

EU IDENTITY IN THE WESTERN BALKANS

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-Abstract-

Western Balkan countries are still facing systemic structural difficulties while complying with the European standards on the rule of law. The article argues that similar to other new EU member states such as Poland and Hungary, they might face similar rule of law issues once they become part of the EU if significant rule of law reforms does not take place in the region. Therefore, considering the importance of the rule of law as a core value of the European Union (EU) identity according to the EU Court of Justice, the study assesses to what extent this part of EU identity is present in the Western Balkan countries. On the one hand, the article evaluates the potential risks that the Western Balkans countries might face in light of the binding and not-binding instruments adopted by the European Union for protecting the rule of law. On the other hand, it sheds some light on the state of play of the implementation of the rule of law in the region according to its new definition provided by the EU Court.

Keywords: Western Balkans countries; EU rule of Law; Poland and Hungary; EU identity.

I. PRELUDE: RULE OF LAW AND EU IDENTITY IN THE EUROPEAN UNION

In recent years, the EU has increasingly emphasized the importance of upholding the rule of law as a common value that binds its member states legally on several occasions, considering it not a mere declaration.¹ The reason is that in the past decades, there have been concerns about the compliance of the rule of law in some new member states, notably Poland and Hungary, leading to discussions

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¹ The rule of law is a fundamental principle in the European Union (EU), outlined in Article 2 of the Treaty on European Union (TEU): “*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*”. In addition, the European Court of Auditors (ECA) defines the rule of law as a multi-dimensional concept in which, among other things, all public acts are within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. European Court of Auditors, *Special Report EU support for the rule of law in the Western Balkans: despite efforts, fundamental problems persist* (10 October 2022). See Barbara Grabowska-Moroz, Joelle Grogan, Dimitry V. Kochenov & Laurent Pech, ‘Reconciling Theory and Practice of the Rule of Law in the European Union’(2022), Hague J Rule Law 14, 101–105. <<https://doi.org/10.1007/s40803-022-00183-9> > accessed 18 March 2024; Bieber Florian, Kmezić Marko, ‘Protecting the rule of law in EU Member States and Candidate Countries’ (2020), Sieps <<https://www.sieps.se/en/publications/2020/protecting-the-rule-of-law-in-eu-member-states-and-candidate-countries/>> accessed 18 March 2024.

and initiatives within the EU to address and safeguard this principle.² Certain tools have been established, such as the Rule of Law Framework³ and the Conditionality Regulation,⁴ to monitor and address potential threats to the rule of law within the member states. These mechanisms aim to ensure that all EU countries adhere to the principles and values set out in the treaties.

The importance of the principle was upheld on the 16th of February 2022, when the Court of the EU (hereafter the *Court*) released its judgment on the cases C-156/21 and C-157/21,⁵ dismissing the request for annulment brought by Poland and Hungary against the regime of conditionality for the protection of the Union budget in the event of breaches of the rule of law principles. The Court launched the concept of *constitutional identity* in EU terms, challenging a growing national trend in some Member States who were trying to abuse the European concept of national identity in finding a constitutional justification for their illiberal and autocratic transformation.⁶ The Court, for the first time, defines the principles enshrined in Article 2 TEU, and among them, the rule of law, as part of an EU identity.⁷ From a broad perspective, this judgment of the Court came at a moment when the rule of law was being undermined by the adoption of anti-democratic rules, especially by Hungary and Poland. In consequence, the Court identified in its decision a common rule of law understanding within the EU, that inevitably became a benchmark when evaluating the rule of law deterioration of Member States.⁸

Why then the rule of law becomes so relevant for an analysis that focuses on the Western Balkans? The reason lays within the accession procedure for candidate countries to the EU, listed in Article 49 TEU. In the latter, the European Union identity acknowledged by the Court and based on the values enshrined in Article 2 TEU plays a dual direction.⁹ Rule of law thus represents the main criterion under which the applicant country must demonstrate already a commitment to respect and promote the values listed in Article 2 TEU, namely it must show an *EU identity*.

