



Protecting the rule of law in EU Member States and Candidate Countries

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Summary

The rule of law is defined in Article 2 of the Treaty on European Union (TEU) as a shared value on which the Union is rooted. As such, it defines the collective identity of the whole organisation and constitutes a condition for EU membership. Despite already advanced EU policies to promote the rule of law, within as well as beyond EU borders, not only EU aspirants but also several EU Member States are currently confronted with grave threats to the functioning of the rule of law.

This text highlights a double challenge to the EU's role in ensuring the rule of law within the Union and promoting it in future Member States. By analysing the EU's role and policy options to promote the rule of law, it will be seen how both the internal and the external dimensions of EU rule of law promotion suffer from deficiencies, while the solution for the observed problems lays in aligning these policies together. In order to address these deficiencies, a series of recommendations is presented, involving, for example, transparency, independent state agencies, civil society, monitoring instruments and conditionality strategies.

According to the authors, there is finally a need for a conceptual shift: it should be recognised that problems in regard to the rule of law are often the result of a deliberate policy of autocrats and not the accidental by-product of weak states.

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1. Introduction

The rule of law is one of the founding values of the European Union and reflects the EU Member States' shared identity and common constitutional traditions. This has been enshrined in Article 2 of the Treaty on European Union (TEU) which lists 'respect for human dignity, freedom, democracy, equality, *the rule of law* and respect for human rights, including the rights of persons belonging to minorities' as the shared values on which the Union is rooted.

The legal order of the EU, the *Acquis Communautaire*, also comprises the national constitutional traditions of EU Member States, the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the jurisprudence of the Court of Justice of the European Union (ECJ).

As the rule of law defines the collective identity of the whole organisation, it essentially determines the EU's action in the domestic and international realms as well as conditions for EU membership.

- A functioning rule of law is a cornerstone of a democratic system in all Member States, indispensable for both the efficient implementation of the internal market and for the common area of security and justice, where laws apply uniformly in accordance with the applicable rules.
- The Union is legally obliged to promote its fundamental values, which underlie the Union's external relations (Articles 21, 3(5) and 8 TEU).
- A functioning rule of law is an important element of the EU's enlargement policy, as its implementation creates a key condition for aspiring members to join the Union (Article 49(1) EU).

1.1 Monitoring Member States

EU candidates are vetted for their compliance with the rule of law before they accede to the Union. However, once they have become Member States, the mechanisms for enforcing and monitoring adherence to the rule of law and other foundational legal principles have proven relatively weak.

Sanctions can thus be imposed during accession talks on a prospective member country in case of breaches of the rule of law, namely the suspension of membership negotiations and financial assistance from the EU. But there is still no *effective* counterpart to such measures after accession.

1.2 Monitoring candidate countries

The accession process in recent years has not been transformative in regard to the rule of law. Countries in accession negotiations have made little progress when it comes to the rule of law. In the meantime, not only EU aspirants but also several EU Member States have been confronted with grave threats to the functioning of the rule of law. In some cases, the same breaches of the rule of law principle existed both before and after EU membership. In other cases, for example in Hungary and Poland, they re-emerged after the countries had joined the EU. Acknowledging these dangers, European Commission President Ursula von der Leyen declared in her political guidelines that 'threats to the rule of law challenge the legal, political and economic basis of how our Union works'.¹ Thus, the EU is currently confronted with a double challenge of ensuring the rule of law within the Union and promoting it in future Member States.

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1.3 Purpose and analysis

This text provides a comprehensive overview of the EU's role and policy options to promote the rule of law (1) as a conditionality benchmark and guiding principle for (potential) candidate countries and (2) as a foundational and common value applicable to Member States. It will analyse what lessons and 'best practices' could be shared between the two in order to uphold and strengthen rule of law practices.

¹ von der Leyen, Ursula, 'A Union that strives for more: My agenda for Europe – Political guidelines for the next European Commission, 2019–2024', European Commission, July 16 2019. Available at: https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

2. The EU's toolbox for assessing the respect for the rule of law in candidate countries

For more than two decades, present and potential candidate countries in the Western Balkans—Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia—have been exposed to the EU's rule of law promotion mechanisms within the Stabilisation and Association Process (SAP).² Yet the respect for the rule of law in these countries has declined overall during the past decade. The enduring problems are not new and have been noted over the years, including in the latest Freedom House *Freedom in the World* report that observes an absence of the rule of law and an increase in patronage networks and clientelism that threaten democratic institutions in the region.³ In the same vein, the European Commission departed from its usual technocratic account of the rule of law in its *Communication on a credible enlargement perspective for the Western Balkans* (2018) and declared that the countries show 'clear elements of state capture, including links with organised crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests'.⁴

A wealth of academic literature also notes the nexus between the rule of law and democratisation in the Western Balkans, observing that domestic political elites have built a democratic façade by holding more or less regular elections, by promulgating legal acts guaranteeing freedom of expression, and by constitutionally declaring a strict system of checks and balances. In reality, however, they rely on informal structures and clientelism, control of the media⁵ and even a regular manufacture of crises to undermine democracy and the rule of law. This translates into manipulation and abuse to their

advantage of the existing rule of law system and of fragile institutions.⁶ The EU has tried to answer these challenges by making respect for the rule of law one of its 'fundamental' conditions for EU enlargement to the Western Balkans.

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Despite the fact that academic scholarship on democratic policies agrees on the rule of law as a legitimising principle for the exercise of state authority, there is no uniform 'European standard' for institution-building or monitoring activities by the EU in this area. While the EU promotes the rule of law during the accession process through various EU Justice and Home Affairs (JHA) policies, stretching from asylum and border control to the fight against corruption and organised crime, the Commission still tends to translate the rule of law into an institutional checklist with primary emphasis on the judiciary.

