Inconsistencies in the EU's human rights conditionality towards enlargement countries in the Western Balkans – the case of Serbia

Introduction

The EU’s enlargement policy has long been regarded as the EU’s most effective foreign policy tool when it comes to the EU’s ability to change structures, institutions and practices in third countries. By the same token, enlargement policy could be considered as the EU’s most potent external instrument for human rights promotion as democratic principles and human rights have taken centre stage in the EU’s conditionality policy since the introduction of the Copenhagen criteria into the enlargement process in 1993. Moreover, since the start of membership negotiations with Croatia, the role of human rights in the accession process has been significantly upgraded. A new chapter on judiciary and fundamental rights (Chapter 23) was added to the list of negotiation chapters, and benchmarks were introduced at the opening and closing of individual chapters. In 2012, starting with Montenegro’s accession talks, the monitoring process of fundamental rights was further strengthened. The EU added a special suspension clause to the process that allows the Council to halt the negotiations of all chapters if there is no sufficient progress in the area of judiciary and fundamental rights.

The EU has a unique position vis-à-vis accession candidates and has put human rights at the core of its enlargement policy. To see what the EU’s real impact is in the target countries on existing human rights practices, this study will look more closely at the human rights component of the EU’s conditionality policy towards Serbia since the country became an EU candidate in 2012. Following Schimmelfennig, conditionality is understood here as an impact mechanism of the EU where “the EU provides non-member governments with incentives such as financial aid, market access or institutional ties on the condition that they follow the EU’s demands”.

However, in spite of these recent institutional developments reinforcing the role of human rights in the EU’s enlargement policy, many authors studying enlargement have demonstrated that the EU’s political conditionality has had a limited impact in the Western Balkans when it comes to spreading democratic values and protecting human rights, especially if compared to the Central Eastern

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1 This paper is based on research financed by the European Commission’s Seventh Framework Programme (FP7/2007-2013) under the Grant Agreement FRAME (Project No. 320000). For more information on the research project see http://www.fp7-frame.eu, especially the forthcoming report on human rights conditionality in the enlargement context: Susanne Fraczek, Beáta Huszka and Zsolt Körtvélyesi, The role of human rights in the EU’s external action in the Western Balkans and Turkey, Deliverable 6.2.

2 According to this “new approach” the rule of law chapters including Chapter 23 have to be opened at an early stage of the negotiations, while interim benchmarks were introduced in addition to opening and closing benchmarks. Christophe Hillion, ‘Enlarging the European Union and deepening its fundamental rights protection’ (Sieps, European Policy Analysis 2013 June) 8 <http://www.sieps.se/sites/default/files/2013_11epa.pdf> accessed 12 October 2014.

3 Ibid.

European states that joined the EU in 2004.\(^5\) Even the experiences of that enlargement wave revealed mixed results about the effectiveness of the EU’s democracy promotion, especially if we take into account implementation and performance in the post-accession phase.\(^6\) A central question in the literature is whether adaptation under the EU’s influence can go beyond formal transposition of rules and lead to actual changes in the form of implementation and enforcement. As Schimmelfennig and Sedelmeier argued, the EU’s rules are more likely to be accepted by candidates if the EU offers credible incentives and domestic adoption costs are low.\(^7\) Based on this model of rationalist institutionalism, the reasons for the EU’s weak performance in promoting human rights in the Western Balkans might lie, on the one hand, in domestic obstacles to effective political conditionality, that are largely connected to the legacy of ethnic conflicts in the post-Yugoslav space.\(^8\) On the other hand, the credibility of conditionality and incentives on the part of the EU also matter.

To be credible, the EU needs to offer a clear and tangible membership perspective, which is the greatest reward it can offer.\(^9\) Furthermore, credible incentives also require normative consistency: that benefits promised by the EU can be expected by candidates upon meeting the EU’s conditions, while significant sanctions can be anticipated in the case of non-compliance, by cutting assistance funds or holding back the target state from moving into the next accession stage.\(^10\) It is important to note here that EU conditionality operates by rewards, thus “sanctions” do not mean punishments in the form of imposing extra costs but rather that rewards (for example in the form of advancement on the accession path and financial support) will be withheld or withdrawn in the case of non-compliance. Schimmelfennig, while he recognised the difficulty caused by domestic factors in the Western Balkans, regarded the political conditionality of the enlargement policy “normatively consistent” and reasoned that “enlargement policy has remained consistently linked with basic democratic norms in the target countries”.\(^11\) The present study will challenge this assumption through the example of the EU’s human rights policy in Serbia. As Sedelmeier argued, credibility also


suffers if “the EU rewards candidates who did not meet (all) the requirements (fully)”\textsuperscript{12} It will be shown that Serbia has received the promised rewards even though it failed to meet fundamental human rights requirements set by the EU.