² Bieber Florian, Kmezić Marko, Ibid.; Hermann-Josef Blanke, Aimee Sander (2023) ‘Enforcing the Rule of Law in the EU: The Case of Poland and Hungary’, ZEuS, 239 <<https://www.nomos-elibrary.de/10.5771/1435-439X-2023-2/zeus-zeitschrift-fuer-europarechtliche-studien-volume-26-2023-issue-2?page=1>> accessed 18 March 2024; Ula Aleksandra Kos, ‘Signalling in European Rule of Law Cases: Hungary and Poland as Case Studies’ (2023), Human Rights Law Review, Volume 23, Issue 4, ngad035 <<https://doi.org/10.1093/hrlr/ngad035>> accessed 18 March 2023; Martin Krygier, Tímea Drinóczi, Agnieszka Bień-Kacała, ‘Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law.’, International Journal of Constitutional Law’ (2023), Volume 21, Issue 3, Pages 947–954 <<https://doi.org/10.1093/icon/moad060>> accessed 18 March 2024; Beáta Bakó, ‘National Democracy vs European Rule of Law? The lack of public demand for the rule of law in Hungary’ (2023), re:constitution Working Paper, Forum Transregionale Studien 13/2023, <<https://reconstitution.eu/working-papers.htm>> accessed 18 March 2024; Dorothee Bohle, Béla Greskovits & Marek Naczyk (2023) The Gramscian politics of Europe’s rule of law crisis, Journal of European Public Policy, <DOI: 10.1080/13501763.2023.2182342> accessed 18 March 2024.

³ Commission’s Communication to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, of 11 March 2014, COM(2014) 158 final.

⁴ European Commission, *Rule of law mechanism*, in https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en

⁵ C-156/21 and C-157/21, *Hungary v European Parliament and Council of the European Union, Poland v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:98.

⁶ Danuta A. Tomczak, ‘The Unpredicted Rise of Populism: The Case of Poland’ (2023), Central European Economic Journal, 10(57), 304-322, <<https://doi.org/10.2478/ceej-2023-0018>> accessed 18 March 2024.

⁷ Hungary and Poland (n. 5), para. 127.

⁸ Tomczak (n. 6), 313; Bohle, Greskovits, Naczyk (n. 2), 5.

⁹ ‘Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union’ Art. 49 of the Consolidated Version of the Treaty on European Union [2008] OJ C202. The provision outlines the procedure for a European country to become a member of the European Union and it includes the respect by the candidate country of the values referred to in Article 2 and its commitment to promote them. It follows that the accession process involves careful consideration of the applicant country’s adherence to those values and principles. The decision to accept a new member requires the unanimous agreement of the existing member states, and negotiations are conducted to define the terms of accession. The EU Accession Criteria, the so-called Copenhagen Criteria as defined in June 1993, requires that the candidate country has achieve, inter alia, stability of institutions guaranteeing democracy and the rule of law. Therefore, the rule of law represents one of the conditionalities that bind access to the Union.

The concrete implementation of this conditionality criterion means that the Commission carries out a systemic examination of the public structure of the country's public authorities, as well as the mechanisms for the protection of fundamental rights. For this reason, the Commission normally assess how the rule of law works in practice, namely it conducts a substantive assessment of the structure, powers and functioning of the legislative, executive, and judicial branches, and finally, a concrete look at the actual exercise of civil and political rights and the protection of minorities.¹⁰

Despite all these concrete legislative criteria, scholars argue that the rule of law crisis in certain EU Member States has been caused, on the one hand, by the European Commission's inability to define a clear notion of the European values enshrined in Article 2 TEU during the pre-accession negotiation to Poland, Hungary, and the other Central and Eastern European countries. On the other hand, the EU institutions responsible for the procedure lacked a correct evaluation regarding the compliance of legal order with the rule of law standards.¹¹

Therefore, in light of the above-mentioned case law by the Court of Justice, it appears that the EU has now set clear thresholds for what the rule of law, as an essential EU value, means. It follows that it will strengthen its surveillance on the implementation of the rule of law for the next candidate countries even more not letting them develop their own concepts of democracy, rule of law, and human rights, and their implementation and enforcement. The analysis might also explain the reluctance of the EU to pave the way for accession in a well-defined framework.¹²

Hence, the article argues that the Western Balkan countries¹³ might face analogous rule of law issues of Poland and Hungary, in case of their accession into the EU, if significant rule of law reforms do not take place in the region. Several studies and reports from the EU institutions indicates that the area is still facing important rule of law issues that seem to be systematic in the legal structure of those countries.¹⁴ The EU made the reforming and strengthening of the rule of law a central element of its new enlargement policy in the Western Balkans in light of the democratic backsliding in Poland and Hungary. Therefore, considering the importance of the rule of law as a core value of the European Union identity according to the Court, the article analyses the potential risks that these candidate countries might face in light of the rule of law tools adopted by the EU to protect the rule of law. The study suggests that the Western Balkan countries should meet the appointment of accession, becoming part of the EU, with the awareness of the legal (and financial) risks that might incur if they do not implement and strengthen their rule of law weakness. The methodological choice is justified by that

¹⁰ Ramses A Wessel, Joris Larik, *EU External Relations Law*, 2nd edn, Hart Publishing 2020; see also Soeren Keil, Zeynep Arkan, *The EU and Member State Building, European Foreign Policy in the Western Balkans*, 1st edn, Routledge, 2016.