2.1 Enforcement mechanism

The EU's comprehensive strategy to promote an effective rule of law is exercised through the Stabilisation and Association Process in the Western Balkans. It consists of the progressive development of contractual relations and institutional ties based on an enhanced political dialogue and monitoring process, supported by financial assistance and technical aid. At the core of these processes is the demand from aspiring Member States to comply with a set of political conditions. In a nutshell, the EU relies on the obviously asymmetric relationship

² European Commission, European Policy and Enlargement Negotiations - Stabilisation and Association Process: https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/sap_en

³ Freedom House. 2020. Freedom in the World 2020. Available at <https://freedomhouse.org/countries/freedom-world/scores>.

⁴ European Commission, A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM(2018) 65 final. Strasbourg, 6 February 2018. Available at https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf.

⁵ Keil, Soeren. 2018. The Business of State Capture and the Rise of Authoritarianism in Kosovo, Macedonia, Montenegro and Serbia, *Southeastern Europe* 42: 59–82.

⁶ Kmezić, Marko and Florian Bieber. 2017. The Crisis of Democracy in the Western Balkans: An Autonomy of Stabilitocracy and the Limits of the EU Democracy Promotion. Balkans in Europe Policy Advisory Group: Belgrade.

with candidate countries to set the rules that shape their public policymaking through the process of accession. The EU pays the reward to governments that comply with their demands and, alternatively, withholds the reward from those that do not.

The most powerful conditionality tool with any candidate country is ‘gate keeping’ during the different phases of the EU accession process, particularly when it comes to achieving candidate status and starting accession negotiations. The biggest reward—full EU membership—is often distant, which makes the success of the rule of law promotion via conditionality largely dependent on the use of intermediary rewards. Examples include market access, enhanced financial aid and visa liberalisation. Moreover, the candidates must be assured that they will receive the promised rewards after complying with the EU demands, but, at the same time, they need to know that the reward will follow only after fully completing the compliance process. Thus, credibility of conditionality depends on a reliable, merit-based application of conditionality by the EU.

Credibility issues

This has thus far not always been the case. Most recently, despite the green light given by the European Commission, the European Council rejected in October 2019 the start of accession negotiations with North Macedonia and Albania, notwithstanding the good track record of reforms in these two countries. France, supported by the Netherlands and Denmark, blocked the opening of negotiations out of a concern for the ability of the EU to absorb new members. The French veto not only demonstrated the dominance of Member States in the enlargement process but also exposed

how a single EU country can hurt the credibility of the EU in the Western Balkans and potentially even undermine already achieved results with regard to the rule of law.

The next challenge for the implementation of EU-led rule of law reforms in candidate countries is the lack of clearly articulated political conditions in accordance with the Copenhagen criteria, particularly due to the ever-growing body of EU law and the absence of a single EU rule of law model. Finally, compliance with the EU rule of law conditionality is often a menace to prevailing corrupt practices of domestic ruling elites. The recent convictions of the former Croatian Prime Minister Ivo Sanader on corruption charges and of the former Macedonian Prime Minister Nikola Gruevski on embezzlement charges serve as striking examples of the harmful effect that EU reforms can have for established elites. Therefore, it can be concluded that reforms will not be pursued in the Balkans if there is an apparent absence of a functional system of checks and balances that would restrain the arbitrariness of elites because the price for the ruling elites is too high compared to the benefits. Alternatively, if the expected costs are deemed insignificant, reforms will be considered a free lunch.

2.2 Benchmarks/monitoring

The enforcement instrument assessing the respect for rule of law in candidate countries is enshrined in Article 49 TEU. It reads that only European states that respect the EU values stated in Article 2 TEU and are committed to promoting them may apply to become a member of the Union. Against the background of a deeper relationship in the early 1990s between the EU and the Central and Eastern

Table 1: EU rule of law methods in candidate countries.

Enforcement mechanism	Benchmarking/monitoring	Dialogue	Financial and technical assistance
Article 49 TEU	Copenhagen criteria	Accession negotiations, chapters 23 and 24	IPA
	Progress report	Structured Dialogue on the Rule of Law	Twinning
	Strategy papers		TAIEX
	Peer review mission		

European countries, the well-known Copenhagen criteria followed by the Madrid Council criteria-linked accession and membership in the EU to a set of economic and political conditions.

The Copenhagen criteria

The Copenhagen criteria remain the blueprint for accession of the Western Balkans. The criteria require candidates to have stable democratic institutions, a functioning market economy and the capacity to adopt and implement the ever-growing body of the *Acquis communautaire*. Therefore, the Copenhagen criteria remain an imperfect starting point towards grasping the essence of the EU's rule of law criteria. In fact, these are not elaborated in a single working document, but rather in the bulk of Copenhagen-related documents pertaining to the rule of law conditionality that can be divided into two groups:

- The first group includes the documents addressed to a particular candidate country, such as the Commission's Opinions on the Application for Membership of the EU, Country Reports on the candidates' progress towards accession, Accession Partnerships, Roadmaps, etc.
- The second group comprises documents of more general application, including the Commission's Agenda 2000, yearly Composite Papers and Strategy Papers, Comprehensive Monitoring Reports, etc.

Furthermore, both groups of documents frequently reference credentials created by sources falling beyond the scope of EU law, thus effectively including international organisations such as the OSCE (Organization for Security and Co-operation in Europe) and the Council of Europe to indirectly contribute to the assessment of candidate countries' compliance, particularly in regard to the political criteria of democracy and the rule of law. By offering a variety of influence tools, the Copenhagen-related documents in fact provide the Commission with a complex system of reform promotion in that they allow it to make practical use of the conditionality principle for the benefit of both the European Union and candidate countries.

