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# THE RULE OF LAW AS A FUNDAMENTAL VALUE OF THE EUROPEAN UNION IDENTITY IN THE WESTERN BALKANS: STATE OF PLAY AND POTENTIAL CHALLENGES

by *Francesco Spera*\*

SUMMARY: 1. Introduction: The Crisis of the Rule of Law. – 2. Western Balkans Countries and EU *ante*-2022. – 3. Rule of Law Framework and Mechanism and the Western Balkans. – 4. Conditionality Mechanism for the Rule of Law. – 5. The Rule of Law in the Western Balkans: State of Play – 6. Conclusions.

## 1. Introduction: The Crisis of the Rule of Law

In its special report on February 2022, 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. The European Union (EU) has adopted this definition from the Council of Europe and it has enshrined the rule of law in art. 2 of the Treaty of the European Union (TEU) as one of the common values of its Member States<sup>1</sup>.

The 16<sup>th</sup> of February 2022, the Court of the European Union (hereafter “the Court”) released its judgement on the cases C-156/21 and C-157/21, dismissing the request of 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. Moreover, the Court launched the concept of “constitutional identity” in EU terms, challenging a growing national trend in some Member States who are trying to abuse the European concept of national identity in finding a constitutional justification to their illiberal and autocratic transformation<sup>2</sup>. More widely, the judgment of the Court comes in a moment where the rule of law as enshrined in art. 2 TEU is being undermined by certain EU Member States. In consequence, the Court identifies in its decision a common rule of law understanding within the EU, that inevitably becomes a benchmark when evaluating the rule of law deterioration of Member States<sup>3</sup>.

It is a guiding principle of its foreign policy, and it is also an essential and necessary condition for EU membership. For this reason, the rule of law as a core feature of the European Union identity applies also to the “aspirant” countries at its border, such as the Western Balkan countries where the effort of the European Union to promoting the rule of law is at the basis of the enlargement process. Honouring its commitment to Western Balkans is not just a question of EU credibility, but it represents an EU strategic interest.

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### DOUBLE BLIND PEER REVIEWED ARTICLE

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<sup>1</sup> 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.

<sup>2</sup> T. DRINÒCZI, P. FARAGUNA, *Constitutional Identity in and on EU Terms*, in *VerfBlog*, 21 February 2022.

<sup>3</sup> *Ibid.*

Nevertheless, the most recent independent reports on the Western Balkan countries shed some light on the difficult situation that the area is facing in terms of the rule of law<sup>4</sup>.

Hence, the Article argues that the Western Balkan countries might face analogous “rule of law” issues of Poland and Hungary, in case of their accession in the EU, if significant rule of law reforms do not take place in the region. Therefore, considering importance of the rule of law, as core values of the European Union identity according to the Court, the Article on one hand, assesses the potential risk that the Western Balkans countries might face in light of the instruments adopted by the EU for protecting the rule of law, on the other hand, shed some light on the state of play of the implementation of the rule of law in the region according to the new EU definition provided by the Court.

To answer this question, firstly, the study provides an overview of the relation between the EU and the Western Balkan countries. Secondly, on the footsteps of Hungarian and Polish saga, based on the recent data, 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 are part of the EU. The methodological choice is justified by that 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 16<sup>th</sup> of February decision: the Commission’s Rule of Law Framework (2014), Commission’s Rule of Law Mechanism (2020), and the Conditionality Mechanism for the rule of law (2020). Thirdly, it identifies the concept of the rule of law according to the Court and the most important EU sources. Finally, based on the previous findings, the Article assesses the state of play and the possible threats to the “EU rule of law” in the Western Balkan countries. In doing so, the study takes into consideration the data from recent reports in the region considering only the EU rule of law definition in line with the Court’s decision understanding, such as the abovementioned ECA report on EU support for the rule of law in the Western Balkans (2022)<sup>5</sup>.

Finally, for the purpose of the research question and the strict focus on the EU rule of law and the European identity, 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 by the author. Furthermore, the methodology of the study requires the exclusion of any assessment of the impact of EU financial and technical assistance on the rule of law in the region identified since, for reason of length and words, in the last part, it only focuses on the state of play of the rule of law according to the Court’s criteria.

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<sup>4</sup> European Court of Auditors, *Special Report*, cit.; European Commission For Democracy Through Law (Venice Commission), *Annual Report of Activities 2021*, CDL-RA(2021)001, Or. Engl./Fr.; Western Balkans Investment Framework, *Investing to Strengthen the Rule of Law in the Western Balkans*, available at <https://www.wbif.eu/investing-strengthen-rule-law-western-balkans>; OECD, *Government at a Glance: Western Balkans, The rule of law*, 2022, available at: <https://www.oecd-ilibrary.org/sites/0c63e810-en/index.html?itemId=/content/component/0c63e810-en>; SecuriMeter 2022, 24 Jun 2022, Survey, *Balkan Barometer Public Opinion Survey on “Attitudes towards security: Perceptions of security and threats in the Western Balkans”*, June 2022; SecuriMeter 2022. Infographics, 24 Jun 2022, Brochure; Regional Cooperation Council, *Balkan Barometer 2022, Public Opinion*, and Freedom House recent reports on each Western Balkan countries.

<sup>5</sup> Court of Justice of the European Union, Judgment of 16 February 2022, cases 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*.

## 2. Western Balkan Countries and EU before 2022

According to the European law and policy, the Western Balkans consists of Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Kosovo<sup>6</sup> and Serbia. In the last decades, the then European Communities and now European Union gave them a perspective to accede to the European Union hence are also called enlargement countries.

The beginning of the process was marked by the first European Council meeting in 2003 that adopted the Thessaloniki agenda for the Western Balkans: Moving towards European Integration<sup>7</sup>. This policy papers underlines the European perspective of the countries of the Western Balkans and reiterates “[...] *the future of the Western Balkans is within the European Union and pledged the Union’s full support to the endeavours of the countries of the region to consolidate democracy, stability and to promote economic development*”<sup>8</sup>. The European leaders declared that the EU Member States and the Western Balkans all “*share the values of democracy, the rule of law, respect for human and minority rights, solidarity and a market economy, fully aware that they constitute the very foundations of the European Union*”. What is peculiar in this statement is the importance of tolerance and ethnic reconciliation between communities since “*fragmentation and divisions along ethnic lines are incompatible with the European perspective*”. However, a real obstacle for a European perspective is the endemic organised crime and corruption for democratic stability, and the rule of law. Moreover, the conditionality clause and the rule of law have always been closely connected. On the one hand, the Western Balkans stressed the importance for them concerning the visa liberalisation of the EU’s visa regime and, on the other hand, the EU is ready to pursue this step on the condition that implementing major reforms in areas such as the strengthening of the rule of law, combating organised crime, corruption, and illegal migration, and strengthening administrative capacity in border control and security of documents is accomplished. Officials documents stress the fact the area should adopt European values and standards.

