



BiEPAG

Policy Study

# Strengthening the Rule of Law in the Western Balkans: Call for a Revolution against Particularism

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# About BiEPAG

## The Balkans in Europe Policy Advisory Group (BiEPAG)

is a co-operation initiative of the European Fund for the Balkans (EFB) and Centre for the Southeast European Studies of the University of Graz (CSEES) with the aim to promote the European integration of the Western Balkans and the consolidation of democratic, open countries in the region. BiEPAG is composed by prominent policy researchers from the Western Balkans and wider Europe that have established themselves for their knowledge and understanding of the Western Balkans and the processes that shape the region. Current members of the BiEPAG are: Dimitar Bechev, Florian Bieber, Blerjana Bino, Srđan Cvijić, Milica Delević, Srđan Majstorovic, Natasha Wunsch, Marika Djolai, Vedran Džihić, Dejan Jović, Marko Kmezić, Jovana Marović, Milan Nič, Corina Stratulat, Dane Taleski, Nikolaos Tzifakis, Alida Vračić, Shpend Emini, Zoran Nechev, Tena Prelec, Hedvig Morvai and Igor Bandović.

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## Introduction

The European Union (EU)'s conditionality for the aspiring members of the Western Balkans in the rule of law field has been constantly upgraded over the past years. Nevertheless, its impact remains rather limited. Instead of strengthening democratic reforms and institutions, democracy is retreating in the Western Balkans,<sup>1</sup> the pace of transformation is slow, and a solid track record of results has yet to be established in all of the Western Balkan countries. For some of the EU-hopefuls in the region, democratic backsliding has paradoxically started after the opening of accession negotiations with the EU.

This policy study contains three sections that analyse the core problems of the EU's current approach to the promotion of the rule of law in the Balkans. The sections offer complementary approaches to the rule of law issue and together amount to a fully-fledged strategy. The study follows in the footsteps of previous efforts of the Balkans in Europe Policy Advisory Group (BiEPAG) on the subject matter, offering fresh thinking on how to foster sustainable EU integration that is as effective as it is uncompromising<sup>2</sup>, and that would benefit prospective and existing EU members alike<sup>3</sup>.

Our assessment builds on the premise that the problems affecting the rule of law in the countries of the Western Balkans – and indeed in most countries that are undergoing transitions – are, by and large, structural. The EU's approach to conditionality for the region should better reflect this structural challenge.

In the Western Balkans, state capture and corruption happen within a particularistic mode of governance, under which the access to public (and sometimes even private) resources depends on the closeness to political-business elites. 'Particular' interests still prevail over those

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1. Kmezić, Marko and Bieber, Florian (Eds.). "The Crisis of Democracy in the Western Balkans. An Anatomy of Stabilitocracy and the Limits of EU Democracy Promotion", BiEPAG, March 2017,

<http://biepag.eu/publications/the-crisis-of-democracy-in-the-western-balkans-an-anatomy-of-stabilitocracy-and-the-limits-of-eu-democracy-promotion/>

2. BiEPAG and European Fund for the Balkans (2018), "New European Balkans Partnership", April 2018,

<http://balkans-declaration.eu/wp-content/uploads/2016/02/Policy-Brief-New-European-Balkans-Partnership.pdf> and

<https://biepag.eu/publications/>

3. Prelec, Tena (2019), "Strengthening the Rule of Law in the Western Balkans: Why Should EU Member States Care?", BiEPAG Blog. Available at <https://biepag.eu/strengthening-the-rule-of-law-in-the-western-balkans-why-should-eu-care/>

of the general public – hence the term particularism<sup>4</sup>. This mode of governance is therefore a form of social inequality<sup>5</sup> whose problems were exacerbated during the ‘transitions’ after the fall of communism<sup>6,7</sup>, creating an uneven playing field in which some actors wield more power than others. A large part of the population accepts this modus operandi as ‘the rules of the game’, turning to those wielding more power (often, the political parties) to ‘get things done’.<sup>8</sup>

Conceiving the issues related to state capture and corruption as simple “exceptions to the rule” is therefore incorrect as, in many ways, they *are* the rule. This state of affairs entails three main challenges for the EU’s promotion of the rule of law in the region. First: what instruments to devise to incentivise and monitor the progress in a meaningful way? Second: how to approach systemic issues, especially those that tend to skew the rules further in favour of the incumbent elites? Third: how to ensure that the reforms have long-lasting effects? The three sections of the paper address these challenges.

- **Section 1** sets out a strategy on how to improve the EU’s system of monitoring and benchmarking. The aim here is to identify the key problems in the EU’s current approach, offering suggestions for appropriate solutions to further develop the ‘flagship initiatives’ by the European Commission. The potentiation of the Commission’s instruments – including clear rewards and punitive steps, and the use of precise language in calling out the authorities when abuses are detected – is an initial step in consolidating the rule of law.
- **Section 2** provides an analysis of the levers used (and abused) in one of the spheres that are key to the weaknesses in the rule of law: the electoral process. While improving the system of benchmarking and monitoring is an essential step in giving the EU’s conditionality more incisive ‘teeth’, it is also insufficient. The areas where systemic problems are deeply

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4. Mungiu-Pippidi, A. (2006), “Corruption: Diagnosis and Treatment”, *Journal of Democracy*, 17 (3), pp. 86-99

5. Popovikj, M. (2018), “Corruption: The Western Balkans’ Achilles Heel?”, Italian Institute for International Political Studies (ISPI), 16 May 2018

6. Kostovicova, D. and Bojicic-Dzelilovic, V. (eds.) (2008), *Transnationalism in the Balkans*, Abingdon: Routledge, p.19

7. Elbasani, A. and Selo-Sabic, S. (2018), “Rule of law, corruption and democratic accountability in the course of EU enlargement”, *Journal of European Public Policy*, vol. 25, n. 9, p. 1319

8. Popovikj, M. (2018), “Corruption: The Western Balkans’ Achilles Heel?”, Italian Institute for International Political Studies (ISPI), 16 May 2018

rooted, fostering the dominance of the incumbent elites, require specific attention and a proactive approach<sup>9</sup>. Elections are a necessary area to tackle.

- **Section 3** is dedicated to explaining what will make the reforms stick. To help the Balkan countries internalise EU norms, more inclusive bottom-up approaches to the rule of law promotion are necessary, which can empower civil society actors to play a rights-holder's role vis-à-vis public authorities. This would help to push for compliance on key laws, the monitoring of their implementation, and further the norm internalisation, both before and during the accession negotiations.

Considering that the actors in power have little incentive to bring about change, the role of the EU conditionality is crucial to guarantee meaningful strides forward. The European Commission (EC) has already recognised the need for a more far-reaching stance in its February 2018 Strategy, by placing the strengthening of the rule of law at the top of the agenda for the region and stating that “the countries show clear elements of state capture, including links with organised crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests”<sup>10</sup>.

To act on these insights, the EU should adopt a more comprehensive and bolder approach, such as the one outlined in this study. As summarised by one of the interviewees consulted for this paper, “change happens slowly because the elites in power have many levers at their disposal”<sup>11</sup>. The overall aim of this study is thus to show how these levers can be weakened and replaced with lasting transparency, genuine political competition, and the internalisation of good governance norms.

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9. Pervasive corruption and state capture occur in several other areas too, most of them interlinked with one another, including: the judicial system; public procurement; economic sector; and media. All of these areas should be seen in conjunction and tackled simultaneously: in forthcoming BiEPAG papers, we intend to examine each of these elements, accompanied by specific recommendations.

10. European Commission (2018), “A credible enlargement perspective for an enhanced EU engagement with the Western Balkans”, 6 February 2018, p.3 [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)

11. Interview with Bojan Klačar, CESID, October 2018

## Summary – What should be done?

Although in the last year's Strategy for the Western Balkans the EU announced a set of initiatives that would enhance the rule of law in the region, no progress can be identified yet on reforms or their implementation. Therefore, the EU should upgrade its conditionality tools for the Balkans as follows:

### **The EU should:**

- Provide corrective measures in a prompter and more frequent manner than so far;
- Define more concrete benchmarks, regularly updated and divided in multiple sub-benchmarks;
- Establish a clear link between the peer review missions' reports, the Commission's country reports, and the reports on the current state of play in chapters 23 and 24;
- Develop specific roadmaps for each of the Western Balkan countries based on the annual priorities for the rule of law;
- Define case-specific and target-oriented mandates for the peer review missions;
- Make public the reports of all individual peer review missions;
- Make reporting stricter, binding and precise;
- Provide non-papers on the current state of play on chapters 23 and 24 for all the Western Balkan countries;
- Bind priorities to a specific timeframe (measured annually);
- Accompany priorities by a set of positive (incentives) and negative (sanctions) measures;
- Apply and keep pressure when violations of law are recorded;
- Support expert efforts in the process of EU rule of law promotion;
- Consider and support civil societies bottom-up strategies for the promotion of the rule of law.

### **Following the EU's guidelines, state institutions in the Balkan countries should:**

- Deliver a concise narrative report on the fulfilment of benchmarks as an overview of the key results and challenges;
- Conduct more in-depth analysis based on recommendations from the Commission to define detailed measures and take concrete actions;
- Develop new templates for reporting on the rule of law to the Commission;
- Improve transparency at all levels (including in hiring and selection procedures) in order to establish clear legal responsibility if abuses are recorded but also to engage the best candidates and ensure professionalism;
- Widen the opportunities for training and make them more widely available (especially) at the local level.

## Section 1.

# Monitoring and Benchmarking: How to Maximise the Impact of the EU's RoL Flagship Initiatives

The European Commission (EC) has repeatedly warned about democratic problems in its annual reports evaluating progress in the candidate and potential candidate countries of the Balkans. Its 2018 Strategy for the region was no exception in this regard, although, in the same document, the Commission also made sure to reaffirm the European perspective of the Western Balkans and, for the first time, even offered an indicative 2025 accession date for the present frontrunners, Montenegro and Serbia.<sup>12</sup> However, since the launch of its 2018 Strategy for the region, the EU and the Western Balkans have moved on and put behind the important messages of this document.

