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The EU's Governance Transfer

From External Promotion to Internal Protection?

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Paper prepared for the International Studies Association (ISA) Annual Convention, San Francisco, 3-6 April 2013

Abstract:

Whether the European Union (EU) really lives up to its image of 'transformative power' is still an open empirical question. There is no doubt that the EU has been active in setting and promoting norms going far beyond the objective of regional economic integration. It prescribes and promotes standards for national governance institutions related to democracy, human rights, and the rule of law. However, in comparison with other regional organizations, the EU used to focus on the transformation of domestic governance institutions beyond rather than within its borders, targeting accession candidates, neighbourhood countries and third states alike. Only recently, the EU started to develop policies and instruments that explicitly aim at protecting the very norms and values within its own member states that it seeks to externally transfer. This paper traces the evolution of the EU's external and internal governance transfer. While the external dimension is institutionally still better developed, regional integration by law provides the EU with effective policies and instruments to protect its fundamental values in the member states.

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1. Introduction

The European Union (EU) is a 'governance exporter' par excellence. The successful top-down Europeanization of member states and attempts at external governance transfer towards third countries has earned the EU the name of a 'transformative,' 'civilian,' or 'normative' power (cf. Börzel and Risse 2009). With the Treaty of Lisbon (2009), the EU has a comprehensive framework at its disposal to shape the governance institutions of its member states as well as in accession, neighbouring and third countries. Yet, external and internal policies and practices have evolved differently over time. Unlike other regional organizations, which almost exclusively focus on shaping the governance institutions of their member states, the EU employs its external relations to support domestic reforms towards political liberalization and democratization of (semi-)authoritarian regimes as well as the consolidation of democracy in countries that successfully underwent transition. When it comes to protecting and promoting democracy, human rights, the rule of law, and good governance in its member states, the EU has been less active. Article 7 provides a formidable safe-guard against breaches of fundamental values upon which the EU is based, and the risk thereof, in the member states. Yet, the EU has refrained from using this instrument of internal governance transfer to sanction the extradition of Roma by France or the attempts of Hungary and Romania to undermine democratic freedoms and the rule of law. Instead, the European Commission has resorted to the infringement proceedings of Art. 258 TEU as well as the Control and Verification Mechanism, which both were not designed to respond to serious breaches of democratic standards and human rights.

Article 7 TEU is a rather weak instrument of internal governance transfer compared to other regional organizations that have a much weaker democratic membership base. As a 'club of democracies', the EU did not see the need for internal governance transfer for the longest time. It was the prospect of Eastern enlargement that made the member states adopt Article 7 in the Amsterdam Treaty to keep domestic changes locked-in in post-communist countries after their accession to the EU, which would mean the end of membership conditionality. While Article 7 follows the standard model of a democracy clause adopted by other regional organizations, such as the Council of Europe, the Organization of American States (OAS), Mercosur, or the West African Economic Community (ECOWAS), the institutional design renders its use as an instrument of democracy protection cumbersome.

The first part of the paper provides an overview of the EU's governance transfer and how it has evolved over time. We will show that the EU has developed a comprehensive and elaborate set of standards, policies and instrument to transfer governance institutions to countries that are not members (yet). Its internal governance transfer has not only lagged by 10 years; compared to other regional organizations, the EU has chosen a rather weak institutional design for the democracy clause introduced in 1997 as its core instrument. The second part of the paper will argue that the instalment of Article 7 followed a functional demand for safeguarding the 'community of values' by locking-in domestic changes in the post-communist countries that were to join in 2004 and 2007, respectively. Despite several developments in Hungary and Romania that have triggered discussion about Article 7, it has not been invoked so far. We discuss to what extent institutional design, institutional self-interest and party politics can account for the non-application of Article 7. The paper concludes with an overall assessment of the EU's external and internal governance transfer. While the external

dimension is institutionally still better developed, regional integration by law provides the EU with effective policies and instruments to protect its fundamental values in the member states.

2. EU Governance Transfer: (External) Democracy Promotion and (Internal) Democracy Protection

In order to map and compare the activities of the EU in shaping the governance institutions of member and non-member states, the paper applies an analytical framework we have developed in research project on the governance transfer by regional organizations (Börzel et al. 2013; Börzel et al. 2011).[1]

We speak of governance transfer if the EU explicitly prescribes and/or intentionally and actively promotes the building and modification of governance institutions in member states or third countries. In line with the SFB 700 (Risse 2011), we understand governance institutions as norms, rules, and procedures that are the basis for the provision of collective goods and collectively binding rules (*what*), defining the *who* (governance actors – state and non-state), *how* (modes of social coordination – hierarchical and non-hierarchical), and *for whom* (governance collective) of governance Beisheim et al. 2011. By prescribing and promoting standards for governance institutions, the EU defines what governance should look like at the national level to be legitimate. Next to human rights, the rule of law, and good governance, the EU puts a major emphasis on democracy as a standard for legitimate governance institutions (Börzel and Risse 2009; van Hüllen and Stahn 2009).

In investigating the framework for governance transfer by regional organizations, we consider both the mere prescription of standards and provisions for their active promotion and protection. Provisions for governance transfer can be integrated into the founding treaties of a regional organization, political declarations, or secondary legislation at the regional level. In addition, we analyze the adoption and implementation of actual measures by regional actors, both regarding the application of instruments and other, ad-hoc initiatives. We describe governance transfer in terms of actors involved (standard-setter vs. addressee; promoter vs. target), the standards set and promoted (content; objectives), and the instruments and underlying mechanisms of influence: litigation and military force (coercion), political and economic, material and immaterial sanctions and rewards (incentives), fora for dialogue and exchange (persuasion, learning, and/or socialization), and technical and financial assistance (capacity-building). Figure 1 summarizes our analytical framework.