It will be also demonstrated through the case of Serbia’s media reform that the EU can successfully promote changes to the legal and institutional framework, but actual implementation has so far remained a challenge. The study will draw on the distinction between “formal change” and “behavioural change”, as introduced by Schimmelfennig and Sedelmeier,\textsuperscript{13} the latter meaning practical application and enforcement. Serbia has followed the strategy of introducing some formal measures that fall short of implementation and thus cannot achieve the goals of the reform as originally intended. Second, irrespective of Serbia’s advanced status in the integration process of an accession candidate negotiating its EU membership, so far the EU has not sanctioned Serbia’s infringements on freedom of expression and media freedom except for advancing strongly worded criticism. The integration process was not halted and Serbia could progress with the opening of the first negotiation chapters in December 2015. As a result, Serbia could “get away” with its half-hearted reform measures and worsening tendencies in media freedom without consequences, which calls into question the consistency and credibility of the EU’s human rights conditionality. In order to demonstrate the significance of consistent conditionality in effective rule transfer through the case of Serbia, we draw on the findings of a collaborative research project on the role of human rights in the EU’s enlargement policy.\textsuperscript{14}

By relying on previous literature, various inconsistencies of the EU’s political conditionality in the enlargement process to the Western Balkans will be discussed first as they are relevant to the Serbian case as well. The next section will present Serbia’s media reforms and the EU’s reactions to the deteriorating situation of freedom of expressions and media freedom, to be followed by an examination of previously highlighted inconsistencies in the context of the EU’s human rights promotion in Serbia. The paper will close with a final evaluation and an outlook on the immediate future investigating some policy options available to the EU.

Inconsistencies in the EU’s human rights conditionality in the Western Balkans

Although both domestic and EU level factors influence the effectiveness of conditionality policy, the responsibility for its consistent application lies fully with the EU, which will be the focus of our research.\textsuperscript{15} Several scholars explained the EU’s weak leverage in the Western Balkans by pointing to domestic factors underlining how difficult it is to encourage democratic change if the national

\begin{itemize}
\item \textsuperscript{14} This research project called FRAME has received funding from the European Commission’s Seventh Framework Programme (FP7/2007-2013) under the Grant Agreement FRAME (project n° 320000). The present paper is largely based on Deliverable 6.2 The role of human rights in the EU’s external action in the Western Balkans and Turkey, by Susanne Fraczek, Beáta Huszka and Zsolt Körtvélyesi.
\end{itemize}
identity of the respective countries at least partly contradicts the EU’s requirements. Without ruling out that this mechanism might apply in some cases, it is certainly not a universal rule: policy changes in Serbia concerning Kosovo and ICTY cooperation show this, representing two issue areas where EU demands ran against elements central to national identity. Contrary to previous expectations, from 2012 Serbia managed to change its processes and policies vis-à-vis Kosovo. The normalisation process with Pristina led to two land-mark agreements between the Serbian and the Kosovar governments in 2013 and 2015. This happened despite the EU’s demands challenging Serbia’s fundamental national values and perceptions of the state, i.e. that Kosovo is an integral part of Serbia as stipulated by the preamble of the constitution. In spite of the EU’s lack of a clear stance on Kosovo’s independence and on what should be the final aim of the normalisation process, the Council managed, in December 2011, to set a couple of clear and specific requirements that Serbia had to meet for opening membership negotiations. These included “continuing to implement in good faith all agreements reached [so far with Pristina],” allowing EULEX to operate in the north of Kosovo, respecting provisions of the Energy Community Treaty, finding agreements on telecommunication issues, and finding a way to let Kosovo participate in regional cooperation. Concerning Serbia’s Hague cooperation, another issue of high national symbolic significance, Pawelec and Grimm showed that, similarly to the Kosovo issue, Serbia managed to amend its policy on war crimes prosecution, under consistent EU pressure where “conditions were consistently linked to rewards”. Serbia fulfilled the criteria of extraditing the most wanted war criminals by 2011.

These two examples demonstrate that credible and consistent conditionality seems to matter from the aspect of whether the EU can exert effective influence, even if domestic adoption costs are high, as was certainly true in both cases. EU conditionality could work here also because the criteria were not only credible but also small scale, as the EU broke down the “big conditions” into specific

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22 Ibid, 1303.
smaller steps and provided feedback on these incremental changes. For instance, the EU put on hold Serbia’s negotiations on the Stabilisation and Association Agreement (SAA) in 2006 because of insufficient cooperation with the Hague Tribunal, and restarted them again in June 2007 after Serbia showed commitment to cooperate fully with the court. After a pro-EU coalition was elected into office in December 2007 which promised a more constructive stance on war crimes prosecution, the EU signed the SAA with Serbia in 2008. SAA ratification and the implementation of the interim trade agreement were blocked until the extradition of the last high-profile war criminals, Mladić and Hadžić in 2011. Therefore, the EU consistently responded with rewards or sanctions to Serbia’s actions or their lack.

