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Promoting domestic change in the EU neighborhood: administrative capacity, hard power and legitimacy. Case of Georgia

First draft, comments are welcome

Panel on European Neighborhood Policy/Eastern Partnership and its impact on domestic change in Eastern neighbors at an academic conference organized by UACES in Cambridge in September 2011.

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Further promotion of domestic change in the EU neighborhood should take into account the assessment of the achievements of Europeanization in the EU neighborhood. Different evaluations sometimes are ambiguous; but the general conclusion is quite clear. European Neighborhood Policy (ENP) and its enhanced version Eastern Partnership (EaP) is hardly the most effective instrument of Europeanization of the EU Eastern neighborhood. Slow progress of Europeanization in the EU neighborhood is in stark contrast to the success of the Europeanization of Central and Eastern Europe.

Failures of the Europeanization through the ENP are in line with the findings of the recent literature on Europeanization beyond the EU, which concludes that an effective Europeanization is not possible without a credible EU membership prospect (Schimmelfennig, 2009). However, the case of the Western Balkans demonstrates that a credible membership prospect is not a sufficient condition for a successful Europeanization as it worked only for some Western Balkan countries. The reform process here was slower and more difficult than expected, and it was recognized that the EU conditionality was working only in certain areas (Freyburg and Richter, 2008, Noutcheva, 2009, Trauner, 2009, Borzel and Van Hullen, 2011).

There are an increasing number of authors questioning the benchmark used to assess the effectiveness of the EU's neighborhood policy. They are questioning the seeming success of the Europeanization in the CEE, which is in such a sharp contrast with failures of Europeanization in Western Balkans and Eastern neighborhood. Instead of concentrating at the reasons for different outcomes, they are looking whether there was a real Europeanization in the CEE. What they found is quite surprising. First, it is possible to demonstrate that the real progress of the CEE during the accession years across a wide range of reform indicators was quite limited (Mungiu-Pippidi, 2008, Borzel and Van Hallen, 2011). It is particularly evident in the area of quality of democracy. It seems that it has hardly improved during the accession years (Borzel and Van Hallen, 2011), and the main transformation happened in the early years of post-communist transition. Therefore the EU's power might have been less 'transformative' than suggested earlier. However, while more limited than thought before, the Europeanization in the CEE has brought about many changes. The difference in outcomes is still a relevant question.

Issue of impact of the EU on its neighborhood is therefore a relevant question, which has to be investigated further for the academic and practical reasons. It might be useful to use insights of literature of the implementation of the EU law and Europeanization further in this area. The management and enforcement approaches to implementation will be used in this paper accordingly (Tallberg, 2002). The enforcement approach emphasizes the political will to comply as a major cause of a good compliance record. The management approach places a stronger emphasis on administrative capacities, which essentially determine the outcome. Administrative capacity is understood here as a government's ability to enforce and implement its decisions. The first approach is based on an assumption that the main problem of implementation is a lack of administrative capacity. The second paradigm points to a lack of will.

There could be different reasons for the lack of will. Lack of will might result either from the interest groups pressure or for the strategic calculation of cost and benefit. The two are interrelated. Europeanization literature could help to identify relevant pre-conditions for a successful Europeanization in the EU neighborhood. First hypothesis relates to the change in an incentive structure of these countries. As there is a more pronounced deficit of security and stability in the EU neighborhood, hard power of the EU or rather a lack of it becomes more important than the attractiveness of the EU soft power. This is particularly obvious in the Eastern Neighborhood as the EU is short on hard power to match Russia's military might. This is particularly obvious in Georgia, but plays a role in all Eastern Partnership countries.

This hypothesis is made within the logic of rational institutionalism. The second hypothesis questions validity of the exclusiveness of the rational institutionalist approach to Europeanization.

Rational institutionalism has become a dominant explanation of the success of the CEE Europeanization. It was argued that the main driving force behind the changes in the CEE was the benefits of the membership (Schimmelfennig and Sedelmeier, 2005). Different ratio of the cost and benefit thus explains the failures of Europeanization in the EU neighborhood. Higher costs of compliance, related to the fact that EU membership conditionality clashes with national identity issues in Western Balkans, explains difficulties of Europeanization in South Eastern Europe (Schimmelfennig, 2008, Freyburg and Richter, 2010).