Finally, it is interesting to notice the fact that in the Wider Europe – New Neighbourhood – Council Conclusions<sup>9</sup> the EU linked the European path of Western Balkans to the potential that geographical proximity will generate converging interests and increase the importance of working together to address common challenges. Hence, building new and common policies with the Western Balkans will be based on the building of shared values such as liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. However, it is clearly stated that “*this should be seen as separate from the question of possible EU accession that is regulated by article 49 of the Treaty on European Union*”.

The same ideas can be found in the following policy documents on EU's enlargement policy<sup>10</sup> which underlines the necessity to invest in peace, security, and stability. It

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<sup>6</sup> The EU officially states that this designation is without prejudice to positions on status and is in line with UNSCR 1244 and the ICJ’s *Opinion on the Kosovo declaration of independence*.

<sup>7</sup> General Affairs And External Relations, *2518th Council meeting – External Relations*, Luxembourg, 16 June 2003,

<sup>8</sup> C/03/163, Thessaloniki, 21 June 2003, 10229/03 (Presse 163), Eu-Western Balkans Summit, Thessaloniki, 21 June 2003, Declaration.

<sup>9</sup> General Affairs And External Relations, *op. cit.*, p. V.

<sup>10</sup> 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*, of 2 November 2015,



stresses that an accession process offering a credible prospect of EU membership is vital to enhance the resilience of countries in the Western Balkans and to spur transformation in these countries. However, it seems that the situation has been deteriorating since the language seems harsher and the perspective for accession to the EU block slowing down. 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”*<sup>11</sup>. 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”*. Moreover, the freedom of expression is a particular challenge, with negative developments in several countries. Public administration reform is needed to ensure the essential administrative capacity as well as to tackle high levels of politicisation and a lack of transparency. The functioning of democratic institutions is slowing and inefficient. In terms of democratic transformation, it is indicated that national parliaments need to be at the heart of the reform process in each of the enlargement countries to ensure democratic accountability and inclusiveness, a prerequisite not least for a successful reform process. Finally, the EU Commission suggests that there is a need to work even more closely with local civil society actors to anchor reforms across society.

The Commission again links the rule of law, as European values, to the economic development: *“the political, economic, and institutional fundamentals are both indivisible and mutually reinforcing. The rule of law and economic development can be seen as two sides of the same coin. Strengthening the rule of law increases legal certainty, encourages, and protects investment and contributes significantly to supporting economic development and competitiveness. Conversely, economic reforms and integration have the capacity to stabilise countries in the longer term”*. The EU clearly states that the rule of law is a fundamental value on which the EU is founded.

In another important and strategic document of the EU, namely the Global Strategy 2016, the public discourse has somehow shifted since the implementation of the rule of law in the Western Balkan countries represents for the EU and the region a mean for tackling the same challenges *“given the EU unique influence in all these countries”*. This approach has been confirmed in the last just-launched Strategic Compass<sup>12</sup>, whereby the EU is committed to more certain tangible progress on the rule of law and reforms *“based on European values, rules and standards needs to continue and the European perspective must remain a guiding beacon”*.

Finally, the last Strategy for the Western Balkan countries on which the ECA and other reports are based was launched in 2018<sup>13</sup>. The EU 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

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COM (2015) 611 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2016 Communication on EU Enlargement Policy*, of 9 November 2016, COM(2016) 715 final; *EEAS Global Strategy: Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union’s Foreign and Security Policy*, June 2016.

<sup>11</sup> COM(2015) 611, final, cit.

<sup>12</sup> EEAS, *A Strategic Compass for the EU*, Strategic Communications, 21 March 2022.

<sup>13</sup> European Commission, *Strategy for the Western Balkans: EU sets out new flagship initiatives and support for the reform-driven region*, 6 February 2018.

economic reforms. It seems that the context has deteriorated even more. It is for this reason that the ECA Report, and other assessments, assessed the outcomes based on a new methodology for accession negotiations that has been set up for boosting the stalled rule of law-based reforms path in the Western Balkan countries.

### 3. Rule of Law Framework and Mechanism and the Western Balkans

In a crisis, the Commission can trigger the rule of law framework to address systemic threats in EU countries. This is the first subtitle that appears on the official page that describes and formalizes the Rule of Law Framework<sup>14</sup>.

The European Commission has adopted a complementary instrument to art. 7 TEU. The instrument, adopted with a Communication, can fall within the context of soft law instruments that the Commission makes extensive use of in its internal and external action<sup>15</sup>.

In recent years, practice has shown that a systemic threat to the rule of law in Member States 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 art. 258 TFEU, can only be initiated 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.

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*”<sup>16</sup>.

This new instrument provides for a three-stage “structured dialogue” process at the discretion of the Commission: in the first stage, if the Commission considers that a systemic threat to the rule of law could materialize in an EU country, it can adopt a formal opinion following activation of the Framework. In the absence of satisfactory responses from the Member State concerned, the Commission can then issue a formal rule of law recommendation in the second stage which may include specific recommendations and the deadline for their implementation. Finally, after a final phase of monitoring the compliance of the Member State, the Commission may decide to activate one of the mechanisms referred to in art. 7 TEU in the event of non-compliance.

With reference to effectiveness, despite repeated requests from the European Parliament as early as 2015<sup>17</sup>, the Commission continually refused to activate the 2014 framework *vis-à-vis* Hungary, but did so towards Poland in January 2016 for two reasons: the lack of compliance with the binding rulings of the then still independent Polish Constitutional Court, and the adoption of measures by the Polish legislative to

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<sup>14</sup> European Parliament Resolution of 16 January 2020 on ongoing hearings under art. 7, para. 1 TEU regarding Poland and Hungary (2020/2513(RSP)) in L. PECH, P. BÁRD, (eds), *The Commission's Rule of Law Report and the EU Monitoring and Enforcement of art. 2 TEU Values*, Study, European Parliament, February 2022, p. 34.

<sup>15</sup> *Ibid.*, p. 61.

<sup>16</sup> 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.

<sup>17</sup> Resolution of the European Parliament, *Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015*, of 16 December 2015, 2015/2935(RSP).

compromise the functioning of said court<sup>18</sup>. As a result, the Court of Justice has since taken note of the framework with an order adopted on 17 December 2018<sup>19</sup>, and subsequent references to it by an EU Advocate General<sup>20</sup> and by the national referring courts<sup>21</sup>. However, following this first and hitherto only activation of the rule of law framework, the Commission was forced to admit that the Polish authorities continued to ignore its recommendations and to pass laws allowing the executive and legislative branch to “systematically interfere in the composition, powers, administration and functioning of the judiciary”<sup>22</sup>. Therefore, it left the Commission no choice but to activate art. 7, para. 1 TEU for the first time in December 2017<sup>23</sup>. The new tool has shown in practice that this type of approach cannot effectively address a situation where national authorities pursue a deliberate strategy of methodical annihilation of the rule of law<sup>24</sup>.