Similarly, the EU was willing to apply such an incremental feedback strategy towards Serbia concerning its relations with Kosovo. After the condition of cooperation with the international war crimes tribunal was largely fulfilled in 2011, Serbia’s relations with Kosovo became the issue most defining of Serbia’s pace of EU integration. In spite of the European Commission’s recommendation in October 2011 to give candidate status to Serbia, the Council, under Germany’s influence, delayed the decision to the spring of 2012 because of violent clashes on Kosovo’s border with Serbia. Serbia was called on to remove roadblocks on the border and to allow Kosovo to participate in regional cooperation, which became conditions for receiving candidate status. The EU’s incentive worked: in December 2011, a deal was reached between the Serbian and the Kosovar governments about the “Integrated Border Management” (IBM). Under this the two governments undertook to set up joint border posts to be managed by the two sides with EULEX’s assistance. Moreover, in February 2012, Belgrade and Pristina agreed on Kosovo’s representation in regional forums and institutions. Rewarding its compliant behaviour, the EU assigned candidacy to Serbia in March 2012. The European Council’s decision to endorse the start of membership talks in 2013 also followed the first major breakthrough agreement on the normalisation of relations with Kosovo in April 2013. More recently the opening of the first negotiation chapters in December 2015 can be linked to the agreement reached in August 2015 on the association of Serbian municipalities.

Since Serbia was willing to make painful concessions in two very sensitive areas for the sake of EU integration, compliance could also be expected in other fields, including human rights that are comparatively less demanding from the aspect of national identity. It can be assumed that domestic adoption costs would be lower there than concerning ICTY cooperation or the normalisation process with Kosovo. Thus the consistency of the EU’s conditionality has to be scrutinised if the EU fails to make the expected impact. Therefore, the dependent variable of our analysis is the EU’s

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conditionality policy concerning human rights in Serbia, varying according to its consistency. The literature on EU enlargement to the Western Balkans lists a number of inconsistencies within the EU’s conditionality policy. Before assessing these in the case of Serbia, some of the inconsistencies will be briefly presented.

Inconsistencies arise for example if there is a mismatch between standards applied to candidates and Member States. When it comes to fundamental rights, both in terms of the content of obligations and the rigorousness of the monitoring process, candidates are subject to stricter standards than Member States. Fundamental rights requirements as enumerated in Chapter 23 of the negotiations that candidates have to meet are more extensive than the list of rights in the EU Charter of Fundamental Rights or Article 2 of the Treaty of the European Union obliging Member States. The monitoring process also differs. The EU can check almost any act of candidates on human rights grounds while Member States are constrained by the Charter only when they are implementing EU law. In principle, Member States’ general conduct of human rights can be also examined based on Article 7 TEU, yet, this mechanism has been never applied as a unanimous decision would be required in the Council. By contrast, in case of candidates the whole accession process can be suspended by a qualified majority if their progress on rule of law issues is regarded as inadequate.27 One noteworthy example where the difference in standards is apparent is minority rights. Although minority rights are not part of the EU’s fundamental rights acquis except for anti-discrimination legislation which provides very limited means of minority rights protection, minority rights constitute a much emphasised part of human rights conditionality during the enlargement process. In the absence of sufficient EU rules applying to this issue area, the EU refers to standards set by the Council of Europe or OSCE and requires measures like Roma strategies, anti-discrimination action plans, and inclusion policies. However, as experience from previous enlargements suggests, it has been quite ad hoc what exactly the EU expected from various countries in terms of minority rights protection.28 Because there were no clear benchmarks, criteria were often negotiated with governments while compliance became the subject of political judgements on behalf of the EU.29

Double standards can undermine the legitimacy of the EU’s demands also when Member States do not perform better than candidates, such as in the area of Roma rights, media freedom and asylum policy. Concerning Roma rights, the EU is calling for an end to forced evictions from Serbia and the Bosnia and Herzegovina, while many Member States continue this practice.30 The situation of media freedom is similar or worse in quite a few EU Member States than in the Balkans according to IREX or Reporters without Borders rankings (to be discussed later), or the treatment of asylum seekers.

This is closely related to a further type of inconsistency, the difference between rhetoric and action, which emerges, for example, when the EU in reality is motivated by security goals but employs a normative rhetoric, or when security concerns or other types of interests prevail over human rights considerations. In the Western Balkans, the aspiration to keep countries in the enlargement process and thus the region stable and secure often contradicted the rhetoric of strict conditionality, such as in the case of Macedonia where performance concerning human and minority rights hardly improved in the 2000s, as compared to the 1990s, before the EU’s engagement. Still, Macedonia became an EU candidate in 2005, and the European Commission recommended opening membership negotiations with its government in 2009 for the first time. This case indicates another kind of inconsistency that stems from vague guidelines on how to measure performance of candidates when it comes to democratic principles and the respect of human rights. Accession talks can be started if a candidate has fulfilled the Copenhagen criteria sufficiently, yet there are no clear benchmarks to establish whether the political conditions were sufficiently met (while they must be fully completed before accession). As a result, unclear standards of adequate performance or progress of candidates can easily suggest the arbitrariness of the EU’s decisions when it upgrades, or refuses to upgrade, the candidate country’s status in the accession process. A similar criticism was presented concerning the Central Eastern European enlargement: political conditions were random and hard to predict. A study commissioned by the European Parliament in 2012, reiterating the same message on vague standards and indicators, also found that the EU paid too much attention to formal measures and failed to follow up adequately on implementation during the monitoring process.

