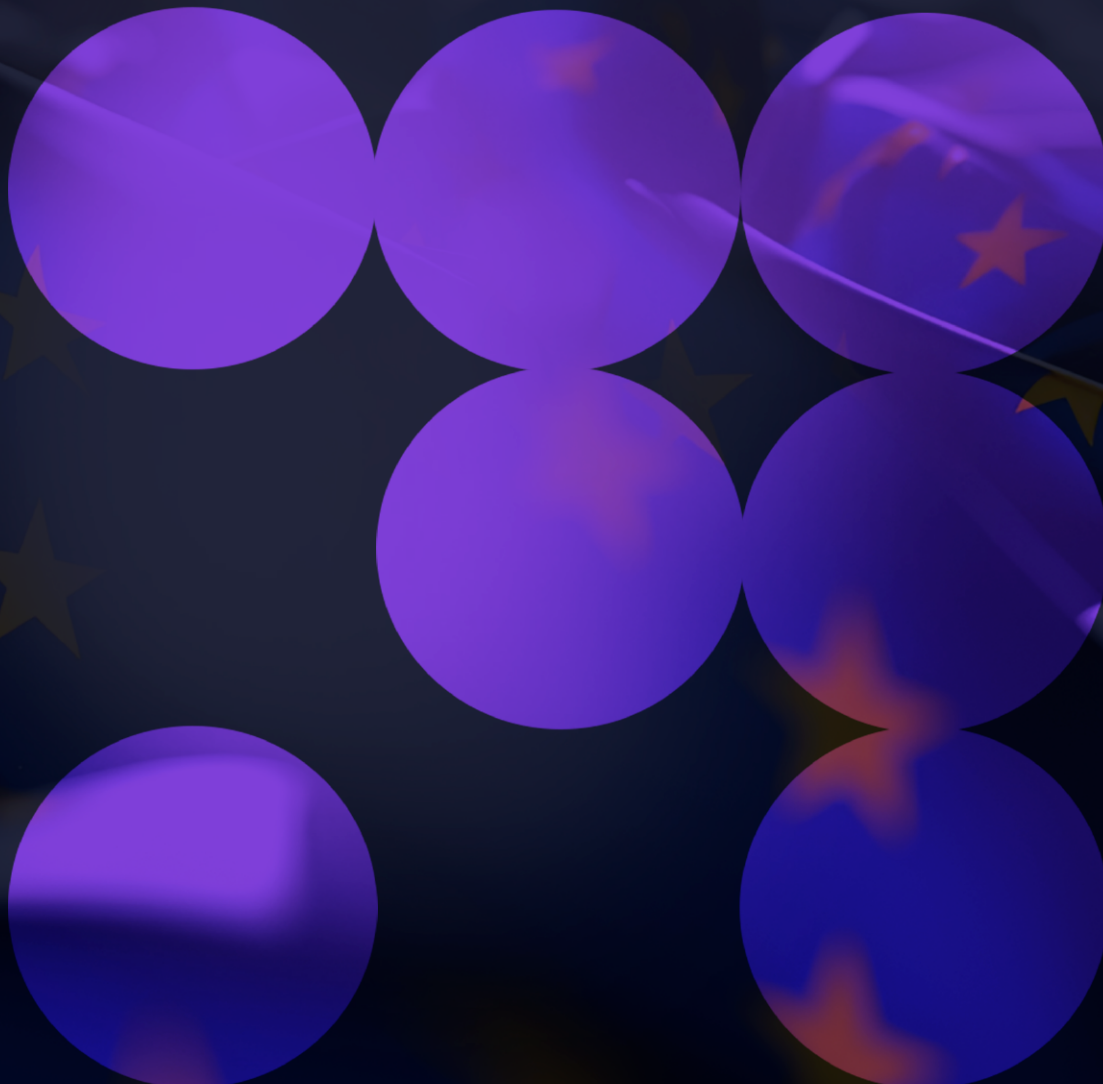


European
Policy
Institute.
Skopje

Reflections on rule of law instruments in view of EU accession

By Milena Mihajlović, European Policy Centre – CEP, Belgrade



Reflections on rule of law instruments in view of EU accession

Publisher:

European Policy Institute - Skopje

About the publisher:

Simonida Kacarska, PhD

Author:

Milena Mihajlović
European Policy Centre – CEP, Belgrade

Graphic design:

Relativ

Skopje, 2024



This brief was prepared under the project Building bridges for a common future: Rule of law in view of EU accession, funded by the European Union. The content of this brief does not reflect the official opinions or positions of the European Union. Responsibility for the information and views expressed lies entirely with the author.

