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Measuring the rule of law:
The use of indicators in the EU enlargement policy towards Balkan countries

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by
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Graz, August 2014
Statement of Authorship

I hereby certify that this master thesis has been composed by myself, and describes my own work, unless otherwise acknowledged in the text. All references and verbatim extracts have been quoted, and all sources of information have been specifically acknowledged. This master thesis has not been accepted in any previous application for a degree.

Alexandra Kulmer

Graz, 30 August 2014
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<th>Full Form</th>
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<tr>
<td>AG</td>
<td>Advocate General</td>
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<td>art</td>
<td>Article</td>
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<tr>
<td>CARDS</td>
<td>Community Assistance for Reconstruction, Development and Stabilisation</td>
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<td>CEPEJ</td>
<td>European Commission for the Efficiency of Justice</td>
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<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<td>CoE</td>
<td>Council of Europe</td>
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<tr>
<td>CVM</td>
<td>Mechanism for Cooperation and Verification</td>
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<td>DAC</td>
<td>Development Assistance Committee</td>
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<td>DCI</td>
<td>Development Cooperation Instrument</td>
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<td>DG</td>
<td>Directorate General</td>
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<td>DPKO</td>
<td>Department of Peacekeeping Operations</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECHR</td>
<td>European Convention for Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EIDHR</td>
<td>European Initiative for Development and Human Rights</td>
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<tr>
<td>ENI</td>
<td>European Neighbourhood Instrument</td>
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<td>ENPI</td>
<td>European Neighbourhood and Partnership Instrument</td>
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<tr>
<td>ETC</td>
<td>European Training and Research Centre for Human Rights and Democracy</td>
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<td>EU</td>
<td>European Union</td>
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<td>FRA</td>
<td>European Union Agency for Fundamental Rights</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>HiiL</td>
<td>Hague Institute for the Internationalisation of Law</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>IPA</td>
<td>Instrument for Pre-Accession Assistance</td>
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<td>ISPA</td>
<td>Instrument for Structural Policies for Pre-Accession</td>
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<td>MFF</td>
<td>Multiannual Financial Framework</td>
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<tr>
<td>NGO</td>
<td>Non-governmental Organisation</td>
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<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>OJ</td>
<td>Official Journal</td>
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<td>OSCE</td>
<td>Organization for Security and Co-operation in Europe</td>
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<td>para</td>
<td>Paragraph</td>
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<tr>
<td>PHARE</td>
<td>Poland and Hungary Aid for Restructuring of the Economies</td>
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<tr>
<td>SAA</td>
<td>Stabilisation and Association Agreements</td>
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<td>SAP</td>
<td>Stabilisation and Accession Process</td>
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<td>SAPARD</td>
<td>Special Accession Programme for Agriculture and Rural Development</td>
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<tr>
<td>SJC</td>
<td>Supreme Judicial Council</td>
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<tr>
<td>TEC</td>
<td>Treaty establishing the European Community</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>WGI</td>
<td>Worldwide Governance Indicators</td>
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European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome, 4 November 1950

Treaty establishing the European Economic Community, signed in Rome, 25 March 1957


Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, signed in Brussels, 8 March 1993


Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [2001] OJ C80/01 (Treaty of Nice)


Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2005] OJ L26/3 (SAA Croatia)


Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Montenegro, of the other part, signed in Luxembourg, 15 October 2007 (SAA Montenegro)


Introduction

The rule of law is seen as a precondition and as a basis for respecting human rights, promoting democracy and also for a smooth economic development in states around the world. Therefore, promoting the rule of law has become a main subject in peace building, transitional justice and development programmes of many international organisations. It is regarded as a core mission by the United Nations (UN), the Council of Europe (CoE) and the European Union (EU). The quality of law making, access to justice and the independence and accountability of the judiciary are considered as key elements of the rule of law.

The rule of law is laid down as one of the foundational principles of the EU in the Treaty on European Union (TEU) and according to Article 21 TEU it is one of the main priorities for the Union’s external relations. As one pillar of the Copenhagen political criteria, the rule of law is now at the heart of the EU enlargement process and is referred to as a key principle in the Commission’s Enlargement Strategy. The EU has set strict requirements and has established a monitoring system for measuring the rule of law in enlargement countries. Countries aspiring to join the EU need to secure the rule of law by establishing core institutions and promoting judicial reforms, ensuring the independence, impartiality, efficiency and accountability of judicial systems. In many enlargement countries, the requested reforms also include the fight against corruption and organised crime. Also international organisations, like the UN, the CoE and the World Bank, have developed monitoring mechanisms for measuring the impact of their rule of law policies and actions. With regard to measuring the rule of law in the candidate and potential candidate countries, the EU has made use of the monitoring instruments of these organisations and has continuously improved its own assessment tools.

The master thesis deals with the question of how to measure the rule of law in the EU enlargement policy towards Balkan countries. To answer this question, the monitoring mechanism in place and the indicators used by the Commission to measure the rule of law in the EU enlargement countries are analysed. This analysis is conducted on the basis of a theoretical discourse on the rule of law as a principle in the EU internal and external policy and on the conceptual framework for rule of law indicators. Furthermore, the existing monitoring mechanisms developed by international organisations are investigated in order to identify basic principles for the use of indicators in rule of law measurement. Based on this theoretical background, the mechanisms and indicators applied by the Commission to measure the rule of law in the EU accession process are examined in three case studies of the
enlargement countries Bulgaria, Croatia and Montenegro. These three cases were selected for examination, as they reflect three different periods in the EU enlargement policy, and they show the consistent further development of the Enlargement Strategy that is guiding the accession negotiations. The progress assessments conducted by the Commission on the three countries are investigated with regard to the application of indicators for measuring the rule of law. Based on the findings of the case studies, general implications are derived and conclusions are drawn for the use of indicators in the EU enlargement policy towards Balkan countries.

Chapter 1 of the thesis examines the concept of the rule of law as a main policy goal of the EU in a descriptive manner with a special focus on the priorities set over time in the EU enlargement policy.

Chapter 2 describes the conceptual framework for identifying and developing indicators for the rule of law, considering possible challenges in the data analysis and exploring the available data sources and data collecting mechanisms. Furthermore, three existing indicator systems for measuring and observing the rule of law developed by international organisations are reviewed to define basic principles for the use of indicators to measure the rule of law.

The tools and mechanisms used to monitor and promote the rule of law in the EU enlargement policy are analysed on the basis of three case studies presented in chapter 3. The case studies of Bulgaria, Croatia and Montenegro review the indicators used for measuring the independence and accountability of the judiciary and access to justice in the accession process of these three countries. At the end of chapter 3, general implications for the use of indicators in the EU enlargement policy are derived from the case studies.

In the final chapter, conclusions are drawn and an outlook is given on the application of rule of law indicators in the EU enlargement policy towards the Balkan countries as well as for the promotion of the rule of law in the EU Member States.
1. Rule of law as a principle in the European Union

The EU is based on the adherence to fundamental rights, democracy and the rule of law. These principles are inherent to many of the legal texts and documents of the Union. However, before discussing the position of the rule of law in the European legal system, the different conceptions of the notion have to be examined. The rule of law is a complex concept. A variety of theoretical formulations can be identified in academia and among practitioners of different legal traditions. In scholarly literature, the notion of rule of law is explained basically through formal and thin conceptions or through substantial and thick conceptions. In fact, these two categories are broad differentiations and there is a spectrum of alternative formulations, with fewer or more conditions and requirements. The formal theorist Raz defines two essential aspects of the rule of law

\[(1) \text{ that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it.}\]

In accordance with Raz’s definition, the formal conception of rule of law requires that government action must be authorized by law and that the laws must be capable of guiding the behaviour of its subjects. Based on the formal definition of the rule of law, Fuller and Raz describe some main formal principles, concerning the legal effect and enforcement of law. These principles require that all laws should be prospective, public promulgated, general, clear and relatively stable over time. There has to be consistency between the laws and the actual conduct of legal actors that is reviewed by the courts. The courts must be easily accessible. Open and fair hearings without bias as well as the independence of judiciary must be guaranteed. The formal conceptions of rule of law impose requirements only with regard to the form of legality the law must take and in terms of procedural law. However, they say nothing about the actual content of the law itself. In this regard, the formal conceptions make an analytical distinction between the ideal of the rule of law and the independent ideal of substantive justice.

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5 Raz (n 3) 214-19.
7 Janse, Sanchez Galera and Liivoja (n 1) 11.
Substantive theories include various specifications on the content of the laws that are added to the formal elements. The realisation and enforcement of a democratic order, justice and fundamental rights are inherent elements of the substantive definitions of the rule of law. These substantive definitions may range from versions with fewer or more substantive elements.  

Various formulations can not only be found in academia, but also in the legal texts of international organisations active in promoting the rule of law. These conceptions reflect the different mandates or purposes of the organisations at the international level. The EU has determined the rule of law as an essential principle and foundational value, nevertheless, no uniform definition of the notion is given in its legal documents. Similarly, the UN and the CoE as well as the Organisation for Security and Co-operation in Europe (OSCE) have issued different rule of law conceptions within their documents and legal texts that range from formal to substantive notions. All of these organisations present the rule of law as an essential principle for sustained economic development and the protection of human rights. In a joint statement issued by the CoE, the UN and the OSCE with participation of the EU in 2005, these organisations are demonstrating their common interest in promoting the rule of law as “a prerequisite for maintaining and building peace, consolidating democracy and promoting sustainable development.” This document demonstrates a common understanding of the rule of law and indicates that a substantive and holistic conception is promoted by all of these organisations. The Secretary-General of the UN describes the rule of law as a substantial concept:

“[R]ule of law [...] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”

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8 Tamanaha (n 2) 91.
9 Janse, Sanchez Galera and Liivoja (n 1) 28.
In the European Commission for Democracy through Law (Venice Commission) the CoE adopted a consensual definition of the rule of law that should allow a practical application and expanded the formal conception of the rule of law by several other elements. The substantial definition of the rule of law provided by the Venice Commission includes:

“(1) Legality, including a transparent, accountable and democratic process for enacting law (2) Legal certainty (3) Prohibition of arbitrariness (4) Access to justice before independent and impartial courts, including judicial review of administrative acts (5) Respect for human rights (6) Non-discrimination and equality before the law.”

In its Communication “on a new EU Framework to strengthen the Rule of Law”, the Commission makes reference to this definition that reflects the “important but not exhaustive common and generally shared traits of the rule of law” in the Union. This master thesis follows this definition of the rule of law, compromising the elements as described above. However, the limited scope of the master thesis does not allow for a comprehensive examination of the use of indicators to measure all the rule of law elements inherent to this substantial conception. Therefore, the analysis conducted in chapter 3 is rather focused on the measurement of the judicial system as a core element of the rule of law. In particular, the independence and accountability of judiciary and access to justice are in the centre of the analysis, while other elements are only covered in a general overview.

The following sections are examining the tradition of the rule of law within the EU as an internal principle, as a principle in the EU’s external policy and as criterion for the accession of new Member States.

1.1. The rule of law as an internal principle of the EU

The rule of law as an internal principle of the EU derives from the law of the EU, from the jurisdiction of the Court of Justice of the European Union and from national doctrines. Based on these sources, there appears an EU supranational concept of the rule of law that can be described “as a constitutional principle of the European Union”.

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Initially, the EU primary law did not contain any explicit reference to the rule of law.\textsuperscript{17} The concept was first mentioned by the Court of Justice in the judgment ‘Les Verts’, where the rule of law was determined as one of the fundamental principles of the constitutional framework of the European Community (EC). In its judgement the Court emphasized:

\begin{quote}
"the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."
\end{quote}

The treaty amendments following this judgement – the Maastricht Treaty of 1992,\textsuperscript{18} the Amsterdam Treaty of 1997\textsuperscript{20} and the Nice Treaty of 2001\textsuperscript{21} – have led to the inclusion of multiple references to the rule of law in the EU’s primary law. The rule of law was referred to in the Preamble of the TEU as one of the common principle of the contracting parties. With the Treaty of Amsterdam, an important provision was inserted into the new Article 6 TEU, which provided that the Union is founded on the rule of law, a principle that is common to the Member States. According to the European Court, this principle is, therefore, a criterion for assessing the legality of the actions of its institutions and of the Member States in matters for which the Union has jurisdiction. In his opinion to the case ‘Gestoras Pro Amnistia’, Advocate General (AG) Mengozzi argued

\begin{quote}
"if the Union is based on the principle of the rule of law (Article 6(1) EU), its institutions and the Member States of which it is composed cannot be exempted from judicial review of the compatibility of their acts with the Treaty, in particular Article 6(2) EU, even where they act on the basis of Titles V and VI of the EU Treaty."
\end{quote}

The Treaty of Amsterdam has also introduced the development of the Union as an “area of freedom, security and justice”, where mutual recognition and mutual trust evolved as the main principles in order to guarantee the protection of individual rights and to enhance judicial cooperation. EU policies in the area of the rule of law, democracy and fundamental

\textsuperscript{17} The Treaty establishing the European Economic Community, signed in Rome, 25 March 1957 did not mention the rule of law as an underlying principle.
\textsuperscript{22} Case C-345/04 P Gestoras Pro Amnistia and Others v Council [2007] ECR I – 1631, Opinion of AG Mengozzi, para 77.
rights were aimed to maintain and further develop the Union as an area of freedom, security and justice. This objective became the framework for the EU action in the field of justice and home affairs.23

Furthermore, the Amsterdam Treaty has led to the inclusion of a provision that allows for sanctions against a Member State in case of a serious and persistent breach of the values laid down in ex Article 6 TEU. The entry into force of the Nice Treaty also gave the Union the capacity for preventive action in the event of a clear threat of a serious breach. Article 7 TEU still constitutes one of the core legal instruments for such situations. Not only member states’ actions when implementing EU law are covered by Article 7, but also areas, where member states act autonomously. The European Commission, the European Parliament and the Member States are conferred the power to monitor the rule of law in the EU and identify potential risks.24 The EU institutions are supported in their duty to monitor fundamental rights and the rule of law by the European Union Agency for Fundamental Rights (FRA), founded in 2007. The FRA assists EU institutions with expertise based on objective, reliable and comparable data on the situation of fundamental rights in the Member States. However, the reporting of the FRA is limited to those areas, falling within the scope of EU law.25 The mechanism of Article 7 is based upon political persuasion, but also has a punitive dimension. Possible sanctions foreseen within the Article 7 mechanism involve the suspension of certain rights, such as the voting rights of the representatives in the Council.26 In its Communication of 2003, the European Commission as the guardian of the Treaties stated its intention “to exercise its new rights in full and with a clear awareness of its responsibility.”27 However, as the Commission did not establish any centralised monitoring tools to evaluate respect of human rights or rule of law, there was no clarity, on how to make the Article 7 mechanisms operational. So far, Article 7 has never been used in practice and the mechanism is considered as a last resort solution28 by EU policy-makers.

24 Sergio Carrera, Elspeth Guild and Nicholas Hernanz, The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism (CEPS Paperbacks 2013) 5-6.
26 Carrera, Guild and Hernanz (n 24) 7.
28 In his speech on the State of the Union on 11 September 2013 Commission President José Manuel Barroso called the Article 7 mechanism a “nuclear option”.
With the entering into force of the Lisbon Treaty on 1 December 2009,\textsuperscript{29} the reference to the rule of law as foundational principle of the Union was included in the new provision known as Article 2 TEU, which provides that:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

Even though multiple references to the rule of law can be found in the Treaties, the term is nowhere defined in the EU primary law. Article 2 TEU includes an explicit linkage of the EU’s constitutional system with the traditional values of the Member States. In this system, the rule of law is presented as a value that is common to the EU Member States. Despite the constitutional traditions and the persistence of some significant differences, these national interpretations can be a useful guidance to identify a European meaning of the rule of law.\textsuperscript{30} The EU assumes a rather substantive conception of the rule of law, as in the EU’s constitutional framework the rule of law is always mentioned in conjunction with the principles of democracy and respect for fundamental rights. The “renewed EU fundamental rights framework”\textsuperscript{31} that has been introduced with the entering into force of the Treaty of Lisbon constitutes a new reference point for a substantive meaning and the content of the rule of law in the EU. The new Article 6 TEU gives the Charter of Fundamental Rights of the European Union\textsuperscript{32} the same legal value as the Treaties establishing the European Union and makes reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The rule of law and the right to a fair trial are enshrined in Article 6 of ECHR and in Article 47 of the Charter of Fundamental Rights of the European Union. Based on the provisions of these Articles, the judiciary must be independent and impartial and everyone shall be entitled to fair and public hearings within a reasonable time. The guarantee of legal aid shall ensure effective access to justice. Article 6 connected with Article 14 of the ECHR and Article 47 connected with Article 21 of the Charter of Fundamental Rights of the European Union also provide for equal treatment and fair trials free from discrimination, applicable to both, civil and criminal procedures. In this way, judges

\textsuperscript{30} Pech, “The Rule of Law as a Constitutional Principle of the European Union” (n 16) 41.
\textsuperscript{31} Carrera, Guild and Hernanz (n 24) 1.
and prosecutors are bound by the imperative of equal treatment. The Member States must fight corruption effectively, as it threatens equal treatment and the rule of law. The equal treatment imperative requires formal equality in the access to justice, in front of the law and through the law and, therefore, is not only binding on the jurisdiction but also on the legislation. Other articles of the Convention and the Charter include references to citizens’ rights and rights for political participation. According to Article 51 of the Charter of Fundamental Rights of the European Union, democracy, respect for human rights and the rule of law are binding on the Union institutions in the exercise of their powers and on the Member States when they implement EU law.

With the coming into force of the Treaty of Lisbon and the recognition of the Charter of Fundamental Rights of the European Union, the rule of law and access to justice became core themes of the monitoring activity of the FRA. A new debate on how to monitor and safeguard the rule of law in the EU and its Member States has started among institutions, when the EU has been confronted with Member States’ deficiencies in protecting the rule of law on several occasions. The Roma crisis in France in 2010, the democratic crisis in Hungary starting at the end of 2011 as well as the Romanian constitutional crisis in 2012 have emerged to “a true ‘rule of law’ crisis” in the EU and led to discussions among the EU institutions. These challenges as well as the creation of new indicators and assessment mechanisms in order to safeguard the rule of law and fundamental rights were discussed in the 2013 FRA symposium on promoting the rule of law in the EU. In its resolution of 3 July 2013, the European Parliament calls on the Commission as the guardian of the Treaty to create an independent monitoring mechanism and an early-warning system. These instruments should make sure that any potential risks of serious breach of Article 2 values are addressed at an early stage through a structured political dialogue with the relevant Member State. Based on the revisited request of the Justice and Home Affairs Council and the European Parliament for a

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37 Council of the European Union, ‘Conclusions of the Justice and Home Affairs Council Meeting’ (Luxembourg, June 2013).
collaborative and systematic method to tackle these issues, the Commission has set out a “new framework to ensure an effective and coherent protection of the rule of law in all Member States”\(^\text{39}\) in 2014. This new framework shall address and resolve future threats to the rule of law in Member States, before the conditions for activating the mechanisms foreseen in Article 7 would be met. The framework establishes a three stage process, focusing on a diplomatic solution through dialog with the Member State concerned. So the “new EU Framework to strengthen the Rule of Law” precedes and complements the Article 7 mechanisms and is an addition to the infringement procedures foreseen under Article 258 TFEU.

