

# **RULE OF LAW REFORMS IN THE WESTERN BALKANS**

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**Valeska Esch  
Olga van Zijverden (eds.)**

In cooperation with:



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This publication includes conference papers and proceedings of Aspen Germany's Western Balkans conference in 2018.

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# FOREWORD

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The countries in the Western Balkans, Albania, Bosnia and Herzegovina, FYROM, Kosovo, Montenegro and Serbia, can become full members of the European Union once they satisfy the Copenhagen criteria – this commitment, which continues to govern the European Union's policies towards the Western Balkans, was solemnly reaffirmed at the Sofia Summit of the EU and the countries of the Western Balkans in May 2018. With the Sofia Priority Agenda, which builds on the EU Commission's Strategy for the Western Balkans published in February, the EU identified a list of measures to accelerate reforms in key areas and to improve the living conditions of people on the ground. Support for sustainable democratic and economic transformation is, ultimately, Europe's response to the increasing importance of the Western Balkans region for its security and strategic foreign policy interests.

This is the backdrop against which the Aspen Institute Germany addressed, in its Western Balkans Program 2018, key issues regarding transformation under the specific circumstances prevailing in the region: rule of law, justice reform, the importance of independent institutions, media freedom and fight against corruption and organized crime. Aspen events have offered high-ranking representatives from the Western Balkans and from the EU space to exchange views and best practices. Moreover, they have helped to forge a common understanding of the challenges ahead.

In 2018, the Western Balkans featured more prominently on the European Union's agenda than in previous years and we saw Skopje and Athens signing the Prespa-Agreement – an outstanding example of skillful diplomacy and successful conflict resolution which sends a strong signal of encouragement to the region and beyond. But we also saw other bilateral conflicts deepening, we saw economic hardship, migration and, last but not least, unmistakable symptoms of state capture.

There is no room for complacency, the stakes remain high. In 2019, the EU will have to take a decision on the start of accession negotiations with Albania and the Former Yugoslav Republic of Macedonia based on the country reports of the European Commission. Progress of both candidate countries in the field of rule of law and fight against organized crime and corruption will be as important as strategic vision and sense of purpose on the side of the European Union.

I thank the Aspen Institute for its contribution to the dialogue between Germany, the EU and the Western Balkans and look forward to new inspiring meetings and discussions.

Dr. Christian Hellbach, Ambassador  
Director for South-Eastern Europe, Turkey and the EFTA States  
Federal Foreign Office



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# INTRODUCTION

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Dear friends of the Aspen Institute Germany,

2018 has been a year in which the European Union and its member states have been faced with numerous major challenges posed by global changes and an ever more difficult process of ensuring EU unity. US President Trump's disregard of the rules-based multilateral world order and his unilateral "America First" policy oppose the EU's interests in many areas, from the Paris climate agreement and the Iran nuclear deal to a rules-based world order and free trade. This has on the one hand sparked debate in Europe on the EU's defense capabilities and role in the world, but his emphasis on the national interest in international affairs also benefitted nationalist narratives both in and outside the EU. Authoritarian leaders, far-right and anti-EU parties are on the rise, questioning the very idea of European integration, and the upcoming European Parliament elections will be of utmost importance for the future course and functionality of the EU, not to mention the uncertain impact of Brexit.

At the same time, many considered 2018 a window of opportunity for the Western Balkans' EU integration. And indeed, the past year has seen renewed efforts on the side of the EU to reconfirm and strengthen its commitment to the region. In February 2018, the European Commission reemphasized the membership perspective for all Western Balkan countries in its new enlargement strategy "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans" – a document that has been highly welcomed by many observers for its blunt assessment of remaining shortcomings in the region. It clearly emphasizes the need to increase reform efforts in Western Balkan countries, in particular in the field of rule of law and good governance, and highlights the need for a serious commitment of regional governments both to the political choice of joining the EU and to the transformation of their countries according to EU standards. The Bulgarian EU Presidency in the first half of 2018 put enlargement to the Western Balkans at the top of its agenda and organized the first EU-Western Balkans summit since the 2003 Thessaloniki summit, gathering highest EU officials, as well as the leaders of EU member states and all Western Balkans countries. However, the summit did not quite meet expectations in the region as some member states' reservations regarding EU enlargement remained evident. The June Council conclusions on the opening of accession negotiations for Albania and Macedonia have also reconfirmed both, the general readiness to integrate countries in the region, but also member states' concerns to trust the countries' reform efforts. The following Austrian presidency also set progress in integrating the Western Balkans as one of its priorities, but has not been able to deliver clear results either. While the upcoming EU Council Presidencies of Romania, Finland, Croatia, and Germany are considered supporters of EU enlargement to the region, it remains to be seen how well they will manage to convince sceptics within the EU and what impact the upcoming European Parliament elections will have on enlargement issues.

The region itself has produced mixed results in 2018 as well. The major success story of 2018 is certainly the signing of the Prespa agreement to end the name dispute between Greece and the FYR Macedonia, which will change its name to Republic of North Macedonia in exchange for Greece refraining from vetoing the country's EU and NATO integration. Albania and Macedonia both received the European Commission's recommendation to open EU accession negotiations in April 2018. However, in June 2018 the European Council decided that in both cases more efforts are needed to implement key reforms. Following the Prespa Agreement, Macedonia has furthermore been officially invited to join NATO and will sign the Accession Protocol shortly. Montenegro continues to slowly but steadily move forward in the EU accession negotiation process with 32 out of 35 chapters opened. However, political polarization remains high and more efforts are still needed to fully implement the required reforms. Serbia, too, has continued its accession negotiations, but progress has been slow due to limited progress on reforms in crucial areas, in particular those related to chapters 23 and 24. Another challenge Serbia continues to face is the normalization of its relations with Kosovo. The EU facilitated dialog took a turn supported by the US, suddenly removing red lines of not changing borders in the Balkans, which has further polarized the dialog and the political elites in Pristina, and which also divides EU member states on the issue. Intermittent tensions like Serbia's activities to prevent Pristina's entry to Interpol, the formation of Kosovo Armed Forces, and Kosovo's imposition of 100% tariffs on goods from Serbia and Bosnia and Herzegovina have not helped to calm the relations in the end of the year, but have led to a suspension of the dialog until the tax is removed. Amidst these developments it remains to be seen when the dialog will resume and how a way out of this situation can be found. Kosovo itself has fulfilled all criteria for the long-awaited visa liberalization to be granted visa free travel to Schengen countries. However, the process is now being delayed as no decision has been made by the Council of the European Union so far. Finally, Bosnia and Herzegovina's complex political system and political and ethnic divisions hamper the government formation after the 2018 general elections and continue to hinder the country's progress to be finally officially granted candidate status in its EU integration process.

Overall, most countries in the region were able to move forward in their respective accession processes in 2018. However, challenges remain. Despite continued recovery, the economic situation in the region remains dire and unemployment rates are high. Add to that poor social systems, high levels of corruption, weak governance and rule of law, brain drain and emigration are consequently some of the biggest challenges. These challenges do not get easier with EU accession, as the cases Bulgaria, Romania and Croatia have shown. All Western Balkans countries still have a way to go before they can be considered consolidated liberal democracies and market economies. Major reform issues include the independence of the judiciary and public administration from political interference, the development of a functioning rule of law, the strengthening of parliaments to enable them to exercise their control function over the executive, media freedom, and minority rights. Moreover, 2018 was again characterized by deep political polarization within all Western Balkan countries and

nationalism and radical positions also continued to play a role. All in all, it would be crucial for all Western Balkan countries to seriously prioritize rule of law reforms and prove the growing number of sceptics in the EU wrong by showing that genuine transformation is possible.

Against this background, the Aspen Institute Germany continued its efforts to actively contribute to a regular constructive high-level regional dialog in 2018. It has been committed to providing a confidential and neutral platform for debate. In a closed and protected environment, off-the-record meetings were organized to allow for in-depth discussions that respect different points of views. Since 2008, leaders of the Western Balkan countries have embraced this opportunity and have come together at the Aspen Institute Germany's conferences to discuss regional challenges and current issues their countries are facing. Aspen Germany has provided a neutral platform for eight Southeast Europe Foreign Ministers' conferences and more than 30 sub-cabinet level meetings. These conferences facilitate in-depth discussions regionally, including German, European, and U.S. decision-makers and experts, as well as representatives from the EU and international organizations. The aim of these conferences is to find common ground with regard to regional challenges and to develop concrete policy recommendations and mutually beneficial solutions. Over the past years, the Aspen Institute Germany has fostered dialog and debate on issues like trust, reconciliation, identity and ethnicity, EU and NATO integration, bilateral security roles, organized crime, energy security, economic development, rule of law, public administration reform, democratic governance, the role of parliament, and regional cooperation. International experts from academia and civil society organizations provide valuable input to these meetings with the papers and insights they contribute to the discussions. These conferences have therefore not only served as an opportunity for a productive exchange of opinions and the development of mutually acceptable ideas for solutions, but have also developed a sustainable regional and international network of decision-makers and experts, politicians and members of the civil society, which can contribute to establishing trust and closer contact between formerly conflicting countries.

We would like to express our gratitude to the German Federal Foreign Office, whose financial support through the means of the Stability Pact for Southeast Europe made this project possible. We would also like to thank the Ministry of Foreign Affairs of Macedonia, which co-hosted a conference with us this year. Moreover, we would like to thank all participants over the past years, who have so actively contributed to the success of the project, and, in particular, all authors of conference papers for providing substantial contributions and expertise for discussion and suggesting constructive solutions. Finally, we would like to thank Sandra Esser, David Mills and Sandra Schwalen for their contributions to this publication.

We hope you enjoy reading this compilation of conference papers, reports, and recommendations that were developed during the conferences in 2018 and we look forward to continuing our commitment to the Western Balkans.



Rüdiger Lentz  
Executive Director



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Program Officer



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# SUMMARY AND RECOMMENDATIONS

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In 2018, Aspen Germany held three sub-cabinet level meetings in Alt Madlitz, Skopje and Berlin with high-level decision-makers and experts from the Western Balkan countries, Germany, the EU and the U.S. During these meetings, discussions focused on the rule of law reforms in the Western Balkans and how to curb political influence on independent institutions and fight corruption. These topics were discussed against the background of the European Commission's 2018 Enlargement Strategy "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans". This publication contains conference papers and proceedings of these meetings that give an overview of the topics discussed and the constructive suggestions and recommendations that were made. All meetings followed the Chatham House Rule, which is reflected in the reports.

The 2018 conferences were characterized by two main aspects: on one hand by a hope for a revival of the enlargement momentum by the publication of the EU enlargement strategy and several EU summits with Western Balkans focus; on the other hand the discussions were marked by an ever-growing concern about democratic backsliding and undermining of independent institutions in the Western Balkans, rising populism within some EU member states and the potential implications for the region's EU accession process. Another major debate across all three conferences was the appropriate role for the EU in the region, given its relative influence and the multiple demands on its significant resources, but also questions of ownership over the processes. During the discussions a series of policy recommendations were identified, for the governments in the region, the region as a whole, as well as the EU and its member states.

The reform priorities relating to the topics discussed in 2018 on the **national level** were linked to governments' responsibilities in the transformation processes of their countries, including the promotion of an independent judiciary, the depoliticization of public institutions and administration, the fight against corruption, strengthening independent media, and the disentanglement of business and politics. In particular governments in the region were called upon:

- To take ownership of the reform process, its success stories, as well as its potential failures, instead of criticizing the EU for a lack of progress and support in the process. Completing rule of law reforms is not merely a task imposed by the EU, but is beneficial to every member of society and this should be communicated to the public to foster stronger engagement.
- To stop „window-dressing“ reforms to make it appear as though structural changes have been made, when in reality this is not the case. This is exactly what undermines faith in the transformation processes on the side of EU member states and risks undermining the entire process.
- To refrain from exercising political influence over independent institutions, media, and civil society, and thereby demonstrate readiness for genuine democratization.
- To refrain from violating 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, as stated in Article 2 of the TEU, especially now that some member states in the EU have backtracked in this regard.
- To improve the quality of institutions, public administration, and economic governance, in particular the fight against corruption, to strengthen economic competitiveness.
- To strengthen the role of parliaments, in particular their oversight roles, and enable MPs to act as “watchdog” of state institutions by providing sufficient resources for staff, offices, etc.; this requires opposition to also act as constructive opposition for the benefit of citizens.
- To strengthen inner-party democracy and transparency to develop accountability of elected officials in front of their electorates.
- To secure the most important independent institutions by granting them constitutional status and requiring a constitutional majority in parliament to elect officials. No simple parliamentary majority should be able to change the fundamental setup of the institutions.
- To ensure sufficient funding for independent institutions, non-reliant on government budgeting and to provide their officers and board members with greater legal protection through lengthy tenures and legal immunities.
- To invest more in civic education, awareness raising campaigns and independent media in order to increase the public's knowledge of law and the legal institutions in their country so that they can develop a proactive mindset concerning corruption and hold officials accountable.
- To refrain from making judicial reform a one-time activity, but to implement long-term measures to monitor the quality of the judiciary and hold judges accountable, from the judges' initial training up to the day-to-day work. Moreover, corrupt judges should not simply be dismissed but prosecuted.
- To incorporate safeguards into accountability mechanisms for judicial reform by implementing annual audits under the inclusion of a diverse range of actors, such as civil society organizations or non-governmental organizations.
- To put in place effective witness-protection in order to help uncover corruption and organized crime in a sustainable way.
- To improve the selection process for public servants (by a centralized recruitment via a digital platform including independent experts) and to make selection criteria more objective (anonymous tests, independent correction of exams, minimum grade for entrance into the civil service, hiring by job families and not for each position independently).

- To adequately increase salaries of civil servants to reduce the propensity to enter into corruption.
- To develop a comprehensive view on corruption to better fight it: distinct between high- and low-level corruption and develop tailored measures, to better take into account the distribution, not just the amount of corruption.
- To improve media quality by refraining from political interference in content and financing, and implementing a system for credentialing professional journalists.

On the **regional level**, it was considered paramount for the region to cultivate a culture of compromise, rather than a winner-takes-all mentality, and to realize that if the WB6 do not support each other, they can hardly expect that the EU or other external actors support them as a whole. In particular, governments were recommended:

- To refrain from using nationalist rhetoric for political gains and instead increase efforts in delivering on the commitments made related to regional cooperation.
- To consider the creation of a transnational Anti-Corruptive Tribunal for the Western Balkans, which can investigate instances of alleged corruption while remaining outside the influence of any single national government.
- In the same thought, to strengthen regional media as they are less likely to be object of political influence or censorship than national media.

A number of recommendations were also developed **for the European Union and its member states**. In order to better support the region and strengthen its European perspective they should be committed:

- To deliver on the principle of conditionality. The *quit pro quo* approach of strict but fair conditionality requires EU member states to deliver on promises once criteria are fulfilled, irrespective of individual national situations or agendas, as failing to do so seriously undermines the principle of conditionality and the credibility of the EU as a whole.
- To deliver on the six flagship initiatives announced in the 2018 EU Enlargement Strategy in order to utilize its momentum.
- To improve the communication with the Western Balkan countries regarding EU activities in the region, by facilitating exchange with the WB6 proactively and at an early stage of the processes. The EU should consider including Western Balkan countries in strategic initiatives that will affect them.
- To invest more in the strengthening of parliaments, e.g. by facilitating exchange between parliamentarians from EU member states and the WB6, by encouraging parliaments to take a more active role in discussing government measures, and by involving them more in the reform processes of their countries, not solely focusing on the executive.
- To consider more individual, tailor-made reports and recommendations following the example of the Priebe report for Macedonia.
- To improve the communication to political decision makers and citizens in the Western Balkans by using clearer language in their country reports, “calling things by their name”, and to publish short summaries in a language understandable for the wider public.
- To not shy away from naming and shaming those responsible for slow reform progress publicly, as populations need to be enabled to hold their governments accountable for lack of progress in the accession process.
- To put corruption even higher on the EU’s reform agenda, as it is the basis of many other rule of law issues in the region.
- To consider whether the pre-screening process of national legislation and the EU *acquis* should start at an earlier stage for potential candidate countries, as the screening can already foster further reform processes, instead of losing time waiting for the official start of the accession negotiations.
- To increase personnel resources in the Commission to monitor and accompany the accession process of the Western Balkans even more closely.
- To establish an EU Special Envoy to deal with bilateral disputes in the region on a daily basis.

These recommendations were developed in the conference papers and the discussions during the meetings. On the following pages, you can find further and more detailed recommendations and summaries of the discussions and the conference papers that contributed to the meetings.

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# SYNOPSIS OF THE SOUTHEAST EUROPE PROGRAM 2018

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*The following pages provide a synopsis of the points that were discussed at the two conferences in 2018 “Rule of Law in the Western Balkans: Exploring the New EU Enlargement Strategy and Necessary Steps Ahead” in April and “Curbing Political Influence on Independent Institutions in the Western Balkans” in September.*

*Please note that the following summary will only provide an overview of the points raised by participants. They do not reflect the Aspen Institute’s position on the issues addressed.*

## **The EU’s 2018 Enlargement Strategy and Rule of Law Reforms in the Western Balkans**

- The European Commission states in its latest EU enlargement strategy that all Western Balkans countries show “clear elements of state capture (...) as well as strong entanglement of public and private interests”.
- The impact of this influence on the rule of law and democracy in general is seen as one of the most pressing issues.
- It was highly welcomed that the EU’s new strategy more specifically targets chapters 23 and 24 of the *acquis*, not only to bring the region closer to EU accession, but also in order to enhance social change in the region.
- There is no clear *acquis* in the area of rule of law and different standards, practices, and legal cultures within the EU itself. This makes it difficult to define how standards can be reached and how these should be measured.
- The different legal cultures lead to different views on and approaches to rule of law reforms. This can result in the phenomenon that for consultancy and assistance projects within the region different EU member states come up with different recommendations and solutions for regional issues.
- The past years have shown that the creation of new norms and mindsets with regard to the rule of law needs to be cultivated and that incrementally changing the system takes time in all countries of the region.
- A mere entering into force of legislative acts is not enough; there is often a lack of implementation and enforcement.
- Rule of law reforms have been difficult to transpose due to organized crime in the form of embezzlement, money laundering schemes, political patronage, and judiciary corruption.

## Recommendations

- The European Commission should put a stronger focus on tailor-made approaches for rule of law reform, specifically targeted at the different branches of state; addressing “constitutional capture” should be a priority.
- It would be beneficial to find a suitable way of assessing the success of judicial reform over a longer period of time, e.g. by developing indicators and instruments to measure the reform impact.
- It should be made clearer by regional political leaders that completing rule of law reforms is not merely a task imposed by the EU, but is beneficial to every member of society. Citizens need to be more strongly engaged in the reform process and regional political leaders need to understand how to show the public their role in reforms.
- The public’s knowledge of law and the legal institutions in their country needs to increase so that they can make better use of it and are more able to hold officials accountable; investment in civic education and independent media should therefore be increased.
- In this context, the EU could improve its communication to citizens in the Western Balkans by using clearer language in their country reports and possibly publishing short summaries in a language understandable for the wider public; this, too, would help citizens to hold governments accountable.
- The European Commission should consider more direct contact with the legislative and judicative to assure a more holistic reform approach.

## **Establishment of an Independent Judiciary in the Region**

- The establishment of an independent judiciary has been one of the key reform priorities in the EU accession processes of the Western Balkan countries.
- However, legal systems continue to be influenced by politicization, thereby impeding their independent functioning.
- The implementation and application of the enormous body of new laws, as well as the operationalization, funding, and staffing of new organizations is a challenge for the Western Balkans.
- Operational accountability mechanisms, such as depoliticized vetting procedures, can be a useful system to detect crime, political interference, and issues of transparency.
- Proper enforcement of reforms and operational independence require long-term monitoring and safeguarding.
- The most crucial aspect in establishing an independent judiciary is the existence of political will.

Recommendations:

- Reforms should be tailored to already existent domestic capacities as opposed to creating entirely new, one-size-fits-all laws and bodies.
- Reforms should focus on facilitating change in all stages of the judiciary, namely from judges' initial training up to the day-to-day work.
- The establishment of independent Judicial Councils to appoint judges and hold them accountable should be considered to curb the influence of the ruling majority on the judiciary.
- The opposition needs to be constructive and help create an environment which fosters depoliticization of the judiciary.
- An external assessment of the quality of judiciary should be conducted by an impartial oversight body to ensure that there is no self-assessment (for example, consider the possibility of monitoring by NGOs or by having annual audits, the possibility of sanctions etc.).
- Annual audits or open discussions under the inclusion of a diverse range of actors, such as civil society organizations or non-governmental organizations, should be held.
- Vetting processes during judicial reform:
  - the vetting process should be well monitored over a longer period of time.
  - it should be ensured that "bad apples" are not merely dismissed, but that they are also prosecuted.
- The international community should work more directly with the judiciary and not merely demand reforms via the executive.

**Depoliticization and Professionalization of Public Institutions / Public Administration Reform**

- Efforts to strengthen rule of law in the region have led to the creation of numerous organizations and agencies and a high pluralization. Political interference and party politicization, however, often have had the impact of undermining the independence of these newly created organizations.
- Features such as organized crime have sought to address and make use of this fragmentation, political disunity, and institutional incoherence, and have thereby firmly established themselves in the region.
- These trends are *inter alia* exacerbated by the divergent, sometimes contradictory requirements of various donors regarding good governance.
- The public sector is one of the major sources of employment in the region. This has resulted in the prevalence of corruption within the public sector. A stronger private sector would not only assist in terms of economic development, but would simultaneously address the problem of state capture by creating a stronger middle class, which would have less need to enter corrupt links.

Recommendations:

- There is a need throughout the region to better define which positions should be filled by technocrats and which should remain as political appointments in public administration.
- The selection criteria for civil servants could be made more stringent through improved objective criteria:
  - anonymous tests and independent correction of exams;
  - a broad range of grades;
  - the necessity of a minimum grade for entrance into the civil service.
- The selection process could be improved by:
  - a centralized public service recruitment;
  - inclusion of civil society or experts in the hiring process;
  - instead of recruiting separately for each vacancy, similar positions should be grouped into job-families for the purposes of hiring;
  - conducting all recruitment through a digital platform to add more transparency and accountability to the process.
- Salaries of civil servants should be adequately increased to reduce the propensity to enter into corruption.
- International donors and political leaders in the Western Balkans should strive towards more coherence and unity in governance to both counteract fractionalization and curb politicization.
- Instead of continuously creating new laws and agencies, international donors should make a better effort to develop more tailor-made approaches to work with the existing public sector infrastructure. There is no one-size-fits-all solution and an abundance of laws and bodies imposed externally can create confusion within the existing system.

**Fighting Corruption**

- Chapters relating to the judiciary and fundamental rights are prioritized throughout the accession process. Anti-corruption funding has gone to strengthening institutions, developing capacities, systems, and tools, as well as to awareness-raising.
- The renewed focus of the 2018 EU strategy on rule of law reforms was welcomed, as it portrays a new priority and understanding of corruption and its connection with state capture, organized crime, impunity, inequality, and political interference.
- Nonetheless, although the legal and institutional framework is largely in place throughout the region, legal systems continue to be politicized and faced with corruption.
- Governments often pursue institutional neutralization: they make anti-corruption agencies harmless (e.g. by political appointments of staff, granting little legal protection and independent funding to the agencies), rather than getting rid of them outright, as doing so would block their path to EU accession.

**Recommendations**

- Corruption should be even higher on the EU's reform agenda; it is the basis of many other rule of law issues in the region and fighting corruption more forcefully would at the same time earn a lot of public support.
- It is necessary to better take into account the distribution, not amount, of corruption and to employ a holistic approach to address the matter across the government spectrum, as corruption is said to occur when it is both convenient and possible.
- There needs to be a better distinction between high- and low-level corruption and corresponding measures tailored to tackle both.
- Reforms should also include the general public, as this is not only where low-level corruption is perceived as being most prevalent, but also as the public has the power to keep or oust corrupt politicians.
- Both, international and regional media need to be more strongly engaged in the fight against corruption and organized crime in the region, as they are more powerful than regional media alone.
- To ensure a fight against corruption on all levels of society, substantial witness protection is needed.
- A transnational Anti-Corruptive Tribunal for the Western Balkans could investigate instances of alleged corruption while remaining outside the influence of any single national government.
- The European Commission should consider whether there is a possibility of freezing or confiscating assets of highly corrupt political figures.
- The European Commission/international donors need to focus on supporting application-friendly law, as the current abundance of ever-changing new laws is not only confusing, but can even render corruption easier.
- Anti-Corruption Agencies need greater legal protection and independent funding in order to function effectively:
  - write these institutions and rules for their governance into the constitution;
  - require appointments to be made or confirmed by qualified parliamentary majorities;
  - provide the officers and board members with lengthy tenures and legal immunities;
  - provide and protect sources of funding independent of government budgeting;
  - encourage Parliament to take a more active role in discussing reports publicly and in pressuring for the implementation of report recommendations.
- It is crucial to instill a proactive mindset concerning corruption and organized crime through education and awareness-raising among all layers of society.

**Strengthening the Independence of the Media**

- The media is considered the fourth estate essential to the functioning of a democracy. However, in the Western Balkans the independence and transparency of media remains a major challenge.
- There is a presumption that media is simply a pillar of democracy, and so it is easily forgotten that media is also a pillar of autocracy.
- In the "Reporters Without Borders" media freedom index, countries of the region rank fairly low.
- A media market requires roughly ten million language-speakers to be self-sustainable, with the implication that markets smaller than this will likely require significant government or philanthropic assistance to ensure content producers remain viable. Add to this regionally-specific pressures of income inequality and relatively small GDPs, and Balkan media companies quickly run up against the limits of market models.
- Balkan strongmen seeking to discredit their adversaries turn to media rather than the police or intelligence agencies, sometimes even creating their own media outlets. Now add to these developments the shift to digital, social media, aiding the proliferation of fake news and the ability to question the legitimacy of verified truths.

- Purveyors of fake news are exploiting the existing rural-urban divide in traditional media coverage and consumption, and are attracting the attention of people ignored by the established media.

#### Recommendations

- Systems for credentialing professional journalists should be developed.
- There is a need to reform school curricula to bolster media literacy for the digital age.
- At the same time, older, adult populations, who are often in need of digital literacy training need to also be addressed, as they are most likely to get caught up in fake news and online media ‘isolation chambers’.

**RULE OF LAW IN THE  
WESTERN BALKANS:  
EXPLORING THE NEW EU  
ENLARGEMENT STRATEGY  
AND NECESSARY STEPS AHEAD**

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April 16-19, 2018 | Alt Madlitz

In cooperation with:



The Aspen Institute Germany wishes to thank the German Federal Foreign Office for its sponsorship of the “Aspen Regional Dialogue Western Balkans 2018” through the Stability Pact for South Eastern Europe.



*Accommodation and conference venue:*

*Gut Klostermühle, Mühlenstr. 11, 15518 Madlitz Wilmersdorf (Alt Madlitz)*

## Monday, April 16, 2018

*Arrival of participants during the day*

20:00

**Welcome Dinner at Refektorium**

## Tuesday, April 17, 2018

09:00 – 09:30

### **Welcoming Remarks**

Rüdiger Lentz, *Executive Director, Aspen Institute Germany*

Christian Hellbach, *Director for South-Eastern Europe, Turkey and the EFTA States, Federal Foreign Office*

09:30 – 11:00

### **Session I:**

#### **Implications of the New Enlargement Strategy for Rule of Law Reforms in the Western Balkans**

On February 6, 2018, the European Commission published its new enlargement strategy for the Western Balkans. By providing a potential time frame for Serbia and Montenegro to join the EU by 2025 and the next steps to take by Albania, Bosnia and Herzegovina, Kosovo, and Macedonia, it tries to create further momentum for reforms in the region. What does the new strategy entail regarding the rule of law? What can be expected from the announced flagship initiative to strengthen the rule of law in the Western Balkans? What should this initiative focus on? What does this mean for the reform processes in this field? Are there any promising new approaches? How should the EU further develop its efforts?

Introduction: Andi Hoxhaj, *The New EU Rule of Law Initiative for the Western Balkans*

Moderation: Rüdiger Lentz

11:00 – 11:30

Coffee Break

11:30 – 13:00

### **Session II:**

#### **How to Establish an Independent Judiciary in the Region**

The establishment of an independent judiciary has been one of the key reform priorities in the EU accession processes of the Western Balkan countries. However, legal systems continue to be influenced by corruption and politicization, thereby impeding their independent functioning. How can justice systems be reformed successfully? Can the Albanian reform serve as a model for the region? What are the shortcomings in the Albanian model? How can corruption and political interference be curbed sustainably? How can vetting procedures be depoliticized and a culture of selective justice and impunity for high-level crimes be ended? Does the new enlargement strategy provide any answers?

Introduction: Arolda Elbasani, *International Promotion of Rule of Law: Facing Connections between Patronage, Crime, and Judiciary Corruption*

Tamara Takacs, *Rule of Law and the Independence of the Judiciary in the Western Balkan Countries*

Moderation: Ana Trišić-Babić



13:00 – 14:00	Lunch at Finckenlounge (Breakfast Hall)														
14:15	Departure to Berlin														
16:00 – 17:00	<b>Meeting with Dr. Joachim Bertele, Deputy Head of Division “Foreign and Security Policy”, German Federal Chancellery</b>														
17:30 – 18:30	<b>Meeting with Dr. Christoph Hübner, Head of Division “Europe”, German Federal Ministry of the Interior</b>														
19:00	<b>Reception and Dinner with Members of the German Bundestag</b> Venue: Altes Zollhaus, Carl-Herz-Ufer 30, 10961 Berlin  <b>Confirmed MPs:</b> <table><tr><td>Renata Alt, FDP</td><td>Nikolas Löbel, CDU/CSU</td></tr><tr><td>Thorsten Frei, CDU/CSU</td><td>Frank Müller-Rosentritt, FDP</td></tr><tr><td>Thomas Hacker, FDP</td><td>Andreas Nick, CDU/CSU</td></tr><tr><td>Metin Hakverdi, SPD</td><td>Dietmar Nietan, SPD</td></tr><tr><td>Josip Juratovic, SPD</td><td>Manuel Sarrazin, Die Grünen</td></tr><tr><td>Gunther Krichbaum, CDU/CSU</td><td>Katrin Staffler, CDU/CSU</td></tr><tr><td>Michael Kuffer, CDU/CSU</td><td></td></tr></table>	Renata Alt, FDP	Nikolas Löbel, CDU/CSU	Thorsten Frei, CDU/CSU	Frank Müller-Rosentritt, FDP	Thomas Hacker, FDP	Andreas Nick, CDU/CSU	Metin Hakverdi, SPD	Dietmar Nietan, SPD	Josip Juratovic, SPD	Manuel Sarrazin, Die Grünen	Gunther Krichbaum, CDU/CSU	Katrin Staffler, CDU/CSU	Michael Kuffer, CDU/CSU	
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Josip Juratovic, SPD	Manuel Sarrazin, Die Grünen														
Gunther Krichbaum, CDU/CSU	Katrin Staffler, CDU/CSU														
Michael Kuffer, CDU/CSU															

## Wednesday, April 18, 2018

09:30 – 11:30	<b>Session III:</b> <b>Depoliticization and Professionalization of Public Institutions</b> One of the major challenges in the region continues to be the politicization as well as the lack of transparency and professionalization of public institutions. How can they be enabled to serve the benefits of the citizens rather than patronage networks? How can patronage networks be dismantled more efficiently? How can the independence of public institutions from political interference be increased? How can institutions that should be independent, such as Ombudsmen, Anti-Corruption Agencies, Electoral Commissions, etc., be protected from political control? How can these institutions be professionalized, and merit-based recruitment be ensured? Why have previous efforts not been successful and how can this be changed? How can the use of state resources for personal or party-political benefits be ended?  Introduction: Martin Mendelski, <i>Good Governance Promotion in the Western Balkans: An Empirical Analysis of the De-politicization and Fragmentation of the State</i>  Stefan Pürner, <i>Depoliticization and Professionalization of Public Institutions: How Should it (Not) be Done?</i>  Moderation: Ramadan Ilazi
11:30 – 12:00	Coffee Break
12:00 – 13:00	<b>Discussion with Lidija Prokic, Regional Advisor for Southeast Europe at Transparency International on:</b> <b>Transparency International's Work in the Western Balkans</b>

**13:00 – 14:30**

Lunch at Finckenlounge (Breakfast Hall)

**14:30 – 16:30**
**Session IV:**
**Fighting Corruption and Organized Crime**

The EU Commission's new enlargement strategy notes that "countries show clear elements of state capture, including links with organized crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests." To establish a functioning rule of law and end the undermining of the legal, economic, and political systems in the Western Balkans for personal interests, it is essential to fight corruption and dismantle criminal networks more efficiently. Does the new enlargement strategy provide any promising new approaches? Is there a need for completely new approaches, especially when it comes to fighting high-level corruption? What could new approaches look like? Should controversial models of transitional justice (e.g. plea bargaining, deferred prosecution agreements, immunity programs) be considered to more effectively dismantle existing informal power structures that undermine the functioning of the systems? What could be other new methods to fight high-level corruption more efficiently?

Introduction: Senada Šelo-Šabić, *Fundamentals First: Operationalizing the Fight Against Corruption in the EU Accession of the Western Balkan Countries*

Nieves Zúñiga, *The New EU Enlargement Strategy and Anti-Corruption Measures in the Western Balkans*

Moderation: Johanna Deimel

**16:30 – 17:00**

Coffee Break

**17:00 – 18:30**
**Session V:**
**Fundamental Rights and Equal Economic Opportunity**

Safeguarding fundamental rights and providing equal economic opportunity continues to be a challenge throughout the region. While fundamental rights are largely protected in the legislation of countries throughout the region, they are often not fully implemented in practice. What are the major shortcomings in guaranteeing fundamental rights to all citizens equally? How can marginalized groups be better included? How can freedom of expression be better protected? At the same time, equal economic opportunity is challenged by weak economies and high unemployment on the one hand, but also clientelist economic structures on the other. How can clientelist economic structures be dismantled? What is the role of state-owned enterprises in this context? How can party patronage in the distribution of posts be addressed more effectively? What kinds of reforms should countries in the region focus on?

Introduction: Simonida Kacarska, *Guaranteeing Fundamental Rights in the Western Balkans*

Moderation: Valeska Esch

**19:00**
**Barbecue on the Shore of Madlitz Lake**
**Thursday, April 19, 2018**
*Departure of participants*

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# LIST OF PARTICIPANTS

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Dritan Abazović

Andrea Berner

Agnes Bernhard

Josip Brkić

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Bernard Chappedelaine

Gordana Čomić

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Arola Elbasani

Susan Falatko

Adam Gardener

Maja Gasal-Vražalica

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Toni Gogu

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Ramadan Ilazi

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Rapporteur: Sandra Esser

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# CONFERENCE REPORT: RULE OF LAW IN THE WESTERN BALKANS: EXPLORING THE NEW EU ENLARGEMENT STRATEGY AND NECESSARY STEPS AHEAD

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Sandra Esser  
Rapporteur

From April, 16-18, 2018, the conference “Rule of Law in the Western Balkans: Exploring the New EU Enlargement Strategy and Necessary Steps Ahead” took place in Alt-Madlitz, organized by the Aspen Institute Germany and funded by the German Federal Foreign Office. Based on the publication of the European Union’s (EU) new enlargement strategy in February 2018, the idea behind the conference was to discuss current problems in achieving the necessary levels of ‘rule of law’ in the Western Balkans (WB) as required by the EU *acquis*, as well as to generate new ideas going forward in order for the region to move closer towards EU accession. To ensure fruitful discussions based on inputs from different viewpoints, the participants stemmed from diverse backgrounds, such as academia, politics, civil society organizations, and think tanks.

Throughout the conference, different sessions concerning a variety of topics within the scope of ‘rule of law’ were held; these sessions took the format of a presentation of a paper, followed by a lively discussion among the participants. The conference also included meetings with officials from the German Federal Chancellery as well as the German Federal Ministry of the Interior. All meetings and sessions took place under the Chatham House Rule.

## Opening

The conference was opened by Dr. Christian Hellbach, Director for South-Eastern Europe, Turkey and the EFTA States of the German Federal Foreign Office, and Rüdiger Lentz, Executive Director of the Aspen Institute Germany. Throughout this opening session, positive developments in the region, such as Montenegro’s recent NATO membership in 2017, the settlement of the border dispute between Kosovo and Montenegro, as well as generally improved visa and security cooperation were highlighted, but also negative topics were broached, such as the rise of nationalism and the use of force in parliaments. Moreover, it was discussed what the current German view on the EU accession of the Western Balkan countries comprises. Here, an emphasis was placed on the importance of both sustainability and depth of reforms in the Western Balkans to ensure good governance in the region, particularly in the judicial system; this was deemed a necessary prerequisite in order to achieve economic development as well as stability in the region. It was thus confirmed that the reinvigorated focus of the new EU enlargement strategy on chapters 23 and 24 of the EU *acquis* are also regarded as crucial to Germany.

**Session I: Implications of the New Enlargement Strategy for Rule of Law Reforms in the Western Balkans**

The first session revolved around the implications of the new EU enlargement strategy for rule of law reforms in the Western Balkans. In particular, the discussion focused on the specific contents set out by the recently published EU strategy in February 2018, such as the six flagship initiatives as well as the indication of the year 2025 as a possible accession date for Serbia and Montenegro. Throughout the session, it was highly welcomed that the EU's new strategy more specifically targets chapters 23 and 24 of the *acquis* and emphasizes the importance of the rule of law, not only to bring the region closer to EU accession, but also in order to enhance social change in the region. Moreover, it was commented that the mention of "state capture" in the new strategy document was regarded as positive, yet it was suggested that further differentiations needed to be made between "state capture" and "constitutional capture" to thus better delink the judiciary from the executive. In this context, three main suggestions were made, namely to increase judicial capacity, to create fairer access to justice for all societal groups (for example by developing an infrastructure for free legal aid), and to implement greater digital justice. These suggestions not only sought to make justice more accessible across all groups of society, but also to decrease problematic issues surrounding corruption, data management, bureaucratic red tape, and high legal costs.

The ensuing discussion focused on the role of the different societal actors involved in tackling and completing this process, namely the EU, international donors, as well as the governments and citizens in the Western Balkans. Many participants agreed that it must be made clearer to both regional political leaders and the public that completing rule of law reforms is not merely a task imposed by the EU, but is beneficial to every member of society. It was hoped that this would encourage citizens to take greater part in transposing the necessary reforms. It was also suggested that taking a more regional approach to justice in the Western Balkans could be useful, for example by implementing minimum common ground for judicial reforms. In this context, it was underlined that it is problematic that there are no common standards for the rule of law set by the EU both within and outside of its borders – neither for accession candidates nor, more importantly, among the EU member states, as exemplified by the tricky cases of Bulgaria, Hungary, Poland, and Romania. Moreover, it was discussed that the abundance of new laws imposed by various international donors have, to a certain extent, deteriorated the quality of rule of law in the Western Balkans as well as rendered the judicial system more prone to corruption due to its complexity. As a conclusion, it was agreed upon that the creation of new norms and mindsets with regard to the rule of law need to be cultivated and that incrementally changing the system this way takes time.

**Session II: How to Establish an Independent Judiciary in the Region**

In the second session, the focus laid on the successful reform of judicial systems in the Western Balkans in order to decrease and eradicate corruption and politicization thereof, with the Albanian case serving as a case study for analysis. In this context, the need for comprehensive reforms was discussed, such as through linking reform targets like accountability with judicial independence, or judicial efficiency with quality. Here, it was emphasized that it is problematic that there is no "rule-of-law-readiness" measurement nor another suitable way of measuring the success of judicial reforms within and outside of the EU. Such an indicator was deemed as beneficial in assisting the Western Balkan countries on their trajectory towards EU membership.

Aside from a change in the mindset of the public sector and citizens in the Western Balkans being needed, further challenges such as the implementation and application of the enormous body of new laws as well as the operationalization, funding, and staffing of new organizations were named. It was agreed upon that issues such as proper enforcement of reforms and operational independence require monitoring and safeguarding, too, maybe also over a long period of time. To this end, in order to establish an independent judiciary in the long run, it was suggested that judicial councils be introduced. Moreover, it was proposed that one should focus on facilitating change in all stages of the judiciary, namely from judges' initial training up until the day-to-day work. In addition to this, operational accountability mechanisms, such as depoliticized vetting procedures, were proposed as a useful system to detect crime, political interference, and issues of transparency. Finally, an external assessment outside of the judiciary, such as impartial oversight bodies, was seen as advantageous in terms of ensuring that there is no self-assessment.

With regard to the Albanian case, it was analyzed how reforms tackling patronage, crime, and judiciary corruption promoted by international actors such as the United States (US) and EU have fared. It was stated that rule of law reforms have been difficult to transpose due to organized crime in the form of embezzlement, money laundering schemes, political patronage, and judiciary corruption, as exemplified by the problematic case of Albania's former Prosecutor General Adriatik Llalla. Here, it was deemed as troublesome that, although international assistance has sought to address issues concerning the rule of law for years, it has merely imposed superficial changes and done little to disturb underlying corrupt links. It was discussed that the use of political resistance and informal links between institutions and politicians has watered down reforms in these areas in key moments. Suggestions therefore focused on the role of international actors, who should better harness local conditions to impose change. Ideas for this included tailoring reforms to already existent domestic capacities as opposed to creating entirely new, one-size-fits-all laws and bodies. Moreover, it was largely agreed upon that, until now, most

funding has focused on technicalities and certain timeframes, disregarding the need for long-term, non-superficial measures.

In the ensuing discussion, it was emphasized that it must be ensured there is no self-assessment nor involvement of elites when creating an independent judicial system through reforms, as this causes an obvious conflict of interests. For example, with regard to the establishment of judicial councils, it was emphasized that a mere implementation thereof is not enough, but that necessary conditions are needed in which politicization cannot occur. For this reason, external assistance and a responsible opposition were suggested as necessary for creating a good vetting system. Further, it was suggested that the vetting process should be well monitored, too, potentially also over a longer period of time. Moreover, it was proposed that one could build safeguards into accountability mechanisms; for example, these could include making sure that political appointees are not able to vote or that judicial administration stems from a variety of backgrounds. It was further suggested that annual audits or open discussions under the inclusion of a diverse range of actors, such as civil society organizations or non-governmental organizations, be held. Finally, it was also proposed that the international community should enter direct communication with the judiciary and not merely implement reforms via the executive. To round off the discussion, the majority of participants agreed that the most crucial aspect in establishing an independent judiciary is the existence of sufficient political will. Should there be a lack thereof, international actors should increase its assistance in helping to create the necessary political will throughout the different parts of society in the Western Balkans.

**Meeting with Dr. Joachim Bertele, Deputy Head of Division “Foreign and Security Policy”, German Federal Chancellery**

The meeting with Dr. Bertele in the German Federal Chancellery focused on Germany’s current position regarding the EU accession of the Western Balkan countries. It was discussed that the accession of the region is a high priority issue for the German government, especially in terms of the policy fields economic development, rule of law, transparency, and corruption. Moreover, it was stated that through the recent migration crisis, interest has rekindled in the area with regard to neighborhood policy and visa liberalization. In this context, a rapid accession of the Western Balkans was seen as welcome; however, accession was regarded as being conditional on the implementation of reforms and the sufficient maturity thereof. It was also underlined that progress on accession talks necessitates parliamentary cooperation and support in Germany, which cannot necessarily be achieved easily if reforms in the Western Balkans are seen to make little progress. In addition to this, elections and the inclusion of younger generations in the Western Balkans were stated as mandatory to ensure a democratic path towards accession.

**Meeting with Dr. Christoph Hübner, Head of Division “Europe”, German Federal Ministry of the Interior**

In the German Federal Ministry of the Interior, the delegation met with Dr. Christoph Hübner, Head of Division “Europe” in the German Federal Ministry of Interior, and his colleagues to discuss Germany’s position regarding the EU accession of the Western Balkan countries. Similar to the previous meeting, it was emphasized that the accession of Western Balkan countries is of great interest to the German government and occupies a high spot on the political agenda. In this context, chapters 23 and 24 of the EU *acquis* as well as the topics of migration and asylum were deemed of key importance both to Germany and the EU. Again, the role of the migratory movements across the Western Balkans were detailed as being of strategic importance in terms of cooperation in the fields of corruption, organized crime, and security. The discussion revolved around international police cooperation, criminal procedures against delinquents, border management, and general law enforcement in the region, especially as these are topics important to the German parliament. It was also outlined that, compared to previous accession rounds, the nature of EU accession itself has changed and has thus led to greater pressure on sustainably implementing rule of law measures in EU candidate countries.

**Session III: Depoliticization and Professionalization of Public Institutions**

The third session was based on the analysis of the depoliticization and professionalization of public institutions in the Western Balkans. Here, it was suggested that rule of law does not function well throughout the region due to processes of depoliticization and state fragmentation, caused by excessive pluralization, agencification, party politicization, and dispersion. The analysis proposed that features such as organized crime have sought to address and make use of this fragmentation, political disunity, and institutional incoherence, and have thereby firmly established themselves in the region. Moreover, it was explained that these trends are *inter alia* exacerbated by the divergent, sometimes contradictory requirements of various donors regarding good governance, thereby actually worsening the rule of law situation in the Western Balkans. In this context, it was suggested that both international donors and political leaders in the Western Balkans should strive towards more coherence and unity in governance to both counteract fractionalization and curb depoliticization. Pluralism *per se* was thus welcomed, but not in terms of excessive political, ministerial, and administrative fragmentation so as to safeguard stability in the region. However, the participants’ appraisal of the existence of fragmentation among the Western Balkans countries differed substantially.

In a similar vein, it was analyzed how previous methods of international donors to tackle dysfunctional political systems in the Western Balkans have fared. For example, these include judicial prosecution, naming and shaming,



and the creation of independent bodies for oversight purposes. Here, it was criticized that none of these methods have worked in the current regional context and that, importantly, the international community has lost credibility in demanding further reforms in this area. As the public perceives that corruption and nepotism were previously less prevalent than they are currently, it was suggested that the quality of the work of the international community needs to be better scrutinized. To this end, it was proposed that a better idea for reform in the Western Balkans would be based on a greater differentiation between who is addressed by which reforms. For instance, it was mentioned that one could target employees of the civil service and elected officials and politicians separately in order to tailor reforms accordingly. For instance, it was proposed that the selection process for civil servants could be made more stringent through improved objective criteria, such as anonymous tests, independent correction of exams, a broad range of grades, the necessity of a minimum grade for entrance into the civil service, and adequate pay of civil servants to reduce the propensity to enter into corruption. Concerning elected officials, it was suggested that additional public awareness and information campaigns would assist in ensuring accountability.

Following the presentations, many participants agreed that a stronger private sector in the Western Balkans countries is needed, as, so far, the public sector is one of the only credible sources of employment in the region. This has thus resulted in the prevalence of corruption within the public sector. A stronger private sector would therefore not only assist in terms of economic development, but would simultaneously address the problem of state capture by creating a stronger middle class, which would have less need to enter corrupt links. Many participants also agreed upon that tougher entry criteria indeed are needed for a higher quality civil service. It was also concurred that, instead of continuously creating new laws and agencies, international donors should make a better effort to work with the existing public sector infrastructure. As an abundance of laws and bodies are imposed externally, confusion about the existing system is prevalent both within the public sector and among citizens. Naturally, this is seen as counterproductive to tackling the problem of lacking political will. As a last note, it was underlined that the post-war context of the region should not be forgotten when drafting new reforms regarding the implementation of new laws and agencies.