Good governance first

The evolution of the EU's political conditionality was particularly evident in 2011 with the

introduction of 'good governance' criteria, the maintenance of the rule of law, an independent judiciary, and an efficient public administration. The new EU approach on negotiating Chapters 23 and 24 dealing with 'Judiciary and fundamental rights' and 'Justice, freedom and security', introduced for the first time in the Croatian negotiating process, is now fully integrated into the EU's negotiations with Montenegro, Serbia, North Macedonia and Albania and will most likely apply to all future accession talks in the region.

For the Western Balkan countries, this approach has meant that negotiations on the most difficult aspect—rule of law reforms—come first in order to allow enough time to build solid track records of implementation before opening other negotiating chapters. Furthermore, the 'new approach' envisages an interim benchmarking system that would assess the country's preparedness to open and close a negotiating chapter. This involves the introduction of safeguard measures, most notably the overall balance clause intended to stop negotiations on all other chapters if progress on the most difficult chapters, namely 'Judiciary and fundamental rights' and 'Justice, freedom and security', begins to lag behind. Hence, chapters 23 and 24 represent the main instrument of the European Union's strategy towards the Western Balkans, while the benchmarking system linked to these chapters aims to help a candidate country meet the EU requirements through specific tasks facilitating the measurement and evaluation of progress. These tasks are translated into:

1. Opening benchmarks related to the adoption of comprehensive Action Plans for chapters 23 and 24, whereby the candidate country proposes measures that can improve the situation in relevant programme areas;
2. Interim benchmarks on requirements that a candidate country must meet to advance in the negotiation process, that is, the adoption of relevant legislation, the set-up or strengthening of a rule of law related institution, training activity or international cooperation; and
3. Closing benchmarks based on a solid track record of reform implementation in fields ranging from the prevention and suppression of corruption to the handling of war crimes, the protection of fundamental rights and the fight against organised crime.

Furthermore, the European Commission introduced the so-called imbalance clause in the negotiations in 2012, which means that if an accession country is progressing within other chapters, but not in the rule of law, negotiations on all chapters can be stopped. In practice, the interim benchmarks are very broad and represent a long-term goal, which makes their assessment rather superficial. In addition, the benchmarks are not tailored to the specific circumstances of the countries they target, as seen in the example of identical benchmarks developed for two accession frontrunners—Serbia and Montenegro.

Monitoring—A matter of politics and transparency

Following the 2007 enlargement to Romania and Bulgaria, the EU redefined its monitoring mechanisms, adopting a more rigorous application of conditionality. Nevertheless, the amended monitoring tools have been criticised by experts for focusing on individual aspects that jointly do not provide good insight into the state of the rule of law in candidate countries.⁷ Moreover, the EU has often remained silent on apparent violations of the rule of law and the erosion of democratic standards in candidate countries, as seen in the Savamala case in Serbia or the wiretapping scandal in North Macedonia. Finally, the EU's monitoring process suffers greatly from the lack of transparency, as the Commission refuses to publish documents to allow outside observers to scrutinise the assessment, such as reports from the peer review missions or commentaries on legislation. As a consequence, neither the EU reports nor its official statements properly address the root causes of the rule of law deficiencies in the region.

Throughout the pre-accession period, the Commission assesses the rule of law and democracy interchangeably, with the effect that it gains political manoeuvring space for more specific policy prescriptions within the process. In essence, both terms—democracy and the rule of law—are left vaguely defined as the Commission does not provide a definite list of contents to act as benchmarks. The Commission is therefore able to introduce new components under these umbrella terms. Consequently, the Union can freely interpret

these terms in dealing with candidate countries. This could entail strengthening the rule of law criteria based on experience, but it also enables the Commission to be less stringent when other considerations might be given greater weight. When examining the specific strategies and instruments used by the EU, it becomes obvious that the transposition of the *Acquis communautaire* is not only a technical matter but also a highly political affair.

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The apparent thinness of the *Acquis Communautaire* in the field of rule of law promotion contrasts with the centrality of this issue in the accession negotiation process. For a more effective process to result in pre-accession reforms, both the candidate countries and their citizens should know when and how they are considered to be progressing. In this regard, the EU still must produce criteria and indicators for candidate country assessment.

2.3 Dialogue

Presently, the EU accession negotiations are conducted between the EU and governments. National Parliaments and civil society remain largely side-lined. Even in Montenegro, which adopted a more inclusive approach to civil society participation in the negotiations, Non-governmental organisations do not have access to reports prepared by the different Directorates General and agencies of the European Commission or by EU expert missions to the country. Parliaments of the countries in the region also do not have full access to such documents. Hence, the negotiation processes remain largely non-transparent. Due to the vaguely defined goals in the Action Plans within the benchmark framework of the negotiating chapters, governments are at liberty

⁷ Balkans in Europe Policy Advisory Group, Western Balkans and the EU: Fresh Wind in the Sails of Enlargement, October 2017. Available at <http://www.biepag.eu/wp-content/uploads/2017/11/western-balkans-and-the-eu.pdf>.

to manipulate perceptions of achieved results when they communicate with other stakeholders and the general public. In this regard, it is important to release the reports of the TAIEX (Technical Assistance and Information Exchange) experts, the Peer Review mission and the Twinning Projects, as well as expert opinions on draft legislation of candidate countries in the Western Balkans.

‘Due to the vaguely defined goals in the Action Plans within the benchmark framework of the negotiating chapters, governments are at liberty to manipulate perceptions of achieved results [...]’