The second hypothesis is based on an assumption that importance of the logic of appropriateness has been underestimated in explaining the Europeanization in the CEE. The logic of appropriateness and the change based on imitation of the EU might have played a major part in the CEE Europeanization (Maniokas, 2008). The lack of this supporting logic of change, based on the legitimacy of the targets and process could thus explain the failures of Europeanization in the Western Balkans and the CEE. Recent publications on Europeanization in Western Balkans increasingly refer to the issue of legitimacy (Noutcheva, 2010).

The main problem thus becomes the legitimacy of the EU projected norms. In the South Eastern Europe and the ENP countries the EU has put an emphasis on the general concept of European values such as functioning democracy, human rights, good governance, fight against corruption and organized crime, which hardly relate to the EU *acquis* and are contested by the partners. The EaP countries also question the EU *acquis* on trade, in particular the concept of deep and comprehensive free trade agreements as there are competing US and Russia's norms in particular. Moreover, there is a feeling that these norms are used by the EU selectively and reflect EU interests.

These hypotheses are further explored in a qualitative country case study of Georgia. Examples from other EaP countries are used as well. Data on the implementation of their ENP actions plans are used to assess the progress made. Combined with other sources, it should allow for a first judgment whether the non-implementation is voluntary or it is related to the lack of administrative capacity. Voluntary non-implementation will be further explored looking for the main considerations of non-compliance focusing on issues of hard power and legitimacy.

Assessment of the effectiveness of the neighborhood policy: demand and supply side of the ENP

Most of the current assessments of the effectiveness point to the fact that situation in the Eastern neighborhood is worse than at the start of the ENP. It is particularly evident in the area of democracy. In the light of indicators of democracy and human rights most of the EaP countries look worse than at the start of the ENP policy (FRIDE, 2010). Part of this failure relates to the unfavorable strategic context, shift of the US attention from Eastern Europe to Asia, growing ambition of Russia, associated with high oil price and more influential China (Popescu and Wilson, 2011). However, it seems that part of the answer lies in the design and execution of the policy itself. It is a policy, which has been based on enlargement tools, but without a membership perspective.

The flaws in the design of this policy were quite evident from the beginning. It was one of the reasons why the ENP and its Eastern enhancement, EaP, had been met rather ambiguously. On the one hand, it was undoubtedly a big step forward towards strengthening the EU relations with its Eastern neighbors. A perspective of an association agreement as a future framework of bilateral relations between the Eastern ENP countries and the EU was a new big incentive to motivate the EaP countries for rapprochement with the EU, which the ENP framework was missing. Multilateral framework supporting and reinforcing bilateral relations was also long overdue. The EaP thus was regarded as a logical and welcomed enhancement of the ENP policy.

However, even during the launch of the ENP and the EaP there were doubts raised whether the ENP and the EaP offered sufficient incentives for a change in the ENP countries to ensure democracy, stability and increasing prosperity. It was argued that EaP was short on incentives to induce reforms (Mayhew and Hillion, 2009). Yet another subject of criticism was a too technocratic nature of the initiative and a particular lack of a politically active and attractive strategy taking a full account of the Russia's policy of dominance in the region (Popescu and Wilson, 2009). The policy was criticized as passive, based on an overstated attraction of the EU.

Both strong and weak points of the strategy were particularly evident in Georgia. Lack of strong political component of the EaP, in particular lack of new instruments, strategies and resources

aimed at conflict resolution and prevention as well as readiness to confront Russia when necessary seemed a particularly serious weakness of the EaP in the Georgian context¹. It was dominated by a still continuing stand-off with Russia and unresolved consequences of the August 2008 war. On a positive side, an association agreement and new bilateral and multilateral elements of the Partnership provided a possibility to enhance the EU presence in the EaP countries.

As regards structure of incentives, the ENP was considered insufficient. EaP went beyond the ENP providing a prospect of an association agreement, trade and, while with many conditionalities and in a long-term perspective only, a prospect of a visa free regime. There was a promise of more resources, more dialogue, also in the multilateral framework and, subsequently, attention to the Eastern Neighborhood. However, it was also clear that a stronger political dimension to complement it and match competing Russia was missing.

