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EFFECTIVE BENCHMARKING FOR CONCRETE RULE OF LAW REFORMS IN THE WESTERN BALKANS

At the outset of a new political and institutional cycle of the EU, 2019 has been a year of many unknowns. For the countries of the Western Balkans, the direction of the future development of EU enlargement policy has been a key concern. During the mandate of the previous European Commission (EC) it has been clear for some time that there is discontent on the side of EU member states concerning the on-the-ground effects of the enlargement methodology. The discussions on the effects of the enlargement methodology gained new impetus following the European Parliamentary (EP) elections over the summer and related to the October 2019 European Council session at which the much-awaited decisions on the start of accession negotiations with North Macedonia and Albania were on the agenda. The EU debate on enlargement has recently been accompanied by formal requests from EU member states to revise the methodology of enlargement, primarily in view of the progress as related to monitoring rule of law. Such demands have surfaced in various places, including coming directly from French President Macron,¹ as well as appearing in September 2019 decisions of the Bundestag and Dutch Parliament.² In short, EU member states demand that the enlargement methodology includes modes of strictly ensuring the monitoring and implementation of reforms, especially in relation to rule of law, as well as responding to reversibility in the accession process.

In this brief, we focus on the lessons learned from rule of law benchmarking in the Western Balkans so far in order to provide input for ongoing discussions on revising the accession methodology. The brief first provides an overview of rule of law benchmarking and provides key recommendations that need to be taken into consideration when revising rule of law instruments in the accession process. It then proceeds to summarise the key findings of a comparative research project on the effectiveness of benchmarking in the EU accession process in the Western Balkans.³ The findings presented here reflect on the debates at the October 2019 summit, at which EU member states did not reach a decision despite the recommendations of the European Commission to the start the accession negotiations with North Macedonia and Albania.⁴

I. Benchmarking as a key enlargement policy instrument in rule of law

The “fundamentals first” approach of the European Commission announced in 2013 places rule of law at the heart of the enlargement process.⁵ The new enlargement approach, endorsed by the European Council in December 2011, pushes for countries to tackle issues such as judicial reform and the fight against organised crime and corruption early in accession negotiations. This mechanism relies on the extensive system of benchmarking initially developed for Romania and Bulgaria in the post-accession period (the Cooperation and Verification Mechanism), and now being implemented for each chapter of the EU’s *acquis* under negotiation in the cases of Serbia and Montenegro. Put simply, benchmarks represent a set of specific requirements for opening and closing chapters of the *acquis* during accession negotiations.⁶ The aim of such an approach is to assist candidate countries by making requirements more concrete as well as by facilitating the assessment of progress achieved and thereby more effectively navigating, and giving directions in, the accession process. Benchmarks have also been introduced in various instruments for countries that are yet to open accession negotiations.⁷ Thus, benchmarking has become the key mechanism to ensure the consistency and credibility of EU conditionality policy towards the Western Balkans, all the while providing encouragement for further reform.



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1. <https://www.politico.eu/article/macron-urges-reform-of-bizarre-system-for-eu-hopefuls/>

2. <https://www.bundestag.de/dokumente/textarchiv/2019/kw39-de-nordmazedonien-657402>; See also Marusić, S. J., “Netherlands Welcomes EU Talks With North Macedonia, Not Albania,” *Balkan Insight*, 10 September 2019, available at: <https://balkaninsight.com/2019/10/09/netherlands-welcomes-eu-talks-with-north-macedonia-not-albania/>.

3. The research for “Benchmarking for EU reform: How effective” was conducted in 2017 and 2018 and aimed to critically evaluate the degree to which rule of law benchmarking has been effective since its introduction. A description of the methodology of this research is provided in the annex. The full report is available at: <https://ten.europeanpolicy.org/benchmarking-for-eu-reform-how-effective-bencher/>

4. A key presumption underpinning our analysis was the persistence of a consensus on the European accession perspective for the region. The French position at the October 2019 summit seems to question this perspective, and a separate analysis would be needed to analyse this point in finer detail.

5. European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL “EU Enlargement Strategy and Main Challenges 2013-14,” https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf

6. Including interim benchmarks for Chapter 23 (focused on the judiciary and fundamental rights) and Chapter 24 (focused on justice, freedom and security)

7. Including high level dialogues as well as other instruments that the EU has used in the region.

The February 2018 the EC's Communication on "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans" reiterates a focus on rule of law, driven by the need to continuously address those areas in which concerns persist, and where real, de facto progress on the ground is lacking.⁸ This document was announced as a turning point in enlargement policy. In it, the Commission announced a reinforced engagement with the region through flagship initiatives in six areas, including rule of law,⁹ which would require concrete support from European institutions as well as EU member states. Nevertheless, one and a half years after its publication, there has been no major shift towards reinforced engagement on rule of law.