The problem is similar with the annual rule of law peer review missions that feed into the European Commission Reports. None of the peer review mission documents has been made public in the Western Balkans. The only exception has been special ad hoc missions. The first of these reports, which revealed serious abuse by the government, was released in 2015 because of the political crisis over wiretaps in North Macedonia. A follow-up report was issued in 2017, and in 2018, the Commission strategy suggested the organisation of further such ad hoc missions. The first ad hoc mission in Bosnia and Herzegovina released its report in 2019, which, like the other two reports, is public.

In addition, the European Commission has devised creative ways to keep the reform process going in situations of domestic or bilateral deadlocks in the Western Balkans. These include the Structured Dialogue on Justice with Bosnia and Herzegovina and the Structured Dialogue on the Rule of Law with Kosovo. Dialogues are bilateral exercises between the EU and laggards in the EU integration process which are open to the participation of relevant high-level practitioners and authorities. Nevertheless, the outcome of these dialogues remains extremely limited as they do not tackle any of the root causes for deadlocks which are preventing democratic reforms.

2.4 Financial and technical assistance

In addition to enforcement mechanisms and constructive dialogue, the EU also provides

financial and technical help to candidate countries as they make reforms via the Instrument for Pre-accession Assistance (IPA). At the same time, in cases of clear lack of progress or even backsliding of rule of law reforms in candidate countries, the withdrawal of IPA funds can be used as a sanctioning mechanism intended to bring the reform processes back on track. The IPA funds build up the capacities of the countries throughout the accession process, resulting in progressive, positive developments in the region. For the period 2007–2013, IPA had a budget of some €11.5 billion. Its successor, the ongoing IPA II, builds on the results already achieved by dedicating €11.7 billion for the period 2014–2020. Around 15–20 percent of the support at the national level is dedicated to the support of the efficiency of justice via targeted funding of human and technical institutional bodies related to the building of the rule of law—courts, high judicial and prosecutorial councils, penitentiaries, judicial academies, etc. In the IPA region, Twinning projects and Technical Assistance and Information Exchange (TAIEX) instruments are established with the aim of providing support for the transposition, implementation and enforcement of Union law. These instruments aim at sharing good practices developed within the EU with public administrations in candidate countries through jointly implemented activities, including workshops, training sessions, expert missions, study visits, internships and counselling.

3. The EU's toolbox for assessing the respect for rule of law in Member States

European integration has made a significant and lasting contribution to a rule-based order in Europe. Yet over the past decade, problems with democratic pluralism and governance based on the rule of law have increased throughout EU Member States. The systematic and deliberate erosion of the rule of law in Hungary under Viktor Orbán's government is already well-known and has been emulated by other EU member states, particularly Poland. In September 2018, the Commission had to refer Poland to the ECJ for the adoption of a new law on the Supreme Court, which was one year later considered in breach of the principle of judicial independence. Despite the far-reaching reforms enacted in preparation for EU membership, Bulgaria and Romania are still subject to a specific

post-accession monitoring system in the sphere of rule of law.

Moreover, not only ‘new’ Member States but also long-established EU countries are struggling with rule of law implementation, such as Italy with problems in the sphere of media pluralism or Greece with poor governance as revealed by the euro crisis. The rule of law has also been openly challenged by the rise of populist and far right parties across Europe which openly reject the rule of law.

Responding to the rising problems related to the rule of law across the Union, the European Commission announced a new toolbox in 2019. These measures build upon the Rule of Law Framework that was adopted in 2014 and the rulings by the ECJ which require Member State compliance with EU legal principles of judicial independence and separation of powers. This section provides a snapshot of the most relevant and recent instruments, as well as of the wider policy landscape of diversified approaches and EU actors involved in protecting the rule of law in the EU.

EU promotion of the rule of law in Member States

The EU principally recognises effective judicial protection as the core of the internal rule of law protection. By focusing on effective judicial protection in the Member States, the EU seeks

to guarantee EU citizens the protection of their rights and duties that come with EU membership while refraining from going into detail in the legal assessments of the national courts. Hence, the Commission seeks to strengthen the Union’s capacity to promote and uphold the rule of law through the advancement of a common rule of law culture, the prevention of rule of law problems and an effective response. Taking into account the need for improvement, the Commission has grouped this work into three thematic areas:

1. legality, legal certainty, equality before the law and separation of powers;
2. prohibition of arbitrariness and penalties for corruption;
3. effective judicial protection by independent courts.

For the purpose of this study, a wide range of tools to promote the respect for the rule of law in the Member States were systemically divided into four categories, depending on their actual scope and normative nature (the same categories as for candidate countries described above): enforcement mechanisms, benchmarking/monitoring, dialogue and technical and financial assistance. Table 2 below provides an updated snapshot of a 2013 European Parliament study⁸ of the set of most relevant and recent instruments, as well as a picture of the wider policy landscape of diversified methods and the EU actors involved.

Table 2: EU rule of law methods in Member States.

Enforcement mechanisms	Benchmarking / monitoring (early prevention)	Dialogue (better promotion)	Financial and technical assistance
Article 7 TEU	EU Justice Score Board	Council rule of law dialogue	The European Structural and Investment Funds
ECJ			Structural Reform Support Service
	Cooperation and Verification Mechanism		

⁸ Carrera, S., Guild, E. and Hernanz, N. The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism, CEPS 2013, available at <http://www.ceps.eu/system/files/Fundamental%20Rights%20DemocracyandRoL.pdf>, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL- LIBE ET%282013%29493031_EN.pdf, 4–15, and Annex 1 of the study.

3.1 Enforcement mechanisms

Enforcement instruments comprise coercive tools in case an EU Member State does not comply with its membership obligations. These instruments can be activated when Member States are at risk of a serious breach or when they actually and persistently breach Article 2 TEU legal principles.

