

NEW EU ENLARGMENT STRATEGY AND COUNTRY PROGRESS REPORTS – A MOTOR FOR CHANGE ?

Abstract

In November 2015, the European Commission has adopted the new Enlargement Strategy and a new methodology in reporting on the progress countries have made in the EU accession process. The novelties in the strategy and the reporting methodology are aimed to increase transparency and facilitate greater scrutiny of reforms by all stakeholders, including civil society. What does the new approach imply and what changes can we expect it to induce in the behaviour and actions of the legislator and the civil society in the accession countries?

Keywords: *European Union, accession process, enlargement, reforms*

1. EU Conditionality Policy

With the introduction of the Copenhagen criteria for EU membership², the EU has moved the policy of conditionality to the centre of the EU enlargement process.³ The annual reporting on the progress of every country in the process has been an important element of that policy. The accession of the 10 Central and East European Countries to the EU in 2004 was acknowledged as a success and a good example of the transformative power of the EU.⁴ However, the accessions of Bulgaria and Romania have shown some deficiencies in the conditionality policy, since both countries have still had to demonstrate that the rule of law

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² Conclusions of the presidency, Copenhagen European council. For more information, see http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf

³ Z.Nechev et al, Embedding rule of law in the enlargement process—a case for EU political conditionality in the accession of the Western Balkan Countries, 2013. www.kas.de/wf/doc/kas_36352-1522-1-30.pdf. Also see F.Schimmelfennig and U.Sedelmeier. “Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe” *Journal of European public policy* 11.4 (2004): 661-679.

⁴ *Ibid.* For a detailed analysis in Serbian language see. A. Cavoski et al. Pristupanje Državne zajednice Srbija i Crna Gora Evropskoj uniji – iskustva deset novoprimljenih država, Beograd, Institut za uporedno pravo, 2005.

was fully observed in their domestic systems. In order to mitigate these deficiencies, EU had developed the Cooperation and Verification Mechanism – a monitoring process requiring prompt policy response from the government – in order to identify and address shortcomings in problem areas.⁵ Drawing on that experience and also the experience of Croatia's EU accession process, the European Commission proposed a “new approach” to the accession process in October 2011, which rests on the principle that issues related to judiciary and fundamental rights should be dealt with early on in the accession process.⁶ As Fagan and Sircar duly note,⁷ through this new approach the EU sought to avoid the requirement of a post-accession mechanism for monitoring and safeguarding reforms in the justice and home affairs sectors in the Western Balkan countries.

The EU accession process in the countries of the Western Balkans has to a certain extent benefited from this new approach. Possibly the most important positive change of the approach was the setting of benchmarks – opening, interim and closing benchmarks – particularly in areas where there are no clear EU standards and the target to be met by the accession countries was somewhat elusive, such as the Judiciary and Fundamental Rights. Also, the political impact of the EU progress reports to internal country's policy must not be disregarded – perhaps the most prominent example of the significance of the EU reporting is the manner in which the EU approach to the process in which decisions on judicial non-appointments in Serbia were reviewed was reflected in government policy, rhetoric and the final outcome of the process – a more lenient EU assessment was used by the Government to justify this contentious reform, while a more critical view led the Government to somewhat re-examine its approach and policy.⁸

In November 2015, the European Commission has taken an additional step forward and introduced a new approach to the accession strategy and the progress reporting methodology. What are the novelties

⁵ M.A. Vachudova, A. Spenzharoda, The EU's cooperation and verification mechanism: fighting corruption in Bulgaria and Romania after EU accession. Swedish Institute for European Policy Studies 1., 2012, www.stieps.se/sites/default/files/2012_1epa%20EN_A4.pdf, 2.

⁶ European Commission 'Enlargement Strategy and Main Challenges 2011-2012', COM(2011) 666 final.

⁷ A. Fagan, I. Sircar, *Judicial Independence in the Western Balkans: Is the EU's 'New Approach' Changing Judicial Practices?* No. 11, June 2015, http://www.maxcap-project.eu/system/files/maxcap_wp_11.pdf, 9, access November 13, 2015

⁸ Namely, in its progress report for 2011 the EU gave an understated and, furthermore, positive assessment of this process. Months later, following the questions of a EU Parliament member over leaked negative reports on the process and the recommendations of the Ombudsman on the issue, the EU had considerably changed its position and put the entire process under closer and more objective scrutiny. This has supported the change in the public perception of the process and induced additional public pressure for the deficiencies in the process to be addressed – including the final decision of the Constitutional Court which had annulled the entire problematic process. For more details see: V. Rakic - Vodinelic, A. Knezevic Bojovic, M. Reljanovic, *Judicial Reform in Serbia 2008 – 2012*, Belgrade, CUPS, 2012

and can they be expected to drive the change in the accession countries, and specifically, in Serbia?