1.2. The rule of law as a principle in the external policy of the EU

For a long time, the EU international relations have been focused on economic cooperation, while the promotion of democracy, human rights and the rule of law were neglected, and there was hardly any integration of the Member States external policies into a broader EU context. The promotion of the rule of law has become a major objective of the EU external action since the end of the Cold War.\(^\text{40}\) With the establishment of the EC, the rule of law was not only referred to as a common foundational principle, but was also incorporated as a transversal objective for the Community policy in the field of external relations and development cooperation. The objectives of developing and consolidating democracy, the rule of law and respect for fundamental rights have been assigned to the EU’s foreign and security policy in Article 11 TEU and to the policy of development cooperation in Article 177 (2) of the Treaty establishing the European Community (TEC), now incorporated in the new Article 21 TEU. The wording of Article 21 TEU commits the EU to pursue the principles of democracy, the rule of law and human rights in its external actions and to develop relations, build partnerships and define common policies and actions in order to support these principles. This provision makes the EU one of the most committed state-based actors to promoting these principles abroad. The EU engages in promoting this value in a variety of ways. The applicable instruments range from soft instruments, like human rights dialogues, via technical and financial assistance programmes, to bilateral cooperation agreements and rely on different mechanisms, like persuasion, capacity-building or coercive means.\(^\text{41}\)

\(^{39}\) COM (2014) 158 final, 3.
\(^{41}\) ibid 25.
In 1994, the European Parliament launched the European Initiative for Development and Human Rights (EIDHR) as a comprehensive strategy for the EU’s efforts in developing and consolidating democracy and the rule of law in third countries. Two Council Regulations\(^{42}\) adopted in 1999 provided the legal basis for the activities carried out under the initiative. The EIDHR complemented the Community Programmes carried out with governments and the objectives of the Common Foreign and Security Policy. In May 2001, the Commission adopted a communication on the EU’s role in promoting human rights and democratisation in third countries with the goal to assume a more strategic approach for the EIDHR.\(^{43}\) In its conclusions of 25 June 2001, the Council\(^{44}\) welcomed the Commission communication and reaffirmed its commitment to strengthening the coherence and consistency between Community action, the Common Foreign and Security Policy (CFSP) and development policy through mainstreaming of human rights and democratisation into EU external policies and actions. The EU considered the rule of law as a prerequisite for stability and for economic and social development. Therefore, the rule of law became an essential element of the EU’s agreements with third countries.\(^{45}\)

In the technical and financial assistance for poverty reduction and democratisation in third countries and to foster global security, the rule of law is a key element. This is why the rule of law is one of the six priority areas for the EU development policy.\(^{46}\) Following the expiry of the Council Regulations of 1999,\(^{47}\) the EIDHR was replaced by a financing instrument for the promotion of democracy and human rights worldwide.\(^{48}\) The European Instrument for Democracy and Human Rights complemented other instruments such as the European Neighbourhood and Partnership Instrument (ENPI) and the Development Co-Operation


\(^{47}\) The Council Regulations 975/1999 and 976/1999 of 29 April 1999 both expired on 31 December 2006.

Instrument (DCI), which provide assistance through bilateral development cooperation, or the Instrument for Pre-Accession Assistance (IPA), specifically aimed at actual and potential candidate countries. The instruments adopted in 2006 for the period 2007 to 2013 invariably reflect the EU’s objective of promoting and consolidating the values of democracy, the rule of law and respect for human rights in its relations with third countries. In his opinion to the case ‘Gestoras Pro Amnistia’ AG Mengozzi argued that the rule of law has “an ‘external’ dimension, as a value to be ‘exported’ beyond the borders of the Union by means of persuasion, incentives and negotiation.” In June 2012, the Council adopted the EU Strategic Framework and Action Plan on Human Rights and Democracy, emphasizing the importance of human rights, democracy and the rule of law as basis for sustainable peace, development and prosperity in the world. According to the Strategic Framework, the human rights based approach shall be applied in all areas of external action and development cooperation to assist partner countries in the implementation of international human rights obligations.

In December 2013 the new Multiannual Financial Framework on the External Action Financing Instruments was presented as part of the EU Multiannual Financial Framework (MFF) for 2014-2020. The MFF allocates the EU budget that is agreed for seven years to the EU’s political priorities. In the field of external action the EU is focusing its work on the four policy priorities, namely enlargement, neighbourhood, cooperation with strategic partners and development cooperation. One of the main underpinning principles of the external instruments for the period is a greater focus on human rights, democracy and good governance. When it comes to allocating and disbursing funds to partner countries, the EU will take greater account of these values and will aim for donor-recipient mutual accountability. The emphasis on the rule of law is mainly represented in the European Neighbourhood Instrument (ENI), the DCI and the IPA.

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53 Further financial means are made available outside of the EU budget through three more instruments for the development cooperation with African Caribbean and Pacific countries and Overseas Countries and Territories for nuclear safety cooperation and for Greenland.
1.3. The rule of law as criterion for the accession of new Member States

The principles of democracy and respect for fundamental rights have always been decisive elements for accession to the EC and later the EU. Together with the willingness to accept the fundamental objectives of the Union and the capacity to adopt the entire body of legislation (*acquis communautaire*), these principles were at the heart of the conditions imposed on new Member States in the first enlargement rounds. The end of the Cold War opened up new perspectives for enlargement to the post-communist countries of Central and Eastern Europe. This was the first time that immediate accession was denied to applicant countries due to an insufficient level of development and capacity to implement the acquis. There were heavy concerns, as the functioning of the internal market and mutual trust among Member States rely on the compliance with the rules and credible commitments of all members. These concerns led to imposing strict conditions for EU accession. Therefore, the EU policy towards the Central and Eastern European countries is commonly described as a policy of conditionality. The desire of these countries to join the EU in combination with a need for effective solutions to domestic policy challenges have provided strong incentives for the target governments to comply with the imposed obligations. Contrary to the former accessions, the candidate countries of the fifth enlargement round were not granted the right to opt-out from any EU policy.

With the establishment of the European Union by the Treaty of Maastricht, it became necessary to identify general criteria that have to be fulfilled by countries in order to be eligible for EU accession. At the Copenhagen meeting in 1993, the European Council has agreed on objective criteria required for EU membership – the so called “Copenhagen Criteria”. The guarantee of the rule of law is one of the key elements identified as the political criteria for EU accession. Besides the economic criteria and the criteria concerning the adoption of the acquis communautaire, membership requires that the candidate country has achieved “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.

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57 Veebel (n 55) 223
59 European Council, ‘Conclusions of the Presidency’ (Copenhagen, June 1993) para 7 (A) (iii).
The formal use of the rule of law as a principle in EU accession was brought about by the Treaty of Amsterdam. Article 49 TEU constitutes the legal basis for any accession of new Member States. According to Article 49 TEU, all European countries can apply for membership of the EU. However, the applicant country must adhere to the values referred to in Article 2 TEU (ex art 6 TEU) in order to join the EU. Even though the Copenhagen criteria are not explicitly mentioned, Article 49 TEU refers to these conditions by stipulating that “[t]he conditions of eligibility agreed upon by the European Council shall be taken into account.”

While the association of East and Central European countries had proven to be a successful step towards integration, EU relations towards Balkan countries experienced several difficulties.\(^{60}\) The countries in the post-conflict situation experienced a range of very specific problems and were unable to develop good governance practices on their own behalf. Eliminating corruption, promoting human rights, encouraging the exercise of citizen rights and the protection of minorities are, therefore, fundamental tasks of the reform agenda in these countries. Very specific efforts are needed to establish and uphold rule of law in such settings.\(^{61}\) The EU has become the prime state builder in the Western Balkans. The transfer of the mechanism of conditionality to state-building projects has led to tensions between the accession conditionality and the efforts to end political conflicts.\(^{62}\) To deal with the history of ethnic antagonism, unstable economies and widespread corruption, the EU integration policy emphasized stabilisation and regional cooperation on the Balkans. The willingness to re-establish good neighbourly relations and economic cooperation with one another was a precondition for the countries to proceed in the accession progress and to access financial assistance.\(^{63}\)

In 1999, the EU launched the Stabilisation and Association Process (SAP) as a more comprehensive and individualized framework for Balkan countries to make further progress on their way to EU membership. The instruments covered by the SAP continue to depend on compliance of each country with the general and specific conditions set out by the EU.\(^{64}\)

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\(^{60}\) Bislimi (n 58) 40-41.


importance of the Copenhagen criteria in the accession of new Member States was emphasized in the Thessaloniki Summit in 2003, where all Western Balkan countries were granted the perspective of EU membership subject to fulfilment of the necessary conditions. The use of conditionality is a very powerful tool to export the values on which the EU is founded.\(^{65}\) The Copenhagen criteria reflect these values and are a cornerstone in the EU’s enlargement policy towards Western Balkan countries.

In the context of EU enlargement it is critically important for the EU institutions to have a clear idea about the status of the rule of law, justice and fundamental rights in the applicant countries.\(^{66}\) Therefore, the fulfilment of the political criteria and the adoption, implementation and application of the acquis are continuously assessed during the accession negotiations, and the Commission issues regular monitoring reports on each candidate country. These continuous assessments are intended to make sure that the countries are prepared to meet their obligations as Member States, once they join the EU. The acquis is divided into negotiation chapters, each of which corresponds to a different area of EU legislation and policy.\(^{67}\) EU policies aimed to maintain and further develop the Union in the area of the rule of law and democratic governance are now covered by chapter 23, judiciary and fundamental rights, and chapter 24, justice, freedom and security. These chapters are now at the centre of the negotiation process. Member States must ensure respect for fundamental rights and a solid legal framework, providing for reliable institutions and an independent and efficient judiciary, guaranteeing fair trial procedures. Equally, the fight against corruption and organised crime must be ensured. Together with the Copenhagen political criteria, chapters 23 and 24 are essential for safeguarding and developing the rule of law in enlargement countries.\(^{68}\)

A proper functioning judiciary is one of the core elements to ensure the realisation of the rule of law and of human rights. Especially in the context of the enlargement process with the Central, Eastern and South-Eastern European countries, the reform of the judicial system in candidate countries has a twofold function. On the one hand, an independent, impartial, accountable and effective judiciary is a necessary precondition to ensure respect for the values named in Article 2 TEU at the domestic level of the candidate country. On the other hand, the

\(^{65}\) Spreeuw (n 23) 8.
effective operation of the judiciary has to be secured upon accession because of the special function the national courts have as part of the Union judiciary in applying the acquis. 69

Most of the enlargement countries are facing a number of key challenges and need to go through major reforms, as necessary legislation and institutions have to be put in place to fully assume the obligations of EU membership. The EU has designed several instruments and programmes to support the enlargement countries in their reforms. Since 2007, the IPA grants funds for both, candidate countries and potential candidates to support reforms with financial and technical means, building up the capacities of the enlargement countries. IPA has replaced the former programmes PHARE, ISPA, SAPARD, CARDS and the specific pre-accession instrument for Turkey as one single instrument. 70

Through IPA over € 800 million pre-accession assistance has been provided in the period 2007 to 2013 to improve the justice sector, independence of judiciary, fight against corruption and organised crime as well as border management and security. Furthermore, the functioning of institutions guaranteeing democracy has been supported by over € 30 million pre-accession assistance, provided to enhance the capacity of national parliaments, ombudsmen and audit institutions as well as € 190 million to support civil society organisations. 71

After the expiry of IPA in 2013, IPA II was launched as the second Instrument for Pre-Accession Assistance. 72 The EU continues to provide substantial support for the preparation of accession in order to support for political reforms in the enlargement countries, inter alia through strengthening democracy and the rule of law. 73 Regional cooperation and mutual trust in the field of justice and home affairs are still key priorities of the EU’s policy towards the Western Balkans. Through IPA II, the Commission aims to strengthen the rule of law by developing sector strategies with a particular focus on independent, efficient and professional judiciaries and effective law enforcement bodies. Democratic governance shall also be supported through IPA II by public administration reform and capacity building of civil society. 74

73 Reg 231/2014, art 2 (1) (a) (i).
74 COM (2013) 700 final, 7-9.
2. **Indicators for measuring the rule of law**

Indicators describe and compare situations that exist. Indicators can be used to monitor compliance with obligations and objectives to be achieved. Furthermore, indicators are a planning tool and can be used to assess progress towards specific goals, to track changes over time and to draw comparisons between places. In this way, indicators can function as an accountability mechanism and early warning instrument to identify problems in many areas of public policy. Indicators are also being deployed to measure the impact and success of particular rights-based development programming on the specific beneficiary.\(^{75}\) Depending on the policy area addressed or field of application, the definition of the term can vary. In the glossary of key terms the OECD Development Assistance Committee defines an indicator as a

> “[q]uantitative or qualitative factor or variable that provides a simple and reliable means to measure achievement, to reflect the changes connected to an intervention, or to help assess the performance of a development actor.”\(^{76}\)

According to the definition of the United Nations Development Programme (UNDP), indicators are a “device for providing specific information on the state or condition of something.”\(^{77}\) In the guidelines for defining indicators for human rights of the Danish Institute for Human Rights the authors opt for a broader definition of the term and in their definition, indicators are seen to capture more than a particular trait of social reality:

> “Indicators are data used by analysts or institutions and organizations to describe situations that exist or to measure changes or trends over a period of time. They are communicative descriptions of conditions or of performance that may provide insights into matters of larger significance beyond that which is actually measured.”\(^{78}\)

Also, the Office of the United Nations High Commissioner for Human Rights (OHCHR) applies a similar broad definition of the term in its Guide to Measurement and Implementation of Human Rights Indicators.\(^{79}\) In the field of the rule of law, indicators are a powerful tool to identify important actors and to hold them accountable for their actions by linking the

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\(^{75}\) DPKO and OHCHR, ‘Rule of Law Indicators Implementation Guide and Project Tools’ (UN 2011) 1.


normative level of legal obligations with empirical data reflecting the implementation practices. To be a useful monitoring tool, they need to be explicitly and precisely defined and should be based on an acceptable methodology of data collection and presentation. Based on general guidelines for the identification of indicators, this chapter describes the conceptual framework for measuring the rule of law, considering possible challenges in data collection and data analysis. Existing mechanisms for measuring the rule of law developed by international organisations, like the World Bank, the CoE, the UN and the EU, are reviewed to identify basic principles for the use of rule of law indicators.

2.1. The conceptual framework for identifying rule of law indicators

Only well-defined, contextually meaningful indicators can effectively underpin data-driven policy development for the promotion of the rule of law. Such indicators need to be well constructed, suitable and provide valid and reliable measures for the context being studied.

2.1.1. What to measure?

Measuring the rule of law is considered difficult, as the underlying concept is complex. The precise definition of the notion is an important prerequisite of constructing indicators and requires a coherent and parsimonious formulation of the concept. As discussed in chapter 1, there is a variety of theoretical formulations for the rule of law that leads to competing and conflicting ideas for measuring the rule of law. When identifying a set of indicators for measuring the rule of law, the objectives of its usage have to be considered. Depending on the conception and purpose of the measurement, different methodologies and tools can be used to analyse either the overall situation in terms of general trends within a country or to determine the performance of a specific government or the practical situation on the ground. Following a human rights centred approach, the focus of the rule of law measurement shall be the practical experience of the rule of law by individuals, while the normative framework shall be used as a common reference.

81 OHCHR ‘Human Rights Indicators’ (n 79) 44.
84 Todd Landman, ‘Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance’ (Human Rights Centre, University of Essex 2003) 3-4.
Only indicators showing contextual relevance can be useful as monitoring tools. The contextual relevance of indicators is of special importance for monitoring the rule of law in enlargement countries, as the different levels of realisation of the rule of law have to be considered in the assessment. Indicators designed to attain global coverage tend to have a higher level of abstraction and may not provide the required level of differentiation to be applied for the EU’s rule of law analysis. The measures provided through indicators may be helpful for obtaining a diagnosis and exploring causal relations, when combined with other tools and analysis of other variables, providing additional information on the country’s situation, like the economic performance, demographic development or level of migration. However, a misinterpretation of the data could lead to erroneous conclusions and wrong guidance for policy makers.

2.1.2. What type of indicators?

Indicators can either be quantitative or qualitative. Quantitative indicators are equivalent to statistics and can be expressed in numbers, percentages or proportions, while qualitative indicators cover any narrative or categorical form of information. Compared to quantitative data, qualitative indicators are often criticised for a lack of reliability and comparability. Still, they can be applied to measure complex concepts, where purely quantitative indicators often miss the broader context. In the field of human rights, democracy and the rule of law the information covered by indicators often goes beyond pure statistics. Qualitative information coming from checklists or questionnaires can be used to complement the interpretation of quantitative indicators. Reciprocally, quantitative indicators can elaborate qualitative evaluations by providing statistical information.

Depending on the information content of the source of data, rule of law indicators can be categorized either as fact-based, objective indicators or as judgement-based, subjective indicators. Objects, facts or events that can be directly observed or easily verified are categorized as objective indicators. Subjective indicators are based on opinions, perceptions, assessments or judgements expressed by individuals. However, also in the category of

88 OHCHR ‘Human Rights Indicators’ (n 79) 16.
89 Gramatikov and Frishman (n 66) 17.
91 OHCHR ‘Human Rights Indicators’ (n 79) 17.
objective indicators, elements of subjectivity cannot be fully excluded, as the selection of the indicators and consequently the indicator results are based on subjective assumptions and choices. Therefore, the use of clear, specific and universally recognized definitions is of great importance for the identification and the design of any type of indicator. Moreover, the methodology and criteria applied for the identification of indicators have to be transparent and well documented. Subjective indicators applied for measuring the rule of law are prone to concerns of validity and bias, as they do not necessarily capture the underlying reality but are representing the perception of a specific group of respondents.

According to what is the aim of measurement, indicators can be classified in structural, process and outcome indicators. Structural indicators reflect the ratification and adoption of legal instruments in national law as well as the allocation of necessary resources and existence of institutional mechanisms to assist the realization of the concerned right. In this way structural indicators measure the de jure protection of specific rights. The policy framework and strategies relevant to the existence of laws, treaties and legislative agreements need to be considered by structural indicators as well. Process indicators measure how policies contribute to a specific objective and can be defined in terms of concrete cause-and-effect relationships. Process indicators relate policy instruments with milestones that cumulate into outcome indicators, measuring the attainment of an objective and de facto realization of a right. Progress indicators can be used to monitor the progressive realization and fulfilment of a right, reflecting the state’s effort in policy implementation. These indicators are more sensitive to capturing momentary changes, while outcome indicators are often slow-moving indicators that consolidate the impact of policy instruments over time. Outcome indicators are used to measure the results and, therefore, are determined by a combination of structural and process indicators. Based on outcome indicators, benchmarks can be defined as predetermined values, setting specific obligations to be achieved over a period of time. A prerequisite, in identifying a meaningful benchmark, is to select appropriate indicators for the assessment and to have a clear view on what the indicators indicate. A further distinction can be drawn between outcome and impact indicators. Outcome indicators measure the results at the level of beneficiaries, while impact indicators measure the objective at national level.

92 Markus Möstl, Alexandra Stocker and Klaus Starl, ‘Monitoring Racism and Discrimination at the Local Level’ (European Cities against Racism Project, ETC Graz 2013) 9.
94 see Landman ‘Map-Making and Analysis’ (n 84) 5ff and OHCHR ‘Human Rights Indicators’ (n 79) 33ff.
2.1.3. How to ensure quality in measurement?

When developing indicators, different criteria can be taken into consideration to ensure quality in measurement. Based on the SMART criteria, indicators must be specific, measurable, attainable, relevant and time-framed. For indicators to be specific and measurable, it is necessary that they are precisely defined and verifiable. The collection and measurement of the required data must be attainable, and the indicators must provide information relevant in relation to the specific goal of measurement. For an indicator to be time-framed, it must be clearly indicated, when and how often the indicator shall be reported and when change is expected. Not all of these requirements are always respected in practice and depending on the type of indicator, certain criteria can be neglected. The use of qualitative indicators in some cases implies less restrictive requirements in terms of measurement and specificity. However, an overall good standard of indicator determination shall be respected, when developing indicators. The quality of measures with regard to statistical adequacy is evaluated in terms of validity, reliability and bias. Reliability of an indicator refers to whether the estimate or the value of an indicator is consistent, if the employed data-generating mechanism is repeated. The reliability is affected by biases in the data-generating mechanism, resulting from misspecification of definitions or questions, apprehensions of the respondents or non-representativeness of the sample. Validity refers to the truthfulness of information provided by the value or estimate of an indicator. In other words, the criterion of validity requires that the indicator effectively measures the concept, which it is supposed to measure. The notion of validity includes among other dimensions the content validity, constructive validity and predictive validity.

The elements of the rule of law are complex concepts and, therefore, cannot be measured unambiguously with one indicator alone. Various components have to be aggregated to multidimensional measures or indices by cross-checking several indicators in order to reduce ambiguity. Through aggregation, the individual indicators can produce “higher-level measures” of complex concepts, like accessibility, accountability or efficiency of judiciary. The efficiency of judiciary can, for instance, be approximated through the measurement of clearance rates, caseloads and average time to disposition. In this way, the indicators for the rule of law are often quite imperfect proxies for measuring the underlying complex concepts.

