
ADNAN KADRIBAŠIĆ *

**The Effectiveness of Human Rights Conditionality in
Bosnia and Herzegovina. What Lessons for Future
Advocacy?**

Intersections. EEJSP
3(2): 33-51.
DOI: 10.17356/ieejsp.v3i2.346
<http://intersections.tk.mta.hu>

* [adnan.kadribasic@gmail.com]

Abstract

This paper analyses the effectiveness of EU conditionality in the area of human rights with a focus on non-discrimination in terms of its characteristics, particularities, and difficulties in Bosnia and Herzegovina. From the analysis of two case studies, this paper finds evidence that the effectiveness of human rights conditionality largely depends on the determinacy of conditions, the size and speed of rewards, the credibility of threats and promises, and the size of adoption costs. It also finds evidence of the impact socialization plays as an alternative and supportive model of rule transfer. These findings could support future EU conditionality policy towards Bosnia and Herzegovina which entered its most intensive phase following the entry into force of the Stabilisation and Association Agreement on June 1, 2015, and the presentation of the EU Questionnaire in December 2016.

Keywords: Europeanization, conditionality, Bosnia and Herzegovina, equality and non-discrimination, Sejdić and Finci v. Bosnia and Herzegovina.

1. Introduction

One could define EU enlargement conditionality as an exchange between the EU and a candidate country in which the EU offers the candidate a (realistic) prospect of EU membership if the candidate implements a wide range of (EU-driven) domestic reforms. The so-called carrot and stick approach of conditionality involves the withdrawal of the benefits of accession and the halting or slowing down of the process if the candidate state government fails to progress with reforms (Steunenbergh and Dimitrova, 2007). As Schimmelfennig and Sedelmeier (2004: 670) argue, ‘the dominant logic underpinning EU conditionality is a bargaining strategy of reinforcement by reward, under which the EU provides external incentives for a target government to comply with its conditions.’

EU conditionality in Bosnia and Herzegovina (BiH) is part of a comprehensive process of institution building and the creation of a democratic and stable ‘political community’ as part of post-war reconstruction. The EU is capitalising on its authoritative/asymmetrical position vis-à-vis Bosnia and Herzegovina, which is eager to become part of, or closely affiliated with, the EU. The prospect of European integration has the potential to create a long-term and coherent perspective, to encourage domestic ownership and institutional development, to support stability and regional cooperation, and to soften nationalist identities.

The EU perspective is perceived by many as a viable approach to supporting the transition of Bosnia and Herzegovina from an unstable to a functioning democracy. The current constitutional set-up is based on the 1995 ‘Dayton Peace Agreement’ – the General Framework Agreement for Peace in Bosnia and Herzegovina – which defined the country as a parliamentary democracy with a bicameral parliamentary assembly and a three-person rotating presidency at the central level of government. The constitution states that Bosnia and Herzegovina is a state of three constituent peoples – Bosniaks, Croats, and Serbs – as well as ‘Others’, making clear reference to the group rights of the main ethnic groups, not to individual rights. As a result, members of the presidency need to be from the three different ethnic groups and a similar rule applies to the upper house of parliament, the House of Delegates, where there need to be five delegates from each group. This system has been criticized by many,¹ and since 2009, following several rulings of the European Court for Human Rights (ECtHR),² it has become clear that the constitution of Bosnia and Herzegovina is discriminatory since it excludes all other groups (except for the *constituent peoples*) from key government positions.

This paper will analyse the effectiveness of EU conditionality in the area of human rights in Bosnia and Herzegovina. It uses the general proposition that the effectiveness of EU conditionality depends on a cost-benefit analysis of the costs of adaptation and the rewards that are promised. Schimmelfennig and Sedelmeier (2004: 664) argue that this cost-benefit analysis depends on the following factors:

¹ See e.g. Chandler, 2000.

² *Sejdić and Finci v. Bosnia and Herzegovina* [GC], (nos. 27996/06 and 34836/06), ECHR 2009; *Zornić v. Bosnia and Herzegovina* (no. 3681/06), ECHR 2014; *Slaku v. Bosnia and Herzegovina* (Application no. 56666/12), ECHR 2016.

- (i) the determinacy of conditions,
- (ii) the size and speed of rewards,
- (iii) the credibility of threats and promises, and
- (iv) the size of adoption costs.

Two case studies which involve the topic of non-discrimination – the adoption of the law prohibiting discrimination, and the implementation of the *Sejdić and Finci vs Bosnia and Herzegovina* decision – will be assessed against these factors. These cases studies were selected for three reasons: a) because of the position of the prohibition of discrimination in the EU's and Bosnia and Herzegovina's legal order; b) because they were both clear conditions for Bosnia and Herzegovina during crucial parts of the integration process; and c) because one was seen as a success and the other as a failure of EU conditionality policy.

2. Prohibition of discrimination in the EU and the legal order of Bosnia and Herzegovina

Prohibition of discrimination is based on the key principles of international human rights law. Articles on the prohibition of discrimination can be found in all major international and human rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, etc.

Non-discrimination is one of the fundamental values of the European Union as we know it today (see the references in both Art. 2 and 3-3 of the Treaty on European Union). The basic legal text of the Treaty Establishing the European Economic Community (1957) included a provision on the prohibition of discrimination. With the entry into force of the Treaty of Amsterdam which was signed in 1997, the European Community was allowed to legislate not only on gender but also on other grounds – namely, race and ethnicity, religion and belief, age, disability and sexual orientation. In 2000, two directives were adopted: the Employment Equality Directive (Council Directive 2000/78/EC) that prohibited discrimination on the basis of sexual orientation, religious belief, age and disability in the area of employment; and the Racial Equality Directive (Council Directive 2000/43/EC) which prohibited discrimination on the basis of race or ethnicity in the context of employment, but also in accessing the welfare system and social security, and goods and services. This was a significant expansion of the scope of non-discrimination law within the EU, which recognised that in order to allow individuals to reach their full potential in the employment market, it was also essential to guarantee them equal access to areas such as health, education and housing. Finally, after the Treaty of Lisbon entered into force, the Charter of Fundamental Rights of the European Union (2000/C 364/01) became legally binding and defined broader aspects of discrimination in Article 21.