[1] This paper is derived from the research project "B2 Governance Transfer by Regional Organizations", which is part of the collaborative research center SFB 700 "Governance in Areas of Limited Statehood", funded by the Deutsche Forschungsgemeinschaft (DFG, German Research Foundation). We would like to thank Sebastian Krapohl and the participants of the panel "The Transformative Power of Regions? Governance Export and Regional Organizations" at the ECPR General Conference of 2011 held in Reykjavik, August 2011. We are also grateful to Sven Hilgers, Lea Spörcke, Sören Stapel, and Wiebke Wemheuer for their most valuable research assistance.

Figure 1: Analytical framework for mapping the governance transfer by the EU in the field of democracy

	internal	external		
	member states (MS)	accession candidates	neighbourhood countries	'the rest'
prescription of **standards**				
policy for protection & promotion - objectives - actors - **instruments** – mechanisms ○ coercion – military intervention, litigation ○ incentives – conditionality: sanctions & rewards ○ capacity-building – assistance ○ socialization, learning, persuasion – dialogue & exchange				

The remainder of this section will use the analytical framework to map the EU's governance transfer in member and non-member states exploring how the internal and external dimensions have been entangled. We will show that while the EU has developed policies for promoting democracy and human rights in its member states, its activities emerged as side-products of the integration process rather than the explicit prescription of own standards linked to specific policies and instruments for their promotion. The EU has developed a far more comprehensive toolbox for external governance. It evolved with its attempts to shape the governance institutions of developing countries in the late 1990s, and was subsequently applied to accession candidates and neighbourhood countries. Only 10 years later, the EU started to systematically engage in internal governance transfer.

A Community of Values

From its very beginnings, the EU has been a 'community of values' of Western European democracies. The founding treaties of the 1950s did not include any reference to democracy, human rights, or the rule of law. However, the so called "Birkelbach Report" (Birkelbach 1961) confirmed already in the early 1960s that membership in and accession to the three European Communities was inextricably linked to the values shared by (potential) member states, including democracy and human rights. Next to monitoring the conformity of national policies with EU primary and secondary law, the European Court of Justice (ECJ) has since the late 1960s protected the respect of human rights and fundamental freedoms in the implementation of Community legislation (Bogdandy 2000: 1320; Heidbreder and Carrasco 2003: 6; Merlingen et al. 2000: 4). Before the Charter of Fundamental Rights, which only entered in force in 2009 , the ECJ referred to the "legal heritage of the Community" formed by principles common to all member states (Alston and Weiler 1998: 665). The ECJ thereby permitted individuals to challenge the EU legal acts on the basis that they violated their human rights (ibid.: 709). However, in the absence of general jurisdiction, many deemed the ECJ's human rights protection inadequate (Sadurski 2010: 419; Bogdandy 2000: 1320).

Beside the ECJ, the EU made efforts at establishing an anti-discrimination policy. Using "specific legal bases to be found in the Treaty, where human rights and the objectives of creating a common or single market happen to coincide" (Alston and Weiler 1998: 666), the EU sought to advance issues

such as gender equality, e.g. reflected in the 1976 Equal Treatment Directive (Bogdandy 2000: 1314; Alston and Weiler 1998: 717).[2]

Judicial protection of human rights and their promotion through EU secondary law could be considered as some first inceptions of internal governance transfer. However, they emerged as side-products of economic integration rather than the intentional efforts of the EU to shape the governance institutions of its member states. Moreover, these efforts focussed on anti-discrimination policies as a particular area of human rights that could be linked to market freedoms (employment) and had, in case of gender equality, its origins in Article 119 of the Treaty of Rome (equal pay).

Constitutionalizing Governance Transfer

The accession of Greece, Portugal and Spain in the 1980s had raised concerns among the member states about safe-guarding and strengthening democratic reforms to lock-in their recent transitions. While the Treaties remained unchanged, the European Council issued a "Declaration on Democracy" in April 1978 stating that "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership" (EC Bulletin 3/1978: 6). The declaration could be invoked by the member states to counteract breaches of democracy after accession (Wallace 1996).

In 1986, the member states made their first constitutional commitment to governance transfer. The preamble to the Single European Act (SEA, 1986/1987) obliges the member states (not the EU!) to "promote democracy" (3rd paragraph) internally and to "display the principles of democracy and compliance with the law and with human rights" (5th paragraph) externally to contribute to international peace. Yet, this commitment at first did not translate into specific policies and instruments.

This changed with the Maastricht Treaty (1992/1993), which integrated external governance transfer into the EU's legal basis as part of its new external policies. The objective "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms" was introduced in the newly created policies of the Common Foreign and Security Policy (CFSP) (TEU, Article J.1, now 11.1) and Development Cooperation (TEC, Article 130u.2, now 177.2).

From Development Cooperation...

The EU's external governance transfer started out in its development cooperation policy with the so called 'essential element clause'. It allows for the suspension of an agreement or treaty if one of the two parties acts against democracy or other essential principles that shall guide the external relations of the EU. The 'essential element clause' was first introduced into the fourth Lomé agreement with the African, Caribbean, and Pacific (ACP) countries in 1989, which marked the beginning of both economic and political conditionality in EU development policy (cf. Börzel and Risse 2009). It then 'travelled' to bilateral cooperation and association agreements with other countries (Horng 2003). The wording of the clause was standardised and its inclusion in new agreements with third countries and regional groupings became mandatory in 1995 (European Commission 1995; Council of the EU

[2] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 039, 14.02.1976, p. 40-42

1995).[3] Next to (negative) democratic conditionality, political dialogue explicitly builds on this clause (Bartels 2004).