¹¹ Jan-Werner Müller, 'Defending Democracy Within the EU', *Journal of Democracy* (2013), vol. 24, no. 2, 138-49 <<https://www.journalofdemocracy.org/articles/defending-democracy-within-the-eu/>> accessed 19 March 2024; Roland Janse, 'Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement', *International Journal of Constitutional Law*, 17(1), 43-65 <<https://doi.org/10.1093/icon/moz009>> accessed 19 March 2024.

¹² Luca Jahier, 'Balcani Occidentali – Europa: una relazione complicata' (CESPI 30 November 2023) <<https://www.cespi.it/it/eventi-attualita/focus-balcani/balcani-occidentali-europa-una-relazione-complicata>> accessed 19 March 2024; European Commission, *Statement by President von der Leyen at the joint press conference with President Michel following the EU-Western Balkans Summit*, Brussels, 13 December 2023; ANSA, ATA, BTA, dpa, EFE, FENA, HINA, MIA, STA, Tanjug, *Western Balkans still knocking on Europe's door*, (ENR 15 December 2023) <<https://europeannewsroom.com/western-balkans-still-knocking-on-europes-door/>> accessed 19 March 2024.

¹³ Albania, Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia, according to the definition of Western Balkans provided by the EU Commission in <https://www.europarl.europa.eu/factsheets/en/sheet/168/the-western-balkans>

¹⁴ Elise Bernand, 'Geopolitics of the European Rule of Law – Lessons from Ukraine and the Western Balkans' (2022), *Intereconomics* 57, 229–231 <<https://doi.org/10.1007/s10272-022-1068-z>> accessed 18 March 2024; Marko Kmezcic, 'EU Rule of Law Conditionality: Democracy or 'Stabilitocracy' Promotion in the Western Balkans?' (2018), in *The Europeanisation of the Western Balkans, A Failure of EU Conditionality?* (Edited by Jelena Dzankic, Soeren Keil, Marko Kmezcic), Palgrave Macmillan, 2018; Nikolaos Tzifakis, 'The Western Balkans during the pandemic: Democracy and rule of law in quarantine? European View' (2020), 19(2), 197-205 <<https://doi.org/10.1177/1781685820963333>> accessed 18 March 2024; Andi Hoxhaj, *The EU Rule of Law Initiative Towards the Western Balkans* (2021) in *Hague Journal on the Rule of Law* (2021) 13:143-172 <<https://doi.org/10.1007/s40803-020-00148-w>> accessed 18 March 2024.

fact that the three instruments recently adopted by the EU have played an important role for the protection of the rule of law as a core value part of the European Union identity against Poland and Hungary and led to the 16th of February decision.

First, the article discusses the theoretical framework of the rule of law and its definition according to the EU treaties, the Court of Justice, the Court of Auditors, and the main literature. It is discussed which instruments the EU has implemented in order to protect it, given the fact that it is argued to represent an essential value that defines the EU identity; second, the study sheds light on the state of play of the rule of law in the Western Balkans; third, the methodology is introduced, meaning the application of the new EU mechanisms for protecting the rule of law in light of the accession process of the Western Balkans. This is done for answering to the research question; fourth, the article analyses the risks that the Western Balkans might incur when they become full members of the EU.

Finally, the research thus excludes an analysis of the “EU conditionality” theoretical concept. Notwithstanding its importance in relation to the EU rule of law, it might divert the object of the article, aimed at an analytical assessment of the state of play of the EU understanding of the rule of law in the Western Balkan countries. However, further in-depth analysis of rule of law and conditionality in a theoretical framework in the region at issue is envisaged.

II. THE EU MECHANISMS FOR PROTECTING THE RULE OF LAW IN THE EUROPEAN UNION

The practice and the Polish and Hungarian saga have shown that a systemic threat to the rule of law in an EU member state cannot, in all circumstances, be effectively addressed by the instruments provided for in the Treaties. Action taken by the Commission to initiate infringement procedures, based on Article 258 TFEU, can only be implemented by the Commission if such concerns constitute, at the same time, a breach of a specific provision of EU law. However, violations of the rule of law sometimes fall outside the scope of EU law and often cannot be considered as a violation of the obligations under the Treaties.¹⁵