Studies suggest that compliance is less likely if the EU has an undefined position on a certain issue and clear EU standards are lacking. At the same time, the absence of common rules or norms itself

33 Koinova lists a number of these, among them torture and ill-treatment remained widespread, arbitrary arrests and detention continued, inhuman conditions in prisons led to an increase in suicides, many people who were internally displaced during the conflict in 2001 were involuntarily returned to their place of origin and were threatened and brutalized by the police, masses of people cannot receive justice in courts, harassment of journalists is widespread, etc. In Maria Koinova, ‘Challenging Assumptions of the Enlargement Literature: The Impact of the EU on Human and Minority Rights in Macedonia,’ [2011] 63(5) Europe-Asia Studies 824.
need not be a problem if the EU manages to articulate clear conditions concerning a specific issue. As was explained above, while the EU has demanded normalisation of relations with Kosovo from Serbia, it was left benignly in the dark what exactly should be the ultimate goal of such normalisation, and the EU itself has lacked a clear position on Kosovo’s independence. Still, in 2011, the Council did manage to present some specific requirements of what the “improvement of relations” should entail, which were mostly followed by Serbia.37

Inconsistencies at work in the EU’s human rights conditionality

The type of inconsistency that left its mark on conditionality in Serbia the most is the discrepancy between rhetoric and action. This is to a great extent a result of the EU’s general reluctance to apply negative conditionality to the human rights area, which leads to half-hearted measures and cherry-picking by candidates from the EU’s human rights conditions. The inconsistency stemming from the EU’s failure to provide credible incentives, in the form of holding back rewards when candidates fail to comply with key requirements, decreases the costs of non-compliance and demotivates candidates from implementing painful reforms. Experience from the enlargement process in Bosnia and Herzegovina and Serbia suggests that non-compliance with human rights related conditions was hardly followed by serious consequences. The EU did not withhold its promised rewards, with two notable exceptions: ICTY cooperation, where the EU did follow a credible approach as was argued above; and the requirement set for Bosnia and Herzegovina to comply with the ECtHR ruling on the Sejdić-Finci case.38 Otherwise, the integration process was never put on hold because of insufficient progress in the area of anti-discrimination, Roma rights, and freedom of expression, women’s rights or any other type of human rights, the effects of which will be presented in more detail through the case of freedom of expression and media freedom in Serbia.

A review of all tools and instruments the EU used in Serbia for the promotion of human rights from 2010 to 2015 shows that freedom of expression and media freedom have been among the highest priorities on the EU’s agenda.39 Every enlargement strategy and progress report from 2010 to 2015 has put an emphasis on this topic. It was highlighted in the European Commission’s opinions on Serbia’s membership application,40 the Negotiation Framework, Council conclusions, dialogues between Serbia and the EU, and the European Parliament’s resolutions. (For more details of human


Although Bosnia’s failure to meet this condition put the country’s integration process on hold from 2009 to 2014, at the end, the EU eased this requirement in the face of lack of cooperation on this matter, and postponed it to a later stage of EU integration while it gave a green light to the implementation of Bosnia’s SAA, which came into force in June 2015.

See Susanne Fraczek, Beáta Huszka and Zsolt Körtvélyesi, The role of human rights in the EU’s external action in the Western Balkans and Turkey, FRAME Deliverable 6.2 (forthcoming) <http://fp7-frame.eu/reports>.

There were two of these, one published in 2011 which substituted the regular EU progress report and recommended granting candidate status to Serbia. The second one the Commission issued in 2013 in which it recommended the opening of accession negotiations.
rights priorities revealed by these instruments see Table 2.) Freedom of expression and media freedom was the most extensively discussed human rights criterion among political conditions in the 2015 EU Commission report on Serbia. The salience of an issue indicates its importance to the EU which increases the credibility of conditionality. In principle, this should also make rule transfer in that area more effective. For that reason, freedom of expression and media freedom in Serbia could serve as a litmus test for the effectiveness of the EU’s political conditionality on human rights. Second, Serbia has reached the highest stage of the accession process during the last five years and is currently negotiating its membership, so it is worth seeing how the EU with its strong leverage managed to exert influence in such a high priority area. Third, the link between EU conditions and ensuing reforms can be quite clearly established: the 2011 media strategy was adopted as part of Serbia’s EU integration agenda, and the European Commission assisted the process with its expertise.

The biggest achievement of the strategy was that it set the foundations for legislative changes prohibiting state ownership in the media. Although the EU already regarded the legal framework on freedom of expression and media freedom to be generally in place in Serbia even before that, it still saw a need for improvements. The main goals were to increase transparency of ownership and the funding of media outlets, to reduce room for political and economic influence and pressure over journalists, and to strengthen editorial independence. The overall aim was to protect the pluralism of the media, to make ownership more transparent and to withdraw the state from media ownership by moving onto financing media content through public competition. Based on the strategy, four laws were to be adopted. Three of these have been passed so far, all in 2014: the Public Information and Media Act, the Electronic Media Act and the Public Media Services Act. Only the law on advertising remains outstanding.

What the overview of the legislative changes does not show us – other than the fact that Serbia formally mostly complied with the EU’s legislative requirements on media freedom – is that the

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43 See the country’s “Strategy for the Development of the Public Information System in the Republic of Serbia”.
situation of media freedom deteriorated in the last few years (see Table 1 below).

