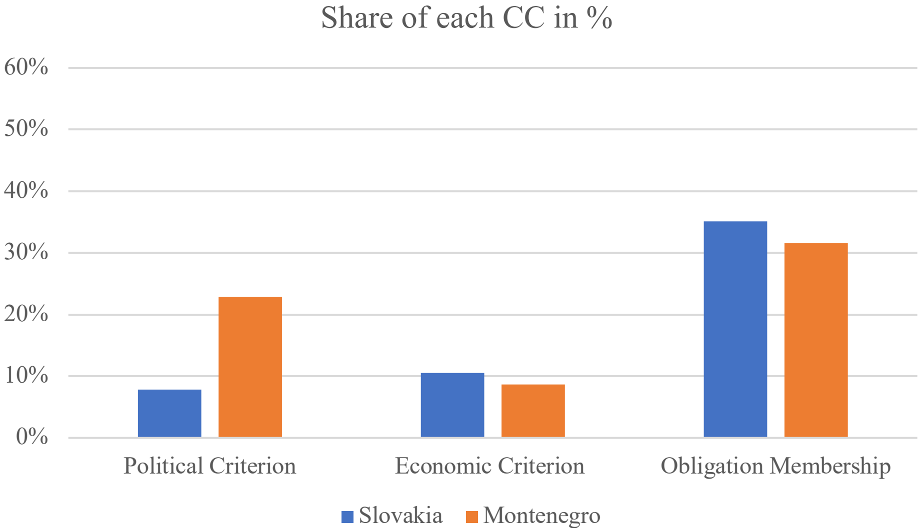

Figure 5: Average of Pages dedicated to each Copenhagen Criterion

When comparing the amount of pages dedicated to each criterion, a shift appears. As figure 5 shows, there was a steep increase in pages spent on the political criterion. While the average in Slovakia's procedure was 7,8% per document, this number nearly tripled in Montenegro's case (22,88%). At the same time, the emphasis on the economic criterion and the ability to take on the obligations of membership in form of implementing the acquis into the national legislation dropped from 10,55 % to 8,63% for the economic evaluation and 35,14% to 31,56% for the latter. Nevertheless, the share of pages examining the country's progress in implementing national standards remains the highest. The percentages do not add up to 100, since they only cover the Copenhagen Criteria. The documents also include other content.

Counting how often the word "rule of law" was mentioned in the documents of both cases also shows notable differences. In Slovakia's documents it was mentioned on average 10 times per document. In Montenegro's texts the average lies at 21 times.

While these numbers do not provide an indication of the actual content or the thoroughness in scrutinizing the criteria, they give proof to the first hypothesis. The fact that Montenegro's accession procedure is twice as long as Slovakia's and still going on cannot be traced back to domestic weak conditions given the similar initial conditions outlined in Chapter 6.1. It can also not solely be based on the results outlined in the Nations in transit report, since the decline started in 2019, but the documents since then have not been included. Even though the lack of progress indicated needs to be taken into account, it is a sign for a more thorough approach. The overall share of pages dealing with the political criteria increased significantly which suggests a higher focus on the compliance with the EU's fundamental values. The word count supports this assumption and hypothesis 2 on a superficial level. Whether this shift not only refers to its extent, but also its content, is assessed in the following section.

7.2 The Political Criteria: Subcategories and their Frequency

The following section outlines the codes identified for the political criteria's four core values and their frequency. The first subsection deals with the categories protection of minorities, human rights and democracy and the second one separately with rule of law. This distinction resembles the majorities starting with the smallest share and is used to answer the conjectures individually. Even though the focus of this work is on the latter one, the first three were coded as well since the total amount of codes needed to be identified to calculate the shares. Moreover, the concepts are not separately described in the documents but mixed. Aspects belonging to the rule of law were also found in e.g. the section on human rights. Therefore, it needs to be assessed in light of the other values. Furthermore, in order to answer hypothesis 1 about the Commission's overall increase in scrutiny of the political criteria, an analysis of the whole chapter is necessary. The subsection is rounded off by a section focusing on the changes within Montenegro's process.

7.2.1 Overview of the Political Criteria

Starting with a comparison of the structure of the chapter on the political criteria, first differences between the cases emerge. The political criteria's chapter in Slovakia's progress reports was divided into two sections combining democracy and rule of law as one and human

rights and protection of minorities as another. The first section was subdivided into an assessment of the parliament, the executive and the judiciary followed by anti-corruption measures. The second section included paragraphs on civil and political rights, then economic, social and cultural rights and lastly the protection of minorities and their rights. Throughout the accession process, this structure remained the same.

Until 2015, the overall structure of Montenegro's progress reports was similar but extended by various subsections. The democracy and rule of law part was supplemented by an analysis of the constitution, elections, public administration as well as sporadically the ombudsman and civil society. The evaluation of human rights and the protection of minorities was complemented by a section focusing on the observance of international human rights law. The two sections were supplemented by a subsection dealing with regional issues and bilateral relations in the Western Balkans. The changes after 2015 will be outlined in section 7.2.3. As indicated before, since Croatia's enlargement negotiations, a new chapter, "judiciary and fundamental rights", was included in the list of *acquis* chapters the applicant countries need to implement in order to conclude the negotiations successfully. Since it deals with rule of law issues and human rights and the Commission explicitly refers to this chapter in the assessment of the political criteria, it was coded as well, but separately. However, no new subcategories were found for this chapter, they completely matched the coding frames found for the political criterion. Hence, they are not presented independently in the following figures, but their amount of codes was added to the others.

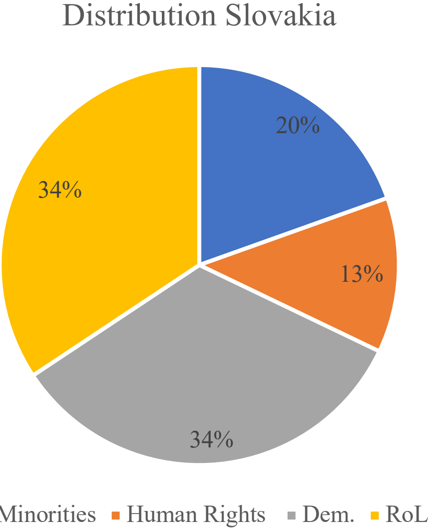

Figure 6: Distribution issues of Political Criteria in Slovakia's accession process

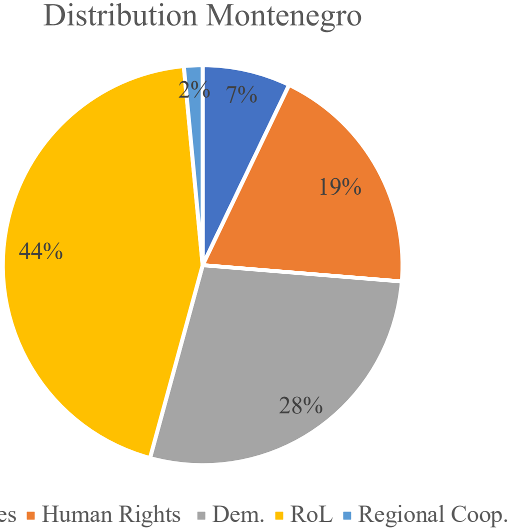

Figure 7: Distribution issues of Political Criteria in Montenegro's accession process

Figures 6 and 7 display the overall distribution of codes according to the four topics mentioned in the definition of the political criteria. In both cases the highest amount of codes was found for rule of law, followed by democracy. For Slovakia's case, protection of minorities ranked third, for Montenegro human rights. In Montenegro's accession a fourth section was added, regional cooperation, which is a new category included specifically for the Western Balkans. Based on the history of conflict in the Western Balkans, it mainly deals with bilateral relations between neighboring countries, e.g. their border issues, regional initiatives and the cooperation with the International Tribunal for the former Yugoslavia, which is a body of the United Nations established to prosecute crimes committed during the Yugoslav Wars from 1991 to 2001. For reasons of completeness and since it also affects the distribution within the political criteria, it was included here but will not be followed up.

This comparison shows a substantial increase in the assessment of rule of law (raised by 10%) and at the same time decreasing attention for the protection of minorities. While the focus on democracy was also less in Montenegro's case, the emphasis on human rights was higher than in Slovakia's documents.

The following figures outline the issues covered by each category excluding rule of law.[3] While the overall structure seems pretty clear, identifying the subcategories was more challenging

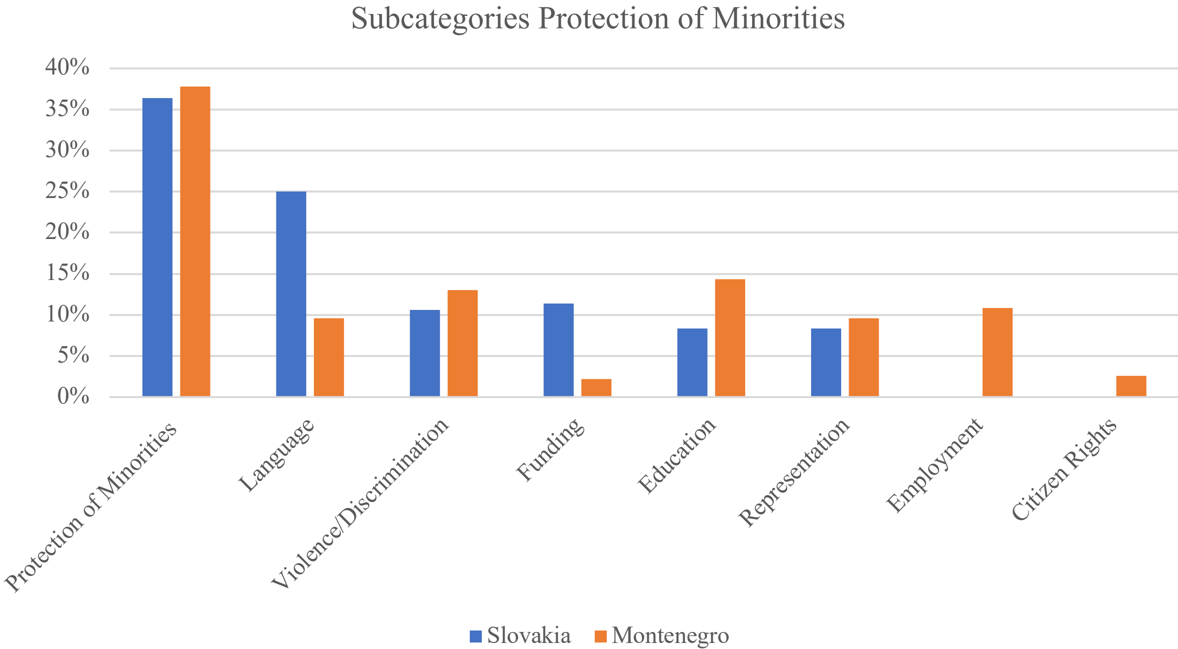

Figure 8: Subcategories found for Protection of Minorities in both cases

[3] An overview including the entire coding frame can be found in the Appendix

since they are diffused across the sections. Thus, the illustrations (Figures 8 to 12) exhibit a categorization based on the different concepts and not the division in the documents.

