REFORMING FROM THE BENCH – MARKING OFFSIDE

The (in)effectiveness of EU benchmarking mechanism in the Western Balkan

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European Fund for the **Balkans**

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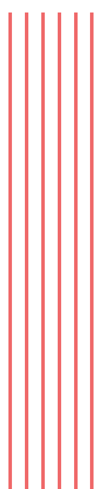
CONTENTS

I.1 Introduction....................5
I.2 Methodology....................7
I.3 The different paths of benchmarking....................9

II. Chapter 23....................11
II.1 Merit-Based Career System for Judges....................12
II.2 Judicial academy reforms....................16
II.3 Merit-based career system for civil servants....................18
II.4 Track record for addressing media intimidation; attacks on journalists; media independence....................22
Implementation of the Law on Protection Against Discrimination....................25

III.Chapter 24....................29
III.1 Law on Asylum Aligned with the EU acquis....................30
III.2 Specific anti-corruption plans at borders; Providing adequate follow up of detected cases....................32
III.3 The role of intelligence services and the oversight mechanisms that are introduced; established initial track record of investigations in organised crime....................34

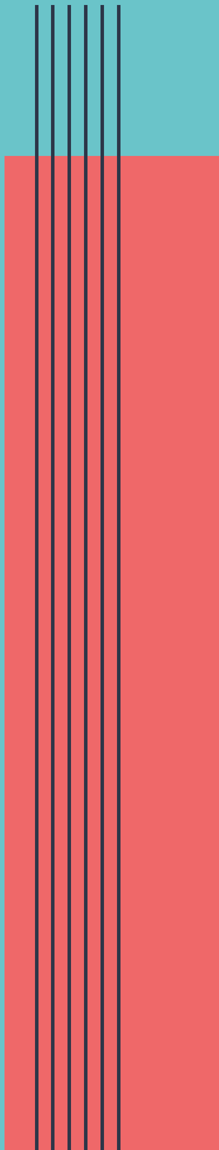
IV. CONCLUSIONS AND RECOMMENDATIONS....................36
IV.1 Conclusions....................37
IV.2 Recommendations....................38
To the EU institutions and member states....................38
To the national governments in WB6....................39



List of abbreviations

ACQUIS	The body of common rights and obligations that is binding on all the EU member states.
BENCHER	Benchmarking for EU reform – How Effective?
BIA	Serbia's Security Information Agency
BiH	Bosnia and Herzegovina
BTI	Bartelesmann Transformation Index
Chapter 23	Judiciary and fundamental rights
Chapter 24	Justice, freedom and security
CSOs	Civil Society Organisations
DCAF	Geneva Centre for the Democratic Control of Armed Forces
EC	European Commission
ECHR	European Commission for Human Rights
EU	European Union
HLAD	High Level Accession Dialogue
PAR	Public Administration Reform
ZNM	Association of Journalists of Macedonia
SAC	Stabilisation Association Council
SAA	Stabilisation Association Agreement
SIGMA	Support for Improvement in Governance and Management
OSCE	Organisation for Security and Cooperation in Europe
US	United States
UN	United Nations
URP	Urgent Reform Priorities
WB6	Western Balkan Six

I. INTRODUCTION



“The fundamentals first” approach announced in 2013[1] places the focus of the EU integration process on democracy and the rule of law. This mechanism relies on extensive system of benchmarking, which was developed for Romania and Bulgaria in the post-accession period (Cooperation and Verification Mechanism), while now it is being implemented for each chapter of the EU’s *acquis* under negotiation. Accordingly, benchmarks represent a set of requirements for accession negotiations for chapters of the *acquis* – opening and closing benchmarks (and interim benchmarks for Chapter 23 Judiciary and Fundamental rights and Chapter 24 Justice, Freedom and Security). The aim of such approach is at one side, to aid the candidate countries by making the requirements more concrete and on the other side to facilitate the process of assessment of progress achieved and thus navigate and give directions to the accession process. Moreover, benchmarks have been introduced for the countries that are yet to open accession negotiations without actually enjoying the benefits of negotiations. Thus, benchmarking has become the key mechanism of EU conditionality policy towards the Western Balkans (WB6) that should ensure the consistency and credibility of this policy, while providing encouragement for further reform. Although this mechanism has already been implemented for a decade, its results have not yet been systematically assessed.

Moreover, to no surprise, the new Western Balkans Enlargement Strategy published in February 2018, retains the focus on the rule of law, driven by the need to continuously focus on these areas in which most of the concerns persist, and where real, de facto progress on the ground is lacking.[2] The question arises as to the outcome of these reforms, which the European Commission has continuously supported but assessed very critically in recent years, noting high politicization, selective justice, deficient protection of human rights and in the case of Macedonia even state capture. These contradicting parallel assessments, where on one hand *certain* progress achieved, while on the other hand vigorous criticisms is served, shows that the current model of setting and accelerating reforms is followed by serious shortcomings.[3]

Consequentially, the policy process targeted by this project is the EU benchmarking mechanism for the countries of the Western Balkans, as a key tool to encourage and assess EU- related reform in the Western Balkans. The main issue in focus is how effective the benchmarks are – exploring the degree to which the objectives are achieved and the extent to which targeted problems are solved.

This analysis is based on the contributions and separate country analyses made by project partners produced within the BENCHER project with the aim to study the effectiveness of the EU’s benchmarking system on selected policy issues within the Chapters 23 and 24 focusing on the cases of the WB6. The analyses represent a first major attempt to critically evaluate the degree to which the objectives are achieved and the extent to which targeted problems are solved in order to further advance in the EU accession process.

The purpose of this analysis is to highlight and compare the key developments in relation to the selected benchmarks in the six countries, whereas an in depth discussion of the benchmarks in the separate countries is to be found in the national studies.

Following a brief explanation of the methodology, this analysis provides a contextual overview of where the countries stand in the process of EU integration as well as an overview of the benchmarking mechanism across the Western Balkans. Next, the study provides an analysis of the selected benchmarks within Chapters 23 and 24. The overview of each benchmark consists of the timeline of introduction in each of the countries, joined by an assessment of the current state of play and key challenges. Lastly, the study reflects on the overall findings and provides recommendations both to the EU institutions as well as to domestic actors.

1 EU Enlargement Strategy and Main Challenges 2013-14 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf

2 A credible enlargement perspective for and enhanced EU engagement with the Western Balkans 2018, https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf

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

1.1. 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 was carried out on a sample of benchmarks from the Chapters 23 and 24.

The **selection of the sample of benchmarks** was made according to the following steps: interim and opening benchmarks that have been laid out for Serbia and Montenegro in Chapters 23 and 24 were taken as the 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 have been 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

The **data collection** for all countries consisted of both **desk-based analysis and interviews with stakeholders**. First, the **key documents**[4] related to the EU accession process were analysed for the identification, sampling and analysis of the evolution benchmarks. In addition, for the assessment of the effectiveness of the benchmarking the study utilises the assessments of the own reports of the research team engaged, but also reports of other international bodies that have monitored developments in the policy areas studied. These included Progress/Country Reports and strategic documents on enlargement by the European Commission SIGMA reports, OSCE reports, US Department State Reports, Reports of UN bodies, as well as Council of Europe Monitoring Mechanisms. Where available, the analysis of the state of play also includes a review of available quantitative indicators such as: the Freedom House Nations in Transit scores, Bertelsmann Transformation Index (BTI) in combination with perception indicators through regional surveys such as the Balkan Barometer. Second, in all countries **semi-structured interviews** were conducted with representatives of the EU delegation and/or EU Members States as well as representatives of national institutions in charge of EU accession and in the implementation of the selected benchmarks. The focus on

4 EU common positions on chapter 23 and 24 (for countries in accession negotiations); EC Country reports – staff working papers (analysing the areas in which the sample of EU benchmarks are mentioned); Enlargement Strategy – Communication of the Commission (analysing the areas in which the sample of EU benchmarks are mentioned); EU negotiating frameworks; EU screening reports; Roadmaps, conclusions of "high level dialogues" and other instruments setting conditions for further progress in the accession process; Documents through which the countries involved respond to the set benchmarks (National Plans); Action plans submitted by relevant authorities to the European Commission, Stabilisation and Association Council minutes, Subcommittees on Justice and Home affairs committees.

the EU staff and the national civil servants is a result of the important roles these individuals play in both crafting the benchmarks at the EU level as well as the respective national response(s). The countries have conducted 71 interviews – 14 in Macedonia; 11 in Bosnia and Herzegovina; 21 in Serbia; 11 in Montenegro; 5 in Albania; and 9 in Kosovo in the period from July 2017 to January 2018.

The analysis of the benchmarks was done through the insertion of the collected data and findings in a pre-determined template,[5] which consisted of several steps. First, it traced the introduction and evolution of the benchmark for at least the last five years, or since the last critical juncture in the EU documents. Second, the researchers assessed the current state of play through a document review, including through available quantitative indicator 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.

For Albania, the analysis captures the challenges and evolution of the benchmarks during the period 2009-2017, considering that 2009 marked a new stage in bilateral relations between EU and Albania after the entry into force of the Stabilization and Association Agreement.

When it comes to Bosnia and Herzegovina, the evolution of respective benchmarks was traced back to different time spans of their formal introduction. The Report on the Preparedness of BiH to negotiate the Stabilization and Association Agreement with the EU from 2003, was the starting point of most of the analyses, given that most of the basic reform measures were identified and stipulated, which were then further elaborated in the EC Country Reports throughout the years. From 2011, the EU initiated the Structured Dialogue on Justice with BiH, the mechanism through which the focus was on implementation of measures regarding rule of law and judiciary and later on broadened to include policy areas of anti-corruption, anti-discrimination, prevention of conflict of interest and measures to strengthen integrity, accountability and efficiency of the police forces.

In the case of Macedonia the analysis captures the evolution for some benchmarks ever since 2004, when the SAA entered into force. Even though the tracing was done back to 2004 to see when the benchmarks were firstly introduced and their evolution was analysed throughout the years, most of the analysis is focused on the challenges faced in the last 10 years, or since the introduction of the visa liberalisation roadmap.

For Montenegro, since the process of accession negotiations is well underway since 2012, the focus is placed on benchmarks laid out in screening reports on Chapters 23 and 24, common positions of the EU on two chapters and respective action plans. It should be noted that due to the setting of the benchmark in chapter 24 in the area of the role of intelligence services, Montenegro focused on track record in investigation of crime due to the fact that the benchmark on the role of intelligence services was not available.

Year 2012 represents a critical juncture of Kosovo relations with the EU because the Union gave the Visa Liberalisation roadmap, which set out the reforms and requirements to complete in order to quality for visa-free travel to the Schengen area. This was considered both as a serious engagement that reaffirmed the support of the Union and the biggest carrot to be given to the country of Kosovo upon implementation of the reforms. Thus, 2012 is selected as a starting year of the analysis for the eight selected benchmarks. It should be noted that in the benchmark focused on the role of intelligence services, Kosovo focused on track record in investigation of crime due to the available information and formulation of the benchmarks.

For Serbia, benchmark evolution sections included a different timespan for each individual benchmark - for example, 2006 was the baseline year for the two benchmarks related to judiciary, as this year saw the adoption of first Judicial Reform Strategy in Serbia, while the years of issuance of screening reports and common positions of the EU for chapters 23 and 24 were taken as years of official (opening and interim) benchmark introduction.

5 Annex 1

1.2. The different paths of benchmarking

The path of benchmarking has been quite rocky and challenging, even though some of the countries have benefited from the fast track lane, while others have been returned to its beginning.