The EU invoked the suspension clause several times in the 1990s, e.g. against Nigeria, Rwanda, Burundi, Niger, and Sierra Leone (Holland 2002: 134). Yet, in case of the Mediterranean countries, the EU has refrained from using negative conditionality although both its regional cooperation programme Mediterranean Development Assistance (MEDA) and the bilateral Euro-Mediterranean Association Agreements (EMAA) contain suspension clauses (Van Hüllen 2012). The same is true for the EU's relations with its Eastern neighbours (see below).

Its reluctance to protect democracy by sanctioning undemocratic changes to the status quo and serious human rights violations might be related to its concern about the legitimacy of its external democracy promotion and protection efforts, particularly vis-à-vis developing countries, many of which (the ACP) are former colonies of EU member states. The 1991 Resolution on Human Rights, Democracy and Development clearly underlined that "a positive and constructive approach should receive priority", focussing on such instruments as political dialogue (persuasion), financial assistance (capacity-building) and positive conditionality (incentives), and only secondarily drawing on negative conditionality tied to contractual relations.

The foundations for the EU's external governance transfer were laid in the field of development cooperation. It received its biggest boost, however, in 1993 when the EU member states decided to offer the post-communist countries of Central and Eastern Europe a membership perspective.

... to Eastern Enlargement and the European Neighbourhood

The EU's enlargement policy used the external governance transfer developed in the EU's cooperation agreements with the ACP and Mediterranean countries. It adapted them to the situation in Central Eastern Europe, where the main challenge for the EU was to foster democratic consolidation rather than induce political liberalization and democratization in authoritarian regimes. Most importantly, the EU's enlargement policy strengthened the essential element clause as an instrument of positive conditionality, rewarding compliance with human rights, democracy and the rule of law (political Copenhagen Criteria) with the opening of accession negotiations and ultimately membership (cf. Cremona 2003; Kochenov 2004). The Europe Agreements, which provided the framework for the applicant countries' integration into the EU, made accession conditional upon *ex-ante* compliance with the Copenhagen criteria (i.e., positive conditionality). Suspension clauses (negative conditionality) were only introduced by the so-called Accession Partnerships in 1998, which defined specific priorities in the accession process agreed upon between the Commission and the candidate country, making financial aid conditional upon compliance with democratic principles, human rights, the rule of law, and market economy. Failure to respect these general conditions could lead to a decision by the Council on the suspension of pre-accession financial assistance. Likewise, the EU could postpone the opening of accession negotiations or delay the opening of new and the closure of opened chapters if candidate countries refused to comply, as the EU did in case of Slovakia in 1997 helping to prevent an authoritarian backlash by nationalist forces (cf. Henderson 1999).

[3] "Respect for the democratic principles and fundamental human rights (...) inspires the domestic and external policies of the Community and of [the country or group of countries concerned] and constitutes an essential element of this agreement." (European Commission 1995: 9)

Yet, with a few (successful) exceptions, negative conditionality was hardly invoked. As in its relations with developing countries, the EU's enlargement policy complemented accession conditionality with financial and technical assistance to help candidate countries comply with the Copenhagen criteria. (Bailey and de Propris 2004; Maresceau 2003: 12-13).

Given the perceived success of Eastern enlargement in external governance transfer to the CEE countries, the EU's pre-accession strategy for the current candidate countries in the Western Balkans closely follows the CEE trajectory combining financial incentives with trade concessions in the shadow of (positive) membership conditionality (Friis and Murphy 2000; Magen 2006: 513-516; Elbasani 2013).

Finally, external governance transfer has been a key component in the EU's approach to turn its new neighbours to the East into an area of security, stability, and prosperity (Börzel et al. 2008). The European Neighbourhood Policy uses the same policies and instruments that proved so successful in the CEE accession countries, although with a much lower intensity and one major exception (Kelley 2006; Magen 2006). The ENP was built as an alternative to membership as a result of which the EU lacks its most important instrument for both democracy promotion and protection: accession and membership conditionality.

In sum, since the 1990s, the EU has sought to actively transfer norms, rules, and procedures of democracy, human rights, the rule of law, and good governance to states in its immediate neighbourhood and beyond. It thereby heavily relies on political dialogue, assistance and positive conditionality to reward and support domestic reforms towards political liberalization and democratization of (semi-)authoritarian regimes as well as the consolidation of democracy in countries that successfully underwent transition. Negative conditionality is largely confined to democracy protection sanctioning authoritarian backlash.

The various policies and instruments developed through an incremental process of "learning by doing" rather than a great master plan. They initially emerged in the development cooperation of the EU with the so called ACP countries, then "travelled" to the Eastern enlargement process and to the European Neighbourhood Countries (Börzel et al. 2007). As we will see in the next section, they finally also spilled over into the domestic politics of the EU.

Locking-In External Governance Transfer: The Emergence of Internal Governance Transfer

As we have seen in the previous section, the EU has developed anti-discrimination policies, which were protected and promoted through legal coercion exercised by the ECJ. Yet, the EU did not set its own governance standards. Instead, it referred to the legal heritage of its member states and the Conventions of the Council of Europe. Nor did the EU develop specific policies and instruments to shape the governance institutions of its member states.