**Discussion with Lidja Prokic (Regional Advisor for Southeast Europe at Transparency International): Transparency International's work in the Western Balkans**

In this session, Transparency International's work in the Western Balkans region was introduced, focusing on the mission of curbing corruption and promoting transparency. In this context, Transparency International's methods were presented, such as the use of national integrity systems, advocacy, and legal advice centers or the corruption perception index. The analysis suggested that

common problematic features in the Western Balkans are state capture, lack of coordination and cooperation among state actors, weak law enforcement and prosecution. For instance, weak justice and law enforcements were exemplified by institutional fragmentation, political interference and selective justice. Furthermore, captured political systems were illustrated by highly dominant executive and political parties, close links between business and organized crime, limited transparency of political parties, and weak oversight of political finance. Moreover, it was shown that media and civil society organizations (CSOs) are exposed to threats and (in)direct pressure through physical attacks, defamation and unequal application of law. Plus, CSOs were seen to run the jeopardy of being coopted or even completely established by political parties.

Many participants agreed with the analysis and identification of these various problematic points; however, they also pointed out that public procurement constitutes a further huge problem within the field of corruption, but was not named in the analysis. A further issue brought forward by participants was the lack of mention of the political unpredictability in the region, both through internal political changes and through frequent externally imposed changes through donors. This unpredictability serves as a further explanatory factor when analyzing the prevalence of corruption in the region.

**Session IV: Fighting Corruption and Organized Crime**

Session four focused on the fight against corruption and organized crime in the Western Balkans. Using the case study of Croatia as a country with similar conditions for EU accession to the other six Western Balkan countries, it was explored what worked well and what did not in the fight against corruption. In this context, it was emphasized that entrenching rule of law reforms mainly relied on changing mindsets and attitudes as opposed to mere technical prerequisites. Moreover, beneficial framework conditions in Croatia such as a strong civil society network and relatively free media reporting were listed as further factors contributing to success. Through the creation of new laws or the adaptation of existing ones as well as the establishment of an anti-corruption body, it was explained that Croatian courts first tackled smaller cases before grappling with bigger ones. Thus, this was regarded as not only useful in reducing the politicization of the implementation of the rule of law process, but also in increasing transparency. However, it was also discussed that Croatia has experienced a certain amount of backsliding on anti-corruption measures since joining the EU. Moreover, the issue was raised whether neighboring Western Balkan countries dispose of a strong enough civil society network, a solid enough consensus on whether to join the EU, as well as relatively independent judges and free media in order to follow a trajectory similar to Croatia's. Thus, establishing the necessary political will to combat corruption was identified as the most important task, with the discussion and main suggestions

revolving around how the EU can help to tackle the problem of a lack thereof.

Throughout the analysis, the renewed focus of the 2018 EU strategy on rule of law reforms was welcomed, as it portrays a new priority and understanding of corruption and its connection with state capture, organized crime, impunity, inequality, and political interference. It was supposed that this refreshed emphasis is based on the recent awareness that previous enlargement rounds have not been unproblematic in terms of the transposition and, especially, implementation of rule of law measures. In this regard, it was suggested to employ the term “state capture” not only at the highest political level, but to also investigate the citizens’ role in corrupt links in order to approach the subject from a broad angle. Moreover, it was proposed to better consider the distribution, not amount, of corruption and to employ a holistic approach to address the matter across the government spectrum, as corruption is said to occur when it is both convenient and possible.

In the ensuing discussion, it was emphasized that in the fight against corruption and organized crime, international engagement is necessary, but also part of the problem. It was contended that reforms should also include the general public, as this is not only where low-level corruption is perceived as being most prevalent but also as the public has the power to keep or oust the elites in power. Suggestions also involved making more effective use of donor money to better include CSOs in the reform process. Moreover, it was proposed that international media should be more strongly engaged in the matter. In addition to this, many participants agreed that effective witness protection needs to be in place in order to help to uncover corruption and organized crime. Furthermore, conventional reform suggestions by both the EU and international donors, such as fair trials, public scrutiny, free media and strong, independent institutions, were also deemed important going forward. Additionally, it was proposed that the use of case studies could help to identify better indicators to measure success. For instance, it was elaborated that problems of corruption do not only involve the judiciary but also social politics, as people live in precarious situations which warrant a tendency to enter corruption. Finally, it was concluded that it is important to instill a proactive mindset concerning corruption and organized crime through education and awareness-raising among all layers of society.

#### **Session V: Fundamental Rights and Equal Economic Opportunity**

The focus in the final session lay on fundamental rights and equal economic opportunity. In this context, the difficulty of ensuring fundamental rights in post-conflict communities such as in the Western Balkans was discussed, especially with a view to vulnerable groups. In this vein, it was debated that fundamental rights can sometimes be perceived as externally imposed and not as embedded measures. Furthermore, it was deemed problematic that the upkeep of fundamental rights relies on

the cooperation of and coordination between the different branches of power as well as checks and balances, both of which are not without problems in the Western Balkans. This was regarded as especially difficult due to judicial systems not being impartial and as there is a general lack of awareness and knowledge concerning fundamental rights throughout all societal layers. Moreover, it was mentioned that the abundance of laws imposed by international donors is perceived as counterproductive to economic development in the region. For instance, as many political bodies deal with a large amount of legislative influx, with laws continuously changing, this was seen as resulting in most laws not being implemented and thus hindering the smooth functioning of the different agencies.

In the analysis of fundamental rights, anti-discrimination policy was used as a demonstrative example, especially in the case of visa liberalization. Here, it was stated that no consensus within the Western Balkans countries exists with regard to whether a specific anti-discrimination law is needed or if sectoral legislation is sufficient. A major problem identified here was a lack of knowledge of the topic in the region paired with a lack of guidance of the Commission with a view to transposing laws in this area. Further disadvantageous issues in this regard are understaffing, lack of funding, and the ill-equipment of anti-discrimination bodies to successfully help to transpose the law. Moreover, it was explained that it is difficult to ensure that independent bodies are actually able to function in a tricky economic and political context. Thus, international donors’ general tendency to “Europeanize” reforms was viewed as problematic in terms of entailing unintended consequences, such as malfunctioning newly-created institutions.

In terms of the problems of the effective implementation of anti-discrimination laws, the example of the profiling of Roma was given. It was stated that both throughout and after the European migration crisis, Roma were increasingly profiled, with the EU playing a substantial role in this development. It was discussed that the Commission’s demand for reforms in the area of fundamental rights often conflicts with its requirements in the field of security, with the latter often being the priority, as shown throughout the migration crisis. In terms of suggestions to improve this, it was proposed that the Commission establishes a clearer differentiation of the requirements of the different chapters of the *acquis* to assist Western Balkan countries in their reform actions. Moreover, it was brought forward that the EU should stop solely focusing on the executive branches of power with regard to the implementation of reforms; rather, an increased empowerment of other branches like the judiciary and the parliament was identified as necessary. It was therefore concluded that the Commission should give a more symbolic role to other stakeholders, such as civil society or non-governmental organizations.



# THE NEW EU RULE OF LAW INITIATIVE FOR THE WESTERN BALKANS

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The European Commission adopted its new enlargement strategy for the Western Balkans in February 2018. This strategy sets out an action plan with six flagship initiatives, targeting specific areas of interest of both the EU and the Western Balkans countries, in particular in the fields of rule of law, security, migration, and good neighborly relations. Moreover, it provides a time frame for Serbia and Montenegro to potentially complete their accession process by 2025 and outlines the next steps to be taken by Albania, Bosnia and Herzegovina (BiH), Kosovo, and Macedonia to join the EU at a later stage. This paper evaluates the implications of the new enlargement strategy for rule of law reforms and argues that the negotiating chapter 23 on 'Judiciary and Fundamental Rights' and chapter 24 on 'Justice, Freedom and Security' should be at the heart of the strategy in order to support the transformation process in the region. Further, this paper discusses how the new enlargement strategy tries to overcome the enlargement fatigue in the EU and how this renewed approach injects reform momentum into both the rule of law and the fight against corruption in the Western Balkans.

## Introduction

Since the successful integration of the Central and Eastern European states into the EU, the European Commission has attempted to replicate the same success in the Western Balkans, albeit with greater caution. However, the long-standing ethnic disputes, wide-spread corruption, state capture, organized crime, poor track record of democracy and independent institutions, as well as weak civil societies<sup>1</sup> have created many barriers for the enlargement policy in the Western Balkans. This especially holds true before the backdrop of the failure of the integration of Bulgaria and Romania as well as recent developments in Hungary and Poland aiming at 'constitutional capture' to gain political control over the judiciary, thereby weakening checks and balances.<sup>2</sup>

These multiple challenges can help to explain the delay in the EU integration process in the Western Balkans countries and underline the challenging conditions in which the EU is working in this region. Bearing this in mind, one of the bigger challenges in the six Western Balkan countries in the years to come will be to keep the political parties and citizens motivated to continue the reform process and ensure that the rule of law and independence of institutions are supported.<sup>3</sup> So far, the EU's enlargement policy on the Western Balkans has been running on autopilot and is rather perceived as a box-ticking exercise than as a substantial reform, such as in areas like the progress on democratization, the creation

<sup>1</sup> Sanfey, P., Milatovic, J., and Kresic, A. (2018) 'How the Western Balkans Can Catch Up'. European Bank for Reconstruction and Development (EBRD) Working Paper No. 185. Available at SSRN: <https://ssrn.com/abstract=3119685> or <http://dx.doi.org/10.2139/ssrn.3119685> (Accessed: 6 March 2018).

<sup>2</sup> Maurice, A., and Meuwese, A. (2017) 'Constitutionalism and the Rule of Law: Bridging Idealism and Realism'. Cambridge University Press, Cambridge, pp. 419-525.

<sup>3</sup> Memeti, A. (2014), 'Rule of Law through judicial Reform: A Key to the EU Accession of the Western Balkans', *Contemporary South-eastern Europe*, Vol.1, No (1), pp. 58-67.

of independent institutions, the implementation of rule of law reforms, and the respect of law as part of the daily culture.<sup>4</sup>

On February 8, 2018, the Commission adopted a strategy for ‘A credible enlargement perspective for and enhanced EU engagement with the Western Balkans’, thus supporting the future enlargement of the European Union in the region as a geostrategic investment for the EU.<sup>5</sup> This strategy spells out the priorities and areas of joint reinforced cooperation, addressing the specific challenges that the Western Balkans are facing, in particular the need for fundamental reforms and good neighborly relations. Furthermore, the new enlargement strategy sets out six flagship initiatives targeting specific areas of common interest, such as the rule of law, security and migration, socio-economic development, transport and energy connectivity, the digital agenda, and reconciliation and good neighborly relations.<sup>6</sup>

The aim of this paper is to provide an assessment of the EU’s new enlargement strategy towards the Western Balkans and, in particular, to discuss the rule of law initiative. This paper will provide a brief analysis of the key obstacles that the region is encountering in the areas of corruption, organized crime, and state capture.<sup>7</sup> Furthermore, the paper will attempt to provide an answer to the critical question of whether the current EU approach to enlargement in the Western Balkans is sufficient and what the flagship initiative on the rule of law should focus on. Particular attention will be dedicated to the shortcomings of the enlargement strategy in previous accession countries, which now have problems with respecting the rule of law. This is followed by several recommendations for the rule of law initiative and the action plan for the Western Balkans regarding their ongoing structural reforms in the area of judiciary and security.

### Supporting the Rule of Law as a Policy Goal

The Western Balkans Strategy pays particular attention to the issues concerning the rule of law, with the topic constituting one of the six announced flagship initiatives. The strategy sets out some broad suggestions for strengthening the rule of law in the region and points out that in the next two years, 2018-2020, the Commission

will develop a detailed action plan together with the countries from the region to address shortcomings and prioritize key issues to align existing legislation and practices with EU standards.<sup>8</sup> Furthermore, the strategy illustrates that the EU will work closely with the Western Balkans towards ensuring that the judicial reform is passed and implemented accordingly. Moreover, the EU will offer technical support to the Western Balkans in the fight against corruption and organized crime.

The Western Balkans enlargement strategy indicates that the EU should make use of the negotiating frameworks in the case of Montenegro and Serbia, particularly to address the outstanding issues concerning the rule of law reforms throughout the negotiations process. Thus, the Commission recommends that greater use should be made of the leverage provided in the negotiating frameworks with the countries of the Western Balkans. Furthermore, the strategy suggests that substantial improvement in the rule of law and, in particular, judicial reform and the fight against corruption and organized crime is crucial for the Western Balkans and must be addressed before technical talks on other chapters of the accession negotiations can be closed.

These proposals set the stage for meeting the membership criteria regarding the rule of law, also known as the ‘Copenhagen criteria’.<sup>9</sup> In particular, the strategy’s focus on judicial reforms, the fight against corruption and organized crime, and depoliticizing public administration in order to enhance a functioning democracy and independent institutions is expected to strengthen the rule of law.<sup>10</sup> Albania is an example where the Commission made judicial reform a key condition for opening accession talks. All 140 lawmakers in Albania’s parliament voted in favor of the judicial reform package on July 21, 2016, which amended nearly one third of the constitution.<sup>11</sup> On paper, the constitutional amendments and legal changes to establish new institutions are aimed at battling organized crime and corruption, thus reducing the politicians’ long-standing influence on the courts. The reform is seen as a major step in the nation’s journey towards EU membership and the Commission has expressed that it will recommend opening accession talks in June 2018.<sup>12</sup>

<sup>4</sup> Gstohl, S. (2016) ‘The European Neighbourhood Policy in a comparative perspective: models, challenges, lessons. Routledge’, pp. 1-15.

<sup>5</sup> European Commission (2018), ‘Communication on A credible enlargement perspective for and enhanced EU engagement with the Western Balkans’, COM (2018) 65 final.

<sup>6</sup> European Commission (2018), ‘Communication on A credible enlargement perspective for and enhanced EU engagement with the Western Balkans’, COM (2018) 65 final.

<sup>7</sup> Transparency International (2016), ‘Fighting Corruption in the Western Balkans and Turkey: Priorities for Reform’. (online), pp.1-18. Available at: [https://www.transparency.org/whatwedo/publication/fighting\\_corruption\\_in\\_the\\_western\\_balkans\\_and\\_turkey\\_priorities\\_for\\_reform](https://www.transparency.org/whatwedo/publication/fighting_corruption_in_the_western_balkans_and_turkey_priorities_for_reform) (Accessed: 6 March 2018).

<sup>8</sup> European Commission (2018), ‘Communication on A credible enlargement perspective for and enhanced EU engagement with the Western Balkans’, COM (2018) 65 final.

<sup>9</sup> Müller, J. (2015) ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’, *European Law Journal*, Vol. 21, No. (2), pp. 141-160.

<sup>10</sup> Fagan, A., and Kopecký, P. (2018), ‘The Routledge Handbook of East European Politics’, Abingdon, Oxon: Routledge, pp. 113 – 125.

<sup>11</sup> Albert, R., and Benvindo, J., and Rado, K., and Zhilla, F. (2017), ‘Constitutional Reform in Brazil: Lessons from Albania?’, Boston College Law School Legal Studies Research Paper No. 453. Available at SSRN: <https://ssrn.com/abstract=2960734> (Accessed: 6 March 2018).

<sup>12</sup> Juncker, J (2018) Interviewed by Efi Koutsokosta for Euronews, 02 March. Available at: <http://www.euronews.com/2018/03/02/jean-claude-juncker-and-eu-enlargement-fatigue> (Accessed: 6 March 2018).

In theory, the judicial reform should ensure that Albania formally fulfills the criteria set out in the negotiating chapters 23 and 24 on 'Justice, Freedom and Security'. However, in my assessment, tangible results in implementing the judicial reform and developing a positive track record in fighting high-level corruption and organized crime will also be required. Furthermore, the vetting of key anti-corruption institutions, the Prosecutor's Office, the High Court, the Central Election Commission and the High Inspectorate for the Declaration of Audit of Assets and Conflict of Interest will be necessary in Albania, as they are regularly subjected to political pressure, preventing them from implementing the new judicial reform. Moreover, many employees of these institutions as well as members of parliament have been subject to previous criminal conviction and links to organized crime.<sup>13</sup> In my view, the Western Balkan countries will need to go through a thorough judicial reform and will be required to show a track record of cracking down on high-level corruption and organized crime.

#### Rule of Law Flagship Initiative

The Western Balkans enlargement strategy sets out the EU's support to the transformation process of the region, targeting specific areas of interest of both the EU and the Western Balkans. This paper focuses on the main initiative, the rule of law. So far, the enlargement strategy points towards addressing reforms in the areas of rule of law, fundamental rights, and good governance, as they remain the most pressing issues in the region.<sup>14</sup> Furthermore, as the strategy suggests, the key benchmark against which the prospects of these countries will be judged is the rule of law. Moreover, the initiative on the rule of law underlines that the Western Balkans countries must embrace fundamental EU values and incorporate them into their daily culture. Therefore, strengthening the rule of law is not only an institutional issue, but it also requires a societal transformation in the countries of the Western Balkans.

The key message of the Western Balkans enlargement strategy regarding the rule of law is to ensure the independence, quality and efficiency of the judicial system. The strategy not only requires the independence of the judiciary and of individual judges to ensure fairness and to hold the executive and legislative branches of the government to account, but it can also be translated as a crucial precondition for any democratic society based on the rule of law in the European Union.<sup>15</sup>

In my observation, in order to transform the judicial system into an effective and independent body, the judiciary and its institutional operations must not only be re-organized and re-structured, but Article 2 of the Treaty on the European Union (TEU) must also be fully embraced. This Article states that the European Union is founded on values such as the respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights, including the rights of persons belonging to minorities.<sup>16</sup> It is crucial that Western Balkans countries demonstrate their respect of Article 2 of TEU, especially now that some member states in the EU have backtracked in this regard.

An example of this is Hungary, where the Government is abusing its constitution-changing majority in order to eliminate forms of extra-parliamentary control through the court system as well as the media.<sup>17</sup> Furthermore, similar tendencies can also be observed in Poland, where the governing coalition has undermined the independence and functioning of the constitutional court and seeks to restrict the freedom of the media.<sup>18</sup> Therefore, the political situation in some of the member states jeopardizes the values set out in Article 2 of TEU to a considerable degree; this notably holds true for the principle of the rule of law. Thus, the EU needs to adopt a tougher stance in the Western Balkans prior to welcoming these countries as new member states.

#### Recommendations

In my view, the rule of law flagship initiative should focus on three transformational pillars in order to strengthen the rule of law in the Western Balkans: (1) Increasing Judicial Capacity, (2) Access to Justice; and (3) Digital Justice. Below is a brief discussion on how these pillars can both transform the judiciary and strengthen the rule of law.

##### 1) Increasing Judicial Capacity

In this pillar, the EU can anchor key changes in the Western Balkans related to the culture, organizational structure, and good governance practice in the judiciary, thereby improving transparency and tackling corruption more effectively.

The experience with Bulgaria and Romania, where the Commission established a monitoring mechanism known as the 'Cooperation and Verification Mechanism' to ensure that the rule of law is upheld in line with EU

<sup>13</sup> Mejdini, F. (2016), 'Albania Sacks MPs and Mayor for Hiding Convictions', Balkan Insight, 29 December. Available at: <http://www.balkaninsight.com/en/article/two-albanian-mps-and-a-mayor-dismissed-from-office-12-29-2016> (Accessed: 6 March 2018).

<sup>14</sup> European Commission (2018), Communication on A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM (2018) 65 final.

<sup>15</sup> Konstadinides, T. (2017), 'The Rule of Law in the European Union: The Internal Dimension Modern Studies in European Law', Oxford and Portland: Hart Publishing, pp. 15-38.

<sup>16</sup> Closa, C., and Kochenov, D. (2016), 'Reinforcing Rule of Law Oversight in the European Union', Cambridge: University of Cambridge Press, pp. 68-69.

<sup>17</sup> Jusic, A. (2016), 'Constitutional Changes and the Incremental Reductions of Collective Religious Freedom in Hungary', Vienna Journal of International Constitutional Law, Vol. 10, No. (2), pp. 199-219.

<sup>18</sup> Wojciech, S. (2018), 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding', Sydney Law School Research Paper No. 18/01. Available at SSRN: <https://ssrn.com/abstract=3103491> (Accessed: 6 March 2018).

standards, has led the Commission to exert more caution, thus requiring future members to have a better track record in this respect.<sup>19</sup> With regard to the rule of law reform in the case of Bulgaria and Romania, in addition to the recent developments in Poland and Hungary, it can be seen that a merely institutional approach to the rule of law and, in particular, in closing Chapters 23 and 24 which pertain to 'Judiciary and Fundamental Rights' and 'Justice, Freedom and Security', is not adequate and that wide-reaching social transformation is also needed.

In the previous round of enlargement, the accession negotiations were rather a box-ticking exercise regarding legislative approximation. Thus, the EU's rule of law promotion policy in candidate countries translated the rule of law into an institutional checklist.<sup>20</sup> An argument against such a merely formal approach in the rule of law promotion by the EU so far is that it does not work beyond the norm adoption phase of particular legislations; thus, this leverage is only available during the negotiation phase.<sup>21</sup> Therefore, the EU should work together with the countries of the Western Balkans in seeking to change the philosophical compass for the judiciary and place good governance practice at the heart of modernizing the justice system.

The judiciary in the Western Balkans is, in most cases, subject to 'political capture' and is highly corrupt.<sup>22</sup> Therefore, creating a judiciary that is sensitive and responsive to the needs and EU aspirations of ordinary citizens is crucial. Furthermore, the initiative on the rule of law should seek to create an institutional environment of the judiciary that is friendly and fair to people in its decisions and process. Thus, establishing a framework based on accountability, integrity and openness that will undergird the institutional design of the judiciary should be a major part of the rule of law initiative. Furthermore, the initiative can support an adoption of modern management practices driven by a clear focus on results and a reliable accountability, monitoring and evaluation framework assisted by the Commission. This will also help to institutionalize the performance of judicial systems and, as a result, strengthen the judicial processes and potentially eliminate unethical practices and reduce the level of corruption.

The infrastructural investment in the judiciary has been inadequate in the Western Balkans thus far. Courts are

usually far away, thereby forcing citizens to travel long distances as soon as cases move to upper courts and tribunals. Thus, many years of neglect and underinvestment have undermined the objective of access to justice of ordinary citizens in the Western Balkans. Therefore, together with the countries of the region, the EU's rule of law initiative should develop an infrastructure development strategy to accelerate the re-construction of courts and increase the capacity and resources of the judiciary. The overall objective should be to render the judiciary more accessible to the citizens of the Western Balkans countries.

## 2) Access to Justice

The constitutions of the countries of the Western Balkans by law guarantee equal protection for their citizens. Thus, the constitutions ensure that all state organs must enable access to justice for all of their citizens. However, access to justice and free legal aid still poses a challenge to citizens of the countries of the Western Balkans.<sup>23</sup>

In this pillar, the rule of law initiative should pay attention to supporting the judiciary in taking effective steps towards reducing the obstacles that hinder public access to information, ensuring proximity and closer access to courts, as well as simplifying court procedures so that all parties can effectively participate in court processes.<sup>24</sup> The constitutions of the countries of the Western Balkans by law demand that the judiciary must offer access to justice. However, the judiciary is not open and available to all who seek its assistance due to high levels of corruption and lack of resources. Therefore, the initiative on the rule of law must ensure that an effective strategy to reducing the citizens' alienation from the justice system is established, thereby simplifying the court documents and procedures for all parties involved in the due process.

The rule of law initiative should also support the establishment of more courts or tribunals, in particular with regard to special courts for young offenders and other vulnerable groups.<sup>25</sup> Furthermore, small claims courts and tribunals of petty offenders should be supported in the initiative in order to provide more effective and fairer trials. The rule of law initiative might also encourage and offer technical support in developing a digital case management system and apply appropriate technology to enhance court efficiency, including audio-visual recording

<sup>19</sup> Carp, R. (2014), 'The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism', *Utrecht Law Review*, Vol. 10, No. (1), pp. 1-16.

<sup>20</sup> Dallara, C., and Piana, D. (2015), 'Networking the Rule of Law: How Change Agents Reshape Judicial. Surry: Ashgate Publishing', pp. 17-32.

<sup>21</sup> Kmezić, M. (2015), 'The Western Balkans and EU Enlargement: Lessons learned, ways forward and prospects ahead'. European Parliament Think Tank. Available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO\\_IDA%282015%29534999](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_IDA%282015%29534999) (Accessed: 6 March 2018).

<sup>22</sup> Transparency International (2016), 'Fighting Corruption in the Western Balkans and Turkey: Priorities for Reform', (online) Available at: [https://www.transparency.org/whatwedo/publication/fighting\\_corruption\\_in\\_the\\_western\\_balkans\\_and\\_turkey\\_priorities\\_for\\_reform](https://www.transparency.org/whatwedo/publication/fighting_corruption_in_the_western_balkans_and_turkey_priorities_for_reform) (Accessed: 6 March 2018).

<sup>23</sup> European Commission (2017), Press Statement on EU – Western Balkans Justice and Home Affairs Ministerial Forum. (online) Available at: [http://ec.europa.eu/newsroom/just/itemdetail.cfm?item\\_id=606474](http://ec.europa.eu/newsroom/just/itemdetail.cfm?item_id=606474) (Accessed: 6 March 2018).

<sup>24</sup> Westminster Foundation for Democracy (2016), 'Regional Road Map on Good Governance for the Western Balkans'. (online) Available at: [https://www.wfd.org/wp-content/uploads/2018/07/Regional\\_Road\\_Map\\_Good\\_Governance.pdf](https://www.wfd.org/wp-content/uploads/2018/07/Regional_Road_Map_Good_Governance.pdf) (Accessed: 6 March 2018).

<sup>25</sup> Jeffrey, A., and Jakala, M. (2015), 'Using courts to build states: The competing spaces of citizenship in transitional justice programmes', *Political Geography*, Vol 47, pp. 43-52.



and transcription of court proceedings. This would not only make courts more transparent and easier to access, but also reduce the level of corruption in the judiciary.

As a last point, the rule of law initiative should, in my view, support the establishment of free legal aid centers and incorporate these into the judicial system.<sup>26</sup> In every EU member state, the exercise of basic human rights and freedoms mostly depends on the fact of whether and how the rights to free legal aid are attained. Furthermore, free legal aid is a very important element of the access to justice and public administration bodies for all the citizens, especially for marginalized and vulnerable groups. However, exercising the right to free legal aid depends on the functioning of judicial institutions and state administration, their accessibility by the citizens, and legal culture in a society. In the Western Balkans, access to justice is challenging and limited, due to that fact that legal aid is not fully institutionalized and there is still a lack of trust in the institutions based on their communist and authoritarian legacy.<sup>27</sup> Thus, the rule of law initiative for the Western Balkans should prioritize access to justice and support the establishment of free legal aid for the public.

### 3) Digital Justice

The use of technology in the judiciary has an enormous potential to improve the administration of justice as a cross-cutting imperative for the above pillars that this paper suggests in transforming and modernizing the judicial system in the Western Balkans. If the technology is properly harnessed and deployed throughout the judiciary, it can have a positive impact on enabling fair trials and further enhancing the effectiveness of administrative processes through data management, data processing, and secure archiving of the information of cases.<sup>28</sup> Such use of technology would guarantee more transparency and fairness in the adjudication of cases and the due process, as well as facilitating a better internal and external communication of the judiciary in the region. Thus, the use of technology has great potential to also enhance public confidence in the judicial process, the lack of which Western Balkans courts currently suffer from. Furthermore, using technology will minimize the risk of misplacement or loss of court files, and make it easier to conduct an annual review of the judiciary performance.

Therefore, the rule of law initiative should encourage the use of technology in the judiciary and, more broadly, in delivering public services across the Western Balkans. Many studies support that the use of technology can help to deliver more efficient, intelligent and citizen-centric public services as well as encourage fairer decisions in

courts.<sup>29</sup> However, to date, public services in the Western Balkans have barely scratched the surface of technology's potential and, therefore, the rule of law initiative can make a transformative change by increasing the use of technology in the delivery of services by the judicial system. In most countries of the Western Balkans, long court delays are common and efforts to reduce the time frame have not been a policy objective so far.<sup>30</sup> Therefore, the court system remains cumbersome and victims of crime must wait a long time for cases to be completed. There is also a significant regional variation between metropolitan and rural areas.

Thus, in my evaluation, the increase of the use of video technology is a key part of the answer to these interrelated issues. Furthermore, the use of technology would also fight corruption more effectively in the justice system. Another logistical issue, which the use of technology could change, is the convention that court hearings are dependent on getting every relevant actor in the same room at the same time. Particularly at the early stages of the judicial process, this exercise is quite unnecessary and expensive, in particular for the countries of the Western Balkans, where the budget is limited. The rule of law initiative could thus explore the use of a virtual court, which establishes a video link between defendants detained in police custody or prison and a court room. As a result, such practice could reduce the time between custody and the first hearing from hours to minutes. Furthermore, transporting defendants who are detained in prison or a police station is a time-consuming and risky operation, during which detainees have previously escaped from court houses or en route to the court. This can be avoided by police/prison-to-court video links, hereby also reducing the expense attached to running court custody facilities. Therefore, greater use of technology in the judiciary can significantly cut some of the costs involved, thereby freeing up resources that can be made available for better use of public services for the citizens of the Western Balkans.

### Conclusion

The EU's new enlargement strategy for rule of law reforms in the Western Balkans is promising and offers a platform for a productive dialogue between the EU and the countries of the Western Balkans. Moreover, it is a clear indication of the EU's future engagement in the region. The six flagship initiatives target specific areas of common interest, such as the rule of law, security and migration, socio-economic development, transport and energy connectivity, the digital agenda, reconciliation

<sup>26</sup> Huszka, B., and Körtvélyesi, Z. (2017), 'Human Rights and EU Conditionality in the Western Balkans Intersections', *East European Journal of Society and Politics*, Vol 3, No (2), pp. 8-52.

<sup>27</sup> Elbasani, A. (2013), 'European Integration and Transformation in the Western Balkans. Europeanization or Business as Usual?', Abingdon, Routledge, pp. 85-101.

<sup>28</sup> Alcaide, L., and Rodriguez, M. (2017), 'International E-Government Development: Policy, Implementation and Best Practice', Cham: Palgrave Macmillan Publishing, pp. 39-73.

<sup>29</sup> Preiser, W., Hardy, A., Schramm, U. (2018), 'Building Performance Evaluation', Cham: Springer Publishing, pp. 223-230.

<sup>30</sup> Sanfey, P., Milatovic, J., and Kresic, A. (2018) 'How the Western Balkans Can Catch Up', European Bank for Reconstruction and Development (EBRD) Working Paper No. 185. Available at SSRN: <https://ssrn.com/abstract=3119685> or <http://dx.doi.org/10.2139/ssrn.3119685> (Accessed: 6 March 2018).

and good neighborly relations. These constitute encouraging policy objectives for transforming the countries of the Western Balkans into more liberal democracies. The initiative to strengthen the rule of law in the Western Balkans is therefore very much welcome, as the new approach can accelerate the process of the judicial reform in the region. However, the Commission should aim to not only focus on institutional capacity-building in the region to strengthen the rule of law, but also on the cultural transformation of the judiciary. In my view, the rule of law initiative should focus on three transformational pillars to further strengthen the rule of law: judicial capacity, access to justice and digital justice. As outlined above, these three pillars can assist the countries of the Western Balkans in fighting corruption more effectively in the judiciary as well as offering better access to justice to its citizens.

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# INTERNATIONAL PROMOTION OF RULE OF LAW: FACING CONNECTIONS BETWEEN PATRONAGE, CRIME, AND JUDICIARY CORRUPTION

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How do externally promoted judiciary reforms fare in specific post-communist contexts marked by strong connections between organized crime, political patronage and a corrupt judiciary? Can the EU and international involvement break down long-established links and historical processes that keep the judiciary hostage to politics? What kind of institutional change can we expect based on the evidence of externally promoted reforms so far?

This paper analyses the resistance to recent judiciary reform in the case of Albania, which is often seen as one of the most advanced cases of internationally promoted reform and, possibly, as a model to replicate across the region. Specifically, we analyze what the reform seeks to establish, what the anti-reform block stands for, and whether the international community can break down binding connections between organized crime, political control, and judiciary corruption, that characterize the current system.

## Introduction

On December 18, 2017, the Albanian Parliament elected a temporary Prosecutor General, Arta Marku. Her profile is radically different for a system that has traditionally favored political protégés: Marku brings along 15 years of experience in the Albanian provinces, where she has shown remarkable integrity, no affiliation with politics, and no preference for media fuss. Notably, she is among the first institutional outputs of an internationally-led reform, which has been in the making since 2014 and promises to vet all levels of the judiciary for links to crime, corruption and politics.<sup>1</sup> Hence, her choice is the epitome of what the reform seeks to establish, but also demonstrates who stands in the way and what form of resistance can be expected.

The reform project was largely sponsored by the EU and the US, who provided much of the preparatory work and expertise, facilitated political negotiations and supplied the necessary financial sources. The ruling majority, 2013 to present, backed the project by leading a special parliamentary commission, extending political support, and steering related constitutional changes in July 2016. 'Today's vote will set the stage for a much-expected revolution of the judiciary... I assure the Albanian people – the iron broom of vetting will wipe out corrupt judges and prosecutors,' the Prime Minister Edi Rama told the Parliament following the consensual vote of July 2016.<sup>2</sup>

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<sup>1</sup> Elbasani, Arolda. 2017. 'Judiciary as a Mechanism of State Capture: External Actors, Party Patronage and Informality.' In *Captured States in the Balkans, Perspectives No 3*: <https://ba.boell.org/bs/2017/09/29/perspectives-captured-states-balkans-0;>

<sup>2</sup> Euractiv. 2016. Albanian Parliament Passes Judiciary Reform Key to EU Accession. <https://www.euractiv.com/section/enlargement/news/albania-parliament-passes-judiciary-reform-key-to-eu-accession/>.



The implementation of the constitutional package, however, proved rather slow and uncertain. To start with, the drafting of the reform package had already begun in 2014, with all parties' declaration of enthusiastic support, but the legal package only made it to the Parliament after two years of inexplicable delays, blockages, boycotts, and political touches to experts' drafts. The political ultimatum from its international sponsors, including a text message from the US Ambassador 'summoning' Albanian MPs to the US Embassy to 'take vision of the consequences the American state would adopt towards them in case of voting against the reform', was instrumental for the extraordinary midnight voting of the package in the Parliament. Even afterwards, critical secondary laws and the institutions necessary to realize what was agreed upon, were fiercely challenged, boycotted and blocked along the way; indeed a reminder of the powerful and effective anti-reform block that militates against it.<sup>3</sup>

The need for a temporary Prosecutor General itself exposed the delays in creating the new institutional set-up already agreed upon in the 2016 constitutional package. Moreover, before, during and after the election of the new Prosecutor, major opposition parties rallied against her voting in the Parliament. On the day of Marku's election, the Parliament was in uproar: bodyguards had to protect her from possible physical attacks by members of the opposition, and key political representatives announced her election unconstitutional.<sup>4</sup> Their position stood in stark contrast not only to international experts' opinions that provided the legal justification for Marku's election, but also to international actors' public support for her profile. The opposition's warning of 'popular confrontation with major consequences of stability' even brought aggressive militants in front of Parliament to disrupt the vote.

The new Prosecutor General only received the votes of the governing majority, which, in the mid-2017 elections, had attained an absolute majority of parliamentary seats, also because of the promise of judiciary reforms. The swearing in of the Prosecutor amidst tear gas and war-like attacks, however, heralded ongoing resistance and many blockages along the way. What brings together the resisting block, what it stands for and the interests at play are made clear by the profile of the outgoing Prosecutor General, Adriatik Llalla, a nominee and long-term protégé of the protesting parties, but also publicly known

for his corruption-tainted profile, links to organized crime, and a politically sponsored career.

#### Judiciary, Crime and Corruption

In February 2018, Llalla, who had just ended his term in office, was designated as the first Albanian official to be publicly banned entry to the US based on evidence of 'significant corruption'.<sup>5</sup> The US press release for the occasion stated: 'In cases where the Secretary of State has credible information that foreign officials have been involved in significant corruption or gross violations of human rights, those individuals and their immediate family members are ineligible for entry into the United States.'<sup>6</sup> Back in 2017, Llalla was also nominally mentioned as one of the officials blocking reform and was deprived of his US visa together with a few other high-ranking colleagues in the judiciary.

The US did not release specific evidence on Llalla's corruption, but the media has already provided a wealth of data on the former Prosecutor's affairs, including hints that Llalla's family had developed unusually expensive tastes for holidays, cars, fashion, and real estate. Evidence of the luxury and lavishness the family enjoyed was totally disconnected from their official income. Only during the last months in office, Llalla was apparently involved in transactions worth millions of dollars, which fitted into a clear scheme of money laundering, such as the reevaluation and sale of properties, which he had bought only a few months before, at a much higher price.<sup>7</sup> In one case, the transaction involved selling a property for a price 23-times higher than the one he had allegedly bought it for from a person with an official record of killings and various crimes.<sup>8</sup> The public also learned that Llalla's high school diploma cannot be found, but the alleged lack of secondary education seemed rather insignificant amidst the allegations of criminal charges that have surfaced.

Indeed, the former Prosecutor General is a meaningful case and perhaps one of the institutional orchestrators of by now evident connections between the judiciary, crime, and corruption, but he is neither an isolated case and quite probably not the worst. 80% of Albanian professional judges cannot justify their own declarations of assets.<sup>9</sup> The recorded ownership of substantial business shares, large portfolios of real estate properties, large bank accounts, dynamic movements in the property portfolios and luxurious lifestyles of Albanian judges may

<sup>3</sup> Carmona-Boryas, Robert. 2017. Judicial Reform in Albania still Face Many Obstacles. <http://thehill.com/blogs/congress-blog/foreign-policy/322819-judicial-reforms-in-albania-still-face-many-obstacles>.

<sup>4</sup> Semini, Lllazar. 2017. Albania opposition protesters in clashes outside parliament <http://www.chicagotribune.com/news/nation/world/sns-bc-eu--albania-parliament-clashes-20171218-story.html>; Daci, Merxhan, Albania's Judicial Reform all but Go Up in Smoke. [www.euronews.com/2017/12/31/albania-s-judicial-reforms-all-but-go-up-in-smoke](http://www.euronews.com/2017/12/31/albania-s-judicial-reforms-all-but-go-up-in-smoke).

<sup>5</sup> <https://www.state.gov/t/pa/prs/ps/2018/02/278338.html>.

<sup>6</sup> Erebara, Gjergj. 2018. US Bans Albanian Former General Prosecutor. [www.balkaninsight.com/en/article/us-state-department-bans-albania-former-general-prosecution-from-entering-us-02-152-018](http://www.balkaninsight.com/en/article/us-state-department-bans-albania-former-general-prosecution-from-entering-us-02-152-018).

<sup>7</sup> The Scheme: How Adriatik Llalla transformed 100 thousand dollars into a million and a half. [www.gazetatema.net/2018/03/09/skema-e-plote-si-i-beri-magjistari-adriatik-llalla-100-mije-eurot-nje-miliard-eegjysem/](http://www.gazetatema.net/2018/03/09/skema-e-plote-si-i-beri-magjistari-adriatik-llalla-100-mije-eurot-nje-miliard-eegjysem/).

<sup>8</sup> 2018. The document: Adriatik Lalla Buys from the Killer. [www.tiranapost.al/dokumenti-adriatik-llalla-blevrasesit3000metr-akatro-reullishte-ne-tirane-per-1-5-milione-leke](http://www.tiranapost.al/dokumenti-adriatik-llalla-blevrasesit3000metr-akatro-reullishte-ne-tirane-per-1-5-milione-leke).

<sup>9</sup> Likmeta, Besart. 2016. The Integrity Gap, <http://www.balkaninsight.com/en/article/the-integrity-gap-albanias-appeals-court-judges-asset-disclosures-raise-redflags-06-16-2016>.

appear shocking to judges in other parts of the world.<sup>10</sup> And that is only the tip of the iceberg that is made public based on the Albanian judges' declarations of assets. The noted discrepancies between their official income and declarations, let alone undeclared assets, tend to escape any judicial scrutiny thanks to the cooperation of their colleagues within the system. Cases of judiciary corruption that are exposed in the media, however, indicate individuals paying judges 'in cash' for favorable decisions, the prosecutors' manipulation of evidence, the judiciary transfer of big chunks of state properties to individual claimants, burdening of the state with harsh penalties when the state is a party, favors to corrupt businesses, and, in general, the doctoring of final decisions based on who offers the highest bid. Anecdotal evidence shows a well-organized scheme of bribe-sharing between lawyers, judges and prosecutors. Not surprisingly, surveys persistently rank the judiciary as the most corrupt institution.

Llalla's alleged transactions with registered criminals are also symptomatic of a larger trend of connections between the judiciary and organized crime, where some of the judiciary's unjustified wealth seemingly stems from. The Albanian public has already learned long ago, both through the media and personal experience, that renowned 'international' criminals – killers, pimps, drug dealers and leading heads of organized crime – get released during various stages of the 'due' process. The released protagonists come to the attention of the public not because they are investigated, but because they often strike again. In an explosive case in 2016, a notorious prisoner accused of several killings, international drug trafficking, and orchestrating businesses' racketeering schemes – activities which the police found he continued to pursue from prison – was pardoned for 'good behavior'.<sup>11</sup> Various prosecutors and judges involved in his decade-long process gave him minimal fines and then systematically shortened his term in prison – decisions which went through and involved various levels of the judiciary. The US Ambassador, then actively involved in the ongoing judiciary reform, did not mince his words: "I want to say to the corrupt judiciary that this is an unacceptable decision."

#### **Patronage Networks: Political Sponsorship and Judiciary Services**

Most importantly, the outgoing Prosecutor General best signifies political sponsorship of key members of the judiciary in return for their political loyalty and services, including the cover-up of high-level political corruption.<sup>12</sup> Political sponsoring usually entails nomination and promotion of suitable political candidates across top

layers of the judicial hierarchy. Until the 2016 reform package, the politicization of Albanian presidents, who maintained the constitutional prerogative to nominate key judiciary posts and chair the High Council of the Judiciary, proved to be the key institutional mechanism through which party cronies made it into the judicial hierarchy.<sup>13</sup> As five out of six post-communist presidents have been nominees of one party and the first and last two presidents hailed from that party's close circle of leadership, the Albanian presidents usually served to carry out party patronage schemes by positioning individual and party loyalists across the judiciary system. The process of selection, moreover, typically sidelined professional criteria, thus often promoting people who lacked the required expertise and experience for the job. Since those appointees owed their job to the party, they served the party patronage schemes – by controlling active investigations, nominating lower-level appointments, distributing cases to suitable prosecutors and judges, etc. – in order to advance their careers. Consequently, not only did the Albanian presidents establish a long-running mechanism of political patronage, but they also helped to maintain low professional standards, as the second side of the same coin.

The system of patronage-cum-low-professional-standards was not incidental. Instead, it proved an effective tool to transform the judiciary into a subsidiary political institution. Llalla came to office as a result of that purposeful mechanism involving a politically-charged presidency and a corruption-tainted ruling majority in need of keeping the judiciary under control. The nomination and timing of Llalla's appointment back in 2012 was very significant with regard to how and why he would acquire that position. At the time of his appointment, the ruling coalition faced daunting cases of political corruption, involving key members of the then-Cabinet: a 2007 case that allegedly cost the state €230 million, a 2008 case including the explosion of a facility that killed 26 people, a 2011 case involving the live-broadcasting of huge corruption deals among key members of Cabinet, and a 2012 case involving the killing of four unarmed protesters by the Republican Guard, whose chain of command was limited to top government officials.<sup>14</sup> Since all cases implicated key ministers, the PM and their family members, the then-ruling majority was keen on investing in a president from their close political circle for the 2012 presidential race. To be sure, the outgoing President was also the former number two of the same party, but not meek enough to respond to the party's immediate contingencies. The President-elect in 2012 was indeed part of the ruling majority's Cabinet before being voted into his new position. Once in the new office, he made sure to remove via a questionable process the acting prosecutor

<sup>10</sup> Bakillari, L. 2016. Albanian Judges' Wealth Escapes Scrutiny, <http://www.balkaninsight.com/en/article/albanian-judges-suspicious-wealth-escapes-scrutiny>.

<sup>11</sup> BTI. 2018. Albania Country Report.

<sup>12</sup> Elbasani, A. and S. Šelo Šabić. 2017. 'Rule of law, corruption and democratic accountability in the course of EU enlargement.' *Journal of European Public Policy*. Onlinefirst: <http://www.tandfonline.com/doi/abs/10.1080/13501763.2017.1315162>.

<sup>13</sup> Elbasani, 2017.

<sup>14</sup> Primatarova, A. and Deimel, J. 2012. *Bridge over Troubled Waters? The Role of Internationals in Albania*. Center for Liberal Strategies, Sofia; BTI. 2014. *Albanian Country Report*. [https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2014/pdf/BTI\\_2014\\_Albania.pdf](https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2014/pdf/BTI_2014_Albania.pdf).

who had dared to open investigations into some of the above-mentioned cases, and whom his party echelons had publicly humiliated as a ‘boulevard prostitute’ on national TV.<sup>15</sup>

The President’s choice for the vacant position, Llalla, had already shown political loyalty in his appointment as chief of the High Directorate of Declaration and Audit of Assets – an institution which, under Llalla, maintained total silence on unfolding cases of corruption. Llalla showed the same political loyalty and submission in his new position by closing all old and new cases of political corruption.<sup>16</sup> He also mobilized against the reform package that targeted the very patronage relations, impunity of political abuses, and judiciary corruption that he represented. When facing accusations from the US Ambassador that, ‘for 18 months, the Attorney General has spoken persistently and loudly against reform’, Llalla wrote a letter of ‘complaint’ and then met to discuss his reaction with the then-President-elect and the then-Chair of the Parliament, both representing the coalition that had entrusted him to the position, leaving no doubt as to whom he relied on. Indeed, loyalty and services of patronage networks work both ways: Llalla was nominated to control ongoing investigations into high-level political abuses of office, and so he did; the presidency and the parties that nominated him, in return, extended their protection throughout all the eventful moments that marked his term in office between 2012 and 2017.

Yet, the ‘mutual services’ between politics and judiciary that the outgoing Prosecutor General represents implicate all levels of the judiciary system. How politically ‘delicate’ cases end up going nowhere due to the collaboration of the judiciary is illustrated by a case on the privatization and subsequent collapse of the Albanian Power Distribution Company, the so-called CEZ affair, in 2016. The then-Attorney General, Llalla, who enjoyed centralized control over active investigations, refused to investigate a file documenting potential abuses in the 2009 privatization scheme. The High Court of Justice, another important institution that is usually filled with political appointees and thus has a reputation for serving as a political instrument,<sup>17</sup> effectively closed down further investigations. A parliamentary committee led by the ruling party, which was in opposition when the privatization was concluded, continued to investigate the involvement of key political figures – several then-ministers, the former PM, his son, and other state officials – in the affair. The parliamentary investigations showed that a third person received a \$7 million transfer for ‘consultancy’, a sum he withdrew in cash soon after the deal. The same ‘consultant’, who is neither a public official nor any kind of expert in the field, had registered around 100 calls with the then-PM back in 2006, when the

privatization was not yet on the public agenda. Neither the recorded calls, nor red-light transfers, nor disclosed emails and meetings between the ‘consultant’, Albanian politicians and their relatives, proved sufficient for the judiciary to investigate the case, a demonstration of how the system serves to cover up political corruption.

So far, various levels of the judiciary have managed to obstruct, delay and ultimately close down all cases of high-level political corruption, a strong indicator that it is the politics that pull the strings of the system.<sup>18</sup> When the Parliament voted for Llalla’s successor, the US Ambassador made clear the link between political and judicial corruption that the reform targeted: ‘The Prosecutor General who refused to prosecute politicians is gone. The people of Albania are impatient for justice. And the politicians are afraid.’ Whether other implicated members of the judiciary will be ousted and the judiciary will amass independence to investigate political corruption remains to be seen.