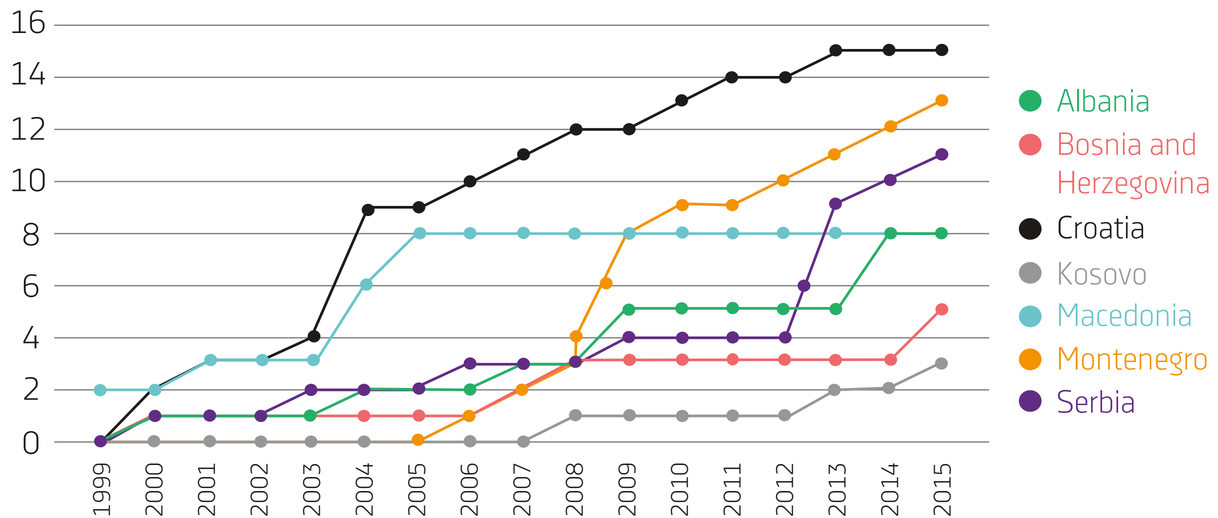


Figure1. The process of Balkan countries from gaining the status of potential candidates for EU membership[6]

The exceptional example is Macedonia currently still waiting in the line to open negotiations despite having been the first country to sign the SAA in 2001, with the longest (hi)story of the benchmarking mechanism. As the analysis of the sample benchmarks has shown, for Macedonia some of them were introduced as key priorities as early as in 2005, while officially set as opening benchmarks in 2013 in the cases of Montenegro and Serbia. In this sense, Serbia and Montenegro have had a more favourable situation in which they opened negotiations with Serbia having to wait only two years upon entering in force of the SAA.[7] Also, we can foresee that when Macedonia actually opens negotiations the threshold of benchmarks will increase and evolve over those that Serbia and Montenegro implemented it in this phase. However, this may also be an advantage because it may enhance the process as the 'opening benchmarks' will/may concentrate on the actual track record instead of legislative adaptations.

On the other hand, Montenegro opened accession negotiations with the EU in June 2012, being the first country to undergo the new approach, which consisted of frontloading the rule of law criteria. To date Montenegro has opened 33 chapters and Serbia 12 - having opened Chapter 23 and 24 one and a half year ago. At the same time, in addition to being the only ones to have opened negotiations, the two countries were included in the "State of the Union" address of Commissioner Juncker, which was the spoiler for what was later included in the Western Balkans Strategy.[8]

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, and improve administrative, institutional and financial capacities as well as the resources for provision of reliable statistical information'. The process of opening the two chapters is especially insightful as it reveals the features of the EU's recalibrated approach to the rule of law. It is characterised by three key elements: the procedural complexity and lengthiness, the (negative) effects of the veto rights of EU member states (MS) in the accession dynamics and lastly the evolution of benchmarks with ever growing and demanding character'.*[9] Firstly, it took 4.5 years to open these chapters since

6 Potential candidate (1); sea negotiations start (2); SAA signed (3); application lodged (4); SAA in force (5); questionnaire sent (6); questionnaire answered (7); candidate (8); decision for negotiations (9); launch negotiations (10); negotiations proceed (11), (12), (13); negotiations closed (14); membership (15); see EUROPEAN POLICY INSTITUTE (2016), The Western Balkans and its EU integration : 2015 Comparative overview http://epi.org.mk/docs/The%20WB_Comparative%20Overview_2015.pdf

7 As an example, the Academy for judges and prosecutors in Macedonia was mentioned as a key priority in the European Partnership in 2005" Launching of the Training Academy for Judges and Prosecutors", while in Montenegro this benchmark has been mentioned in 2012, while the Centre for Training in Judiciary and State Prosecution, has been established as an independent organization with the status of a legal entity, since the adoption of the new Law on the Centre for Training in Judiciary and State Prosecution Service, October 2015.

8 EUROPEAN COMMISSION President Jean-Claude Juncker, State of the Union Address, 13 September 2017, available at: https://ec.europa.eu/commission/sites/beta-political/files/roadmap-factsheet-tallinn_en.pdf (Access 15.1.2018.)

9 EUROPEAN POLICY CENTRE (2018), EU's Benchmarking within Chapters 23 and 24 in Accession Negotiations with Serbia Effects and Challenges; Benchmarking in Serbia, Belgrade 2018.

Serbia obtained candidate status and 2.5 years since the accession negotiations were formally launched while Croatia finished negotiations for these two chapters within a year.[10] *When compared to the EU enlargement rounds in 2004 and 2007, which had only one chapter, encompassing the now two Chapters 23 and 24[11], the tendency to make the process more complex can easily be noted.*[12] *Secondly, this process has demonstrated the effects and the negative potential the EU member states have in influencing the dynamics of accession negotiations in each step of the accession process.*[13] Lastly, the requirements in the current benchmarks deviate from the approach of previous enlargement rounds which focused solely on harmonisation of *acquis* to include also necessity to conduct impact/needs assessments, analyses, capacity building (institutional, financial, administrative) activities, data collection, monitoring and establishing a track record of implementation.[14] This fact reveals the EU's evolution in its approach to the measurement of a candidate country's compliance with the *acquis*: from formal transposition of legislation to the focus on implementation and enforcement.[15]

Due to the specificity of the constitutional setup of the country, the situation and approach to BiH has been somewhat different. Analysing the previous transformative leverage the EU had over BiH, it is difficult to come to a clear conclusion on the effectiveness of the former approaches, due to the specific situation where the EU has acknowledged that the previous conditionality did not function (the nine yearlong stalemate). This led to the British-German initiative in 2014 and in return managed to temporarily unlock the process and bring some positive actions in following years, thus demonstrating that the accession process is more relevant than the conditionality. However, despite the positive momentum in reform implementation that the new approach brought to the country, the fulfilment of the next steps of the accession process is being hampered by the inability to reach consensus within the country and speak with the EU with one voice.

The latest contractual relationship of the EU is with Kosovo through the Stabilization and Association Agreement (SAA) which entered into force in April 2016, having been signed in 2015, although the benchmarks can be traced back to the visa liberalization roadmap that was introduced six-years prior to this event.

10 MINISTARSTVO VANJSKIH I EUROPSKIH POSLOVA, "Izvješće 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

11 WOLFGANG NOZAR (2012), "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

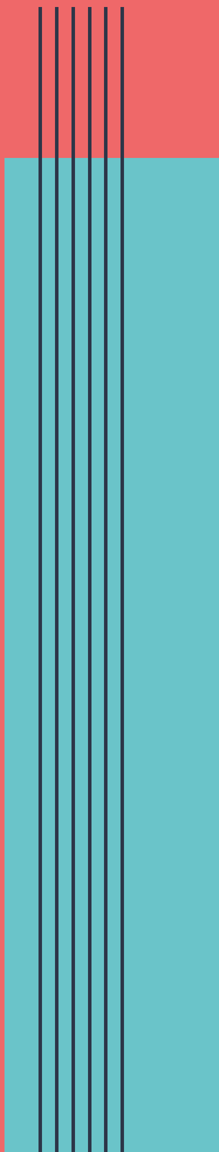
12 EUROPEAN POLICY CENTRE (2018), EU's Benchmarking within Chapters 23 and 24 in Accession Negotiations with Serbia Effects and Challenges; Benchmarking in Serbia, Belgrade 2018

13 Ibid.

14 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.

15 EUROPEAN POLICY CENTRE (2018), EU's Benchmarking within Chapters 23 and 24 in Accession Negotiations with Serbia Effects and Challenges; Benchmarking in Serbia, Belgrade 2018.

II. BENCHMARKS WITHIN CHAPTER 23



2.1. Merit-Based Career System for Judges

Country	Merit –based career system for judges	
	Critical juncture	Document of introduction
Macedonia	2005	Analytical Report for the Opinion on the application from Macedonia
Bosnia and Herzegovina	2003	Report on BiH preparedness to negotiate SAA with the EU
Serbia	2014;2016	Screening report; EU Common Position Chapter 23
Montenegro	2012;2013	Screening report; EU Common Position Chapter 23
Kosovo	2012	EC Progress Report
Albania	2010	EC Progress Report

This benchmark was introduced as an opening benchmark in both Montenegro [16](2012) and Serbia [17](2014) on the occasion of opening negotiations. Despite the great similarities, an attempt to shape the benchmarks according to the needs of the countries can be noted by their further specification in the kinterim interim benchmarks. In this sense in the case of Montenegro the interim benchmark is also focused on the obligatory Judicial Training of judges and prosecutors,[18] while in the case of Serbia the accent is placed on the evaluation and promotion of judges and prosecutors. Prior to establishing these benchmarks in the Common Position for Chapter 23 of these two countries that have opened negotiations; this benchmark can be found in all six Western Balkan countries. Namely, this benchmark has been protracted in one way or another since the establishment of relations with the EU as early as 1995, the introduction the SAA by underlining the need to take actions to reform the judiciary, the 2005 European Partnership and made if for the first time in the Strategies for reform of the judiciary as early as 2004 in Macedonia and 2006 in Serbia. In Albania the foundations for an assessment system of judges can be traced even earlier, back to 2002 when they were created by the High Council of Justice, although the details of the assessment process and criteria have been regulated formally as of 2010. In BiH they are introduced through the 2011 EU-BiH Structured Dialogue on Justice, while in Kosovo they can be traced back to 2012 in the recommendations of EC country reports. In the case of Macedonia, pieces of this benchmark were introduced back in 2005 in the European Partnership and the Analytical report for the opinion on the application from Macedonia, where it was underlined that there is a need to strengthen the independence of the judges, notably by reforming the Judicial Council and their system of selection.
Interestingly, the Judicial/Prosecutorial Councils (Macedonia, Montenegro, and Kosovo), High Judicial/Prosecutorial Council (Serbia, Albania, BiH) and the appointment of its members is today a matter of great discussion. Rather than de-politicizing the appointment and career advancement of judges, the history of appointments and decisions on timely referrals to perform a judicial function by the Judicial Council clearly indicate political bias[19][20] while the role of the Judicial/Prosecutorial Councils remains questionable in terms of ensuring the independence of the judiciary.

Across the countries, despite the multiple changes to the legislative framework, judicial independence that would allow for the fulfilment of this benchmark has not been guaranteed. Political affiliation is still a predominant factor in the selection and dismissal of judges, prosecutors and members of the relevant judicial and prosecutorial councils. Namely, the countries have only built in solid merit based career system for judges in their legislative frameworks.

Therefore, even though the legislation is most often in line with EU standards and prepared with the support of the Venice Commission, proper implementation is lacking. Quite interestingly, the perception of the national authorities differs across the countries. Namely, in Serbia and Montenegro the authorities believe that the countries are on the right path to meet the benchmarks.[21] The government of Macedonia has acknowledged that there has been systematic errors in the past and politicization of the judiciary and is now stating that they are working on amending the

16 As laid down in the Screening report for Chapter 23, Montenegro, May 2012, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/montenegro/screening_reports/20130218_screening_report_montenegro_ch23.pdf

17 As laid down in the Screening Report for Chapter 23, p.25. Corresponding activity from the Action Plan: 1.1.3, Serbia, available at: http://www.europa.rs/upload/2014/Screening-report-chapter-23-serbia.pdf

18 INSTITUTE ALTERNATIVA (2018), Unravelling Montenegro's Frontrunner Status in the EU Accession Process; Benchmarking in Montenegro, Podgorica 2018 (more information under Benchmark 3 – Establishment of the Academy for Judges and Prosecutors),

19 EUROPEAN POLICY INSTITUTE (2017). Priebe Report – 2 years later: New Government and new opportunities to solve old issues. (EPI: Skopje)

20 This has been confirmed once again in the report from the Senior Expert Group from 2017, which indicates that priorities concerning the de - politicisation of appointments and promotions, appraisal, disciplinary proceedings and dismissal of judges are not being implemented.