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96 Andersen and Sano (n 78) 12-14.
97 Malhotra and Fasel (n 90) 5.
98 Botero, Nelson and Pratt (n 87) 156.
100 DPKO and OHCHR (n 75) vi.
However, the use of proxy indicators can lead to less validity, since there might be a gap between the concept being measured and the indicators used to measure it.\textsuperscript{101} To provide comparative means, indicators can be aggregated to indices. Indices rely on composite information and there are several requirements that must be satisfied by indices to be both, reliable and valid. The reliability depends upon the quality of conceptualization and the rigor of the data collection. Also, the methods employed for aggregation, imputation, weighting and normalization have to be considered with regard to the reliability of an indices.\textsuperscript{102}

### 2.1.4. How to apply indicators?

Rule of law indicators can be applied in different kinds of assessments. The descriptive assessment represents the basic form of indicator application. Monitoring and Evaluation entails a systematic collection of information, assessment and examination of the outcome, impact or effects. This may result in a set of policy recommendations. An impact assessment gives decision-makers evidence regarding the potential consequences and potential impact across social, economic and environmental dimensions and may reveal the advantages and disadvantages of alternative policy choices. Supervision aims at improvement of the system under assessment by combining monitoring and evaluation with potential intervention.\textsuperscript{103} Benchmarking is a management concept that aims at the improvement by comparison to an existing standard and, thus, creating new and even higher standards. A large number of rule of law reform initiatives make use of benchmarking methodologies to measure success, failure and progress against a certain performance standard. In the context of assessing the compliance of state parties, benchmarking is a useful tool, through which accountability can be exercised effectively.\textsuperscript{104} However, introducing benchmarking procedures is a quite challenging undertaking as it requires a clear definition of the underlying concepts and objectives, a decision on measurement methods and the selection of appropriate indicators and data sources. Intelligent benchmarking shall be based on a concrete, systematic and holistic approach, taking into consideration the underlying political, economic and social background of the performance standards against which the progress is to be measured.\textsuperscript{105}


\textsuperscript{102} see Michaela Saisana and Andrea Saltelli, ‘Rankings and Ratings: Instructions for Use’ (2011) 3 Hague Journal on the Rule of Law 247, 249-257.

\textsuperscript{103} Carrera, Guild and Hernanz (n 24) 16.

\textsuperscript{104} Thom Ringer (n 83)182.

2.2. Sources of data and data collecting methodologies

The most commonly used data sources and data collecting methodologies range from reviews of legislation and other documents, via administrative data and public or expert surveys, to event-based data. Depending on the scope of the rule of law conception to be measured, it may be appropriate to rely on a single data source or not. Drawing wide-reaching conclusions based on data from a single source might lead to systematic misinterpretation and the underlying concepts may be misrepresented. The use of diverse data sources usually makes indicators more robust and can yield to a more nuanced and complete picture, as the measures or a variety of sources are compiled.\(^{106}\) In the following sections the advantages and drawbacks of the most commonly used data sources are described.

2.2.1. Document review

One method of data generation is the review of legislation and other documents, including rulings and decisions of judicial institutions, such as courts or prosecutors, customary justice rules, administrative acts and reports from international organisations. By document review, the legal and legislative commitment of the state and its authorities with regard to the rule of law can be assessed. In this way, document reviews typically focus on the existence of laws, treaties and legislative agreements, rather than the practical implementation of it.\(^{107}\) The gap between the law on the books and the law in practice can only be detected by reviewing documents, describing the use of resources and public spending as well as reports of problems or abuses.\(^{108}\)

2.2.2. Administrative data

Administrative data can provide an important source of quantitative information. These datasets are routinely collected and compiled by the state through government authorities and may be stored as hard copies or computerized. They refer to national registers and administrative records, using standardized methodologies to collect information usually with reasonable reliability and validity. Administrative data capture a large amount of information related to administrative action and, therefore, are of prime importance to measure the fulfilment of obligations by the state. They can be applied for tracking institutional progress over time and for holding the state accountable.\(^{109}\) Analysing the administrative data

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\(^{107}\) OHCHR ‘Human Rights Indicators’ (n 79) 24.

\(^{108}\) Parsons (n 106) 174-75.

\(^{109}\) OHCHR ‘Human Rights Indicators’ (n 79) 56ff.
generated by state institutions can often lead to straightforward conclusions, if the records are complete and accurate. The accuracy of administrative data depends on the resources, provided to the agencies for maintaining these data, what could lead to fluctuations in the generated data over time. Another factor leading to possible biases in reporting is that administrative records do not measure the actual prevalence rate but only capture the official registered cases. Furthermore, there might be incentives to underreport certain activities or events that would negatively influence the performance record. As a result of these factors, the reliability of administrative databases to record the activities of state institutions in the field of the rule of law and provision of justice is still largely limited to developed countries. Especially in the context of rule of law assessment, administrative data can be supplemented by information collected by international institutions and alternative sources, such as public or expert surveys.\textsuperscript{110}

\textbf{2.2.3. Survey-based data and census}

Survey-based data can be generated by public surveys or by expert surveys. Public surveys are means of data generation to identify perceptions and experiences and can be used to check the credibility of administrative data. While public surveys collect direct quantitative or qualitative information from a selected subset of the population, a census is a complete record of all members of the population. A census provides baseline data on key characteristics of the population and allows for a highly disaggregated statistics. Therefore, census data can also be used for generating well-structured samples for public surveys, where complete enumeration is impracticable.\textsuperscript{111} Public surveys are usually designed to produce findings that can be generalized to the population. Large samples of the population are necessary to gather representative data, what makes the implementation of public surveys expensive.\textsuperscript{112} Expert surveys typically gather information from key informants that have specific experience or hold a professional position in the specific field of interest. Therefore, these surveys are suitable data sources for topics where specialized knowledge is required and shall reflect the expert understanding of a situation, rather than the personal experience of the respondents. The advantage of expert surveys is that conclusions can be drawn based on relatively small samples, what makes expert surveys less resource intensive than other survey methods.\textsuperscript{113} The results of public and expert surveys are very much dependent on the sample characteristics. A not representative selection of key informants for expert surveys can lead to a lack of validity

\textsuperscript{110} Parsons (n 106) 173-74.
\textsuperscript{111} OHCHR ‘Human Rights Indicators’ (n 79) 59-65.
\textsuperscript{112} Parsons (n 106) 176-78.
\textsuperscript{113} OHCHR ‘Human Rights Indicators’ (n 79) 24.
and reliability. The data gathered through expert surveys might not sufficiently represent experiences and priorities of marginalized or vulnerable groups, who are most likely to experience problems in accessing justice and lacking equality and fairness of the system as a whole. With regard to this, public surveys are particularly relevant as they capture directly the respondents’ views and provide an assessment of public opinion and perception. Especially in the field of the rule of law, the biases inherent in key informant surveys, administrative data and document reviews can be balanced by indicators based on well-crafted public surveys, including the views of vulnerable and victimized groups. Through systematic combination of data from expert evaluations and public surveys a cross-examination of all relevant witnesses can be achieved. Each group has a specific perspective (insider versus outsider) with a varying degree of technical knowledge. By combining the data, conflicting opinions of experts and the general public can be revealed and more reliable results can be achieved.

2.2.4. Event-based data

Event-based data refer to qualitative and quantitative data resulting from counting specific events, promoting or impeding specific rights. The events used to collect such data are usually divided between positive and negative occurrence. These events reflect improvements and achievements in the fulfilment of a right and individual or collective violations of a right. There is a variety of sources for events-based data, including information provided by the media, reports from states, civil society organisations and NGO information networks, business monitoring of government performance and testimonies of victims or witnesses.

Compared to other categories of data, indicators derived from event-based data are more concrete in terms of demonstrating compliance or non-compliance with specific rights. The use of events-based data has initially been confined to monitoring civil and political rights. The usefulness of the methodology for gathering evidence in support of the administration of justice has also been demonstrated. However, the indicators derived from this kind of data suffer from shortcomings in terms of reliability and validity, as the data collection methodology is not statistically representative and may underestimate the incidence of violations. Still, the information compiled through event-based data can complement information captured by other data.

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114 Parsons (n 106) 176-77.
116 Landman ‘Map-Making and Analysis’ (n 84) 5.
117 OHCHR ‘Human Rights Indicators’ (n 79) 54-56.
2.3. Existing mechanisms for measuring the rule of law

The measurement of the rule of law has a shorter history than the measurement of democracy and human rights. It started in the 1980s with first attempts by academics to measure ‘good governance’ in order to classify countries according to the results obtained. These measures of good governance included civil and political liberties or political freedoms as proxy measures for the rule of law. One of the first works was Freedom House’s “Freedom in the World” that used so-called proxy measures of the liberties and freedoms of political and legal institutions from state constraint to approximate rule of law and governance.\textsuperscript{118}

In the early 1990s the debate moved from scientific journals to international discussion as international organisations, like the World Bank and the International Monetary Fund, started to consider the ways, in which good governance influenced the economic performance of countries in their development assistance.\textsuperscript{119} World Bank researchers emphasized that only in well-governed countries foreign aid could be used effectively and called attention to the institutional prerequisites for economic growth. The rule of law has been regarded as a basis to provide a secure environment for contracts, investments and market transactions and for a functioning market economy. In that way, good governance became both, “\textit{a means of achieving development and a development objective in itself.”}\textsuperscript{120}

Also other international organisations, like the UN, the OECD and EU, have imposed the protection of the rule of law as a condition for the provision of financial assistance on recipient countries. Later, the concept was expanded by the UNDP to integrate a political dimension including government legitimacy, government accountability and the protection of human rights through the rule of law.\textsuperscript{121} In response to the growing demand for measuring quality of governance, the protection of human rights and adherence to the rule of law, international organisations started to work on quantifiable indicators and benchmarks. A number of aggregate governance and rule of law indicators have been produced. However, these first attempts of international organisations to measure a country’s adherence to the rule of law did not escape criticism as methodological problems were debated among the scientific community.\textsuperscript{122}

\textsuperscript{118} Landman ‘Map-Making and Analysis’ (n 84) 28.
\textsuperscript{119} Cécile and Magalie (n 82) 6.
\textsuperscript{120} Melissa Thomas, ‘What Do the Worldwide Governance Indicators Measure’ (Johns Hopkins University 2006) 2.
\textsuperscript{121} Landman ‘Map-Making and Analysis’ (n 84) 2.
\textsuperscript{122} Cécile and Magalie (n 82) 6.
2.3.1. Major initiatives for measuring the rule of law by international organisations

There have been many attempts to develop mechanisms for measuring the rule of law by academia, states, intergovernmental organisations, NGOs or governments. Three major initiatives by the World Bank, the CoE and the UN have been selected to show different approaches for measuring the rule of law that are of specific relevance also in the EU. These three initiatives have to be regarded as a non-exhaustive selection of relevant mechanisms that exist on the international level. Based on the analysis of these three initiatives, basic principles for the development and use of indicators to measure the rule of law are identified in the last section of this chapter.

With the initiation of the Worldwide Governance Indicators (WGI) project, the World Bank has been at the forefront in developing measurement tools to monitor the performance of national politico-legal systems over time. The rule of law is defined as one of the six dimensions of governance by the WGI project. The data for the WGI are gathered from 35 data sources provided by 33 different organizations, including commercial survey institutes, think tanks, non-governmental organizations, international organizations and private sector firms. 25 of these different data sources are used by the WGI project to produce the rule of law index. These data sources capture a mixture of rule of law elements, like strength and impartiality of the legal system, independence of judiciary, trust in judicial accountability and law enforcement but also other elements, like confidence in police force, which are usually not included in the rule of law conceptions illustrated in chapter 1. Further elements usually assigned to rule of law can be found in other dimensions defined by the WGI project. The indicators combine the views provided by a large number of expert survey respondents from the public and private sector, NGOs, enterprises and citizens in industrial and developing countries. As a result of this sort of data collection, the indicators do not reflect an objective measurement but rather the perceived level of the rule of law based on the subjective opinions of survey respondents. Therefore, the WGI project is representing the “demand side” of the rule of law and does neither measure the rule of law from an institutional point of view, nor pays attention to what is thought of as the law on the books.

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123 A mapping of main international initiatives on developing indicators for rule of law can be found in Landman ‘Map-Making and Analysis’ (p 84).
The European Commission for the Efficiency of Justice (CEPEJ), established by the CoE, conducts regular evaluations of the judicial systems of the CoE member states to measure the rule of law from an institutional perspective. These evaluations are based on the “Pilot Scheme for Evaluating Judicial Systems”, an instrument developed by the CEPEJ in 2003. The scheme is meant to gather qualitative and quantitative information on the daily functioning of judicial systems based on reports by member states and national correspondents, appointed by the states. The pilot scheme is a set of originally 108 questions, categorized by ten topics related to access to justice, functioning and efficiency of justice, fair trial as well as enforcement of court decisions. The CEPEJ study is based on data gathered from judicial institutions, governmental agencies in the justice sector and legal professionals that represent the “supply side” of judicial systems. This way, the evaluation scheme is based on an institutional conception of the rule of law by assuming that the availability of certain guarantees, proceedings and legal institutions assure adherence to the rule of law. The correspondents are also delivering replies to questions concerning the rights and position of the “users” of the justice systems. However, the evaluation scheme does neither include questions regarding the quality standards of law practices, nor the level of satisfaction in the society and public trust in judicial systems, as these areas are falling in the responsibility of other institutions within the CoE.

The UN launched its own Rule of Law Indicators Project in 2008 as a joint initiative of the Department of Peacekeeping Operations and the Office of the High Commissioner for Human Rights. The UN Rule of Law indicators were prepared by experts from the Vera Institute of Justice in collaboration with other members of the Altus Global Alliance and consultants from academia. The primary objective of the initiative is to provide an empirically based approach for measuring the strengths and challenges of the rule of law sector in a given country in order to assist both, international donors and national authorities in their rule of law reform efforts. The UN Rule of Law indicators form a tool for assessing the rule of law in post-conflict situations. The set of indicators is designed to obtain information on successes and shortcomings among the law enforcement agencies, the judicial system and the prison system and to monitor performance of institutions within a country over time. The UN Rule of Law

129 Albers (n 125) 10.
Indicators Project is not designed to produce a single rating for a country or to rank and compare countries in terms of their rule of law performance. The indicators shall be rated or measured on the basis of four main sources of data, including surveys of experts and public surveys, to a smaller extent administrative and field data as well as the review of legal and/or administrative documents. Similar to the WGI project, the UN Rule of Law Indicators Project focuses more on the rule of law in practice, rather than the law on the books. In this way, the instruments measure the rule of law by performance and outcome indicators, rather than measuring in detail the institutional means in terms of legal and regulatory frameworks. However, the UN Rule of Law Indicators try to combine multiple data sources, what shall yield a more nuanced and complete picture. Through the combination of a public survey and a survey of experts, the UN Rule of Law Indicators describe the operation of justice institutions from multiple perspectives. This shall also compensate for the weaknesses that often exist in the administrative data of states in conflict and post-conflict situations. The UN Rule of Law Indicators and the guide for implementation follow an empirically based approach to measure the strengths and effectiveness of law enforcement, judicial and correctional institutions. So far the UN Rule of Law Indicators have only been applied in pilot implementations in Haiti and Liberia, with no publicly available results. However, the guide for implementation provides general guidelines for developing and applying indicators to measure the rule of law.

2.3.2. Mechanisms for measuring the rule of law in the EU and its Member States

As the EU applies a substantive conception of the rule of law by connecting it to democracy and fundamental rights, the monitoring of the rule of law in the EU and its Member States must equally focus on the law on the books and on the realisation of the rule of law in practice. Accordingly, the EU needs instruments to measure legal and other relevant institutional inputs as well as compliance of public institutions with the relevant norms and standards. As described in chapter 1.1, Article 7 TEU places the EU institutions under the obligation to maintain surveillance in order to detect possible risks of breaches of the rule of law.

131 DPKO and OHCHR (n 75) 24.
133 DPKO and OHCHR (n 75) 1-2.
law in the EU Member States or by the EU itself. In monitoring the rule of law in the EU, the Commission, so far, mainly relied on sources of information from the EU bodies, from international organisations and civil society organisations. These sources of information included the CoE reports, the European Parliament’s annual reports on the fundamental rights situation in EU, the annual reports from the FRA, the European Ombudsman and the Commission’s annual report on the application of the Charter of Fundamental Rights of the EU as well as the EU Anti-Corruption Report. The need for a comprehensive monitoring tool for measuring the rule of law and human rights in the EU was repeatedly expressed by the European Parliament and the Council, making reference to the major initiatives of international organisations, such as the CoE and the UN.

In 2013, the Commission presented the EU Justice Scoreboard as a new initiative, for evaluating the functioning of national justice systems in terms of quality, independence and efficiency. The Scoreboard is a comparative tool, covering all Member States and used to monitor the functioning of national justice systems over time. It focuses on civil and commercial justice, encompassing non-criminal cases, litigious civil and commercial cases as well as administrative cases. The findings are related to the efficiency and quality of justice systems and the independence of the judiciary. The indicators used to measure the efficiency of proceedings are the length of the proceedings, the clearance rate and the number of pending cases. Furthermore, factors, like the availability of regular monitoring systems for the courts, the use of ICT systems, the availability of Alternative Dispute Resolution methods, the training of judges and resources available for the courts, are part of the assessment. The EU Justice Scoreboard uses different data sources. Most quantitative data were collected in accordance with the CEPEJ methodology for Evaluation of European Judicial Systems and presented in a study on the functioning of judicial systems prepared in 2012 by the CEPEJ on behalf of the Commission. Additional sources of information were data from Eurostat, the World Bank, the World Economic Forum, the World Justice Project and the European judicial

135 For a detailed description of the main EU mechanisms for measuring the rule of law see Carrera, Guild and Hernanz (n 24) 4ff.
136 The Council underlined the importance to make full use of existing mechanisms for the assessment of the rule of law in its Conclusions of the Justice and Home Affairs Council Meeting (n 37), para 9. The European Parliament Resolution P7_TA-PROV (2014) 0231, para 6 reiterated that a mechanism for the assessment of the rule of law must seek complementarity with the work of other international institutions.
networks. The EU Justice Scoreboard makes use of benchmarking to promote a high level of the rule of law in the EU Member States and provides reliable and comparable data on the functioning of national justice systems. Furthermore, the EU Justice Scoreboard was designed to support the country specific analysis of the European Semester and to give recommendations to the Member States. However, “[it is not a mechanism for guaranteeing the rule of law across the EU.”\(^{140}\)

Also, the “new EU Framework to strengthen the Rule of Law”, initiated in 2014, provides a basis for monitoring of the rule of law in the EU Member States. Within this new framework the Commission seeks to contribute to reach the objective of safeguarding the rule of law in the EU, based on the expertise of the Venice Commission of the CoE and the FRA.\(^{141}\) In the future, especially the FRA might have an important role in assessing the rule of law in the EU Member States, as it was repeatedly requested by the European Parliament.\(^{142}\) The new EU Framework for the Rule of Law is based on the competences conferred to the Commission by existing Treaties, while future developments of the Treaties in this area are not excluded.\(^{143}\)

2.3.3. Basic principles for the use of indicators to measure the rule of law

Based on the foregone description of existing initiatives, basic principles can be identified that need to be considered for the use of indicators to measure the rule of law in the EU accession process. A meaningful, comprehensive and acceptable approach for measuring the rule of law requires certain aspects as summarised below.

1. Combining structural, process and outcome indicators

Recent research on measuring the rule of law\(^{144}\) suggests using a mix of structural, process and outcome indicators, such as it is proposed by the UN Rule of Law Indicators Project.\(^{145}\) As the law on the books is not necessarily always translated into practice, the rule of law cannot be measured by assessing the legislation and institutional settings of a country through structural indicators only. Following a substantive conception of the rule of law, indicators should also evaluate the impact of governments’ policies as well as the states compliance with


\(^{141}\) COM (2014) 158 final, 7.


\(^{144}\) see Berenschot and Imagos (n 99) 33.