The problems nevertheless endure, and the EU is short of effective instruments to follow up on the flagship initiatives that it announced in its 2018 Strategy. At the end of 2017 – a year that was expected to bring significant novelties in the EC's approach towards the Western Balkans – it is quite clear that the EU's objectives for the Balkans are not aligned with the means available. The aim of this section is to **identify the key problems in the EU's current approach, offering possible solutions for the further development of the flagship initiatives.**

By building on the assumption that future developments in the Western Balkans' integration will depend on three groups of factors: internal reforms, the resolution of bilateral disputes, and the EU's readiness to enlarge/'widen',<sup>13</sup> this analysis continues in the footsteps of the Balkans in Europe Policy Advisory Group (BiEPAG)'s previous efforts to contribute to all three clusters.<sup>14</sup>

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12. European Commission (2018), "A credible enlargement perspective for an enhanced EU engagement with the Western Balkans", February 2018, [https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlarge-perspective-western-balkans\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlarge-perspective-western-balkans_en.pdf)

13. Bildt, Carl (2018), "On track for EU members or stagnation", European Council for Foreign Relations, 15 February 2018, [https://www.ecfr.eu/article/commentary\\_balkans\\_on\\_track\\_for\\_eu\\_membership\\_or\\_stagnation](https://www.ecfr.eu/article/commentary_balkans_on_track_for_eu_membership_or_stagnation)

14. BiEPAG and European Fund for the Balkans (2018), "New European Balkans Partnership", April 2018, <http://balkans-declaration.eu/wp-content/uploads/2016/02/Policy-Brief-New-European-Balkans-Partnership.pdf> and <https://biepag.eu/publications/>

## The EU's Ever-Evolving Strategy towards the Western Balkans

The current EC's approach to the enlargement process, upgraded/improved in 2012<sup>15</sup> and built on lessons learned from previous accession waves,<sup>16</sup> is more rigorous, more complex, and more demanding than ever before. This entails that the Western Balkan countries are held to higher standards than previous aspiring members but also that the EU capitals have become more cautious about allowing the Balkan countries to advance too quickly on their respective integration paths. All too often, the breaks that the EU member states put in the spanners of the enlargement process are driven by considerations that have more to do with the vagaries of their domestic politics than with the situation on the ground in the Balkans.<sup>17</sup>

### The 5 steps of the current EC approach towards the candidate countries:



At the centre of the EU's current approach towards the Balkan candidate countries is a benchmarking mechanism for assessing progress on all chapters of the *acquis*, with special focus on the rule of law and good governance. The benchmarks include recommendations that seek to address identified problems and vulnerable areas in these countries.

15. Endorsed by the Council in December 2011 but confirmed by the 2012-2013 Enlargement Strategy: "The new approach to negotiations in the rule of law area introduces the need for solid track records of reform implementation to be developed throughout the negotiations process. Reforms need to be deeply entrenched, with the aim of irreversibility", European Commission (2012), "Enlargement Strategy and Main Challenges 2012-2013", p. 3, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2012/package\\_strategy\\_paper\\_2012\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2012/package_strategy_paper_2012_en.pdf)

16. Especially with Croatia

17. Balfour, Rosa and Stratulat, Corina (2015) (ed.), "EU member states and enlargement towards the Balkans", EPC Issue Paper No. 79, Brussels: European Policy Centre.

In order to ensure the irreversibility of reforms, the chapters on the rule of law are now opened first and closed last. Thus, the EU-hopeful countries of the region must get an early start on policies that fall under chapters 23 (Judiciary and fundamental rights) and 24 (Justice, freedom and security), and have to implement these from the very beginning of the negotiation process. The EU puts a high premium on concrete results and the implementation of adopted laws in the case of the Balkans.

The chapters themselves, however, are opened only when a country meets certain conditions. Montenegro, for example, took one and a half year from the start of its negotiations with the EU before it arrived in a position where it could open chapters 23 and 24, while Serbia needed two and a half years to do the same.<sup>18</sup>

Hence, **chapters 23 and 24 represent the main instrument of the European Union's strategy towards the Western Balkans, while the benchmarking system affixed to these chapters aims to help a candidate country meet the EU requirements through specific tasks that facilitate the measurement and evaluation of progress.**<sup>19</sup>

## What was introduced in 2012?



18. It should be taken into account that the opening of the Serbian rule of law chapters was blocked by Croatia once. Member States might have negative influence on negotiations due to their veto right on each stage of negotiations which is another way of possible slowing down the Western Balkans' integration process.

19. Opening benchmarks are requirements for a country in order to be able to open chapters (usually requirements for the adoption of comprehensive action plans for chapters 23 and 24 whereby the candidate country proposes measures that can improve the situation in the identified areas). Interim benchmarks are requirements that a candidate country must meet to advance in the negotiation process. Closing benchmarks are requirements that a candidate country must meet to close the chapters.

As it stands, the principle of opening chapters 23 and 24 at the very beginning of the negotiation process is neither sufficient nor effective,<sup>20</sup> as it lacks efficient monitoring and clear guidelines. The following section explains the shortcomings and suggests potential solutions.

## 1. Key Gaps in the EU's Conditionality

Neither the EU's reports nor its official statements are properly addressing the root causes of the rule of law deficiencies in the region. While many factors can explain the flawed Balkan democracies, the autocratic way in which the region's countries are governed accounts for the largest share of the problem. Balkan strongmen and their political parties, which enjoy virtual monopoly on power, have no incentive to change since non-democratic practices is what sustains them at the helm of their countries in the first place.

Many of these leaders saw in the EC's 2018 Strategy a strong political message of support for the region's European perspective and chose to ignore the red flags presented in the same document about the poor state of democracy throughout the Balkans. However, this is also because the EU itself is not always clear or precise in its messages. Instead of setting strict conditions and increasing the pressure on the region's politicians, whom the EU blames for state capture, European officials are often using phrases that play to the advantage of Balkan political leaders, strengthening their position publicly. The "Montenegro is a backbone for the EU in the Western Balkans", after the Montenegrin president Milo Đukanović's speech in the European Parliament in October 2018, is a case in point.<sup>21</sup>

Moreover, the instruments that the EU has at its disposal to correct lapses are largely inefficient. The Balance Clause, for example, which allows the EU to block a country from further opening negotiating chapters until satisfactory progress on reforms under chapters 23 and 24 has been achieved, could be a powerful mechanism but it has never been used in practice, and in the case of Montenegro, which has only one more chapter to open, it has essentially lost its leverage. And clearly, stopping negotiations is not necessarily the best way to go in order to bring about an acceleration of reforms.

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20. The European Union has been negotiating for five years now with Montenegro under chapters 23 and 24, while the overall negotiations within these chapters with Croatia lasted for a year.

21. Said by the European Parliament president.

Furthermore, by prioritising the region's stability over other considerations<sup>22</sup>, the EU has undervalued an important lesson from European integration and enlargement, namely that democracies are the most suitable polities to solve security and state-building problems.

In addition, the entire toolkit of rules and conditions that the EU has are largely based on lessons learned and reactions to urgencies that have emerged in the region, rather than the result of a pro-active and systematic approach. The EU has no blueprint on how to support the consolidation and sustainability of democracies, and the EC does not have competences to intervene in this field either. Even in the member states, the toolbox is limited and inefficient, as demonstrated by the struggles of the EC with the likes of Hungary and Poland.

Aware that its approach has limits<sup>23</sup>, the European Commission has put forward a set of instruments (referred to as 'flagship initiatives'), meant to strengthen the rule of law reform effort in the Western Balkans.

### **European Commission's Flagship Initiatives**

*Existing negotiation tools, such as detailed Action Plans, will be expanded to all Western Balkan countries. Assessment of reform implementation will be enhanced, including through new advisory missions in all countries. Greater use will be made of the leverage provided in the negotiating frameworks with Serbia and Montenegro.<sup>24</sup>*

Apart from the fact that these initiatives are not completely new, their implementation to date has encountered multiple challenges, as explained below.

#### **1.1. Action Plans: 'Non-Living' Documents<sup>25</sup>**

The opening benchmark for the start of negotiations on chapters 23 and 24 is a request on the country in question to adopt comprehensive Action Plans tackling all the issues identified during the screening process.<sup>26</sup> The European Commission initiates and approves these Action Plans, thus confirming that a set of proposed measures and activities can meet an interim benchmark.

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22. Kmezić, Marko and Bieber, Florian (2017), "The Crisis of Democracy in the Western Balkans. An Anatomy of Stabilitocracy and the Limits of EU Democracy Promotion", BiEPAG. Available at <http://biepag.eu/publications/the-crisis-of-democracy-in-the-western-balkans-an-anatomy-of-stabilitocracy-and-the-limits-of-eu-democracy-promotion/>

23. By publishing the strategy for a credible enlargement perspective for and enhanced EU engagement with the Western Balkans in February 2018

24. European Commission (2018), "A credible enlargement perspective for an enhanced EU engagement with the Western Balkans", February 2018, p. 17

25. The EC often refers to Action Plans as 'living' documents

26. Analysis of the national legislation harmonization with the EU acquis

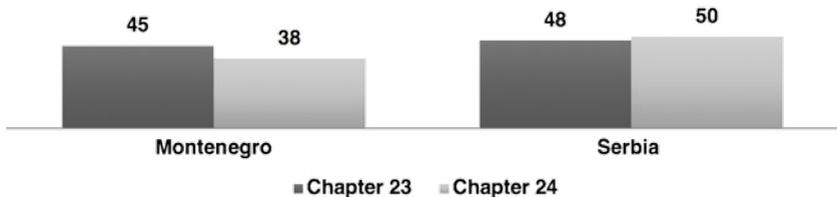
The Action Plans for chapters 23 and 24 have been adopted in 2016 for Serbia and in 2013 for Montenegro. In both cases, the Action Plans have not been adapted regularly. According to the chief of the negotiating working group for chapter 23, Montenegro has not received a recommendation to change and improve these plans for the past three years.<sup>27</sup>

Because of the large number of out-dated measures and a lack of new proposals, the process is condemned to stagnation. Although the EC often refers to Action Plans as ‘living’ documents, which can evolve and be adapted, in practice, their “immutability” negatively influences the dynamics of reforms since the measures are not being supplemented further in order to achieve the goals. Moreover, the reports on the implementation of these Action Plans have hundreds of pages and do not paint a clear picture of the issues that the countries face.

## 1.2. Benchmarks Across the Region: Broad and All the Same

Activities included in the Action Plans are grouped around interim benchmarks (recommendations from the screening reports in the Serbian case).

**Graphic 1: Number of Interim Benchmarks**



Still, interim benchmarks are not “measurable” or “uniform”, some are broad and represent a long-term goal, which makes their assessment complicated and often superficial. In addition, the benchmarks are not tailored to the specific circumstances of the countries they target. Most of the benchmarks for Serbia and Montenegro are almost the same as can be seen from the following examples:

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27. Information from the Working Group for Chapter 23 in Montenegro

*Montenegro ensures that freedom of expression and the media in the country is improved and applies a zero-tolerance policy as regards threats and attacks against journalists, prioritising criminal investigations should such cases occur. Montenegro establishes a Commission to monitor the actions of competent authorities in the investigation of old and recent cases of threats and violence against journalists, including a murder case. Montenegro provides an initial track record of progress in the investigation, effective prosecution and deterrent sanctions for perpetrators in these cases.<sup>28</sup>*

*Serbia fully respects the independence of media, applies a zero-tolerance policy as regards threats and attacks against journalists, and prioritising criminal investigations, should such cases occur. Serbia provides an initial track record of progress in the work of the "Commission for consideration of the facts that were obtained in the investigations that were conducted on the killings of journalists" including further investigations, effective prosecution and deterrent sanctions for perpetrators.<sup>29</sup>*

### **1.3. Peer Review Missions: Paper Tigers**

The EC has been organising the rule of law peer review missions for twenty years now.<sup>30</sup> However, little is known about the ensuing reports, with the exception of the Priebe report.<sup>31</sup> The latter is the product of a specific mission different from the usual expert and peer review missions for the Western Balkans, and differs both in terms of structure and content from usual reports. The Priebe report on Macedonia was published in 2015 and its success was facilitated by a number of factors:

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28. "European Union Common Position, Chapter 23: Judiciary and Fundamental Rights: Montenegro", December 2013

29. European Union Common Position, Chapter 23, Judiciary and Fundamental Rights: Serbia", July 2016, <http://data.consilium.europa.eu/doc/document/AD-20-2016-INIT/en/pdf>

30. "EU's guidance note on the organisation of rule of law peer-review missions", July 15, 2014, p. 1, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/taix-peer\\_review\\_0.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/taix-peer_review_0.pdf)

31. The group of experts was led by the retired Commission Director Reinhard Priebe.

- Specified mandate;<sup>32</sup>
- Political momentum – an extremely tense situation that threatened to escalate into an open conflict;
- Direct connection between the mission’s framework and the worrisome state of the rule of law in the country;
- Recommendations for concrete measures;
- Full support to the mission and team of experts from the European Commission and the Delegation of the European Union in Macedonia.

