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Reflexive Governance in the EU Enlargement Process*

Zusammenfassung

Dieser Beitrag geht der Frage nach, wie die Einhaltung von Normen und Politiken, die im Zuge des EU Erweiterungsprozesses angenommen werden, verbessert werden kann. Das EU Antidiskriminierungsregime dient dabei als Politikfeld, anhand dessen exemplarisch die Anwendbarkeit der hier angestellten theoretischen Überlegungen diskutiert wird. Vorangegangene Studien haben gezeigt, dass Kandidatenländer und neue Mitgliedsstaaten EU Recht relativ effektiv umsetzen aber große Probleme bei der Anwendung haben. Dieser Beitrag bietet eine Übersicht über Erklärungsmodelle für die Übernahme von Normen aus der Europäisierungsliteratur, der Literatur zum Politiktransfer und der Politikdiffusion sowie über die Bedingungen, die von diesen Literaturströmungen für einen erfolgreichen Transfer von Normen und Ideen ausgemacht wurden. Er stimmt mit ihnen darin überein, dass das „external incentives" Modell, mit seiner Strategie der Bestärkung durch Belohnung, wahrscheinlich am besten die Wahrscheinlichkeit der Normenübernahme erklärt. Wenn das letztendliche Ziel aber sein soll, dass die übernommenen Normen auch tatsächlich angewendet werden, geht dieser Beitrag davon aus, dass Ansätze, die auf Lernen basieren, im Erweiterungsprozess verstärkt werden müssen. Zu diesem Zweck werden unterschiedliche Ansätze von reflexiver Governance vorgestellt und behauptet, dass diese Ideen liefern, die noch näher untersucht werden sollten, um ihr Potential bei der Verbesserung der Performance im EU Erweiterungsprozess festzustellen.

Résumé

Cet article est régi par la question de savoir comment améliorer les normes et politiques adoptées dans le cadre de l'élargissement de l'UE. Le régime de non-discrimination de l'UE sert de domaine politique pour illustrer l'applicabilité des considérations théoriques exposées. En réalité, des recherches précédemment réalisées dans ce domaine ont démontré que les pays candidats et les nouveaux États membres parviennent assez bien à transposer la législation européenne mais rencontrent d'énormes problèmes dans la phase de mise en œuvre et d'application. L'article passe en revue les modèles explicatifs d'adoption des lois de l'européanisation, la littérature sur la diffusion et le transfert des politiques et les conditions identifiées comme étant nécessaires au succès du transfert des normes et des idées. Il soutient que le modèle d'incitations externes, utilisant une stratégie de renforcement positif, pourrait mieux expliquer la probabilité d'adoption des

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lois mais si l'objectif final est la mise en œuvre et l'application des lois, des approches fondées sur l'apprentissage doivent être renforcées dans le processus d'élargissement. Différentes approches concernant la gouvernance réflexive sont présentées, affirmant qu'elles offrent des idées qui méritent d'être étudiées plus en détails afin d'établir leur potentiel dans l'amélioration de la performance du processus d'élargissement de l'UE.

I. Introduction

The general theme of this issue, "translating law" can be approached from various angles. The one chosen for this contribution is a figurative one, looking at the "translation" of EU law (in particular the anti-discrimination *acquis*) into national law and practice in candidate countries in the process of European enlargement. In other words, it deals with the transposition, application and enforcement of the EU *acquis*. It does so by combining approaches and concepts of political science, legal philosophy and governance studies trying to "translate" them for a reader with a legal background.

Political science literature on Europeanisation, policy transfer and diffusion is highly relevant in explaining why candidate countries adopt the EU *acquis*. These fields of study provide explanatory models for rule adoption and specify the conditions which have to be present in order for these models to be successful. The focus is thus on the transposition phase. The newest strand of Europeanisation literature looks at the performance of new member states a couple of years into their membership. This research has shown that new member states continue to be quite effective in transposing EU law. However, when it comes to application and enforcement they have huge problems resulting in an enormous gap between the at times very advanced legislation and the practice. "Translation" has only partly been successful.

I argue that the external incentives model, using a strategy of reinforcement by reward might best explain the likelihood of rule adoption but if the ultimate goal is that rules are applied and enforced, learning-based approaches have to be strengthened in the enlargement process. In this contribution I present different approaches to reflexive governance arguing that they offer ideas for how the performance in the current enlargement process could be improved to come out from what has been called by *Falkner* et al. the "world of dead letters".

After introducing to the state of affairs (II), I will put the concept of reflexive governance in context with Europeanisation, policy transfer and diffusion literature to elaborate on the advances it makes vis-á-vis these studies (III.). I then work out the appropriateness of this concept in the enlargement process (IV.) and with regard to the EU anti-discrimination regime (V.). In my conclusions (VI.) I expose ideas for further research which could link the concept of reflexive governance to the one of norm contestation.

II. From External Incentives to Compliance. An Unfinished Road?

The enlargement round concluded by the accession of twelve countries to the EU in 2004 and 2007 was an enormous challenge for all actors involved. The fulfilment of the

Copenhagen criteria of 1993 meant amongst others that candidate countries had to proof their ability to implement the entire *acquis communautaire* allegedly consisting of over 80.000 pages of legislation already back in 2005.[1] The EU has developed various methods to support candidate countries in this endeavour, for instance through financial and technical assistance and by monitoring the progress of candidate countries.

1. Explanatory Models of Rule Adoption in Europeanisation Literature. The Transposition Phase

The domestic impact of the EU on its member states is regularly referred to as "Europeanisation". One strand of this literature has focused on studying this impact on candidate countries. The research on the Europeanisation of candidate countries and more recently of new member states has rapidly grown over the past fifteen years. The main research question guiding studies on the Europeanisation of candidate countries is "*under what conditions are the EU's attempts to influence candidate countries effective?*"[2] The questions asked are thus, whether the EU has any domestic impact and by which factors this impact can be explained. Lacking empirical evidence for the application and enforcement phase, the focus of the research on Europeanisation of candidate countries was initially on the transposition phase, the translation of EU law into domestic legislation.[3]

Different explanatory models for rule adoption in the pre-accession phase have been elaborated, most authoritatively for instance by *Schimmelfennig* and *Sedelmeier*.[4] Their elaboration of a theoretical framework of analysis is representative for most of the literature on the Europeanisation of candidate countries, which is situated within the debate between rational choice and constructivist/sociological neo-institutionalism in international relations and comparative politics.[5] *Schimmelfennig* and *Sedelmeier* distinguish between two dimensions. The first one asks whether the change is EU or domestically driven. The second considers the logic of action, which can be a logic of consequences, following thus a rational choice approach, or a logic of appropriateness of the constructivist approach. If a rule change is EU driven and follows a logic of consequences the explanatory model for rule adoption is labeled as the "*external incentives model*". If rule adoption is EU driven but follows the logic of appropriateness this results in "*social learning*" where the government concerned adopts EU rules if it is persuaded of its appropriateness. Finally, if there is domestic discontent about a status quo and the rule change is thus home driven, this results in both institutionalist variants in "*lesson-drawing*". When it derives from a logic of consequences, simple learning takes place (chan-

1 *Schimmelfennig/Sedelmeier* (eds.), The Europeanization of Central and Eastern Europe, 2005, 2.

2 *Sedelmeier*, Europeanisation in new member and candidate states, Living Reviews in European Governance, 6, 1/2011, 9.