If the same criteria are applied to the Western Balkan countries, according to the ECA Report and others, it is possible that similar issues might rise. 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. The current data has identified the cause in the insufficient domestic political will to drive the necessary reforms, because some scholars defined these countries as semi-autocratic systems<sup>25</sup>. In the future, this factor might play an essential role as for Poland and Hungary 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. 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<sup>26</sup>. This is also confirmed by recent public opinion survey where Western Balkan citizens perceive judiciary as the most corrupt sector<sup>27</sup>.

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 were no guarantees of the institutions’ financial independence<sup>28</sup>. Moreover, political interference with the judiciary remains a challenge

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<sup>18</sup> European Commission, *Readout by the First Vice-President Timmermans of the College Meeting of 13 January 2016*, Speech/16/71.

<sup>19</sup> Court of Justice of the European Union, Judgment of 11 July 2019, Case C-619/18 R *Commission v Poland (Independence of the Supreme Court)*, para. 81.

<sup>20</sup> Court of Justice of the European Union, Opinion of Advocate General Campos Sánchez-Bordona, Case C-157/21, *Hungary and Poland*, para 80-81 and 145.

<sup>21</sup> L. PECH, P. BÁRD, *op. cit.*, p. 33.

<sup>22</sup> European Commission, *Rule of Law: European Commission acts to defend judicial independence in Poland*, of 20 December 2017, IP/17/5367.

<sup>23</sup> European Court of Auditors, *Special Report*, cit., p. 4

<sup>24</sup> D. KOCHENOV, L. PECH, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality in European Constitutional Law Review*, Vol. 11, No. 3, 2015, p. 512.

<sup>25</sup> L. STORCHI, *Rule of Law in the Western Balkans: Between Honesty and Government Control*, in *eurac.edu*, 4 January 2021; European Court of Auditors, *Special Report*, cit., p. 4; A. SCHIEDER, *Rule of Law in the Western Balkans; A Comparison of the Developments in Serbia and North Macedonia and the Role of the Accession Mechanism*, in *CeSPI*, 30 September 2020; A. PINGEN, *ECA Report on EU Support for the Rule of Law in the Western Balkans*, in *eucri*, 25 February 2022; A. HOXHAI, *The EU Rule of Law Initiative Towards the Western Balkans*, in *Hague Journal on the Rule of Law*, Vol. 13, 2021, p. 143.

<sup>26</sup> European Court of Auditors, *Special Report*, cit., p. 33; Western Balkans Investment Framework, *cit.*, p. 2;

<sup>27</sup> SecuriMeter 2022, *cit.*, p. 18.

<sup>28</sup> European Court of Auditors, *Special Report*, cit., p. 31; A. HOXHAI, *op. cit.* and all recent Freedom House’s report on Western Balkan countries 2022, see Freedom House, *Nations in Transit 2022*.

and even in Albania, that has made the most of the progress in the area of the independence of the judiciary, the system might be disrupted by the scale and slow pace of vetting<sup>29</sup>.

Another instrument adopted of a “soft” nature is the *European Rule of Law Mechanism* which 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. The starting point of this new Mechanism is the report on the rule of law. 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. This goal reflects a longstanding interest on the part of both the European Parliament and the Council on the matter. The Commission also invites national parliaments and national authorities to discuss the report and promotes the involvement of other stakeholders at national and EU level. First launched in 2020, the annual report consists of 27 chapters per country and an overall report that presents an overview of the state of the rule of law in the EU. It focuses on four “pillars”: (i) national judicial systems; (ii) national anti-corruption frameworks; (iii) media pluralism; and (iv) other institutional checks and balances.

The European Rule of Law Mechanism strengthens and complements other EU instruments that encourage Member States to implement structural reforms in the areas covered by its scope, including the EU Justice Scoreboard and the European Semester. The rule of law also plays a leading role in the implementation of the resilience and recovery mechanism. Member States' plans for recovery and resilience include important reform priorities such as improving the business environment through effective public administration and justice systems<sup>30</sup>.

The problem that has been raised by many parties is the limited approach of this tool. Unlike the provisions of the European Parliament, the purpose of the annual report does not cover all the values referred to in art. 2 TEU. The Commission seems to favor the use of this agreement only to codify the existing interinstitutional cooperation and the exchange of views “*on the basis of the experience acquired through the application of the European rule of law mechanism*”<sup>31</sup>. It was therefore noted that the Commission will continue to address the promotion and monitoring of the values of art. 2 TEU separately from the Annual Rule of Law Report.

With regards to the Western Balkan countries, it seems that this soft Mechanism might also generate certain problems. For instance, the ECA Report states that, by interviewing Civil Society Organizations (CSOs), 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. Since effectively communicating EU goals to the public requires continued cooperation and coordination between the governments and civil society, it seems that a link between civil society and public institutions is missing. Notwithstanding, the Report stresses that civil society plays a key role in the rule of law, and it has been only partly addressed by the EU: “*The civil society currently does not play a sufficiently large role in policy and*

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<sup>29</sup> *Ibid.*, p. 35; Freedom House, *Nation in Transit 2022*, Albania, available at: <https://freedomhouse.org/country/albania/nations-transit/2022> and Reporters without Borders, Albania, available at <https://rsf.org/en/country/albania>.

<sup>30</sup> L. PECH, P. BÁRD, *op. cit.*, p. 28.

<sup>31</sup> European Commission, *Follow up to the European Parliament non-legislative resolution on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights of 7 October 2020*, of 3 March 2021, SP(2020)686, p. 3.

*decision-making*<sup>32</sup>. Except for North Macedonia and to a certain extent Montenegro<sup>33</sup>, where the EU delegation reports recent improvements in the environment in which civil society operates, the region's CSOs remain muted. There is no structural CSOs involvement in the public-decision making, and "*consultation is often ad hoc and that civil society recommendations are often ignored in the final versions of documents*"<sup>34</sup>. CSOs desire to strengthen their collaboration with the EU delegations, the independent media community and investigative journalists in order to, among other things, monitor the reform implementation and its effect on the evolution of corruption; and alert the public opinion and the region's governments<sup>35</sup>. Furthermore, since the EU consider enabling media and civil society can promote EU's democratic principles, freedom of expression has progressed the least in all Western Balkans, and in some countries is even declining<sup>36</sup>.

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. For example, the Commission has dropped the IPA II indicator for monitoring civil society participation in the reform process and therefore does not report progress in this area<sup>37</sup>.

#### 4. Conditionality Mechanism for the Rule of Law

Finally, in the midst of the pandemic of COVID-19, the European Union adopted, on 14 December 2020, the draft Regulation relating to a general cross-compliance regime for the protection of the Union budget, the so called "conditionality Mechanism". The Mechanism has been the outcome of a joint initiative by the "Frugal Four" (Austria, Denmark, the Netherlands, and Sweden) who seek for some form of accountability for Member States when the recovery and resilience facility was created, unhappy that much discretion would go to the EU level without sufficient checks and balances<sup>38</sup>.

