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CURBING THE EXECUTIVE BIAS IN EU ENLARGEMENT POLICY FOR A STRONGER DEMOCRACY IN THE WESTERN BALKANS

Think *for* Europe Network

I. Western Balkan enlargement at an impasse

Almost two decades have passed since the countries of the Western Balkans (WB) began their way on the European integration process. From today's perspective, however, the region's prospects of achieving EU membership in the foreseeable future appear rather grim.

On the EU side, enlargement policy towards the WB is coming to an impasse. Member states diverge in their assessments of aspirants' performances, with positions that increasingly deviate from those of the European Commission (EC). The most recent examples of this phenomenon include disagreements over the opening of accession negotiations with North Macedonia and Albania as well as granting Kosovo a visa-free regime, in spite of the EC's positive opinions in all three cases. Moreover, the argument that the EU should focus on internal consolidation before dealing with further enlargement is gaining traction among member states, being most vehemently promoted by France.¹ The hesitation, and the divergence in functional terms from agreed standards and procedures, demonstrated by member states damage the credibility of the enlargement policy and its transformative power in the WB region.²

On the side of the Balkan aspirants, the sluggish pace of reforms is preventing countries of the region from moving (faster) towards the EU. In particular, stagnation or backsliding on reform of the rule of law – one of the three fundamental pillars of the EU's enlargement strategy for this region³ – has become a major point of concern. Moreover, the functioning of basic democratic institutions, a key political criterion for accession, has deteriorated in several countries. EC reports, as well as renowned indices such as that of Freedom House, the Bertelsmann Transformation Index, that of the Economist Intelligence Unit and that of Varieties of Democracy, all note these worrying trends.⁴ Lack of progress is particularly problematic in the case of the two countries already negotiating EU membership (Montenegro and Serbia), as this stage of accession would presuppose a more solid track record democracy and rule of law. These developments call into question the effectiveness of the EU's investments to support and monitor democratic transformation and incentivise necessary reforms.

With both sides losing their commitment to the process, a rethinking of existing approaches to pursue and enable the transformation of the WB region seems necessary. The experience of the "big bang" enlargement in 2004 and 2007 demonstrated that a credible membership perspective for aspirant countries does not alone guarantee the sustainability of results post-accession.⁵ In the case of the WB, even if the EU regains interest in the region's European integration, existing policies to incentivise reforms, including in the field of rule of law, are not effective enough to achieve the desired results. In fact, some have even argued that the EU's top-down conditionality has unintentionally contributed to the entrenchment of state capture in the WB, by, *inter alia*, legitimising corrupt political elites and weakening mechanisms for internal accountability and deliberation.⁶ In other words, the default format of the EU integration process in which executive branches from the EU side engage in dialogue and negotiations with the executive branches from the EU aspirants has negatively impacted the consolidation of democracies in the region.

This policy brief zooms precisely on this "executive bias" – the focus of the region's EU integration process based largely on dialogue between elected governments, with insufficient involvement of parliaments and wider society. It contends that meeting membership criteria and securing the irreversibility of reforms post-accession is only possible if the ownership of reforms in aspirant countries is extended beyond the executive branch of power. It also offers recommendations towards building more substantive involvement of national parliaments and civil society in the EU integration process.

II. Executive bias in the EU integration process

Despite a somewhat enhanced position of WB parliaments and CSOs in the process...

As compared to the situation in previous enlargement rounds, both civil society and national parliaments in the WB have benefited more in terms of direct technical support and engagement with the EU. Recent EC strategic documents emphasise the crucial role of these two stakeholders in the democratic transformation of the region.⁷ In terms of civil society, the EU initially focused on

1. Press conference of Emmanuel Macron on the occasion of the EU-WB Summit in Sofia, May 2018
<https://www.elysee.fr/emmanuel-macron/2018/05/18/sommet-union-europeenne-balkans-occidentaux-a-sofia-en-bulgarie>

2. R. Balfour, C. Stratulat (ed.), "EU member states and enlargement towards the Balkans," European Policy Centre, July 2015, pp.222-223, available at:
https://www.epc.eu/pub_details.php?cat_id=2&pub_id=5832

3. The three pillars were defined in the "EU Enlargement Strategy 2014-2015" and they include rule of law, public administration reform and economic governance.