3 In a review of literature on how EU policies are put into practice by its member states, *Treib* has found that literature has a strong focus on transposition while relatively little is known about enforcement and application. *Treib*, Implementing and complying with EU governance outputs, Living Reviews in European Governance, 9, 1/2014, 1.

4 *Schimmelfennig/Sedelmeier* (eds.), (Fn. 1), 8-25.

5 *Sedelmeier*, (Fn. 2), 7.

ging means, not the ends), whereas when it is based on a logic of appropriateness, complex learning takes place (modification of underlying goals). In borderline cases, according to *Schimmelfennig* and *Sedelmeier*, the external incentives model can explain the rule adoption, but the lesson-drawing model explains the choice of specific rules.[6]

This can be the case when the EU rule is quite flexible and allows for different ways of adapting to it. In the typology of modes of governance in the policy field, established by *Treib* et al., this would be the field of framework regulation, which remains within the realm of binding law (e.g. in the form of Directives) but offers states more leeway in implementation.[7] The EU non-discrimination Directives can serve as an example in this respect. For instance, the Directives call for the implementation of alternative dispute resolution processes without providing clear prescriptions of how these should look like. They also foresee the establishment of equality bodies without establishing binding rules on exact mandate, composition and functioning.

Most of Europeanisation literature seems to share the conclusion of *Schimmelfennig* and *Sedelmeier* that the external incentives model using conditionality as its main strategy and being based on a rationalist institutionalist approach is the dominant mechanism of the *European Union's* domestic impact. In fact, these studies have found that

> *"the main rationale for adopting the acquis was the benefits of full EU membership rather than the intrinsic benefits of EU models in the various policy areas."*[8]

For the purpose of this article, which prepares the ground for a larger research on the application and enforcement of the EU's non-discrimination *acquis* in the enlargement context, it is relevant to recall the main conditions under which the external incentives model deploys its effectiveness.[9] The most important precondition for the success of this model is the credibility of the reward, ie of EU membership. Credibility is important also in other respects. It is for instance relevant to look at whether a policy is consistently pushed forward by different EU institutions or whether there exist internal conflicts. Credibility is increased if the monitoring of a specific policy area is consistent and the legitimacy of the rule to be adopted is supported by parallel or additive conditionality stemming from other *International Organizations*. The most relevant aspect of credibility is, however, that the EU is willing *and* capable to pay the promised reward of membership. Connected to this sizable reward (also size influences effectiveness) is the speed at which it comes about: a very distant (or even moving further) perspective of being paid the reward can have a negative impact on rule adoption. And finally, the adoption costs are another decisive factor influencing the success of the external incentives model: adoption costs must not be prohibitively high or endanger the power base of governing elites.

6 *Schimmelfennig/Sedelmeier* (eds.), (Fn. 1), 21-22.
7 *Treib* et al., Modes of governance: towards a conceptual clarification, Journal of European Public Policy, 14, 1/2007, 1, 14-15.
8 *Sedelmeier*, (Fn. 2), 6-7.
9 For the following see *Schimmelfennig/Sedelmeier* (eds.), (Fn. 1), 12-17.

In terms of explanatory models for rule adoption, social learning and lesson-drawing are considered by this literature as complementary to the external incentives model.[10]

2. About Compliance in New Member States

By finding that the external incentives model best explains the likelihood of rule adoption the respective literature does not mean to claim that it is also the best to ensure application and enforcement. Rational cost-benefit calculations about accession which are typical for a rational-choice institutionalist approach "may inform legal changes in candidate countries, but this does not necessarily mean that legal changes are underpinned by successful socialization into European norms or indeed will promote such a normative and behavioural change."[11] *Schimmelfennig* has indeed found that "[r]ules that are transferred through social learning or lesson-drawing are much less contested domestically. Implementation is more likely to result in behavioural rule adoption and sustained compliance, while external incentives primarily privilege formal rule adoption as the least costly form of rule adoption."[12]

This assessment was made at a point in time when ten[13] Central and Eastern European countries had just acceded the *Union*. It is thus interesting to look into empirical findings of the performance of new member states a couple of years into their membership in order to establish the success of the external incentives model, both in terms of continued transposition but primarily also in terms of application and enforcement. This is indeed what the newest strand of Europeanisation literature does. It conceives the research on Europeanisation of new member states not simply as part of Europeanisation of member states but as a continuation of Europeanisation of candidate countries. As such it tries to establish how sustainable the EU's pre-accessions endeavours are.[14]

An insightful study in this direction in the non-discrimination field has been carried out by *Falkner* and *Treib*. They evaluated the transposition, enforcement and application of, amongst others, two equality directives in *Hungary*, *Slovenia*, *Slovakia* and the *Czech Republic*. They found that the transposition record of these four countries was "*considerably better than that of the EU-15*" and that transposition efforts did not significantly decrease after accession. In fact, they tentatively concluded that new member states "*even perform systematically better than old ones*".[15] However, when it comes to

10 See for instance *Kelley*, International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions, International Organization, 58, 3/2004, 425.

11 *Sasse*, The politics of EU conditionality: the norm of minority protection during and beyond EU accession, Journal of European Public Policy, 15, 6/2008, 842, 856.

12 *Schimmelfennig/Sedelmeier*, Governance by conditionality. EU rule transfer to the candidate countries of Central and Eastern Europe, Journal of European Public Policy, 11, 4/2004, 661, 674.

13 The ten countries which acceded the European Union in 2004 were the Czech Republic, Cyprus, Hungary, Estonia, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

14 *Sedelmeier*, (Fn. 2), 6; *Börzel/Risse*, From Europeanisation to Diffusion: Introduction, West European Politics, 35, 1/2012, 1.

15 *Falkner/Treib*, Three Worlds of Compliance or Four? The EU-15 Compared to New Member States, Journal of Common Market Studies, 46, 2/2008, 293–313, 303 and 307.

the application and enforcement of EU directives, all countries analyzed have huge problems which results in an enormous gap between the at times very advanced legislation and the practice.[16] In their quadripartite categorisation of "*worlds of compliance*", the authors have classified this group of countries into the "*world of dead letters*".[17] This world is characterized by rather good transposition into domestic laws (which can be marked by political battles between parties and interest groups), "*but then these countries lack proper institutions and processes for turning these laws into action*."[18]

For the purpose of this article three things need to be highlighted. Conditionality and the external incentives model seem to be indeed effective in the transposition phase. It even seems that candidate countries have internalized the adaptation pressure and continue with transposition also after accession at a level which bears comparison with old member states or might even go beyond. The lack of application and enforcement is, however, alarming and requires reflection of how this shortcoming of the external incentives model can be overcome. *Sedelmeier* hypothesized that the lack of enforcement could be an unintended consequence of the application of pre-accession conditionality. He reasons that although the EU institutions have continuously emphasized the need for the appropriate administrative and judicial structures for the correct application and enforcement of EU legislation, pre-accession conditionality might have placed too much focus on fast and correct legal transposition, as this is easier to monitor.[19] One could therefore ask whether a stronger focus on social learning and lesson-drawing would improve this situation and if so, how this could be achieved in the pre-accession period and what could be done in the post-accession period.