2. The New Enlargement Strategy

The new EU Enlargement Strategy⁹ sets out the medium-term enlargement policy strategy of the European Commission. As a change from the previous years, when a strategy paper was adopted each year, this Strategy shall cover the period of the mandate of the Commission – therefore, it will be the overarching enlargement policy document until late 2019. The reasons for this are twofold – first, as in any other strategic approach, medium-term planning allows for the setting of more ambitious objectives and sufficient time for their realization. Secondly, the Commission has assessed that “while there has been important progress by many countries in many areas over the past year, the challenges faced by these countries are such that none will be ready to join the EU during the mandate of the current Commission, which will expire towards the end of 2019.”¹⁰ This assessment does not come as a surprise – when the Commission was being formed in late 2014, the enlargement portfolio was not planned¹¹ and the neighbouring policy portfolio was subsequently amended to include “enlargement negotiations”; moreover, the current president of the European Commission, Jean-Claude Juncker, had announced in a speech leading up to his confirmation vote that there would be no new enlargement for the next five years.¹²

In the 2015 Strategy, the Commission has further assessed that all the countries covered by the current enlargement package – the Western Balkan countries and Turkey – face major challenges with respect to the rule of law, or, more specifically, that “judicial systems are not sufficiently independent, efficient or accountable. Serious efforts are still needed to tackle organised crime and corruption”.¹³

It was therefore logical that the new strategy will reaffirm the “fundamentals first” approach, first launched in 2011, as described above. Namely, the rule of law, fundamental rights, the strengthening of democratic institutions, including public administration reform, as well as economic development and competitiveness remain key priorities of the EU’s enlargement

⁹ Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions – EU Enlargement Strategy, COM(2015) 611 final, hereinafter: 2015 Enlargement Strategy

¹⁰ *Ibid.*, 2.

¹¹ <http://www.balkaninsight.com/en/blog/enlargement-delayed-a-new-commission-without-an-enlargement-commissioner>, access November 13, 2015.

¹² <http://www.eubusiness.com/news-eu/politics-juncker.x29>, access November 13, 2015.

¹³ 2015 Enlargement Strategy, 2.

policy in the 2015-2019 period. The focus on these issues is reflected in the specific areas subject to strengthened reporting in the EU country progress reports, which is the second important novelty that will be discussed in more detail further in the text. The Commission has also underlined that the listed fundamentals are both indivisible and mutually reinforcing, and that is imperative that the enlargement process facilitates their synergies.

Another issues that remain in the focus of the strategy are regional cooperation and inclusive accession dialogue – the Commission has emphasised that the civil society must be given a more prominent role in the reform process. In fact, the new reporting methodology may well be understood as a tool for increasing the transparency of the progress reporting, but also as a clear and value-based mechanism for tracking progress, which can be used both the European Union, in line with its re-affirmed conditionality policy, and by the countries' civil sector and citizens, to affect policy formulation and implementation at the national level.

The Commission has also announced in the 2015 Strategy that it will improve the information gathering. Namely, in order to gain a deeper understanding of reform challenges for all countries, the Commission will resort to a more systematic use of existing mechanisms, such as TAIEX, and also through more frequent and better targeted peer review missions.¹⁴ The peer review missions have proven to be a valuable source of information on not just legislation, but also practice and problems in implementation. For example, relevant peer review missions in the field of judiciary, which will remain in the focus of the accession process, have enabled the EU to observe the working conditions of the judiciary, include a wider array of stakeholders (particularly non-state actors), and not limit the missions to capitals or major urban centres.¹⁵ Also, the full inclusion of the civil sector in the planned reforms “to anchor reforms across society”¹⁶ will be supported in the implementation of the 2015 enlargement Strategy.¹⁷

3. The New Approach to Annual Country Reports

As a part of the new enlargement package, the Commission has further strengthened the assessments in its annual country reports. As of this year, more emphasis is put on the state of play in the countries, so that it is clear to what extent they are prepared for the challenges of membership, and, additionally, the progress made over the past year is

¹⁴ 2015 Enlargement Strategy, 32

¹⁵ A.Fagan, I.Sircar, 32.

