

## CHALLENGES OF RULE OF LAW CONDITIONALITY IN EU ACCESSION / Ana Knežević Bojović, Vesna Čorić

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**Abstract:** *EU enlargement process towards the Western Balkan countries has been in place since the 2003 Thessaloniki summit. However, the expected democratic transformation and fostering of the rule of law values have not become a reality, while rule of law conditionality has been criticized as ineffective in achieving its goals. In parallel, the EU has been struggling with rule of law backsliding internally, and, in order to tackle this issue, has developed a multitude of instruments that have so far had limited effects on internal rule of law promotion. The paper supports the idea that there is a need for approximation of the rule of law standards in the EU's internal and accession policies. After providing a bird's-eye-view of the position of the rule of law in EU accession negotiations with WB countries, the authors go on to elaborate on the four major causes contributing to the EU's lack of effectiveness and coherence in the WB accession process. In doing so, the authors provide recommendations on how to improve the convergence between internal and accession rule of law policies and foster a common understanding of the rule of law as a core pre- and post-accession value in the EU.*

**Key words:** *EU; Rule of Law; Rule of Law Conditionality; EU Accession; Western Balkan Countries; Effectiveness; Coherence*

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## 1. INTRODUCTION

The European Union's (hereinafter: **EU**) enlargement process towards the Western Balkans (hereinafter: **WB**) countries has been in place since the 2003 Thessaloniki summit. Although it had provided the region with the EU membership perspective, the expected democratic transformation and fostering of the rule of law values have not become a reality (Zweers et al., 2022, p. 10). The transformative power of the EU, attributed to the attractiveness of the EU itself, both in economic terms and as a norm-setter, was hailed as a success in the 2004 EU enlargement cycle.<sup>1</sup> It is prevalently explained as the phenomenon of external conditionality through the External

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<sup>1</sup> The term "transformative power" was originally coined by Mark Leonard (2005), for positively assessed transformative power of the EU in former communist countries see Grabbe (2006); Pridham (2005); Schimmelfenig, Engert, and Knobel (2006); Vachudova (2005).

Incentive Model,<sup>2</sup> where the EU sets the adoption of its norms and rules as conditions that prospective candidates have to fulfil in order to receive a reward i.e. EU membership. The said conditions comprise both political (such as democracy and the rule of law) and regulatory conditions (pertaining to the EU's public policies) (Zhelyazkova, Damjanovski, Nechev, and Schimmelfennig, 2019).

However, the rule of law conditionality<sup>3</sup> has been criticized as ineffective in achieving its goals in the case of the WB countries for various reasons, particularly for those related to social changes and strong legacies of the past; it is said to have caused fragmentation and even state capture (Börzel and Pamuk, 2012; Mendelski, 2016; Mungiu-Pippidi, 2007, 2014; Richter and Wunsch, 2020). Independent indicators reveal that the democratic level of some countries in the region has in fact deteriorated in the past decade.<sup>4</sup> Further criticisms of the approach point to the lack of differentiation between democratic consolidation and rule of law (Kochenov, 2004), and the absence of a coherent EU conception of the rule of law and its underlying monitoring and implementation framework (Pech, 2016). The EU institutions and member states have also recognized the lack of reform progress in the WB countries<sup>5</sup> and are attempting to address it through changes in the accession methodology.

In parallel, the EU has been struggling with rule of law backsliding internally. As Craig duly points out, once rather general or abstract primary duty, stemming from Article 2 of the TEU, thought to be “merely hortatory stuff”, rule of law has gained a more substantive and real dimension within the EU over the recent years (Craig, 2020). This was done through a series of efforts made by the CJEU, the European Commission, and the Council. These developments have been criticized and assessed as a multiplication of new instruments but in an uncoordinated manner, with limited effects on internal rule of law promotion within the EU (Pech, 2020). In that context, Kmezić and Bieber (2020, p. 1) argue that the solution for the problems pertaining to the internal and the external dimensions of the EU rule of law promotion and protection can be found in aligning these policies. In a similar vein, other authors call for approximation of the rule of law standards in the EU's internal and accession policies, relying on the premise that the rule of law is a value to be shared between the EU member states and non-member states that will continue to be shared among the EU member states in the future (Merdzanovic and Nicolaidis, 2021, p. 122; Nicolaidis and Kleinfeld, 2012).

The present paper posits that the different approaches the EU takes in the field of rule of law internally and externally are in principle acceptable and reasonable, to the extent they are attributable to the specifics of internal and external policies. The authors

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<sup>2</sup> There are two additional models of Europeanization proposed: social learning and lesson drawing (see Schimmelfennig and Sedelmeier, 2004 for more details).

<sup>3</sup> For the purpose of this paper, the “rule of law conditionality” will encompass both the internal and the external dimension of rule of law conditionality, and will not be restricted to the meaning of the term as per the Rule of Law Conditionality Regulation (Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget).

<sup>4</sup> See, for instance, the Bertelsmann Stiftung's Transformation Index (BTI) which qualifies all WB countries as defective or highly defective democracies (<https://bti-project.org/en/reports/east-central-and-southeast-europe>), while the Nations in Transit 2022 report qualifies them as transitional or hybrid regimes which are generally less free compared to 2020, with the exception of Montenegro, see Change in Democracy Status. In *Freedom House*, available at: <https://freedomhouse.org/explore-the-map?type=nit&year=2022&mapview=trend> (accessed on 15.05.2023).

<sup>5</sup> For instance, the European Court of Auditors in its recent report firmly criticized EU investments in rule of law reforms in the WB countries, noting the absence of progress in the region and hence questioning the overall sustainability of EU financial support. The 2021 and 2022 European Commission enlargement packages confirm that the lack of reforms in the rule of law area in particular remains a major issue in the accession process (European Court of Auditors, 2022).

of this paper argue that the EU rule of law instruments in the accession process in the WB countries lack consistency and effectiveness, and as such have failed to effect the expected transformative power. For the purpose of this paper, effectiveness is understood as the EU's ability to foster democratic transformation in line with the values enshrined in Article 2 of the Treaty on EU (hereinafter: **TEU**) and pursuant to the Copenhagen Criteria. The notions of consistency and coherence will be used interchangeably. In the paper, a broader understanding<sup>6</sup> of the notion of coherence will be employed, where it entails "the absence of contradictions as well as an increased synergy and added value between the different norms, instruments, policies, and actions of the Union", including the EU internal and external dimensions (Pech, 2016, p. 9). The authors further identify four main problems hindering the consistency and effectiveness of the EU rule of law instruments in the accession process, which will be examined below. These are: lack of clarity when it comes to the nature and scope of rule of law; deficiencies in the EU reporting and monitoring methodology; disbalance in rewarding and sanctioning mechanisms, and lack of a more coherent approach among external and internal policies and instruments dedicated to the upholding and promotion of the EU values. Before getting into the analysis of identified problems, the authors will first provide a bird's eye on the development of the rule of law instruments in the EU accession process.