Second, the authors of this study have found that the "*world of dead letters*" is not only composed of new member states but two old member states also fall within this category: *Italy* and *Ireland*. It can thus be presumed that whatever the lessons learned from an enhancement of the learning process for candidate countries are, can be fruitfully used by and applied to old member states as well.

The third set of considerations that requires highlighting is connected to the explanations offered by the authors for the implementation gap in the non-discrimination field. One problem was the lack of litigation from below, which accounts on one hand for a lack of knowledge among the potential victims of discriminations of their rights and on the other hand for a lack of litigation culture among citizens of formerly socialist countries. Connected to that, the authors also found that court proceedings are rather lengthy in some of the countries which can also be a deterrent for a victim of discrimi-

16 Ibid., 303.

17 The other worlds are: 1) the world of law observance (compliance goal typically overrides domestic concerns, well considered and adapted laws, application and enforcement typically successful, non-compliance rare, remedied rather quickly); 2) the world of domestic politics (obeying EU rules is at best one goal among many, main obstacle to compliance is political resistance at transposition stage, once transposed, implementation and enforcement not problematic, as administration and judiciary function well); 3) the world of transposition neglect (compliance with EU law is not a goal in itself, administrative inefficiency, inactivity, characteristic is negligence at the transposition stage, not at the implementation stage).

18 Ibid., 310.

19 *Sedelmeier*, (Fn. 2), 27.

nation to go to court. A second problem was detected in the lack of support by civil society actors. In fact, the procedures for involving organizations with a legitimate interest in ensuring the compliance to the equality directives in judicial or administrative proceedings (as foreseen by the equality directives) have remained "at a rather minimalist level in most countries".[20] A third reason for the enforcement gap was found in the so far rather toothless equality bodies, which often struggle with a lack of visibility, institutional standing and resources. Finally, the authors have found that labour inspectorates often place too little attention on equality issues. Inspectors often also lack the expertise in this field of law.[21] In part V. of this contribution it will be assessed how these problems could be addressed by resorting to reflexive governance approaches.

3. How to Complete the Road: Reflexive Governance?

At this point I would like to summarize what has been said so far and to set out how the identified challenges could be met: It is acknowledged that the external incentives model based on a conditionality strategy is the dominant mechanism explaining rule adoption. A look into application and enforcement in the field of non-discrimination shows however, that there is a huge gap between the law in the books and the practice. If it is true that rules that have been adopted on the basis of social learning and lesson-drawing suffer less from domestic contestation at the application level, it is only logic to ask whether there is room for more such learning in the enlargement process and how this learning can be organized to be successful. Here I would like to introduce the idea of *reflexive governance*. Reflexive governance can be understood as model of governance that

> *"involves the establishment of institutions and processes which facilitate the actors within a domain for learning not only about policy options, but also about their own interests and preferences."*[22]

Lenoble and *Maesschalk* present a continuum of four approaches to reflexive governance, which continuously expand the conditions for the success of the learning operations such that, from the point of view of expectations of actors involved, their effectiveness as normative processes is ensured.[23] These approaches range from neo-institutionalist economic, to collaborative-relational, pragmatist and genetic.

After presenting more in detail the different approaches of reflexive governance, it should be possible to answer the question, whether these theoretical thoughts about how learning can be improved can be used in the enlargement process in the context of the non-discrimination field. The reason why it makes sense to shift the focus from the

20 *Falkner/Treib*, (Fn. 15), 305.
21 Ibid., 304-306.
22 *Lenoble/Maesschalck*, Renewing the Theory of Public Interest. The Quest for a Reflexive and Learning-based Approach to Governance', in: de Schutter/Lenoble (eds.), Reflexive Governance. Redefining the Public Interest in a Pluralistic World, 2010, 3–21, quoting *Scott*, How Reflexive is the Governance of Regulation?, paper presented at the annual meeting of The Law and Society Association, Berlin, 2007.
23 Ibid., 7.

rationalist to the constructivist perspective lies not only in the fact that it is assumed that enforcement results are somewhat better[24] but also in the fact that the most important condition for the external incentives model to be successful seems less and less given in the context of the enlargement to the *Western Balkans* and *Turkey*: the credibility of the membership award.[25] It is therefore useful to think of ways in which the enlargement process could be reconsidered with having not only successful transposition but also compliance in mind as its ultimate goal.

III. Reflexive Governance in Context

> *"[G]overnance today should be conceived so as to provide the actors involved with an opportunity for learning."*[26]

I will now try to link the findings of Europeanisation literature to various related approaches to transfer of norms and ideas, namely to policy transfer studies and diffusion studies in order to establish in which way reflexive governance contributes to the discussion on a successful translation of EU law into the law and practice of candidate countries.

Europeanisation, policy transfer and diffusion studies share a concern of how

> *"Knowledge about policies, administrative arrangements, institutions and ideas in one political setting (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political setting."*[27]

In other words they all deal with learning. In the following I will illustrate that they are all quite similar in classifying explanatory models for rule change within their field of study, no matter the diversity of terms used to describe these phenomena. As shown in *Table 1*, it is possible to classify the different explanatory models distinguishing between logics of action on the one hand and the directly EU driven or domestically driven pathways on the other. The three strands of literature differ, however, in the definition of scope conditions which are expected to lead to a successful transfer of norms and ideas. As will be shown, none of these approaches investigates into the conditions for the learning operation itself. This is the contribution of reflexive governance.

24 See above at Fn. 13. In the context of the planned research this proposition will be empirically tested with regard to the non-discrimination *acquis* compliance in Croatia.

25 *Phinnemore*, Beyond 25 – the changing face of EU enlargement: commitment, conditionality and the Constitutional Treaty, Journal of Southern Europe and the Balkans, 8, 1/2006, 7, 8; *Sedelmeier*, (Fn. 2), 31.

26 *De Schutter/Jacqes Lenoble*, Introduction: Institutions Equipped to Learn, in: de Schutter/Lenoble (eds.), Reflexive Governance. Redefining the Public Interest in a Pluralistic World, 2010, xv.

27 *Dolowitz/Marsh*, Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making, Governance, 13, 1/2000, 5.

1. Policy Transfer Literature

Policy transfer literature establishes a continuum of transfer types running from "want to" and thus voluntary lesson-drawing in the form of perfect rationality to "have to" in the sense of coercive transfer by direct imposition. The steps in between are made of lesson-drawing based on bounded rationality; voluntary transfer but driven by a perceived necessity; and conditionality. Policy transfer literature is thus concerned of rational choices (although it is acknowledged that actors are rarely perfectly rational)[28] on a continuum from voluntary to coercive, submitting that most of the time the borrowing of policies from other political systems involves a mixture of voluntary decisions and coercive pressures. The main questions studied by policy transfer literature deal with who is involved in the transfer; what is transferred (hard transfer of policy instruments, institutions, etc. and softer transfer of ideas, ideologies, concepts);[29] from where are lessons drawn (international, national and local level; horizontally and vertically);[30] and it studies degrees of transfer (copying, emulation, combinations, inspiration).[31] Europeanisation literature clearly borrows from policy transfer literature when discussing lesson-drawing as alternative to the external incentives model.