#### Externally Promoted Reform: What the International Stakeholders Got Wrong

Disturbingly, however, Llalla is also the epitome of the institutional changes that the international actors, including the EU, have helped to promote. The international community in Albania has maintained a leading role in initiating, negotiating and sponsoring major institutional reforms at least since the collapse of the state order in 1997.<sup>19</sup> After 2000, the European Union emerged as a leading actor, with the EU integration providing a consensual agenda around which the country’s progress is evaluated. Hence, the EU has long been in the position to set the priorities, monitor reforms, use various diplomatic channels to push for its priorities, and allocate substantial funds in target areas of EU integration.<sup>20</sup>

The judiciary and other rule of law institutions have received the lion’s share of external assistance and of EU funds in particular. Since 2005, moreover, the EU has poured financial assistance into the so-called Euralius mission, which aims at ‘the development of a more independent, impartial, efficient, professional, transparent and modern justice system’. The EU rule of law mission is now in its fifth extension. Other projects and funds related to the judiciary kept coming in within the framework of other international organizations, including the Council of Europe, OSCE, World Bank and other foundations. Throughout the process, Llalla and his alike colleagues within the system have benefited as key interlocutors, stakeholders, and the very target of external assistance.

<sup>15</sup> BTI, 2014.

<sup>16</sup> Elbasani, Arolda and Senada Šelo Šabić. 2017. ‘Rule of law, corruption and democratic accountability in the course of EU enlargement.’ *Journal of European Public Policy*. <http://www.tandfonline.com/doi/abs/10.1080/13501763.2017.1315162>.

<sup>17</sup> Ibid.

<sup>18</sup> BTI. 2016. Albania Country Report. [https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI\\_2016\\_Albania.pdf](https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI_2016_Albania.pdf).

<sup>19</sup> Abrahams, F. 2015. *Modern Albania*. NY: NYU Press.

<sup>20</sup> Elbasani, Arolda, ed. 2013. *European Integration and Transformation in the Western Balkans: Europeanization or Business as Usual?* Abingdon: Routledge.

The international community's focus on rule of law also enabled streams of well-paid international experts to come in and suggest new rules, procedures, and institutional arrangements. Many projects were successfully concluded and huge amounts of assistance, some of which was provided as loans, were successfully spent. Although the country received plenty of international advice, legal assistance and actual financing, the formal institutional and legal changes resulting from these initiatives had little effect on curbing political control over or widespread corruption within the ranks of the judiciary. Nor did they delve into the real problems of the judiciary appointments, patronage networks, or links to organized crime that loomed underground. Instead, international support insisted on training and coaching judiciary personnel<sup>21</sup> which was already politically nominated and part of the patronage networks of loyalty embedded into institutions, thus enabling rather than challenging a politically-controlled and self-serving judiciary system. To put it differently, international assistance has more often than not facilitated the work of political appointees, like the outgoing Prosecutor General, without ever questioning how he was picked for the job and what he stood for.

A crucial problem of why such internationally-led campaigns have failed to make a real change is related to the technicalities of funding. As Mendelski suggests on the basis of comparative evidence from South-East Europe, most financial assistance has focused on technical capacities – better infrastructure, improved payment schemes, clear institutional procedures, training etc. – while ignoring the dimension of impartiality, such as independence, corruption, and de facto separation of the institutions in question.<sup>22</sup> Much of the assessment conducted under the auspices of international bodies moreover focuses on one-shot, quick and formal assessments of newly built institutions, while ignoring the informal patronage schemes and long-term historical processes that hold these new institutions hostage to politics. Hence, most external reporting on the issue remains at the superficial level of formal institutional change and fails to dig deeper into the actual links, actors and historical processes that enable judiciary corruption.

A related problem has to do with the nature and time frame of international projects. Most projects have a specific time span and are concerned with spending the allocated funding while recording a list of demonstrable outputs within that specific time period. Few projects had a long enough time span to evaluate how the newly built institutions functioned, whether they changed and/or were replaced after the project ended. Besides, most international consultants employed by such projects are interested in skipping from one position to another and reaping the benefits of lucrative international positions, instead of delving into the mud of long-term informality and corruption, which would probably also put them on bad terms with domestic politicians whose support they

need to pursue further consultancy appointments and projects. Most projects, therefore, typically cater to politics and steer away from identifying problems that hint at political patronage, binding connections, and mutual services. Certainly, the usual international reporting on general institutional and judiciary changes that skims the surface of reform is more rewarding for their authors than delving into how and why those institutions are and remain captured in the first place. The result is an abundance of formal laws and formalistic changes, but little consistent long-term change in the way the institutions function, and even less analysis of the gap between frequent formal changes and persistence of similar problems in the long term.

Last but not least, the international community has often proved rather weak in consistently pushing for its initiatives and counteracting complex networks and strategies of resistance. In the case of judicial reform, the EU and the US have sponsored the entire legal package and arranged a 'consensual' adoption of the necessary constitutional changes. Yet, the secondary legislation necessary to implement the constitutional changes was still blocked and delayed, the creation of new institutions is still pending, and various parties have continued boycotts and blockages. The international officials, moreover, have often proved reluctant to name and shame sources of resistance, preferring instead to pace their requirements and facilitate consensus, even when consensus can end up protecting the patronage schemes that the reform targets. Specifically, when some segments of the Parliament mobilized to block the constitutional package in 2016, the EU and other international officials reached for a 'political' offer, which watered down the experts' draft so that the parties would be in charge of appointing, thus controlling, members of the new vetting commissions – a concession that played into the parties' interest in maintaining control over ongoing reforms. As we learned later in the process, it was exactly the concessions made to the contesting parties in 2016 that enabled them to delay the creation of new institutions. In another twist that shows how strong the anti-reform block is, the Albanian Association of Judges silently appealed the vetting law to the Constitutional Court, while the parties were seemingly working to set up the new vetting institutions in the summer of 2017. The court had already checked and arguably watered down some of the key articles of the vetting laws during a previous appeal that involved judges and politicians.

To what extent the concessions have managed to water down the main pillars of reform, particularly the vetting procedures, can be evaluated only during the process of implementation, which has only just started. For the time being, the country has elected a new temporary Prosecutor General, who remains heavily challenged by key political and institutional actors. Most prosecutors and judges that embody the connections between political

<sup>21</sup> [www.euralius.eu/index.php/en/events/past-events/range.listevents/](http://www.euralius.eu/index.php/en/events/past-events/range.listevents/).

<sup>22</sup> Mendelski, Martin. 2015. 'The EU's pathological power: the failure of external rule of law promotion in South Eastern Europe.' *South-eastern Europe* 39(3): 318-346.



patronage, organized crime, and widespread corruption are firmly holding onto their positions.

### Conclusions

Political consensus, a crucial focus of the international supporters of reform, rarely delivers long-term and sustainable institutional change in transition contexts. As the progress of the constitutional package adopted with the votes of the entire Parliament shows, political actors often use the process of consensus to water down challenging aspects of reform; additionally, during the implementation stages, they can easily withdraw what they formally consented to.

Political resistance to reform is neither straightforward nor candid. Instead, it arises in the form of informal strategies – delays, boycotts, protests, etc. – that aim to hold institutional changes hostage to politics. Hence, any analysis of short-term, formal changes that lack engagement with informal strategies and processes that bind coalitions of resistance fails to account for more than surface-level forms of institutional changes.

International structures promoting reforms have often insisted on formal technical improvements that have failed to identify or address the patronage schemes, historical processes and underground links that merge politics, crime, and judiciary into a network of mutual services.

The poor performance of international projects and legal missionaries that offer quick, formal, institutional fixes, often without knowledge of the context of and accountability for what they do, has not delivered in terms of sustainable institutional changes. Most such missionaries have proved more interested in reaping the benefits of their lucrative positions than tackling difficult issues of rule of law as well as political and criminal linkages that loom underground.

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# RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY IN THE WESTERN BALKAN COUNTRIES

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The rule of law and issues related to the independence and operation of judicial systems have been at the heart of the reforms and conditionality prescribed by the European Commission in the context of enlargement. This is revealed in the Cooperation and Verification Mechanism introduced *vis-à-vis* Romania and Bulgaria in 2006, and in the context of the Western Balkan countries, with the integration of the two relevant negotiating chapters being the first ones to be opened, continuously assessed, and the last ones to be conclusively assessed and closed in the process of harmonization. This conditionality and assessment of compliance, in lack of a common EU-based system and framework, reverts to standards by reference to recommendations and guidelines developed and adopted as soft-law instruments within regional rule of law organizations (Council of Europe and its Venice Commission, GRECO). One must note, however, that even within the EU's pluralistic landscape of justice systems, deviations from these standards emerge – and the EU's reaction appears to be rather slow to address these concerns.<sup>1</sup> Indeed, there is no specific EU *acquis* against which to measure the 'rule of law-readiness' in various areas under this specific conditionality criteria; moreover, the EU has also not managed to prescribe a specific blueprint for judicial independence or to harmonize a judicial model "based on the institutional legacies of the judicial systems of the old member states".<sup>2</sup>

While the main dimensions of the institutional framework for a modern judiciary in line with EU standards are either in place or coming into place in the countries of the Western Balkans, the big challenges are (i) the implementation/application of the new body of law that has been passed, (ii) the operationalization/funding/staffing of the new organizations/entities that have been established.<sup>3</sup> These judicial reforms will necessarily have to improve the structural and operational independence, efficiency, accountability, and enforcement capacity of judicial institutions.

Indeed, for a successful judicial reform, a comprehensive approach is best suited, due to the evident linkages between the different building blocks. For example, independence and accountability are closely linked: a judiciary that is not accountable to society and has no eye for societal needs will not gain the trust of society and will

<sup>1</sup> The most obvious example would be the judicial reforms in Poland and therein the Draft Act on the Council of the Judiciary and other Acts related to the judiciary from 2017, condemned by various regional rule of law organisations and addressed by the European Commission in defence of the independence of the judiciary. See: [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm).

<sup>2</sup> Piana, D. (2009) 'The Power Knocks at Courts' Back Door: Two Waves of Postcommunist Judicial Reforms', *Comparative Political Studies* 42(6), p. 828. Cited by Denise Presnova et al., 'The

effectiveness of the 'European Model' of Judicial Independence in the Western-Balkans: Judicial Councils as a solution or a new Cause of concern for judicial reforms', *CLEER Papers*, 2017/1, p. 10.

<sup>3</sup> 'Thematic evaluation of the Rule of law, Independence of the Judiciary and Fight against corruption and Organised Crime in the Western Balkans – Lot 3.' Final Main Report, February 2013. Available at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/financial\\_assistance/phare/evaluation/2013\\_final\\_main\\_report\\_lot\\_3.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/financial_assistance/phare/evaluation/2013_final_main_report_lot_3.pdf).

endanger its independence in the short- or long-run.<sup>4</sup> Similarly, efficiency and quality are connected: a transparent and efficient way of organizing the judiciary – and public services in general – contributes to less corruption, more public trust, better justice, and improved rule of law.<sup>5</sup>

Such comprehensive reforms should also go beyond the verbatim transposition of international standards and should aim at transforming and fostering a judicial culture and attitude wherein these reforms can be implemented. This transformation is key to a successful reform of the justice system; it will also present a challenge not only for the implementation, but also for the effective assessment of developments in the negotiation process.

#### **Independence and Self-Governance of the Judiciary: a Tool to Curb Political Interference and Corruption**

Independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.<sup>6</sup> Independence of the judiciary is also a prerequisite for the adequate protection of the fundamental human right to a fair trial, as recognized by international and regional human rights treaties.<sup>7</sup>

There are various ways to ensure that the independence of the judiciary is appropriately discharged, and its governance is effective. The creation of Councils of the Judiciary (judicial councils) in charge of ensuring the self-governance of the profession has been recommended by various regional rule of law organizations and observers.<sup>8</sup> Judicial councils are “designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process while ensuring some level of accountability.”<sup>9</sup> Such independence and

accountability relate to curbing corruption and interference. Councils of the Judiciary “are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system.”<sup>10</sup> Self-governance of the judiciary is expected to guarantee and contribute to not only strengthening the independence of the judiciary, but also to the efficient administration of justice.<sup>11</sup>

By now, most European countries have introduced judicial bodies of self-governance.<sup>12</sup> The historical, political and cultural context constitutes the foundations of the legal and constitutional system of each country and thus has implications on the status and structure of self-governing judicial bodies. From the existing wide variety of models, each country adopts one whose composition and competences reflect the concern about the judiciary in a specific context, balancing demands for accountability and independence.<sup>13</sup> European guidelines place broad competences for all questions concerning the status of judges within the responsibilities of these judicial self-governance bodies; these competences include the appointment, promotion, career development, and discipline of judges as well as the organization, in addition to the functioning and image of judicial institutions. These guidelines should enjoy a leading role in co-operation with other bodies as applicable.<sup>14</sup>

Placing the Council of the Judiciary at the constitutional level (or equivalent basic law) is recommended “to secure the independence of the judiciary ‘from every other power’, to ensure effective self-governance” as well as to “ensure the role of judges as monitors and guarantors of the basic rights of every citizen whilst counteracting any perception of self-interest, self-protection or self-referencing”.<sup>15</sup> Provisions should be made for setting up

<sup>4</sup> EJNC Report (2017) ‘Independence, Accountability and the Quality of the Judiciary’, Performance Indicators 2017, p. 11. Available at [https://www.ency.eu/images/stories/pdf/workinggroups/independen/ency\\_report\\_ia\\_ga\\_adopted\\_ga\\_13\\_6.pdf](https://www.ency.eu/images/stories/pdf/workinggroups/independen/ency_report_ia_ga_adopted_ga_13_6.pdf).

<sup>5</sup> Council of Europe Working Group on Efficient Judicial Systems (2013) ‘Enhancing judicial reform in the Eastern Partnership’, Project Report, March 2013, p. 7. Available at: <https://rm.coe.int/eastern-partnership-enhancing-judicial-reform-in-the-eastern-partnership/1680788f3e>.

<sup>6</sup> UN Human Rights Council (2015) ‘Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers’, A/HRC/29/L.11, 30 June 2015. Available at [http://ap.ohchr.org/documents/alldo\\_cs.aspx?doc\\_id=21380](http://ap.ohchr.org/documents/alldo_cs.aspx?doc_id=21380). This resolution emphasizes ‘the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards’.

<sup>7</sup> See International Covenant on Civil and Political Rights (ICCPR) (1966) Article 14, Universal Declaration of Human Rights (UDHR) Article 10, the European Convention on Human Rights and Fundamental Freedoms (ECHR) (1951) Article 6, African Charter of Human and People’s Rights (ACHPR) (1981) Article 7.

<sup>8</sup> Establishing such independent bodies has been recommended by the Venice Commission (2010) ‘Report on independence of the judicial system—Part I: the independence of judges’ par. 32; Venice Commission (2007) ‘Judicial Appointments’ pars. 44 et seq., and the Consultative Council of European Judges (hereinafter) Magna Charta of Judges (2010) art 13. See also several concluding

observations by the UN Human Rights Committee on State compliance with obligations under the ICCPR and reports from the UN Special Rapporteur on the independence of judges and lawyers. Moreover, see Judicial Integrity Group (2010) ‘Measures for the effective implementation of the Bangalore Principles of Judicial Conduct’, par. 4.1.; OSCE/ODIHR (2010) ‘Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia’; Council of Europe (2010) ‘Recommendation CM/Rec (2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities’, article 26 and Consultative Council of European Judges (CCJE) (2007) ‘Opinion No. 10 on the Council for the Judiciary at the Service of Society’, par. 42. Available at <https://rm.coe.int/168074779b>.

<sup>9</sup> Nuno Garoupa and Tom Ginsburg (2009) ‘Guarding the guardians: Judicial Councils and Judicial Independence’, *American Journal of Comparative Law* 57, pp. 103-134 and p.108.

<sup>10</sup> Council of Europe (2010) Recommendation on judges, article 26. See also, CCJE (2007) ‘Opinion No. 10’, par 11.

<sup>11</sup> European Network of Judicial Councils (hereafter: ENCJ) (2008) ‘Budapest Resolution’, par. 1.

<sup>12</sup> With the notable exception of Germany, Austria, the Czech Republic and Finland.

<sup>13</sup> Nuno Garoupa and Tom Ginsburg (2009) ‘Guarding the guardians: Judicial Councils and Judicial Independence’, *American Journal of Comparative Law* 57, pp. 103-134.

<sup>14</sup> CCJE Magna Charta of Judges (2010) par. 13; ENCJ (2008) ‘Budapest Resolution’, par. 2; CCJE (2007) ‘Opinion No. 10’, par. 42.

<sup>15</sup> ENJC (2010-2011) ‘Councils for the Judiciary Report’, p. 3. Available at [https://www.ency.eu/images/stories/pdf/workinggroups/ency\\_report\\_judicial\\_reform\\_ii\\_approved.pdf](https://www.ency.eu/images/stories/pdf/workinggroups/ency_report_judicial_reform_ii_approved.pdf).

such a body as well as for the definition of its functions, the sectors where its members may be drawn from, and the establishment criteria for membership and selection methods.<sup>16</sup> In addition, the constitutional basis for judicial councils may emphasize their importance as a guarantor of independence, and help strengthen their legitimacy and position *vis-à-vis* the other branches of government and within the judiciary.<sup>17</sup>

The composition of the Council of the Judiciary should be such as to guarantee its independence and to enable it to carry out its functions effectively.<sup>18</sup> Membership of judicial councils should include “substantial judicial representation”<sup>19</sup> as well as “representatives of the higher judiciary and the independent legal profession”.<sup>20</sup> In addition, the broad-based membership of the Council of the Judiciary should “include a majority of judges, but not less than 50% of the membership should be judges”, and the latter should be elected by their peers. In Europe, the CCJE recommendation for the selection process of judge members favors the complete exclusion of political authorities and, with respect to the selection of non-judge members, the preference of non-political authorities of appointees; otherwise, it calls for safeguards for opposition support and diverse representation of society to prevail over political considerations.<sup>21</sup>

In the context of the Southeastern European countries, the reform requirements set by the European Union include the establishment of judicial self-governance and enhanced judicial independence. Chapter 23 and its segment on judicial reform explicitly envisage the establishment of a self-governing judiciary led by a judicial council.<sup>22</sup> The EU induced processes of institutionalization of judicial councils as one of the most important pillars of the judicial reforms, have manifested in new legislation in all of the countries; however, the actual implementation – that is the operational and functional assessment of such a council’s impact on judicial independence, on professionalization, on internal and external accountability – has showed a mixed picture, and has oftentimes negated the results that had been hoped for or anticipated. Based on the case of Macedonia, *Preshova et al.* explain the multi-faceted problems arising from the functioning of the Supreme Judicial Council that had been introduced following the standards of the strong Euro-model: Its processes have been repeatedly condemned by the European Court of Human Rights (ECtHR), criticized by the European Commission and gained little, if any, trust from the judiciary and citizens.<sup>23</sup> Specific concerns include the lack of accountability of the Council and of guarantees for its impartiality, hereby underlining the vulnerability to external pressure (from other branches of

power) and that of the individual judges from the Council.

Still, others lend their critical voice to the rule-focused institutional reforms in the region, whereby ‘the parallel process of transformation of culture’ is missing, leading to adverse effects, or where the introduction of judicial councils in systems without sufficient political maturity and clarity on appropriate leveling between judiciary and other political branches has led to corruption and clientelism as well as failing comprehensive judicial reforms.<sup>24</sup>

It should therefore be noted that, while the EU’s enlargement conditionality, justice reforms and independence of the judiciary and curbing of corruption are closely linked to the establishment of ‘strong’ judicial councils, the introduction of the latter may lead and has led to adverse effects when carried out prematurely, without the appropriate legal and judicial culture and mentality. Such adverse effects on the independence of judges has come about through the functioning of the judicial councils and the implementation of their tasks relevant to the career development/disciplining of individual judges; moreover, independence was further damaged by the unclear terms of the accountability and liability of the councils’ members, with increasing elitism, clientism, and opaqueness in the exercise of their powers.<sup>25</sup>

Thus, judicial councils can have an important role in sustainably establishing independence and curbing political interference from the judiciary, while at the same time increasing the effectiveness and accountability of the justice sector; this is under the premise of such councils operating in a functional framework with mature judicial culture and mentality, and with a sufficient sense of accountability enhanced by transparency and professionalism. This will certainly not be a one-size-fits-all solution and, while standards are instructive and inspiring, the local particularities will greatly affect the outcome.

### Depoliticizing Vetting Procedures

The vetting of judges provides for an operational framework to exclude individuals who lack integrity from the administration of justice. Such a framework plays an important role in justice system and institutional reforms, with a view to ensure an effective and legitimate personnel, and with the general objective of strengthening the accountability and integrity of the public sector, restoring confidence in national institutions, and eradicating

<sup>16</sup> CCJE (2007) ‘Opinion No. 10’, par. 11. Available at <https://www.osce.org/odihr/315946?download=true>; Council of Europe (1998) ‘European Charter on the Statute for Judges’, par. 16. Available at <https://www.osce.org/odihr/315946?download=true>.

<sup>17</sup> Violaine Autheman and Sandra Elena (2004) ‘Global Best Practices: Judicial Councils. Lessons learnt from Europe and Latin America,’ IFES Rule of Law White Paper Series, p. 7. Available at [http://pdf.usaid.gov/pdf\\_docs/PBAAB591.pdf](http://pdf.usaid.gov/pdf_docs/PBAAB591.pdf).

<sup>18</sup> CCJE (2007) ‘Opinion No.10’, par. 15.

<sup>19</sup> Universal Charter of the Judge (1999) Arts. 9 and 11.

<sup>20</sup> Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1995) Art. 15.

<sup>21</sup> CCJE (2007) ‘Opinion No. 10’, pars. 31 and 32.

<sup>22</sup> Denise Preshova et al., see n.2. at p. 14.

<sup>23</sup> D. Preshova et al., see n. 2.

<sup>24</sup> M. Bobek and D. Kosar (2014) ‘Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe’, German Law Journal 15(7), pp. 1257-1292 and p. 1280.

<sup>25</sup> D. Preshova et al., see n. 2., p. 21.



corruption.<sup>26</sup> In the context of these reforms, “[i]nstitutions such as courts and prosecution services that abused human rights and defended the partisan interests of a few need to become institutions that protect human rights, prevent abuses and impartially serve the public”.<sup>27</sup> Vetting procedures typically consist of the investigation and evaluation of skills, competencies, personality, assets and other aspects of a given individual, whereby depoliticization is an indispensable condition of the entire operational framework so as to exclude political preferences and interferences. This condition should apply to all stages: the adoption and design of the underpinning legislative framework should be based on wide consultations and requires assessment and transparency; moreover, the independent oversight body must carry out the assessment through impartial procedures that are just and fair, with consequences (sanctions) that are deterrent and duly implemented.

Not only is depoliticization crucial in such a system, but also the prevention of corporatism and self-referencing by the assessors. Holding the members of the judiciary accountable and screening their integrity through vetting processes expands to the potential of detecting connections with organized crime as well (through the verification of asset declarations).

Vetting can thus be a useful tool and building block within justice system reforms to curb corruption and detect/prevent connections to organized crime in particular, but also to establish and operate individual judicial accountability mechanisms in general, as long as its impartiality is beyond question.

#### **The EU Enlargement Strategy: Addressing Judicial Independence and the Way Forward for Justice Reforms**

The most recent EU Enlargement Strategy underscores the centrality of rule of law, fundamental rights and good governance (all with direct linkage to justice system reforms) as being the most pressing issue for the Western Balkans; moreover, it emphasizes the fact that “strengthening the rule of law is not only an institutional issue – it requires societal transformation.”<sup>28</sup> The independence of the judiciary and of judges is essential to enforce the accountability of political powers, and plays a central role among the institutions that prevent and tackle corruption. The Commission’s suggested actions reveal a recognition of the major challenges, such as the trial monitoring to prevent impunity for high-level crimes, and the commitment – in general terms – to calibrate the assessment of justice reform progresses so as to gauge its success. Moreover, the prevalence of this area above all other technical chapters in the negotiations, the achievement of concrete results in judicial reforms and in the fight

against corruption and organized crime places these topics at the heart of the assessment process under the current enlargement strategy.

Judicial reforms and the fight against corruption are areas that are inherently comprehensive and are closely related to appropriate legal and judicial culture and mentality. It will therefore be of utmost importance for the Commission to assess these areas appropriately and for the EU to appear as a credible negotiating partner that truly stands up for these rule of law standards.

<sup>26</sup> UN Security Council (2004) ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General’, S/2004/616, 23 August 2004, p. 2. Available at: <https://www.un.org/securitycouncil/>.

<sup>27</sup> UNHCHR (2006) ‘Rule-of-law tools for post-conflict states. Vetting: An operational framework’, p. 10. Available at: <http://www.ohchr.org/Documents/Publications/RuleoflawVetting.pdf>.

<sup>28</sup> European Commission (2018) ‘A credible enlargement perspective for and enhanced EU engagement with the Western Balkans’, COM(2018) 65 final, p.4.

# GOOD GOVERNANCE PROMOTION IN THE WESTERN BALKANS: AN EMPIRICAL ANALYSIS OF THE DE-POLITICIZATION AND FRAGMENTATION OF THE STATE

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## Abstract

This paper analyzes the externally-driven process of de-politicization (good governance reforms) which has accompanied the Europeanization of the Western Balkans. It is argued that, rather than improve governance and the functionality of the state, de-politicization (de-etatisation) has reinforced the fragmentation of the state. The Europeanized, balkanized and fragmented state has not had the strength to rebuild coherence through a national counter-movement of unity building. Instead, countries from the Western Balkans have tried to overcome fragmentation through a revival of informality (i.e. informal hidden structures based on clientelistic, secret services, organized crime and paramilitary networks). Overall, the imposed good governance agenda of neutralization and depoliticization has fragmented and weakened the state and reinforced informal governance.

*Der Vorgang der Entpolitisierung, die Schaffung staatsfreier Sphären, ist nämlich ein politischer Vorgang.<sup>1</sup>*

## Introduction

We are living in the age of the de-politicization of the state. In the Western Balkans and elsewhere, the de-politicization, erosion, and fragmentation<sup>2</sup> of the state has been propelled forward under the guise of neutral 'good governance' reforms. The 'good governance' agenda,<sup>3</sup> which has aimed to create an impartial, capable, and pluralistic state, has paradoxically led to the emergence of a fragmented, politicized, and dysfunctional state. After two decades of externally-driven state-building and good governance reforms in the Western Balkans, the *fragmented state* looks like a cake (or pie chart) that was split into multiple diverse pieces (be it political parties, ministries or regions), or like a Swiss cheese, perforated by numerous, autonomous, 'neutral' public agencies that, in many cases, have turned into unaccountable enclaves or politicized fiefdoms.<sup>4</sup> This 'reformed', 'Europeanized' and 'de-politicized' state in the Western Balkans resembles a 'Frankenstein state', which consists of multiple conflicting models and a hybrid panoply of best practices and incoherent institutional varieties.

<sup>1</sup> [The process of de-politicization, the creation of state-free spheres, is a political process]. Carl Schmitt (1932), 'Starker Staat und gesunde Wirtschaft', reprinted in Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969, Berlin, Duncker & Humblot, 1995, pp. 89-91.

<sup>2</sup> Fragmentation is a process that involves the splitting of a coherent whole into many conflicting and incoherent parts. Political fragmentation refers to the erosion and dissolution of 'the political', i.e. a lower degree of political cohesion or unity and is therefore closely intertwined with processes of de-politicization of the state. See Schmitt, C., Der Begriff des Politischen (Duncker & Humblot 1932).

<sup>3</sup> Andrews, M. (2008) 'The Good Governance Agenda: Beyond Indicators without Theory', 36(4) Oxford Development Studies 379; Mendelski, M. (2009) 'The Impact of the EU on Governance Reforms in Post-Communist Europe: A Comparison between First and Second-Wave Candidates.', 9(2) Romanian Journal of Political Science 42; Fawcett, P., Flinders, M., Wood, M., & Hay, C. (Eds.). (2017). Anti-politics, Depoliticization, and Governance. Oxford University Press.

<sup>4</sup> Pesic, V. (2007) 'State Capture and Widespread Corruption in Serbia', CEPS Working Document No. 262/March 2007, 22 and 24. Available at <http://bgcenter.org.rs/bgcenter/wp-content/uploads/2013/12/CEPS-State-Capture-and-Widespread-Corruption.pdf>.

How did the fragmented state emerge? This paper argues that the emergence of the fragmented state is the result of its de-politicization, which occurred through four inter-related processes (1. Pluralization, 2. Agencification, 3. Party-politicization and 4. Dispersion). The outcome of these processes is a disintegrated state that lacks political unity and institutional coherence. Precluded from (re)building political unity through patriotic nation-state building, elites from the Western Balkans have attempted to re-integrate their states, economies, and societies through informal relationships of reciprocity (of clientelism, nepotism, kinship). Hence, the fragmented parts of the Frankenstate were stitched together with threads of informality, which, in its pathological form, result in corruption and the emergence of hidden, parallel state structures. The paper aims to shed light on the processes that have produced state fragmentation in the countries of the Western Balkans (Albania, Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Serbia).

#### Conceptual Clarification: What Does De-politicization Mean?

The concept of de-politicization (as employed by Carl Schmitt) has led to much confusion. In his work 'Der Hüter der Verfassung' (The Guardian of the Constitution),<sup>5</sup> Carl Schmitt distinguished between two opposite processes of de-politicization: 1. *de-politicization* (de-etatization, *Entpolitisierung*) and 2. *de-party-politicization* (*Entparteipolitisierung*) (see Table 1). The first type of *de-politicization* refers to a centrifugal de-politicization process of the state through political parties and interests groups.<sup>6</sup> This type of de-politicization can be understood as *Entstaatlichung* and reflects a process in which the state is captured by particularist interests and 'emptied' of its substance, so that it can no longer integrate the diverse political and societal groups and serve as an umpire above factions (i.e. in the sense of multipartiality). Schmitt was aware that de-politicization (the creation of state-free spheres) was a highly political process. He was concerned about the depoliticizing effects of political pluralism (*Parteienstaat*) as it existed in the Weimar Republic, a pluralism that produced or fostered a fragmented and instable political system, including the instrumentalization of the law and the politicization of autonomous state structures. This type of centrifugal, party-related politicization (de-politicization in the Schmittian sense) nowadays reflects, for instance, the capture of autonomous state bodies (e.g. the Constitutional Court, the anti-corruption agency, the judicial council) by diverse party interests, turning them into party-political weapons and not into constraining neutral accountability institutions.

Table 1: Two types of de-politicization

	De-politicization (party politicization)	De-party-politicization
<b>Synonyms</b>	Entpolitisierung Entstaatlichung/ De-etatization Pluralization	Entparteipolitisierung State formation Unification
<b>Method</b>	Political partisanship	Nonpartisanship
<b>Direction</b>	Centrifugal	Centripetal
<b>Process</b>	Fragmentation, Erosion of the political	Integration, Formation of the political
<b>Outcome</b>	Disunity	Unity

Source: Author's elaboration based on Schmitt 1931.

The second type of de-politicization (de-party-politicization) has to be understood as a non-pluralist, centripetal counter-process of political integration (re-politicization, re-integration, de-fragmentation) which seeks to rebuild political unity ('the political'), on the basis of which the state would be able to take decisions in the interest of the entire nation. Carl Schmitt was a conservative advocate of a strong state who wanted to reverse the process of legislative and state fragmentation of the Weimar Republic by rebuilding political unity and strengthening the unitary state. Schmitt criticized the centrifugal type of disintegrated political pluralism and the party-politicization of autonomous state institutions. His aim was to reverse the fragmenting neutralization/de-politicization processes of the German state and rebuild its unity, for instance through the president as a 'pouvoir neutre' and the 'guardian of the constitution'. This view contrasted with Hans Kelsen's call for creating the Constitutional Court as the guardian of the constitution, which would resolve political conflicts and promote political consensus among conflicting parties.<sup>7</sup> In Germany's post-war democracy, both institutions (the office of the president and the Constitutional Court) have been important integrative forces that continue to counter-balance the fragmenting centrifugal forces of political pluralism.<sup>8</sup>

#### Empirical Trends: Measuring De-politicization (Fragmentation) of the State

This section analyzes the processes of de-politicization of the state in the Western Balkans. The countries from this region are 'typical or pathway cases' to test my main hypothesis, which can be summarized briefly as: De-politicization (in the form of externally-driven good governance reform) has reinforced state fragmentation. In the Western Balkans, the de-politicization of the state occurred through four interrelated reform and policy processes: 1. Pluralization of the political system, 2.

<sup>5</sup> See Schmitt, C., *Der Hüter der Verfassung* (Duncker & Humblot 1931).

<sup>6</sup> Schmitt, C., *Der Begriff des Politischen* (Duncker & Humblot 1932).

<sup>7</sup> Kelsen, H., *Wer soll der Hüter der Verfassung sein?* (Rothschild 1931).

<sup>8</sup> See Böckenförde 1991, see Herzog 1971.

Agencification of the state, 3. Party-politicization, 4. Dispersion of coordination and decision-making. Most of these neutralization processes were the outcome of best practices and the mantra of good governance.<sup>9</sup>

### 1) Pluralization

The process of the democratic pluralization of the state started right after the collapse of communism in the early 1990s. It included the introduction of a *de facto* multi-party political system, which, in the Western Balkans, exhibited high legislative fragmentation or polarization. Three decades later, most countries from the region continue to have relatively high and growing legislative pluralization (and polarization). This is reflected in the high number of political parties for the region, which was on average around seven political parties in the early 1990s and has grown to 10 parties in 2015 (see Table 2).

Table 2: Number of Political Parties in the Western Balkans

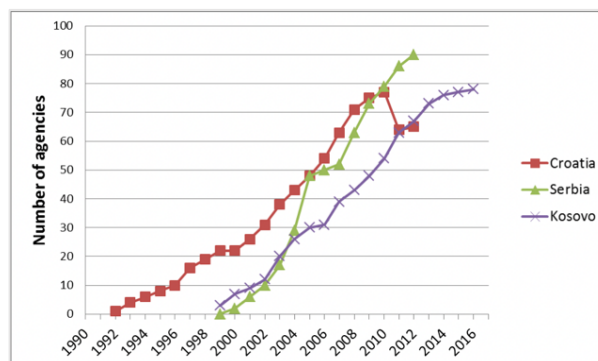
	1992/94	1996/97	2000/01	2003/04	2007/08	2011/12	2014/15
Albania	5	5	11	13	9	10	7
Bosnia & Herzegovina		10	14	12	12	12	12
Croatia	9	6	6	9	8	9	9
Kosovo			14	17	18	17	15
Macedonia	6	7	6	7	8	6	6
Montenegro			5	4	8	8	9
Serbia	10	5	4	6	11	12	12
Average	7.5	6.6	8.6	9.7	10.6	10.6	10.0

### 2) Agencification

The second de-politicization process of the state has been the mantra of agencification, i.e. the functional de-concentration of ministerial responsibilities to (semi-) autonomous agencies. The number of agencies has grown considerably: in Croatia and Kosovo by 400% and in Serbia by 500% (see Figure 1). The intensification of agencification can be attributed to processes of Europeanization.<sup>10</sup> Several interrelated factors stand behind the process of de-politicization of the state through agencification: 1. The European Union (and other international donors) as a driving force, capacity-builder, and upholder of agencies; 2. The doctrine of New Public Management and its mantra of neutrality, expertise, and efficiency (output orientation); 3. The desire of transnational coalitions to advance reforms speedily by circumventing

'burdensome' democratic processes (e.g. legislative debates and oversight) or the inertia and resistance of bureaucracy; 4. The desire of an enhanced regulation of markets, society, and the state, regardless of who wins the elections (erosion of sovereignty).

Figure 1: Agencification Trends in the Western Balkans



Source: USAID 2013; Ministry of Public administration Kosovo

While working relatively well in developed countries (e.g. in Sweden), agencification has been associated with several pathologies in the Western Balkans, such as fragmentation of the state, weaker accountability, less predictability and more party-politicization. Several revealing examples can be cited:<sup>11</sup>

*"The organization of the administration lacks coherence, with too much fragmentation; it is too bureaucratic, is managed very hierarchically and very formalistically."* (Sigma, 'Albania', 2010:4);

*"The main weakness is the danger of fragmentation that blurs clear accountability lines, undermines the coherence of the state administrative system and might foster politicisation of the administrative level."* (Sigma, 'Bosnia and Herzegovina', 2013:8).

*"Problems reported in previous years related to the confusing system of agencies, their unclear roles and weak accountability still persist."* (Sigma, 'Croatia', 2009:6)

*"An important obstacle to good administrative practice is caused by the ill-advised practice in recent years of establishing new administrative institutions (for instance agencies) for new tasks. This tendency for 'agencification', instead of integrating new functions in the existing infrastructure, has led to a fragmented administrative system with a number of inefficient sub-elements and overlapping competences. Sometimes newly created*

<sup>9</sup> It could be thus argued that the good governance agenda from the 21st century has become the new 'central sphere' of de-politicized neutrality (after theology in the 16th, metaphysics in the 17th, morality in the 18th, economics in the 19th, and technology in the 20th century). See Schmitt, C., *Der Hüter der Verfassung* (Duncker & Humblot 1931).

<sup>10</sup> Bileišis, M. and Kovač, P. (2017) 'Public administration reforms in Eastern European Union member states: post-accession convergence and divergence'; Musa, A. (2013) 'Agencies in Croatia: Something

Old or Something New?', 13(2) *Hrvatska i komparativna javna uprava* 353; Musa, A. and Koprić, I. (2011) 'What kind of agencification in Croatia: trends and future directions', 6 *Transylvanian review of administrative sciences* 33; USAID (2013) 'Agencies in Serbia. Analysis and recommendations for reform', March 2013. Available at [http://www.bep.rs/documents/news/Analysisof agencies in Serbia.pdf](http://www.bep.rs/documents/news/Analysisof%20agencies%20in%20Serbia.pdf).

<sup>11</sup> See <http://www.sigmaxweb.org>.



*bodies remain completely understaffed; they might exist on paper but in reality are nearly empty shells. Sometimes new mechanisms have been established in parallel to already existing institutions (departments in ministries, administrative bodies). Further 'agencification' is weakening the rule of law in Montenegro." (Sigma, 'Montenegro', 2011:6)*

*"The large number of agencies that operate under a separate regime, set out in the Law on Public Agencies is problematic. It should be noted that a number of agencies were allegedly established as a requirement for EU accession, while in fact most of them were purposefully created as forming a parallel administration established by the after 2000 authorities to circumvent the old Milošević administration, which was mostly left untouched." (Sigma, 'Serbia', 2011:11)*

*"In addition, the international presence is still very strong in Kosovo, and has contributed to the non-systemic creation of different autonomous agencies and independent bodies. As a result, the state administration has grown on the basis of ad hoc criteria, resulting in a fragmented structure mainly composed of microinstitutions." (Sigma, 'Kosovo', 2014:15)*

Overall, the establishment of autonomous agencies, instead of complementing existing state structures (e.g. ministries, the judiciary, prosecution, etc.) has produced conflicting, parallel and unaccountable enclaves that have reinforced fragmentation and structural heterogeneity (including duplication and overlap).

### 3) Party-politicization

In the Western Balkans, under the conditions of structural and political fragmentation, the newly transplanted or established regulatory agencies, accountability structures as well as new laws did not become impartial constraints over the executive, but have developed into 'political weapons' of opposing political factions in most cases. Polarized political competition was reflected in fights over key positions and nominations of heads of autonomous structures (personalization of politics). Regulatory agencies, constitutional courts, anti-corruption agencies and judicial councils became partisan and politicized 'third parties', shifting their loyalties according to the reconfiguration of political powerholders' constellations. Judicial councils (the supposed guarantors of judicial independence), evolved into politicized, unaccountable, and nontransparent bodies.<sup>12</sup> Similarly, anti-corruption agencies, integrity structures and specialized courts

turned into unaccountable 'political instruments' of party and business elites with vested interests.<sup>13</sup>

### 4) Dispersion

External good governance promotion in the Western Balkans has been characterized by processes of dispersion and, in particular, a lack of reform coordination, which can be, among others, attributed to the heterogeneity of the international community. Good governance reforms in the Western Balkans were insufficiently coordinated by a variety of multilateral and bilateral donors with competing goals, interests, agendas, and methods. Dispersed post-conflict state-building has undermined the creation of unitary states and resulted in the hybridization of policy and governance (most notably in Bosnia and Herzegovina, Serbia, and Kosovo).<sup>14</sup> Donor and policy coordination, although improved in some countries (e.g. Serbia, Albania), was often reduced to mere information exchange or functioned only in narrow sectors. In addition, there has been a lack of coordination within the EU itself. The EU as a highly heterogeneous union of multiple states, traditions, interests, and actors could neither offer one coherent model of governance (or the rule of law etc.) nor a coherent strategy to implement it.<sup>15</sup> The consistency of EU conditionality was undermined by the lack of internal coordination, the presence of multiple cross-conditionalities, the (geopolitical) interests of its members (Realpolitik), and the employment of national legal experts and consultants (e.g. Twinning advisors) with diverse cultural and legal backgrounds.

### The Rise of the Fragmented State and Informality in the Western Balkans

Good governance reform can be seen as a modern attempt to de-politicize the nation-state. In the Western Balkans, this process has been reflected in the mantras of pluralization, agencification, and judicialization of the political. The introduction of independent regulatory agencies and specialized judicial and prosecutorial structures has resulted in several unintended and pathological consequences, such as increased fragmentation, duplication and the party-politicization of state structures. The emerging fragmented state lacks institutional coherence and is unable to effectively coordinate its activities. Similar pathological outcomes of neutralization and de-politicization were already observed during the Weimar Republic. The fragmented state in the Western Balkans looks like a mixture between a Swiss cheese and a

<sup>12</sup> Seiert-Fohr, A. (2012) 'Judicial Independence in Transition' (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Veröffentlichungen des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht), vol. 233, Springer Berlin Heidelberg); OSCE (2009) Legal analysis: independence of the judiciary'. Available at <http://www.osce.org/skopje/67584?download=true>; OSCE (2012) 'Independence of the Judiciary in Kosovo: Institutional and Functional Dimensions'. Available at <http://www.osce.org/kosovo/87138?download=true>.

<sup>13</sup> See the descriptions of anti-corruption agencies in the National Integrity System Assessments, published by Transparency International. Available at <http://www.transparency.org/whatwedo/publications/doc/nis/>.

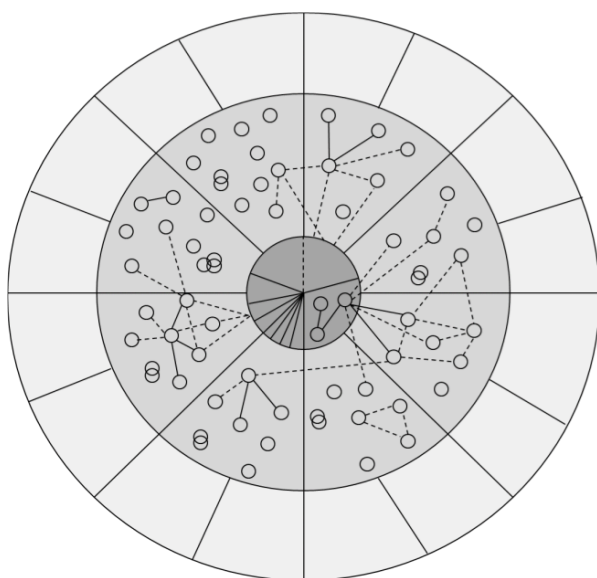
<sup>14</sup> See Juncos, A.E. (2011) 'Europeanization by Decree? The Case of Police Reform in Bosnia\*', 49(2) JCMS: Journal of Common Market Studies 367; European Court of Auditors (2014) 'EU Pre-accession Assistance to Serbia', Special report No. 19, p.14.

<sup>15</sup> Tolsdorf, D. (2014) 'Incoherent Peacebuilding: The European Union's Support for the Police Sector in Bosnia and Herzegovina, 2002–8', 21(1) International Peacekeeping 56.

birthday cake and exhibits excessive political and administrative fragmentation (see Figure 2).

The fragmented state is perforated by myriads of autonomous ‘islands of excellence’ (e.g. autonomous agencies, specialized bodies, regulatory agencies, integrity structures, etc.); these appear to be based on the logic of Western governance (independence, high budgets and salaries, expertise, efficiency and result orientation), but remain embedded in a sea of conflicting forms of governance, be it hierarchical subordination or informal networks of reciprocity (dashed lines in Figure 2). Hardly any spillover to the entire system is visible. The autonomous ‘foreign bodies’ have rather turned into externally-empowered ‘enclaves’ that are able to deliver quantitative results (e.g. an increasing number of convictions, sentences, asset declarations, fines etc.), but no overall improvement of governance.<sup>16</sup>

Figure 2: The Fragmented State<sup>17</sup>



Despite selective progress in some sectors, the overall structural heterogeneity reduces the functionality of the entire political system. The problem here is not pluralism *per se*, but the lack of political unity, cooperation, and

coordination of activities between the diverse governmental structures (i.e. state agencies, ministries, judicial structures, etc.). The result is a fragmented (balkanized) state full of quarrels over competence and posts, frictions, duplication, inefficiency as well as lack of accountability. The most extreme case of a fragmented ‘state’ is Bosnia and Herzegovina, which is probably the ‘world’s most complicated system of government’.<sup>18</sup> It can be concluded that, instead of coherently integrating and embedding different autonomous state agencies and units into a coherent whole, good governance reform (as depoliticization) has reinforced structural heterogeneity and fragmentation.

The fragmentation of the state in the Western Balkans through processes of depoliticization and neutralization has resulted in a weaker state, unable to take decisions and to coordinate reforms and policies. Nevertheless, total state collapse and state failure has been avoided through a counter-process of de-fragmentation. In the Western Balkans, the re-integration of the state occurred through hidden networks of informality. First, almost all countries in the Western Balkans saw the emergence of informal networks and practices in the form of patronage, clientelism, nepotism, and informal connections (stela, s vrutka, vruzki, veza, kumstvo, vrski).<sup>19</sup> These informal networks have had ambiguous effects. On the one hand, informal institutions have had a compensating role, helping to deliver public goods when a fragmented and dysfunctional state could not provide them. On the other hand, informal networks have undermined the proper functioning of formal institutions. In some cases, they have turned into forms of state capture, patronage, and parallel structures (parallel state, deep state) that undermine the legitimacy of the state.<sup>20</sup>

In sum, the empirical analysis demonstrates how depoliticization through externally-driven good governance reforms has resulted in a fragmented state that has been partly re-integrated through informal structures. Persisting fragmentation is reflected in the Weimarization of the political system (the number of parties remains high), the presence of factionalized elites, party-politicization and a high number of autonomous agencies and international donors. The fragmented state is a weak and dysfunctional

<sup>16</sup> See Mendelski, M. (2017) ‘The Revival of Balkanization: How Externally-Driven Reforms Reinforce the Fragmentation of Governance in South Eastern Europe’. Available at SSRN: <https://ssrn.com/abstract=3001231> or <http://dx.doi.org/10.2139/ssrn.3001231>.

<sup>17</sup> Notes: The figure is a visual illustration of a typical fragmented state of the Western Balkans. The inner core circle reflects the fragmentation (separation) of powers, including the fragmentation of the legislative into numerous parties (legislative fragmentation) and the cohabitation of the executive. The inner middle circle reflects the fragmentation of the executive into ministries (which is 23 on average). The small circles reflect autonomous governmental agencies (administrative enclaves) that are linked through formal laws, semi-secret protocols or informal relationships between heads of these agencies. The outer circle reflects further administrative subordination, decentralization and fragmentation of state structures (e.g. into ministerial departments, units etc.).

<sup>18</sup> <https://www.theguardian.com/news/datablog/2014/oct/08/bosnia-herzegovina-elections-the-worlds-most-complicated-system-of-government>.