## 2. RULE OF LAW IN THE EUROPEAN UNION ENLARGEMENT FRAMEWORK

Rule of law has been referred to as a fluid concept that is not precisely defined in EU treaties but is reflected mostly in general EU principles or values enshrined in the TEU (Nozar, 2012, p. 2). When it comes to the conditions for accession to the EU, for a long time, the EU treaties did not go far beyond what was envisaged in the Treaty of Rome, namely that the accession is open to "any European state" and that conditions for admission were to be determined by "an agreement between the member states and the applicant State".<sup>7</sup> The Treaty of Amsterdam mandated that any European state wanting to join the EU must respect the principles set out in Article F1 of the TEU, which, *inter alia*, include democracy, respect for human rights, and the rule of law.<sup>8</sup> The Treaty of Lisbon amended the TEU to firmly establish the rule of law as a foundational value of the European Union, or, as some authors point out, a part of the constitutional identity of the EU.<sup>9</sup> A clear link between respecting the rule of law as one of the EU founding values in terms of Article 2 of the TEU and accession was further supported by amendments to Article 49 of the TEU, made by the Lisbon Treaty<sup>10</sup> stating that any European state which

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<sup>6</sup> Some authors take a narrow view of the notion of coherence, which they refer to as "inner coherence". According to them, the "transformative power" of the EU requires the existence of inner coherence in order to prevent the "transformative power" from being converted into a "transformative flaw". The authors offering this view criticize the lack of inner coherence, attributing it to ideological divisions among member states with regard to the importance of the rule of law and democracy, which undermine the EU's ability to develop a common understanding and interpretation of the rule of law (see Zweers et al., 2022, p. 10).

<sup>7</sup> See Article 237 paragraph 1 of the Treaty establishing the European Economic Community (Rome, 25 March 1957). The Maastricht Treaty did not introduce improvements in that respect. See Article O of the Treaty on the European Union 92/C 191/01 (Coman, 2020, pp. 782–783).

<sup>8</sup> See Article 1, point 13 of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (97/C 340/01).

<sup>9</sup> See General Provisions, point 3) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01) (see also Schroeder, 2023).

<sup>10</sup> See Final Provisions, Point 47) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community 2007/C 306/01 and Article 49 of the Consolidated version of the Treaty on European Union 2016/C 202/1.

wants to join the EU must not only respect the rule of law and other EU founding values, but also be committed to promoting them. In a nutshell, the respect for and promotion of the said founding principles which include the rule of law carefully guide the accession processes and outcomes of aspiring countries (Kmezic, 2018, p. 14).

More detailed accession requirements have been formulated in the early 1990s, enhancing the rule of law membership requirement once the Iron Curtain fell in the context of Eastern Enlargement.<sup>11</sup> They were adopted in the form of the Copenhagen criteria, which remain the key reference document for the process.<sup>12</sup> The Copenhagen criteria link accession and membership in the EU to “political” conditionality concerning the stability of institutions guaranteeing democracy, rule of law, and protection of human and minority rights, coupled with a functioning market economy and the ability to take on the obligations of membership, including the capacity to effectively implement the body of EU law. The accession framework is not elaborated in a single working document, but rather in the bulk of Copenhagen-related documents which are described by Kochenov as a “spider web” of political and legal obstacles” towards capturing the essence of the rule of law accession requirement (Kochenov, 2008, p. 78). A prominent role in the process was given to Regular Reports on the candidate countries’ progress towards accession, addressed at individual countries, and to documents of more general application, including Comprehensive Monitoring Reports, yearly Composite Papers, and Strategy Papers.

In 1995, the EU Commission defined its political criteria in the Agenda 2000 as a combination of free and fair elections, political pluralism, freedom of expression, freedom of religion, the need for democratic institutions, and independent judicial and constitutional authorities. In 1997, the General Affairs Council elaborated on the political criteria that WB countries need to fulfil to conclude a Stabilization and Association Agreement (Kmezic, 2018, p. 16). In an effort to provide benchmarks capable of measuring success or failure in reforms, the Council made the express reference to the rule of law, stating that it refers to the following components: effective means of redress against administrative decisions; access to courts and the right to a fair trial; equality before the law; and freedom from inhumane or degrading treatment and arbitrary arrest.<sup>13</sup> The demand for the separation of executive, legislative and judicial powers, as well as the demand for government and public authorities to act in a manner consistent with the constitution and the law, were identified as elements to be examined under the democratic principles. This approach was not fully visible in the country progress reports developed in the 1998-2004 accession cycle. They were structured in line with the Copenhagen criteria and examined the democratic principles, rule of law, and human rights under the same umbrella of political criteria for EU accession. The following accession cycles have continued to bring changes in the reporting methodology, which went hand in hand with the evolution of the EU *acquis* and the adaptation of the accession

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<sup>11</sup> The requirements for democracy and the rule of law were previously addressed within the accession context in the case of Greece, Spain, and Portugal in 1980s, through a general commitment of the member states to safeguard the principle of rule of law. In negotiations with Austria, Finland, and Sweden, due to a lack of clear indicators of the contents of requirements for democracy and the rule of law, external indicators were borrowed, most notably the Commission on Security and Cooperation in Europe’s 1990 Charter of Paris for a New Europe (Kmezic, 2018, p. 15).

<sup>12</sup> The Copenhagen criteria were established by the Copenhagen European Council in 1993 and further strengthened by the Madrid European Council in 1995. Accession criteria (Copenhagen criteria), available at: <https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html> (accessed on 15.05.2023).

<sup>13</sup> 2003rd Council meeting – GENERAL AFFAIRS – Luxembourg, 29/30 April 1997, [https://ec.europa.eu/commission/presscorner/detail/en/PRES\\_97\\_129](https://ec.europa.eu/commission/presscorner/detail/en/PRES_97_129) (see also Smilov, 2006, p. 286).

methodology to the specific situations and circumstances in the new potential candidate countries, most notably the WB countries.

