Inescapable partners: The European Union and the Council of Europe as rule of law promoters in Ukraine

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Introduction

The dissolution of the Soviet Union changed the political landscape in Europe and transformed the membership and role of Europe’s two major organisations—the European Union (EU) and the Council of Europe (CoE). The nature of these organisations’ relationships with post-Soviet states and with each other received considerable scholarly interest in the 1990s and early 2000s. Originally founded as alternatives, the EU and the CoE "have run in parallel for most of the time, each within its very own field of activity" (Kolb, 2010, p. 2). Following the decades of transformation, however, the two found themselves pursuing similar tasks in similar fields: promoting the triptych of European values – democracy, human rights and the rule of law—in post-Soviet states. Scholars examined transforming networks of "interlocking" European organisations and concluded that there are increasing overlaps of their memberships and competences, with elements of both cooperation and competition (see Baracani, 2008; Bartole, 2000; Dimitrova & Pridham, 2004; Guetzkow, 1998; Merlingen & Ostrauskaite, 2004; Peters, 1996; Strohal, 2005). In the last decade, the political and developmental context in Europe altered once again, due to the maturing of the EU as an actor and the new quality of EU relations with post-Soviet states after the 2004 and 2007 EU enlargements. The EU value promotion discourse solidified, development assistance funds grew, and interest, presence and engagement in the region intensified. Post-Soviet states themselves developed an interest in EU, all the way to membership aspirations for some, giving the EU greater political weight. The CoE also expanded its membership and competences in the last decade, but not as dramatically as the EU.

Acknowledging these changes, this study revisits the relationship between the EU and the CoE as promoters of European values in post-Soviet states. To provide empirical detail and analytical depth, the study examines a sin-
gle case: rule of law promotion efforts of the two organisations in Ukraine.\(^1\) The rule of law is extracted from the basket of shared European values for two reasons. First, the rule of law has been visibly mainstreamed inside both the EU\(^2\) and the CoE\(^3\) over the last twenty years. Second, rule of law compliance, or rather drastic rule of law incompliance, in post-Soviet states constitutes a great challenge for domestic reformers and a major concern for external actors. Ukraine is selected among post-Soviet states for its elaborate relationships with both the EU and the CoE, which have engaged in extensive rule of law promotion efforts in this country. Moreover, Ukraine's formal aspirations of EU membership give the EU additional political leverage, affecting the EU-CoE relationship.\(^4\) It should be emphasised that this case study research strategy is used instrumentally to investigate in-depth the general phenomenon, the relationship between the EU and the CoE as promoters of European values in post-Soviet states, inasmuch as it examines rule of law promotion in the Ukrainian case in particular.

\(^1\) Rule of law promotion efforts of the OSCE, the UN, the OECD, International Financial Institutions and individual states (in particular, USA and EU Member States), as well as the relationship between them and the EU/the CoE are not addressed by this study due to scope limitations, without prejudice to their effect on developments in post-Soviet states and Ukraine in particular.

\(^2\) Rule of law clauses occupy a solid place in the Treaty on the European Union (TEU) and permeate EU internal and external policies, including relevant framework policies (the European Neighbourhood Policy and the Eastern Partnership) and policies specifically towards Ukraine (Burlyuk, 2014b).

\(^3\) In 2005, the CoE, the OSCE and the UN adopted a "Multilateral organizations rule of law pledge"; in 2007, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution "The principle of the rule of law" (1594/2007); in 2008, Rapporteur Group on Legal Co-operation issued a report "The Council of Europe and the rule of law: an overview" (GR-J(2008)11); in 2011, Venice Commission adopted a "Report on the rule of law" (2011-003.rev); and due to the latest restructuring, the rule of law now is featured not only in the titles of CoE programmes, but also in the title of Directorate General I – Human Rights and Rule of Law.

\(^4\) For the first time, Ukraine declared its intention to develop relations with the EU based on the principles of integration leading to full membership in the Decision of the Parliament of Ukraine "On key directions of the foreign policy of Ukraine" on July 2\(^{nd}\), 1993. At the same time, formal aspirations most of the time do not match the attitude and performance behind them, which made scholars speak of "integration by declaration" (Sherr, 1998, p. 12) and "integration without Europeanisation" (Wolczuk, 2004, p. 2) as strategies of the Ukrainian political elites.
The main objective of this study is to explore and conceptualise the complex nature of the EU-CoE relationship. The existing scholarship on the subject revolves around the competition-cooperation dichotomy\(^5\) and concludes that the EU and the CoE are simultaneously involved in a conflictive and cooperative relationship (Kolb, 2013). Recognising that "relations between international organizations are, as a rule, based on both co-operation and competition" (Rotfeld, 2000, p. 377), this study aims to enrich the debate empirically and analytically by revealing and conceptualising the relationship's nuances in the studied case. The investigation focuses on the substance and process of EU and CoE rule of law promotion.\(^6\) The elements of comparison notwithstanding, this is not a comparative study as such: the main objective is to analyse how and why the two actors interact in the shared field of rule of law promotion. The analysis draws on original empirical data collected through document analysis; semi-structured interviews with EU and CoE officials (working on rule of law promotion in the region or cooperation between the two organisations) and experts (working for these and other development actors) in Ukraine; and participant observation at policy events, panel discussions and EU/CoE project conferences. Data collected through expert interviews and participant observation are especially valuable for exposing informal details, attitudes and perceptions that add nuance to understanding the relationship between the EU and the CoE.

The findings reaffirm that the EU and the CoE as rule of law promoters in Ukraine are in a complex interactive relationship, with elements of both co-operation and competition. In addition to this, the findings reveal three important details (or tendencies) in their relationship: first, cooperation prevails over competition at substantive, political and operational levels, while competition is concentrated at the institutional level; second, cooperation at the

\(^5\) Many contributions include the dichotomy in the very title (e.g. De Schutter, 2007; Kolb, 2010, 2011; Polakiewicz, 2009).