<sup>19</sup> Bojicic-Dzelilovic, V. (2013) ‘Informality, Inequality and Social Reintegration in Post-War Transition’, 7(2) Studies in Social Justice 211; Giordano, C. and Hayoz, N. (2014) Informality in Eastern Europe, Peter Lang 2014; Kleibrink, A., ‘Political elites and decentralisation reforms in post-socialist Balkans regional patronage networks in Serbia and Croatia (New perspectives on South-East Europe, Palgrave)’; Cvejić, S. (2016) ‘On inevitability of political clientelism in contemporary Serbia’, 58 (2) 2 Sociologija 239.

<sup>20</sup> Priebe, R. (2015) ‘The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts’ Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015’; Pesic, V. (2007) ‘State Capture and Widespread Corruption in Serbia’, CEPS Working Document No. 262/March 2007, 22 and 24. Available at <http://bgcentar.org.rs/bgcentar/wp-content/uploads/2013/12/CEPS-State-Capture-and-Widespread-Corruption.pdf>; Heinrich Böll Stiftung (2017) ‘Perspectives - Captured states in the Balkans’. Available at <https://ba.boell.org/bs/2017/09/29/perspectives-captured-states-balkans-0>.



state that is unable to protect society from the fractionalizing forces of liberalization, globalization, and Europeanization.

### Conclusion

The paper has made an attempt to empirically analyze the degree of fragmentation in the Western Balkans and to explain the emergence of the fragmented state. I argued that, rather than alleviating fragmentation, international state-building and good governance reforms reinforce it and thus reproduce a dysfunctional mode of governance. This sobering finding reflects the absence of a transition towards 'good' (i.e. impartial, coherent, capable, effective) governance, despite considerable reform efforts by the EU and the international community. Two decades of externally-driven liberal reforms in different areas have neither resulted in functioning democracies (rather in polycracies), nor in coherent and performant market economies or the rule of law. Hybrid and fragmented dysfunctionality persists.

The good governance agenda (including the rule of law and anti-corruption) has promised fewer conflicts, more stability, and prosperity to the citizens from the Western Balkans. In reality (and under the conditions of political fragmentation), the de-politicization of the state has resulted in the exact opposite: more fragmentation and more instability. While in more advanced countries from the West, de-politicization/neutralization processes have created an integrated pluralist system (in the sense of embedded autonomy), in the Western Balkans de-politicization has resulted in a mainly fragmented pluralism and a dysfunctional weak rule of law.<sup>21</sup>

What are the implications of the emergence of a de-politicized and fragmented state? First, a fragmented state (which lacks political unity and institutional coherence) will rely much more on alternative modes of coordination and integration, such as a 'neutral' Podestà from abroad (e.g. the High Representative in Bosnia and Herzegovina and Kosovo), an activist and frequently politicized 'pouvoir neutre' (e.g. the Constitutional Court), an authoritarian guardian of the constitution (e.g. the charismatic, activist president), or informal networks that work as a binding force that helps to stick the fragmented parts of the state together. All these means of unity formation are not optimal from the perspective of a modern nation-state, but they can become compensating 'functional equivalents' of integration of fragmented states.

Second, the de-politicized and fragmented state lacks sovereignty and the ability to decide in the name of the interest of the dominant group (national, ethnic, civic, etc.). The divided state is therefore much easier to rebuilt.

control, be it by foreign and transnational networks, international organizations, or by hidden networks (shadow elites, transnational, parallel and informal networks, security-based and paramilitary networks or organized crime groups). The result of this lack of national sovereignty is a dependent and dysfunctional state (and economy). Despite selective progress in enclaves of excellence, the process of modernization (cum Europeanization) remains incomplete. Fragmented states do not achieve political unity (in the sense of a degree of structural coherence and cohesiveness among elites) and remain in a perpetual transition between the traditional and the modern. They are caught between national centripetal forces that try to rebuild the nation-state and international centrifugal forces (e.g. Europeanization, globalization) that erode the nation-state. Fragmented states never achieve the recombination of these two competing movements. Rather, they are torn apart by them.

How to overcome fragmentation and rebuild coherence? How to transition towards good (i.e. coherent) governance? Given the different historical, geopolitical, and socio-economic conditions, 'one-size-fits-all' approaches will hardly work. Re-forming and re-building the state through de-politicized agencies and horizontal accountability structures (e.g. constitutional courts, anti-corruption agencies) may work during periods of elite consensus (e.g. the Visegrád states in the early 1990s), but reinforce politicization, polarization, and conflict when elites are disunited (e.g. in the Western Balkans). Strengthening national and political unity through partial exclusion of minorities (e.g. ethnic Russians) may create a unitary polity and good governance in one country (e.g. Estonia), but the same strategy can provoke a violent counter-reaction by the excluded minority in another country (e.g. Ukraine).

There should be many diverse transitional paths towards a unitary and functional nation-state. They can run from recreating political unity through national identity building, socio-economic integration (e.g. a common infrastructure), consensus on the legal norms, goals or values. The paths towards modern, integrated nation-states vary across time and space. The main policy advice for domestic reformers would be to avoid fragmentation, fractionalization, and too much heterogeneity. Building unity and coherent state structures can be done by initiating processes of de-agencification, de-fragmentation, de-party-politicization and de-feudalization. Only after having reconstructed political unity at the core, more pluralism at the periphery may be sensible. Last but not least, civilizational processes are processes of recombination (and not of rejection). Successful reforms need to recombine the modern with the traditional, but in such a way that political unity at the core is preserved or rebuilt.

<sup>21</sup> Mendelski, M. (2015) 'The EU's Pathological Power: The Failure of External Rule of Law Promotion in South Eastern Europe', 39(3) Southeastern Europe 318.

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# DEPOLITICIZATION AND PROFESSIONALIZATION OF PUBLIC INSTITUTIONS: HOW SHOULD IT (NOT) BE DONE?

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## Introduction: Why this Paper will Raise More Questions Than it Answers

There are some questions where the person who is supposed to provide an answer knows from the outset that they will fail. One of these questions is surely the issue of how one can prevent the (continued) abuse of public institutions in the transition states of the Western Balkans for the purpose of nepotism and patronage. If it were easy to achieve the depoliticization and professionalization of public institutions, it would already have been done. Despite great efforts by a wide range of different players with considerable financial resources at their disposal to combat the phenomena collectively referred to herein as ‘abuse of office’, this has so far not been possible. It would therefore be unrealistic to expect that the path to that goal can be described in this short paper.

Conclusive answers therefore cannot be provided here. However, suggestions can be put forward on individual points and it should be possible to formulate some proposals for further discussion.

The focus will lie on points which, in the author’s opinion, are usually given too little consideration in the discussion; a cursory presentation of all the ‘usual suspects’ among the generally recommended means of combating patronage networks and the like will thus be deliberately avoided. These mainly undiscussed points range from awareness-raising through protection for whistle blowers and the protection of journalists, including against civil law sanctions for reporting on patronage networks, to criminal sanctions for abuse of office. The participants in this event are probably already aware of these.

## Why Some ‘Standard Methods’ Have Had Little Success So Far (and Will Continue to Do So)

It must also be pointed out before discussing this issue that some of the ‘standard methods’ in the fight against abuse of positions in public institutions are unfortunately less effective in practice than one would wish.

Judicial prosecution remains a blunt weapon if the justice system is dysfunctional.

The legal pursuit of abusers of public office is ineffective if the judicial system which considers the cases does not work properly and conducts the prosecution and clarification of such issues only half-heartedly or not at all. There are examples of this in the region with regard to corruption in the university examination system, where

even high-profile proceedings against alleged criminal offences have not been concluded after ten years.<sup>1</sup>

Judicial measures can only be as good as the justice system which handles them. And that justice system is in poor shape for many reasons (which, in the area of criminal procedural law, include rash legislative reforms that hamper judicial practice). Therefore, one area of activity in the fight against abuse of office must be the justice system and reform thereof.

Is ‘naming and shaming’ often perceived as mere ‘beyond a good horse there’s a lot of dust’?

The strategy of ‘naming and shaming’ also only works to a very limited degree in a social environment in which accusations by the media are more the rule than exception, as allegations tend to lose their potency in such a context. Irrespective of this (or because of it), media which operate reliably must be supported in order to increase their credibility and thus the pressure that media coverage can exert. ‘Naming and shaming’ is frequently conducted with support evidently being lent by foreign players. This is relevant because in South-East Europe there is a cultural tendency to close ranks if one’s compatriots (including those towards whom one is otherwise rather critically disposed) are attacked by outsiders. In a climate of such an enforced solidarity (which may also be called ‘reflexive solidarization’) with one’s ‘own people’, naming and shaming campaigns can therefore easily remain without effect or even be counterproductive, eliciting the old saying that “Beyond a good horse there’s a lot of dust” (this saying means that the fact that someone is the aim of criticism does not necessarily mean that this person really deserves to be criticized but may also be a sign of envy by the critics).

The ‘international community’ often has a credibility problem.

Furthermore, only he who is without fault should throw the first stone. As a foreigner from the West, one must bear in mind that in public perception in the respective country one is seen as being ‘in the same boat’ as all the members of the international community. ‘Naming and shaming’ campaigns with an all too obvious foreign background (which can also include financing by non-governmental organizations) can therefore easily fizzle out or even be counterproductive.

Generally, one must be aware of the fact that the ‘international community’ does not always set a good example as far as nepotism and cronyism in South-East Europe are concerned. Big scandals, though they do happen<sup>2</sup>, are not required for the inhabitants of the country to get the impression that the ‘international players’ are ‘no better’

and ‘do not practice what they preach’. Sometimes it is enough to merely watch, as an external observer (whether international or domestic is irrelevant), the personnel merry-go-round on the international (and also domestic) level over a longer period of time: Staff run from one project to another and from one position to the next (in some cases already in their second decade). It is thus easy to come to the conclusion that in this area such offices are obtained ‘through contacts’, as is alleged to occur in the case of domestic institutions.

Is there greater abuse of public institutions today than during socialism?

One must not forget that in many people’s perceptions there was less politicization and abuse of public institutions previously (i.e. in the socialist period) than is the case today. At that time there was certainly no shortage of attempts to abuse public institutions either. However, in socialist times, the abuse (even if it served personal purposes) was mostly perpetrated by the ruling party, which was also the only party, or by its members. Today in the post-conflict region of the Western Balkans, the group of individuals who abuse public institutions has presumably grown considerably and become more heterogeneous.

The naive faith in independent commissions and authorities

If one systematically addresses the subject of ‘depoliticization and professionalization of public institutions’, one finds that the following arguments are often put forward:

- Institutions are depoliticized and professionalized if their members and/or employees are selected and appointed according to professional criteria (and, during their work, are not subjected to any pressure and also do not themselves cede to the temptation to abuse their position).
- One must therefore take away the power to appoint them from politicians (parliaments) and transfer it to independent commissions.
- They will then decide independently and select the best candidates for the positions in question exclusively based on professional criteria.

Following this approach, a wide range of commissions and councils have been set up in various states, from legal aid commissions to judicial councils or separate councils for appointing judges and public prosecutors. At least when one looks at Macedonia<sup>3</sup> and Bosnia and

<sup>1</sup> See, for example, <https://www.blic.rs/vesti/drustvo/afeta-indeks-trajanje-sudenja-neizvesno-i-posle-deset-godina-postup-ka/q1scvmv>.

<sup>2</sup> See, for example, <https://www.walesonline.co.uk/news/wales-news/former-director-kosovo-airport-bribes-2279238> and <https://www.bartstaes.be/nl-BE/artikel/content/200406-airport-corruption-row-in-flames-kosovo-balkan-insight/24866>.

<sup>3</sup> [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14\\_seg\\_report\\_on\\_systemic\\_rol\\_issues\\_for\\_publication.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf).

Herzegovina<sup>4</sup>, doubts may arise as to whether this approach works as intended.

The problem that then arises can be described as follows: *'What do you do if a commission which has deliberately been granted a high degree of independence decouples itself from the rules it is supposed to follow, if it turns into an 'unguided missile'?' This is a serious problem, particularly because these commissions are deliberately endowed with a largely untouchable status. As a result, their decisions are less contestable than typical administrative decisions.*

These bad experiences should act as an impetus for a fundamental rethinking of the concept of independent commissions, particularly because such commissions raise questions from the point of view of the democratic principle and the principles of parliamentary democracy. For example, one might ask whether someone who mistrusts the political system with regard to appointments to public institutions therefore does not also reveal a mistrust for parliamentary democracy. Sometimes, one cannot avoid the impression that in discussions on this subject the phrase 'the political system' is used where the conversation should actually be about 'abuse of a political position by politicians' or by 'certain parties'. Such mistrust for the political system also not least engenders disenchantment with politics and democracy.

This conclusion is important in the context of the subject of this paper because it follows from it that the education of members of parliament (besides the education of citizens in political matters) is also an important aspect of the fight against abuse of office. It is a good thing that civil society and the media also see themselves as watchdogs. However, this must not blind us to the fact that there should also be such watchdogs in the system of state institutions. This role should be played by members of parliament, though up to now they have performed it inadequately.

One should also consider whether it would not be better to set up and develop an administrative jurisdiction which qualitatively and objectively reviews, in accordance with the applicable laws, decisions on appointments to public institutions, promotions and sanctions against officeholders in those institutions rather than rely on independent and therefore sometimes also unpredictable commissions.

#### Ideas for Discussion and Proposals

The situation is therefore ambiguous. For this reason (or in spite of this?), I will now put forward some ideas for discussion and make some proposals.

#### General observations

As we consider what a possible solution to the problem may look like, we must first understand that the key starting point on the pathway towards professionalization and depoliticization of institutions is access to those institutions. One must also take into account that there are essentially two types of access to positions in public institutions:

- 1.) The first are positions for which one must/should **qualify** through one's own achievements and skills. These include, to put it simply, all typical civil service functions for which one has to be selected. One can therefore refer to these as **selected** public positions.
- 2.) The other type are positions to which one is **elected**, from traditional political offices to roles in commissions and authorities, which did not exist in this form in the past.<sup>5</sup> These can be referred to as **elected** public positions.

#### A paradox

A paradox exists with regard to these two groups – for the first group, the possibilities of influencing the selection of the employees of the public institutions are greater. For the second, the elected offices, they are more limited, although the influence that individuals of this group have in their respective offices will usually be considerably greater than that enjoyed by those in the former. This means that the possibility of exercising influence over a public institution and its members and the influence of the public institutions and their employees are inversely proportional. This is a regrettable but unalterable fact.

#### Qualification-oriented positions in public institutions (selected positions)

For typical positions in the civil service which are not elected political offices, measures aimed at professionalization and depoliticization must primarily be taken at the point of access to those offices. Reforms in this respect should be immediately tackled, irrespective of progress in other areas, as inappropriate procedure at the point of access to public offices has the longest lasting repercussions – with each new appointment which is not made according to objective criteria, the existing situation in the relevant public office will be enshrined for decades, as, once a person has been appointed, they can only be removed from their position with difficulty under the current rule of law.

<sup>4</sup> [https://www.slobodna-bosna.ba/vijest/63181/pravni\\_eksperti\\_o\\_vstv\\_u\\_chemu\\_i\\_kome\\_sluzi\\_ovakvo\\_visoko\\_sudsko\\_i\\_tuzilackov\\_jece\\_kao\\_i\\_sudije\\_i\\_tuzitelj\\_koje\\_ono\\_bira\\_i\\_postavlja.html](https://www.slobodna-bosna.ba/vijest/63181/pravni_eksperti_o_vstv_u_chemu_i_kome_sluzi_ovakvo_visoko_sudsko_i_tuzilackov_jece_kao_i_sudije_i_tuzitelj_koje_ono_bira_i_postavlja.html).

<sup>5</sup> There are also mixed forms, i.e. positions which are primarily filled based on performance but for which a collective body is involved in

the appointment decision, so that the candidate's performance is a requirement for inclusion in the group of candidates while the ultimate selection occurs through an election.



*The search for objective criteria for the selection of officeholders.*

To ensure that officeholders are appropriately selected, objective selection criteria must be established first. But what are objective criteria? This will have to be separately established for each role.

However, there are some common features: **Not everything that looks like an objective criterion is objective.** The first statement in this regard is probably surprising for some readers, as not everything which is measurable also automatically constitutes an objective criterion. For example, the mere number of cases that a judge deals with in a particular period says nothing about the quality of his decisions.

Nor is the number of cases dealt with by a judge which are reversed by the next instance an objective criterion. If it was, a judge whose decisions were all upheld in the next instance would be the best judge. However, since it is part and parcel of a continental European constitutional state that case-law is to a certain extent also a self-learning system and can improve (and therefore change), judges must have the personal aplomb to make decisions that diverge from the hitherto prevailing view. If, however, their reversal rate determines their advancement, judges become mere 'parrots' of the case-law of the next instance. This is incompatible with both the objectives of legal development through case law and the ideals of an independent judge; moreover, the citizen seeking justice is thus deprived of a functional instance.

The above arguments already indicate that the issue of objective content criteria is complex. Furthermore, it is clear that there are also 'bogus objective' criteria, which one should not use as the basis for a selection decision.

*The selection procedure*

**Blind justice as a model for the selection procedure.**

The content of access examinations is only one of the issues which must be clarified in this context. Another question is how one can formally, objectively organize examinations that qualify candidates for a public office. In this respect, there is an ideal on a meta-level, which has developed in the European cultural environment in the area of case-law and which can also serve as a guide for access to public offices, namely blind justice. In blind justice, a decision is made without looking at the person due to the judges being blindfolded.

The fact that one can actually implement a procedure that is blind to any information regarding the identity of the participants is demonstrated by the final examinations associated with legal education in Germany. The exams predominantly consist of written tests which, similar to scientific publications, are assessed by two examiners in a double-blind review, anonymously and independently of one another. Such a system can, if it is rigorously implemented, actually lead to anonymous examinations (in Germany, it even regularly happens in such examinations

that professors give students who were among their favorites in lectures poor grades in written tests).

However, a precondition for this is that such a system must be consistently implemented and the other examination arrangements must also be in line with the idea of neutral selection of those individuals who are actually the best qualified in technical terms.

**A broad range of grades.** This also includes having a broad range of grades which is actually fully utilized by the examiners. It is particularly important that top grades are only awarded rarely and that fine differentiations within the top third of the performance range are made. This anonymous examination will thus also differentiate between those who are 'only' among the best and those who are the very top candidates.

**A large written and anonymous part of the exam.**

Consistent implementation of the notion of selection of the best candidates also affects the number of written examinations and the weight that they have with respect to the subsequent oral test. A large number of exams reduces the risk that exam results are based primarily on flukes or one-off failures. Moreover, ensuring that the number of written anonymous examinations is as large as possible reduces the weighting of the subsequent oral exam in the overall assessment, in which anonymity cannot be granted for obvious reasons.

**Minimum grade as a K.O. criterion.** The points above alone are not enough to exclude errors (or manipulations) in an examination of this kind; thus, it is also necessary that minimum grades (based on the number of positions to be filled) are established, below which employment in the public institution is impossible without exception. This is the only way nepotism and 'favors for friends' can be largely excluded – even a child of the national president will be 'out of the running' if he/she fails to achieve that minimum grade (the requirement for that range of grades to actually be utilized by the examiners is mentioned above).

**Measures following selection.** This selection procedure is a *condicio sine qua non* for ensuring that only the best candidates in technical terms find their way into public institutions. However, this procedure alone is not sufficient, as technical qualifications alone do not guarantee that the office will not be abused. The temptation to abuse an office can never be entirely excluded, but it should be prevented as much as possible. Rules of conduct, such as a code of conduct, and internal regulations, as well as external regulations such as laws, through which the different forms of abuse of office are punished, may help to achieve this.

Almost even more important than this is that the employees in the public institutions are paid enough so that they do not give in to the temptation to abuse their office for material reasons. It is therefore necessary to pay the employees in these institutions an adequate (one could even say decent) salary. There would even be financial room

for manoeuvre here if, as numerous people have demanded for many years, the hopelessly overmanned civil service were reformed and the subsequent smaller number of employees were paid more in their individual salaries. However, it must be borne in mind that this task is difficult to accomplish in terms of domestic policy. This is not only due to the resistance of those who would lose their job in a public institution as a 'technological surplus', but also due to the politicians in power who would lose out as a result. Even if they are not well-paid, positions in the civil service are also a means of conducting political patronage and thus securing votes.

### Elected Positions

In the following, some ideas for discussion and proposals with regard to elected positions will be put forward.

#### *Democracy puts limits on influence*

The situation with elected positions is significantly more delicate. Here, respect for democracy rules out the possibility of introducing any direct influence. The question therefore arises as to how one can respect voters' autonomy and, at the same time, ensure that they are not manipulated or allow themselves to be manipulated. In order to get closer to a solution, one must first address abstractly (and perhaps also somewhat naively) the issue of how an 'ideal world' would look, in which public institutions (and therefore their employees) would work exclusively in a practically-oriented manner and in the interests of public welfare.

#### *Support for public welfare must be strengthened*

To do this, an overall social climate is required in which it is not one's own advantage (or that of one's own group) but public welfare which is seen as the goal of all action.

How can this be achieved? Realistically, it requires a certain level of material security, i.e. a certain standard of living of society as a whole. For altruism to exist, people must be able to afford it. This is already a well-nigh impossible task in view of the current situation in the transition states of the Western Balkans.

However, that alone is not enough. In societies in which the idea of public welfare has not gained acceptance for numerous reasons, a fundamental change in general consciousness is also necessary. This is not only a difficult educational task, but it is also tricky because overall social re-education measures actually fit in poorly with the ideal of a democratic, pluralist society, which is the aim of the transformation. At any rate, it should be noted that raising awareness is indispensable, but that this is only the first step.

#### *The younger generation is the most important*

Ingrained habits are hard to change. It becomes all the more difficult the older the target group is and the longer it has had that habit. It is easier to address younger target

groups, whose idealism hopefully has not receded along with their hairline.

It follows from this that this awareness-raising must particularly address the young generation. Obviously, this also means that the self-imposed task of combating abuse of office will take several years, if not several generations, to accomplish. Anyone who expects quick fix solutions in this area must understand that he is ignoring important psychological, sociological and historical facts in the same way that the 'prophets' of early socialism did, who thought that a new world could be built within a few years.

#### *The collective with which one identifies must be prioritized*

Such awareness-raising should not take a too naive and bold approach. In principle, it should acknowledge that egoism exists. Strictly speaking, the current nepotism and clan mentality, like every form of collectivism, is egoism, based on the motto: if I do other people in 'my group' a favor, they will also do me one in return. When my group is doing well, the same goes for me. At least with regard to the second attitude, there is nothing to criticize. Strictly speaking, support of public welfare does not work any differently in a pluralist, democratic society. The only difference is that one defines the group which is supposed to prosper more broadly and that, as a result, because the members of that group include everyone, it is also in my interests that the most qualified individuals take on particular offices.

### **Conclusion**

Obviously, in such a short paper, important points relevant to the subject cannot be addressed to the necessary extent or even at all. In the author's view, the following points are significant for further discussion:

- We have not come close to finding the 'philosopher's stone'.
- Some steps that have been taken in the past (and are suggested or at least supported by the international community) should be reviewed.
- In particular, it should be considered whether independent commissions and councils are really always the right choice.
- The key point we should focus on with regard to the prevention of abuse of office is access to positions in public institutions.

This can be made very detailed in the case of employment relationships.

- In the case of positions which are filled through elections, the possibilities of exercising influence are comparatively limited. In this case, prevention of



abuse of office must primarily focus on strengthening the responsibility of those who elect and those who are elected.

- A functional and actually independent administrative jurisdiction which allows questionable appointments and promotion decisions to be objectively examined is also necessary.
- In the area of access to positions in public institutions, action must be taken immediately. With each new appointment made according to questionable existing criteria, not only is the technically better qualified but unsuccessful candidate wronged, but the current situation is also prolonged by decades.
- The selection of qualified employees alone does not prevent abuse of positions in public institutions. If the material situation of the employees is inadequate, even objectively selected employees may be inclined to abuse their position.
- Moreover, the substantive laws must provide a lever against abuse of office and at the same time protect those who counteract abuse of office (e.g. whistleblowers or journalists) from the possibility of being prosecuted for their actions.
- A functional justice system is also necessary to implement those regulations.

Abuse of office is symptomatic of the fact that the entire system of public service is seriously defective. At the same time, these defects in turn also give rise to abuse of office. Abuse of office is thus both symptom and cause at once; it therefore cannot be combated in isolation. Without comprehensive reform of all public institutions, combating abuse of office will always remain piecemeal.

# FUNDAMENTALS FIRST: OPERATIONALIZING THE FIGHT AGAINST CORRUPTION IN THE EU ACCESSION OF THE WESTERN BALKAN COUNTRIES

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## How to Read the New Enlargement Strategy

Corruption remains one of the primary traits of societies in the Western Balkans. The effective and successful fight against it has not yet occurred. Corruption impairs democracy, the economy, and the overall prosperity anywhere it takes place.

The new EU Enlargement Strategy, published in February 2018, spells out key areas of policy concentration in the upcoming period. These are grouped into four areas<sup>1</sup>:

- Rule of law, fundamental rights, governance
- Strengthening the economy
- Applying EU rules and standards
- Reconciliation, good neighborly relations, and regional cooperation

The Commission makes no reservations in pointing out that “reforms in the area of rule of law, fundamental rights and good governance remain the most pressing issues for the Western Balkans.”<sup>2</sup> Under this heading, it lists tasks that urgently need to be fulfilled: an independent judiciary, the fight against corruption, the transparent management of public funds, tackling organized crime, the protection of fundamental rights, strengthening democratic institutions, carrying out public administration reform, and inclusive social dialogues with all relevant stakeholders.<sup>3</sup> Let us just spend a moment on the first task: a judiciary which must be independent and free from political interference in its work.

Corruption cannot be uprooted in societies in which courts rule unfairly and in which citizens are not equal under the same law.<sup>4</sup> It is as simple and as basic as this. The new enlargement strategy, if it wants to deliver, may not need to go any step further. The Commission and other stakeholders could just spend all their efforts in ensuring that judges are competent, that they are independent, and that courts are staffed and resourceful. Fairness and justice are the foundations of a functional, stable democratic system, which ensures that all its citizens, regardless of their race, ethnicity, religion, gender, economic status, political affiliation, family background and any other identity trait, are equal under law. Such a rules-based system makes the existence of untouchables impossible. Such a system nurtures trust and strengthens social ties. It works for the benefit of all, not just a privileged few.

An accountable executive and legislative ensure that elected officials work for the benefit of society, not for themselves or their patrons. Slowly, a sense settles that

<sup>1</sup> European Commission (2018) ‘A credible enlargement perspective for and enhanced EU engagement with the Western Balkans.’, 6 February 2018.

<sup>2</sup> Ibid, p. 4.

<sup>3</sup> Ibid, pp. 4-5.

<sup>4</sup> Eric M. Uslaner, an expert on corruption, speaking at a training workshop, ‘Anti-corruption and transparency in public administration’, held in Zagreb on March 15-17, 2018.

the government is not there to abuse, cheat, and misappropriate, but to protect, advance, and safeguard public interests.

#### Fundamentals First<sup>5</sup>

With this vision in mind, reforms are not conducted to tick a box in the evaluation reports of Commission officials, but to create genuine positive changes in a society. Only a new generation of leaders able and willing to articulate such a vision and a society that recognizes and supports such leaders will make a lasting change. Anything short of that is a cosmetic, superficial change that scratches the surface without ever delving deeper into the corrupt undercurrents of Balkan societies. A sophisticated and elaborate guise of reforms<sup>6</sup>, as a reaction to ever more sophisticated and elaborate EU conditions, would not do the job.

The EU understands the current underperforming reform dynamic in the Western Balkans, but is also criticized as being an accomplice in democratic regression by its preference for stability over democracy.<sup>7</sup> Embroiled in its internal battles, confronting Brexit and responding to ever increasing foreign policy and security demands from outside, it is not surprising that the EU exhibits preference for stability and peace in its Southeastern corner, even at the price of democracy.

There is no need to elaborate here on how self-defeating this approach is, however. A number of experts have already warned about this ill-fated policy preference.<sup>8</sup> With little appetite for further enlargement under current circumstances in the EU and in light of prevailing trends in the Western Balkans, there are slim prospects for deep and comprehensive change in this region in the next few years. Yet, these years should not be lost time. Positive trends exist – a potential brought about by a change of government in Macedonia and the resolution of the border dispute between Montenegro and Kosovo. To maximize both time and effort, the EU should further streamline the new enlargement strategy and pronounce a selected few key goals it wants to achieve in the coming years.

The focus should be on entrenching the rule of law, an effective fight against corruption and organized crime, support for competent and independent judiciary, and the protection of minority rights. These lie at the core of the EU and, thus, should be at the core of the EU's approach to this region.

Compromising on fundamentals undermines the overall objective of the EU's engagement in the Balkans. Choosing easy goals will not do the trick. It is rather time for a slow, steady and stubborn policy of 'fundamentals first'.

#### Reflecting on the Croatian Experience in Fighting Corruption

When operationalizing the rule of law and the fight against corruption, the Croatian experience may be instructive. Lessons learned from the accession negotiations of a country that, in terms of historical legacy, geographic vicinity, and temporal proximity is the closest to the countries in the Western Balkans, is valuable both in terms of what and what not to do.

To effectively fight corruption, Croatia both adopted new and changed existing laws in addition to taking a number of other steps, including the establishment of USKOK, an anti-corruption agency<sup>9</sup> whose powers and resources grew over time. Croatia, to start with, had some relatively independent judges as well as media that extensively reported on corruption cases, and a staunch civil society acting as watchdog. In addition, Croatia negotiated the most demanding *acquis* to that date alone. This meant that the capacity to monitor a small country negotiating alone was much higher than it is in the case of a cluster of ten, or even two.

The fight against corruption was also high on the EU's agenda in assessing Croatia's progress. Since 2006, the EU Commission insisted that Croatia intensified the fight against corruption.<sup>10</sup> To demonstrate seriousness, the country started with a few corruption trials of university professors, an out-of-favor business tycoon, and several other cases that were usually referred to as 'small fish' in the media.<sup>11</sup> However, due to a set of circumstances, Ivo Sanader, the Croatian prime minister, resigned in 2009,

<sup>5</sup> See Alexander Strelkov (2017) 'Rising nationalism and EU transformative power in the Balkans: What went wrong and how to fix it' in Valeska Esch and Yannic Remme, eds., A European Future for the Western Balkans. Addressing Political and Economic Challenges. The Aspen Institute Germany.

<sup>6</sup> Gergana Noutcheva (2007) 'Fake, Partial and Imposed Compliance: The Limits of the EU's Normative Power in the Western Balkans', Journal of European Public Policy 16(7); Florian Bieber (2011) 'Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans', Europe-Asia Studies 63(10).

<sup>7</sup> Kurt Bassuener (2017) 'Power in the Balkans: Time to reverse a decade of regression.', The New European, 13 June 2017. Available at <http://www.theneweuropean.co.uk/top-stories/power-in-the-balkans-time-to-reverse-a-decade-of-regression-1-5059969>; Bodo Weber (2017) 'The Western Balkan Societies' Travails with Democratic Transformation and the Fate of the Transformative Power of EU Integration' and Marko Kmezić (2017) 'Democracy in the Western Balkans - the Current State of Play', both in Valeska Esch and Yannic Remme, eds., A European Future for the Western Balkans.

Addressing Political and Economic Challenges. The Aspen Institute Germany.

<sup>8</sup> Jasmin Mujanović (2018) Hunger and Fury: The Crisis of Democracy in the Balkans. Hurst Publishers; Srđan Cvijić (2017) 'EU is ready to trade democracy for stability in the Western Balkans.', European Western Balkans, 5 April 2017; Marko Kmezić and Florian Bieber, eds. (2017) The Crisis of Democracy in the Western Balkans. An Anatomy of Stabilitocracy and the Limits of EU Democracy Promotion. BiEPAG (Balkans in Europe Policy Advisory Group), March.

<sup>9</sup> The Bureau for the Suppression of Corruption and Organized Crime (USKOK) serves as a model for creating anti-corruption agencies in other countries of the Western Balkans.

<sup>10</sup> European Commission, 'Enlargement Strategy and main challenges 2006-2007.' Brussels, 7 November.

<sup>11</sup> HINA (2009) 'Pusić: Demontirajmo 'kulturu' korupcije!', T-portal, 13 November 2009. Available at <https://www.tportal.hr/vijesti/clanak/pusic-demontirajmo-kulturu-korupcije-20091113>.

leaving Jadranka Kosor as his successor – at the time the minister for war veterans. Sanader apparently selected Kosor as his replacement counting on her loyalty as well as lack of political independence, and lack of explicit political ambition.<sup>12</sup> Kosor enjoyed no political clout within the party nor in the Croatian society. She spent the first months in office making sure that her cabinet and the public acknowledged the fact that she was the prime minister. Kosor, to Sanader's surprise, proved anything but loyal or obedient.<sup>13</sup> She was determined to gain legitimacy and the best way to achieve that was by doing what her predecessor could not, namely unblock Croatia's accession negotiations.

One aspect of this was to show determination in fighting corruption. Kosor gave full political backing to USKOK and the police to carry out investigations and raise charges against those suspected of corruption, whoever they may be. Her policy of 'zero tolerance for corruption'<sup>14</sup> resulted in the apprehension and trials of government ministers, public officials, businessmen, and eventually, of the former prime minister himself. If not this, then what would be proof that Croatia was serious about uprooting corruption?

The political will in the case of Kosor seems to have come out of the genuine belief that Croatia should do everything necessary to join the EU, including an uncompromising fight against corruption. At the same time, by pursuing such a policy, she personally stood with nothing to lose. She was not a part of Sanader's clique in HDZ (Croatian Democratic Union) or any other corrupt network. On the contrary, fighting corruption could help Kosor eliminate opponents and bolster her own hold on power.

In two independent court procedures, Sanader was found guilty in 2012 and 2014, convicted for nearly two decades in prison and obliged to return millions of euros. HDZ, as the first political party ever, was found guilty and required to pay back four million euros. Croatia entered the EU with several prominent court cases ongoing, including a further case against Sanader. There was a belief that the fight against corruption was entrenched and that Croatia had crossed a point of no return. The Commission decided not to impose a monitoring mechanism despite a consortium of NGOs in Croatia requesting otherwise. As a result, a 'Sanader syndrome' has spread across the Western Balkans, as leaders are undermining

the rule of law and the fight against corruption if that saves them from jail.

After joining the EU, enthusiasm for fighting corruption receded in Croatia. Under Kosor, HDZ lost elections in late 2012 and she was kicked out of the party on March 1, 2013. In 2015, the Constitutional Court, in one case against Sanader, and the Supreme Court, in another case, demanded new trials.<sup>15</sup> There was hardly any progress in ongoing court cases. The investigation of a powerful mayor of Zagreb, lasting for several years including his arrest, did not materialize in an official charge against him. Even a convicted former minister in Sanader's cabinet, who in 2012 admitted his crimes and was sentenced to community work as a cooperative repentant (a few months of peeling potatoes in a public kitchen), requested the annulment of his conviction and demanded a renewed trial in July 2017 in the spirit of regression on the fight against corruption.<sup>16</sup>

In 2016, the minister of interior at the time called the Constitutional Court in Croatia a threat to national security, making reference to questionable decisions the Court made in a number of criminal proceedings.<sup>17</sup> A Committee on Deciding on Conflict of Interest was an active and visible body investigating conflicts of interest of public officials for several years. One of its investigations led to the resignation of Tomislav Karamarko, HDZ's party president, in 2016. However, in 2018, the Committee was taken back under political control when the Croatian Parliament did not renew the mandate of the Committee's female president, an agile and outspoken person. The same fate is probably awaiting the president, also a woman, of the Committee for Access to Information, whose mandate runs out in 2018.

GONG, a local prominent NGO, held a press conference on the occasion of Anti-corruption day in December 2017. The key message was that the will to fight corruption in Croatia has significantly decreased since the country joined the EU.<sup>18</sup>

What the Croatian experience teaches us is that the fight against corruption is a permanent struggle and that temporary breakthroughs do not necessarily entrench an anti-corruption mindset for good. The pledge to fight corruption has to be regularly renewed.

<sup>12</sup> Gordan Malić (2010) 'Zašto Sanader umjesto Jadranke Kosor nije izabrao Bebića, Šeksa ili Kalmetu?', Jutarnji list, 9 November. Available at <https://www.jutarnji.hr/arhiva/zasto-sanader-umjesto-jadranke-kosor-nije-izabrao-bebica-seksa-ili-kalmetu/1891488/>.

<sup>13</sup> Mislav Bago (2009) 'Kosor: nekome smeta moja odlučnost.', Dnevnik.hr, 10 September 2009. Available at <https://dnevnik.hr/vijesti/hrvatska/kosor-nekome-smeta-moja-odlucnost.html>.

<sup>14</sup> Anita Malenica (2009) 'Kosor: Vlada ima nultu toleranciju za bilo koji oblik kriminala i korupcije.', Večernji list, 19 December 2009. Available at <https://www.vecernji.hr/vijesti/kosor-vlada-ima-nultu-toleranciju-za-bilo-koji-oblik-kriminala-i-korupcije-69339>.

<sup>15</sup> A. Elbasani and S. Šelo Šabić (2017) 'Rule of law, corruption and democratic accountability in the course of EU enlargement', Journal of European Public Policy, Published online 4 May 2017. DOI 10.1080/13501763.2017.1315162.

<sup>16</sup> I.I.R. (2017) 'Čobankovićev odvjetnik pojasnio zašto je zatraženo poništenje u slučaju Planinska', Dnevnik.hr, 7 July 2017. Available at <https://dnevnik.hr/vijesti/hrvatska/petar-cobankovic-zatrazio-ponistenje-presude-u-slucaju-planinska---482046.html>.

<sup>17</sup> Zdravko Milinović (2016) 'Orepić u velikom intervjuu novom Globusu: 'Najveća prijetnja nacionalnoj sigurnosti Hrvatske je Ustavni sud, vrijeme je da podnese kolektivnu ostavku'', Globus, 6 December 2016. Available at <https://www.jutarnji.hr/globus/Globus-politika/orepic-u-velikom-intervjuu-novom-globusu-najveca-prijetnja-nacionalnoj-sigurnosti-hrvatske-je-ustavni-sud-vrijeme-je-da-podnese-kolektivnu-ostavku/5354147/>.

<sup>18</sup> GONG (2017) 'After joining EU, Croatia lost political will to fight corruption.', 8 December 2017. Available at <http://gong.hr/en/good-governance/after-joining-eu-croatia-lost-political-will-to-fi/>.

## Final Observations

How does the Croatian story relate to the Western Balkan dynamic in fighting corruption? Croatia had a relatively independent judiciary and a solid civil society at the beginning of negotiations. It also had a consensus on joining the EU. One, both or all three of these may be lacking in one or more of the Western Balkans countries. The consensus to join the EU was strong, but it seems that vested interests were stronger. Securing clientelistic and corrupt networks has inhibited a genuine fight against corruption despite public statements, political campaign slogans, extensive media reporting on corruption, and pressure from the EU. What has been lacking is the political will. In Croatia, the will to fight corruption came as a completely unusual episode, with the prime minister resigning to be replaced by a person who apparently had no corrupt networks to protect. This, in combination with EU pressure, led to a breakthrough. Yet, once Croatia joined the EU, the will to fight corruption receded. Perhaps this regression is a result of the incoherence of Croatia's laws, as some legal experts claim? Or is it a result of deep corrupt undercurrents going all the way to the Constitutional Court, as a former interior minister claimed? One can only hope that the regression in the fight against corruption is of temporary nature and that it will accelerate when a new consensus is fostered – namely that reforms are carried out to develop one's society, not to please the EU Commission. Croatia indeed had a consensus on acceding to the EU, but it was “a political goal instead of being the main instrument for the achievement of development goals.”<sup>19</sup>

Despite its shortcomings, Croatia stands as a ‘success story’ in fighting corruption during the final stages of the accession process. How likely, then, is it to try to replicate its experience in other Western Balkan countries? How likely is it that one or more of the current leaders in the region voluntarily steps down and gives way to a successor who has no reservations in fighting corruption?

Short of an option to manipulate office succession processes, the EU should focus on instruments and policies that take into account an existing lack of will to fight corruption.

With corruption identified as the second biggest problem after unemployment by citizens in the Western Balkans<sup>20</sup>, the EU should prepare itself for a long-lasting battle to help create conditions in which corruption can be fought and resilient democratic institutions sustained. Operationalization of the rule of law in the new strategy has to be detailed and strategic.

Possible measures, such as earmarked funds for the development of independent anti-corruption agencies, the training of judges, the protection of judges' independence, the active dialogue with and support of civil society, education and public campaigns on anti-corruption

already exist. What is needed on behalf of the EU is a clear and uncompromising focus on the fight against corruption as a crucial policy area in the enlargement process.

<sup>19</sup> Pero Maldini and Davor Pauković, eds. (2016) *Croatia and the European Union*. Routledge. Introduction.

<sup>20</sup> Center for the Study of Democracy (2016) ‘Izviješće o procjeni korupcije u 2016. godini’, p. 7.

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# THE NEW EU ENLARGEMENT STRATEGY AND ANTI-CORRUPTION MEASURES IN THE WESTERN BALKANS

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In February 2018, the European Commission (EC) published a new strategy setting out its future plan to engage with the Western Balkans on their journey towards joining the European Union. This strategy reinvigorates the languishing aspiration of the six Western Balkan states to be part of the Union, and it calls for concrete action and results from the countries and from the EU in achieving that goal. The EU highlights its commitment to support this process, and reminds the countries of the need to give priority to the rule of law, justice, and fundamental rights in their negotiations. The EU's recognition of these countries as captured and the fight against corruption are especially relevant aspects of the strategy.

## **Anti-Corruption in the New EU Enlargement Strategy for the Western Balkans**

The new EC strategy 'Credible enlargement perspective for an enhanced EU engagement with the Western Balkans' (2018) strongly prioritizes the fight against corruption as part of the rule of law, fundamental rights, and good governance, the key benchmarks against which the Western Balkans will be judged by the EU. The strategy emphasizes the importance for Western Balkan countries to 'root out corruption without compromise'. The EC suggests two approaches to achieve that goal: through the enforcement of the rule of law and effective sanctioning mechanisms, and through prevention. In the first case, strong and independent institutions are crucial to conduct more effective investigations and prosecutions leading to the enforcement of court decisions and the inclusion of dissuasive sanctions. The need to strengthen specialized prosecutorial structures and judicial bodies, including special police units to prosecution offices, is particularly important.

Regarding the prevention of corruption, the EU highlights the need for reform in the area of public procurement. Specifically, it recommends more transparency in the management of public funds at all stages of public procurement, increased competitiveness and fairness in public procurement tenders, a limit on the use of confidential procedures, and the introduction of safeguards to preclude political influence on bidders. Crucial reforms for the prevention of corruption include transparent and publicly accessible e-procurement to enable citizens to know how their taxes are spent, managerial accountability, and an institutional culture of internal control.

The way in which the EC refers to the problem of corruption as part of the new enlargement strategy presents some novelties. One is the increased priority given to the problem of corruption. Since the 1990s, anti-corruption measures have been vital for accession to the EU, since corruption undermines the core democratic values, stability of institutions, and economic growth necessary to meet the Copenhagen criteria (Lilyanova, 2017).



Nevertheless, at the start of the accession talks, corruption in the context of the Western Balkans was only mentioned after organized crime, which was considered the primary concern in the region (Stabilisation and Association Process 1999, Western Balkan Summit in Thessaloniki 2003, Ministerial Meeting Brussels 2003). The importance of corruption started to rise around the time of the Berlin Process in 2014, when a zero-tolerance policy on corruption was considered vital for achieving sustainable economic growth. Under the new strategy, the emphasis on corruption is not only mentioned (as was previously the case); it is also defined, and this leads to the second novelty.

The increased importance of tackling corruption is accompanied by a broader and more complex understanding of corruption in the region. From an initial narrow comprehension of corruption as bribery in the EU (Open Society Institute, 2002), the new strategy presents a complex and more realistic picture of corruption, characterized by the links with organized crime; the existence of corruption at all levels of government and administration; the strong entanglement of public and private interests; impunity; inequality; and extensive political interference in and control of the media and in public procurement. Of particular importance is the explicit mention of the existence of state capture in the region. The message to Western Balkan countries about it is clear: any sign showing that the machinery of the state has been captured by private interest will seriously compromise any chance of becoming an EU member by 2025 (Transparency International, 2018).

A powerful motivation to include the emphasis on corruption and state capture in the new strategy is the realization that previous rounds of enlargement failed to address this problem efficiently. For example, according to data provided by Transparency International's 2009 Corruption Perception Index (CPI), among the 15 countries considered to be most corrupt in the EU, 10 were then recently added member states: Bulgaria, Romania, Latvia, Slovakia, Lithuania, Czech Republic, Poland, Hungary, Malta, and Slovenia. The index for 2017 showed the same findings, with the addition of Croatia.

The EC is also continuing with its recent inclusion of benchmarks (which had previously been absent); moreover, it is focusing on results, and not just on harmonizing legislation (Lilyanova, 2017), in the assessment of anti-corruption progress. For example, the Action Plan in Support of the Transformation of the Western Balkans (2018) includes concrete and specific methods, such as case-based peer-review missions, trial monitoring for serious corruption and organized crime, and the measurement of results in justice reform.

#### **New Insights on State Capture: Rethinking Anti-Corruption Approaches in the Western Balkans**

Since the prospect of integrating the Western Balkans and Turkey into the EU first arose in the 1990s, these countries have made important steps towards fighting corruption through the creation of anti-corruption institutions and laws. Decades later, however, the results of these measures have not been as expected. In Transparency International's most recent Corruption Perception Index (2017), the Western Balkan countries and Turkey scored below 46 (100: considered very clean; 0: highly corrupt), with Montenegro performing best (CPI score 46) and the Former Yugoslav Republic of Macedonia performing worst (CPI score 35). This negative perception is confirmed by the Balkan Barometer 2017, which shows that corruption is seen as pervasive across the region and corroborates an overwhelming sentiment that the rule of law is a problem there. Several studies point to the 'systemic nature' and 'institutionalization' of corruption as the region's major difficulty (Lilyanova, 2017).

National Integrity System assessments (a methodology to analyze the robustness and effectiveness of a country's institutions in preventing and fighting corruption) for the seven countries<sup>1</sup> point to the consistent dominance of political parties over the Executive and the lack of cooperation and coordination among state actors as key explanatory factors for the lack of better anti-corruption results (McDevitt, 2016). While anti-corruption laws and policies are good on paper, they are selectively enforced, and corruption goes largely unpunished (McDevitt, 2016). A general characteristic across the region is the subjection of the media and civil society to different kinds of direct and indirect pressures. The media, for example, is characterized by tight government control, external interference and self-censorship, which reduces its ability to act as an impartial watchdog (McDevitt, 2016). The weakness in law enforcement is attributed in large part to the captured political systems, and the close links to organized crime networks and wealthy private businessmen.

State capture (understood as a situation in which powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests) is consistent across the seven countries (McDevitt, 2016). Nevertheless, even if the existence of state capture in the Western Balkan countries has been publicly acknowledged, its complexity has not always been understood. Transparency International's analysis of obstacles to good governance and state capture in high-risk sectors in the Western Balkans sheds light on how state capture takes place in the region.<sup>2</sup>

<sup>1</sup> The Western Balkan Six and Turkey.

<sup>2</sup> This analysis is based on the case studies done by Transparency International chapters and partners in 2017 on high-risk sectors such as health, energy, urbanism and private security in Bosnia-Herzegovina, The Former Yugoslav Republic of Macedonia, Serbia, Kosovo, Montenegro, Albania and Turkey. Since this paper focuses on the Western Balkans, we do not refer to the case of Turkey.