The regulation provides the European Commission with an additional conditionality Mechanism to protect the EU budget, including funds available through the new EU instrument for recovery / "Next Generation EU" (Regulation 2020/2094), in the event of a breach of the rule of law. Although the Commission in its guidelines has presented this tool as of a preventive nature, in the opinion of the writer, also on the basis of more recent studies, this probably constitutes, at least in part, an incorrect characterization. The Mechanism provides for the adoption of appropriate measures if, pursuant to art. 6, violations of the principles of the rule of law in a Member State are established which compromise or seriously risk compromising in a sufficiently direct manner the sound financial management of the budget of the Union or the protection of the financial

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<sup>32</sup> A. HOXHAI, *op. cit.* and Freedom House reports, *cit.*

<sup>33</sup> *Rule of Law in the Western Balkans: Between Honesty and Government Control*, *op. cit.*; Freedom House, Freedom in The World 2022, Montenegro, available at <https://freedomhouse.org/country/montenegro/freedom-world/2022> and Freedom House, Freedom in the World 2022, available at <https://freedomhouse.org/country/north-macedonia/freedom-world/2022>.

<sup>34</sup> European Court of Auditors, *Special Report*, *cit.*, p. 40.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, p. 42.

<sup>37</sup> *Ibid.*, p. 41.

<sup>38</sup> B. VANHERCKE, A. VERDUN, *The European Semester as Goldilocks: Macroeconomic Policy Coordination and the Recovery and Resilience Facility*, in *Journal of Common Market Studies*, Vol. 60. No. 1, 2022, pp. 204–223 .

interests of the Union<sup>39</sup>. Therefore, the Mechanism has both a preventive and a reactive dimension<sup>40</sup>. With reference to the sources of information on which the Commission bases the possible activation of preventive and reactive actions provided for by the regulation, recital 16 explicitly lists the report on the rule of law, as explained above as a soft tool, in the non-exhaustive list of available sources. Concerning this point, the Commission underlined that while the cross-compliance regulation and the Commission report “*have different objectives and should remain separate*”, “*the results of the annual rule of law report can feed into the Commission's assessment under the regulation and references. The measures taken pursuant to the regulation can be included in the annual rule of law report*”<sup>41</sup>. Moreover, art. 5 of the Mechanism provides for the Commission a list of relevant powers when “*it it has reasonable grounds*” to consider that there has been a breach of the rule of law in one of the EU Member States: for instance, it can suspend the allocation of post-pandemic funds to EU Member States, or a suspension of the disbursement of instalments in full or in part or an early repayment of loans guaranteed by the Union budget. In consequence, in the Regulation the Commission plays a key role in assessing breaches of the rule of law, in taking the necessary measures and in reassessing them, at the request of the EU Member States concerned.

The proposal has been rejected at its first reading by Hungary and Poland<sup>42</sup>. With this argument, Hungary expressed its negative opinion on the regulation: “*During the negotiations, several statements by the Commission and the Council addressed Hungary's political and legal concerns regarding the interpretation and application of the draft regulation on a general cross-compliance regime for the protection of the Union budget. However, serious legal concerns remained regarding the compliance of the draft regulation with EU law which obliges Hungary to vote against the Council's position at first reading on the draft regulation. Hungary reserves the right under art. 263 TFEU. Full implementation in good faith of the European Council conclusions and related Commission statements on the interpretation and application of the Regulation on a general cross-compliance regime for the protection of the Union budget is in the vital national interests of Hungary and is a precondition for Hungary's consent to any legislative act relating to the multiannual financial framework for the years 2021 to 2027, including Next Generation EU*”. Despite everything, on December 16, 2020, the Regulation was adopted, and formally entered into force from January 1, 2021. However, since its entry into force, the Commission has in fact refused to effectively apply this new instrument following the controversial and probably illegitimate “*compromise*” agreed by the European Council in December 2020, and which instructed the Commission not to apply the Regulation 2020/2092 until the ruling by the Court of Justice on its legitimacy and on the subsequent publication of probably redundant guidelines reflecting the judgments of the Court of Justice<sup>43</sup>. The main reason is that both Hungary and Poland threaten to block the entire EU budget to which the recovery and resilience plan is linked.

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<sup>39</sup> *Ibid.*, art. 4.

<sup>40</sup> L. PECH, P. BÁRD, *op. cit.*, p. 36.

<sup>41</sup> European Commission, *Follow up to the European Parliament non-legislative resolution on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom)*, of 3 November 2021, 2020/2092, SP(2021)570 .

<sup>42</sup> Regulation (UE, Euratom) 2020/2092 of the European Parliament and of the Council *on a general regime of conditionality for the protection of the Union budget*, of 16 December 2020, in OJ L 433I , of 22 December 2020.

<sup>43</sup> European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20. In the same field, A. ALEMANNI, A., M. CHAMON, *To Save the Rule of Law you Must Apparently Break It*, in *VerfBlog*, 11 December 2020; K.L. SCHEPPELE, L. PECH, S. PLATON, *Compromising the Rule of Law while Compromising on the Rule of Law*, in *VerfBlog*, 13 December 2020.

The EU needs a unanimous vote from all 27 members in order to pass the budget and coronavirus economic recovery fund. In December 2020, both countries used their veto power to strike a deal on the legality of the new Mechanism and *de facto* suspend its application.

However, after 14 months, the Court ruled, with an historical decision issued on 16 February 2022 in the annulment cases filed by the Hungarian and Polish governments on 11 March 2021, the importance of which was unfortunately overshadowed by the Russian invasion of Ukraine<sup>44</sup>. It is important to point out that the historicity of the rulings is not given by the result, which was clear enough from the beginning and has taken up the arguments of the Advocate General's Opinion in its fundamental points<sup>45</sup>. What really stands out is a strong stance by the Luxembourg Court to reconfirm itself once again as the driving institution of the European Union. In response to the continuing attacks on the primacy of European law and the outcry by numerous constitutional courts of various Member States<sup>46</sup>, the Court literally launched the “heart over the obstacle”, when it spoke for the first time about an “identity of the European Union” based on art. 2 TEU: “*The values contained in art. 2 TEU have been identified and are shared by the Member States. They define the very identity of the Union as a common legal order. Therefore, the Union must be able, within the limits of its powers under the treaties, to defend these values*”<sup>47</sup>. For this reason, if on the one hand article 4, para. 2, TEU, requires the Union to respect the national identity of the Member States, inherent in their fundamental political and constitutional structure, and that they enjoy a certain discretion to ensure the implementation of the principles of the rule of law, on the other hand, the objectives and the final aim cannot vary from one Member State to another. Indeed, while having distinct national identities, inherent in their fundamental political and constitutional structure, which the Union respects, the Member States adhere to a notion of the “rule of law” which they share, as a common value to their own constitutional traditions, and that they are committed to complying with<sup>48</sup>.