The Priebe report revealed that previously suggested measures and knowledge about the situation that made the subject of the mission were insufficient. Some of the lessons that were inspired by this case include:

- The mandate of peer review missions should be specific, case-based, and target-oriented;
- Given that the time which the missions have for ‘field work’ is limited (three short days in the case of the Priebe mission), the planning for the work of the peer review missions needs to be thorough and should include consultations with interested parties (NGOs, journalists following a specific case, etc.) before engaging in the field work;

The EU guidelines for peer review missions in the rule of law field stipulate that members of the missions can come from the public sector of the member states and, in special circumstances, when the required expertise does not exist, they can be private experts. However, external/contracted members often suggest solutions from their respective countries, which are not always applicable in the context of the country where the mission has its mandate.

*“Since peer review reports are not public documents, experts are asked to sign a ‘Declaration of confidentiality’”*

*EU’s guidance note on the organisation of rule of law peer-review missions, p. 4*

32. “To carry out a rapid analysis of the situation and provide concrete recommendations on how to address the issues arising from the interception scandal”, “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”, June 2015, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news\\_corner/news/news-files/20150619\\_recommendations\\_of\\_the\\_senior\\_experts\\_group.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf)

Besides the Priebe report, which was published due to the “seriousness of the situation”,<sup>33</sup> no reports of completed peer review missions in the Western Balkan countries have been publicly released. In Montenegro, the then Ministry for European Integration published peer review mission reports in 2017 in response to a request invoking the law on free access to information.<sup>34</sup> A lawsuit filed by a local NGO before the Administrative Court had nevertheless been necessary to produce this outcome.<sup>35</sup> In other Western Balkan countries, the reports of the peer review missions are not public documents. Yet **the publication of these reports is of utmost importance** in order to enable civil society organisations to monitor progress and establish responsibility for unfulfilled recommendations. Moreover, the names of the mission members are not publicly available either, even if they have eventually become known in the case of the Priebe mission. Experts’ names should be released together with the report in order to lend credibility to the work of the mission.

## 1.4. Reporting: Keeping Quiet when Voice is needed

The EU often remains silent on issues where it should raise its voice. By failing to speak up against violations of the rule of law and the erosion of democratic standards through smear campaigns against the civil society, media, or independent institutions (like in the “Savamala” case in Serbia)<sup>36</sup>, the EU tacitly encourages autocratic elites. Even if unintentionally, every time the EU enables such self-proclaimed pro-European leaders with questionable democratic credentials by keeping tight-lipped, it creates room for further erosion of the rule of law.

Additionally, when cases of human rights violation, attacks on media, or abuses of public resources are mentioned in reports or public statements, these do not have any follow-up activities or measures. Moreover, the country reports prepared by the EU include copy-pasted assessments which are not even specific enough to be effective.

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33. As explained by the Cabinet of the European Commissioner for enlargement

34. Ministry for European Integration, [http://www.mep.gov.me/informacije/spi/informacije\\_trlalaal/](http://www.mep.gov.me/informacije/spi/informacije_trlalaal/)

However, the ministry hasn’t publicly announced that reports were published.

35. Marović, Jovana and Muk, Stevo (2015), “Negotiations between Montenegro and the EU: Data access for privileged only”, Institute Alternative, September 2015, <http://media.institut-alternativa.org/2015/10/ia-negotiations-between-montenegro-and-the-eu.pdf>

36. In April 2016 a group of masked people demolished privately owned facilities by bulldozers in the Belgrade district of Savamala (where the Belgrade Waterfront project is being built), See: PointPulse (2016), “The Collapse of the Rule of Law in Serbia: the “Savamala” Case,” May 2016, <https://pointpulse.net/magazine/collapse-rule-law-serbia-savamala-case/>

Given the obligation of the EC to report to the Council on reforms in the field of the rule of law, the Commission has recently started preparing the so called non-papers.<sup>37</sup> Yet, **non-papers on chapters 23 and 24 address issues and assessing progress on benchmarks in a general manner. Rather than offering a proper evaluation, they repeat the same general conclusions from the EC country reports.** The European Commission has published the non-papers on the state of affairs on chapters 23 and 24 for Serbia following the request of the Serbian Government and civil society. In Montenegro, it was the then Ministry of European Affairs that did so, under pressure from the civil sector.

The EU's policies are not completely transparent or consistent since the European Commission refuses to publish a series of documents of importance for monitoring the negotiation process, such as reports from the peer review missions or commentaries on legislation. The practice is thus rather different from country to country and from case to case, when it comes to the public availability of these documents.

## 1.5. Long-term Priorities

The EC started to define priorities<sup>38</sup> for certain chapters in 2015. While some chapters change annually, the EU regularly sets priorities for chapters 23 and 24. However, this practice has not yielded any significant results so far since these priorities do not differ much from the benchmarks defined for Montenegro and Serbia at the beginning of their negotiation talks.

### **2018 Priorities under the chapter 23 for Serbia<sup>39</sup>**

- *Strengthen the independence, accountability, impartiality, professionalism, and overall efficiency of the judicial system;*
- *Ensure an effective implementation of the national anti-corruption strategy and action plan, including by providing effective coordination and ensuring that all key institutions have adequate capacity and resources to fulfil their remits effectively;*
- *Improve the situation as regards creating an enabling environment for freedom of expression and media freedom.*

37. Semi-annual reports prepared by the European Commission on the state of play within the chapters related to the rule of law (23 and 24)

38. Prioritised activities in the effort to achieve a higher level of reforms annually.

39. European Commission (2018), "Serbia 2018 Report", April 2018, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf>

### **2018 Priorities under the chapter 23 for Montenegro<sup>40</sup>**

- *Step up efforts to increase the use of financial investigations in line with Financial Action Task Force (FATF) standards, and establish a track record of seizure and confiscation of criminal assets;*
- *Strengthen the independence, accountability, professionalism, and overall efficiency of the judicial system;*
- *Strengthen media freedom, including by clearly stepping up efforts to investigate cases of violence against journalists and by shielding public broadcaster RTCG and all other media from undue influence and political pressure.*

For example, the priority to create an enabling environment for the freedom of expression and media freedom is a long-term goal and cannot be achieved in the one-year period for which the EC sets it as a priority. Giving the candidate country the maximum time to secure a track record is a good argument for a new approach, but this should also include a dedicated role for the EU during the entire process.

## **1.6. Reporting on Progress: Complicated and Unclear**

Reports on progress within the rule of law area have the same form as Action Plans. The information which is delivered by Balkan state institutions to the EC in these reports (approved by the EU) on the implementation of the Action Plans for chapters 23 and 24 are lengthy, based on benchmarks/activities which are not updated regularly, often using poor indicators, susceptible to different interpretations, and frequently relying on incorrect statistics.<sup>41</sup>

## **2. Identifying Solutions**

### **Goal 1: Actions Plans and Reports – Avoiding Long Reads**

In case of problems during negotiations, the new approach foresees that the EC will propose to the Council corrective measures, including amendments to the Action Plans. The EC **should provide such corrective measures in a prompter and more frequent manner than so far.**

40. European Commission (2018), "Montenegro 2018 Report"; April 2018, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-montenegro-report.pdf>

41. MANS (2017), "Report on implementation of Action Plan for Chapter 23", Podgorica, February 2017, <http://www.mans.co.me/en/wp-content/uploads/2017/05/AP23ENGfin.pdf>

State institutions should deliver a narrative report on the fulfilment of benchmarks, which should be concise but make sure to include an overview of the key results and challenges. This would compel state institutions in the Western Balkans to think about the impact of reforms and act accordingly.

Roadmaps<sup>42</sup> for each of the countries should be better-distinguished from measures in the Action Plans.

## Goal 2: Benchmarking - Beyond the Technocratic Mode

**Benchmarks should be more concrete, more regularly updated, and divided in multiple sub-benchmarks. In this way, layered conditioning and the achievement of benchmarks in phases would be facilitated.**

At the same time, defining and fulfilling the closing benchmarks would become less challenging. With the successful attainment of specific benchmarks, the number of problems would be reduced and progress would become tangible.

At present, it is not even possible to establish measurable progress for some activities within the Action Plans for chapters 23 and 24 because the indicators for assessment are poorly defined. For example, strengthening the control over public procurement contracts in Montenegro is measured through a monitoring framework and by increasing the number of inspectors, which in practice affects the control of an extremely limited number of contracts. Therefore, control has been only slightly improved.

**Benchmark “improve the control over the public procurement contracts’ implementation”**

Number of annual controls	
2012	2018
0 <sup>43</sup>	221 <sup>44</sup> out of 97513 <sup>45</sup>

42. Based on the annual priorities for the rule of law.

43. At the beginning of the negotiations with the European Union, Montenegro didn't have an established institutional mechanism for public procurement contracts control, and its realisation has been left completely unsupervised.

44. Inspection Administration (2017), “Annual report of the Inspection Administration for 2017”, p. 57

45. 6185 concluded contracts in 2017 and 91328 direct agreements in the first half of 2017, Public Procurement Administration (2018), “Annual report of the Public Procurement Administration for 2017”, p. 77. Reporting should include, for example, percentage (controlled vs. total).

In its 2018 report on Montenegro, the European Commission indicates that “checks on the overall public procurement cycle remain a cause for concern”<sup>46</sup> and calls for further strengthening of inspection capacities and internal audits within the contracting authorities. At the same time, not a single benchmark about control over public procurement contracts implementation is listed among the priorities of the Commission’s report on chapter 5 (public procurement). Had a more in-depth analysis been conducted (by the relevant institutions following the EC’s recommendation and pressure), more detailed measures would have resulted/emerged:

EC’s recommendations	Possible measures
<p><i>“Inspection capacity in public procurement needs to be further improved”</i></p> <p><i>“Better internal auditing within contracting authorities is required to improve monitoring and verification of contract implementation”</i></p>	<p><i>Annual plan of inspection controls for public procurement should be made in consultation with interested parties (bidders, NGOs, etc.)</i></p> <p><i>Inspection to pro-actively operate based on the findings of the State Audit Institution.</i></p> <p><i>Inspection to execute controls after reports of the interested party (since the controls so far have been done solely on the basis of an annual plan).</i></p> <p><i>Increase the number of controls (determine a percentage on an annual basis)</i></p> <p><i>Internal audit reports to be made publicly available.</i></p>

46. European Commission (2018), “Montenegro 2018 Report”, April 2018, p. 21, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-montenegro-report.pdf>

### **Goal 3: Peer Review Missions – From a Paper Tiger to Tiger with Teeth**

The reports of all individual peer review missions should be made public and available to all interested parties in a timely manner<sup>47</sup> (to be published by the European Commission).