Only the Treaty of Amsterdam (1997) finally created a general legal basis for the Community to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" (art. 13 TEC, now art. 19 TFEU). Shortly before, the European Monitoring Centre on Racism and Xenophobia (EUMC) was founded in 1997, reflecting the EU's

growing ambitions of a human rights policy based on the principle of anti-discrimination.[4] Beyond the creation of the EUMC as an independent monitoring agency, the Race Directive and the Employment Directive of 2000 (Heidbreder and Carrasco 2003: 9-10) as well as a second Equal Treatment Directive of 2004 directly go back to this innovation, making the protection of fundamental rights part of EU legislation/jurisdiction.[5] In this field of action, the EU has even engaged in active promotion through a Community programmes to combat discrimination (2001-2006) and for employment and social solidarity (PROGRESS, 2007-2013).[6]

The Amsterdam Treaty also codified a democracy clause to protect the values on which the EU was built upon. Article 7 of the revised TEU established a sanction mechanism in case member states failed to uphold/respect common principles such as democracy, human rights, and the rule of law (see below). While applicable to all member states, Article 7 was clearly part of the attempts of the Treaty of Amsterdam to address the need for institutional reforms to prepare the EU-15 for the accession of up to 12 new member states (see e.g. Mayhew 1998). A sanction mechanism was prominently proposed in December 1995 in the final report of a Reflection Group and discussed during the Intergovernmental Conference throughout 1996 (Sadurski 2010: 390). The need for a sanction clause was regularly justified with reference to the Eastern enlargement, suggesting that the EU should safeguard its democratic status quo in anticipation of the accession of new and potentially unstable democracies (Sadurski 2010: 391-396; Merlingen et al. 2000: 5; Dinan 2001: 37). These concerns were not only shared among politicians but also among scholars who maintained that "[w]ith enlargement, the Union will be importing a new set of unresolved minority issues as well as additional human rights challenges, whose solutions will test the strength of many Community policies" (Alston and Weiler 1998: 672).

The prevention mechanism added to Article 7 TEU by the Treaty of Nice (2001) was a response to an internal rather than external event. After the Austrian general elections of 1999, Wolfgang Schüssel of the Austrian People's Party (Österreichische Volkspartei, ÖVP) formed a coalition government with the Austrian Freedom Party (Freiheitliche Partei Österreichs, FPÖ), a right-wing populist party whose politicians and especially its chairman Jörg Haider were known for racist and xenophobic statements/positions. European politicians warned against this step and even before the government was sworn in, a declaration of the EU Presidency on behalf of the other 14 member states threatened diplomatic sanctions. These unilateral sanctions were indeed applied in February 2000 and affected bilateral relations between Austria and the other EU member states, but not Austria's representation within the EU. Article 7 did not allow an EU response to the situation in Austria because the inclusion of the FPÖ in the government represented as such no "serious and persistent

[4] Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151, 10.6.1997, p. 1-7.

[5] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180 , 19/07/2000 P. 0022 – 0026
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303 , 02/12/2000 P. 0016 – 0022
Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37–43

[6] Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination (2001-2006), OJ L 303, 02.12.2000, p. 23-28
Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress, Official Journal L 315 , 15/11/2006 P. 0001 - 0008

breach" of the EU's fundamental principles. However, the wider public and the governments of the other EU member states felt the necessity to act upon their disapproval. It is controversial whether European governments were driven by a concern for the future of democracy and human rights, owing to a specific European sensitivity (Bogdandy 2000: 1318), or whether they were driven by the "self-interest of power-hungry politicians" (Merlingen et al. 2001: 61) in light of right-wing parties growing stronger in Western Europe.[7] No matter the underlying motivation, the harsh reaction has again to be understood in light of the by now ever more likely and ever closer Eastern enlargement:

> "The uncertainties about what level of populism, irrationality, or bigotry the new Member State may bring into the European Union, and the anxieties stemming from those uncertainties, may explain why it was actually useful for the E.U.-14 to focus on a particularly nasty example of a West European political leader, and castigate him relatively severely, to make a statement about the threshold of political commonality, and limits of diversity, in the enlarging Union." (Sadurski 2010: 405)

The sanctions were lifted in September 2000 on the basis of a report of "three wise men", appointed by the President of the European Court of Human Rights at the request of the EU Presidency, highlighting the domestic control over the respect of fundamental rights and democratic standards exercised by the Austrian constitutional court (Menéndez 2002: 483; Sadurski 2010: 405). The legality of the sanctions is highly controversial as is their impact. While they did not bring about a change in the democratically elected government, effectively removing the FPÖ from political power in Austria, they might have had a moderating influence on the FPÖ ministers and served as a warning signal to right-wing populist parties in other member states (Dinan 2001: 41). It is clear, however, that the incident directly resulted in the creation of the Nice prevention mechanism allowing the EU to act already upon a "clear risk of a serious breach", heading off an erosion of the EU's principals at an earlier stage (Sadurski 2010: 397; Bogdandy 2000: 1309; Merlingen et al. 2000: 483).

The Treaty of Nice also included the "Charter of Fundamental Rights", which, however, only took full legal effect with the entry into force of the Lisbon Treaty in December 2009. It remains to be seen to what extent the Charter of Fundamental Rights that only will provide a foundation for both the ECJ to sanction violations of human rights and democratic standards and preventive and or sanctioning action under article 7 (Sadurski 2010: 419; cf. Bogdandy 2000; Menéndez 2002).

Again, the major boost for the EU's internal governance transfer came from Eastern enlargement. When eight of the 10 CEE countries joined in 2004, the EU extended a pre-accession instrument inter alia used for external governance transfer to accession countries to the post-accession period turning assistance under PHARE and twinning (TAIEX) into instruments of internal governance transfer (Könige vá 2006: 13; Nikolova 2008: 94). The so-called "Transition Facility" was included in the acts of accession of 2003 (art. 34) and 2005 (art. 31). For the ten new member states of 2004, the Transition Facility encompassed appropriations for three years after accession, amounting to EUR 380 million in 2004-2006. By contrast, the Transition Facility for Bulgaria and Romania was limited to one year after accession, worth EUR 82 million. Allocations were made in chapter 22-03 of the EU's budget, which specified the Transition Facility's purpose as to "address the continued need for strengthening institutional capacity in certain areas through actions which cannot be financed by the Structural

[7] "Haiderism was not an isolated phenomenon in Western Europe at the time." (Sadurski 2010: 399), also Andreev 2009: 385.