Starting with protection of minorities, see figure 8, six (Slovakia) respectively eight (Montenegro) subcategories were found. The first bar "protection of minorities" includes every text segment that was about minorities but not further specified, e.g. "the persistent violations of human rights and important deficiencies in the treatment of minorities are causes for concern" (European Commission, 1998a) or was about their overall integration into society. Among the identified topics when assessing the protection of minorities, the Commission dealt mostly with "language" in Slovakia's case, which mainly meant checking for "a law on use of minority languages" (European Commission, 1998b), or "access to the media and to religious services in minority languages" (European Commission, 2014b). The next subcategory is "violence/discrimination", dealing with attacks or discrimination in general against minorities. An exemplary excerpt is: "There has been an increasing incidence of racially motivated violence against the Roma which has not received the unequivocal response from the authorities which it demands" (European Commission, 1999a). When assessing the protection of minorities, the European Commission also checked for "funding", meaning budget supplied by the government to tackle problems of certain communities. Another aspect under scrutiny was "education". These codes were about access to primary and secondary schools, dropout rates or training of teachers to integrate e.g. Roma students. The last identified topic for Slovakia's assessment regarding their treatment of minorities was there "representation" or rather under-representation "in state administration, the judiciary and the police as well as in the wider public sector" (European Commission, 2010).
While Montenegro's accession documents include these aspects as well, they were complemented by two other subcategories: "employment" and "citizen's rights". The first set of text segments focusses on opportunities on the labor market for marginalized groups and their unemployment rate, a suitable excerpt is: "Concerns persist regarding discrimination against displaced persons for employment purposes and in relation to unemployment benefits. Montenegro needs to allow displaced persons who opt to integrate locally to do so without major obstacles" (European Commission, 2007b). The last bar in figure 8 deals with the process of birth / civil registration for minorities and respective obstacles.

Overall, many aspects of the daily life of marginalized groups were assessed, which even improved in Montenegro's process where not just access to education but also to employment was evaluated, as well as their registration procedures. What is interesting is that these

“marginalized groups” in both cases were understood as ethnic minorities, so groups categorized based on their heritage, language or religion. Disabled people or people with different sexualities or gender identities were not included, but separately listed in the section on human rights (see below). The situation of the Roma minority got in both cases the most attention. As already mentioned, in Slovakia’s documents a focus on the implementation of language laws was found. The other topics received much less attention. This somewhat shifted in the assessment of Montenegro. The overall distribution was more balanced, scrutinizing the different aspects more equally, except “funding” and “citizen’s rights”. The highest results were found for “education” and “violence/discrimination”. However, the amount of frames identified for “protection of minorities” increased, meaning a more superficial description, not going a lot into details, than for Slovakia. Against the background of the overall high decline in the assessment of minorities, this trend is even more worrying, since it cannot be traced back to a worse situation for minorities in Slovakia. Most of the coded segments for Montenegro outline areas that still need attention, especially when it comes to the treatment of Roma and Egyptians (see e.g. European Commission 2013b).

Figure 9 introduces the topics in relation to human rights, ten for Slovakia, twelve for Montenegro. Here again, the first bar depicts the excerpts dealing with human rights without further specifications. The section “refugees” analyses the conditions and legal framework for refugees and internally displaced people. The subcategories “disabled people”, “women”, and “children” outline the situation and rights for these groups, e.g. criticizing violence against women and children or pointing out the discrimination women and disabled people face in education and employment. Exemplary segments are the following: “Plans aimed at improving women’s and children’s rights have raised awareness. However, further improvements in implementation need to be made. The protection of women against all forms of violence needs to be further improved. Implementation measures regarding the protection of children's rights have to be accelerated” (European Commission, 2007a), or “socially vulnerable and disabled persons, however, reportedly continue to face discrimination in access to higher education, employment, and social services provided by the Government” (European Commission, 2002b). In the category “Racism”, the Commission evaluated all kind of action plans “to prevent all forms of discrimination, racism, xenophobia, anti-semitism and other forms of intolerance” (European Commission, 2001b). The following sections on “human trafficking” and the “death penalty” assess whether efforts are in place to prevent/abolish them. By “labor” all different rights for workers were summarized, e.g. the right of workers to join existing trade

unions or form new ones, or the legislation on strikes to public administration employees. The last subcategory used in both documents is "property", which is about the property rights included in the country's legal framework like their restitution, compensation or privatization. A suitable text excerpt is the following: "Regarding property rights, restitution of property is covered by the Law on Restitution of Confiscated Property Rights and Compensation which was adopted in 2004. The Government has passed a Decree on Creating a Fund for Compensation. (…) Complaints have been submitted by former owners regarding the earlier privatisation of real estate property which is subject to restitution" (European Commission, 2006).

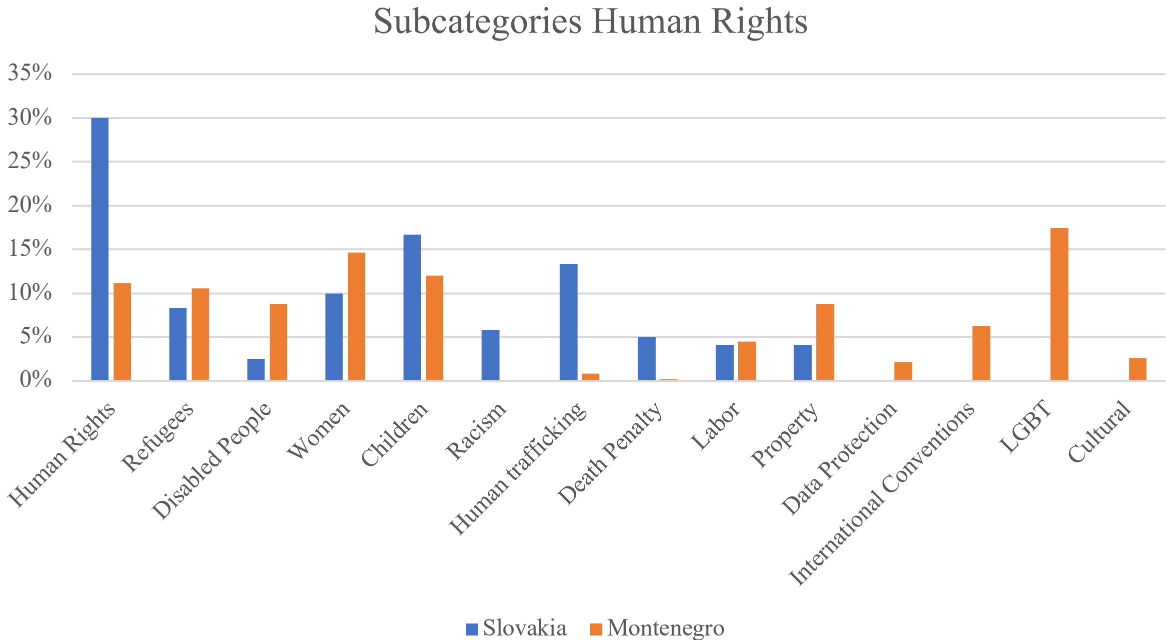

Figure 9: Subcategories found for Human Rights in both cases

In Montenegro's accession documents four other subcategories to human rights were found. While "Data protection" is self-explanatory, "international conventions" needs some explanation. As already mentioned in the section describing the structure, a new subsection on the observance of international human rights law was added in Montenegro's documents. There the Commission examined the applicability of international human rights treaties, e.g. the European Convention on Human Rights or different UN conventions like on the elimination of all forms of discrimination against women. "LGBT" took up the largest share in Montenegro's negotiations on human rights. It stands for the "area of anti-discrimination policies and adoption of laws on prohibition of discrimination against lesbian, gay, bisexual and transgender people, who "are marginalized and discriminated against in Montenegrin society due to homophobic attitudes and lack of legal and practical protection by the authorities" (European Commission,

2008b). The last section identified, “cultural”, looks at the handling of e.g. cultural heritage or reconstruction of religious sites.

To summarize, in both countries a variety of human rights were analyzed, covering most aspects of the United Nations Universal Declaration of Human Rights or the Charter on Fundamental Rights of the European Union. Nevertheless, the assessment varies between Slovakia’s and Montenegro’s accession. While the analysis of the categories “refugees”, “women”, “children”, “labor” and “property” resemble each other, there are topics left out on both sides. The issues covered the most in Slovakia’s process are the rights of women and children as well as getting human trafficking under control. Especially the last was barely assessed in Montenegro’s negotiations, at least not in this section (It was included in the part on organized crime which will be outlined later). There the focus was more on the protection of vulnerable groups, like the LGBT community, women, children, and refugees, which again shows that these groups were not included in the section on protection of minorities, but human rights. Against the background of the first subcategory in figure 9, “human rights”, so the coded segments that do not further specify on which human rights are actually meant, there needs to be noted that the coverage in Montenegro’s case was not as shallow. The amount of coded segments that did not further specify on the topic decreased significantly which means the monitoring was more precise focusing on particular rights. In addition, the monitoring was more diversified, since the range of rights was supplemented by new ones, e.g. on data protection or the LGBT community.

The last category laid out in this chapter is “democracy”. Here, eight subcategories used in both cases were identified. The first bar in figure 10) again deals with text segments mentioning democracy but not going into detail. When looking at the conditions the candidate country needs to fulfill in order to have a functioning democracy, one aspect is the election system, here “elections”. The commission checked whether they are “free and fair”, a proper legislation is in place and the outcome is respected and implemented (European Commission, 1999b). Another component the Commission looked at is the inclusion of the “civil society” and non-governmental organizations, by reviewing existing laws and legislative proposal. The same was checked for political “parties”. Here the focus was mainly on “loopholes and legal uncertainties regarding the use of loans and party resources to finance the election campaign, insufficient women's participation and a lack of transparency in the financing of political parties” (European Commission, 2019). The assessment of the “public administration” took on a large share, checking their capacities, conditions of employment for its civil servants and the division

between the political and administrative level. Besides this public body the main democratic institutions were described (further elaborated below). In addition, in the subcategory "political oversight" the interplay of these institutions and whether they supervise each other adequately was scrutinized. The last topic covered in figure 10 are the basic "democratic freedoms". Together with the "democratic institutions" section, they were further unraveled.