The mandate of Peer Review Missions should be specific, case-based, and target-oriented.

The peer review missions should include a representative of the country where the mission takes place, a non-partisan and independent expert, who has proven knowledge in the field and follows it actively. This way, the data collection process and the writing of the reports would be facilitated.

#### **The (possible) subject (scope) of the peer review missions' work:**



A clear link should be established between the peer review missions' reports, the Commission country reports, and the reports on the current state of play in chapters 23 and 24. Therefore, peer review missions should be specific and organised in accordance with the priorities which the EC defines annually.

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47. Immediately after preparation and not after a certain period of time



Annual benchmarks and priorities should be concrete and adapted to results (or lack thereof). This approach would address the current problem of out-dated Action Plans. At the same time, it would ensure a better coordination and acceleration of the process, given that competent institutions in the Western Balkans would not have to duplicate efforts and prepare new plans for which considerable resources and time is needed.

#### **Goal 4: Reporting – Escaping the Diplomatic Language/Jargon**

The EU's reporting should be more:

**Precise** – Instead of emphasising that “challenges to the credibility, independence, and priority-setting of the Anti-Corruption Agency need to be addressed”, the European Commission should specify what influences the lack of credibility and independence of the Agency.

**Binding** – Instead of, for example, highlighting that “the Agency is encouraged to perform more in-depth checks of officials on random samples”, the European Commission should set this as a condition.

**Stricter** – Since the EC has started to speak more clearly about elements of captured states in its latest Strategy on the Western Balkans, it should regularly and more specifically call out undemocratic practices in all of its reports.

**Non-papers on the current state of play on chapters 23 and 24 should be prepared for all the Western Balkan countries, irrespective of their position on the EU track.** Considering that the non-paper's aim is to assess the fulfilment of the benchmarks/criteria under chapters 23

and 24, it should include an assessment for each benchmark rather than a general overview of the areas that make up a chapter (similar to that of the European Commission's annual reports on country's progress). For countries that have not yet started accession talks with the EU, non-papers should include an assessment of the conditions that would help that country advance to the next phase of integration.

### **Goal 5: Priorities – Make the ‘fundamentals first’ approach visible in practice**

To be able to monitor and ensure progress, the EU's priorities should be bounded by a specific timeframe, that is, they should be measured annually.

Defining priorities should be accompanied by a set of positive (incentives) and negative (sanctions) measures to reward or discipline a country that delivers/does not deliver, respectively.

### **Goal 6: Exposing Progress (or Lack of It) – Template for Assessment**

**Sample template for the WB states' reporting on benchmarks/priority fulfilment<sup>48</sup>**

Priority & Core Activities	Performance Measure (Specified on Annual Basis)	Performance Target/Impact indicator	Problems in Fulfilling Core Activity (Why the performance target was not reached?)	Source of information (With the goal to secure a better quality of reporting in the annual reports of institutions)
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48. Developed by Marović in: Marović, Jovana (2018), "Western Balkans and the Rule of Law: How to solve a catch 22?", Institute for Democracy "Societas Civilis", Skopje, July 2018, <https://idscs.org.mk/en/portfolio/western-balkans-rule-law-solve-catch-22/>

## Section 2:

### Rule of Law and Elections: How to Tackle Systemic Problems

This section deals with the second question at hand, that is: **“how to approach systemic issues, especially those that tend to skew the rules further in favour of the incumbent elites?”** As explained in the introduction, far-reaching improvements in the EU’s approach to conditionality should take into account that the problems affecting the rule of law in the countries of the region are, by and large, structural. That is why improving the system of monitoring and benchmarking will not, in itself, guarantee consequential results.

The spheres in which systemic state capture is present are several and include: the judicial system, law enforcement, public procurement, and the media. In most of the Western Balkan countries, however, the conditions for significant improvements in the fight against particularism are not in place yet, not least because there are systemic issues preventing the running of fair elections – one of the most relevant areas in this sense. As it will be shown, the consolidation of the rule of law is significantly hampered by the fact that those who control power, and thus also the state resources, are in a much better position to lock in their dominance through the voting process.

Citizens are aware of this dynamic, which is skewed towards the elites in power. This, in turn, creates a **great lack of trust**: research carried out in Bosnia and Herzegovina (2016), for instance, showed that only 11% of Bosnian citizens trust the electoral process. This low level of trust is one of the main reasons why voters decide not to participate in elections. Of all respondents, 50% say that it is because “everyone is the same” and 25% think that their vote has no weight and will not change anything.<sup>49</sup>

Turning this tide is difficult. The low level of trust in the electoral process, and in the very possibility of change, makes citizens more inclined to think about how to benefit from the rents offered by the system rather than about the most effective ways to fight it.

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49 Centar za Izborne Studije (2017), “Iskustva i preporuke NVO sektora za unapređenje kvalitete izbornog procesa u Bosni i Hercegovini”, Heinrich Boell Stiftung, Sarajevo, May 2017. <http://cisbih.ba/wp-content/uploads/sites/9/2017/06/cis-hbs-jacanje-uloge-nvo-sektora-final.pdf>

For change to happen, the party system should be truly pluralistic and the institutions should be – as much as possible – open and transparent, so that citizens can start feeling that they can make a difference. The analysis that follows will make a diagnosis of the problems at hand and suggest ways by which the European Union is able to counter them.

## **The research**

The analysis presented in this section therefore identifies the main pathologies affecting the integrity of electoral processes and evaluates their weight, before suggesting ways to tackle them effectively. It relies on a wide-ranging consultation with experts dealing with the electoral process across the six Western Balkans countries. Data collection was carried out in October–November 2018. On the back of desk research and expert interviews, five macro-areas have been investigated through a tailor-made questionnaire<sup>50</sup> : (1) Abuse of state resources; (2) Media dominance; (3) Electoral register; (4) Electoral commissions, and (5) Voter fraud.

Two to three leading organisations dealing with elections in every Western Balkan country (that is, Albania, Bosnia and Herzegovina, Kosovo, Serbia, Macedonia, and Montenegro) were included in the research. Each of them was asked to fill in the questionnaire, drawing on pre-existing research on the subject. Follow-up interviews were then held when necessary, while taking on board the most recent research reports (period: 2014–2018) on elections and the rule of law.

All these efforts produced a large amount of country-specific knowledge, which has been summarised here to give an overall picture for the situation in the region.

Discussions on issues affecting the electoral process are common across the European Union. However, there are specific – and, arguably, deeper-seated – problems that affect all the countries of the Western Balkans. For the purposes of this research, discussions on the need for electoral reform as well as issues related to party financing have been left out, not least since many of them are also found in consolidated democracies and would therefore represent a grey area. Instead, this section focuses solely on problems that are undoubtedly capable of negatively affecting the consolidation of the rule of law and which are characteristic of the whole region.

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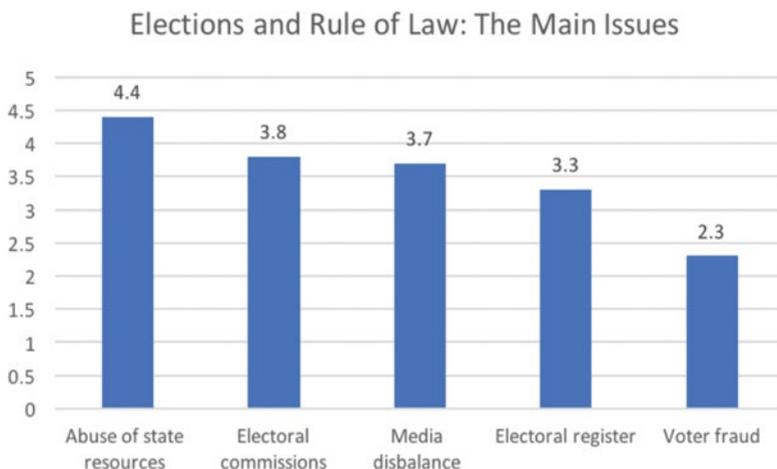
50. The full questionnaire is available at: <https://goo.gl/forms/o77lkdC9em9GUX-qP2>

The abuse of state resources was consistently indicated as the most troublesome issue in this sense, as shown in Figure 1. The second most prominent issue, according to the experts consulted, was the lack of independence (and of skills) of national and local electoral commissions. The imbalance in the media reporting, often skewed towards the governing parties, took third place. And finally, electoral register and voter fraud occupied the fourth and fifth place, respectively.

The discussion that follows will identify the main ways in which each of these macro-issues plays out in the countries of the region, while also highlighting, where relevant, the differences in the incidence of the issues in individual countries and analysing any changes that have occurred over the course of the four years covered (2014-2018).

**Figure 1.**

**Election-related Macro Issues Affecting the Consolidation of the Rule of Law in the Western Balkans**



*Note: Field work by BIEPAG, October-November 2018. Country experts were asked to assess election-related issues capable of undermining the rule of law, grading them from 0 (not at all) to 5 (extremely). For a list of the country experts, see Appendix 1.*

## 1 – ABUSE OF STATE RESOURCES

The abuse of state resources was consistently indicated as the number one issue affecting the rule of law in the electoral processes of the Western Balkan countries. On a scale from 0 to 5 in terms of negative impact on the rule of law, abuse of state resources was rated 4 or above in all countries, and in Serbia and Bosnia-Herzegovina all respondents gave it the highest possible rating, that is 5. The problem involves the **public as well as the private sector** (although the latter to a lesser extent, and mainly through politicised procurement), and the practices identified encompass a large spectrum ranging from clientelism, to patronage, to corruption, and to nepotism.

By and large, it was highlighted that the abuse of state resources follows the line of **relational clientelism**, that is, of the relationships between patrons (usually the incumbent political parties) and the clients (voters or companies). Political parties “become brokers of public resources in return for support and loyalty”.<sup>51</sup> For voters, the main methods by which this happens is the **promise of employment** (or the threat to lose it)<sup>52</sup>, with each party promising up to 200,000 jobs in every election.<sup>53</sup> Often, voters-clients need to supply additional votes aside from their own. Companies, on the other hand, either return in-kind donations for the public procurement they won, or pay the party in cash. In some cases, the cash is then “launder(ed) back to private accounts or to the party accounts through fake ‘crowd’ funding”.<sup>54</sup>

Promises made during the election campaigns include the increase of salaries in the public sectors (doctors, teachers, and public servants) and the opening of new public universities (as a way of promising jobs).<sup>55</sup> The use of **targeted help to specific groups** is also a widespread pressure mechanism, for example, through farming subsidies or by directing social workers to households in need. Other categories of voters who are being promised rents in exchange for their support at the ballot box are miners, health workers, and war veterans. Adnan Huškić of the Center for Electoral Studies defines veterans as an “outright voting army” operating within a “clear fight for resources”.<sup>56</sup>

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51. Written submission by Misha Popovikj, November 2018.