Funds".[8] This included the area of "justice and home affairs (strengthening of the judicial system, external border controls, anti-corruption strategy, strengthening of law enforcement capacities)" (ibid.), which reflects an instrumental interest in strengthening the rule of law similar to the CVM. Implementation of projects continued after the periods indicated and the last payments were foreseen in the 2010 budget, chapter 22-03 not being included in the 2011 budget any more.[9] The European Commission only reports on the projects implemented with the ten new member states of 2004, whereas it is difficult to come by any information on the implementation of the Transition Facility in Bulgaria and Romania.[10] Apart from projects related to justice and home affairs, ranging from drug policies to customs control, the Transition Facility funded projects in any policy area such as agriculture, internal market, environment, social policy and environment. In addition, there were occasional projects that touched upon "political criteria", e.g. the situation of Roma in the Czech Republic in 2006, or civil society.

In the case of Bulgaria and Romania, whose accession had been postponed by three years for lack of sufficient progress particularly with regard to the rule of law and the fight against corruption, "[t]he introduction of post-accession benchmarks and the intensification of monitoring process represent the logical steps in the evolution of EU enlargement policy based on the lessons learnt from the previous experiences" (Gateva 2010: 21). Building on the safeguard clauses incorporated in the Act of Accession, the European Commission created a specific Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania (Gateva 2010: 6; Trauner 2009: 6).[11] The CVM establishes a 'rule of law' protection (and promotion) mechanism by setting a number of country-specific benchmarks and providing regular monitoring with bi-annual progress reports upon accession to the EU.

Just as the 2003 accession treaty, the 2005 Act of Accession included a number of safeguard clauses (Trauner 2009: 5).[12] Among them, the internal market (Article 37) and the justice and home affairs (Article 38) safeguard clauses allowed the adoption of 'appropriate measures' for up to three years after accession if there were shortcomings in the new member states. The CVM was an innovation in that it extends the EU's systematic monitoring and reporting system beyond the date of accession for a set of benchmarks that aim at the strengthening of an independent judiciary in order to fight

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8 Final adoption of the general budget of the European Union for the financial year 2007, OJ L 77, 16.3.2007, p. 1–1565, here 1214.

9 Definitive adoption of the European Union's general budget for the financial year 2010, OJ L 64, 12.3.2010, p. 1-1718, here 1220, and Definitive adoption of the European Union's general budget for the financial year 2011, OJ L 68, 15.3.2011, p. 1-1277.

10 European Commission, Enlargement, Financial Assistance – Transition Facility, http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/transition_facility_en.htm, last access August 12, 2011.

11 COMMISSION DECISION of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569) (2006/928/EC), OJ L 354, 14.12.2006, p. 56-57 and COMMISSION DECISION of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime (notified under document number C(2006) 6570) (2006/929/EC), OJ L 354, 14.12.2006, p. 58-59.

12 ACT concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ L 236, 23.9.2003, p. 33-49 and ACT concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded, OJ L 157, 21.6.2005, p. 203-220.

corruption and, in the case of Bulgaria, organized crime. The countries' performance in achieving these benchmarks has been monitored by the European Commission in bi-annual progress reports from June 2007 on.[13] The CVM is explicitly linked to the safeguard clauses of articles 37 and 38 of the Act of Accession and their possibility of sanctions. In addition, it foresees technical assistance and exchange of information in order to facilitate compliance.

Albeit geared towards a specific purpose – the fight against corruption and organized crime –, the CVM helps promote and protect an independent judiciary, one of the essential features of the rule of law. However, the overall slow progress made in Bulgaria and Romania in achieving the benchmarks casts doubt on the effectiveness of the CVM, in particular when considering the otherwise unexpectedly good compliance with EU law (Gateva 2010: 6, Trauner 2009: 11). During the three-year period following accession, the European Commission has only once applied sanctions under the CVM. Based on its second progress report in February 2008 and an ensuing fraud investigation by the European Anti-Fraud Office (OLAF), the Commission temporarily froze open payments under various pre-accession instruments, including ISPA, SAPARD, and PHARE (Trauner 2009: 9-10). While most of the funds were ultimately disbursed, the sanction is deemed as at least partially effective because "[t]he loss of EU funds marked a low in the EU-Bulgarian relations, which prompted Bulgaria to step up efforts to reform" (Trauner 2009: 10). While this might indicate the success of linking the safeguard clauses with an "improved approach towards establishing conditions and monitoring compliance" (Gateva 2010: 21), the EU has been left without this option of sanctions since 2010. There is the (remote) possibility that the European Commission continues to use the CVM conditionality on future funding under structural and agricultural funds (Markov 2010: 4). This does not attenuate the assessment that "the limited penalizing power of the *remedial and preventive sanctions* established in the framework of the CVM produces very weak negative incentive structure which diminishes the effectiveness of post-accession conditionality" (Gateva 2010: 21).

EU Governance Transfer: A Case Sui Generis?