For this reason, the EU has implemented certain binding and non-binding instruments aimed at protecting the rule of law: the Rule of Law Framework adopted in 2014 and informally known as *Pre-Article 7 Procedure*. The Framework was, therefore, the Commission's immediate response to the inefficiency and insufficiency of the *[existing] mechanisms to rapidly respond to threats to the rule of law in a Member State*. According to the mechanism, in the first stage, if the Commission considers that a systemic threat and a clear risk to the rule of law could materialize in an EU country, it can adopt a formal opinion following the activation of the Framework.¹⁶ Although the EU Parliament pushed several times for its activation, the EU Commission only started the procedure under this framework toward Poland in 2016. It did so for two reasons: one was the non-compliance with the judgment of the then still independent Polish Constitutional Court; and second, the adoption of several laws by the government to disrupt the work of this court.¹⁷ Consequently, the EU Court of Justice took into consideration the framework with an order adopted on 17 December 2018,¹⁸ referring to it by an EU Advocate General¹⁹ and by the national referring courts.²⁰ Notwithstanding, the Commission was forced to admit that the Polish authorities kept ignoring its recommendations

¹⁵ Bieber Florian, Kmezić Marko (n. 1), 9; ‘EU court slams Hungary’s ‘Stop Soros’ law’, Deutsche Welle (16 November 2021).

¹⁶ Laurent Pech, ‘The Future of the Rule of Law in the EU’ (Verfassungsblog, 14 December 2023) <<https://verfassungsblog.de/the-future-of-the-rule-of-law-in-the-eu/>> accessed 20 March 2024, Laurent Pech, ‘The Rule of Law as a Well-Established and Well-Defined Principle of EU Law’ (2022), Hague J Rule Law 14, 107–138 <<https://doi.org/10.1007/s40803-022-00176-8>> accessed 20 March 2024.

¹⁷ European Commission, *Readout by the First Vice-President Timmermans of the College Meeting of 13 January 2016*, Speech/16/71.

¹⁸ Case C-619/18, *Commission v Poland (Independence of the Supreme Court)* [2019] ECLI:EU:C:2019:531, para. 81.

¹⁹ Case C-157/21, (n. 5), para 80-81 and 145.

²⁰ Pech (n. 16), 33.

and passing laws allowing the executive and legislative branches to systematically interfere in the composition, powers, administration, and functioning of the judiciary.²¹ For this reason, the Commission was forced to activate Article 7, para. 1 TEU for the first time in December 2017.²²

In addition to it, the EU adopted another instrument for protecting the rule of law: the *European Rule of Law Mechanism*. The latter provides for an annual dialogue procedure between the Commission, the Council, and the European Parliament, together with the Member States, national parliaments, civil society, and other stakeholders, on the rule of law issue. One of the key objectives of the European Rule of Law Mechanism is to promote interinstitutional collaboration and encourage all EU institutions to contribute to line with their respective institutional roles.²³

This mechanism provides for the adoption of appropriate measures if an EU member state is found not compliant with the principles of the rule of law and there is a seriously risk compromising in a sufficiently direct manner the sound financial management of the budget of the Union or the protection of the financial interests of the Union. Furthermore, it is designed to address concerns related to issues such as the independence of the judiciary, the fight against corruption, and the protection of fundamental rights. With this mechanism, the EU managed to connect the protection of the rule of law to its budget, enabling one of the most powerful tools that it has against its members, namely funds. In this way, the values enshrined in Article 2 TUE are directly enforced to all member states.

Despite the difficulties of its adoption, its implementation that involves a balance between ensuring compliance with EU values and respecting the sovereignty of member states requires a fair and objective evaluation process to determine whether a breach of the rule of law has occurred.²⁴ In consequence, the EU found a way to limit the discretion that EU member states have enjoyed in implementing the EU values according to Article 4, para. 2, TEU, using their national identities. The EU legal system and its full harmonized implementation cannot allow that each member states would vary in implementing EU values. For this reason, an EU identity emerges where a uniform notion of rule of law should be shared by the constitutional traditions of each member states, and for which they are committed to comply with.

Despite the fact the Commission claims that this general regime of conditionality is different from the previously analysed European Rule of Law mechanism, because of the diversity of the goals between the two instruments,²⁵ both acts have the protection of the rule of law considered as an essential EU value beyond their rationale. However, it cannot be denied that the Commission introduced an important new element by linking the protection of this value when a breach of it directly affects or seriously risk affecting the sound financial management of the Union budget of the financial interests of the Union in a sufficiently direct way.

Those mechanisms, and the above-mentioned Court of Justice case, contributed to set clear thresholds on the definition of the rule of law according to the EU treaties, in particular Article 2 TEU. The concept of the rule of law is widened as it *shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU*. It means that a compliance with the rule of law encompasses several other principles that are listed in a non-exhaustive manner in the regulation but

²¹ European Commission, *Rule of Law: European Commission acts to defend judicial independence in Poland* (20 December 2017) IP/17/5367.

²² Court of Auditors (n. 1), 4.

²³ European Commission (n. 4).

²⁴ Eric Maurice, 'The Rule of Law: the uncertain gamble on conditionality' (Fondation Robert Schuman, 13 March 2023) < <https://www.robert-schuman.eu/en/european-issues/0660-the-rule-of-law-the-uncertain-gamble-on-conditionality>> accessed 20 march 2024; European Parliament, *The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context* (Report, 2023).