Most relevant for the purpose of this article is to look at the factors identified by policy transfer literature as being responsible for successful or unsuccessful transfer/learning. As the main constraints for successful policy transfer, *Dolowitz* and *Marsh* initially identified the following: path dependency arising from previous decisions; institutional and structural impediments; a lack of ideological compatibility between transferring countries; and insufficient technological, economic, bureaucratic and political resources on the receiving side to implement the transferred policies.[32] They later regrouped these factors into uninformed transfer (receiving country has insufficient information about the policy and how it operates in the originating country); incomplete transfer (crucial elements for success may not be transferred); and inappropriate transfer (when insufficient attention is paid to differences in the socio-economic, political and ideological context).[33] It will be shown below how reflexive governance approaches can help mitigating these constraints.

28 Bounded rationality, as opposed to perfect rationality, has thus to be understood as acting within limited information, influenced by its own perceptions of a decision-making situation. Ibid., 14.

29 *Benson/Jordan*, What Have We Learned from Policy Transfer Research? *Dolowitz*/*Marsh,* Revisited, Political Studies Review, 9, 3/2011, 366, 370.

30 *Dolowitz/Marsh*, (Fn. 27), 12.

31 Ibid.; 13. Other authors have included further categories: *Prince*, Policy Transfer as Policy Assemblage: Making Policy for the Creative Industries in New Zealand, Environment and Planning A, 42, 1/2010, 169; *Rose*, Learning From Comparative Public Policy: A Practical Guide, 2005.

32 *Dolowitz/Marsh*, Who Learns What from Whom? A Review of the Policy Transfer Literature, Political Studies, 44, 2/1996, 343; summarized by *Benson/Jordan*, (Fn. 29), 372.

33 *Dolowitz/Marsh*, (Fn. 27), 17.

2. Policy Diffusion Literature

Policy diffusion is to be understood as "*a process through which ideas, normative standards, or […] policies and institutions spread across time and space*."[34] Like Europeanisation studies and policy transfer studies, *Börzel* and *Risse* distinguish between diffusion mechanisms related to a logic of consequences and a logic of appropriateness. They add to these two a logic of arguing.[35] As will be seen, this extends already into the idea of reflexive governance. In addition, they distinguish between direct and indirect influence mechanisms. Within the direct influence model of diffusion they found four mechanisms: legal coercion (mostly relevant for member states and only to a lesser extent for accession candidates); manipulating utility calculations through positive and negative incentives and capacity building (both based on a logic of consequences); socialization by normative pressure, often resulting in complex learning by which actors redefine their interests and identities (based on a logic of appropriateness); and finally persuasion, based on a logic of arguing.[36] This latter mechanism has been usually subsumed under a logic of appropriateness, as it is closely related to social learning. Actors try to persuade each other of the validity and appropriateness of institutional models and policies. Accession conditionality and persuasion are closely linked as the former is always accompanied by the attempts of the EU to convince the candidate countries of the appropriateness of the rules and institutional models to be adopted.[37]

Börzel and *Risse* further identified three indirect mechanisms of diffusion: if actors cannot achieve their goal or cannot solve a problem they look elsewhere for best practices (lesson-drawing) or compete about best practices (competition) in order to improve their performance (functional emulation). If actors emulate for normative reasons, e.g. because they consider the appropriateness and legitimacy of the model offered by others as given, they do not consider the functional need of such a model, but want to behave like everybody else in a given community (normative emulation/mimicry).[38]

Let us now look at the scope conditions identified by policy diffusion studies responsible for leading or not leading to institutional change. Similar to Europeanisation studies diffusion studies consider the empowerment of domestic political actors and society (domestic incentives) as decisive for institutional change. Europeanisation literature focuses here on adoption costs which must not be prohibitively high in order for political elites to be inclined towards change. In a liberal party constellation such change is thus more likely to happen.[39] What neither Europeanisation studies nor diffusion studies ask is whether empowerment alone is enough, or whether actors' capacities need to be enhanced in some way. As will be seen later, this is where reflexive governance approaches come in.

34 *Börzel/Risse*, (Fn. 14), 5.
35 Within a logic of arguing, "actors try to persuade each other about the validity claims inherent in any causal or normative statement." Ibid., 8; see also *Risse*, 'Let's Argue!' Communicative Action in World Politics, International Organization, 54, 1/2000, 1, 2-7.
36 *Börzel/Risse*, (Fn. 14), 6-8.
37 Ibid., 8.
38 Ibid., 9-10.
39 Ibid., 11; *Sedelmeier*, (Fn. 2), 14-15.

Another factor influencing the transformative power of the EU, and here policy transfer, diffusion and Europeanisation studies concord, is the institutional and administrative capacity of the states concerned and the capacities of civil society.[40] Here two questions arise: the more procedural one is to ask how this capacity building for both, administration and civil society is organized. On a more psychological level it has to be asked whether something needs to/can be done about the typical defensive strategies of actors which determine the way how they represent a problem and which solutions they find. Reflexive governance has invested a lot of thought into these questions.

Both Europeanisation and diffusion studies identify power (a)symmetries as crucial in defining the degree of EU's influence on institutional change. The bigger the power asymmetry, i.e. the more a country benefits from being part of the club, the more inclined it is to align itself to EU's demands. Power asymmetries are of course nothing alien to the idea of reflexive governance. The question is rather how it deals with it in framing a successful learning operation.

Table 1: Explanatory models of rule adoption in Europeanisation (E), policy transfer (P), and diffusion (D) literature

	Logic of consequences	Logic of appropriateness	Logic of arguing
EU driven/direct	E: External incentives P: Conditionality D: Legal coercion D: Manipulation on utility calculations (pos./neg incentives, capacity building)	E: Social learning D: Socialisation by normative pressure	D: Persuasion through reason-giving
Domestically driven/ indirect	E: Lesson-drawing P: Lesson-drawing (perfect, bounded rationality) P: voluntary transfer driven by perceived necessity D: Lesson-drawing D: Competition	E: Lesson-drawing D: Mimicry	

3. The Contribution of Reflexive Governance

As shown in this overview, learning is not only inherent but a central element in all these different strands of literature: Europeanisation, policy transfer and diffusion studies. None of them, however, goes really deep in trying to understand, how this learning comes about, or how the conditions for the learning operation could be expanded such that its effectiveness as normative process is ensured.

This is where reflexive governance comes into play. *Lenoble*, *de Schutter* and *Maesschalck* distinguish between four approaches to reflexive governance. Its starting point is the neo-institutionalist economic approach. On the next step it discusses the collaborative-relational approach, which has been alluded to by diffusion studies by reference

40 Diffusion literature refers to "degree of (limited) statehood": *Börzel/Risse*, (Fn. 14), 11-12; *Sedelmeier*, (Fn. 2), 15.

to the logic of arguing. The two pragmatist approaches, one best represented by *Sabel*, *Dorf* and *Zeitlin* (experimentalist governance)[41] and one represented by *Schön* and *Argyris* further expand the conditions for the success of the learning operation. The maximum of expansion is reached by the concept of a genetic approach to reflexive governance developed within the Centre for Philosophy of Law at the *Université catholique de Louvain*, in particular by *Lenoble* and *Maesschalck*. Each of these approaches has a different conception of reflexivity. They all share the learning imperative but differ in the way they conceive the conditions for success of a learning operation. In this respect

> *"they lie on a continuum. [They] reflect increasingly expansive conceptions of the conditions that must be satisfied to ensure the success of the learning operation."*[42]