Contrary to the strategy’s main goal, conflicting laws allow the state, in practice, to continue to own media companies. The ensuing privatisation of media outlets which was foreseen by the strategy and was supposed to increase media independence in reality resulted in the opposite effect, as the process led to businessmen close to the government buying up media companies. The three acts that were adopted under the strategy have not been implemented as the necessary by-laws have not been passed even after the deadline (200 days after the laws’ adoption) passed. Contrary to the media strategy’s aspiration to increase media pluralism with a more transparent ownership structure freed from political influence, “opaque ownership, unregulated financing, covert and open political and economic influence on the media and money channelled to favoured media from various state sources continued to be features of the media environment”, as the EU’s 2015 report on Serbia concluded. The various ways of financial pressure were summarised by the Balkan Investigative Reporting Network (BIRN) under the term “soft-censorship”. This includes “biased subsidies to media outlets, selective government advertising, public enterprises contracting directly with media outlets absent competition or monitoring, regulatory manipulation regarding licensing and ownership transparency, and differing treatment of tax obligations and covering loans and debts of media close to government.”

Problems of the media point beyond the implementation of these laws and concern the general climate of freedom of expressions and media freedom. Beside media think tanks and human rights organisations, the EU also has for years given voice to its concerns about political pressure, threats and violence against journalists. That criminal charges and final convictions are rare in such cases creates a climate of impunity. Articles are withdrawn, TV programmes cancelled, editorial policies changed under political pressure, which are all manifestations of soft- or self-censorship. At the same time, some tabloids close to the government, such as Informer, continue to leak confidential

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47 Mostly since 2010, although when this tendency started exactly depends on the media think tank consulted. See Table 1.
48 “The Capital City Law is, for instance, directly at odds with the Public Information Law, as it allows the city of Belgrade to own media outlets, whereas the latter forbids this.” Konrad-Adenauer-Stiftung, ‘Media freedom in Serbia’ <http://www.kas.de/wf/en/71.13626/> accessed on 30 August 2015.
52 See reports of IREX, Belgrade Centre for Human Rights, Freedom House.
information about people’s private lives, ongoing investigations or personal data.55 The Ombudsman suggested that these tabloid media serve as a mouthpieces of the government authorities and are used in a systematic way to undermine political adversaries.56 In spite of the decriminalisation of libel in 2012, newspapers continue to be threatened with lawsuits for insults instead of libel, which remains a criminal charge even if not to be punished by prison sentence.57 Especially investigative journalists tend to be sued while financial pressure is exerted on their outlets.58

The EU has been pointing out these problems about the state of freedom of expressions and media freedom in Serbia for many years. In 2014 it called the situation deteriorating, while in 2015 it sustained its strong criticisms and noted that the conditions had stayed more or less the same. According to Freedom House, freedom of speech and independence of the media has steadily worsened since 2011. This negative trend continued paradoxically as “the authorities adopted legislation designed to make media ownership and financing more transparent.”59 IREX, another media think tank, also recorded a steady decline of media freedom since 2009 in Serbia, similarly to Freedom House (Table 1).

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<th>Year</th>
<th>IREX (higher is better)</th>
<th>Freedom House Press freedom index (lower is better)</th>
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<td>2015</td>
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Table 1 NGO media indicators on Serbia, 2009-2015. IREX Media Sustainability Index, 0-4, 0: unsustainable, 4: sustainable;60 Freedom House Press Freedom Scores: Free (F): 0-30 / Partly Free (PF): 31-60 / Not Free

56 “No proceedings have ever been conducted to determine the sources of such information, which is available only to authorised officials, and to punish the instigators of such actions for unauthorised disclosure of official secrets and other criminal offences, infringements and disciplinary infractions. The information reported by the media is, as a rule, selective and one-sided, remarkably timed to coincide with ups and downs of political processes and arrangements, and systematically directed against specific individuals.” Republic of Serbia Protector of Citizens, ‘2013 Annual Report’ 11 <http://www.ombudsman.rs/attachments/2013%20Annual%20Report%20of%20the%20Protector%20of%20Citizens.pdf> accessed 12 February 2016.
60 “IREX designed the MSI to measure the strength and viability of any country’s media sector. The MSI considers all the factors that contribute to a media system—the quality of journalism, effectiveness of management, the legal environment supporting freedom of the press, and more—to arrive at scores on a scale ranging between 0 and 4. These scores represent the strength of the media sector components and can be analyzed over time to chart progress (or regression) within a country.” Unsustainable media means “Country does not meet or only minimally meets objectives. Government and laws actively hinder free media development, professionalism is low, and media-industry activity is minimal.” Sustainable means: “Country has media that are considered generally professional, free, and sustainable, or to be approaching these objectives.
As the government was coming under increasing international criticism, these were generally harshly rejected by the Serbian prime minister who also clashed with OSCE and the EU over media freedom during the last two years. In 2014, after the devastating summer floods, the government started removing websites and blogs such as Peščanik, Vaseljenska, BKTV News and Teleprompter that reported about the extent of the destruction, and detained people for allegedly spreading panic and false information. This attracted criticism from OSCE representative on Freedom of the Media Dunja Mijatović, who in turn was accused by Prime Minister Vučić of being deceived and demanded an apology. The practice of the authorities to remove critical content from online media continued even afterwards.