\(^6\) That is to say, this study does not investigate actors' motivations to promote the rule of law. It assumes the aspiration of the EU and the CoE to make a positive impact, but does not imply altruism behind such an aspiration and allows for their engagement to be driven by "enlightened self-interest" (Whitman & Wolff, 2010, p. 7). This study also does not investigate the impact of their efforts as such. The impact is a feature in the analysis only in so far as concerns about impact inform actors' decisions on the substance and process of their engagement.
political and operational levels precedes and even triggers cooperation at the institutional level, bending the reluctant institutional structures of the two organisations; and, third, the growing political, financial and normative leadership of the EU does not cancel out the traditional and special relevance of the CoE in this region and policy area.

The chapter proceeds as follows. The first section examines the quest for normative leadership given substantive overlap in the value agendas of the two actors. The second section explores how this substantive overlap in value agendas leads to operational overlap in actors' areas of actual engagement. The third section analyses why, despite such substantive and operational overlap, there is more cooperation than competition between the two actors, concluding on a determinant role of the unity of their "civilising mission", or political overlap. The fourth section examines how the limitedness of resources and the complementarity of comparative advantages of the two organisations make them natural key partners for each other. Finally, the fifth section addresses an observation that the inevitability of cooperation at political and operational levels triggers cooperation at the institutional level. The findings' implications for future research and policy are stipulated in the concluding section.

Value agenda, substantive overlap and the quest for normative leadership

First of all, the obvious: the EU is a latecomer in the field of rule of law promotion, in Ukraine and globally. Ukraine acceded to the CoE on the 9th of November, 1995, is a participant of the Venice Commission since February 3rd, 1997, and falls under the jurisdiction of the European Court of Human Rights since September 11th, 1997. In contrast, the EU engagement in Ukraine became more or less active and deliberate only in 2004–2005, following the Eastern enlargement, the introduction of the European Neighbourhood Policy (ENP) and the so-called Orange Revolution. Until then, the EU "neither played nor endeavoured to play a role in domestic change in the Soviet successor states" (Wolczuk, 2009, p. 187). The Partnership and Cooperation Agreement (PCA) framework and technical assistance under the Technical Assistance to the Commonwealth of Independent States (TACIS) programme were basic and poorly targeted, the value dimension
was underdeveloped, and the relationship with Ukraine was secondary to those with the Central and East European countries (CEEC) and Russia.⁷

Concerning the value package, the EU and the CoE pursue similar and indisputably compatible agendas, with the rule of law firmly in both. The two actors fall in line as "European organisations" that represent "European values", to the extent these can be identified. Adherence to the rule of law is a membership condition of both organisations, according to Article 49 of the consolidated Treaty on the European Union (TEU) and Article 3 of the Statute of the Council of Europe respectively. Ukraine is a CoE member state, although norm compliance did not follow norm acceptance. Similarly, Ukraine aspires to become an EU member state, although its rhetorical commitment to the values shared by EU member states is not accompanied yet by practical commitment. While the CoE already missed an opportunity to apply pre-accession conditionality, the EU still has the power to do so, as analysed in this chapter.

The concept of the rule of law is not exhaustively defined for the purposes of its promotion by either the CoE or the EU, and its exact meaning may seem fluid. Conversely, the EU, the CoE, the Venice Commission and the United Nations all advocate for the existence of a consensus on the core meaning of the rule of law and a shared pre-understanding of its essential, unquantifiable elements.⁸ A coherent directing idea that law should serve its social goals by coordinating social relations, minimising arbitrariness and

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⁷ In the mid-1990s, the EU concluded ten similar partnership and cooperation agreements with all post-Soviet states minus Belarus and the Baltic states. The aims of these partnerships are to provide a general framework for political dialogue, support new democracies and develop their market economies and provide a basis for cooperation in a number of fields. TACIS was launched as early as 1991 to speed and support the domestic developments. For an overview of TACIS, see Frenz (2007).

⁸ See, for instance, European Commission Communication "A new EU Framework to strengthen the rule of law" (2014; also Annex); PACE Resolution "The principle of the rule of law" (1594/2007); Venice Commission "Report on the rule of law" (2011); UNGA Resolution "On the Declaration of the High-level meeting on the rule of law at the national and international levels" (A/Res/67/1, 2012) and Joint EU pledge for a High-level meeting at the UNGA, when the said resolution was adopted. EU officials repeatedly emphasised the existence of a consensual understanding of the rule of law in interviews. The ratio of the universal and the particular in European rule of law conceptions and human rights is debated in the literature (see Leino, 2002, 2005; Leino & Petrov, 2009).
providing order in society provides the conceptual baseline on the rule of law (Hill, 2007, p. 12; Tamanaha, 2007, p. 1). In relations with third states in the case of the EU and in relations with non-compliant states in the case of the CoE, this consensual understanding of the rule of law is common for the two organisations. In "A new EU framework to strengthen the rule of law" from March 2014, the European Commission stated explicitly that "aspects of the rule of law as a common denominator of the Union are fully reflected at the level of the Council of Europe" (Annex, p. 2). It ensures a degree of unity of their rule of law promotion efforts at a meta-level, notwithstanding differences in practical substantiation of the concept and areas of actual engagement analysed in the following section.