What sets the neo-institutionalist approach apart from the remaining three approaches is the fact that learning (in other words: change) is triggered by an external incentive (externalist conception of learning and governance). New solutions can be generated only through an outside incentive. Any expansion of behaviour does not emerge from a learning operation but from an external factor.[43] The external incentives model in Europeanisation studies and its analogues in policy transfer and diffusion studies follow this logic. The following approaches to reflexive governance sharpen the lesson-drawing and social learning variants of explanation on the issue of the "*organization of the learning operation with respect to decentralized interaction*." They share a commitment to "internalizing" the conditions for the success of the learning operation.[44]

The collaborative-relational (deliberative) approach is based on *Habermas'* theory of communicative action.[45] Learning is the result of the organisation of a dialogue between various actors, who have to provide good arguments for their positions and who have to engage with the viewpoints of the other participants. The widest possible range of views should be heard and the consensus reached between the actors involved should be based on rational arguments. According to this approach, it is necessary to act on the organisation of decentralised interaction. The problems related to this participatory and deliberative reflexive approach appear to be first, that there exists a lack of trust in relation to these processes and second, that actors' capacities might need to be reinforced. The focus here, different to the following reflexive approaches, is on the strengthening of capacities for argumentation. This implies that actors must have or be able to acquire the relevant knowledge and understanding to engage in argumentation and the development of methods of debate.[46]

Whereas this is how far the deliberative approach goes for *Lenoble* and *Maesschalck*, *Risse* conceives it as a "*truth-seeking discourse*", in which actors "*must be prepared to change their own views of the world, their interests, and sometimes even*

41 *Dorf/Sabel*, A Constitution of Democratic Experimentalism, Columbia Law Review, 98, 2/1998, 267–473; *Sabel/Zeitlin* (eds.), Experimentalist Governance in the European Union: Towards a New Architecture, 2010.
42 *Lenoble/Maesschalck*, (Fn. 22), 7.
43 Ibid., 11-12.
44 Ibid., 13.
45 *Habermas*, Theorie des kommunikativen Handelns, 1982.
46 *Lenoble/Maesschalck*, (Fn. 22), 14-15.

their identities."[47] This goes already in the direction of one of the two versions of the pragmatist approach. They are pragmatist in the sense that they

> *"posit that true learning can only occur by a revision of the very presuppositions that guide us in action, and those we fall back upon and make explicit when we have to defend our choices against external critiques."*[48]

Sabel's theory underlines the necessity to organise the negotiation in an experimentalist manner. This means that

> *"actors must be engaged in a process of joint inquiry in order to 'allow themselves' to be taught by the results of an experimental encounter between existing solutions and new problems requiring solution. […] This 'expansion' of the conditions for success of the learning operation is reflected, according to Sabel, in the requirement that three new conditions be fulfilled in building systems of governance: co-design (and thus collaboration among those who define policy and those responsible for implementing it), benchmarking and monitoring."*[49]

Experimentalist governance is a recursive process in which framework goals/rules are defined by a combination of central and local units, the target countries implement them as they best see fit taking their local circumstances into consideration, accept to report on their performance, undergo peer-review, share their knowledge with others and exchange good practices which ends up in a re-evaluation and, if necessary, reformulation of the framework rule.[50] Experimentalist governance can thus be described as decentralized problem solving combined with the pooling of results.[51]

The second version of the pragmatist approach (*Schön* and *Argyris*) has revealed the weakness within the first version consisting in this approach obscuring the question of actors' capacitation, as the spontaneous capabilities may not suffice. It is thus more radical in the enhancement of actors' capacities. It makes aware of defensive strategies which prevent actors from forming appropriate representations of new problems and finding solutions (repetition compulsion). From this follows that there is a need to organize reflexivity in the sense of actors returning over their pre-existing frames. In the view of these pragmatist authors, an incentive suffices in order to start this reflexive

47 *Risse*, (Fn. 36), 2. For *Risse*, in addition to social constructivism and rational choice there is a third logic of action: argumentative rationality. This is reflected in Table 1. Ibid., 2-7.

48 *De Schutter/Lenoble*, (Fn. 26), xvii–xix. According to *de Schutter* they are pragmatic also because they accept "that innovation […] can only emerge from actors' engagement with concrete controversies. Learning is therefore not a theoretical enterprise, and it is not an abstract calculation of the pros and the cons of different scenarios. It is necessarily embedded: linked to problem-solving in specific settings. [And finally, they acknowledge the open-ended nature of the inquiry: […] 'New solutions tend to generate new problems.' […] In that sense, learning is a continuous process […].".

49 *Lenoble/Maesschalck*, (Fn. 22), 16.

50 *Sabel/Zeitlin*, Experimentalism in Transnational Governance: Emergent Pathways and Diffusion Mechanisms: Paper presented at the panel on Global Governance in Transition, annual conference of the International Studies Association, 16 March 2011, Montreal, 1.

51 *De Schutter/Lenoble*, (Fn. 26), xviii.

process. However, it is questionable whether the capacity to transform one's frames can be taken for granted.[52]

This is then the contribution of the genetic approach. It asks

> *"how the actors involved in collective action and problem-solving can be supported in operating a revision of the assumptions guiding both their description of the problem, and their choice of solutions. It posits that such revision can be triggered by requesting from these actors both an exercise in reconstruction and an exercise in political imagination."*[53]

The reconstruction exercise takes account of the understanding that our past experiences and the social norms we have internalized shape our desires and expectations. It further acknowledges the psychological tendency to adjust one's preferences to one's situation. The genetic approach aims at creating the background conditions to support the actors in questioning these preferences "*by an explicit examination of their genesis*", and in questioning the role each actor seeks to play for himself.

> *"The term 'genetic' is intended to take account of two factors: on one hand, the set of conditions for production (that is, engenderment) of actors' capacity to carry out the 'reflexive' return required for the success of the learning operation; and on the other hand, the setting up of institutional conditions likely to guarantee effective implementation of the actors' commitments."*[54]

This approach is similar to the capabilities approach of Sen and Nussbaum[55] in that it emphasises the need to ensure that actors are equipped with the resources required to effectively participate in collective action and in that it acknowledges that the ability of actors to use these resources varies depending on their specific situation. It differs from the capabilities approach in that it postulates that "*what actors need is not just to be equipped with the required capabilities: they must be prepared to question their very representation of their role and, ultimately, of their identity*."[56] They must be ready to understand that it is not only their past knowledge which is inadequate but their past positioning.

Directed into the future, political imagination implies that actors accept to "*get rid of institutional fetishism"* and instead are open to political imagination as "*it is unrealistic to expect that all problems can be solved appropriately within institutions as they are given*."[57] The genetic approach thus suggests that learning-based theories of governance are "*complemented by an approach focused on the capacities of the actors*."[58]

Common to these approaches is the reflexivity. The conception of it varies in that they show a

52 *Lenoble/Maesschalck*, (Fn. 22), 16.
53 *De Schutter/Lenoble*, (Fn. 26), xix.
54 *Lenoble/Maesschalck*, (Fn. 22), 10.
55 *Sen*, Commodities and Capabilities, 1985; *Nussbaum*, Women and Human Development. The Capabilities Approach, 2000.
56 *De Schutter/Lenoble*, (Fn. 26), xxi.
57 Ibid., xix-xxi; *de Schutter*, A New Direction for the Fundamental Rights Policy of the EU, Working paper series: REFGOV-FR-33, 2010, 2.
58 *De Schutter/Lenoble*, (Fn. 26), xix–xxi.