\(^{145}\) DPKO and OHCHR (n 75).
the rule of law and the perceived level of the rule of law by individuals.\textsuperscript{146} To measure the results at the level of beneficiaries and to identify any inequalities or discrimination, it makes good sense to further disaggregate data by individual characteristics, like age, gender or ethnic groups.\textsuperscript{147} By combining structural, process and outcome indicators, the commitments of states can be assessed at the same time as their performance in terms of delivering justice. In this way, the indicators are complementary and can only properly reflect the realisation of rule of law standards in terms of commitment, effort and results, when taken together.\textsuperscript{148}

(2) Combining quantitative and qualitative indicators

Creating a meaningful set of indicators requires a combination of both, quantitative and qualitative indicators. Quantitative indicators can be used, where it is possible to identify statistical information, and their numerical precision often allows for a more objective interpretation of results. In this way, quantitative indicators are usually preferable. However, qualitative indicators can supplement the numerical data with a richness of information that cannot be displayed by pure statistics.\textsuperscript{149} As indicated in the previous sections, there is a series of existing mechanisms from international organisations that provide for quantitative indicators to measure the rule of law. These quantitative measures provide valuable sources of information that can be applied also to underpin qualitative assessments of the rule of law in a specific country.\textsuperscript{150}

(3) Combining universal and country-specific indicators

Like for any other set of indicators, a balance between universally relevant indicators and country-specific indicators needs to be found. Certain elements of the rule of law, relevant across all countries, shall be measured by universal indicators. Such universal indicators allow for making comparisons of particular elements across countries. However, universal indicators can only be applied for comparisons between states that have achieved a similar standard of the rule of law, as they do not take into account the different capacities of each individual state. Therefore, it may not be possible to have universal indicators only.\textsuperscript{151}

\textsuperscript{147} Starl and Pinno (n 85) 28.
\textsuperscript{150} see Berenschot and Imagos (n 99) 33ff.
\textsuperscript{151} OHCHR, ‘Report on Indicators for Promoting and Monitoring the Implementation of Human Rights’ (UN 2008) para 16.
Through the creation of country specific indicators, the contextual relevance of the assessment can be increased and differences in the nature of institutions, policies and in the state priorities can be better reflected.\footnote{DPKO and OHCHR (n 75) 2.}

(4) Combining multiple data sources

By using multiple sources of data, the institutional perspective of the “\textit{supply side}” of the rule of law can be combined with the “\textit{demand side}”, reflecting the rule of law in practice. A set of indicators combining multiple data sources must be flexible enough to cope with the different types of data but at the same time should be standardized enough to be meaningful concerning the indicator’s results.\footnote{Starl and Pinno (n 85) 27.} Indicators need to be clearly defined and carefully selected in order to facilitate the identification of relevant data sources that are available at limited costs. The indicators need to be based on reliable and objective data that consists of both, quantitative and qualitative information. The required level of reliability of the data has to be adjusted to the purpose of measurement to allow for reasonably confident decisions. While quantitative data can be gathered by reviewing administrative documents and legislation or from statistical surveys, qualitative information can mainly be obtained from media review, public or expert surveys. The involvement of responsible authorities has proven to be a crucial factor in selecting the most relevant indicators and accessing sensitive data sources.\footnote{Berenschot and Imagos (n 99) 16ff.}

(5) Tracking changes over time and setting benchmarks

Indicators are most useful, when the same measure can be tracked over time, as this allows identifying improvements or deteriorations in the realisation of the different rule of law elements.\footnote{DPKO and OHCHR (n 75) 4.} A baseline assessment drawing on clear indicators is a helpful starting point for developing specific reforms. The progress achieved can then be measured against these baseline measurements. In this way, the monitoring schemes are capable of revealing continuous trends and dynamics, which can be the basis to identify feasible benchmarks to be reached by the implementation of follow-up policies and actions.\footnote{Martin Gramatikov and Ronald Janse, ‘Monitoring and Evaluation of the Rule of Law and Justice in the EU: Status Quo and the Way Ahead?’ (Concept Paper, HiiL 2012) 2.} Setting benchmarks allows for monitoring the achievements of a state in a given time frame in terms of progress towards reaching a specific target or goal. By using intermediate benchmarks, progress can be
monitored on a regular basis to help states reaching the obligations.157 Effective benchmarking requires a clear understanding of the rule of law and of the key features it compromises. For the development of meaningful benchmarks measureable indicators, adequate measurement methods and reliable data sources are necessary.158

157 de Beco (n 148) 47.
158 Del Sarto (n 105) 14-15.
3. Measuring the rule of law in the EU enlargement policy

Based on the presidency conclusions from the Luxembourg European Council in 1997, the EU established an evolutionary and inclusive accession process, under which all candidate countries are “destined to join the Union on the basis of the same criteria and [...] on equal footing.” The rule of law forms a basic condition for EU accession as one component of the political criteria agreed in the Copenhagen European Council in 1993, namely the “stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities”. Furthermore, several elements of the rule of law are also part of the acquis criteria – that is the “ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union”.

To establish and uphold the rule of law is a particular challenge in post-conflict situations. Stable, predictable and well-enforced laws help to create a “sense of security and well-being” that is also encouraging business activity and the economic development of a country. A proper functioning judiciary is one of the core elements to ensure the realisation of the rule of law and human rights in post-conflict situations. Therefore, the reform of the judicial system was of particular importance in the context of the enlargement processes with the Central, Eastern and South-Eastern European countries. The transformation of the judicial system in the candidate countries should assure both the functioning of the judiciary at national level and at Union level and, therefore, was a high priority in measuring the rule of law.

Acting on the mandate of the Council and the European Council, the Commission has a key position in the assessment of the progress made by the candidate and potential candidate countries towards fulfilling the conditions of the Copenhagen criteria. Each year the Commission presents a set of documents to the Council, explaining its strategy in line with the EU enlargement policy and reporting on the progress achieved at country level. The so-called “Enlargement package” adopted by the Commission includes the Progress Reports for each candidate and potential candidate country as well as the annual Enlargement Strategy Paper, taking stock of the developments in the last twelve months and setting out the way forward for the coming year. The Council and the European Council take their decisions to

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159 European Council, ‘Presidency Conclusions’ (Luxembourg, December 1997).
160 European Council (n 59) para 7 (A) (iii).
161 Möstl (n 61) 57.
162 Dimitry Kochenov (n 69) 227-29.
move on in the accession process of a country based on the recommendations contained in the Commission’s assessments. In this way, the assessment of the progress towards the fulfilment of the membership criteria is one of the most important and powerful tools in the accession process.\textsuperscript{164}

In this chapter, the use of indicators for measuring the rule of law in the EU enlargement policy is analysed with a specific focus on the transformation of the judicial system in three case studies of the countries Bulgaria, Croatia and Montenegro. The three case studies reflect three different periods in the EU enlargement policy. The analysis is specifically focusing on the progress assessments conducted by the Commission during the accession periods of these countries. The EU mechanisms for measuring the rule of law in terms of the independence and accountability of judiciary and access to justice are examined in detail. This examination takes into account the basic principles identified in chapter 2.3.3 as well as the specific status of the countries in the EU enlargement process. Along the three case studies, the adaptations of the EU monitoring mechanism are analysed over time. Three major steps, that were aimed to improve the measurement of the rule of law in the enlargement process, can be identified. The first step was the introduction of a monitoring system in the accession process of Bulgaria to overlook the progress achieved in fulfilling the Copenhagen political criteria. The second step was the establishment of a specific negotiation chapter on judiciary and fundamental rights as an integral part of the EU acquis and the identification of specific benchmarks in the accession process of Croatia. Finally, the new approach to rule of law in the EU enlargement policy is guiding the accession negotiations with Montenegro and has put the rule of law at the heart of the accession process.

The case studies conducted in this chapter are based on an analysis of the Progress and Monitoring Reports issued by the Commission and other documents related to the EU enlargement policy. Furthermore, recent research and studies conducted by different authors are considered. Background information gained through an interview conducted by the European Training and Research Centre for Human Rights and Democracy (ETC Graz) with an official from DG enlargement\textsuperscript{165} is used to undermine the findings of the case studies and to derive general implications for the use of indicators in EU enlargement policy in the last part of this chapter.

\textsuperscript{164} Kochenov (n 69) 59.

\textsuperscript{165} ETC Graz, Interview with an official from DG Enlargement (Brussels and Graz, 17 June 2014). The interview was conducted in the context of the FRAME research project. The project FRAME - Fostering Human Rights Among European Policies is a large-scale, collaborative research project funded under the EU’s Seventh Framework Programme. The interview report is not publicly accessible but was available for the author.
3.1. The case of Bulgaria

The “Europe Agreement”\textsuperscript{166} has entered into force on 1 February 1995 and provided the legal basis for relations between Bulgaria and the Union (the EC at that time). Based on this framework for political dialogue and the gradual integration into the Union, Bulgaria has submitted the application for membership of the EU on 14 December 1995. At that time all together eleven applications for membership were submitted to the EU, which led to the adoption of a new strategy for enlargement by the European Council.

3.1.1. The new strategy for EU enlargement

With regard to the criteria adopted by the Copenhagen European Council in 1993 and on request of the Madrid European Council in 1995,\textsuperscript{167} the Commission had developed a methodology for the objective assessment of applications for membership that should ensure that all candidate countries were treated on an equal basis. A composite paper on enlargement was presented as Part Two of the Agenda 2000\textsuperscript{168} and explained the methodology for an assessment of applications for membership through the application of predefined accession criteria. Together with nine other associated countries of Central and Eastern Europe, Bulgaria was among the first countries for which the Commission issued an opinion in 1997, making use of the common methodology for the assessment of applications.

The methodology for the assessment of applications developed by the Commission was affirmed by the Luxembourg European Council in 1997, where two significant elements were introduced into the Enlargement Strategy. On the one hand, the European Council adopted a comprehensive enlargement framework, under which the Commission was asked to submit Regular Reports to the Council, assessing the candidate countries preparedness for accession in the light of the Copenhagen criteria. For these assessments the Council decided “to follow the method adopted by Agenda 2000 in evaluating applicant States’ ability to meet the economic criteria and fulfil the obligations deriving from accession.”\textsuperscript{169} The progress towards meeting each criterion in terms of legislation and measures actually adopted or implemented was to be assessed against a standardised checklist that ensured transparency and equal treatment of all countries aspiring accession to the EU. On the other hand, the Luxembourg European Council introduced an enhanced pre-accession strategy, consisting of increased pre-accession aid and the introduction of the Accession Partnerships.

\textsuperscript{166} Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, Brussels, 8 March 1993 (Europe Agreement).
\textsuperscript{167} European Council, ‘Presidency Conclusions’ (Madrid, December 1995).
\textsuperscript{169} European Council (n 159) para 29.
Most of the candidate countries from Central and Eastern Europe lacked the internal resources to meet the conditions for membership on their own behalf. The Union aimed at assisting applicant countries by creating a framework of structural and financial support.\textsuperscript{170} The Accession Partnerships were concluded to support the applicant countries in their preparations for membership by providing a single framework for the countries’ actions, to address the priority areas identified in the Regular Reports and to target the financial assistance available from the EU. A number of financial instruments were designed for candidate and potential candidate countries to carry out the demanded reforms. The PHARE programme, initially designed to support transition to democracy and the market economy in Poland and Hungary, was remodelled into an accession driven instrument for institution building and investment in the regulatory infrastructure to ensure compliance with the acquis. Furthermore, investment in economic and social cohesion was covered by the PHARE programme.\textsuperscript{171} The measures implemented through the EU financial assistance as well as the progress achieved through the Accession Partnerships and related National Programmes or Action Plans were to be assessed within the Regular Reports.

3.1.2. The monitoring mechanism applied to Bulgaria

In line with the new strategy for enlargement and the adoption of the comprehensive enlargement framework by the Luxembourg European Council in 1997, the Commission had developed a monitoring system to effectively underpin the accession negotiations of the Council and the Member States. This monitoring system is made up of several monitoring tools (as presented in Figure 1), designed to assess the priorities identified in the policy documents and reform plans, like the Europe Agreement, the Accession Partnerships and the National Programmes or Action Plans.\textsuperscript{172}

\textbf{Figure 1: The monitoring mechanism applied to Bulgaria}

\begin{itemize}
  \item 1995: Application
  \item 1997: Opinion
  \item 1998: Screening
  \item 1996 - 2004: Regular Reports
  \item 2005: Treaty of Accession
  \item 2005 - 2006: Monitoring Reports
  \item 2007: EU Accession
  \item since 2007: CVM Reports
\end{itemize}

\textsuperscript{170} Veebel (n 55) 223.
\textsuperscript{171} Commission, ‘Composite Paper: Reports on progress towards accession by each of the candidate countries’ COM (99) 500 final, 8.
\textsuperscript{172} ibid 33.
**The Opinion on the Application for Membership**

On request of the Madrid European Council in 1995, the Commission conducted a baseline assessment of Bulgaria’s preparedness for membership and presented an Opinion on Bulgaria’s Application for Membership of the European Union in 1997.\(^{173}\) In the light of the Copenhagen criteria, this assessment followed the threefold division into political criteria, economic criteria and the ability to assume the Union acquis. The extent to which democracy and the rule of law were actually operating in line with the EU was assessed under the political criteria for membership. The rule of law and democracy were examined with regard to the structure, powers and functioning of the legislative, executive and judicial bodies. The judiciary was assessed in terms of the structure of the justice system, the independence of judiciary, the effective handling of cases and access to justice. Furthermore, the fight against corruption and organised crime were recognized as serious problems. Human rights and the protection of minorities were addressed as a separate category of the political criteria by the Commission. The provisions in place for guaranteeing an independent judiciary, judicial cooperation in criminal and civil matters and police cooperation to combat organised crime were further assessed as elements of the justice and home affairs acquis that primarily concerned asylum, border control and immigration. In conducting the assessments, the Commission utilised a wide range of information coming from the Bulgarian authorities, the Member States and numerous international organisations. Based on the Commission’s opinion and on the Presidency Conclusions from the Luxembourg European Council in 1997, the accession process with Bulgaria was to be formally launched by the Ministers of Foreign Affairs Council on 30 March 1998.

**The Regular Reports on Bulgaria’s Progress towards Accession**

The process of accession and negotiation followed the structure as introduced by decision of the Luxembourg European Council in 1997. In April 1998, the Commission launched an analytical examination of the acquis, the so-called “screening”, with the aim to identify any possible problem areas for the adoption of the acquis.\(^{174}\) Starting in 1998, the Commission submitted annual Regular Reports on Bulgaria’s progress towards accession. The structure of these Regular Reports followed the structure of the Commission Opinion on Bulgaria’s application for membership from 1997 and was based on the Copenhagen criteria. The Regular Reports presented the results of the monitoring and were of high significance for the

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\(^{173}\) Commission, ‘Opinion on Bulgaria’s Application for Membership of the European Union’ DOC/97/11.

decisions on the opening and closing of negotiating chapters. In the Regular Reports, judiciary was not only assessed as part of the political and the acquis criteria for membership but also in a separate chapter examining the judicial and administrative capacity to apply the acquis. This duality in the assessment of judiciary can be explained by the dual function of the national judicial systems to uphold the rule of law in the country itself and to guarantee effective implementation of the acquis communautaire as part of the Union judiciary. From the year 2000, the judicial and administrative capacity to apply the acquis was no longer assessed in a separate chapter of the criteria for membership but rather included in the political criteria, what improved the consistency of the reports. Starting with the Regular Report of 2000, also the assessment of the acquis criteria has been restructured and the ability to assume the obligations of membership was divided into 31 negotiating chapters. The negotiations on these chapters followed a road map presented by the Commission in the Enlargement Strategy Paper from 2000. Certain aspects related to the rule of law were discussed in chapter 24 of the acquis, dealing with co-operation in the field of justice and home affairs. However, the content of chapter 24 was dominated by the topics of the Schengen acquis, namely border control, visa policy, migration and asylum, as well as fight against corruption and organised crime.

The Regular Reports provided both, criticism and support for the applicant country. To address the deficiencies identified by the Commission in its assessments, concrete, achievable goals were formulated in the Accession Partnerships, Action Plans and in a Roadmap for Bulgaria. The Accession Partnerships with Bulgaria set out a single framework for the reforms in the priority areas identified by the Commission and for the financial assistance supporting the implementation of these reforms. The priorities were divided into short and medium term, depending on whether substantial improvement was expected within one year or to take more than one year to complete. The first Accession Partnership contained several short and medium term objectives for the promotion of the rule of law under the chapters “Justice and Home Affairs” and “Reinforcement of administrative and judicial capacity”.

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177 Kochenov (n 69) 245.
The Accession Partnerships at the same time formed the basis for the programming of pre-accession assistance from the EU financial instruments to support the demanded reforms. The pre-accession assistance was bound to the conditionality of meeting the Copenhagen criteria and the Europe Agreement obligations. The budgetary allocations of the programmes and the impact of the assistance provided to Bulgaria were assessed in the Regular Reports. “Judicial reform”, “strengthening the rule of law” and “developing a recruitment and training strategy for the judiciary” were among the measures, for which considerable financial means from the PHARE programme were used from 1999 to 2001. However, in the Regular Reports, no clear connection was drawn between the measures financed and the progress achieved with regard to meeting the respective conditions for membership. Only through the adoption of the “Action Plans for strengthening administrative and judicial capacity”, the impact of the reforms financed under the PHARE programme could be demonstrated in the assessment of the political criteria in the Regular Report of 2002.

The Accession Partnerships were under regular revision to take account of the progress made and to allow for new priorities to be set. While the priorities of the first Accession Partnership of 1999 were formulated very broadly, referring to general goals, like reinforcing the independence of judiciary, the Accession Partnership of 2003 contained detailed priorities, requesting specific reforms of the judicial system. From 2003 on, the progress in the priorities of the Accession Partnerships was assessed in line with the membership criteria of section B and no longer in a separate section of the Regular Reports. In this way, the structure of the reports was continuously improved with every reporting year, leading to higher consistency and transparency. Furthermore, the Regular Reports were gradually becoming more and more detailed, also broadening the scope of the issues assessed related to the rule of law and the functioning of the judiciary.

Carrying out the assessment for the Regular Reports, the Commission collected information from a number of data sources. A main source of information was the review of legislation adopted, administrative documents as well as official statistics. The Bulgarian authorities were invited to provide information on the progress made since the publication of the last report. The information provided by Bulgaria within the framework of the Europe Agreement

185 Kochenov (n 69) 246.
or in the context of the screening and the accession negotiations served as additional source of information. Various peer reviews conducted by country experts have taken place in order to assess Bulgaria’s administrative capacity in a number of areas. Reports from the Commission’s delegations and the Member States’ embassies as well as Council deliberations and European Parliament resolutions have been taken into account for the preparation of the reports. The Commission also used the assessments provided by the Member States with regard to the political criteria for membership. Furthermore, the rule of law measurements conducted by international organisations were important sources of information for the Commission. In particular the reports from the CoE, the OSCE, the international financial institutions, and NGOs provided additional information on the realisation of the rule of law and the functioning of the judicial system in the enlargement countries.\(^\text{186}\)

**Continued monitoring and the Cooperation and Verification Mechanism**

After the closing of the accession negotiations in December 2004, the Treaty of Accession was signed in April 2005.\(^\text{187}\) The Commission, as guardian of the Treaties, had the duty to monitor Bulgaria’s preparation for accession in the fields, where Bulgaria had committed itself to completing specific measures by the time of accession.\(^\text{188}\) In October 2005 the Commission published a Comprehensive Monitoring Report\(^\text{189}\) in order to ensure that all the duties and requirements to become a fully-fledged Member State can be met by the date of accession foreseen for January 2007. The 2006 Monitoring Report on the state of preparedness for EU membership\(^\text{190}\) showed that further progress was still necessary in the area of judicial reform and fight against organised crime and corruption. Based on the Articles 37 and 38 of the Act of Accession\(^\text{191}\), the Commission established a Cooperation and Verification Mechanism (CVM) to monitor improvements in these areas after accession. Under this mechanism, Bulgaria was requested to report regularly on the progress made in addressing specific benchmarks in the field of judicial reform, fight against organised crime and corruption. For judicial reform three benchmarks were included in the CVM that obliged Bulgaria to:

\(^{186}\) COM (98) 707 final, 5 and later Commission Regular Reports on Bulgaria.


“(1) Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system.

(2) Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure codes, notably on the pre-trial phase.

(3) Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually.”

The monitoring method of the CVM consisted of periodic reports sent from the Bulgarian government to the Commission, giving details about the measures taken to respect the EU acquis and reforms implemented. Based on these reports and on other available sources of information, a regular evaluation of Bulgaria’s progress was carried out by the Commission. The results of the CVM mechanism were presented by the Commission in six-monthly Progress Reports that were accompanied by the Technical Reports, providing the basis for the analysis.