21 According to the Serbian authorities, Serbia is on the right track to meet this benchmark; According to the Ministry of Justice, Montenegro is on the right track to meet this benchmark.

laws towards improving the system for the recruitment and promotion of judges and prosecutors.[22] Nevertheless, the problems that are encountered in practice are of the same nature across the countries.

The assessment shows that political will is crucial for the success of the planned reforms across the countries. However, it has been demonstrated that in practice, the opposite is happening. As an example, in Serbia, as in many of the other countries, political elites have vested interests in maintaining the status quo and keeping their grips on the judiciary. This is demonstrated by the current constitutional reform process whereby the amendments would satisfy the Venice Commission recommendations, but at the same time would open new roads for political interference into the selection process of the judges.[23] A similar case arises in Montenegro where despite completely new legal framework prepared with extensive assistance from EU experts (and Venice Commission) and capacity building of certain institutions, such as the Judicial Training Centre, and the Judicial and Prosecutorial Council, merit based recruitment and promotion is not yet guaranteed.[24]

Another problem that is noticed across the countries is the criteria upon which judges are promoted. In Montenegro and Macedonia, judges have raised concerns that the complexity of cases is not taken into account sufficiently vis-a-vis statistics. Interestingly, in Macedonia this impacts the 'efficiency of cases being solved', meaning that there is less of a backlog of cases. However, this impacts the quality of the judgments.

A slightly different situation is seen in Bosnia where the issues remain within the local institutions and the lack of political consensus and inter-entity agreements. Due to the complex structure of the justice sector, the implementation and harmonisation of the legal framework within BiH is difficult and leads to inefficiencies and ineffectiveness. All of this affects public trust in the judiciary, which is demonstrated by the Balkan Barometer scores. Moreover, the worrying situation of the countries is portrayed by their scores on the Freedom House and BTI assessments.

22 However, there are still problems in practice, demonstrated by the last appointment of judges by the Judicial Council, following the local elections in November 2017. The last appointment of judges was objected by the judges that applied for the positions due to the fact that the judge with the highest number points was not elected, thus circumventing the article of the Law on Courts stipulating that the judge with the highest points has an advantage over the other candidates.
23 EUROPEAN POLICY CENTRE (2018), EU's Benchmarking within Chapters 23 and 24 in Accession Negotiations with Serbia Effects and Challenges; Benchmarking in Serbia, Belgrade 2018.
24 INSTITUTE ALTERNATIVA (2018), Unravelling Montenegro's Frontrunner Status in the EU Accession Process; Benchmarking in Montenegro, Podgorica 2018

	MERIT BASED CAREER SYSTEM FOR JUDGES		
	FREEDOM HOUSE – NATIONS IN TRANSIT		
	Judicial Framework and Independence Score (1=Most Democratic, 7=Least Democratic)		
	2017	2016	2015
Macedonia	4.75	4.50	4.25
Bosnia and Herzegovina	4.50	4.50	4.50
Serbia	4.50	4.50	4.50
Montenegro	4.00	4.00	4.00
Kosovo	5.75	5.75	5.5
Albania	4.75	4.75	4.75

	BALKAN BAROMETER					
	Figure 86: Do you agree that the following institutions are independent of political influence? (by economies) A – Judicial system					Table 16: To what extent do you agree or not agree that the following categories in your economy are affected by corruption? Judiciary
	Totally Agree	Tend to Agree	Tend to Disagree	Totally Disagree	DK/ Refuse	
Macedonia	3%	19%	37%	36%	3%	76%
Bosnia and Herzegovina	3%	12%	35%	46%	4%	83%
Serbia	2%	16%	40%	33%	9%	76%
Montenegro	8%	28%	29%	27%	8%	65%
Kosovo	7%	36%	37%	19%	1%	72%
Albania	2%	11%	37%	49%	1%	90%

	BTI		
	RULE OF LAW – INDEPENDENT JUDICIARY (10 - The judiciary is independent and free from intervention and corruption; 1- judiciary not independent and institutionally differentiated)		
	2016	2014	2012
Macedonia	6	6	N/A
Bosnia and Herzegovina	5	5	6
Serbia	7	6	6
Montenegro	7	6	6
Kosovo	5	5	5
Albania	4	4	5

To conclude, across all countries:

The commitments of legislative character have been fulfilled. Yet, the mere involvement of experts such as the Venice Commission in the preparation of legislation does not suffice to guarantee merit based recruitment, appraisal and promotion in practice.

Implementation is still its early stages and meaningful commitment is yet to born results. The numerous legislative amendments did not at prevent the "human element" circumventing the legal provisions in the case of recruitments evident with the corruptive practices in the case of testing in Montenegro and Kosovo and using legal gaps such as *vacatio legis* to overlook the implementation. In addition, the appraisal of judges is merely done perfunctorily, is

completely formal and is without real consequences for the promotion or demotion of judges.[25] Currently there is stagnation, if not backsliding, in efforts to make the judiciary more resilient to political influence. Political intervention is present in appointments and dismissals of judges and prosecutors, and Judicial/Prosecutors Councils.

Actions undertaken to meet the benchmark represent interim solutions in the absence of indisputable political will to engage in dialogue with the CSOs and other stakeholders on the future judiciary reforms.[26]

The benchmark remains vague due to the increasing scope of introducing various types of measurements. In most cases only quantitative criteria are is applied, disregarding the expertise and integrity of the judges and thus leaving room for personal and political influences over the appointment and promotion of judges. The focus solely on statistical results leaves room for the continuous politicization of judiciary. *The introduction of qualitative criteria accompanied by a transparent recruitment and appraisal procedure is therefore advocated for.*[27]

Evidence shows that authorities often lack the understanding of the severity and comprehensives of the justice sector reforms in order to comply with the conditions set in Chapter 23.

Countries are more likely to comply with EU requirements in the case of intermediate "rewards", as seen by the case of Albania and the current positive momentum for opening accession negotiations in Macedonia, where a slight change towards merit-based recruitment is evident one that did not occur as a result of legislative changes, but by the mere change of political climate and actual decrease of political pressure when the Government changed in June 2017. Furthermore, our research shows that the EC tend to be more detailed and demanding during accession negotiations in comparison to the pre-negotiation phase.

The implementation of this benchmark is basically dependent on two factors: political will and the extent to which the EU will use conditionality as a tool to induce more fundamental reforms. Despite the fact that countries are at different accession stages, the same (negative) assessment of the fulfilment of this benchmark remains for all the six countries. There are concerns that the approach is too institutional in its focus and that an approach that will be **more "custom-made", would be more suitable for this benchmark and in line with the fact that the EU does not have uniform rules in this area.**

25 GROUP FOR LEGAL AND POLITICAL STUDIES (2018); EU's Benchmarking Mechanism on 'Fundamentals First': Results and Challenges; Benchmarking in Kosovo, Pristina 2018.

26 EUROPEAN POLICY CENTRE (2018), EU's Benchmarking within Chapters 23 and 24 in Accession Negotiations with Serbia Effects and Challenges; Benchmarking in Serbia, Belgrade 2018.

27 EUROPEAN POLICY INSTITUTE (2018), Sitting on the bench and marking; How effective? Benchmarking in Macedonia, Skopje 2018.

2.2. Judicial academy reforms

Country	Judicial Academy Reforms	
	Critical juncture	Document of introduction
Macedonia	2005	European partnership ACTION PLAN
Bosnia and Herzegovina	2007	BiH Progress Report
Serbia	2014;2016	Screening report; EU Common Position Chapter 23
Montenegro	2012;2013	Screening report; EU Common Position Chapter 23
Kosovo	2015	SAPD meeting
Albania	2009	EC Progress Report

The benchmark regarding the establishment and reform of the Judicial Academy (Macedonia, Serbia, Kosovo), the Judicial Training Centre (Montenegro), the School of Magistrate (Albania), and the Judicial and Prosecutorial Training Centres (BiH), has been introduced at a different point over an extensive time period in the six Western Balkan countries. The same can be found as a benchmark as early as in 2005 in the European Partnership (Macedonia),[28] 2011 in BiH (EU-BiH Structured Dialogue), 2013 in Montenegro and 2014 in Serbia as opening/interim benchmarks and 2015 in Kosovo. These bodies were established much earlier than the introduced benchmarks[29] and are still a subject of the judiciary reforms across the countries.

The formulation of the benchmark and the action it requires depends on the country in which it was introduced. Namely, in some of the countries the actions focus on the establishment of the institution while in others it focuses on the implementation of the training materials and adoption of acts.

The Judicial Academy is the main entry point for judicial/prosecutorial candidates into the judicial system, which carries out the initial and continuous training of these candidates to further pursue their careers in the justice systems and contributes towards a more efficient and professional system. While in all countries the Academies/Centres/Magistrates have jurisdiction to provide professional training to judges and prosecutors, in BiH the centres can provide trainings to other interested individuals as well, which is not the case in other countries. The international community has insisted that Academia are the only entry points for newly elected judges and prosecutors. However, in Serba, civil society was advocating for openness for candidates from academia, experienced lawyers, etc. In the case of Macedonia, the Government postponed the application of the principle of entry just from the Academia and used it to appoint, especially at higher courts, candidates close to the Government; however, experienced associate from Courts were practically excluded from the opportunity to stand for candidates for judges, which was not justified. Consequently, the issue cannot be addressed by bans or ensuring one-entry points, but on essential application of the criteria, and especially integrity of the candidates.[30]

Firstly, most of the challenges regarding of this body are common: financial autonomy and a chronic lack of budgetary and relevant training resources.[31] The key findings on the implementation of the benchmark indicate that Serbia has great international funding when it comes to its Judicial Academy. Most of its activities are being implemented and are in line with the agreed deadlines because of international donor projects, and the activities that should be implemented between 2017 and 2020 will be also funded by international donors. In return this affects the sustainability of the Academy since measures towards full financial independence have not yet commenced. On the other hand, other countries face financial difficulties because of inadequate budgetary allocations. In Albania for example, the School of Magistrates faces challenges because of insufficient budgetary allocations, which has been identified as a constant concern by the EU. Macedonia takes part here as well since the budget that the Judiciary Academy has is not sufficient to cover the expenses of the overall operation of the institution. Even though over the last three years the budget has increased moderately, in practice it has been followed by cuts in later stages through budget reallocations. In Montenegro there is a specific situation, where the amount of budget proscribed by the law is still not allocated to the Centre, but however, due to donor support, the Centre is actually over-funded.

28 European Partnership with the Republic of Macedonia, 2005 https://www.sobranie.mk/WBStorage/Files/Council%20Decision%2030.01.2006.PDF

29 1997 in Albania, 2000 in Montenegro, 2001 in Serbia, Macedonia - the Academy in 2005 and the School of Magistrates much earlier, from the 90's, followed by Bosnia and Hercegovina in 2003, Montenegro in 2013, and most recently in Kosovo in 2017.

30 EUROPEAN POLICY CENTRE (2018), EU's Benchmarking within Chapters 23 and 24 in Accession Negotiations with Serbia Effects and Challenges; Benchmarking in Serbia, Belgrade 2018.

31 INSTITUTE FOR MEDIATION AND DEMOCRACY (2018), Bencher- (Un) Effectiveness of EC Monitoring Mechanisms, Benchmarking in Albania, Tirana, 2018.

Institutional reforms are needed to improve the delivery and substance of trainings, while training standards, methodology and delivery need upgrading.[32] However, understaffing and underfunding have in turn influenced the performance and quality and quantity of the trainings provided. In this sense, Albania, Macedonia and Bosnia and Herzegovina face difficulties with their infrastructures and lack of personnel. In Macedonia the quality of justice has also been jeopardised through legal amendments shortening the training for public prosecutor candidates. Montenegro lacks quality control of the trainings provided by the Centre, while Bosnia and Herzegovina also lacks capacities for comprehensive training in order to improve the work of the judiciary.