Content:

4

I. Introduction: Fundamentals first – rule of law at the centre of EU enlargement policy

5

II. Socialising and Peer Learning: Early participation of candidate countries in the EU's rule of law mechanisms and institutions

5

Progress and Limitations of the EU Rule of Law Report

6

Benefits of early integration into EU rule of law mechanisms and institutions

8

III. Integrating rule of law conditionality into new accession instruments – New Growth Plan for the Western Balkans

8

Design challenges of rule of law conditionality

9

Implementation challenges of rule of law conditionality

10

IV. Building on past experience while looking to the future

10

I. Strengthening Rule of Law Mechanisms

11

II. Enhancing Conditionality and Economic Support

I. Introduction: Fundamentals first – rule of law at the centre of EU enlargement policy

The European Union (EU) has long been committed to promoting democracy, human rights, and the rule of law within its member states and in candidate countries seeking EU membership. These core values are fundamental not only to the EU's internal cohesion but also to its external relations and particularly its enlargement policy, which features a “fundamentals first” approach.¹ The EU has recently opened its door for candidate countries to some of its key rule of law mechanisms and institutions, such as the EU Rule of Law Report, the work of the Fundamental Rights Agency and the European Economic and Social Committee. At the same time, the New Growth Plan for the Western Balkans – a new instrument supporting socio-economic development and EU accession reforms – has placed rule of law at the centre by incorporating a precondition for the new EU financial support. These recent initiatives showcase the EU's strategic efforts to ensure that rule of law principles are upheld during the region's integration into the EU.

Together, these initiatives highlight the EU's dual approach to fostering both economic growth and democratic governance in the Western Balkans. However, the challenges associated with their implementation underline the need for continuous refinement and support to ensure that these mechanisms achieve their intended impact. This paper explores the opportunities and challenges surrounding the implementation of these instruments and offers recommendations to enhance their effectiveness in promoting stability, prosperity, and adherence to European values in the region.²

1 The “fundamentals first” approach in EU enlargement policy prioritizes the establishment of solid foundations in rule of law, democratic governance, human rights, and economic stability before advancing further in the accession process. Its application means that Cluster 1 – Fundamentals is the first one opened and the last one closed in the accession negotiations. Moreover, progress across all other clusters is conditioned by sufficient progress in the first cluster, making it a “blocking” cluster in the negotiations process.

2 This policy brief is mainly based on the presentations and discussion at the Forum Europaeum 2024. Conference recording is available at: <https://www.facebook.com/EPI.Skopje/videos/1419268872121633>. References in the text are only provided where other sources are used.

II. Socialising and Peer Learning: Early participation of candidate countries in the EU's rule of law mechanisms and institutions

Following years of intensive advocacy by the Western Balkan civil society, the EU has opened its rule of law mechanisms to candidate countries. Thus, the 2023 Enlargement Package announced the inclusion of four candidate countries – Albania, North Macedonia, Montenegro and Serbia – into the Rule of Law Report, with the objective of supporting “these countries’ reform efforts to achieve irreversible progress on democracy and the rule of law ahead of accession,” and guaranteeing “that high standards will continue after accession.”³ At the same time, the newly introduced accelerated integration measures have made it possible for candidates to start participating in the activities of certain EU institutions and agencies, including the Fundamental Rights Agency (FRA) and the European Economic and Social Committee (EESC), already during the EU accession process. This section of the paper takes stock of the progress made to date and assesses the challenges going forward.

Progress and Limitations of the EU Rule of Law Report

The Rule of Law Report is designed to monitor and address challenges in four key areas for the rule of law: the justice system, the anti-corruption framework, media pluralism and freedom, and other institutional issues related to checks and balances.⁴ It has evolved over the past four years, driven by advocacy efforts from human rights organisations and supported by EU institutions. While there has been progress, it remains slow, underlining the need for a robust negotiating framework to effectively address rule of law issues. A significant development within the mechanism has been the introduction of recommendations in the Rule of Law Report, which aim to facilitate dialogue between civil society, academia, and EU institutions. However, these recommendations often lack precision, which limits their effectiveness in addressing the specific challenges faced by member states.

Comparisons with other preventive tools in the rule of law domain suggest that the Rule of Law Report has potential, but it needs to be sharpened to have

3 2024 Rule of Law Report, “The rule of law situation in the European Union,” Brussels, 24.7.2024, COM(2024) 800 final, https://commission.europa.eu/document/download/27db4143-58b4-4b61-a021-a215940e19d0_en?file-name=1_1_58120_communication_rol_en.pdf, p. 1.