In Bosnia and Herzegovina, international and regional human rights conventions relevant to human rights and equality are central pillars of the constitution. Additionally, the protection of human rights is incorporated in Article II of the constitution of BiH. Pursuant to Paragraph 1 of the said provision, Bosnia and

Herzegovina and both entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms. Pursuant to Article II.2 of the BiH constitution, the ‘rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina’ and ‘shall have priority over all other law’.

Grammatical interpretation leads us to the conclusion that the phrase ‘*over all other law*’ means that in the legal order of Bosnia and Herzegovina the European Convention has priority over the entire legal order of the country and, consequently, over the BiH Constitution as well; i.e. ‘over all other law’.

Such a formulation puts the European Convention at the centre of the constitutional order of Bosnia and Herzegovina and represents the supreme law of the land, since ‘all other law’ represents the entirety of the legal system including constitutional law. However, this is not translated into an effective mechanism which would ensure full compatibility with the ECHR, or, most importantly, in terms of the discriminatory provisions of the constitution.

3. EU human rights conditionality policy for Bosnia and Herzegovina

The conditionality policy of the EU began to take shape at the summit in Copenhagen in June 1993 when the European Union established the criteria for entry of future Member States into the EU. These conditions are value based and they rely on values which the EU is founded on: democracy, the rule of law, respect for fundamental rights, as well as the importance of a functioning market economy.

Looking at the recent history of Bosnia and Herzegovina and the turbulent changes that took place, it is obvious why the EU had to recognise that all relations with Bosnia and Herzegovina and other Western Balkan countries would take place within a special framework known as the Stabilisation and Association Process (SAP). The entire legal and institutional system had to go through a structural reset due to the situation immediately after the conflict. It is important to note that in this process of change the EU was not the only driving force, and other organizations (the Office of the High Commissioner, OSCE, and the Council of Europe, just to name a few) also participated in the internalization of the reform processes in the country. These organisations, many of which were used to impose reforms, had their roles defined through the Dayton Peace Agreement. This fact needs to be taken into account since the success of conditionality was on most occasions the result of synergies between these organisations.

Overall, EU conditionality in Bosnia is established with the following tools:

1. general Copenhagen criteria - political, economic and *acquis*-related - that are applied to all candidate and potential candidate countries;
2. the 1997 Regional Approach and the 1999 SAP;
3. country-specific conditions that must be met before entering the Stabilisation and Association Agreement (SAA) negotiation phase, and conditions arising out of the SAAs and the CARDS framework;
4. conditions related to individual projects and the granting of aid, grants or loans;
5. conditions that arise out of the Dayton Peace Agreement.

Table 1 Main phases of EU conditionality in the area of non-discrimination law and policies.

No.	Name of stage	Main events and conditionality	STAGE
1.	Post-war Stabilisation	<p>ROADMAP FOR BOSNIA AND HERZEGOVINA</p> <ul style="list-style-type: none"> • Focus on ethnic discrimination and ethnic-related incidents • Creation of a non-discriminatory common market • Allocation of sufficient funding for the Constitutional Court of BiH • Approve and implement laws on judicial and prosecutorial service in the Federation and law on court and judicial service in Republika Srpska 	PRE-EUROPEANIZATION LIMITED EUROPEANIZATION AND STABILIZATION ASSOCIATION
2.	Enlargement perspective	<p>FEASIBILITY STUDY ASSESSING BIH'S CAPACITY TO IMPLEMENT A FUTURE SAA</p> <ul style="list-style-type: none"> • Meeting Council of Europe post-accession criteria, especially in the area of democracy and human rights • implementation of the decisions of the human rights institutions (including better reporting to international human rights bodies) 	
3.	Pre-SAA period	<p>SAA NEGOTIATIONS BETWEEN THE EU AND BIH ARE OFFICIALLY LAUNCHED VISA LIBERALISATION WITH BOSNIA AND HERZEGOVINA ROADMAP ADOPTED</p> <ul style="list-style-type: none"> • Anti-discrimination legislation exists in several areas, but implementation has been deficient. • A Law on Gender Equality was adopted in 2003 • Discrimination on the basis of sexual orientation and discrimination against minorities, most notably the Roma population, is common • Discrimination in employment and education remained a key obstacle to sustainable return 	
4.	POST-SAA	<p>STABILISATION AND ASSOCIATION AGREEMENT WITH BOSNIA AND HERZEGOVINA IS SIGNED; SEJDIĆ and FINCI v. BIH RULING; HIGH-LEVEL DIALOGUE ON THE ACCESSION PROCESS</p> <ul style="list-style-type: none"> • A comprehensive state-level anti-discrimination law was adopted which failed to include age and disability • Little progress was made in harmonising other laws with the anti-discrimination law. • Implementation of the anti-discrimination law remained weak. • Country's failure to implement the Sejdić-Finci ruling of the European Court of Human Rights (ECtHR) 	
5.	The SAA enters into force BiH submits its application to join the EU	<p>REFORM AGENDA APPROACH (pays particular attention to the implementation of the Sejdić-Finci ruling)</p> <ul style="list-style-type: none"> • Some progress with the adoption of relevant amendments to the anti-discrimination law. • Uneven implementation of the anti-discrimination legislation and the absence of a country-wide anti-discrimination strategy. 	