¹⁶ 2015 Enlargement Strategy, 2

¹⁷ One such mechanism which is particularly effective in Serbia is the National Convention on the European Union in Serbia. See more on National Conventions in A.Knezevic Bojovic, “Ucesce civilnog sektora u procesu pridruzivanja Evropskoj uniji i praksa Nacionalnog konventa o EU”, *Strani pravni život* 2/2015, 131 – 144.

also assessed in a clearer manner. This pilot effort is applied to a selected group of areas, the importance of which was underscored in the Strategy:

- rule of law and fundamental rights – judiciary, fight against corruption, fight against organised crime, freedom of expression
- economic development
- public administration reform
- three specific chapters of the *acquis* – public procurement, statistics and financial control.

In these areas, one assessment is provided for the state of play, using the following five-tier descriptive scale:

Early stage – Some level of preparation - Moderately prepared - Good level of preparation - Well advanced.

The second assessment is provided for the level of progress, again, using a following five-tier scale:

Backsliding – No progress – Some progress – Good progress – Very good progress.

The assessments are made using a careful and detailed situation analysis, which is included in the Enlargement strategy as its Annex 2. For instance, the assessment of the functioning of the judiciary includes an analysis of the following issues:

- strategic framework and budget
- management of the judiciary
- independence
- accountability
- professionalism and competence
- quality of justice
- efficiency.

Similar sub-criteria and checklists are formed for the majority of the other pilot areas. However, the relevant sub-criteria with regards to the economic accession criteria are not as easy to set – as the Commission admits, there is no simple checklist to assess compliance. The fulfilment of economic criteria requires profound and lasting structural reforms, which is why the importance of a sustained track record of implementation is of particular importance in this area. This means that in the area of economic criteria the regime remains negatively defined, as the case was in the accession process so far, without directly addressing the main

development criteria.¹⁸

The new reporting should increase the reporting transparency and facilitate both the state officials and the other stakeholders to understand the challenges that lay ahead and to steer the internal reform policy. However, it still remains to be seen whether this novel approach to what essentially remains the EU conditionality approach will yield more substantial results than the case was so far. It is likely that one of the main deficiencies of the conditionality approach in general – the fact that domestic context was under-played as an intervening variable¹⁹ – could, to an extent, be mitigated through the increased transparency of the reporting and a more inclusive process. Evidence from the past years has shown that countries in the Western Balkans are competitive and responsive when it comes to external assessments of their performance and reforms, particularly in the economic sphere. For instance, Serbian government has formed a working group the objective of which is to increase Serbia's ranking on the Doing Business List.²⁰ This working group has spearheaded reforms in legislation and practice that have resulted in the improved ranking of Serbia on this list,²¹ which is perceived by the government as a major accomplishment in business enabling reforms.²² Similar reformatory efforts were taken in Macedonia in the past years.²³ On the other hand, similar efforts at assessing government performance in various reform areas, which are closely linked to the EU accession process, introduced by the local civil society, have seldom had a similar effect.²⁴ This means that the introduction of the five-tier scale for assessing both the state of play and the progress accomplished so far, by a strong political actor such as the European Commission, can reasonably be expected to induce more focused and targeted reforms in all Western Balkan countries and also, that relevant policy dialogues can become more structured and ultimately, more effective.

¹⁸ L.Bruszt, J.Langbein, "Anticipatory integration and orchestration: The evolving EU governance of economic and regulatory integration during the Eastern enlargement", Paper prepared for the APSA Annual Meeting, Washington, August 28–31, 2014, 12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2451961, November 16, 2015

¹⁹ A.Fagan, I.Sircar, 8.

²⁰ Decision of the Government of Serbia No. 02-16383/2014 of December 20, 2014. The working group is headed by the deputy prime minister and minister of construction, transport and infrastructure, and also includes the minister of finance, independent experts, representatives of the civil society and representatives of local self-government.

²¹ <http://www.doingbusiness.org/data/exploreeconomies/serbia/>, accessed on November 16, 2015

²² Vucic: Serbia climbs 32 positions in WB rankings, http://www.tanjug.rs/full-view_en.aspx?izb=209983, accessed on November 16, 2015

²³ <http://www.worldbank.org/en/news/press-release/2014/10/29/fyr-macedonia-once-again-among-region-highest-performers>, accessed on November 16, 2015

²⁴ See for example the efforts aimed at formulating a neutral indicator assessing the quality of regulatory environment in Serbia launched by a Serbian NGO <http://www.naled-serbia.org/en/page/138/Regulatory-Index-of-Serbia>, accessed on November 15, 2015

In order to assess the possibility of the new reporting system to drive changes in the sector which remains in the focus of the accession process – the functioning of the judiciary – this paper will analyse in more detail the way in which the new methodology is used in the Serbia progress report in 2015.