52. Researchers from Kosovo noted that this practice is particularly spread in the rural parts of the country. Written submission by Eugen Cakolli and Florent Spahija, October 2018.

53. Written submission by Rezarta Delibashzade and Shpend Emini, November 2018.

54. Written submission by Misha Popovikj, November 2018.

55. Written submission by Rezarta Delibashzade and Shpend Emini, November 2018.

56. Interview with Adnan Huškić, November 2018.

The mobilisation along ethnic lines – characteristic of some countries of the Western Balkans, such as Macedonia and Bosnia-Herzegovina – is thus complemented and outdone by the **penetration of the political parties** in almost every sector. And while public sector workers are clearly susceptible to these pressures, the problem involves the private sector as well, through politicised public procurement. Finally, the **misuse of public office** for promotional ends during electoral campaigns – such as the public officials’ visits to companies, schools, hospitals, factories, or construction sites – is so widespread “that the public no longer responds to (it)”<sup>57</sup>, raising hardly any complaint.

While such issues used to be an open secret, in recent years they have started to come **out in the open**. During the campaign for the 2018 Bosnian general elections, for instance, the systematic abuse of state resources for electoral gains was openly discussed by some candidates. For example, the then Republika Srpska president Milorad Dodik (who was elected to the tripartite Presidency), openly threatened to fire anyone who would vote for competitors (“We will fire them on the spot”)<sup>58</sup> and promised payoffs to pensioners (“so they can warm up ahead of the winter and come vote for us”).<sup>59</sup>

Numbers speak for themselves on the wide reach of these practices. For example, the use of public resources was observed in 96 out of the 655 electoral campaigning activities scrutinised during the 2017 Kosovo elections. However, in spite of the common recognition of these practices, respondents stated that some governmental anti-corruption **institutions are refusing to acknowledge the presence of such abuses** (as highlighted for Montenegro<sup>60</sup>). The misuse of public resources during election campaigns has increased in Serbia in recent years;<sup>61</sup> it has become “more aggressive” in Kosovo ever since 2008; whereas it retreated in Macedonia at the latest local elections in 2017 (after a new government took office in May 2017).<sup>62</sup>

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57. Written submission by Milica Kovačević, November 2018.

58. TV1 (2018), “Dodik prijeti otkazima, mora se glasati za njega” <https://www.youtube.com/watch?v=6i7IztDTqi0>

59. Oslobođenje (2018), “Dodik: 30KM da glasate za SNSD!” <https://www.oslobodjenje.ba/vijesti/bih/pogledajte-video-dodik-30-km-da-glasate-za-snsd-393551>

60. Written submission by Milica Kovačević, November 2018.

61. CRTA, “Izborne neregularnosti obeležje i ove kampanje”, 27 February 2018.

62. Written submissions by respondents for Macedonia. and Dimeski, Jane and Pankovski, Marko (2017), “The Republic of Macedonia’s Local Elections 2017 Handbook”, Konrad Adenauer Foundation and Institute for Democracy “Societas Civilis” – Skopje. [https://www.kas.de/c/document\\_library/get\\_file?uuid=428d0a15-3722-7f6d-f85f-34f3b2f79d0b&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=428d0a15-3722-7f6d-f85f-34f3b2f79d0b&groupId=252038)

Attempts to control it – with limited success – have also been made in Albania, where a task-force was instituted in 2017 to monitor the use of public resources.<sup>63</sup>

Summary of the main issues – abuse of state resources:

- Promise of employment (in public and, to a lesser extent, in private companies);
- Threat of losing employment;
- Creation of lists in public institutions in which managers record the voting intention of their employees;
- Public procurement: tenders are distributed to political allies;
- Misuse of public office during campaigns for promotional purposes;
- Promise of benefits or welfare for specific groups;
- State advertising in exchange for media attention;
- Public procurement used for PR, marketing and surveys;
- Public events organised in government premises (or at public companies) during electoral campaigns.

Recommendations:

**Improve the transparency of hiring procedures.** While the abuse of state resources takes several different forms, it is clear that a particular systemic issue sits at the core of this problem: the politicisation of the hiring process. The EU accession process should therefore place greater emphasis on addressing this specific issue. In turn, this could resolve a host of related problems, such as the infamous “Bulgarian trains” (vote-rigging schemes in which party activists hand out pre-filled ballots to voters in front of polling stations<sup>64</sup>). Pressure is paramount if **clear legal accountability** is to be assigned in case of abuse. A two-pronged action is thus suggested:

- **At state level.** Make the transparency of hiring procedures a condition of the accession process, with Balkan governments required to make progress on this front in order to advance their EU candidature. Monitoring and sanctioning abuses

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63. Written submission by Dalina Jashari, November 2018; and OSCE / ODIHR (2017), OSCE/ODIHR election observation mission final report, Albania, Parliamentary elections, 25 June 2017. <https://www.osce.org/odihr/elections/albania/346661?download=true>

64. Novinite (2010), „Bosnians name vote-buying technique after Bulgaria“, 30 September 2010 <https://www.novinite.com/articles/120632/Bosnians+Name+Vote-Buying+Technique+after+Bulgaria>

occurring in state-owned and state-controlled companies would give considerable teeth to the EU's conditionality.

- **At grass-root level.** Offer citizens the possibility to report on the hiring practices of companies during and after election campaigns, for example by setting up a web portal that gives the opportunity to employees to review the companies for which they work(ed), giving positive (in case of virtuous behaviour) or negative (in case of abuses) comments/feedback, as deemed applicable. Reviews would need to be vetted by a project team, but the identity of the reviewers should not be disclosed to the public. The launch of the web portal should be accompanied by awareness-raising campaigns ahead of each election (that could be coordinated with organisations already participating in election monitoring). The reviews published on the website would automatically apply public pressure on companies and officials engaging in malpractice, but they should also be used as a basis to investigate, tackle, and sanction widespread malpractices.

## 2 – ELECTORAL COMMISSIONS

Electoral commissions at both national and local levels are, on the whole, **extremely politicised**. Most of the respondents have explained that, in practice, the “entire electoral administration is decided on the basis of party affiliation”<sup>65</sup>, and the members of the commissions are exposed to a high degree of influence from both the executive and the legislative powers. At the national level, the way commissioners are appointed and dismissed often does not ensure consistency and does not protect the members from arbitrary dismissal. The situation is even worse at the local level, where guarantees of impartiality are even weaker. Proposals to depoliticise electoral commissions have been largely disregarded by officials, and some respondents went as far as to summarise the situation by saying that the commissions “are made up of militants”<sup>66</sup>.

A frequent phenomenon concerns **parties trading (or outright buying) posts** on local electoral commissions. The Bosnian example is interesting insofar as it is indicative of the stalemate and lack of will to change in this sense. Although this practice is so widespread as to be considered “not even an open secret” any longer<sup>67</sup>, it is not legal, given that the electoral law clearly states that each political party can only have one spot on each commission. However, the Central

65. Written submission by Milica Kovačević, November 2018.

66. Written submission by Alba Čela, November 2018.

67. As stated by former Central Electoral Committee member Vehid Šehić, see: Koalicija “Pod Lupom”: Šta je trgovina mjestima u biračkim odborima?, video, February 2017. <https://www.youtube.com/watch?v=a9tBtAQdt2Y>

Electoral Commission has not shown willingness to remedy the situation, invoking as excuse the absence of instruments to enforce this rule<sup>68</sup>.

The presence of politicised electoral commissions is dangerous due to the possibility of both more covert influence – for example, in the interpretation of legal technical matters – and brazen impact – as they are able to directly influence the election result at the voting stage, after the closure of the polling stations.

Another issue is the **lack of proper training** for electoral commission members, which is particularly problematic at the local level, but can sometimes be an issue also on the national stage. In Kosovo, the capacities of the members of the Central Election Commission to deal with the complex issues of the election process are seen as “limited”<sup>69</sup>.

The transparency of the work of the electoral commissions is still an issue, although it has improved in some countries in recent election cycles – especially where forceful international criticism during previous elections has pushed the government to implement changes, as it happened in Kosovo and Macedonia. In the latter, the new State Electoral Commission appointed after the 2017 local elections has worked with greater efficiency and transparency on the 2018 referendum, although experts warn that “the 2019 presidential elections will be the true test” for the renewed commission<sup>70</sup>.

Summary of the main issues – electoral commissions:

- Overall lack of independence, that is, politicisation;
- Trading or outright buying of electoral commission posts;
- Last minute changes of the commissioners;
- Lack of training (especially at local level);
- Lack of interest in attending the trainings and / or “ad hoc” trainings organised by political parties;
- Insufficient transparency (with recent improvements in certain countries, such as Kosovo and Macedonia);
- Lack of adequate equipment and funds for the central commission to run the process effectively (Albania).

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68. Ibid., Koalicija “Pod Lupom”: Šta je trgovina mjestima u biračkim odborima?”, video, February 2017.

69. Written submission by Rezarta Delibashzade and Shpend Emini, November 2018.

70. Written submission by Zlatko Dimitrioski and Venco Popovski, November 2018.

Recommendations:

- **Transparency in the selection process.** The EU should demand transparency in the selection process of the members of the electoral commission. The list of members of the electoral commissions should be closed at least two weeks before elections, the names of the commission members should be made publicly available, and the composition of the commission should be impossible to change after the cut-off date.
- **Capacity-building.** The opportunities for training should be widened, especially at the local level. The provision of additional funding could come through the Instrument for Pre-Accession (IPA).

### 3 – MEDIA DOMINANCE

For most countries, it was highlighted that a serious problem in terms of uneven media coverage lies in the politicisation of the **public broadcasting service**. This issue, however, does not impact all Balkan countries equally, and sometimes fair air time does not guarantee fair treatment. While both Kosovo and Serbia's state broadcasters were found to have given more coverage to the governing parties during the latest elections in 2017<sup>71</sup> and 2018<sup>72</sup>, respectively, Montenegro's Radio Televizija Crne Gore (RTCG) was assessed as having given "equal access to free air time" to all candidates during the 2018 presidential election<sup>73</sup>. However, RTCG itself is under constant political pressure, raising questions over its editorial line, and the recent replacement of "unfavourable" board members does not bode well for the future.