Before the entry into force of the SAA, the EU had not presented a coherent and comprehensive human rights conditionality strategy for Bosnia and Herzegovina. Conditions were defined in various documents produced by the EU to monitor the progress of BiH, but seemed to be neither coherent, nor comprehensive. I illustrate this fact with a research matrix which was developed for a paper entitled *Europeanization by Rule of Law Implementation in the Western Balkans* (Kmezić et al., 2014).

After the entry into force of the Stabilisation and Association Agreement on June 1, 2015, Bosnia and Herzegovina was presented with an EU Questionnaire³ in December 2016. The Questionnaire has several chapters containing questions related to human rights and non-discrimination, and one specifically entitled 'Anti-Discrimination and Equal Opportunities'. In this process Bosnia and Herzegovina entered its fifth and most intensive pre-accession phase. However, it is too early to assess the effectiveness of the future EU conditionality policy in terms of human rights, although a much more credible policy in relation to human rights could be anticipated.

4.1. Pre-Europeanization

EU conditionality policy toward Bosnia and Herzegovina over the years progressed from quite general conditions to more concrete ones. Much of the conditionality in the first years before 2009 focused on institution building and consolidation. In these two phases, the EU relied significantly on other actors such as the Office of the High Representative, the Council of Europe and the OSCE Mission to Bosnia and Herzegovina. The institution in the driving seat in this period was the Office of the High Representative in BiH (OHR). The role of the OHR was to supervise the transition to self-governing democracy. Its role was particularly strengthened after the Bonn Peace Implementation Council (PIC) summit in December 1997, which gave the High Representative the power to directly impose legislation.⁴ The 'Bonn Powers' provided the High Representative with almost unrestricted power (Chandler, 2006: 27). Most of the decisions by the High Representatives were made in order to implement the Dayton Peace Agreement, and included innovative reference to the 'spirit of Dayton' (Chandler, 2006: 25). The lack of clear criteria concerning how these new powers of the OHR should be used was severely criticized by some authors such as Knaus and Martin, who named the High Representative at the time, Paddy Ashdown, the 'European Raj' (Knaus and Martin, 2003).

The OHR has used its Bonn Powers to enact laws which directly influenced the efforts to establish a human rights system and to respond to human rights issues. When in March 2000 the European Union announced a Road Map as a first step for Bosnia in the SAP, the role of the international community shifted from post-conflict rebuilding toward an enlargement perspective for the country. During this phase the

³ Information requested by the European Commission to the Council of Ministers of Bosnia and Herzegovina for the preparation of the Opinion on the Application of Bosnia and Herzegovina for Membership of the European Union, December 2016.

⁴ Peace Implementation Conference meeting, December 10, 1997, Bonn.

approach of the OHR was increasingly shaped by the EU Road Map, and subsequently EU engagement strategies, rather than by the Dayton Agreement itself. This was also confirmed by the Peace Implementation Council at the May 2000 meeting in Brussels. These developments have intensified the role of the enlargement process, as well as the overall approach of the international community in BiH. The European Commission agenda became an instrument of the Office of the High Representative.

Whereas prior to 2000 the EU played a subordinate and supporting role within the PIC Dayton framework rather than dictating its own terms, a shift in ownership started in 2002 when Lord Paddy Ashdown, the High Representative at that time, was named the first European Union Special Representative in Bosnia. The creation of Ashdown's 'double-hatted' position as both EU and PIC representative marked the clear intention to focus on transition (Council Joint Action 2004/569/CFSP: 7). Although many would later criticize the OHR for rarely wearing the EUSR hat, the shift gradually started to take place. With the launch of the SAA negotiations between the EU and BiH in November 2005 and the adoption of a visa liberalisation process within the Bosnia and Herzegovina Roadmap in December 2007, EU conditionality and the EU's role compared to other international organisations intensified.

In this phase, EU progress reports started taking note of the existence of anti-discrimination legislation, and reporting on occurrences of discrimination. These assessments found that anti-discrimination legislation existed in several areas, but implementation remained deficient. However, the progress reports recognized that a Law on Gender Equality was adopted in 2003, which was the first anti-discrimination legislation in Bosnia and Herzegovina. In relation to occurrences of discrimination, progress reports found that discrimination on the basis of sexual orientation and against minorities, most notably the Roma population, was common. At the same time, they continued to focus on refugees and displaced persons in employment and education – issues which were also highlighted in previous years.

This phase can be considered the pre-Europeanization phase, since clear conditions were not yet put forward. This changed with the signing of the Visa Facilitation and Readmission Agreement in September 2007 and the introduction of the Roadmap Towards a Visa Free Regime with Bosnia and Herzegovina (ESI, 2008). These agreements represented the first step towards the establishment of a visa-free regime and triggered the structured dialogue on visa liberalisation based on detailed roadmaps. The Roadmap introduced a number of requirements, and offered visa-free travel as the reward for meeting these benchmarks. Visa-free travel was high on the agenda of most citizens since applying for a Schengen visa was time-consuming, costly and stressful. This push from the citizenry was even more important for the political elites than the pull from the EU.

In terms of non-discrimination, the primary condition was easy to identify: Bosnia and Herzegovina should 'adopt and enforce legislation to ensure effective protection against discrimination'. It should be noted that before the EU defined the requirement to regulate legal mechanisms for protection against discrimination as a condition, a civil society network was actively advocating for the adoption of a uniform anti-discrimination law. This group of over 100 NGOs led by the Helsinki Committee for Human Rights was greatly inspired by the work of the Europe-wide

association the Starting Line Group, and worked to improve anti-discrimination protection⁵ and conduct country-wide consultations on the content and the scope of the future draft law. This process can be considered a form of socialization, one of the alternatives to conditionality as proposed by Schimmelfennig and Sedelmeier.