> *"growing recognition of the need to progressively expand the conditions to be put in place to ensure the success of the reflexive operation. [The four currents] are complementary and reflect an increasingly acute understanding of the precise nature of the conditions required for the success of this operation."*[59]

From this introduction to the idea of reflexive governance it becomes clear that it is based in the concepts of lesson-drawing and social learning and develops them further in the question, of how this learning process has to be organised in order to ensure the success of the learning operation. From the action theoretic perspective it is rather situated within a logic of appropriateness and a logic of arguing, even though in the enlargement context the logic of consequences must not be neglected. A question for further research would however be, to what extent a logic of contestedness, as developed by *Wiener*,[60] would even be more appropriate to grasp the reflexivity that is characteristic of the just presented approaches[61] and would fit even better in the context of EU enlargement,[62] for which the various approaches of reflexive governance are highly intriguing.

IV. Reflexive Governance and Enlargement

Europeanisation, policy transfer and diffusion studies are highly relevant in explaining *why* certain things happen and not others. The contribution of reflexive governance is to offer ideas for *how* the current performance in the enlargement process *could be improved* to come out from the "*world of dead letters*". The tools it offers can be divided into procedural and psychological. Collaborative-relational ideas and the experimentalist governance approach have their strength (although not exclusively) in the former, while the second pragmatist approach of *Schön* and *Argyris* as well as the genetic approach concentrate on the latter.

Sticking to the example of transposing EU (e.g. equality) Directives into domestic law, the procedural side highlights the importance of effective participation of all stakeholders in deliberation about how they are translated into national legislation. In fact, in experimentalist thinking agenda-setting and problem-solving is opened to a wide

59 *Lenoble/Maesschalck*, (Fn. 22), 5.

60 *Wiener*, The Dual Quality of Norms and Governance beyond the State: Sociological and Normative Approaches to 'Interaction', Critical Review of International Social and Political Philosophy, 10, 1/2007, 47; id., The Invisible Constitution of Politics: Contested Norms and International Encounters, 2012; id., A Theory of Contestation, 2014.

61 *Wiener* herself qualifies the post-modern approaches to be subsumed under a logic of contestedness as "reflexive approaches". Quoted from *Schirmbeck*, Normerosion: Zur Schwächung von Tabus in den internationalen Beziehungen. Nukleares Tabu und Folterverbot, Dissertation, 2013, 78.

62 In fact, the difference between the logic of contestedness and the logic of arguing lies in the fact that the latter assumes that once a state has accepted a norm after a process of argumentation and deliberation it goes over to compliance following a logic of appropriateness and the content of the norm is not contested any more. In contrast, according to the former norms remain contested even after acceptance by the state due to intercultural difference which remains. Ibid., 79.

range of actors, particularly from civil society. *"[T]he broadest possible degree of stakeholder participation compatible with effective decision-making*" has been identified as one of the most important factors for an experimentalist governance system to succeed.[63] The procedural side of reflexive governance also addresses the scope condition of empowerment of domestic actors highlighted by both Europeanisation and diffusion studies. Indeed, "*effective participation*" in the sense of the collaborative-relational approach implies a transparent negotiation process and a public information campaign providing all stakeholders with the necessary knowledge to participate in argumentation and thus avoiding information asymmetries between the government and civil society actors. The procedural side thus not only enhances the ownership of the process but also addresses problems of "*uninformed, incomplete or inappropriate transfer*", identified by policy transfer literature as impediments for the success of learning from abroad. In fact, the risks connected to a lack of information about the policy to be transferred, how it operates, what its crucial elements for success are and what kind of socio-economic, political and ideological context it presupposes can be reduced if a government in the first place engages in finding and providing extensive information about it and is ready to involve a wide spectrum of partners from civil society in the reflections of how to approach a new uncertainty arising from the need to adapt to the EU *acquis*. While it will mainly remain with the candidate country to decide whom to involve in this process, the *Commission* could exert more pressure on candidate countries to organize such national consultations or be more proactive, for example through is national delegations.

Of further relevance it is to look at the technical assistance provided by the EU, especially in the framework of TAIEX and twinning projects. The idea of these project lines is to bring together experts from member states' administrations with experts from candidate countries' administrations with the aim of supporting the latter in their institutional adaptations and capacity building in a specific policy field. The success of this endeavour will depend, amongst others, of the approach of the persons involved: a twinning advisor could perceive his/her role as "teacher" and simply provide an input by presenting a solution to a specific policy problem considered as good practice. Or he/she understands his/her role as facilitator who, on a par with the counterparts from the candidate country reflects on the most suitable solution for the specific context and is ready to "*learn something from the everyday work on the reforms in a candidate country.*"[64] The counterparts in the receiving countries might have to redefine the perception of their role as well and enter this process with a readiness to reconsider the ways in which they have approached the issue so far (both on terms of description of the problem and the kind of solutions accepted) and to political imagination. The example of twinning projects is thus not only a playground for testing collaborative-relational and experimentalist approaches but also the strand of reflexive governance focusing more on psychological aspects.

63 *De Búrca*, New Governance and Experimentalism: An Introduction, Wisconsin Law Review, 2010, 227, 235.

64 *Tulmets*, Experimentalist Governance in EU External Relations: Enlargement and the European Neighbourhood Policy, in: Sabel/Zeitlin (eds.), Experimentalist Governance in the European Union: Towards a New Architecture, 2010, 297, 310.

Learning from good practice already at work elsewhere, be it in legislative processes or capacity building endeavours such as twinning, does not necessarily make the exercise one of experimentalist governance. For that there needs to be some sort of recurrence of the process. In the framework of current EU enlargement design one element in this recursive process consists of the monitoring by the Commission and peer-reviews. In fact, according to de *Búrca* without "*effective and informed monitoring*" an experimentalist system will fail in addressing the problem.[65] Peer-reviews, similar to the twinning projects, are thought to provide an opportunity for exchange of experience between experts from member states and experts from candidate countries. Peer-review reports contain an assessment of the state of implementation in a specific policy field and a set of recommendations which need to be translated by the beneficiary administration into specific action plans. The results of this peer-review process feed then also into the regular monitoring of the *Commission*. The idea behind the peer-reviews is one of horizontal transfer of knowledge.[66] A closer look into empirical practice would unfold whether this approach could be strengthened.