Being a non-specialised organisation, the EU extensively relies on the CoE concerning the rule of law standards and the assessment of a country’s compliance therewith. The CoE is better placed for the task of setting the standards and evaluating the performance both politically in terms of its mandate and membership (which translate into better legitimacy) and practically in terms of its structures and expertise (which translate into monitoring tools and mechanisms). Moreover, the availability of CoE standards in a given area makes it easy for the EU to promote respective values. It is easier politically, because it relieves the EU of a need to emphasise certain issues bilaterally, which often can put the relationship under (additional) strain. It is easier technically, because the EU can build on the CoE expertise in the field and, thereby, does not need to "reinvent the wheel". A senior EU official reiterated this point as follows:

The Council of Europe is a point of reference, absolutely. It is there, with all the standards, and those standards are included in the Copenhagen Criteria. So, perfect! And it is very convenient for us to have it as a point of reference: it allows us to put less emphasis on certain issues ourselves, because it is being done anyway, through a different mechanism.

In its programming documents, the EU operates widely with "European standards", directly or indirectly referring to the CoE and its elaborate networks of treaties, to which Ukraine is usually a party. Similarly, in its report-

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9 Programming documents analysed include ENP policy papers, Country strategy papers, National indicative programmes, as well as Action Plans, Association Agendas and Annual lists of priorities.
ing documents, the EU operates widely with Parliamentary Assembly of the Council of Europe (PACE) Resolutions, Venice Commission Opinions and reports of various monitoring bodies of the CoE.\textsuperscript{10} In fact, the dominance of the CoE and its standards in Ukraine was recognised also by non-European donors. For example, the U.S. Agency for International Development (USAID) Ukraine Rule of Law Project adopted the European model and focused its activities on rule of law components present in the Universal and European codes of standards.\textsuperscript{11}

At the same time, the EU is enhancing its own competence. Although many questioned the appropriateness of the EU taking up a value promoting role, the EU "has assumed such a role regardless" (Greer & Williams, 2009, p. 471). On the one hand, the EU is developing its own standards and "capturing the standard-setting tasks" of the CoE in certain areas (Kolb, 2010, p. 8).\textsuperscript{12} On the other hand the EU engages in developing new European standards under the auspices of the CoE itself, through and alongside individual EU Member States. A European Commission official emphasised that the EU is actively involved in drafting new CoE Conventions, in order to ensure that the latter contain "European standards" which are compatible with EU legislation on the subject and which the EU wants to see as such. One of the objectives behind this is precisely to make these standards binding on third state-partners of the EU that are CoE members. EU accession to the European Convention on Human Rights would increase EU leverage in the CoE forum further, making the EU a member of the Council of Europe in its own right, alongside the 28 EU Member States.\textsuperscript{13}

The CoE is said to perceive the tendency of the EU to take up new competences and claim normative leadership as a threat, because there is "a fear

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\textsuperscript{10} Reporting documents analysed include Annual Country reports, as well as periodic ENP reviews and reports.
\textsuperscript{12} In particular, the new EU framework on the rule of law from March 2014 is an attempt to consolidate the EU position on the rule of law (primarily for the purposes of internal affairs, but also for the purposes of external affairs).
\textsuperscript{13} Discussed since late 1970s, EU accession to the ECHR is a legal obligation under the Treaty of Lisbon (Article 2). For the state of affairs, see: http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention. Legally, EU accession to the ECHR is considered highly problematic (see Greer & Williams, 2009).
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of marginalization" of the CoE and its becoming a "standard-receiver" instead of a "standard-setter" (De Schutter, 2007, p. 3). The affirmation of its standard-setting role is still an important and sensitive issue for the CoE. For example, the Summary Report on Co-operation with the European Union (Council of Europe, 2013a, p. 1) separately emphasises that "the expertise and benchmarking role of the Council of Europe in European Union policies have been confirmed and even reinforced in the context of EU Enlargement and Neighbourhood Policy", in particular in the area of rule of law promotion. In any case, regardless of how sceptical the CoE is of the EU approaching and engaging itself in the CoE core tasks, it is "unable to act independently anymore" and "has to align itself with these new EU standards" (Kolb, 2010, p. 3).

The area of engagement and operational overlap

Due to its cross-cutting nature, its "connectedness", the rule of law "constitutes a kind of structural trap that bedevils reform efforts" in any area (Tamanaha, 2011, pp. 214, 224). Just as all roads lead to Rome, progress in any area eventually hinges on the poor application of the rule of law in a country. However, speaking of the areas of actual engagement of the EU and the CoE, "rule of law promotion can only be on the agenda of these organisations if it somehow falls within the mandate or contributes to the purpose of the organisation" (HIIL, 2007, p. 28). The CoE is concerned primarily with human rights and human security. In the European Convention on Human Rights (1950) and 200 other treaties that form the body of jus communis and in respective CoE development efforts, the rule of law features in relation to human rights and their protection by domestic courts (Council of Europe, 2006). The major activity of the CoE Office in Ukraine is targeted at the improvement of Ukraine's domestic legislation and capacity and at the enforcement of Ukraine's international commitments with regard to the protection of human rights, and the functioning of the judiciary and law enforcement institutions (Council of Europe, 2008; Council of Europe, 2013b). In terms of the object of reform, the rule of law promotion efforts of the CoE—as an intergovernmental organisation—focus first and foremost on
legislation to reform relevant institutional structures.\textsuperscript{14} The Venice Commission is the key specialised agency and, to use the words of the former Judge at the Constitutional Court of Ukraine, "definitely enjoys the biggest influence and authority in Ukraine on constitutional issues".\textsuperscript{15} In turn, the European Court of Human Rights embodies "the fourth degree of jurisdiction" for Ukrainians and is defined as "the most active external change agent for the past ten years (even if its judgements did not concern Ukraine)" (Petrov & Serdyuk, 2008, p. 198).\textsuperscript{16}