Confrontation with the EU came after a BIRN investigative piece appeared, shedding light on corruption in a procurement case. Prime Minister Vučić accused the journalists of lying and acting with EU support. At the same time, the Commission communicated confusing messages about the media situation in Serbia. Johannes Hahn, EU Commissioner for European Neighbourhood Policy and Enlargement, expressed his doubts concerning the claims about violations of press freedom and self-censorship in Serbia, and called for “evidence and not rumours”, despite the Commission’s reports reiterating such claims. The Commissioner’s spokesperson had to explain that the EU was “still committed to media freedom”.

Systems supporting independent media have survived multiple governments, economic fluctuations, and changes in public opinion or social conventions.” IREX, ‘MSI Serbia – 2015 Introduction’, accessed on 30 August 2015.

Confrontations with the OSCE Office did not end there, in December 2015 Vučić said that “the first great orchestrated attack with falsehoods on the government of Serbia" also came from Dunja Mijatovic, and specified that it happened after last year’s floods in Serbia.” In ‘Lavrov, Vucic praise relations, criticize OSCE media office,’ (B92, 4 December 2015) <http://www.b92.net/eng/news/politics.php?yyyy=2015&mm=12&dd=04&nav_id=96268> accessed on 30 January 2016.


The phenomenon of declining media freedom and worsening conditions of freedom of expression should not be seen as an isolated problem in Serbia but rather as part of the wider political context, characterised by increasing authoritarian tendencies and concentration of power by the government. After the 2014 general elections, the incumbent coalition of the Serbian Progressive Party and the Socialist Party of Serbia further consolidated its grip on power by winning an absolute majority in parliament, which emboldened the government’s attitude to disregard institutions that should serve as checks on its power even more. After gaining an overwhelming parliamentary majority, the coalition demonstrated increasing intolerance towards any kind of criticism from the media, civil society, opposition parties or independent institutions. In April 2016, the third general elections were held in four years since 2012, the year of the last regular elections. The last two were snap elections in 2014 and 2016, called by the government in order to translate its good results in opinion polls into parliamentary mandates in time.

Independent institutions are a key to guaranteeing human rights in practice, and courts are the primary players in this field. Serbia currently does not have a free judiciary. According to the EU’s 2015 report, judicial independence is “not assured in practice”, as the Constitution and laws allow plenty of room for political interference. The report also criticised politicians for commenting publicly on ongoing trials, thus putting pressure on judges. There has been no progress in improving the efficiency of the judiciary either. Courts are burdened by a significant backlog and poor organisation. According to Freedom House, since 2008, there has been no effective improvement in the situation of the judiciary despite reform efforts in 2009/2010, which have largely failed.

Attacks on the Ombudsman are a further proof of the authorities’ attempts to suppress criticism and constrain effective control over their power. In the spring of 2014, tabloid media started a smear campaign against Saša Janković, the Citizen’s Ombudsman, implicating him in a suicide case into which the investigation was closed a long time ago. This happened after he presented his critical report about human rights in Serbia to the Parliament in April 2014. Importantly, government ministers also endorsed these claims, publicly speculating about the possibility of reopening the case. Furthermore, the Ombudsman received denigrating comments during a hearing in the parliamentary committee about his investigation into incidents involving military officers during the

The authorities are reluctant to act upon recommendations of the Ombudsman or the Commissioner for Free Access to Information of Public Importance and Personal Data Protection, which reflects a general tendency of undermining the work of independent institutions. Moreover, the existing legal framework does not ensure that decisions of the Commissioner will be followed.

Altogether, Serbia’s EU accession process gained a new momentum after the extradition of Ratko Mladić in 2011. This allowed for the implementation of Serbia’s interim trade deal with the EU and the speeding up of the ratification of the SAA in the Member States in 2011. Serbia received candidate status a year later, and in 2014, accession negotiations officially opened. The launch of membership talks means that, according to the EU, Serbia has “sufficiently fulfilled” the Copenhagen criteria, including the respect for human rights and the protection of minorities. However, as was demonstrated above, the upgrade of Serbia’s EU relations was not accompanied by improving human rights records, as reflected by developments concerning freedom of expression and media freedom. These areas actually saw a gradual deterioration during this period. Furthermore, the negative tendency in the field of freedom of expression and media freedom has not been an isolated case but reflects the general rule of law conditions marked by the worsening status of independent institutions and the backsliding concerning judicial freedom.