The EU is not the only regional organization that engages in governance transfer. Regional organizations as diverse as the West African Economic Community (ASEAN), Mercosur, the Association of South East Asian Nations (ASEAN), and the Council of Europe (CoE) have developed increasingly detailed prescription of standards for human rights, the rule of law, the fight against corruption, and more recently also democracy. They have also established similar instruments to promote these standards for "good" governance, including the legal protection of human rights, democracy clauses, membership conditionality, election observation missions and election assistance (Börzel et al. 2013). The EU diverges from this general trend among major regional organizations in two important respects. First, the EU is unique in having developed a comprehensive toolbox of external governance transfer to non-members in the late 1980s. With the exception of Mercosur, other regional organizations seek to shape the governance institutions of their members. Only the EU uses its external relations to promote human rights, democracy, the rule of law, and the fight against corruption in countries that are not up for membership. Moreover, while references to democracy, human rights, and the rule of law as 'fundamental principles' or 'common values' have spread among regional organizations since the 1990s, few link them explicitly to preconditions for joining their

[13] European Commission, Secretariat General, Mechanism for Cooperation and Verification for Bulgaria and Romania, The reports on progress in Bulgaria and Romania, http://ec.europa.eu/dgs/secretariat_general/cvm/progress_reports_en.htm, last access August 12, 2011.

'club'.[14] The EU is the only organization with an extensive pre-accession policy that aims to promote and consolidate change in the governance institutions of prospective members.

Second, for the longest time the EU did not systematically engage in internal governance transfer. Unlike the Council of Europe, the Organization of American States, or the Organization of African Unity/African Union, the EU did not establish a regional human rights regime based on a human rights charter and judicially protected by a specific human rights court. When the ECJ established human rights as a fundamental principle of the European Communities in the 1960s, it referred explicitly to the European Convention of Human Rights (ECHR) as common legal heritage. All EU member states are also members of the Council of Europe and thus signatories of the ECHR. With an amendment of the ECHR (Protocol 14, 2010) and the Treaty of Lisbon, the EU's accession to the ECHR became not only possible but also obligatory (art. 6 TEU) and the European Commission and the Council of Europe have started talks in 2010.[15] The EU enacted a range of anti-discrimination policies, which have been protected and promoted through legal coercion by the ECJ. Yet, they emerged as side-products or functional spill-overs from economic integration rather than from the explicit prescription and active promotion of the building and modification of governance institutions in member states. Only in the late 1990s did the EU start to specify and prescribe standards and establish policies and instruments for their promotion and protection, including a democracy clause, which is to sanction breaches of human rights, democracy, and the rule of law. As we will see in the remainder of this paper, this safeguard is much broader in scope as compared to the democracy clauses of other regional organizations. Yet, its institutional design is also weaker and can be hardly considered 'user-friendly'.

3. Article 7: Too Little, too Late?

Next to election observation and assistance, democracy clauses are relatively common instruments used by regional organizations for internal governance transfer. As "multilateral mechanisms for protecting and defending democracy when it is unconstitutionally interrupted or threatened by autocratic rulers" (Piccone 2004: 8), they serve as an enforcement mechanism for a joint commitment to certain norms, foreseeing some form of sanction in the event of non-compliance.

The EU is not the first regional organization to include a democracy clause in its treaties. Yet, its design seems to be unique in two regards: broader scope but weaker institutional design. First, the scope of the commitment made in Article 2 TEU (ex Article 6.1 TEU) that is subject to the enforcement mechanism of Article 7 is much broader than in most other regional organizations, which focus on the threat of coups d'état and massive human rights violations. Since the Treaty of Amsterdam (1997/1999), the EU can adopt sanctions against member states in the case of a "serious and persistent breach" (Article 7.1 TEU Amsterdam, Article 7.2 TEU Nice and Lisbon) of the EU's founding "principles of liberty, democracy, respect for human rights and fundamental freedoms, and

[14] The Council of Europe is the only regional organization that has a similar clause as the EU – predating the EU's Treaty of Amsterdam by almost 50 years. Nevertheless, in contrast to the EU, "the Council of Europe's approach is not based on strict conditionality and effective gatekeeping, but on post-membership socialization" (Dimitrova and Pridham 2004: 99).

[15] Council of Europe: EU accession to the European Convention on Human Rights, http://www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention, last access August 12, 2011.

the rule of law" (Article 6.1 TEU Amsterdam and Nice).[16] The Council of Europe included a similar clause already in its founding treaty in 1949. However, sanctions are limited to the "serious violation" (Article 8, Treaty of London) of "the principles of the rule of law and of (...) human rights and fundamental freedoms" (Article 3, Treaty of London).[17] By comparison, the enforcement mechanisms of regional organizations in the Americas and Africa build on "a strong anti-coup norm" Legler and Tieku 2010. The OAS' Washington Protocol (1992) focuses on the overthrow of a "democratically constituted government" (Article 9, OAS Charter). Similarly, South American regional organizations such as Mercosur (Ushuaia Protocol, 1998) and the Andean Community (Additional Protocol, 2000) modified their treaties to protect member states against disruptions of the democratic order. The African Union institutionalized mechanisms to sanction unconstitutional changes of (democratically elected) governments in 2000 (Constitutive Act, Lomé Declaration). Sub-regional organizations like ECOWAS and SADC placed their democracy clauses in the context of their conflict prevention policies. The respective protocols adopted in 2001 sanction any situation that might put regional security at risk, including coups d'état and massive human rights violations. The EU, like other regional organizations, added a preventive mechanism that would allow dealing with the 'risk' of non-compliance with its founding principles, adding a preventive dimension to the enforcement mechanism (see above).