As for the EU, the rule of law (or rather rule of law compliance) is relevant for virtually every EU policy area and sector of bilateral cooperation; a point stated explicitly in some EU documents and emphasised repeatedly in interviews.\textsuperscript{17} An official at the European External Action Service commented: "Well, it is difficult to see rule of law as a ‘sector’, because elements of it are present in everything we do". Consequently, unlike the CoE which is a "niche player" in post-Soviet states (Merlingen & Ostrauskaite, 2004, p. 370), the EU pursues a holistic approach to rule of law promotion and refers to the rule of law for identification, authorisation, regulation and a variety of instrumental purposes.\textsuperscript{18} In EU framework (ENP) and bilateral (Ukraine) programming documents, the rule of law appears in relation to: the democratic organisation of power and constitutional and electoral reforms; the system of justice and the functioning of judiciary and law enforcement institutions; good governance and the functioning of public administration at all levels; the relationship between society and state, and human rights protection; economic and social development; legislative adaptation of regulatory institutions, procedures and standards; and, finally, in relation to stability

\textsuperscript{14} Kleinfeld (2012, Chapter 4) identifies four objects of rule of law promotion or reform: laws, institutions, power structures and social norms.

\textsuperscript{15} Similar views were expressed by other Ukrainian experts.

\textsuperscript{16} Ukrainians actively give recourse to the ECHR: a total of 56,427 applications have been submitted by Ukrainians as of January 1\textsuperscript{st}, 2014, according to the Overview 1959-2013 ECHR (see: http://www.echr.coe.int/Documents/Overview_19592013_ENG.pdf). Out of 717 court judgements, 709 are violation judgements, as of January 1\textsuperscript{st}, 2011 (see Ukraine country fact sheet, http://www.echr.coe.int/Documents/Country_Factsheets_1959_2010_ENG.pdf).

\textsuperscript{17} For example, it is stated in the National Indicative Programme for Ukraine 2011-2013 (p. 27).

\textsuperscript{18} Walker (2009, p. 124) identifies the above four rule of law use-values or purposes, which the rule of law can be put to serve by the EU.
and security and the management of borders and migration, fighting organised crime and corruption (Burlyuk, 2014a). Just as CoE efforts, EU rule of law promotion is targeted at transforming domestic legislative and institutional frameworks.

Being a latecomer, the EU had to carve a place amongst the activities already pursued by others. As a result, the EU cooperates with and even relies fully on other rule of law promoters as far as their understandings of the rule of law overlap and carries out its own activities as far as their understandings diverge. Constitutional reform, the reform of the system of justice, public administration and protection of human rights are traditional areas for rule of law promoters. Hence, the EU cooperates closely with the CoE, as well as with the Organization for Security and Co-operation in Europe (OSCE) and the USAID. The rule of law understood in relation to regulatory frameworks necessary for trade and investment is promoted by the EU and by the World Bank, the European Bank for Reconstruction and Development (EBRD) and others actors. At the same time, support for the adaptation of Ukrainian legislation to the EU *acquis communautaire* comes from the EU alone. Finally, the rule of law understood in relation to stability and security is promoted primarily by the EU (in cooperation with the OSCE), and no other rule of law promoter puts equal emphasis on border management, illegal migration and organised crime. Noteworthy, recent years have brought a reversal of the trend: external donors increasingly align their activities in Ukraine with the EU agenda, set out in Action Plans, Association Agendas and annual Lists of Priorities. This is because they recognise the special role of the EU due to Ukraine's European aspirations and because the EU agenda serves as a basis for Ukraine's national reform programmes, often adopted as reactions to EU-Ukraine cooperation documents (Wolczuk, 2009, p. 200). The Association Agreement between the EU and Ukraine concluded in parts in March and June 2014 makes up to 80 per cent of the EU *acquis communautaire* obligatory for Ukraine and will inflate the relevant weight of the EU and its standards, including on the rule of law.\(^\text{19}\)

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\(^{19}\text{The complete texts of the Association Agreement can be accessed at: http://eeas.europa.eu/ukraine/assoagreement/assoagreement-2013_en.htm.}\)
Although both the CoE and the EU remain ambiguous over the precise scope of the rule of law, the core business of the CoE is clearer and narrower than that of the EU. EU rule of law promotion is broader and more all-encompassing, with less focus than that of the CoE, due to the EU's wider interests, mandates and ambitions.20

"Mission civilisatrice" and political overlap

In organisation theory, such substantive and operational overlap should generate competition and conflict (Grandori, 1987, p. 58; Pfeffer & Salancik, 2003, p. 2). In practice, however, there is no apparent competition among different actors, and the rule of law promotion environment in Ukraine can be characterised as "friendly". Interviews uncovered a strong and seemingly genuine ambition of all parties to avoid duplication and to ensure compatibility. In the absence of a structured government-led mechanism, semi-formal structures have been created to this end by rule of law promoters themselves. For example, the Ukraine Rule of Law Project (USAID) initiated regular monthly roundtables of all "activists" in the field of rule of law promotion; and the EU Delegation in Ukraine coordinates assistance cooperation with EU member states and other development partners. Consultation, co-ordination and even cooperation between various rule of law promoters in Ukraine, also non-European and non-governmental ones, can be observed. The "common product" in the form of joint publications, conferences and workshops confirms that such cooperation is not a mere imitation.21 Nonetheless, this coordination is more about stream-lining separate efforts than about working together: ultimately, they are distinct actors with their own agendas, budgets and procedures.