Inconsistencies revisited

In a regional comparison, Serbia is hardly an outlier with its problems concerning freedom of expression and media freedom. A short look at the EU Member States and the closer region reveals that media freedom has generally been on the decline. Hungary received a similar score as Serbia

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77 According to Freedom House’s evaluation, Montenegro which is the frontrunner of EU integration in the region also had worsening press freedom scores from 2011 receiving almost the same marks as Serbia (in 2015 Montenegro received 39, Serbia 40) where ‘serious attacks’ on reporters and political pressure on journalists have been widespread. In Macedonia, which has been an EU candidate for more than a decade and has received the recommendation of the European Commission to open accession negotiations in 2009 the
(37 as opposed to Serbia’s 39 where lower is better) from Freedom House in 2015, while it got a much worse ranking in 2015 than Serbia from Reporters Without Borders (Hungary: 64th, Serbia: 54th) and in 2016 (Hungary 67th, Serbia 59th). Two EU Member States, Italy and Greece ranked far behind the Western Balkan EU candidates in 2015 (73rd and 91st, respectively). Some problems seem to be less characteristic in the EU than in the Western Balkans, such as physical assaults on journalists, but there are exceptions to this as well, such as Greece, where physical attacks on journalists have become systematic throughout the country, including death threats. Pressure through civil lawsuits and financial means are quite common in some EU countries. The problematic performance of quite a few EU Member States might question the credibility of the EU to demand high standards from candidates. As the EU is requiring standards that are obviously not respected in some parts of the EU, conditionality concerning freedom of expression and media freedom represents a clear case of inconsistency stemming from double standards applied to Member States and candidates. In addition, the lack of clear European standards on free media and mixed messages from the Commission naturally weaken the potential impact of EU interventions.

To refine our picture on the effects of EU human rights conditionality, we can look beyond freedom of expression and media freedom, and assess developments in other high priority areas. LGBT rights, anti-discrimination and Roma rights, similarly to freedom of expression and media freedom, were among the highest priorities on the EU’s agenda and were promoted by almost all available EU instruments from 2010 to 2015. (See Table 2.) If we consider these other high priority areas, many positive developments can be highlighted in the recent period. Although conditions of media freedom worsened, an ad hoc commission was set up in January 2013 to investigate unsolved cases of murdered journalists, which managed to charge several members of a former security agency. This was a significant step that the EU has long been calling for. The decriminalisation of...
Defamation was a largely formal success (see earlier), but this was also a condition set by the EU that Serbia fulfilled. Setting up the legal framework of anti-discrimination – the adoption of a strategy and an action plan – was an outcome of the EU’s visa liberalisation conditionality, although it remains to be seen how it will be put into practice. The 2012 amendments to the Criminal Code also marked an important step: they recognised certain hate crimes – committed based on sexual orientation, religion or ethnic origin – as an aggravating circumstance. These amendments constituted part of the anti-discrimination reform, much promoted by the EU through all its instruments (see Table 2). There were noticeable efforts to increase visibility of LGBT people by providing special training to the police on dealing with homophobic violence, holding the pride parade in two consecutive years (2014 and 2015), and organising parliamentary sessions dedicated to LGBT rights. Moreover, the processing of legal cases involving LGBT rights became more active, including the cases before the Commissioner for Equality. There was also progress concerning Roma rights, including the registration of people without documents, housing programmes, and health mediators and educational staff employed for assisting the Roma. EU support was crucial in these Roma inclusion programmes, both politically and financially.

These changes had been long promoted by the EU through the whole arsenal of its instruments and the positive developments occurred during the last few years. It is safe to assume, based on these, that the EU’s influence has played a pivotal role in bringing about these reforms. At the same time, there has been no progress in some other areas, despite repeated calls for reforms on behalf of the EU. The EU has been urging the introduction of free legal aid since 2007, so far to no avail, even though it was included in the government’s action plan on Chapter 23 with a deadline of the third quarter of 2015. In the area of freedom of religion, the EU has for many years raised demands for a more transparent and consistent system of church registration, with no effect. Harmonisation of the data protection legislation with EU standards has been long outstanding. Despite the fact that Serbia received the greatest amount of funds for Roma inclusion among all IPA countries, beside the relative success of registration, not much has changed in the lives of the Roma who are as marginalised as ever in the area of healthcare, education and employment.

84 It should be added here that the visa liberalisation conditionality had a mixed effect on anti-discrimination in Serbia. While it promoted the adoption of the framework law on anti-discrimination, and established a new post of Equality Commissioner, it contributed to the increasing practice of ethnic discrimination in border inspection owing to the EU’s pressure on the Western Balkan governments to control their borders better, and stop false asylum seekers from passing through, the majority of whom were Roma and Albanians. See Simonida Kacarska, ‘Losing the Rights along the Way: The EU–Western Balkans Visa Liberalisation’ (2015) 3 European Politics and Society 363-378, 366.
85 Ibid.
88 Ibid.
housing programme, the eviction of Roma without providing them with adequate housing has continued.  

These illustrative examples indicate that the EU did have some positive impact on Serbia’s human rights regime, yet Serbia has been mostly cherry-picking from the EU criteria regularly listed in the annual progress reports (see list in Table 2). Importantly, the accession process was never put on hold because of insufficient progress, not only in the area of media freedom and freedom of expression, but also concerning personal data protection, right to free legal aid, women’s rights or because of any other human rights issue, apart from ICTY cooperation which concerns the right of the victims for justice.  

