



EU'S BENCHMARKING WITHIN CHAPTERS 23 AND 24 IN ACCESSION NEGOTIATIONS WITH SERBIA EFFECTS AND CHALLENGES

BENCHMARKING IN SERBIA



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Coordinated by:
European Policy Institute (EPI) – Skopje

Publisher:
European Policy Centre (CEP) - Belgrade

Editors-in-chief:
Milena Lazarević (CEP)
Srđan Majstorović (CEP)

Authors:
Sena Marić (CEP)
Dragana Bajić (CEP)

Graphic design:
Relativ ltd - Skopje

Belgrade, February 2018



European Fund for the Balkans

This policy brief has been produced as part of the research within the 2017 Think and Link Regional Policy Programme and co-financed by OSF. The views presented in the policy brief are authors' views and do not necessarily reflect the position of the European Fund for the Balkans and Open Society Foundations.



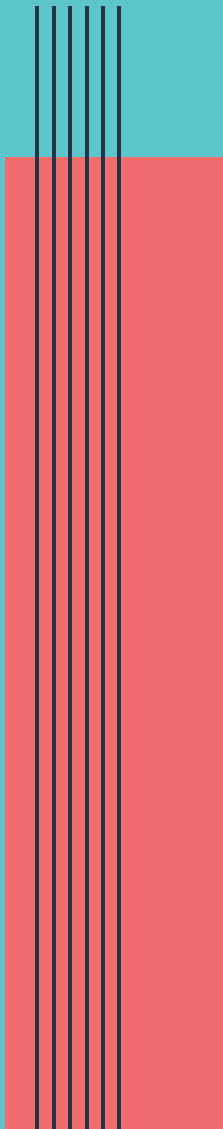
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I. INTRODUCTION



It has been exactly one year and a half since the opening of Chapters 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security) in the framework of European Union (EU) - Serbia accession negotiations. These two chapters, which address the issues related to the rule of law, have been the *spiritus movens* of the EU's strategy towards the Western Balkan (WB) candidate countries, a strategy which is still evolving. Ever since the "new approach to enlargement" was defined in 2012,¹ the EU has been upgrading its tools and resources in order to incentivise rule of law related reforms in the candidate countries and evaluate the results in that respect.²

Compared to the previous enlargement rounds, the EU has been placing much greater emphasis on the quality of the implemented reforms in the Serbian (and Montenegrin) case. It has required from Serbia to monitor the achieved results, demonstrate a track record of implementation of the enacted legislation, improve administrative, institutional and financial capacities as well as the resources for provision of reliable statistical information.³ In that respect, the EU has introduced the *benchmarking* mechanism, whose rationale is threefold: to help the candidate country in attaining the EU requirements, by making them more concrete and publicly transparent; to help the EU in measuring effects of the candidate's undertaken actions and provide critical assessment; and to help "navigate" the entire accession process, by setting the requirements which need to be attained in order to progress to the next step in this process. In short, benchmarks are supposed to translate the EU's rhetorical commitment and insistence on "fundamental" issues (among which is the rule of law), enshrined in its strategic documents on enlargement policy, into the realities on the ground.

This analysis aims to take stock of the effects of the EU's benchmarking system on a sample of issues within the Chapters 23 and 24 in Serbia's EU accession negotiations, pertaining to the following fields: independence of the judiciary and professionalism; freedom of expression; anti-discrimination policy; prevention of corruption within the civil service system; prevention of corruption at borders; asylum policy, and intelligence services. The sample was selected following a mapping of benchmarks that are common or similar among the Western Balkan aspirants for EU membership, for the purpose of achieving regional comparability.⁴ The analysis represents the first major attempt to critically evaluate the main factors that influence the scope of EU's power to make Serbia meet the requirements in the two chapters, in order to further advance in the EU accession process. Although the short timeframe between the opening of the two chapters (July 2016) and closure of this study (January 2018) narrows down the possibility of extracting far-reaching conclusions, the findings of this analysis are expected to enrich the debate on how to render the rule of law related reforms, implemented during the EU accession process, sustainable, which is in the interest of both the EU and Serbia.

I.1 THE STORY OF BENCHMARKS – A COMPLEX PATH TOWARDS OPENING AND NEGOTIATING CHAPTERS 23 AND 24

Before going into the details of the analysis, it seems worth explaining the timeline and the main features of EU's approach in the accession negotiations with Serbia on Chapters 23 and 24 and how the benchmarking mechanism is applied.

The process of opening of the two chapters is insightful as it reveals the features of the EU's recalibrated approach to the rule of law. The first characteristic is its procedural complexity and lengthiness – it took 4.5 years to open these chapters since Serbia obtained candidate status and 2.5 years since the accession negotiations were formally launched. Croatia, for instance, finished negotiations for these two chapters within a year,⁵ while countries that joined the EU in 2004 and 2007 had only one chapter which encompassed the areas currently

1 In its 2012-13 Enlargement Strategy, the EU the newly introduced "new approach" to negotiations in the area of rule of law recognised "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." ... "The new approach also foresees greater transparency and inclusiveness in the negotiations and reform process, with candidates encouraged to develop their reform priorities through a process of consultation with relevant stakeholders to ensure maximum support for their implementation. The Commission will further focus its monitoring on progress achieved in these areas. IPA funds will continue to be targeted to support reform implementation."

2 The EU's Enlargement Strategy 2014-15 defined the rule of law, public administration reform and economic governance as three cross-cutting "fundamental" areas, stating that progress in the three areas will determine when the candidate countries will be ready to join the EU (European Commission, 2014:4). The EU - Serbia Negotiating Framework from 2014 introduces a so-called "safeguard clause" for the Chapters 23 and 24 (and 35), meaning that the entire accession negotiation process may be temporarily suspended in case of no progress within these chapters. In 2015, it introduced an upgraded methodology for assessing the progress made by the candidate and potential candidate countries, which included harmonized grading of the level of progress achieved compared to the previous year and the level of preparedness of a country to take up the obligations stemming from the EU membership (European Commission Enlargement Strategy, 2015:31). The most recent EU-Western Balkans Strategy published in February 2018 has so far been the most straightforward, compared to previous EU documents, in terms of assessing the state of play in the rule of law in the region as well as when it comes to proposals to strengthen the rule of law in the WB.

3 EU-Serbia Negotiating Framework, 21 January 2014, p.14.

4 Detailed methodological steps are given in the section "Methodology" below.

5 Ministarstvo vanjskih i europskih poslova, "Izvešće o vođenim pregovorima po pregovaračkim poglavljima", 25.10.2011, available at: http://www.mvep.hr/custompages/static/hrv/files/pregovori/izvjesce_o_vodjenim_pregovorima.pdf

covered by Chapters 23 and 24.⁶ Second, this process has demonstrated the effects of re-nationalisation of the EU Enlargement policy and the negative potential the EU member states might have in influencing the dynamics of accession negotiations, due to their veto rights in each step of the accession process. Third, the conditions set in the EU's opening and interim benchmarks illustrate how the character of the EU's requirements have changed and evolved. Namely, out of 48 interim benchmarks for Chapter 23 and 50 for Chapter 24, in both cases the requirements for the legislative activities represent only a third of the total number of benchmarks, which is a major difference compared to the previous enlargement rounds when the main indicator for compliance was the level of harmonisation of legislation with the EU *acquis*. The remaining conditions set in the benchmarks include the necessity to conduct impact/needs assessments, analyses, capacity building (institutional, financial, administrative) activities, data collection, monitoring and establishing a track record of implementation. This fact reveals the EU's evolution of the understanding and approach to measurement of a candidate country's compliance with the *acquis*: from formal transposition of legislation to the focus on implementation and enforcement.

Serbia obtained the status of a candidate country for the EU membership in March 2012 and officially opened the accession negotiations almost two years later – in January 2014. The two chapters – 23 and 24 – were opened as late as two and a half years after this official start of the negotiations. As stipulated by the EU Enlargement Strategy and EU – Serbia Framework for Accession Negotiations, these chapters were *among the first* to be open, but were not opened *the first*, contrary to the common expectations and belief.⁷

The initial step towards opening of the two chapters was the screening process, during which the European Commission (EC) provided Serbia with detailed presentation of the EU *acquis* in the two chapters (explanatory screening) and examined the state of play of Serbia's compliance in relation to the respective *acquis* (bilateral screening). It took place in autumn 2013, even though the accession negotiations had not yet formally begun, which represented a precedent compared to the previous EU accession rounds.

Based on the outcome of the screening process for the Chapters 23 and 24, the Commission issued Screening Reports for the two chapters in July 2014. These reports summarised the information provided by the Serbian delegation, gave the Commission's assessment on the state of play in the two chapters, as well as recommendations to be addressed before these negotiating chapters could be opened. For both chapters, Serbia was supposed to adopt comprehensive action plans that would include concrete results, activities, timelines, expected budgets, result indicators, sources of verification and responsible institutions aimed at addressing the issues/recommendations that the Screening Reports emphasised. This condition was practically considered as the *opening benchmark* for the two chapters.

The entire drafting process of the two documents lasted over a year, with commendable involvement and participation of the Serbian civil society. In September 2015, the Commission approved the Action Plans for the two negotiating chapters. The APs were subsequently discussed in the Council working group on enlargement (COELA). Its adoption within this working group was pending for nine consecutive months, due to the reservations expressed by several member states' representatives on Chapter 23. After COELA gave its consent for the two APs, Serbia presented the negotiating position in June 2016. The two chapters were expected to be open by the end of June, when the European Council meeting was held, but several member states vetoed opening Chapter 23. After further reassurances especially on national minorities rights topics were provided by Serbia this blockage was lifted in July 2016, the EU sent its Common Position on each chapter on 8th of July 2016. The two Common Positions contain recommendations which are considered as *interim benchmarks*, i.e. their fulfilment creates condition for definition of the *closing benchmarks* which need to be met before the decision on closing of the particular chapter. The chapters were open on Inter-governmental conference held in Brussels on 17th of July the same year.

Once the two negotiating chapters were open, Serbia committed itself to submit reports on monitoring the implementation of respective Action Plans for Chapters 23 and 24 – in case of Chapter 23, on a quarterly basis, and biannually on Chapter 24. These reports are supposed to provide narrative explanations on the state of play in the implemented activities, refer to the defined deadlines and result indicators and give justification in case certain activities are not carried out in accordance with the planned schedule. On its part, the EU issues biannual reports on the Chapters 23 and 24 in a form of a non-paper. These reports track the implementation of the interim benchmarks in a rather general manner, based on the following sources: the commitments set in the two Action Plans; the respective reports on implementation of the AP (prepared by the Serbian Ministry of Justice and the Ministry of Interior, coordinators of the Chapters 23 and 24 respectively); reports by the EU experts following the conduct of peer review/expert missions; reports and information provided by the Serbian civil society organisations; and the information which the European Commission requires from Serbia for the sake of writing these documents. All these sources are meant to give the European Commission a clear picture on the state of play in fulfilment of the benchmarks, i.e. provide arguments which would help the EC present the results made by Serbia before the Council (the EU member states).⁸

⁶ Wolfgang Nozar, "The 100% Union: The rise of Chapters 23 and 24", 2012, available at: <https://www.clingendael.org/sites/default/files/pdfs/The%20100%25%20Union.%20The%20rise%20of%20Chapters%2023%20and%2024.pdf>

⁷ Chapter 31 – Financial Control and 35 – Other issues – normalisation of relations with Pristina were opened first in December 2015, which for some stakeholders signalled the EU's greater insistence and focus on the political issues (i.e. dialogue with Pristina authorities), rather than the rule of law related ones, even though according to the Negotiating Framework, Chapters 23, 24 and 35 have the equal weight.

⁸ Interview with the former member of the Serbian negotiating team for Chapter 23, July 2017.

So far, publicly available information on the implementation of the Action Plans and the interim benchmarks has proven to be rather scarce and fragmented. The reports on the implementation of the APs compiled by the two ministries are not uniform and comprehensive – for some activities, the only information available is whether they have been implemented or not. The quality of these reports has been abundantly criticised by the Serbian civil society,⁹ which is deprived of the valuable information needed to provide constructive input in monitoring the fulfilment of the obligations under the two APs and to hold the authorities accountable. When it comes to the EC's Non-Papers, it is noteworthy that the EC agreed to make these reports open to the public upon request by the Serbian government and the Serbian civil society, which is a praiseworthy practice. However, these reports do not give the EC's *assessment* on the fulfilment of the respective benchmarks, but instead provide a short introduction on the topic in question; statistical information on conducted activities; and a general comment on what needs to be done. These reports lack analytical approach, since they do not make clear references to specific benchmarks and fall short of the EC's critical assessment on the implementation stage and prospects. Reporting language is allowing for ambiguous reasoning of actual state of play by different stakeholders. Finally, the peer review/expert reports prepared by the EU envoys are not publicly available but are instead only shared with the parts of the Serbian government in charge of a given issue for fact-checking.

These deficiencies in the quality and accessibility of information regarding the state of play in accession negotiations for Chapters 23 and 24 do not lend support to the EU's mission to make the accession process transparent, inclusive, and comprehensive to the wider public. In the framework of this analysis, to provide insights into the effectiveness of the EU's benchmarking system in Serbia's case, the research team attempted to minimise the effects of these limitations by building up a methodological approach described in the next section.

I.2 METHODOLOGY

In order to **assess the effectiveness** of the benchmarking mechanism, this research process was based on sampling, comparison, monitoring of the implementation and assessment of the benchmarks. For the purpose of an in-depth analysis, the research is carried out on a sample of benchmarks from the Chapter 23 and 24.

The **selection of the sample of benchmarks** was done according to the following steps: interim and opening benchmarks that have been laid out for Serbia and Montenegro in Chapter 23 and 24 were taken as basis and were categorized in a table, depending on the type of action required:

Adoption of a policy document (Pol); Adoption of legislation (Leg); Implementation: Setting up/strengthening a body (B); Training (T) Setting up ICT systems (ICT) Cooperation (Coop) Track-record (Trck) Other (O).

Next, the research team selected a sample of 8 benchmarks which will be analysed in depth. In this process the following factors were considered: the relevance and importance of the issue both from a national and regional perspective; common critical junctures and equal distribution of categories and actions as set by the benchmarks; availability of information pertinent to assess the effectiveness of the benchmarks. While Montenegro and Serbia have traced the benchmarks in their Screening reports and Common position papers as countries that have opened negotiations, the other countries have adequately traced the benchmarks in the enlargement documents (EC country reports; roadmaps; Enlargement strategy). Thus, the following benchmarks were selected:

Chapter 23	
•Merit-based career system for the judges	Track record
•Judicial academy reforms	Setting up / strengthening a body
•Merit-based career system for civil servants	Other / track record
•Track record for addressing media intimidation; attacks on journalists; media independence	Track record / strengthening a body
•Implementation of Law on prohibition of discrimination	Leg/Pol
Chapter 24	
•Law on Asylum aligned with EU acquis	Leg
•Specific anticorruption plans; providing adequate follow up of detected cases	Track record/Cooperation
•The role of intelligence services and the oversight mechanisms that are introduced; established initial track record of investigations in organised crime	Other/track record

⁹ See for example, Milan Antonijević, *Book of Recommendations by the National Convention for the European Union 2016-17*, European Movement in Serbia (ed.), p. 130, available at: http://www.yucom.org.rs/wp-content/uploads/2017/10/NKEU-2016_2017-za-web.pdf ; and reports made by Preugovor coalition, available at: <http://www.preugovor.org/Publications/1131/Reports.shtml>

The data collection for all countries consists of desk analysis and interviews with stakeholders. Among the sources were the following:

- Progress/Country Reports and strategic documents on enlargement by the European Commission and OCED/SIGMA, from 2006 to 2017;
- EU's documents relating to the EU accession process, such as Screening Reports, Framework for Negotiations, Opening Benchmark Assessment Reports, Common Positions, Non-Papers;
- Serbia's documents related to EU accession, including Action Plans (APs) for the two chapters, Negotiating Positions, reports on implementation of the APs;
- Other official documents such as laws, strategies, official reports from the public administration bodies.
- Reports and independent indices by the Freedom House, Bertelsmann Foundation, World Bank, Transparency International, etc. used for adding a quantitative element.
- Reports and analyses made by the Serbian civil society organisations (CSOs);
- Policy and academic studies/papers.

Depending on the issue in question, the baseline year for the analysis was chosen based on an event/juncture which crucially determined the way the topic evolved. For Serbia, for most analysed benchmarks under Chapter 23, the baseline year was 2006, which saw the adoption of the incumbent Constitution, whereas for Chapter 24, the year 2008 was important in the context of visa liberalisation process.