This group, supported by the Parliamentary Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics, produced a draft law which the members of the Joint Committee publicly declared that they would sponsor. Although this represented an unprecedented case of cooperation between the elected members of the Parliamentary Assembly of BiH and NGOs, the draft was not forwarded to the parliament for adoption but was delivered to the Council of Ministers (the government composed of ministers of state-level ministries) for further consultation with the relevant ministries.

The Ministry for Human Rights and Refugees of BiH took the lead in this process and included it in its Program of Work for 2008. The work on the draft started formally in May 2008 when the MHRR established an expert working group for the purpose of preparing the draft law.⁶ The working group held its first meeting in June 2008. Its baseline study was a comparative analysis of ten anti-discrimination acts in Europe at that time, while it also conducted research into how BiH could comply with international standards.

The working group agreed that its main approach would be to draft this law along the lines of the Race Equality Directive 2000/78/EC, the Employment Equal Treatment Directive 2002/73/EC, and the Recast Directive, but that it would also aim to incorporate other international legal provisions into the legal system of BiH. The focus on the directives was a result of the strong conditionality created by the Community Visa Facilitation and Readmission Agreement, a situation which also proved crucial for the adoption of the law in the Parliamentary Assembly.

As the concepts of discrimination on other grounds besides gender (and the forms prohibited in the Law on Gender Equality in BiH) were new to the legal system of BiH, members of the working group also had problems defining different concepts. The main challenges included deciding on the list of grounds on which discrimination was to be prohibited, the scope of the protection provided by the law, and the provisions for the formation and the role of a central institution to combat discrimination. In almost all other areas, the draft substantially follows the approach of the equality directives and uses almost the same wording when defining different forms of discrimination.

The parliamentary debate on the draft law in 2009 was heavily influenced by EU conditionality, especially since by that time the adoption of an anti-discrimination law was one of two last remaining conditions for the visa liberalisation agreement. At the same time, some groups, especially religious communities, were advocating against what they perceived was an attack on the traditional values of the country. The Inter-Religious Council of BiH in an open letter to all parliamentarians warned that the *'Law if adopted without amendments [...] would enable [gay] couples to legally marry*

⁵ The Starting Line Group was a coalition of more than 400 non-governmental actors from across the European Union, active in the field of anti-discrimination, which advocated for the adoption of directives in the field of anti-discrimination

⁶ The author of this paper was a member and the secretary of the working group

and adopt children' (Latal, 2009). This position disregarded the fact that sexual orientation was at that time already a prohibited basis for discrimination in the legal system of BiH, including in the Law on Gender Equality from 2003, the Criminal Code from 2003, and the open-ended list from the Constitution of BiH when read in line with ECtHR case law.

In response, a group of MPs proposed a set of amendments designed to exclude sexual orientation from the law and a number of other grounds, such as '*marital and family status, pregnancy or maternity, age, health status, disability, genetic heritage, sexual orientation or expression*'.⁷ Although there was no debate during any of the sessions about the reason why these other grounds were not to be included, many have argued that this was only to mask the true intent behind the amendment relating to the deletion of sexual orientation. This was particularly obvious during the parliamentary debate when arguments were raised only in relation to sexual orientation. Many professionals and international organisations, including the EU delegation, criticized this approach, but the amendments were adopted.

After many discussions and exhausting parliamentary debates the Law on the Prohibition of Discrimination was adopted in July 2009 and entered into force in August 2009. However, once the law was published in the Official Gazette, 'sexual orientation' and 'sexual expression' appeared on the list of prohibited grounds - but all the other grounds mentioned above did not (*marital and family status, pregnancy or maternity, age, health status, disability and genetic heritage*), leaving experts who were monitoring the process puzzled. Regardless of the fact that the law did not fully transpose the equality directives of the EU (failing, in particular, to spell out 'age' and 'disability' as grounds for discrimination), the Roadmap condition of adopting a law on anti-discrimination was considered as fulfilled. This might be because, even though the law did not explicitly mention 'age' and 'disability' as grounds for discrimination, the list of grounds for prohibition is open-ended, which is not the case with the equality directives. This has allowed the first litigants to use the law to successfully litigate a disability discrimination case.⁸

Applying the research methodology, we find evidence of effective conditionality in the case of the adoption of the law prohibiting discrimination. It is clear that the condition was:

- (i) determinable - the Roadmap Towards a Visa Free Regime with Bosnia and Herzegovina spelled out a quite determinable condition: 'adopt and enforce legislation to ensure effective protection against discrimination'. In terms of the determinacy of EU standards in the area of non-discrimination, the EU equality directives created clear standards for compliance.

⁷ Amendments proposed by the members of the Croat Democratic Party of BiH (HDZ BiH) to the House of Representatives, The Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics and the Constitutional Committee of the House of Representatives of the Parliamentary Assembly of BiH on June 10, 2009.

⁸ E.B. vs. Ministry of Education, Science, Culture and Sports of Herzegovina-Neretva Canton, Case No. P 58 0 P 056658 09 P, July 7, 2010.

(ii) the size and speed of rewards – being one of the last conditions for a visa-free regime, compliance promised immediate rewards. The push from the citizenry to obtain the opportunity for visa-free travel in this case could be considered even more important to the political elites than the pull from the EU.

(iii) the credibility of threats and promises – in this case, the EU, possessing an important bargaining tool, was able to employ a credible promise and threat in case of non-compliance. Given the size and speed of rewards, the credibility of this promise was further amplified.