²⁵ Michael Blauburger, Vera van Hüllen, 'Conditionality of EU funds: an instrument to enforce EU fundamental values?' (2021), *Journal of European Integration*, 43:1, 1-16, <<https://doi.org/10.1080/07036337.2019.1708337>> accessed 20 March 2024.

to whom *a society is bound to respect*. This definition is complemented by Guidelines on the application of the Regulation issued by the Commission.²⁶

For this reason, it seems that the concept of rule of law according to this regulation contains a number of elements and also principles that might look quite broad. Article 2(a) of the Regulation is intended not to be exhaustive on the notion. The same applies to the list of situations provided by the Commission that are intended to facilitate the application of the regulation. The list is merely indicative. Other principles, such as that of non-discrimination, are part of the definition of the rule of law in their own right: *a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value*.²⁷

Surely, an element that constates the essence of the rule of law is the effective judicial review by independent courts and tribunals that ensure the full compliance with EU law in a country.²⁸

Moreover, breaches of the rule of law are found also when the national authorities perform certain conducts that are relevant for the sound financial management of the Union budget.²⁹ To this point, other important public services such as the proper functioning of investigation and public prosecution bodies are considered highly relevant for the notion at issue.³⁰

All these principles and elements constitute what the Court defined the *EU identity*, in contrast with national identities.

All that said, the criteria from which the Commission might activate the mechanism are the following: the nature, duration, seriousness and scope of the identified breaches of the principles of the rule of law, which can vary depending on the characteristics of those breaches.³¹ In addition, it seems that the Union adds an important non-legal element in the evaluation of the breaches, namely the willingness of the member state to collaborate with the Commission for putting an end to the situation in which it is found allegedly non-compliant.³²

Finally, there are situations where the violation might entail a serious risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union. The Court required that the risk needs to be demonstrated that has a highly degree for occurring, in relation to the situations or to the forms of conduct of the authorities according to the list provided by the regulation. For instance, the Guidelines describes a situation where *certain acts of national authorities implementing Union funds through public procurement, or collecting the Union's own resources, or carrying out financial control, monitoring and audit of Union funds, or investigating allegations of fraud, corruption or other breaches of Union law in the implementation of Union funds or revenue, cannot be effectively reviewed by fully independent courts, this may entail a serious risk insofar as the Union funds and the financial interests of the Union are concerned*.³³

III. THE DETERIORATION OF THE RULE OF LAW AND THE EU VALUES IN THE WESTERN BALKANS

The discussion about the rule of law and the EU's values in the Western Balkan countries dates to the first EU-Western Balkans talks. The first and most notorious one is the Thessaloniki Summit held in 2003. In the official documents, the rule of law is mentioned for his importance, considered as the very foundations of the European Union: *We all share the values of democracy, the rule of law, respect*

²⁶ COMMUNICATION FROM THE COMMISSION Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, Brussels, 2.3.2022 C(2022) 1382 final.

²⁷ Hungary and Poland (n. 5), paras 229-324.

²⁸ Hungary and Poland (n. 5), paras 132-150.

²⁹ An indicative list of these specific situations is also included in Annex I to the Guidelines (n. 26).

³⁰ Hungary and Poland (n. 5), para.143.

³¹ Ibid. 331-361.

³² Ibid. 332.

³³ Guidelines, para 31.

*for human and minority rights, solidarity and a market economy, fully aware that they constitute the very foundations of the European Union.*³⁴

The EU considered as a source of grave concern the situation of the rule of law in the region and already suggested that combating it should have been a priority. Moreover, if those countries did not implement the reforms in areas such as the strengthening of the rule of law, visa liberation in the EU would be difficult.³⁵

Twelve years later, it seems that the rule of law has been deteriorating and the prospect for accession to the EU block is slowing down for the Western Balkans. In terms of the rule of law and European values, the EU Commission held that, despite important progress having been made, *the challenges faced by these countries are such that none will be ready to join the EU during the mandate of the current Commission, which will expire towards the end of 2019.*³⁶

It appears from the report of the EU that all Western Balkan countries *face major challenges with respect to the rule of law. Judicial systems are not sufficiently independent, efficient, or accountable. Serious efforts are still needed to tackle organised crime and corruption.*³⁷ Furthermore, the Commission highlights that the political, economic, and institutional fundamentals are both indivisible and mutually reinforcing. Rule of law and economic development must be connected; by strengthening one, a country increases legal certainty, and it encourages and protects investment, and contributes significantly to supporting economic development and competitiveness. Economic reforms and integration have the capacity to stabilize countries in the longer term. The main problem, according to the EU Commission, seems to be the effective implementation of reforms. It is clear from the EU Commission that no accession talk can be allowed if the reforms that these countries need to undertake within the framework of the EU Enlargement Policy do not focus on the *fundamental first principle.*³⁸ Again, the EU prioritize the fact that these issues reflect the very EU core values, and the rule of law is at the heart of the accession process.