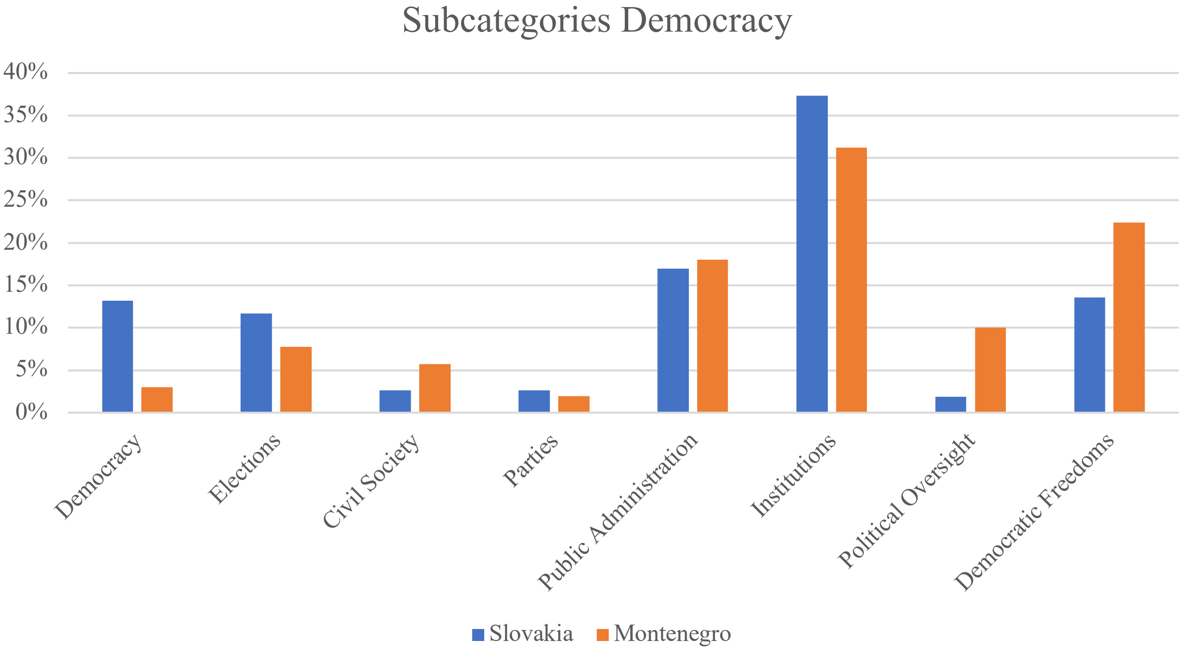

Figure 10: Subcategories found for Democracy in both cases

Figure 11 shows the institutions included. The Commission assessed the behavior and functioning of the government, the parliament, the ombudsman, and in Montenegro's case the military (here "defence"). These subcategories were more descriptive, outlining their legislative framework, different ministries, working with the opposition, the composition of the parliamentary committees, the efficiency of the ombudsman, and the defense structures. Here again the first bar includes all segments that mentioned e.g. "effective functioning of the state level institutions" (European Commission, 2007a), but did not further specify it.

Figure 12 shows the four basic democratic freedoms: the freedom of thought, conscience and religion, the freedom of association/assembly, the freedom of expression and the freedom and pluralism of the media. For all of them the Commission checked whether they are guaranteed by the government.

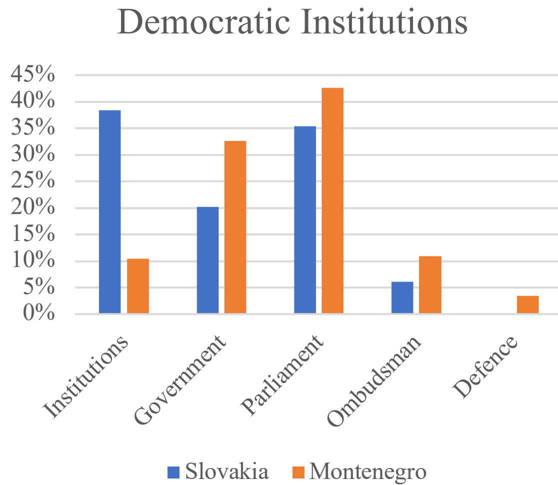

Figure 11: Subcategories found for Democratic Institutions (Over category: Democracy) in both cases

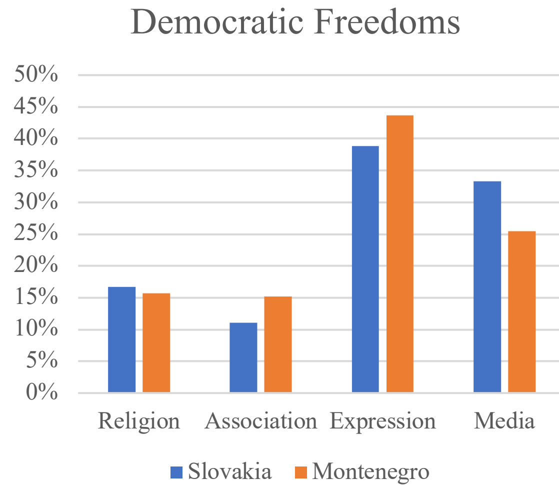

Figure 12: Subcategories found for Democratic Freedoms (Over category: Democracy) in both cases

On the whole, the evaluation of democracy in both cases has a lot in common. The distribution was somewhat similar, no new issues were added, except the defense structure in Montenegro's documents, and the focus was mostly on the same topics, namely the institutions and, one level below, the functioning of the parliament and freedom of expression. The biggest differences can be found in the subcategories "political oversight" and "democratic freedoms", which both increased in Montenegro's assessment, at the expense of the subcategory "democracy" and "institutions". Yet, the latter remained the priority, which shows a focus of the Commission on the functioning of the democratic institutions. Just as for human rights, the scrutiny of Montenegro's democracy was more in depth than for Slovakia. However, one needs to keep in mind the overall decrease in assessing the democratic criteria in Montenegro's case compared to Slovakia (see Figure 6 and 7), which can be, based on the similar results for the indices in Chapter 6.1, not be traced back to a better functioning democracy in Montenegro's case.

Overall, this subsection gives further proof to the first hypothesis. Referring to the critique mentioned in Chapter 3.3 expressed by Kochenov as well as Hughes and Sasse about the superficiality of the chapter dealing with the political criterion in the Eastern Enlargement, this does not apply to the current enlargement policy. Not just the amount of pages increased significantly, but the content became more far-reaching. Further subdivisions were added to the chapters and, leaving out rule of law, in all three categories, one or more criteria were added for Montenegro's analysis, suggesting a more comprehensive evaluation of the values. Instead of using "formulaic expressions" so much (Hughes & Sasse, 2003), which can be understood here as the categories for each value that did not further specify on the issue (always the first

bar in the figures), the description and analysis was more profound, so actually referring to their dimensions instead of criticizing the compliance with the values as such (see Appendix for clarifying examples). This indicates the Commissions learning capacity. It reflected on previous enlargements and the criticism expressed and supplemented its procedure. The fact that a section on regional cooperation was included, demonstrates the reflexivity and individuality of the Commission's enlargement strategy. Against the background of a rather unstable area that is burdened with a history of conflict, it is necessary to address these regional issues and support the countries in their process of reconciliation. This overview also shows a significant increase in the assessment of rule of law issues, which gives proof to Hypothesis 2. However, for this assumption to hold the topics belonging to RoL need to be outlined and compared, which is subject of the next section.

7.2.2 The Understanding of Rule of Law

This section outlines the issues the Commission monitored to assure rule of law. It soon becomes clear that by only looking at this section in the documents, their understanding of the conception is a rather narrow one. But when looking at it together with the other sections of the political criterion and especially the inclusion of the chapter on the judiciary and the fundamental rights in Montenegro's process, the notion becomes more multifaceted. After an introduction of the overall issues covered, this is further outlined at the end of this chapter by comparing the results to the concept's definition given by the Rule of Law Framework.

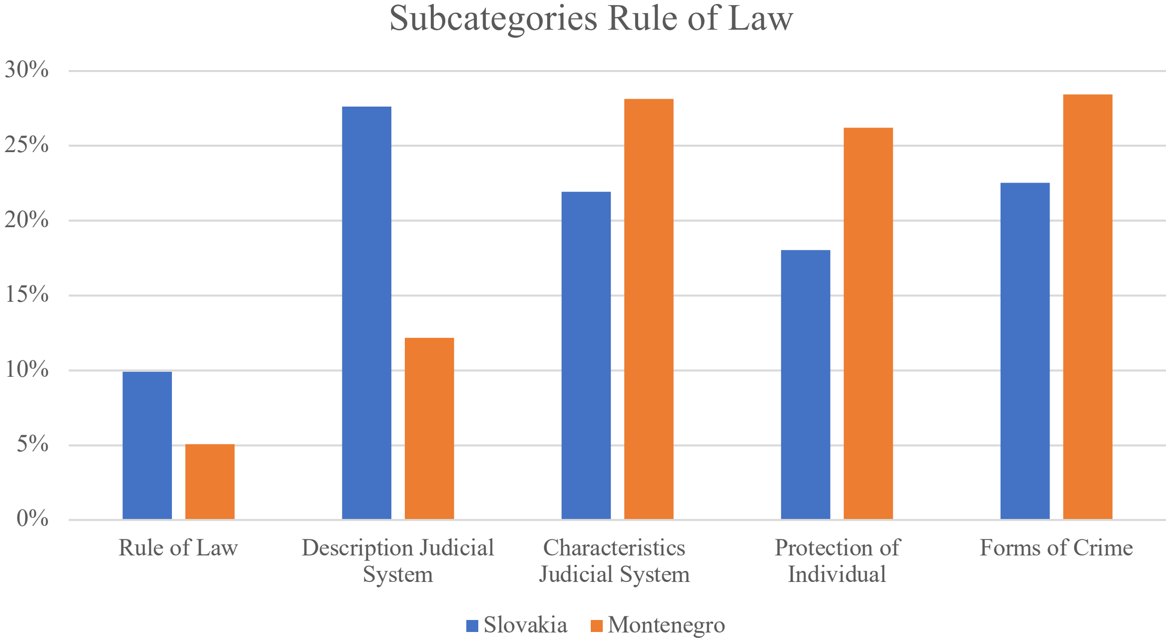

Figure 13: Subcategories found for Rule of Law in both cases

Figure 13 identifies the subcategories and their frequency of the Commission's assessment of the rule of law. In total there are five and they were identified for both cases. Just as in the previous graphs, the first bar entails the text segments dealing with rule of law, but not going into detail about it. The other four categories were further subdivided into smaller groups, shown in Figures 14, 15, 16, and 17.