In drawing up the reports, the Commission relied on information received from the Commission’s representation, the Member States’ diplomatic missions, specialised international organisations, EU agencies and NGOs. Furthermore, the Commission was sending country experts from other Member States to on-field visits and missions in Bulgaria. Where available, the Commission used the standards as defined by international organisations, like the Council of Europe, the OECD and UN agencies, as points of reference for the progress made by Bulgaria. Also, the situation of other Member States was taken into account for a comparison with the situation in Bulgaria. In 2012, the Commission requested a Flash Eurobarometer survey to be conducted under the CVM that addressed public attitudes towards the state of the judicial system and corruption in Bulgaria and Romania. The


193 Carrera, Guild and Hernanz (n 24) 8.


195 Carrera, Guild and Hernanz (n 24) 44.

data provided by this survey were used to assess the respondents’ perceptions on the independence, accountability and efficiency of the judiciary and access to justice. The perceptions of judicial shortcomings were referred to in the CVM report of 2012 to measure the outcome of the implemented reforms at the level of beneficiaries.\textsuperscript{197}

At the end of each Progress Report, specific recommendations were given by the Commission to bring forward the progress in achieving the set benchmarks. Due to insufficient progress, the Commission decided in July 2012 to suspend the CVM for 18 months in order to give Bulgaria the time to achieve visible results from the implemented reforms. The Commission underlined that the potential of the mechanism has not been used to the full and the lack of consistent direction of reforms puts into question the sustainability and irreversibility of the progress.\textsuperscript{198} Due to a lack of political commitment to a long-term strategy for reform and of concrete short-term measures to bring the process forward, also in January 2014, no sufficient progress could be identified by the Commission.\textsuperscript{199} This leads to the conclusion that the post-accession incentives and the sanctions applied were too weak to bring about the requested changes after accession.\textsuperscript{200}

\subsection*{3.1.3. The indicators applied to measure the rule of law in Bulgaria}

Even though the Commission did not publish any checklists or indicator schemes used for its assessments, the use of indicators for measuring the rule of law in the accession process of Bulgaria can be analysed on the basis of the Regular Reports presented by the Commission between 1998 and 2004. In order to measure the progress in the field of the judicial system, the Commission has used predominately structural indicators, reflecting decisions taken, legislation adopted and international conventions ratified. Process and outcome indicators were used to assess the implementation of legislation and its application in practice. The measures were mostly qualitative in nature, while quantitative indicators were used in several areas to underpin the qualitative assessments. With the CVM, benchmarks were introduced as a new tool to measure the progress in six specific areas. In the Technical Reports accompanying the reports from the Commission under the CVM each benchmark was assessed in a separate chapter through structural, process and outcome indicators measuring the progress in meeting the requested standards.

\begin{footnotesize}
\begin{enumerate}
\item[197] SWD (2012) 232 final.
\end{enumerate}
\end{footnotesize}
The judicial system was considered by the Commission as one of the main challenges for realising and upholding the rule of law in the enlargement countries. As there was no acquis in terms of substantive provisions for this area of the rule of law, the Commission assessed the progress of the enlargement countries against the standards set by international organisations, like the CoE and the UN, the case law of international courts and tribunals, and also considered the practice of the Member States.\(^{201}\) However, in the field of judiciary, the Western European legal systems provide for a plurality of models to ensure the independency and accountability of the judicial bodies and access to justice. Therefore, no sufficiently specific common European standard could be identified in this area. Due to the lack of such a European standard, the Commission relied on a loosely-structured set of elements for the assessment of the judicial systems in candidate countries.\(^{202}\) In its Guide to the Main Administrative Structures Required for Implementing the Acquis, the Commission identified the guarantee of

\[
\text{“sufficient human resources and qualified staff, adequate and modern equipment, acceleration of court proceedings, reduction of the number of pending cases so as to avoid unreasonable delays, measures to ensure the enforcement of judgements, and procedures to ensure ethical conduct by the judiciary and the effective access to justice.”}^{203}
\]

as requirements for the establishment of an independent, reliable and efficient judicial system.

**The assessment of the independence and accountability of the judiciary**

Strengthening judicial independence was included among the short-term and medium-term priorities of the Bulgarian Accession Partnerships. The assessment of the independence of judiciary was divided into two main components, namely the institutional independence of the judiciaries in the form of autonomy from the executive bodies and the personal independence of the individual judges. Judicial self-governance was viewed as one basic element to ensure institutional independence of the courts. The Commission promoted the establishment of functioning self-governance organs for the judiciary, which should at least have the competences to recommend judges for appointment, to supervise the functioning of the

\(^{201}\) see Kochenov (n 69) 249ff.  
judiciary as well as to overlook the general administration and the budget of the courts. The close dependency of the Bulgarian courts on the executive power of the Ministry of Justice was regarded as a threat to the judicial independence and the proper functioning of the judicial system by the Commission.\textsuperscript{204} Therefore, the Commission welcomed the reforms of the structures of the judicial system as progress in terms of strengthening the institutional independence of the judiciary in the Regular Reports.\textsuperscript{205}

Another factor to increase the institutional independence of the Bulgarian judiciary, considered as crucial by the Commission, was to ensure budgetary independence. In the Regular Reports, a clear connection was drawn between the self-governance of the judiciary and the ability to control its own budget. This included the requirement that budgeting decisions on the financing of the judiciary had to be respected by other branches of power and that the usual practice of considerable budget cuts effectuated by the Bulgarian parliament had to be abandoned. In order to tackle this problem, the Commission requested Bulgaria to amend the procedure for the adoption of the budget for the judiciary in the way that the Bulgarian Council of Ministers was prohibited to make any amendments to the budget proposal submitted by the judiciary.\textsuperscript{206} The efforts of Bulgaria in this respect were consistently monitored throughout the Regular Reports. Furthermore, the Commission tried to quantify the progress in the institutional independence of the judiciary in terms of the increase of financial means for the substantially under-funded courts. However, it was difficult to determine the exact amount of budget necessary to ensure a proper functioning of the judiciary. In the 2002 Regular Report, the Commission pointed out that the budget of the judiciary with around 0.3\% of GDP remained very low and needed substantial increasing to reach the average rate of 2 to 4\% of GDP in the EU-15.\textsuperscript{207} As a result of the Commission’s critique, several reforms of the judicial system were adopted, leading to considerable progress only after 2002. The Council of Ministers was no longer entitled to amend the budget proposed by the Supreme Judicial Council (SJC) to the Parliament, and the budget for the judiciary was considerably increased in the following years.\textsuperscript{208}

probation terms, the remuneration and allocation of cases. The standards applied by the Commission in terms of individual independence of judges were laid down in the recommendations issued by the CoE and by the UN, however, no direct reference was made to these standards in the Regular Reports. The Commission repeatedly requested Bulgaria to assure the full independence of magistrates and judges and to apply transparent criteria and competitions for the recruitment and promotion of judges. The progress with regard to these indicators was quite consistently monitored throughout the Regular Reports.

A competitive recruitment system for magistrates and objective criteria for the promotion of judges were already installed in 2002. However, no uniform criteria for the competitive selection of judges or to monitor the performance before granting tenure and promotion were yet in use at that time. Up till 2005, the number of appointments made on the basis on an extraordinary procedure without competition did not decline. This was a clear indicator that the amendment of the Law on the Judicial System did not have sufficient impact on the actual recruitment practices. In the 2003 and 2004 Regular Reports, the Commission reported on the improvement of working conditions of judges, prosecutors, investigators and judicial staff and on an increase of magistrates’ salaries. Concerning the impartiality of judges, the system in place to ensure random allocation of cases was continuously assessed by the Regular Reports. The analysis of the Commission did not only focus on the legal framework adopted but also on the improvement of the practical situation. Even though the SJC had already decided on the use of an objective case distribution system in 2002, the Commission criticised the lack of transparent standards for case assignment in practice.

In terms of accountability, the Commission assessed the provisions regulating the immunity of judicial bodies as well as the systems for monitoring in place. With regard to the immunity of the judicial bodies, the Commission criticised throughout numerous reports the rather broad view of the judiciary adopted by the Bulgarian constitution to include criminal investigators as members of the judiciary. This critique of the Commission was mainly based on the understanding of the judiciary assumed by the EU Member States at that time.

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216 Kochenov (n 69) 250.
immunity of criminal investigators was considered as giving potential to corruption and criminal activity in the judiciary and as harmful for the realisation of the rule of law in the country. The required reforms limiting the immunity of criminal investigators could only be implemented by a change of the Constitution in September 2003 and were welcomed by the Commission in the Regular Report. Several measures adopted in 2002 were aimed to establish a system of accountability of courts, prosecution offices and investigation services. Anti-corruption measures for the judiciary included mandatory property and income declarations. Also the adoption of a Code of Ethics for magistrates and administrative staff of the judiciary was evaluated as a positive contribution to establish a system of accountability. However, up until 2005, the Commission found little evidence of the enforcement of this code in practice. Furthermore, the SJC was obliged to prepare annual reports on the functioning of the judiciary to the Parliament. These annual reports included issues such as the length of proceedings, judicial workload, etc and were a form of control to ensure the accountability of the judiciary to the public.

After Bulgaria’s accession to the EU, the assessment of independence and accountability of the judicial system was continued under the CVM through several benchmarks. For each benchmark a list of qualitative indicators mostly focusing on structural reforms was designed to measure progress against. When assessing the constitutional amendments and reforms adopted to strengthen the independence, impartiality and accountability of the judiciary, as addressed by benchmark 1 and 3, the Commission focused on the legal framework in place to restrict the immunity of magistrates, the election process for members of the SJC and the introduction of provisions on the Inspectorate to the SJC. The number of irregularities reported by the Inspectorate and a track record of disciplinary proceedings and sanctions were applied as outcome indicators. Furthermore, the system in place to guarantee the application of objective criteria for the appointment and promotion of judges and the random allocation of cases in courts were continuously monitored under the CVM. Through the Flash Eurobarometer survey conducted under the CVM in 2012, it was shown that there is a strong

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221 Daniel Smilov, Bulgaria: The Discontents and Frustrations of a Newly Consolidated Democracy’ in Morlino L and Sadurski W (eds), 
common interest in rule of law issues by the Bulgarian population. The data gathered through this survey allowed to measure the perceived level of improvements of the judicial system, fight against corruption and organised crime on the ground, which mirrors the public confidence in the judicial system.\textsuperscript{225}

Table 1 gives an overview of structural, process and outcome indicators used in the Regular Reports and under the CVM to measure the independence and accountability of the judiciary.

**Table 1: Indicators to measure the independence and accountability of the judiciary**

<table>
<thead>
<tr>
<th>Structural indicators</th>
<th>Process indicators</th>
<th>Outcome Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Legal framework in place guaranteeing self-administration and organisation of the judiciary</td>
<td>• Budget available for the judiciary</td>
<td>• Amendments to the budget proposal of the judiciary by executive bodies</td>
</tr>
<tr>
<td>• Legal framework in place guaranteeing and restricting the immunity of magistrates</td>
<td>• Salaries of magistrates and judges</td>
<td>• No of disciplinary proceedings and sanctions against judicial staff</td>
</tr>
<tr>
<td>• Provisions in place for the recruitment of judicial staff and the appointment of judges</td>
<td>• Mandatory property and income declarations</td>
<td>• No of appointments based on transparent and objective criteria</td>
</tr>
<tr>
<td>• Provisions in place for assigning cases to individual judges</td>
<td>• Objective and transparent criteria established for the recruitment of judicial staff and for the appointment of judges</td>
<td>• No of irregularities reported through the inspections</td>
</tr>
<tr>
<td>• Codes of Ethics in place</td>
<td>• Application of a system for random allocation of cases to individual judges</td>
<td>• Public confidence in the judicial system</td>
</tr>
<tr>
<td>• Provisions in place for inspections and performance monitoring of judicial institutions</td>
<td>• Enforcement of the Code of Ethics</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• No of inspections carried out and monitoring reports prepared on the judiciary</td>
<td></td>
</tr>
</tbody>
</table>

**The assessment of access to justice**

Access to justice was measured by the functioning of the judiciary in terms of the structure of the judicial system, the qualification and training of judges, human and material resources, work load in courts and length of court proceedings. Also, the complexity of legal procedures and the availability of legal aids were considered as contributing factors for access to justice.

With regard to the structure of the judicial system, the Commission relied on the recommendation of the CoE and the rights granted by the ECHR.\textsuperscript{226} The creation of the basic judicial organs and the introduction of a three-tier judicial system in Bulgaria were monitored throughout the accession process by making use of structural indicators. The Accession

\textsuperscript{225} COM (2012) 411 final, 2-3.

\textsuperscript{226} cf CoE Committee of Ministers, ‘Recommendation Concerning the Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases’ R (95) 5 and Article 2 of the Protocol No. 7 to the ECHR concerning the right of appeal in criminal matters.
Partnership contained several demands with regard to judiciary reform and the Commission demonstrated quite clearly the importance of the restructuring and improvement of the efficiency of Bulgaria’s judiciary.\textsuperscript{227}

Furthermore, the Commission concentrated its assessments on issues, like the reduction of backlogs and the length of judicial proceedings and pre-trial detention as well as the improvement of quality of investigation. Emphasis was also put on the improvement of the physical infrastructure and human resources of the judiciary. Progress was measured in terms of new court buildings opened and the computerisation of the courts and equipment in terms of a unified information system. Furthermore, the Commission assessed the number of magistrates and the new administrative positions created to relieve the work of judges and to accelerate court proceedings.\textsuperscript{228} The training of judges, prosecutors and administrative staff was an issue consistently monitored in the Regular Reports and was addressed as a priority in the Accession Partnerships, with the goal to ensure the proper functioning of the judicial system. The Commission’s reports were very detailed in assessing the availability of training programmes for new and existing staff within the judiciary and requested the transformation of the non-governmental Magistrate Training Centre into a publicly funded training institution.\textsuperscript{229} The National Institute for the Judiciary was only set up in December 2003 under the financial and organisational responsibility of the SJC. The Commission particularly recognised the special trainings in EU law provided to the judicial staff as an indicator to increase the professionalism and competence of the judiciary.\textsuperscript{230}

The issue of guaranteeing legal aid was regarded by the Commission more as a human rights issue and, therefore, was primarily assessed in the section on civil and political rights of the reports. While the legal framework for legal aid was found to be adequate, the information gathered through surveys indicated that a large part of defendants did not actually have legal representation at all stages of judicial proceedings.\textsuperscript{231} This was seen as an indicator for insufficient legal aid and, therefore, had to be addressed in the priorities of the Accession Partnership of 2003.\textsuperscript{232} Only in 2006 a national bureau for legal aid was set up and adequate budget was provided to assure equal access to justice.\textsuperscript{233}

\begin{itemize}
\item[227] Kochenov (n 69) 249-51.
\end{itemize}
The assessment of access to justice and efficiency of the judiciary was continued under the CVM after Bulgaria’s accession to the EU. As requested under benchmark 2 and 3, Bulgaria had to ensure a more transparent and efficient judicial process and to enhance professionalism, accountability and efficiency of the judiciary. The indicators used to measure the progress in meeting these benchmarks addressed the procedural framework in place and the institutional set-up to speed up civil and criminal court proceedings and to ensure effective investigation in criminal matters. The Commission positively recognised that the SJC received extensive powers over the organisation of the justice system and new attributions in assessing the workload of judicial bodies, adjusting personnel schemes, changing jurisdiction areas and reallocating resources. The consistency of human resource planning and the strategies of the SJC to reduce the workload of judges were analysed by the Commission through process and outcome indicators. Also the quality of the trainings provided for judicial staff by the National Institute for Justice was assessed with regard to the embedment in the overall judicial structure.\textsuperscript{234} The perceptions of judicial shortcomings at the level of the Bulgarian population could be measured based on the Eurobarometer survey conducted in 2012 and was assessed by the Commission as an outcome indicator for the judicial reforms in the CVM Progress Report of July 2012.\textsuperscript{235}

Table 2 gives an overview of the structural, process and outcome indicators that were used in the Regular Reports and under the CVM to measure access to justice and efficiency of the judiciary in Bulgaria.

Table 2: Indicators to measure access to justice

<table>
<thead>
<tr>
<th>Access to Justice</th>
<th>Structural indicators</th>
<th>Process indicators</th>
<th>Outcome Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Legal framework in place guaranteeing a three-tier jurisdiction</td>
<td>Budget available for the judiciary</td>
<td>Length of judicial proceedings</td>
</tr>
<tr>
<td></td>
<td>Legal framework in place facilitating quicker proceedings</td>
<td>Speed of execution of rulings</td>
<td>Length of pre-trial detention</td>
</tr>
<tr>
<td></td>
<td>Legal provisions in place to provide human resources to courts</td>
<td>Quality of investigation</td>
<td>Backlog of cases</td>
</tr>
<tr>
<td></td>
<td>Legal framework in place ensuring the qualification and training of judicial staff</td>
<td>Human resources available in courts</td>
<td>Transparent and efficient handling of cases</td>
</tr>
<tr>
<td></td>
<td>Legal framework in place to guarantee legal aid</td>
<td>Material conditions in courts (court buildings, courts equipped with computer systems, unified information systems in place etc.)</td>
<td>No of cases sent back to investigation</td>
</tr>
</tbody>
</table>

\textsuperscript{234} SWD (2012) 232 final, 8-19 and SWD (2014) 36 final, 4-18.

\textsuperscript{235} COM (2012) 411 final, 2-3.
Judicial reform in terms of the independence and accountability of the judiciary and access to justice has proven to be one of the most difficult issues in Bulgaria’s accession process.\footnote{Smilov ‘Bulgaria’ (n 221) 115.} The Commission continuously addressed these issues in the Regular Reports. Over the years, the scope of the reports was more and more broadened and the issues selected for monitoring were described in more detail. However, there was no clear list of indicators that would have allowed for consistent monitoring of these areas. Only rarely quantifiable measures were used to document progress or setbacks. The assessments conducted to measure the progress in addressing the benchmarks under the CVM did follow a standardised set of mostly structural and process indicators. The reports also made reference to the results of previous assessments. This ensured the comparability of the progress over time. In this way, the methodology applied to conduct the assessments under the CVM was more transparent and consistent than the methodology applied in the Regular Reports that were issued before accession.

\subsection*{3.2. The case of Croatia}

The policy of conditionality, introduced in the fifth enlargement round, was also applied and gained even more significance in the enlargement policy towards the Western Balkan countries. In the accession process with Croatia, the EU pursued a broader agenda of conditionality reflecting also the legacy of ethnic conflicts in the region.

\subsubsection*{3.2.1. The framework for negotiations}

The Luxembourg General Affairs Council in April 1997 adopted conclusions on the application of conditionality, with a view to developing a coherent EU strategy for its relations with the countries in the region of Former Yugoslavia.\footnote{Council of the European Union, ‘Conclusions from the General Affairs Council Meeting’ (Luxembourg, April 1997) Annex III.} The EU strategy was intended to serve as an incentive and not as an obstacle to fulfil certain general conditions that were applied to all countries in South-Eastern Europe. The conditionality defined by the Council included the requirements of co-operation with the International Criminal Tribunal for the former Yugoslavia (ICTY) and regional co-operation. Furthermore, specific conditions were set as obligations for certain countries only. The Commission guaranteed an operational cooperation between the EU and the Western Balkans through the SAP (Stabilisation and Association Process) for Countries of South-Eastern Europe.\footnote{Commission, ‘On the Stabilisation and Association Process for Countries of South-Eastern Europe’ (Communication) COM (1999) 235 final.}
By launching the SAP, a more comprehensive and individualized framework was established for Western Balkan countries to make further progress on their way to EU membership. The SAP was aimed to improve the situation in the region by assisting the creation of effective and accountable law enforcement institutions and improving the border control and migration management. These reforms were seen as a pre-condition to prepare for membership. The Feira European Council in June 2000 reiterated its support for the reforms in the Western Balkans and confirmed the objective of “the fullest possible integration” of the countries participating in the SAP by acknowledging them as “potential candidates for EU membership.”

To support the Western Balkan countries in the implementation of the relevant reforms in the SAP, the EU provided assistance through the CARDS programme in the period 2000 to 2006. One of the six objectives of the programme was to assist the countries in “the creation of an institutional and legislative framework to underpin democracy, the rule of law and human and minority rights [...].” A core element of the SAP were the Stabilization and Association Agreements (SAAs), which provided the formal contractual relationship between the EU and the potential candidate countries to support the adoption of the EU standards and necessary rules. The SAAs included a specific title on justice and home affairs that provided for intense cooperation and encouraged the candidate and potential candidate countries to place particular emphasis in this field. In the judgements, whether or not a country qualified as a candidate country for membership, matters related to justice and home affairs, such as the reform of the police and the justice system and the fight against organised crime, have ranked high in the EU’s assessments.