Following the analysis of the available sources, the project team conducted 21 direct semi-structured interviews in the period between July 2017 and January 2018 with the relevant EU, state and CSO stakeholders who have been directly involved in implementation or monitoring of the selected benchmarks in Serbia. They include representatives from the Office of the Commissioner for Protection of Equality; Ministry of Interior; Member of Negotiating Team in charge of Chapter 23; EU Delegation in Serbia; German Chancellery; Judges' Association of Serbia; Judicial Academy Alumni; Association of Judicial Associates of Serbia; EU IPA project supporting the Judicial Academy reforms; Lawyers Committee for Human Rights; Preugovor Coalition; Asylum Protection Center; Belgrade Center for Security Policy; European Policy Centre, Civic Initiatives, Praxis, Association for Revision of Accessibility, Balkan Investigative Reporting Network, Center for Investigative Journalism of Serbia. They include representatives from the Office of the Commissioner for Protection of Equality; Ministry of Interior; Member of Negotiating Team in charge of Chapter 23; EU Delegation in Serbia; German Chancellery; Judges' Association of Serbia; Judicial Academy Alumni; Association of Judicial Associates of Serbia; EU IPA project supporting the Judicial Academy reforms; Lawyers Committee for Human Rights; Preugovor Coalition; Asylum Protection Center; Belgrade Center for Security Policy; European Policy Centre, Civic Initiatives, Praxis, Association for Revision of Accessibility, Balkan Investigative Reporting Network, Center for Investigative Journalism of Serbia. The purpose of these interviews was to gather views of the experts on the main issues and problems in implementation of the given benchmark; the EU's role in providing guidance/incentives to conduct the necessary reforms; the opinion on the EU's effectiveness in inducing reforms in the given policy/benchmark; and suggestions how to improve the existing framework.

The analysis of the benchmarks was done through the insertion of the collected data and findings in a pre-determined template¹⁰ which consisted of several steps. First, it traced the introduction and evolution of the benchmark at least in the last five years, or since the last critical juncture in the EU documents. Second, the researchers assessed current state of play through document review, including through available quantitative indicators findings in the specific policy area. Last, conclusions were drawn on the effectiveness of the benchmarking in the specific policy area thus far. The information from the templates was further used to develop the country analyses by each of the partners.

This combination of primary and secondary sources allowed the research team to provide an assessment on the major factors which contribute or impede the successful realisation of the analysed benchmarks. Moreover, the findings based on the analysis of the benchmark sample can be extrapolated and used to enrich the discussions on how to make the EU's current approach on the rule of law issues more effective.

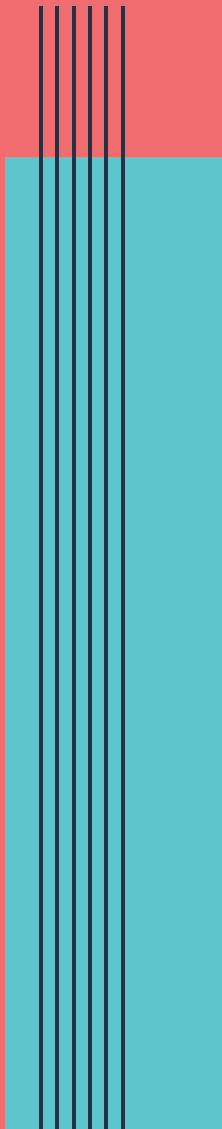
10 Annex 1 - Template for analysis of benchmarks



ANALYSIS OF SELECTED BENCHMARKS



II. CHAPTER 23



II.1 JUDICIARY

Merit-based system for the judges

➤ ➤ ➤ *Opening benchmark:*

*A fair and transparent system of promotion of judges and prosecutors needs to be established, together with a periodical professional assessment of judges and prosecutors' performance. A system to monitor and evaluate the application of those standards in practice should be established. The Councils should bear the responsibility for taking decisions on promotion, demotion or dismissal.*¹¹

➤ ➤ ➤ *Interim benchmark:*

*Serbia establishes an initial track record of implementing a fair and transparent system based on merit for the management of the careers of judges and prosecutors including recruiting, evaluating and promoting judges and prosecutors based on periodic, professional performance assessment (including at senior level).*¹²

Background

The issue of merit-based and transparent human resource management system for the careers of judges and prosecutors has been in focus of EU's attention ever since the first Judicial Reform Strategy was brought in 2006, following the adoption of the new Constitution in the same year. The years that followed saw the adoption of the new legislation on judiciary (in the period between 2006-09) and court reorganisation/rationalisation (2009-10). Both processes were criticised by the European Commission (EC): the former for the lengthy adoption process and for legal solutions that contained major weaknesses in terms of the appointment procedure of the High Judicial Council members and the reappointment of the judges and prosecutors, where both procedures were considered to allow for political influence and thus undermined the principle of independence of the judiciary;¹³ the latter for the fact that 876 first-time judges and 88 deputy prosecutors were appointed without interviews or any merit-based criteria.¹⁴

However, the 2011 Opinion of the EC on Serbia's application for the EU membership and the Progress Report assessed the state of play in the Serbian judiciary in a much lighter tone, emphasizing the positive aspects of the previous reform efforts. It pointed out the "substantial reforms of the judiciary" and strengthened independence through the establishment of the institutional framework. At the same time, the Commission considered that the judiciary was one of the few EU areas where Serbia will need to make "considerable and sustained efforts" in the medium term before full alignment is achieved.¹⁵ After Serbia was granted a candidate country status in 2012, the EC's assessments and recommendations in the field of judiciary independence were more detailed and demanding in comparison to the previous period. In 2013, a new Judicial Reform Strategy for the period 2013-18 was adopted, which coincides with the timeframe for which the Serbian authorities initially planned to fully align Serbian legislation with the EU acquis.

State of play

According to the official documents by the Serbian authorities (i.e. the Ministry of Justice, as the coordinator for the Chapter 23 negotiating group), Serbia is on a good way to meet this benchmark. A series of rulebooks on the selection criteria, appraisal and evaluation standards for judges and prosecutors were adopted or amended in 2015 and 2016, based on new laws on High Judicial Council and State Prosecutorial Council (2015); as well as the amendments to the Law on Judicial Academy and the amendments to the law on enforcement and security (2016).¹⁶ The report of the EC from May 2017, presented in the Non-Paper on Chapter 23, states that the implementation of the adopted measures is at the early stage, and that their impact needs to be followed up closely.¹⁷ The latest Non-Paper issued in November 2017 makes no reference on this particular case but notes the developments, both positive and negative, when it comes to the appointment procedure of new judges and prosecutors.¹⁸

11 As laid down in the Screening Report for Chapter 23, p.25. Corresponding activity from the Action Plan: 1.1.3.

12 Laid down in EU's Common Position on Chapter 23, p. 22.

13 European Commission, Serbia Progress Report 2009, available at: https://ec.europa.eu/neighbourhood-enlargement/countries/package_en

14 European Commission, Serbia Progress Report 2010, available at: https://ec.europa.eu/neighbourhood-enlargement/countries/package_en

15 European Commission, Opinion on Serbia's application for membership of the European Union, pp. 6 and 11-13, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2011/package/sr_rapport_2011_en.pdf

16 Ministry of Justice, Third Report on Implementation of AP for Chapter 23, pp. 8-26, available at: <https://www.mpravde.gov.rs/files/Report%20no.%203-2017%20on%20implementation%20of%20Action%20plan%20for%20Chapter%2023.pdf>

17 European Commission, Non-Paper on Chapters 23 and 24, May 2017, p. 3, available at: http://www.mei.gov.rs/upload/documents/eu_dokumenta/non_paper_23_24/non_paper_ch23_24_eng.pdf

18 European Commission, Non-Paper on Chapters 23 and 24, November 2017, pp.2-3,

available at: <http://www.mei.gov.rs/eng/documents/eu-documents/non-paper-on-the-state-of-play-regarding-chapters-23-and-24-for-serbia/>

In any case, it should be noted that full realisation of this benchmark is entirely dependent on a separate, but interlinked commitment from Chapter 23 negotiation process, which faces significant delays and pitfalls in its realisation. It concerns the requirement to amend Serbia's constitution, which is deficient in provisions and measures that would disable political interference on the appointment of judges and prosecutors. Namely, in 2007, the Venice Commission of the Council of Europe criticized the Serbian constitution for the fact that the Parliament is given a final word in the selection process of the judges and prosecutors. The same authority claimed that this measure opens the door for politicization in the appointment procedure, stating the clear evidence on the risks that its implementation would convey in practice.¹⁹

Ten years after, despite two major judicial reforms conducted and series of legislative amendments, both the European Commission assessments and other relevant independent indices reveal stagnation, if not backsliding in the efforts to make the Serbian judiciary more resilient to political influence. More precisely, the EC annual reports have repeatedly raised concerns on the possible political intervention in the appointments and dismissals of the judges, prosecutors and the members of the High Judicial Council. The stagnating/negative trend is also confirmed by the BTI index, in which Serbia made no progress in terms of independence of the judiciary for two consecutive times with the score of 6 (on the 1-10 scale, 10 being the best), whereas according to the Freedom House index on Judicial Framework and Independence, Serbia regressed from 4.25 to 4.50 in the observed period (1 being the highest level of democratic progress and 7 the lowest). Moreover, both the World Bank and Balkan Barometer survey on public perceptions on judiciary reveal massive public belief that the judiciary is highly dependent on political influence.²⁰

Evaluation and prospects

Given all circumstances described, it seems too early to give any assessment on the implementation of this benchmark and its effectiveness. The commitments of legislative character have been completed, while the short timeframe since their adoption has not allowed for monitoring the track record of implementation. The recent adoption of the interim measure by the Constitutional Court to suspend the newest Rulebook by the High Judicial Council, following a complaint submitted by the Judicial Academy Alumni Association,²¹ illustrates the amplitude of problems caused by inadequate legal framework. Nevertheless, the interviewees agree that the constraining constitutional provisions that enable political influence might have been circumscribed in practice, had the political elites demonstrated a genuine will to address this issue.²² Instead, the previous judicial reform rounds and the ongoing "debate" on constitutional reforms indicate that the executive branch seems determined to use or invent the new legal loops to exert control over judiciary.²³ Therefore, in order to draw credible conclusions on the effectiveness of this benchmark, its realisation needs to be observed in parallel with the implementation of the ongoing constitutional reforms and Judicial Academy reforms, and the corresponding benchmarks (please refer to analysis of the following benchmark – Judicial Academy reforms). The undertaken actions to meet the given benchmark solely represent an interim solution in the absence of indisputable political will to engage in a dialogue with the CSOs and other interested stakeholders on future judiciary reforms.

Judicial Academy reforms

➤ ➤ ➤ *Opening benchmark:*

Develop the Judicial Academy as a center for continuously and initial training of judges and prosecutors in line with the rulings of the Constitutional Court on the provisions of the laws on the public prosecution and the Judicial Academy, including through: introducing a yearly curriculum covering all areas of law, including EU law; allocating sufficient resources and introduce a quality control system for initial and specialized training;

Develop a system that allows assessing training needs as part of the overall evaluation of performance of judges and prosecutors;²⁴

19 Council of Europe, Venice Commission Opinion on Constitution of Serbia, 2007, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e)

20 World Bank, Serbia Judicial Functional Analysis, 2015, available at http://www.mdtfjss.org.rs/en/serbia-judicial-functional-review#.Wh_OCEqnE2w; World Bank, Perceptions of the Judiciary's Performance in Serbia: Results of the Survey with the General Public, Enterprises, Lawyers, Judges, Prosecutors, and Court Administrative Staff, 2014, available at: <https://openknowledge.worldbank.org/handle/10986/21711>

21 N1, "Ustavni sud utvrdiće zakonitost pravilnika za izbor sudija", N1, 21th December 2017, available at: <http://rs.n1info.com/a351027/Vesti/Vesti/Ustavni-sud-utvrđice-zakonitost-pravilnika-za-izbor-sudija.html>

22 Interview with the president of the Judges' Association of Serbia, Belgrade, July 2017.

23 Ibid; interview with the director of the Serbian Lawyers' Committee for Human Rights (YUCOM), July 2017.

24 1.3.1. and 1.3.2

➤ ➤ ➤ *Interim benchmark:*

Serbia ensures that the Judicial Academy adopts a multi-annual work programme, covering human and financial resources and a further development of its training programme. Serbia also provides a sustainable and long-term solution for financing the Judicial Academy, applies a quality control mechanism and regularly and effectively assesses the impact of the training. Serbia ensures that training needs are evaluated as part of the performance assessments of judges and prosecutors.

Background

Judicial Academy (JA) was founded in 2010 and succeeded the Judicial Centre for Professional Development (est.2001), a semi-public institution under the patronage of the Supreme Court which provided trainings for continual professional development. Its main deficiency was the lack of adequate legal framework which prevented this institution from providing compulsory training programmes.²⁵ According to the Law on Judicial Academy, adopted in 2009, its mandate is to provide initial and continuous training for judges and prosecutors with the aim to make the judicial system more professional, efficient and independent.²⁶ Since then, it has been gradually developing its capacities, mostly thanks to donor support, especially from the EU, which has been one of the major advocates for setting up this institution.²⁷ The National Judiciary Reform Strategy 2013-18 recognised the Judicial Academy as one of the key stakeholders in the judiciary reform process and dedicated significant part of measures to its further development.²⁸

The first major challenge for development of this institution came in early 2014, when the Constitutional Court found that the provisions of the Law on JA were unconstitutional, as they discriminated judicial candidates who were not JA alumni.²⁹ This decision opened the floor for a contentious debate over the existing legal solutions when it comes to the initial intake of the candidates for the judges. In fact, the existing Constitution stipulates that election of judges and deputy public prosecutors to permanent office, as well as their election to other or higher court/public prosecutor's office is exclusive competence of the High Judicial Council/State Prosecutors' Council.³⁰ At the same time, the 2013 Judicial Reform Strategy foresees the Judicial Academy as one of the compulsory entry points for the judicial/prosecutorial candidates into the judicial system.³¹ According to the EC, such legal solutions affect the credibility and the purpose of JA and negatively influence the efforts to make this institution sustainable.³²

State of play

Since 2011 EC report to nowadays, it can be noticed that the EU progressively raised its requirements and expectations in terms of JA's contribution to the full development of merit-based career system for judges and prosecutors, as well as when it comes to its programme, institutional and financial capacity building. According to the Ministry of Justice, the given benchmark is being implemented with success – most of the activities set in the AP have been met with the agreed deadlines (i.e. adoption of amendments to the Law on JA, to allow this institution to perform programs of professional development of public notaries and bailiffs; amendments to the amendments to the Law on judges and Law on public prosecution; adoption of Rules on the Criteria and Standards for the Evaluation of the Qualification, Competence and Worthiness of Candidates for election of judges and presidents of courts; conduct of trainings; etc.). At the same time, measures which concern achieving full financial independence and sustainability of JA, envisaged to start in fourth quarter of 2015, have not yet commenced. The establishment of quality review mechanism to evaluate the effectiveness and adequacy of the implemented training is also delayed.³³

²⁵ Marko Kmezić, *Judicial Reform in the Western Balkans*, Routledge, 2016, p.115.

²⁶ Law on Judicial Academy (Official Journal, 104/2009, 32/2014, 106/2015), articles 2 and 5, available at: http://www.paragraf.rs/propisi/zakon_o_pravosudnoj_akademiji.html

²⁷ Interview with the member of a EU IPA project team "Enhancing educational activities and improvement of organisational capacities of the Judicial Academy", January 2018.

²⁸ Action Plan for the Implementation of the National Judiciary Reform Strategy for 2013-2018, available at: https://www.mpravde.gov.rs/files/NSRJ_2013%20to%202018_Action%20Plan_Eng%202.0.pdf

²⁹ Constitutional Court ruling, 5th February 2014, available at: <http://www.ustavni.sud.rs/page/view/sr-Latn-CS/88-101957/saopstenje-povodom-odluke-ustavnog-suda-o-zakonu-o-pravosudnoj-akademiji>

³⁰ Constitution of Republic of Serbia (OG 98/2006), articles 147 and 159, available at: http://www.paragraf.rs/propisi/ustav_republike_srbije.html.

³¹ "Compulsory" does not mean "exclusive", but rather designates that the candidates for the judicial profession need to meet certain requirements, unlike "exclusive" where all requirements need to be met during only one process.

³² European Commission, Non-Paper for Chapter 23 and 24, November 2017.

³³ For full list of activities and implementation stage, as reported by the Ministry of Justice, please see: Third Report on Realisation of AP for Chapter 23, pp. 80-93, available at: <https://www.mpravde.gov.rs/files/Report%20no.%203-2017%20on%20implementation%20of%20Action%20plan%20for%20Chapter%2023.pdf>

Overall, one of the major factors that contributed to a rather smooth realisation of envisaged activities is arguably the fact that they have been carried out with the support of the international donor projects – EU IPA and USAID.³⁴ However, in its country reports for 2015 and 2016 and in the two non-papers from 2017, the EC has been repeating its concerns in relation to these “successfully” implemented activities, especially over the quality of the training programmes, the expertise of the trainers and the undertaken actions to make the JA sustainable. In fact, according to the AP for the JA, designed in the framework the EU IPA support project, the costs for around 57% of the activities foreseen between 2017 and 2020 are estimated to be covered from the donor support (i.e. the mentioned EU project), which does not sound promising considering EU’s requirements to achieve financial independence. In addition, the JA’s reputation has been eroding over time, especially among domestic expert community, who is dissatisfied with the political/executive interference in its work (according to the Law on JA, 3 out of 9 members of the JA’s Steering Committee are representatives of the executive branch), poor training curriculum and opaque criteria for selection of both the incomers (judicial candidates) and the trainers.³⁵

Evaluation and prospects

Despite considerable investment from international donors in institutional building of the JA and the intensity of implemented activities in this respect, the manner in which this institution has evolved has so far been under fire of the interviewees, expert community opinion and the EC reports. The success of donor projects depends on the beneficiary’s commitment (i.e. JA) to fully take advantage of such support. The overwhelming impression remains that the core actors and bodies within the JA lack a strategic way of thinking when it comes to its institutional building and development. Such dominant form of functioning undermines the efforts of a small number of committed individuals to make this institution competent and sustainable.³⁶

Furthermore, strengthening the JA’s role in establishing merit-based career system for judges and prosecutors needs to be observed more globally, in the context of achieving full independence of the judiciary, given that the issues of independence and competence go hand in hand. In other words, the current legal setup (i.e. the presence of executive representatives in the Steering Board, the body in charge of electing the Programme Council which brings decisions on curriculum and selects the candidates) and the evidence of political interference in the work of JA (public denouncements made by Serbian Judges Association, Association of Judicial Associates of Serbia, JA Alumni Club, Centre for Judiciary Research, Lawyers Committee for Human Rights, etc.) do not bode well to the objective to render the Serbian judicial system more professional. For that reason, the effectiveness of this benchmark is dependent on the realisation of other measures aimed at ensuring full independence of the judiciary.