The 2005 negotiating frameworks for Croatia and Turkey introduced a specific chapter 23 - "judiciary and fundamental rights" - in addition to the already existing and at that time renumbered chapter 24 - "justice, freedom, and security". Both chapters cover key rule of law issues, in particular reform of the judiciary and the fight against organized crime and corruption. The reason behind this development was to remedy the limitations of the enlargement process identified in the negotiation process with Bulgaria and Romania (Nozar, 2012, p. 2). However, in the 2006-2014 progress reports, democracy, and rule of law were examined under the same subtitle, with a separate, more detailed examination of the issues falling under Chapters 23 and 24, thus leading to a somewhat conflated notion of what is understood under each individual term.

Another major step in positioning the rule of law in the accession process came with the adoption of the so-called "fundamentals first" approach, pushing the candidate countries to deal with issues of judicial reform, and fight against organized crime and corruption early in the accession negotiations (Kacarska and Abazi Imeri, 2019, p. 1). In doing so, the EU introduced a benchmarking system that provides more detailed assessments and recommendations of the steps to be taken to ensure the adequate transposition of the EU *acquis* (Zhelyazkova et al., 2019). The novel benchmarking system implied the setting of benchmarks for opening and closing a chapter of the *acquis* during accession negotiations as well as interim benchmarks for Chapters 23 and 24. While opening benchmarks enabled the prioritization of the key issues from the very beginning of negotiations, the interim benchmarks were set to postpone the adoption of closing benchmarks until such time as the candidate country demonstrated solid track records of reform implementation (Nozar, 2012, p. 3). In the same vein, in the 2015 reporting methodology, the rule of law started to be assessed separately, while the current state of play and progress started to be assessed for selected areas, including the rule of law and fundamental rights. In the reports themselves, the relevant subsection of the annual national reports examined the functioning of the judiciary, the fight against corruption, the fight against organized crime, and the fight against terrorism, while human rights protection of minorities were examined under a separate subsection. Consequently, in the reporting exercise, rule of law was reduced to the key Chapter 23 and 24 elements, which is a somewhat narrow point of view. While this dissection of the approach used in the Commission's reports may seem to rely too much on technicalities and less on substance, it is still indicative of the EU's reluctance to formulate in clear terms the notion of the rule of law in its accession policy, which is fittingly accompanied by the fact that no accession-related documents clearly elaborate the methodology underpinning the reporting process (Vlajković, 2020).

The new accession methodology, adopted in 2020,<sup>14</sup> aims to address this failure, by a combination of positive and negative conditionality. The underlying tendency of the new accession methodology, which applies both to new candidates and to frontrunners for accession who accept it, is to put a stronger political steer on the process, while at the same time improving the definition of the conditions for the progress of the candidates (Ćeranić Perišić, 2020b, p. 103, 2020a). This approach can be seen as somewhat of a response to the proposal put forward for a less formalistic, more ends-based definition of the rule of law. This additional commitment perhaps can be seen as a way to

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<sup>14</sup> Communication to the European Parliament, the Council, the European Economic, and Social Committee, and the Committee of Regions with a proposal for "Enhancing the accession process – A credible EU perspective for the Western Balkans", 5.2.2020 COM(2020) 57 final.

streamline the existing rule of law demands and standards put before the candidate countries. Nevertheless, the criteria which were set out to be "objective, precise, detailed, strict and verifiable"<sup>15</sup> still do not seem to be formulated.

For the purpose of introducing further dynamism into the negotiating process, fostering cross-fertilization of efforts beyond individual chapters while bringing a more coherent approach, the negotiating chapters are now organised in thematic clusters, which follow broad themes. The annual reports thus take on a somewhat different format, as the state of play in individual chapters is presented per cluster, not per numeral order of the chapters. Nevertheless, the "fundamentals of the accession process" keep the examination of the rule of law closely linked to the functioning of the judiciary and fight against specific forms of crime, while the functioning of democratic institutions and public administration reform are examined separately. As can be seen, very little actual progress has been made in terms of clarifying the content, or the benchmarks of the rule of law in the accession process.

According to the new methodology, if a candidate country moves on reform priorities agreed in negotiations sufficiently, this should lead to closer integration of the country with the EU, work for accelerated integration and "phasing-in" to individual EU policies, the EU market, and the EU programmes.<sup>16</sup> The success of this latest approach and even more stringent conditionality is yet to be seen.

### 3. LACK OF CLARITY WHEN IT COMES TO THE NATURE AND SCOPE OF THE RULE OF LAW

As described above, the Copenhagen Criteria impose the obligation on candidate countries to respect the rule of law, but the translation of that concept into straightforward benchmarks has proven challenging (Dimitrova, 2016, p. 9). It was further observed in legal literature that rare determinations of the rule of law offered by the EU institutions are rather superficial, since they cover different components of the rule of law, while not providing a comprehensive list of minimum requirements to be met in any circumstances (Pech, 2016, p. 10). An illustrative example of such an approach is visible in the definition of the rule of law in the recently adopted Rule of Law Conditionality Regulation.<sup>17</sup> The reference to this Regulation admittedly comes with a number of caveats. Firstly, the Regulation is applicable solely to member states, and is not relevant for candidate countries. Secondly, the said Regulation sets out the rules for the protection of the Union budget in the case of breaches of the principles of the rule of law, where such a breach "affects or seriously risks affecting that sound financial management or the protection of those financial interests of the Union in a sufficiently direct way". It is clear therefore that the definition of the rule of law offered in the Regulation is not necessarily a universal one. This was further confirmed in Guidelines on the application of the Regulation adopted in March 2022,<sup>18</sup> which clearly underline that the said definition is not intended to provide an extensive determination of the concept of the rule of law. It

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<sup>15</sup> Communication to the European Parliament, the Council, the European Economic, and Social Committee, and the Committee of Regions with a proposal for "Enhancing the accession process – A credible EU perspective for the Western Balkans". COMMISSION Brussels, 5.2.2020 COM(2020) 57 final.

<sup>16</sup> The concept of flexibility was always a part of the European integration process (see Čeranić, 2017).

<sup>17</sup> Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 433I, 22.12.2020, pp. 1–10.

<sup>18</sup> Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, C(2022) 1382 final.

may be concluded that the EU sometimes resorts to “fit to purpose” definition of its core value concept.

