



POLICY BRIEF

REFORMING FROM THE BENCH >>> MARKING OFFSIDE

**THE EU BENCHMARKING MECHANISM IN THE WESTERN BALKANS:
ACHIEVING THE MARKS OR MISSING THE POINT?**

“*The fundamentals first*” approach announced in 2013 places the focus of the EU integration process on democracy and the rule of law. This mechanism, which relies on an extensive system of benchmarking, was developed in the context of the Romanian and Bulgarian post-accession, while now it is being implemented for each chapter of the EU’s *acquis* under negotiation. Benchmarking has become the key mechanism of the EU conditionality policy towards the Western Balkans that should ensure the consistency and credibility of the conditionality policy, while providing encouragement for further reform. The new Western Balkans Enlargement Strategy, published in February 2018 focuses (yet again) on the rule of law, but these are the areas in which most of the concerns persist and where real, de facto progress on the ground is lacking. To no surprise, rule of law is also included in the **six initiatives** for increased engagement with all countries in the region in the new enlargement WB Strategy and in the same time it is accompanied by announced action plans to ensure the sustainability of the rule of law reforms.¹ The question arises as to the outcome of these reforms, which the European Commission has continuously ‘supported’ but assessed very critically in the last years, by noting high politicization, selective justice and state capture. The contradictory parallel assessments, where there is praise of progress, which is largely technical, tends to overshadow criticism which often addresses substantial flaws of the undertaken reforms. This shows that the current model of setting and accelerating reforms is followed by serious shortcomings.²

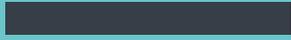
This **policy brief** summarizes the findings of a yearlong project with the objective to study the effectiveness of the EU’s benchmarking system on a selected policy issues within the Chapters 23 and 24 focusing on the cases of the WB6. The project is a first major attempt to critically evaluate the degree to which the objectives are achieved and the extent to which targeted problems are solved in order to further advance in the EU accession process. For the purposes of our research, we analysed a sample of 8 selected benchmarks in all of the six countries of the Western Balkans since their introduction through desk review of documents and interviews with stakeholders, ensuring variations of benchmarks that relate to legislative alignment, ensuring track record as well as capacity to implement the *acquis*. The detailed country analyses are available online.³

Chapter 23: Judiciary and fundamental rights	Merit-based career system for the judges
	Judicial academy reforms
	Merit-based career system for civil servants
	Track record for addressing media intimidation; attacks on journalists; media independence
	Implementation of anti-discrimination legislation
Chapter 24: Justice, Freedom and Security	Law on Asylum aligned with EU <i>acquis</i>
	Specific anticorruption plans; providing adequate follow up of detected cases
	The role of intelligence services and the oversight mechanisms that are introduced; established initial track record of investigations in organised crime

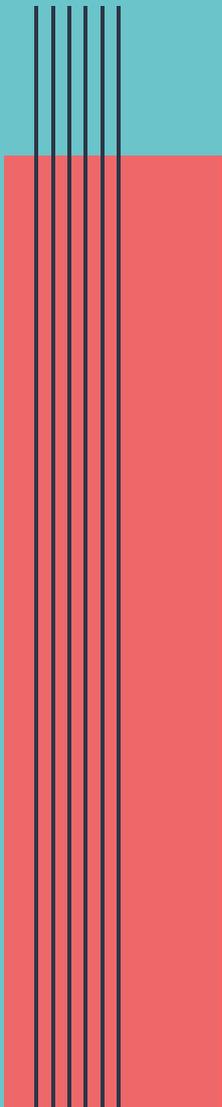
1 EUROPEAN POLICY INSTITUTE (2017). Western Balkans Bumpy Quest for EU integration: 2016 Comparative overview <http://epi.org.mk/newsDetail.php?nwsid=198>

2 EUROPEAN POLICY INSTITUTE (2014) Overshadowed Recommendation: Analysis of the European Commission 2014 Progress Report on the Republic of Macedonia. (EPI: Skopje)