(iv) the size of adoption costs – analysis of the parliamentary discussion suggests that adaptation costs in this case were quite high. On the one hand, the law introduced standards many of the members of parliament were not comfortable with, while on the other hand civil society groups which had a perceived influence over an important part of their constituencies asked them to reject parts of the law.

In this case of conditionality, all factors proved to be important. It is clear that rewards and the credibility of threats and promises existed, which created a clear push towards the adoption of the law. The adaptation cost of a part of the law (including ‘sexual orientation’ among the prohibited grounds) was obviously high, and members of parliament used every opportunity to argue that it should not be part of the anti-discrimination legislation of BiH. However, the determinacy not only of the law, but also of the disputed prohibited ground in EU equality directives, proved to be crucial as this specific substantive condition was followed through by the EU. At the same time, less push was made in relation to the grounds of age and disability which remained deleted by the abovementioned amendment.

4.2 Limited Europeanization

The SAA with Bosnia and Herzegovina was signed in June 2008.⁹ While many expected the process of Europeanization to intensify, new challenges emerged in relation to the dysfunctional constitutional system created by the Dayton Peace Agreement. In December 2009, the ECtHR ruled – in its judgement on the case *Sejdić and Finci v. Bosnia and Herzegovina*¹⁰ – that the constitution and the electoral law of Bosnia and Herzegovina violated the ECHR and its protocols. The court found that the precondition of declaring one’s affiliation as Serb, Croat or Bosniak ‘constitutes a violation of Article 1 of Protocol No. 12’ of the European Convention on Human Rights. The ruling in *Sejdić and Finci v. Bosnia and Herzegovina* has since become the dominant issue in Bosnian politics. It also became one of the conditions

⁹ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other, OJ L 164, June 30, 2015. 2–547.

¹⁰ *Sejdić and Finci v. Bosnia and Herzegovina* [GC], (nos. 27996/06 and 34836/06), ECHR 2009; *Zornić v. Bosnia and Herzegovina* (no. 3681/06), ECHR 2014; *Slaku v. Bosnia and Herzegovina* (Application no. 56666/12), ECHR 2016.

of a credible membership application and one of the most foreseeable human rights conditions tied to EU candidacy. However, changing a constitution in a country with outdated post-conflict power-sharing mechanisms proved to be challenging. The EU invested a significant amount of its capacity in organising high-level political meetings facilitated by EU institutions, but to no avail.

In 2014 plenty of criticism arose over this approach and several initiatives were established to overcome the stalemate. One of them was the British-German initiative which proposed a new approach to Bosnia and Herzegovina based on the argumentation that this condition should be dealt with at a later stage. This new approach was translated into the conclusions of the EU Foreign Affairs Council on Bosnia and Herzegovina that were agreed at a meeting in Luxembourg in October 2014 (Council of the European Union, 2014). As a follow-up to these conclusions, the main political stakeholders of BiH made a written commitment to the EU.¹¹ This written commitment proposed to address ‘*the implementation of [the ruling of the ECtHR in the case of Sejdić and Finci v. Bosnia and Herzegovina] at later stage (consequent to the initial reform measures)*’ and invited the country instead to ‘*make progress regarding implementation of additional reforms in order to improve the functionality and efficiency of all levels of government in Bosnia and Herzegovina*’.¹²

Some saw this shift as the end of conditionality in Bosnia and Herzegovina and a ‘bankruptcy of the previous policy, and the fact that a proper strategic approach to Bosnia appears unattainable’ (Vogel, 2015). Others like Mr Sejdić welcomed the new approach and the readiness of the EU to continue supporting reforms in Bosnia, warning however that the decision would have to be implemented (Lingo-Demirovic and Sajinovic, 2016). In any case, this made possible the unfreezing of the SAA, which has been in force since 1 June 2015.

Applying the same research methodology to the time before the Sejdić-Finci condition was dropped, we can find evidence of what has hindered the effectiveness of this condition.

(i) Determinacy – this condition was quite determinable since it was related to the decision of the ECtHR. At the same time there is no doubt that the constitution of Bosnia and Herzegovina is discriminatory concerning citizenry.

(ii) The size and speed of rewards – the reward in this case was clear, and could be obtained quickly: the entry into force of the SAA brings political gains and permits access to new pre-accession funds. On the other hand, it also initiates further conditionality, which may be anticipated to be even more demanding. Although there was a push from many human rights advocates, the citizenry remained largely divided, and one cannot argue that there was a significant push

¹¹ Written Commitment of Bosnia and Herzegovina Agreed by the BiH Presidency on January 29, 2015, Signed by the leaders of the 14 parties represented in parliament, and endorsed by the Parliamentary Assembly of Bosnia and Herzegovina on February 23, 2015. http://www.europarl.europa.eu/meetdocs/2014_2019/documents/dsee/dv/0507_11/0507_11en.pdf
Accessed: 01-03-2017.

¹² Ibid.

from the citizenry/citizenries to put these amendments high on the political agenda.

(iii) the credibility of threats and promises – the credibility of the withdrawal of the reward was clear. The entry into force of the SAA was postponed for almost six years.

(iv) the size of adoption costs – this factor was one of the main obstacles for most stakeholders in the country. Considering that the Sejdić-Finci judgement touched upon a key element of the Dayton constitutional setup – the ethnic quota –, compliance could not have happened without fundamental changes. Any change in the current power-sharing mechanism could have had a significant impact on the constitutional set-up of the country, and it seems that not many of the political parties which had been in position since 2009 were ready to give up on this system, or at least a critical number of political parties never shared the same vision.