The principle of the rule of law in the accession context was described as a ‘soft’ ideal that guides EU institutions when they determine their priorities and draft relevant instruments and external policies. For De Baere, its effect is limited to “guiding” since the principle of the rule of law does not impose precise obligations on EU institutions (2012, p. 354). Pech additionally clarifies that the binding effect of the concept of the rule of law in its external dimension is rather incomplete since the EU institutions in exercising their executive and legislative functions have a wide margin of discretion when it comes to promoting the rule of law values, particularly vis-a-vis candidate countries (2016, p. 9). That leaves room for the EU to interpret the concept of the rule of law to its advantage, which adversely affects both the consistency and effectiveness of rule of law instruments in the EU accession process (Kmezcic, 2018, p. 15).

However, the lack of clarity is not characteristic only of the EU concept of the rule of law, but of some other notions strongly linked to it, such as the principle of democracy. As indicated before, the European Commission assessed the rule of law and democracy interchangeably, hence not making a clear distinction between those concepts. In that light, it was rightly observed, that the rule of law does not appear as a “stand-alone” principle but rather as an “umbrella principle,” (Leino, 2002) usually along with the principles of democracy and the respect for fundamental rights. When it comes to the political criteria of democracy and the rule of law, Copenhagen-related documents frequently refer to standards created by other international organizations, such as the OSCE and the Council of Europe, to clarify their meaning and contribute to the assessment of the candidate countries’ compliance with the Copenhagen political criteria (Kmezcic, 2018, pp. 14–15). While the invoking of standards of other supranational and international organizations may seem like a worthwhile attempt at establishing further linkages between the EU concept of the rule of law and other elaborated understandings of that term, the list of standards seems somewhat overwhelming and may open/trigger a dilemma why some other similar non-EU standards are not included. Such an approach may also create confusion to candidate countries regarding whether other similar sources can be also automatically applied although not explicitly included in the Copenhagen-related documents.

The lack of clarity of the rule of law concept is inherently linked to shortcomings of the applicable rule of law-related benchmarks (Abazi Imeri, Ivanovska, and Hrasnica, 2018). Benchmarks are envisaged as tools contributing both to consistency, credibility, and effectiveness of EU conditionality policy towards the WB countries, particularly in the area of the rule of law (Kacarska and Abazi Imeri, 2019, p. 1). However, the translation of the fluid concept of the rule of law to a set of verifiable and clear benchmarks has proven to be challenging and, as indicated above, not fully conducive to the rule of law reforms.

Firstly, there is a principal difficulty in quantitatively verifying the achieved level of compliance or progress achieved with regard to the Copenhagen political criteria, such as the rule of law and democracy, given that, due to their nature, they are principally not amenable to quantitative verification. Unlike the benchmarks applicable in the context of economic reform, such as inflation rate and gross domestic product, benchmarks in the area of the rule of law and democracy cannot lead to great accuracy (Kmezcic, 2018, p. 15). EU tried to mitigate this by providing an increased number of detailed requirements

related to implementation during the accession negotiations.<sup>19</sup> Those more detailed requirements constitute a development, as they were found to be easier to measure, more precise, and more effective. However, these benchmarks still provide candidate countries with a lot of discretion in presenting their achievements (Kacarska and Abazi Imeri, 2019, p. 2). It has consequently been argued that a more outcome-related benchmarking system would be more conducive to tracking implementation, while not allowing representatives of candidate countries to deliver results and reports on progress in meeting benchmarks that are only descriptive (Abazi Imeri et al., 2018, p. 38). The more detailed approach to benchmarking is further complicated by the fact that the attainment of certain benchmarks is not solely dependent on the adoption of a sound legislative framework, but also hinges on the overall state of democracy in a country, and also on the current local context.

The second relevant factor is the limited availability of hard *acquis*, particularly under Chapter 23, leading to benchmarks that are “rather general, lacking specificity and adaptation to context” (Kacarska and Abazi Imeri, 2019, p. 2) and undermine the efforts of the candidate countries to identify exactly which reforms they need to adopt and how to approach them (Nozar, 2012, p. 2). The organization of the judiciary is a particularly relevant example for several reasons. Firstly, this is the field where the standards, formulated mostly on the level of the Council of Europe, but also the UN, recognize the diversity of national systems in effecting the key principles. Secondly, this is a field that has traditionally not been covered by the *acquis*. However, the developments over the past seven years have put various issues related to the organization and functioning of the judicial systems firmly at the core of the EU’s understanding of the rule of law, both internally and externally. Thirdly, the establishment of judicial councils (particularly the so-called Southern-type of judicial councils) was strongly promoted by the EU in all of the accession cycles following the fall of the Iron Curtain. The concept has proven to have limited success (Kosař, 2018; Magalhães, 1999, pp. 58–59; Mendelski, 2015; Preshova, Damjanovski, and Nechev, 2017; Urbániková and Šipulová, 2018), while serious rule of law backsliding in the countries that participated in the 2004 enlargement has been found to have taken place, particularly through thwarting the institutional setup and functioning of the judiciary.<sup>20</sup> Internally, over the past decade, the CJEU built a consistent line of jurisprudence aimed at securing the functioning of the EU judicial system by operationalising the values enshrined in Article 2 of the TEU in the context of judicial independence (Pech and Kochenov, 2021; Spieker, 2021, pp. 249–253). Namely, the CJEU took a firm position that the independence of national judges is a necessary facet of the rule of law as understood under Article 2 TEU (Rossi, 2020, p. 13) and has addressed national practices that impinge on judicial independence. Nevertheless, CJEU jurisprudence has only enabled the identification of unacceptable practices – there are still no clear rules on what is the best way to go. This is particularly poignant as certain rules might produce positive results in the Member States with established democratic

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<sup>19</sup> Interim benchmarks for Chapters 23 and 24 for Serbia are a good example of this approach – only a third of them refers to legislative activity, while the remainder is linked to other aspects of reform, e.g. impact assessments, analyses, capacity building, monitoring and establishing a track record of implementation (see Kacarska and Abazi Imeri, 2019, p. 2).