This policy has been recently reassessed and adjusted. ENP review, undertaken by the European Commission (European Commission, 2011) and endorsed by the Council of the European Union (Council, 2011) recognized achievements and failures of the policy and proposed a number of new measures to make it more efficient. Analysis of these measures shows that the conceptual framework of the policy has not changed. All new principles and measures proposed are taken from the tool box used by the EU in Western Balkans, including the principles of conditionality and differentiation, civil society facility first introduced as an enlargement related enhancement in the European Commission's Enlargement Strategy of 2006, more multilateral dialogue, more high level political dialogue, more elaborated sectoral cooperation, wider scope of financial assistance, including agricultural and rural development dimension. Certain of these measures might work indeed. However, there is a question whether further development of the neighborhood policy through further and wider borrowing from the enlargement toolkit addresses the real needs of the countries in question or it is just another attempt to increase the supply of goods which are not really needed.

Implementation of the ENP in Georgia and other EaP countries

¹ This was considered as a serious weakness in Moldova and South Caucasus in general as there were two more protracted conflicts in Transnistria and Nagorno Karabakh.

ENP implementation has been regularly assessed by the European Commission through yearly progress reports in a similar way as during the EU enlargement. These reports, independent assessments (Wolzuk, 2009, Shapovalova and Boonstra, 2010, Popescu and Wilson, 2011) and research conducted for this paper reveal a rather mixed picture. There is a certain progress registered by the European Commission, in particular in trade related and technical issues, related to administrative capacities. It is understandable as the European Commissions' progress reports and horizontal papers on sectoral progress in particular focus on technical and procedural aspects of the EU's relationship with these countries determined by its mandate. Democracy and human rights related issues are increasingly brought into the core of the agenda, but this is a relatively new phenomenon well accelerated by the Lisbon Treaty. High Representative of the Union for Foreign Relation and Security Policy and creation of the External Action Service followed by the transformation of the Representations of the European Commission into the full-fledged EU Embassies have certainly added to this trend. However, it is still too early to expect to see the impact of this institutional development.

Most of the current assessments of the performance of the ENP and EaP countries in particular (Borzel and Van Hullen, 2011, Popescu and Wilson, 2011) draw on different governance and democracy indicators produced by international organizations and think tanks. They reveal slightly worsening situation on democracy, which is in line with global tendencies and certain improvements in governance indicators. While the progress registered by the Commission in recent progress reports points to Moldova as the best performer, indicators of governance and, to a lesser extent, democracy put Georgia even higher. Other countries are usually noted by their mixed performance. Ukraine is considered as advanced in many technical matters and until recently was leader in the sphere of democracy.

Is it possible to explain why there is more progress registered by the Commission and through different indicators in some countries and sectors? Is this progress amounts to a real change? Is it a result of the EU's influence, or it is mostly endogenous? First question is a general question of development. Vast literature of implementation and implementation of the EU law in particular might help to answer the second questions. The third one is a core question of the studies of Europeanization.

It seems that the strategic context is particularly important with respect to both implementation and Europeanization. Countries, which wanted higher EU presence as a counterweight to the Russia's

influence, demonstrated faster progress. This seems to be the main motivating factor behind the impact of the ENP and the EaP in particular. Georgia, Moldova and, to a lesser extent, Armenia belong to this group of countries. Azerbaijan was more reluctant picking and choosing certain initiatives, which seemed line with their own interest. Ukraine is seemingly the most interesting example. It wanted heavier EU presence, but failed to undertake a real effort. ENP implementation mobilized only administrative class leaving political elite disinterested (Wolczuk, 2009).

Reports of the European Commission and governance indicators of the international organizations are hardly sufficient to explain whether a lack of progress in certain areas is related to a lack of will of a lack of administrative capacities. Moreover, it is difficult to establish a causal link between the EU pressure and the real change. Qualitative assessments and implementation studies in specific sectors are thus necessary.