Article 7

Article 7 is exceptional and a last resort measure to confront a serious breach of the rule of law in an EU Member State. It provides a specific enforcement mechanism in two situations:

1. Where there is a clear risk of a serious breach of Article 2 values in a Member State, a majority of four-fifths of the members of the Council, not counting the Member State subjected to the procedure, can make such a determination. While no specific sanction can be adopted under this procedure, the most drastic outcome can be the adoption of recommendations regarding the rule of law made by a majority of four-fifths of the members of the Council.
2. When the European Council acting by unanimity, excluding the state in question, determines the existence of a serious and persistent breach by a Member State of the values referred to in Article 2. In this case, the Council, acting by a qualified majority, may decide on the suspension of certain rights which derive from the application of the Treaties to the Member State in question, including the voting rights in the Council.

‘Particularly, the condition of unanimity makes it virtually impossible to activate the so-called “nuclear option” vested in Article 7 [...]’

The procedure to invoke a clear risk of a serious breach under Article 7(1) TEU is subject to high decision-making thresholds. Particularly, the condition of unanimity makes it virtually

impossible to activate the so-called ‘nuclear option’ vested in Article 7 in cases where two Member States are considered in serious and persistent breach of EU values. This was clearly visible in the difficulties to determine a serious breach of the rule of law by Poland and Hungary, as Hungary formed a coalition with Poland and vetoed the resolution.

Infringement procedures and the ECJ

The limited outcome of Article 7 regarding rule of law in Poland and in Hungary therefore raises the question of the instrument’s effectiveness and calls for realistic alternatives. After identifying possible infringements of EU law in a Member State, the Commission may launch a formal infringement procedure laying down a request to comply with EU law. It also requests that the country inform the Commission of the measures taken within a specified time framework. If the country still does not comply, the Commission may decide to refer the matter to the ECJ. For this reason, the Commission has referred Poland to the ECJ in reaction to serious rule of law problems linked to a breach of Union law. In its seminal ruling of 24 June 2019, the ECJ declared that by lowering the retirement age of judges of the Supreme Court, and by granting the President of Poland discretion to extend the active mandate of Supreme Court judges upon reaching the lowered retirement age, Poland violated the principle of judicial independence, which is a fundamental value of the EU.⁹

Although it is still early to evaluate the impact of the ECJ’s judgement against Poland, it should be observed at this point how the combination of different enforcement instruments, namely the ECJ rulings and the infringement proceedings brought by the Commission, could serve as an additional way to exert pressure on Member States in breach of the rule of law.

3.2 Benchmarking/monitoring

In its *Communication on Further Strengthening the Rule of Law within the Union—State of play and possible next steps*,¹⁰ the European Commission identified a number of existing and new

⁹ Court of Justice of the European Union, Judgment in Case C-619/18 Commission v Poland, Luxembourg, 24 June 2019.

¹⁰ European Commission, Communication on Further Strengthening the Rule of Law within the Union – State of play and possible next steps COM (2019) 163. Brussels, 3 April 2019. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>.

benchmarks and monitoring frameworks. These could serve as early warning tools on rule of law issues in EU Member States before reaching Article 7 territory. These tools can be used in a variety of ways as described below.

The Justice Scoreboard

The annual EU Justice Scoreboard (the Scoreboard) is part of the EU's rule of law toolbox used by the European Commission to monitor Member States' justice reforms. This comparative tool looks at a range of institutional indicators to assess the independence, quality and efficiency of national justice systems, restraining, however, from promoting any particular type of justice system. The Scoreboard mainly focuses on litigious civil and commercial cases as well as administrative cases that emphasise quantitative benchmarks, such as the appointment and dismissal procedures of the national judiciary or a breakdown of total government spending on judges' salaries, court buildings, software development and legal aid.

'[...] a final option in cases of perpetual non-compliance is the imposition of financial fines.'

The Scoreboard feeds into the European Semester, where further qualitative assessments are carried out through a bilateral dialogue with the national authorities and concerned stakeholders. This is translated into country-specific assessments, presented in the Country Reports, which enable a deeper analysis based on the national legal and institutional context. In a final instance, the Commission may propose to the Council the adoption of country-specific recommendations on the improvement of their national justice systems. Country specific recommendations have a preventive and a coercive arm, and while the latter consists of stricter monitoring, a final option in cases of perpetual non-compliance is the imposition of financial fines.

The Cooperation and Verification Mechanism

Romania and Bulgaria completed the EU's sixth enlargement in 2007. Despite the far-

reaching reforms enacted in preparation for EU membership, both countries still had some way to go in the adaptation of their legal systems to guarantee an effective system of rule of law. To ensure that these reform efforts continued beyond accession, the Commission established a package of transitional measures within the Cooperation and Verification Mechanism (CVM). This mechanism is still in place in 2020. For this purpose, the Commission developed specific benchmarks related to the reform of the judiciary, anti-corruption reforms and, in the case of Bulgaria, the fight against organised crime. The Commission regularly monitors progress along these indicators, and together with the constructive engagement of many Member States, the civil society, international organisations and independent experts, it prepares an annual report which is subsequently discussed with the Council of Ministers.

A common rule of law framework for all EU Member States

European Commission President Ursula von der Leyen announced that the Commission would set up a preventive European rule of law mechanism covering all Member States with the objective of annual reporting to the European Commission. The first annual Rule of Law Report should be one of the major initiatives of the Commission's Work Programme for 2020.¹¹ A three-stage Rule of law framework mechanism is at the core of the Commission's strategy. It entails Commission assessment, recommendation and monitoring of the country's follow-up to the Commission's recommendation before possibly having to invoke Article 7 of the TEU as the last resort. The new European rule of law mechanism should act as a preventive tool, deepening dialogue and the joint awareness of rule of law issues.