The major reason for more cooperation than competition among different rule of law promoters in Ukraine in principle and the EU and the CoE in particular is the political reality and the lack of interest, motivation and capacity for reform among local partners. Notwithstanding important differences in the established objectives of the two organisations, they pursue principally

20 Greer and Williams (2009, p. 480) make a similar argument concerning human rights policies of the EU and the CoE.

21 For example, a DVD "International standards for judiciary" (2010) in Ukrainian is a joint production of three rule of law promoters: the EU, the CoE and USAID.
the same *mission civilisatrice*, or "civilising mission", in Ukraine and in the post-Soviet space overall.\(^{22}\) Indeed, assessed against receiving states, the EU and the CoE have more in common than not. As discussed earlier, a shared pre-understanding of the essence of the rule of law exists in Europe. In the Report on the Rule of Law (Venice Commission, 2011, pp. 4–5), the Venice Commission explicitly stated that a consensual understanding of the essence of the rule of law is to be distinguished from a distorted, purely formalistic understanding as "rule by law", "rule by the law" or even "law by rules", found in some former socialist states.\(^{23}\) In the EU context, "we can be certain of at least one thing: an oppressive legal order cannot satisfy the EU's understanding of the rule of law" (Pech, 2012, p. 27).

However, it remains a question whether the understanding of the rule of law in Ukraine and other post-Soviet states is the same, similar or at least receptive of the European one. Ukraine declared a commitment to the rule of law through its Constitution (Articles 1 and 8) and, among other things, its membership in the CoE. Yet, norm acceptance did not translate into immediate norm compliance. Moreover, little to no improvement in Ukraine's rule of law compliance in the past two decades can be reported. In the World Justice Project Rule of Law Index 2011, Ukraine received low scores for all identified rule of law factors and sub-factors, ranking last or close to last globally, regionally and by income group (Agrast, Botero, & Ponce, 2011, pp. 100, 143).\(^{24}\) The systemic shortcomings are best captured by two paradoxes: the façade arrangement paradox and the Brownian motion paradox. The first means that, although spelled out thoroughly at the fundamental constitutional level, rule of law clauses fail drastically in reality. Thus, their role is reduced to a façade arrangement. The second means that, with a lot of movement overall, but no movement in a particular direction, rule of law reform processes in Ukraine resemble Brownian motion (Burlyuk, 2013, Chapter 7).

\(^{22}\) Merlingen & Ostrauskaite (2004, p. 366) made a similar argument with respect to the OSCE and the CoE.

\(^{23}\) Incidentally, the interviewed Venice Commission official revealed that this particular line was included upon the insistence of a Ukrainian delegate to the Venice Commission, with Ukraine and other post-Soviet states in mind.

\(^{24}\) See also reports by KIIS (2006), Neill & Brooke (2008), Chebanenko, et al. (2011), and Allison (2012).
The reasons behind these paradoxes are deficiencies in all categories (or objects of rule of law reform)—laws, institutions, power structures and professional and popular social norms—and lie beyond the scope of this chapter. What is relevant here is the obstructive and infamous lack of political will for reform among Ukrainian elites. One of the risks of competition between the two organisations is duplication and sending mixed signals to their Ukrainian partner institutions, which are often identical for different projects. In the situation of limited interest, will and capacity for reform among local stakeholders, competition between the EU and the CoE would undermine the effects of their efforts. Forum-shopping by local stakeholders is another risk of competition in the studied context: local authorities will readily set the competing actors off against each other, exposing inconsistencies in their recommendations and expectations, interpreting these inconsistencies as signs of illegitimacy of the recommendations and expectations and so justifying the domestic status quo and their own inaction.

So, the main competition of the EU and the CoE is not with each other, but with the unwillingness of the domestic government to reform. Their common purpose, or "mission", is to promote a European understanding of the rule of law in Ukraine. Therefore, the EU and the CoE usually take similar political stances vis-à-vis Ukraine in cases of severe rule of law violations, as the recent cases of the Tymoshenko trials in 2010–2013 and repressions against Euromaidan protesters in 2013–2014 illustrate.

**Limited resources and complementary comparative advantages**

The sheer limitedness of donor resources (political, financial and human) in Ukraine further inclines the EU and the CoE to cooperate. Indeed, cooperation and complementarity with others is one of the ways for an international organisation to enhance its own effectiveness (Brummer, 2010, pp. 292–294). By pooling resources, the EU and the CoE try to maximise their impact and avoid the waste of resources through "turf battle" (Kolb, 2010, p. 4). The Memorandum of Understanding (Council of Europe, 2003, p. 3) acknowledges this explicitly and states that the organisations will "take due account of the comparative advantages, the respective competences and

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25 Other ways, such as increasing the incentives or the scale of support, are beyond the scope of this study.
expertise" of each other. All development actors cooperate with each other to some extent. However, the relationship between the EU and the CoE is special, and even the interviewed experts spoke of them as key and even natural partners. This section revisits the particularly compatible comparative advantages that give rise to this relationship.

On the one hand, the EU-CoE cooperation is believed to enhance significantly the role of the CoE, linking it to the EU, an organisation with bigger strategic importance and larger funds (Kolb, 2010, p. 2; Merlingen & Ostrauskaite, 2004, p. 396). Compliance with the rule of law is a condition for membership in both the CoE and the EU. In the uncertain yet enthusiastic political context of the early 1990s, accession to the CoE was dominated by presumptions that "compliance could be achieved within a reasonable timeframe with the good will of governments" and that "admission would result in a continuing and indeed much stronger influence of the CoE than would be the case if the country were not a member" (Dimitrova & Pridham, 2004, p. 99; Djeric, 2000, p. 610). As a result, admission procedures were rather flexible. Ukraine and other post-Soviet states became CoE members despite their poor compliances (Jordan, 2003, pp. 667, 679). Given the wasted opportunity to apply pre-accession conditionality and its political weakness as an intergovernmental organisation, the CoE has few means to impose compliance at this point. It has the power to suspend membership of a country in violation of its principles, but is reluctant to do so. Ukraine was threatened with suspension twice, in 2000 and 2001. However, neither Ukraine, nor any other state, has been disowned yet. The Council of Europe has the monitoring tools, but rarely acts upon the monitoring results (Brummer, 2010, p. 281). Usually, the CoE does not go beyond diplomatic "naming and shaming" through Venice Commission's opinions and recommendations, PACE resolutions or CoE reports. It has vast tasks and aims, but its financial resources are "relatively modest" (Benoit-Rohmer & Klebes, 2005, p. 22). Nevertheless, it does enjoy significant socialising potential vis-à-vis Ukraine.