This reluctance to apply sanctions against Serbia because of non-compliance or even relapses in the human rights area, represented a glaring gap between the EU’s discourse on human rights and its actions. In the absence of negative consequences, Serbia could afford to comply with some conditions while dismissing others. Cherry-picking seems to be a useful strategy as long as Serbia complies on issues that are really important for the EU, such as the normalisation process with Kosovo. Moreover, Serbia’s handling of the migration crisis also won praise for the government, especially in contrast with its neighbour, EU member Hungary.  

Besides negative consequences of non-compliance, what has also been missing is the linking of human rights requirements to the different stages of EU integration. As Pawelec and Grimm suggested, the Copenhagen criteria should be expanded “towards more fine-grained and direct conditions and rewards”. Conditions on a small scale should be tied to rewards steadily and the EU should respond to incremental changes, which would make conditionality policy more consistent and credible. Such fine-tuning of conditionality policy in the human rights field could contribute to a higher impact, also because the main reward of conditionality, full EU membership, is relatively distant, so intermediate rewards are also important. Of course, we cannot tell whether Serbia would have complied with the spirit of EU conditionality while carrying out its media reforms, had the EU applied a more consistent conditionality policy. Yet, in light of its positively changing behaviour concerning Kosovo and, previously, ICTY cooperation, there is a chance that it would also have improved its human rights performance if the EU had followed a more consequential approach.

**Conclusions**

Since the beginning of the Stabilisation and Association Process, the EU has been constantly criticising Serbia for its shortcomings in the area of human rights and the rule of law, yet no serious sanctions have followed in the form of withholding rewards. Moreover, in light of the Commission’s

91 Except for the issue of ICTY cooperation and the Sejdic-Finci case as was explained above.
yearly progress reports on Serbia between 2010 and 2015, it could not be argued that the EU glossed over important flaws in the area of freedom of expressions and media freedom, or did not pay attention to implementation. The criticisms by the EU matched those formulated by media think tanks and human rights organisations. The question emerges why the EU has constrained itself to critical remarks, and why it did not introduce more serious punishments. Part of the explanation could be that there are several issues high on the EU’s agenda, and human rights are just one among these. Economic and judicial reforms, the fight against corruption beside the normalisation process with Kosovo were all listed among essential conditions during the last years. The EU has to balance these multiple goals and has to think carefully when to halt the whole integration process because of insufficient progress on any of these conditions. However, Serbia’s accession process was never put on hold because of relapses in the rule of law area, including human rights, apart from ICTY cooperation. As was already pointed out, the EU was willing to use negative conditionality only concerning two issues: ICTY cooperation and the normalisation of relations with Kosovo. These were also the two areas where the EU managed to score some relatively good results.

The inconsistency of the EU’s conditionality policy has not been the only cause of the failure of the media reforms. Turning back to our initial framework, domestic adoption costs were also too high for Serbian authorities, as a free and pluralistic media would make it much harder for the government to continue its power concentration efforts. Freedom of expression and media freedom have been generally resisted, sometimes attacked, by the government as an effective check on its power, similarly to the Ombudsman. The judiciary has been subject to frequent political interference. This suggests that the dominant typology applied in the literature, according to which high domestic adoption costs in the post-Yugoslav space emerge concerning issues which require concessions from the aspect of national identity, might be outdated. While Serbia was willing to compromise on its perceived national interests concerning international war crimes prosecution and Kosovo, both of high significance from the aspect of national identity, the real threat to the authorities now are well functioning independent institutions and a free media which can put constraints on their power.

Serbia could make headway on its EU integration despite its uneven human rights performance because of its efforts to improve relations with Pristina. Paradoxically, as the government has increasingly turned to authoritarian practices, its position has been simultaneously reinforced by the EU integration process which requires and rewards a strong leadership. As Serbia delivered on the Kosovo condition, it was rewarded by the EU, boosting the power of the national leadership despite Serbia’s meagre performance in the area of rule of law including human rights. The EU integration process has so far indirectly empowered the leadership to continue its efforts to maintain power including its steps to undermine effective checks and balances.

Finally, timing might be also a factor here that should be reckoned with. A systematic analysis of the applied instruments for human rights promotion revealed that during pre-accession negotiations the EU’s human rights agenda has limited ambitions and focuses on a few strategically important human rights issues, such as on transitional justice in the case of Serbia. The EU promotes human rights selectively and strategically, balancing between the need to keep the partner countries on the integration path and the need to sustain its norms and principles. Once accession negotiations on Chapter 23 start, these might offer the opportunity for a more systematic and meticulous conditionality policy taking effect.
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Table 2. Human rights priorities in EU documents, Serbia, 2010-2015

Legend:
X: priorities of the examined instruments;
EP: included in EP’s resolution in the relevant year;
IPA: priorities in IPA;
DP: priorities in parliamentary dialogue;
DSA: priorities in the dialogue in the stabilisation and association committee;
CC: priorities in Council conclusions.

- 2010 ES: 2010 Enlargement strategy, country conclusions;
- 2011 CO: 2011 Commission opinion;
- 2012 ES-CC: 2012 EU enlargement strategy, country conclusions;
- 2013: 2013 April EC opinion on Serbia’s membership application;

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In 2014 the summary of findings in the beginning of the progress report was identical with the annex on Serbia in the enlargement strategy.