The main challenges in terms of the rule of law in the Western Balkan countries remained the lack of improvement of the functioning and independence of the judiciary, which was undermined by examples of selective justice and political interference in the work of judicial bodies. In addition, the report highlights that corruption remained widespread in all countries, with continued impunity, especially for high-level corruption. In consequence, the Commission acknowledged that if these countries want to make further progress in these fields, that will require strong political will, leading to tangible results.³⁹

In the new EU strategy for the Western Balkan adopted in 2018,⁴⁰ an element of novelty is introduced. The rule of law does not only represent a common value and a fundamental element for the EU enlargement but it is also linked to *the way of everyday life that eventually the people in the Western Balkans countries might see it closer to the one in the European Union if the rule of law is strong.*⁴¹ However, considering the previous report, it doesn't seem that most of the countries underwent important reforms on the rule of law because the Commission still underlines that *addressing reforms in the area of rule of law, fundamental rights and good governance remains the most pressing issue*

³⁴ 2518th Council meeting, General Affairs and external Relations,– External Relations, Luxembourg, 16 June 2003; C/03/163, Thessaloniki, 21 June 2003, 10229/03 (Presse 163), Eu-Western Balkans Summit, Thessaloniki, 21 June 2003, Declaration.

³⁵ Ibid.

³⁶ Communication From the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions EU Enlargement Strategy, COM/2015/0611 final.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Communication From the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions: A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM/2018/065 final.

⁴¹ Ibid.

for the Western Balkans.⁴² A lack of strong political will is still mentioned, and the Commission stresses the point that the Western Balkan countries need to implement comprehensive reforms in crucial areas. The document emphasizes the real need and necessity to implement such reforms by deploying several times the urgency to implement rule of law-based reforms linked with economic reforms. It seems that the context has deteriorated even more.

Finally, the Commission points out that strengthening the rule of law is not only an institutional issue but a societal transformation, which is interesting if linked to the previously mentioned *European way of life*. The importance of reforming the rule of law with tangible progress based on European values in the Western Balkans has been also underlined in the recent policy document, namely the Strategic Compass adopted in 2022.⁴³

Against this background, based on the now well-defined criteria of what the EU identity is, in the next part, the article provides a more structured overview of the state of play of the respect of the rule of law in the Western Balkan countries. For the purposes of this contribution, the article considers explicitly one of the essential elements of the EU identity, as stated in the previously.⁴⁴

According to the Court, the independence of the judiciary *presupposes, in particular, that the judicial body concerned is able to exercise, both under the relevant rules and in practice, its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body, and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.*⁴⁵

1. Albania

Albania undertook significant judicial reforms in recent years to enhance the independence and efficiency of its judiciary. Those reforms aim at addressing issues such as corruption, political interference, and inefficiency within the judicial system. One of the most important reform undertaken by the Albanian system is the vetting process, that involves the re-evaluation of judges and prosecutors. This process has the aim to assess the professionalism and the ethics of each individual in light of the job that he/she is going to do. This is done by analysing whether the individual has issues related to crimes of corruption or ties to organized crime. In that case, the person is removed from its post. It is argued that this process is an important step in rebuilding public trust in the judicial system.

With regards to the accessibility of the judicial system, Albania adopted measures to reduce delays in court proceedings and enhance the overall efficiency of the legal process.

⁴² Ibid.

⁴³ A Strategic Compass for Security and Defence, 24.03.2022 Strategic Communications, for a European Union that protects its citizens, values and interests and contributes to international peace and security.

⁴⁴ The next analysis is based on the assessment of the state of play of the rule of law in the following documents: European Court of Auditors (n. 1); see European Western Balkans, 'CSF 2023: Joining EU rule of law mechanisms would benefit security in the Western Balkans' (European Western Balkans, 12 October 2023) < <https://europeanwesternbalkans.com/2023/10/12/csf-2023-joining-eu-rule-of-law-mechanisms-would-benefit-security-in-the-western-balkans/>> accessed 20 March 2024; European Western Balkans, 'Western Balkans cannot be a stable region if the rule of law is not taken seriously' < <https://europeanwesternbalkans.com/2023/10/12/the-western-balkans-cannot-be-a-stable-region-if-the-rule-of-law-is-not-taken-seriously/>> accessed 20 March 2024; Lili Bayer, 'EU funds have little impact in Western Balkans, auditors say' *Politico* (Brussels, 10 January 2022); Visegrad/Insight, 'Western Balkans Futures' (2022), special edition 1 (19).