On the same day of the publication of the judgments, the Commission indicated that it “*will adopt guidelines in the coming weeks providing further clarity on how [it] will apply*” the Regulation in practice<sup>49</sup>, and possibly activating the 2020/2092 Regulation by sending written notifications pursuant to art. 6, para. 1, of the Regulation, to the Member States concerned. In November 2021, the Commission had only sent letters requesting information, pursuant to art. 6, para. 4 of the Regulation, to Hungary and Poland. The Commission's action was heavily criticized in the course of 2021 by the European Parliament which equated its persistent refusal to send written notifications to unlawful inaction, which is why the European Parliament voted to refer the Commission to the Court of Justice for deficiency pursuant to art. 265 TFEU<sup>50</sup>. In this regard, it can be noted

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<sup>44</sup> Court of Justice, *Hungary and Poland*, cit. For further analysis, see L. PECH, *No More Excuses: The Court of Justice greenlights the Rule of Law Conditionality Mechanism*, in *VerfBlog*, 16 February 2022.

<sup>45</sup> S. PROGIN-THEUERKAUF, M. BERGER, *ECJ Confirms Validity of the Rule of Law Conditionality Regulation*, in *European Law Blog News and Comments on EU law*, 11 March 2022.

<sup>46</sup> Take, for example, the counter-limit theory in Italy, the *Weiss* case in Germany, and of course, the disputes with the Polish and Hungarian Constitutional Court.

<sup>47</sup> Court of Justice, *Hungary and Poland*, cit., para. 127.

<sup>48</sup> *Ibid.*, paras. 233-234.

<sup>49</sup> Statement by European Commission President Ursula von der Leyen *on the judgments of the European Court of Justice on the General Conditionality Regulation*, of 16 February 2022, Statement/22/1106.

<sup>50</sup> European Parliament Resolution *on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092*, of 10 June 2021, 2021/2711(RSP); European Parliament resolution *on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget of 8 July 2021*, 2021/2071(INI); European

that the Advocate General is of the opinion that the Commission, accepting the request of the European Council to adopt guidelines to be defined after the judgment of annulment of the Court of Justice, has in fact suspended the application of the regulation. It is the opinion of important scholars that this represents a violation of the EU Treaties, as the appeals submitted to the Court do not have suspensive effect<sup>51</sup>.

Given these considerations, it can nevertheless be said that the “Cross Compliance Regulation” certainly represents a significant addition to the EU toolbox for the rule of law for several reasons. For the first time, it expressly and comprehensively links the implementation of the EU budget to respect for the fundamental principles of the rule of law. It comprehensively codifies for the first time in a binding legislative instrument the meaning and scope of the rule of law in the light of the EU Treaties and the extensive case law of the associated Court of Justice. It clearly describes, and in a non-exhaustive manner, situations indicative of violations of the principles of the rule of law, with the Regulation also concerning both individuals and systemic violations that may amount to actions (general measures or recurrent practices) or omissions by the public authorities<sup>52</sup>.

In conclusion, the importance of the regulation from a political, legal and practical point of view emerges from the analysis of the regulation and recent studies. The European legislator established a legal relationship between the various instruments available to the EU, “*in particular to assess whether and to what extent these instruments could be made operational in parallel in order to guarantee a (more) comprehensive and (more) solid defense of the principles of the rule of law in the legal order of the Union*”<sup>53</sup>. Furthermore, a comprehensive, proactive and risk-based approach that facilitates EU intervention to safeguard sound financial management even before EU disbursement is admirable<sup>54</sup>.

With regards to the Western Balkan countries, the ECA Report assesses the link between the rule of law reforms and financial assistance. For instance, in the past 15 years, the EU has provided more than EUR 60 million to the judiciary with the aim of strengthening the rule of law in Bosnia and Herzegovina. About EUR 18.8 million of this financial assistance has gone in direct grants to the High Judicial and Prosecutorial Council (HJPC). However, it is reported that, according to the Commission, the HJPC has shown insufficient ambition in pursuing reforms and ensuring that the EU-funded actions it carries out are sufficiently sustainable. In addition, another evaluation from the EU Commission reported that the Bosnian authorities and judiciary had taken no action to address the implementation of the key rule of law priorities, while the obstruction of judicial reforms, both by politicians and from within the judiciary, remained widespread<sup>55</sup>.

It is noted that, there is no efficient reform/funding Mechanism that can incentivise beneficiary countries to be more active and adjust their possible mistakes in reforming. While the 2020 performance reward strengthened the link between progress on the fundamentals and additional IPA II funding, there was no provision or condition linking

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Parliament’s Press Release, *Parliament prepares legal proceedings against Commission over rule of law mechanism*, 20 October 2021.

<sup>51</sup> L. PECH, P. BÁRD, *op. cit.*, p. 37.

<sup>52</sup> Art. 4 of Regulation (EU) 2020/2092.

<sup>53</sup> K.L. SCHEPPELE, R.D. KELEMEN, J. MORIJN, *The EU Commission Has to Cut Funding to Hungary: The Legal Case, Appendix 1* (An analysis of Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget and its legal context), p. 44.

<sup>54</sup> *Safeguarding The Rule of Law in The European Union*, A project by the Meijers Committee, Rule of Law Update, December 2021, posted on January 12, 2022 in Rule of Law Update.

<sup>55</sup> European Court of Auditors, *Special Report*, *cit.*, p. 23; and A. HOXHAI, *op. cit.*



the lack of progress or backsliding with reduced funding, in specific aid intensive areas such as infrastructure or rural development<sup>56</sup>. Additional requirements enshrined in the IPA II are a more effective type of conditionality, in that they can trigger national corrections by invoking an immediate aid reduction. However, the additional requirements Mechanism is not applied systematically. IPA II – unlike the original IPA scheme – does not explicitly provide for the possibility of suspending assistance if a beneficiary country fails to observe the basic principles of democracy, the rule of law and respect for human rights<sup>57</sup>.

The Court reports that the European Parliament advocated tougher conditionality rules, with a workable suspension clause, to penalise backsliding in the areas of democracy, the rule of law and respect for human rights in its position paper of 27 March 2019. For this reason, the IPA III Regulation sets out to reinforce conditionality, however, according to the Report, it is not clear how this will affect the provision of funding<sup>58</sup>.

In conclusion, there are still many weaknesses for strengthening the rule of law, especially, in the area of the freedom of expression that was the least covered area funded through IPA II. 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 support<sup>59</sup>, all the grant recipients report that they have been enabled to strengthen their civil society and media work in a repressive environment<sup>60</sup>. However, all project reported issues of project sustainability. In consequence, similarities can be found in the Western Balkans and Poland and Hungary and the possibility that misusing of EU funds might trigger similar situations such as described for Hungary and Poland. The 2019 external evaluation on the rule of law also confirmed that, in many contexts, sustainability is difficult to achieve. Only three projects were taken up by the national authorities, thus giving them some guarantee of financial sustainability. Otherwise, financial sustainability was mostly dependent on the continuation of EU support. Together with weak project ownership the two most obvious obstacles to sustainability are poor financial and institutional capacity. This was also recognised by the IPA II monitoring committee at its meeting in 2019: “*The sustainability of the results of EU-funded actions is often at risk, notably due to poor maintenance and lack of financial resources*”<sup>61</sup>.