<sup>20</sup> CJEU, judgment of 6 November 2012, *Commission v. Hungary*, C-286/12, ECLI:EU:C:2012:687; CJEU, judgment of 5 November 2019, *Commission v. Poland*, C-192/18, ECLI:EU:C:2019:924; CJEU, judgment of 19 November 2019, *A. K. and others*, joined cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982; CJEU, judgment of 23 November 2021, *IS*, C-564/19, ECLI:EU:C:2021:949; CJEU judgment of 24 June 2019, *Commission v. Poland*, C-619/18, ECLI:EU:C:2019:615; ECtHR, *Baka v. Hungary* [GC], app. no. 20261/12, 23 June 2016.



traditions, while they might not work in a country with unconsolidated democracy (Nozar, 2012, p. 2).<sup>21</sup>

This above discussion underlines the necessity of a well-adjusted approach to benchmarking, which is also responsive to the local context while ensuring objectivity. Such an approach could imply using a compound set of indicators to assess progress and achievement.

#### 4. DEFICIENCIES IN THE EU REPORTING AND MONITORING METHODOLOGY

The coherence and effectiveness of EU rule of law instruments in the accession process have been also undermined by the absence of adequate reporting and monitoring (Pech, 2016, pp. 10–11). It has been argued that the annual reports on candidate countries are more focused on the formal adoption of the EU *acquis* than on its implementation and enforcement. Despite the fact that the reform benchmarks have been adjusted to measure progress beyond mere legislative requirements, “the reports still fail to grasp democratic setbacks” (Bajić and Marić, 2018, p. 6). Sometimes the EU seems to still favour traction over substance, at least in the EU accession process. Let us recall that in the 2012 annual report, the EU assessed the process of review of decisions on judicial and prosecutorial non-appointments in a rather positive light; this assessment was later challenged before the Parliament by some MPs who cited the internal documents of the EU delegation to Serbia expert team, who called the process “a travesty of justice”. Similarly, the EU report on Serbia in 2018 remained rather value-neutral when it came to the text of the proposed constitutional amendments, although it did note the disagreements expressed by the civil sector. The same goes for the 2022 constitutional amendments, promulgated after a tight referendum victory in Serbia. This approach is somewhat surprising as it comes with full knowledge that the constitutional and legislative amendments previously implemented in Hungary have proven their potential in leading the country into rule of law backsliding. Such superficial monitoring practices which do not follow improved benchmarks reflect the criticism according to which monitoring was traditionally based on a light-touch and subjective assessment and monitoring of candidate countries’ adherence to the rule of law by the Commission (Pech, 2016, p. 11). In sum, sometimes the disconnect between the EU political steer towards integration and positive reinforcement may in fact be detrimental to its core values, particularly if the normative reforms are not backed by a society-wide commitment to the rule of law.

It has also been argued both the EU and the candidate countries could benefit from a consistent approach to the development of peer review reports in the field of rule of law, as the case was with the Priebe reports for Macedonia and Bosnia and Herzegovina. Even though the said reports were developed under the previous enlargement methodology, they have proven to have a significant positive impact. When it comes to annual progress reports of candidate countries, it was rightly argued that at least their executive summaries should be instantly available in local languages. This would help avoid the cases where the local authorities of the candidate countries have, in absence of a local language translation of the report, presented the findings of the report in a way that fits their own internal narratives (Zweers et al., 2022, p. 47).

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<sup>21</sup> Also see the illustrative example of failure of institutional setups relating to judicial integrity and ethics from the Netherlands to Romania (Knežević Bojović, Matijević, and Glintić, 2022)

## 5. DISBALANCE IN REWARDING AND SANCTIONING MECHANISMS

The disbalance in rewarding and sanctioning mechanisms may be explained by the fact that they are sparsely used in the accession process. It is worth recalling that the sanctioning mechanism in the accession process can apply in the case of a serious and persistent breach of the values on which the EU is founded by the candidate country, or where there is significant backsliding. In such cases, the EU can recommend that the negotiations be put on hold in certain areas, suspend the negotiations overall, it can reopen or reset the provisionally closed chapters or it can adjust the scope and intensity of EU funding downward. So far, the EU has resorted to postponing the opening of certain chapters, or, more recently, clusters, in cases of insufficient or inadequate results in the rule of law-related reforms.<sup>22</sup> However, since the new methodology clearly states that the progress under the fundamentals' cluster will determine the overall pace of the negotiations, the danger of accession negotiations coming to halt due to lack of progress seems like a realistic option – for instance, in the 2021 reporting cycle, the EU has not noted any progress in the fundamentals chapters in any of the WB countries except in Albania, while backsliding was noted with regard to Turkey.<sup>23</sup> However, the lack of a clear accession timeline and undermined credibility of the enlargement process diminish the potential effects of the sanctioning mechanisms, thus reducing the transformative power of EU conditionality. On the other hand, the EU was strongly criticized for continuing to provide financial support to WB countries, despite the rule of law backlash (Eisl, 2020, p. 6). While the downward adjustment of funding is set to exclude the civil sector, it still seems that, if implemented, the measure would be most likely to affect the national stakeholders who are advocating for necessary reforms and using the EU conditionality as a policy leverage, not necessarily a goal in itself. Conversely, the lack of EU funding could provide arguments for deviating from EU-oriented reforms altogether, and thus should be used cautiously.

On the other hand, the EU has so far failed to reward progress, while the binary “in or out” enlargement setup apparently does not provide sufficient incentives for difficult reforms, particularly in the light of the previously mentioned uncertain enlargement timelines. The new accession methodology aims to address this issue through incorporating a potentially more attractive rewarding mechanism, whereby, if the candidate country moves on reform priorities agreed in negotiations sufficiently, this should lead to closer integration of the country with the EU, work for accelerated integration and “phasing-in” to individual EU policies, the EU market and the EU programmes. Although this possibility is considered one of the key novelties of the new accession methodology, this instrument has been already known in the EU integration process. Closer integration is actually an institutionalized form of differentiated integration (flexible integration), a phenomenon present in the EU integration process from the very beginning (Čeranić Perišić, 2020b; Dabrowski, 2020). While a staged accession has been advocated by some local think-thanks (Emerson, Lazarević, Blockmans, and Subotić, 2021) others have underlined the lack of norms regarding its operationalization. Furthermore, concerns have been raised that the said phasing-in can

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<sup>22</sup> EWB (2021): No consent in the EU on opening new chapters with Serbia in June. In *European Western Balkans*, June 14, 2021. Available at: <https://europeanwesternbalkans.com/2021/06/14/without-consent-within-eu-on-opening-new-chapters-with-serbia-in-june/> (accessed on 15.05.2023); EU-Serbia: A stagnation comfortable for both sides. In *EURACTIV*, June 18, 2021. Available at: <https://www.euractiv.com/section/enlargement/opinion/eu-serbia-a-stagnation-comfortable-for-both-sides/> (accessed on 15.05.2023).