Secondly, concerns persist over political influence through the composition of the Directors and or/Steering councils/Management boards of the Academies, as in the case of Albania, Serbia and Macedonia.

Thirdly, reiterating the accomplishment of the main goal of the establishment of the Academy – to contribute to the merit-based recruitment and professionalism of judges, in practice its role has been circumvented and other factors have prevailed, leading to the predominantly politically biased appointment of judges[33] especially evident in the case of Serbia, Albania, Macedonia. In Macedonia, the scandal of forged foreign language certificates of the candidates for public prosecutors in 2017 resulted in abolishing the call for recruitment of 60 candidates for prosecutors. In addition, the lowering of the entry criteria and the reducing of the testing and evaluation procedure of candidates during initial training indicate further political influence over recruitments and attempts to politicize appointments. In Montenegro the Centre does not have any substantive role in the testing process of judges and prosecutors, despite providing the training.

Even though the laws for the establishment of the Academies have been enacted, the implementation and the actual appointment of the candidates for judges from the Academy has been delayed so that in a period of several years the door has been opened for appointments of candidates from outside of the judiciary that circumvented the system.[34]

To conclude:

The benchmark has been effectively implemented as regards the formal establishment of the institution and functionality has been ensured, despite being hampered by insufficient funds and staff. In return, the benchmark has often failed to contribute towards merit-based recruitment and the professionalism of judges, as its role is circumvented leading to politically based appointments.

The reforms regarding the academy have not been subject to broader policy debates (in Montenegro and Macedonia), which in turn has contributed to the enactment of laws through short proceedings and legal uncertainties. The current inability to appoint judges and public prosecutors from a line of lawyers who have extensive work experience, the experienced existing collaborators in the courts, academia, former judges in the ECHR and representatives of other legal professions (except through the Academy), opens a space for dilemmas and discussions.[35]

Without a doubt, the Governments should increase the budget of the academies, in order to fully operational and independent from international funding. Moreover, the management and operational capacity of the academies should be enhanced and the independence reinforced since the effectiveness of this benchmark is dependent on the realization of other measures aimed at ensuring the full independence of the judiciary.

The EC should provide more detailed benchmarks and more indicators regarding financial autonomy and training methodologies[36] and should further specify the merit based criteria.[37]

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32 FOREIGN POLICY INITIATIVE (2018), Concretization of European Integration Process: Masks to Fall off, Benchmarking in Bosnia and Herzegovina, Sarajevo, 2018.

33 EUROPEAN POLICY INSTITUTE (2018), Sitting on the bench and marking; How effective? Benchmarking in Macedonia, Skopje 2018.

34 EUROPEAN POLICY INSTITUTE (2018), Sitting on the bench and marking; How effective? Benchmarking in Macedonia, Skopje 2018.

35 Case of Macedonia and Serbia

36 Recommended by Macedonia, Bosnia and Herzegovina, Kosovo

37 Recommended by Macedonia,Serbia

2.3. Merit-based career system for civil servants

Country	Merit – based career system for civil servants	
	Critical juncture	Document of introduction
Macedonia	2005	European partnership action plan
Bosnia and Herzegovina	2005	BiH Progress Report
Serbia	2014; 2016	Chapter 23 screening report; Common Position of the EU
Montenegro	2010	EU Accession Negotiation
Kosovo	2013	Progress Report
Albania	2009	EC Progress Report

The de - politicization of the public administration across the countries lies at the core of the essential reforms on the road to the EU, but its accomplishment is still lingering. Civil servants are very often recruited without adequate assessment of competencies or experience but based on political affiliation, while the selection process for senior civil servants is still on the high discretion level. There is evidence of corruptive and politically influenced recruitment for all categories of civil servants, as in the case of Macedonia, thus enabling only "certain" individuals to make it to the final selection.[38]

Governments vested efforts towards positive developments for PAR and advancement of merit-based recruitment. However, as seen in the case of Macedonia, contradictory processes speak of a lack of genuine commitment towards reform: for example, enactment of new legislation to support the recruitment of expert-level public servants based on merit and equal treatment[39] on the one side, and on the other side circumventing the legislative framework.[40]

The numerous legislative changes in the case of Macedonia have had deterrent effect and contributed to restraining the process of development of a good merit system. In addition, the long process of non-objective employment has contributed to the capture of institutions[41], which to great extent has been enabled by the frequent changes of the legal framework, its selective enforcement and lack of transparency.

There are also cases when, despite some positive steps in terms of alignment of legislation, the legislation itself is creating the problems. Namely, only a small number of BiH institutions have established human resource management units but they are still not used for decision making and planning due to a lack of comprehensive information and legal obstacles regarding data protection. Furthermore, the EU has recommended that the BiH legislation needs to reflect the clear separation between politics and public service.

Our findings also suggest that the legislative reforms are simply guided by a 'box ticking' principle. As an example in Kosovo the four laws that comprise the legislative framework of public administration are on the government or legislative agenda mainly due to the EU conditionality.[42] The drafting of the Law on Civil Servants and the Law on Salaries of Civil Servants by the Kosovo institutions passed the European Commission's deadline. However, according to the legal office in the Ministry of Public Administration, this is happening because these laws are being drafted based on evidence, analysis and lessons learned, in addition to EU standards and legislation.[43]

All countries have PAR strategies that aim to tackle the problems. However, the focus of the strategies is central government oriented while local governments are often overlooked (Montenegro, BiH, Macedonia) which indirectly damages merit-based recruitments. Secondly, the strategies also focus on legislative adaptations while the problem remains one of implementation. Thirdly, the measures in the strategies are not outcome-oriented but action-oriented and thus carry a risk of losing the broader objective along the way. The governments of Serbia and Macedonia have

38 EUROPEAN POLICY INSTITUTE (2016), Life and numbers: Equitable ethnic representation and integration in workplace, Skopje 2016 http://www.epi.org.mk/docs/Life%20and%20numbers_ENG_Final%20version.pdf

39 Such as the amendments to the Law on Civil Servants adopted in December 2017 in Serbia and the new public service legislation from 2015 in Macedonia (but this still allows the use of non-objective criteria in the recruitment and termination of senior public servants).

40 In Macedonia the merit principle has been ignored by the Law on Transformation into Permanent Contracts, while in Serbia through postponing for 2018 the amendments concerning the improvement of the recruitment procedure

41 BLUEPRINT FOR URGENT DEMOCRATIC REFORMS (2016) see chapter Public Administration Reform coordinated by EPI, June 2016

42 GOVERNMENT OF THE REPUBLIC OF KOSOVO (2018), Legislative Program; Concept Document on the Salaries of Civil Servants Law, Ministry of Public Administration, Republic of Kosovo.

43 Interview with the Director of the Legal Office, Ministry of Public Administration, Kosovo 18.01.2018

made positive steps by involving civil society in developing PAR Strategy (Macedonia) and Action Plan for Strategy implementation (Serbia). However, in Macedonia for e.g. the CSOs expertise has been used more in the process of portraying the state of affairs in the text of Strategies and not so much in shaping the measures or recommendations as to how to tackle the problems.

Overall, some positive developments in the countries relate to policymaking and the adopting of legislation, partly owing to the repeated efforts from the EU and SIGMA. However, as has been shown in Serbia's case, *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.*[44]

The EU has both helped the process by defining clear standards and providing guidelines as to how to ensure them and organize regular monitoring cycles in the field. Nevertheless, as an e.g. in Montenegro the assessment shows that local sector recruitment, even though it has been defined in the new law of the country, it still needs more attention from the EU.[45] In these regards, although the local administration employment has been recognized as an area particularly prone to corruption, and it is being addressed by the annex to the Action Plan 23 (Operational Document for Prevention of Corruption in Particularly Corruption-Prone Areas), municipalities fail to meet the obligation to proactively publish the number of newly employed people. Similarly, the assessment shows that the regulatory framework in BiH is highly fragmented as the state, entity and local levels have jurisdiction to control the work of their public service and public companies and to prescribe conditions for appointment and appraisal.

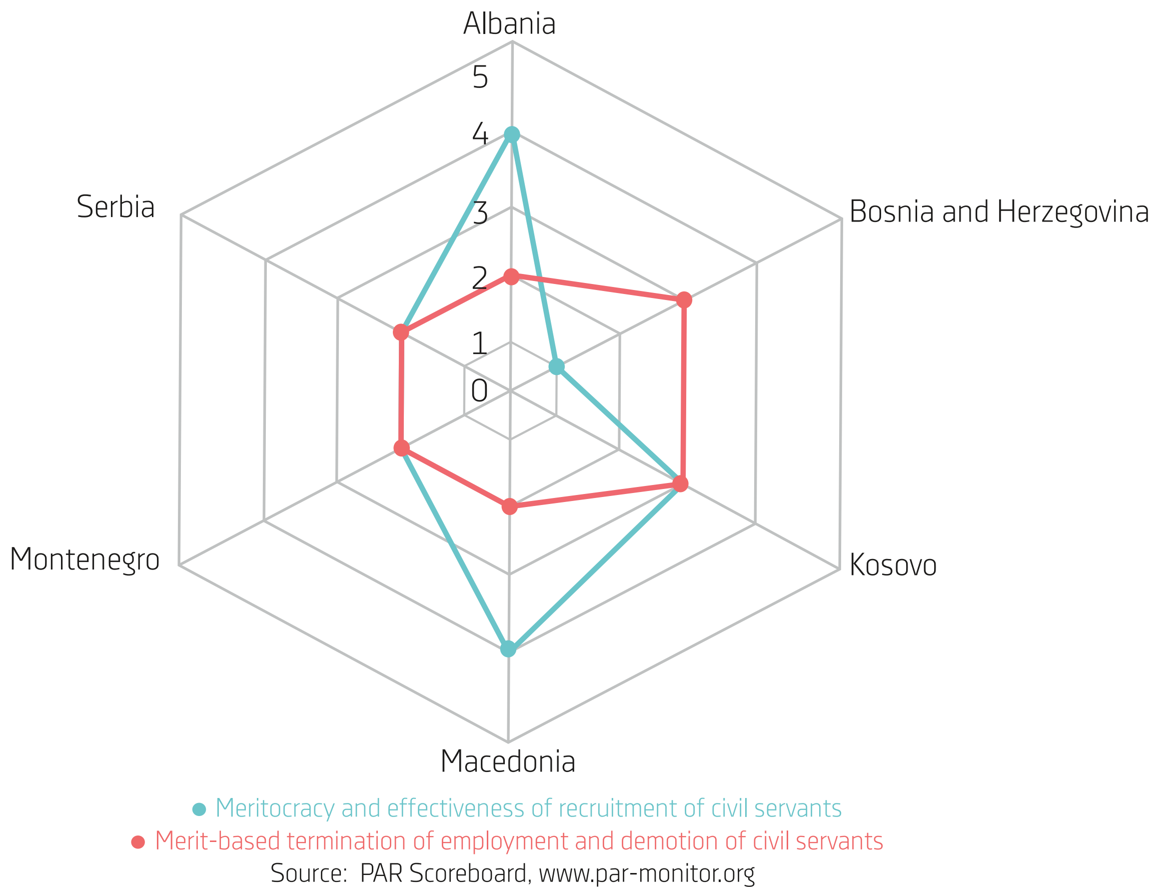
	MERIT –BASED CAREER SYSTEM FOR CIVIL SERVANTS
	BALKAN BAROMETER
	Table 16: To what extent do you agree or not agree that the following categories in your economy are affected by corruption? (by economies) Public officials /civil servants
Macedonia	64%
Bosnia and Herzegovina	83%
Serbia	74%
Montenegro	63%
Kosovo	62%
Albania	73%

44 EUROPEAN POLICY CENTRE (2018), EU's Benchmarking within Chapters 23 and 24 in Accession Negotiations with Serbia Effects and Challenges; Benchmarking in Serbia, Belgrade 2018

45 Moreover, new recruitment and other human resource management procedures are supposed to be specified in the by-laws, which at the time of the public debate were not available; Hence the complete assessment of the new legal framework cannot be made