The proposed monitoring mechanism recently announced by the Commission is ground-breaking insofar that the Commission's assessment will rely on a diversity of relevant sources on rule of law developments on the ground in the Member States, including input to be received from Member States, country visits and stakeholder contributions. Moreover, the assessment would complement and be incorporated within instruments such as the

¹¹ European Commission, Commission Work Programme 2020: A Union that strives for more, COM(2020) 37 final, Brussels, 29.1.2020. Available at https://ec.europa.eu/info/sites/info/files/cwp-2020-publication_en.pdf.

Justice Scoreboard, thereby eventually replacing the CVM for Romania and Bulgaria. It covers topics structured around four pillars, namely 1) the justice system, 2) the anti-corruption framework, 3) media pluralism, and 4) other institutional issues related to checks and balances, thus expanding the traditional Commission's focus on the judiciary as a single rule of law benchmark.

3.3 Dialogue

In 2015, the Council of the EU and the Member States established an annual dialogue to promote and protect the rule of law which includes all Member States within the Council in its General Affairs configuration (the Dialogue).¹² From its outset, the Dialogue procedure suffered from intrinsic inefficiency as representatives of Member States proved unwilling or unable to discuss and decide on their own breaches of rule of law without an external control mechanism. This weakness was demonstrated in the Council's repeated omissions to debate problems of the rule of law in Hungary or its, at best, restrained reaction to Poland's interference with the independence of judiciary. In the wake of discussions over Poland's neglect for the rule of law, the conclusions of the 2018 Council's Dialogue addressed this in a single sentence: 'The hearing offered a possibility for ministers to have an in-depth exchange with Poland on the concerns identified in the Commission's reasoned proposal'.¹³

This development threatened to completely undermine this initiative [...]

This development threatened to completely undermine this initiative until a freedom of information request¹⁴ filed by a Professor of EU Law, Laurent Pech, opened the doors of the Council meeting to the public. This unexpected transparency urged the Hungarian government to

engage more decisively with allegations of attempts to subdue its judiciary.¹⁵ It is anticipated that the pressure coming from experts, NGOs, media and the general public on rule of law matters will contribute in reverting the content of the Dialogue discussions to the most pressing issues. This would make the problems visible and force governments to justify their policies, thus making this tool a valuable supplement to existing coercive and pre-emptive measures.

3.4 Financial and technical assistance

The European Structural and Investment Funds support Justice reforms and help Member States to strengthen public administration and the judiciary as well as to enhance the Member States' capacity to uphold the rule of law. The EU Justice programme promotes judicial cooperation in civil and criminal matters, helps train judges and other legal practitioners, and facilitates effective access to justice for individuals and businesses throughout Europe by providing financial support to NGOs and Member States' authorities implementing Union law. The total budget allocated to the programme within the current seven-year period is €378 million.¹⁶

The Commission's DG Reform, that provides technical support for structural reform in Member States to promote jobs and growth, also includes areas relevant to the rule of law, such as institution building, judicial system reform, fight against corruption, and anti-money-laundering strategies. The support is provided on the request of Member States and is tailor-made to address needs reflecting defined reform priorities.

4. Ways forward

As this study has shown, EU leverage in the past decade has not been sufficient to promote the rule of law in countries seeking to join the Union, nor

¹² Council of the European Union, Conclusions of the Council of the European Union and the member states meeting within the Council on ensuring respect for the rule of law, 16862/14 COR 1. Brussels, 16 December 2014. Available at <https://www.consilium.europa.eu/media/24875/146323.pdf>.

¹³ Council of the European Union, Outcome of the Council Meeting, 3629th Council meeting, General Affairs, 10519/18, Luxembourg, 26 June 2018. Available at <https://www.consilium.europa.eu/media/35866/st10519-en18.pdf>.

¹⁴ See https://www.asktheeu.org/en/user/laurent_pech.

¹⁵ Uitz, Renáta, EU Rule of Law Dialogues: Risks – in Context, Verfassungsblog, 23 January 2020. Available at <https://verfassungsblog.de/eu-rule-of-law-dialogues-risks-in-context/>.

¹⁶ European Commission, Funding and Tender Opportunities, Justice Funds. Available at <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/programmes/just>.

has membership provided a sufficient safeguard by itself. Despite giving greater attention to the rule of law in the accession process and towards Member States, it has been unable in the last decade to prevent the decline of rule of law in some Member States and in most candidate countries. In particular, this erosion has not occurred as a result of ineffective public administrations and/or hapless decisions by well-intended governments. Instead, it has occurred as part of deliberate policies by some Member State governments and candidate country governments to subvert and undermine the rule of law or prevent its consolidation. The challenge is thus not primarily one of technical capacity or competence but of political will. This does not preclude problems of administrative capacity and training, but they are less pernicious and easier to tackle.

EU policies regarding the rule of law thus require the provision of tools for both members and future members. While the accession process can provide leverage, if successful, it cannot prevent backsliding after accession, as no democracy and rule of law-based system is ever completely immune to setbacks. It is thus impossible to develop an accession process that completely ensures an ever-solid rule of law-based system after accession.

Integrating prevention tools

To address this challenge, joint strategies for current and future member states are required. These can draw from the experience within the EU and from lessons of the accession processes. These include tools to identify setbacks in the rule of law, such as rolling out the EU justice scoreboard to all countries of the Western Balkans, and developing the enlargement methodology to focus beyond the judiciary to other aspects of the rule of law, such as media freedom, checks and balances, informalities and anti-corruption. In addition, rule of law expert missions like the ones developed in North Macedonia and since then identified as a general tool for the Western Balkans could be used within the EU.