<sup>23</sup> Institut für Politikwissenschaft: Progress Report Monitor. In *Universität Duisburg-Essen*. Available at: <https://www.uni-due.de/politik/progmonitor.php> (accessed on 15.05.2023).

undermine the credibility of enlargement, as there are no guarantees that the promised differentiated integration can ever be transformed into a fully-fledged membership; however, such an arrangement can prove to be more feasible and desirable for some WB countries (Čeranić Perišić, 2020a). It is clear that a careful balancing of sanctioning and rewarding instruments is necessary if the effectiveness of the rule of law instruments in the accession process is to be achieved.

## 6. LACK OF A MORE COHERENT APPROACH AMONG EXTERNAL AND INTERNAL POLICIES AND INSTRUMENTS DEDICATED TO THE UPHOLDING AND PROMOTION OF EU VALUES

It has already been pointed out in scholarly literature that Europeanization entails not only the domestic adaptation to EU norms, laws, and rules (top-down process), but also the changes in the dynamics of Europeanization as a result of the domestic change (bottom-up process) (Zhelyazkova et al., 2019). However, the said convergence seems to be limited and mostly effected through *de facto* rather than *de iure* interventions. In legal literature, it has been frequently argued that there is a traditional problem of the disconnect between the EU's internal and external policies and mechanisms dedicated to the promotion of its foundational values, including the rule of law (Pech, 2016, pp. 14–15). The problem is taken to be manifested in the employment of 'double standards' amounting to the discrepancy between accession conditions and membership obligations ('Editorial Comments: Fundamental rights and EU membership: Do as I say, not as I do!', 2012). While the EU sets the rule of law as a condition for the state's accession to the EU, it had no mechanisms in place to formally control and sanction a violation of fundamental values by its own Member States (Kochenov, 2017, p. 4). The importance of a convergent approach to the rule of law in the EU's external and internal policies was also highlighted by the CJEU in its most recent case law, where it was held that the commitment to the rule of law cannot be limited to the pre-accession stage only, but is a continued obligation of all EU member states.<sup>24</sup>

First and foremost, the infringement of the values of the EU triggers the procedure envisaged in Article 7 of the TEU. The procedure, set up already by the Treaty of Amsterdam as a repressive option, was subsequently modified by the Treaty of Nice and the Treaty of Lisbon to comprise both preventive and repressive procedures, which can be initiated separately. While the Article 7 repressive procedure is commonly referred to as a "nuclear option", given the drastic repercussions it may entail, it has been assessed as paradoxical in as much as the decision to safeguard the rule of law under Article 7 is, in fact, a political one (Mohay and Lukonits, 2017, p. 406). To date, only the preventive arm of Article 7 has been activated with respect to Poland and Hungary<sup>25</sup> with limited results. In parallel, so as to address the rule of lack of backsliding in the EU member states, over the past decade, the EU has adopted a complex set of instruments aimed at safeguarding and promoting the rule of law internally. These are the following: the EU

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<sup>24</sup> CJEU judgment of 16 February 2022, Hungary v. Parliament and Council, C-156/21, ECLI:EU:C:2022:97.

<sup>25</sup> European Commission, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 20 December 2017 and European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (see Pech and Jaraczewski, 2023 for more on the procedure regarding Poland).

Justice Scoreboard (2013),<sup>26</sup> the Rule of Law Framework (2014),<sup>27</sup> annual rule of law dialogue within the Council (2020)<sup>28</sup> Rule of Law mechanism, with the annual Rule of Law reports as the foundation, and most recently, the Regulation on the Rule of Law Conditionality.<sup>29</sup> Described as a “swift evolution and densification of the EU’s rule of law toolbox” (Pech, 2020, pp. 16–22) and the “normative fixation of the Union’s values” (Müller-Graff, 2021, p. 5) this plethora of instruments has, as indicated before, proven to be of limited effectiveness vis-à-vis the monitoring and sanctioning of the EU Member States in the cases when actual rule of law backsliding does take place. Nevertheless, the underlying value cohesion in the EU is reasonably expected to affect the accession process; cross-comparisons are inevitable.

Without going into details about each of the instruments themselves, which have given rise to abundant academic discussion (see, for instance, Łacny, 2021; Lenaerts, 2020; Pech, 2020), for the purpose of this paper, the authors will focus on Rule of Law Reports and Rule of Law Conditionality Regulation to highlight the lack of convergence in EU’s approach in its internal policy and external accession policy. The Rule of Law reports are taken as an example due to their underlying methodological approach, which is highly resemblant to the one used *vis-à-vis* accession countries, while the Rule of Law Conditionality Regulation is taken, as the first EU document to provide a definition of the rule of law and a potent sanctioning mechanism based on rule of law conditionality. To illustrate the lack of convergence in the internal and external accession-related approach to the rule of law, a closer look will be taken into the methodologies and approaches to the understanding of the rule of law in the two chosen internal instruments compared to the accession-related instruments under the new accession methodology.

Firstly, there is a difference in the scope of issues covered by the reports pertaining to the EU member states under the Rule of Law Mechanism and annual reports related to candidate countries. It is worth recalling that no accession-related documents clearly nor unambiguously refer to the relevant methodology based on which the attainment of the rule of law, or the rule of law both in books and in practice, or even the so-called thick or thin definition of the rule of law (Møller and Skaaning, 2014) is achieved in the member states. Conversely, the internal Rule of Law reporting methodology is clearly outlined every year. However, neither the Rule of Law Mechanism-related documents nor the accession-related documents offer a closer definition or a more precise understanding of what the rule of law is. A closer look at the reports themselves does offer some insight into the matter and shows the divergence between the approaches.

As indicated before, the new accession methodology aims to further streamline the processes through the introduction of thematic clusters rather than individual chapters, so do the annual reports take on a somewhat different format, as the state of play in individual chapters is presented per cluster, not per numeral order of the chapters. However, within the “fundamentals of the accession process” cluster, the examination of the rule of law is still closely linked to the functioning of the judiciary and the fight against

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<sup>26</sup> Communication from the Commission to the European Parliament, the Council the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, The EU Justice Scoreboard A tool to promote effective justice and growth, COM/2013/0160 final, 27 March 2013.