The proposals for constitutional amendments issued by the Ministry of Justice in January 2018, which foresee JA as a compulsory entry point in the judicial profession³⁷, are expected to raise fierce public debate and negative reactions, especially among those expert associations who see the proposed amendments as the way to extend the political influence on the judiciary.³⁸ The European Union is thus expected to play a pivotal role in providing an expert and impartial opinion on the proposed amendments and finding ways to obtain unequivocal commitment from the Serbian political elites for carrying out the necessary reforms in a sincere and substantive manner.

II.2 ANTI-CORRUPTION

Merit-based career system for civil servants; internal control and accountability

➤ ➤ ➤ *Opening Benchmark*

Take steps to depoliticise the public administration, to strengthen its transparency and integrity, including through strengthening internal control and audit bodies.

³⁴ EU support to Judicial Academy “Enhancing educational activities and improvement of organisational capacities of the Judicial Academy” available at: <http://jap.pars.rs/>; and http://www.cfcu.gov.rs/dokumenti/sr/93_493499_service-ja.pdf and USAID project on Judicial Academy <https://www.usaid.gov/serbia/fact-sheets/judicial-academy-support-project>

³⁵ Interview with Interview with Nina Nicovic, Co-Founder of Association of Judicial Associates of Serbia, and Serbia’s President of the Judges’ Association, July 2017; Also, see, for example: Dragana Boljevic, op-ed, *Vreme* <http://www.vreme.co.rs/cms/view.php?id=1169261>; judge Miodrag Majić (CEPRIS), blog on Judicial Academy <http://misamajic.com/2015/07/07/akademija-mejd-in-serbija/>

³⁶ Interview with the member of the EU project team, op.cit.

³⁷ Amendments published on January 23rd 2018, available at: <https://www.mpravde.gov.rs/files/amandmani%20za%20objavljivanje1.pdf>

³⁸ Interview with the President of Judges’ Association of Serbia; opinion of judge Miodrag Majić (CEPRIS).

Interim Benchmark:

Serbia recruits and manages the career of civil servants on the basis of clear and transparent criteria, focusing on merits and proven skills. Serbia develops and applies a mechanism for the effective implementation of the Code of Conduct for civil servants. Serbia provides an initial track record of effective sanctions in cases of breaches of this Code. Serbia ensures prevention of corruption through systematic introduction of effective internal control systems and strengthening managerial accountability in the public sector.

Background

A nominal commitment towards achieving professional and depoliticised civil service in Serbia have been part of the public administration reform (PAR) since 2004. Demands for higher transparency and accountability, as well as merit-based recruitment and promotion in the civil service were included in the reform agenda. Subsequent adoption of the Law on Civil Servants, the Law on Government, the Law on State Administration in 2005, and the Law on Salaries of Civil Servants and State Employees in 2006, shaped the legal framework for adequate functioning of the state administration in Serbia, including the merit-based civil service system.³⁹ The Stabilisation and Association Agreement (SAA), signed in 2008, additionally pressured the government to ensure anti-corruption mechanisms in the PAR context. The government adopted the Code of Conduct for Civil Servants to regulate ethical behaviour in the civil service, however without the methods of monitoring compliance with the code.⁴⁰ Plans to develop internal financial control system in the public sector were developed in 2009, by adopting a corresponding strategy for 2009-2014. The concept of managerial accountability was introduced in 2012 through the adoption of the Law on Amendments of the Budget System Law. This was related to the efforts to harmonise public finance system with the financial management and control (FMC), within the EU accession context, but the concept as such goes beyond the strictly financial aspect and includes general managerial accountability for organisational performance.

Despite mentioning EU integration, the first Strategy still did not provide a specific link between the PAR and the EU accession process.⁴¹ This and other factors, such as the insufficient capacities of the line Ministry and ineffectiveness of the institutional framework for coordinating the process, as well as a lack of performance monitoring framework,⁴² contributed to adopting the current PAR Strategy in 2014. Additional milestones of the same year signalled a positive momentum for PAR: the European Commission introduced the PAR as a pillar of the enlargement agenda,⁴³ SIGMA⁴⁴ developed the new Principles of Public Administration to support the EC's assessment, and Serbia commenced its EU accession negotiations. The High Civil Service council amended the Code of Conduct for Civil Servants in 2015 to include articles related to monitoring, evaluation and reporting on the compliance with the Code. After repeated recommendations of the EC, Serbia adopted the Law on Autonomous Province and Local Self-Government Employees in 2016, which should regulate the civil service system on the local and provincial level. Finally, and a new Strategy for Development of Public Internal Financial Control in the Republic of Serbia (PIFC Strategy) 2017-2020 was adopted in 2017.

State of Play

The EC has been noting, since 2012, that the political influence has been negatively impacting the development of a merit-based recruitment and career system in Serbia, which coincided with the time when the currently ruling political party came to power. According to an official report on the Action Plan implementation, covering 2015-2017, 28% of activities and 10% of results related to establishing a harmonized merit-based civil service system and improving HRM have been accomplished.⁴⁵ In the most recent SIGMA assessment, Serbia achieved low scores for meritocracy and effectiveness of recruitment, as well as merit-based termination of employment and demotion of civil servants (score of 2 on a scale 1-5).⁴⁶ The same score was achieved in the domain of recruitment and dismissal of senior civil servants, while the scores are only slightly higher for the quality of disciplinary procedures and integrity of public servants (3 out of 5).⁴⁷

39 Interview with Vladimir Mihajlović, 22 January 2018.

40 Articles of the Code related to monitoring, evaluation and reporting on the compliance with the Code were included in 2015. See: <http://www.pravno-informacioni-sistem.rs/SIGlasnikPortal/reg/viewAct/777fb73b-8726-4e57-ab4d-aecb49e2aaf>

41 Milena Mihajlović, "Public Administration Reform and European Integration Processes: On the Same or Parallel Tracks?" p. 136. Available at: <http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan024311.pdf>

42 Interview with Miloš Đinđić, European Policy Centre (CEP), 23 January 2018.

43 European Commission, Enlargement Strategy and Main Challenges 2014-15, 2014, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-strategy-paper_en.pdf

44 "SIGMA (Support for Improvement in Governance and Management) is a joint initiative of the OECD and the European Union. Its key objective is to strengthen the foundations for improved public governance, and hence support socio-economic development through building the capacities of the public sector, enhancing horizontal governance and improving the design and implementation of public administration reforms, including proper prioritisation, sequencing and budgeting." See more: <http://www.sigmaweb.org/about/>

45 Report on the implementation of the Action Plan for PAR Strategy 2015-2017, covering 1 January 2015 – 30 June 2017. http://mduls.gov.rs/doc/lzvestaj_20152017-171227.pdf

46 WeBER, Regional PAR Scoreboard for SIGMA, available at http://www.par-monitor.org/regional_par_scoreboard

47 Ibid.

Public opinion surveys support these findings: 74% of Serbia's citizens see public officials/civil servants as corrupt, which is a bit higher than the regional average (six enlargement countries plus Croatia).⁴⁸ A different research showed that a majority of population (73%) do not think that public servants are recruited through public competitions based on merit.⁴⁹ Practical issues remain, such as non-transparent competition procedures, lack of job security, unclear responsibilities and insufficiently clear roles and positions within the civil service system.⁵⁰ To illustrate, heads of administration bodies (i.e. ministers, directors) are not obliged to select the best ranked candidates in the recruitment process, nor are they required to provide any justification and there is no deadline for their final decision.⁵¹

The Code of Conduct for Civil Servants prescribes integrity and ethical behaviour standards, but some public administration bodies do not submit their input to the High Civil Service Council (HCSC) for the purposes of reporting on the compliance with the Code.⁵² Since the introduction of monitoring and reporting provisions in 2015, the HCSC has released two annual reports (2015 and 2016) and made them publicly available online,⁵³ which is commendable. Reports predominantly summarize statistics, without much qualitative elaboration. State administration bodies assessed the level of compliance with the Code as: "high", "extremely high", "very high", "satisfactory", "very good", and similar. However, the significance of the Code remains questionable, as it has still not achieved its practical purpose and application in a sufficient manner.⁵⁴ In practice, the Code has a marginal value from the perspective of both civil servants (part of which are unaware of its existence) and the HCSC.⁵⁵

Positive developments relate to the amendments to the Law on Civil Servants in December 2017, in line with the schedule of the Government Annual Work Plan 2017 (GAWP). Amendments, however, concerned only professional development and to a small extent internal labour market within the civil service, while they did not address improvement of the recruitment procedure, that had also been foreseen by the GAWP. This activity has been postponed for 2018 and the formation of a new working group is expected in February 2018 to proceed with the amendments.⁵⁶ The initial idea is also to include introduction of competences in the civil service system, which will reflect the recruitment procedure, and also strengthen the conflict of interest instruments.⁵⁷

Following the termination of the 2015-2017 Action Plan for PAR Strategy Implementation, Ministry of Public Administration and Local Self-Government (MPALSG) and the Office for Cooperation with Civil Society published an open call for civil society organizations to participate in the Working Group for the preparation of the new Action Plan 2018-2020. All 12 civil society organizations that expressed their interest in participating and met all formal conditions were eventually selected. The working group was formed in September 2017 and two large meetings have been organized gathering over 50 members, after which the work has continued within Special Working Groups. Following the SIGMA's comments on the draft Action Plan developed in December 2017, a new draft will be prepared in early 2018 and will be available for public commenting period. The upcoming Action Plan should be significant for the implementation of this benchmark, since the first draft envisages improvements in the recruitment and depoliticisation processes, performance assessment and strengthening of integrity and managerial accountability, including the improvement of delegation of powers within the public administration bodies.⁵⁸

Regarding the internal control, legal and policy frameworks are in place, but the functioning of internal control has been assessed as low by SIGMA, due to weak implementation of financial management and control (FMC), and even a lack of information on implementation in some cases.⁵⁹ Furthermore, Serbia has been criticised for low awareness and understanding of the significance of FMC within the strategic and operational processes.⁶⁰ It has been assessed that public sector still does not entirely grasp the benefits of the FMC system despite extensive trainings.⁶¹ There is also a delay in strengthening of staff capacities of the Central Harmonisation Unit, which is in charge for FMC harmonisation and coordination. SIGMA high-

48 Regional Cooperation Council, Balkan Barometer 2017, available at: http://www.rcc.int/seeds/files/RCC_BalkanBarometer_PublicOpinion_2017.pdf

49 Public opinion survey conducted within the "Western Balkans Enabling Project for Civil Society Monitoring of Public Administration Reform – WeBER." For more information, please see: <http://www.par-monitor.org/>

50 Interview with Vladimir Mihalović, CEP, 22 January 2018.

51 Milena Mihajlović, "Public Administration Reform and European Integration Processes: On the Same or Parallel Tracks?" Available at: <http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan024311.pdf>

52 For example, two out of three ministerial cabinets and eight out of 30 subordinated bodies did not submit their inputs for 2016 report. See the Official report (in Serbian) on the compliance with the code for 2016: <http://www.suk.gov.rs/dotAsset/21751.doc>

53 Available (in Serbian) at http://www.suk.gov.rs/sr/visoki_sluzbenicki_savet/akti_saveta.dot

54 SIGMA, Monitoring Report: The Principles of Public Administration, 2017, p.84, available at: <http://www.sigmaxweb.org/publications/Monitoring-Report-2017-Serbia.pdf>; Corroborated by Dušan Protić, CEP, interview held on 7 February 2018.

55 Interview with Dušan Protić, 7 February 2018.

56 Interview with Vladimir Mihalović, CEP, 22 January 2018.

57 Interview with Dušan Protić, CEP, 7 January 2018.

58 Interview with Vladimir Mihalović, CEP, 22 January 2018.

59 Serbia achieved 1 out of 5 points. See the Monitorint Report: <http://www.sigmaxweb.org/publications/Monitoring-Report-2017-Serbia.pdf>

60 SIGMA, Monitoring Report: The Principles of Public Administration, Serbia, November 2017, available at: <http://www.sigmaxweb.org/publications/Monitoring-Report-2017-Serbia.pdf>

61 International Bank for Reconstruction and Development, "Program appraisal document on a proposed loan in the amount of euro 69 million (us \$75 million equivalent) to the Republic of Serbia for a modernization and optimization of public administration program", available at: <http://documents.worldbank.org/curated/en/492311467991009480/pdf/104182-PAD-P155172-R2016-0059-1-Box394877B-UO-9.pdf>

lighted the need to widen the responsibilities of this body and to enable it to follow up on Government decisions “related to improving the FMC system”.⁶² On the other hand, internal control observed outside the FMC context, at the level of the entire public administration system, has not been adequately elaborated in the regulation and in practice, since the legal framework does not provide well-defined control instruments: to illustrate, although managers in public administration bodies are legally empowered to exercise control – it is not clear what this means in practice, in terms of the methods, techniques, conditions, powers, etc.⁶³

Considering managerial accountability, the very notion of managerial accountability is rather vague and the public sector lacks understanding of the concept.⁶⁴ It still needs to acquire its full meaning and significance outside of the FMC System. While the Budget System Law only defines managerial accountability, this concept is not sufficiently implemented, because of the lack of clear legal references as to how it relates to concrete activities and responsibilities.⁶⁵ The World Bank pointed to the lack of operational guidance from the Ministry of Finance on implementation of managerial accountability in practice.⁶⁶ Consequently, the effectiveness of basic managerial accountability mechanisms for central government bodies achieved zero out of four points in the SIGMA assessment. Results show that PIFC framework lacks provisions on managerial accountability and delegation of decision-making powers in the ministries, since the decision-making for majority of technical matters remain in the hands of ministers.⁶⁷ Rulebook and Manual for FMC should be amended by June 2018, in accord with the 2017 PIFC Strategy,⁶⁸ so that the concept of managerial accountability is aligned with the principles of good governance. As SIGMA highlights, “programme-based budgeting is not yet enforced through the managerial accountability of the institutions’ programme managers.”⁶⁹

Evaluation and prospects

Fulfilment of this benchmark has remained limited. Despite the positive developments, partly owing to the repeated efforts from the EU and SIGMA, progress is mostly restricted to the policymaking and law adopting while implementation issues remain within each benchmark component. Low percent of implemented activities indicates that progress is happening, but at a slow pace. In fact, the weakest progress has been achieved with the civil service reform. Meritocracy in the civil service is still at an insufficient level, with marks slightly worse than in the field of integrity of civil servants. Public opinion surveys signal a negative image of civil servants in the public, characterised as being unethical and prone to corruption. Regarding the ethics, existence of a body monitoring the implementation of the Code of Conduct, and the fact that the reports of this body are publicly available, is commendable and this practice should continue. However, not all bodies deliver their inputs to HCSC for the reporting purposes, hence there should be a stronger interinstitutional cooperation so that these mechanisms become more effective and purposeful. Another issue concerns the questionable effects of the HCSC’s reporting, since the HCSC submits the report to the MPALSG in order “to take appropriate measures from its scope” but the public is usually short of their outcome.⁷⁰ Moreover, the conflict of interest of civil servants has not been sufficiently elaborated to include all aspects, which is why there is a need for deeper regulation and a more precise mechanism in terms of suppressing the conflict of interest and monitoring the work of civil servants.⁷¹ Finally, implementation of the internal control system is steadily but rather slowly increasing in terms of the scope of budget beneficiaries that are adopting it, while basic managerial accountability mechanisms were assessed as ineffective.

On the other hand, it should be noted that EC’s requirements in this benchmark refer to rather ongoing, lasting processes, which limits the assessment of their implementation. Despite significant efforts and (mostly legislative) outcomes, low overall realisation of planned PAR activities⁷² directly impacts progress in implementation of this benchmark. Reasons can predominantly be linked to administrative culture, e.g. the fact that some ministers have difficulties comprehending the prohibition of discretionary appointment, after the system had been functioning in this manner for years, is rather troubling. Furthermore, Serbia is lagging behind its Western Bal-

62 SIGMA, Monitoring Report: The Principles of Public Administration, Serbia, November 2017, available at: <http://www.sigmaweb.org/publications/Monitoring-Report-2017-Serbia.pdf>

63 Interview with Dušan Protić, CEP, 7 January 2018.

64 Milena Lazarević, Dušan Protić, Miloš Đinđić, Katarina Kosmina, Saša Varinac, “Managerial Accountability in Serbian State Administration: Progress and Limitations in Law and Practice,” (unpublished study), European Policy Centre, Belgrade, 2017, p.23.