⁴⁵ Hungary and Poland (n. 5), 10.

Despite all, the main problem still remains the full implementation and enforcement of the reforms, together with the endemic corruption and political interference in the judiciary.

2. Bosnia and Herzegovina

The issue of this country is the complex political structure inherited by the Dayton Agreement. It poses several challenges to the independence of the judiciary. Political influence and interference in the appointment and functioning of the judiciary have been identified as issues of concern. To this, the Constitutional provisions on the judiciary, also established by the Dayton Agreement and the decentralized political system contribute to challenges in establishing a fully independent judiciary. The country has adopted certain reforms to strengthen the independence of judiciary and its efficiency. However, the data identifies in the corruption within the judiciary the main challenge for the system.

3. Kosovo

Kosovo undertook certain initiatives for reforming its judiciary. For instance, the Judicial Council and the Prosecutorial Council are key institutions are important and responsible for overseeing the work of judges and prosecutors, respectively. These two institutions should play a crucial role in safeguarding the independence of the judiciary and ensuring the integrity of judicial and prosecutorial functions.

Kosovo's main issues remain corruption, political interference, and inefficiency within the judiciary. For instance, there were some concerns about delays in the establishment of a 'confiscation fund' into which the amounts received from the confiscation of criminal assets will be paid and then redistributed to the criminal justice institutions.

4. Montenegro

Montenegro adopted a clear set of rules for safeguarding the rule of law and the independence of judiciary. In particular, the High Judicial Council of Montenegro represents an important institution that is responsible for overseeing the work of the judiciary. It plays a role in appointing and promoting judges, as well as addressing disciplinary matters. The composition and functioning of the Judicial Council should be designed to ensure independence from external influence. Notwithstanding these efforts, several concerns remained as to the sustainability and proper functioning of the new institutions, especially when EU funds are not present anymore. The final report mentioned that both the High Judicial Council and the Prosecutorial Council were struggling to adapt to their new role and to exercise their prerogatives independently from the Supreme Court and Supreme Prosecution Office. The judiciary was reluctant to renew high management positions at the Judicial Council as long as there were no guarantees of the institutions' financial independence.

5. North Macedonia

In the country, fundamental problems remain in areas such as the independence of the judiciary, the concentration of power, political interference and corruption, which is considered the worst in the region.

North Macedonia made good progress in the fight against corruption, and further consolidating a track record of prosecuting and adjudicating high-level corruption cases. However, its special prosecutor for organised crime and corruption Katica Janeva was arrested on suspicion of offering leniency in exchange for a bribe to a businessman indicted for corruption. In June 2020, Janeva was sentenced to seven years' imprisonment after being found guilty of accepting bribes and luxury gifts as part of an extortion scheme. Janeva's case has fuelled major political turmoil in North Macedonia

over the last two years and has been a major test for the courts to demonstrate their ability to uphold the rule of law.

North Macedonia difficulties is the consequence of difficulties due to internal political stalemates and a weak statehood. In addition, the country, after solving the name's issue with Greece, is again trapped in pushing changes in the Constitution by Bulgaria on the issues of minorities and language.

6. Serbia

The outcome of the data clearly acknowledged the serious rule of law situation in the country, stating that there were “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”.

Despite important contribution of EU to strengthen the judicial efficiency, important constitutional reforms are stalled. And political influence in the judiciary plays an important role. The implementation of new legislation aimed at strengthening the independence, professionalism and accountability of judicial and prosecutorial bodies and structures, in the cause of the fight against corruption and organised crime, faces delays –mainly due to a lack of political commitment. In the region (notably in Albania, Montenegro and Serbia), government officials (some of them high-ranking) and members of parliament still comment publicly and regularly on ongoing investigations and court proceedings, and sometimes even on individual judges and prosecutors. In Serbia articles in tabloid newspapers target and seek to discredit members of the judiciary and in Albania the Council of Europe criticized the practice of online media to spread rumours and attacks on public figures.