Second, while the scope of Article 7 is very broad, its focus on the potential suspension of membership rights is very much in line with the sanctions envisaged by many other regional organizations: the suspension of membership rights based on (mostly) intergovernmental decisions. Yet, unlike in some of the other regional organizations, the negative conditionality of Article 7 neither allows for harder sanctions, such as full exclusion (CoE), nor military coercion (ECOWAS, SADC). Moreover, the degree of legalization is relatively low (Abbott et al. 2000). While legally binding and with procedures clearly defined, the standards are rather imprecise. There is neither a definition nor an operationalization of the values specified in Article 2 TEU, their breach, or the risk thereof. The criteria for the application of Article 7 are, hence, open to political interpretation. This seems all the more problematic, since monitoring and enforcement have not been delegated to the European Commission or the ECJ but are left to the member states and the European Parliament. In contrast to regional organizations, such as the Council of Europe or the Organization of American states, the EU lacks a systematic monitoring mechanism, and judicial protection has only slowly developed. Enforcement is further weakened by majority requirements. Most regional organizations require a unanimous decision on applying their democracy clause by their highest intergovernmental decision-making body, bringing together all member states (minus one) at the level of heads of state or government (Börzel et al. 2013). ECOWAS is probably the only regional organization that delegates decisions on sanctions and military interventions to a special body, the Mediation and Security Council (MSC) created in 1999 (Hartmann 2012). The MSC is composed of representatives of nine out of SADC's 15 member states and takes decisions with a two-thirds majority vote. On behalf of the SADC Authority, it implements "the Mechanism", including the democracy clause, which means that six heads of state or government are enough to decide on enforcement measures. In the EU, by contrast, the decision on applying Article 7 is not left to the member states alone but requires also

[16] The Lisbon Treaty changed the text into "values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" (Article 2 TEU Lisbon).

[17] In its Communication on article 7, the European Commission explicitly refers back to this clause (European Commission 2003: 6).

the consent of European Parliament, making it necessary to obtain two majorities. Any decision on a 'risk' or a 'breach' has to be supported by a two-thirds majority vote of the European Parliament in addition to agreement among four fifths of the EU's member states (minus one) in the Council or a unanimous decision (minus one) of European Council respectively.

The dog that has not barked

With Article 7, the EU has developed a formidable instrument not for promoting but for protecting the governance institutions of its members. Interestingly, it has not been invoked as yet, notwithstanding several incidences in new as well as old member states that caused public concern and could have triggered at least the preventive mechanism of Article 7.

In 2009 and 2010, developments in Italy and France caused public debates on whether these governments respected fundamental rights – the freedom of the press in the case of the Berlusconi government (new laws) and non-discrimination of Roma in the case of the Sarkozy government (expulsion). In the Italian case, the EP discussed the idea of an EU directive on the freedom of the press rather than Article 7, but the Commission declined to take any action at the European level as long as national institutions were in place to deal with conflicts of fundamental rights. In the French case, Commissioner Reding initially voiced her criticism in terms of fundamental rights, but after an éclat with the French government, focused on French (non-)compliance with the Free Movement Directive. It sent a letter of formal notice, but a final ultimatum allowed France to avoid further infringement proceedings. The EP adopted a resolution with the votes of the left, greens, and liberals that condemned the expulsion on grounds of the EU's Fundamental Rights Charter and EU anti-discrimination and free movement directives, but not referring to Article 7.

In Hungary in 2010 and 2011, the adoption of a new media law and various constitutional reforms raised even more serious concerns about the respect of the EU's founding principles. So did the power struggle between Prime Minister Ponta and President Basecu in Romania in 2012. The EP discussed Article 7 on various occasions, but any resolution adopted was only supported by either of the two main camps: the socialists (together with the greens and liberals) in the case of the Hungarian constitutional reforms, and the conservatives in the case of Romania. The Commission, in turn, resorted to alternative means in all cases and ruled out Article 7 as a 'nuclear option'. It brought legal action under the infringement proceedings of Article 258 TEU against Hungary in 2012 for violating the Equal Treatment Directive (Directive 2000/78/EC) and the Data Protection Directive (Directive 95/46/EC). The ECJ ruled against Hungary concerning the reform of the judiciary in November 2012 striking it down for age discrimination; the ruling on data protection is still pending. It also started an infringement proceeding against the reform of the central bank at the same time with the other two, but withdrew the case as the Hungarian government quickly relented. The Commission, together with the International Monetary Fund, had exerted additional pressure by making accession to the Schengen area conditional upon the status of the central bank. Regarding the new media law, the Commission lacked a legal basis for an infringement procedure – as it was the case for Italy. It only suggested amendments that were indeed adopted by the Hungarian government before the Hungarian constitutional court ruled that the media law as such was unconstitutional. Finally, the Commission dealt with the situation in Romania in the framework of the CVM. In its regular report in July 2012, it criticized the government for systematically violating the rule of law – one of the EU's founding norms protected by Article 7. Instead of referring to the democracy clause, however, the Commission issued eleven recommendations on the rule of law and

the reform of the judiciary that should be further monitored through the CVM. On the basis of the following report in 2013 that was still critical but acknowledged some improvements, the Commission decided to extend the monitoring process twice a year for Romania beyond the five year period foreseen by the CVM. By contrast, monitoring of Bulgaria's performance only continues on a yearly basis. It also linked Romania's access to the Schengen area and the Euro zone to respect for the rule of law.

The most recent and, arguably, the most serious challenge to the values protected by Article 7 is the forth constitutional reform the Hungarian prime minister, Victor Orban, had the Hungarian parliament adopt in March 2013. The changes circumscribe the powers of the Constitutional Court and the freedom of the media, particularly with regard to electoral competition. For the first time, not only the (socialist) President of the EP, Martin Schulz, but also Commissioner Reding called for invoking Article 7. The European Council, by contrast, which took place right after the adoption of the constitutional reform in Hungary, did not issue any statement.

In sum, the application of Article 7 has never been seriously considered in the Council or the Commission. If at all, the two institutions used it as an implicit threat indicating that all the options were on the table. Only the EP has continuously debated Article 7 without forming a cross-party majority that would be necessary for its activation.