65 Interview with Dušan Protić, CEP, 7 February 2018.

66 International Bank for Reconstruction and Development, “Program appraisal document on a proposed loan in the amount of euro 69 million (us \$75 million equivalent) to the Republic of Serbia for a modernization and optimization of public administration program”, p.78 available at: <http://documents.worldbank.org/curated/en/492311467991009480/pdf/104182-PAD-P155172-R2016-0059-1-Box394877B-OUO-9.pdf>

67 SIGMA, Monitoring Report: The Principles of Public Administration, 2017, available at: <http://www.sigmaweb.org/publications/Monitoring-Report-2017-Serbia.pdf>

68 PIFC Strategy, Official Gazette RS”, no. 99, 2011, available (in Serbian) at: <http://www.mfin.gov.rs/UserFiles/File/strategije/Strategija%20IFK%202017%202020.pdf>

69 SIGMA, Monitoring Report: The Principles of Public Administration, 2017, available at: <http://www.sigmaweb.org/publications/Monitoring-Report-2017-Serbia.pdf>

70 Interview with Miloš Đinđić, CEP, 23 January 2018.

71 Interview with Dušan Protić, CEP, 7 February 2018.

72 SIGMA, Monitoring Report: The Principles of Public Administration, Serbia 2017, available at: <http://www.sigmaweb.org/publications/Monitoring-Report-2017-Serbia.pdf>

kan counterparts, as achievements in the civil service reform are around average and in some cases even below the average, compared to the other countries in the region. Political influence and political will have remained a crucial hurdle on the reform path throughout Serbia's EU integration process.

Efforts and pressures coming from SIGMA assessments have produced substantial effect in the reform process, as all aspects under this benchmark are being closely monitored and reported on by SIGMA. Considerable legislative improvements have been made owing to the authority that SIGMA/EC experts enjoy within MPALSG. It has even been argued that the PAR Action Plan "represents more of a SIGMA's and EC's document than MPALSG's",⁷³ as this document has been developed according to the comments provided by these two institutions. However, there is an impression that SIGMA's assessment, on the one hand is respected because it enjoys support from the EC and because its findings are embedded in the EC country reports, but on the other hand its impact in fact reaches to the professional level of state administration (e.g. assistant ministers), and lacks influence on the higher political levels.⁷⁴ The EC reporting in this area tends to soften the edge of SIGMA assessment and preserve a mild approach aimed to stimulate political commitment to reforms. The following two excerpts from the SIGMA and EC assessments illustrate this:

*There is still a lack of a clear, practical distinction between political and senior civil service posts as the majority of them are still not being filled on the basis of merit.*⁷⁵

*The legal separation of political and public service positions is not clearly enforced.*⁷⁶

In other words, while SIGMA draws its power from the EC support, the EC at the same time undermines this power because of not verbalising the findings in a clearer and stronger tone, which could impact the slow progress of this benchmark.

II.3 FUNDAMENTAL RIGHTS

Media

➤ ➤ ➤ *Opening benchmark:*

Ensure protection of journalists against threats and violence, in particular through effective investigations and deterrent sanctioning of past attacks.

➤ ➤ ➤ *Interim benchmark:*

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.

Background

Media freedom represents a global challenge, persistent to an extent in both authoritarian and democratic societies. Respect for the freedom of expression (FoE) and media pluralism are not necessarily the result of either good legal regulations or special procedures or protocols, but they are often dependent on the social and political environment.⁷⁷ In Serbia, severe cases of violence against journalists and media freedom deterioration date back to the 1990s' authoritarian regime, when tens of media workers were killed, kidnapped, disappeared or lost their lives under unclear circumstances.⁷⁸ After the democratic changes in the early 2000s, all aspects of society underwent transition, including the media, featuring the rise of independent media and investigative journalism, and being able to work freely to a certain extent. A general protection of the FoE found its place in the 2006

⁷³ Interview with Miloš Đinđić, CEP, 22 January 2018.

⁷⁴ Interview with Vladimir Mihalović, CEP, 22 January 2018.

⁷⁵ SIGMA, Monitoring Report: The Principles of Public Administration, Serbia, May 2016, p. 14, available at: <http://www.sigmaweb.org/publications/Monitoring-Report-2016-Serbia.pdf>

⁷⁶ European Commission, Serbia 2016 Report, November 2016, p. 11, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_serbia.pdf

⁷⁷ Ana Knežević Bojović et al., „Zaštita bezbednosti novinara: Analiza međunarodnih standarda, primeri dobre prakse i preporuke za unapređenje pravnog okvira i prakse u Srbiji” [Journalists' security protection: Analysis of international standards, good practice examples and recommendations for improving the legal framework and practice in Serbia], available at: <http://www.ombudsman.rs/attachments/article/4540/Zastita%20novinara%20-%20prikaz%20uporedne%20prakse%20i%20preporuke%20za%20Srbiju.pdf> p. 2

⁷⁸ Serbian journalist association "Novinari i medijski radnici srpskih medija ubijeni i oteti od 1991. godine" [Serbian journalists and media workers killed and kidnapped since 1991] available at: <http://www.uns.org.rs/sr/sta-radimo/akcije/12889/novinari-i-medijski-radnici-srpskih-medija-ubijeni-i-oteti-od-1991-godine.html>

Constitution of Serbia as well as the Criminal Code, which sanctions criminal offenses against honour, dignity and personal safety.

The EU's focus on media independence, FoE and violence against journalists has been progressively increasing since 2010. This was predictable given the country's attainment of the candidate status and acceleration of the accession negotiations in 2012, as well as the simultaneous development of the new approach to the EU enlargement.⁷⁹ During that time, Serbia adopted the first Strategy for the Development of Public Information System in the Republic of Serbia (Media Strategy) in 2011-2016. Progress was made in 2014 by adopting three laws under the Strategy (the **Law on Public Information and Media**, the **Law on Electronic Media**, and the **Law on Public Service Broadcasting**). As a lesson learned from the Croatian accession to the EU, matters related to fundamental rights of the journalist profession became part of negotiating chapter 23, contrary to the chapter 10 related to the information society, which was deemed too technical.⁸⁰

The "new approach" of the EU instigated sharpening of the EC's tone in 2013 onwards, demanding from Serbia to "sustain the momentum of reforms over time in the key areas of the rule of law "including the media freedom.⁸¹ However, after 2014, most of the recommendations started being repetitive and despite the stronger pressure, FoE area has worsened. The reports started to place high attention on the abundance of media-related issues including threats, attacks and intimidation of journalists, self-censorship, transparency of ownership and media control, questionable independence of the Republican Broadcasting Agency (now the Regulatory Body for Electronic Media), blurred legal environment, and many other. The EC has started demanding track record of investigation and prosecution for the cases of attacks and murders of journalists on the one hand, while highlighting the biased media coverage each year the elections were held (2012, 2014 and 2016), on the other. The scope of the examined issues has been extended by including the violation of internet freedoms and intervention against websites. Considering that the implementation of the media legislation package had remained problematic, the EC called for amendments.⁸²

State of play

Despite a sound institutional framework for law enforcement, this area has been achieving the lowest scores in the European Commission assessment for years. In practice, journalists agree that the media situation has been dramatically deteriorating in recent couple of years, being characterised by a prevailing atmosphere of fear, censorship or self-censorship, as well as hindered media sustainability.⁸³ Freedom House (FH) scoring⁸⁴ shows an unambiguous downfall of the press freedom in Serbia for the past four years, which multiple internationally renowned think tanks link to the current ruling party.⁸⁵ Moreover, Serbia is "one of the largest single-year declines among all of the 199 countries and territories assessed"⁸⁶, achieving lower scores than all the EU member states, as well as Montenegro and Kosovo among the enlargement countries. Other quantitative indicators confirm these findings: Media Sustainability Index⁸⁷ shows a steady decrease in the freedom of speech in Serbia for the past three years (placing the country on the lower level than Kosovo, Montenegro and Albania) while findings of the Reporters without Borders place Serbia as 66th out of 180 examined countries in the World Freedom Index, which is a drop to 7 places compared to 2017.

In addition, Serbian media stakeholders feel that the EU benchmarking has not been sufficiently strong, effective, and constructive to respond to the severity of circumstances. They indicate that other priorities on the EU's agenda, such as the normalisation of relations with Pristina, necessitated collaboration between the EU and the Serbian government and in turn took away the focus from media freedom violations.⁸⁸ On the positive side, journalists express content with cooperating with the EC, perceiving it as well familiar with the findings of investigative and analytical media, and thus treating their reports as a serious source of knowledge from the field. However, media workers believe that problems, although recognised by the Union, are not being verbalised in the (publicly available) country reports in a satisfactory manner and do not necessarily reflect the gravity of the actual situation, lack specificity and focus. For instance, earlier mentioning of specific cases such as 24 controversial privatizations, media representatives characterise as a good practice showing the EU's concern about

79 Based on the experience with Croatia, the EU developed the "new approach", which included placing priority on the fundamental areas (the rule of law and fundamental rights, justice, freedom and security), demanding track record, introducing interim benchmarks during the negotiations to tackle the emerging issues, and a suspension clause in case of the serious breach of countries' commitments.

80 Interview with Bojana Selaković, Civic Initiatives, 3.8.2017.

81 European Commission, Serbia 2013 Progress Report, 16.10.2013, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/sr_rapport_2013.pdf

82 This has been highlighted by the EC from 2015 report onwards.

83 IREX, Media sustainability index 2017, „Serbia“ pp. 105-120, Washington, 2017, available at: <https://www.irex.org/sites/default/files/pdf/media-sustainability-index-europe-eurasia-2017-full.pdf>

84 Shannon O'Toole, „A Cry for Help from Serbia's Independent Media“, 5 October 2017, available at <https://freedomhouse.org/blog/cry-help-serbia-s-independent-media>

85 See, for example: <https://freedomhouse.org/blog/cry-help-serbia-s-independent-media> and <https://rsf.org/en/serbia>

86 <https://freedomhouse.org/blog/cry-help-serbia-s-independent-media>

87 Shannon O'Toole, „A Cry for Help from Serbia's Independent Media“, 5 October 2017, available at <https://freedomhouse.org/blog/cry-help-serbia-s-independent-media>

88 Interview with Branko Čečen, CINS, 4 August 2017.

the level of democracy and fundamental freedoms in the country, which today is not the case.⁸⁹ Stakeholders mostly see reasons in the need to provide “political support” to the ongoing reforms in the country, as well as the inclinations of individual officials of the DG NEAR.⁹⁰

FH findings indicate the continuous lessening of the space for media independence in Serbia.⁹¹ The Anti-Corruption Council report confirms that “practically no independent media exists in Serbia”, and outlines key issues: 1) non-transparency of media ownership; 2) non-transparent financing and economic pressure through the budget, tax incentives and other indirect forms of funding; 3) media privatisation and unsafe status of public services; 4) censorship and self-censorship; 5) tabloidization.⁹² Essential control usually takes place in a subtle way, e.g. through advertising of public enterprises, which in truth do not need advertisement. Investigative media representatives frequently cope with different types of pressures, including **political pressure** (inspections, pressure on donors and management), **media pressure** (loyal pro-regime media against independent journalists), **legal pressure** (large and well known legal offices stand behind persons subject to investigative journalism), and **institutional pressure** (lack of cooperation and support from relevant institutions such as police, prosecutors...).⁹³ They believe that their core existence depends on the European integration process and the Commissioner for Information of Public Importance and Personal Data Protection,⁹⁴ since the Law on Free Access to Information is often not respected, and the authorities ignore calls for interviews, thus undermining the investigative journalists’ sustainability.

Media representatives and initiatives keep publishing statistics about the increasing number⁹⁵ of attacks, threats and pressures on journalists in Serbia.⁹⁶ A general impression is that only media professionals deal with data instead of institutions in charge, which are in the context of EU negotiations required to provide track record. Despite the existence of the Permanent Working Group on the Safety of Journalists,⁹⁷ and established mechanisms for instant reaction, perpetrators still enjoy impunity, and the number of attacks and threats to journalists has been increasing,⁹⁸ which is shown in the table 1 below. According to one source, as of 23 January 2018, 425 violations have been reported in the region for the past four years (Macedonia, Kosovo, Bosnia and Herzegovina, Croatia, Montenegro and Serbia), whereas Belgrade dominates with 132 reports, out of which 82 have been reports on intimidation.⁹⁹ Between 1991 and 2001, 39 Serbian journalists and media workers were killed, kidnapped, missing or lost their lives in (still) unknown circumstances.¹⁰⁰ Some of the identified problems in this context relate to the lack of efficient protective mechanisms from online persecution and the fact that authorities rarely file criminal charges in threats against journalists.¹⁰¹

89 Ibid.

90 Interview with Bojana Selaković, Civic Initiatives, 3 August 2017.

91 Freedom House, Nations in Transit 2017, Serbia, available at <https://freedomhouse.org/report/nations-transit/2017/serbia>

92 Anti-Corruption Council, “Izveštaj o mogućem uticaju institucija javnog sektora na medije kroz plaćanje usluga oglašavanja i marketinga.” [Report on the possible impact of public sector institutions on the media through the payment of advertising and marketing services.] available at <http://www.antikorupcija-savet.gov.rs/izvestaji/cid1028-3007/izvestaj-o-mogucem-uticaju-institucija-javnog-sektora-na-medije-kroz-placanje-usluga-oglasavanja-i-marketinga>

93 Branko Čečen, „Pretnje i pritisci” [Threats and pressures], CINS, 29.8.2017, <https://www.cins.rs/srpski/news/article/pretnje-i-pritisci>

94 Interview with Branko Čečen, CINS, 4 August 2017.

95 Cenzolovka, „Grupa Za slobodu medija podseća tužilaštvo na brojne slučajeve napada na novinare” [The Group for Freedom of the Media reminds the prosecution of numerous cases of attacks on journalists] <https://www.cenzolovka.rs/pritisci-i-napadi/grupa-za-slobodu-medija-podseca-tuzilastvo-na-brojne-slucajeve-napada-na-novinare/>

96 See, for example: <https://www.cenzolovka.rs/pritisci-i-napadi/uns-bez-kazni-za-ubistva-i-napade-na-novinare-3/> and <http://safejournalists.net/rs/medunarodni-dan-borbe-protiv-nekaznjivosti-zlocina-nad-novinarima-nema-slobode-medija-tamo-gde-novinari-rade-u-strahu-podstaknite-kaznjavanje-zlocina/>

97 Composed of journalists and media associations, representatives of the Prosecutor’s Office and the Ministry for Interior.

98 Independent Journalists’ Association of Vojvodina, “Udruženja: Osuda upada u stan Dragane Pećo” [Associations condemn breaking and entering into the apartment of Dragana Pećo] available at <http://www.ndnv.org/2017/07/08/udruzenja-osuda-upada-u-stan-dragane-peco/>

99 Regional Platform for Advocating Media Freedom and Journalists’ Safety „Safe Journalists”, available at <http://safejournalists.net/>

100 Association of Journalists of Serbia, “Novinari i medijski radnici srpskih medija ubijeni i oteti od 1991. godine” [Serbian journalists and media workers killed and kidnapped since 1991] available at <http://www.uns.org.rs/sr/sta-radimo/akcije/12889/novinari-i-medijski-radnici-srpskih-medija-ubijeni-i-oteti-od-1991-godine.html>

101 IREX, Media sustainability index 2017, „Serbia” pp. 105-120, Washington, 2017, available at: <https://www.irex.org/sites/default/files/pdf/media-sustainability-index-europe-eurasia-2017-full.pdf>

Table 1. Statistics of the Independent Association of Journalists of Serbia¹⁰²

Year	Number of attacks	Physical attacks	Attack on property	Threat to damage property	Pressure	Verbal threat
2008	144	69	9	8	25	33
2009	35	8	7	0	11	9
2010	34	11	2	0	8	13
2011	73	16	10	1	29	17
2012	31	11	2	0	0	18
2013	23	6	2	0	0	15
2014	36	11	2	0	9	14
2015	58	12	4	0	17	25
2016	69	9	1	0	33	26
2017	92	6	2	0	62	22
TOTAL	595	159	41	9	194	192

There have been developments within the implementation of the Action plan for Chapter 23. Assessment of the needs for amending the Criminal Code to ensure a higher level of protection of journalists against threats of violence was conducted, but no amendments were recommended besides improving certain practices. Authorities have established contact points for emergency protection of journalists, while the Public Prosecutor and the Minister of the Interior signed a Cooperation Agreement that aimed to place priority on the investigation of threats and violence against journalists. Public Prosecutor's Office and independent journalists' associations signed cooperation agreement and held consultations on its implementation and measures to raise the level of safety of journalists.