Despite the specificities in each country, Transparency International's analysis suggests some important key shared characteristics of state capture for anti-corruption design. One is that the capture of a specific sector often needs to work at two levels: at the decision-making level, for the actual achievement and protection of the capture through the design of tailor-made policies and laws (or the nationalization or privatization of the sector); and at the level of maintaining that capture through different mechanisms of corruption. Customized laws and policies to suit the interests of the captors alone are not sufficient. To preserve the structure that maintains the capture, the captors need to put an array of corrupt mechanisms in place to keep the 'right or favorable' officials in office, to maintain the cracks in the state apparatus that facilitate the capture, to buy impunity, or to bribe the police due to their controlling power (among other factors). This implies that state capture should be approached at two levels: in the way it is achieved and in the way it is maintained. Thus, the separation between grand corruption and petit corruption mechanisms as traditionally understood is blurred, since both can be interlinked.

A second key realization is that state capture is not about the size or extent but the distribution of corrupt activities. On the one hand, there are contexts in which we find extensive corruption in government, but the decision-making processes at policy level are not necessarily captured. On the other hand, there can be less extended corruption that operates in a way that controls decision-making processes in a specific sector at the macro level. Moreover, the state capture can be replicated in smaller decision-making processes, creating micro-state capture.

Third, the capture of a certain sector cannot be addressed in isolation from other government sectors. This does not only imply the existence of networks necessary for the capture of the state, but also considers the connections between policies, looking at how the capture of a specific sector or policy area affects others, generating either corrupt relations of dependency or contradictory governance.

Finally, one of the overall conclusions of Transparency International's research on state capture in the Western Balkans region is the difficulty in providing a universal definition of state capture due to the different understandings and forms that the capture of the state can take, depending on the context. Despite some historical differences between the countries of the Former Yugoslavia and Albania, they share some contextual characteristics that are important to consider for an effective anti-corruption approach. One of the most significant is the existence of strong patron-client relationships. In post-communist countries, for example, patron-client networks have played an important role in structuring the relationship between the state, the private sector, and the citizens (Open Society Institute, 2002). Those networks are generally based on inter-temporal systems of exchange of benefits that make corruption very difficult to define or identify (Open Society Institute, 2002). In addition, social fragmentation and ethnic and religious

divides in Western Balkan societies – with the exception of Albania, which has a considerably homogenous society – create a context in which favoritism and uneven application of the law is applied (McDevitt, 2016). Thus, a broader understanding of the phenomenon of corruption in the Western Balkans, together with contextual specificities, should be accompanied by more specific and contextualized anti-corruption approaches.

### **Strategies to Counteract Corruption in the Western Balkans**

A more complete understanding of the problem of corruption in the Western Balkans requires specific strategies to fight it. Regarding concrete recommendations, the new EC enlargement strategy for the region points to the Judiciary, the political system, and the media and civil society as priority areas for reform. The table (please see Annex) compares EC recommendations and Transparency International recommendations based on the National Integrity System regional report (McDevitt, 2016) for those specific areas (based on Transparency International, 2018).

### **Conclusion**

In general, the anti-corruption policy measures the EC has tended to recommend to candidate states have emphasized the enforcement of criminal anti-corruption law, a top-down approach to the promotion of codes of ethics to public officials (Open Society Institute, 2002), and institutional reform to increase the capacity of institutions to identify and denounce corruption. This anti-corruption approach seems to understand that corruption happens because it is both convenient (from the perspective of rational choice behavior) and possible (following the Klitgaard approach, the high discretion of public officials, and the little transparency and accountability they encounter). Recent studies show that the origin of corruption might be more complex and less logical. Particularly in the Western Balkans, relations of dependency, links with other social challenges (such as organized crime and ethnic and religious divisions), and social norms that shape behavior (such as the communist legacy, the associated lack of a clear sense of public responsibilities and a public culture that rewards integrity [Open Society Institute, 2002]) are important conditions. Those conditions call for broader societal reforms and anti-corruption approaches to address two key challenges in the region: the effective implementation of anti-corruption mechanisms and the lack of the political will to fight corruption.

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**Annex**

	<b>EC Enlargement Strategy (2018)</b>	<b>TI's NIS report (2016)</b>
<b>Judiciary</b>	<p>Ensure the independence, quality and efficiency of the judicial system</p> <p>Strong specialized prosecutorial structures to fight corruption and organized crime and judicial bodies</p> <p>Allocation of special police units to prosecution offices</p> <p>Pursue and enforce the stripping of illegally acquired assets, the loss of the right to hold public office, stricter compliance rules for public officials and accessible information and complaints mechanisms for citizens</p> <p>A concrete and sustained track record in tackling corruption, money laundering and organized crime</p>	<p>Reduce executive influence over the judiciary and prosecution by ensuring transparent and more objective systems for the appointment, transferal and dismissal of judges and prosecutors</p> <p>Reduce the politicization and strengthen the professionalization of the police by applying strict sanctions on members of the police who engage in political activity, and by ensuring merit-based appointment of police personnel</p> <p>Strengthen cooperation between bodies responsible for investigating and prosecuting corruption, and improve the quality and sharing of information regarding the prosecution of corruption offences</p> <p>Minimize delays in processing corruption cases and provide transparent justification for decisions not to prosecute</p>
<b>Political system</b>	<p>Reform the rules for the public and private financing of political parties</p>	<p>Improve the transparency of political party finances, including full publication of party incomes and expenditures</p> <p>Develop stronger and more coordinated oversight of political party and campaign finances and activities, and ensure that violations of electoral and campaign regulations are consistently punished</p> <p>Apply strict penalties for the abuse of public resources for election campaigns</p> <p>Ensure the integrity of those running for political office, for example by establishing checks on candidate backgrounds and excluding those faced with criminal charges</p>
<b>Media and civil society</b>	<p>Safeguard the freedom of expression and the independence of the media</p> <p>Ensure stakeholders can actively participate in the reform and policy-making process by, for example, establishing inclusive structured dialogues on reform priorities with the involvement of an empowered civil society</p>	<p>Investigate all allegations of threats and violence against media and civil society representatives without delay, and apply strict sentences when these are proved to be well-founded</p> <p>Ensure full transparency in terms of media ownership and civil society organization funding</p> <p>Ensure fair and transparent procedures for the allocation of state subsidies and tax exemptions for civil society and media organizations, and establish clear rules for state-sponsored advertising in the media</p> <p>Ensure effective and apolitical regulation of media and civil society organizations</p>

# GUARANTEEING FUNDAMENTAL RIGHTS IN THE WESTERN BALKANS

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## Introduction

Post-conflict societies with deep ethnic cleavages create less than optimal circumstances for guaranteeing fundamental rights to all citizens equally, as the case of the Western Balkans has clearly indicated. The legal guarantees and the institutions in the region have been in flux in the last three decades due to the various wars and conflicts, the democratic and economic transition, and the numerous conditionalities from international organizations. The legislation has been shaped by the adaptation to international and European instruments of human rights protection as well as the broader context of European integration. While on paper, the regulations guaranteeing fundamental rights are in place, in practice the realization of rights has been difficult, especially for vulnerable and marginalized groups. The regional standing in various international and European human rights indices confirms this broad gap between the legal guarantees and their realization.<sup>1</sup>

The implementation of the numerous reforms has been difficult due to a number of issues which include basic rule of law issues and state capture, as the European Commission noted in its last communication on credible enlargement.<sup>2</sup> The elements of state capture in most of these societies relate to a grip of the executive over the other branches of government and the increasing role of political parties. In response, the trust in institutions, including the judiciary, is very low.<sup>3</sup> In these circumstances, the realization of fundamental rights becomes increasingly difficult due to a variety of reasons which can be traced to weaknesses in all branches of power, including the executive, the judiciary, as well as independent bodies responsible for their protection.

With this in mind, this paper aims to analyze how the interplay of the weaknesses of the various branches of government in the Western Balkans has contributed to the problems in guaranteeing fundamental rights in the region, focusing on anti-discrimination policies. Anti-discrimination is a policy area which has been shaped significantly by the European Union due to the legislative alignment requirements. These include a well-functioning executive, the operation of an independent equality body, and also a judicial track record. Anti-discrimination is therefore an appropriate policy area to examine how the weaknesses of various branches of government and institutions contribute to the feeble implementation of this legislation across the region.

<sup>1</sup> See table in annex 1.

<sup>2</sup> European Commission, 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans', February 6, 2018, available at: [https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf).

<sup>3</sup> See 'Balkan Barometer 2017', available at: [https://www.rcc.int/see ds/files/RCC\\_BalkanBarometer\\_PublicOpinion\\_2017.pdf](https://www.rcc.int/see ds/files/RCC_BalkanBarometer_PublicOpinion_2017.pdf).



### Systemic Rule of Law Weaknesses and Realization of Fundamental Rights

From a systemic perspective, the realization of fundamental rights relies on the effective operation of all branches of government and respect for international instruments. Yet, the governments and public administrations in the region have been facing substantial difficulties in terms of competences and capacities. At the policy level, the fundamental rights protection is based on inter-institutional cooperation and coordination, which is one of the weakest links in these policy systems.<sup>4</sup> In addition, legal certainty in the region has been undermined by the adoption of laws with extraordinary procedures as well as hasty alignment with the European *acquis* and best practices. The international obligations are largely seen as external and are not embedded in the national systems.

Second, while the executive has been a weak link in upholding the rule of law, the judiciaries in the region have been plagued by questions as to their impartiality.<sup>5</sup> There is low awareness of human rights instruments, although ratified and considered to be part of the domestic legal framework. At the same time, the judiciaries do not sufficiently use the practice of the European Court of Human Rights (ECHR) or the European Court of Justice (ECJ) as a reference point. The judicial reforms, although lengthy, have still not bred significant results in terms of positioning the judiciary as a third power in these countries.

Third, the circumstances of state capture have not been fertile for the work of independent bodies vested with fundamental rights protection; for instance, ombudsmen and equality bodies all over the region are plagued by underfunding, including low staffing levels. In most cases, ombudsmen and human rights protectors all around the region do not satisfy the Paris principles for national human rights institutions in terms of their financial independence and the approval of their budgets.

Fourth, fundamental rights depend on the support and mobilization of civil society organizations (CSOs), which mobilize and advocate on behalf of various marginalized groups. The Balkan Civil Society Development Network noted in 2017 that the opportunities for civil society development are diminishing in all enlargement candidate countries, which brings to the fore the need to prioritize support for ensuring an adequate legal environment, diversified financial sources, political support, and

effective cooperation between the state and CSOs in a regular, structured way.<sup>6</sup>

In these circumstances, it is broadly expected that the prospects of EU membership will help to support democratizing forces of the society and the reestablishment of checks and balances between the various branches of government. The question remains, however, whether this is too heavy a lift for what is now a relatively weak enlargement process compared to the early 2000s. The occasional preferences for stability and security on the side of the Union at the expense of democracy have not helped in this context.

### Which Role for Antidiscrimination Policies and Bodies?<sup>7</sup>

The interplay of these numerous institutional and legal obstacles is well-illustrated in the weak implementation of the anti-discrimination legislation in the Western Balkans as one of the key tools for guaranteeing the fundamental rights to all citizens equally. The anti-discrimination laws in the region were adopted almost eight years ago against the background of the requirement of the visa liberalization dialogues. Even in this area, which is fairly regulated at the EU level, there are deficiencies which can be linked to the weaknesses of all the institutions responsible for policy-making and policy implementation, as can be shown by numerous indicators in this policy area (see table in Annex 1). In this regard, the latest communication on enlargement by the European Commission notes that “decisive efforts are needed to protect minorities and fight discrimination, notably against the Roma – for whom social inclusion should be more robustly promoted – and the LGBTI community”.<sup>8</sup>

First, on the side of the executive, despite the relatively clear guidelines on the side of the EU, the legislation in most of the Western Balkans is still not aligned with the *acquis* in this policy area. In Macedonia, even eight years after the adoption of the law, we are still not able to speak of effective protection against discrimination, especially when it comes to marginalized groups; the main issues that remain unresolved include: the access to justice due to court expenses for initiating court procedures for protection from discrimination, independence of the Commission, and absence of sexual orientation and gender identity as grounds for discrimination.<sup>9</sup> In Kosovo, the Law on Protection Against Discrimination lacks legal harmonization with other laws and, in general, there is insufficient protection from discrimination in practice

<sup>4</sup> See ‘SIGMA 2017 Monitoring Reports’, available at: <http://www.sigmaweb.org/publications/public-governance-monitoring-reports.htm>.

<sup>5</sup> A survey of the European Policy Institute and the Helsinki Committee for Human Rights in Macedonia recently indicated that respondents consider equality before the law a key issue in human rights. See: <http://www.merc.org.mk/aktivnost/41/mrezha-23-54-odadministracijata-smeta-deka-sostojbata-vo-pravosudstvoto-e-losha>.

<sup>6</sup> See Balkan Civil Society Development Network, ‘Monitoring matrix on enabling environment for civil society development regional report 2016’.

<sup>7</sup> The analysis of the anti-discrimination legislation and its implementation presented in this paper draws upon a regional study, ‘Reforming from the bench – Marking offside: The (in)effectiveness of the EU benchmarking mechanism in the Western Balkans’, conducted by the Think for Europe Network.

<sup>8</sup> European Commission, ‘A credible enlargement perspective for and enhanced EU engagement with the Western Balkans’.

<sup>9</sup> For a detailed analysis, see Kotevska, B., ‘Country Report Macedonia: Non-Discrimination’, 2017, available at: <https://www.equalitylaw.eu/downloads/4460-fyr-macedonia-country-report-non-discrimination-2017-pdf-1-79-mb>.



due to many inconsistencies, contradictions, and misinterpretations of the law.<sup>10</sup> The Montenegrin Law on Prohibition of Discrimination was amended in 2017, when, according to the government, it achieved compliance with EU standards.<sup>11</sup> The key changes included a more precise definition of direct and indirect discrimination and discrimination based on race, as well as streamlining the role of the ombudsman in protecting against discrimination and prescribing additional sanctions to deter discriminatory behavior.<sup>12</sup> Serbia's legal framework for protection against discrimination is in place,<sup>13</sup> but not fully aligned with the EU *acquis*, particularly "as regards the scope of exceptions from the principle of equal treatment, the definition of indirect discrimination and the obligation to ensure reasonable accommodation for disabled employees."<sup>14</sup>

When it comes to the equality bodies as responsible institutions, there is lack of institutional capacities of both new bodies and ombudsmen across the region in cases where they were assigned this role. In Macedonia, the Commission for Protection against Discrimination cannot be said to meet the criteria of the directives in terms of its independence as well as its members. Some of the members have, "aside from being publicly known as supporters of the [former] ruling party, [have] publicly voiced homophobic statements and have relativized discrimination, hate crime and hate speech".<sup>15</sup> In Montenegro, the leading institutions in the area of anti-discrimination, the ombudsman and the Ministry, have reinforced their capacities with additional staff; however, the capacity building of these institutions has not been properly institutionalized and has therefore failed to contribute to moulding and strengthening the human rights culture.

The peer review mission reports on the poor, inadequate and overcrowded working conditions in the Ministry.<sup>16</sup> In Serbia, the Office for Human and Minority Rights and the Equality Commissioner's Office, the two main institutions responsible for implementing the anti-discrimination legislation, still do not have the complete institutional capacity required by the EU, primarily due to budgetary restraints.<sup>17</sup> Organizational needs of the Equality Commissioner's Office, for example, relate to filling vacant posts, the need for adequate premises, additional professional development, and improving the organizational structure and internal procedures and standards.<sup>18</sup> In terms of the professional competence, the institutions have organized training sessions and other professional development activities for the employees, but the mechanisms to monitor the effects of these activities are usually not defined. A similar institutional capacity issue is present in other institutions as well: for instance, anti-discrimination knowledge is still lacking among prosecutors and judges,<sup>19</sup> which often results in a misapplication of the notion of discrimination.<sup>20</sup>

As mentioned above, the Europeanization process has predominantly been a process supportive of the protection of fundamental rights, analyzed above through the case of anti-discrimination. Yet, specifically in this area, the pressure from EU member states to decrease the number of asylum seekers from the region has been accompanied by unwanted practices such as profiling (predominantly) Roma people upon exit.<sup>21</sup> This practice has raised concerns among international human rights defenders. For example, the Meijers standing committee of experts on international immigration, refugee and criminal law highlighted that "the EU pressure on third

<sup>10</sup> Kosovo has a more 'fresh' case of legal implementation as of 2015, when the so-called 'Human Rights Package of laws' was adopted. The aim of this package is to protect and promote the rights of individuals, including anti-discrimination and gender equality provisions. One of the three laws adopted was the Law on Protection from Discrimination. This came as a result of the requirements of the EU Visa Liberalization Roadmap with Kosovo, which required the adoption and implementation of legislation that ensures effective protection against discrimination as well as full respect of domestic provisions on human rights. See more in: 'EU's benchmarking Mechanism on Fundamentals First: Results and Challenges – Benchmarking in Kosovo'. Available at: [http://epi.org.mk/docs/Benchmarking in Kosovo\\_BENCHER .pdf](http://epi.org.mk/docs/Benchmarking_in_Kosovo_BENCHER.pdf).

<sup>11</sup> See more at: <http://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/181/1458-9287-23-3-17-3-3.pdf>.

<sup>12</sup> 'Izvještaj o razmatranju Predloga Zakona o izmjenama i dopunama Zakona o zabrani diskriminacije', Odbor za ljudska prava i slobode, Skupština Crne Gore, 28. jun 2017 (Report on the discussion on the Draft Law on Changes and Amendments to the Law on the Prohibition of Discrimination, Committee for Human Rights and Freedoms, Parliament of Montenegro, June 28, 2017 – Available only in Montenegrin) See more in: 'Unravelling Montenegro's frontrunner status in EU accession process'.

<sup>13</sup> General protection from discrimination is guaranteed by the Constitution, while two specific anti-discrimination laws serve as umbrella legislation. Additionally, a set of nearly 20 legal acts contain anti-discrimination provisions, including the Gender Equality Law, the Labor Code, the Law on Free Access to Information of Public Importance, etc.

<sup>14</sup> European Commission, 'Screening Report Serbia, Chapter 19 – Social policy and employment', January 18, 2016, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/serbia-s-screening-reports/screening\\_report\\_ch\\_19\\_serbia.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/serbia-s-screening-reports/screening_report_ch_19_serbia.pdf) [17.1.2018].

<sup>15</sup> Kotevska, B. 2017, p.87. See: Flash report 'Appointment of new members of the equality body', <http://www.equalitylaw.eu/downloads/3752-macedonia-appointment-of-new-members-of-the-equalitybody-pdf-123-kb>.

<sup>16</sup> Šelih Ivan, Dolčić Tone, Peer Assessment Report (Second Follow-up, November 21-25, 2016), January 2017.

<sup>17</sup> Roagna, Ivana, Peer review mission on the capacity of the Ministry of Human Rights, April 3-7, 2017, May 2017, See more in: 'Unravelling Montenegro's frontrunner status in EU accession process'. [http://epi.org.mk/docs/Benchmarking in Montenegro\\_BENCHER.pdf](http://epi.org.mk/docs/Benchmarking_in_Montenegro_BENCHER.pdf).

<sup>18</sup> Šelih Ivan, Dolčić Tone, Peer Assessment Report (Second Follow-up, November 21-25, 2016), January 2017; Roagna, Ivana, Peer review mission on the capacity of the Ministry of Human Right, April 3-7, 2017, May 2017, See more in: 'Unravelling Montenegro's frontrunner status in EU accession process'. [http://epi.org.mk/docs/Benchmarking in Montenegro\\_BENCHER.pdf](http://epi.org.mk/docs/Benchmarking_in_Montenegro_BENCHER.pdf).

<sup>19</sup> Ivana Krstić, 'Country report - Non-discrimination -Serbia' European Commission, Directorate-General for Justice and Consumers, 2016, [http://ec.europa.eu/justice/discrimination/files/ad\\_2015\\_country\\_reports/2016-rs-country\\_report\\_nd\\_final\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/ad_2015_country_reports/2016-rs-country_report_nd_final_en.pdf).

<sup>20</sup> 'EU's Benchmarking within Chapters 23 and 24 in accession negotiations with Serbia – effects and challenges', available at: <http://cep.org.rs/en/publications/eus-benchmarking-within-chapter-s23and24-in-accession-negotiations-with-serbia/>.

<sup>21</sup> For more on this, see Kacarska, S., 'Europeanisation through mobility: Visa liberation and citizenship regimes in Western Balkans', 2012, *CITSEE Working Paper* 2012/21. (Edinburgh: University of Edinburgh).

countries to prevent Roma from entering the EU in order to claim asylum, [...] may contribute to a climate of stigmatization and repression of ethnic minorities in Balkan countries”.<sup>22</sup> Such practices disproportionately affect the Roma community across the region and add an additional layer of discrimination, which goes as far as denying exit from the country in the cases of Macedonia and Serbia.<sup>23</sup> This example highlights how the securitization of Europeanization can lead to unintended consequences such as discrimination of disadvantaged groups in terms of their freedom of movement.

### Conclusions

The guaranteeing of fundamental rights in the Western Balkans has been plagued by deficiencies that can be linked to the rule of law, as well as the elements of state capture that have affected all branches of power, including the executive, judiciary, and the responsible independent bodies. The case of anti-discrimination policy examined above illustrates the common challenges of the implementation of legislation that was required and supported by the European Union through the visa liberalization process as well as the accession negotiations in the case of Serbia and Montenegro. Even though there are fairly clear rules that have been supported by EU conditionality in this policy area, the record in this field is patchy. Despite the adopted legislation, a significant legislative and institutional gap prevents the effective implementation of anti-discrimination policies in all countries in the region. This is reflected in the weak alignment in relation to LGBT communities, which face significant discrimination in the region as well as the weaknesses of responsible equality bodies across the region. At the same time, though anti-discrimination has been a topic supported by the European Commission and the member states, the increased pressure from the same actors on the Western Balkan countries to lower the number of asylum seekers has resulted in an additional layer of discrimination against Roma as one of the most vulnerable groups of these societies.

<sup>22</sup> Meijers Committee, ‘Letter to European Parliament: Note of the Meijers Committee on the proposal to introduce a safeguard clause to suspend visa liberalization’, 2011, *Meijers Committee Standing committee of experts on international immigration, refugee and*

*criminal law*. Available at: <http://www.statewatch.org/news/2011/dec/eu-meijers-committee-visas.pdf> (accessed 09 January 2012).

<sup>23</sup> Kacarska, S., ‘Losing the Rights along the Way: The EU–Western Balkans Visa Liberalisation’, 2015, *European Politics and Society*.

	IMPLEMENTATION OF LAW ON PROTECTION AGAINST DISCRIMINATION					
	The Global Gender Gap Report 2016 <sup>1</sup> , World Economic Forum – ranking					
Macedonia	73 out of 144 countries					
Bosnia and Herzegovina	83 out of 144 countries					
Serbia	48 out of 144 countries					
Montenegro	89 out of 144 countries					
Kosovo	No data					
Albania	62 from 144 countries					
	The Global Gender Gap Report 2017 <sup>1</sup> , World Economic Forum - ranking					
Macedonia	67 <sup>th</sup>					
Bosnia and Herzegovina	66 <sup>th</sup>					
Serbia	40 <sup>th</sup>					
Montenegro	77 <sup>th</sup>					
Kosovo	No data					
Albania	38 <sup>th</sup>					
	RAINBOW EUROPE 2017 <sup>1</sup>					
	Rank among EU countries	Achieved LGBTIQ rights (score)	Equality and Non – discrimination Legal and policy situation	Hate Crime & Hate Speech Legal and policy situation		
Macedonia	41 <sup>st</sup> among 49	16%	21%	0%		
Bosnia and Herzegovina	25 <sup>th</sup> among 49	31%	58%	26%		
Serbia	28 <sup>th</sup> among 49	30%	52%	38%		
Montenegro	21 <sup>st</sup> among 49	39%	71%	51%		
Kosovo	27 <sup>th</sup> among 49	30%	65%	13%		
Albania	24 <sup>th</sup> among 49	33%	52%	51%		
	SOCIAL PROGRESS INDEX 2017 – TOLERANCE AND INCLUSION <sup>1</sup>					
	Ranking	Tolerance for immigrants	Tolerance for homosexuals	Discrimination and violence against minorities	Religious tolerance	Community safety net
Macedonia	98 <sup>th</sup>	113 <sup>th</sup>	106 <sup>th</sup>	77 <sup>th</sup>	54 <sup>th</sup>	58 <sup>th</sup>
Bosnia and Herzegovina	88 <sup>th</sup>	90 <sup>th</sup>	94 <sup>th</sup>	73 <sup>rd</sup>	54 <sup>th</sup>	81 <sup>st</sup>
Serbia	69 <sup>th</sup>	72 <sup>nd</sup>	65 <sup>th</sup>	95 <sup>th</sup>	56 <sup>th</sup>	46 <sup>th</sup>
Montenegro	79 <sup>th</sup>	69 <sup>th</sup>	89 <sup>th</sup>	88 <sup>th</sup>	54 <sup>th</sup>	55 <sup>th</sup>
Kosovo	No data	94 <sup>th</sup>	108 <sup>th</sup>	No data	92 <sup>nd</sup>	73 <sup>rd</sup>
Albania	70 <sup>th</sup>	81 <sup>st</sup>	80 <sup>th</sup>	30 <sup>th</sup>	1 <sup>st</sup>	117 <sup>th</sup>



# **CURBING POLITICAL INFLUENCE ON INDEPENDENT INSTITUTIONS IN THE WESTERN BALKANS**

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September 3-6, 2018 | Skopje

In cooperation with:



Ministry of Foreign Affairs of  
the Republic of Macedonia

The Aspen Institute Germany wishes to thank the German Federal Foreign Office for its sponsorship of the “Aspen Regional Dialogue Western Balkans 2018” through the Stability Pact for South Eastern Europe.



*Accommodation and conference venue:  
Park Hotel Skopje, 1732 street no. 4,  
Skopje 1000, Macedonia*

## Monday, September 3, 2018

*Arrival of participants during the day*

**20:00**

**Welcome Dinner hosted by H.E. Foreign Minister Nikola Dimitrov**  
*Venue: Hotel Park Skopje, Restaurant*

## Tuesday, September 4, 2018

**09:30 – 10:15**

### **Welcoming Remarks**

Rüdiger Lentz, Executive Director, Aspen Institute Germany  
Sabine Stöhr, Head of Western Balkans Division, Federal Foreign Office  
H.E. Foreign Minister Nikola Dimitrov

**10:15 – 11:45**

### **Session I:**

#### **Current Perspectives on Political Interference in Different Sectors of Society in the Western Balkans**

The European Commission states in its latest EU enlargement strategy that all Western Balkans countries show “clear elements of state capture (...) as well as strong entanglement of public and private interests.” The impact of this influence on the rule of law and democracy in general is seen as one of the most pressing issues in the Western Balkans. The first session will therefore take a general look at the current state of political interference and will focus on the following questions: What is the current situation regarding political influence on independent institutions? What impact can the EU enlargement strategy and the Commission’s upcoming flagship initiative have within the reform processes on curbing the misuse of political influence? What measures and initiatives could work as best practices, and on the contrary, what has already been tried and has not worked in this respect?

Introduction: Jelena Budak, *Rule of Law and Good Governance in Focus: Brief on Croatia After Five Years of EU Membership*

Moderation: Rüdiger Lentz

**11:45 – 12:15**

Coffee Break

12:15 – 13:45

**Session II:****How to Strengthen Governance at all Levels through Public Administration Reform: Transparency, Efficiency, Responsiveness, Quality**

A well-functioning public administration and integrity of state institutions is considered key to democratic governance and economic development. Moreover, citizens expect their governments to ensure an effective, professional and accountable public administration to deliver services to their citizens. However, in most Western Balkan countries public administration remains weak, with limited administrative capacity, high levels of politicization and a lack of transparency. What are the key priorities when it comes to public administration reform? How can the quality and the accountability of public services be improved? How can transparency, depoliticization, and professionalization be enhanced, in particular with regard to the organization's recruitment and dismissal of staff? How can digitalization and e-governance help to foster functional state institutions and improve the effectiveness and services for citizens of public administration? What can the EU and other external actors do to further support these processes? How can these aspects be further strengthened in the countries' reform agendas?

Introduction: Ramadan Ilazi, *Challenges and Opportunities of the Public Administration Reform Process in the Western Balkans: Good Governance, Democratic Systems, and Public Service Delivery*

Moderation: Edith Harxhi

13:45 – 15:15

Lunch

15:30

**Departure (walking) to City Center for Afternoon Program**

*Meeting point: Hotel Reception*

16:00 – 17:00

**Meeting and Discussion with H.E. Prime Minister Zoran Zaev**

*Bulevar Ilindenska BB, Skopje 1000*

17:15 – 18:15

**Guided Tour through Skopje (voluntary)**

*Meeting point: In front of Government building,  
Bulevar Ilindenska BB, Skopje 1000*

18:30

**Departure (by bus) to German Ambassador's Residence**

*Meeting point: In front of Government building,  
Bulevar Ilindenska BB, Skopje 1000*

19:00

**Cocktail Reception Hosted by German Ambassador Thomas Gerberich**

## Wednesday, September 5, 2018

09:30 – 11:00

### Session III:

#### Strengthening the Independence of the Media and Freedom of Speech

Media is considered the fourth estate essential to the functioning of a democracy. However, in the Western Balkans “extensive political interference in and control of the media”, as stated by the European Commission in its latest enlargement strategy, is challenging the independence and transparency of media. In the Reporters Without Borders media freedom index, countries of the region also rank fairly low. What is the impact of a lack of media independence on the political landscape and freedom of speech in general? What does this mean for a young democracy and its public discourse? How can the ability of citizens to make informed decisions be enhanced? How can political interference be addressed to safeguard the freedom of expression and independence of media as a pillar of democracy? How can a more pluralistic media environment be created? What role does the internet play? What is the role of the EU and how can the EU better support these essential freedoms?

Introduction: Marko Milosavljević, *Curbing Political Influence on Independent Institutions in the Western Balkans*

Remzi Lani, *Relationship Between Media and Democracy in the Balkans Today: Questioning the Usual Assumptions*

Moderation: Adnan Ćerimagić

11:00 – 11:30

Coffee Break

11:30 – 13:00

### Session IV:

#### Political Influence on the Judiciary, Ombudsmen, and Anti-Corruption Agencies

The establishment of an independent judiciary and the fight against corruption are key reform priorities in the EU accession processes of the Western Balkans. Chapters relating to the judiciary and fundamental rights are prioritized throughout the accession process. Anti-corruption funding has gone to strengthening institutions, developing capacities, systems and tools, as well as to awareness-raising. Nonetheless, although the legal and institutional framework is largely in place throughout the region, legal systems continue to be politicized and faced with corruption. How can interference and corruption be curbed in a sustainable way? What is the role of the EU and how can the EU support the fight against political influence in this matter? How can ombudsmen and anti-corruption agencies be further strengthened? How can their independence be guaranteed?

Introduction: Sotirag Hroni, *Curbing Political Influence on Anti-Corruption Agencies: The Case of Albania*

Vujo Ilić, *Turning the Tide: Political Influence and Independent Institutions in Serbia*

Moderation: Valeska Esch

13:00 – 14:15

Lunch

14:15 – 15:45

**Session V:****Disentangling Business and Politics: How to Strengthen the Private Sector**

Almost a decade after the global financial crisis, employment has recovered to pre-2008 levels in all Western Balkan countries. The region is expanding its economies faster than in recent years. In 2018-2020 the Western Balkan countries are expected to reach economic growth of over 3%. However, making full use of this growth potential will strongly depend on how quickly countries can tackle the problems that hold back the region's private sector, including the political and legal frameworks in the country and unfair competition by entanglement of politics and business. What does this entanglement currently look like? How can it be detected and addressed? What can the private sector do and what needs to be done on the policy-side in order to protect private business from political interference? What is the role of the EU and how can the EU support the fight against political influence?

Introduction: Blerim Reka, *De-politicized Economy Through Post-Corruptive Transformation*

Comment: Blagoj Hristov, *Views from the Private Sector Regarding "Disentangling Business and Politics"*

Moderation: Ana Trišić-Babić

16:15

**Departure (by bus) for Cultural Program**

*Meeting point: In front of Hotel Park (Main entrance)*

*Dress code: Casual*

17:00

**Boat Tour Through Matka Canyon**

18:45

**Walk Through Vineyard and Wine Tasting at Hunter's Lodge "Kamnik"**

19:45

**Farewell Dinner at Hunter's Lodge "Kamnik"****Thursday, September 6, 2018**

*Departure of participants*

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# LIST OF PARTICIPANTS

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Dritan Abazović

Josip Brkić

Jelena Budak

Gent Cakaj

Adnan Ćerimagić

Nikola Dimitrov

Victor Dimovski

Thomas Gerberich

Edith Harxhi

Fatmir Haxholli

Christian Hellbach

Andi Hoxhaj

Blagoj Hristov

Sotirag Hroni

Ramadan Ilazi

Vujo Ilić

Beti Jaceva

Remzi Lani

Srđan Majstorović

Žarko Mićin

Marko Milosavljević

Tanja Mišćević

Thomas Mühlmann

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Genc Pollo

Nikola Poposki

Anja Quiring

Blerim Reka

Konstantin Samofalov

Ruslan Stefanov

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*Acting Deputy Director*

Isabelle Kues

*Program Assistant*

Rüdiger Lentz

*Executive Director*

Olga van Zijverden

*Program Officer*

Rapporteur: David Mills



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# CONFERENCE REPORT: CURBING POLITICAL INFLUENCE ON INDEPENDENT INSTITUTIONS IN THE WESTERN BALKANS

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David Mills  
Rapporteur

The Aspen Institute Germany Southeast Europe Program's conference on "Curbing Political Influence on Independent Institutions in the Western Balkans" took place in Skopje, Macedonia between September 3-6, 2018. Participants represented a variety of nationalities from across the region and Europe, and arrived with a diverse set of backgrounds in politics, public administration, civil society, academia, journalism, and business. Over five sessions the conference covered such topics as: the impact of the EU accession process on measures of corruption, public administration reform, media independence, governance of independent institutions, and support for the private sector.

This summary provides a brief account of the presentations made in each session, followed by an overview of the subsequent general discussion. It then concludes by briefly highlighting topics and debates which emerged as common threads across each of the sessions.

## Introduction

The conference opened with an introduction placing it within the region's current political context. Top of mind was Macedonia's September 30 referendum on changing its official name and potentially clearing the way for opening accession negotiations with the European Union. It was hoped that the agreement recently concluded between Macedonia and Greece could serve as an example for the possibilities of peace and stability in the region and across Europe. Also mentioned were this year's Berlin Process meetings hosted in London and the 2018 Bulgarian and Austrian presidencies of the Council of the EU.

## Session I: Current Perspectives on Political Interference in Different Sectors of Society in the Western Balkans

The session began with a presentation comparing Western Balkan countries across various measures of corruption and political interference. Croatia was singled out as the data indicated it had experienced a period of improvement, relative to the other countries in the study, during the years immediately before and after its accession to the EU. Did joining the EU solve its corruption problems completely? No. However, the indicators showed that real progress had been achieved in specific areas.

On the positive side, petty bribery in Croatia has been on the decline since it entered into EU accession talks. E-services have improved some areas of service provision while reducing opportunities for corruption. Freedom of the press has become fairly well established, although some of the larger media outlets still face political pressures. Meanwhile, EU procurement rules have reduced the scope for corruption whenever projects utilize EU

funds. On the other hand, corruption is still present and common in local government, non-EU public procurement, and within state-owned enterprises. Furthermore, government jobs remain a valuable source for patronage, and a sizable portion of current bureaucrats are under-qualified for their roles and remain loyal to the political parties that appointed them. Finally, while conflicts of interest complaints have declined year over year, much of the business and politics of Croatia still occur within small, well-established networks. As a result, conflict of interest cases continue to arise on a regular basis. The effects of these various forms of political interference and corruption are difficult to detect and difficult to control, and despite the gains made over recent years corruptive practices and political interference remain a reality in Croatia today.

This led to a number of conclusions on the impact of the EU's anti-corruption requirements with regards to EU accession, and further to some lessons about what may be expected by the region's EU candidate countries as they work their way towards and through the accession process. Based on Croatia's experience, as Western Balkan countries complete the steps and stages of the EU accession process there is some likelihood they will see real and lasting reductions in certain types of corruption, such as requests for bribes to access government services and in government procurements for large investment projects. However, the speaker also projected that in other areas, such as political interference in government hiring practices and local government procurement, corruption would likely prove more difficult to dislodge. Finally, the speaker recommended that the EU focus on implementing country-specific anti-corruption policies as part of its accession requirements rather than insisting each country adopt the EU's existing anti-corruption rules. It was felt these are likely to be less relevant and less achievable given the context and realities found in each individual country.

The presentation was followed by a discussion, which often focused on the EU's role in fostering independent institutions and actively preventing state capture. Some participants argued that the EU currently tolerates, in the name of stability, regional governments whose officials are caught or suspected of engaging in corrupt and/or anti-democratic practices. These participants felt the EU should be actively calling out politicians found to be engaging in these practices, as well as withholding support and resources until democratic reforms are realized and irreversible. Others argued that it was rather the role of each country to find the political will and leadership needed to resist and discourage political interference. It was proposed that laws and policies require substantive implementation before they become effective and produce real changes, and it is only by building an observable "track record" of successful reform that a government will persuade both citizens and international stakeholders that it is serious about fighting such issues. The point was also raised that there are many levers for combatting these unwanted behaviors, and that much could be

learned from the experiences in other countries, such as Italy and the United Kingdom (UK).

There was also considerable discussion about how anti-corruption, pro-democracy interest groups should prioritize their campaigns against the many different types of political interference and corruption currently found in the Western Balkans. A few participants felt that while low-level corruption, such as professionals accepting bribes in exchange for services or preferential treatment, was indeed being addressed, that high-level cronyism, clientelism, nepotism, and patronage were widespread, difficult to detect from outside of the institutions where they take place, and were a source of the extreme distrust of governments held by citizens. There was also some discussion about the difficulties of measuring these various forms of corruption and interference, although how to address this issue was left as an open question. The session ended with the speaker voicing the opinion that combating corruption and political interference requires significant political will, but also felt there were reasons to be optimistic that change may be forthcoming in the years ahead.

As a new feature at this year's conference, participants were asked to respond to a short survey before the start of the presentation, the results of which were shared and featured in the discussion. The first question asked about the gravity of political influence on independent institutions compared to other issues in the Western Balkans, and which sectors/spheres are seen as being most targeted by political influence. Participants rated the importance of political interference at 8/10, and the most targeted sectors were clearly seen to be public administration and the judiciary. This led one participant to ask about how to accurately measure political interference, and as an example asking in what contexts was it acceptable or unacceptable when a politician publicly comments on a court case?

The final question asked participants: "Over the course of the past 15 years, would you say that political influence on independent institutions has been: increasing; consistent; or decreasing?", and led to some further debate. Results were split between those seeing an increase and those feeling it had not changed much either way, with perceptions of a decrease in a distant third. The follow-up discussion revolved in part around whether political interference is objectively getting worse, or conversely if public expectations are moving towards reduced tolerance of official corruption. The point was raised that some of the countries that joined the EU in 2004 have, over time, seen their citizens begin to demand solutions to corruption and political interference independent of EU initiatives.

## **Session II: How to Strengthen Governance at all Levels through Public Administration Reform: Transparency, Efficiency, Responsiveness, Quality**

Session II was introduced with a quote from the EU Commission's 2018 Enlargement Policy, that "[p]ublic administration reform is paramount to strengthening governance at all levels",<sup>1</sup> then followed up with two questions: Can government bureaucracies in the region be reformed? What support can the EU provide in this area?

The presenter began by highlighting that design of public administration will always be a balance between competing tensions: between fast approval and meaningful consultation; between political discretion and expert advice; between the systems portrayed in the television series "House of Cards" and "Yes Minister". The presentation focused on two overarching issues: first, the need to improve delivery of public services, for example through new formats and avenues of service provision; second, to improve the organization of the bureaucracy itself through, for example, implementation of standardized job descriptions and standardized salaries, or by professionalizing and depoliticizing the hiring process. The presenter offered four concrete proposals for reducing political interference in government hiring: a) centralize public service recruitment; b) include civil society or experts in the hiring process; c) instead of recruiting separately for each vacancy, similar positions should be grouped into job-families for the purposes of hiring; and d) conduct all recruitment through a digital platform to add more transparency and accountability to the process.

The speaker then drew some examples from the recent experience of Kosovo that demonstrate the difficulty of implementing public administration reforms. One described how the United Kingdom's Embassy there partnered with an international recruitment service to develop a rigorous, merit-based process for hiring senior managers for a number of public institutions. The speaker felt the results had been mixed: in some cases the government agencies hired the individuals who scored highly in the recruitment process; however, in many instances the agency ignored the recommendations and simply hired the politically connected candidate regardless. The presentation concluded with an anecdote about service provision in the region's communist states, and the powerful symbolism of citizens having to access civil servants through small, discomforting service windows. The presenter thus argued there was a need for both citizens and the bureaucracy to adopt new expectations of professional, efficient service delivery from the public sector.

Discussion opened by framing public administration reform as a generational challenge, then flowed into a debate about the tension between meritocracy and political (democratic) accountability, and the desirability and

drawbacks of each. Some participants felt that significant reforms were needed to make the civil service more independent and meritocratic. Others posited that there was a need to better define which positions should be filled by technocrats and which should remain as political appointments. Then another set of participants argued that Western Balkan public administrations are currently ill-equipped to make these distinctions, and any reforms will likely take considerable time to have a noticeable impact. The presenter added to this discussion, arguing that there is a clear need today for more safeguards to protect senior managers from political interference given their position in the middle of these competing forces.

Also addressed was the interesting paradox found by surveys of regional youth, where respondents indicate preferences both to move away from the region (77%) and a desire to work in the public sector (40%). Some argued this was an indication that young talent would only remain at home and enter the public service if it can be made more meritocratic. Others argued that these numbers show there still exists a perception in the region that the public sector is the only path to a stable and secure livelihood. Finally, there was much talk about the discrepancy between laws and regulations and their implementation. Some felt this is highlighted by the media attention paid to the EU's annual country reports, which include updates on public administration reform progress, and the complete absence of follow up actions either taken by government or demanded by citizens. It was mentioned that SIGMA (Support for Improvement in Government and Management) also annually produces detailed reports on public administration reform in each country, but that these rarely receive media attention. Discussion concluded with the sentiment that political will is necessary to realize any meaningful reforms, and that there should be more consultation with external actors and service users throughout the process.

## **Session III: Strengthening the Independence of the Media and Freedom of Speech**

In the early 1990s, media across the region shifted to a market model. There was an expectation that this would solve political influence in the media, but over time a more nuanced story has emerged. At the same time, digital disruption has similarly forced a complete rethinking of business models. At the same time the expectation was for digitalization to democratize media content, but in reality a more varied set of outcomes developed.

The first presenter began with recent research suggesting that a media market requires roughly ten million language-speakers to be self-sustainable, with the implication that markets smaller than this will likely require significant government or philanthropic assistance to ensure content producers remain viable. Add to this regionally-specific pressures of income inequality and relatively

<sup>1</sup> European Commission (2018), A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, Brussels. Available at: [https://ec.europa.eu/commission/sites/beta-](https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf)

[political/files/communication-credible-enlargement-perspective-western-balkans\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf) (Accessed: July 2018).

small GDPs, and Balkan media companies quickly run up against the limits of market models. The presenter argued this gap could be filled by arms-length government funding, or targeted support from NGOs or philanthropists, but says that these have yet to appear at a significant level in the region.

The second presentation focused more on media freedoms and recent trends of political interference in independent media. The presenter argued that Southeast European countries in the post-communist era thought they had already passed the point of no return on media freedoms, but today witness once again an absence of the rule of law in the media sector. The presenter expressed that there is a presumption that media is simply a pillar of democracy, and so it is easily forgotten that media is also a pillar of autocracy. The importance lies in distinguishing between the two. Anti-liberal media has recently gone mainstream and is flourishing. Today, Balkan strongmen seeking to discredit their adversaries turn to media rather than the police or intelligence agencies, sometimes even creating their own media outlets. Now add to these developments the shift to digital, social media, aiding the proliferation of fake news, the ability to question the legitimacy of verified truths, and the rise of troll farms.

Discussion began with a short lesson in translation. In the Balkans' Slavic languages, Darwin's famous concept of survival of the *fittest* translates more directly as survival of the *strongest*. It was pointed out that there is a subtle difference in meaning, as "fit" does not necessarily imply "strong", and it was felt this made for an apt comparison with the media sector in the region, where successful companies are perhaps "strong" but not "fit".

Given the likes of fake news and media outlets aligned with (or captured by) state or private interests, how can governments and civil society maintain public trust in the media while also creating an environment conducive to freedom of speech? Much of the discussion focused on the differences between regulating traditional and digital media. One presenter felt direction on this issue needed to come first from the EU. A few participants brought up the idea of developing systems for credentialing professional journalists. Many of those present addressed the need to reform school curricula to bolster media literacy for the digital age. Then, one participant pointed out that it was rather the older, adult population who are often in need of digital literacy training. Some studies show it is this older demographic who are most likely to get caught up in fake news and online media 'isolation chambers'. One of the speakers also made the point that the purveyors of fake news are exploiting the existing rural-urban divide in traditional media coverage and consumption, and are attracting the attention of people ignored by the established media.

Talk then moved on to the role that might be played by civil society in supporting media, producing content, financing investigative journalism, and in producing and promoting media narratives. Conversation finally turned to the pros and cons of a few different models for financing media for today and in the future, in particular the

impact and role of the newly dominant digital companies like Google and Facebook. Many saw a danger in the rise of these digital monopolies, noting that these companies earn revenue whether their content is verified news or hate speech. Others argued that while there are serious problems with the unregulated nature of digital media, it also offers a platform for opinions and investigations that would otherwise be stifled by media companies in thrall to government interests.

#### **Session IV: Political Influence on the Judiciary, Ombudsmen, and Anti-Corruption Agencies**

This session also saw two presenters hold forth, the first on Albania's recent experience instituting an anti-corruption authority. The speaker argued that, compared to best practice, this agency has no resources, no powers, and therefore no independence or legitimacy, a situation made worse this year by a further centralization of its powers in the Prime Minister's Office. It was pointed out that the EU plays a role in maintaining these circumstances, simultaneously funding the agency's operations while complaining about its performance. To become a true check on the government, it was argued that the agency requires: legally guaranteed permanence; for Parliament to receive powers to appoint and remove staff; for the EU to demand more evidence and accountability; and more active participation and support from both parliamentarians and civil society.

The next presenter provided a look at executive-branch influence on independent institutions in Serbia with results from a recently completed study. Using comparative statistics, the study sampled data from four institutions and looked at how changes in institutional inputs and outputs – staffing, spending, parliamentary discussion, and action on reports – might correlate with changes in government and their appointments at the heads of these institutions (whether individuals or boards of governance).

The study found that changes in political appointments did change institutional behavior. However, these changes were fairly nuanced. For example, after the appointment of a new State Auditor, the study found there was no change in which local governments were being selected for audits. However, the results also found a significant change did occur in which private businesses the office selected to audit: since the new appointment the number of audits has increased significantly but, conversely, the pursuit of large, often politically connected employers has declined. In a stringer example, after a change in the majority on the Regulatory Authority of Electronic Media's board of governors, that agency ceased publishing entirely reports on the fairness of political party representation in the media during election periods.

The presentation concluded that the government prefers to make these agencies harmless rather than getting rid of them outright, as doing so would block their path to



EU accession. To combat this institutional neutralization, a number of recommendations were made: write these institutions and rules for their governance into the constitution; require appointments to be made or confirmed by qualified parliamentary majorities; provide the officers and board members with lengthy tenures and legal immunities; provide and protect sources of funding independent of government budgeting; and encourage Parliament to take a more active role in discussing reports publicly and in pressuring for the implementation of report recommendations. In sum, these institutions require greater legal protections and independent funding in order to function effectively.