In Bosnia, the two entities are differently affected by this issue: while Republika Srpska's public broadcaster, Radio Televizija Republike Srpske (RTRS), is extremely politicised, this influence is less outright in the Federation's Federalna Televizija (FTV)<sup>74</sup>. Similarly, the two news agencies – SRNA and FENA – have different standards, with FENA maintaining a more equal access to different parties and candidates than SRNA<sup>75</sup>. In most cases, the public broadcaster is dependent financially on the parliament, and hence the higher risk of political

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71. Democracy in Action (2017), Early elections to the Assembly of Kosovo: 11 June 2017. Election Observation Report. [http://kdi-kosova.org/wp-content/uploads/2018/01/150-dnv-raporti-perfundimtar-zgjedhjet-2017\\_eng.pdf](http://kdi-kosova.org/wp-content/uploads/2018/01/150-dnv-raporti-perfundimtar-zgjedhjet-2017_eng.pdf)

72. Written submission by Raša Nedeljkov, November 2018.

73. OSCE / ODIHR media monitoring report, Montenegro, Presidential election, 15 April 2018. <https://www.osce.org/odihr/elections/montenegro/386127?download=true>

74. Interview with Adnan Huškić, November 2018, and written submission by Nedim Jahić, November 2018.

75. Written submission by Nedim Jahić, November 2018

influence by those holding the majority in the assembly<sup>76</sup>. Furthermore, the tone of reporting differs: positive-neutral for government leaders and neutral-negative for the opposition<sup>77</sup>.

The control of privately-owned media with wide reach – especially **terrestrial TV stations and influential tabloids** – is a distinct problem in some countries. For example, in Serbia, the government controls Pink TV, Happy TV, and the widely-read weekly tabloids such as Informer, Srpski Telegraf, and Alo. Two other TV stations – O2 and Prva – were recently bought by a company thought to be close to the senior ruling party, the Serbian Progressive Party (SNS). Similarly, Montenegro's own Pink TV favours the government (however, there are also some media outlets that back the opposition, redressing the imbalance). The strong control asserted over certain media outlets is closely connected with the possibility of vicious **smear campaigns** against political opponents, as evidenced, for example, in the case of the Belgrade 2018 local elections, during which media attacks were accompanied by negative campaigning, such as the distribution of fake opposition leaflets, the prevention of public campaigning in public spaces, and the intimidation of opposition candidates<sup>78</sup>.

Equal treatment is not ensured via **paid advertising**, either. In Montenegro, some parties reported significantly lower costs for media advertising than the value of the same ad space according to the official price lists, raising suspicion of covert deals<sup>79</sup>. Excessive state-funded expenditure is also a major red flag. In Macedonia, media were corrupted largely via public advertising, which saw a dramatic increase while the VMRO-DPMNE was in power. The situation seems to be more balanced under the new government, though it is still too early to tell<sup>80</sup>. In Albania, amendments to the law on audio-visual media (adopted in May 2017) strictly prohibited paid political advertising during the electoral period<sup>81</sup>, but the legal framework has yet to regulate political advertising, paid or not, hidden or direct, beyond the electoral period<sup>82</sup>.

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76. Written submission by Rezarta Delibashzade and Shpend Emini, November 2018.

77. Written submission by Raša Nedeljkov, November 2018.

78. CRTA, Belgrade elections 2018. Long term observation: Second interim report. February 18-24. <http://crt.rs/wp-content/uploads/2018/03/CRTA-election-observation-Second-Interim-Report-Summary.pdf>

79. Written submission by Milica Kovačević, November 2018.

80. Written submission by Zlatko Dimitrioski and Venco Popovski, November 2018. Other ways by which VMRO-DPMNE was capturing the media: via close ties with media owners and editors, and suppression of critical journalists, such as the Tomislav Kezarovski case in 2013 – convicted and put in prison in a staged trial.

81. Coalition of Domestic Observers (2017), "Elections for the Assembly of Albania, 25 June 2017. Final Monitoring Report". <http://democracyinternational.com/media/2017%20Final%20Monitoring%20Report%20of%20the%20Albanian%20Assembly%20Elections%20-%20English.pdf>

82. Written submission by Dalina Jashari, November 2018

In terms of online media, there is a problem with the **suspected presence of “bots”** posting a great number of comments on the most read web portals, as the parties with the most resources (again, those close to the public coffers) will be able to have the upper hand in this sense<sup>83</sup>. Similar issues have started to appear on social media, with the appearance of fake pages and profiles. The lack of online media regulation leaves space for biased political content.

Summary of the main issues – media dominance:

- State broadcaster leaning towards the party in power;
- Broadcasting of electoral activities “live” during prime time;
- Control of mainstream media with wide reach, especially terrestrial TVs and tabloids;
- Close ties to media owners and editors;
- Suppression of critical journalists;
- Smear campaigns against opponents;
- Paid advertising: possibility of covert deals & state-funded advertising;
- Online media: “bots” invading the comment sections of popular web portals;
- Controlling mechanisms (such as parliamentary oversight) are weak and ineffective, passive role of regulatory bodies.

Recommendations:

- **Transparency of media ownership.** Promote transparency of media ownership by carrying out independent inquiries into media outlets (through Priebe-style reports).
- **Promptly condemn smear campaigns.** EU institutions should be vigilant and swiftly apply informal pressure in cases where smear campaigns are used to attack and discredit activists and political candidates. Public statements of condemnation of such attacks go a long way towards providing support and confidence to the activists, while sending a message to the population that the EU is not a distant institution propping illiberal leaders. The most prominent EU officers dealing with EU Enlargement (that is, the Commissioner in charge of Enlargement and the High Commissioner in charge of the European External Action Service) are the best suited figures to take this role.

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83. Interview with Adnan Huškić, November 2018.

## 4 – ELECTORAL REGISTER

In all of the Western Balkans countries there are strong indications that the electoral register is **out of date – with great margins of error**. Problems with the voters' roll have worsened during the past 20–30 years, which means that they cannot be attributed to any specific party of a given political colour. The lack of will to deal with this problem appears to characterise all legislatures. Once again, the traits of the problem are shared across the region.

For example, in Bosnia, the voter roll contains about 3.2 million people, but only 3.3 million people are estimated to still live in the country, which makes the electoral register unrealistic. This is substantiated by the strong discrepancy between the official turnout as reported by the Bosnian Central electoral committee (at about 50-55%) and the number of citizens who state that they have voted at previous elections (consistently found to be at about 73–75%)<sup>84</sup>. The situation is even worse in Kosovo, where, at present, there are more voters in the electoral register than citizens in the country<sup>85</sup>. In Serbia, a conservative estimate of the errors in the electoral register (containing 6.7 million people) is about 600,000 entries<sup>86</sup>, while experts state that the number of Serbian citizens who find it impossible to vote – due to, among others, the significant barriers to the **diaspora vote**<sup>87</sup> – is as high as one million<sup>88</sup>. In Macedonia, the outdated register (containing 1.8 million voters in a country of just over 2 million people<sup>89</sup>) – has more recently raised questions about the legitimacy of the result of the September 2018 referendum on the agreement with Greece: would the quorum have been reached if there were no problems with the voters' roll?

**Unreported deaths** are a first hurdle to tackle: the legal framework on how the transmission of data should work is frequently not clear in this sense, and municipalities often fail to provide the latest information to the central electoral commission. In Kosovo, unofficial estimates indicate that at least 30,000 deceased people are contained in the electoral register<sup>90</sup>.

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84. Center for election studies, 2018

85. Written submission by Rezarta Delibashzade and Shpend Emini, November 2018.

86. Ilić, Vujo (2017), "Nevolje sa biračkim spiskom", Peščanik, 15 April 2017 <https://peSCANIK.net/nevolje-sa-birackim-spiskom/>

87. Prelec, Tena (2018), "The Serbian Diaspora's Political Views: A Study on the 2017 Serbian Presidential Election", Journal of Balkan and Near Eastern Studies, December 2018

88. Klačar, Bojan in Al Jazeera (2017), "Srbija: Na biračkom spisku 800.000 ljudi više nego na popisu" <https://www.youtube.com/watch?v=zla1-x702Bc>

89. Bieber, Florian (2018), "For Macedonia, is joining NATO and the EU worth the trouble?", Foreign Policy, 13 September 2018 <https://foreignpolicy.com/2018/09/13/for-macedonia-is-joining-nato-and-the-eu-worth-the-trouble/>

90. Written submission by Eugen Cakolli and Florent Spahija, November 2018.

The other significant problem lies in the **high levels of emigration** and the fact that the number of citizens who emigrated from the Western Balkan countries is likely to be much higher than official statistics suggest<sup>91</sup>. For instance, while only 30,000–40,000 Bosnians living abroad have registered for postal vote, the number of Bosnians abroad is exponentially higher – a very conservative estimate being set at 2 million<sup>92</sup>. Even in Montenegro, whose electoral register is centralised and automatically updated (but still not completely immune to the issues outlined above), the fact that the register of permanent residences is not up to date has remained unaddressed, and its effect on elections unknown<sup>93</sup>. Furthermore, the phenomenon of **internal migration** – a significant problem for countries like Albania<sup>94</sup> – creates similar complications.

These wild inaccuracies in the electoral registers leave the door open for gross **manipulations**. A recent instance that confirmed suspicions of problems with the electoral register is the 2015 wiretapping scandal in Macedonia. The leaked tapes revealed that the government was manipulating the electoral register and taking advantage of its inconsistencies by **bringing to the voting booth** on election day **people from outside the country** (such as Macedonians from Pogradec, Albania) or creating **fake identities** (for some of the people brought in during the 2013 local elections)<sup>95</sup>. In Kosovo, serious doubts arise in connection with the **dual citizenship** issue, in particular with the Serb voters in Kosovo (but not only them): a large number of citizens from Serbia applied for out-of-country voting and many of these voting ballots were found to be filled out by the same handwriting<sup>96</sup>.

The problems with the voters' roll, which intentionally or unintentionally remain unresolved, are therefore closely interlinked with other abuses discussed in this paper, namely the politicisation of the electoral committees and voter fraud. The reluctance to clean the register is connected to the fact that the register is often run by 'political' institutions, such as the Ministry of Interior in Albania<sup>97</sup>, as well as to the long-standing systemic problem of record-keeping by institutions that provide data for the register<sup>98</sup>. Limited initiatives have been

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91. Vračić, Alida (2018), "The way back: Brain drain and prosperity in the Western Balkans", policy brief, European Council on Foreign Relations, 9 May 2018.

92. Interview with Adnan Huškić, November 2018.

93. Written submission by Milica Kovačević, November 2018.

94. Written submission by Alba Çela, November 2018.

95. Written submission by Zlatko Dimitrioski and Venco Popovski, November 2018.

96. Written submission by Eugen Cakolli and Florent Spahija, November 2018.

97. Written submission by Alba Çela, November 2018.

98. Written submission by Zlatko Dimitrioski and Venco Popovski, November 2018.

undertaken in some countries (sometimes in cooperation with religious communities, such as in Kosovo<sup>99</sup>), but they are insufficient. Dealing with the political will to change the situation is therefore a key action point.

Summary of the main issues – electoral register:

- The voter roll is out of date, needs updating, especially in terms of:
  - Unreported deaths;
  - Emigration;
  - Internal migration (not updating addresses).
- Out-of-country voting: barriers to the diaspora vote;
- Out-of-country voting: facilitates stolen identities and fake voters;
- Bringing people from outside the country to the booths on election day;
- Politicisation of institutions that manage the voter roll (Ministry of Interior).