The EU's repeated efforts to urge the establishment of an *ad hoc* Commission, aimed to shed light on unsolved murders of journalists during the 1990s/early 2000s, proved to be effective. The Commission has been operating since 2013. The interim benchmark requires the initial track record of progress of the Commission's work "including further investigations, effective prosecution and deterrent sanctions for perpetrators". However, the progress in the Commission's work has been slow thus far. An interviewed media professional questions its legitimacy,¹⁰³ raising doubts in its mandate and potentials to control the work of police and prosecution without necessary resources or apparatus. There are doubts that the Commission has been vulnerable to manipulation, and that it has had only a PR value.¹⁰⁴ Furthermore, there are considerations that its establishment came in a politically convenient moment because the majority of cases happened during the rule of the previous political party.¹⁰⁵ On the other hand, there are opinions in favour of the Commission's work, outlining positive results such as the provision of an expert report, preventing the state from treating some cases as suicides, taking one case to a trial, etc.¹⁰⁶

Evaluation and Prospects

Deterioration of fundamental rights and freedoms of media workers in Serbia has become critical in the past four years, evidenced by both qualitative and quantitative indicators. Issues include threats, attacks and intimidation of journalists, hindered economical sustainability and related media control, self-censorship, lack of ownership transparency and blurred legal environment, etc. Relevant stakeholders link the situation with the powershift in 2012, after which the trend has only been negative. There have been developments under the Action Plan on Chapter 23, but the activities conducted only represent initial steps towards achieving general progress in the area, hence it is early to assess the outcomes. Although the EC's benchmarking in this area has improved since 2014 by providing a more in-depth analysis of the ongoing situation and more focused recommendations, the benchmarking efficiency remains limited overall due to a very slow activity on the government side. To support the operationalization of some recommendations, it could be relevant to examine examples of positive comparative practice,¹⁰⁷ however, it has proven difficult to impose a desired level of media freedom in the candidate countries while they have non-exemplary immediate neighbours, such as Hungary. In addition, while the EC's

102 Independent Association of Journalists of Serbia, "Napadi na novinare" [Attacks on Journalists] <http://www.bazenuns.rs/srpski/napadi-na-novinare>

103 Interview with Tanja Maksić, BIRN, 6 September 2017.

104 Interview with Bojana Selaković, Civic Initiatives, 3 August 2017.

105 Ibid.

106 Interview with Branko Čečen, CINS, 4 August 2017.

107 Ana Knežević Bojović et al., „Zaštita bezbednosti novinara: Analiza međunarodnih standarda, primeri dobre prakse i preporuke za unapređenje pravnog okvira i prakse u Srbiji” [Journalists' security protection: Analysis of international standards, good practice examples and recommendations for improving the legal framework and practice in Serbia], available at: <http://www.ombudsman.rs/attachments/article/4540/Zastita%20novinara%20-%20prikaz%20uporedne%20prakse%20i%20preporuke%20za%20Srbiju.pdf>

high awareness of the severity of problems in the media sector is undeniable, media representatives do not feel that country reports have given sufficient attention to this sector. The state of media is a cross cutting issue covered by several different chapters (5, 8, 10, 23, 28 and 32) hence it requires particular attention during the negotiation process.

Prohibition of Discrimination

➤ ➤ ➤ *Opening benchmark:*

Complement the anti-discrimination strategy with a credible action plan, including actions to foster gender equality and a mechanism to monitor its implementation. Strengthen the institutional capacity of the bodies active in this area, improve their cooperation and ensure more effective follow up from the law enforcement bodies to possible violations, enhance awareness and support measures, especially on employment and public representation of women. Particular focus should be put on ending discrimination of the LGBTI community and respecting their rights and freedoms; Adopt the Law aiming at protecting persons with mental disabilities in institutions of social welfare.

➤ ➤ ➤ *Interim benchmark:*

Serbia implements the Strategy and action plan on anti-discrimination and adopts amendments to the Law on Prohibition of Discrimination in line with the EU acquis. Serbia ensures adequate institutional capacity for their implementation. Serbia monitors closely the impact of these two instruments - including as regards the full respect of the rights of LGBTI persons - and takes remedial action where required.

Background

The EU's benchmarking process in this area can be divided in two phases. The **first phase** covers the period between 2006 (enactment of the new Constitution and negotiations on the Stability and Association Agreement between Serbia and EU member states) and 2012 (Serbia receives the EU candidate status). This phase predominantly refers to the EC's pressure on Serbia to adopt anti-discrimination legislation, given that Serbia negotiated visa liberalisation in 2008-2009, where anti-discrimination was one of the crucial packages and law adoption one of the key conditions. As a result, the **Law on Prohibition of Discrimination (2009) and the Law on Gender Equality (2010) were adopted and the Commissioner for Protection of Equality (hereinafter: Equality Commissioner or Commissioner) was appointed (2010)**. The EC began to explicitly use the acronym "LGBT" in the country reports only in 2008 and therefore started increasing its focus on this group in the years that followed.

The **second phase** has been ongoing since the EC issued the 2012-2013 Enlargement strategy¹⁰⁸ and defined the "new approach"¹⁰⁹ to enlargement. From the time when the EU developed the new approach and Serbia became a candidate country, the rule of law area has been placed under the stronger spotlight, while the reports have become visibly more thorough and the recommendations more precise. The following milestones mark the second phase within this benchmark: **Pride Day (2012), Anti-Discrimination Strategy (2013), Law on Mental Disability (2013) and Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2014)**. The new focus of the EC has been law implementation and amendments (to fully align with the EU *acquis*), as well as adoption of strategies and action plans, strengthening administrative and financial capacities of the anti-discrimination bodies, and the much-needed political commitment for reforms. The 2014 report included persons with HIV/AIDS for the first time among the groups that are most prone to discrimination in Serbia.

State of Play

Today, Serbia's legal framework for protection against discrimination is in place,¹¹⁰ but not fully aligned with the EU *acquis*, particularly "as regards the scope of exceptions from the principle of equal treatment, the definition

¹⁰⁸ European Commission, Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2012-2013, Brussels, 10.10.2012. https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2012/package/strategy_paper_2012_en.pdf [13.12.2018]

¹⁰⁹ Based on the experience with Croatia, the EU developed the "new approach," which includes placing priority on the fundamental areas (the rule of law and fundamental rights, justice, freedom and security), demanding track record, introducing interim benchmarks during the negotiations to tackle the emerging issues, and a suspension clause in case of the serious breach of countries' commitments.

¹¹⁰ General protection from discrimination is guaranteed by the Constitution, while two specific anti-discrimination laws serve as umbrella legislation. Additionally, a set of nearly 20 legal acts contain anti-discrimination provisions, including the Gender Equality Law, the Labour Code, the Law on Free Access to Information of Public Importance, etc.

of indirect discrimination and the obligation to ensure reasonable accommodation for disabled employees.”¹¹¹ Apart from the laws, Serbia has been implementing a strategy (since 2013) and action plan (since 2014) for the prevention and protection against discrimination, as well as a set of other strategic documents focused on specific areas within the anti-discrimination field. Institutional framework for the protection against discrimination is vast,¹¹² but insufficient capacities (e.g. understaffed departments, lack of professional development) to properly implement the legal and policy frameworks have been repeatedly highlighted by the EC.

Although Serbia adopted most anti-discrimination legislation by 2012, the implementation has remained problematic and research shows numerous shortcomings in practice. Representatives of the legislative (MPs on the national, provincial, town and municipality level) and executive branches (public servants from the ministries, provincial secretariats, towns and municipalities) are partly familiarised with the legal framework on anti-discrimination, while institutions partially implement recommendations from the Equality Commissioner’s annual reports.¹¹³ Furthermore, the annual reports of the Equality Commissioner, although being regularly submitted to the Parliament, are not being considered in the parliamentary debates. Nine years after the adoption of the core anti-discrimination law, there is still no centralised and standardised data collection mechanism that would ensure systematic monitoring and analysis of the law implementation and hence galvanise analytics on discrimination.¹¹⁴ In addition, there are no clear cases of discrimination in the case law,¹¹⁵ while low sanctions for discriminatory acts show that “judges are still not aware of the detrimental effects of discrimination.”¹¹⁶

Quantitative indicators show that Serbia has only 30% of achieved LGBT human rights, which places it as 28th among the 49 European countries (lower than 19 EU members and 4 enlargement countries).¹¹⁷ Another ranking, concerning discrimination and violence against minorities,¹¹⁸ is particularly worrying since Serbia takes the 95th place out of 128 examined countries, achieving worse results than all the EU member states and enlargement countries.¹¹⁹ The Equality Commissioner has identified an increase in citizens’ complaints over the years, but CSOs believe that the figures are not reflecting the reality.¹²⁰ CSOs believe that the acts of competent authorities in cases of discrimination and violence against LGBTI persons are far from adequate,¹²¹ and that those who implement the anti-discrimination legislation are generally not sufficiently sensitised for these topics. Finally, the relation between the institutions and CSOs working in this area is mostly characterised by “ticking the box exercise” by the authorities. In reality, transparency and CSO participation is limited, and the feedback on provided inputs and comments by the civil society is almost always lacking.¹²² Representatives of the Commissioner’s office justify this with the fact that deadlines are short, there is insufficient time for all CSOs to express their opinion and organisations with whom the Office had been cooperating are always being invited to provide comments.¹²³ On the positive side, Serbia took 40th place in the global gender gap ranking among the 144 countries, achieving greater score than 11 EU member states and positioning itself lower than only one enlargement country (Albania).¹²⁴

Although envisaged in the Action Plan (AP) for Chapter 23,¹²⁵ amendments to the Law on Prohibition of Discrimination (hereinafter: anti-discrimination law) are already a year overdue. Currently, the amendments are still in the drafting process, under the responsibility of the Ministry of Labour, Employment, Veteran and Social Affairs, which will be the official law proposer. According to the representatives of the Equality Commissioner’s Office, reasons relate to the demanding procedural requirements, and from the very beginning it was evident that deadlines would be hard to achieve because the timing of the planned activities was too narrow.¹²⁶ After authorities hired a Serbian law professor to analyse the implementation of the existing Law and provide recommendations for alignment with the *acquis*, the Commissioner organised two public debates on law amendments. However, PrEUgovor coalition reported that “relevant CSOs that are acting in the

111 European Commission, Screening Report Serbia, Chapter 19 – Social policy and employment, 18.01.16, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/serbia/screening-reports/screening_report_ch_19_serbia.pdf [17.1.2018]

112 The main institution responsible for the implementation of anti-discrimination policy is the Ministry of Labour, Employment, Veteran and Social Affairs. Other relevant institutions include the Office for Human and Minority Rights as well as the Commissioner Equality Protection.

113 The Equality Commissioner for the Equality Protection, “Odnos predstavnika organa javne vlasti prema diskriminaciji u Srbiji”, Belgrade, 2013 http://ravno-pravnost-5bcf.kxcdn.com/wp-content/download/izvestaj_odnos_predstavnika_javne_vlasti_prema_diskriminaciji_u_srbiji_final.pdf [13.12.2018]

114 This has been repeatedly emphasised by the Equality Commissioner. See, for example: “Redovan godišnji izveštaj poverenika za zaštitu ravnopravnosti”, Belgrade 2014; <http://bit.ly/2ES7NOa>

115 Interview with a CSO representative, 17 November 2017.

116 Ivana Krstić “Country report - Non-discrimination -Serbia” European Commission, Directorate-General for Justice and Consumers, 2016, <https://www.equalitylaw.eu/downloads/4408-serbia-country-report-non-discrimination-2017-pdf-1-75-mb>

117 Rainbow Europe Country Ranking, <https://rainbow-europe.org/country-ranking> [11.12.2017]

118 2017 Social Progress Index, <https://www.socialprogressindex.com/?tab=2&code=SRB> [11.12.2017]

119 Except Kosovo, where no data was provided in the ranking.

120 Interview with a CSO representative, 17 November 2017.

121 Kristina Todorović, Milan Filipović, Lazar Mišković, Milan Antonijević, “Analitički izveštaj o nedostacima i pravnim prazninama u implementaciji postojećih politika anti-diskriminacije, prevencije nasilja, zločina i govora iz mržnje prema LGBT osobama”, YUCOM, November 2016. <http://www.yucom.org.rs/wp-content/uploads/2016/11/Analitički-izveštaj-i-preporuke-LGBT-prava.pdf> [21.12.2017]

122 Interview with a CSO representative, 17 November 2017.

123 Interview with representatives of the Equality Commissioner’s Office, 17 January 2018.

124 World Economic Forum, the Global Gender Gap Report 2017, Switzerland, http://www3.weforum.org/docs/WEF_GGGR_2017.pdf [21.12.2017]

125 Action plan for chapter 23 with implementation status, Activity 3.6.1.5, April 2016, p.268, available at: <https://www.mpravde.gov.rs/files/Acti%20on%20plan%20Ch%2023%20with%20implementation%20status.pdf> April, 2016.

126 Interview with representatives of the Equality Commissioner’s Office, 17 January 2018.

sphere of antidiscrimination have not been invited nor consulted regarding the amendments to this Law¹²⁷. The representatives of the Commissioner's office stated that they had invited (primarily law-oriented) organisations with whom they had been cooperating before, and whose work they had been familiar with.¹²⁸ Additionally, they justify this approach by referring to the insufficient time during the debate for all CSOs to express their opinion. This situation demonstrates the premature nature of relationship between the state and the CSO sector in this sphere, in which the responsible authorities do not dispose with the relevant CSO database whose inputs might be valuable. Moreover, draft versions of the law, the abovementioned analysis of the implementation of the Law or the minutes of the consultation process are not publicly available.

Apart from the general anti-discrimination law, additional issues exist in specific laws within this field. The European Equality Law Network found 16 ambiguities in the Serbian anti-discrimination legislation "that require further judicial interpretation or changes to the existing legislation,"¹²⁹ while Serbian experts emphasised "horizontal inconsistencies" between individual laws.¹³⁰ It is therefore necessary to achieve both their mutual alignment and harmonisation with the EU acquis.¹³¹ This issue is partially tackled by other interim benchmarks within the Fundamental Rights area, where the Commission requires further amendment, adoption or implementation of relevant laws and policy documents related to e.g. gender equality, combating violence against women or children, legal aid, minority rights, Roma population etc. However, achievement of these benchmarks has proved to be equally slow and delayed.¹³²

According to the European Equality Law Network, the Strategy for the Prevention of and Protection from Discrimination lacks proactive and systematic approach.¹³³ It has been in force since 2013 but its implementation was more than a year delayed due to the late adoption of the action plan (AP) for its implementation. A CSO representative stated that anti-discrimination measures were either not being implemented or "partially implemented," which in practice does not mean anything substantial and could indicate a general disinterest of the strategy holders.¹³⁴ Other CSO representatives found that less than half of the measures listed in the AP have been implemented, while for the quarter of activities no data was found.¹³⁵ A specially appointed Monitoring Council has so far issued five reports on AP implementation, revealing that some bodies had refused to submit their inputs for implementation reporting purposes, while others had submitted content that was not part of the Action Plan.¹³⁶ This demonstrates that some parts of Serbia's administration do not consider EU accession requirements as a priority, but rather see it as an additional, non-obligatory duty. The Monitoring Council, on the other hand, only expressed the intention to inquire into the reasons and instigate the implementation in the next reporting period, but the outcomes of this intention are not part of any publicly available document. In other words, the public is short of information on whether the unimplemented activities have been carried forward.

The Office for Human and Minority Rights and the Equality Commissioner's Office, two main institutions responsible for implementing the anti-discrimination legislation, still do not have complete institutional capacity required by the EU. Budgetary restraints are the main reason preventing the engagement of additional human resources in these institutions.¹³⁷ Organisational needs of the Equality Commissioner's Office, for example, relate to the filling the vacant posts, needs for adequate premises, additional professional development, and improving the organizational structure and internal procedures and standards.¹³⁸ In terms of the professional competence, institutions have been organising training sessions and other professional development activities for the employees, but the mechanisms to monitor effects of these activities are usually not defined.

127 PrEUgovor Coalition, Report on Progress of Serbia in Chapters 23 and 24 - October 2017, <http://www.preugovor.org/Reports/1384/Coalition-prEUgovor-Report-on-Progress-of-Serbia.shtml> p. 13

128 Interview with representatives of the Equality Commissioner's Office, 17 January 2018.

129 SEE: Ivana Krstić "Country report - Non-discrimination -Serbia" European Commission, Directorate-General for Justice and Consumers, 2017, <https://www.equalitylaw.eu/downloads/4408-serbia-country-report-non-discrimination-2017-pdf-1-75-mb> [11.12.2017]

130 Kristina Todorović, Milan Filipović, Lazar Mišković, Milan Antonijević, "analitički izveštaj o nedostacima i pravnim prazninama u implementaciji postojećih politika anti-diskriminacije, prevencije nasilja, zločina i govora iz mržnje prema LGBT osobama", YUCOM, November 2016.

<http://www.yucom.org.rs/wp-content/uploads/2016/11/Analiticki-izvestaj-i-preporuke-LGBT-prava.pdf> [21.12.2017]

131 Ibid.

132 See: Council for Implementation of the Action Plan for Chapter 23, Report 3/2017 on Implementation of the Action Plan for Chapter 23, Belgrade, November 2017, <https://www.mpravde.gov.rs/files/Report%20no.%203-2017%20on%20implementation%20of%20Action%20plan%20for%20Chapter%2023.pdf> [21.12.2017]

133 Ivana Krstić "Country report - Non-discrimination -Serbia" European Commission, Directorate-General for Justice and Consumers, 2017, <https://www.equalitylaw.eu/downloads/4408-serbia-country-report-non-discrimination-2017-pdf-1-75-mb> [11.12.2017]

134 Interview with a CSO representative, 17 November 2017.

135 PrEUgovor Coalition, Report on Progress of Serbia in Chapters 23 and 24 - October 2017, <http://www.preugovor.org/Reports/1384/Coalition-prEUgovor-Report-on-Progress-of-Serbia.shtml>

136 See: Office for Human and Minority Rights, Monitoring reports on action plan implementation (in Serbian), <http://www.ljudskaprava.gov.rs/sr/dokumenta/ljudska-prava/strategija> [21.12.2017]

137 The Ministry of Finance rejected the financial plan proposal of the Office for Human and Minority Rights, related to hiring new employees, while an initial commitment of the Equality Commissioner to hire 36 new employees has had a slow progress due to the budgetary restraints.