This session sparked a number of compelling and sometimes heated debates. One was on the acceptable or desirable levels of political influence and control in the context of the Balkans given, as argued the day before, that this debate exists on a continuum. There was also considerable back-and-forth on the expected role of the EU. A number of participants voiced their opinion that while the EU espouses the virtues of democracy and the need to combat corruption, it hypocritically works with and supports politicians, parties, and governments that are known to engage in corrupt and anti-democratic practices. They questioned what they saw as the EU's prioritization of political stability over political accountability, and argued strongly that the EU should do more to penalize and deter corrupt and undemocratic behavior at the national level. Other participants responded that while the EU has a big role to play in driving and shaping reforms, it cannot change mindsets and political culture all on its own. These participants felt that the EU had a responsibility and an interest in working with the democratically elected governments of the region, and went further to suggest that EU efforts to drive reforms are often undermined by national political maneuvering from all sides. Other participants countered that if citizens see the EU supporting corrupt officials it leads directly to citizen apathy and movement away from a push for reforms from below. This debate went back and forth for some time, and it was eventually remarked that the EU creates significant local consequences whether it decides to actively engage in or, conversely, to stand back from national political debates.

There was then further discussion on current public expectations of – and at times acceptance of – political interference. This was framed as a chicken and egg issue, and there was discussion about how to change these expectations and how to get stakeholders and citizens to demand accountability, and even if citizens can or should participate in processes of institutional accountability. Finally, after debating, there were some questions left mostly unanswered about the pros, cons, and practicalities of a number of the recommendations, including in which cases a constitutional amendment or other legislative mechanisms would be appropriate, how to provide these agencies with operational and financial independence, as well as the how to strike a balance on term limits in order to maintain both immunity and legitimacy.

#### **Session V: Disentangling Business and Politics: How to Strengthen the Private Sector**

As introduced, the topic for the final session aptly combined discussions from the previous ones: given all of the issues already debated, what are the impacts on the private sector and the economy of political interference in independent institutions and what might be done to help the private sector given this context.

The first speaker focused on one of the main themes arising throughout the conference: the tension between political stability but with less democracy, and a democracy with greater instability. It was argued that the Euro-Atlantic stabilization of the region has prevented fresh conflicts but has also failed to bring democratic governance or economic prosperity. As a clear symptom of this, the speaker pointed to the private sector. It is still highly dependent on government spending and thus leaves business open to political influence and corruption, especially in the area of public procurement. Two main forms of interference in the private sector were addressed: market shifts after elections, as politically aligned companies come into or fall out of favor; and symbiotic relationships between politicians and oligarchs. Money laundering was cited as a prevalent illegal activity in the region that often involves collusion between political and financial elites. The presentation recommended that the EU demand more accountability from governments, and also proposed the establishment of a transnational Anti-Corruptive Tribunal for the Western Balkans, which could investigate instances of alleged corruption while remaining outside the influence of any single national government.

The conference's final presenter focused on the current relationship between government and the business community in Macedonia. Recent dialogue between chambers of commerce and the government have led to a memorandum of understanding on creating forums for regular communication. The immediate goal is to create a space for dialogue between the businesses and government, and ultimately to forge an improved business environment. This process has resulted in a host of clear initiatives for improving the business climate, including six realized to date. The presenter then turned to continuing challenges with implementation, institutional independence, and improving the efficiency of the bureaucracy. It was proposed that further digitalization, transparency, and a move towards open data on the part of government would be of assistance. The EU was also mentioned as a potential source of support and watchdog. However, the presenter recommended the EU recognize that its regulations cannot simply be copied and pasted directly into existing national regulatory frameworks, as governments in the Western Balkans do not have the resources to maintain regulatory governance on the scale found in other parts of Europe.

The final round of discussion focused on the potential for regional cooperation in a number of different fora. One option that came up repeatedly was some form of



regional trading block. It was thought this might forge greater economic integration, improve economic growth, drive political cooperation, and prepare the region for entry into the EU common market. It was noted that many firms are already trading regionally. However, a number of significant barriers to this proposal were also raised, namely nationalism as a potent political force, but also the power of vested interests that would seek to scuttle any proposed trade agreement.

The other major topic was education and the labor force. “Brain drain” took center stage, and there was much discussion about both its pros and cons, and what conditions would be needed to attract some of these talented workers back to the region to live and settle. Discussion here returned to some common themes heard throughout the conference. It was argued that reducing corruption and political interference would lead to a more vibrant and optimistic business climate and so to more opportunities for ambitious, energetic young talent. One speaker suggested that there are already business champions in the region, but they prefer to keep a very low profile as they worry that if their success is advertised, they might become the target of damaging political meddling or extortion. Another participant felt that reforming the public administration and providing opportunity for advancement through the civil service might also help to slow the problem of brain drain. Finally, it was noted that some sectors of the economy are now experiencing skills shortages, highlighting the need for dialogue between employers and policy makers in the areas of training and education.

## Conclusion

After two days of debates, a number of key themes emerged. In general, political interference in independent institutions remains a major issue in the Western Balkans. The problems are complex, and how to best package the solutions remains an open question. A major debate present across all the sessions was the appropriate role for the EU, given its relative influence and the multiple demands on its significant resources. As countries in the region are all, in one form or another, part of the EU integration process and the reform processes this entails, the relationship between the EU and national governments will clearly be critical in determining which improvements in reducing corruption and political interference can be realized.

It also became clear across the two days that passing laws and forming institutions is only the first step to securing improvement. That is to say: implementation is a long and fraught road. Finally, it is clear that every country in the region is anxious about youth migration. One of the long-term questions hanging over regional decision makers is how to build communities that future generations want to call home. Reducing political interference, combating corruption, and improving governance all form part of that long-term vision. Despite all the difficulties being debated, the conference was often optimistic that,

slowly but surely, progress is being made on these fronts every day.

# RULE OF LAW AND GOOD GOVERNANCE IN FOCUS: BRIEF ON CROATIA AFTER FIVE YEARS OF EU MEMBERSHIP

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In February 2018, the European Commission published the EU Enlargement Strategy for the Western Balkans, stressing that “addressing reforms in the area of rule of law, fundamental rights and good governance remains the most pressing issue”<sup>1</sup>.

The current situation in the Western Balkans presented by the Rule of Law Index 2017-2018<sup>2</sup> clearly shows the region is lagging behind the EU average in terms of the rule of law, particularly in some of its associated domains. Selected results presented for four Western Balkan nations place the countries in the process of EU accession from the mid-range to near the bottom of global rankings (Table 1). The aggregate score of sampled countries on the Rule of Law Index is slightly above 0.5 on a scale from 0 (poor rule of law) to 1 (full adherence to the rule of law). Croatia, as the only EU member state, performs better when compared to other countries observed in the sample. However, in some components of the main index, namely ‘Constraints of Government Powers’ and in particular ‘Sanctions for Official Misconduct’, all countries, including Croatia, are low performers. These statistics illustrate that formal regulations related to the rule of law are in place and enforced by the EU accession process, but also show that the informal soft rules that govern implementation still stand as a huge problem both in Croatia and across the entire region.

Table 1: Rule of Law Index, 2018

Country	Global rank (out of 113)	Rule of Law Index	Constraints of Government Powers	Sanctions f. Official Misconduct
Croatia	35	0.67	0.59	0.45
BiH	56	0.53	0.46	0.35
Macedonia	57	0.53	0.45	0.34
Serbia	76	0.50	0.42	0.29
Montenegro	n.a.	n.a.	n.a.	n.a.
Albania	n.a.	n.a.	n.a.	n.a.

*Note: Scores range from 0 to 1, with 1 indicating the strongest adherence to the rule of law. Green scores denote performance 0.5 and higher, or position in the upper half of the global ranking list. Red scores denote scores below 0.5, or position in the lower half of the global ranking list. Data for Montenegro and Albania are not available. Source: The World Justice Project (2018), Rule of Law Index 2017–2018.<sup>3</sup>*

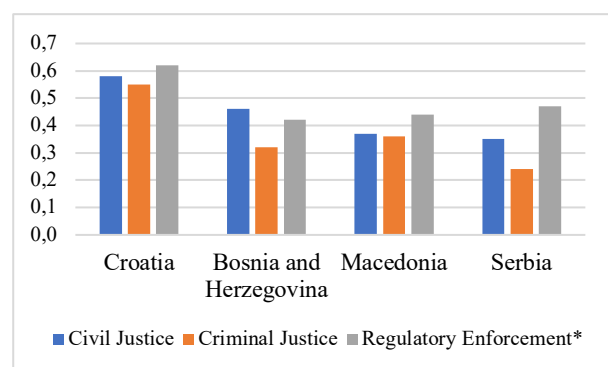
<sup>1</sup> European Commission (2018), A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM (2018) 65 final, 6.2.2018. Available at: [https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf) (Accessed: 10 August 2018).

<sup>2</sup> The World Justice Project (2018), Rule of Law Index 2017–2018. Available at: [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf). (Accessed: 10 August 2018).

<sup>3</sup> Available at [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf).

Observed countries also have poor scores on the ‘No Improper Government Influence’ variable. This is a measure of government influence in civil justice and criminal justice as well as influence over regulatory enforcement (Figure 1), and it serves as a proxy for influence on judicial institutions and independent regulatory bodies. In all observed countries in the Western Balkans, the most affected domain is criminal justice, while regulatory enforcement is less susceptible to influence. While government influence over the judiciary is evidently a problem, the external pressure on regulation being imposed by government is not so prevalent. This might indicate that, for example, lobbying or private sector obstruction of regulatory norms is not a problem in the region, or conversely that such malpractice is not captured by the ‘No Improper Government Influence’ variable.

Figure 1: No Improper Government Influence, 2018



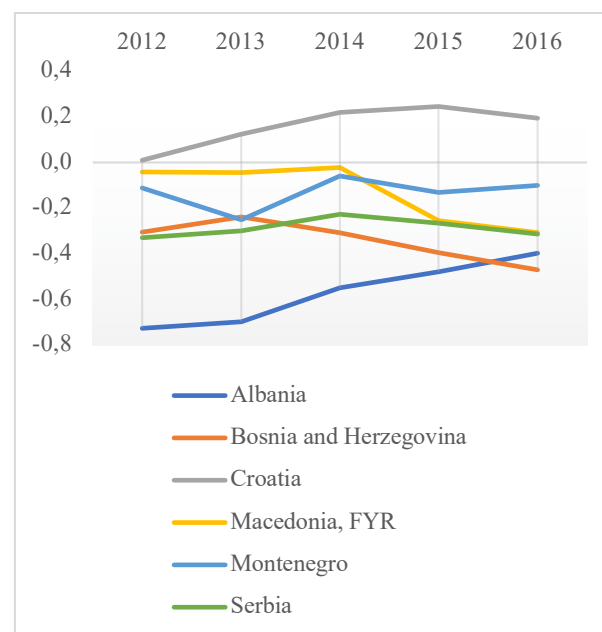
\*No improper influence.

Note: Scores range from 0 to 1, with 1 indicating there is no improper (Government) influence at all.

Source: The World Justice Project (2018), Rule of Law Index 2017–2018.

Such indices are soft indicators of enforcement of the rule of law. Political influence is hard to measure precisely. However, economic theories of corruption and empirical studies provide evidence that state capture and political corruption are often intertwined.<sup>4</sup> Therefore, the ‘World Governance Indicator Control of Corruption’ ‘captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as ‘capture’ of the state by elites and private interests’<sup>5</sup>. Since 2012, Control of Corruption is, at best, improving in Albania, yet it has not reached the more advanced countries in the region. Although the whole region has a corruption problem, Croatia did manage to establish firmer control of corruption both during the EU accession process and in the two years immediately following (Figure 2).

Figure 2: Control of Corruption



Estimate gives each country's score in aggregate, in units of a standard normal distribution, i.e. ranging from approximately -2.5 to 2.5.

Source: World Bank, Worldwide Governance Indicators.<sup>6</sup>

Political interference has many facets and all of them are very difficult to empirically assess and confirm. Taking the example of Croatia, there are several studies as well as anecdotal evidence (cases brought up by media) of conflict of interest, cronyism and other types of favoritism, and other corrupt practices that endanger the proper functioning of independent institutions.

Croatia became an EU member on July 1, 2013 after a long accession period during which the government had to provide evidence it was implementing anti-corruption policy measures both in its practices and by producing concrete results. This effort faded out and corrupt practices are still present, but in different, more sophisticated or less evident ways. A job in the public sector is today one of the most valuable means of corruption; it serves well for establishing large and complex networks of patronage throughout the entire public sector. And vice versa: private companies and corporations regularly engage ex-politicians or members of their families and friends. An ex-governor of the Croatian National Bank, immediately upon completing his mandate was employed in, what was at the time, the largest private corporation in Croatia. On the other hand, the current Minister of Finance used to be a highly positioned employee of the very same company. Croatia is a small country and expert networks are naturally overlapping, so the issue of conflict of interest is often brought up by NGOs and media in Croatia. The Commission for Conflict of Interest

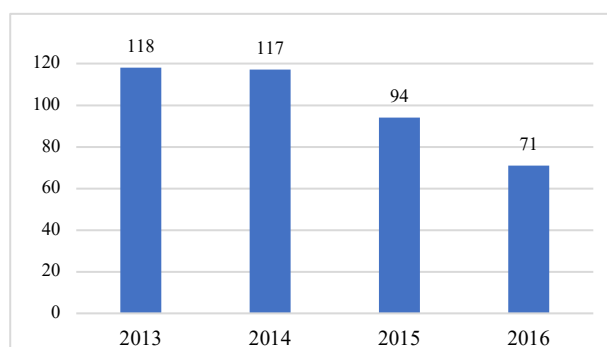
<sup>4</sup> See for example Rose-Ackerman, (1999), *Corruption and Government*, Cambridge, Cambridge University Press.

<sup>5</sup> Kaufmann, D., Kraay, A., and Mastruzzi, M. (2010), *The Worldwide Governance Indicators: Methodology and Analytical Issues*, World Bank Policy Research Working Paper No. 5430. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1682130](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682130) (Accessed: 10 August 2018).

<sup>6</sup> Available at: <http://info.worldbank.org/governance/wgi/#home>.

appointed by the Croatian Parliament is seen in public as one of the most independent and trustful institutions in Croatia. The number of proceedings initiated by the Commission for actions prohibited by the Conflict of Interest Law is decreasing (Figure 3.) This indicates some higher standards for avoiding conflicts of interest have been set.

Figure 3: Conflict of Interest Proceedings Initiated in Croatia



Source: *Povjerenstvo za odlučivanje o sukobu interesa, Republika Hrvatska (Commission for Conflict of Interest, Republic of Croatia)*. Available at: <https://www.sukobinteresa.hr/hr/annual-report-of-the-commission>

In some aspects, the accession process and EU membership has helped to curb political interference in Croatia. For example, corruption in large investment projects is prevented if these projects are EU-funded, and therefore managed under the strict control procedures that govern how EU funds are spent.

On the other hand, fraudulent public procurement procedures at the local government level are widespread. Recent studies show that the political party in power at the national level uses the state budget to fund local politicians and to ensure success in the next national elections.<sup>7</sup> Vuković argues that in Croatia “systemic corruption is indeed supported by an environment in which institutional and legal frameworks are personalized”<sup>8</sup>. Political interference, corruption and lack of transparency in local budgets<sup>9</sup> are still prevalent in Croatia, and public procurement remains one of the most vulnerable sectors.

Here, except for the previously mentioned EU-funded projects, EU membership did not contribute to fighting corruption in public procurement in Croatia. Anti-corruption momentum waned after accession, and an effective suppression of specific corruption risks in Croatia is not guaranteed by the principles of public procurement and EU regulations. Croatian voters never sanctioned the

corrupt misbehavior of politicians.<sup>10</sup> This finding is supported by the arguments of North on the institutional change needed, where both formal and informal institutions play key roles in changing the attitudes and behavior of individuals in society.<sup>11</sup> Formal institutional changes introduced by adopting EU legislation are not efficient enough in suppressing conflicts of interest, crony capitalism, clientelism and corruption in its different, often disguised forms. In the Croatian context, and probably in the entire Western Balkans region as well, there is still a long road ahead to change the mindset that everybody would be better off if strict moral rules were applied and a strong institutional framework was established. The role of the EU is to further control the implementation of higher standards in the public arena of EU member states and candidate countries.

In their future efforts to implement EU standards related to the rule of law, the European Commission and its agencies should be more focused on public procurement.

The EU Enlargement Strategy for the Western Balkans, Section on Public Procurement states:

“More transparency is needed in the management of public funds especially at all stages in public procurement, an area particularly prone to corruption.

There have been several examples in the Western Balkans of confidential procedures for procuring goods and some major contracts have been awarded without a public tender. There have been allegations of politically connected local subcontractors being favored and of illicit payments. Countries should substantially increase the transparency, competitiveness and fairness of public procurement tenders, limit the use of confidential procedures and introduce safeguards excluding political influence on bidders.

The use of transparent, publicly accessible e-procurement should be fully rolled out. This should enable citizens to see clearly how their taxes are spent, from the initial tender to final execution of contracts. Managerial accountability and an internal control culture in public institutions are also crucial.”<sup>12</sup>

One study on the obstacles for small and medium-sized enterprises (SMEs) to access public procurements showed that “despite introducing EU standards in public procurement (at least in terms of regulatory framework) Croatian companies still experience irregularities and lack confidence in the national public procurement system”<sup>13</sup>. Comparing real experiences of firms in Croatia and in Bosnia and Herzegovina showed that the most pressing problem in Bosnia and Herzegovina is corruption risk in public procurement, while in Croatia small

<sup>7</sup> Glaurdić, J., and Vuković, V. (2017), Granting votes: Exposing the political bias of intergovernmental grants using the within-between specification for panel data, *Public Choice*, 171(1), pp. 223-241.

<sup>8</sup> Vuković, V. (2017), The political economy of local government in Croatia: winning coalitions, corruption, and taxes, *Public Sector Economics*, 41(4), pp. 387- 420.

<sup>9</sup> For more information on transparency of state and local budgets in Croatia see: [www.ijf.hr](http://www.ijf.hr).

<sup>10</sup> Budak, J. (2016), *Korupcija u javnoj nabavi: trebamo li novi model istraživanja za Hrvatsku?*, *Ekonomski Pregled*, 67(4), pp. 306-327.

<sup>11</sup> North, D. (1990), *Institutions, Institutional Change and Economic Performance*, Cambridge, Cambridge University Press.

<sup>12</sup> European Commission (2018), *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans*.

<sup>13</sup> Budak, J., Slijepčević, S., and Rajh, E. (2017), Small and Medium Enterprises’ obstacles to public procurement: lessons learned for Balkans, *World Review of Entrepreneurship, Management and Sustainable Development*, 13 (2/3), pp. 178-193.

and medium enterprises consider that tenders lack transparency as a process (Table 2).

Table 2: Issues SMEs are Facing in Public Procurement in Bosnia and Herzegovina and Croatia

Issues	Bosnia and Herzegovina	Croatia
Transparency of tenders	84.7%	<b>87.3%</b>
Conflict of interest in public procurement	71.2%	40.8%
Trust in the system	47.5%	17.0%
Corruption risk in public procurement	<b>90.8%</b>	82.8%
Public contract awarded under the influence of corruption	60.1%	28.0%

*Note: percentage of SMEs answering “Yes”; Source: Budak, Slijepčević, and Rajh (2017), based on the SMEs survey data, n=725*

It is difficult to prescribe remedies that will work for all countries since “one-size-fits-all” policies do not work. Therefore, instead of the formal legislative prescription of EU regulations, which may never be fully implemented, customized policies should be set up for every country, local government or type of public investment. However, the high standards established through EU practices should stand as a higher rule in terms of the rational allocation of public resources. Policy recommendations might be different for micro, small and medium-sized companies in the post-transition phase.

In conclusion, Croatia, as the one EU member state in the sample of Western Balkan countries, had a significant problem with corruption before the EU accession process was intensified, so it is intuitive to conclude that in the advanced stages of EU accession other countries in the region will overcome their current problems with corruption. Nations in the process of accession would resolve similar issues that Croatia faced in the past. One could assume that the Western Balkans will attain a higher level of transparency, more competent public procurers, less corruption and, in general, enforced rule of law. Instead of blank, “one-size-fits-all” recommendations, the EU should design context-specific supporting policies to improve organizational culture and strategies for implementing efficient public procurement practices.



# CHALLENGES AND OPPORTUNITIES OF THE PUBLIC ADMINISTRATION REFORM PROCESS IN THE WESTERN BALKANS

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*“To take a stand, to be passionate... is the politician’s element,... indeed, exactly the opposite principle of responsibility from that of the civil servant. The honor of the civil servant is vested in his ability to execute conscientiously the order of the superior authorities.... Without this moral discipline and self-denial, in the highest sense, the whole apparatus would fall to pieces.”*

Max Weber<sup>1</sup>

Public administration reform (PAR) is, at least declaratively, one of the key priority reform areas for all six governments in the Western Balkans. PAR is recognized as a crucial reform agenda to deal with the increasingly complex challenges and trends in the region, including the eroding relations between the citizen and the state, systemic corruption and abuse, democratic functioning of institutions, and economic growth. A well-functioning public administration is key for effective governance and the democratic system, and an essential pillar of the European integration process for the Western Balkan Six (WB6).<sup>2</sup>

The EU enlargement strategy published in February this year states that:

“Public administration reform is paramount to strengthening governance at all levels. This includes improving the quality and accountability of administration, increasing professionalism, de-politicization and transparency, also in recruitment and dismissals, more transparent management of public finances, and better services for citizens”.<sup>3</sup>

Furthermore, SIGMA provides an elegant summary of why PAR matters:

“A well-functioning public administration is a prerequisite for transparent and effective democratic governance. It is the foundation for the functioning of the state, determining a government’s ability to provide public services and foster competitiveness and growth. It also plays a fundamental role in the European integration process by enabling the implementation of crucial reforms and efficient accession dialogue with the European Union (EU).”<sup>4</sup>

This paper offers some food for thought on how to strengthen governance at all levels in the WB6 through a public administration reform process focused on some key areas of PAR, such as rationalization of state administrations, recruitment and salary in the civil service. The paper begins by setting a brief context with a discussion of the general state of play and PAR priorities in the WB6. It then continues with a section on the quality and accountability of public services and how digitalization and e-governance can help to improve them, a section on how we can further transparency, de-politicization, and professionalization in the public administration, in particular with regard to recruitment and dismissal of staff, and concludes with a section on what the EU can do to further support PAR efforts. Kosovo is used as a primary

<sup>1</sup> Weber, M. (1946), Politics as a vocation, in Max Weber, Gerth, H.H. and Mills, C.W., New York, Oxford University Press, page 95.

<sup>2</sup> SIGMA (2016), Functioning of the Centres of Government in the Western Balkans, Paris, OECD/SIGMA. Available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/SIGMA\(2017\)1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/SIGMA(2017)1&docLanguage=En) (Accessed: August 2018).

<sup>3</sup> European Commission (2018), A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, Brussels. Available at: [https://ec.europa.eu/commission/sites/beta-political/files/com-munication-credible-enlargement-perspective-western-balkans\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/com-munication-credible-enlargement-perspective-western-balkans_en.pdf) (Accessed: July 2018).

<sup>4</sup> SIGMA (2017), Principles of Public Administration – 2017 Edition, Paris, OECD/SIGMA. Available at: [http://www.sigmaweb.org/publications/Principles-of-Public-Administration\\_Edition-2017\\_ENG.pdf](http://www.sigmaweb.org/publications/Principles-of-Public-Administration_Edition-2017_ENG.pdf) (Accessed: July 2018).

case study to illustrate arguments and other points of information in this paper.

### Context: 'Variable Geometry'

As Lorenzo Casini notes, there is not one definition of the notion of public administration, but it can best be 'interpreted as an institute of "variable geometry"'.<sup>5</sup> James P. Pfiffner outlines two main models of public administration: the classical, monocratic model, and the new public management model.<sup>6</sup> He further argues that the classic model of the public administration is heavily influenced by the work of Max Weber and emphasizes a top-down approach to public administration, where there is a clear rules-based hierarchy with everyone reporting to someone and where the "role of the bureaucrat is strictly subordinate to the political superior".<sup>7</sup> Key features of this model include the dichotomy between politics and public administration, as well as hierarchy, stability, permanence, institutionalized civil service, etc.<sup>8</sup> The new public management model is a policy response meant to address the challenges inherent in the classic model. It emphasizes the enhancement of performance, deregulation, rationalization, and reforming the structures and institutions of the classic model in order to be compatible with the developments of the current era, in which information systems are essential.

Like in EU and OECD countries, the organization of public administration in the WB6 varies. For example, in the case of Albania and Kosovo, the ministerial system is organized as a monocratic hierarchy, in which every ministry has one chief administrative officer (Secretary General) who is solely accountable to the political level (Minister). In the case of Serbia and Montenegro there is a functional system of governance. While there is no unique model or approach to public administration in the WB6, all countries have committed themselves to implementing a comprehensive public administration reform agenda. The PAR strategic framework, in the case of Kosovo, consists of: Strategy for Modernization of Public Administration 2015-2020;<sup>9</sup> Better Regulation Strategy 2017-2021;<sup>10</sup> Strategy for Improving Policy Planning and Coordination in Kosovo 2017-2021;<sup>11</sup> and Public Finance Management Reform Strategy 2016-2020.<sup>12</sup> In addition to these, there are other important strategies that serve the PAR process in Kosovo, such as the Strategy for Training of Civil Servants, Strategy for Cooperation with Civil Society, and the Interoperability Framework

and E-Governance Strategy. Although the four strategies together comprise the PAR strategic framework, one can easily note that their timeframes are not aligned, proving the criticism of weak planning on the part of SIGMA and the EU, while also creating practical problems for the government.

These strategies reflect the SIGMA/OECD Principles of Public Administration (developed in 2014 and revised in 2017) that were developed to support the EU's approach to PAR in the WB6 within the framework of the enlargement process. The principles "define what good public governance entails in practice and outline the main requirements to be followed by during EU integration".<sup>13</sup> SIGMA/OECD monitoring reports on PAR for the WB6 focus on six key areas of reform: 1) a strategic framework for public administration reform; 2) policy development and co-ordination; 3) public service and human resource development; 4) accountability; 5) service delivery; and 6) public financial management, including public procurement and external auditing. SIGMA's monitoring reports provide the most comprehensive and detailed picture of the state of play in the WB6 concerning the PAR agenda and serve as a guideline for the government to formulate interventions and focus priorities. The reports provide specific assessments for each country and place them in a regional context, so each country can see if they are doing better or worse than the regional average.

Based on the SIGMA reports of 2017 and the European Commission (EC) Country Reports of 2018 we can identify some common denominators in the PAR challenges facing the WB6. The first and most significant challenge has for some time now been the de-politicization of the public administration, ensuring a merit-based process of recruitment of public employees and ending impunity for violations of ethics and anti-corruption legislation from within the public administration. The efforts of the EU and the focus of the PAR process in the WB6 has generally focused on developing a professional and non-partisan civil service: Reforming human resource management within the public administration, rationalization of processes and structures, capacity development of the civil service, and defragmentation of public service delivery. In the Country Reports of the EC, Bosnia and Herzegovina is considered to be at an early stage, while Kosovo is thought to have achieved some level of preparation. The rest of the countries are all considered as

<sup>5</sup> Casini, L. (2007), Models of public administration: comparative analysis of administrative organization, Centre for Administration Innovation in the Euro-Mediterranean Region (C.A.I.M.E.D.). Available at: <http://unpan1.un.org/intradoc/groups/public/documents/CAIMED/UNPAN028187.pdf> (Accessed: August 2018).

<sup>6</sup> Pfiffner, J.P. (1999), Traditional Public Administration versus the New Public Management: Accountability versus Efficiency. Available at: <http://mason.gmu.edu/~pubp502/pfiffner-readings-npm.htm> (Accessed: August 2018).

<sup>7</sup> Ibid.

<sup>8</sup> Peters, G., in Pfiffner, J.P. (1999).

<sup>9</sup> Government of Kosovo (2015), Strategy for Modernization of Public Administration, Prishtina. Available at: <http://www.kryeministri>

[iks.net/repository/docs/Strategy-for-Modernisation-of-PA-2015-2020.pdf](https://www.kryeministri-ks.net/repository/docs/Strategy-for-Modernisation-of-PA-2015-2020.pdf) (Accessed: August 2018).

<sup>10</sup> Government of Kosovo (2017), Strategy on Better Regulation 2017-2021, Prishtina. Available at: [http://www.kryeministri-ks.net/repository/docs/Better\\_Regulation\\_Strategy\\_2\\_0\\_for\\_Kosovo\\_-\\_ENGLISH.pdf](http://www.kryeministri-ks.net/repository/docs/Better_Regulation_Strategy_2_0_for_Kosovo_-_ENGLISH.pdf) (Accessed: August 2018).

<sup>11</sup> Government of Kosovo (2017), Strategy for Improving Policy Planning and Coordination 2017-2021, Prishtina. Available at: [http://www.kryeministri-ks.net/repository/docs/National\\_Development\\_Strategy\\_2016-2021\\_ENG.pdf](http://www.kryeministri-ks.net/repository/docs/National_Development_Strategy_2016-2021_ENG.pdf) (Accessed: August 2018).

<sup>12</sup> Government of Kosovo (2016), Public Finance Management Strategy 2016-2020, Prishtina.

<sup>13</sup> SIGMA (2017), Principles of Public Administration – 2017 Edition.

moderately prepared. BiH is yet to adopt a PAR strategy that is applicable to the entire country.

Other common denominators include a weakness or lack of political will and commitment necessary to support reforms that would result in a public administration that is professional, politically neutral, has continuity, and ensures a merit-based management of the human resources. Recruitment and advancement in the civil service, especially for senior management appointments, are subject to political interference across the WB6. De-politicization of the public administration is an essential pre-condition for all of the reforms. However, this is easier said than done, considering that across the WB6 public administration is viewed and used as the main employment platform for party loyalists and supporters, often with total disregard to the professional background and qualifications of such individuals.

### Improving Public Services

The results of the Regional Cooperation Council's (RCC) Balkan Barometer for 2017 show that the citizens in the WB6 "feel they are not getting their money's worth when it comes to government performance and public service delivery"<sup>14</sup>. How can the quality and the accountability of public services be improved? There are two dimensions to this question: the quality and accountability of the delivery system and approach, and the quality and accountability of the system that designs and provides public services.

Concerning the first dimension, improving public services means improving accessibility, delivery, and affordability. As such, this process has become synonymous with e-governance as the best platform to effectively deliver on all three principles. Using a digital channel to provide public services is also the preferred option for citizens across the WB6 according to the RCC's Balkan Barometer 2017.<sup>15</sup> Digitalization of public services is essential for good governance, including efficiency, transparency and accountability. Implementing this in practice means, first and foremost, developing a platform of interoperability where different government systems, such as tax administration and civil registries, are linked and communicate with each other. This is vital for the next stage in the digitalization of public services: offering services via an online platform. In addition, another piece of technology that is important for offering public services to citizens is Public Key Infrastructure (PKI). PKI refers to the necessary hardware, software, the policies and procedures concerning digital certificates that allow citizens and government officials secure and verified access to the public services. In other words, it is about instituting keys for citizens to be able to access

public services. In the case of Kosovo, the government has developed with the support of Microsoft an interoperability platform, and plans are for 40 systems to be linked to this platform by the end of 2020.

In the context of the digitalization of public services one example we can look to is Albania, which has digitized a number of public services now offered through the *e-albania* portal. A quick count shows that there are up to 90 services offered by a host of institutions.<sup>16</sup> This includes such services as application for a construction permit, initial registration of a business, property certificates, etc. In addition to delivering services via an online platform, another important undertaking is the establishment of one-stop shops for public services. Without an interoperability platform, creating a one-stop shop would be very difficult if not impossible. In Albania, public services via one-stop shops are provided by the Agency for the Delivery of Integrated Services Albania (ADISA) which operates under the Prime Minister's Office.<sup>17</sup> The ADISA Centre in the town of Fier offers 343 different public services to citizens, including property registration, social security, declaration and certification of taxes, business registration, etc.

On another note, according to the RCC's Balkan Barometer 2017 the cost of public services in Albania is considered the worst in the region. E-governance provides a unique opportunity to address the issue of affordability of public services for citizens and government. Using online platforms to offer services to citizens can reduce the financial burden on citizens and the government. For example in Serbia, the government report on PAR implementation for 2017 states that the implementation of *e-ZUP* (the Serbian government's online information system) will save citizens five million hours they would normally spend in queues for services, and one million working hours for civil servants.<sup>18</sup> In addition to this, the report states that digitalization of public services has saved citizens RSD 750 million (6.3 million Euros) as a result of the removal of various service fees, presumably since the start of the service in 2017. An important note in this context is that these estimates and data are based on government sources, and independent assessments of the impact of *e-ZUP* were not available.

In regards to the quality of the services, one of the most suitable options for monitoring quality, and for subsequently making the necessary improvements, is creating tools with which citizens can provide an assessment of public services from within the very institutions that offer them. Governments should institute a permanent approach to measuring citizen satisfaction with public services and for answering the feedback that is received. In Kosovo, the government has installed at various service points the *e-kutia* (e-box), an iPad-like tool that provides

<sup>14</sup> Regional Cooperation Council (RCC) (2017), Balkan Barometer 2017, Sarajevo, RCC, page 115. Available at: [https://www.rcc.int/sites/default/files/RCC\\_BalkanBarometer\\_PublicOpinion\\_2017.pdf](https://www.rcc.int/sites/default/files/RCC_BalkanBarometer_PublicOpinion_2017.pdf). (Accessed: August 2018).

<sup>15</sup> Ibid., page 47.

<sup>16</sup> For more information please visit <https://e-albania.al>.

<sup>17</sup> For more information please visit <http://www.adisa.gov.al/>.

<sup>18</sup> Ministry for Public Administration and Local Self Government (MPALSG) (2018), Report on Public Administration Reform 2015-2018, Belgrade, MPALSG, page 19. Available at: [http://www.mduls.gov.rs/doc/PARReport\\_eng\\_mar2018.pdf](http://www.mduls.gov.rs/doc/PARReport_eng_mar2018.pdf).

citizens with a quick way of expressing their satisfaction with services. While this is a good option, the problem has been the lack of a policy in place on how to answer feedback, and it is not clear if the feedback is even collected. With the support of the EU, the Ministry of Public Administration is in the process of developing a policy paper on measuring citizen satisfaction with public services, and it has committed itself in the Action Plan for implementation of the PAMS (Public Administration Modernization Strategy) to institute four different mechanisms by 2020, besides the e-box that will allow citizens to express their satisfaction with the services provided.

Concerning the second dimension, the quality and accountability of the system that designs and provides public services, there are a number of issues that present a challenge across the WB6. Some are basic, such as job descriptions within the public service, the lack of a unified salary system for public employees, and performance assessments. Others are more challenging, such as the rationalization of the state administration. These factors all contribute to unprofessional, unmotivated and unaccountable public administration, which in return affects delivery of public services to citizens.

There are currently a number of jobs in the public administration that lack a basic job description, including important elements such as the purpose of the position, or accountability and reporting lines. Job descriptions tend to be unclear and generalized, and sometimes are prepared on an ad-hoc basis without clear descriptions of the competences, responsibilities, or required qualifications. This situation is further fueled by political interference, when jobs have to be 'invented' to accommodate individuals within the public administration. There are also problems with the catalogue of job classifications, which contains the job titles, codes and job ranks, qualification levels, and minimum required working experience of every job in the civil service.

Other practical problems relate to the salary system in the public administration. For example, there are 82,000 people working in the public sector in Kosovo, and they cost the national budget approximately 500 million Euros annually. Out of this figure, there are a little over 18,000 civil servants. The regulatory framework for the recruitment, advancement, salary, performance assessment, and accountability for the employees of the public sector is fragmented. In Kosovo there are currently two models of payment for the public sector: a) a coefficient based system (a scale system from 4 to 20 coefficients, with each coefficient corresponding to a financial amount e.g. 1 coefficient = 200 Euros) and b) a system based on fixed-salaries (monthly salaries from 232 Euros to 4,633 Euros). The coefficient based system is

primarily used for the 18,000 civil servants, while the rest of the public sector uses the fixed-salary based system. This approach has created a number of problems in the public administration, including a significant gap in the base-salary for equivalent positions in the public administration. For example, when we examine the base-salary for the position of the chief administrative officers of public institutions, we find that the base-salary of the General Secretary in any government ministry is coefficient-based, so it is 1,126 Euros/month, while the salary of the Director of the Kosovo Privatization Agency, which is a fixed-salary, is 4,633 Euros/month.<sup>19</sup>

In the case of Serbia, in 2016 Parliament adopted the Law on the Salary System in the Public Sector, affecting the entire public sector, which is comprised of 510,000 employees. By doing so, it has addressed the problem with "considerable variations in salaries for similar jobs throughout the public service".<sup>20</sup> However, as the report notes, the new salary system is still not being implemented and additional actions are required, including the creation of comprehensive job catalogues.

In general, all countries of the WB6 face the challenge of big state administrations, and its rationalization is an important reform for modernizing the public administration. Legislation in the region often does not provide adequate definitions for the establishment, internal organization, accountability, governance, etc. of public administration bodies. There are often no proper rules for the ministerial system, both in typology and accountability, just as there is not adequate regulation for the institutions providing public services directly to citizens, such as the healthcare and education sectors. A particular challenge in this context has been the growing number of independent and executive agencies. Most WB6 countries in the SIGMA Monitoring Reports for 2017 are required to implement some degree of rationalization. For example, Montenegro is required to rationalize the organization of its state administration, and Macedonia is to "consider the rationalization of the large number of first-level budget organizations".<sup>21</sup> And this is not only a problem for the WB6, Ireland has been facing similar problems.<sup>22</sup>

In June 2018, Kosovo adopted the Action Plan for Rationalization of Agencies in line with its obligations under the Sector Reform Contract for PAR and the European Reform Agenda (ERA). In 2016, a report by the Ministry of Public Administration found that Kosovo's Assembly had established more than 30 independent regulatory and executive institutions and agencies, while the government had established 46 agencies/bodies under

<sup>19</sup> Ministry of Public Administration (MPA) (2018), The Report on the State of the Civil Service of Kosovo for 2017, Prishtina, MPA.

<sup>20</sup> SIGMA (2017), Monitoring Report 2017 for Serbia. Available at: <http://www.sigmaweb.org/publications/Monitoring-Report-2017-Serbia.pdf> (Accessed: August 2018).

<sup>21</sup> SIGMA (2017), Monitoring Report, Paris, SIGMA, page 134. Available at: <http://www.sigmaweb.org/publications/Monitoring-Report-2017-the-former-Yugoslav-Republic-of-Macedonia.pdf> (Accessed: August, 2018).

<sup>22</sup> Department of Public Expenditure and Reform (DPER) (2014), Report on the Implementation of the Agency Rationalisation Programme, Dublin, DPER.



the umbrella of various ministries.<sup>23</sup> This lack of cohesion in the public administration leads to an inability and lack of capacity to serve the citizens, creates unnecessary red-tape, and creates a financial burden for the national budget.

#### (De)Politicization of Public Administration

Across the WB6 there is a wide-spread public perception of nepotism and political interference in the process of recruitment and advancement of personnel within the public administration. This perception is backed by the findings of the EC Country Reports and the monitoring reports of SIGMA. Every election cycle in the region inflates the size of the public administration. This situation creates unprofessionalism and instability in the civil service, hinders career development of civil servants and affects the ability of institutions to develop proper personnel planning.

In the case of Kosovo, inflating the civil service with party loyalists is done primarily through the so-called *Kontrata mbi Vepër*, which roughly translates as 'service contract'. Service contracts can be signed for up to six months (although in practice they are always extended) to employ personnel without a competition, allowing the chief administrative officer in the institution to hire anyone they please. According to the 2017 Report on the State of the Civil Service in Kosovo, employment in the civil service through service contracts is higher than the number of employees recruited using the proper procedures: there were 991 service contracts compared to 723 contracts based on the regular procedures. Service contracts lack transparency, are not merit-based and ignore professional requirements while violating the principles of impartiality and equal opportunity. These kinds of formalized and, to a certain degree, legalized practices that influence the civil service are present across the WB6.

How to solve these problems? Before creating the necessary policies for preventing further politicization of the public administration, there is an even bigger question of what to do with the people who occupy important positions in the public administration without the necessary qualifications? One option is implementing a civil service-wide assessment to determine the compatibility of the personnel (e.g. educational and professional qualifications) vis-à-vis their position's job catalogue entry and job description. Something like this was introduced in Kosovo's Action Plan 2018-2020 for Public Modernisation Strategy<sup>24</sup> that has been recently approved by the Government, but it remains to be seen if there will be sufficient political will for its proper implementation.

Implementing this technically will not be as challenging as deciding what to do or how to implement the findings. Equally important in this context are performance assessments of civil servants. While this mechanism is in place across the WB6 it has not been implemented seriously, and most civil servants, in the case of Kosovo, receive marks in the range of fours and fives where five is the maximum score. In another example from Kosovo, to prevent political interference in the recruitment process, an international company was invited to manage the process of recruitment of senior managers in public institutions, and it was done in cooperation with the UK Embassy in Kosovo.<sup>25</sup> While well-intentioned, the success of this exercise has been limited. The company would send a list of interviewed candidates ranked based on their scores, with the hope that the highest ranking candidate would be picked for the job. In practice, some institutions still selected the candidate with political backing, even though he or she had scored poorly.<sup>26</sup>

In regards to preventing the further politicization and degradation of the public administration, one option is reforming the procedures for recruitment of the public employees with the following four proposals: first, centralize the recruitment for all public administration; second, invite members of civil society or external experts to participate in selection committees; third, change the approach from position-based recruitment to job-family recruitment; and finally, implement the recruitment process through a transparent and digital based platform. In addition to these proposals, introduce strong safeguards to protect civil servants from being fired by political actors for political reasons. Taken together, this is largely how the European Commission implements recruitment for its civil service, for example.

A central-unit would be established to manage recruitment for the entire public administration, with permanent, professional committees that interview and rank candidates. This would make it much harder for political actors to interfere in the process. Special attention and regulation should be given to human resource management units in order to transform their role from a mere secretariat for implementation of political decisions to units that have the capacity to manage a merit-based recruitment process, implement merit-based advancement, assert an active role in matters concerning discipline, ethics and anti-corruption violations, and that constantly support capacity development within the public administration.

Instead of recruiting for every position that becomes available in the civil service, which allows for interference and is often costly, time consuming and ineffective,

<sup>23</sup> Ministry of Public Administration (MPA) (2016), Report on the Review of the Independent Institutions and Agencies, Prishtina, MPA. Available at: [https://map.rksgov.net/Dokumentet/Rishikimi\\_i\\_institucioneve\\_dhe\\_agjencive\\_te\\_pavaru.aspx/](https://map.rksgov.net/Dokumentet/Rishikimi_i_institucioneve_dhe_agjencive_te_pavaru.aspx/) (Accessed: August 2018).

<sup>24</sup> You can download the draft action plan from the online public consultation platform of the government. Available here: <http://ko.nslutimet.rks-gov.net/view/Consult.php?ConsultationID=40344>.

<sup>25</sup> British Embassy Pristina (2016) Ambassador O'Connell launches project with Assembly and Government of Kosovo. Available at <https://www.gov.uk/government/news/ambassador-oconnell-launches-project-with-assembly-and-government-of-kosovo> (Accessed: August, 2018).

<sup>26</sup> Example: Popova, E., (2018) Pa Pëlqimin Britanik Emërohet Sekretari i MASHT-it. Available at <https://kallxo.com/pa-pelqimin-britanik-emerohet-sekretari-masht/> (Accessed: August, 2018).

develop job-families for both general administration and special administration positions. In practice, there would be around 15 to 20 job-families. For example, legal experts could be one job-family. The competition would not be about getting a certain position in the civil service, (e.g. senior legal analyst in a certain department). Instead, it would be to score as high as possible during the recruitment process then enter onto a waiting list for the respective job-family. When job opportunities become available, those with the highest scores will have the choice of which public institution he or she would like to work in. Also introduce a timeframe for announcing competitions to enter public service (e.g. every 2 years). This is the period when the list would be refreshed. For senior management positions (e.g. Secretary General or director of a department), competitions should be open only to civil servants.

Another very important aspect of increasing transparency and accountability in the public service is the human resource management in public institutions and this is also another opportunity to discuss the benefits of using IT. In Kosovo, since January 2015, the Ministry of Public Administration has used the Human Resource Management Information System (HRMIS). This platform basically allows the human resources units in every institution to manage electronic dossiers of all the employees in the respective institution. This enables better opportunities for monitoring and tracking public service. The system can be modified to be used for the recruitment process and advancement of the public officials and as such can be an opportunity for addressing existing shortcomings in the performance assessment. HR units can update information for every official in the system, including the trainings received, qualifications, etc. Using this system enables greater transparency and accountability and would provide a much more accurate picture of the state of the civil service. The Department for Civil Service Administration in the MPA has access to the system thus providing some level of oversight. However, the system is not used to its full capacity, and the lack of necessary legislative regulations that would oblige institutions to use the system hinders its implementation. A potential innovative idea in this context is linking HRMIS with the salary payment system into one major platform, which would provide additional opportunities for quality assurance in the civil service.

### The EU's Role

The EU is engaged and supports the PAR agenda in the region in different levels and through different political and technical mechanisms. Through IPA funding and

Twinning projects, technical assistance for institutions is provided. In the case of Kosovo, key PAR issues have been integrated also in the European Reform Agenda (ERA). Twice a year, the representatives from the government and the European Commission meet in the format called the Special Group on PAR, which represents the highest forum of exchange between the country and the EU on PAR. In every meeting joint conclusions are issued that address the most pressing issues for the PAR agenda. These conclusions are also used by the media and civil society for added credibility in their work when addressing PAR issues. It is worth noting that when it comes to PAR, there are fewer civil society organizations that are actively engaged with the process, compared to other sectors and also the capacities of the NGOs are limited to have an active participation, and sometimes they depend on government officials for their publication on PAR related issues.<sup>27</sup>

Recently the EU has begun a new approach, through Sector Reform Contracts (SRC) for Public Administration Reform, to support and incentivize PAR-related reforms in the WB6. This is the right approach that holds a great potential for pushing the governments in the region for the right decisions on PAR and offering civil society a new platform to come together and pressure the decision-making process in the right direction. Albania,<sup>28</sup> Kosovo<sup>29</sup> and Serbia<sup>30</sup> have already signed SRCs for PAR. Through an SRC, the European Commission transfers financial resources directly to the recipient country's national budget, but the transfers are conditional on the fulfilment of concrete indicators, jointly agreed upon and identified from the existing national PAR strategic framework. The SRC for PAR for Kosovo was signed in 2017 and the country is set to receive 22 million Euros for fiscal years 2018, 2019, 2020, and 2021. The SRC for PAR for Kosovo aims to achieve the following results: improve policy and legislative planning, coordination, and monitoring; promote an evidence based approach to making policy and drafting legislation; improve public access to government documents; increase professionalism and improve management of human resources in public administration; improve services for citizens and businesses and reduce red tape; and promote rationalization of the public administration by improving accountability lines and access to administrative justice. The SRC for PAR uses an advanced system of incentivizing the government to implement the necessary measures leading to these results.

SRC establishes two sets of instalments: the fixed tranche and the variable tranche. The fixed tranche (5.5 million Euros) is requested upon signature of the SRC and transferred when there is a generally satisfactory

<sup>27</sup> For example see INDEP report (2018) Review of Independent Agencies in order to rationalize functions and enhance performance. Available at [http://indep.info/wp-content/uploads/2018/05/INDEP\\_Rishikimi-i-Agjencive-te-pavarura-ne-Kosove.pdf](http://indep.info/wp-content/uploads/2018/05/INDEP_Rishikimi-i-Agjencive-te-pavarura-ne-Kosove.pdf) (Accessed: August, 2018).