Why the dog has not barked

The non-application of Article 7 could be explained by three different factors: institutional design, institutional self-interest or party politics.

One could argue that the majority requirements in both Council and Parliament constitute an almost insurmountable institutional hurdle. Moreover, the lack of sufficiently precise criteria of what constitutes a serious breach of liberal democratic values leaves ample room for political interpretation, which adds a further obstacle to building the required majorities. Such an institutional design would reflect the member states' intention of using Article 7 as a means of last resort. After all, the member states did not back up Article 7 by any monitoring mechanism. The Commission had in 2002 created an EU Network of Independent Experts on Fundamental Rights (European Commission 2003: 9; Sadurski 2010: 417). The member states replaced this network by the newly created Fundamental Rights Agency, the successor to EUMC, in 2007. However, FRA has no mandate to monitor compliance under Article 7. Nor did the member states link Article 7 to the EU's human rights policies based on the principle of anti-discrimination and the Fundamental Rights Charter (Sadurski 2010: 395).

While the institutional design of Article 7 as the nuclear option goes at least against the preventive dimension of Article 7, the Commission has fostered such a restrictive interpretation by using alternative instruments to respond to situations that raised concerns regarding member state (potential) violations of the EU's fundamental values. The use of infringement proceedings, CVM, issue-linkage and other instruments at the Commission's disposal is not only a way of circumventing party politics blocking majorities in Council and EP. It also corresponds to the Commission's institutional self-interest and self-understanding as the guardian of the treaties. Framing issues in terms of non-conformity of national policies with EU Law is also in line with its strategy, together with the ECJ, to invoke EU legislation aimed at the creation of the Single European Market to protect and promote human rights.

Interestingly, the institutional self-understanding of the EP as the advocate of human rights and democracy (Sadurski 2010) as well as its institutional self-interest in flexing new powers to strengthen its position in EU decision-making has not prevented the MEPs from engaging in petty party politics. Somewhat unexpectedly, the assessment of the situation in the member states causing concern by the two party families seems to be informed by the party affiliation of the incumbent government rather than the common interest in protecting liberal democracy and trying out the EP's new powers.

In sum, Article 7 is the only treaty provision that allows the EU to engage in internal governance transfer beyond the scope of Community legislation. Yet, Instead of activating the potential of this broad mandate, the EU continues to rely on its much older approach of ensuring the respect of fundamental rights in the implementation of European policies and developing a narrower human rights policy based on the principle of anti-discrimination.

4. Conclusion

The EU is unique in actively engaging in external governance transfer. Unlike other regional organizations, it focused on shaping the governance institutions of third countries and accession candidates rather than member states. Only with its 'big bang Eastern Enlargement', the EU has turned the patchwork of individual Community policies and the judicial protection of the fundamental rights of its 'market citizens' into a more comprehensive approach of internal governance transfer aimed at locking-in democratic standards in new but eventually also in old member states. Next to the post-accession instruments based on conditionality and assistance, the EU has strengthened the constitutionalization of the very principles it has sought to protect and promote externally; its new anti-discrimination legislation and the Charter of Fundamental Rights do not only bind EU institutions but also the member states when they apply and enforce EU Law. Moreover, Article 7 and FRA provide sanctioning and monitoring mechanisms that equally apply to old and new member states. While these policies and instruments certainly provide a basis for internal governance transfer, they focus on human rights and the rule of law rather than democratic standards. Moreover, the (old) member states have been reluctant to even allow for an effective monitoring of compliance with the principles enshrined in Article 2 and protected by Article 7. There are no instruments in place that would match the toolbox the EU has developed in its external democracy promotion and protection frameworks. As a result, the internal dimension has largely remained confined to the protection of democratic and human rights as it had evolved through a 'spill-over' effect of Community legislation aimed at creating the Single European Market as we could observe it in the fields of environmental and social regulation or Justice and Home Affairs (Börzel 2006). Not surprisingly, the EU member states have been criticized for using double standards, being "very willing to police human rights and democracy in their eastern backyard – but less interested in having European institutions nosing about in their own affairs" (Sadurski 2010: 395; cf. Heidbreder and Carrasco 2003: 16; Albi 2009; Johns 2003).

While being a pace-setter in external governance transfer, the EU's attempts to shape the governance institutions of its member states appear to have been lagging behind. This should not be too surprising since the EU has always been a community of democracies. Democracy has always been a condition for joining the EU. The Europeanization of domestic structures by adopting the

acquis communautaire and integrating into the Single European Market was considered sufficient to make the new member states converge to the governance standards of the old ones (Whitehead 1996). The EU's approach to internal governance transfer only changed with Eastern enlargement, when the EU took on 10 new democracies in Central and Eastern Europe. Not least due to the rise of right-wing populist parties in the EU 15, the mechanisms the EU had primarily installed to safe-guard democratization in the new member states spilled-over making all member states equally subject to democracy protection and promotion policies. Yet, member state government have been very reluctant to accept the control of the EU over their democratic institutions. As a result, the EU's attempts at internal governance transfer still appear modest and remain driven by the European Commission and the European Court of Justice seeking to protect the human rights of EU citizens through individual Community Policies. Yet, despite the resistance of the member states against the implementation of a comprehensive approach that would mirror its external governance transfer, the EU is no real laggard when compared to other regional organizations. Overall, its internal policies and instruments are still more developed.

5. Annex

Treaty on European Union (TEU, 2009)

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 7 (ex Article 7 TEU)

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining 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, after inviting the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.
4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.
5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Article 21

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.
2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (…)
   (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (…)

Article 49 (ex Article 49 TEU)

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and

the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Treaty on the Functioning of the European Union (TFEU, 2009)

Article 19 (ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

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