The first one, description of the judicial system (Figure 14), describes the institutions of the judicial system. According to the same scheme as above, the first bar deals with overall descriptions, not aiming at individual bodies, like the following example shows: "The judicial system is moderately prepared. During the reporting period, Montenegro made some progress in this field" (European Commission, 2016a). The other four bars display the institutions that were analyzed, including the judicial and prosecutorial council, the police, judges and prosecutors, and the court. The description was about their functioning, capacity and modes of operation. Exemplary segments are "the Judicial and the Prosecutorial Councils are the key bodies in charge of managing the judicial system and the careers of judges and prosecutors. Their composition and appointment procedures are broadly in line with European standards" (European Commission, 2018c) or "This law includes provisions that regulate, inter alia, the procedure for selecting, promoting and disciplining judges. It gives the judiciary more powers. The new law also increases the remuneration of judges, which was considered to be low" (European Commission, 2000b), or "The upgrading of the infrastructure of courts needs to be completed" (European Commission, 2002a). There were no content-related changes in Montenegro's documents, but the same institutions evaluated.

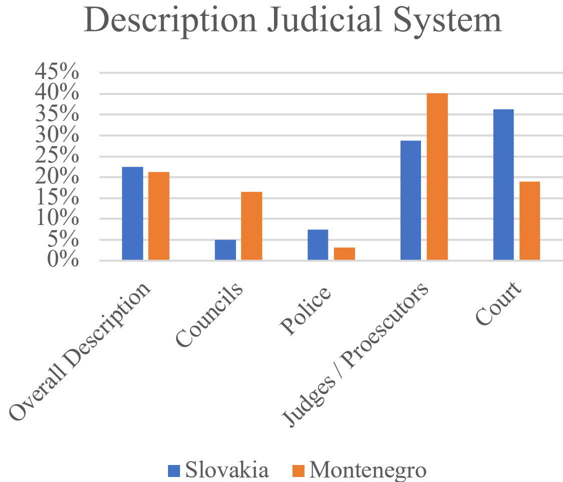

Figure 14: Subcategories found for the Description of the Judicial System (Over category: Rule of Law) in both cases

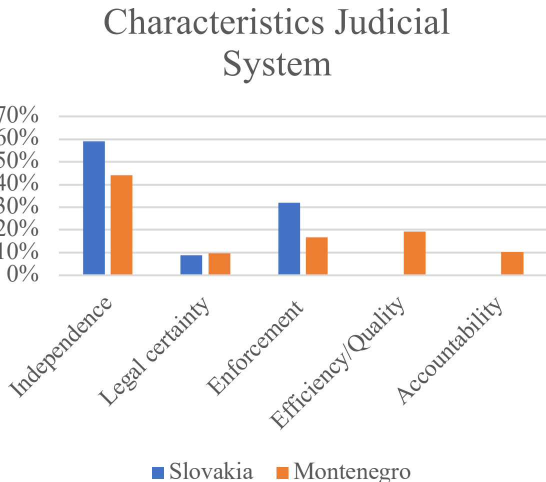

Figure 15: Subcategories found for Characteristics of the Judicial System (Over category: Rule of Law) in both cases

The second subdivision, visible in figure 15, summarizes the characteristics and fundamental legal principles the judicial system fulfills. For Slovakia three were found, for Montenegro these three were extended by two others. The first and most often mentioned one is "independence", checking whether the judicial institutions, mostly the judges, are independent, impartial and free from political interference. An exemplary phrase is, "further important steps were taken to strengthen the independence of the judiciary. (…) The new legislation and institutions should be used to the full, so as to guarantee the judiciary's professional impartiality and political neutrality" (European Commission, 2002b). The second aspect looked at is "legal certainty", a central requirement to the notion of rule of law. Here the Commission evaluated in both document groups whether law is predictable and not applied in an arbitrary way. A good example is the following statement on Montenegro: "This formulation raises concerns over legal certainty in Montenegro, as it does not provide an unequivocal response to the question on the applicable legislation in the country. Montenegro should therefore clarify which laws and international obligations of the State Union continue to apply after independence" (European Commission, 2006). The subcategory "enforcement" collects the text segments assessing whether mechanism are in place to "to ensure that court decisions are duly enforced" (European Commission, 2002a).
In Montenegro's evaluation of the rule of law, a section on "efficiency and quality" of the jurisprudence was added. It is about the training for judges, prosecutors and advisors and the length of procedures and amount of cases not being processed yet. A suitable text excerpt for the latter is "the overall efficiency of the judicial system remains low. Backlogs in civil and criminal cases and excessively lengthy procedures remain a cause for concern" (European Commission, 2008a). Another new criteria the Commission included was "accountability", where they assessed whether judges comply with the Code of Ethics and can be held accountable by disciplinary procedures against them or the removal of their immunity.

The most subgroups were found for the third subdivision, the protection of individuals (see figure 16). This compilation includes different procedural rights and legal guarantees for the individuals to protect them against possible state abuse. Covered are an assessment of conditions in "pre-trial detention" and prison (here prison system) including allegations of torture and "ill-treatment" during arrest and detention, aspects regarding the timeframe of procedures and whether there are compensation systems in place in cases of temporal transgression, as well as the availability of legal aid to people who are unable to afford legal representation. This last right is often mentioned together with the subdivision "access", which

checks whether citizens have access to justice, and "equality", which checks whether every independent is treated equally by law and is subject to the same law. Regarding the last two criteria, "arbitrariness" means whether there are arbitrary arrests and "witness protection" includes phrases outlining whether respective mechanisms are in place. Examples illustrating these subdivisions can be found in the appendix.

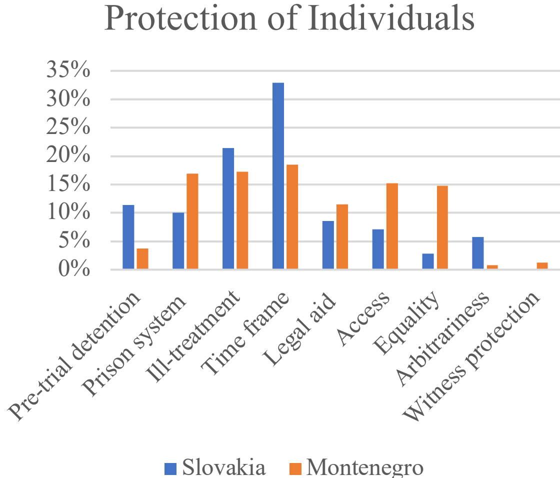

Figure 16: Subcategories found for Protection of Individuals (Over category: Rule of Law) in both cases

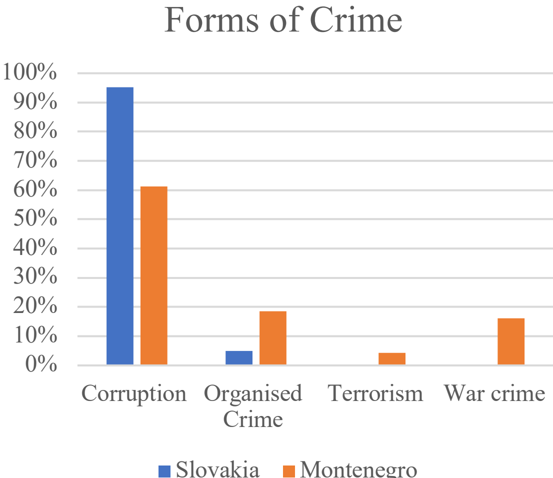

Figure 17: Subcategories found for Forms of Crime (Over category: Rule of Law) in both cases

The last subcategory for the rule of law is "forms of crime", which lists different forms of crime that the applicant countries are facing. The first and by far most closely inspected is "corruption". In both cases corruption was or is a big concern that needed to be tackled. Therefore, the Commission outlined the areas that are most affected and analyzed anti-corruption measures from the government, like this example shows: "In spite of the above measures, the perception exists, confirmed by various sources, that corruption is widespread in Slovakia and that it is either rising or at best not decreasing. The most affected areas appear to be health care, the National Property Fund, (…)" (European Commission, 2000b). The second subgroup is "organized crime". The following examples gives a good overview of areas affected by it: "While Montenegro has continued to develop a track record in the fight against drugs, and new cases were opened on people smuggling, more needs to be done to combat trafficking in human beings, cybercrime and money laundering" (European Commission, 2014c). Here as well the Commission monitors the government's efforts to fight it. The other two bars, "terrorism" and "war crime", were only discovered in Montenegro's documents. The first one includes all phrases about terrorism in the country and action plans by the government to prevent it, like against financing terrorism or to increase institutional awareness to "monitor

possible terrorist threats, including radicalized Montenegrin nationals returning from battlefields" (European Commission, 2016b). "War crimes" is another review criterion only found in Montenegro's and other Western Balkan countries' documents. Based on it, the Commission checked whether proper judicial tools are in place to handle war crimes and follow the jurisprudence from the International Tribunal for the former Yugoslavia. An example to go with is the following excerpt: "As regards domestic handling of war crimes, Montenegro needs to tackle impunity and ensure that decisions by the Montenegrin judiciary on war crimes cases are in line with international humanitarian law, reflect the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and fully apply domestic criminal law" (European Commission, 2013b).

In summary, the figures suggest a more in-depth and diversified monitoring of the rule of law. While the amount of text space dedicated to describing the judicial system went down, the other categories went up, resulting in a better analysis, since it wasn't just descriptive but actually aimed at understanding the connections between the institutions and identifying shortcomings. Within the sub-subcategories different changes became visible. For all of them except the one describing the institutions new criteria were added, in total five. Regarding the description of the judicial system, the focus changed from an assessment of the courts in Slovakia's documents to the judges and prosecutors in Montenegro's. There was also a significant increase in the assessment of the judicial council. Concerning the characteristics of the judicial system, two new conditions were identified: efficiency/quality and accountability. What remained the same is the strong focus on the independence of the judiciary. Enforcement on second place was replaced by the new criterion efficiency/quality. For the third group, protection of individuals, the assessment of mechanisms regarding witness protection was added for Montenegro. What is also notable is a more balanced distribution across the different procedural rights. The focus on an appropriate timeframe of trials was the leader in both cases, but the difference to the next closest was in Montenegro's case only 2%, in Slovakia, however, 16%. Compared to Slovakia, this means that in Montenegro's case the Commission tries to make sure that a wider range of legal guarantees for the individual is in place. The last upper category, forms of crime, also shows more elements for Montenegro than Slovakia. Terrorism and war crime are two issues that were only dealt with in Montenegro. Nevertheless, corruption continues to get the most attention, which was/is a serious concern in both countries. After the increase in the assessment of rule of law identified in chapter 7.2.1, this lends further significance to hypothesis 2. Based on the presented figures, it can be concluded that the monitoring process of the rule of law was

more in-depth, more diversified and more balanced, which again proofs the Commission's learning capacity. Rule of law has always been an issue in the enlargement policy, but for every round it was changed a little with shifting foci.