<sup>28</sup> See <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/albania/ipa/2015/ipa-2015-038715.01-al-sector-reform-contract-for-public.pdf>.

<sup>29</sup> See [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/ipa2016\\_ks\\_action\\_programme\\_part\\_ii\\_annex.docx.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/ipa2016_ks_action_programme_part_ii_annex.docx.pdf).

<sup>30</sup> See [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/serbia/ipa/2015/pf\\_04\\_sector\\_reform\\_contract\\_for\\_public\\_administration\\_reform.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/serbia/ipa/2015/pf_04_sector_reform_contract_for_public_administration_reform.pdf).



assessment of the implementation of the PAR strategic framework, especially concerning public financial management. The process of putting forward the request for the fixed tranche provides an additional opportunity for conditionality on the part of the EU, and in the case of Kosovo this has been used to push forward three key decisions: 1) government approval of the law on state administration, the law on salaries, and the law on public officials; 2) amending the regulation on senior management; and 3) implementation of the action plan on rationalization of agencies and adopting a more realistic action plan for implementation of the Strategy for Modernization of the Public Administration.

The request for the variable instalment is more complicated. As the title suggests, there are a number of indicators, and how much the government receives in financial support depends on the fulfilment of each indicator. In the case of Kosovo, there are eight separate indicators for each of the years 2018, 2019, and 2020. The indicators are very clear and concrete, including specifications for verification of their implementation. Each instalment is approximately 5.5 million Euros annually, if all indicators are achieved in full. Each indicator has a certain percentage weight vis-à-vis the financial resources made available. All indicators are extracted from existing strategies adopted by the government.

Departing from the conventional consultancy based support through the Instrument for Pre-Accession Assistance (IPA) (which is often ineffective), the Sector Reform Contract for PAR is a results-focused approach that provides clarity and ensures ownership and accountability. This approach also helps streamline government and EU efforts to implement their PAR agendas, provides a platform for coordination, and boosts implementation of the key priorities in the European integration process, such as implementation of the Stabilization and Association Agreements.

This approach needs to be further strengthened. First, there is limited information about SRCs for PAR among the general public and civil society, and this needs to be addressed in partnership between the government and the EU through an awareness raising campaign and training opportunities. Secondly, the meetings of the Special Group on PAR should have dedicated sessions on the agenda that fully focus on the implementation of the SRC for PAR.

The EU can do better in elevating the significance of the PAR process in the public discourse and public interactions with the WB6 governments. While PAR is recognized as an essential process for fighting abuse and corruption, in the public debates these priorities are seen separately and they should be presented in tandem. The

conversation can shift more to the solutions rather than diagnosis.

#### **In Lieu of a Conclusion: the Small Windows and the Entrenched Bureaucracy**

How to strengthen governance at all levels through public administration reform? It can be done. The answers on how to do it are not complicated and some options have been elaborated in this paper. The current system of recruitment and advancement in the civil service does not work and it is not merit based. Also, performance evaluations are not working. We have problems with job catalogues and we have people holding important positions in the public administration without proper qualifications. In addition, the agencification<sup>31</sup> process has resulted in large and unsustainable public administrations across the WB6. The entrenched bureaucracy in the WB6 is hindering EU reforms and efforts for modernization of the public administration. Centralized recruitment, recruitment for job families and not for specific positions, using online platforms for recruitment and management of human resources in public administration are some of the solutions that some in the WB6 are making efforts to implement and some, like Kosovo, are planning to introduce.

At the same time, rationalization of the state administration is essential for reducing red tape and building an effective state administration. Decisions on implementing these measures are straightforward but difficult because the political will is weak as public administration in our region has been the primary employment agency for the political parties. Because of this, changing the rules of recruitment and advancement in the civil service would prevent or at least make it harder for political parties to exercise influence, just as reducing the number of agencies would result in important political actors losing big pay-checks and prestigious positions as members and chairs of the boards of these agencies.

This brings us to another equally important aspect of the PAR agenda and the transformation process, but one often ignored, the 'mentality transition'. One of the key features that previously defined public administration in the region was the 'small windows' in public institutions that enabled the citizens to communicate with a public official when using a public service. These small windows were also positioned in such a way that you always needed to bend down in order to reach the window. This was done intentionally to send a clear message to the citizen who was in charge in that system. The citizen had to bow before the state and they were treated with a condescending approach by the officials. The state officials were anything but servants to the citizens.

<sup>31</sup> Agencification refers to the establishment of new agencies or expanding the autonomy of the existing ones. This is often driven by the argument that policy development should be done by the Ministries while implementation should be done by agencies. Often

the agencification process has been incentivized on the premise that it further strengthens the independence and effectiveness of the administration.

While the institutional transformation, the reform of structures, policies and rules, has been on a successful path largely thanks to support from the EU, the mentality of those working in public administration is still a challenge. Even more importantly, the mentality of the political elite is similarly not conducive to the general idea of the PAR process. In public administration, the mentality transition has to do with the principle of accountability and the difficulty of public officials in embracing both their status as ‘civil servants’ and the conceptual shift in what defines public administration as a service provider for the citizens and business community.

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# CURBING POLITICAL INFLUENCE ON INDEPENDENT INSTITUTIONS IN THE WESTERN BALKANS

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For most of the media in the Western Balkans, and Central and Eastern Europe as a whole, the promises of a new era of market dominance and market-based economy that followed the democratic changes of the late 1980s, early 1990s, which were supposed to overthrow the political paternalistic model of financing media of the 1980s and earlier, have remained unfulfilled. The economic crisis on the one hand and digital disruption on the other have shown the fragility of the media market across the wider region, and emphasized the important role of the state and state interventionism.

When looking at the market characteristics and potential of a particular market, we usually analyze a number of factors: size of the national market; gross domestic product (GDP); advertising market and shares and trends within specific market segments, such as television, digital, print; size/reach of the national language and scale of emigration; and the state of existing infrastructure, including high-speed internet penetration, that influence consumption patterns and market potential.

Unfortunately, in all of these aspects, countries in the Western Balkans and Central and Eastern Europe (CEE) – which were not included in any of the categories in key classifications such as those by Hallin & Mancini (2004)<sup>2</sup> – do not show much potential. Although the term “Balkanization” has a historical and political dimension, in the case of the media it provides the exact definition of the key issue in the region: small, fragmented markets lacking the economies of scale that allow media companies to offer high-quality products and remain economically viable.

## Digitization, Fragmentation and Pauperization

New technological developments offer even more reasons for concern. The digitization of media has led to an abundance of choice and media channels in many countries, and caused problems even in markets that are stronger in terms of GDP and population. This fragmentation of the media landscape is, however, even more devastating for smaller countries – in Finland for example, “the restricted size of the market makes it more difficult to introduce fresh products to the market”.<sup>3</sup> The problem is even greater in smaller countries with weak GDPs, including all of CEE.<sup>4</sup> In all of these countries, the size of the market had been, in previous decades, the

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<sup>1</sup> Author’s note: This is an edited and updated version of a paper for Media Observatory, Sarajevo, published at: <http://mediaobservatory.net/radar/financing-media-south-east-europe>.

<sup>2</sup> Hallin, D.C., and Mancini, P. (2004), *Comparing Media Systems. Three Models of Media and Politics*, Cambridge, Cambridge University Press.

<sup>3</sup> Lehtisaari, K., Karppinen, K., Harjuniemi, T., Grönlund, M., Lindén, C.G., Nieminen, H., and Viljakainen, A. (2012), *Media Convergence and Business Models: Responses of Finnish Daily Newspapers*, Helsinki, Communication Research Centre CRC, Department of Social Research, University of Helsinki.

<sup>4</sup> Apart from weak GDPs, most of the countries in the region have relatively low economic/purchasing power – defined by Eurostat as GDP per capita in Purchasing Power Parity (PPP) – and have evidenced a decrease of investments over the last five years.

main obstacle for media development and specialization, even before digital media when only a handful of media were present. Today, the fragmented landscape is presenting further obstacles for the development and survival of new businesses in media.

Warnings about the limited market potential of these small markets were already expressed at the beginning of digitization. “Digitization will lower certain broadcasting costs, but this does not mean that there will suddenly be 200 channels in Slovenia, as there are in Britain or France or Germany”; and “there will never be 200 or more channels that will cover all the niche audiences” (Milosavljević and Bašić-Hrvatini, 2000: 254 and 258).<sup>5</sup>

Today, there may still not be 200 channels in Slovenian, but the regular package offered by cable providers includes between 120 and 180 channels, among those 45 Slovenian-language channels and 40 channels with Slovenian subtitles (and mostly with Slovenian advertising).<sup>6</sup>

An additional issue for countries in the region is the reduced use and circulation of their national languages internationally, hampering the economic potential of local media enterprises. Unlike other small European countries such as Austria or Ireland, for most of the countries in the region there is no other space where editorial products may be exported – except, in some cases, within the (economically weak) region. For example, although figures regarding the penetration of newspapers and magazines show these are frequently higher in Slovenia than in many other wealthier European countries, the total number (circulation) is much smaller, ultimately posing a significant challenge for Slovenian media companies.

This fragmentation is also causing concern for advertisers: “The market is so small that the economy of simply does not function. Investments in specific channels are, compared to the results, simply too large. In the time of mass media, for example television, this was still possible. It is true that the reach was small, but media buying and production were cheap as well. With everything that is brought by modern communication this is sadly not the case. And it does not matter if it is about mobile apps or guerrilla outdoor advertising. The costs of app development or the creation of a giant puppet are, in Slovenia, very similar to those in much bigger countries, except that here they are seen by a much smaller number of people,” wrote Slovenian advertiser Gal Erbežnik in 2013.

Technological development enabled the multiplication of media channels (radio, television, online); however, economic development could not keep up with the pace of this fragmentation. The economic crisis in 2008 further endangered the survival of new media outlets: revenue from advertising (which represents the majority of broadcasting and online revenue) has decreased while

the number of channels has increased. This means a larger number of actors must share a shrinking pool of revenues, leading to the pauperization of an increasingly fragmented market.

New channels are therefore often developed not because of their market potential but in order to prevent the development of new competition, and/or to simply re-use existing content in an attempt to maximize the return on investment. The increase in the number of channels thus does not correspond with an increase in the quality or diversity of this content.

This was also one of the main reasons for the failure of a pay television project by the TV company Pro Plus in Slovenia. The company owns the two most popular commercial channels, Pop TV and Kanal A, and launched a pay TV service called “Pop Non Stop” in September 2011. The service included six channels: Kino and Kino 2 (movie channels), Fani (a sit-com channel), Brio (a channel oriented towards women), Oto (a kids channel) and Spot (a music channel), all offered as a package through existing cable providers. However, in March 2013 the company decided to close down the project due to a lack of success. The programming was mostly composed of repeat content already purchased and broadcast on Pop TV and Kanal A. There was also an attempt to use less-attractive content, purchased in packages from studios, that did not fit into the schedules of Pop TV and Kanal A. The lack of prime, original content was perceived as one of the main reasons for the service’s failure (however, starting in April 2013 channels Kino, Brio and Oto continued to be offered by cable operators).

#### **Low Level of Internet Penetration and the Growth of Mobile**

Other important issues are the level of internet penetration, users’ habits, and their related spending habits. In most countries in the CEE region, including those that are members of the European Union, internet penetration remains low compared to the EU average. It is most often concentrated in larger urban areas. Furthermore, better educated populations, living in cities and with greater spending power, are more interesting for advertisers, service providers, or producers of different media-related products.

However, in most CEE countries this means their already small markets become even smaller and more fragmented, and thus less relevant and less interesting for service providers, advertisers, media companies and media producers. The fragmentation of small national markets due to the digital divide and its underlying demographic characteristics thus has serious economic consequences for the potential development of new services and products, not to mention the potential survival of legacy media and services.

<sup>5</sup> Milosavljević, M., and Bašić-Hrvatini, S. (2000), Who will control the controllers?, in Lees, T., Ralph, S., and Brown, J.L. (eds.), Is

regulation still an option in a digital universe? (current debates in broadcasting, no. 9), Luton, University of Luton Press, pp. 253-257.

<sup>6</sup> See, for example, Telemach: <https://telemach.si>.

At the same time, the lack of economies of scale is also seen in digital markets. Media publishers need to work hard at developing the UX and UI (User eXperience and User Interface) of their offerings. However, this is only possible (i.e. economically viable) in markets that offer high enough potential returns, and small markets lack the economies of scale needed for the development of particular digital UX and UIs. This is already an issue in economically stronger countries such as Finland. “As a small market and a small linguistic area, Finland also places its own restrictions when it comes to pioneering applications and ideas. (...) The small linguistic area means that innovations do not have the same user potential as they would get in a larger area.” (Lehtisaari et al, 2012: 46)

The patterns of media consumption will, of course, develop and change with the proliferation of new platforms, devices and technologies. However, certain patterns and habits will only change over many years, not overnight.

### The New Role of (Media) Policy and Politics

Past research has shown that market-based media financing is sustainable only in larger countries (for example, Lowenstein and Merrill, 1990),<sup>7</sup> and even countries with a strong GDP, positive trends in advertising revenue, and technologically advanced infrastructure face important market limitations (e.g. small populations and language barriers) with scepticism and concern (see Lehtisaari et al, 2012). In CEE, where most of the factors listed at the beginning of this chapter severely limit the economic potential of (new) media projects and entrepreneurship, it seems that a market-based model for media is even less sustainable. It is, for the most part, only sustainable in catch-all media such as general television channels with national reach, strong investments, and stable ownership (for example, Pop TV in Slovenia). However, these same media are also blamed and attacked as “the biggest evil in the Slovenian media market”,<sup>8</sup> mostly because of their market power.

Most of the other media, including previously very profitable major newspapers (such as Delo and Dnevnik in Slovenia), have in the last few years seen dramatic falls in circulation and profitability. Furthermore, web-only sites that are not connected to any legacy media have so far not reached the kind of revenues that would provide them with a stable financial footing. Mergers are one of the classic responses: see, for example, the recent takeover of Nova TV in Croatia by telecom group United Group / KKR (which is also attempting to take over the largest Slovenian commercial broadcaster Pro Plus / Pop TV / Kanal A), or the merger between the two Slovenian

regional daily newspapers Dnevnik and Večer in July 2018.

It seems, therefore, that market-only media will have an increasingly difficult time in the following years to maintain their levels of production and employment. As such, they will need financial support, be it private or public, to stay viable.

As for support coming from the private sector, in the Western Balkans and CEE this is still very scarce. Regional millionaires are often not willing to invest in the media. Perhaps they are not aware of the public interest or, conversely, they are aware of the importance and influence of the media but then view and use media ownership as a tool to pursue personal business interests and/or help political friends and allies. Philanthropic investments in the media as a public responsibility for the richest members of society – as frequently seen in Western Europe or the United States – is not as common in the region.

On the other hand, foreign donors are not as interested in the region as some parts have already joined the EU, and others are either in the process of accession or are seen as less relevant or urgent than other parts of Eastern Europe or the world. Foreign donors are largely shifting their assistance from CEE towards the Middle East or other areas (such as South Sudan). At the same time, the region is not seen as adequately influential or prestigious to be relevant to, for example, the Russian, Indian or Chinese billionaires who sometimes invest in media in other, more ‘prestigious’ countries, such as the United Kingdom, in order to enhance their public profile. The interest from such investors is mostly geo-political: see, for example, the 2017 purchase by Chinese investors of a regional television station in Maribor, Slovenia called RTS24; and by Hungarian investors in politically-backed Slovenian television station Nova24 and magazines Demokracija and Skandal24 in 2018.<sup>9</sup>

At the same time, there is no strong push to develop alternative models of financing, such as charitable foundations or consortiums founded by workers. A specific, small-scale example of such a consortium emerged in Slovenia when a free daily newspaper, Žurnal24, folded in May 2014. After years of losses, Austrian owner Styria decided to close down all of its editions: daily, weekly and online. However, after a few months a group of former employees and contributors decided to try again, this time with only a website, and has – with permission from Styria – revived Žurnal24 online. They are now attempting to maintain enough web traffic to attract sufficient advertising revenue and ensure their survival.

<sup>7</sup> Lowenstein, R.L., and Merrill, J.C. (1990), *Macromedia: Mission, Message, and Morality*, New York, Longman.

<sup>8</sup> Biščak, J. (2015), Zakaj je POP TV največje zlo na medijskem trgu (Why POP TV is the biggest evil on the media market), Reporter, 21 June 2015. Available at: <https://reporter.si/clanek/tiskana/zakaj-je->

[pop-tv-najvecje-zlo-na-medijskem-trgu-467695](https://reporter.si/clanek/tiskana/zakaj-je-). (Accessed: 22 June 2015).

<sup>9</sup> Kingsley, P. (4 June 2018), Safe in Hungary, Viktor Orban Pushes his Message Across Europe, The New York Times. Available at: <https://www.nytimes.com/2018/06/04/world/europe/viktor-orban-media-slovenia.html> (Accessed: 11 August 2018).



However, this is a rare example of such an endeavour. Again, the situation in the region is not entirely unique when compared to, for example, Western Europe. In many countries new models of financing are only slowly starting to take-off or develop, and still largely lack the long-term results that would prove their viability. Once again, there are similarities to other, smaller countries, particularly in Scandinavia; in Finland, for example, many local experts and professionals “do not seem to believe that foundations could be a vital model for financing Finnish journalism, since they do not think that Finnish foundations could secure the basics of independent journalism” (Lehtisaari et al, 2012: 51).

On the other hand, for most of the media in the region, the promises of a new era of market dominance and market-based economy, which was supposed to overthrow the political paternalistic model of financing media of the 1980s and earlier, have remained unfulfilled. The 2008 economic crisis on one hand and digital disruption on the other have demonstrated the fragility of media markets in CEE, and have emphasized the important role of the state and state interventionism as the only possible solution for maintaining a relatively diverse media environment. The return of the state, however, also severely limits the potential of the media in the region to become at least approximately independent in terms of political pressure and political influence. State intervention will probably help maintain a larger number of media companies in each country – however, this does not necessarily help to maintain the independence, plurality, and diversity of views and content in those media that survive. In this regard, the important role of (party) politics in sustaining the media ecosystem remains relevant in much the same way that it was in the Western Balkans more than 130 years ago.<sup>10</sup>

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<sup>10</sup> Jesenko, J. (1884), *Časnikarstvo in naši časniki* (Newspapership and our newspapers), Ljubljana, Narodna Tiskarna.



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# CURBING POLITICAL INFLUENCE ON ANTI-CORRUPTION AGENCIES: THE CASE OF ALBANIA

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## National Context

There is a general understanding among the Albanian public as well as national and international institutions that corruption remains endemic in Albania's governance and socio-political culture.

Regrettably, no genuine efforts have been made to date to mitigate corruption risks. Rather, the tendency to control all government and anti-corruption institutions has increased during the last decade by dictating the appointment of their leaders. Public discourse on corruption has always been either fully dominated by politics or met with social indifference and passivity because of a lack of trust in governance and institutions.

Corruption and fraud undermine the potential impact of any reform and, ultimately, the efficient use of public resources for effective service delivery to citizens. Weaknesses exist in the overall institutional set-up, a highly complex legislative framework, deficient human resources and managerial accountability, and in the lack of cooperation among law enforcement agencies. The high level of corruption results in a low level of public trust in public administration and the judiciary.

In a study on Albania, Harald W. Mathisen argues that “the international community is faced with many endemically corrupt societies where anti-corruption strategies fail to bring any meaningful progress as they do not address the fundamental problem, i.e. the lack of political will of senior government officials in corrupt networks”<sup>1</sup>. This conclusion is shared by each and every one of us – either in the government or civil society, employed or jobless, rich or poor. For a considerable number of people, including the youth, widespread corruption often becomes a substantiated argument for leaving the country.

The handling of charges for corruption and misuse of public funds by political leaders follow a well-known formula. Political leaders or groups substantiate their arguments against these charges by citing similar charges previously brought against their political opponents. The justice system has failed to arrest any ‘big fish’. No serious policies or actions have been undertaken to date to adequately, comprehensively, and sustainably respond to the challenges of strengthening the institutional framework to prevent and fight corruption.

A lack of trust in political parties, the judiciary, parliament and government, as well as the politically dominated anti-corruption institutions and instruments in place at the national and local levels, do not allow for participatory, citizen-driven anti-corruption processes. Record-low public trust is one of the main implications of the meager results produced by current anti-corruption efforts. The level of trust in the ability to effectively fight

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<sup>1</sup> Mathisen, H.W. (2003), Donor roles in face of endemic corruption-Albania in the policy debate, Bergen, U4 Reports. Available at:

<http://www.cmi.no/publications/file/2960-donor-roles-in-face-of-endemic-corruption-albania.pdf> (Accessed: 15 August 2018).

corruption in Albania is the lowest in the region. Consequently citizens, civil society actors, and the business community are generally inactive and have limited interaction with public institutions.

#### **Experiences and Challenges – Legislation, Institutions, Implementation**

Governments of various political coalitions have made efforts to develop policies and set up relevant institutions to fight corruption since 2005. The 2007-2013 and 2015-2020 anti-corruption strategies, and their corresponding action plans, were developed with international assistance.

In 2009, an Internal Control and Anti-Corruption Department was established within the Prime Minister's Office to address corruption in public institutions. This structure is still operational, although it has been downsized to a unit with inadequate human resources. In September 2013, the new Socialist Party-led coalition government assigned the duties of the National Coordinator against Corruption (NCAC) to the Minister of State for Local Issues. This duty was then transferred again in September 2017, this time to the Minister of Justice.

Some common characteristics of all the national anti-corruption authorities include scarce human resources (1-5 staff) and insufficient financial means to carry out their duties. Placed under the leadership of different ministries, the technical staff of the office of the NCAC are often assigned several other additional duties unrelated to their anti-corruption mandate. In such circumstances, it is next to impossible to speak of institutional legitimacy, since the office of the NCAC does not feature any of the preconditions of legitimacy, such as broad political support, powers, resources, independence, and accountability.

Indeed, it is debatable whether the NCAC can be properly called an institution. Anti-corruption has rather been one of several functions of the Minister of State for Local Affairs or Minister of Justice. To date, no political or public discussions of how an anti-corruption authority could better serve its purpose have ever been observed in the country. The fight against corruption has been treated as a priority linked with the executive authority of the head of the government. This is becoming more and more visible (as seen with a recent Government Decision, explained below) because all government anti-corruption structures and institutions are controlled and accountable to the Prime Minister alone.

It is interesting to compare the experience of the Albanian NCAC with the experiences of other Western Balkan countries. Each of these countries employ different

models, but they do have some core elements in common: independence from the executive branch, in some cases a system of checks and balances on powers to ensure independence, etc. The Albanian model is the outlier when compared with other WB anti-corruption authorities, and lags behind its peers in terms of human and financial resources.

Vested with the NCAC's powers, the Minister of Justice is currently leading two other central government structures established in April 2018 by a decision of the Council of Ministers:

- 1) The Coordination Committee for the Implementation of the National Cross-Cutting Strategy against Corruption 2015-2020; Deputy Ministers are members of this committee.
- 2) The Anti-Corruption Task Force, established with the purpose of conducting inter-institutional inspections according to the Action Plan 2018-2020. This task force is composed of senior level officials from four different departments within the Office of the Prime Minister.

This Council of Ministers' Decision requires the Agency for Dialogue and Co-Governance established within the Prime Minister's Office, as well as the Internal Auditing Units (IAU) of each governmental institution, to support the work of the Anti-Corruption Task Force.

Apparently, this makes the implementation of their legislation more complex and adds to the existing challenges currently confronting the Internal Auditing Units. In one of its policy briefs, the Institute for Democracy and Mediation (IDM) pointed out that "malpractices and corruption go unobserved mainly because, in practice, IAUs are not independent"<sup>2</sup>.

This system of overregulated governmental structures is often burdened with duplicate and overlapping tasks and responsibilities among government institutions and agencies, resulting in a vagueness and incoherence in their anti-corruption policies and efforts.<sup>3</sup> On the other hand, the NCAC's task to coordinate with other independent institutions of the sector does not seem to be relatively easy given its ability and capacity.

In addition, by possessing a majority in Parliament, the government has managed to maintain control of its own 'supervisors' by appointing heads of oversight and independent institutions through a simple majority vote. The General Prosecutor, the Inspector General of the High Inspectorate for the Declaration and Audit of Assets and Conflict of Interest (now amended, see below), the Head of the Supreme Audit Institution (SAI), even the President of the Republic, are voted into office by a simple

<sup>2</sup> Qirjazi, R. (2017), Fighting Corruption in Albania: Improving the Efficiency of Internal Auditing, Institute for Democracy and Mediation. Available at: <http://idmalbania.org/fighting-corruption-in-albania-improving-the-efficiency-of-internal-auditing/> (Accessed 16 August 2018).

<sup>3</sup> Transparency International (2016), National Integrity System Assessment Albania 2016. Available at: [https://www.transparency.org/whatwedo/publication/national\\_integrity\\_system\\_assessment\\_albania\\_2016](https://www.transparency.org/whatwedo/publication/national_integrity_system_assessment_albania_2016) (Accessed: 16 August 2018).

majority vote. In this way, the law rarely guarantees the full independence of these institutions to check and balance political powers.

The legislation governing the Supreme Audit Institution is adopted using qualified majority voting, and provides for the SAI's operational independence. However, the SAI's credibility is often questioned by various government authorities any time they have to challenge SAI audit reports. Thus, the Supreme Audit Institution is constantly exposed to political pressure, and its recommendations or sanctions are only ever partially considered. According to Transparency International, the Supreme Audit Institution lacks the capacity to force audited public institutions to enforce its recommendations.<sup>4</sup>

Although there is no evidence yet of the efficiency of Parliamentary Decision No. 49/2017 "for the establishment of systematic monitoring and implementing mechanism of independent constitutional institutions", there are expectations that the parliament will take a more proactive role, which in turn would enhance the credibility and performance of the SAI. The Supreme Audit Institution has requested that Parliament take a number of measures to improve its access and authority to audit various sensitive sectors. This request seems to have fallen on deaf ears, as Parliament has failed to respond to another SAI request to set up an audit mission on SAI performance. This may quite well be an indication of the parliamentary majority's agenda to marginalize the SAI's professional performance.

In April 2017, the Parliament approved an important legal amendment to elect the Inspector General of the High Inspectorate of the Declaration and Audit of Assets and Conflict of Interest (HIDAACI) through qualified majority voting for a nonrenewable seven-year office term. This comes after the adoption of the justice reform package in which an important role in the vetting process was assigned to HIDAACI. This legal amendment may be considered an important development in ensuring more independence from political interference, because in local political culture the role of the individual leading an institution is often a "stronger determinant of independence than legal provisions"<sup>5</sup>.

HIDAACI is the main institution responsible for the implementation of the Law on Whistleblowers adopted in 2016. While it expanded the normative framework of anti-corruption as a preventive tool for alleged acts/practices of corruption in the public and private sectors, implementation of this law will nevertheless remain a challenge.

Because of its mandate as an independent institution charged with the audit of asset declarations and the conflicts of interest of elected and other officials, HIDAACI might be in a better position to perform as an overall multi-purpose anti-corruption agency, and better able to

coordinate and avoid a fragmentation of institutions in the fight against corruption.

The Parliament of Albania has adopted international conventions and a considerable number of laws related to the fight against corruption and good governance. The quality and enforceability of legislation, together with a guarantee of institutional independence and the durability of the institutions in the sector, should become top priorities for each political grouping within Parliament. Civil society will also have to enhance its communication with the Parliament regarding these priorities.

If it seeks to demonstrate that it is not under tight control of the government, Parliament should make better use of the work of independent institutions, such as the SAI, HIDAACI, and the Ombudsman, to hold the government to account and ameliorate the entire system to improve governance. This would also uphold the role of the Parliament in assessing the integrity of anti-corruption legislation. It should be noted, however, that the entire national practice of an anti-corruption institution contrasts with the generally accepted principles of good governance for Anti-Corruption Agencies (ACA):

- *A broad and clear mandate:* ACAs should have a clear mandate to tackle corruption through prevention, education, raising awareness, investigation, and prosecution.
- *Legally guaranteed permanence:* established through a stable legal framework, such as a constitution or special law, to ensure the permanence of the institution.
- *Neutral appointment of ACA heads:* through a process that ensures their independence, impartiality, neutrality, integrity, apolitical stance, and competence.
- *Removal of ACA heads and leadership continuity:* their heads should have security of tenure, and may only be dismissed through a procedure established by law.
- *Ethical conduct and governance:* ACAs ought to adopt codes of conduct that set high standards of ethical conduct for their employees and have a robust and enforceable compliance regime.

It should become clear to all decision makers in the country, including the opposition, that the continuing lack of a specialized, independent anti-corruption institution with sufficient human and independent financial resources will render it difficult for the country to meet the required standards and challenges.

<sup>4</sup> Transparency International (2016).

<sup>5</sup> Transparency International (2016).

Even comprehensive institutional efforts against corruption are prone to fail without the active involvement of civil society and the private sector, which together seem to be quite skeptical of any progress in the fight against corruption. To illustrate this, I would like to quote several contributors from the NGO sector, saying that “ours is a society where you can hardly find one single model to lead any sector that can serve as an example for the others”<sup>6</sup>.

An IDM assessment in 2016 gathered the feedback of close to 300 contributors from civil society and the business sector nationally. It rationalized that the current structure of the NCAC is in a conflict of interest, given that this structure is part of the executive branch and therefore politically controlled at the national and local levels. This contributes to the lack of trust on the part of the society in the anti-corruption processes.<sup>7</sup>

### Support and Role of the EU

There is no doubt that the role of the international community is very important for Albania as long as the country demonstrates a full commitment towards EU accession. In April 2018, the EU Commission recommended that accession negotiations be opened with Albania, while the Council underlined the critical need for Albania to deliver further tangible results in the fight against corruption at all levels. Nevertheless, advancement along the membership process remains conditional upon maintaining and deepening progress on key priorities, including fighting corruption.

But, evidence shows that reports do not say much to Albanians. Every time, either through EU Progress Reports or some other international instrument that assesses the country’s performance, they look upon such reports as each party doing its share, i.e. internationals mentioning some progress and issuing a to-do list. Locals, on the other hand, would read the same report through the lens of party politics. This lasts for a few days and then everyone goes back to the same daily routine.

It should be interesting to assess the progress (if any), judging upon the European Commission 2015 Progress Report for Albania. This report identified “a number of remaining challenges, such as increasing the independence of institutions in charge of the fight against corruption, which are still vulnerable to political pressure and other undue influence, and ensuring a solid track record of investigations, prosecutions and convictions”<sup>8</sup>.

According to a 2016 report drafted by EU Court of Auditors, Albania has performed poorly in implementing the EU Assistance Program. This report states that EU

anti-corruption projects implemented in Albania failed to deliver any results: “Not only did it fail to deliver on measurable targets, but its sustainability was also affected by the fact that the national anti-corruption coordinator was not independent and coordinated policies at national and local level without adequate budget or staff”<sup>9</sup>.

Although none of these findings were addressed, the EU has continued financial assistance to the country for anti-corruption projects. In November of the same year (2016), the Neighborhood and Enlargement Negotiations Director General announced in Albania another “€10 million of financial support in the pipeline for the implementation of the cross-cutting strategy against corruption.”<sup>10</sup>

### Recommendations

The challenge of fighting corruption in Albania should acquire greater importance and be made the responsibility of Parliament. This would ensure a more inclusive approach by putting participatory anti-corruption mechanisms in place to make the Albanian society more sensitive, contributive and supportive of anti-corruption efforts.

Most countries have established Anti-Corruption Agencies based on national priorities, legislation, context, and other performance indicators. This paper is not opting for a particular model, but mostly promoting the need to rigidly apply globally accepted principles of good governance to an effective anti-corruption agency. The recommendations provided below reflect IDM’s opinions of what might work in Albania.

The role of the Parliament in ensuring the independence and integrity of an effective National Anti-Corruption Authority is indispensable. An Anti-Corruption Agency should have legally guaranteed independence and permanence and be established on a solid legal framework adopted by qualified majority. It is quite advisable, for all the reasons mentioned in this paper, that such an agency might also be a constitutional institution. The Parliament should also consider a comprehensive review of all anti-corruption legislation in order to overcome fragmentation and improve cooperation among different institutions.

HIDAACI is closer than any other authority to being transformed into an Anti-Corruption Agency. In order to move in this direction, this institution should achieve the main requirements of legitimacy, especially as it is performing at a national scale and trying to involve citizens as much as possible. Public accountability, communi-

<sup>6</sup> Report on Local Forum Consultations with CSOs and Business Community, 2016 IDM (unpublished).

<sup>7</sup> Ibid.

<sup>8</sup> European Commission (2015), Albania 2015 Report, Brussels, Chapter 32 (Financial Control).

<sup>9</sup> European Court of Auditors (2016), EU pre-accession assistance for strengthening administrative capacity in the Western Balkans. At: [https://www.eca.europa.eu/Lists/ECADocuments/SR16\\_21/SR\\_WESTERN-BALKANS\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR16_21/SR_WESTERN-BALKANS_EN.pdf) (Accessed: 17 August 2018).

<sup>10</sup> NEAR’s Director General Christian Danielsson on anti-corruption at Tirana Uninvestiy. 16/11/2016.



cation, and oversight are all important elements of citizen outreach.

The government should support a national anti-corruption authority that is independent and has sound institutional and financial capacities. The National Anti-Corruption Authority should have a clear mission and a mandate to tackle corruption through prevention, education, raising awareness, investigation, and prosecution.

The office of the Anti-Corruption Authority should be ensured independence, permanence, and financial and human resources that enable smooth operational performance, even if a model linked with the executive branch is employed (as is currently the case of Albania). In this case, a system of checks and balances should be established to ensure the neutral appointment and dismissal of the head of this office. The head of the Anti-Corruption Authority should have a secured tenure, and can only be dismissed through a procedure established by law.

In both cases, it is advisable that the Parliament establish a special and permanent anti-corruption structure led by members of parliament, civil society, academia, unions, and other private sector interest groups. These should by all means constitute a majority of this structure. Its mission should include monitoring implementation, commissioning research, assessing cooperation among independent anti-corruption agencies, and formulating policy recommendations for Parliament and other institutions. This structure should also include objectives to ensure convergence of the fragmented work of different anti-corruption and law enforcement agencies.

International bodies, including the EU but also its member states, might have been taught that the most effective language for the Albanian local politics is calling things by their name. Otherwise, both Albania and the EU will lose more time and opportunity trying to adjust their programs to fit with Albania's existing governance models, which are far removed from the principles of good governance. The EU must highlight all democratic deficiencies and deviations from good practice, otherwise assistance will seem like a ticking-the-box exercise. I find it difficult to understand the impact of the expertise and knowhow provided by international experts given that, in Albania, the legislative framework of the anti-corruption office is politically dominated and controlled, and are operating with exceptionally limited human and financial resources. The approval of the Anti-Corruption Action Plan 2018-2020 by the Government of Albania in April 2018 without any prior consultation with other groups, including civil society, is the most recent example of an anti-corruption process dominated and controlled by the government.

The EU should clearly outline steps and benchmarks that Albania should meet to reform its legal and institutional infrastructure in the fight against corruption, rather than simply adjusting its financial and knowhow to Albania's existing anti-corruption framework. This would not

serve the purposes and goals of the EU, and even less so those of Albania.

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# TURNING THE TIDE: POLITICAL INFLUENCE AND INDEPENDENT INSTITUTIONS IN SERBIA

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The countries of Central and Eastern Europe have been experiencing democratic backsliding in recent years. Democratically elected governments are increasingly centralizing power and dismantling systems of checks and balances. This is especially true for the judiciary and other independent institutions. The latter have been introduced in the past decades in order to limit the power of the executive in emerging democracies. However, as executive branches increasingly act to weaken external controls, the values that independent institutions were meant to protect – from human rights to transparency and freedom of the press – are also becoming more vulnerable, which in turn is enabling state capture in many of these countries. This is why the centralization of power in the executive is increasingly a threat to democracy itself, and warrants our utmost attention.

In this paper we analyze the state of independent institutions in Serbia, hoping it will shed light on shared problems and offer some solutions for the region. Independent institutions and regulatory bodies have proliferated in Serbia since 2000. They were designed as key partners of Parliament in exercising control over executive power and administrative bodies. Most of these institutional innovations were direct consequences of European Union leverage. For example, the 2009 founding of the Anti-Corruption Agency was encouraged by the EU and tied to the introduction of a visa-free regime for Serbian citizens, which was hailed as a big success by the Serbian government.<sup>2</sup>

However, there has always been some friction between the formal assertion of independence and the informal attempts of the government to maintain control over these bodies. This is perhaps best illustrated by the case of the Serbian Broadcasting Agency. Formed early on, in 2003, in order to remove regulation of the media from the executive, it was immediately struck with the resignations of three Board members, nominated by non-governmental actors, citing the government's attempts to ensure the loyalty of a majority of the Board.<sup>3</sup>

The struggle of these institutions to establish their independence from the executive has been constant. However, it seems that the period of proliferation ended in 2012 when the ruling Democratic Party was replaced by the Serbian Progressive Party, which then started a slow trend of suppressing institutional independence. In this paper we rely on the evidence produced by these institutions to test if this assumption holds.

<sup>1</sup> This paper presents evidence collected through a larger project "The Map of Power and Governance" funded by the Kingdom of Netherlands within the "Who is in My Government – Citizens in Power" project, implemented by the Centre for Research, Transparency and Accountability (CRTA) between December 2017 and August 2018. The team responsible for data collection, analysis, peer-review, and quality control were: Aleksandra Ivanković, Ivan Radojević, Tamara

Branković, Tara Tepavac, Vladana Jaraković and Vujo Ilić. The complete study will be available by the end of 2018 at [www.crt.rs](http://www.crt.rs).

<sup>2</sup> B92 (30 November 2009), EU lifts visa restrictions for Serbia. Available at: <https://bit.ly/2nOUkLs> (Accessed: 22 August 2018).

<sup>3</sup> The agency transformed into the Regulatory Authority of Electronic Media in 2014 and is analyzed in more detail further in the text.

## Research Design

Political influence is notoriously hard to explore, one could say that it is one of the “black boxes” of the social sciences. We treated political influence as a constraining factor on the independence of these institutions, and we approached it in the following way. We selected six independent institutions, based on our assessment of their importance for the democratic process, three institutions headed by a single official: the Ombudsman, the Commissioner for the Protection of Equality, and the Commissioner for Information of Public Importance and Personal Data Protection; and three run by collective bodies: the State Audit Institution, the Anti-Corruption Agency, and the Regulatory Authority of Electronic Media.

Since for this phase of our research we treated political influence as a “black box”, we collected data on what can be observed: longitudinal data from official sources on the inputs and outputs of these institutions, namely the appointments, funding, and endorsements of their reports by the National Assembly (Parliament) on the one hand, and their activities on the other. As we could follow the changes over time, we wanted to see whether there is any relationship between the inputs and the outputs, and if there is, then could this change be related to political influence. Finally, it should be noted that there are significant differences between these six institutions, and in no point in this paper do we try to compare them. What we do compare, though, is their outputs across different points in time.

## Findings – Inputs

The Serbian Constitution recognizes only two of these independent institutions: the Ombudsman and the State Audit Institution.<sup>4</sup> Parliament not only has wide influence on all aspects of the work of the six independent institutions considered here, but in the case of the four institutions not defined by the Constitution, it can also vote to dissolve the institutions at any time. For all six institutions, Parliament appoints members of their overseeing entities, decides on the scope and instruments of their activity, endorses their findings and monitors the implementation of their recommendations by the government.

## Appointments

The way officials are appointed, as well as their tenure, differs from one institution to another. In some cases, they are appointed upon the nomination of a parliamentary committee, whereas in others the nominations are shared between governmental and non-governmental bodies. The length of the tenure also differs, ranging from four to seven years. Different establishing years and tenure length has led to different lengths of time in which

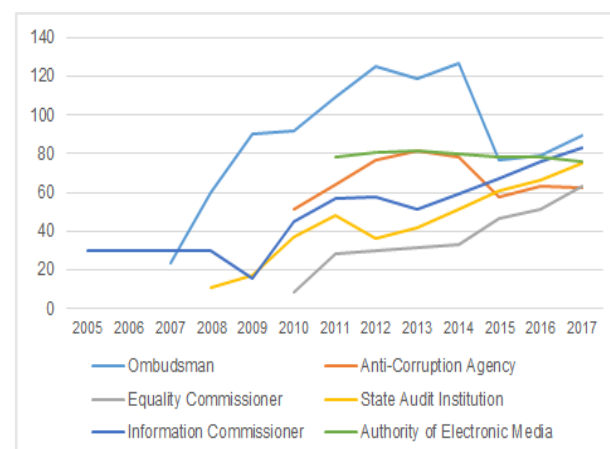
officials appointed before 2012 were still in office after the change of the parliamentary majority.

Members of the State Audit Institution Council were re-appointed as early as 2012; the Anti-Corruption Agency Board had five members appointed in 2013, but a clear new majority was established only in 2015; the new Commissioner for Protection of Equality was appointed in 2015; the majority on the Regulatory Authority of Electronic Media Board changed in 2016; the new Ombudsman was appointed in 2017; and the Commissioner for Information of Public Importance and Personal Data Protection is the only official appointed before 2012 still in office, until the end of 2018. During these periods, the officials appointed by the previous government were supposed to oversee the work of another, which means that at least in this aspect the political influence could have been absent from their work.

## Number of Employees

Parliament decides on the means the independent institutions can rely upon in pursuing their objectives. Almost all of the institutions had problems with office space, insufficient budgets, and the number of employees. However, we chose to look at the number of employees per year as an indicator comparable both across time and across institutions. We were interested in how many employees institutions had in each year, compared to how many employees were expected based on the systematization plan agreed on by Parliament. With a single exception of the Ombudsman between 2011 and 2014, no independent institution has ever reached its planned number of employees.<sup>5</sup> Graph 1 shows a general trend of increases before 2012, stagnation between 2012 and 2014, and a slow rise from 2015 when most of the officials were re-appointed by the new government.

Graph 1: Ratio of actual versus planned employment for the six institutions (percent)



<sup>4</sup> The Constitution also defines the roles of the Governor of the National Bank, the High Judicial Council and the Public Prosecutor as independent bodies.

<sup>5</sup> The increased number of employees in the Ombudsman's office was the result of temporary hires intended to deal with an increase in the number of incoming cases.

## Plenary Session Discussions

The institutions send annual reports to Parliament which can discuss them in committees and in plenary sessions. Parliament discussed the reports of five out of six institutions only in the years 2011, 2013 and 2014, while reports from the Regulatory Authority of Electronic Media have never been discussed in a plenary session.<sup>6</sup> In all other years, if the reports were discussed, they were discussed only in the committees.

In 2013 and 2014 Parliament requested that the government implement the independent institutions' recommendations, and to regularly report back on its progress.<sup>7</sup> In 2014 the government set up reporting mechanisms in accordance with this request,<sup>8</sup> but as far as we have been informed, the report was never made public and Parliament never again discussed the report of any independent institution in a plenary session.

What we can conclude from this brief overview is that independent institutions in general lack the means and support necessary to efficiently execute their tasks. This was especially the case in the first years after the 2012 change of government, when an increased workload for the institutions was not followed by increases in the workforce. However, in several cases an increase in the number of employees followed appointments at the head of the institutions.

The oversight roles of both Parliament and the independent institutions depend on their mutual cooperation, partly resting on the endorsement of recommendations, which are regulated by the rules of procedure.<sup>9</sup> This mechanism was working to some extent within a very short period of time, between 2011 and 2014, with a gap during the 2012 election year. The discussion of the reports in the plenary sessions in 2013-2014 shows us that the newly formed majority in Parliament wanted to signal that it would conform to democratic standards. Perhaps they even wanted to show that they were 'more democratic' than the previous majority. However, this short-term enthusiasm ended after 2014, and Parliament became a stage for debates in which independent institutions were undermined instead of supported.<sup>10</sup>

Finally, and this will be discussed in more detail in the next passages, the appointment of key figures in the independent institutions stopped being consensual after 2012, as indicated by voting patterns. Parliament also deliberately prolonged appointments of non-governmental nominees and was far quicker in appointing government nominated officials. In the following part of the paper we will show how these inputs are related to the activities of the institutions.

<sup>6</sup> REM has published annual reports since its founding, but only after the adoption of the new Law on Electronic Media in 2014 was it also obliged to submit these to Parliament. Nevertheless, as with all other reports since then REM reports have still not been discussed in a plenary session.

## Findings – Outputs

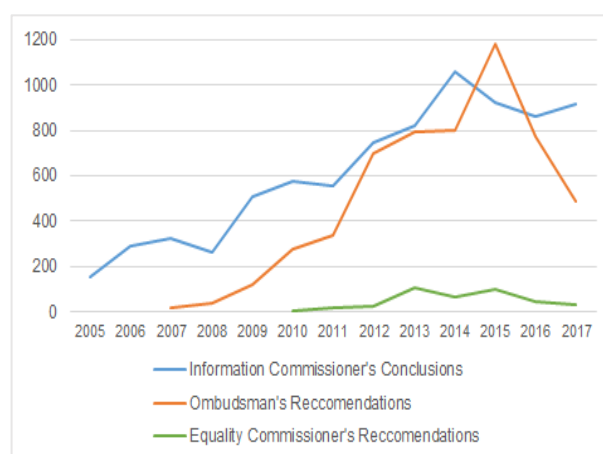
Here we will present our main findings about the work of the institutions, by taking a separate look at each, as every institution has a different set of outputs. We will start with the institutions headed by individual officials and continue with the collectively-led bodies.

### Ombudsman

The Protector of Citizens (Ombudsman) is an independent institution introduced in 2005, with its status confirmed by the 2006 Constitution. The role of the Ombudsman was designed to safeguard and promote citizens' rights and to control the legality and regularity of the state administration. The first Ombudsman, Saša Janković, was appointed after the Constitution was enacted, in 2007, and reappointed in 2012 with a large margin of votes (167 out of 170 present). Towards the end of his tenure he resigned in order to run in the 2017 presidential elections. After his resignation, a new Ombudsman, Zoran Pašalić, was appointed in 2017 (with 142 votes for and 20 votes against).

Analyzing data from annual reports, we established that there was a steady increase in the number of cases brought before the Ombudsman, right until his political role became more prominent and he entered into confrontation with the executive. This rise of cases was followed by an increase in the number of recommendations released by the Ombudsman. The recommendations almost doubled in 2015 compared to 2012 (Graph 2). However, the number of recommendations sharply declined in 2016 and 2017, falling to a pre-2012 level in coincidence with the change of officials.

Graph 2: Main outputs of three independent institutions



<sup>7</sup> Conclusions of the National Assembly (1 July 2013), RS-36; and (5 June 2014), RS-39.

<sup>8</sup> Conclusion of the Government (18 July 2014), 021-7728/2014.

<sup>9</sup> National Assembly Rules of Procedure, Article 238.

<sup>10</sup> European Commission (2015), Serbia 2015 Report, Brussels. Available at: <https://bit.ly/2nRE7oU> (Accessed: 22 August 2018).

### Commissioner for Protection of Equality

The Commissioner for Protection of Equality is an independent authority established in 2009 on the basis of the Law on Prohibition of Discrimination, with the aim of preventing discrimination and protecting the equality of citizens. The first Commissioner, Nevena Petrušić, was appointed in 2010 for a five-year term, after some debate about her nomination.<sup>11</sup> Even though she was entitled to, she did not put up a nomination for a second term, so a new Commissioner, Brankica Janković, was appointed in 2015 after a 151-7 vote in the Parliament.

The Commissioner needed some time to establish its practice, and activity then peaked in the 2013-2015 period with a threefold number of recommendations compared to 2012. However, after the new Commissioner was appointed the activities declined and returned to 2012 levels (Graph 2). We also registered that the primary angle of the institution under the new Commissioner changed, from producing specific recommendations based on complaints, to producing hundreds of general recommendations to state institutions.