The identification of problems is not sufficient by itself, as governments often deliberately undermine the rule of law. Thus, they are only susceptible to change their approach if they are under domestic or international pressure. The strong and hostile reaction of the Polish government and president to the recommendation of the Venice Commission of

the Council of Europe in January 2020 highlights that without enforcement mechanisms, reports will not be heeded. Accession countries might be more susceptible to reports due to the tools of conditionality. In reality, however, conditionality has also lost a lot of weight since the relative success of the 2004 enlargement round, as the EU has become reluctant to enforce the conditions. This has been visible in the lacklustre response to the EU expert report on the serious shortcomings in the rule of law in Bosnia and Herzegovina in 2019.

Thus, the promotion of rule of law requires clear consequences for governments that are not addressing the shortcomings.'

Thus, the promotion of rule of law requires clear consequences for governments that are not addressing the shortcomings. In order to be effective, the sanctions have to be possible during the accession and post-accession periods, that is, not exempting EU members which would discourage backsliding on strategic and incomplete reforms. These could include more robust and accelerated infringement procedures and the development of specialised rule of law expert groups feeding into the Commission's reports for countries negotiating accession. During the accession process, the imbalance clause has not been used, despite being an available tool since 2012. Furthermore, it could be linked to financial assistance and not only accession talks, as it is currently.

More robust EU mechanisms are needed for two reasons.

- First, the rule of law is an essential component of the EU, as the national courts enforce EU law and are accountable institutions as the main intermediaries between citizens and the EU. Without such institutions, the rules of the EU cannot be enforced, and the EU cannot function as a European legal space.
- Second, as outlined in this analysis, the erosion of the rule of law is inseparably linked to the erosion of democracy. Regimes that are legitimised through unfair elections and that undermine independent institutions and checks and balances are not democratic

governments but just competitive authoritarian regimes. The EU is founded as a group of rule-bound democracies and cannot survive with authoritarianism that fundamentally rests on arbitrariness, unpredictability and unfairness.

‘Success rests upon eradicating the root causes of illiberal elite-centred political systems.’

How can the implementation of democratic laws and the independence of state institutions be ensured in order to substantively reinforce democracy? Success rests upon eradicating the root causes of illiberal elite-centred political systems. The rule of law, independent institutions and checks and balances will not work because of legal framework alone but only with the political commitment of the government and key political actors in the country. The key thus lies in unlocking a new political dynamic that would enable a break with the established patterns of clientelism, informal networks and strong party control over media and state institutions. In other words, liberal structures must be strengthened in order to persistently challenge illiberal power structures and norms.

Therefore, it is necessary to include additional actors in the EU’s process of rule of law promotion, including civil society and experts, who would complement the efforts to internalise EU values. Basically, it is essential to achieve the transformation of traditional top-down power structures in which governments dominate the legislative and judiciary branches through clientelistic networks and/or methods of more or less open pressure into a horizontally structured civil society based on the rule of law. Specific efforts should be made to support constructive grassroots and local initiatives. If this does not happen, the prevalence of these patterns will cement the democratic smokescreens behind which *business as usual* shall continue in decades to come.

5. Policy recommendations

The main conclusion of this study is that the apparent decline of the respect for the rule of law requires additional EU efforts. While this study acknowledges the announced Rule of Law Report as a positive step in the right direction, the EU should still do more. It is essential to empower the

wider community, particularly the expert public, to become part of the pressure group able to exercise bottom-up pressure on the political elites. Due to the complicated decision-making procedures, the EU’s enforcement mechanisms in case of a serious breach of the rule of law in a Member State have thus far proved ineffective. The lack of clarity of the political conditions makes candidate countries’ alignment with EU values a difficult exercise. Finally, there is a need for a conceptual shift: it should be recognised that problems in regard to the rule of law are not just raising serious questions about the state of democracy in the respective countries but also are often a result of a deliberate policy of autocrats and not the accidental by-product of weak states.

Below are some policy recommendations to the EU institutions on how to redefine their rule of law framework for internal and external use, notwithstanding the need to make the two more coherent.

Redefine the EU institutions’ rule of law framework for internal and external use by

- improving civil society assistance;
- supporting specialised independent state agencies;
- closely monitoring the state of democracy;
- making the rule of law benchmarks clearer;
- amending the rule of law related decision-making procedures;
- introducing rule of law conditionality for Member States.

Improve civil society assistance. The EU’s ongoing rule of law efforts are state-centred, with a strong emphasis on law reform and government institutions, particularly judiciaries, whereas civil society is at best an adjunct to the institution-building process. There is a need for a more inclusive bottom-up approach to the EU’s rule of law promotion in which civil society actors, including constructive grassroots and local initiatives, are empowered to play a rights-holder’s role vis-à-vis public authority. This would help to push for compliance with key laws, monitor their implementation and influence norm internalisation before, during and after EU membership negotiations.

In concrete terms, civil society empowerment should strengthen their expertise, capacities and technical know-how; provide for regional and international networking possibilities with the aim of establishing support mechanisms for systemic resilience; help local fund raising; and better connect civil society to politics. The EU should commit to diverting financial aid from governments to civil society in countries whose administrations breach core democratic norms. This particularly applies to EU candidate countries strongly dependent on the inflow of IPA financial resources. In addition, more funding must be provided to protect civil society activists from state repression in countries with shrinking democratic space. EU monitoring bodies feeding into an annual cycle on the rule of law or accession Progress Reports should draw on local expertise provided by civil society organisations. Such collaboration should be institutionalised via regular channels of communication, for example, through commissioning regular ‘shadow’ reports on the state of the rule of law and democracy.