4. How the new approach works in practice - The Functioning of the Judiciary in the 2015 Serbia Report

When it comes to the functioning of the judiciary, this year's Serbia Progress Report²⁵ assessed that the Serbia's judicial system has some level of preparation, which means that, if expressed numerically, the functioning of the Serbian judicial system would obtain a score of 2 on a 1-5 scale, where 5 is the best result. The assessment provided in section dedicated to the Political criteria is reiterated in the section dealing with Chapter 23, Judiciary and Fundamental Rights, in more detail. The progress level in the past year has been assessed "some progress", which means that, if expressed numerically, it would obtain a score of 3 on a 1-5 scale.

The main assessment is that judicial independence is not assured in practice and that there is scope for political interference with the recruitment and appointment of judges and prosecutors. Interestingly, the 2014 progress report has underscored the same - "the constitutional and legislative framework still leaves room for undue political influence affecting the independence of the judiciary, particularly in relation to the career of magistrates".²⁶ Even though the Commission has acknowledged the fact that steps have been taken to reduce the backlog of cases, it has also correctly assessed that it remains significant.²⁷

The European Commission therefore recommends that the following specific steps be taken:

- establish and implement a fair and transparent merit-based recruitment system and career management to better guarantee the operational independence of the justice system;
- adopt a new law on free legal aid and enable smooth implementation in cooperation with main stakeholders;
- reduce the case backlog and harmonise case law.

²⁵ Serbia 2015 Report, SWD(2015) 211 final

²⁶ Serbia 2014 Progress Report, SWD(2014) 302 final, 41

²⁷ The total backlog of unresolved cases in Serbia on December 31, 2014 amounted to 2.300.252, out of which 1.797.155 are old cases that remain unresolved, as documented in the Supreme Court of Cassation (SCC) Analysis of the Work of Courts in 2014. The analysis is available at http://www.vk.sud.rs/sites/default/files/attachments/ANALIZA%20rada%20sudova%20za%202014%20%20KONA%C4%8CNI_0.pdf, accessed on November 16, 2015.

These recommendations are fully in line with the planned reformatory agenda of the Serbian government in this field – both the relevant National Judicial Reform Strategy and the action plan for its implementation²⁸ and the Chapter 23 Action Plan. Also, unlike the recommendation in the previous year, the Commission clearly no longer demands that constitutional changes be made – it rather focuses on the results that are reasonably attainable until the next report.

However, experience in the implementation of reform has shown that practical problems are likely to occur in practice and that true reforms require not only formal changes to the Constitution, as advised in the 2014 Progress Report, but, more importantly, in building a sound system where both judicial independence and the checks and balances system are in place and fully functional. Independent assessments of Serbia's progress in this area are still not available, but it is safe to assume that the expert public is more likely to agree with the assessment of the state of play than on the assessment of progress given by the Commission in the 2015 Progress report, particularly given that the main challenges remain constant, and unresolved, over the years. On the other hand, the specific recommendations included in the Progress report may provide additional leverage, particularly for the civil sector, to demand that the legislative drafting process, particularly the one related to free legal aid, be as inclusive as possible, and also to advocate for effective and practical solutions in the entire judicial reform process. This will, hopefully, prevent the judicial reform from being a mere box-ticking exercise. The Commission's rather optimistic assessment of the progress made in the sector over the past year should therefore be understood, as times before, as a recognition of the efforts of the competent state authorities, mostly the Ministry of Justice, in setting the reform agenda for the future, than of the actual results achieved – this is clearly seen from the relatively low assessment of the current state of play. However, there is hope that the competent authorities will strive to maintain or improve the assessment of the progress accomplished over the years.

5. How were the countries assessed – a cross comparison

As explained above, the European Commission has decided to use a five-tier descriptive scale in pilot areas observed and assessed within the accession process.

²⁸ National Judicial Reform Strategy for the 2013-2018 period, RS Official Gazette No. 57/13); National Judicial Reform Strategy for the 2013-2018 Period Implementation Action Plan, RS Official Gazette No. 71/13 and 55/14 and the Third Draft of the Action Plan for Chapter 23, available at <http://www.mpravde.gov.rs/tekst/9664/treci-nacrt-posle-tehnickog-usaglasavanja-sa-komentarima-evropske-komisije.php>, access November 16, 2015.

However, if the scale was translated into a numerical one, a more simplistic yet easily understandable scale could be provided and used to cross-compare country's performances in specific areas. Fully aware of the fact that such an assessment would not only be more simplistic, but also would not duly acknowledge the interior contexts of all the countries covered by the 2015 Enlargement Strategy, the author hereby provides an outlook on the numerical assessment of the state of play and progress in the pilot areas, as provided in relevant country reports.