The EU, in turn, has the potential to induce policy change through the incentives of political and economic integration with the Union and has larger development funds to assist in policy change. Notwithstanding the fact that the mega-incentive of membership is not on the table, Ukraine's EU membership aspirations distinguish it from most other post-Soviet states and
give the EU stronger political leverage in Ukraine than elsewhere in the region. Moreover, Ukraine’s aspirations for EU membership give new relevance to CoE standards: they become significant not only as standards of the CoE itself, but also as pre-conditions for EU membership. Although the CoE may be displeased with such subservient political placement, its position as "an antechamber or waiting room for EU accession" in reality enhances its relevance (Joris & Vandenbergh, 2009, p. 13). Technical and financial assistance funds ten or more times the size of those of the CoE give the EU undisputed financial leadership. There are examples of joint projects funded by the EU for 50, 80, 90 and 100 per cent. In 2012, EU contribution amounted to 89 per cent of the total budget of Joint Programmes. (Council of Europe, 2013)

On the other hand, having the CoE on board is advantageous for the EU. Incidentally, in interviews, the importance of the EU for the CoE was emphasised mostly by EU officials, whereas the importance of the CoE for the EU was underlined by EU and CoE officials, as well as independent experts. Despite its relative political and financial weakness, overlooking or reducing the role of the CoE to "a large footnote" is unjustified (MacMullen, 2004, p. 406). Most decisively, the Council of Europe possesses the necessary competence in terms of both the mandate of the organisation and the accumulated institutional memory, expertise, knowledge, know-how and experience. The wide membership (encompassing 47 states, including 28 EU Member States and all European partners of the EU apart from Belarus) gives CoE standards, activities and opinions an unparalleled degree of legitimacy. In this way, CoE standards are representative, relevant and binding at the same time, while they are also tighter and stronger than those of the United Nations as the universal organisation. By complying, member states’ governments gain a sort of legitimacy themselves. Unlike the EU, whose relationship with Ukraine evolves within a highly ambiguous political paradigm, the CoE is an organisation of which Ukraine is currently a member. Ukraine has binding treaty obligations resulting from its membership in

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26 The total amounts of allocated development assistance can be found in EU National Indicative Programmes and Annual Action Programmes for Ukraine for respective years. Although it is difficult to isolate the amount of money directed at rule of law promotion as such, it is obvious that the amount is significantly larger than that of the CoE.
the organisation, including on the rule of law. Even though the political and legal weight of these membership commitments may be questioned, the CoE, its activities and requests enjoy a certain degree of formal authority in Ukraine. Ukraine's official rhetoric remains at all times respectful of the CoE, its recommendations, reports and statements and maintains the image of Ukraine's willingness to comply with its membership commitments (unlike Russia, for instance\textsuperscript{27}). Furthermore, the formal relationship in place between the CoE and Ukraine allows the CoE to engage in Ukraine’s domestic political processes in its own capacity, while at the same time provides a tool for domestic actors to use in domestic debates. For example, Venice Commission opinions and recommendations are an important external reference point for domestic actors.\textsuperscript{28} A Venice Commission official revealed in interview that the Secretariat receives occasional requests from Ukrainian politicians to provide a recommendation on legislative drafts that normally would be outside of its competence, so as to obtain an authoritative opinion as a tool in domestic debates.

All this makes the CoE more than just another body for implementing EU-funded projects, which in the case of EU-CoE cooperation are framed with the Joint Programmes mechanism. The input of the CoE is significant already because it is often the one bringing the initiative and responsible for developing the content of a project and its implementation once approved.\textsuperscript{29} Moreover, "having the Council of Europe on board opens many doors and guarantees better receptiveness on the Ukrainian side", to quote an officer from the EU Delegation to Ukraine. Precisely because Ukraine is a member of the CoE, the EU often chooses the latter as an implementer for projects dealing with the state of democracy, human rights and the rule of law in Ukraine. As an expert with 10 years of experience in monitoring develop-

\textsuperscript{27} In the recent years, Russian officials stated publicly Russia’s dissatisfaction with the treatment it received from the CoE and warned that Russia would revise its own attitude all the way to withdrawal.

\textsuperscript{28} Over 70 Venice Commission Opinions on various Ukrainian laws and legislative initiatives have been issued since 1995, yet before Ukraine joined the Venice Commission in 1997. The recurring themes include constitutional reform, judicial reform, electoral legislation, legislation on prosecution, creation of a professional association of lawyers and, more recently, legislation on the right to assembly.