What does this say about the Commission's understanding of rule of law? Does it represent the interpretation outlined in Chapter 2.1? As other scholars found out for the Eastern enlargement (see Chapter 2.1), in Slovakia's documents formal and substantive elements were found, and the analysis of RoL was intertwined with democracy and human rights aspects. When looking at the RoL framework and the six components defining the concept, many of them were covered. Regarding *legality*, the parliament and its legalistic capacities enjoyed the most attention compared to the other democratic institutions, which indicates a proper analysis by the Commission of "the democratic and pluralistic process for enacting laws". *Legal certainty* was mentioned as a characteristic describing the judicial system. *Prohibition of arbitrariness* was an issue and ill-treatment and torture as *disproportionate interventions* ranked second in the subcategory protection of the individual. The other codes in that sub-category like legal aid, access to justice, and timeframe can all be categorized as a *right to fair trial* and the fact that independence of the judiciary was mentioned by far the most in in the category characteristics of the judicial system shows the emphasis of the Commission on a *separation of power* and *tribunals that are independent*. The high focus on corruption substantiates these findings, since this form of crime is a threat to a well-functioning judicial system and thus the rule of law per se. However, the last two aspects of the framework's definition, *judicial review in light of human rights* and *equality before the law*, were somewhat left out. The latter was barely mentioned (3% of the category protection of individuals) and judicial review was no issue at all. Obviously, human rights were essential in the process, but the supervision of the courts in light of it was no requirement the applicant countries had to fulfill, at least based on the documents.

For Montenegro, substantive and formal elements were found too, covering all six components of the RoL framework. Just as for Slovakia, the parliament and its legislative capacity was scrutinized closely with an even higher focus, assuring *legality*. *Legal certainty* was just as often mentioned. Arbitrary arrest, ill-treatment and torture by the police were criticized, underpinning the aspect of *arbitrariness* and *disproportionate interventions.* Legal aid, access to justice, timeframe, and many more procedural rights were listed to assure *fair trials* to Montenegro's public. Similar to Slovakia, independence of the judiciary was a central element in Montenegro's negotiations. In combination with a higher focus on judges/prosecutors and

the councils, who are responsible for the appointment of judges and thus have a great capacity to strengthen their independence and impartiality, this allows for an even higher emphasis on the *separation of power* and *independent tribunals*. *Judicial review in respect of fundamental rights* was not mentioned explicitly, but the newly added category on war crimes deals with it. It checks whether Montenegrin judiciary on war crime cases are in line with international humanitarian law and the International Criminal Tribunal for the former Yugoslavia. Hence, this element of the framework's definition was at least partly covered in Montenegro's accession. *Equality before the law* also became more important in Montenegro's case compared to Slovakia's. Within the subcategory protection of individuals its share increased, and the new category on accountability can also be assigned to it, since it deals with mechanisms to hold judges also accountable to law so they are just as much subject to the law as other individuals. Again, the high focus on corruption discovered for Montenegro counts for almost all of the components, since it affects the judicial system as a whole.

Overall, this comparison shows that in both cases the focus is on procedural elements of the rule of law and primarily aims at the protection of individuals against possible state abuse. But when looking at the rule of law codes together with the sections on human rights, democracy and protection of minorities, substantial elements defining the character of the law become visible, leaving it to a "thick" interpretation of the rule of law. While the focus in the documents' section on the rule of law was on the judiciary and judicial protection, the other sections included criteria that need to be part of the national law so it resonates in international declarations on human, social and political rights (see Chapter 2.1 for the explanation of this kind of understanding of Rule of Law). This becomes even more true for Montenegro when looking at the inclusion of the chapter on the judiciary *and* fundamental rights. There the functioning of the judicial system was directly coupled with the adherence of basic human rights. Since every value included more subcategories in Montenegro's case, it's conception of the rule of law can also be seen as "thicker" than back in Slovakia's accession procedure.

7.2.3 Changes within Montenegro's Accession Process

The enlargement process with Montenegro is going on since quite some time. For more than twelve years the Commission has been negotiating with the country and monitoring its progress. A lot has happened in the EU during that time. The economic crisis in 2008/2009, the erosion of the rule of law in some Member States since 2011, the refugee crisis in 2014/2015 and the decision by the British public to leave the EU in 2016 are only the most severe ones on a longer

list. How did this affect the enlargement process? What changes can be discovered and to what can they be attributed?

First of all, the structure of the political criteria changed a couple of times. As already mentioned in chapter 7.2.1, the first time in 2015. The section on democracy and RoL was split, they became separate sections, and were supplemented by an own section on public administration. The subsections on 1) human rights and protection of minorities and 2) regional issues and international obligations remained the same. In 2018 rule of law was combined with fundamental rights as one subsection and regional issues not listed as a chapter anymore. Since then the chapters 23 (judiciary and fundamental rights) and 24 (justice, freedom and security) of the list of *acquis* chapters the applicant countries need to implement were pulled forward in the table of contents into the chapter on the political criteria. This change in structure supports the result that the chapters of the acquis did not address any new subjects, but are identical with issues covered in the political criteria. What didn't change since 2015 was the structure of the rule of law section. It includes a part on the functioning of the judiciary, which is further divided into a section on strategic documents, management bodies, independence of the judiciary, accountability of judges, their professionalism, the quality of the judicial system and its efficiency. The other three parts dealt with the fight against corruption, organized crime and terrorism. This categorization gives a good overview of the topics the Commission relates with RoL. It mostly resembles the codes that were found. In summary, this restructuring demonstrates a higher concentration on the rule of law. The chapter got longer, more structured and started to give clear guidance on what the countries have to do to overcome shortcomings. The timing of these structural changes correlates with the events in Hungary and Poland affecting the rule of law. In 2015 the PiS party in Poland took over and started to interfere in the nomination process of the Constitutional Tribunal, and in 2018 the European Parliament called the Council to use Art. 7 (1) against Hungary (see Chapter 2.3 for the description of the RoL crisis).

What also got developed during the process was the "Fundamentals First Strategy". Since 2013 the Commission highlights its priorities yearly and encourages aspiring members to tackle them early in the process. The Commission stated, "the accession process today is more rigorous and comprehensive than in the past. This reflects the evolution of EU policies as well as lessons learned from previous enlargements. The process is built on strict but fair conditionality with progress towards membership dependent on the steps taken by each country to meet the established criteria. A key lesson from the past is the importance of addressing the fundamentals

first" (European Commission, 2013a). These include the rule of law, which is now "at the heart of the enlargement process" (European Commission, 2013a), strengthening of democratic institutions, including public administration reform, respect for fundamental rights, especially for "the principles of freedom of expression and the protection of the rights of persons belonging to minorities", economic governance, and good neighborly relations and cooperation (European Commission, 2013a). Since then, yearly, the key challenges in these areas were listed in the Commission's communication on the enlargement strategy. While they varied slightly every year, rule of law, economic governance and fundamental rights always built an integral part. Just as for the structural changes, the timing of this strategy fitted in well with the developments happening in the EU's Eastern Member states. It was announced just after an infringement proceedings against Hungary where the CJEU decided that the country fails to fulfil its obligations under the treaty with regard to its scheme requiring compulsory retirement of judges and prosecutors based on their age (see also Chapter 2.3).

In 2020 the EU reconfirmed its enlargement strategy, stating about rule of law (European Commission, 2020):

> *"Credibility should be reinforced through an even stronger focus on the fundamental reforms essential for success on the EU path. These fundamentals will become even more central in the accession negotiations. Negotiations on the fundamentals will be opened first and closed last and progress on these will determine the overall pace of negotiations. Negotiations on the fundamentals will be guided by: A roadmap for the rule of law chapters equivalent to the previous action plans will constitute the opening benchmark. Interim benchmarks will continue to be set. No other chapter will be provisionally closed before these benchmarks are met. (…)"*

This excerpt shows how serious the Commission is about upholding the rule of law. Just like the Nations in Transit report, it also signals that there are still many fundamental issues that need to be tackled before the applicant countries can join the EU.

Against the background of the changes outlined above, it seems that its importance even raised during the process. The timing of the structural changes just outlined also correlates with the events in Hungary and Poland affecting the rule of law (see Chapter 2.3 for the description of the RoL crisis). However, these developments cannot be safely traced back to the rule of law

crisis going on in the EU. As indicated earlier, different crises were or are still taking place. The commission reflected on the economic as well as the refugee crisis in its enlargement documents. In the years following the economic shock, the Commission held a close eye on the developments in the enlargement countries and promised support to “alleviate the impact of the crisis and prepare for sound recovery” (European Commission, 2009). After the influx of refugees in 2015, where the Western Balkan Route was one of the main migratory paths into Europe, the EU guaranteed help and cooperation “to address this phenomenon, in order to identify people in need of protection, to provide assistance, to secure the EU's external borders and to dismantle criminal networks engaged in people smuggling” (European Commission, 2015). Since then the situation on migration is part of the countries’ summary in the yearly composite papers. The backsliding in various countries of the Eastern enlargement, however, was no issue.
The Commission conceded faults in earlier enlargements, but only focused on a better communication to restore credibility of the process and get public support and an individual step-by-step process for each enlargement country, like this statement shows: “The Western Balkans contains smaller countries at different stages on their road towards the EU. Future enlargements will go at the pace dictated by each country’s performance in meeting the rigorous standards, to ensure the smooth absorption of new members" (European Commission, 2005). Reading between the lines, this can be interpreted as a critique of the Eastern enlargement, where all applicant countries except two entered at the same time, even though the negotiations started in different years. As mentioned earlier, Slovakia did not meet the political criteria in the beginning and long counted as a problem child. Nevertheless, its process was also terminated in 2003. This proofs the Commissions overall learning capacity. The institution increased its “understanding of reality by observing the results of their actions”, in particular those of the Eastern enlargement (Malek & Hilkermeier, 2001), but not on all of those mistakes. The possibility of backsliding on reforms after accession was not brought up once, not to mention the rule of law crisis or happenings in Hungary and Poland.

While other external factors like the economic and refugee crisis played a role in Montenegro’s enlargement process, the same cannot be said of the backsliding, which was never once subject of the documents. Even though, there is a time correlation and the assessment of issues that are of concern in those Member States, like the independence of the judiciary, the nomination process of judges, the political oversight capacity of the parliament, or ensuring freedom of expression, all increased in Montenegro’s process compared to Slovakia, and were further

highlighted by the "fundamentals first strategy", it is not enough to answer hypothesis 3 positively. Nevertheless, it demonstrates the Commissions flexibility and learning capacity once again. The Commission not just changed its strategy based on previous enlargements, but also adapted it based on the progress in ongoing negotiations.