<sup>27</sup> Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final, 11 March 2014.

<sup>28</sup> Council of the EU: General Affairs Council, 13 October 2020. Available at:

<https://www.consilium.europa.eu/en/meetings/gac/2020/10/13/> (accessed on 15.05.2023).

<sup>29</sup> Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

specific forms of crime, while the functioning of democratic institutions and public administration reform are examined separately. Conversely, the Rule of Law reports focus on four pillars: justice systems, anti-corruption framework, media pluralism, and media freedom, and other institutional issues related to checks and balances.<sup>30</sup> The inclusion of the anti-corruption framework, media pluralism, and media freedom, as well as the examination of selected institutional issues relating to the process of enacting laws, the independent institutions, etc. clearly show that the EU internal concept of the rule of law is viewed in the context of its close links with democracy. It is indicative that both sets of reports scrutinize an issue that is seen by the Venice Commission as a particular challenge to the rule of law, not as a fundamental element or a benchmark of the rule of law – the fight against corruption.

Both sets of documents examine some of the core elements elaborated more closely therein: legality; legal certainty; prevention of abuse of powers; equality before the law and non-discrimination and access to justice. However, a closer look at the benchmarks set in the Rule of Law Checklist shows that annual Rule of Law reports in fact follow this concept of the rule of law more closely than the annual reports developed for accession countries. The latter, again, examines some of these elements (legality, prevention of abuse of powers) under the examination of the functioning of democratic institutions. This differentiation perhaps can be attributed to technicalities rather than to a substantive intention of narrowing down the concept of the rule of law for acceding countries. To make matters more complicated, the EU has, in internal terms, offered a determination of the rule of law in the Rule of Law Conditionality Regulation. In Article 2, it states that the rule of law includes the principles of legality implying a transparent, accountable, democratic, and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. As regards fundamental rights, the Court has clarified that the reference to them 'is made only by way of illustration of the requirements of the principle of effective judicial protection.'<sup>31</sup> The principle of non-discrimination, by contrast, is part of the definition of the rule of law in its own right.

Secondly, the annual reports on candidate countries refer to a set of international standards that differ from those included in the rule of law reports on the EU member states. The Rule of Law reports rely on a number of directly or indirectly invoked sources, including the EU Justice Scoreboard, the case law of the CJEU and the ECtHR,<sup>32</sup> but also the other hard law and soft-law documents developed by the Council of Europe various bodies, such as GRECO, CCJE, and CCPE. The methodology also invokes the standards section of the Venice Commission Rule of Law Check List. The "Selected standards" section of the Checklist, let us recall, does not extract the standards themselves (they are well elaborated in the checklist itself), but rather points to a plethora of hard and soft law documents and (re)sources. These include certain rule of law indicators, the Venice Commission sponsored reports that acknowledge the existence of various national

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<sup>30</sup> European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, available at: [https://ec.europa.eu/info/sites/default/files/rolm\\_methodology\\_2022.pdf](https://ec.europa.eu/info/sites/default/files/rolm_methodology_2022.pdf) (accessed on 15.05.2023).

<sup>31</sup> CJEU, judgment of 16 February 2022, Hungary v. Parliament and Council, C-156/21, ECLI:EU:C:2022:97, para. 229; CJEU, judgment of 16 February 2022, Poland v. Parliament and Council, C-157/21, ECLI:EU:C:2022:98, para. 324

<sup>32</sup> For instance ECtHR, Baka v. Hungary [GC], app. no. 20261/12, 23 June 2016; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, app. no. 26374/18, 1 December 2020.

solutions on judicial and prosecutorial setups, and documents developed outside the immediate European legal forums such as the American Convention on Human Rights, the Arab Charter on Human Rights, ASEAN Human Rights Declaration etc. While the invoking of the Venice Commission Rule of Law Checklist's standards may seem like a worthwhile attempt at establishing further linkages aiming at structuring an EU definition of the rule of law with a more widely elaborated understanding of that term, the list of standards seems somewhat overwhelming and some of the sources cited therein are not likely to be used. The Conditionality Regulation, in its recital 16, cites specific sources such as judgments of the Court of Justice of the European Union, reports of the Court of Auditors, the Commission's annual Rule of Law Report and EU Justice Scoreboard, reports of the OLAF and the EPPO and information provided by them, as relevant, and conclusions and recommendations of any relevant international organizations and networks, including Council of Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission, and the European networks of supreme courts and councils for the judiciary. It is stated that, in addition to those sources other information relevant to the protection of EU's financial interest may be taken into account. The annual reports on candidate countries as can be seen in the Commissions communications in the enlargement package rely on third-party indicators related to the status of democracy, good governance, and the rule of law, such as the Freedom House Nations in Transit and Global Freedom Scores, Freedom House, or the World Justice Project Rule of Law Index. A direct reference to these third-party indicators is absent from the Rule of Law reports with regard to Member States.

Furthermore, the explanatory screening for North Macedonia and Albania introduced for the first time in the explanatory screening for the latter two countries the case law of the CJEU directly related to judicial independence, as part of the European standards on judiciary within the framework of Chapter 23 (Damjanovski, Hillion, and Preshova, 2020, p. 7). For instance, in the explanatory screening for Chapter 23, specific reference was made to the Minister for Justice and Equality case C-216/18, where Ireland initiated a preliminary reference procedure in connection with the execution, in Ireland, of European arrest warrants issued by Polish courts. The explanatory screening related to Chapter 23 for North Macedonia also made mentions of the TEU Article 7 mechanism,<sup>33</sup> but has failed to do so with other rule of law tools, such as the Rule of Law Report applicable to the member states. The use of different standards opens the door for double standards in the internal and external dimensions of the rule of law promotion.