### Commissioner for Information of Public Importance

The Commissioner's mandate to protect and promote free access to information of public importance was established by the 2004 law, and extended to personal data protection by another law in 2008. The Commissioner, Rodoljub Šabić, was appointed by Parliament in 2004 for a seven-year term. His position was then verified after the new constitution was ratified, and he was reelected to another seven-year term in 2011, all three times without a single "no" vote in Parliament.

The Commissioner remains the only institution out of the six still headed by the official appointed before 2012. What we can observe is a constant rise in both citizen involvement with the Commissioner and his activity towards government institutions, which peaks around the period when the other two previously discussed institutions were experiencing declines. In 2017 citizens brought twice as many cases before the Commissioner compared to 2012. As well, the Commissioner's position in relation to government organs worsened. As the Commissioner has no legal instruments to enforce his conclusions in cases of non-compliance, he is entitled to request enforcement from the government. In the first three years after 2012 the Commissioner made 30 such requests, but in the next three years he made 128. There is no data available to suggest that the government has ever fulfilled any of these requests.

### State Audit Institution

The State Audit Institution (SAI) is an independent state authority responsible for auditing the use of public funds. It was founded in 2005 by law and further established through the Constitution. The institution is run by a five-member council which appoints the director. Council members are appointed for a five-year period, by a majority vote in Parliament, upon nomination by the Committee for Finances and Budget Control. The council was first established in 2007, and their terms ended right after the 2012 elections. Two members, including the President of the Council, were re-appointed as consensus candidates, and three new members were appointed by the new ruling coalition.

The SAI is organized into departments which audit, respectively: the state budget, local self-government, public enterprises, health and social services, and the National Bank and other public funds beneficiaries. Each year, the institution selects a sample of beneficiaries in each group and audits their financial reports. We wanted to see if there is any political bias in the selection of beneficiaries, and whether it changes over time. For this we analyzed the sampling in the departments responsible for local self-government and public enterprises.

The first thing we found is that the selection of local self-government does not suffer from any political bias. We collected data on the political control of municipalities, and then we calculated the probabilities of a municipality being selected for audit if it is controlled by a party other than the ruling one. We found that the odds were always practically the same, and that the findings of the audits are not harsher for the oppositional municipalities.

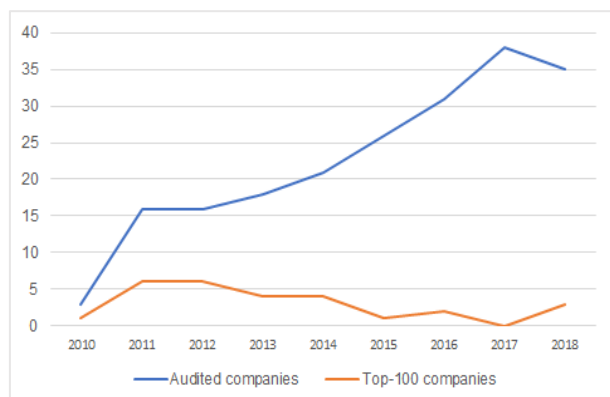
We also wanted to see if the SAI is avoiding politically sensitive public enterprises. We compared the public enterprises they sampled for audit since 2010 to the Business Registers Agency annual lists of "top 100" companies.<sup>12</sup> We found that even though the SAI audits more enterprises each year, the numbers of top-100 companies is falling, both in absolute and relative terms (Graph 3). This is especially true for top 20 companies, which the SAI audited 16 times between 2011 and 2014 but then only twice in the period between 2015 and 2018.

<sup>11</sup> The civil society organizations considered her to be a less qualified candidate than Goran Miletić, who had been nominated by the oppositional Liberal Democratic Party.

<sup>12</sup> We coded any company that was in the top 100 in one of the six categories: capital, income, net gain, net loss, total loss, and assets. The data for 2017 and 2018 is based on the most recent list of companies, from 2016.



Graph 3: State Audit Institution's sample of public enterprises



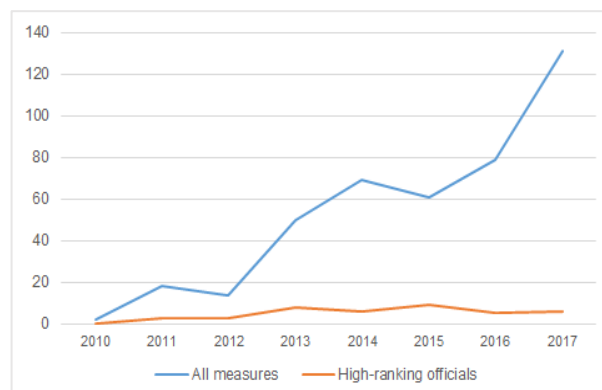
### Anti-Corruption Agency of Serbia

The Anti-Corruption Agency of Serbia (ACAS) was established in 2009 as an independent state authority, with the aim to tackle and prevent corruption.<sup>13</sup> The establishment of the Agency removed this responsibility from the executive government. However, the ACAS was ultimately designed to have a strong preventive role, and to rely significantly on cooperation with other public authorities.

The ACAS is headed by a board of nine members, nominated by different branches of the government and non-governmental bodies. The board has almost never worked at full capacity, to the point that it operated with only two members in 2017. This was mostly due to Parliament, which was reacting with urgency when appointing members nominated by government bodies, while delaying appointments of members nominated by non-governmental bodies. The Agency got five new members in 2013, but only after the end of the term of the member jointly nominated by the Ombudsman and Commissioner and with the appointment of a member nominated by the government in 2015 was there a clear majority of members who could have been politically influenced by the new majority.

We wanted to see if there were any changes in the work of the Agency in this period. We focused on the prevention of conflicts of interest, and two measures the Agency can take against these officials: the public announcement of violations of the law, and the public announcement of recommendations for dismissal.

Graph 4: Anti-Corruption Agency public measures regarding conflict of interest



The first thing our data shows is a rise in a number of measures. However, once we dug deeper, we found that a majority of public announcements relate to officials in education and at the local level of government (2/3 of announcements of violations of the law and 3/4 of all recommendations for dismissal). Only 10% of announcements of a violation, and as low as 3% of recommendations for dismissal, were directed at officials in the executive, legislative, judicial, or independent branches. When we further disaggregated the data, we established that both measures directed at officials on the national level had peaked before 2015, with only one recommendation for dismissal of an official at the national level in the last three years (Graph 4). Furthermore, when we looked at the time periods when these individuals were in office, we found that most of these officials were not appointed by the current ruling party or elected on their lists. Even though the number of measures is on the rise, the number of high-ranking public officials with ties to the ruling party that were targeted by the Agency for conflicts of interest is very low, with a tendency of decline.

### Regulatory Authority of Electronic Media

The Regulatory Authority of Electronic Media (REM) was established in 2002 as an independent regulatory body, with the aim to improve broadcasting policy and to ensure efficient implementation of broadcasting regulations. It was given wide authority, and its enabling legislation intended it to have functional independence. The idea was to remove the power to regulate media from the legislative or executive branches, and this was primarily to be done by setting up the REM Council.

Just like ACAS, the REM is also headed by a nine-member council which appoints the director. The council is appointed by Parliament, upon the nomination by different bodies and organizations, for the length of four

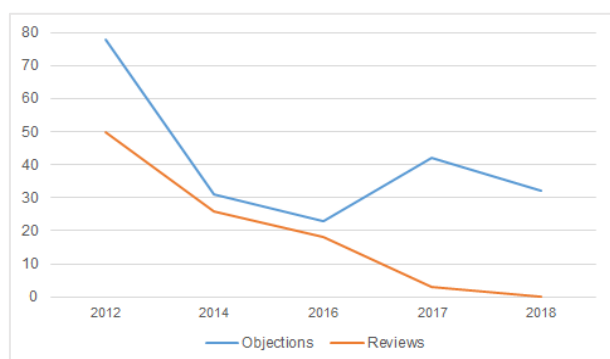
<sup>13</sup> ACAS was not the first institution in this field. The Anti-Corruption Council was founded in 2001 as an expert, advisory body of the

Government, which caused some friction regarding the overlap of the competencies.

years.<sup>14</sup> Until 2016 the majority of REM council members were appointed by the previous government. That year started with the end of terms for three members. This led to a 2:4 ratio of new to pre-existing members, which towards the end of the year had become 5:4. When the three additional members' terms ended in early 2017, they were not replaced, and together with the reelection of one member, this led to a 6:0 ratio for newly appointed members.

An important role of the REM is monitoring of electoral campaigns in order to ensure equal representation in the media. To do this, the REM was monitoring the campaigns for the 2008 and 2012 presidential, parliamentary and local elections, and the 2014 parliamentary and Belgrade local elections. For these elections, the REM was publishing periodic reports during the campaign, as well as final reports. However, the REM ceased publishing any reports for the 2016 parliamentary elections, the following 2017 presidential election, and 2018 Belgrade local elections. Another observable trend is the decline in the number of objections received during the campaign that the REM had reviewed (Graph 5). Since 2016, very few objections have been taken into consideration. The REM has issued only one measure based on these objections in 2016, and none since.

Graph 5: Review of objections received by the REM during election campaigns



## Conclusions

The oversight activities of the Ombudsman, the Commissioner for Protection of Equality, and the Commissioner for Information of Public Importance were increasing for several years. But after the new appointments, the numbers for the first and the second on this list started declining, indicating that the intensity of their scrutiny of the government was decreasing. The Commissioner for Information of Public Importance, however, continued to work with relatively unchanged intensity.

The Anti-Corruption Agency's public announcements about officials caught in conflicts of interest are

increasingly directed against officials at the lower levels of government, and their targeting of highly ranked officials is getting increasingly rare. The Regulatory Authority of Electronic Media had stopped monitoring an increasingly important aspect of democratic elections – equal media representation. We did not find political bias in the State Audit Institution's sampling of municipalities, but it seems that over time it is increasingly avoiding audits of large public companies that employ many voters of the current government.

We found that in most cases these changes were either simultaneous or followed new appointments in these institutions. This, coupled with the lack of resources allocated to the institutions, and the lack of cooperation and endorsement by Parliament and the government, leads us to a conclusion that the ruling majority in Serbia acts in many ways similar to other countries going through a phase of democratic backsliding: it is actively trying to make independent institution as harmless to their political agenda as possible, effectively removing constraints to the power of the executive.

In 2018, there will be a final new appointment at the Commissioner for Information of Public Importance, and we expect to see more of what we identified in this paper. However, we still hope there is a chance that the tide could be turned and that independent institutions could be brought back into the game. In order for that to happen, we offer several recommendations we identify as critical points that might safeguard the institutions' autonomy and independence.

## Recommendations

- 1) The existence of the most important independent institutions should be regulated by the Constitution. No simple parliamentary majority should be able to change the fundamental setup of the institutions.
- 2) Independent institutions' findings and recommendations should be discussed and promoted by the parliament, and the government should automatically and regularly report to the parliament about their implementation.
- 3) Appointment procedures should become more challenging than a simple parliamentary majority, ideally with a form of qualified majority which would lead to consensus candidates.
- 4) The nominations, for both individual and collective bodies, should be moved away from political parties and closer to civil society. Members of collective bodies nominated by actors further away from the executive and legislative bodies should have longer terms, not the other way around.

<sup>14</sup> Before the introduction of the new law, the tenure length varied depending on the nominating bodies. The tenure of council members nominated by the Parliament was the longest – six years; those nominated by the Autonomous Province of Vojvodina, university rectors,

and religious communities was five years; and the tenure of the remaining council members, those nominated by associations of media outlets and non-governmental organizations working on freedom of speech, was the shortest – four years.

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- 5) Officials appointed to run the institutions should be protected by the same immunity provisions as MPs, and should have longer tenures than MPs. The members of the collective bodies could be divided into groups which would be re-appointed at different times, so that a ruling majority cannot influence the appointment of all members at once.
  - 6) Independent institutions should have predictable funding that automatically increases with the workload and cannot be easily reduced by either a parliamentary majority or the Ministry of Finance.

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# DE-POLITICIZED ECONOMY THROUGH POST-CORRUPTIVE TRANSFORMATION

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Two decades after the end of the Balkan wars, the Euro-Atlantic stabilization approach to the region has prevented new conflicts, but also brought neither democratic governance nor economic prosperity. The region experiences fragile peace, fragile governments and fragile economies.

Good governance and accountability are still missing in the region. That is why, last year, state capture was noted by the EU, urging all Balkans countries towards more reform.

State capture does not only mean capture by the state of the judiciary and state administrations, but of the economy as well. The private sector is still depending heavily on the state, and business suffers from political interference.

Constitutionally, economic freedom is guaranteed, and legally the state's influence in private business is prohibited. However, in reality public tenders still remain a hidden instrument of institutional corruption. If in one country of the region misuse of tenders is approaching 20%, it shows how much Balkan "inventiveness" has bypassed Brussels' procurement rules.

In a situation where, regionally, the state is the biggest employer and the key financial source for big business projects, the private sector remains dependent on politics. Unfortunately, this influences the mentality of young generations, who if not able to find a job in public administration, leave the country. Every third young respondent in all surveys in the region declared that they will leave the country. Further, in all surveys with our students about their future plans, a majority of them declared the state administration as their preferred employer; only very few of them want to find a job in the private sector.

In Macedonia, this is due to a decade of politically dominated economy, because of a combination of interventionist policy, and preferable/discriminatory measures. Hopefully the new government, led by a Prime Minister who comes from the private sector, will change this practice and avoid two phenomena of political interference in business:

1. "Party's business"
  2. Protected oligarchs
- 
1. The phenomenon of "party's business" is well known in the Balkans, where a change of government means a change of position of companies in the market. With new governments come new companies with privileged status. Not to mention the worst cases: privileged positions for companies owned by a state's high officials. Through this, party's business violates market freedom by protecting monopoly positions and unfair competition against other, non-party's businesses.

2. Next is the regional phenomenon of protected oligarchs, who – protected by politicians – dominate the market. Some of them are local, others regional, even part of larger international networks of organized crime. They are above the state. Each country in the world has a mafia. I'm afraid that in the Balkans we are near to a situation where the mafia has the state.

Both forms of political interference happen due to widespread corruption, which remains as not only the most significant economic issue, but also poses security risks for the whole region. The absence of the rule of law is exactly what non-Euro Atlantic players with authoritarian regimes dream of as they look for similar local authoritarian regimes in the region to partner with.

The key “entrance door” for such suspected foreign companies with dirty cash is through money laundering. The Council of Europe, through GRECCO warned some of the Balkans countries of insufficient results in the fight against money laundering.

Foreign regimes which have a surplus of cash but a democratic deficit can, because of corruptive deals with authoritarian state elites in the Western Balkans, achieve not only their lucrative business interests but also their strategic goals: preventing the region from becoming part of the Euro- Atlantic community. For regional authoritarian regimes, it is just what they like: to be out of Brussels' radar. We had that experience in Macedonia for the past ten years, and a repetition of the same should be prevented in the region.

Fears that this fragile region could fall into new wars lead the EU to avoid stronger policies against authoritarian state elites in the Balkans. Inside, they continue to control cash and trade. Outside, they misuse geopolitical risks and blackmailing with “other strategic alternatives”.

Three decades of post-communist transition in the region show us that countries themselves cannot fight corruption and organized crime without international support. Special Prosecutors, Vetting, or Special Courts were internal attempts to fight state corruption and organized crime, because of the non-existence of an independent judiciary.

A politicized judiciary can neither fight a politicized economy nor corrupted politicians who control the private sector. Independence of private businesses cannot be achieved in the Balkans without a strong international enforcement mechanism.

One concrete step would be the establishment of an International Anti-Corruptive Tribunal for the Western Balkans (IACTWB), which would investigate all state corruptive scandals in all countries of the region. Waiting for local authorities to liberalize economies through politics, separating the private sector from the state, is just wishful thinking.

Now the region needs further transformation in three directions: from post-conflict towards post-corruptive societies; from stabilization to democratization; and from poor countries with rich politicians to welfare states with accountable statesmen.

Unfortunately, the actual state of play in the Balkans is poor states with rich statesmen. It is time for the EU to shift away from their current approach of stabilocracy towards real democracy in the Western Balkans.







# **SOUTHEAST EUROPE WORKING GROUP: TAKING STOCK OF THE EU ENLARGEMENT STRATEGY AND ITS IMPACT ON REFORM PROCESSES IN THE WESTERN BALKANS**

November 20-22, 2018 | Berlin

In cooperation with:



The Aspen Institute Germany wishes to thank the German Federal Foreign Office for its sponsorship of the "Aspen Regional Dialogue Western Balkans 2018" through the Stability Pact for South Eastern Europe.

*Accommodation and conference venue:  
Regent Hotel, Charlottenstraße 49, 10117 Berlin*

## Tuesday, November 20, 2018

20:00

### **Welcome Dinner**

*Café Einstein Unter den Linden,  
Unter den Linden 42, 10117 Berlin*

## Wednesday, November 21, 2018

*Regent Hotel, Charlottenstraße 49, 10117 Berlin  
Salon Taut, 1st floor*

10:00 – 10:15

### **Welcoming Remarks**

Rüdiger Lentz, Executive Director, Aspen Institute Germany  
Sabine Stöhr, Head of Western Balkans Division Federal Foreign Office

10:15 – 12:00

### **Session I**

#### **The European Commission's 2018 Enlargement Strategy – New Momentum for Reforms?**

In February of this year, the European Commission has published its strategy on “A credible enlargement perspective for and enhanced EU engagement with the Western Balkans”. While the strategy clearly spells out that the EU door is open to further accessions, it underlines the specific challenges the Western Balkans have to address and emphasizes the need for fundamental reforms. Was the enlargement strategy able to meet the high expectations for it? What will be the next steps? Did the strategy open the often-mentioned window of opportunity in 2018? What can the European Commission deliver via the flagship initiatives that were announced in the enlargement strategy? What do the Western Balkans expect from these measures? What are the main challenges both, the EU and the region are facing?

Moderation: Rüdiger Lentz

12:00 – 13:00

*Lunch*

13:00 – 14:30

### **Session II**

#### **Rule of Law Reforms in the Western Balkans**

The European Commission listed rule of law as its first priority for reform efforts in the Western Balkans in this year's EU enlargement strategy and announced a flagship initiative in order to bring together different actions from the EU's side to assist the countries of the region in their reform priorities in this field. The European Commission states that “strengthening the rule of law is not only an institutional issue. It requires societal transformation.” This session will therefore address current priorities, policies, and instruments to shape this process. How can the rule of law be strengthened sustainably throughout the region? How promising are the tools set out in the latest enlargement strategy? What is lacking for more effective rule of law reforms in the region? How can independent judiciaries be established? Should the Albanian judicial reform serve as an example for other countries in the region? How can fundamental rights of citizens and equal economic opportunities be guaranteed?

Moderation: Valeska Esch

14:30 – 15:00

*Coffee Break*

15:00 - 16:30

**Session III****Curbing Political Influence on Independent Institutions and Fighting Corruption**

The European Commission states in the enlargement strategy that “strong and independent institutions are crucial to prevent and tackle corruption and conduct more effective investigations and prosecutions“. This session will therefore focus on the strengthening of independent institutions, including public administration, judiciary, anti-corruption agencies, and the media. How can transparency and depoliticization in public services be enhanced? How can public administration be further professionalized and strengthened? How can a more independent and pluralistic media environment be created? How can any entanglement of business and politics be detected and addressed? Does the new enlargement strategy provide any promising new approaches for fighting corruption? What should be the priorities in this field? Is there a need to try new, controversial models of transitional justice in the fight against high-level corruption?

Moderation: Valeska Esch

**Public Event**

*Regent Hotel, Charlottenstraße 49, 10117 Berlin  
Salon Gontard, Ground Floor*

19:00

**Roadblocks on the Way to EU Enlargement – How Can the Reform Processes in the Western Balkans be Reenergized?**

Government representatives from the Western Balkans Six will discuss

*with*

Christian Hellbach, Director for South-Eastern Europe, Turkey and the EFTA States, Federal Foreign Office

*and*

Genoveva Ruiz Calavera, Western Balkans Director in DG NEAR, European Commission

**Thursday, November 22, 2018**

07:30

Meeting at the hotel lobby for departure to Bundestag

08:00 - 09:30

**Meeting at the Bundestag with Members of the Parliamentary Group “Southeast Europe”**

*Paul-Löbe-Haus, Room 4.300, Konrad-Adenauer-Straße 1, 10557 Berlin*

*Departure of participants during the day*

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# LIST OF PARTICIPANTS

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Renata Alt

Peter Beyer

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Aleksandar Drljević

Metin Hakverdi

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## **The Aspen Institute Germany**

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*Executive Director*

Yannic Remme

Program Officer

Olga van Zijverden

*Program Officer*

Rapporteur: Sandra Schwalen



# ASPEN SOUTHEAST EUROPE WORKING GROUP: CONFERENCE REPORT

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Sandra Schwalen  
Rapporteur

The Aspen Southeast Europe Working Group's conference "Taking Stock of the EU Enlargement Strategy and Its Impact on Reform Processes" took place from November 20-22, 2018 in Berlin, Germany. This conference marked the culmination of a year of discussion on progress and reform in the Western Balkans in conjunction with the EU's new Enlargement Strategy, which was introduced in February of 2018. The previous two conferences this year, which took place in Germany and Macedonia, covered as main topics rule of law and curbing political influence on independent institutions in the Western Balkans.

The aim of this working group was to provide a round-table setting for government representatives, public servants and members of civil society from the Western Balkans and the EU to come together and discuss successes and shortcomings of the past year. Participants were asked to discuss the implementation of the EU Commission's 2018 strategy, rule of law reforms in the Western Balkans, and how to fight corruption and maintain politically independent institutions. All sessions took place under Chatham House Rule.

## **Session I: The European Commission's 2018 Enlargement Strategy – New Momentum for Reforms?**

The conference began with opening remarks by Aspen Institute Germany's director Rüdiger Lentz, who placed this working group in the context of the year's previous two discussions.

The session's discussion then started off by a "Tour de Table". Rüdiger Lentz asked participants to reflect on what they took away from the EU Commission's new strategy, its successes and shortcomings.

It was underlined that the EU perspective to the Western Balkans should not become a "shadowboxing exercise", where both parties are merely pretending. The EU's and Germany's commitment towards the region is real, but sincere efforts in rule of law reform processes are needed.

Generally, it was agreed upon that the strategy was a step in the right direction towards the Western Balkans' accession into the EU and to put the region back on the political agenda. Many participants emphasized the importance of the strategy's objectives, such as rule of law reforms as well as managing security issues, for example the migration crisis and the emigration of young people from the Balkans. Participants praised the strategy for focusing on economic development and social reforms, which has made the public in the Balkans feel like the EU was listening to them. The strategy was also praised for providing clearer perspectives on EU integration, which participants felt could help bring about resolution of bilateral issues.

Even though the strategy was widely seen as a comprehensive diagnosis of the current situation in the Western Balkans, participants expressed some disappointments with the strategy, stating that after the initial enthusiasm had passed, the EU had not concretely followed through with the proposed six flagship initiatives. Moreover, this missed opportunity to follow through with the goals on the momentum from the strategy caused skepticism and frustration in the Western Balkans. It was proposed that a coherent roadmap should be followed, with clear goalposts and dates to meet objectives. Participants representing the EU, however, mentioned that part of the reason why goals were not being met was due to regional bilateral disputes, which made it hard to collaborate efficiently.

Another main recommendation by the participants to improve the EU's strategy was developing better strategic communication, including the Western Balkan countries more in the process of developing these type of strategies, and facilitating exchange proactively and at an early stage of the process already.

In the ensuing discussion, many participants took a critical stance towards both the European Union and countries in the Balkan region. It was remarked by representatives from the Balkans that the EU often takes generalized policy approaches towards the Balkans, and that the EU and its member states should look at crucial areas and identify precisely what is at stake, and take a more strategic approach. Frustration was also voiced at inconsistencies, that certain EU member states do not support Balkans' accession, and that standards and goalposts always seem to be shifting. Politicians from the region therefore claimed they have trouble convincing their constituencies that EU accession is an attainable goal, or even that it is a goal worth striving towards. Conversely, Balkan governments were criticized for window-dressing at times to make it appear as though structural changes had been made, when this was not really the case. Improved strategic communication where political messages and goals for the region are aligned, as well as trust-building were both suggested to help improve these areas. Furthermore, regional cooperation and mutual support were seen as crucial on the way to the common goal of EU accession.

#### **Session II: Rule of Law Reforms in the Western Balkans**

The second session of the conference was aimed at discussing how to effectively and sustainably strengthen rule of law in the Western Balkans, and what is lacking to implement better rule of law reforms in the region. This session also looked at how effective the tools set out in the latest enlargement strategy were, and how independent judiciaries can be established.

The discussion focused around the different models of rule of law reforms that have been implemented in different Western Balkans countries, such as Macedonia and Albania, and to what extent these could be exported

to other countries in the region. The Macedonian reforms were based on two EU Commission reports by trustworthy non-political expert groups that found a balance between criticizing the government and its institutions, and helping them to improve. The Albanian rule of law reforms were achieved through external supervision with an internal vetting process, and successfully removed corrupt officials from the justice system. However, now Albania is facing the challenge of developing the capacities of personnel who will replace these officials.

Participants underlined the importance of outsourcing the task of assessing the problems in rule of law, and creating roadmaps to solve them to an outside expert group. Despite attempts by civil society institutions, these are often not taken seriously by regional governments, or do not have the capacity to create reports suitable for advising policy reform. However, there was debate about this point, as some participants pointed out the importance of the role of civil society to be involved in the rule of law reform process. Some also criticized the outsourcing of these tasks, saying that efforts to reform must come from within the region in order to be effective, and that in order for the local society to have faith in the reforms, civil society must be included in the process. Participants called for a combination of European instruments with internal justice in order for rule of law reforms to be sustainable in the region.

Some of the biggest problems in rule of law in the Western Balkans identified by participants included corrupt officials and nepotism; lack of trust in the judiciary by society and therefore lack of authority; and different understandings of rule of law between different sectors of society and governments. To resolve some of these issues, it was suggested that there should be independent pre-screening of politicians and judges, and that the EU should work with regional governments to create action plans for rule of law reforms. Participants voiced that these should be short-term enough to have goals that could be met within the term of office, in order to increase capacity and political commitment.

Some participants recommended to start the pre-screening process of national legislation and the EU *acquis* at an earlier stage for potential candidate countries. According to them waiting until the official opening of accession negotiations would be losing time, as all candidates have to go through the process at one point anyway and the pre-screening can already foster further reform processes in the meantime. Others however, found it more helpful to develop, publish and share action plans, especially for the rule of law chapters 23 and 24, which include detailed measures to tackle.

In this discussion, it was again mentioned that lines have become blurred in accession talks, in respect to what types of reforms need to be made in order to move forward in the EU accession process. Participants again called for a central plan to move all Western Balkans states forward, instead of different disjointed documents.

**Session III: Curbing Political Influence on Independent Institutions and Fighting Corruption**

This session focused on the strengthening of independent institutions, including public administration, judiciary, anti-corruption agencies, and the media, through depoliticization and transparency. Most of the discussion centered on how to strengthen parliaments throughout the region in order to improve democratic processes and reduce corruption.

Participants reported a number of problems with parliaments throughout the Western Balkans, including lack of political will and open debate, as well as political polarization. Parliaments are also often reported as not acting independently and being controlled by a certain party, or collaborating with the executive branch. Reports from independent institutions, such as audits or reports on human rights, are often not discussed by the parliaments; a problem which could be solved by rule of law reforms and more political independence and ownership of parliaments. The lack of political will in the region means that many civil society institutions and people looking to make changes do not see governments and parliaments as partners in their fights. Instead, people tend to think of the policy process (and the EU accession process) as a closed-door discussion rather than a conversation across different sectors of civil society.

Conference participants made some recommendations on how to help strengthen parliaments in the Western Balkans. Increasing the checks and balances between different branches of government would ensure that the parliament could function without interference from the executive. It was also proposed that strengthening the relationships between Balkan and EU parliamentarians, for example through parliamentary friendship groups, could help build self-confidence and democratic practices. Democracy workshops for members of civil society to help the population better understand the democratic process were also recommended, as these have been successful in some Balkan countries. Participants also suggested other international mechanisms to monitor policy implementation and thereby improve the accountability of regional parliaments.

In order for national parliaments in the Western Balkans to gain the trust of their constituencies there must be better access to information and more open political dialogues. Track records are also important to build accountability. It was also advised that parliamentarians meet before plenary sessions in informal meetings with the ruling party and the opposition in order to increase dialogue. Another criticism was that parliamentarians are hardly involved in the EU accession process. This can be remedied by Balkan parliaments working directly with the Commission to meet stipulations for accession, and by creating committees for different specializations to reach goals more efficiently. Including regional parliaments more in this process will also increase trust of constituencies in the parliaments and improve the EU-Balkan relationship.

**Public Event: Roadblocks on the Way to EU Enlargement – How Can the Reform Processes in the Western Balkans be Reenergized?**

The working group concluded its day with a public event in the evening. The event was held in a panel discussion style, led by Aspen Institute director Rüdiger Lenz, and was opened to questions from the audience in the end.

Participants from the region were asked to look at their countries' successes and main challenges ahead and how the reform process could be revitalized. Many mentioned the importance of fighting internal crime and corruption, increasing economic and social development, improving education and thereby increasing political dialogue, and promoting rule of law and justice reforms. Participants also urged the building of trust between the EU and the Western Balkans, improved strategic communication, and good track records.

Both participants from the EU and from the Balkans voiced concern over the Kosovo-Serbia conflict, stating that this was a major roadblock to EU accession for all countries in the region. Although the normalization process has been making some headway, many issues are not being addressed head-on in detail, which is causing stagnation in the negotiations. To solve this conflict, participants voiced the importance of a culture of compromise, rather than a "winner takes all" mentality.

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# LIST OF ABBREVIATIONS

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ACA	Anti-Corruption Agencies
ACAS	Anti-Corruption Agency of Serbia
ADISA	Agency for the Delivery of Integrated Services Albania
ARD	German Public TV Channel
BiH	Bosnia and Herzegovina
CCJE	Consultative Council of European Judges
CEE	Central and Eastern Europe
CILC	Center for International Legal Cooperation
CNN	Cable News Network
CPCC	Civilian Planning and Conduct Capability
CPI	Corruption Perception Index
CRTA	Centre for Research, Transparency and Accountability
EC	European Commission
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEAS	Europe External Action Service
EFTA	European Free Trade Association
ERA	European Reform Agenda
ESI	European Stability Initiative
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
EURALIUS	Consolidation of the Justice System in Albania
GABC	German American Business Council
GDP	Gross Domestic Product
HDZ	Croatian Democratic Union
HIDAACI	High Inspectorate of the Declaration and Audit of Assets and Conflict of Interest
HR	High Representative
HRMIS	Human Resource Management Information System
IAU	Internal Auditing Units
IDM	Institute for Democracy and Mediation
INPO	Initiative for Progress
IPA	Instrument for Pre-Accession Assistance
IRZ	German Foundation for International Legal Cooperation
IVLP	International Visitor Leadership Program
JICA	Japan International Cooperation Agency
KIP	Kosovar Institute of Peace
KIPRED	Kosovar Institute for Policy Research and Development
LGBTI	Lesbian Gay Bisexual Transgender Intersexual
MP	Member of Parliament
NATO	North Atlantic Treaty Organization
NCAC	National Coordinator against Corruption
NDI	National Democratic Institute
NGO	Non-Governmental Organization
NJ	New Jersey
NY	New York
NYU	New York University
OSCE	Organization for Security and Co-operation in Europe
OECD	Organization for Economic Cooperation and Development
PA	Pennsylvania
PAMS	Public Administration Modernization Strategy
PAR	Public Administration Reform
PKI	Public Key Infrastructure
RCC	Regional Cooperation Council
REM	Regulatory Authority of Electronic Media
SAI	State Audit Institution
SDPM	Social Democratic Party of Montenegro
SME	Small and Medium-sized Enterprises
SMI	Socialist Movement for Integration Party
SRC	Sector Reform Contracts
TEU	Treaty on the European Union
TI	Transparency International
UK	United Kingdom

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UI	User Interface
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
URA	United Reform Action
US	United States
USKOK	Croatian State Prosecutor's Office for the Suppression of Organized Crime and Corruption
VP	Vice President
UX	User experience
WB	Western Balkans
WB6	Western Balkan Six (Albania, Bosnia and Herzegovina, Kosovo, FYR Macedonia, Montenegro, Serbia)
WDR	Westdeutscher Rundfunk



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# ABOUT ASPEN

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The Aspen Institute Germany promotes values-based leadership, constructive dialog amongst conflicting parties, and Euro-Atlantic cooperation to support and enhance a strong open society. Aspen Germany does this by convening decision-makers and experts from politics, business, academia, media, culture, and civil society in three programs:

The Policy Program offers a non-partisan confidential platform for dialog and analysis to address regional and global challenges and develop mutually acceptable solutions. The Leadership Program reflects on values and ideas through the Socratic method to deepen knowledge, broaden perspectives, and enhance the participants' abilities to solve problems they face. The Public Program provides a forum for open and constructive dialog between decision-makers and a broader audience on a wide range of current issues.

The Aspen Institute Germany embodies the idea of transatlantic community and a free and open society. It serves as a non-partisan, non-profit convening platform and is part of the global Aspen network with partners in the U.S., France, Italy, the Czech Republic, Romania, Spain, Japan, India, Mexico and the Ukraine. Together, the Institutes are committed to address the challenges of the 21st century.

## **Public Program**

The Aspen Institute Germany's Public Program serves as a forum for discourse and exchange addressing a broader audience of interested individuals who wish to discuss fresh ideas and look at issues from new perspectives. Topics include current political, economic, and social matters as well as questions of values-based leadership.

The Public Program consists of several different formats. A series of evening events features renowned speakers who share their ideas either in an interview setting or in a brief presentation followed by a discussion. While the interview portion of the event is sometimes broadcast by one of our media partners, the following discussion is off-the-record to enable a frank and open exchange. The Aspen Brown Bag Lunch series takes place several times a year and gathers experts, members of the "Verein der Freunde des Aspen Instituts e.V." (Association of Friends of the Aspen Institute), and representatives from politics, business, and civil society for a working lunch to discuss current topics under Chatham House Rule. Finally, the Public Program includes stand-alone events such as exclusive breakfast and dinner events, the annual Aspen Summer Party, and the Aspen Annual Gala. Some of the events are hosted in cooperation with partner organizations. The Public Program is open to invited guests and upon request. Members of the "Verein der Freunde des Aspen Instituts" enjoy preferred access to major Public Program events.

## **Policy Program**

Aspen Policy Programs actively address current policy challenges. In closed-door conferences and seminars focusing on complex political and social trends and developments, decision-makers analyze common challenges and develop viable solutions. Kick-off introductory presentations by international experts lay the groundwork for focused debates with policy makers with the aim of forging an international consensus among politicians, diplomats, and experts from academia, business, and the media. During the discussions, participants develop constructive suggestions and policy recommendations, which are subsequently published.

## Berlin Transatlantic Forum

In 2014, on the occasion of its 40th anniversary, Aspen Germany launched its Berlin Transatlantic Forum to address the most pressing challenges jointly facing Europe and the United States. Each fall, the Institute hosts a conference bringing together renowned experts and decision-makers from both sides of the Atlantic to exchange ideas and seek answers to important questions in the fields of security, energy, and trade, as well as to discuss issues pertaining to our shared foundation of Western values. The annual conference is preceded by a workshop in late spring, during which a small group of experts from Germany, Europe, and the U.S. gathers for an in-depth discussion of key topics of transatlantic concern. The Berlin Transatlantic Forum marks a continuation of the Institute's close ties to the city of Berlin. In 1974, in the midst of the Cold War, the Institute was founded as a symbol of transatlantic solidarity. Since then, Aspen Germany has attracted high-level guests to come to Berlin to strengthen Euro-Atlantic cooperation. The project is made possible by a generous grant of the foundation "Lotto-Stiftung Berlin".

## Staffers Exchange Program

The gradual erosion of the Euro-Atlantic relationship has been most visible in the German-American friendship. The often-hailed relationship has eroded ever since the beginning of the 2003 Iraq war. Diverging views on military force, intelligence gathering within alliance, ways out of the economic and financial crises, the role of the European Union, and the rights and responsibilities of the state to balance personal freedoms and security all point to a growing lack of understanding for each other's views, systems, and political cultures. At the same time, generations are changing. Future leaders on both sides of the Atlantic have little personal experience of what made this relationship so important.

The Aspen Institute Germany, with the support of the Transatlantic Program of the Federal Republic of Germany with funds from the European Recovery Program of the Federal Ministry for Economic Affairs and Energy,

has designed an exchange program for Congress and Bundestag staffers to foster dialog on the transatlantic relations. Participating staffers take part in intensive debates on the most pressing concerns facing the transatlantic community. In addition, they meet with decision-makers, experts, and practitioners. Site visits in Berlin and Washington D.C. as well as cultural events promoting mutual understanding are also an integral part of the program.

The Program is supported by the Transatlantic Program of the Federal Republic of Germany with funds from the European Recovery Program of the Federal Ministry for Economic Affairs and Energy. Aspen Germany is the project coordinator on behalf of the Federal Ministry for Economy and Energy (BMWi).

### Digital Program

The digital revolution is causing some of the most profound societal challenges of the 21st century. It is estimated, that by 2020, almost 25 billion networked devices, approximately 3.5 for every person, will be circulating on the planet. Cloud computing, cross-border supply chains, the Internet of Things, e-commerce and the sharing economy are giving rise to a new class of Mittelstand, the „Micro-Multinational.“ Across the OECD member countries, digitally-dependent jobs make up 22 percent of all new jobs created.

But the digital revolution is not happening in a vacuum. It comes against the backdrop of a rising tide of populism and resentment towards institutions and elites that have not delivered on inclusive growth, security, and social cohesion. Productivity gains of the past two decades – benefiting from the rise of the internet – have accumulated disproportionately at one end of the wealth spectrum as income inequality grows and social mobility becomes more difficult. Many citizens from Dresden to Detroit feel alienated from an overaccelerating process of digitization that some feel is ignoring privacy protection; excluding citizens from dignified work; treating safety and cybersecurity as an afterthought; and unmooring their sense of moral grounding. Against this backdrop of opportunities and challenges, Aspen Germany has established a digital policy program consisting of three pillars.

### *The Transatlantic Digital Agenda*

The Aspen Institute Germany has launched, together with the Atlantic Council and the Internet Economy Foundation, a new initiative, the Transatlantic Digital Agenda: Bridging the Gap. The initiative brings together European and U.S. senior decision-makers from different fields such as politics, academia and the civil society sector to foster closer transatlantic digital cooperation. In this context, the initiative will explore the question: how can we translate the transatlantic values – which have served the global community so well for 70 years – for a digital age where those values are increasingly under threat by economic uncertainty, rising populism, new

democratic vulnerabilities, and previously unimagined cyber risks?

### *Aspen Berlin Artificial Intelligence Conference*

In 2018 the Aspen Institute Germany hosted its first annual Aspen Berlin Artificial Intelligence Conference which brought users, policy-makers, business leaders, innovators, economists, philosophers, religious leaders, unionists, civil servants and security experts together to discuss AI's possibilities and drawbacks. The day-and-a-half long conference addressed four separate – but interrelated – dimensions of AI: economic impact; ethics and democracy; safety and security; and the over-the-horizon challenges of artificial general intelligence. At its core, the conference confronted the question: How can AI designers, operators and policy-makers guarantee that AI improves lives, ensures dignity, preserves security and safeguards democracy for users and citizens?

### *Digital Dish Luncheons*

Once a month the Aspen Institute Germany organizes a Digital Dish Luncheon, inviting an inspirational thinker to an intimate, off-the-record lunch to discuss a current issue relating to the field of technology. The luncheons bring together leading experts in the tech policy area and experts focusing on U.S.-European relations. By connecting both communities, the Digital Dish Lunch series confronts the experts with trends, frictions, and successes in the transatlantic tech policy field and contextualize issues in the broader U.S.-European relationship.

### Southeast Europe Program

The Aspen Institute Germany has focused on developments in Southeast Europe since the early 1990s. In cooperation with the Carnegie Endowment for International Peace, Aspen's former Executive Director David Anderson initiated the International Commission on the Balkans in 1995 under the leadership of former Belgian Prime Minister Leo Tindemans, which published the report "Unfinished Peace" in 1996, an analysis of the causes of the Balkan conflicts and an independent assessment of the European, American, and UN responses. This high-level international commission was followed by a young leaders study group on the future of the Balkans in addition to several other events with a focus on the region.

Since 2008, one of the Policy Program's main focuses has again been on the Western Balkans, which includes the countries of former Yugoslavia and Albania. In closed-door meetings, the Aspen Institute Germany facilitates an open and honest high-level exchange between former conflict parties in order to support regional cooperation and dialog, as well as to further the region's agenda on Euro-Atlantic integration and the transformation processes this entails. The goal of this exchange is to openly address both remaining problems and

disagreements between decision-makers of the region as well as successes and advances. Moreover, Aspen Germany regularly brings together experts and decision-makers working in, on and with the region for an increased exchange of perspectives, opinions, and assessments. In pursuit of these goals, the Aspen Institute Germany's Southeast Europe Program has different formats: the Aspen Southeast Europe Foreign Ministers' Conferences, the so-called Sub-cabinet Meetings, it facilitates small, off-the-record exchanges, and background briefings and discussions.

#### *Aspen Southeast Europe Foreign Ministers' Conferences*

The first Aspen Southeast Europe Foreign Ministers' Conference took place in December 2008. Behind closed doors, top politicians and senior officials from Germany and the U.S. met with foreign ministers from Southeast Europe including, for the first time, the Serbian Foreign Minister and the Acting Foreign Minister from Kosovo. In subsequent years, Foreign Ministers from the region have gathered annually in Berlin for a regional meeting together with their U.S., European, and German colleagues.

Since 2010, Aspen's Southeast Europe Foreign Ministers' Conferences have been organized in cooperation with the German Foreign Office and an EU member state's Embassy in Berlin with the German Foreign Minister. Since 2010, partners have included the Austrian Embassy in Berlin and Foreign Ministers Dr. Guido Westerwelle and Dr. Michael Spindelegger; the Hungarian Embassy in Berlin and then Foreign Ministers Dr. Guido Westerwelle and Dr. János Martonyi; the British Embassy and then Foreign Ministers Dr. Frank-Walter Steinmeier and Philip Hammond; the Italian Embassy and then Foreign Ministers Dr. Frank-Walter Steinmeier and Paolo Gentiloni; as well as the Czech Embassy and Foreign Ministers Sigmar Gabriel and Lubomír Zaorálek. In 2014, Foreign Ministers Dr. Frank-Walter Steinmeier and Philip Hammond used the Aspen Foreign Ministers' Conference as a platform to present a joint German-British initiative to revitalize the reform process in Bosnia and Herzegovina. In his opening speech of 2017, Foreign Minister Gabriel emphasized Germany's commitment to the region and revealed Germany's plans of setting up additional funds to further support the Western Balkans.

#### *Sub-Cabinet Meetings*

Since 2009, Aspen Germany's Southeast Europe Program's sub-cabinet meetings have brought together high-level decision makers, politicians, diplomats, and experts from the Western Balkans, the U.S., Germany, the EU, NATO, and other international organizations to discuss various issues related to current and future challenges in Southeast Europe. At exclusive closed-door conferences, a limited number of participants can exchange views informally and off-the-record, and discuss their differences and commonalities. Supported by expert policy papers, discussions aim at bridging differences that still exist,

identifying common challenges and ideas, and developing mutually acceptable solutions and recommendations. Topics discussed include the Euro-Atlantic integration of the Western Balkans, non-traditional security threats, the fight against organized crime and corruption, the role of external actors in the region, economic development, energy security, regional cooperation, rule of law, and democratization.

#### *Policy Hub for Think Tanks from the Western Balkans*

One of the challenges for policy organizations from the Western Balkans is a disconnect to the European Union. All too often pro-European voices interacting with their EU counterparts struggle to step beyond local paradigms. This deepens the perception in the EU that the Western Balkans are a problematic neighbor who, in the future, might become a free-rider on EU financial assistance without contributing to solving wider European problems. Genuine Europeanization cannot take root if two sides are talking cross purposes. In order to bridge this growing gap, this initiative seeks to establish closer, more regular, and more targeted contacts between policy organizations from the Western Balkans and their EU member states' counterparts as well as decision-makers. In cooperation with the Open Society Foundations, the Aspen Institute Germany functions as a policy hub in Berlin for select policy research organizations from the Western Balkans. Aspen Germany supports these organizations in identifying potential local partners in Berlin, facilitates their advocacy visits, and assists with the preparations of these visits. The idea is to help policy organizations from the Western Balkans to better understand the policy scene in Berlin, identify opportunities for collaboration with local organizations, and improve the effectiveness of their political outreach and advocacy. Through the establishment of contacts to other organizations, a more sustainable and impactful involvement of Western Balkans organizations in Western European policy debate is intended. In its first year of functioning as a policy hub, Aspen's Southeast Europe Program organized and facilitated a total of ten visits, hosting more than fifteen think tanks from five countries and connecting them with leading figures at institutions such as the German Bundestag, the Foreign Office, the Federal Chancellery, Berlin-based think tanks, as well as individual experts, such as renowned journalists.

#### *Background Discussions*

Complimentary to the core events of its Southeast Europe Program, Aspen Germany facilitates background discussions for increased exchange among MPs, political advisors from the Bundestag, and selected experts from government and civil society, such as Berlin-based think tanks, political foundations and journalists. The topics of such background discussions vary from evaluations of relevant summits, current developments in the region, and exclusive dinners with selected politicians from the region, such as the Macedonian Prime Minister Zoran Zaev and his delegation in 2018.

## Leadership Program

### *Aspen Leadership Seminar*

The Aspen Leadership Seminar “Philosophy & Practice” is an exceptional leadership program, which promotes values-based leadership and enables substantial dialog about fundamental questions of human nature and society. The Seminar was launched in the United States more than sixty years ago and in 2011, Aspen Germany introduced this unparalleled program in Germany. Every year, it hosts three Seminars. Led by expert moderators from the U.S. and Europe, the Seminar convenes a small circle of up to 17 high-ranking decision-makers to reflect and discuss the most fundamental questions of the human condition. It has attracted an impressive array of brilliant leaders from across society, including high-ranking representatives from Deutsche Bank, Pfizer, Daimler, Siemens, Airbus SA, Bertelsmann, Axel Springer, BP, politics, as well as think tanks and many others.

The purpose of the Seminar is to encourage participants to think more deeply about their own beliefs and values, enhance their understanding of competing viewpoints, and highlight the complexity of our societies. It is not a skill building or case study exercise but focuses on the essence of leadership. Participants are encouraged through the Socratic method to interpret the materials in their own way. The diversity of views is a key factor for success. Participants emerge from the Seminar with a deeper understanding of their own values and how they translate into their leadership and decision-making. They often find the Seminar to be a life changing experience. The Seminar is deeply rooted in the Aspen idea of creating a safe space for leaders, thinkers, and artists from around the globe to step away from daily routine to reflect on what makes good leaders and a good society. The first Seminar was conducted in 1951, inspired by philosopher Mortimer Adler at the University of Chicago. According to Adler, philosophy is everybody’s business and essential to what makes us human. The idea was that the Seminar would improve society by fostering humanistic thought among important decision-makers.

### *Aspen Leadership Alumni Program*

Leadership alumni are our allies in enhancing the Aspen Leadership Program. Today, the Aspen Leadership alumni community consists of more than 230 alumni from very different professional and individual backgrounds. To keep this network closely connected as a source of continued inspiration, our alumni program is designed with strong involvement of former Seminar participants. The Aspen Leadership alumni program provides a new platform for alumni to connect, continue the conversation about the quality of leadership that is needed in politics, business and civil society, as well as participate in events and programs of Aspen Germany.

**RULE OF LAW REFORMS IN  
THE WESTERN BALKANS**

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