3 See ten.europeanpolicy.org



FINDINGS AS TO THE EFFECTIVENESS OF SELECTED BENCHMARKS



Most of the benchmarks analysed are not fully developed, lack specificity, focus and do not capture the substance of change thus are subject to free interpretation. In cases of countries in accession dynamics (such as Serbia and Montenegro) the EU tends to be more specific in non-papers on the state of play in Chapters 23 and 24 while other countries, which are not in the mode of “accession dynamics” (six-month reporting on benchmarks), the implementation of the benchmarks can be procrastinated without any major effect on the progress in the accession process. When comparing the countries at different points of their accession, we have found that the EC tends to provide more detailed and demanding requirements during accession negotiations. Still, the benchmarks are in some cases vaguely formulated and remain ineffective, largely due to the increasing scope of various types of measurements, the lack of elaboration and strategic target setting.

Yet, we note the risk of over-specification of the benchmarks in terms of expecting and accepting “ready-made”, further contributes to the erosion of domestic capacity to conceptualise and implement reform. There are concerns that the approach is too institutional in its focus, and that “one model fits all” approach might ignore the significant variations amongst the Western Balkans. Thus, a more “custom-made” approach would be suitable for the benchmarks also in line with the fact that the EU does not have uniform rules in this area.

The lack of concrete EU models in most of the analysed benchmarks enables “alibi” for governments to choose “their best” fitted model within the margins of reforms. However, the implementation of reforms does not mean undertaking legislative adaptations for purposes of ticking boxes. The EU does not have a proactive attitude to monitor the achievement of these benchmarks and signal in time that a model that does not comply with their guidelines cannot be selected. In return this leads only to change in form and not in substance.

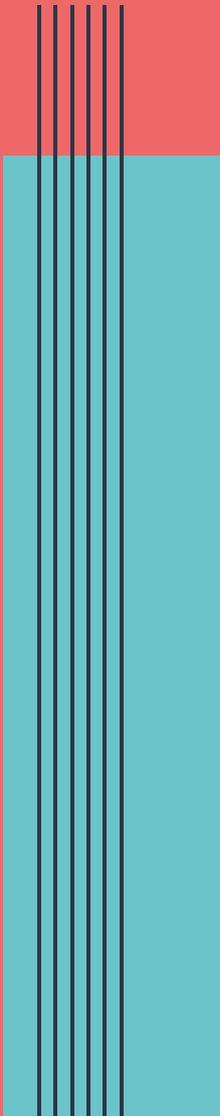
In terms of the incentives at work, our research shows that the countries are more likely to comply with EU legislation and policies if offered intermediate ‘rewards’ for the country in specific areas, like the example of visa liberalization in the case of compliance with the conditions in the justice and home affairs sector. The requirements stemming from the Visa Liberalization Roadmap have been more specific compared to other recommendations deriving from country reports. Given that, they were effective and easy to monitor. There is clearly a potential for the EU to use direct political conditionality against the government. Hence, it is essential for EU to maintain pressure on key issues and set a clear agenda for action for governments to comply.

In this context, civil society can play a pivotal role in this endeavour, as it has potential to capture the political context on the ground and extract the main concerns of citizens related to democratic standards as opposed to the technicised EU benchmarking system and reporting mechanism.

Overall, our findings show there is a gap between the high expectations from the benchmarking mechanism to encourage EU-related reform, and the actual results. While EU conditionality is highly important in prompting reforms, significant transformative effects are currently missing. The results present a work in progress with initial results achieved and work remaining to be done. The problems, although recognised by the EU are not being verbalised in the (publicly available) country reports in a satisfactory manner and do not necessarily reflect the gravity of the actual situation. In addition, the EU benchmarking has not been sufficiently strong, effective, and constructive to respond to the severity of circumstances. Other priorities on the EU’s agenda (ex. such as the political crisis in Macedonia, the Belgrade – Pristina dialogue, the judicial reform in Albania) have necessitated collaboration between the EU and the governments and in turn have taken away the focus from more severe violations. The reluctance to use the stick, mainly due to security concerns and party alliances solidarity compromised the conditionality policy – and implicitly the benchmarking system.