The absence of the clear determinacy of this condition combined with the size of adaptation costs gave political elites enough room to argue and advocate against these reforms. Others have confirmed this conclusion and found that in the case of BiH the value of ‘eventual membership is considered lower than the value of maintaining the current status quo of ethnic relations,’ which limits the effectiveness of EU conditionality to ensure reforms (Vasilev, 2011). It was not only government sources who argued that this conditionality is too strict for a pre-accession country and ‘unfair and counterproductive’, questioning the fairness of the costs of adaptation (ESI, 2013). Speaking of determinacy, some have raised the question that as similar legislative provisions existed in EU countries such as Belgium, South Tyrol (Italy) and Cyprus, then why was there so much focus on the constitution of Bosnia and Herzegovina? With the known outcome of this condition we can argue that these factors have contributed to an adjustment in EU conditionality policy. However, if this change in EU conditionality policy will affect its future effectiveness remains to be seen.

4.3 Stabilization and Association

The entry into force of the SAA in June 2015 gave new momentum to the process of Europeanization. In terms of non-discrimination, this momentum will support efforts to further strengthen legal safeguards against discrimination and to address the prohibited grounds for discrimination that are lacking. The progress report from 2010 immediately noted that ‘no steps were taken to remedy the shortcomings of the Anti-Discrimination Law, notably the failure to include age and disability and the broad scope of the exceptions.’ Additionally, the recommendations from the 7th Plenary meeting on Structured Dialogue between the EU and Bosnia and Herzegovina concerning the revision of the Law on the Prohibition of Discrimination recommended that the Ministry of Human Rights and Refugees consider *‘the inclusion of more substantial amendments to further harmonise the law with the EU*

acquis, particularly looking at disabilities and age as grounds of discrimination, as well as including a definition of sexual orientation and gender identity in line with internationally agreed terminology (European Commission, 2014b).¹³ This conclusion was repeated in the European Commission Progress Report of Bosnia and Herzegovina in 2015 (European Commission, 2015).

In addition to these conditions, understanding grew among legal professionals, civil society organisations and academia that the law has other shortcomings. Several research papers which analysed these shortcomings were produced, many of which highlighted other areas where the law was failing to transpose the directives fully (Šimonović Einwalter and Selanec, 2015). The OSCE Mission to Bosnia and Herzegovina produced a set of ready-made proposals for amending the law, pointing to the shortcomings of the law which affected its effectiveness. Again, there was enough evidence of socialization beyond conditionality, as was the case in 2008 and 2009.

These conditions, but also a growing awareness of implementation problems, finally motivated the Ministry for Human Rights and Refugees of BiH to work towards amending the law in late 2015. The explanatory report following the amendment of the law specifies that the main goal of these amendments is to fully align the law with EU equality directives.¹³ Once again, the inclusion of sexual orientation as a prohibited ground was questioned during the hearings but less vigorously than in 2009. The law was finally modified in August 2016 following numerous hurdles in the parliamentary assembly.¹⁴ The amended law is now significantly improved and introduces many procedural safeguards which can support the litigation of discrimination cases.

The amendments were later hailed as progress by the 2016 Progress Report, especially ‘the inclusion of age, sexual orientation, gender identity and disability as grounds for discrimination’ (European Commission, 2016). Although the amendments were adopted and progress was noted, the effectiveness of EU conditionality policy in this case is questionable. As already noted, the inclusion of the two missing grounds in the law were not that controversial, since both were de facto already part of the law, and, most importantly, the law was already used to litigate cases of disability and there was nothing to prevent litigation of age discrimination cases. Instead of focusing on these two grounds, the EU should have defined the full transposition of equality directives as a condition. Other organisations took the lead in this regard and proposed amendments which rectified important shortcomings of the law; e.g. a very restrictive statute of limitation which affected the effectiveness of the law. Additionally, the article on the burden of proof was not aligned with the relevant standard from the directives, which prevented an important procedural safeguard being used in many cases. These and a number of other shortcomings were amended, although not specifically mentioned as a condition.

¹³ Draft Amendments of the Law prohibiting discrimination, March 2016. [http://static.parlament.ba/doc/89179_0102-02-1-341_16%20-%20\(B\)%20Precisceni%20tekst.pdf](http://static.parlament.ba/doc/89179_0102-02-1-341_16%20-%20(B)%20Precisceni%20tekst.pdf). Accessed: 29-06-2017.

¹⁴ Law on changes and amendments to the Law on Prohibition of Discrimination, BaH Official Gazette No. 66/16.

Additionally, EU conditionality relating to the ‘broad scope of exceptions’ of the principle of equal treatment contained in Article 5 of the law was not amended. Experts agree that some of these exceptions are grounded in EU equality law (such as positive measures for marginalized groups, genuine occupational requirements, exceptions in the best interest of the child, reasonable accommodation, and citizenship), while others are not (Kovač, 2016). These include an exception from application of the law in terms of access to any right regulated by the family codes, while another relates to certain exceptions in terms of access to employment in religious communities. Conditions in relation to these particular shortcomings are quite determinable in EU equality directives, and it is not quite clear why they were not communicated to the government.

Application of the same methodology as in the previous cases is not fully possible. The condition was determinable and the adaptation costs were low. Although a tangible reward was missing, it appears that socialization contributed to the success of this condition. However, EU conditionality cannot be seen as responsible for the success and the improvements in the law prohibiting discrimination, at least not for those which go beyond the inclusion of the missing grounds for discrimination. However, the EU can be criticized for failing to use this opportunity to condition the full transposition of EU equality directives. This is a missed opportunity which will have to be addressed through future conditionality. However, Bosnia and Herzegovina can be praised for making very significant and substantive changes to the procedural aspects of the law which pave the way for its more efficient implementation and better protection of victims of discrimination.