138 Strategy of organisational development of the Equality Commissioner, available (in Serbian) at: <http://ravnopravnost-5bcf.kxcdn.com/wp-content/uploads/2016/07/microsoft-word-icon.png> [17.1.2018]

The institutional capacity issue is present in other institutions as well, e.g. anti-discrimination knowledge has still been lacking among prosecutors and judges,¹³⁹ which often results in misapplication of the notion of discrimination.¹⁴⁰ Nevertheless, institution building within the anti-discrimination policy brought some positive achievements, particularly regarding education of officials in direct contact with vulnerable groups. For example, the Equality Commissioner's office and the Ministry of Public Administration and Local Self-Government organised training sessions on anti-discrimination for local government employees, while the discrimination topic has been incorporated in the state examination for both civil servants and local government employees. Furthermore, it is commendable that a number of police officers have been selected, trained and appointed as contact points for the socially vulnerable groups, and another number of officers have been trained to improve communication and cooperation with the CSOs. However, although some authorities hold training sessions, their effectiveness remains questionable since there are no monitoring mechanisms besides reporting on the number of training sessions held and number of people trained.

In 2017, the first openly LGBT Prime Minister was appointed in Serbia. However, discrimination and violence against LGBT persons are still widespread. Simultaneously, reports are few due to the lack of trust in the institutions and fear of violence and further victimization.¹⁴¹ LGBTI rights "remain a controversial issue in Serbia and the Law on Registered Partnerships has not yet been adopted."¹⁴² Young LGBTI people are often being rejected by their families but there are no shelters or other measures and care services for people in this situation.¹⁴³ According to the civil society, there has been serious progress in cooperation with the police, but the long-term effects are still limited.¹⁴⁴ Five years after the introduction of the institute of hate crime as an aggravating circumstance, the prosecutors have still not applied this institute in discrimination cases. There is a strong opinion among the LGBTI group that the prosecutor's office excludes this institute from the indictments and pays more attention to the circumstances that can in fact be mitigated.¹⁴⁵

Evaluation and Prospects

The benchmarking system in the area of anti-discrimination in Serbia has been successful to some extent. The interim benchmark on non-discrimination focuses on legislation-related necessities, institutions implementing the legislation and places emphases on the LGBTI persons, which is commendable. Interviewees from the civil sector agree on the crucial role of the EU as a key driver for reforms in the field of discrimination, but express concern about the thoroughness of the EC's publicly available recommendations and the quality of reporting on the progress. The situation has been improved from the legal standpoint, since many laws, strategies and action plans for their implementation have been adopted. Further alignments with the EU *acquis* are needed. Despite the efforts shown, full institutional capacity for proper implementation is still not achieved. Apart from the legal and institutional set up, practical shortcomings remain, with the lack of transparency in legal drafting and lack of trust in the institutions. Reports on implementation of various action plans are not citizen-friendly, they lack clarity and make it hard for the interested public to monitor and get familiarised. Overall, although positive (and mostly legislative) steps are evident, the full implementation of this benchmark is expected to encounter a long path towards tangible, evident improvements.

139 Ivana Krstić "Country report - Non-discrimination -Serbia" European Commission, Directorate-General for Justice and Consumers, 2017, <https://www.equalitylaw.eu/downloads/4408-serbia-country-report-non-discrimination-2017-pdf-1-75-mb> [11.12.2017]

140 Interview with a CSO representative, 17 November 2017.

141 Kristina Todorović, Milan Filipović, Lazar Mišković, Milan Antonijević, "analitički izveštaj o nedostacima i pravnim prazninama u implementaciji postojećih politika anti-diskriminacije, prevencije nasilja, zločina i govora iz mržnje prema LGBT osobama", YUCOM, November 2016. <http://www.yucom.org.rs/wp-content/uploads/2016/11/Analiticki-izvestaj-i-preporuke-LGBT-prava.pdf> [21.12.2017]

142 Ivana Krstić "Country report - Non-discrimination -Serbia" European Commission, Directorate-General for Justice and Consumers, 2017, <https://www.equalitylaw.eu/downloads/4408-serbia-country-report-non-discrimination-2017-pdf-1-75-mb> [11.12.2017]

143 Annual Ombudsman Report 2016, available at <http://ombudsman.rs/attachments/article/5191/Godisnji%20izvestaj%20Zastitnika%20gradjana%20za%202016.%20godinu.pdf> [21.12.2017]

144 Interview with a CSO representative, 17 November 2017.

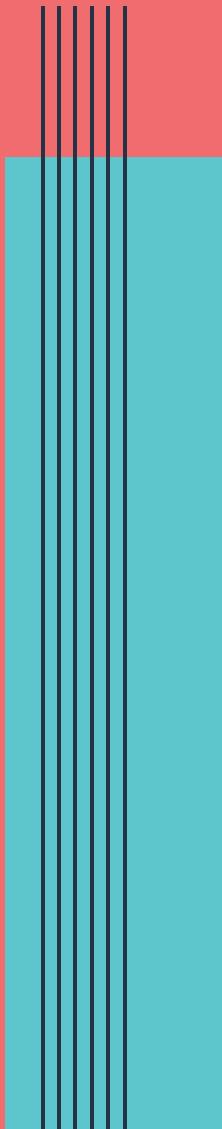
145 Kristina Todorović, Milan Filipović, Lazar Mišković, Milan Antonijević, "analitički izveštaj o nedostacima i pravnim prazninama u implementaciji postojećih politika anti-diskriminacije, prevencije nasilja, zločina i govora iz mržnje prema LGBT osobama", YUCOM, November 2016. <http://www.yucom.org.rs/wp-content/uploads/2016/11/Analiticki-izvestaj-i-preporuke-LGBT-prava.pdf> [21.12.2017]



ANALYSIS OF SELECTED BENCHMARKS



III. CHAPTER 24



III.1 ASYLUM

> > > *Opening benchmark:*

Outline measures to further align legislation with the acquis in the area of asylum where needed and establish a mechanism to ensure that legislation is correctly implemented, in particular when it comes to adequately and timely processing of applications and in terms of effective access to the asylum procedure, so that, inter alia: the expression of the intention to apply for asylum is treated as an asylum application; access to the asylum procedure for rejected asylum seekers who cannot be returned to a safe third country is guaranteed; implicit withdrawal/abandonment leads to discontinuation or rejection rather than the current suspension of the procedure; time limits are enforced, including through effective judicial remedies; a revision of the safe third country concept and its implementation is conducted; a training plan tailor-made for staff of all bodies involved is developed.

> > > *Interim benchmark:*

Serbia adopts and implements a new Law on Asylum which is to the maximum extent aligned with the relevant EU acquis and which provides the basis for establishing an initial track record on implementing an EU compliant asylum procedure ensuring:

- unhindered access to the procedure;*
- a reasonable length of handling asylum requests;*
- an improved quality of the decisions taken;*
- recognition rates comparable to the EU average;*
- sufficient accommodation for, assistance to and integration of asylum seekers (including vulnerable categories) into society;*
- effective measures to prevent possible misuse of rights by migrants, including swift appeal procedures;*
- effective and rapid return of rejected applicants to the country of origin or third-country of transit;*
- Appropriate legal and immigration provisions for failed asylum applicants or irregular migrants that cannot be quickly removed from Serbia.*

Background

The Serbian asylum system was established in 2008, with the entry into force of the first Law on Asylum (LoA) (Official Journal RS 109/2007). The visa liberalisation process, i.e. the fulfilment of requirements needed for Serbia to obtain visa-free regime for the Schengen countries in 2009, was one of the reasons why the Law was adopted at that specific time. This Law is harmonised with the 1951 Geneva Convention on the Refugees and the EU asylum acquis that was in force at that moment. However, ever since its adoption to present day, the system has been facing major deficiencies, which rendered the system slow and inefficient. Namely, the European Commission and the NGOs that provide direct assistance to the asylum seekers have repeatedly emphasised the problems relating to asylum procedure, incompetent decision-making in first instance, quality of appeals procedure, inadequate reception and accommodation conditions, absence of respect of the rights that the asylum seekers and persons granted protection are entitled to according to the Serbian law (right to healthcare, education, work, etc.). The reasons behind such situation boil down to the lack of experience and competence of human resources involved in the asylum system (Office for Asylum of the Ministry of Interior, in charge of first instance procedure; Commissariat for Refugees, in charge of providing accommodation; Centres for Social Welfare; etc.); and the lack of financial resources (and probably genuine will) to improve the existing capacities and make the asylum system more efficient.

In order to remedy the existing deficiencies and fully align the Serbian asylum system with the EU asylum acquis, which has evolved since 2008 and after the adoption of the Law, it was decided that the new law should be enacted, instead of amending the existing one. The legislator justified this decision claiming that many existing provisions were not precisely defined and thus are hardly implementable and leave space for misuse.¹⁴⁶ Preparatory activities for adoption of the new law were carried out swiftly and with expert support under the EU IPA 2013 twinning project “Support to National Asylum System in Serbia”, which commenced in September 2015 and ended in January 2018. The Gap Analysis of the existing law was prepared and presented to a small group of NGOs in December 2015. The working group for the development of the new LoA was formed soon after and three rounds of public consultations were held in March 2016. Some proposals from two NGOs who deal with asylum issues have been adopted, which, together with the fact that the legal drafting process involved the CSO sector, was deemed as a positive practice, both by some parts of the CSO sector¹⁴⁷ and the EC.¹⁴⁸

146 Draft Law on Asylum, Justification, p. 37, available at: http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2445-17.pdf

147 Preugovor Report, October 2016, p. 39, available at: <http://preugovor.org/lzvestaji/1320/lzvestaj-koalicije-prEUGovor-o-napretku-Srbije-u.shtml>

148 Interview with the official from the EU Delegation in Serbia, September 2017.

State of play

Nevertheless, the adoption of the new LoA, together with the corresponding by-laws and fulfilment of this benchmark, has already been almost two years behind the schedule¹⁴⁹ – according to the Action Plan for Chapter 24, it was set to take effect due to happen in the first quarter of 2016.¹⁵⁰ All linked activities, which are supposed to enable this law to be enacted, are also delayed and dependent on the adoption of the Law. The draft law was adopted at a Government session in September 2017 and passed to the National Assembly. No discussion on the law has been scheduled by January 2018, whereas the Law itself could be found on “Legislation under procedure” section on the Parliament’s website.

The Parliament’s inactivity in the past two years is an important factor that influenced such negative outcome. Namely, the Parliament was inactive for more than 9 months during 2016-17. These were crucial years for fulfilment of obligations under this benchmark.

It is worth noting that during 2015-16, Serbia was massively affected by the “refugee crisis” phenomenon and was praised by the EU and the EC in the way it dealt with the acute situation on the ground. However, the EC country reports have kept iterating the key problems and deficiencies of the Serbian asylum system, relating to slow and ineffective asylum procedure; lack of human resources; knowledge and skills of the existing staff on asylum matters, which results in deficient asylum decisions; and the lack of accommodation capacities. Serbian officials claimed that the “refugee crisis” had no impact on the pace of fulfilment of commitments set in the Action Plan.¹⁵¹

Evaluation and prospects

The new Law contains provisions which make the Serbian asylum system aligned with the EU acquis, but since the Law has not been adopted, it is not possible to assess whether its implementation contributed to ironing the endemic deficiencies of the system. More so, it is not possible to evaluate the effectiveness of this benchmark in its entirety. However, bearing in mind the described circumstances and the current situation on the ground, strong arguments can be made to believe that the new Law would not substantially help to improve the functioning of the Serbian asylum system.

In fact, it would be naïve to expect that the new LoA would remedy all the shortcomings of the Serbian asylum system. The crucial problem has not been the bad quality of the existing Law, but the lack of implementation of the basic provisions of the law in force (which are maintained in the new Law), such as the right to submit an asylum request; the right to enter the asylum procedure; the right to receive the identification documents. These provisions are essential as they enable the asylum seeker to enjoy the rights he/she is entitled to under LoA and the Serbian constitution, such as accommodation, primary healthcare, education, etc. In brief, basic rule of law principles and legal certainty, which would be guaranteed had the existing law been implemented, are breached in practice.¹⁵²

For that reason, the new Law will probably not dramatically change the situation on the ground if other complementary actions that are supposed to enable the proper implementation of the basic standards and principles are not undertaken in parallel. They include, among others, genuine will of the authorities to ensure legal certainty and act in accordance with the existing legislation; reinforcement of staff capacities in the Asylum Office (which is one of the commitments under the Action Plan that has not been carried out in accordance with the agreed deadline)¹⁵³; greater investment in education and training of the staff dealing with first instance procedure (also emphasized by the EC in its Non-Papers); empowerment of courts and the judiciary, in charge of the appeals procedure, as they tend to act under political influence or have no proper knowledge to bring decisions/judgements in merits.¹⁵⁴

To conclude, the present arguments reveal that the EU has so far not been effective in enforcing the given benchmark and that a number of challenges can be expected once the new LoA is adopted. They include the risk of calling early elections, which might result in another postponement of fulfilment of this activity and the related ones; and the lack of genuine will to ensure the functioning of the asylum system in accordance with the national and EU legislation. Negative developments in some of the EU countries when it comes to treatment of the asylum seekers and the refugees, might have influenced the behavior of the Serbian authorities, i.e. their reluctance to properly implement the basic provisions that would guarantee respect of the rule of law and legal

149 See the last available Mol Report on AP implementation, January-June 2017, available at: <http://bit.ly/2Dz8MON>

150 Action Plan for Chapter 24, 2015, activity 2.1.4.3., p. 53, available at: http://arhiva.mup.gov.rs/cms_cir/oglasni.nsf/ap-p24.pdf

151 Statement from the official of the Mol during the National Convention meeting for the working group on Chapter 24, February 2016.

152 Interview with the lawyer from NGO Asylum Protection Center, October 2017.

153 See Activity 2.1.2.1 of the Action Plan for Chapter 24, available at: http://arhiva.mup.gov.rs/cms_cir/oglasni.nsf/ap-p24.pdf; The latest Mol’s Report on AP implementation states that this activity is “under progress”, whereas the latest EC’s Non-Paper from November 2017 states that increasing the staff of the Asylum Office in the Border Police Directorate to a total of 29 has been envisaged since autumn 2016, but that additional positions have neither been created nor filled.

154 Interview with the lawyer of Asylum Protection Center, October 2017.

certainty. Further research needs to be done to examine possible correlation between the breach of rule of law standards and principles in the EU member states, on the one side, and Serbia as a candidate country, on the other side.

III.2 SCHENGEN

Twin-threats of corruption and organised crime at the borders

➤ ➤ ➤ *Opening benchmark:*

Outline a comprehensive set of measures to improve the fight against corruption at the borders, covering all agencies active at the border, in order to effectively address the twin challenges of corruption and organised crime.

➤ ➤ ➤ *Interim benchmark:*

Serbia addresses the twin-threats of corruption and organised crime at its borders through the implementation of a dedicated anti-corruption plan at the borders and provides an initial track record of an adequate follow up of detected cases.