II. Effectiveness of rule of law benchmarking in the Western Balkans – key findings

As mentioned above, ongoing debates among the EU member states requesting a revision of the enlargement methodology focus on the need to improve the performances of acceding countries and to provide for instruments that would sanction backsliding in reform processes.

The findings from the aforementioned research "Benchmarking for EU reform: How effective" confirm that the countries of the Western Balkans face similar problems with respect to rule of law. The Commission recently began using a firmer voice in its assessments of the region, noting severe violations of democratic standards, such as state capture or selective justice, and politicisation at all levels throughout the Western Balkans. While this approach has raised the bar for EU-aspirants in the region, including by setting benchmarks on countries that are not formally in the accession process, it has also reinforced member states' doubts about the preparedness of the WB countries to advance towards EU membership.

Based on the premise that the EU lacks hard *acquis* on rule of law issues and presents international standards and best practices as *acquis*, we recognise that rule of law benchmarking is faced with a challenge at its outset. The **three key findings** from our research include the need to further specify benchmarks, the need for intermediate rewards in the process, and the reluctance of EU institutions and member states to fully apply the sanctioning instruments at their disposal.

First, as a result of the lack of joint EU legislation in this area, most benchmarks tend to be rather general, often lacking specificity and adaptation to context. In the examples of countries negotiating accession, such as Montenegro and Serbia, the EU tends to be more specific in negotiations-related documents, which are missing in other countries. For example, out of all the interim benchmarks for Chapter 23 and Chapter 24 for Serbia, the requirements for legislative activities represent only a third of the total number of benchmarks, while the rest are linked to other aspects of reform, including conducting impact/needs assessments, analyses, institutional, financial, and administrative capacity building activities, data collection, and monitoring and establishing a track record of implementa-

tion. Comparing information from countries at different points in the accession process, the research found that the EC tends to provide a greater number of detailed requirements related to implementation during the accession negotiations than earlier on in the process. Such requirements were found to be both more effective and easier to monitor. Yet, despite their greater precision for countries negotiating EU membership, these benchmarks are still not sufficiently results-oriented, which gives candidates a lot of discretion in presenting their achievements. The European Commission seems to be learning from this experience, as exemplified in the ongoing revisions of the action plans for Serbia for Chapters 23 and 24. In these cases, the EC expects more when it comes to measuring the results and impacts of the conducted activities prescribed by these two action plans. In comparison, countries not engaged in accession negotiations are subject to less precise benchmarking and thus face difficulties in measuring results.

What does this mean for revisions of the enlargement methodology?

This finding is largely in line with the requests of EU member states for the further specification of benchmarking in the joint work of the new European Commission and candidate countries. However, as indicated above, improved monitoring and specification has so far been better ensured with the dynamics and specifications provided by accession negotiations.

The **second key research finding** was that countries are more likely to comply with EU legislation and policies if offered intermediate "rewards" for progress in the accession process. Examples here include benchmarking various processes, with progress valuable in obtaining a candidate status or a recommendation for commencing accession negotiations, which have in most cases provided successful reform outcomes. Nevertheless, once countries have begun accession negotiations, there is less room for intermediate rewards that can contribute to an incremental approach in negotiations. This is obvious in the cases of Montenegro and Serbia, where the absence of intermediate "carrots" and the elusiveness of the membership perspective offer little incentive for governments to implement cumbersome and politically costly reforms.

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8. "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans 2018," https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf

9. See Annex: methodology of the "Benchmarking for EU reform: How effective" research study.

What does this mean for revisions of the enlargement methodology?

This finding indicates that the new methodology also needs to integrate intermediate rewards for progress during accession negotiations. Examples commonly given for this purpose include the potential participation of representatives of these countries at various EU meetings and bodies on specific policy areas where progress has been determined, which were also foreseen in the EC's 2018 February Communication on Credible Enlargement Policy. While not revolutionary, the recognition of this type of progress would contribute to building rapport and trust between EU and Western Balkans officials as partners.

Third, the research found that while the EU integration process has been rather slow, the Union and its member states have shown reluctance to use the instruments at their disposal in the case of no progress in the area of rule of law. For example, the "imbalance clause" provides the Union with an instrument to suspend negotiations in all other chapters should there be delay in fulfilling obligations in relation to rule of law reforms. While annual reports in recent years as well as other documents note slow progress or even backsliding in the area of rule of law in the countries currently negotiating, the EU has not utilised this tool.

What does this mean for revisions of the enlargement methodology?