Taking account of the experiences of the fifth enlargement round, the Brussels European Council in 2004 requested that a general framework for negotiation had to be agreed in advance of the negotiations. Within the Enlargement Strategy 2004, the Commission proposed the negotiating framework for Croatia and in this context introduced benchmarks as

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239 European Council, ‘Conclusions of the Presidency’ (Santa Maria da Feira, June 2000) para 67.
243 European Council ‘Presidency Conclusions’ (Brussels, June 2004) para 34.
a new tool to monitor the progress in the accession process. The purpose of benchmarks was to improve the quality of negotiations, as they are providing quantifiable measures referred to the legislative alignment with the acquis or to a track record in the implementation. Upon proposal from the Commission, benchmarks were set to be met by the candidate country to open negotiations as well as to provisionally close the chapters. While opening benchmarks concerned key preparatory steps for the future alignment with the acquis requirements, closing benchmarks reflected the need for legislative measures, administrative or judicial reforms to implement the acquis. The benchmarks were regarded as incentives for the candidate countries to stimulate the necessary reforms at an early stage of the accession negotiations. The provisions of the negotiating framework also provided for the suspension of accession negotiation in case of “serious and persistent breach of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.”

The European Partnerships and Accession Partnerships remained a central element of the accession strategy. The Partnerships were setting out the priorities identified for each country in the Commission’s Progress Reports and provided the framework for the EU assistance. As of 2007, the CARDS programme and the other programmes providing assistance to candidate countries (namely PHARE, SAPARD and ISPA) were replaced by one single instrument, namely the IPA. Assistance granted under the IPA was linked to the progress and needs identified through the Commission’s evaluations and was subject to a suspension clause for the case of failure to make sufficient progress in the accession process.

3.2.2. The monitoring mechanism applied to Croatia

Croatia signed the Stabilisation and Association Agreement (SAA) with the EU in 2001 and started the preparations for membership. The institutional framework of the SAA and the negotiating framework adopted by the Council provided for the continuous monitoring of Croatia’s progress in fulfilling the obligations. The Commission made use of the monitoring system that had been developed in the previous enlargement rounds and added new monitoring tools like the Screening Reports or Interim Reports to measure the level of realisation of the rule of law in Croatia. An overview of the different monitoring tools used by the Commission during the accession process of Croatia is presented in Figure 2.

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The monitoring tools were used throughout the different stages of the accession process to assess the progress towards fulfilling the obligations and implementing the political priorities of the SAA, the European Partnership and the Accession Partnerships between the EU and Croatia.

**The Opinion on the Application for Membership**

From 2002 on, the Commission was evaluating the SAP for South-Eastern Europe in annual reports. These reports were accompanied by country reports assessing the political, economic and administrative reforms of the Western Balkan countries. In these reports, the Commission welcomed the strong commitment of the Croatian government to the implementation of the SAA but also highlighted priority areas for further reforms.\(^{249}\) Croatia presented its application for membership in 2003. Already in 2004, the Commission recommended to open accession negotiations and submitted a favourable Opinion on Croatia’s Application for Membership. However, the Commission also came to the conclusion that Croatia had to make “considerable and sustained efforts to align its legislation with the acquis”\(^{250}\) especially in the field of justice and home affairs. The methodology adopted by Commission in drawing up this Opinion was based on the experience from earlier enlargement rounds and the structure of the Opinion followed the Copenhagen criteria and the conditionality established by the Luxembourg General Affairs Council in April 1997.

The judiciary mainly was assessed as part of the political criteria. Other rule of law elements were covered by the acquis criteria in chapter 24, dealing with “Co-operation in the field of justice and home affairs.”\(^{251}\) For both areas the Commission identified substantial


shortcomings in fulfilling the membership criteria that needed to be addressed by Croatia throughout the accession process. Croatia was recognised as a candidate country in the Brussels European Council in June 2004 with the prospective of launching the accession negotiations in March 2005. Also the SAA finally entered into force on 1 February 2005, after an enlargement protocol had been signed in December 2004.\footnote{European Union, ‘Press Release: The Stabilisation and Association Agreement with Croatia enters into force today’ (1 February 2005) <http://europa.eu/rapid/press-release_IP-05-122_en.htm> accessed 9 August 2014.} The EU committed Croatia to implement the required reforms under the Title on Justice and Home Affairs, covering among others Articles the reinforcement of institutions and rule of law, early in the accession negotiations. However, the formal opening of accession negotiations was postponed due to insufficient co-operation of Croatia with the ICTY, a condition of the SAA.\footnote{Trauner (n 241) 781-82.} Only by the end 2005 Croatia had met the outstanding condition of full cooperation with the ICTY and the accession negotiations were formally opened by decision of the Luxembourg General Affairs Council in October 2005.\footnote{Council of the European Union, ‘Press Release General Affairs Council Meeting’ (Luxembourg, October 2005).}

The screening and the benchmarking process

At the same time with the formal opening of the accession negotiations, the Luxembourg General Affairs Council in October 2005 adopted the negotiating framework for Croatia, setting out the principles governing the negotiations and providing a preliminary indicative list of negotiation chapters. The acquis was now organised in a list of 33 negotiation chapters plus two chapters concerning institutions and other issues. The acquis in the field of “justice, freedom and security” was negotiated in chapter 24 that covered issues like border control, visas, external migration, asylum, police cooperation, the fight against organised crime and judicial cooperation in criminal and civil matters. The negotiating framework provided for a new chapter 23, dealing with “judiciary and fundamental rights”, under which the political issues of the rule of law were addressed. As a result of the adoption of the new negotiating framework, the rule of law was no longer regarded solely as part of the political criteria but was also conceived as an integral part of the acquis, what should allow the Commission to keep the crucial areas of the rule of law, notably judiciary and fundamental rights, under close scrutiny.\footnote{Hillion (n 200), 4.}

Immediately after the formal opening of accession negotiations in 2005, the Commission introduced the process of screening to obtain preliminary indications of the accession criteria
for each negotiation chapter. The process of screening was completed in 2006. Separate Screening Reports were issued for each negotiation chapter. The assessment of the rule of law in Croatia started with the screening of chapter 23, judiciary and fundamental rights that was conducted in two screening meetings in September and October 2006. The Screening Report described Croatia’s alignment with the acquis and the implementation capacity in a twofold way. On the one hand, the report included the information provided by Croatia in the screening meetings regarding the country’s current state, on the other hand, the Commission identified the deficits to be tackled and monitored during the accession process. After a chapter had been screened, the Council decided on whether to open a chapter for negotiations or on the benchmarks to be met by the candidate country before opening it. This decision was based on a recommendation from the Commission reflecting the results of the screening process and the negotiating position presented by Croatia. Based on the Commission’s screening report, the Council decided on three opening benchmarks for chapter 23. The Commission recommended making the Screening Reports and opening benchmarks available for the public to increase transparency and ensure public support for enlargement. However, only the Screening Reports are publicly available, while details on the content of the opening benchmarks cannot be accessed.

After Croatia had made sufficient progress in fulfilling the opening benchmarks, the EU’s common position for the opening of the negotiating chapter was adopted by the Council on 25 June 2010. In this EU common position the closing benchmarks that had to be met to provisionally close the chapter, were tabled. The negotiations on chapter 23 were formally opened in the tenth meeting of the Accession Conference at Ministerial level with Croatia. Together with two other chapters (competition policy and foreign, security and defence policy), the chapter on judiciary and fundamental rights was among the last three negotiating chapters. The Council set 10 closing benchmarks to be fulfilled by Croatia in the field of judiciary and fundamental rights. These closing benchmarks were continuously monitored by the Commission and addressed in the accession negotiations with the Council. In February 2011, the Croatian civil society organisations published a joint opinion on the readiness of the

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258 ibid, 10.
260 Council of the European Union ‘Tenth Meeting of the Accession Conference at Ministerial Level with Croatia’ (Press Release, June 2010).
Republic of Croatia for the closing of negotiations in chapter 23, requesting the Commission and the Croatian Government to communicate the progress in this chapter in a transparent manner and to publish the results of the negotiation process with the EU. In this joint opinion, the civil society organisations pointed out several areas where significant challenges remained to be addressed by the Croatian institutions to meet the benchmarks. Following this joint opinion, the Commission’s on-going monitoring efforts were presented in an Interim Report on the negotiation chapter 23. In this report, the Commission described the progress made in meeting the ten closing benchmarks and concluded that further work was necessary to establish a convincing track record in the area of judiciary and fight against corruption. Several closing benchmarks of chapter 23 were addressing the judicial system, very vaguely requesting Croatia to strengthen the independence, accountability, impartiality and professionalism of the judiciary and to improve efficiency of judiciary. In this way, the benchmarks were not reflecting specific standards or targets, but were rather based on broad concepts that had to be further defined through specific indicators in the Commission’s reports. However, from the available sources it does not appear that the development of the closing benchmarks was based on “clear concepts, measurement methods, indicators, collection methods or time frames”.

The Progress Reports on Croatia

The SAA that entered into force in February 2005 provided the legal framework for the relations between the EU and Croatia. A mechanism for the implementation, management and monitoring of all areas of relations was established through the institutional framework of the SAA. The implementation of the obligations under the SAA was monitored in the annual Progress Reports together with the criteria for membership as defined by the Copenhagen European Council. Based on the main priorities identified in the Progress Report, the Commission proposed Accession Partnerships for Croatia.

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263 Wolfgang Benedek and others ‘Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans’ (Study, European Parliament 2012) 69.

264 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2005] OJ L269/3 (SAA Croatia).

Two Accession Partnerships with Croatia were adopted by the Council in 2006 and 2008.\textsuperscript{266} The Accession Partnership of 2006 established short term and key priorities for the next one or two years and medium term priorities to be accomplished within three or four years, whereas the Accession Partnership of 2008 only distinguished key priorities. The short-term priorities that were identified for the judicial system under the political criteria in the Accession Partnership 2006 were reiterated as priorities in the Accession Partnership 2008, as no satisfactory fulfilment could be achieved until 2007.\textsuperscript{267} Both partnerships contained among others the reform of the judicial system and the effective fight against corruption as key priorities in the field of the rule of law. Also, the proper implementation of all commitments made under the SAA and full cooperation with the ICTY were among these priorities. The priorities identified in the partnerships constituted the basis for the evaluations conducted by the Commission in line with the mechanisms established under the SAP, notably the annual Progress Reports.\textsuperscript{268}

The SAA also established a basis for the technical and financial assistance from the EU. The financial assistance under the PHARE and CARDS programs was well focused on the Croatian accession priorities as defined in the partnerships and addressed the specific negotiation requirements in terms of opening and closing benchmarks. In addressing the political criteria for membership, EU assistance also focused on long-term needs going beyond the negotiation dynamics.\textsuperscript{269} As from 2007, Croatia has benefited from financial assistance under the IPA that was intended to support the preparations for accession. The Accession Partnerships provided a framework to determine the different areas to which funds were to be allocated and at the same time served as a checklist against which to measure progress in the annual reports.\textsuperscript{270}

The Commission presented annual Progress Reports on Croatia from 2005 to 2011. In drawing up the Progress Reports, the Commission followed the methodology applied in the previous enlargement rounds. Rule of law was covered under the political criteria for membership and in the chapters 23 and 24 of the acquis. In this way, the results of the assessment of the judicial system were presented in two sections of the report and cross-


\textsuperscript{268} Decision 2006/145, art 2 and Annex; Decision 2008/119, art 2 and Annex.


\textsuperscript{270} Benoît-Rohmer and others (n 64) 86.
reference was made between these two sections. The opening and closing benchmarks that were introduced in the accession negotiations for the specific negotiation chapters would have provided an instrument to measure progress against. However, the Commission did not make reference to the closing benchmarks in the annual Progress Reports. This made the overall process of progress assessment quite un-transparent.\footnote{271} In preparing the Progress Reports, the Commission utilised numerous sources of information. Croatia was given the possibility to provide information on the progress made since the previous report and also the information provided by Croatia within the framework of the SAA was considered by the Commission. Various peer reviews and technical consultations have taken place to assess Croatia’s administrative capacity. Furthermore, the deliberations and reports from the EU institutions, various international organisations and NGO’s were considered.\footnote{272}

**Continued monitoring**

The accession negotiations were closed at the thirteenth meeting of the Accession Conference with Croatia on 30 June 2011 by closing the last four negotiating chapters.\footnote{273} The Council pointed out the considerable progress made with regard to fulfilling the commitments under chapter 23, however, the importance of the continuation to develop a track record of implementation and to further demonstrate concrete results was emphasised. The Treaty of Croatia’s Accession to the European Union\footnote{274} was signed on 9 December 2011. Article 36 of the Act of Accession\footnote{275} foresaw to closely monitor the commitments undertaken by Croatia in the accession negotiations, as they were spelled out in Annex VII to the Treaty of Accession that had to be achieved before or by the date of accession. The Commission’s monitoring had to be focused in particular on the commitments in the area of judiciary and fundamental rights. Continuous effort was necessary for Croatia to meet the closing benchmarks of chapter 23. There were 10 closing benchmarks set for chapter 23, covering different areas related to judiciary and fundamental rights. The progress in the respective fields was assessed by the Commission and presented in Monitoring Reports every six month up until the time of accession.

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\footnote{271}{Benedek and others (n 263) 68.}
\footnote{272}{SEC (2005) 1424, 4 and Croatia Progress Reports of the following years.}
\footnote{273}{Council of the European Union, ‘Thirteenth Meeting of the Accession Conference with Croatia at Ministerial level’ (Press Release, June 2011).}
\footnote{274}{Treaty concerning the Accession of the Republic of Croatia to the European Union [2012] OJ L112/10.}
The assessment of the Commission was based on information gathered through own analysis, the input provided by Croatia and by Member States as well as information from international and civil society organisations. Furthermore, the Commission used specific Monitoring Tables to update its findings for the reports. These Monitoring Tables were a working tool that was used to following up the details on all of Croatia’s commitments from the negotiations.\textsuperscript{276} Also in the last Monitoring Report presented in March 2013, the Commission identified several areas with regard to the judiciary and fundamental rights, were further efforts were necessary in order fulfil the commitments.\textsuperscript{277} However, unlike in the case of Bulgaria, the accession of Croatia was not made subject to the monitoring of the CVM, as benchmarks were to be reached before accession.\textsuperscript{278}

\subsection*{3.2.3. The indicators applied to measure the rule of law in Croatia}

Even though the Commission made use of new monitoring tools, like the Interim Report, to measure the rule of law in the accession process of Croatia, the indicators applied closely resembled those of previous enlargement rounds. With the introduction of benchmarks in the accession negotiations, the Commission made use of a new tool to assess the progress made towards achieving a specific standard that had to be fulfilled prior to accession. To define the standards against which the independence, impartiality and efficiency of the judiciary were measured, the Commission made reference to the definition of the content of these notions in the jurisprudence of the ECtHR, as this is an accepted reference for the EU acquis under Article 2. In particular this definition included the following criteria:

\begin{quote}
"Courts must be established by law; there shall be no discrimination in the appointment procedures of judges; the judiciary must not be influenced in its decision-making by either the executive or the legislature; judges must act impartially and be seen to do so; their conditions of tenure must be adequately ensured by law; the grounds for disciplinary action or removal from the post must be limited and laid down in the law."
\end{quote}

Furthermore, the Commission used the recommendation from international organisations as guidelines to identify a common European standard in the field of independence and

\begin{itemize}
\item \textsuperscript{276} Commission, ‘Comprehensive Monitoring Report on Croatia’ (Staff Working Document) SWD (2012) 338 final, 5.
\item \textsuperscript{277} Commission, ‘Monitoring Report on Croatia’s Accession Preparations’ (Communication) COM (2013) 171 final, 4-10.
\item \textsuperscript{278} Carrera, Guild and Hernanz (n 24) 9.
\item \textsuperscript{279} Commission, ‘Screening Report Croatia: Chapter 23’ (n 256) 2.
\end{itemize}
accountability of the judiciary, efficiency of the judicial system and access to justice. The progress made by Croatia in fulfilling the membership conditionality was assessed by the Commission against these standards in the annual Progress Reports. The assessments of the judiciary provided in chapter 23 of the reports was quite consistently structured along the areas “independence of the judiciary”, “impartiality”, “professionalism and competence”, “efficiency of the judiciary” and “judicial reform strategy”, what allowed to track changes over time in these areas. The following analysis is conducted on the basis of the Commission’s Opinion, the annual Progress Reports, the Screening Reports, the Interim Report and the Monitoring Reports issued by the Commission between 2005 and 2013.

The assessment of the independence and accountability of the judiciary
The cooperation in the field of justice and home affairs established under the SAA specifically focused on the reinforcement of institutions and the consolidation of the rule of law. The independence of the judiciary was one of the priority areas identified in Article 75 of the SAA. Also in the Accession Partnerships of 2006 and 2008, “judicial reform” and the establishment of “an open, fair and transparent system of recruitment, evaluation, promotion and disciplinary measures in the judiciary” were identified as priorities to improve the independence, impartiality and accountability of the judiciary.

In its assessment of the independence and accountability of the judiciary, the Commission has used very much the same indicators that had already been applied to Bulgaria. The institutional independence of the judiciary was measured through structural indicators evaluating the legal framework in place for judicial self-administration and the budgetary independence of the judiciary. In terms of accountability, the regulations on the appointment and dismissal of judges and the responsibility for disciplinary proceedings were examined. These parameters were measured through process indicators, assessing the structure and functioning of the State Judicial Council. As of 2006, the Commission measured the number of disciplinary proceedings conducted by the State Judicial Council and the sanctions

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282 SAA Croatia, art 75.


applied against judges, like reprimands, fines and dismissals or acquittals. However, in 2009, the Commission criticised the lack of transparency in disciplinary proceedings and the absence of legal means for the Ministry of Justice to verify the declarations of assets by judges and prosecutors.

The introduction of a Code of Ethics was assessed as a structural indicator to improve the accountability and impartiality of the judiciary. The impartiality and independence of the individual judges was measured through the regulations in place for recruitment of judicial staff and the appointment to permanent positions, the regulations on the immunity of judges and the salaries of magistrates and judges. Shortcomings in the application of transparent criteria for the appointment of judges and prosecutors were criticised throughout numerous reports by the Commission. Only in 2010, the Commission recognised the improvements made in this regard through the revision of the selection procedure for new judges, the application of transparent and objective selection criteria and the abolition of probation periods for judge. However, the Commission requested Croatia to establish a track record of the appointments based on the revised procedure and the new selection criteria in practice. Also the improvements in terms of judicial inspections were recognised in the Progress Report. The impartiality was a specific issue of the judicial system in Croatia, as there was a persisting ethnic bias against Serbs in local courts. In order to ensure a random allocation of cases, the implementation of an integrated case management system in all courts was requested and continuously assessed by the Commission.

Benchmarks imposed for the opening and closing of specific negotiation chapters were a new instrument against which the progress of the implemented reforms could be measured. In the Monitoring Reports, the Commission assessed the continued effort to meet these closing benchmarks by applying similar indicators as in the annual Progress Reports. The legal framework guaranteeing judicial self-administration, the systems for recruitment and appointment of judges and the limits to the immunity of judges were evaluated. To monitor the progress in addressing the specific benchmarks, the Commission relied very much on process and outcome indicators, focusing on the implementation of measures and the

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establishment of solid track records.\textsuperscript{291} The Commission requested Croatia to establish a track record of the application of uniform, transparent and objective criteria in recruiting and appointing judges and prosecutors as well as of the conduct of disciplinary procedures against errant judicial officials. Furthermore, the implementation of the system for asset declarations for judges and the application of the code of conduct were monitored in the reports.\textsuperscript{292}

Table 3 gives an overview of structural, process and outcome indicators applied in the Progress Reports and Monitoring Reports on Croatia to measure the independence and accountability of the judiciary.