RECOMMENDATIONS



TO THE EU INSTITUTIONS AND MEMBER STATES:

Related to the content and formulation of the benchmarks

- When it comes to the content of the benchmarks, all benchmarks should be specified in a manner to include outcome related indicators, which won't allow the governments to deliver results and reports on progress in meeting benchmarks that are only descriptive.
- Since the process of legal alignment is completed in most areas, the European Commission should focus its efforts on formulation of new impact indicators for the implementation of the laws.
- Benchmarks requiring the adoption of new strategies and plans should be avoided and replaced by benchmarks which clearly define the key objectives of the required actions.

Transparency and CSO involvement

- The EU should insist on greater openness and transparency of the EU accession process and provide own example in that respect. One option for increasing the effectiveness of the EU's approach towards the rule of law related issues might be to "ally" with the civil society sector, which has a high potential in providing pressure for the governments to deliver results from the "bottom-up" perspective. Furthermore, the EU should open its expert/peer review reports to the public, as it did in the case of 'Pribe report' in Macedonia, whose publishing had outstanding positive impact on the future direction of Macedonia's democratisation process. Such was the case in Montenegro as well, where the peer review reports were proactively published upon constant pressure from CSOs that demanded access.
- Include and use the potential of civil society in this process as it can extract the concerns of the citizens and demand greater transparency of the reform process, while also communicate to the citizens the EU integration process and all of its mechanism in a less technicised manner.

EU communication and use of momentum

- The EU should take advantage of the new momentum to refine the rule of law conditionality and mechanisms. The EU should continue streamlining its tools, including the benchmarking system, for the sake of inducing greater compliance with the membership conditions. The EU-Western Balkans Strategy, published in February 2018, together with the "enlargement package" to be announced in April 2018, represent an opportunity for the EU to set a kind of roadmap with more tangible timelines and tasks on rule of law related issues.
- The EU must take full advantage of the accession negotiation process for rule of law promotion and use its "transformative power". The announced greater political devotion to enlargement by the member states has the potential to boost the effectiveness of the EU conditionality mechanisms in the rule of law, which have so far yielded limited results.
- As the EU-Western Balkan Strategy is also directed to the EU MS, this is a moment to increase the communication regarding the key novelties in the WB6 across different MS and EU institutions. This is needed due to the fact that the fate of the WB6 in the EU is not dependent on the decisions of the EC, but moreover on the decisions of the Council.

To the national governments in WB6:

- The reforms in the area of rule of law should be predominantly shaped by the countries themselves, in order to ensure implementation and sustainability.
- All available national capacities in the countries should be employed in the process of envisioning and planning the reforms. In addition, raising capacity of all the stakeholders to understand and adopt the EU and international standards in the area should be a priority.
- The process of benchmarking should be perceived and put into the context of the wider process of Europeanisation, democratisation and accepting high international democratic standards, instead of reporting on “boxed ticked”.
- In order to increase the transparency of policy making, the reform processes should be the subject of public debate and broad consultation processes.
- As in addition to executive, the other branches of government – the legislative and the judicial - are crucial, their role in the process of shaping the reform and implementation of the benchmarks should be significantly improved.
- Result-oriented monitoring of implementation of laws should encompass scrutiny of the quality and implementation of (secondary) legislation.
- The governments should invest more efforts into engaging in a frank and open dialogue with the stakeholders and CSO representatives, considering their feedback and accepting constructive criticism.
- The Governments should ensure timely and adequate information on the benchmarking process for the wider public.
- Freedom of media is of utmost priority and further deterioration in this field would have negative impact on the whole process.