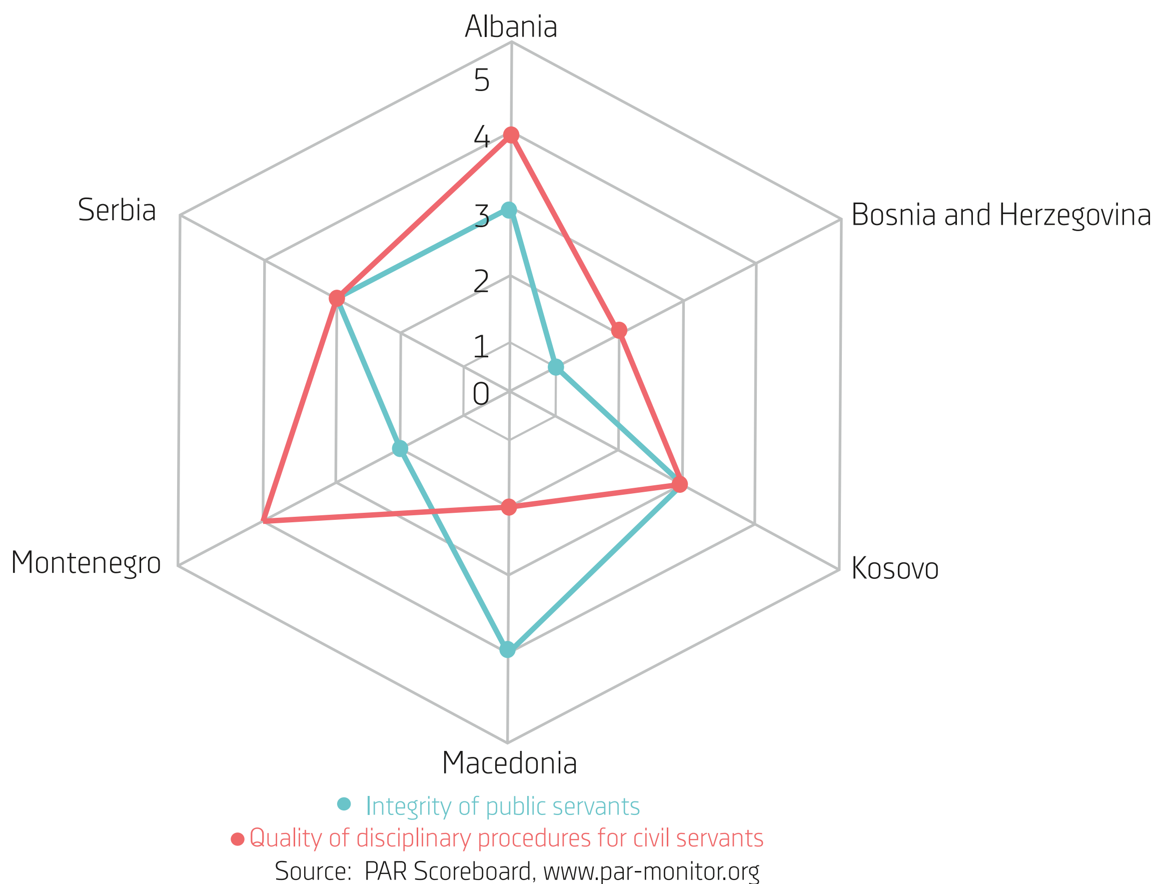
SIGMA scores (0 (the lowest result) to 5 (the highest result))

Principle 3: The recruitment of public servants is based on merit and equal treatment in all its phases; the criteria for demotion and termination of public servants are explicit



Source: PAR Scoreboard, www.par-monitor.org

Principle 7: measures for promoting integrity, preventing corruption and ensuring discipline in the public service are in place



Source: PAR Scoreboard, www.par-monitor.org

To conclude:

The public sector is still the most desirable employer due to the perception that it can ensure stability and longevity, which in turn makes it more attractive for political pressures and gains. Meritocracy in the civil service is still at an insufficient level and the politicization of the public administration is still widely present. Recruitment and dismissal along political lines seriously hamper the rule of law and the overall performance of the public service delivery.

The EU, owing to the SIGMA initiative, has to a greater extent than in the other areas, provided clear guidance on what is expected both in terms of changes in the legislation and in terms of structural management. However, the governments have mostly 'rotated' the requests from the EU in order to show some conformity, mainly through legislative changes. On the other hand, frequent changes in the legal framework, accompanied by its selective enforcement and lack of transparency, have created insecurity both within the administration, and in terms of service provision to citizens.

There is an asymmetry in putting more emphasis on civil service reform at the central level while the local level remains neglected by the EU. The European Principles of Public Administration and their accompanying monitoring reports encompass only the central level. The authorities use this lack of attention on the local level to delay the reform.

The Governments should ensure that a high-quality monitoring and reporting framework is in place for all PAR planning documents, and that civil society representatives are involved in monitoring implementation more actively. All PAR planning documents should have outcome-level indicators in place, and implementation reports should provide information about progress towards the achievement of those objectives, particularly the time frame for implementation, and should also be reviewed carefully to ensure more realistic deadlines.

2.4. Track record for addressing media intimidation; attacks on journalists; media independence

	Media Benchmark	
	Critical juncture	Document of introduction
Macedonia	2006	EC Progress Report
Bosnia and Herzegovina	2008	BiH Progress Report
Serbia	2014;2016	Chapter 23 screening report; Common Position of the EU
Montenegro	2013	EU Common Position
Kosovo	2013	EC Progress Report
Albania	2010	EC Progress Report

Despite the solid institutional framework for law enforcement, in practice, 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.[46] [47]The case of Albania is rather disappointing having that the situation reached a dramatic low in 2013[48] as it was once considered a forerunner in the region in terms of guaranteeing favourable conditions for free and independent media. On the other side, BiH is the only country in the region where still threats to physical integrity of journalists are not treated as a criminal offence[49] and legislative adaptations in this regard are expected. Issues related to the climate in which the media operates and editorial independence have remained a concern. The independence of the regulatory authority and the public broadcasters should further strengthen across the countries. Reports show that a large portion of media outlets' support was 'bought' through government funding of advertising.[50] In Macedonia especially, the support was on two levels, firstly at the level of the owner of the media, and secondly at the level of editorial policy. There is a clear indication that the editorial policy of those media outlets was controlled from one centre.

In terms of economic security the situation continues to be poor and the lack of transparency of media ownership continues to remain problematic.[51] In general, transparency of media ownership in BiH and Kosovo is very limited and especially in BiH since it does not have the law on media ownership transparency. Both facts have contributed to making journalists feel unsafe with regard to reporting perspectives. In Serbia, there has been identified an entire typology of pressure on media, starting from political through legal to institutional. One of the main problems with media independence in Western Balkan countries is the long-term financial sustainability of the public broadcaster and political appointments in the editorial board. This clearly does not serve the purpose of a diverse and plural platform.

The downwards trends in the area of media freedom across the region has been confirmed by a number of international actors, such as the EC, OSCE/ODIHR, Reporters without borders and the Freedom House, whose scoring is given below.

46 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

47 EUROPEAN POLICY CENTRE (2018), EU's Benchmarking within Chapters 23 and 24 in Accession Negotiations with Serbia Effects and Challenges; Benchmarking in Serbia, Belgrade 2018

48 http://www.kas.de/wf/en/71.13549/

49 BiH OMBUDSMAN. Special Report on the Status and Cases of Media Intimidation in BiH. Available at: http://ombudsmen.gov.ba/documents/obmudsmen_doc-2017082415202346bos.pdf. Accessed on December 7th 2017.

50 SOUTHEAST EUROPEAN MEDIA OBSERVATORY (2014). Hijacked Journalism. Available at: http://mediaobservatory.net/radar/hijacked-journalism

51 GROUP FOR LEGAL AND POLITICAL STUDIES (2018). EU's Benchmarking Mechanism on 'Fundamentals First': Results and Challenges; Benchmarking in Kosovo, Pristina 2018.

	TRACK RECORD FOR ADDRESSING MEDIA INTIMIDATION; ATTACKS ON JOURNALISTS; MEDIA INDEPENDENCE		
	FREEDOM HOUSE – NATIONS IN TRANSIT		
	Independent Media (1=Most Democratic, 7=Least Democratic)		
	2017	2016	2015
Macedonia	5.25	5.25	5
Bosnia and Herzegovina	4.75	4.75	4.75
Serbia	4.50	4.50	4.25
Montenegro	4,50	4,50	4,50
Kosovo	5.00	5.25	5.50
Albania	4.25	4.25	4
	FREEDOM HOUSE – FREEDOM OF THE PRESS SCORES (0=Most Free, 100=Least Free)		
	Total Score		
	2017	2016	2015
Macedonia	64/100	62/100	58/100
Bosnia and Herzegovina	51/100	50/100	51/100
Serbia	49/100	49/100	40/100
Montenegro	44/100	41/100	39/100
Kosovo	48/100	49/100	49/100
Albania	51/100	51/100	49/100

Freedom House scoring shows an unambiguous downturn in media independence and press freedom. The most worrisome situation regarding freedom of the press is the case of Macedonia, followed by BiH, Albania and Montenegro. Regionally the situation is more favorable in Montenegro, even though the freedom of the press has also deteriorated there over the years. Media independence, despite the downward trend across all countries, has suffered the most in Macedonia and Kosovo, followed by BiH, while Serbia and Montenegro have retained their scores and Albania has, regionally, a more favorable situation.

Attacks on journalists

As of 23 January 2018, 425 violations have been reported in the region in the past four years (Macedonia, Kosovo, Bosnia and Herzegovina, Croatia, Montenegro and Serbia), with Belgrade dominating with 132 reports, out of which 82 have been reports of intimidation.[52] Between 1991 and 2001, 39 Serbian journalists and media workers were killed, kidnapped, went missing or lost their lives in (still) unknown circumstances.[53] In Serbia, despite the existence of the Permanent Working Group on the Safety of Journalists,[54] and established mechanisms for instant reaction, perpetrators still enjoy impunity, and the number of attacks and threats to journalists has been increasing.[55]

When it comes unsolved cases of murders of journalists, Serbia and Montenegro hold the records with special Commissions constituted in order to deal with this challenge. The formation of these Commissions is an achievement and it is again an indicator of increased EU involvement and monitoring when accession negotiations are opened. The EU's pressures on Serbia to establish this Commission, to shed light on cases of unsolved murders of journalists during the 1990s/early 2000s, proved to be effective, although some Serbian stakeholders criticise its work.t.. In Montenegro on the other side, the cooperation between representatives of the Commission for Monitoring Competent Authorities in Investigating Cases of Intimidation and Violence Against Journalists (established in 2014) has

52 REGIONAL PLATFORM FOR ADVOCATING MEDIA FREEDOM AND JOURNALISTS' SAFETY „Safe Journalists", http://safejournalists.net/

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

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

55 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/

been weak.[56] Clearly, there is lack of political will to improve the state of play followed by a lack of effective investigations in resolving the attacks[57] and there has been no accountability for the ineffective investigations.

In BiH the problem largely rests on the (lack of) legislation. Namely, the criminal law in BiH does not treat threats/ attacks against journalists as a criminal offence.[58] According to the data provided by the Association BH Journalists, the number of attacks against journalist increased in 2016 (64 cases, while in 2012-47, 2013-45, and 2014-37). Since 2013, 217 media houses, institutions and association have been attacked[59]. Often, such attacks do not receive adequate judicial follow up. Similarly, in Macedonia there have been multiple instances of physical attacks on journalists. From the beginning of 2016 until the incidents in Parliament in April 2017, at least 21 attacks against journalists were registered by the Association of Journalists of Macedonia (ZNM), out of a total of several dozen within recent years.[60] There was a sparkle of hope that investigations into previous attacks on journalists would take place as they were announced in the Government's Plan 3-6-9, but still no actions have been taken to pursue this political commitment. In Kosovo and Albania journalists have been continually targeted because of their efforts to expose the country's widespread official corruption and organized crime affiliation, although the findings show that the physical security of journalists has been better during the period of 2012-2015, compared to 2015-2017, when more journalists were attacked.