## 5. The Rule of Law in the Western Balkans: State of Play

Having considered the previous findings and rule of law risks that Western Balkan countries might face in light of the new rule of law instruments, in this last paragraph, the study assesses to what extent Western Balkans countries (considered by the EU and the

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<sup>56</sup> The Instrument for Pre-accession Assistance (IPA) is the means by which the EU has been supporting reforms in the enlargement region with financial and technical assistance since 2007. IPA funds build up the capacities of the beneficiaries throughout the accession process, resulting in progressive, positive developments in the region, available at [https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/overview-instrument-pre-accession-assistance\\_en](https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/overview-instrument-pre-accession-assistance_en).

<sup>57</sup> European Court of Auditors, *Special Report*, cit., p. 23.

<sup>58</sup> Regulation (EU) 2021/1529 of the European Parliament and of the Council *establishing the Instrument for Pre-accession Assistance (IPAIII)*, of 15 September 2021, OJ L 330, 20 September 2021; European Court of Auditors, *Special Report*, cit., p. 24.

<sup>59</sup> 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.

<sup>60</sup> European Court of Auditors, *Special Report*, cit., p. 29

<sup>61</sup> *Ibid.*, p. 30

Court as a single area) appear to have “European identity” according to the criteria set by the EU Court of Justice (ECJ) in its 16<sup>th</sup> February judgement.

It is therefore necessary to set the threshold that the ECJ held in its judgment. As stated above, according to the Court, art. 2 TEU contains the shared values of the Member States. The identity of the European Union is defined by them as a common legal order<sup>62</sup>. Moreover, the Court, contrary to the arguments put forward by Hungary and supported by Poland, held that “*Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States*”<sup>63</sup>.

Having said that, the Court reiterates the inseparable link between the principle that protecting EU financial interests with the importance of the respect for the rule of law. Hence, the rule of law, as part of European identity, requires that “*all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the ‘Charter’) and other applicable instruments, and under the control of independent and impartial courts*”<sup>64</sup>. Furthermore, the European Court of Auditors’ special report, listed a more precise classification of the principles that represent the very core of the rule of law as referred in art. 2 TEU. It includes six basic principles which have been recognised by the European Court of Justice and the European Court of Human Rights. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law<sup>65</sup>. It is explained that states characterised by a functioning rule of law should be able to control and limit the powers of political and economic elites<sup>66</sup>. For this reason, it is a key element to fight against corruption since it might lead to arbitrariness and abuse of power, and the mistrust of citizens in public institutions given the consequent breach of the principles of legality and legal certainty.

In consequence, one wonders why it matters that a European Union identity based on the rule of law should also apply to the Western Balkan countries? The answer is that the rule of law plays a dual direction as confirmed by art. 29 TEU. To become a member of the Union, a country shall not only comply with the rule of law, but also promote them. Moreover, the EU Accession Criteria, the so-called Copenhagen Criteria, clearly state that a country must demonstrate it has “*institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities*” in order to start negotiations. Therefore, the rule of law represents one of the conditionalities that bind access to the Union<sup>67</sup>. However, the definition of the rule of law by the Court sets important thresholds for complying with the rule of law principle given its ambiguity and

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<sup>62</sup> Court of Justice, *Hungary and Poland*, cit., para. 127.

<sup>63</sup> *Ibid.*, para. 232.

<sup>64</sup> *Ibid.*, para. 18, sub-para. 3.

<sup>65</sup> European Court of Auditors, *Special Report*, cit., p. 6.

<sup>66</sup> M. KMEZIĆ, *Rule of Law and Democracy in the Western Balkans: Addressing the Gap Between Policies and Practice*, in *Southeast European and Black Sea Studies*, No. 1, 2020, p. 186.

<sup>67</sup> L. BONIFATI, *The Rule of Law in the European Union and the Prudence of its Procedures*, in *eurac.edu*, 19 November 2020.

lack of a clear definition from the Copenhagen Criteria<sup>68</sup>. It thus helps to EU Commission to employ the above-mentioned instruments for protecting a well-defined rule of law that has been always delayed and blocked by the lack of clarity on what constitutes a “systemic breach”<sup>69</sup>. It is clear now for many scholars that the rule of law crisis in certain EU Member States has been caused by the European Commission inability to explain what the values meant during pre-accession to Poland, Hungary, and the other Central and Eastern European countries. Therefore, it seems clear that the EU will not let other countries, and this applies even more for candidate countries, to develop their own ideas about the meaning of democracy, rule of law, and human rights, and about the way these values hang together<sup>70</sup>. In conclusion, it seems a turning point for the EU. On the one hand, the “conditionality regulations” has provided the much-needed wide powers to the EU Commission to act, on the other hand the Court has justified its legality, clarifying the definition of rule of law. It is a clear message for promoting and protecting the rule of law after a decade of ineffectiveness caused by not-binding tools and the limits of the EU Treaties.

Hence, having regards to the thresholds set by the Court for the respect of the rule of law, as a core value of the European Union identity<sup>71</sup>, the analysis assesses the state of play in the Western Balkans according to the elements that define the rule of law specifically according to the Court’s judgment. Some of these elements have been already addressed in the previous paragraphs, however, this last part of the study complements and conclude the rule of law analysis in the Western Balkan countries by proving an general overview and, when possible, few examples, following the Court’s decision characterization of the EU rule of law elements.

Firstly, the independence of the judiciary is considered extremely relevant for the respect of the rule of law<sup>72</sup>. For instance, Serbia has benefitted from the IPA II action programme “Support to justice sector” in order to achieve an independent, accountable and efficient judiciary, including by way of constitutional reform. However, the constitutional proposals and amendments have been delayed and attacked by the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, the Judges’ Association of Serbia, the Lawyers’ Committee for Human Rights, the Judicial Research Centre and the Belgrade Centre for Human Rights for the possibility to “*strengthen political influence on the judiciary*” and the consultation process among stakeholders have not been transparent<sup>73</sup>. Nevertheless, the new government appointed in 2020, adopted new constitutional proposals that have received a favourable opinion from the Venice Commission in September 2021 with keys recommendations. Finally, amendments were passed after the successful national referendum in January 2022. The adopted text was this time praised by the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, as well as the Judges’ Association of Serbia (since their

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<sup>68</sup> R. JANSE, *Is the European Commission a Credible Guardian of the Values? A Revisionist Account of the Copenhagen Political Criteria During the Big Bang Enlargement*, in *International Journal of Constitutional Law*, Vol. 17, No. 1, 2019, p. 51; I. NEWTON, *The Copenhagen Criteria: Coping with Integration?*, in *Brussels Insider*, 10 April 2020.