5. What lessons for future EU human rights conditionality?

This paper analysed two case studies to identify the lessons that could be learned in relation to the effectiveness of EU human rights conditionality. As elaborated in the discussion of both case studies, the interplay between different factors proved to be crucial in terms of effectiveness. Adoption costs in both case studies were high (it could be argued that, in terms of conditionality, adoption costs generally tend to be high, otherwise internal actors will be able to broker the changes concerning any conditionality). This is why the determinacy of conditions, the size and the speed of rewards, and the credibility of threats need to be as clear as possible: to ensure that local stakeholders do not veto reforms.

In both cases (the adoption of the law prohibiting discrimination and the implementation of the *Sejdić and Finci v. Bosnia and Herzegovina* judgement), adoption costs were high. The former introduced advanced legal solutions which proved to be controversial to members of parliament who used every means available to amend these solutions and water down the legal safeguards proposed by the Council of Ministers. However, the determinacy of conditions manifested in clear legal provisions in EU equality directives and the prospect of a clear and immediate reward lead to the circumvention of these objections and resulted in the adoption of the law.

In the case of the implementation of the *Sejdić and Finci* decision adoption costs were high as implementation would have required a political consensus among a

number of political actors who had divergent views about how the constitution should be amended. In this particular case, the rejection of constitutional reform meant maintaining the status quo of current ethnic relations, which increased the adaption cost. And although the reward was clear, its size and immediacy, as well as the determinacy of the condition, was not. This created enough room to attract criticism from political elites who were more inclined to maintain the status quo than to undertake demanding reforms. The fact that the EU postponed this condition to a later stage might negatively affect the credibility of future conditionality.

Socialization proved to be an important factor, especially during the process of adopting the law prohibiting discrimination. Where conditionality was not clear, as in the amending phase, socialization proved to be a more effective alternative model for exporting values and norms. Domestic actors had the knowledge and the capacity to identify gaps between the law and the equality directives, and used the directives to advocate for the adoption and later amendment of the law. They seemed to have recognised that EU equality directives include rules which if adopted could address domestic policy problems effectively. A network of domestic civil society organisations pushed for the adoption of the law as a response to discriminatory practices in the country, and civil society organisations proposed and successfully advocated for substantial changes in the law which went beyond those identified by the EU.

With the entry into force of the Stabilisation and Association Agreement on June 1, 2015, Bosnia and Herzegovina has entered its fifth and most intensive pre-accession phase. It can be expected that human rights conditionality will also intensify once Bosnia and Herzegovina presents its response to the Questionnaire. This paper has highlighted some of the key factors which influence the effectiveness of this approach. It also proposes that investing in socialization should be considered an effective alternative or supporting model.

References

- Bărbulescu, I. G. and M. Troncoță (2012) The Ambivalent Role of the EU in the Western Balkans: 'Limited Europeanisation' between Formal Promises and Practical Constraints. The Case of Bosnia-Herzegovina. *Romanian Journal of European Affairs*, 12(1): 5–26.
- Chandler, D. (2000) *Bosnia: Faking Democracy After Dayton*. London: Pluto Press.
- Chandler, D. (2006) State-building in Bosnia: The limits of 'Informal trusteeship'. *International Journal of Peace Studies*, 11(1): 17–38.
- Hammond, P. (2014) *Bosnia & Herzegovina - a new strategic approach*. Speech at the Aspen Institute conference. November 5, Berlin. <https://www.gov.uk/government/speeches/bosnia-herzegovina-a-new-strategic-approach> Accessed: 26-06-2017.
- ESI (European Stability Initiative) (2008) *Roadmap Towards a Visa Free Regime with Bosnia and Herzegovina*. <http://www.esiweb.org/pdf/White%20List%20Project%20Paper%20-%20Roadmap%20Bosnia.pdf> Accessed: 13-02-2017.
- ESI (European Stability Initiative) (2013) *Lost in the Bosnian Labyrinth: Why the Sejdić-Finci Case Should Not Block an EU Application*. ESI discussion paper, October 7. http://www.esiweb.org/pdf/esi_document_id_143.pdf Accessed: 26-06-2017.
- Knaus, G. and F. Martin (2003) Lessons from Bosnia and Herzegovina, Travails of the European Raj. *Journal of Democracy*, 14(3): 60–74.
- Kmezić, M. et al. (2014) Europeanization by Rule of Law Implementation in the Western Balkans. *SSRN Electronic Journal*. DOI: <http://dx.doi.org/10.2139/ssrn.2437800>
- Kovač, V. (2016) Kada se različito postupanje može opravdati? (When Can Disparate Treatment be Justified?) Sarajevo: Analitika Center for Social Research. http://www.analitika.ba/sites/default/files/publikacije/kada_se_razlicito_postupanje_moze_opravdati_1.pdf Accessed: 29-06-2017.
- Latal, S. (2009) Bosnia's Religions Unite Against Gay Marriages. *Balkan Insight*, June 3, <http://www.balkaninsight.com/en/article/bosnia-s-religions-unite-against-gay-marriages> Accessed: 26-06-2017.
- Lingo-Demirovic, M. and D. Sajinovic (2016) BiH otvorila vrata Evrope (BiH Opened the Door to Europe). *Nezavisne*, September 21, <http://www.nezavisne.com/novosti/bih/BiH-otvorila-vrata-Evrope/388291> Accessed: 01-03-2017.
- Noutcheva G. and S. Duzgit (2012) Lost in Europeanisation: The Western Balkans and Turkey. *West European Politics*, 35(1): 59–78. DOI: <https://doi.org/10.1080/01402382.2012.631313>