8 Discussion and Conclusion

The main question to this work was *whether and in what way the EU changed its application of the Copenhagen Criteria to candidate countries in light of the recent rule of law backsliding.* Therefore, the aim of this research was to assess changes in the Union's accession procedure and the application of the Copenhagen Criteria based on previous enlargements, in particular of the CEEC's, and the rule of law backslidings in Hungary and Poland, and determine the learning capacity the EU has in this field. By that, it was checked how the Union with its enlargement policy contributes to the upholding of the rule of law. This will be taken up again in this last chapter by summarizing the work, giving answers to the hypotheses and ultimately the research question, outlining methodological limitations and offering a perspective for the future.

8.1 Summary and Answers to the Hypotheses

Based on case law and the Rule of Law Framework, that offered for the first time a comprehensive definition of the notion, the Commission has a multifaceted or "thick" understanding of the rule of law, including procedural elements to guarantee *just* outcomes and substantial elements referring to other fundamental rights. Thus, the EU's foundational principles – democracy, rule of law, human rights, freedom, equality and protection of minorities - are interdependent. A legal analysis demonstrates that there are two dimensions when it comes to the protection of the EU's most fundamental values like rule of law, internal and external. It shows, that for the internal protection mechanism, the tools available to deal with the Member States, mostly Art. 7 TEU, Art. 258-260 TFEU and the Rule of Law Framework, are either not efficient in dealing with such significant breaches, or not properly used by the institutions due to political hesitation and what has been called the "joint decision trap". In simple terms, this means a power struggle between the Union and its Member States due to the dependence of EU institutions on Member States, who are determined by the self-interests of their national governments and not public interests. This problem was not even alleviated by the fact that the EU is in a crisis, as it was the case for others, in particular the

economic crisis. The significance of the rule of law crisis is simply not felt by the Member states yet, leaving the situation unchanged. However, in relation to non- or future members, the external angle, the Union is more flexible and able to act. It was argued, that due to the systemic design of the enlargement policy, where not the Council but the Commission is the main actor and the consent of the Member states is only needed at the end of the process, there is leeway for the Commission in adapting its enlargement strategy constantly. In the past this happened for every enlargement round. The Commission reflected on earlier negotiations, identified wrongdoings and adapted its policy to the individual circumstances in the applicant countries, proofing its learning capacity. Hence, it was expected to find a more effective protection of the EU's core values including the rule of law in its external dimension. This assumption is supported by critique claiming that faults and shortcomings in the accession process and its monitoring of the Eastern enlargement contributed to the drastic backsliding in Hungary and Poland.
Therefore, three hypotheses were put forward. Firstly, it was assumed that the space, time and thoroughness spent on the monitoring of the political criteria increased in the current enlargement process compared to the Eastern enlargement. Secondly, I hypothesized that the assessment of the rule of law turned into a priority in the ongoing process being more in-depth and extensive by covering more issues. The third conjecture suggested that the Commission reflected on the rule of law backsliding in EU Member states and in response changed its enlargement strategy for the Western Balkans.

To get answers to the research question and clearance about the assumptions, a qualitative content analysis was conducted and compared for two cases: 1) Montenegro representing the current enlargement policy, and 2) Slovakia's representing the strategy for the Eastern enlargement. The analysis of the documents outlining the enlargement process shows a substantial increase in the space reserved for the political criteria, while the amount of pages for the economic criterion and the assessment of the acquis chapter went down. Identifying the components of each value shows an increase for each of them in Montenegro's case, in total ten criteria were added. In combination, this suggests a more comprehensive and profound monitoring process, since the priority is now clearly on the political criteria, which confirms the first hypothesis. Within this Copenhagen criterion, RoL enjoyed the most attention in both cases, for Montenegro this share even increased by 10%. For the monitoring, the Commission focused mostly on procedural elements like the independence of judges and rights protecting the individuals against state abuse, to guarantee a justice outcome that is *just*. A comparison of

the issues covered with the components of the definition given by the Rule of Law Framework shows similarities. Slovakia's codes match four out of six, Montenegro's coding frame matches all six, since their assessment was supplemented by new issues. These new topics include characteristics of the judicial system and the protection of individuals, but also a very context-related one, war crimes. By continuously evaluating Montenegro's handling with this form of crime and coming to terms with its past, the Commission demonstrates a reflexive and adaptable enlargement strategy. This gives proof to the second hypothesis. The assessment of rule of law not just turned into a priority, but based on the enlargement documents, it got more in-depth and extensive in comparison with the Eastern enlargement.

To answer the research question, the EU's enlargement policy and thus the application of the Copenhagen Criteria turned into a stricter and more diversified process, prioritizing the political criteria and monitoring more aspects of the core values protection of minorities, human rights, democracy and the rule of law. The latter got even more attention in the current progress than in the Eastern enlargement. Reflecting on the criticism that was voiced for the Eastern enlargement, it does not apply to the current enlargement process. Based on the outlined documents, it got more *thorough* by including new criteria for the monitoring, more *explicit* by constantly defining short- and long term objectives the applicant country needs to meet, more *consistent* by transparently outlining and reviewing these objectives and communicating it to the public, and *vigilant* by getting on-site teams of the Commission, Member States and network experts more involved in the evaluation process.

However, what cannot be confirmed is the third hypothesis. While changes in the policy during Montenegro's enlargement negotiations were noted, they cannot be traced back to the Rule of Law outbreak in the Union. The Commission certainly reflected on the circumstances in the EU, like with the economic crisis or the influx of refugees entering the EU, but this was not the case for the rule of law backsliding in its Member States. Actions like the "fundamentals first" strategy, that was introduced in 2013 focusing on issues like the rule of law, in particular upholding the independence of judges, guaranteeing freedom of expression, and the stabilization of democratic institutions, can be interpreted as a reaction to it, since the issues just mentioned resemble the major deficiencies in Hungary and Poland. There was also a correlation in the timing detectable, meaning that the changes in Montenegro's strategy happened as the same time as significant events took place in Hungary and Poland. But since other external factors were explicitly included, but the RoL crisis not mentioned once, this is not enough to confirm the third hypothesis.

A possible explanation for the lack of reflection on the Rule of Law crisis is the avoidance of public criticism of the own Member States. When mentioning the economic or refugee crisis, no accusations had to be made, since these happenings were not caused by any governmental wrongdoings within the EU. This is different for the Rule of Law crisis, which only broke out because of deliberate actions by Member States, making it a delicate situation. Another reason could be, that an inclusion could make the Commission vulnerable and look weak in front of the applicant countries. Why should they have to comply to higher standards than the actual Member states? If they are not upholding their most fundamental values, it's hard to communicate their importance to potential new members in a credible way. This demonstrates again the joint decision trap between the EU and its Member states, albeit indirectly. The Commission is more independent and flexible in formulating its enlargement strategies, but ultimately the actions of the Member state also play a role there.

8.2 Methodological Limitations

In order to find more evidence for the third hypothesis and establish a causal mechanism between the crisis and the changes in the enlargement policy, further research is needed, which brings me to the methodological limitations of this research. The advantages of both a case study and a qualitative content analysis have been outlined. This form of research allows for a detailed examination since only a small number of cases are included, and is -even though it is qualitative- systematic by using a coding frame, but also flexible since this frame was tailored to the documents, which assures the work's validity. This was further enhanced by the form of data collection. Since all regular reports focusing on the two cases specifically *and* all composite papers outlining the overall enlargement process of that time were included, concerns related to a selection bias as well as a lack of representativeness can be ruled out. In both cases a conclusion can be drawn for the bigger population, in this case the entire enlargement rounds.

However, worries remain. Firstly, due to capacity reasons there was only one coder. The coding was applicated as objective and transparent as possible and the category system was pilot tested to gain methodological strength, but to achieve inter-coder reliability and therefore a higher validity of the coding, a second coder should have been used. Secondly, QCA was the only method used. However, for this type of research it is recommended to use *triangulation*, which is a combination of different methodologies in a study of the same phenomenon. The researcher is expected to draw on multiple data sources, e.g. the inclusion of interviews (Bowen, 2009). This also wasn't done out of capacity reasons. But especially interviews could be a good

addition to this research. By questioning people that work for DG NEAR and were involved in the strategy planning or on-site in Montenegro assessing the developments, valuable insights could be gained about the Commission's motivation behind the enlargement policy.

This research has been a good start. It shows that the Commission reflected on earlier enlargements, identified errors and special circumstances for the Western Balkans, enhanced their strategy and by that made respect for the rule of law a priority in the current enlargement negotiations and ultimately tightened the external dimension of the EU's protection of its core values. Hence, these results add positively to the academic debate on the effectiveness of the Copenhagen Criteria, the theory about the Union's learning capacity, and the overall discussion on EU enlargement by giving it a new perspective. But they are also relevant for society, since they add positively to the credibility of the EU in the enlargement process. However, gaps still remain, that should be filled, given the significance and scale of this crisis. The research should be expanded by the usage of other data sources to fully understand the motivation of the Commission behind its enlargement strategy and establish a connection between the crisis and the changes in the enlargement policy.

8.3 Outlook

One shortcoming identified in the Eastern enlargement, has not been covered, namely the lacking enforcement mechanism. The EU's enlargement policy is designed to achieve compliance of applicant countries with the accession criteria, but at the moment there is no such mechanism that *effectively* assures this for once they enter. However, the presumption that a democratic or rule of law backsliding would not be possible after the countries become members has been clearly refuted. The fact that Member States as well as applicant countries hit the bad headlines, demonstrates that a scrutiny process is needed for the accession but also after it. Montenegro's process is not completed yet. When looking at the democratic decline indicated by Freedom House and the latest enlargement strategy from 2020 reemphasizing fundamental values that have not been meet, it seems rather unlikely that the country will enter the EU in 2025. Commissioner Varhelyi is right, the current enlargement strategy includes a "serious, thorough, and well-based assessment" (see Introduction). But in order to gain the public's trust and assure a *lasting* compliance of the applicant countries with the rule of law and other core values, the Commission needs to stick to this rigor scrutiny even after more than a decade of monitoring.

However, the same rigor should be found in the internal protection of the rule of law. Not just new members need to completely respect this, but also older Member states. The Rule of Law Review Cycle that was introduced in 2019 by the Commission could work as such a post-accession tool. “What the Commission seemingly proposes in essence amounts to the repetition of the pre-accession country reporting in the areas of democracy and the Rule of Law as well as other principles assessed in the context of the Copenhagen political criteria, but with one crucial difference: to apply this to the actual Member States” (Kochenov, 2019). It shows that the EU's enlargement policy is seen as successful, since the plan is to copy and extend it to its own members. It is too early to give an initial assessment, the first report will be published in 2020. But what seems to be the crux of the matter is finding a way to keep the conditionality in order to propel the EU out if its “joint decision trap”. While the EU is in a superior position when negotiating with applicant countries, this is not the case for actual members. The proposal by the Commission in 2018 to tie EU funding to the compliance with the rule of law seems as a promising approach. However, the Corona crisis has pushed this proposal into the background. In the Commission’s new budget proposal in May 2020 it was barely mentioned. Hence, it remains to be seen whether it will work as a proper tool to uphold conditionality.