Recommendations:

- **Cleaning the electoral register.** Make it an outright condition in the EU accession process, providing clear instruments and monitoring guidelines to accomplish the task. The 'Pribe-style' reports should be used to make country-specific assessments of the needs of each country.
- **Remove barriers to the diaspora vote.** With the number of citizens living abroad steadily increasing over the past years, the problem of voters not being able to exercise their voting right is becoming more acute. Specific issues that the EU should focus on include:
  - **Communication.** The voting procedures for diaspora should be announced well in advance of elections and information should be readily available;
  - **Availability.** The availability of polling stations should be expanded, including being able to vote in two places if there are two rounds of elections. The introduction of postal vote should also be considered.

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99. In 2016, an initiative was undertaken to clean Kosovo's voter roll, with a number of deceased people removed from the register in cooperation with the religious communities. – Written submission by Rezarta Delibashzade and Shpend Emini, November 2018.

## 5 – VOTER FRAUD

The issue of voter fraud, such as vote buying, is often highlighted by media reports on election day. Manipulations occurring on election day itself are indeed fairly widespread, but they require extensive logistical preparations. Take, for example, the infamous “**Bulgarian trains**”: political handlers distribute pre-filled ballots in front of empty stations, voters take them into the polling stations, cast the pre-filled ballot, and obtain an empty one, which they bring back to the handler. The fraud occurring on the day of the ballot is therefore considered the least prominent problem<sup>100</sup>. The bulk of irregularities are estimated to happen before the opening and after the closure of the polling stations<sup>101</sup>.

Pre-election, the **postal vote** has proven to be a popular avenue for voter fraud. The registration of fake Bosnian voters from Croatia for postal voting – operations in which members of the Croatian HDZ have allegedly helped individuals from the Bosnian HDZ – is a documented issue of pre-electoral voter fraud in the 2018 Bosnian elections.<sup>102</sup>

Post-election, the **count of the ballot papers** can be compromised by the politicised electoral boards and commissions. Concerns surrounding possible manipulations at this stage are increased by the high levels of **invalid ballot papers**. In 2014, there were about 8–10% invalid ballot papers in Bosnia, and it went down to 6–7% in 2016 (still a very high number, considering that the global average is about 3%, according to the Institute for Democracy and Electoral Assistance).<sup>103</sup>

In some cases, public attention to voter fraud has helped to improve the process and raise standards. This happened in Kosovo, where the contestations of the public and international monitoring missions regarding the irregularities of the 2010 general elections led to significant improvements in the 2017 elections<sup>104</sup>. Still, according to the EU observation mission, issues persist, especially in the Serb-populated areas of Kosovo, where instances of **intimidation** were recorded.<sup>105</sup> Albania is undergoing a reform process which is expected

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100. Written submission by Milica Kovačević, November 2018.

101. Interviews with Adnan Huškić; Written submission by Nedim Jahić, November 2018.

102. Žurnal (2019), “Žurnal obišao fiktivne birače u Hrvatskoj; Kadrovi HDZ-a prijavljivali glasače na nepostojećim adresama”, 29 September 2018 <http://www.zurnal.info/novost/21468/kadrovi-hdz-a-prijavljivali-glasace-na-nepostojecim-adresama>

103. Centar za Izborne Studije (2017), “Iskustva i preporuke NVO sektora za unapređenje kvalitete izbornog procesa u Bosni i Hercegovini”, Heinrich Boell Stiftung, Sarajevo, May 2017. <http://cisbih.ba/wp-content/uploads/sites/9/2017/06/cis-hbs-jacanje-uloge-nvo-sektora-final.pdf>

104. Written submission by Eugen Cakolli and Florent Spahija, November 2018.

105. EUOEM, final election observation report, September 2017. [https://eeas.europa.eu/election-observation-missions/eom-kosovo-2017\\_en](https://eeas.europa.eu/election-observation-missions/eom-kosovo-2017_en)

to address, among others, vote buying and out-of-country voting, and should be implemented before the upcoming elections in June 2019. However, the progress on this front remains heavily conditioned by the willingness of the main political parties.<sup>106</sup>

Another significant barrier to tackling voter fraud is the **slow and inefficient judicial process** that accompanies the numerous irregularities exposed by the media and NGOs. In Montenegro, for example, the cases that reach the final ruling do so “very rarely and slowly”, and even then, the verdicts are “mild and not dissuasive”, while the actors are often “rehabilitated and continue to participate in the political life and perform public functions”.<sup>107</sup>

Summary of the main issues – voter fraud:

- Count of ballot papers;
- ‘Bulgarian trains’;
- Family vote;
- Vote coercion and intimidation;
- Postal vote (in case of abuses);
- Non-transparent coalitions and changing of parties and coalitions after the elections.

Recommendations:

- **Identify and enforce clear rules.** Create tools to counter issues used to compromise the secrecy of the vote. For example, apply penalties for the use of telephones in voting booths.
- **Apply and keep pressure.** Explicitly calling out vote rigging problems helps to raise standards at future elections – it is therefore important to keep doing so.

## Section 2 Conclusions

The analysis above shows that the bulk of election-related problems happen before elections. Improvements in the consolidation of the rule of law are significantly hampered by the fact that those who control power and thus also the state resources are in a much better position to lock in their dominance through the voting process. Elections are supposed to be the bedrock of democracy, but if checks and balances are lacking, the system perpetuates itself, and problems are passed on seamlessly from one electoral cycle to the next.

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106. Written submission by Dalina Jashari, November 2018.

107. Written submission by Milica Kovačević, November 2018.

To help fight against the systemic nature of these mechanisms, the EU needs to apply more creative thinking, combining the implementation of **specific demands** to be included as part and parcel of EU conditionality in the accession negotiations, with the **exposure of public officials** who aid and abet irregularities. The recommendations offered follow this dual aim, while focusing on the instances where the EU's conditionality can have a clear impact. They are here summarised as follows:

- 1) **Specific demands (provisions to be included as necessary conditions for countries to progress in the negotiations for chapter 23)**
  - Ensure the transparency of the hiring process (see: abuse of state resources);
  - Ensure the transparency and fairness in the lists of electoral commission members (see: electoral commissions);
  - Clean the voters' roll (see: electoral register);
  - Remove the barriers to the diaspora vote, where applicable (see: electoral register);
  - Identify and enforce clear rules to prevent vote-rigging (see: voter fraud).
- 2) **Exposure of public officials**
  - Smear campaigns: EU officials and institutions should issue prompt condemnations of smear campaigns and show support to those at the receiving end (see: media dominance);
  - Electoral fraud: EU should be vocal in explicitly calling out vote rigging problems (see: voter fraud);
  - Patronage: EU officials and institutions should condemn very harshly issues related to hiring malpractices and politicised public procurement, and apply pressure to have legal accountability placed on the abuses (see: abuse of state resources).
- 3) **Additional measures**
  - Provide extra funding to meet specific needs, such as the training of electoral commission members (see: electoral commissions);
  - Use Priebe-style expert reports to make country-specific assessments on issues where a better diagnosis is needed (including media ownership, the state of the electoral registers, and problems related to the voting from abroad).



## Section 3:

### Internalisation of EU norms: Rule of Law Needs Democrats

“To forget one’s purpose is the commonest form of stupidity.”

Friedrich Nietzsche. 1879. *Human, All Too Human*: 206.

The EU’s top-down institutional approach to enlargement, empowered by the golden carrot of membership, has generated broad-based and long-term support for rule of law reform in the Western Balkans. However, while EU conditionality for accession plays an important role in prompting reforms, a sustainable rule of law reform process also requires certain domestic conditions to prevail – most notably these prerequisites include the reduction of the number of veto players and the elimination of institutional obstructions exhibited in clientelistic relationships among the domestic ruling elites and institutions prone to corruption. Hence, instead of internalizing EU values and approximating to the EU rule of law standards, the Western Balkan countries are still undergoing a rather slow democratic transition hampered by the internal political polarization of the ruling elites, the dominant influence of informal centres of power, and high levels of corruption in all branches of government.<sup>108</sup>

On the other hand, Romania and Bulgaria did not have to cope with violent state dissolution like that seen by the former Yugoslavia and have consequently experienced fewer challenges to democratic consolidation processes. Instead, these two countries were finally successful in their legal and institutional reform efforts and joined the European Union with the accession in 2007, which completed the EU’s fifth enlargement. However, despite the far-reaching reforms enacted in preparation for EU membership, Bulgaria and Romania still had some way to go in the adaptation of their legal systems to guarantee an effective system of rule of law. To ensure that these reform efforts continue beyond accession, the Commission has established a package of transitional measures within the Cooperation and Verification Mechanism to ensure the smooth integration of Bulgaria and Romania. A decade after the accession both countries are still subject to this specific post-accession monitoring system.

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108. Kmezić, Marko (2017), “EU Rule of Law Promotion: Judiciary Reform in the Western Balkans” Routledge, London

Croatia managed to consolidate its democracy and in July 2013 became the twenty-eighth member state of the EU as the second country from the former Yugoslavia to enter the EU, and the first country after Greece to join the Union in a single country enlargement. While Croatia might have dodged the post-accession monitoring because it was pushed to do a better job than Bulgaria and Romania in the implementation of an effective rule of law system, it could also be argued that EU had become aware of the “limited effects”<sup>109</sup> of the Cooperation and Verification Mechanism, and therefore chose to rely more on ‘soft pressure’ to ensure the effective implementation of the rule of law post-accession.

To be sure, democratic backsliding is a constant preoccupation for the European Commission, not only in the EU-hopeful counties of the Balkans but also in the case of the member states. The Hungarian shenanigans in the rule of law field are already well-known and seem to have recently inspired its neighbours as well, particularly Poland. In September 2018, the Commission actually had to refer Poland to the European Court of Justice (ECJ) for the adoption of a new law on the Supreme Court, which was assessed in breach of the principle of judicial independence.

This shows that not only EU candidate countries, but even already minted EU member states did not manage to resolve all the problems with regard to a functioning system of rule of law, which places the rule of law reforms in the Western Balkans high on the agenda of future EU integration.

### **How to Make Reforms Stick?**

The key question, therefore, is how to ensure that reforms endure beyond the accession day. The answer should consider that rule of law reforms are mostly driven by lawyers and political scientists focused on the judiciary, police, and public prosecution, under the assumption that legal certainty in a country depends on the performance of public institutions. However, some of the central issues about the rule of law, particularly the risk of post-accession reversibility of norms, pertain in fact more to the sphere of sociology. While in the earlier stages of integration, the EU assesses the ratification of rule of law reforms and then scrutinizes their implementation, there are no safeguards for their internalization – to be understood as an individual’s acceptance of a set of norms and values established by others through socialization. In other words, although the role of courts and public prosecutors is essential for the respect of the law, this approach, if applied in isolation, fails to deal with the problem of local cultural predispositions, to address the existence of informal

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109. Ott, Katharina (2013), “Croatia and the EU: The Catch-Up Issue”, CEPS Commentary, <https://www.ceps.eu/publications/croatia-and-eu-catch-issue>, p. 4.

institutions and centres of power, and to include the wider society as a means of securing the irreversibility of the reform process.