<sup>69</sup> D. KOCHENOV, *Behind the Copenhagen Façade. The Meaning and structure of the Copenhagen Political Criterion of Democracy and the Rule of Law*, in *European Integration Online Papers*, Vol. 8, No. 10, 2004, p. 7.

<sup>70</sup> J.-W. MÜLLER, *Defending Democracy within the EU*, in *Journal of Democracy*, Vol. 24, No. 2, 2013, pp. 138, 142; R. JANSE, *op. cit.*, p. 45.

<sup>71</sup> As defined in the ECA Report and the EJC Judgment, 10 April 2020.

<sup>72</sup> Court of Justice of the European Union, Judgment of 29 April 2004, Case C-496/99 P, *Commission v CAS Succhi di Frutta*.

<sup>73</sup> European Court of Auditors, *Special Report*, *cit.*, p. 21.

representatives took part in writing of the text). For this reason, according to Freedom House, Serbia scores 3.79 out of 7 as in its Democracy score, and 46.43 in its Democracy percentage, thus Serbia is defined a transitional or hybrid regime. Considering constitutional and human rights protections, judicial independence, the status of ethnic minority rights, guarantees of equality before the law, treatment of suspects and prisoners, and compliance with judicial decisions in the country, Serbia scores 3.50 out of 7. However, there is still room for additional improvement and the need to reduce the risk of politicizing the High Judicial Council and High Prosecutorial Council<sup>74</sup>. For Montenegro, important reforms amid EU funding have been adopted, however, as noticed above, the question remains for their sustainability after the ending of the fundings. Questions of independence and autonomy were raised by the new launched bodies. 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<sup>75</sup>. Montenegro scores 3.25 out of 7 according to its judicial framework and independence. It declines due to growing dysfunction in the justice system as demonstrated by disruptions in the work of the Constitutional Court and Supreme Court along with Parliament's failure to appoint a new Minister of Justice and Prosecution Council for most of the year<sup>76</sup>. More important issues arise in Bosnia and Herzegovina, with regards to the construction and renovation of several court building. The EU contribution in infrastructure improvements has led to a significant impact on the efficiency of the courts and the judiciary<sup>77</sup>. However, the country scored quite poorly, 3 out of 7 according to Freedom House, because of a complex and inefficient system in which jurisdictions are not clearly delineated. Furthermore, courts are subject to political pressure. There are too many administrative levels and 10 cantonal court systems<sup>78</sup>. As mentioned above, due to the lack of political commitment in Albania, 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. Furthermore, it was noticed that Albanian 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. This follows the Council of Europe's criticism of the practice of the online media to spreading rumours and attacks on public figures<sup>79</sup>. Albania scores 3.25 out of 7. Notwithstanding Albania's judicial system continued the structural and institutional changes, and the above-mentioned vetting process for judges and prosecutors, as main component of the justice reform, out of 800 magistrates in Albania, 195 had passed the vetting process, 185 (including 118 judges and 67 prosecutors) had not passed; and 76 had resigned voluntarily. 113 Almost half of those who were dismissed could not justify their assets or had hidden their wealth, suggesting they had engaged in corrupt acts. The other half of the dismissed were done

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<sup>74</sup> Freedom House, *Transitional or Hybrid Regime, Serbia*, available at <https://freedomhouse.org/country/serbia/nations-transit/2022>.

<sup>75</sup> *Ibid.*, p. 31.

<sup>76</sup> Freedom House, *Transitional or Hybrid Regime, Montenegro*, available at <https://freedomhouse.org/country/montenegro/nations-transit/2022>.

<sup>77</sup> *Ibid.*, p. 27.

<sup>78</sup> Freedom House, *Nations in Transit 2022, Bosnia and Herzegovina*, available at <https://freedomhouse.org/country/bosnia-and-herzegovina/nations-transit/2022>.

<sup>79</sup> European Commission For Democracy Through Law (Venice Commission), *Announcement of the opinion on the Law on Audio-visual Media Services*, June 2020.

so based on lack of integrity or professionalism<sup>80</sup>. Finally, certain positive changes are registered in Kosovo, since the Judicial Framework and Independence rating improved from 2.50 to 2.75 due to renewed efforts to reform the judiciary and operational improvements across the justice sector<sup>81</sup>. North Macedonia scores 3.25 out of 7, because its judiciary is widely perceived as operating under political influence.

Another important principle mentioned by the ECA Report and the ECJ judgment<sup>82</sup> is the effective judicial protection and access to justice<sup>83</sup>. It is reported that corruption continue in all countries at issue. Based on Transparency International reports<sup>84</sup>, the Court reports that “*criminal justice systems often fail to investigate, prosecute, and sanction high-level corruption cases effectively. Those who are convicted often receive disproportionately light sentences*”. Furthermore, it is observed that governments in the Western Balkan countries have approved many laws favouring cronyism, with impacts including the award of privileged contracts, industry monopolies and the employment of poorly qualified public officials who will enable corruption<sup>85</sup>. The issue might be linked to the poor overall administrative capacity that appears to be endemic. Partner countries therefore do not show adequate commitment in terms of “*staffing, facilities, budgets and IT tools*”<sup>86</sup>. It is possible to link this principle to the transparency one, defined by the ECJ as accountability, democratic and pluralistic law-making process. However, as already mentioned above with regard to civic society, many gaps have been identified<sup>87</sup>. It is generally observed that in certain sensitive sectors such as public procurement, public administrations and organs remain trapped by corruption issues. For instance, in Serbia, the adoption of a recent Serbian law on special procedures for infrastructure projects, allowing in particular for projects of ‘strategic importance’ to be exempted from public procurement rules, has raised serious concerns about the potential for corruption<sup>88</sup>. The government was condemned by independent NGOs in Serbia on the practice of appointing “acting directors” to manage public property for a period of six months as enabling the governing party “*to keep those persons on a tight leash*”. According to Freedom House, corruption rating declined from 3.50 to 3.25 due to a series of scandals that point to links between state structures and ruling party officials on the one hand and organized crime on the other<sup>89</sup>. Similar problems were faced by Montenegro where corruption was “*prevalent in many areas and remains an issue of concern*”, and Albania where corruption in public procurement is pervasive, with clear indications of state capture: procedures often lack effective competition, the prices bid for public works are

<sup>80</sup> Freedom House, *Nations in Transit 2022, Albania*, available at <https://freedomhouse.org/country/albania/nations-transit/2022>.

<sup>81</sup> Freedom House, *Transitional and Hybrid Regime 2022*, available at <https://freedomhouse.org/country/kosovo/nations-transit/2022>.

<sup>82</sup> Court of Justice, *Hungary and Poland, cit.*, para. 18 (3).

<sup>83</sup> Court of Justice of the European Union, Judgment of 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses*, , paras. 31, 40 and 41; Court of Justice of the European Union, Judgment of 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, paras. 63-67.