With its latest enlargement strategy, the EU aimed at producing irreversible reforms. But for that the Union not just needs an effective and strict enlargement policy, but a post-accession tool to control the new as well old Member states. The EU has always prided itself on being a “community of values” built around its members’ commitment to democracy, human rights, and the rule of law. However, the current situation tells a different story. The backsliding of rule of law in some Member States certainly has an effect on the functioning of the *entire* Union, its credibility and reputation and thus dealing with (yet) non-Member States. Despite the current pandemic, the EU should not lose sight of its other major problems and do everything in its power to restore its “community of values”.

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10 Appendix

Coding Frames

Category / *Subcategory*	**Description**	**Example**
Protection of Minorities / *Protection of Minorities*	Text segments dealing with minorities, but not further specified	"the persistent violations of human rights and important deficiencies in the treatment of minorities are causes for concern" (European Commission, 1998a)
Protection of Minorities / *Language*	Text segments dealing with the use and acceptance of language of minorities in public, education, etc. and/or legislation on minority languages	"The legal framework for the protection of minorities is broadly in place but its consistent implementation across the country needs to be ensured, notably in the areas of (…) and access to the media and to religious services in minority languages" (European Commission, 2013a)
Protection of Minorities / *Violence/Discrimination*	Text segments dealing with attacks, violent behavior, or discrimination in general against minorities	"There has been an increasing incidence of racially motivated violence against the Roma which has not received the unequivocal response from the authorities which it demands" (European Commission, 1999a)
Protection of Minorities / *Funding*	Text segments dealing with financial support provided by the government to tackle problems or fund all kinds of initiatives	"A strategy to tackle the problems of the Roma community was adopted in September. The strategy is general and lacks a precise timetable but is a step in the right direction. A budget allocation of € 1.4 million is called for in the 2000 budget, four times the 1999 allocation" (European Commission, 1999b)
Protection of Minorities / *Education*	Text segments dealing with the access of minorities to schools and universities, but also initiatives raising awareness among teachers and students	"Regarding access to education, there has been some progress on enrolment of RAE pupils in primary and secondary schools and on addressing marginalisation in schools. The Ministry of Education and Science has dispersed RAE pupils across schools to avoid segregation, introduced a policy of affirmative action to secure acceptance of RAE students in secondary schools" (European Commission, 2008b)

Protection of Minorities / *Representation*	Text segments dealing with the representation of minority groups in public bodies, e.g. the judiciary, civil service, parliament	"Minorities continue to face difficulties in the area of employment, both in terms of under-representation in state administration, the judiciary and the police as well as in the wider public sector" (European Commission, 2010)
Protection of Minorities / *Employment*	Text segments dealing with the access of minority groups to the job market and benefits/help for unemployed	"Concerns persist regarding discrimination against displaced persons for employment purposes and in relation to unemployment benefits. Montenegro needs to allow displaced persons who opt to integrate locally to do so without major obstacles" (European Commission, 2007b)
Protection of Minorities / *Citizen's rights*	Text segments dealing with the process of birth and civil registration for minorities	"The lack of birth registration and of access to free legal aid for civil registration continues to hinder their access to basic social and economic rights" (European Commission, 2011a)

Category / *Subcategory*	**Description**	**Example**
Human Rights / *Human Rights*	Text segments dealing with human rights, but not further specified	"Although human rights violations are diminishing, they continue to occur and there is an urgent need both to implement legislation already in force and, with respect to certain areas, to take further legislative initiatives." (European Commission, 2005)
Human Rights / *Refugees*	Text segments dealing with the conditions and legal framework for refugees, asylum seekers, and internally displaced people	"An amendment to the Asylum Law, which entered into force in February 2002, tightened the conditions for granting asylum. It also established a second independent appeal instance for rejected asylum applications. The Council for Equal Opportunities started its work in January 2002." (European Commission, 2002a)
Human Rights / *Disabled People*	Text segments dealing with the situation and rights for this group	"Socially vulnerable and disabled persons, however, reportedly continue to face discrimination in access to higher education, employment, and social services provided by the Government" (European Commission, 2002b)

Human Rights / *Women*	Text segments dealing with the situation and rights for this group	"Plans aimed at improving women's and children's rights have raised awareness. However, further improvements in implementation need to be made. The protection of women against all forms of violence needs to be further improved." (European Commission, 2007a)
Human Rights / *Children*	Text segments dealing with the situation and rights for this group	"Implementation measures regarding the protection of children's rights have to be accelerated" (European Commission, 2007a)
Human Rights / *Racism*	Text segments dealing with all kind of action plans the government has in plan to prevent anti-semitism, xenophobia, and other forms of intolerance	"The Government continued to implement the action plan to prevent all forms of discrimination, racism, xenophobia, anti-semitism and other forms of intolerance. Amongst other things, public awareness campaigns and various education initiatives have been carried out." (European Commission, 2001b)
Human Rights / *Human trafficking*	Text segments dealing with this issue and initiatives to prevent it	"In spite of legal prohibition, trafficking in women and children is a growing problem in certain candidates, which have become countries of origin, transit and destination. The abuse of international adoption schemes is also a matter of concern. Significant efforts are necessary to prevent such trafficking." (European Commission, 2000a)
Human Rights / *Death Penalty*	Text segments dealing with repeal of the death penalty as a form of penalty	"The death penalty was abolished in 1990 and is forbidden under the Constitution in all circumstances" (European Commission, 1997)
Human Rights / *Labor*	Text segments dealing with all different rights for workers	"Regarding labour rights and trade unions, labour rights are regulated by the Labour Law adopted in July 2008. Trade unions and employers' organisations were involved in the public debate on the new law." (European Commission, 2008b)
Human Rights / *Property*	Text segments dealing with the property rights included in the country's legal framework like their restitution or privatization	"Regarding property rights, restitution of property is covered by the Law on Restitution of Confiscated Property Rights and Compensation which was adopted in 2004. The Government has passed a Decree on Creating a Fund for Compensation. (…) Complaints have

		been submitted by former owners regarding the earlier privatisation of real estate property which is subject to restitution" (European Commission, 2006)
Human Rights / *Data Protection*	Text segments dealing with rights of data subjects and privacy issues	"As regards personal data protection, some progress has been made. The Agency for Protection of Personal Data has been established and started functioning, although still lacking of an adequate allocation in terms of human resources and financing." (European Commission, 2011b)(European Commission, 2013b)
Human Rights / *International Convention*	Text segments dealing with the country's applicability of international human rights treaties	"Overall, Montenegro improved its respect for international human rights. It became a member of the UN Human Rights Council in January. It was reviewed under the second cycle of the Universal Periodic Review in January, during which it received 124 recommendations, of which it accepted 109 and took 15 under examination. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence was ratified in March 2013." (European Commission, 2013b)
Human Rights / *LGBT*	Text segments dealing with anti-discrimination policies against lesbian, gay, bisexual and transgender people	"Lesbian, gay, bisexual and transgender (LGBT) people are marginalised and discriminated against in Montenegrin society due to homophobic attitudes and lack of legal and practical protection by the authorities. In addition to increasing legislative efforts, comprehensive anti-discrimination measures covering sexual orientation and gender identity are needed" (European Commission, 2008b)
Human Rights / *Cultural*	Text segments dealing with the handling of e.g. cultural heritage or religious sites	"The Ministry of Culture has set up a directorate for cultural heritage. The reconstruction of religious sites has continued." (European Commission, 2010)

Category / *Subcategory* / **Sub-subcategory**	Description	Example
Democracy / *Democracy*	Text segments dealing with democracy, but not further specified	"The countries have continued to strengthen the functioning of their democratic systems of government" (European Commission, 2000a)
Democracy / *Elections*	Text segments dealing with electoral rights, a proper legislation and the compliance with its results	"The OSCE/ODIHR mission found the Presidential elections in line with Slovak electoral provisions, efficiently conducted and in accordance with OSCE commitments. The mission recognised positive developments in addressing some concerns raised by the May 1998 amendments to the election law" (European Commission, 1999b)
Democracy / *Civil Society*	Text segments dealing with the involvement of civil society and NGO's in political processes	"Montenegro has a satisfactory legal framework for the activities of civil society organisations, although fiscal aspects are not fully covered. NGO representatives are involved in the preparations of a platform for cooperation between the Government and civil society. The Parliament has often invited NGOs to attend sessions." (European Commission, 2006)
Democracy / *Parties*	Text segments dealing with the legislation on parties, their resources, and financing	"The main legal framework regulating political parties is contained in the Law on Political Parties and the Law on the Funding of Political Subjects and Electoral Campaigns, amended in December 2017, with the aim to implement some of the OSCE/ODIHR recommendations." (European Commission, 2018c)
Democracy / *Public Administration*	Text segments dealing with the capacities of public administration, their conditions of employment for its civil servants and the division between the political and administrative level	"In the field of public administration, it is important to harmonise the civil service management structure on the basis of transparent rules and practices in staff matters, and to reinforce accountability of public agencies." (European Commission, 2003)
Democracy / *Institutions*	Text segments dealing with the functioning and capacity of democratic institutions, which were	See below

	further divided into five sub-subcategories	
Democracy / *Political Oversight*	Text segments dealing with the interplay of the democratic institutions and whether they supervise each other adequately	"Membership in parliamentary oversight committees has been offered to and accepted by the opposition parties, following a proportional representation system." (European Commission, 1999b)
Democracy / *Democratic Freedoms*	Text segments dealing with basic democratic rights, which were further divided into four sub-subcategories	See below
Democracy / *Institutions*/ **Institutions**	Text segments dealing with democratic institutions, but not further specifying it	"Events in a number of enlargement countries have underlined the importance of strengthening democratic institutions and ensuring inclusive democratic processes that support these institutions and reinforce core democratic principles and common EU values" (European Commission, 2013a)
Democracy / *Institutions*/ **Government**	Text segments dealing with the government of the acceding country, its legislative framework, structure, ministries, …	"The government also needs to further upgrade capacities in ministries and relevant agencies in order to successfully deal with the tasks related to European integration, such as impact assessments and compatibility checks of draft legislation against the acquis." (European Commission, 2006)
Democracy / *Institutions* / **Parliament**	Text segments dealing with the parliament, working with the opposition, the composition of the parliamentary committees and so on	"The powers of the Slovak Parliament are respected and the opposition plays a full part in its activities. Membership in parliamentary oversight committees has been offered to and accepted by the opposition parties, following a proportional representation system" (European Commission, 1999b)
Democracy / *Institutions* / **Ombudsman**	Text segments dealing with the efficiency and acceptance of the ombudsman	"The Ombudsman's office has initiated a number of valuable activities aimed at enhancing visibility and awareness, targeting both the population at large and specific stake-holders. His annual report for 2005 notes improvements regarding cooperation with the public administration and compliance with his recommendations compared to