Media representatives and initiatives keep publishing statistics about the increasing number[61] of attacks, threats and pressures on journalists and a general impression is that only media professionals deal with this data instead of the institutions in charge, which are required to provide a track record.[62]

To conclude:

The unstable political climate, lack of political will, economical (un)sustainability, self-censorship, lack of transparency of media ownership and (un)functioning of justice systems have contributed to the deterioration of freedom of media and increase of attacks on journalists.

The severity of the actual situation on the ground, although recognised by the EU, is not reflected directly in the country reports, which maintain more soft tone in comparison to the gravity of the problems.

A general impression is that benchmarks lack specificity and focus and have not been sufficiently strong, effective, and constructive to respond to the severity of circumstances, however, in cases of countries in accession dynamics (such as Serbia and Montenegro) the EU tends to be more specific in non-papers on the state of play in Chapters 23 and 24.In the past years, political priorities on the EU's agenda (e.g. the Belgrade – Pristina dialogue, political crisis in Macedonia, judicial reform in Albania) have necessitated collaboration between the EU and the governments and in turn have took away the focus from media freedom violations. In addition, the effectiveness in resolving cases of attacks on journalists and identification of the indirect perpetrators has been hampered by the lack of political will.[63] The EU should insist on sustained and effective measures to prevent and punish violence against journalists, improvements in the judiciary's human rights performance, and guarantees that allocation of state advertising is not abused for political purposes.

The EU should urge the political parties and all related bodies and authorities to prevent further attacks and ensure a safe environment for journalism and freedom of expression. State institutions and political stakeholders need to take responsibility for the protection of journalists. In addition, the judiciary and all responsible authorities should stop the on-going impunity.

56 INSTITUTE ALTERNATIVA (2016) ,Monitoring and evaluation of the rule of law in Montenegro, see: http://media.institut-alternativa.org/2017/01/monitoring-and-evaluation-of-rule-of-law-in-montenegro.pdf

57 In 2017, for the first time in 10 years, the Constitutional Court highlighted such ineffective investigations and underlined the need for state authorities, to work harder on resolving attacks. Decision of the Constitutional Court on the adoption of the constitutional complaint ("Official Gazette of Montenegro", No. 088/17 from 26th December 2017)

58 OMBUSDMAN'S REPORT, pg 40, http://ombudsmen.gov.ba/documents/obmudsmen_doc2017082415202346bos.pdf

59 FOREIGN POLICY INITIATIVE (2018), Concretization of European Integration Process: Masks to Fall off, Benchmarking in Bosnia and Herzegovina, Sarajevo, 2018.

60 https://www.ifex.org/macedonia/2017/04/29/violence-macedonia-journalists/

61 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/

62 EUROPEAN POLICY CENTRE (2018), EU's Benchmarking within Chapters 23 and 24 in Accession Negotiations with Serbia Effects and Challenges; Benchmarking in Serbia, Belgrade 2018.

63 EUROPEAN COMMISSION, Non-paper on the state of play in Chapters 23 and 24 for Montenegro, November 2017 http://www.mep.gov.me/vijesti/179297/MEP-je-objavilo-radni-dokument-EK-za-poglavlja-23-i-24.html

2.5. Implementation of the Law on Protection Against Discrimination

	Implementation of Law on Discrimination	
	Critical juncture	Document of introduction
Macedonia	2005;2008	European Partnership Action Plan; NPAA Revision
Bosnia and Herzegovina	2005	BiH Progress Report
Serbia	2014;2016	Screening report; EU Common Position Chapter 23
Montenegro	2013	EC Common Position Paper
Kosovo	2012	Visa Liberalization Roadmap
Albania	2009	EC Progress Report

This benchmark, originally referring to the preparation and adoption of the legislation for protection against discrimination, has evolved into a benchmark related to implementation. Even though in relation to this benchmark there is specific EU acquis for alignment, unlike in most other areas under examination in our research, there are still challenges in relation to both legislation and alignment in the majority of the countries.

In Kosovo the Law on Protection Against Discrimination lacks legal harmonization with other laws and, in general, there is insufficient protection from discrimination in practice due to many inconsistencies, contradictions, and misinterpretations of the law[64]. The legislation in Macedonia on the other hand has omitted "sexual orientation" as grounds for discrimination, thus leading to partial alignment with EU acquis. When it comes to the Montenegrin example of failing to report and compile evidence on the discrimination cases handled by official institutions, we can see an illustration of impediment to monitoring of implementation of the law. In Montenegro, one of the recommendations from the peer assessment mission has been to amend the Law on the Protector of Human Rights and Minorities, so that the Ombudsman can achieve greater independence, when it comes to deciding on the reimbursements of costs and recruiting employees.[65] In BiH the 2016 amendments to the Law on Protection Against Discrimination were adopted, which included age, sexual orientation, gender identity and disability as grounds for discrimination. Also, gender characteristics are named as a basis of discrimination, making BiH the first country in South-East Europe which includes within the law the protection of intersex persons.[66]In Serbia, although anti-discrimination legislation is in place, further alignment is needed, there are inconsistencies between laws or ambiguities that require further judicial interpretation or legal amendments, while anti-discrimination knowledge of prosecutors and judges has still not reached the desirable level.

Secondly, numerous by-laws, strategies and action plans, have been adopted across the region, however there is lack of institutional capacities for proper implementation often followed by lack of proper understanding of the issues at hand and how the law is supposed to be implemented. In Macedonia as an example non – professional staff with no experience were elected through a non-transparent procedure in the Commission for Prevention and Protection Against Discrimination in 2016, thus bringing into question the independence of the Commission, while some of members have been closely connected with the ruling coalition or were public supporters of the Government's policies, especially those that preclude the equal treatment of ethnic minorities in the country. This situation clearly exposes the tendency towards even more pronounced partisanship. In Montenegro the main concern of the leading institutions in area of anti-discrimination, the Ombudsman and the Ministry, have reinforced their capacities with additional staff, however the capacity building of these institutions has not been properly institutionalized and has therefore failed to contribute to moulding and strengthening the human rights culture. The peer review mission reports on the poor, inadequate and overcrowded working conditions in the Ministry.[67]

64 Kosovo has a more 'fresh' case of legal implementation as of 2015, Kosovo adopted the so-called "Human Rights Package of laws," to protect and promote the rights of individuals, including anti-discrimination and gender equality provisions. One of the three laws adopted, was the Law on Protection from Discrimination. The law adopted came as a result of the requirements of the EU Visa Liberalization Roadmap with Kosovo, which requested the adoption and implementation of legislation that calls for effective protection against discrimination as well as for full respect of domestic provisions on Human Rights

65 ŠELIH IVAN, DOLČIĆ TONE, Peer Assesment Report (Second Follow – up, 21-25 November 2016), January 2017

66 Report on the Work of BiH Ombudsman's Office 2016. Accessed on October 15th 2017. Available at: http://www.ombudsmen.gov.ba/documents/obmudsmen_doc2017032310003163bos.pdf

67 Šelih Ivan, Dolčić Tone, Peer Assesment Report (Second Follow-up, 21-25 November 2016), January 2017; Roagna, Ivana, Peer review mission on the capacity of the Ministry of Human Rights, 3-7 April 2017, May 2017

Thirdly, the institutions face financial burdens as well, and due to the backlog of cases and lack of transparency, the public has a low level of trust in them. In Kosovo one of the main challenges when it comes to the legal framework is that the implementation is lacking and its dispositions remain unused even when they could be applied, because of their open character. In practice, the cases of violence and discrimination remain evident, even though the number of reportings is few due to the lack of trust in the institutions, and this is the case with the LGBTIQ community across all countries. Ethic issues are still present in BiH, despite a decrease over the years, and ethnic identity is being used by local politicians to gain cheap political points. Similarly, discriminatory practices apply to ethnic and religious minorities such as the Roma people in Albania, who face severe discrimination in education, health care, employment, and housing in Albania. In Montenegro citizens are mostly willing to support the fight against discrimination for women and people with disabilities, but are less willing to support the fight against discrimination for the LGBT community.[68] This is a concerning trend, since good results have been achieved in battling discrimination against the LGBT community.[69] These events indicated progress and good cooperation between the LGBT community and the police. Nevertheless, the situation remains difficult at the local level, since other municipalities are accepting the LGBT community at a much slower pace.[70] In Serbia, despite the introduction of the institute of hate crime as an aggravating circumstance,the prosecutors have still not applied this institute in discrimination cases.In Macedonia the number of resolved cases confirming discrimination since 2015 are insignificant, and there is still no effective protection against discrimination when it comes to marginalized groups. Similarly, in Serbia and Albania sustaining a good track record of anti-discrimination cases is also a challenge. In Serbia the low sanctions for discriminatory acts show that "judges are still not aware of the detrimental effects of discrimination."[71] Serbia's Equality Commissioner has identified an increase in citizens' complaints over the years, but CSOs believe that the figures are not reflecting the reality, since there is still fear among some groups, such as LGBTI, to report discrimination. At the same time it is worrying that some of the countries face difficulties at the working places as is the case with BIH with the rise in cases of mobbing and work places discrimination cases during 2014 and 2015.[72]

68 CEDEM (2017); Analytical report on discrimination,
http://www.cedem.me/programi/istrazivanja/ostala-istrazivanja/summary/31-ostala-istrazivanja/1872-obrasci-diskriminacije-analiticki-izvjestaj

69 Minutes of meeting with representatives of EU Delegation, IA Montenegro

70 As laid down in the Non paper for Chapter 23, Montenegro, May 2012, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/montenegro/screening_reports/20130218_screening_report_montenegro_ch23.pdf

71 Ivana Krstić (2017) "Country report - Non-discrimination -Serbia" European Commission, Directorate-General for Justice and Consumers, 2016, http://ec.europa.eu/justice/discrimination/files/ad_2015_country_reports/2016-rs-country_report_nd_final_en.pdf [11.12.2017]

72 http://www.6yka.com/novost/90377/-primjena-zakona-o-zabrani-diskriminacije-bih-mobing-u-bih-u-porastu-prosle-godine-69-zalbi

	IMPLEMENTATION OF LAW ON PROHIBITION OF DISCRIMINATION
	Gender Gap Index, World Economic Forum – ranking
Macedonia	73 out of 144 countries
Bosnia and Herzegovina	83 out of 144 countries
Serbia	48 out of 144 countries
Montenegro	89 out of 144 countries
Kosovo	No data
Albania	62 from 144 countries
	The Global Gender Gap Report, World Economic Forum - ranking
Macedonia	67th
Bosnia and Herzegovina	66th
Serbia	40th
Montenegro	77th
Kosovo	No data
Albania	38th

	RAINBOW EUROPE 2017			
	Rank among EU countries	Achieved LGBTIQ rights (score)	Equality and Non – discrimination	Hate Crime & Hate Speech
Macedonia	41st among 49	16%	21%	0%
Bosnia and Herzegovina	25th among 49	31%	58%	26%
Serbia	28th among 49	30%	52%	38%
Montenegro	21st among 49	39%	71%	51%
Kosovo	27th among 49	30%	65%	13%
Albania	24th among 49	33%	52%	51%

	SOCIAL PROGRESS INDEX 2017 – TOLERANCE AND INCLUSION					
	Ranking	Tolerance for immigrants	Tolerance for homosexuals	Discrimination and violence against minorities	Religious tolerance	Community safety net
Macedonia	98th	113th	106th	77th	54th	58th
Bosnia and Herzegovina	88th	90th	94th	73rd	54th	81st
Serbia	69th	72nd	65th	95th	56th	46th
Montenegro	79th	69th	89th	88th	54th	55th
Kosovo	No data	94th	108th	No data	92nd	73rd
Albania	70th	81st	80th	30th	1st	117th

To conclude:

Stakeholders 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.