In that context, Pech rightly suggests that in order to ensure a greater internal and external coherence in the field of the rule of law, the EU should try to develop a broader rule of law monitoring framework, which could include both EU Member States and candidate countries. He advocates the development of an EU rule of law checklist, which could initially reflect the one developed by the Venice Commission, and would be binding for both EU member states and candidate countries. It would be beneficial for candidate countries as it would enable them to more easily identify the norms and standards they would be expected to comply with (Pech, 2016, pp. 19–20). However, it seems critical to understand that coherence between the internal and external dimensions of the rule of law instruments should not be considered an absolute value. Its limitations are inherent and even desirable under specific circumstances. In other words, the development of any checklist should not reduce the possibility to prioritize

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<sup>33</sup> European Commission DG Justice (2018), Explanatory Meeting. Presentation of European Standards. Chapter 23 – Judiciary, Brussels, 27 September, available at: <http://www.sep.gov.mk/content/?id=2499> (accessed on 15.05.2023).

specific reforms or determine special benchmarks on the basis of individual country assessments (Pech, 2016, p. 20). "One model fits all" approach could provide coherence but overlook the important variations among the WB countries and even more among the candidate countries and the EU member states. Therefore, it seems that the approach to the rule of law conditionality introducing country-specific opening, interim, and closing benchmarks constitutes a significant development from the standpoint of the effectiveness of the accession process in WB countries, although limiting the scope of application of the coherence principle. Those departures and variations are welcome as long as they can be explained and justified by their different stage of the development and the local context of a certain candidate country. In a similar vein, Jakab and Kirchmair (2021) propose the EU Justice Scoreboard to be improved by the addition of qualitative indicators, claiming that reliance on "hard data" is insufficiently sensitive to reflect the actual quality of a given legal system. Additionally, there should be a clearly set minimum standard of attainment of the core rule of law components which is mandatory for both candidate countries and member states. Such a specifically tailored approach for candidate countries is also in line with the fact that the EU does not have sufficiently developed hard *acquis* in this area.

Finally, the EU still seems to fail in establishing clear links between what it does in the field of rule of law internally and externally and provides little or no room for much needed dialogue between its Member States and the candidate countries on how to address common challenges in attaining the aspirational rule of law values. A paradigmatic example and a use-case scenario can be found in the case of the 2022 Rule of Law Report Country chapter on Italy and the current developments in rule of law and judicial reforms in Serbia and Montenegro. Namely, the Italian country chapter outlines the rather comprehensive efforts undertaken by the Italian authorities with regard to its judicial council. The reform seems divisive, and one of the contested questions is the participation of the lay members in the judicial council. This topic is of considerable relevance in the Serbian and Montenegrin judicial reforms, which warranted a dedicated conference in June this year under the auspices of the EU CoE horizontal facility. Therefore, it seems that the calls made by WB-oriented think-thanks (Stratulat et al., 2021), inviting the EU to enable early consultation with WB countries on selected issues, could be effected to the benefit of both the accession countries and the EU member states. This would also facilitate a stronger buy-in from the accession countries on the contents of the relevant standards. As it currently stands, Hungary and Poland, a clear example of rule of law backsliding, are only modestly communicated as undesirable scenarios by the EU during the accession process.

## 7. CONCLUSION

The EU rule of law promotion within its enlargement framework has been criticized over the past fifteen years due to its lack of success in the WB countries. It is interesting to see that such criticisms came despite the fact that the EU has put the rule of law at the forefront of the accession negotiations with countries in the region. The lack of success in rule of law reforms was recognized equally by legal scholars, EU institutions, and member states representatives. This paper identifies the following four main causes which adversely affect the consistency and effectiveness of the EU rule of law instruments in the accession process: (i) Lack of clarity when it comes to the nature and scope of rule of law; (ii) Deficiencies in the EU reporting and monitoring methodology; (iii) Disbalance in rewarding and sanctioning mechanisms; and (iv) Lack of a more coherent approach among external and internal policies and instruments dedicated to the

upholding and promotion of the EU values. The rule of law is not precisely defined in EU hard *acquis* but is reflected in general EU principles or values enshrined in the Lisbon Treaty. Despite the rule of law being put at the forefront of accession criteria regarding the WB countries, particularly through benchmarking and “fundamentals first” approach, the fluid concept of the rule of law has proven difficult to translate into a set of verifiable and clear benchmarks. This leaves room for the EU to interpret the concept of the rule of law to its own advantage, adversely affecting both the consistency and effectiveness of rule of law instruments in the EU accession process. The coherence and effectiveness of EU rule of law instruments in the accession process have been also undermined by the absence of adequate reporting and monitoring. While the requirements made by the EU in the rule of law area became more specific and detailed, the EU still seems to acknowledge or even commend traction i.e. accomplishment of goals rather than the achievement of substantive reforms. This is why both the EU and the candidate countries could benefit from a more consistent approach to the development of peer review reports in the field of rule of law, as the case was with the Priebe reports for Macedonia and Bosnia and Herzegovina. In order to help to avoid the cases where the local authorities of the candidate countries present the findings of the annual progress report in a way that only fits their own internal narratives, it would be important to have at least their executive summaries instantly available in local languages. The sparse use of rewarding and sanctioning mechanisms in the accession process also undermines the effectiveness of rule of law transformative power. A careful balancing of sanctioning and rewarding instruments which are available under the latest enlargement methodology is needed if the effectiveness of the rule of law instruments in the accession process is to be achieved. There is still a disconnect between the EU’s internal and external policies and mechanisms dedicated to the promotion of the rule of law (“Editorial Comments: Fundamental rights and EU membership: Do as I say, not as I do!”, 2012, p. 481). A closer look into the methodologies and approaches to the understanding of the rule of law in the internal Rule of Law reports and the Rule of Law Conditionality Regulation on the one hand and the accession-related instruments on the other, show divergences. Differences in the scope of issues covered by the reports pertaining to the EU member states under the Rule of Law Mechanism and annual reports related to candidate countries were identified. Additionally, annual reports on candidate countries refer to a set of international standards that differ from those included in the rule of law reports on the EU member states. The use of different standards opens the door for double standards in the internal and external dimensions of the rule of law promotion. On the other hand, it is important to understand that coherence between the internal and external dimensions of the rule of law instruments should not be considered an absolute value, since its limitations are inherent and even desirable under specific circumstances as long as they address the different stage of development and local context of certain candidate country. Therefore, the approach to the rule of law conditionality introducing country-specific opening, interim, and closing benchmarks constitutes a significant development from the standpoint of the effectiveness of the accession process in WB countries, although limiting the scope of application of the coherence principle. However, a specifically tailored approach for any candidate country should not go under a clearly set minimum standard of attainment of the core rule of law components which should be mandatory for both candidate countries and member states. Additionally, an opportunity was identified to provide room for a dialogue between Member States and candidate countries on how to address common challenges in attaining the aspirational rule of law values. If such a dialogue was fostered, it could secure a stronger buy-in and a bottom-up approach to the rule of law-related reforms in candidate countries.



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