\textsuperscript{29} See Joris & Vandenberghe (2009, pp. 23-24) for an overview of the operation of Joint Programmes.
ment projects in Ukraine observed, "such joint projects become a mechanism of indirect control over Ukraine's compliance with its obligations under the European Convention on Human Rights". The intergovernmental nature of the CoE allows it to carry out projects in sensitive areas that cannot be entrusted with private company-implementers. A variety of Joint CoE/EU Programmes in Ukraine deal precisely with transparency, independence and efficiency of the judicial system, ill-treatment and impunity, money laundering and terrorist financing. Projects in these areas require a high level of political and operational coordination on the part of Ukrainian partner institutions, as well as access to places of detention or disclosure of information that is otherwise not public. Therefore, Ukrainian partners are more inclined to cooperate with a project backed by the authority of the CoE rather than with a private company-implementer. In addition, the CoE is a full structure, with binding conventions and other legislation, specialised agencies and institutions, monitoring bodies and evaluative information, trained staff and experts, long-standing presence in the field and links with domestic structures and elites. It simply possesses the necessary experience and trained experts to implement the projects, which make it "better understood" among Ukrainian professionals, as experts stated in interviews. Finally, as intergovernmental organisations, the CoE and the EU have similar public statuses and decision-making procedures. This institutional compatibility, high levels of formality and rules of transparency create an atmosphere of trust between them (higher than among other rule of law promoters) and make them "fully reliable" partners, to quote an official from the European Commission's Directorate-General for Development and Cooperation. Nonetheless, the intergovernmental nature of the EU and the CoE has some negative implications at the operational level, as the actual development projects coordinated by them are extremely formal, bureaucratic and, consequently, slow.

The extensive cooperation of the EU and the CoE at the operational level mediates the perceived visibility of their involvement, visibility understood as the degree of awareness of an actor on the part of partner countries and the ease (or difficulty) with which this actor is identified among other external actors who have their own reform strategies (Bendiek, 2008, p. 4). The CoE was traditionally more familiar to domestic audiences in Ukraine and served more frequently as a point of reference and a tool of influence in
domestic public debates. Although the EU lagged behind for a better part of the past two decades, the intensity and visibility of its involvement in the rule of law promotion business in Ukraine is gradually (and ever more quickly) increasing. Since 2005, the EU has intensified political dialogue and cooperation with Ukraine and enlarged the scale of technical and financial assistance provided to its rule of law reform processes. Actually, the EU is said to have finally overcome the USA as Ukraine's largest donor.\textsuperscript{30} As a result, the EU is more frequently brought up in the domestic debate on the subject by politicians, journalists and analysts. However, in interviews, experts working in the sphere of legal reforms still named the Venice Commission and the European Court of Human Rights as external authorities in the field, not the EU. The fact that the EU is more of a financial partner than an implementing one under the Joint Programmes cooperation mechanism reduces the visibility of its rule of law promotion in Ukraine as the beneficiary country.\textsuperscript{31}

**Political and operational reality as triggers of institutional cooperation**

An important observation is that the inevitability of cooperation between the EU and the CoE at the political and operational levels precedes and even triggers their cooperation at the institutional level. The two rule of law promoters work in the same field (Ukraine), deal with the same set of problems (domestic institutional context) and interact with the same counterparts (local stakeholders). Combined with the limitedness of donor resources and the lack of interest, motivation and capacity among their local partners, this reality prompts policy and institutional changes on the part of the EU and the CoE to formalise and professionalise their actual cooperation on the ground.

Indeed, looking retrospectively, the ever increasing cooperation between the two organisations has been institutionalised and formalised over the years with hesitation; a process that has been slow, based on reaction

\textsuperscript{30} The above statement on the EU being the largest donor in Ukraine is based on the statements and calculations by the EU itself, for example, in Country Strategy Paper 2007-2013 (p. 9) or in the Manuscript published by the Delegation of the EC to Ukraine in 2009 (p. 1).

\textsuperscript{31} Joris & Vandenberghe (2009, p. 24) make a general argument of a kind.
more than action, and constantly yielding to operational realities.\textsuperscript{32} The two sets of letters that the EU and the CoE exchanged on June 16\textsuperscript{th}, 1987 and November 5\textsuperscript{th}, 1996 were replaced on May 23\textsuperscript{rd}, 2007 by the Memorandum of Understanding between the Council of Europe and the European Union.\textsuperscript{33} Yet, "the two organizations have not been over-zealous": the Memorandum confirmed the existing relationship rather than introduced genuine novelties (Joris & Vandenberghhe, 2009, pp. 35–37). Moreover, the Memorandum was less ambitious than the one called for in the Report of Jean-Claude Juncker "Council of Europe—European Union: A sole ambition for the European continent" on April 11\textsuperscript{th}, 2006.\textsuperscript{34} Similarly, although EU/CoE Joint Programmes have been in operation since 1993, a Joint Declaration on cooperation and partnership between the Council of Europe and the European Commission was adopted only on the 3\textsuperscript{rd} of April, 2001.\textsuperscript{35} Most recently, on April 1\textsuperscript{st}, 2014, ten years into the European Neighbourhood Policy, the EU and the CoE signed a "Statement of Intent" establishing a new framework for cooperation in the EU Enlargement and Neighbourhood Regions for the period 2014–2020.\textsuperscript{36} As it is described in a press release (IP/14/356) this 5-page "administrative agreement" sets out working methods to strengthen their "strategic and programmatic", or "political and operational", cooperation in the region.\textsuperscript{37}

The planned review of the Memorandum in 2013 celebrated "a quasi-routine of policy co-ordination on issues of common interests" that took shape and concluded that there was no need to review the Memorandum at that point (Council of Europe, 2013) \cdot Yet, many of the ideas suggested in Juncker’s Report in 2006 as necessary and even urgent for efficient EU-