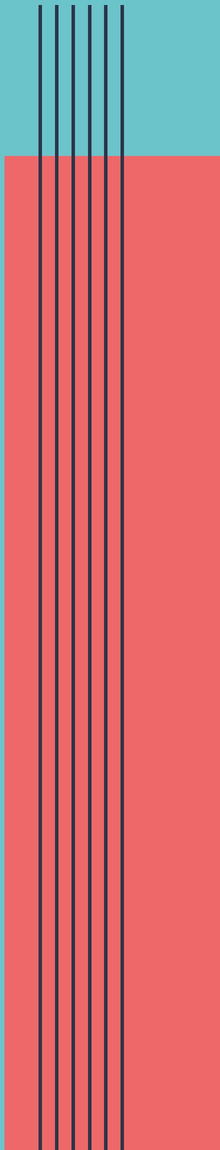
The legislative frameworks for the protection against discrimination stem from the EU conditionality but are usually followed by weak implementation. More effective implementation is needed and in this regard the focus should be placed on strengthening the professional capacities of public officials at all government levels in a more systematic way by providing further assistance through trainings and experts in the field of anti-discrimination. Additionally, adequate financial means should be allocated to institutions leading the implementation of the anti-discrimination policy, in order to achieve their full operational capacity.

Despite the legislative amendments, the track record is more troublesome. Firstly, data on discrimination cases registered with official institutions is scarce and non-systematized. Secondly, the lack of systematic data on discrimination cases impedes a quantitative overview of the situation in the field. There are increasing numbers of discrimination cases on the basis of sexual orientation but the number of unreported cases remains high due to a general lack of trust in the institutions and a fear of negative consequences for the victims.

Since the 2012-2013 EC Enlargement strategy and the "new approach"[73] that places the rule of law area under a stronger spotlight, reporting in the candidate countries Serbia and Montenegro has become more thorough and the recommendations more precise. Nevertheless, in Montenegro the emphasis is placed on the reported discrimination cases, which might be a progress, but still – the reporting is non-systematized, and the qualitative assessment in the field is not foreseen. In other countries the benchmark remains ineffective, vaguely formulated and impossible to create a real impact due to the lack of elaboration and set strategic targets.

73 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 a track record, introducing interim benchmarks during the negotiations to tackle the emerging issues, and a suspension clause in case of a serious breach of a country's commitments.

III. BENCHMARKS WITHIN CHAPTER 24



3.1. Law on Asylum Aligned with the EU acquis

Country	Law on Asylum aligned with EU acquis	
	Critical juncture	Document of introduction
Macedonia	2005;2006	During the subcommittee for justice and internal affairs; officially mentioned in the Action Plan for adoption of the acquis
Bosnia and Herzegovina	2005	New amendments on Law on Immigration and Asylum, intention of alignment with the acquis
Serbia	2014;2016	Screening report for Chapter 24; interim benchmark EU Common Position for Chapter 24
Montenegro	2013	EU Common Position on Chapter 24
Kosovo	2012	Visa Liberalization Roadmap
Albania	2009	EC Progress Report

Considering the unprecedented emergency situation along the Eastern Mediterranean-Western Balkans route in 2015/16, special attention has been paid to asylum and immigration policies in the countries under examination. The EU has confirmed the significance of the issue placing it as one of the flagship initiatives in the new Enlargement Strategy.[74]

Albania, **Bosnia and Herzegovina** and Kosovo have not been significantly affected by the refugee crisis or have witnessed an unprecedented influx of immigrants and asylum seekers. Nevertheless, the human resources and capacities of reception centres remain to be increased given the changing nature and the comprehensiveness of the issue and in order for them to adequately respond to the demands of asylum seekers. Since 2013, **Montenegro** has been going through the alignment process, which has been slow due to delays in adoptions of bylaws, which in turn hamper the overall implementation of the Law.[75] This process could be greatly enhanced by fostering public debate and consultations on legislative adaptations. Furthermore, result-oriented monitoring of the Law implementation should include critical overview of the bylaws, which would ensure quicker alignment with the *acquis*. During the same period (2015-16) in which it was most affected by the refugee crisis and praised for the ways in which the country dealt with the situation, **Serbia** witnessed a two year delay in the implementation of the benchmark, due to the prolonged inactivity of the Serbian Parliament. The asylum law in force, from 2008, although mostly in line with EU and international standards, has not been adequately implemented in practice, which results in 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 lack of accommodation capacities. The new law, which is supposed to be fully harmonised with the EU evolving *acquis*, is yet to be adopted. However, given the underlying problem related to deficient implementation of existing provisions, it is hardly expected to remedy all the shortcomings of the Serbian asylum system, despite proposing better solutions for increasing the system's efficiency. Being faced with increasing mixed-migration flow in 2015, **Macedonia's** largely harmonized Law on asylum was put to test despite the fact that most asylum seekers were only passing through the country. Due to Macedonia's strategic importance in handling the Balkan route, legal solutions were enacted in order to address the needs of asylum seekers (in line with international standards and conventions and which will not harm the country) thus indicating the need for further alignment. Among problems in implementation, as in the case of Macedonia and Serbia are the right to submit an asylum request; the right to enter the asylum procedure, the sensibility of processing and delivering decisions on asylum claims, which are often followed by certain discretion on providing explanations for the reasons for rejecting a claim.

Negative developments in some of the member states regarding the treatment of asylum seekers and refugees, might partially explain the reluctance of Western Balkan countries most affected by the refugee crisis to adequately implement national asylum legislation. Given the unpredictability of the issue and the fact that the EU does not have a clear plan and solution for proper regulation and implementation of the asylum policy, the WB countries tend

74 „Security and migration: Stepping up joint cooperation in fighting organised crime, countering terrorism and violent extremism and improving border security and migration management with the support of EU tools and expertise. Enhancing coordination with EU agencies on border security and migration management." Accessed on February 12th 2018. Available at: http://europa.ba/?p=54840

75 This can be partly explained by the lack of specificity of the process of legal alignment.

to replicate the confusing attitude of the member states[76] leaving them poorly prepared to address the needs of asylum seekers.[77] The EU's attempts to balance between better and rational mechanisms that both respect human rights but also support the countries, which are dealing with the refugee crisis, exemplify the somewhat changing nature of the issue and the approach of the EU. Thus, this is a 'living', ever evolving matter, to which the EU is dedicating special attention, especially now, since the Dublin Regulation demonstrated it is not fit for purpose during the crisis and needs a significant upgrade.

To conclude:

Overall, the assessment is that the benchmark is implemented and generally there is a trend of regular alignment with *acquis*. Nevertheless, the challenge comes with the proper implementation of the legislation.

New legislative adaptations will not bring about a dramatic change 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, the genuine will of the authorities to ensure legal certainty and to act in accordance with the existing legislation and the reinforcement of staff capacities in the Asylum Offices.

Both the EU and domestic non-governmental actors have been deprived of timely insight into the key accompanying secondary legislation that further specifies the implementation of the law. On the other hand, due to the complexity of the legal procedures, delays in adopting the secondary legislation can have a negative impact on the start of implementation and on the preparedness and capacities of key institutions.

However, as EU legislation itself is updated and amended consistently, the national authorities and policy-making institutions should keep up the same speed and frequency as EU countries, to make possible a comprehensive way to deal with and tackle the issue.

76 Interview, professor, Ex director of MARRI S, 23.01.2018, Skopje

77 EUROPEAN POLICY INSTITUTE (2018), Sitting on the bench and marking; How effective? Benchmarking in Macedonia, Skopje 2018.

3.2. Specific anticorruption plans at borders; Providing adequate follow up of detected cases

	External Borders and Schengen: Specific anticorruption plans; providing adequate follow up of detected cases; cooperation on borders	
	Critical juncture	Document of introduction
Macedonia	2004	Visa liberalization roadmap
Bosnia and Herzegovina	2003	Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union
Serbia	2014;2016	Screening report for Chapter 24; interim benchmark EU Common Position for Chapter 24
Montenegro	2013;2015	Common Position of the EU for Chapter 24; Action Plan for Chapter 24.
Kosovo	2012	Visa Liberalization Roadmap
Albania	2009	EC Progress Report

Given that the police reform does not fall under the EU *acquis*, and as such is not part of the accession framework, it is difficult to exert pressure on the accession countries since the EU members themselves do not have standardized legislation in this matter. However, following continuous recommendations from the EU and the international community to strengthen the efforts in the fight against corruption and border management, with significant financial assistance, **Albania** and **Bosnia and Herzegovina** have made improvements, notably with the adoption of strategies on IBM and improvements in training, infrastructure and border surveillance. However, human resources and professional capacities need more efficient efforts and the demonstration of concrete results across all countries. Due to the widespread corruption, the track record of investigations and processing of corruption cases remains to be low. This should be even more difficult in the case of Serbia and Albania where there is interconnection between police corruption and organised crime due to targeted activities of the criminal structures towards public institutions with the purpose of transforming the corrupted public officials into accomplices of their criminal network. The small number of high-level corruption investigations and prosecutions continues to point to the low level of political will and dedication from the region's authorities to focus on this issue. Internal coordination between the police and the judiciary remains to be strengthened, particularly in BiH, due to the complex division of authorities. In general, judicial institutions have not developed the practice of proactive investigations and the publishing of information, thus making the monitoring of implementation of key recommendations and strategic goals more difficult. The biggest "carrot" in meeting the requirements of this benchmark awaits **Kosovo**, given that it was introduced in the visa liberalization process. While **Macedonia** generally met all the set benchmarks, introduced though the same visa liberalization process, the EC has not kept focus on this issue in the ensuing decade. Instead, anti-corruption measures have been included as general recommendations to be applied for all institutions. On the other hand, Macedonian CSOs have been proactive in identifying high levels of corruption within the border police, underlining the lack of merit-based recruitment, which would enable the rooting out of corruptive practices. Overall, this benchmark has not evolved during the past decade as can be noted by comparing the requirements set in the visa liberalisation roadmaps. As for Serbia, the EU raised the issue of the twin-threats of corruption and organised crime at its borders in light of intensification of the so-called "Western Balkans migration route", in which Serbia has an important position as a transit country.

The general impression is that the imprecise benchmarks failed to define „proper monitoring" and „proper implementation" of specific anti-corruption plans as the border leaving room for interpretation during the implementation monitoring process. In case of countries in accession dynamic, such as Montenegro, the substance of the benchmark can be understood indirectly due to additional Action Plans developed under the negotiations of Chapter 24.[78] As evident here, proper monitoring methodologies are vital for the objective assessment of the improvements made, as evident from the difference in approach in the peer review on border management and Montenegro's government report (under the framework of the Action Plan for Chapter 24) which lack a clear linkage and leave significant manoeuvring space for interpretation into the effectiveness and successfulness of the benchmark. Based on the

78 INSTITUTE ALTERNATIVA (2018), Unravelling Montenegro's Frontrunner Status in the EU Accession Process; Benchmarking in Montenegro, Podgorica 2018; Framework for performance evaluation of IBM Strategy for 2018-2020 and Methodology for the Framework of Result-Oriented Monitoring of IBM in Montenegro Akcioni plan za poglavlje 24 – Pravda, sloboda i bezbjednost, Vlada Crne Gore, 16. februara 2015. godine (Action Plan for Chapter 24 – Justice, Freedom and Security, Government of Montenegro, February 16, 2015)

need for a performance oriented monitoring practice, a specific methodology was developed in 2017[79] pointing at a positive effect of EU conditionality in this field given that the previous mechanisms left room for interpretation.[80] In Serbia, similar to other countries, inadequate processing of complaints and internal oversight, coupled with insufficient staffing and financial resources leave border police susceptible to corruption. The lack of autonomy of judiciary institutions and political pressure burden adequate processing of corruption cases.

The positive practice of proactive cooperation which should serve as an example to other countries of the region comes from Montenegro's Ministry of European Affairs, which has established the practice of disclosing copies of peer review reports, commissioned by EC in specific fields[81]. The sharing of reports enables oversight bodies to assess the implementation progress in more detail and to be more involved in recommending future actions. Cooperation with civil society has enabled the imposing of stricter and results-oriented monitoring mechanisms, which assists the EC in gaining an objective and relevant overview of the implementation process in this field. Due to the direct budgetary support provided by the EU in the field, the space is left for more effective scrutinizing of the countries that are not complying with the set benchmarks. The level of achievement of indicators should be tightly linked with the approval of additional funding and investments given that the progress is observed on a technical level (acquiring equipment, trainings, raising analytical and strategic capacities).