4 European Commission, Annual Rule of Law Cycle, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/annual-rule-law-cycle_en

a more substantial impact. Initial implementation in some member states revealed minimal involvement from civil society and academia, with meaningful dialogue occurring mostly through the intervention of external actors, such as the European Commission and the Fundamental Rights Agency. To enhance the mechanism's effectiveness, clearer legislative frameworks and processes are needed to ensure more significant public participation in strengthening governance structures across the EU.

The inclusion of a dedicated pillar on fundamental rights within the EU's Rule of Law Mechanism, proposed by the European Parliament,⁵ is essential for addressing discrimination and hate speech against minorities. Such a pillar would provide a structured approach to monitoring and combating xenophobia, racism, anti-Semitism, Islamophobia, homophobia, and other forms of discrimination across EU member states and the involved candidate countries. This addition would enhance the specificity and impact of the Rule of Law Report, mitigating the risk of normalising human rights violations and reinforcing the interrelationship between human rights and the rule of law. This approach would also align with Article 2 of the Treaty on European Union (TEU), which enshrines respect for human dignity, freedom, democracy, equality, and human rights and strengthen the EU's commitment to upholding these values consistently across member states and candidate countries. Yet, to achieve this goal, the language of these reports needs to be more precise and less driven by political considerations.

Benefits of early integration into EU rule of law mechanisms and institutions

Integration into EU mechanisms and institutions in the rule of law area during the accession process presents numerous opportunities and benefits for candidate countries. Most importantly, the European Commission has included four candidate countries in the 2024 Rule of Law Report – Albania, North Macedonia, Montenegro and Serbia – based on their achieved level of preparedness in the rule of law chapters. This initiative by the Commission is seen as an essential step towards improving the protection of human rights and strengthening the rule of law in the future EU member states. The involved candidate countries will benefit from the learning process in reporting according to the standards imposed on EU member states as well as from the benchmarking against the EU peers, rather than just against other candidates. Moreover, its value is also seen in the fostering of a community of common democratic principles and legal standards between member states and candidate countries.

Furthermore, the inclusion of candidate countries, particularly from the Western Balkans, into activities of the Fundamental Rights Agency (FRA) also has multiple benefits. Firstly, the FRA reports provide a structured mechanism for monitoring rule of law standards and identifying deficiencies. Participation in the work of the Agency facilitates learning and cooperation between candidate countries and EU member states. Such a process exposes candidate countries to best practices in human rights monitoring and reporting, helping them align their legal frameworks with EU standards. This exchange of knowledge fosters a shared commitment to democratic values and rule of law principles. Moreover, the detailed FRA reports will enable early detection of the rule of law backsliding and violations of human rights in the associated candidate countries. By

⁵ In its Report on the Commission's 2023 Rule of Law Report, the European Parliament stressed the necessity to fight against all types of discrimination, hate speech and crimes specifically targeting minority groups and members of national, ethnic, linguistic and religious minorities. Accordingly, the Parliament called on the Commission "to include a specific new pillar on this in the next report, mapping all forms of xenophobia, racism, antisemitism, islamophobia, anti-gypsyism, LGBTIQ-phobia, hate speech and discrimination across all Member States." The Report is available at: https://www.europarl.europa.eu/doceo/document/A-9-2024-0025_EN.html.

identifying and proactively addressing these issues, the EU can prevent their entrenchment and ensure that candidate countries effectively meet the accession criteria. Finally, the engagement of international organisations and external actors has a potential to empower civil society in candidate countries to actively engage in the rule of law reforms by strengthening their capacity to advocate for human rights and participate meaningfully in decision-making processes. This empowerment is crucial to promote transparency, accountability and inclusiveness in governance.

Finally, the initiative of the EESC to involve civil society organisations from the candidate countries in its work also bears significance for the improvement of rule of law in those countries. The EESC aims to encourage dialogue, mutual understanding and cooperation between civil society actors from the candidate countries and the EU institutions in Brussels. Representatives of civil society from candidate countries can establish direct communication with members of the European Parliament, the EC and other EU bodies through the activities of the EESC. By actively participating in the EESC's debates, public hearings and opinion-building processes, members of civil society gain significant experience in the EU's decision-making mechanisms. Such participation of civil society improves its capacity to understand and influence EU policies and prepares its representatives for future roles in their countries' accession process. Considering the fundamental role that civil society plays in the EU dialogue on the rule of law, the integration of the candidates' CSOs into wider European networks allows them to align their advocacy efforts with European standards and practices, strengthening their position in promoting the reforms necessary for EU accession. This system is crucial for facilitating the exchange of knowledge, fostering partnerships and building trust between the various stakeholders involved in the accession process.