Implementation of the Georgian ENP

Analysis of the implementation of the Georgian-EU ENP Action Plan reveals very consistent policy of the Georgian Government (GoG) to implement only those priorities, which coincided with the GoG priorities². During the negotiation of the ENP in 2006 Georgia put a lot of emphasis on the issue of conflict resolutions and EU role in it. This was considered as the major attraction of the ENP policy. However, EU's role in conflict resolution was defined very vaguely in the ENP. This has greatly contributed to a reserved attitude of the GoG towards it at the beginning. Interest of having the EU more involved in conflict resolution and peace keeping only grew stronger.

For a number of years actions planned for the implementation of this plan was not even approved by the Government. It consistently ignored the ENP Action Plan as both irrelevant and, most importantly, incompatible with the Georgian Government priorities centered on the fight against corruption and maximum deregulation of economy. These priorities were related as less regulation was considered to be the best way to fight corruption. The EU was regarded as a source of unnecessary regulation. This concerned almost all areas of law approximation listed in the ENP

² See GEPLAC reports at www.geplac.com. The author of the paper benefited from his direct experience of the ENP AP implementation in Georgia during his work at GEPLAC in 2006-2010.

Action Plan and previously agreed in the Partnership and Cooperation Agreement between the EU and Georgia³.

For a number of years the Georgian Government refused to approve the list of measures implementing the ENP. The Action Plan for the Implementation of the ENP AP Priorities was approved for the first time in 2009 after the war with Russia in August 2008. This war could be regarded as a watershed in the EU-Georgia relations. The Georgian leadership seemingly understood that good relations with the US could not guarantee its security and that they should strengthen their ties with the EU.

The APIP for 2009 was therefore approved by the Governmental European Integration Commission on May 19, 2009 for the first time acquiring a status of an official document. Previous implementation plans were just working documents and non-implementation of actions listed in them could not bear any sanctions. It provided a ground for official monitoring of implementation of ENP AP implementation.

The substance of the ENP AP implementation started to change as well. As it can be seen from the assessments of the European Commission and internal monitoring reports produced by the Georgian-European Policy and Legal Advice Center (GEPLAC)⁴, implementation has improved, in particular in areas related to visa facilitation and readmission negotiations, which has started in 2010, and preparations for the Deep and Comprehensive Free Trade Agreement (DCFTA) process in particular. Eastern Partnership preparation for the negotiations on Association Agreement had a lesser impact.

DCFTA

DCFTA process was the most important in this respect as it demonstrated how EU conditionality worked in Georgia. A desire of the Georgian leadership to keep foreign investment in the country after the August War resulted in prioritizing trade relations with the EU and putting special

³ The commitment of Georgia to gradually align its national legal framework with EU acquis derives from Art 43 of the PCA ratified in 1999.

⁴ www.geplac.ge

emphasis on signing a free trade agreement with the EU. It should have provided a powerful signal to foreign investors.

At the beginning the Georgian government wanted a classical free trade agreement focused on tariffs. However, the EU has changed its policy since. In 2006 it adopted the Global Europe Strategy, where the European Commission stated that through trade policies, the European Union seeks to contribute to a range of the Union's external goals, in particular development and neighborhood policies and maintained that the openness is no longer simply about the tariffs, but especially about non-tariff barriers, access to resources, and new areas of growth (intellectual property rights (IPR), services, investment, public procurement and competition). In addition to the multilateral framework for trade, the Commission suggested development of the new type of Free Trade Agreements (FTA), which can build on WTO and other international rules by going further and faster in promoting openness and integration, by taking issues (especially investment, public procurement, competition other regulatory issues and IPR enforcement) which are not ready for multilateral discussion. In terms of the content, new competitiveness driven FTAs had also to tackle non-tariff barriers through regulatory convergence, include stronger provisions on IPR and competition, provisions of good governance in financial, tax and judicial areas where appropriate. Thus the Georgian call for simple FTA was rejected. Georgia was told to achieve a certain level of regulatory convergence first. This call was additionally legitimized by a special study produced for Georgia (CASE, 2008). It addressed the feasibility of free trade between EU and Georgia and concluded that the major possible gains might come not from tariff reduction, but from regulatory convergence, which can stabilize the environment for investment⁵.

Georgia rightly pointed to the EU interests behind the DCFTA to promote its own regulatory norms and the irrelevance of many of these norms to the developing countries such as Georgia. Georgia was the first EaP country which so openly challenged the main presumption of the ENP policy that the regulatory convergence with the EU acquis is a good development strategy for the neighboring countries and could be the basis of domestic reform agenda. It is important as this concept is being offered to neighboring countries as an anchor of their development. It has been recently praised, for example, as a transformative tool of the EU in Ukraine (Wilson, 2011).