Another way to enhance the mutual learning and experimentalism and thus reflexivity in the current enlargement round would be to provide for possibilities for countries of the *Western Balkans* to confront themselves over specific policy issues. *Böhmelt* and *Freyburg* have found, for instance, that spatial interlinkages have some relevance in explaining variance in the compliance with the EU accession criteria. As a result of their research they suggest, that the EU might want to pay

> *"more attention to trans- and intergovernmental cooperation and exchange in policy-specific networks that bring together candidate countries with varying levels of compliance."*[67]

As these interlinkages in the case of the *Western Balkans* are obvious this suggestion would fare well in this case. A step in this direction is the possibility given to candidate countries to take part in activities of EU agencies and committees, which provides them with the possibility of becoming acquainted with the internal functioning of the EU.[68]

In the end, a specificity of the experimentalist approach deserves being highlighted for its relevance in the enlargement context: this approach breaks down the distinction between conception and execution and connected to that the principle-agent relationship which results in a different form of accountability. The recursive experimentalist process consisting of agreement on framework goals, implementation by local actors as they best see fit, comparative review and monitoring resulting in the revision of local plans and central goals means that "*the implementation becomes the conception*."[69] In such a context the principle recognizes that the goals "*are reshaped by the agent's efforts at*

65 *De Búrca*, (Fn. 63), 235.
66 *Nakrošis*, Policy Transfer in the Pre- and Post-Accession Period: Experience of the New EU Member States, Lithuanian Political Science Yearbook, 2004, 113, 122-123.
67 *Böhmelt/Freyburg*, Diffusion of Compliance in the 'Race towards Brussels?' A Spatial Approach to EU Accession Conditionality, West European Politics, 38, 3/2015, 601, 621.
68 *Tulmets*, (Fn. 64), 310-311.
69 *Sabel/Zeitlin*, Experimentalism in the EU: Common ground and persistent differences, Regulation & Governance, 6, 2012, 410, 411.

implementation." In terms of accountability this means that the agent is not simply supposed to follow instructions prescribing how to realize the goal but he or she is obliged

> *"to explore possibilities for attaining the goal and even the advisability of modifying it, [to] diligently and responsibly engage […] in this kind of exploration, making at least adequate, and preferably optimal, use of all the information and experience available for doing so."*

Sabel and *Zeitlin* call this "*forward-looking or dynamic accountability*" to distinguish it from the rule-following form typical for principle-agent regimes.[70] In the context of enlargement this new understanding of accountability could be fruitfully made (more) use of at two levels: first, in the relationship between EU and the candidate countries and second, in the relationship between candidate country and its administration.

As has been seen the current enlargement mechanisms contain already elements of reflexive governance. The question is whether it would make sense to strengthen them and if so, how this could be achieved. Some suggestions in this direction have already been made but a deeper analysis of the whole enlargement processes with a reflexive governance approach in mind would for sure bring up further ideas. Overall it can be concluded that the whole process can be seen as a mix ranging from neo-institutional to genetic approaches to governance. The external incentive of getting EU membership as reward for legislative and institutional reform has no doubt a powerful driving force. However, when it comes to the specific choice of a rule and especially to the application and enforcement phase it could make sense to provide more space for reflexive processes. Even if one accepts that at the level of law-making rational choice, ie the attempt to maximise utilities might outweigh the readiness to redefine roles and identities, it is still imaginable that at the level of application, when it comes to making most of what is there, reflexive approaches would fall on fertile ground. If for instance an ombudsperson's office is determined to make the non-discrimination legislation work in the best possible way for potential victims of discrimination it has still the opportunity to learn in a reflexive process from other experiences and draw its lessons.

V. Reflexive Governance and Non-Discrimination

Can these theoretical thoughts about how learning can be improved in the enlargement context be used for the equality *acquis*? An experimentalist approach requires, for instance, that the local actors (in the context of enlargement the candidate countries) have some leeway in implementing the framework provided by the centre (the EU). The equality *acquis* is perfectly compatible with this as the norms to be transposed are founded in directives which leave the countries some flexibility in transposition.

At this point it is useful to briefly recall the explanations found by *Falkner* and *Treib* in their comparative analysis of transposition and enforcement of two equality directives in four countries of *Central* and *Eastern Europe* for the huge gap between the law and the practice: the lack of litigation from below, the lack of support by civil society

70 Ibid., 411; see also *de Búrca* et al., Global Experimentalist Governance, British Journal of Political Science, 44, 3/2014, 15.

actors, rather toothless equality bodies, and problems related to labour inspectorates. All these issues match with the distinctive features of the anti-discrimination regime which leave space for democratic experimentalism. It could therefore be asked whether the performance could be improved if learning was improved by stronger integration of reflexive thinking.

The problems related to a lack of litigation from below and a lack of support by civil society actors should be jointly addressed. If there was stronger support from the civil society sector, this would presumable have an impact on the willingness of victims of discrimination to actually go to court and thus also address the problem of a lack of litigation from below.

The equality directives assign a variety of roles to a range of non-state actors. Associations, organisations or other legal entities with a legitimate interest in ensuring compliance with the directives may engage in judicial or administrative proceedings.[71] As evidence from four CEEC reviewed by *Falkner* and *Treib* has shown, the specific design chosen by the countries to implement this possibility has remained quite minimalist. An *actio-popularis* claim, for instance, is foreseen only in *Hungary* under certain conditions.[72] From a pragmatist (in the sense of *Schön* and *Argyris*) and even more so from a genetic point of view one would need to question the defensive strategies of decision-makers against such an option "*by an explicit examination of their genesis*" and encourage them to undertake an "*exercise of political imagination*". They can be supported in doing so on one hand by partners in the EU (member states, *Commission*). On the other hand an informed civil society sector can try to shape the discourse during the deliberation about how to transpose the equality directives, arguing for such a possibility, founded on the experience with this instrument in other countries. This would also be in line with the feature of the non-discrimination regime emphasizing the state-NGO dialogue. The involvement of the biggest possible number of stakeholders in the legislative process is a central element of the collaborative-relational as well as experimentalist governance approaches. It should be assessed whether there would be room for improvement, both domestically (on the side of the state and the civil society) and how the *Commission* deals with it in the course of negotiations and monitoring.

A lack of activity of the civil society sector to make use of existing possibilities (for instance, to support individuals in legal proceedings if not to act on their behalf) could further be addressed by reflexive mechanisms, both procedurally and psychologically: first, relevant NGOs but also potential victims of discrimination have to be empowered in the sense of fully informing them of the possibilities offered by the legal framework. They could be provided with good practice examples from other countries and supported, for instance, in the identification and preparation of strategic litigation cases. Second, civil society actors could be encouraged to make an exercise of imagination in the sense of questioning the role they can play in bringing discrimination cases to court. The idea of actively intervening on behalf or in support of a victim of discrimination might not have been part of their understanding of their role. They could be supported

71 See for instance Art. 7(2) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (*Race Directive*).

72 *Falkner/Treib*, (Fn. 15), 305.

in reconsidering this role in light of the possibilities introduced by transposed EU directives.

Problems related to the establishment and functioning of equality bodies has been another explanation identified by *Falkner* for the gap between law and practice. Also in this field states have room for experimentation. The directives requiring their establishment are broadly framed which allows for diverse approaches in transposition. Still, two broad distinctions can be made when analyzing the main functions of existing bodies: "*predominantly tribunal-type equality bodies*" and "*predominantly promotion-type equality bodies*".[73] Mainly the first type of equality bodies is an example of the emphasis of the equality directives on alternative remedial or dispute resolution processes in addition to the judicial route. This focus on conciliation, dialogue and informal strategies is quite unusual in EU legislation.[74] In terms of their practical performance, *Falkner* finds that equality bodies are "*promising babies with teething problems […] plagued by a lack of visibility, institutional standing and resources*".[75] Ombudspersons' offices have often been the beneficiary institutions of twinning projects. It would thus be instructive to evaluate the successfulness of the learning process through such twinnings in the non-discrimination field to find out, which approach the twinning advisors have taken and how it has been received by the beneficiary administration, how the ownership of the process has been enhanced or could still be improved and what the concrete results in terms of application and enforcement of the non-discrimination regime have been.