III. Integrating rule of law conditionality into new accession instruments – New Growth Plan for the Western Balkans

The New Growth Plan for the Western Balkans aims to spur economic development and institutional reforms in the region. At its heart is the Reform and Growth Facility, a new performance-based funding mechanism which links financial support to the fulfilment of specific governance criteria and reform actions.⁶ Its key component is the conditionality mechanism tied to the rule of law, which seeks to ensure that financial support is contingent upon progress in upholding democratic principles, human rights, and the rule of law. However, the design and implementation of this conditionality present significant challenges that could undermine the Plan's effectiveness.

Design challenges of rule of law conditionality

The rule of law conditionality embedded in the New Growth Plan is designed to incentivise reforms by linking access to EU funds with the fulfilment of specific governance criteria. However, the effectiveness of this approach is contingent upon the clarity, ambition, and enforceability of the conditions set forth. One of the primary design challenges is **the lack of precision in defining the conditions** that Western Balkan countries must meet to secure funding. The European Court of Auditors has noted that the procedures for withholding funds in case of non-compliance are not sufficiently detailed, leaving room for ambiguity in their application. This vagueness could allow countries to design Reform Agendas that are not ambitious enough to drive substantial change, thereby weakening the overall impact of the conditionality.

Another design issue is the **limited scope of the conditionality** itself. While the plan emphasizes the importance of upholding the rule of law, it does not sufficiently address the broader institutional weaknesses that could hinder the effective implementation of reforms. The plan's focus on procedural compliance, rather than on the substantive outcomes of reforms, risks creating a situation where countries

⁶ EUR-Lex, Regulation (EU) 2024/1449 of the European Parliament and of the Council of 14 May 2024 on establishing the Reform and Growth Facility for the Western Balkans, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401449

meet the formal requirements without achieving meaningful progress in areas such as judicial independence, media freedom, and the protection of fundamental rights.

Moreover, the conditionality framework relies heavily on the **assumption that compliance with EU standards will lead to automatic economic benefits**. However, the relationship between institutional reforms and economic growth is complex and bidirectional. Even if Western Balkan countries improve their institutional frameworks, economic gains may not immediately follow, especially in the absence of robust economic support measures. This disconnect between institutional and economic progress challenges the effectiveness of the conditionality as a tool for driving comprehensive development in the region.

Implementation challenges of rule of law conditionality

The implementation of the rule of law conditionality within the Reform and Growth Facility faces several significant hurdles. One of the most pressing is the **weak administrative capacity in many Western Balkan countries**. Even if the conditions for funding are clearly defined, the ability of these countries to meet them depends on their institutional capacity to implement and sustain reforms. The region's historically weak governance structures and limited resources pose a substantial risk to the long-term success of the conditionality framework.

Another implementation challenge is the potential **inconsistent application of the conditionality across different countries and contexts**. The effectiveness of the rule of law conditionality is undermined when the EU applies it unevenly, either due to political considerations or variations in how the conditions are

interpreted and enforced. Previous research related to the sub-area “Functioning of Democratic Institutions” revealed that even the Commission's annual assessments lack consistency among the different candidate countries.⁷ Such inconsistencies can lead to perceptions of unfairness and reduce the incentive for countries to engage in meaningful reforms. Additionally, the political nature of the enlargement process means that decisions on whether to enforce conditionality may be influenced by broader geopolitical considerations, rather than strictly by adherence to rule of law principles.

The **involvement of civil society in the implementation of the conditionality** is also critical but remains underdeveloped. While the regulation stipulates that Reform Agendas should be developed in consultation with civil society, the actual practice varies widely across the region. In some cases, governments have not adequately involved civil society in the drafting of reform agendas, limiting their ability to hold governments accountable and contribute to the reform process. The next major test for both the European Commission and the Western Balkan governments will come with the establishment of national monitoring committees which will follow the implementation of the Reform Agendas which are expected to include representatives of civil society organisations. Without meaningful civil society participation, the conditionality mechanism risks becoming a top-down exercise that lacks the necessary checks and balances to ensure its effectiveness.

7

Strahinja Subotic and Milos Pavkovic, “Identifying Inconsistencies in the 2022 European Commission's Annual Reports for WB6”, European Policy Centre – CEP, Belgrade, September 2023, <https://cep.org.rs/en/publications/identifying-deficiencies-in-the-2022-european-commission-s-annual-reports-for-wb6/>.