⁵ The study concluded that since following the liberalization of 2006 Georgia has unilaterally eliminated most of its tariffs and already enjoys largely tariff-free access to the EU market, and that an EU-Georgia Simple FTA/Simple FTA BIS would bring very small additional welfare effects to Georgia. Its further conclusion was that its further gains from an FTA+ could lock-in Georgia's reforms leading to a boost in investors' confidence and a lowering of the risk to invest in Georgia.

These arguments have generated political and academic interests elsewhere. A special study was produced on the subject⁶, which supported the Georgian critique of the DCFTA approach and its irrelevance on the Eastern neighborhood (CEPS, 2011). It added legitimacy to the Georgia's claim that the DCFTA policy was a bad policy of development as it insisted on heavy and largely irrelevant regulatory framework, bad trade policy because it was likely to divert trade and bad foreign policy of the EU as it forced the EU rules without offering EU membership or even access to agricultural products and services.

However, the EU has not changed its position and the Georgian Government slowly and reluctantly bent down to the requirements of the EU. They were listed in another study produced by the team of the officials of the European Commission⁷, which contained a detailed list of measures to be implemented by the Georgian Government in order to start negotiations on DCFTA. Many of these measures had been already included in the ENP AP.

The first priority was to strengthen the administrative capacity of the institutions to be involved in DCFTA negotiations, in particular capacities of a task force responsible for the preparation. This task force was created by the GoG resolution on April 14, 2009 in a form of a special working group (WG). Other key priorities included adoption and start of implementation of essential legal acts and improvement of institutional framework in the areas of:

- o technical regulations (adopt and start implementing a governmental program of adoption of technical regulations in line with the EU acquis in the priority industrial sectors and achieve progress in the establishment of a domestic institutional system (tech. regulations, standardization, accreditation, metrology, conformity assessment and market surveillance);
- o sanitary and phytosanitary measures (start implementation of the suspended food safety legislation and prepare a comprehensive strategy of establishment of a solid food safety system);
- o competition policy (preparation of a comprehensive strategy in line with the EU standards, adoption of a general competition law and start of its implementation through capacity building);

⁶The Georgians supplied the data and certain arguments.

⁷ European Commission's (EC) assessment of Georgia's preparedness for a DCFTA with the EU was presented to the Georgian Government (GoG) on March 26, 2009

- o intellectual property rights protection (significant improvement of implementation and enforcement of existing IPR legislation through in particular launching a study on piracy and counterfeiting and a dialogue with right holders) and
- o information of the envisaged treatment for Abkhazia and South Ossetia in this context.

The specificity of these measures has also contributed to their implementation. All but intellectual property rights (IPR) protection priorities were directly contradicting the GoG policy. The GoG has consistently refused to regulate competition arguing that it is not necessary for a small market and could only increase incentives for corruption. Regulation of food safety was regarded as too costly and not necessary as well. Introduction of technical regulations was opposed on the basis of the fact that the GoG recognized technical regulations of all the OECD countries. Even IPR protection, while, less important, was contentious as, in the view of the GoG, could have led to re-introduction of inspections, which would create new incentives for corruption. Competition policy had a particular symbolic importance to the EU and Georgia as it reflected the difference in the substance of policy.

Initially the GoG refused to take action in any of these areas, but this stance has gradually changed. The policy discussion and internal preparation in Georgia took more than two years. Following a consistent progress, in July 2011 the EU has promised a date for the start of negotiations. While there was a rather easy agreement on the IPR and technical regulations, discussion on competition and food safety was protracted. The GoG perceived regulatory convergence in these areas as a damage, and tried to limit it. It was the only government in the region and EU neighborhood which engaged in a substantial discussion with the EU on the interpretation of the *acquis* and its relevance for poor developing countries of the EU neighborhood. For example, the GoG questioned the EU prescribed model of enforcement of the competition legislation through an independent separate agency. It argued in favor of dispute-resolution mechanisms in courts. Another example is a sequencing of measures of implementation of food safety law where the GoG argued for an application of law only for big exporting producers.