In this context it would also be interesting to look at the role played by transnational networks, like the *European Network of Equality Bodies* (Equinet),[76] the *Fundamental Rights Agency* (FRA) or the various umbrella organisations[77] in the mutual learning process and the exchange of good practice.[78] Above I have mentioned the possibility of learning from within by allowing candidate countries to participate in EU agencies to get acquainted with their functioning even before accession. Such a possibility is provided by Art. 28 of the *Council Regulation* establishing the *Fundamental Rights Agen-*

73 *Ammer* et al., Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC. Synthesis Report, Human European Consultancy in partnership with the Ludwig Boltzmann Institute of Human Rights, 2010, 43-44.

74 *de Búrca*, Stumbling into Experimentalism: The EU *Anti-Discrimination Regime*, in: Sabel/ Zeitlin (eds.), Experimentalist Governance in the European Union: Towards a New Architecture, 2010, 215, 224.

75 *Falkner/ Treib*, (Fn. 15), 305.

76 Equinet brings together the national equality bodies required to be established under the anti-discrimination directives.

77 *European Network Against Racism* (ENAR), *European Disability Forum* (EDF), *International Lesbian, Gay, Bisexual, Trans and Intersex Association* (ILGA-Europe), *European Older People's Forum* (AGE).

78 Defenders of a logic of contestedness call for the establishment within supranational organisations such as the EU (where contestedness is typically particularly pronounced) of fora, in which the different interpretations given to specific norms can be discussed in order to avoid a clash of incompatible interpretations. See, *Schirmbeck*, (Fn. 61), 81. This perfectly fits the thinking of an experimentalist governance approach, which conceives the advantage of such fora not only in the avoidance of incompatible interpretations but also in the mutual learning and the deliberation on how the framework initially provided could be improved on the basis of the collected experiences.

cy. According to this rule the *Commission* can propose to the *Council* to invite all countries with which a *Stabilisation and Association Agreement* (SAA) has been concluded to participate in the *Agency* as an observer. This option has been used so far only with regard to *Croatia* before it became full member.[79] The *Agency* produces country or thematic studies in which it includes only members or observers. Such studies could be a useful source of comparison and review for the candidate countries in their endeavor to align to EU law. Therefore, the *Commission* could consider making broader use of its possibility to propose to the *Council* such invitation to SAA countries.

Another specificity of the current EU anti-discrimination regime is that harassment and victimization are now clearly prohibited and most of the anti-discrimination Directives expand the scope of application of the norms in that they apply not only to public bodies but also to privates. In addition, the *Directives* have broadened the previous judicial definition of indirect discrimination. Still, its definition remains rather loose. Of further relevance is the shift from negative to positive obligations, including the requirement to mainstream equality goals into all public policies.[80] In these respects the *Directives* leave room for local experimentation and it would be instructive to comparatively assess how states have made use of it in the transposition stage but even more so in the application and enforcement stage which gives a clearer picture of the understanding different actors have of their role in interpreting the existing provisions. A look into the jurisprudence and administrative practice would show the level of contestation.

De *Búrca* has found that the EU anti-discrimination regime clearly resembles an experimentalist governance regime:

> *"The legislation is clearly designated as 'framework' only, the regulatory norms are broad and open-ended, a range of different social actors are specifically allocated various roles in promoting equality, implementing the norms, raising awareness, providing information, assistance, and reporting back. [...] Finally, in the text of the various Directives, the Commission has undertaken to review and revise the legislation in the light of periodic reports on its implementation received from the Member States."*[81]

Further research would be useful in order to assess what use the member states have made in exploiting the possibilities for local experimentation, at which stage we are in the efforts of pooling of results and what current candidate countries can learn from the experience of member states.

VI. Conclusion – A Research Agenda for the Future

As mentioned above, *Sedelmeier* hypothesized that the lack of enforcement could be an unintended consequence of the application of pre-accession conditionality as it places too much focus on fast and correct legal transposition.[82] Further research would need

79 Negotiations with current SAA countries are under way.
80 *De Búrca*, (Fn. 74), 225.
81 Ibid., 221–226.
82 *Sedelmeier*, (Fn. 2), 27.

to investigate whether a higher level of compliance can be found in situations where the focus in the pre-accession phase was on horizontal transfer in the sense of exchange of good practice, social learning, increased public participation and experimentation. It should further try to establish which factors can trigger a reflexive return over past positioning and political imagination. In fact, considering that the conceptualization of reflexive governance is still at an early stage the exact ways to achieve this reflexivity are not yet very clear.[83] The EU non-discrimination regime would constitute an appropriate policy field for this purpose. As could be shown, the respective EU *Directives* are broadly framed so that they allow for varying transpositions. Such framework regulation is one of the elements of an experimentalist governance approach, although it has to be acknowledged that in this respect the enlargement context requires some sort of adaptation of the experimentalist governance system as designed by *Sabel*. He requires in fact co-design and thus collaboration among those who define policy and those responsible for implementing it – which is not given in the enlargement context as the *acquis* has been adopted without the participation of the candidate countries. This element which potentially has a detrimental effect on the success of the learning operation can be tempered by the fact that a candidate country has generally accepted to adapt its legislation to the *acquis* as a condition for acquiring EU membership.

Further research could try to link the idea of reflexive governance to *Wiener's* concept of norm contestation and the related logic of contestedness. Advocates of this approach start from the assumption that norms "*are contested by default [as] their meanings evolve through interaction in context*."[84] They thus posit that the understanding of a norm is dependent of its "*meaning in use*". In other words the interpretation and application given to a norm is decisive for its meaning. This meaning in use can evolve over time, as the norm has to be applied to changing circumstances. It further depends on the cultural context in which the norm is set and on the individual experience of the persons putting a norm into practice.[85] Especially the references to the cultural context and individual experience are relevant in the enlargement context.

In fact, in a transnational context like the EU, where different legal cultures and traditions come together, norm contestation can be more pronounced than in purely domestic contexts. The different approaches to reflexive governance take account of such circumstances in various ways: the collaborative-relational and the first version of the pragmatist approaches put emphasis on deliberative, argumentative and experimentalist processes, during which diverging approaches and understandings can be detected and ways how to deal with these found. The second version of the pragmatist approaches as well as the genetic approach exactly put into question the internalized norms and behaviours of a specific legal culture, asking whether the problems to be solved can be appropriately addressed by sticking to established institutions and norms.

The emphasis of the logic of contestedness on individual experiences can also be linked with reflexive governance approaches in the enlargement process in the non-discrimination field. For instance, experience in twinning projects in this policy field

83 *Lawless*, 'Book Review: Reflexive Governance', European Law Journal, 17, 3/2011, 429.
84 *Wiener*, Making Normative Meaning Accountable in International Politics, WZB Discussion Papers, 2007, 4.
85 *Schirmbeck*, (Fn. 61), 80.

has shown that the success or failure of the project is very much dependent on the persons involved, both on the side of the advisor and the beneficiary.

But whereas the contestedness of a norm is taken as a given, norms can still provide for stability: "*While norm validity is in principle contested, norm facticity does structure behavior*."[86] In order to provide for this stability, three dimensions must be given: formal validity, social recognition and cultural validation. Further research would necessarily have to deal with the question to what extent social recognition and cultural validation could be established by the existing enlargement mechanisms and to what extent a stronger focus on reflexive approaches could strengthen these dimensions.

86 *Wiener*, (Fn. 61), 50.