**Table 3: Indicators to measure the independence and accountability of the judiciary**

<table>
<thead>
<tr>
<th>Structural indicators</th>
<th>Process indicators</th>
<th>Outcome Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal framework in place guaranteeing self-administration and organisation of the judiciary</td>
<td>Budget available for the judiciary</td>
<td>Reduction of risk of political interference in the judiciary</td>
</tr>
<tr>
<td>Legal framework in place guaranteeing and restricting the immunity of magistrates</td>
<td>Salaries of magistrates and judges</td>
<td>No. of appointments based on transparent and objective criteria</td>
</tr>
<tr>
<td>Provisions in place for the recruitment of judicial staff and for the appointment of judges</td>
<td>Objective and transparent criteria established for the recruitment and appointment of judges and prosecutors</td>
<td>No. of disciplinary proceedings and sanctions against judicial staff</td>
</tr>
<tr>
<td>Provisions in place for assigning cases to individual judges</td>
<td>Implementation of an integrated case management system in courts</td>
<td>No. of irregularities reported through the inspections</td>
</tr>
<tr>
<td>Codes of Ethics in place</td>
<td>Enforcement of the Code of Ethics</td>
<td></td>
</tr>
<tr>
<td>Provisions in place for evaluating the impartiality of the judiciary</td>
<td>Methodology adopted to evaluate judges for the purposes of promotion</td>
<td></td>
</tr>
<tr>
<td>Provisions in place for judicial inspections</td>
<td>Mandatory declarations of assets</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Legal means to verify the declarations of assets by judges and prosecutors</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No of inspections carried out</td>
<td></td>
</tr>
</tbody>
</table>

**The assessment of access to justice**

The improvement of the “effectiveness” of the judiciary and the “training of the legal professions” were areas of particular focus under Article 75 of the SAA.\textsuperscript{293} The Accession Partnerships of 2006 and 2008 contained as priorities for the judicial system the reduction of backlog of cases, the rationalisation of court organisation and development of modern information technology systems as well as the enhancement of professionalism through training and the proper execution of court rulings.\textsuperscript{294} The progress in addressing these priorities was assessed by the Commission in the annual Progress Reports in chapter 23.

\textsuperscript{291} COM (2011) 110, 2.
\textsuperscript{293} SAA Croatia, art 75.
Similar to the indicators applied in the accession process of Bulgaria, the efficiency of judiciary was measured in terms of the total budget provided for the judicial system, the infrastructure and equipment of courts, the number of judges and other judicial staff and the average duration of proceedings and backlog of unresolved cases. The Commission provided quantitative measures for these indicators in the Progress Reports and monitored the changes in the figures over time. Also the availability of Alternative Dispute Resolution methods and the reduction of the complexity of legal procedures were assessed as structural indicators to increase the efficiency of the judicial system. In this regard the application of a new Criminal Procedure Code has accelerated the investigation procedure leading to more indictments.\footnote{295} The training programmes provided for judicial staff, were assessed as a contribution to enhance professionalism and quality of the judiciary. The provision of continuous professional training should be provided by the Judicial Academy established in March 2004. Also the budget allocation for the Judicial Academy was considered as a quantitative indicator in the assessment of the Commission.\footnote{296} The Commission especially emphasised the importance of initial training and trainings covering matters of EU law in its reports.\footnote{297} The access to justice in terms of the legal framework in place to guarantee legal aid was not only assessed in chapter 23 of the Progress Reports, but also under the aspect of “Civil and Political Rights” and in other chapters of the acquis.\footnote{298}

One of the closing benchmarks of chapter 23 specifically requested Croatia “to improve the efficiency of the judiciary”. Under this benchmark, the reduction of the backlog of cases and of delay in court cases, the introduction of new methods of enforcement as well as the improvement of human resources and of the physical infrastructure and computerisation of courts were important parameters to measure against the progress of reform implementation.\footnote{299} The Commission continuously monitored the roll-out of the integrated case management system and the rules governing the mobility and transfer of judges. Also the performance of the Judicial Academy in terms of professional training programmes provided was assessed in the six-monthly Monitoring Reports. However, the successful completion of the priority areas identified under this closing benchmark could only be reported in the 2013 Monitoring Report.\footnote{300}

\footnotesize{\begin{itemize}
\item \footnote{297} SEC (2009) 1333, 51 and SEC (2010) 1326, 47.
\item \footnote{299} COM (2011) 110, 3.
\item \footnote{300} SWD (2012) 338 final, 33-34 and COM (2013) 171 final, 4-5.
\end{itemize}}
Table 4 gives an overview of the structural, process and outcome indicators that were used in the Progress Reports and Monitoring Reports to measure access to justice and efficiency of the judiciary in Croatia.

<table>
<thead>
<tr>
<th>Access to Justice</th>
<th>Structural indicators</th>
<th>Process indicators</th>
<th>Outcome Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Legal framework in place facilitating quicker proceedings</td>
<td>• Budget available for the judiciary</td>
<td>• Transparent and efficient handling of cases</td>
</tr>
<tr>
<td></td>
<td>• Availability of Alternative Dispute Resolution methods</td>
<td>• Speed of execution of rulings</td>
<td>• Backlog of cases</td>
</tr>
<tr>
<td></td>
<td>• Legal provisions in place to provide human resources to courts and for the mobility of judges</td>
<td>• Human resources available in courts</td>
<td>• Length of investigation phase in criminal procedures</td>
</tr>
<tr>
<td></td>
<td>• Legal framework in place ensuring the qualification and training of judicial staff</td>
<td>• Material conditions in courts (physical infrastructure, computerisation of courts, integrated case management system in place etc.)</td>
<td>• Length of judicial proceedings</td>
</tr>
<tr>
<td></td>
<td>• Legal framework in place to guarantee legal aid</td>
<td>• Availability and quality of professional trainings provided to the judicial staff</td>
<td>• No of trainings attended by judicial staff</td>
</tr>
</tbody>
</table>

Overall, the independence, accountability and efficiency of the judiciary and access to justice were important issues tackled in the accession negotiations with Croatia. The prospect of EU membership was a powerful incentive for Croatia to bring about the requested reforms under the SAA and the Accession Partnerships. The Commission continuously monitored the progress in fulfilling the required standards in its Progress Reports and Monitoring Reports. The transparency in measuring progress over time has been increased by following a more structured approach and by consistently applying the same indicators. However, the assessment of the progress towards fulfilling the closing benchmarks, that had been introduced as a new monitoring tool by the Commission, lacked consistent measurement methods. The underlying concepts and objectives were not well-defined and no clear reference to the benchmarks was made in the Progress Reports. Only in the Monitoring Reports, the progress towards fulfilling the closing benchmarks was evaluated in a more consistent and transparent manner by applying a set of comprehensive indicators directly related to the benchmarks defined.

Trauner (n 241) 782-83.
Benedek and others (n 263) 69.
3.3. The case of Montenegro

As one of the Western Balkan countries, Montenegro’s perspective for EU membership is based on the decision of the Feira European Council in 2000 and on the “Thessaloniki Agenda for the Western Balkans” that had been endorsed by the Thessaloniki European Council in 2003.\textsuperscript{303} Even before declaring its independence on 3 June 2006, Montenegro maintained relations with the EU as part of the state union Serbia and Montenegro. The European Partnership\textsuperscript{304} and the SAA\textsuperscript{305} with the new state Montenegro were signed in 2007, laying down the formal framework for relations and for Montenegro’s way towards EU membership.

3.3.1. The new approach to negotiations

To take account of the experience acquired from previous accession negotiations, the Commission proposed a new Enlargement Strategy based on consolidation, conditionality and communication in its Enlargement Strategy Paper of 2006. This strategy formed the basis for “a renewed consensus on enlargement” that called to address issues related to the rule of law at an early stage of the accession process.\textsuperscript{306} The renewed consensus on enlargement was confirmed by the Brussels European Council in 2006, where also the EU’s commitment towards the Western Balkan states was renewed. At the same time, the European Council reiterated “that each country’s progress towards the European Union depends on its individual efforts to comply with the Copenhagen criteria and the conditionality of the Stabilisation and Association Process.”\textsuperscript{307} In the light of this, the Commission intensified the dialogue on the rule of law with the candidate and potential candidate countries and extended the use of peer missions. The use of benchmarking in the accession process served as an important catalyst for reforms and gave a clear message, that rule of law issues must be addressed seriously before accession to establish a convincing and credible track record.\textsuperscript{308}

To acknowledge the importance attached to the area of the rule of law and fundamental rights in the accession process with the Western Balkan countries, the chapters 23 and 24 were put in the forefront of the accession negotiations. This new approach should allow maximum time for establishing the necessary legislation, institutions and a solid track record of

\textsuperscript{303} European Council, ‘Presidency Conclusions’ (Thessaloniki, June 2003).
\textsuperscript{305} Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Montenegro, of the other part, signed in Luxembourg, 15 October 2007 (SAA Montenegro).
\textsuperscript{307} European Council ‘Presidency Conclusions’ (Brussels, December 2006), para 8.
With the Council’s endorsement of the Commission’s proposed new approach, Montenegro was the first enlargement country, where both chapters were to be tackled early in the negotiations. In the new approach to negotiations, the rule of law and democratic governance, including the fight against organised crime and corruption, are firmly anchored at the heart of the accession process. The proper functioning of the core institutions from the national parliament and government through the judicial system and law enforcement agencies have to be guaranteed.

The new approach to negotiations was also reflected in the Commission’s proposal for the new IPA II instrument for the multi-annual financial framework 2014 to 2020. Stronger linkages with the priorities identified in the Enlargement Strategy should guarantee an improved strategic focus of the pre-accession financial assistance provided to enlargement countries. Through country and multi-country strategy papers clear targets and a performance element were introduced. The IPA II Regulation also foresees that progress towards achievement of these specific targets shall be monitored by using clear, transparent, country-specific and measurable indicators. These indicators shall cover inter alia the area of strengthening democracy, the rule of law and an independent and efficient justice system. The relevant performance indicators shall be pre-defined and enable objective assessment of progress over time and across programmes. Indicators shall also be taken into account for the contribution of performance rewards. The performance element laid down in Article 14 of the Regulation make it possible to reward countries with good performance and to re-allocate funds in case of underperformance.

3.3.2. The monitoring mechanism applied to Montenegro

After the declaration of independence in 2006, Montenegro took part in the reporting arrangements applying to potential candidate countries. The monitoring mechanism applied by the Commission consisted of the tools that had been used in the previous enlargement rounds (as presented in Figure 3).

313 Regulation 231/2014.
The SAA and the Progress Reports on Montenegro

The EU and all EU Member States recognised the independence of Montenegro in June 2006 and the Commission re-launched negotiations for the SAA with Montenegro in September 2006. Even though contractual relations between the EU and Montenegro were only established in 2007, the Commission presented the first progress report under the SAP on Montenegro already in November 2006. Progress Reports were issued on an annual basis from 2006 to 2009. In 2010 the Commission presented its Opinion on the Application for Membership and, therefore, no Progress Report was issued in this year. From 2011 on, the annual Progress Reports followed the structure of the Copenhagen criteria, assessing the ability to assume the acquis in 33 negotiating chapters. The conditionality established by the Luxembourg General Affairs Council in April 1997, namely the co-operation with the ICTY and regional co-operation, were included in the political criteria for membership. The 2011 and 2012 Progress Reports provided a detailed analysis of the judicial system in two sections of the report, namely under the political criteria for membership and in chapter 23 of the acquis criteria. In 2013 a detailed analysis of the developments in the judicial system was only provided in chapter 23. To draw up the annual reports, the Commission gathered information from different sources. The data provided by the government of Montenegro, the EU Member States and the European Parliament as well as information from various international organisations and NGOs contributed to the reports.

The Opinion on the Application for Membership

Montenegro presented its application for membership of the EU in 2008 and the Commission issued an Opinion on Montenegro’s application in 2010. In preparing the Opinion, the Commission followed a methodology similar to that used in previous Opinions and included the elements of the renewed consensus on enlargement agreed in 2006. The Opinion no longer

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Commission, ‘Montenegro 2012 Progress Report’ (Staff Working Document) SWD (2012) 331 final and
contained a detailed analysis of the criteria for membership, but rather summarised the main findings of the assessment. The detailed analysis was presented in a separate Analytical Report accompanying the Opinion.\textsuperscript{317} The assessments conducted by the Commission followed the conditions of eligibility as laid down by the Copenhagen criteria and the SAP conditionality. Furthermore, Montenegro’s track record in implementing the obligations under the SAA was examined. Based on the results of the Analytical Report, the Commission recommended granting the status of candidate country to Montenegro but at the same time identified seven key priorities to be addressed as a prerequisite to opening accession negotiations. Strengthening the rule of law through judicial reform was one of these key priorities.\textsuperscript{318} In this way, the Opinion reiterated the need for reforms that had already been identified under the SAA and as a short-term priority in the European Partnership in 2007.\textsuperscript{319} Furthermore, chapter 23 and 24 were identified as two of those chapters, where considerable and sustained efforts are necessary to align with the EU acquis.\textsuperscript{320} The Commission supported Montenegro in addressing these issues by providing financial and technical support. The funds provided to Montenegro through the IPA have increased the capacity in the areas of the rule of law, justice and home affairs and have contributed to the opening of negotiations in June 2012.\textsuperscript{321}

\textbf{The screening and the opening of accession negotiations}

With a view to opening the accession negotiations, the Brussels European Council in 2011\textsuperscript{322} requested the Commission to examine in particular Montenegro’s progress in the area of the rule of law and fundamental rights in the first half of 2012 and to prepare a proposal for a framework for negotiations, incorporating the new approach to negotiations. Following this request, the Commission presented a report on Montenegro’s Progress in the Implementation of Reforms in May 2012. This report assessed the efforts made by Montenegro to address the seven key priorities as set out in the Opinion on the Application for Membership. In its assessment, the Commission confirmed that Montenegro had achieved “\textit{the necessary degree of compliance with the membership criteria and in particular the Copenhagen political criteria, to start accession negotiations.}”\textsuperscript{323} Based on the Commission’s report, the

\textsuperscript{318} COM (2010) 670, 11.
\textsuperscript{319} Decision (EC) 2007/49, Annex.
\textsuperscript{320} COM (2010) 670, 9-10.
\textsuperscript{321} COM (2012) 600 final 19.
\textsuperscript{322} European Council, ‘Conclusions’ (Brussels, December 2011) para 12.
Luxembourg General Affairs Council in June 2012\textsuperscript{324} adopted the general EU position and the negotiating framework to open accession negotiations with Montenegro. The Councils decision was endorsed by the Brussels European Council in 2012\textsuperscript{325} and negotiations were formally opened on 29 June 2012.

Following the request of the Brussels European Council in 2011 and in line with the new approach, the Commission initiated the screening of chapter 23 and chapter 24 in spring 2012, as these chapters were to be tackled early in the accession process. This should allow Montenegro to develop the required solid track record of reform implementation and ensure sustainable and lasting progress in the realisation of the rule of law.\textsuperscript{326} The Screening Report of chapter 23\textsuperscript{327} and chapter 24\textsuperscript{328} presented the results from the systematic examination of the acquis and also identified specific issues that needed to be addressed before accession negotiations on these chapters could be opened. In its recommendations, the Commission requested the adoption of one or more Action Plan(s) that should guide the reform process on the rule of law. The recommendations in the field of judicial reform specifically addressed the shortcomings in terms of independence, impartiality, accountability as well as the competence and efficiency of the judiciary.\textsuperscript{329} After the opening benchmarks had been fulfilled by Montenegro in 2013,\textsuperscript{330} both chapters were opened for accession negotiations in the third meeting of the Accession Conference with Montenegro at Ministerial level on 18 December 2013. In the EU common position on chapter 23 and chapter 24, the Accession Conference adopted a list of interim benchmarks that have to be met before the negotiation process can proceed to the next steps. The Accession Conference emphasised that particular attention shall be devoted to monitoring these issues throughout the negotiations.\textsuperscript{331} The interim benchmarks for chapter 23 especially address the “independence”, “impartiality and accountability” and “professionalism, competence and efficiency” of the judiciary as well as “the handling of domestic war crimes cases”.\textsuperscript{332}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{324} Council of the European Union (n 310).
\item\textsuperscript{325} European Council, ‘Conclusions’ (Brussels, June 2012).
\item\textsuperscript{326} COM (2012) 600 final.
\item\textsuperscript{327} Commission, ‘Screening Report Montenegro: Chapter 23 – Judiciary and Fundamental Rights’ (2012).
\item\textsuperscript{329} Commission (n 327) 21-22.
\item\textsuperscript{330} COM (2013) 700 final, 24.
\item\textsuperscript{331} Council of the European Union, ‘Third Meeting of the Accession Conference with Montenegro at Ministerial level – key Rule of Law Chapters opened among Others’ (Press Release, December 2013).
\item\textsuperscript{332} Council of the European Union, ‘European Union Common Position: Chapter 23: Judiciary and fundamental rights’ (Accession Document AD 17/1, December 2013)
\end{enumerate}
\end{footnotesize}
3.3.3. The indicators applied to measure the rule of law in Montenegro

The monitoring tools and indicators applied to measure the rule of law in Montenegro, quite closely resemble those applied in the case of Croatia. The Enlargement Strategy and the conduct of accession negotiations that had already been introduced in the previous enlargement rounds, were further defined and became more comprehensive. Besides the opening and closing benchmarks that were already applied as monitoring tools to Croatia and Bulgaria within the CVM, the Commission made use of interim benchmarks, allowing for a closer monitoring of the continuous progress towards fulfilling the obligations. In its assessments the Commission referred to the same standards that had already been applied to Croatia. The specific requirements identified with regard to independence, accountability and efficiency of the judiciary in chapter 23 were “a firm commitment to eliminating external influences over the judiciary”, “adequate financial resources and training”, “[l]egal guarantees for fair trial procedures” and to “fight corruption effectively”. These requirements were continuously assessed by the Commission in the annual reports. The following analysis is conducted on the basis of the reports prepared by the Commission between 2010 and 2013.

The assessment of the independence and accountability of the judiciary

The monitoring tools applied by the Commission in the accession process of Montenegro made use of the indicators adopted in previous enlargement rounds to measure the independence, impartiality and accountability of the judiciary. In the Opinion on Montenegro’s application for membership, the Commission identified the de-politicisation of appointment procedures and the reinforcement of independence, autonomy and accountability of judges and prosecutors as key priorities to strengthen the rule of law. The Analytic Report of 2010 and the Progress Reports of the following years assessed the improvements made in addressing these priorities. The indicators applied measured the de-politicisation of the Judicial and Prosecutorial Council, the system applied for the recruitment and appointment of judges and prosecutors, the budget available to the judiciary and the salaries of magistrates, prosecutors and judges. The existence of a Code of Ethics was welcomed by the Commission as a structural indicator for improving the accountability in the judiciary and also the number of proceedings initiated for its breach was continuously monitored.

333 cf Commission, ‘Screening Report Montenegro: Chapter 23’ (n 327) 2 and Commission, ‘Screening Report Croatia: Chapter 23’ (n 256) 2.
system in place to ensure a random allocation of cases to individual judges was assessed by
the Commission as a process indicator to guarantee the impartiality of judges.\textsuperscript{336}

The interim benchmarks introduced with the opening of negotiations on chapter 23 by the
Council in December 2013 also addressed the independence, impartiality and accountability
of the judiciary. Based on these benchmarks, Croatia is requested to establish (among others)
initial track records of “appointments of high-level judges and high level prosecutors based
on transparent and merit-based procedures”, “recruiting judges and prosecutors on the basis
of a single, nationwide, transparent and merit based system and […] obligatory initial
training in the Judicial Training Centre”, “implementing a fair and transparent system of
promoting judges and prosecutors” and “regular inspections of the work of judges and
prosecutors”.\textsuperscript{337} These benchmarks remain to be addressed in the Progress Report of 2014.

Table 5 gives an overview of the structural, process and outcome indicators that were used in
the Progress Reports to measure access to justice and efficiency of the judiciary in
Montenegro.