Additionally, the countries' efforts in fulfilling the requirements and making significant progress in this field could be increased by making joint action plans in the fight against corruption and combating organized crime, given the interconnectedness of the issues and the relevant bodies in charge. The creation of joint investigative teams between police bodies and the judiciary would significantly improve internal coordination and communication and would lead to the improvements of the track record, which would lead to more pressure being put on governments to fulfil the obligations.

To conclude:

All countries have performed successfully in relation to this benchmark, especially during the visa liberalisation dialogues in the period 2007-2010. This is mostly since benchmarks were specific and measurable and have been easier to monitor and to report on their fulfilment.

For several years this benchmark has not been in the main focus of the EC in the countries that are not in negotiating specifically. The refugee crisis and the opening of the Balkan route has brought to light this benchmark, underlining the importance of proper border management and the enhancement of cooperation amongst Western Balkan countries in battling corruptive practices and ensuring proper border management.

Currently, the imprecise benchmarks failing to define „proper monitoring" and „proper implementation" of specific anti-corruption plans at the border, and "dedicated action plan" leave room for arbitrary interpretation on how this benchmark should be implemented.

The inadequate processing of complaints and internal oversight, coupled with insufficient staffing and financial resources, leave border police susceptible to corruption.

The need to strengthen efforts in tackling this question primarily requires strong political will and dedication. In general, countries of the region need to strengthen their institutional systems for preventing corruption and work on pre-emptive approaches in this area.

The practices of cooperation between the Government and the CSOs enable the imposing of stricter and results-oriented monitoring mechanisms, which contributes towards an objective and relevant overview of the implementation.

79 INSTITUTE ALTERNATIVA (2018), Unravelling Montenegro's Frontrunner Status in the EU Accession Process; Benchmarking in Montenegro, Podgorica 2018; Framework for performance evaluation of IBM Strategy for 2018-2020 and Methodology for the Framework of Result-Oriented Monitoring of IBM in Montenegro.

80 EUROPEAN POLICY CENTRE (2018), EU's Benchmarking within Chapters 23 and 24 in Accession Negotiations with Serbia Effects and Challenges; Benchmarking in Serbia, Belgrade 2018; The Serbian Border Police has been implementing the National Strategy for the Fight Against Corruption, which addresses police resilience in potential corruption cases. Also, risk assessment of corrupt behaviour by staff involved in IBM system has been finalized, a new code of ethics (organized ethics trainings) and national action plan has been revised followed by the beginning of a track record with the detection and prosecution of a case involving 28 officers.

81 Upon the request made by Institute Alternative in March 2017

3.3. The role of intelligence services and the oversight mechanisms that are introduced; established initial track record of investigations in organised crime

Country	Critical juncture	Document of introduction
Macedonia	2005; 2012; 2015	SAC 2005; HLAD 2012; Urgent Reform Priorities 2015
Bosnia and Herzegovina	2006	BiH Progress Report
Serbia	2014;2016	Screening report for Chapter 24; interim benchmark EU Common Position for Chapter 24
Montenegro	No data	No data
Kosovo	2012	Visa Liberalization Roadmap
Albania	2009	EC Progress Report

Despite having a functioning strategy and action plan to fight organized crime and trafficking, **Albania** is still facing a low number of convictions.[82] Particularly worrisome remains the lack of effective financial investigations and confiscations of illegally acquired assets. International efforts in nation-building in **Bosnia and Herzegovina** and **Kosovo** produced mixed results in combating organized crime. Due to the overlapping jurisdictions of local and international administration, frequent shifts of responsibility among the two hampered the reform progress.[83] And while violent organized crime has been decreasing in the region, white-collar crimes, deeply connected to corruption are growing, underlying that the fight against organized crime is vital for prevention criminal infiltration in political, legal and economic system of the countries.

Notwithstanding the on-going efforts to introduce reforms into security systems and ensure transparency and independence of intelligence services, as evident in the case of Macedonia they have not been met with sufficient government resolve, proposing solutions in reforms which leave the competences susceptible for misuse out outside influence. In Serbia, a separation between intelligence mandates for criminal investigations and security purposes is not guaranteed. In fact, there is no functioning external oversight mechanism, but instead the control over the security institutions is concentrated in a few key-people, who can affect decisions without serious scrutiny. The 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 endeavours 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 necessary legislative amendments, it will be extremely difficult to track how the separation of powers is carried out in practice.

Recognizing the urgency and the need to insist on reforming of models of management, implementation and oversight of the intelligence services, Macedonia’s newly elected Government included the measures in the reform Plan369 with the package laws being adopted in late 2017.[84] However, Macedonia is another example of lack of clear guidance of what needs to be done. Despite the specific recommendations of the Senior Experts’ Group on systemic Rule of Law issues included in the Urgent Reform Priorities, the lack of concrete models have pushed for outsourcing to Geneva Centre for the Democratic Control of Armed Forces (DCAF). This in return has left room for the Government to “navigate” within the EC recommendations and choose on basis of free will the “best model” needed. However, no visible steps have been made in countering high profile corruption due to the lack of functioning of relevant institutions and resistance of government agencies and judiciary to process high level political corruption. Moreover, the track record remains weak on high-level political corruption with indications on “selective passivity” of the institutions on tackling serious allegations.[85]

82 Albania’s “decriminalization” law from 2015 had insignificant results in removing incriminated officials from public offices.

83 ANASTASIJEVIC, DEJAN (2018). „Organized Crime in the Western Balkans“. Accessed on February 14th 2018. Available at: http://www.humsec.eu/cms/fileadmin/user_upload/humsec/Workin_Paper_Series/Working_Paper_Anastasijevic.pdf

84 The wiretapping scandal from 2015 resulted in the establishment of first report of the Group of Senior Rule of Law Experts in 2015 in Macedonia and Urgent Reform Priorities with priorities to reform the intelligence service which resulted in establishment of the Special Public Prosecutor tasked to investigate crimes resulting from the wiretapping scandal.

85 EUROPEAN POLICY INSTITUTE (2018), Sitting on the bench and marking; How effective? Benchmarking in Macedonia, Skopje 2018

While Montenegro's government has implementing the same measures for over a decade, they have been lacking in producing the desired results. New sectorial strategies are being implemented regularly (with a proliferation during 2016 and 2017), visible and concrete results have been absent. Additionally, the Government reports to the EU are lacking consistency and verification of statistical data, which is at risk of being inflated with irrelevant cases. Across the countries, it can be noticed that the contents of the benchmarks has not varied over the years, moreover, that the same have been repeated with continuous assessments into of "some" progress being made an "initial" steps taken. While analysing governments' reports into the fulfilment of the benchmarks, inaccuracies often stem from biased interpretation of official statistics due to the failure to verify the data with the expert community and civil society.

To conclude:

The continuous operation and update of information in the established initial track record is compulsory for fulfilling the benchmark on fight against high level corruption and organized crime. Overall, the fight against organized crime and high level corruption remains a work in progress that requires political will in terms of reform prioritization.

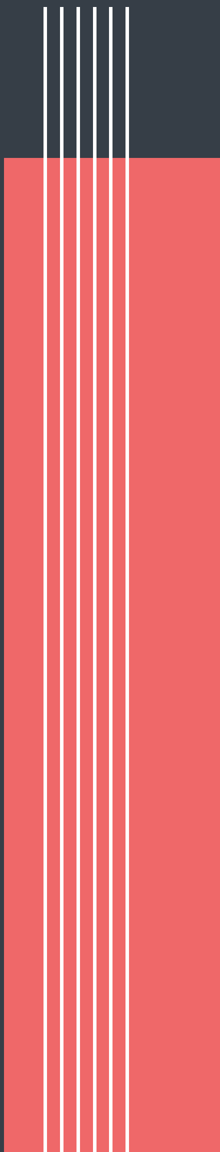
The track record, especially in final convictions is still limited. Even more worrisome is the fact that organized crime seems to have created strong bonds with politics with indications on "selective passivity" of institutions involved in investigations of allegation.

Looking at reforms in the field over the previous decade, what is particularly striking is the extent to which the ECs demands are the same as they were ten to fifteen years ago.

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

Most of the reforming efforts have been instigated from the outside, rather than by governments. This nurtures the culture of expecting and accepting "ready-made" solutions from "foreigners", further contributing to the erosion of domestic capacity to conceptualise and implement reform.

IV. CONCLUSIONS AND RECOMMENDATIONS



4.1. Conclusions

Most of the benchmarks analysed are **not fully developed, lack specificity, focus and do not capture the substance of change** thus are subject to free interpretation. In cases of countries in accession dynamics (such as Serbia and Montenegro) the EU tends to be more specific in non-papers on the state of play in Chapters 23 and 24 while other countries, which are not in the mode of "accession dynamics" (six-month reporting on benchmarks), the implementation of the benchmarks can be procrastinated without any major effect on the progress in the accession process. When comparing the **countries at different points of their accession**, we have found that the EC tends to provide more detailed and demanding requirements during accession negotiations. Still, the benchmarks are in some cases vaguely formulated and remain ineffective, largely due to the increasing scope of various types of measurements, the lack of elaboration and strategic target setting. This in return does not exclude from responsibility the countries which show no political will to genuinely address the deterioration of democratic norms.

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

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

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

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

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

4.2. Recommendations

To the EU institutions and member states:

Related to the content and formulation of the benchmark

-When it comes to the content of the benchmarks all benchmarks should be specified in a manner to include outcome related indicators, which won't allow the governments to deliver results and reports on progress in meeting benchmarks that are only descriptive.

-Since the process of legal alignment is completed in most areas, the European Commission should focus its efforts on formulation of new impact indicators for the implementation of the laws.

-Benchmarks requiring the adoption of new strategies and plans should be avoided and replaced by benchmarks which clearly define the key objectives of the required actions.

Transparency and CSO involvment

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

- Include and use the potential of civil society in this process as it can extract the concerns of the citizens and demand greater transparency of the reform process, while also communicate to the citizens the EU integration process and all of its mechanism in a less technicised manner.

TEU communication and use of momentum

-The EU should take advantage of the new momentum to refine the rule of law conditionality and mechanisms. The EU should continue streamlining its tools, including the benchmarking system, for the sake of inducing greater compliance with the membership conditions. The EU-Western Balkans Strategy, published in February 2018, together with the "enlargement package" to be announced in April 2018, represent an opportunity for the EU to set a kind of roadmap with more tangible timelines and tasks on rule of law related issues.

-The EU must take full advantage of the accession negotiation process for rule of law promotion and use its "transformative power". The announced greater political devotion to enlargement by the member states has the potential to boost the effectiveness of the EU conditionality mechanisms in the rule of law, which have so far yielded limited results.

-As the EU-Western Balkan Strategy is also directed to the EU MS, this is a moment to increase the communication regarding the key novelties in the WB6 across different MS and EU institutions. This is needed due to the fact that the fate of the WB6 in the EU is not dependent on the decisions of the EC, but moreover on the decisions of the Council.

To the national governments in WB6:

-The reforms in the area of rule of law should be predominantly shaped by the countries themselves, in order to ensure implementation and sustainability.

-All available national capacities in the countries should be employed in the process of envisioning and planning the reforms. In addition, raising capacity of all the stakeholders to understand and adopt the EU and international standards in the area should be a priority.

- The process of benchmarking should be perceived and put into the context of the wider process of Europeanisation, democratisation and accepting high international democratic standards, instead of reporting on "boxed ticked".

-In order to increase the transparency of policy making, the reform processes should be the subject of public debate and broad consultation processes.

-As in addition to executive, the other branches of government – the legislative and the judicial - are crucial, their role in the process of shaping the reform and implementation of the benchmarks should be significantly improved.

- Result-oriented monitoring of implementation of laws should encompass scrutiny of the quality and implementation of (secondary) legislation.

-The governments should invest more efforts into engaging in a frank and open dialogue with the stakeholders and CSO representatives, considering their feedback and accepting constructive criticism.

-The Governments should ensure timely and adequate information on the benchmarking process for the wider public.

- Freedom of media is of utmost priority and further deterioration in this field would have negative impact on the whole process.