However, at the end it agreed to adopt and gradually implement all food safety legislation, to substantially amend the Law on Competition and to substantially strengthen the relevant regulatory agencies and inspections⁸.

This progress however has not changed the general attitude of the GG towards the so-called institution building. Calls of the ENP AP to strengthen different government institutions were regarded as unnecessary biurocratization directly contradicting the Government's objectives. Therefore the lack of measures aimed at institutional development could be regarded as a general weakness of the Georgian APIP. This was evident in particular in the areas of statistics and food safety, aviation, maritime and aviation safety, social dialogue.

Conclusions

The general picture of implementation of the ENP in Georgia can be summarized as follows. The priorities which either coincided with the GoG priorities or were subject of the most intense EU conditionality tying with two incentives, the DCFTA and visa facilitation, were being implemented. This concerns in particular delimitation and demarcation of borders, migration management, quality infrastructure and food safety, competition, technical regulations and statistics. This is in conformity with the logic of rational institutionalism and the theory of conditionality.

In terms of implementation, it confirms the enforcement view, namely that the ENP implementation in Georgia was a subject of the political will of the Georgian Government. In other words, non-implementation was not caused by the lack of administrative capacities, but by a lack of political will. This might be usefully compared with other ENP countries, such as Ukraine and Moldova, where the administrative capacity seems to be a more importance issue. It seems that administrative capacity is more an issue in Moldova and Ukraine as interest groups dominates over the weak state, which is in sharp contrast with three South Caucasus countries characterized as autocratic or semi-autocratic countries.

⁸ See Georgia's Progress Report on Implementation of the ENP Action Plan, H1 2011, produced by the Office of the State Minister of Georgia and European and Euro-Atlantic Integration and previous progress reports produced by the Office available at www.eu-integration.gov.ge

The Georgian case also demonstrates that conditionality might work without the membership perspective and even when its priorities do not correspond with the preferences of the domestic actors. This perspective can be replaced by other incentives. However, these incentives must be strong enough. Strategic context of a country plays a role. It can reinforce the conditionality, as it was the case in Georgia. After the war with Russia in 2008 Georgia badly needed tighter relations with the EU. Therefore it agreed to change its policy and to introduce many measures, which contradicted domestic priorities. Other EaP countries, which wanted higher EU presence as a counterweight to the Russia's influence, also demonstrated faster progress. This seems to be the main motivating factor behind the ENP.

The ability of the EU to increase its presence, and especially military one, could be the best means to increase the effectiveness of the EaP policy. However, it does not seem realistic given the objections of Russia and sensitivity of the main EU players to them.

Thus while the rational/strategic motives and, consequently, the consequential logic, are dominating the relationship between the EU and its Eastern neighbors, legitimacy concerns are also important. Increasing legitimacy of the EU policy might thus significantly strengthen the EU policy.

Legitimacy is mostly related to the content of EU conditionalities. Georgia had rightly raised substantial questions about the relevance of *acquis* to the neighboring countries. The regulatory convergence has some benefits, including the ability to stabilize the regulatory agenda of the neighboring countries, but it could not serve as a basis of regulatory reforms due to its irrelevance and high costs. The *acquis* reflects the cross-border externalities of relations between rich and risk-averse societies. Most if not all neighboring countries do not belong to these types of societies.

Moreover, Georgia's progress on governance indicators, in particular with regard to fight against corruption and effectiveness of regulations happened endogenously, even despite the EU pressure. Georgia brought into surface many internal contradictions of the EU agenda. The most obvious one is the focus on corruption and transparency and lightness of regulation and on the push towards heavier regulation. It is not entirely incompatible, but requires clever and skillful sequencing of measures. EU is not particularly helpful in this respect.

Recognition of this problem might lead to modernization of the substance of the neighborhood policy and, hence, to increase its attractiveness to the neighboring governments. More relevant and

less costly regulatory convergence might change the cost-benefit ratio of regulatory convergence with the EU.

As for the research agenda, more research is needed on the actual impact of the EU partner countries, which requires a number of well-designed qualitative studies using cross-sector and cross-country comparisons similar to the Europeanization studies and EU law implementation studies in the EU member countries.

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