- Peace Implementation Conference meeting in Bonn, 10/12/1997.
- Steiner, C. et al. (2010) *Constitution of Bosnia and Herzegovina - Commentary*. Sarajevo: Konrad Adenauer Stiftung.
- Schimmelfennig, F. (2010) *Europeanization beyond the Member States*. Zurich: ETH: Zeitschrift für Staats- und Europawissenschaften.
- Schimmelfennig F. and U. Sedelmeier (2004) Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe. *Journal of European Public Policy*, 11(4): 661-679. DOI: <https://doi.org/10.1080/1350176042000248089>
- Šimonović Einwalter, T. and G. Selanec (2015) *Alignment of the Law on Prohibition of Discrimination with the EU acquis. Expert Analysis on Alignment*. Sarajevo: Sarajevo Open Centre. http://eu-monitoring.ba/site/wp-content/uploads/2016/05/DISKRIMINATION_HRP-9_eng_01_27.04.2015_WEB.pdf Accessed: 29-06-2017.
- Steunenberg, B. and A. Dimitrova. (2007) *Compliance in the EU Enlargement Process: The Limits of Conditionality*. European Integration online Paper. <http://eiop.or.at/eiop/pdf/2007-005.pdf> Accessed: 26-06-2017.
- Vasilev, G. (2011) EU Conditionality and Ethnic Coexistence in the Balkans: Macedonia and Bosnia in a Comparative Perspective. *Ethnopolitics*, 10(1): 51-76. DOI: <https://doi.org/10.1080/17449057.2010.535701>
- Vogel, T. (2015) The End of Conditionality in Bosnia-Herzegovina? *Balkans in Europe Policy Blog*, March 16, <http://www.suedosteuropa.uni-graz.at/bicpag/node/151> Accessed: 01-03-2017.

Official Documents, Laws, and Cases

- Charter of Fundamental Rights of the European Union (2000/C 364/01) December 18, 2000.
- Commission of the European Communities (2006) *Commission Staff Working Document. Bosnia and Herzegovina 2006 Progress Report*. Brussels, 8.11.2006.
- Commission of the European Communities (2007) *Commission Staff Working Document. Bosnia and Herzegovina 2007 Progress Report*. Brussels, 6.11.2007.
- Commission of the European Communities (2008) *Commission Staff Working Document. Bosnia and Herzegovina 2008 Progress Report*. Brussels, 5.11.2008.
- Commission of the European Communities (2009) *Commission Staff Working Document. Bosnia and Herzegovina 2009 Progress Report*. Brussels, 14.10.2009.
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin Official Journal L 180, 19/07/2000 P. 0022 - 0026.

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation Official Journal L 303, 02/12/2000 P. 0016 - 0022.
- Council of the European Union (2014) *Council conclusions on Bosnia and Herzegovina Foreign Affairs Council meeting*, Luxembourg, 20 October.
- E.B. v. France* [GC], no. 43546/02, January 22, 2008.
- European Commission (2005) *Bosnia and Herzegovina. 2005 Progress Report*. Brussels, 9.11.2005.
- European Commission (2010) *Commission Staff Working Document. Bosnia and Herzegovina 2010 Progress Report*. Brussels, 9.11.2010.
- European Commission (2011) *Commission Staff Working Document. Bosnia and Herzegovina 2011 Progress Report*. Brussels, 12.10.2011.
- European Commission (2012) *Commission Staff Working Document. Bosnia and Herzegovina 2012 Progress Report*. Brussels, 10.10.2012.
- European Commission (2013) *Commission Staff Working Document. Bosnia and Herzegovina 2013 Progress Report*. Brussels, 16.10.2013.
- European Commission (2014) *Commission Staff Working Document. Bosnia and Herzegovina 2014 Progress Report*. Brussels, 8.10.2014.
- European Commission (2015) *Commission Staff Working Document. Bosnia and Herzegovina 2015 Report*. Brussels, 10.11.2015.
- European Commission (2016) *Commission Staff Working Document. Bosnia and Herzegovina 2016 Report*. Brussels, 9.11.2016.
- European Commission (2014b) Plenary meeting of the ‘Structured Dialogue on Justice and Additional Rule of Law Matters between the European Union and Bosnia Herzegovina’ Sarajevo, Bosnia and Herzegovina (May 13-14, 2014) Recommendations by the European Commission.
- European Union (2000) Steps to be taken by Bosnia and Herzegovina to Prepare for a Launch of a Feasibility Study. <http://www.esiweb.org/pdf/bridges/bosnia/EURoadMap.pdf> Accessed: 26-06-2017.
- Council Joint Action 2004/569/CFSP on the mandate of the European Union Special Representative in Bosnia and Herzegovina, On 12 July 2004, OJ L 252, 28.7.2004. 7.
- Law on changes and amendments to the Law on Prohibition of Discrimination BiH, Official Gazette No. 66/16
- Law on Prohibition of Discrimination BiH, Official Gazette No. 59/09
- Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009.

Slaku v. Bosnia and Herzegovina, no. 56666/12, ECHR 2016.

Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other, OJ L 164, June 30, 2015. 2-547.

The Constitution of Bosnia and Herzegovina, General Framework Agreement for Peace in Bosnia and Herzegovina, 35 ILM 75 (1996), Annex IV.

Commission on Security and Cooperation in Europe (1992) *The Referendum on Independence in Bosnia-Herzegovina. February 29 - March 1, 1992.*

Written Commitment of Bosnia and Herzegovina Agreed by the BiH Presidency on January 29, 2015, Signed by the leaders of the 14 parties represented in Parliament, and Endorsed by the Parliamentary Assembly of Bosnia and Herzegovina on February 23, 2015.

Zornić v. Bosnia and Herzegovina, no. 3681/06, July 15, 2014.