\begin{itemize}
  \item See Benoit-Rohmer & Klebes (2005, pp. 127-135) and Joris & Vandenberghhe (2009) for an overview of the institutionalisation of EU-CoE relations over the years.
  \item See an overview of the legal basis of EU-CoE cooperation at: http://www.coe.int/t/der/eu_EN.asp.
  \item For Juncker’s final recommendations, see pp. 30-32 of the Report.
  \item The CoE/EU Joint Programmes exist since 1993 and in Ukraine since 1995, although the actual activities started in 2001. At the time of writing, there have been about 20 projects carried out in/for Ukraine, with 5 of them closely related to the rule of law. See: http://www.jp.coe.int/Default.asp.
  \item A Statement of Intent for the cooperation between the Council of Europe and the European Commission in the EU Enlargement region and the Eastern Partnership and Southern Mediterranean countries (EU Neighbourhood region), April 1\textsuperscript{st}, 2014.
  \item Both phrases are used in the text of the Statement.
\end{itemize}
CoE cooperation, including EU accession to the European Convention on Human Rights, have not materialised so far. Although facilitated by the CoE Liaison Office in Brussels and recent restructuring of the CoE, their institutional cooperation remains lop-sided: the EU holds a special status in the CoE and may attend meetings of its institutions and agencies, but not the other way around (Benoit-Rohmer & Klebes, 2005, pp. 44, 131). As acknowledged in the Memorandum itself (Council of Europe, 2003, p. 5), the EU and the CoE are different organisations and retain their decision-making自主. However, the competition between them is concentrated largely at the institutional level, and even here it eventually gives way to cooperation under the pressure of political and operational reality, which bends the reluctant institutional structures of the two organisations.

**Conclusion**

This chapter analysed the relationship between the EU and the CoE as rule of law promoters in Ukraine as an instance of European value promotion in post-Soviet states. The findings reveal three important nuances (and perhaps even general tendencies) that enrich our understanding of the studied relationship, namely that cooperation prevails over competition, political and operational cooperation precedes and triggers institutional level cooperation, and the EU has recently strengthened its position vis-à-vis the CoE.

First, in this country (Ukraine) and policy area (the rule of law), cooperation between the EU and the CoE prevails over competition. Significant overlap of substantive, political and operational agendas of the two organisations in practice leads to cooperation and not competition, as theory would expect. Given the persistently low rule of law compliance levels in Ukraine and reluctance of the Ukrainian authorities to reform, the main competition of the EU and the CoE is with the country’s government, not with each other. The limitedness of their political, financial and human resources further inclines the EU and the CoE to capitalise on the complementarity of their comparative advantages so as to maximise effects from their efforts. Competition is not altogether absent, but it is concentrated at (and perhaps even restricted to) the institutional level.

The second nuance is that cooperation at the political and operational levels precedes and even triggers cooperation at the institutional level. The
institutions of both organisations are slow, reluctant and reactive in formalising cooperation that exists in practice. However, institutional competition also eventually gives way to cooperation. Third, the EU has strengthened its position in the last decade and claims leadership from the CoE: as a richer organisation it has taken financial leadership; as a politically stronger organisation with more incentives to offer it is fighting for political leadership; and as an organisation with a broader rule of law agenda it may eventually challenge the CoE's normative leadership. The understanding of the EU as "a payer, not a player", dominant in the 1990s and early 2000s, is losing relevance as multiple political processes continually shift the balance in favour of the EU. At the same time, the role of the CoE should not be reduced to a footnote or entirely overlooked in the analyses of value promotion in post-Soviet states, which are often limited to investigations of EU efforts. In this country (Ukraine) and policy area (the rule of law), the CoE retains special relevance, both in its own capacity and as an implementer of the (joint) projects of the EU.

The findings of this study are specific to the examined case, EU and CoE rule of law promotion in Ukraine, but can be generalised to the wider phenomenon of EU and CoE value promotion in post-Soviet states albeit with certain limitations. In the first place, it is difficult to speak of "post-Soviet states" as a group today, more than two decades after the dissolution of the Soviet Union. Even categorising them into sub-groups, such as the ENP East, South Caucasus, Central Asia and Russia, would be problematic. All states have followed individual transformation paths, and their domestic contexts and relationships with the EU and the CoE are qualitatively different. This inevitably affects the political leverage of the two organisations over domestic processes in the countries and, eventually, over each other as value promoters in each. In the second place, meaningful variation in the EU-CoE relationship across policy areas can be expected. The value agendas and mandates of the two organisations vary across policy fields, and thus the nature, degree and impact of substantive and operational overlap also differs.\textsuperscript{38} However, one can conclude with a reasonable degree of certainty that similar general tendencies in the EU-CoE relationship are in

\textsuperscript{38} The significance of the political context, policy area, and internal and external coordination for variation in EU external policies is analysed in Burlyuk (2014c).
place across countries and policy areas, namely: the presence of both co-
operation and competition; the dominance of cooperation at substantive,
political and operational levels, and the prevalence of competition at the in-
stitutional level; the determining role of the reluctance of partner states to
reform and the limitedness of donor resources; and finally, the ever stronger
position of the EU as compared to the CoE on all accounts—normative, po-
litical, and financial. Future research should engage in within-case and
comparative studies (with comparison across countries and policy areas) in
order to see the variety of formats of the EU-CoE relationship and the
scope of generalisation of the findings of this study.

As for policy implications, the interconnectedness and interdependence of
the EU and the CoE and their rule of law promotion efforts is apparent. It is
highly unlikely that the process of assuming competences by the EU will be
reversed, the overlap in mandates will be eliminated, identical membership
will be achieved, one organisation will be completely replaced by the other
or that the two will merge. There is no alternative but to develop better co-
operation mechanisms and explore the complementarities between the two
organisations further. In view of the significant and ever growing substan-
tive, institutional and operational overlap, as well as the commonality of challenges addressed and faced, consultation between the EU and the CoE
is a minimum requirement, while coordination and cooperation are desirable
and appropriate ways to advance their value agendas. If not automaticity,
then at least effectively functioning mechanisms to realise this cooperation
should be in place. Future policy should acknowledge the effective coopera-
tion between the two actors that exists on the ground and work on institu-
tional mechanisms to formalise, improve and facilitate this cooperation.

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39 Similar argument was made already in Peters (1996, p. 397).


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