IV. Building on past experience while looking to the future

The EU's engagement with the Western Balkans through initiatives such as integration into its rule of law mechanisms and the introduction of the New Growth Plan reflects its commitment to fostering stability, democratic governance, and economic development in the region. However, the effectiveness of these initiatives hinges on the EU's ability to learn from past experiences and to adapt its strategies to the newly emerging challenges. To enhance the impact of these efforts, it is essential to implement the following recommendations, grouped into two key categories:

I. Strengthening Rule of Law Mechanisms

- To enhance the effectiveness of the Rule of Law Mechanism, EU institutions, member states and candidate countries should ensure continuous and structured communication, emphasising the importance of ongoing dialogue.
- The Commission should address the ambiguity and broad scope of recommendations in the Rule of Law Reports by making them more precise and enforceable, ensuring they are actionable for both member states and candidate countries.
- To strengthen the Rule of Law Reports, the Commission should incorporate a specific pillar on fundamental rights, focusing on issues such as non-discrimination, equality, hate speech, racism, and intolerance, while also emphasising the interconnection of these rights with other pillars like judicial independence and anti-corruption measures.
- The Commission should conduct a thorough assessment of the Rule of Law mechanism's application in candidate countries, drawing on lessons learned from its implementation in EU member states, to help to enhance its effectiveness.
- Civil society organisations should advocate for increased resources and capacity-building efforts by the European Commission, particularly in supporting the national implementation and monitoring of the Rule of Law reports.
- Member states and EU institutions should jointly work to enhance the role of the European Commission in monitoring adherence to fundamental rights standards, ensuring consistent and rigorous oversight across all member states and candidate countries.
- Candidate countries should utilise participation in the Fundamental Rights Agency as an opportunity to build state institutions' capacities and help align national human rights practices with EU standards in support of the accession process.
- Strengthening the engagement of civil society in the Rule of Law Mechanism is key, ensuring their active participation in dialogues and policy discussions, and providing technical assistance to improve their capacity to engage effectively with EU institutions. Both the Commission and EU member states should support such engagement.
- The Commission should support local initiatives that empower citizens to participate actively in the reform process as an essential tool to ensure that these reforms address the real needs of citizens and not just EU requirements. This should be stressed as a priority in the dialogue with candidate countries and member states alike.

- The Commission should encourage and support civil society organisations in candidate countries to become associate members or observers of European platforms like the European Civil Society Forum in order to promote deeper integration and cooperation.
- Building on the recent experience of the European Economic and Social Committee (EESC), the Commission and other EU institutions should further support civil society organisations from candidate countries to contribute to EU policy formulation by enabling their participating in various activities at EU level.
- Finally, it is important to ensure that civil society perspectives are integrated into EU assessments and evaluations – those of the European Commission, FRA and other relevant institutions and agencies, thereby improving monitoring, accountability mechanisms, and the overall effectiveness of EU initiatives in the Western Balkans.
- Western Balkan governments should conduct mandatory consultations with civil society organisations, national parliaments and other relevant stakeholders in the process of preparing their Reform Agendas under the Reform and Growth Facility. In the implementation phase, it will be of utmost importance to enable participation of CSOs in the national monitoring committees. Their meaningful participation will in turn be dependent on the transparency of all relevant documents generated in the implementation process.
- The European Commission should provide a transparent methodology for assessing whether the preconditions for Union support under the Reform and Growth Facility are met. It should also clarify the procedure for withholding funds from the Facility, in case the conditions are violated by a beneficiary country.

II. Enhancing Conditionality and Economic Support

- Western Balkan countries should adhere to effective democratic mechanisms, including the multi-party parliamentary system and the rule of law, as well as respect for human rights obligations, including the rights of persons belonging to minorities, all in order to be able to gain access to the funds provided by the Reform and Growth Facility.
- Western Balkan countries (both candidates and potential candidates) should consider initiating a joint action or a potential coalition with EU member states, to address the need to increase the funds provided for reforms and economic development, in order to increase the stakes for potential failure to implement the designated reforms and improve the effectiveness of the rule of law conditionality under the Reform and Growth Facility.

The path to EU integration for the Western Balkans is a complex and multifaceted journey that requires a careful balance of incentives, oversight, and support. By learning from past experiences and implementing these recommendations, the EU can strengthen its approach, ensuring that its initiatives not only promote stability and prosperity in the region but also uphold the fundamental values that are at the heart of the European project. The success of these efforts will ultimately depend on the EU's ability to remain steadfast in its commitment to the region while taking firm steps to protect and uphold rule of law among its own ranks.