IV. THE OUTCOMES OF THE ANALYSIS: AN EU IDENTITY NOT YET PRESENT IN THE WESTERN BALKANS

The outcome of the assessment on the state of play in the Western Balkans as described above does not differ from the issues that are still present in other EU countries such as Hungary.⁴⁶

While EU action has contributed to reforms in technical and operational areas, such as improving the efficiency of the judiciary and the development of relevant legislation, it has had little overall impact on fundamental rule of law reforms in the region. It is quite present that systemic threat for which the Commission might activate the rule of law protection mechanisms. Moreover, Western Balkans show that insufficient domestic politics is the cause for not having the proper reforms. In consequence, similarly to the Hungarian case, the countries are often defined as semi-autocratic systems.⁴⁷ The data suggests that in Western Balkans countries, the functioning of the judiciary and the judicial system has stalled or worsened, besides Albania and North Macedonia. The political influence on the judiciary is still an issue in some Western Balkan countries. The appointment and dismissal of judges, as well as the allocation of resources, have at times been subject to political pressure. Moreover, the corruption within the judicial system has been identified as a significant obstacle to this independence. This is also confirmed by a recent public opinion survey where Western Balkan citizens perceive the judiciary as the most corrupt sector. The issue that has been raised for several countries that did implement important judiciary reforms is the overall sustainability and proper functioning of the new institutions in the absence of EU funds. The judiciary can be reluctant to renew high management positions if there are no guarantees of the institutions' financial independence. Moreover, political interference with the judiciary remains a challenge.⁴⁸

⁴⁶ A situation for which the above-mentioned Court of Justice case on 22 February 2022 was issued. See also, for previous and comparative analysis: Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015 European Parliament resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)). Kos (n. 2); Krygier, Drinóczi, Bień-Kacała (n. 2).

⁴⁷ Tzifakis (n. 14) 197; see also Hoxhaj (n. 14) 162.

⁴⁸ Hoxhaj (n. 14) 148; Kmezic (n. 14) 97.

Another weak spot that might affect the Western Balkans with regard to especially the Mechanism is related to the mere existence of Civil Society Organizations (CSOs). The ECA Report states a link between civil society and public institutions is missing. CSOs seem to be not active and not playing an important role in these areas, even though there is a need for strategic communication to spell out the positive effects of the reforms and explain that, while disruption will be temporary, the restructuring of institutions will bring lasting benefits. For this reason, the EU recommends that effectively communicating EU goals to the public requires continued cooperation and coordination between the governments and civil society. However, it is important to notice that the Court of Auditors found out that EU support for civil society action on the rule of law is insufficient in meeting the needs of the sector and its impact is not thoroughly monitored.⁴⁹

Finally, given the importance that the EU gives to media and civil society for promoting the EU's democratic principles, it is unfortunately noticed that freedom of expression has progressed the least in all Western Balkans, and is even declining in some countries. Hence, in the future, these fundamental structural issues might surely when it comes with breaches of EU law and the consequent action that the Commission may suggest to the public institutions to comply with the EU rule of law standards.⁵⁰

Against this background, a clear risk that the Western Balkans, once they join the EU, will have similar issues of Poland and Hungary is possible. It seems therefore that there is an insufficient ambition in pursuing reforms and ensuring that the EU-funded actions are carried out in a sufficiently sustainable way (e.g. for Bosnia). Moreover, there is no efficient reform and funding mechanism that can incentivise beneficiary countries to be more active and adjust their possible mistakes in reforming. Despite significant steps forward, and a growing number of supported CSOs, activists, journalists, media outlets and other media actors that are continuing to operate through European Endowment for Democracy support⁵¹, all the grant recipients report that they have been enabled to strengthen their civil society and media work in a repressive environment. Consequently, all project reported issues of project sustainability.

V. CONCLUSIONS

On the footsteps of Hungarian and Polish saga, the article demonstrates that the systemic rule of law issues in the Western Balkan countries might trigger the deployment of three EU instruments for protecting EU rule of law, in case those countries become part of the EU.

The paper defines the new concept of EU identity according to the latest milestone judgment by the EU Court of Justice and the recent reports of EU bodies. It assessed the legal issues that new member states, such as Poland and Hungary, suffered under the new binding and not-binding legal instruments adopted by the EU for respecting the rule of law. The same issues for which the Commission still put on hold new aspirant countries, such as the Western Balkans countries within the EU. If accepted in the EU, given the current rule of law situation, the EU Commission might be forced to trigger those instruments with a clear direct and financial damage for new entries. With the consequences that euroscepticism and anti-EU movement might also find a fertile grounds there.

Finally, assessment of the state of play of the judiciary independence, as essential element of the rule of law, has shed some light on to what extent the Western Balkans might fulfil at the present time and with the data at disposal the definition of an EU identity that is emerging in the EU supranational legal order. The paper does not pretend to be exhaustive and to label whose Western Balkans countries is more or less *European*. Further qualitative and quantitative would be needed for analysing the level of integration of their legal systems within the European Union one.

⁴⁹ Tzifakis (n. 14) 201.

⁵⁰ Bieber, Kmezić (n. 2) 2;

⁵¹ European Endowment for Democracy is an independent, grant-making organisation, established in 2013 by the EU and Member States as an autonomous international trust fund to foster democracy in the European Neighbourhood, the Western Balkans, Turkey and beyond.