Support specialised independent state agencies. No matter how good the legislative solutions adopted by national parliaments are, they are not able to compensate for the lack of independence and quality of the implementing authorities. Alternatively, the lack of capacity to implement adopted legislation efficiently and effectively cripples compliance with EU rule of law conditionality in both the pre- and post-accession periods. The role of independent agencies can be crucial in the implementation of rule of law norms.

‘The role of independent agencies can be crucial in the implementation of rule of law norms.’

Hence, the EU should provide more attention to capacity building in not only ‘traditional’ rule of law sectors, that is, the judiciary, the police and the prosecutors, but should also aim at strengthening the effectiveness of administrative mechanisms in the Western Balkan countries and in Member States alike. Particular focus should be placed on the capacity building of independent state agencies, such as the office of the Ombudsperson, National Audit bodies, specialised prosecutorial agencies, Judicial Academies, the Commissioner

for Information of Public Importance and Personal Data Protection, media regulatory bodies, etc. It is imperative that these bodies enjoy a high level of independence and ideal if they could benefit from international cooperation with organisations such as INTERPOL, Eurojust, Europol, OLAF, the FBI, etc.

Closely monitor the state of democracy. While the EU has put a lot of effort into promoting and defending democracy and the rule of law beyond its borders, it has been rather unsuccessful in preventing internal democratic backsliding. The EU is wrong to believe that the rule of law in Member States can be protected on its own, as it continues to disregard other principles and values enshrined in Article 2 TEU. From a doctrinal and practical point of view, democracy should at least be monitored internally within the EU. This study has observed frequent violations of the rule of law in several EU Member States. The underlying problem is not just the declining rule of law but also the democratic decline. As countries like Poland and Hungary have become considerably less democratic in recent years to the degree that Hungary is no longer considered a democracy by several independent indices, democracy within the EU can no longer be taken for granted. In addition, despite the prominence of democratic conditionality within the enlargement process, the EU has repeatedly been criticised for focusing too much on the smart design of formal institutions while neglecting the larger undemocratic context and the informal practices that can undermine these institutions. In addition, the EU has been short-changing the state of democracy for the sake of other criteria, most notably the notion of stability of the region.

The rule of law and democracy need to be considered as interlinked and mutually reinforcing concepts. Ideally, existing monitoring tools should be integrated under one authority that would regularly observe institutional compliance with the Union’s fundamental values. The European Fundamental Rights Agency (FRA), assisted by local expertise, could expand its scope of work to cover all EU Member States and potential candidate countries by means of a regular assessment on specific legal and political measures concerning the rule of law and democratic reforms. In its work, the FRA would use operational capacities of specialised peer review missions that

should draw on the good practice established by the Reinhard Priebe-led Senior Expert group that researched systemic rule of law issues in North Macedonia in 2015 and 2017. In concrete terms, peer review missions should be composed of independent senior rule of law experts equipped with relevant knowledge of the target country and supported by local experts. They would focus on the most problematic parts of EU values internalisation in the target country, with the task of reporting on the most significant shortcomings. These assessments should feed into the European Semester that should be expanded to include future Member States as well as in the existing enlargement monitoring instruments.

Make the rule of law benchmarks clearer.

Clear EU demands presuppose that the target governments know precisely what they are expected to do should they decide to comply with the EU's conditions. The establishment of an unambiguous and coherent EU policy for the quality of justice which addresses not only aspiring members but also existing Member States would significantly enhance the effectiveness of the rule of law implementation process. It would also facilitate the role of civil society in holding their governments accountable to these standards.

'Therefore, the EU should abandon the "moving target" strategy in the field of the rule of law conditionality and instead distil the particular country-specific criteria and indicators.'

Therefore, the EU should abandon the 'moving target' strategy in the field of the rule of law conditionality and instead distil the particular country-specific criteria and indicators. First of all, the EU needs to have a better understanding of the situation of the rule of law in a given target country. This is particularly important when one considers legacies of the past that influence the independence of the judiciary. Second, the Commission should elaborate rule of law benchmarks in a way that is clear and predictable to the domestic actors.

Amend the rule of law related decision-making procedures. The values enshrined in Article 2 TEU are protected by the current rule of law mechanism established in Article 7 TEU, which in theory enables the EU to suspend certain membership rights in case of Member States' serious and persistent breach or clear risk of a breach of the values. Application of sanctions enshrined in Article 7 requires unanimous (minus the Member State in question) decision in the Council, which has thus far proved unattainable. On the other hand, a single Member State can invoke the overall balance clause to prevent a candidate country from further opening negotiating chapters until satisfactory progress on reforms under the rule of law related chapters is achieved.

This scenario risks introducing 'bilateral' conditionality and/or repeating the mistake of the 2019 French veto over opening EU accession talks with North Macedonia and Albania. Hence, in the event of Treaty change, reviewing Article 7 TEU to lower the thresholds for decisions would be preferable and should take the form of a reversed qualified majority, while gatekeeping in the accession process should require a higher threshold.

Introduce rule of law conditionality for Member States.

Conditioning is a crucial aspect of the EU's rule of law promotion strategy in candidate countries, and as such, it could serve as a useful coercive instrument complementary to the Article 7 procedure. As part of proposals for the next Multiannual Financial Framework (2021–2027), the Commission has already established a connection between the respect for the rule of law and the Union's budget.

Under the 'rule of law conditionality,' the Commission would be given the authority to recommend to the Council, deciding by reverse qualified majority, to reduce EU funding in an appropriate and proportionate way based upon sufficient evidence of generalised deficiencies in the rule of law in a Member State. This procedure would give the Union a major argument vis-à-vis the Member States, namely that EU funding is unable to achieve its core aims when the rule of law is systematically flawed.

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