		2004." (European Commission, 2006)
Democracy / *Institutions* / **Defence**	Text segments dealing with the defense structure of the country	"The formerly common defence structures of the State Union have been divided between the two Republics. The large majority of requests by military personnel to be transferred from Montenegro to Serbia have been accepted" (European Commission, 2006)
Democracy / *Freedoms* / **Religion**	Text segments dealing with the freedom of thought, conscience, religion and whether these rights are guaranteed by the government	"Freedom of religion is guaranteed by the Constitution. Fifteen denominations and religious organisations are recognised and receive financial assistance from the State" (European Commission, 1997)
Democracy / *Freedoms* / **Association**	Text segments dealing with the freedom of association and assembly and whether these rights are guaranteed by the government	"Concerning freedom of assembly and association, the overall framework remains largely satisfactory" (European Commission, 2007b)
Democracy / *Freedoms* / **Expression**	Text segments dealing with the freedom of expression and whether this right is guaranteed by the government	"As regards freedom of expression, no cases of intimidation of journalists and media have been reported during the period. The filling by the Parliament of a vacant position on the Council of Slovak Radio and Television (STV) took seven months, as opposed to the sixty days contemplated by the law." (European Commission, 2000b)
Democracy / *Freedoms* / **Media**	Text segments dealing with the freedom and pluralism of media and whether these rights are guaranteed by the government	"The legal framework on media policy has improved, but better implementation of the existing legislation is required. Further efforts are needed in order to decriminalise defamation and to ensure freedom of information and independence of the public broadcasting regulator" (European Commission, 2008a)

Category / *Subcategory* / **Sub-subcategory**	**Description**	**Example**
Rule of Law / *Rule of Law*	Text segments dealing with the rule of law, but not further specified	"All the applicant countries have flaws in the rule of law which they need to put right" (European Commission, 1997)
Rule of Law / *Description Judicial System*	Text segments dealing with the description and functioning of judicial institutions in the applicant country	See below
Rule of Law / *Characteristics Judicial System*	Text segments dealing with legal principles and characteristics the judicial system has to fulfill	See below
Rule of Law / *Protection of Individuals*	Text segments dealing with legal guarantees and procedural rights that protect individuals against possible state abuse	See below
Rule of Law / *Forms of Crime*	Text segments dealing with different forms of crime that are taking place in the country	See below
Rule of Law / *Description Judicial System* / **Overall Description**	Text segments dealing with the description and functioning of judicial institutions, but without further specifying on the institution	"Continued improvements can be noted with regard to the functioning of the judiciary – although the reform process needs to be continued and consolidated in line with the short-term priorities of the Accession Partnership" (European Commission, 2000a)
Rule of Law / *Description Judicial System* / **Councils**	Text segments dealing with the functioning, capacity and modes of operation of the judicial and prosecutorial council	"The Judicial and the Prosecutorial Councils are the key bodies in charge of managing the judicial system and the careers of judges and prosecutors. Their composition and appointment procedures are broadly in line with European standards" (European Commission, 2018c)
Rule of Law / *Description Judicial System* /**Police**	Text segments dealing with the functioning, capacity and modes of operation of the police and the secret service	"Reform of police services needs to continue, to ensure that they operate without political interference and that they are organised according to technical and professional criteria" (European Commission, 2005)

Rule of Law / *Description Judicial System* / **Judges/Prosecutors**	Text segments dealing with the functioning, capacity and modes of operation of the judges and prosecutors	“This law includes provisions that regulate, inter alia, the procedure for selecting, promoting and disciplining judges. It gives the judiciary more powers. The new law also increases the remuneration of judges, which was considered to be low” (European Commission, 2000b)
Rule of Law / *Description Judicial System* / **Court**	Text segments dealing with the functioning, capacity and modes of operation of the court	“The upgrading of the infrastructure of courts needs to be completed” (European Commission, 2002a)
Rule of Law / *Characteristics Judicial System* / **Independence**	Text segments dealing with (in)dependence and (im)partiality of judicial institutions	“Certain legal steps were taken to strengthen the independence of the judiciary. However, key parts of the reform, in particular the constitutional amendment with regard to the nomination and probationary system, which were set as a short term priority, have not yet been adopted” (European Commission, 2000b)
Rule of Law / *Characteristics Judicial System* / **Legal Certainty**	Text segments dealing with a central requirement of rule of law checking whether law is predictable and not applied in an arbitrary way	“This formulation raises concerns over legal certainty in Montenegro, as it does not provide an unequivocal response to the question on the applicable legislation in the country” (European Commission, 2006)
Rule of Law / *Characteristics Judicial System* / **Enforcement**	Text segments dealing with mechanisms guaranteeing the actual enforcement and implementation of court decisions	“In several countries, progress was made in developing and reinforcing mechanisms to ensure that court decisions are duly enforced, and in improving citizens' access to justice.” (European Commission, 2002a)
Rule of Law / *Characteristics Judicial System* / **Efficiency/Quality**	Text segments dealing with the training of judges, prosecutors and advisors and the length of procedures and the amount of cases not being processed yet	“After the pilot phase of implementation of the new regular professional assessment system was completed in autumn 2016, the Judicial and Prosecutorial Councils reviewed the assessment criteria. Regular professional assessments of prosecutors are ongoing, while for judges they should start in early 2018” (European Commission, 2018c) “Efforts to reduce the case backlog before courts have been stepped up, but the methodology used needs to become more consistent. The lack of

		adequate infrastructure and equipment continues to hinder judicial efficiency" (European Commission, 2011a)
Rule of Law / *Characteristics Judicial System* / **Accountability**	Text segments dealing with the questions whether judges and prosecutors can be held accountable in form of disciplinary procedures or the removal of their immunity, and/or comply with the Code of Ethics	"With regard to the accountability of the judiciary, amendments to the Law on courts provided an exhaustive list of all possible reasons for disciplinary action against judges and – for the first time – presidents of courts. Amendments to the Law on the Judicial Council provided for the establishment of a commission for monitoring implementation of the code of ethics for judges and the autonomy of action of the disciplinary commission" (European Commission, 2011b)
Rule of Law / *Protection of Individuals* / **Pre-trial detention**	Text segments dealing with the conditions of pre-trial detention and in its facilities	"Limited improvement can be noted in the problems surrounding pre-trial detention in several countries. These are primarily related to the excessive duration of the detention, lack of access to a lawyer and, in some cases, maltreatment. These problems need to be addressed" (European Commission, 2001a)
Rule of Law / *Protection of Individuals* / **Prison System**	Text segments dealing with the conditions in prisons	"The reform of the prison system continued, and progress was made in terms of improving physical conditions. Monitoring Boards and the new system of enforcement judges are now operational" (European Commission, 2002a)
Rule of Law / *Protection of Individuals* / **Ill-Treatment**	Text segments dealing with torture and ill-treatment during arrest of detention by police or prison guards	"However, there are continuous allegations of torture and ill-treatment during arrest and detention. Material conditions in police detention facilities remain unsatisfactory" (European Commission, 2008b)
Rule of Law / *Protection of Individuals* / **Time frame**	Text segments dealing with the time frame of trials and possible forms of compensation in case of temporal transgression	"A new law granting compensation to citizens whose trial has exceeded a due timeframe was adopted, but is not yet in force. There is still no clear strategy and procedural changes are lacking" (European Commission, 2008b)
Rule of Law / *Protection of Individuals* / **Legal Aid**	Text segments dealing with the provision of legal aid to people who	"As regards legal aid, it is reported that counsels for the defence in criminal proceedings often do not

	can't afford legal representation themselves	properly defend the rights of the accused persons, as payment by the State for legal aid provided by the counsels is very low and frequently not transferred to them promptly" (European Commission, 2002b)
Rule of Law / *Protection of Individuals* /**Access**	Text segments dealing with requirement of access to justice for every individual	"Access to the judicial system is largely guaranteed in Slovakia". (European Commission, 1997)
Rule of Law / *Protection of Individuals* / **Equality**	Text segments dealing with premise of equality in front of the law meaning equal treatment by law and being subject to the same law	"Bias against Serb defendants still needs to be fully addressed, as does witness protection." (European Commission, 2007a)
Rule of Law / *Protection of Individuals* / **Arbitrariness**	Text segments dealing with cases of arbitrary arrest	"There is protection against arbitrary arrest. Nobody may be arrested without a warrant issued by a public prosecutor and must be brought before a judge within 24 hours." (European Commission, 1997)
Rule of Law / *Protection of Individuals* / **Witness protection**	Text segment dealing with existence of mechanism to ensure witness protection	"The assembly adopted important legislation such as the laws on witness protection" (European Commission, 2011a)
Rule of Law / *Forms of Crime* / **Corruption**	Text segments dealing with the identification of areas in the applicant country that are most affected by corruption and anti-corruption mechanism being set up by the government to stop it	"In June, the Government adopted a national plan for the fight against corruption. It aims at tackling corruption by, inter alia, increasing transparency, limiting the scope for abuse of discretionary powers, addressing market failures related to state-owned enterprises and privatisation, reinforcing control and audit mechanisms, enhancing the quality and impartiality of the civil service and strengthening law enforcement, e.g. through the establishment of a special public prosecutor for anti-corruption" (European Commission, 2000b)
Rule of Law / *Forms of Crime* / **Organised Crime**	Text segments dealing with forms of organized crime taking place in the country and strategies and initiatives from the government to fight it	"In the fight against organised crime, there is an initial track record of prosecutions in the fight against smuggling of migrants and against drug trafficking. However, further results are needed to produce a convincing track record, in particular in the fight against money laundering

		and trafficking in human beings" (European Commission, 2018a)
Rule of Law / *Forms of Crime* / **Terrorism**	Text segments dealing with terrorism in the country and action plans by the government to prevent it	"Montenegro has adopted a new strategy to combat violent extremism 2016-2018, which complements the national strategy for preventing and combating terrorism, money laundering and the financing of terrorism. Institutional awareness needs to be increased to monitor possible terrorist threats, including radicalised Montenegrin nationals returning from battlefields" (European Commission, 2016b)
Rule of Law / *Forms of Crime* / **War Crime**	Text segments dealing with the reappraisal of the Yugoslavian wars in legal terms, meaning an analysis of the judicial tools handling war crimes and their compatibility with international jurisprudence	"As regards domestic handling of war crimes, Montenegro needs to tackle impunity and ensure that decisions by the Montenegrin judiciary on war crimes cases are in line with international humanitarian law, reflect the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and fully apply domestic criminal law" (European Commission, 2013b)