This finding is of increased importance in relation to the recent requests from France about the reversibility of the accession process (in other words sanctioning in cases of backsliding in rule of law). In effect, there are already mechanisms at member states' disposal for this purpose, dependent on their political will to apply them in practice.

Overall, our regional research project showed that a need exists to refine the accession methodology in light of concerns from EU member states as well as in order to make it more effective for candidates and countries negotiating accession. The selected findings presented here include the need for further specification of the benchmarks, the need for intermediate rewards, and the appeal on the side of EU member states for stricter sanctioning in cases of lack of progress and/or backsliding.

Countries are more likely to comply with EU legislation and policies if offered intermediate "rewards" for progress in the accession.

Member states have shown reluctance to use the instruments at their disposal in the case of no progress in the area of rule of law process.

III. Prospects for more effective benchmarking on rule of law

Based on the selected findings of the research presented above, the following recommendations can be made for EU institutions and member states:

- The European Commission and member states should revise the methodology of the accession process, further specifying benchmarks and including outcome related indicators aimed at establishing and proving an implementation track record. Benchmarks requiring the adoption of new strategies and plans should be avoided and replaced by benchmarks which clearly define the key objectives of required actions.
- The European Commission and EU member states should integrate intermediate rewards in the accession and membership negotiation processes in order to improve the effectiveness of benchmarking instruments.
- EU institutions and member states should not shy away from using already available instruments meant to address backsliding in the area of rule of law, such as the imbalance clause in accession negotiations.



Annex: methodology of the “Benchmarking for EU reform: How effective” research study

In order to assess the effectiveness of benchmarking mechanisms, the research process focused on the sampling and comparison, as well as the monitoring of implementation and assessment, of benchmarks. In order to conduct an in-depth analysis, research was carried out on a sample of benchmarks from Chapter 23 (which concerns judiciary and fundamental rights) and Chapter 24 (which concerns justice, freedom and security).

In the assessment process, the following factors were considered: **the relevance and importance of the specific benchmark both from a national and regional perspective; common critical junctures and actions as set by the benchmarks; availability of information pertinent to assess the effectiveness of the benchmarks.**

Benchmarks in Montenegro and Serbia concern those found in their negotiating documents while those of other countries concern those found in relevant enlargement documents (such as EC country reports, roadmaps, and enlargement strategies. Thus, the following benchmarks were selected and analysed:

Chapter 23	
Merit-based career system for the judges	Track record
Judicial academy reforms	Setting up/ strengthening a body
Merit-based career system for civil servants	Other/track record
Track record for addressing media intimidation; attacks on journalists; media independence	Track records /strengthening a body
Implementation of Law on prohibition of discrimination	Leg/Pol
Chapter 24	
Law on Asylum aligned with EU acquis	Leg
Specific anticorruption plans; providing adequate follow up of detected cases	Track records /Cooperation
The role of intelligence services and the oversight mechanisms that are introduced; established initial track record of investigations in organised crime	Other/track record

Data was collected for all countries based on desk-based analysis and interviews with stakeholders. Key documents related to the EU accession process were analysed for the identification,¹⁰ sampling and analysis of the evolution benchmarks. In addition, in order to assess the effectiveness of benchmarking, the study utilised the reports of the research team itself, as well as those of other international bodies that have monitored developments in the policy areas studied. These included various progress/country reports and strategic documents on enlargement by the European Commission, SIGMA reports, OSCE reports, U.S. Department of State Reports, reports from bodies of the UN, and Council of Europe monitoring mechanisms. The analysis of the state of play also included a review of available quantitative indicators when available, such as the Freedom House Nations in Transit scores, the Bertelsmann Transformation Index (BTI), as well as perception indicators based on regional surveys such as the Balkan Barometer. Semi-structured interviews were also conducted in all countries, with representatives of EU delegations and/or EU members states, as well as with representatives of national institutions in charge of EU accession and the implementation of the selected benchmarks. In total 71 interviews were conducted (14 in Macedonia, 11 in Bosnia and Herzegovina, 21 in Serbia, 11 in Montenegro, 5 in Albania, and 9 in Kosovo) in the period from July 2017 to January 2018.

10. These include EU common positions on Chapters 23 and 24 (for countries in accession negotiations), EC Country reports – staff working papers (analysis of the areas in which samples of EU benchmarks are mentioned), Enlargement Strategy – Communication of the Commission (analysis of the areas in which samples of EU benchmarks are mentioned), EU negotiating frameworks, EU screening reports, roadmaps, conclusions of “high level dialogues” and other instruments setting conditions for further progress in the accession process, documents through which aspirant countries respond to set benchmarks (national plans), action plans submitted by relevant authorities to the European Commission, Stabilisation and Association Council minutes, subcommittees on justice, and home affairs committees.



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