The scales are translated in numerical values in the following manner, where 1 is the lowest and 5 is the highest score:

State of play descriptive value	State of play numerical value
Early stage	1
Some level of preparation	2
Moderately prepared	3
Good level of preparation	4
Well advanced	5

Level of progress descriptive value	State of play numerical value
Backsliding	1
No progress	2
Some progress	3
Good progress	4
Very good progress	5

Country/ Field	Serbia	Montenegro	Former Yugoslav Republic of Macedonia	Bosnia and Herzegovina	Albania	Kosovo*	Turkey
Judiciary	2/3	3/3	2/1	2/3	1/3	1/3	2/2
Fight against corruption	2/3	2/3	2/2	2/3	2/3	1/3	2/2
Fight against organised crime	2/3	2/3	2/2	2/3	3/3	1/3	2/3
Freedom of expression	2/2	2/2	2/1	2/1	3/3	2/2	2/1
Existence of a functional market economy	3/3	3/3	4/2	1/3	3/3	1/3	5/2
Capacity to cope with competitive pressure and market forces within the Union	3/3	3/3	3/3	1/3	3/3	1/2	4/3
Public administration reform	3/4	3/3	3/3	1/2	3/4	3/4	3/3
Public procurement	3/4	3/3	3/3	2/4	2/3	1/3	3/3
Statistics	3/4	2/3	3/3	1/3	2/3	1/3	3/3
Financial control	3/4	3/4	3/3	1/3	3/3	1/4	4/3

State of play/progress level per country

The table clearly shows that all countries still have to undergo substantial and comprehensive reforms in the sphere of the judiciary, and that freedom of expression freedoms is also an issue of concern in most countries. As expected, Turkey is most advanced in the domain of economic criteria, whilst the assessments of the state of play and progress in other areas remain relatively uniform across countries, and that the initial statement – that no enlargement should be expected before 2020 – is not based only on the political assessment of the EU's absorption capacity, but is also supported by facts.

6. Will the New Methodology Gear Reforms?

The accession experience so far has shown that the EU conditionality policy has had a considerable effect on the reforms of the countries acceding to the European Union, while at the same time some drawbacks were notable in the field of judiciary and fundamental rights, and inequalities with regards to economic development remain visible between the “old” and the “new” member states. It is evident that the entire process is a learning exercise both for the European Union and for the countries wishing to join it. In the current enlargement package, the European Union has left less room for ambiguity when it comes to the assessment of the accomplishments of the member states in attaining the relevant EU standards and has put additional emphasis on the specific measures that countries need to take in the forthcoming period. Coupled with the new reporting approach, which, for the first time, provides a clear scale for assessing both the state of play and the progress achieved in a number of pilot areas, both the competent country authorities and its citizens have been provided with a transparent mechanism for tracking the progress of reforms. It is unlikely that the new “scoreboard” will result in specialized task forces being formed to advance the country’s scoring, as the case was with Serbia and the Doing Business list; however, the governments may well take a more proactive approach in showing visible and viable traction, both in terms of legislation and practice, in the pilot fields, particularly in cases where progress has not been favourably assessed. Given the significance that the EU conditionality policy has in what are otherwise purely internal policy advocacy initiatives, the new reporting methodology can reasonably be expected to gear reforms in pilot areas, through a combination of external and internal policy reform efforts. Relevant country reports for 2016 will show whether the governments and citizens of the seven countries have seized this opportunity.

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NOVA STRATEGIJA PROŠIRENJA EVROPSKE UNIJE I IZVEŠTAJI O NAPRETKU POJEDINAČNIH DRŽAVA – MOGU LI BITI POKRETAČI PROMENA?

Rezime

U novembru 2015. godine, Evropska komisija je usvojila novu strategiju proširenja i novu metodologiju u izradi izveštaja o napretku pojedinačnih država. Novine koje donose strategija i izveštaji o napretku imaju za cilj da povećaju transparentost ovog procesa i istovremeno svim ključnim akterima, a naročito predstavnicima nevladinog sektora, olakšaju vršenje nadzora nad reformskim procesima. Šta ovaj novi pristup podrazumeva i kakve bi se promene mogle očekivati u ponašanju i aktivnostima zakonodavaca i nevladinog sektora u državama koje pristupaju Evropskoj uniji?

Ključne reči: Evropska unija, process pristupanja, proširenje, reforme.