Background

The interconnection between police corruption and organised crime rests lays on the fact that criminal structures normally target public institutions and actors using corruption tools and mechanisms with the purpose of transforming the corrupted public officials into accomplices of their criminal network. There are five types of corruption that have emerged, with different level of intensity, in the Serbian Border Police: (1) providing police information to crime group members; (2) abusing police authority for the purpose of gaining profit; (3) enabling persons who are not allowed to cross the state border to cross it; (4) participating in the illegal cigarette trafficking; (5) involvement in the smuggling of irregular migrants and human trafficking.¹⁵⁵

The issue of the twin-threats of corruption and organised crime at the borders was raised for the first time within the framework of the screening process for opening of Chapter 24 in 2013. It is noteworthy that this period coincides with the intensification of the “Western Balkan route”,¹⁵⁶ in which Serbia has the important position as a transit country. During the bilateral screening, the Serbian authorities were asked to provide a presentation on the legal and institutional framework, as well as administrative capacities on the topic of corruption at its borders. Starting from 2013, the Border Police was involved in implementation of the National Strategy for Fight Against Corruption and the accompanying Action Plan, which included only one measure that was supposed to increase the resilience of the police *vis-à-vis* potential corruption defies. Furthermore, the Law on Civil Servants and the previous Law on Police contained certain provisions that prevented the police officers from performing activities incompatible with the police work. At the same time, the Serbian authorities identified the vetting system of applicants in the border police, ethics training, awareness raising activities and introducing risk analysis procedures as areas which needed improvement.¹⁵⁷

State of play

So far, this benchmark has been implemented with limited success. On the one side, the responsible authorities finalised the risk assessment on corrupt behaviour by the staff of institutions involved in the integrated border management system, adopted a new code of ethics and revised the national AP for fight against corruption in relation to the border police. Trainings on ethics were organised for almost one thousand police officers, whereas one case of corruption involving 28 officers was uncovered and charges were brought against the responsible ones.¹⁵⁸ Furthermore, the Corruption Prevention Plan for the Border Police and the corresponding plan for implementation of measures have been adopted in accordance with the set deadline.¹⁵⁹ On the other side, Preventive Action Plan for Combating Corruption for Border Police, which also includes monitoring and evaluation based

155 Sasa Djordjevic, “Corruption at the Serbian Border Police”, BCBP, 2014, available at: http://www.bezbednost.org/upload/document/corruption_at_the_serbian_border_police.pdf

156 Frontex phrase, see <http://frontex.europa.eu/trends-and-routes/western-balkan-route/>

157 Screening Report for Chapter 24, p.6, available at: <http://www.europa.rs/upload/2014/Screening-report-chapter-24-serbia.pdf>

158 European Commission Serbia Country Report 2016, op.cit.

159 Report on AP implementation, January-June 2017, op.cit.

on the assessment of the risk of corruption was supposed to be completed by the third quarter of 2017, but its adoption is still pending. The same goes for a memorandum of understanding and the creation of joint investigative teams between the police, prosecutors and customs officers to fight corruption on the border.¹⁶⁰

Evaluation and prospects

Full implementation of this benchmark may be challenged in the future by several significant issues. The first concerns incomplete and inadequate legal solutions in the Law on Police from 2016 and the envisaged amendments, which are currently in the adoption procedure. Namely, although this law introduces for the first time the Human Resource Sector into the Ministry of Interior, which is expected to contribute to enhancing police integrity, it falls short of defining clear mandates for different units in charge of internal police control. Under the current framework, the Criminal Police Directorate and the Internal Affairs Sector both have the competence to conduct investigations against border police members. Instead, the internal control system would be more effective if the mandates were clearly discerned or centralised under one unit, which would be a focal point for registration of complaints relating to the work of the Ministry's staff.¹⁶¹ Secondly, the current human and financial capacities are inadequate to provide internal oversight and handle the complaints.¹⁶² In addition, the salaries of border police officers are rather low, which makes them more prone to corruption.¹⁶³ Thirdly, the Ministry of Interior lacks operational independence in carrying out investigations, either by being dependent on Security Intelligence Agency (BIA), or by being susceptible to political pressure.¹⁶⁴

Finally, twin threats of corruption and organised crime at the borders need to be observed comprehensively, as part of a general police reform, especially efforts to make the system more merit-based, professional, less politicised and increase the citizens' confidence in the police. Regrettably, the police reform as such does not fall under the EU acquis, since the EU countries do not have a uniform or standardised legislation on this matter. Consequently, this issue cannot be embedded in the existing EU accession framework. The realisation of the agreed commitments in the framework of accession negotiations for Chapter 24 might have been more effective if a separate chapter of the AP was dedicated specifically for the police reform topic.¹⁶⁵

III.3 FIGHT AGAINST ORGANISED CRIME

Mandate of intelligence services

➤ ➤ ➤ *Opening benchmark:*

Revise the role and practice of security services in the criminal investigation phase in line with data retention and human rights standards.

➤ ➤ ➤ *Interim benchmark:*

Serbia redefines the role of the intelligence service in the criminal investigation procedure to ensure a clear separation of the mandates and regulations concerning interception of communications for criminal investigation, on the one hand, and for security purposes on the other and put in place a robust oversight mechanism so as to avoid any abuses.

Background

The Security Intelligence Agency (BIA), together with the Ministry of Interior's (MoI) Department for Combating Organized Crime, Military Security Agency, customs and tax authorities and other state organs are in charge of detection and investigation of organized crime under the Serbian legal and institutional framework.¹⁶⁶ At the same time, the BIA is responsible for collecting intelligence for Serbia's national security. Therefore, a separation between intelligence mandates for criminal investigations and security purposes is not guaranteed. Furthermore, there is no functioning external oversight mechanism: The Ombudsman and Commissioner for Information of Public Importance and Personal Data Protection (hereinafter: the Commissioner) formally have the primary

¹⁶⁰ European Commission, Non-Paper for Chapters 23 and 24, November 2017, op.cit.

¹⁶¹ "Alternativni izveštaj o sprovođenju nacionalne strategije za borbu protiv korupcije", 2016, available at: http://www.bezbednost.org/upload/document/drugj_alternativni_izvetaj_o_sprovođenju_antikororu.pdf

¹⁶² Ibid.

¹⁶³ Sasa Djordjevic, 2014, op.cit.

¹⁶⁴ Interview with Sasa Djordjevic, Belgrade Center for Security Policy, December 2017.

¹⁶⁵ Interview with the member of Preugovor coalition, December 2017.

¹⁶⁶ Council for the Implementation of the Action Plan for Chapter 24, Action Plan for Chapter 24, March 2016, p. 164.

independent oversight over the security services. Despite this fact, the Ombudsman's analyses and recommendations are rarely taken into account. At the same time, the Commissioner has limited competences. Rather, control over the security institutions is concentrated in a few key-people, who can affect decisions without serious scrutiny.¹⁶⁷ Additionally, the BIA has some police competences (e.g. to arrest individuals), which could be abused by those in control of the security services, facilitating crimes like diverting money away or blackmailing.¹⁶⁸ The EU has voiced same concerns, claiming that the current system is not in line with EU best practices and as such bears the risk of abuses that interfere with human rights and data retention standards.¹⁶⁹

Furthermore, there are many arguments that confirm the interdependence of the BIA and the police. First, evidence in court cases that has been gathered by the BIA often needs to be supplemented by a description of the method of data collection. This endangers future investigations because criminal organisations get to know the agency's intelligence strategies. Second, given that the monitoring centre is located at the BIA headquarters, this institution and its leaders effectively maintain control over it. As access to the communication interception equipment is not restricted, there is a high risk of abuse.¹⁷⁰

The worries of increased competences of the security services are partially shared by the Council of Europe (COE). Although police competences of the intelligence services generate the risk of abuse, tight internal and external control could greatly reduce it. In a system in which the police conduct intelligence operations independently from the BIA this risk is naturally averted. However, the COE emphasizes that a clear delineation between the institutions for national security and crime investigation undermines synergies between the two. A prominent example of where these synergies are crucial is terrorism.¹⁷¹

State of play

From 2012 to 2017, the European Commission (EC) has increasingly emphasized the risks of the state of play in its country/state reports, referring to potential human rights and data retention abuses. It has stressed that a clear distinction of mandates, an external oversight mechanism, and independent intelligence gathering for criminal investigations are necessary for Serbia to be in line with EU best practices. The opening benchmark was defined in this respect, albeit in a rather inexplicit manner (*"Revise the role and practice of security services in the criminal investigation phase in line with data retention and human rights standards"*).

The corresponding activities have been defined in the Action Plan – Serbia has committed itself to conduct analysis on roles and practices of security services and the police in implementation of specific investigative measures in the criminal investigation phase, as well as to develop a Plan on implemented the Government decision based on the findings of conducted analysis.¹⁷² The former activity was supposed to be finalised by the 4th quarter of 2016, however, it has not been conducted yet. In the monitoring report, the Mol acknowledged the negative impact the early electoral activities have had on its realisation.¹⁷³

In May 2017, a TAIEX mission was conducted to consider the current models applied in the EU member states for implementing specific investigative measures during criminal investigation, with the aim to feed into the required Analysis. This mission has ended with limited success, given that only the contested Romanian model was presented. Therefore, it was concluded that more models need to be analysed, which requires more time and postponement for the realization of this activity for second quarter of 2018.¹⁷⁴

There are some suggestions that the police are working on establishing their own intelligence unit. In cooperation with the Swedish police, the Mol has started intelligence-led policing (ILP) programmes in Kraljevo and Novi Sad. ILP aims at proactively assessing risks by interpreting intelligence data. Having their own intelligence units would make the police less dependent on the BIA, thereby reducing the risk of abuse. However, it is noteworthy that the project is still in its pilot phase.¹⁷⁵

167 Predrag Petrović and Katarina Dokić, *Slippery Slopes in the Reform of Serbian Security Services*, Belgrade Centre for Security Policy, June 2017.

168 Ibid.

169 European Commission, *European Union Common Position - Chapter 24: Justice, freedom and security*, July 2016, p. 14.

170 Predrag Petrović and Katarina Dokić, *op.cit.*

171 Iain Cameron et. al, *Report on the Democratic Oversight of the Security Services*, European Commission for Democracy through Law, 11 June 2007, p. 21.

172 See: AP for Chapter 24, activities 6.2.3.1 and 6.2.3.2.

173 Mol Serbia Monitoring Report on AP realisation, January-June 2017, available at <http://bit.ly/2Dz8MON> p. 41.

174 Ibid.

175 Andrej Stefanović, "Uncertain Role of the Security-Intelligence Agency in Fighting Organized Crime," *Pointpulse*, July, 2016, available at: <http://pointpulse.net/magazine/uncertain-role-security-intelligence-agency-fighting-organized-crime/>, and European Commission, *Non-paper on the state of play regarding chapters 23 and 24 for Serbia*, May 2017, pp. 18-19.

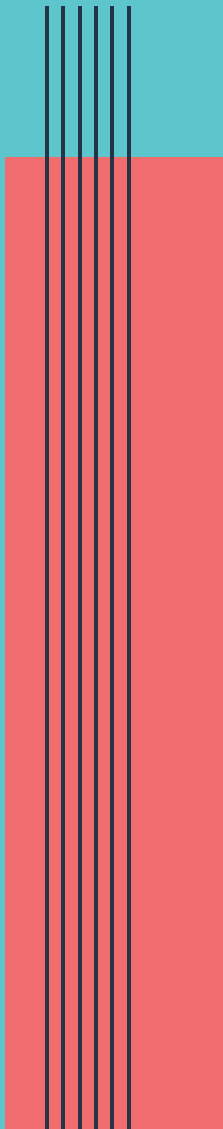
Evaluation and prospects

Overall, it can be concluded that this benchmark has not yet proven to be effective. While the responsible authorities partially blame the early elections for such an outcome, this cannot be taken as an excuse, given that carrying out the respective activities (i.e. development of an Analysis and Government decision) does not require legislative activity and Parliament's involvement. However, this case demonstrates that the periods of Parliament's inactivity due to (early) electoral cycles negatively influence the entire EU accession process, irrespective of the nature of required actions (legislative or non-legislative). Moreover, inexistence of the EU "hard acquis" and uniform standards in the EU member states on this topic is expected to further undermine the EU's endeavors to assess whether the benchmark has been met or not. While it might be relatively easy to satisfy the EU's demands on paper, by making the necessary legislative amendments, it will be extremely difficult, given the described context, to track how the separation of powers is carried out in practice.¹⁷⁶ Finally, it is worth noting this benchmark represents a precedent, as this is the first time the EU sets a specific requirement for a candidate country in this matter.

¹⁷⁶ Interview with the Katarina Đokić, researcher from Belgrade Center for Security Policy, October 2017.



IV. CONCLUSIONS AND RECOMMENDATIONS



IV.1 CONCLUSIONS

General findings

Despite the rather short timeframe since the opening of accession negotiations between Serbia and the EU in Chapters 23 and 24, the analysis of the benchmark sample has allowed the research to draw general conclusions on the dynamics of these negotiations and challenges to the effectiveness of EU's benchmarking system. In fact, the experience of actively pursuing EU integration policy for more than a decade has left remarkable legacies which are nowadays shaping the dynamics of EU-Serbia relations and EU's policy towards Serbia in Chapters 23 and 24. In general, this analysis has found that the two most important factors that influence the effectiveness of the EU's benchmarking mechanism on Serbia in the issues related to Chapters 23 and 24 are, from the EU's side, prioritisation of the issues of high politics over the concrete rule of law questions, and insufficient political support for the whole EU enlargement process, both from the EU's and Serbia's side.

Prevalence of high politics over rule of law. The first major factor which may have produced influence on EU's effectiveness to induce reforms in Chapters 23 and 24 is the seeming higher importance given to the political issues, to the detriment of the rule of law ones. This general observation is widely shared among both domestic and international stakeholders that have been interviewed. The arguments for such impression may be drawn from the two cases – Serbia's cooperation with the International Criminal Tribunal for former Yugoslavia (ICTY) and normalisation of relations with Pristina. The former was the key for Serbia to obtain EC's positive opinion on its membership application. The interviewees confirm that once the full cooperation with the ICTY was reached, the EU has temporarily adjourned all judiciary reform-related demands and lowered down the expectations, for the sake of being able to give a positive *avis* in spring 2011.¹⁷⁷ Moreover, the watered-down language in the EC 2011 Opinion on Serbia's EU membership application in terms of judiciary is also illustrative of this case. The latter case was detrimental when EU brought a decision to grant Serbia a candidate country status in 2012 and to launch accession negotiations in 2014. Although Chapter 35, which deals with the effects of Belgrade-Pristina dialogue, and Chapters 23 and 24 are formally set on an equal footing, the EU's acts and the realities on the ground give an impression that it still prioritises high politics over rule of law.

As a result, both the interviewees and the wider expert community have criticised the EU for turning a blind eye on democratic backsliding and growing state capture tendencies of the current political leadership for the sake of maintaining stability in the region.¹⁷⁸

When Serbia received a positive opinion of the EC on its membership application in 2011, the state of play in rule of law largely corresponded to the given stage in the EU integration process. In other words, for a country which has not yet reached the accession stage, the overall level of compliance with the *acquis* was rather satisfactory. For that reason, prioritising political issues over rule of law might not have been counterproductive at the time. According to one interviewee, it was quite the opposite – such move gave the impetus to the Serbian political establishment and administration to pursue this process further on.¹⁷⁹

However, the same cannot be argued in the present context, when the state of play in the rule of law does not correspond to the current stage of EU accession negotiations and the EU's expectations. The independent indices considered (Freedom House, BTI, etc.), the majority of interviewees and the analysis of the benchmark sample within this research all confirm stagnation, if not backsliding, in rule of law related reforms since 2006. The issue of Belgrade-Pristina normalisation might have turned the EU's attention from the rule of law, in which its conditionality has so far had limited effects, even though it is employing the most sophisticated assessment methods (i.e. benchmarking system). Therefore, the major challenge for the EU in the next period will be to find more effective ways to induce greater compliance from Serbia's side on rule of law related reforms.

Impact of political endorsement and commitment. The second major factor observed which may have shaped the effectiveness of the EU's benchmarking system is the lack of sincere commitment from the Serbian side to implement the necessary reforms. This is vividly reflected in the case of the Serbian Judicial Academy (JA), where the EU invested considerable resources, but still has not managed to secure the commitment of JA's authorities in taking over ownership and thus making this institution sustainable. Furthermore, the analysed benchmark sample reveals that political commitment is missing when it comes to the creation of merit-based career systems both within the judiciary and in the civil service system, as well as in relation to the position of media.

177 Interview with the President of the Judges' Association of Serbia, July 2017.

178 See BiEPAG, "EU Enlargement in time of Uncertainty" 2017, available at: <http://www.biepag.eu/wp-content/uploads/2016/10/EU-Enlargement-in-the-Western-Balkans-in-a-Time-of-Uncertainty.pdf> and "The Crisis of Democracy in the Western Balkans. Authoritarianism and EU Stabilitocracy", 2017, available at: <http://www.biepag.eu/wp-content/uploads/2017/03/BIEPAG-The-Crisis-of-Democracy-in-the-Western-Balkans.-Authoritarianism-and-EU-Stabilitocracy-web.pdf>; Natasha Wunsch, "Europeanisation and democratic regression in southeast Europe: shifting paradigms, new questions", 28 March, available at: <http://www.suedosteuropa.uni-graz.at/blog/index.php/2017/03/28/europeanisation-and-democratic-regression-in-southeast-europe-shifting-paradigms-new-questions/>; Tim Judah, "Wrong and Stable", *The Economist*, 1 July 2017, available at: <https://www.economist.com/news/europe/21724414-some-call-it-stabilitocracy-others-call-it-way-things-have-always-been-west-backs-balkan>.

179 Interview with the former member of Serbian negotiating team, July 2017.

Meagre results on the Serbian side might have partially been caused by the absence of EU's firm political endorsement for pursuing enlargement policy that was dominant in the previous decade and the mentioned focus on high politics (cooperation with ICTY and Kosovo). While all the interviewees agree that the introduction of a more streamlined approach to the rule of law is a positive development, the EU's sway on inducing positive changes in the rule of law, nevertheless, might have been overestimated. The EU conditionality is not a panacea – its effectiveness is dependent on numerous different causes, some of which fall beyond its powers. For the benchmarks to be effective, the interaction needs to be mutually reinforcing: the EU's tools may be futile if Serbia is not demonstrating genuine political will to carry out the necessary reforms, and vice versa: the EU's questionable commitment to the enlargement policy before the announcement of the EU-WB Strategy in February 2018 might have not provided sufficient incentives to Serbia to pursue the EU reform agenda.

Findings related to the benchmark sample

Negative impact of snap elections on implementation. The Parliament's (in)activity in the past two years is an important factor that has certainly influenced delays in realisation of many commitments under Chapters 23 and 24, including the analysed benchmarks. Namely, in 2016, early/snap parliamentary elections were called, which made the Parliament unable to enact laws for 6 months (from its dismissal in early March to formation of the new Government at the end of August). In addition, during the 2017 presidential election campaign, the then Prime Minister decided to run for President. The Parliament's Speaker made a decision to halt the plenary's activities as long as the presidential campaign was ongoing.¹⁸⁰ Consequently, the Parliament was dormant for almost three months – while this decision was in place (March-April 2017) and between the dismissal and formation of a new Government (May-June 2017), following the election of the Prime Minister as President. As a result, the Parliament's work was suspended for more than 9 months during 2016-17, the years that were crucial to the fulfilment of most of the benchmarks and the National Plan for the Adoption of the Acquis (NPAA). The early elections have not only had direct repercussions on the realisation of the analysed benchmarks which required legislative activity (i.e. amendments to the Law on asylum and to the Law on anti-discrimination), but also had a more far-reaching effect (e.g. in the case of reforms in relation to the Serbian intelligence services).