<sup>84</sup> Transparency International: *Captured States in the Western Balkans and Turkey, Politicians and Their Networks Are Controlling Their Nations’ Affairs to Profit from Corruption with Impunity*, 11 December 2020.

<sup>85</sup> European Court of Auditors, Special Report, *cit.*, p. 11.

<sup>86</sup> *Ibid.*, p. 20.

<sup>87</sup> Cf. Section 3, pp. 7-10. Court of Justice, *Hungary and Poland, cit.*, para. 20 (a). “[...]the rule of law refers to the Union value enshrined in article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process”.

<sup>88</sup> European Commission’s Staff Working Document, *Serbia 2020 Report*, of 6. October 2020, SWD(2020) 352 final, p. 29.

<sup>89</sup> Freedom House, *Serbia, cit.*

inflated, and procurement for concessionary agreements lacks transparency<sup>90</sup>. Montenegro scored 3 out of 7 due to the impossibility to reform the prosecutor office seen as the main impediment to combat corruption, whereas Albania scores even more poorly, 2.75 out of 7, since the issue represents a serious concern in the country as a widespread phenomenon<sup>91</sup>. Corruption represents a plague in Bosnia, where Ongoing anticorruption activities were conducted mostly by NGOs and the media, while government institutions refrained from showing any interest or desire to tackle this long-standing and widespread issue. Anticorruption legislation remains largely unharmonized between the various levels of government, so any available anticorruption mechanisms are ineffective at best, compounded by the lack of political will. For this reason, the country scores 3 out of 7. Kosovo has the lowest rate, 2.25 out of 7. Corruption is persistent in Kosovo and requires substantial institutional efforts to achieve any results in this area. Although existing legislation provides sufficient means to address corruption, institutions fall short in implementation<sup>92</sup>. For North Macedonia, the corruption index is 3.35 out of 7. North Macedonia has accelerated its anticorruption efforts in recent years, yet corruption remains prevalent at all levels of government and administration.

Finally, there is a general lack of proper consideration for the role of CSOs, in both political dialogue and financial support, as criticised by Transparency International in its assessment of the 2018 Communication on enlargement<sup>93</sup>. Democratic participation and freedom of expression represent also core values of European identity. Despite not being explicitly named in the ECJ judgment, freedom of expression and free media are protected under the Charter of Fundamental Rights of the EU and it is embodied in the principle of pluralistic law-making process<sup>94</sup>. However, it is reported that attacks on journalists are a serious concern across the region. Journalists and media outlets continue to be targeted through intimidation, threats on social media and physical attacks, while investigations and prosecutions have been slow. The media scene continues to be highly polarised, and self-regulatory mechanisms remain weak. The growing volume of region-wide disinformation, often spread by state-backed media, further polarises society during electoral campaigns in particular<sup>95</sup>. The consequence is a negative impact on democratic process and trust in public institution and justice reforms. It undermines the decades of EU efforts to implement the rule of law in the Western Balkans. Notwithstanding the difficulties in the region, it appears that the Civil Society scores are higher than the previous indicators<sup>96</sup>.

## 6. Conclusions

The Article attempted to assess whether the Western Balkan countries might incur into the same rule of law issues that Poland and Hungary are facing in light of the rule of law tools provided by the EU. Moreover, the study assesses to what extent Western Balkan countries comply with the criteria established by the European Court of Justice in order to fulfil the criteria at the basis of the European Union identity. With regards to the former,

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<sup>90</sup> European Court of Auditors, *Special Report*, cit., p. 37.

<sup>91</sup> Freedom House, *Montenegro and Albania*, cit.

<sup>92</sup> Freedom House, *Kosovo*, cit..

<sup>93</sup> Transparency International EU, *The Western Balkans: Captured States or a Community of Law?*, 7 February 2018.

<sup>94</sup> Court of Justice, *Hungary and Poland*, cit., para. 18, sub-para. 3.

<sup>95</sup> European Court of Auditors, *Special Report*, cit., p. 39.

<sup>96</sup> See Freedom House scores for all Western Balkan countries.

it appears from the specific rule of law overview, yet not exhaustive, that Western Balkan countries might face important rule of law challenges that may delay their accession process and might create tensions when and if they become EU Member States. Most of the report and the experts blame the “*low levels of political will, institutional resistance to change, and inadequate participation or marginalisation of civil society*”<sup>97</sup>. Hence, it appears that without a strong political will the EU efforts for reforming is rather limited, ineffective and unsustainable. This is particularly true for the independence of the judiciary, the concentration of power, political interference, and corruption. However, positive developments are observed in Albania and North Macedonia<sup>98</sup>. It is therefore possible that the new “fundamentals first” approach might enhance the legal order context for finding common grounds among European partners, political forces, and civil societies. For this reason, the ECA Report invites the EU Commission to better support and empower the civil society of the Western Balkan countries. A so-called “bottom-up” approach can really create a change in the political environment to pursue the necessary reforms. In parallel, and avoiding similar past “appeasements mistakes”, the EU should also support the independence of the media for promoting a transparent and pluralistic society that can hold accountable the government for not having fulfilled its promises. An empowered civil society and free media might similarly play a role in promoting the image of the EU in a region that saw the support for the EU decreasing in the past decades. At the same time, the rise of external actors influencing the complex puzzle of the Western Balkan countries might again create the basis for worrying developments affecting the Union as a whole.

Finally, it appears that the Western Balkan countries are still far from having an “European Union identity” since they do not fulfil the conditions at the basis of that identity according to the Court in its 16<sup>th</sup> February judgment. This consideration does not imply that the Western Balkan countries do not share the same values with the other European Member States, however this topic deserve another study and goes beyond the scope of the Article.

### ABSTRACT

*The Article focuses on the rule of law situation in the Western Balkan countries, in light of the definition that the Court of Justice of the European Union (ECJ) provided on the 16<sup>th</sup> of February 2022. In this historical decision, the ECJ defined the rule of law as enshrined in Article 2 of the Treaty on the European Union, one the essential elements that constitute the European Union identity. Moreover, the rule of law is one of the values on which the European Union rests in its enlargement process, honouring its commitment to Western Balkan countries also as a question of EU credibility. For this reason, in recent years the European Commission has adopted a wide range of instruments for protecting the rule of law that has used against Hungary and Poland. Hence, in light of the most recent reports, the Article studies the possibility that the EU Commission might employ the same tools for protecting the rule of law in the Western Balkan countries as it has been doing with Hungary and Poland when and if these countries will be EU Member States.*

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<sup>97</sup> European Court of Auditors, *Special Report*, cit., p. 39.

<sup>98</sup> European Court of Auditors, *Special Report*, cit., p. 41.

THE RULE OF LAW AS A FUNDAMENTAL VALUE OF THE EUROPEAN UNION IDENTITY IN  
THE WESTERN BALKANS

**KEYWORDS**

*Corruption, European Union identity, judicial independence, rule of law, Western Balkan countries.*