In the theory of the socialized actor,<sup>110</sup> individual action is intended as a choice among alternatives. So who are the socialized actors in the process of EU rule of law promotion? These are mostly the members of the political class – Brussels technocrats and ruling elites in the aspiring members of the Balkans. While progress on EU integration continues to depend mostly on the rigorous application of the membership conditionality, **poor rule implementation and extremely weak rule internalization** of the rule of law reforms in the Western Balkans act as major impediments. These are caused by the presence of **veto players** in national governments, who are armed with rationalist calculations of the social costs of deviation from EU demands, and by **inadequate institutional and administrative capacities** caused by legacies of the past.<sup>111</sup>

In order for EU rule of law conditionality to be functional, domestic adaptation costs must not be higher than the reward; otherwise the ruling elites of a rational target state will not comply. At the same time the existing political elites are reluctant to support reforms that create competing centres of authority beyond their control. The conviction of the former Croatian Prime Minister Ivo Sanader on corruption charges and of former Macedonian Prime Minister Nikola Gruevski on embezzlement charges serve as a striking example of the harmful effect EU reforms can have for established elites.

Despite the proper precautions such as later accession dates, the use of safeguard clauses, and post-accession monitoring, the EU still does not have a functional mechanism under which EU conditionality can be genuinely effective against the observed vested interest of the ruling elites in the Western Balkan candidate countries (Kmezić 2017).<sup>112</sup>

This suggests the need to include additional – non-political as well as expert actors in the process of EU rule of law promotion who would complement upon EU's efforts by means of convincing national elites of the need to internalize EU's rules. As seen in the example of the Croatian EU accession, the inclusion of civil society, notably media, citizens, civil society organizations such as Citizens Organize to Oversee Voting (GONG),<sup>113</sup> Partnership for Development (PSD),

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110. Parsons, Talcott (1951), "The Social System", Routledge, New York

111. Kmezić, Marko (2018), "EU Rule of Law Conditionality: Democracy or 'Stabilitocracy' Promotion in the Western Balkans?" in Džankić, Jelena. Keil, Soeren. Kmezić, Marko. "The Europeanisation of the Western Balkans: The Failure of the EU Conditionality", Palgrave, New York

112. Kmezić, Marko (2017), "EU Rule of Law Promotion: Judiciary Reform in the Western Balkans" Routledge, London

113. Građani Organizirano Nadgledaju Glasanje (GONG).

Transparency International (TI) Croatia, etc., has been key to overcoming the potential problems that accompany a governmental approach. Namely, national governments are not always able or willing to implement the rule of law reform process. A high level of corruption prevalent among government officials in the Western Balkans, a lack of expertise, a lack of technical capacities, and a lack of cooperation between highly fragmented levels of government are some of the obstacles to sustainable rule of law reforms. Western Balkan governments, even in the countries that are most advanced in the accession process, fall short of providing a satisfactory level of political transparency in their work and accountability towards their citizens.<sup>114</sup> By focusing exclusively on institutional socialization the EU has thus far failed to include the wider community, particularly the expert public, in order to empower it to become part of the cognitive convergence pressure group and thus exercise bottom-up pressure on the political elites in the target country.

In practical terms, this implies that the **EU's top-down and civil society's bottom-up strategies for the promotion of the rule of law** in Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, and Serbia **should not be considered as mutually exclusive, but rather as complementary approaches for the internalization of EU rule of law norms.**

The rule of law reform is a lengthy, potentially multi-generational process, during which the social and cultural continuity of the transferred norms is eventually attained, particularly by providing every responsible member of society with the skills and habits necessary for their implementation. Therefore, in order to achieve the goal of internalizing adopted norms in everyday life, it is necessary to include widest social strata into the rule of law transformation process.

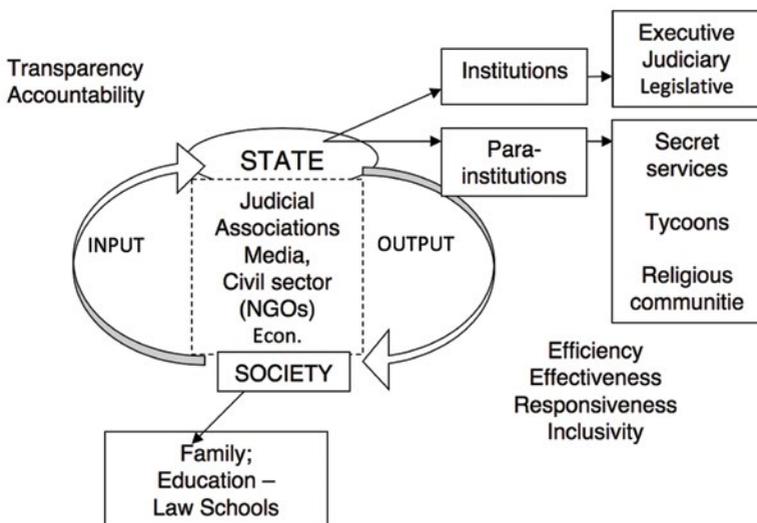
Basically, it is *essential* to achieve the transformation of traditional top-down power structures in which governments are at liberty to influence both legislative and judiciary branch through clientelistic networks and/or methods of more or less open pressure into a horizontally structured civil society based on the rule of law. This exercise is not simply a superficial creation of healthier and less dependent relations between the state and civil society. It has much more serious consequences, particularly within the process of EU integration. As shown in Graph 1 below, the creation of civic networks composed of Judicial Associations, expert NGOs, various civil society organisations, independent investigative journalists, Ombudsperson, Commission for Protection of Competition, Securities Commission,

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114. Kmezić, Marko (2015), "The Western Balkans and EU Enlargement: Lessons learned, ways forward and prospects ahead", European Parliament, EP/EXPO/B/AFET/FWC/2013-08/Lot1/03.

Commissioner for Information of Public Importance and Personal Data Protection, Commissioner for Protection of Equality, Judicial Academy, and so forth is crucial for ensuring the transparency and accountability of the state by providing control over its efficiency, effectiveness and responsiveness. In addition, efforts should be made to support constructive grassroots and local initiatives in the region. Furthermore, this horizontal power structure is central to the prevention of the pervasive veto power of gatekeeper elites embodied in government representatives, and other para-institutional actors such as secret services, tycoon networks, influential religious leaders, and so forth.

**Graph 1: Good Governance Scheme<sup>115</sup>**



Under the 'rule-of-law orthodoxy'<sup>116</sup> understood as a state-centred approach that emphasizes law reform and government institutions, judiciaries in particular – the civil society is at best adjunct to the institution building process. There is, however, a strong need for a

115. The Good Governance Scheme was originally developed by Kmezić in: Kmezić, Marko (2017) "EU Rule of Law Promotion: Judiciary Reform in the Western Balkans" Routledge, London

116. Golub, Stephen. "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative," Carnegie Endowment for International Peace (Oct. 1, 2003)

more inclusive bottom-up approach to EU rule of law promotion, in which civil society actors are empowered to play a rights-holder's role vis-à-vis public authority. This would help to push for compliance of key laws, monitor their implementation and influence norm internalization, both before and during negotiations. The broad inclusion of civil society in the accession process can help build a wider constituency in favour of EU accession in the Western Balkans, as well as keep negotiations on track.

In concrete terms, civil society empowerment should **strengthen its expertise, capacities, technical organization, and provide for regional** (regional Ombudsperson network, regional media outlets such as the N1 TV which broadcasts simultaneously in Serbia, Croatia and Bosnia and Herzegovina, etc.) **and international networking possibilities**. Furthermore, the EU should maintain its support for the inclusion of responsible civil society actors in an effort to put pressure on the government to do its job better, both before and during negotiations. Finally, the EU officials and MEPs should regularly engage in direct communication with citizens, as this will allow them to name and shame those elites who do not follow up on their declaratory support for EU integration. **Financial assistance** through the Instrument for Pre-accession Assistance (IPA III) can play a key role in empowering democratic forces in the region. Based on the principle of a sector-based approach, IPA II takes national development plans as templates for programming its assistance. While this solution is successful in increasing local ownership of IPA assistance, it bears the risk of omitting support for non-government related projects. In this regard, it is important that, regardless of the principle of 'local ownership,' the European Parliament and Commission fine-tune the list of projects and institutions to be funded under the IPA III together with the beneficiaries.

It needs to be said that over the last couple of years, the EU has demonstrated a growing understanding of the role that civil society has in pushing state institutions to cooperate. Since 2012, the Commission has held permanent consultations with civil society organizations in Bosnia-Herzegovina and Kosovo, within the framework of the Structured Dialogue on Justice with Bosnia-Herzegovina and the Structured Dialogue on the Rule of Law with Kosovo. These consultations are intended to guarantee that the voice of civil society reaches EU decision-makers. A positive signal comes from Montenegro, where civil society organizations are included in the accession negotiations. However, a long-term strategic orientation for including civil society is yet to be set. **Increasing the number of democratic actors** within the process of EU enlargement could be a key tool in providing a satisfactory level of political transparency and elite accountability to citizens in the Western Balkans.

What democracy and the rule of law need are not smartly designed institutions, it is democratic citizens.

**Section 3 Recommendations:**

- The EU's top-down and civil society's bottom-up strategies for the promotion of the rule of law in the Western Balkans should be used together.
- Include additional, non-political, and expert actors in the process of EU rule of law promotion to overcome the potential problems that tend to accompany a governmental approach.
- Create and strengthen civic networks to ensure the transparency and accountability of the state by providing control over its efficiency, effectiveness, and responsiveness. Strengthen civic networks by improving their expertise, capacities, technical organization, and by providing them with regional and international networking possibilities.
- Support constructive grassroots and local initiatives in the region.
- Financial assistance through the Instrument for Pre-accession Assistance (IPA III) should play a key role in empowering democratic actors in the region.

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## About the European Fund for the Balkans

The European Fund for the Balkans is a joint initiative of European foundations that envisions, runs and supports initiatives aimed at strengthening democracy, fostering European integration and affirming the role of the Western Balkans in addressing Europe's emerging challenges.

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## About the Centre for Southeast European Studies, University of Graz

The Centre for Southeast European Studies was set up in November 2008 following the establishment of Southeast Europe as a strategic priority at the University of Graz in 2000. The Centre is an interdisciplinary and cross-faculty institution for research and education, established with the goal to provide space for the rich teaching and research activities at the university on and with Southeast Europe and to promote interdisciplinary collaboration. Since its establishment, the centre also aimed to provide information and documentation and to be a point of contact for media and the public interested in Southeast Europe, in terms of political, legal, economic and cultural developments. An interdisciplinary team of lawyers, historians, and political scientists working at the Centre has contributed to research on Southeast Europe, through numerous articles, monographs and other publications. In addition, the centre regularly organizes international conferences and workshops to promote cutting edge research on Southeast Europe.

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