Difficulties in measuring the track record of implementation. Majority of the required actions demand monitoring over a longer period, to be able to conclude whether they have achieved the desired outcomes – this is the case with respect to the freedom of expression, merit-based human resource management of civil servants and judges, implementation of anti-discriminatory and asylum legislation. While the short timeframe since the opening of accession negotiations has not provided sufficient opportunities to take stock of the track record for the analysed benchmarks, the existing practices and tendencies reveal a risk for the measurement efforts to be unsuccessful in the future. It concerns the quality and availability of information necessary for the effective fulfilment of this endeavour. Serbian institutions are generally deficient when it comes to data collection and analysis, as well as providing public reports on implementation or performance.¹⁸¹ Consequently, the monitoring reports on the implementation of APs for Chapters 23 and 24 prepared by the Serbian authorities do not contain robust information, while the CSOs are deprived of access to the principal sources used by the EC to assess and measure the results. As witnessed by the OECD/SIGMA experts, such “data light” environment has hampered their and the EC's efforts to conduct proper assessments and measure the achieved progress.¹⁸² Therefore, it seems that more public attention needs to be invested in discussing options for greater circulation of credible information and data in the negotiating process.

Impression of legislative “fixation”. As argued in the analysis, legislative requirements on amending discrimination and asylum provisions need to embrace the general legal framework – *lex generalis* or other cross-cutting legislation whose faulty implementation or absence prevents the newly adopted laws from being fully enforced. For both benchmarks, the quality of the previous laws was not the principal problem, but instead the shortcomings of their enforcement. Had the enforcement been more consistent, the Serbian asylum system and the policies for fighting discrimination would be more functional. For that reason, it would be erroneous to expect that the newly adopted legislation, fully harmonised with the EU *acquis*, is complied with and implemented, if other complementary measures are not undertaken in parallel.

180 Radio Slobodna Europa, *Predizborno zaključavanje Parlamenta Srbije, 2 March 2017*, available at: <https://www.slobodnaevropa.org/a/predsednica-skupstine-srbije-blokada-parlament/28342983.html>

181 WeBER, “First results from PAR Monitor: (Un)availability of information on governmental performance in the WB”, 13th February 2018, available at: <http://www.par-monitor.org/posts/first-results-from-par-monitor-un-availability-of-information-on-governmental-performance-in-the-wb>

182 Interview with Milena Lazarevic, Programme Director, European Policy Centre (CEP), Belgrade, January 2018.

IV.2 RECOMMENDATIONS

To the EU

Insist on greater openness and transparency of the EU accession process and provide own contribution in that respect. One option for increasing the effectiveness of the EU's approach towards the rule of law related issues might be to “ally” with the civil society sector, which has a high potential in providing pressure for the government to deliver results from the “bottom-up” perspective. The EU has so far made significant steps in making the accession process more transparent, by intensifying consultations with the CSOs through numerous fora; being more open to the citizens through various programmes and projects, including the EU Info centres; and by making its Common Positions and Non-Papers for Chapters 23 and 24 open to the public. All these improvements have helped the Serbian CSOs to better scrutinise the executive and digest information to the wider public. However, it seems that the undertaken actions are not sufficient for making the accession process and the negotiations on crucial Chapters 23 and 24 successful. The EU should therefore insist on greater quality of the governments' monitoring reports and availability of data and information (through publishing reports and statistics). Moreover, it should consider opening up its own sources to the public (i.e. expert and peer review reports), which is a practice already seen in Montenegro and Macedonia to some extent. In the latter case, the “Priebe Report”¹⁸³ produced a considerable impact on the Macedonian society and as such revealed benefits of an independent, evidence-based and clearly argued analysis.¹⁸⁴

Take advantage of the new momentum to refine the rule of law conditionality and mechanisms. The EU should continue streamlining its tools, including the benchmarking system, for the sake of inducing Serbia's greater compliance with the membership conditions. The EU-Western Balkans Strategy, published in February 2018, together with the “enlargement package” to be announced in April 2018, represent an opportunity for the EU to set a roadmap with more tangible timelines and tasks on rule of law related issues.¹⁸⁵ The EU must take full advantage of the accession negotiation process with Serbia for rule of law promotion and use its “transformative power”¹⁸⁶ in the pre-accession period, which has so far proven to be more fruitful than in post-accession period. Such approach would assure Serbia's successful assimilation in the EU family once it becomes the member state, i.e. its ability to assume EU membership rights and obligations. In short, the EU accession process should be used to envision far-reaching improvements and reforms and thus make its effects irreversible. The announced greater political devotion to enlargement by the member states has the potential to boost the effectiveness of the EU conditionality mechanisms in the rule of law, which have so far yielded limited results.

Envision robust post-accession monitoring mechanism in the rule of law area. To ensure genuine reforms in the rule of law, the EU's existing Cooperation and Verification Mechanism applied for Bulgaria and Romania should be enhanced with greater conditionality and tracking mechanisms in Serbia's case. The Serbian authorities might thus be more motivated to conduct substantive rule of law reforms during the pre-accession period, knowing that the access to structural funds and other membership benefits would be dependent on the track record in the rule of law related issues.

Embed the lessons learned on rule of law promotion and enforcement in Serbia on the EU level. The experience of refining the conditionality mechanisms for Serbia (and other WB candidate countries) might be valuable for the EU in the context of ongoing efforts to enforce rule of law in its member states. The extent of problems with the rule of law in several member states, as well as Serbia, necessitates approaches which would go out of the business as usual. The EU should consider pooling its experience and expertise on the rule of law applied at the EU member state level and towards the candidate countries for EU membership. One of the possible ways to take advantage of these synergies would be to expand the role and mandate of its Fundamental Rights Agency (FRA) to the candidate countries; to conceive areas and policies in whose realisation would be dependent on the state of play in the rule of law, and apply coercive measures accordingly; etc. The rationale for a unified rule of law surveillance and policy is the understanding that: a) the current candidate countries are expected to become EU member states in the medium term, and therefore it is in the EU's best interest to integrate fully functional and consolidated democratic states; b) the EU leadership is aware of possible negative effects of the absence of rule of law enforcement for the EU itself and seems ready to upgrade the existing rule of law instruments and capacities.

183 Independent Senior Experts' Group, “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”, 8 June 2015.

184 S. Marić, S. Majstorović, “Transparency and Opacity of Accession Negotiations: Time to Consider the Existing Practices in Serbia”, European Policy Centre, December 2017, available at: <http://cep.org.rs/wp-content/uploads/2017/12/Transparency-and-opacity-in-the-EU-accession-negotiations.pdf>

185 S. Majstorović, “2018 – the Year the Credible EU Enlargement Policy Returns?”, European Policy Centre, January 2018, available at: http://cep.org.rs/wp-content/uploads/2018/02/2018_the-Year-Credible-EU-Enlargement-Policy-Returns.pdf

186 Expression coined by Heather Grabbe. See: The EU's Transformative Power: *Europeanisation through Conditionality in Central and Eastern Europe*, Palgrave MacMillan, 2006.

Impose itself as an expert honest broker in the Constitutional reform debate. The anticipated fervent debate between the Serbian government and the CSOs on the proposed constitutional amendments relating to the independence of the judiciary¹⁸⁷ is an excellent opportunity for the EU to enhance its pressure on the government to engage in an evidence-based, open and frank discussions with the civic sector on such an important issue. The EU should position itself as a credible source of expert knowledge and provide neutral opinion on the proposed changes. With such an approach, the EU would materialise its rhetoric, stipulated most recently in the EC's EU – Western Balkans Strategy, on the importance of the rule of law with concrete acts and set a role model for its future actions in Serbia and other candidate countries. In turn, this would add to the credibility and consistency of the EU's enlargement policy,¹⁸⁸ which has at times been missing, thus helping revamp this somewhat unpopular policy, both in the member states and Serbia.¹⁸⁹

To Serbia

The Ministry of Justice and the Ministry of Interior, as coordinators of the two negotiating chapters, should make sure to **improve the quality of their reports on the realisation of APs**. In fact, provision of credible information and data to the public is one of the key principles of the accession process defined by the Government and frequently reiterated by the Serbian civil society. While one might understand the difficulties of coordinating high number of institutions involved in the two negotiating groups in submitting timely information necessary for publishing the reports, the two ministries should assume greater responsibility in assuring stronger commitment from the respective institutions.

Furthermore, the two ministries need to ensure sufficient and high quality human resources for EU-accession related tasks. The lack of human capacity within the administration should no longer be an excuse for the delays and failures to provide robust information to the public. In line with the positive practices established during the drafting process of Action Plans for Chapters 23 and 24, CSOs as a valuable source of expertise should be included in discussions on models for upgrading the existing staff capacities within the ministries in terms of number, knowledge and skills for dealing with the EU-related affairs.

Ministry of European Integration needs to firmly assume its coordination role of the accession process. As such, it should act as a driving engine of Serbia's institutional system for cooperation with the EU, by further taking part in the process, both from a technical and a political standpoint.¹⁹⁰ The former role is to be assumed by providing additional technical and analytical support to the work of negotiating groups, while the latter should include its increased efforts to put the EU integration process on top of the agenda both of the Government and other bodies which do not necessarily perceive EU-related tasks as a priority. The basic goal behind such actions would be to sustain and improve the quality of output (as the process is accelerating and becoming more demanding) and to boost motivation and increase devotion of all relevant actors involved (as the process has been ongoing for a long time). This goal gains further importance, especially having in mind that the key bodies responsible for the coordination of the accession negotiation process, i.e. the Coordination Body and Coordination Body Council, almost never meet in practice, thus leaving space for speculation how the key decisions are made and whether the interaction between the rest of the bodies is functional in practice.

Move beyond formalistic engagement with the civil society for maximum results in Chapter 23 and 24 negotiations. The Serbian authorities have been consistent in rhetorically endorsing EU integration process, but the achieved results have made many parts of the Serbian civil society question their level of commitment. The government's occasionally adverse approach towards the vibrant and competent Serbian civil society dealing with issues covered by Chapters 23 and 24 indicate that the genuine political will to pursue deep and substantive reforms is still missing. In fact, the first interactions between the two sectors in the framework of opening of Chapters 23 and 24 promised to announce qualitative shift in their premature patterns of cooperation. However, the established positive practices have drastically relapsed once the monitoring of progress achieved within the two chapters came to the agenda.¹⁹¹ Instead of observing the civic sector as obstructive partner in joint EU ac-

187 See, for example, the letter by the Working Group of the National Convention for the EU for Chapter 23 to the Minister of Justice, 13 February 2018, available at: <http://www.yucom.org.rs/konvent-uputio-pismo-ministarki-pravde-sta-je-clij-javne-rasprave-o-ustavu/>

188 European Commission, EU-Western Balkans Strategy: a credible enlargement perspective, 6 February 2018, available at: https://ec.europa.eu/commission/publications/eu-western-balkans-strategy-credible-enlargement-perspective_en

189 Popular support for future enlargement lingers around 50% both at the EU level (2014 Eurobarometer survey) and Serbia (Office for European Integration opinion polls in last 3 years).

190 Strahinja Subotić, "Serbia's Pursuit of Interests in the European Union: Administrative, Financial and Lobbying Capacities", European Policy Centre, Belgrade, 2017.

191 S. Marić, S. Majstorović, "Transparency and Opacity in Accession Negotiations – Time to Consider Existing Practices in Serbia", European Policy Centre, November 2017, available at: <http://cep.org.rs/wp-content/uploads/2017/12/Transparency-and-opacity-in-the-EU-accession-negotiations.pdf>

cession venture, the government should invest more efforts into engaging in a frank and open dialogue with the CSO representatives, considering their feedback and accepting constructive criticism. The Serbian CSOs dealing with the rule of law issues have considerable expertise and are motivated to push the reforms beyond the EU requirements, for the general and tangible benefit for citizens. As such, they represent an asset in the accession negotiation process that can crucially contribute in achieving sustainability and durability of conducted reforms.

Engage in building wide societal alliance for EU membership. The latest EU Enlargement Strategy has confirmed that Serbia's EU membership perspective is clearer than ever. In addition, the most recent EU membership polls show that most Serbian citizens are in favour of EU membership.¹⁹² One of the ways for the political authorities to prove their motivation for pursuing the EU-related reforms would be to initiate creation of broad "social contract". The ruling political parties, the Parliament, the civil society organisations, the business community, and pro-EU opposition should work together to create a wide societal alliance towards EU membership. This could be done through joint drafting and signing a declaration or another high-level document which would express the commitment of all levels of society to work on fulfilment of all EU membership requirements and beyond.

192 According to the latest opinion polls conducted in December 2017, 52% of Serbian citizens favour Serbia's membership in the EU. Polls available at: http://www.mei.gov.rs/upload/documents/nacionalna_dokumenta/istrazivanja_javnog_mnjenja/javno_mnjenje_decembar_17.pdf

V. ANNEX 1

Benchmark [xxx]

[Country]

Date created:	[dd.mm.yyyy]
By:	[Organisation]

0. Benchmark basics

Method of introduction <i>[E.g. laid out in document...]</i>	
Year introduced	
Content of the benchmark and actions required <i>[Please list actions required as bullets as per EC last report/specific document]</i>	
Type of benchmark and actions required <i>[E.g. Adoption of a policy document (Pol); Adoption of legislation (Leg); Implementation; etc.]</i>	

1. Data analysis/methodology

Documents subject to analysis <i>[Desk research e.g. EC reports; OSCE reports; own monitoring reports - please include hyperlink next to each document]</i>	
Interviews <i>[Number of interviews and type of respondents]</i>	
Focus groups <i>[if applicable]</i>	

<p>Quantitative indicator findings <i>[Here inserted you have the indicators for each of the benchmarks – since we will fill out a separate template for each benchmark, please delete the rows of the benchmark you are not filling in and appropriately copy paste the rows for each of the benchmarks in their separate adequate template – you should at the end have 8 identical templates in which the sole difference is this section. In these regards note that we have taken the same indicators for the two benchmarks in the area of judiciary.]</i></p>	<p>Merit-based career system for the judges</p> <p>Judicial academy reforms</p>	<p>Freedom house – Nations in Transit</p> <p>Judicial Framework and Independence score <i>(insert the score for your country for the last 3 years)</i></p> <p>Balkan barometer –</p> <p>Figure 86: Do you agree that the following institutions are independent of political influence? (by economies)(NEW QUESTION) <i>(fill in the score for your country for this year for judiciary)</i></p> <p>Table 16: To what extent do you agree or not agree that the following categories in your economy are affected by corruption? (by economies)(NEW QUESTION) <i>(fill in the score for your country for this year for judiciary)</i></p>
	<p>Merit-based career system for civil servants</p>	<p>BTI –</p> <p>Rule of Law – Independent Judiciary <i>(insert the score for your country for the last 3 years)</i></p> <p>Balkan barometer –</p> <p>Table 16: To what extent do you agree or not agree that the following categories in your economy are affected by corruption? (by economies)(NEW QUESTION) <i>(fill in the score for your country for this year)</i></p>
	<p>Track record for addressing media intimidation; attacks on journalists; media independence</p>	<p>Freedom house – Nations in Transit</p> <p>Independent Media - <i>(insert the score for your country for the last 3 years)</i></p> <p>Freedom house - Freedom of the Press Scores</p> <p>Total Score; Legal Political and Economic Environment - <i>(insert the score for your country for the last 3 years)</i></p>
	<p>Implementation of Law on prohibition of discrimination</p>	<p>European Equality Law Network –</p> <p><i>(Source for Macedonia, Montenegro and Serbia. The rest of the countries: Kosovo; BiH and Albania please insert relevant grey literature reference.)</i></p>
	<p>Law on Asylum aligned with EU acquis</p>	<p>Findings from interviews and EC country report from the last 3 years</p>
	<p>Specific anticorruption plans; providing adequate follow up of detected cases; cooperation on borders</p>	<p>Findings from interviews; FOI request for track records and EC country report</p>
	<p>The role of intelligence services and the oversight mechanisms that are introduced; established initial track record of investigations in organised crime</p>	<p>Findings from interviews and EC country report from the last 3 years</p>

2. Overview of findings

Timeline/evolution of the benchmark over time <i>[Please add as many rows as needed in the table]</i>	<table border="1"> <thead> <tr> <th>Event/document/juncture</th> <th>Year</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> </tr> </tbody> </table>		Event/document/juncture	Year				
	Event/document/juncture	Year						
Narrative timeline of the benchmark <i>[Please briefly explain the evolution of the benchmark over time guided by the info that you have inserted in the table]</i>								
Key findings on the implementation and monitoring of the benchmark <i>[Please provide a critical evaluation and incorporate your findings from the interviews/ desk research/organization expertise – please reference in this process]</i>								
Key findings on the effectiveness of the benchmarks <i>[Please provide findings from interviews and findings from quantitative indicators accompanied with a critical evaluation – please reference in this process]</i>								
Key challenges for the implementation/effectiveness of the benchmark <i>[Briefly state in bullets]</i>								
Observed trends <i>[Briefly state in two sentences]</i>								

3. Recommendations

Recommendations for strengthening the monitoring mechanism/the effectiveness of the benchmark <i>[Please list in bullets; add rows if needed.]</i>	To the government/specific institutions	
	To the European Commission	

4. Conclusions

[Please mention briefly the conclusion of your findings related to the specific benchmark.]

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