\textbf{Table 5: Indicators to measure the independence and accountability of the judiciary}

<table>
<thead>
<tr>
<th>Structural indicators</th>
<th>Process indicators</th>
<th>Outcome Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Legal framework in place guaranteeing self-administration and organisation of the judiciary</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Legal framework in place guaranteeing and restricting the immunity of magistrates</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Provisions in place to apply objective and transparent criteria for recruitment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Provisions in place to guarantee de-politicised and merit-based appointments and promotion of judges and prosecutors</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Provisions in place for assigning cases to individual judges</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Codes of Ethics in place</td>
<td>• Budget available for the judiciary</td>
<td>• Reduction of risk of political interference in the judiciary</td>
</tr>
<tr>
<td>• Provisions in place for regular inspections</td>
<td>• Salaries of magistrates, prosecutors and judges</td>
<td>• De-politicisation of the Judicial and Prosecutorial Councils</td>
</tr>
<tr>
<td></td>
<td>• Objective and transparent criteria established for the recruitment of judicial staff and for the appointment of judges</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Methodology adopted to evaluate judges for the purposes of promotion</td>
<td>• No. of disciplinary proceedings and sanctions against judicial staff</td>
</tr>
<tr>
<td></td>
<td>• Application of a system for random allocation of cases to individual judges</td>
<td>• Establishment of a country-wide single recruitment system</td>
</tr>
<tr>
<td></td>
<td>• Establishment of a commission for monitoring the enforcement of the Code of Ethics</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Mandatory declarations of assets</td>
<td>• No. of appointments based on transparent and objective criteria</td>
</tr>
<tr>
<td></td>
<td>• Publicity of court rulings</td>
<td>• No. of irregularities reported through the inspections and sanctions applied</td>
</tr>
<tr>
<td></td>
<td>• No of inspections carried out</td>
<td></td>
</tr>
</tbody>
</table>


The assessment of access to justice

To reinforce the efficiency of the judiciary was one of the key priorities identified by the Commission for the field of rule of law in its Opinion on the application of membership.\(^\text{338}\) The Commission consistently monitored the efficiency of the judiciary and access to justice in the annual Progress Reports of Montenegro. The Analytical Report of 2010 and the following Progress Reports provided a comprehensive overview of the judicial system and identified several improvements and achievements as well as shortcomings. The three-tier jurisdiction was assessed with regard to the structure of the court system and of the public prosecution. Furthermore, the legal framework in place facilitating quicker proceedings, like the new Criminal Procedure Code with simplified pre-trial proceedings, was investigated. Also the budget allocations for the courts and the administrative capacity in terms of infrastructure and equipment were indicators to measure the efficiency of the judiciary. With regard to the professionalism of the judiciary, the Commission assessed the training for judges and prosecutors provided by the Judicial Training Centre, however, criticised the lack of permanent mandatory courses and of a set curricula. Also the improvements with regard to the guarantee of free legal aid were monitored and the Commission welcomed the implementing acts adopted on the Law of Free Legal Aid in 2012 and the opening of free legal aid offices.\(^\text{339}\)

The interim benchmarks introduced for chapter 23 by the Council in December 2013 addressed the professionalism, competence and efficiency of the judiciary and required in particular to develop an initial track record of backlog reduction, to implement the Judicial Information System that allows monitoring the workload and performance of judges and courts as well as the adoption of a law on judicial training, securing the necessary financial and human resources for the Judicial Training Centre.\(^\text{340}\) In this way, the interim benchmarks adopted by the Council reflect the priorities established in the SAA and European Partnership and address very specifically the issues monitored by the Commission in the reports from 2010 to 2013. However, in which way these benchmarks will be referred to in the future annual reports remains to be seen.

Table 6 gives an overview of the structural, process and outcome indicators that were used in the Progress Reports to measure access to justice and efficiency of the judiciary in Montenegro.

Table 6: Indicators to measure access to justice

<table>
<thead>
<tr>
<th>Access to Justice</th>
<th>Structural indicators</th>
<th>Process indicators</th>
<th>Outcome Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Legal framework in place guaranteeing a three-tier jurisdiction</td>
<td>• Budget available for the judiciary</td>
<td>• Length of judicial proceedings</td>
<td></td>
</tr>
<tr>
<td>• Legal framework in place facilitating quicker proceedings</td>
<td>• Speed of execution of rulings</td>
<td>• Length of pre-trial detention</td>
<td></td>
</tr>
<tr>
<td>• Availability of Alternative Dispute Resolution methods</td>
<td>• Implementation of the law on the right to trial within a reasonable time</td>
<td>• Backlog of cases</td>
<td></td>
</tr>
<tr>
<td>• Legal framework in place with regard to the right to legal remedy</td>
<td>• Human resources available in courts</td>
<td>• Rejections of complaints on procedural grounds</td>
<td></td>
</tr>
<tr>
<td>• Legal framework in place ensuring the qualification and training of judicial staff</td>
<td>• Material conditions in courts (infrastructure, equipment and IT system)</td>
<td>• Transparent and efficient handling of cases</td>
<td></td>
</tr>
<tr>
<td>• Legal framework in place to guarantee free legal aid</td>
<td>• Mandatory courses and systematic training for judges and prosecutors</td>
<td>• No. of trainings attended by judicial staff</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Availability of budget for the Judicial Training Centre</td>
<td>• No. of free legal aid offices</td>
<td></td>
</tr>
</tbody>
</table>

In the current EU enlargement policy towards Western Balkan countries, the accession conditionality has been expanded and specific criteria to be fulfilled by the candidate countries have been identified. Montenegro is one of the countries, for which the new approach to negotiations should allow establishing “the necessary legislation, institutions and solid track record of implementation before the negotiations are closed”. The Commission is promoting and monitoring the reforms to be implemented in the field of judiciary and fundamental rights in its annual reports. In the Analytical Report from 2010, the Commission stressed the paramount importance of an independent and efficient judiciary to safeguard the rule of law in the EU and its Member States. In its assessments, the Commission has very consistently addressed the key priorities identified in the Screening Report, the SAA and the European Partnership in terms of independence, accountability, efficiency and professionalism of the judiciary. With the opening of accession negotiations for chapter 23 in December 2013, very specific interim benchmarks have been established, requesting Montenegro to develop convincing track records in several areas of judiciary. In how far these specific benchmarks will be addressed in the assessments conducted for the annual progress through indicators remains to be seen in the future.

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341 Hillion (n 200), 6.
3.4. Implications for the use of indicators in the EU enlargement policy

The Commission has set up a comprehensive monitoring mechanism for the EU enlargement policy in order to measure the progress of candidate and potential candidate countries in realising the rule of law and fulfilling the membership criteria. Areas, where only little progress was made, were repeatedly addressed as priorities in the subsequent Accession Partnerships with the countries, and the progress in implementing these priorities was monitored in the annual reports. Based on the lessons learned from previous enlargement rounds, the EU continuously improved its Enlargement Strategy. As one can see along the three case studies, the consistency between the different monitoring tools used by the Commission has improved over time and more transparency was achieved. Based on the findings of the case studies, the following general implications for the use of indicators for measuring the rule of law in the EU enlargement policy can be derived.

(1) Combining structural, process and outcome indicators
The case studies have shown that in the fifth and sixth enlargement round, the monitoring of the Commission primarily focused on structural and process indicators. While the progress in terms of legislation and policies adopted for the promotion of the rule of law was assessed in great detail through the various monitoring instruments, there was an apparent deficiency in measuring the results achieved by the requested reforms through outcome indicators. Following a human rights centred approach, the Commission has recognised that also the realisation of rule of law perceived by the population is an important element to be assessed in the rule of law measurement. As a first step in this direction, the current Enlargement Strategy specifically focuses on the development of solid track records of reform implementation in the enlargement countries.

(2) Combining quantitative and qualitative indicators
The measurement of the rule of law in the accession processes initially was performed mainly through qualitative assessments and the results were presented in a descriptive manner in the annual reports. As pointed out by an official from DG Enlargement in the interview,\textsuperscript{343} the rule of law is a field, where appropriate quantitative indicators are hard to define. Therefore, the assessments will always be mostly based on qualitative indicators. However, the case studies have shown that the Commission makes more and more use of quantitative measures provided by international organisations to conduct the assessments. From the information given in the reports, it is not always obviously clear, in which way and to what extent the

\textsuperscript{343} ETC Graz (n 165).
Commission relied on such quantitative measures in drawing up its conclusions. To enhance the consistency and comparability of the reports, the Commission should indicate the data sources more explicitly and continuously follow up on the measures provided in previous years.

(3) Combining universal and country-specific indicators
As the decisions on accession shall be based on the same criteria for all the enlargement countries, the Commission tries to unify the indicators used for measuring the rule of law in the candidate countries as much as possible. The use of a reasonable core set of universal indicators is meant to ensure objectivity and consistency in the measurements and to allow for comparisons among countries. However, the enlargement countries strongly vary in terms of the initial level of realisation of the rule of law, as some of the current candidate and potential candidate countries in the Western Balkans are weakly established states suffering grave political problems in terms of national identity, ethnic conflicts and corruption. These particular challenges have to be taken into account, when assessing progress in the field of the rule of law in these countries. To address these particular challenges and to provide meaningful measures, the indicators applied to measure the rule of law require a thorough contextualisation for the specific situation in the country and should be adapted to the local specificities in cooperation with the respective state authorities and actors from civil society.

(4) Combining multiple data sources
As the case studies showed, the Commission draws upon multiple data sources to prepare the annual reports. These sources include data provided directly by the enlargement countries themselves, data collected by the Commission’s delegations and through expert reviews as well as the data stemming from international organisations and NGOs. As it was pointed out in the interview, the Commission is in continuous contact with international institutions that provide data for the measurement of the rule of law. To increase transparency and to allow for greater comparability between enlargement countries, the different data sources used and the measures applied to conduct the assessments should be more clearly indicated in the reports.

344 ibid.
345 cf Bieber (n 62).
346 Benedek and others (n 263) 62.
347 ETC Graz (n 165).
(5) Tracking changes over time and setting benchmarks

As one can see along the three case studies, the Commission has become more consistent in tracking changes over time throughout the latest enlargement rounds. According to the current Enlargement Strategy, an analytical examination of the acquis is conducted by the Commission in the beginning of the accession negotiations with each country. This assessment provides the basis for the definition of appropriate opening and closing benchmarks for all negotiation chapters. As emphasized in the interview,\(^\text{348}\) the Commission mainly relies on the acquis, the practices from the Member States and the standards set by international organisations to decide on appropriate benchmarks in the field of the rule of law. The Commission is following-up on the progress of the enlargement countries in addressing the benchmarks in its annual reports. The issues monitored correspond to the priorities identified in European and Accession Partnerships and reflect the improvements achieved through the financial assistance provided by the EU. However, for the sake of guaranteeing consistency in the overall monitoring process, the various monitoring tools should be linked in a more transparent manner and the progress made against reaching the specific benchmarks should be clearly indicated in all the reports. Benedek and others suggest, “to spell out in the Progress Reports more explicitly which priorities have been identified in the European and Accession Partnerships and make a concrete statement as to the degree in which these priorities are met or work is taking place in order to reach them, and as to the measures to be taken to reach the goal.” \(^\text{349}\) As stressed by Bieber, it often remains unclear, “what changes are essential for further progress towards EU membership”.\(^\text{350}\) Clear guidance and concrete recommendations, on the one hand, would help the enlargement countries in their efforts to reaching the set targets and, on the other hand, would also make it easier for the Commission to assess the progress or decline in the reports.\(^\text{351}\)

\(^{348}\) ibid.

\(^{349}\) Benedek and others (n 263) 63.

\(^{350}\) Bieber (n 62) 1795

\(^{351}\) Benedek and others (n 263) 92-93.
4. Conclusion and outlook

Over the last decade, the EU enlargement policy has been constantly linked to the prerequisite of the realisation of the rule of law in the enlargement countries. As non-compliance with this requirement could undermine the functioning of the internal market and mutual trust among Member States, the EU has imposed strict accession conditionality on the candidate countries. This conditionality in conjunction with the continuous monitoring efforts of the Commission has proven to be a successful tool to bring about the demanded reforms for the realisation of the rule of law. The three case studies have shown that rule of law issues always had a prominent position in the EU accession negotiations and this position was further strengthened in the current EU Enlargement Strategy.

The tools and indicators applied for measuring the rule of law in the EU accession process have been continuously improved over time. The annual Progress Reports issued for each enlargement country are aimed to ensure consistency in the EU enlargement policy. In conducting the country assessments for these reports, the Commission has been relying on qualitative and quantitative indicators from diverse sources of data. Through the close cooperation with national authorities, NGOs, country experts and international organisations, multiple data sources could be accessed for conducting the country assessments. The performance of the enlargement countries was measured against the standards set through the acquis communautaire and by international organisations, like the CoE or the UN. By setting common standards in the accession negotiations, the comparability and transparency of the conditions to be fulfilled by the enlargement countries could be increased. For several areas of rule of law, the Commission has set specific benchmarks, reflecting the required standards to be achieved prior to accession. These benchmarks are adapted to the specific situation of the respective country and shall allow for tracking changes over time through the annual reports. However, not all elements of the rule of law are covered by the acquis, and for some areas no common standards could be identified at international level. In these areas, it is harder to ensure comparability, and the realisation of the rule of law can only be measured through qualitative assessments. Also the benchmarks established for these areas of rule of law often lack a clear definition of the underlying concepts and of the objectives to be achieved, what hampers a consistent and comprehensive monitoring process.

Throughout the latest enlargement rounds, the Commission has shifted its focus from a structure-driven approach to a more result-oriented approach. The promotion and realisation
of the rule of law is now measured by simultaneously applying structural, process and outcome indicators. In this way, the progress in terms of legislation adopted can be matched to the policies applied and the respective results achieved. Under the current Enlargement Strategy, enlargement countries are asked to develop a solid track record of reform implementation, demonstrating the results achieved with regard to the realisation of rule of law in practice.\(^{352}\) In the long term, this should not only assure that enlargement countries fulfil the membership conditionality in terms of legislation adopted and policies implemented, but should also improve the situation for the population of these countries.

By analysing the quality of the Progress Reports over time and over countries, it becomes clear that there is a serious effort by the EU to enhance consistency and transparency in the enlargement process. Through the incorporation of the lessons learned from previous enlargement rounds, a comprehensive negotiation policy has been established that should ensure equal treatment of all enlargement countries. The standardised methodology for accession negotiations is based on clear procedural guidelines and on specific negotiation chapters. This should allow that conditions for membership are applied in a strict and fair way to all candidate countries.

The membership conditionality is considered to be the fundament of the successful EU enlargement policy in Central and Eastern Europe. As Sedelmeier\(^ {353}\) has shown in his analysis of statistical data on transposition and infringements of EU law, the new Member States that acceded to the EU in 2004 have performed very well in terms of compliance with EU law – also during the first four years after accession. This indicates that the success of the EU’s accession conditionality was sustainable after accession and at least the formal compliance with EU law was ensured in the new Member States. The case of Bulgaria, however, has shown that it is crucial to meet specific standards already during the pre-accession phase. At the time of accession, Bulgaria had not met all the conditions for membership. The accession as such was not the result of a successful integration process in terms of the criteria for membership, but rather based on the political consideration to stand by the commitment of EU membership for Bulgaria. With the establishment of the CVM, the Commission intended to support Bulgaria in achieving the same standards as other Member States. However, also five years after accession no sufficient progress could be observed, what leads to the conclusion that the post-accession incentives were too weak to bring about the requested changes after

\(^{352}\) cf ETC Graz (n 165) and COM (2013) 700 final, 7.

accession. As pointed out by Hillion, post-accession monitoring may be useful to spell out the required reforms, but the credibility and potential of such a mechanism is hampered by the lack of serious consequences in case of non-compliance.\textsuperscript{354} This underlines the importance of the accession conditionality that shall lead to the realisation of the required standards already in the pre-accession and negotiation phase.

To tackle the problems experienced in previous accession processes, the EU policy of conditionality has been expanding from one enlargement round to the other. The case studies of Croatia and Montenegro have shown the wider scope of the accession conditionality on the one hand and the growing number of monitoring tools applied by the Commission to measure the rule of law on the other hand. Also for the future enlargement towards the countries of Eastern and South-Eastern Europe, the EU has imposed strict accession conditionality. The premise that domestic change can be successfully introduced through membership conditionality was the main driving force of the EU’s efforts in the Western Balkans. The perspective of EU membership by compliance with the conditionality shall initiate “the transformation of the countries into stable democracies with a functioning rule of law.”\textsuperscript{355}

The credibility of the membership perspective is considered a basic requirement for the EU’s external leverage. This credibility has decreased significantly after the fifth enlargement round in 2004. The ‘enlargement fatigue’ that has emerged still prevails in many EU Member States. Together with the internal debates on deepening of the EU, this has put into question when, or even whether, the candidate and potential candidate countries actually will become members. The EU has refrained from specifying any date or timeframes for accession to these countries.\textsuperscript{356} As pointed out by Schimmelfennig, “accession conditionality has to be credible in two ways: target states need to be certain that they are rewarded with significant steps toward accession (soon) after complying with the EU’s political conditions – and that they will be excluded from EU membership otherwise.”\textsuperscript{357} Schimmelfennig mentions two main factors that have led to the recent problems in the enlargement process with South-Eastern and Eastern European countries. On the one hand, the EU external leverage was limited by the restrained membership perspective and, on the other hand, some of these states experienced potentially high political costs for compliance with the conditions of membership.

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\textsuperscript{354} Hillion (n 200) 12-13.
\textsuperscript{355} Florian Bieber, ‘Introduction’ (2011) 63/10 Europe Asia Studies 1775, 1776.
\textsuperscript{356} Trauner (n 241) 774-75.
\textsuperscript{357} Frank Schimmelfennig, ‘EU Political Accession Conditionality after the 2004 Enlargement: Consistency and Effectiveness’ (2008) 15/6 Journal of European Public Policy 918, 920.
\end{flushleft}
The lower impact of EU conditionality in the latest accession negotiations can be explained by several aspects that differentiate those states from the Central and Eastern European countries that have acceded to the EU in the fifth enlargement round. Many of the remaining non-member countries in South-Eastern and Eastern Europe have grave domestic political problems in terms of national identity, the legacies of ethnic conflicts and widespread corruption that call into question the ability and willingness of these countries to fulfil the conditions. Furthermore, some of the Western Balkan states are not well established and suffer from weak domestic legitimacy. The complex EU structure in terms of statehood and sovereignty of the Member States stands in stark contrast with the high requirement of external sovereignty of the post-conflict states in this region. This tension has to be overcome by defining standards for the potential EU member states, “which give the states the capacity to achieve membership without losing the state along the way.”

The complex political situation in the enlargement countries of the Western Balkans requires that the conditions for EU membership are applied in a comprehensive manner. The decisions for the accession of new Member States have to be based on reliable results provided through a consistent and transparent monitoring mechanism. The credibility of the conditionality applied to the candidate and potential candidate countries can only be ensured, if the indicators applied for measuring the countries’ alignment with the membership criteria are concrete and specific enough and if benchmarks are set in a systematic way and based on clearly defined concepts and objectives.

The EU was often criticised for applying double standards, with regard to the conditionality applied in the field of the rule of law and fundamental rights. On the one side, the EU requires strict adherence to those values by the enlargement countries as a prerequisite for joining the EU. On the other side, the EU is aware that there are current Member States that do not fully comply with those values. Even though there is a long-standing experience in measuring the rule of law in enlargement countries, the information available about the rule of law in the Member States is often intermittent, hardly comparable and based on weak data sources and data collection methods. The discourse on measuring the rule of law in the EU enlargement policy might catalyse current attempts to establish a monitoring system for the protection of the rule of law in the EU Member States.

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359 Biber (n 62) 1785.
360 ibid 1800.
361 Spreeuw (n 23) 12ff.
When exploring better ways, on how to monitor and safeguard the rule of law in the EU, the vast institutional experience in assessing candidate countries could be used as a basis.\textsuperscript{362} This goes in line with the recommendation that the EU shall apply the same indicators and benchmarks for its internal as well as for the external policy to increase the credibility of the EU’s policy and to legitimate the export of its values towards enlargement and third countries.\textsuperscript{363} When thinking about new mechanisms and procedures to measure the rule of law in the EU and in the countries aspiring EU membership, also the mandate of the FRA should be considered. The monitoring mechanism applied to the enlargement countries could be enriched by the information provided in the thematic and country studies produced by the FRA, and EU benchmarks for the rule of law could be based on the good practice identified by the Agency.\textsuperscript{364}

A consistent set of indicators and data collection methodology for the EU’s internal and external policy would make the progress in promoting the rule of law and justice more transparent, comparable and manageable and would assist the enlargement countries as well as Member States in realising and upholding the rule of law. This would also respond to the request from the European Parliament for establishing “an effective mechanism for a regular assessment of the Member States’ compliance with the fundamental values of the EU”.\textsuperscript{365} Such “a new Copenhagen mechanism”\textsuperscript{366} could ensure the respect and protection of the EU’s foundational values and can be applied as a tool of the EU’s internal and external policy to promote the rule of law.

\textsuperscript{362} FRA (n 35).
\textsuperscript{363} Mühr (n 86) 5.
\textsuperscript{364} Benedek and others (n 263) 66.
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\textsuperscript{366} Carrera, Guild and Hernanz (n 24).
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