4. In its 2018 "Strategy for the Western Balkans," the EC notes that the countries of the region are showing "clear elements of state capture" – p.3, available at:
https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf A compilation of values from the four cited indices for all six countries of the WB is made by Wunsch & Richter in the annex to the paper "Money, power, glory: the linkages between EU conditionality and state capture in the Western Balkans," Journal of European Public Policy, March 2019, available at:
<http://www.tepsa.eu/money-power-glory-the-linkages-between-eu-conditionality-and-state-capture-in-the-western-balkans-solveig-richter-natasha-wunsch/>

5. Tanja A. Börzel & Frank Schimmelfennig, "Coming together or drifting apart? The EU's political integration capacity in Eastern Europe," Journal of European Public Policy, pp.278-296, 2017, DOI: 10.1080/13501763.2016.1265574;

6. Wunsch & Richter, op. cit, p.1.

7. The EU's Enlargement Strategy 2014-15 introduced the "fundamentals first" principle and often referred to the necessity to build a "strong" and "empowered" civil society living in an "enabling environment." It also states that "national parliaments need to be at the heart of the reform process in each of the enlargement countries to ensure democratic accountability and inclusiveness." The EC's 2018 Western Balkan strategy makes many references to the need to empower civil society in the region to take constructive roles in the accession process. See: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20151110_strategy_paper_en.pdf and https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf

internal capacity building, then on working towards the creation of an enabling environment for this sector, and, finally, on fostering relations between the state and civil society.⁸ The EU's support to civil society through the Civil Society Facility instrument has increased over time, making the EU the largest single supporter of the sector in the region.⁹ Likewise, the EU has gradually increased its support to the region's national parliaments, with numerous projects and initiatives conceived to empower these assemblies. EU projects have mainly addressed institutional capacity building, through activities aimed at reinforcing internal institutional structures, enhancing parliamentary oversight of the executive branch, increasing the efficiencies and representative roles of parliaments, raising the awareness of parliamentarians on the harmonisation of their national legislation with the EU law¹⁰, and others. The European Parliament also runs a support programme for the WB countries, which supports mutual exchanges, cooperation, and education.¹¹

The EU's approach towards these key actors has admittedly resulted in some positive changes as compared to the previous enlargement rounds, particularly in terms of CSO empowerment in the integration process. By now, EU delegations in the WB countries have made a tradition of inviting CSOs to provide input into the EC's country assessments. Their contributions frequently make it into the final texts of reports. The transparency of the evaluation process has also been improved as the EC has allowed, and even encouraged, the region's governments to release non-papers on Chapters 23 and 24 of the *acquis* and the minutes of certain meetings held as policy dialogue (documents which were confidential in previous enlargement rounds), to the public. In Montenegro's case, peer review reports commissioned by the EU are made publicly available on request, as a result of the persistent advocacy efforts of CSOs. Based on this access, CSOs were able to draw the EU's attention to certain errors found in these reports, which prompted the EC to consult with CSOs more regularly afterwards. Furthermore, CSOs in Montenegro and Serbia have taken advantage of the EU accession process in order to voice their own concerns beyond EU related requirements and thus act as local watchdogs in domestic policies.¹²

Similarly, parliaments are not entirely excluded from the EU accession process. Domestic arrangements, for example, have given parliaments in Montenegro and Serbia the power of final approval over the government's negotiating positions for accession negotiations with the EU. In terms of dialogue with the EU, members of parliament (MPs) from the countries of the WB region meet biannually with the members of the European Parliament in the framework of the Stabilisation and Association Parliamentary Committees. Nevertheless, this process is not well known and receives poor media coverage, therefore providing negligible effects on increasing the inclusivity of the EU integration process.

.... the formal process is dominated by the dialogue of executives...

Despite EU support to the capacities and activities of civil society organisations and parliaments, and the existence of certain mechanisms to engage these actors in the process, in practice, the formal mechanisms of EU integration continue to suffer from an "executive bias." Coined already in the context of the EU's enlargement to the countries of Central and Eastern Europe, this term describes the risks associated with the top-down character of the accession negotiations.¹³ As the EU has viewed the adoption of its norms primarily as an administrative exercise, its main interlocutors have been members of the executive branch in aspirant countries. Therefore, all decisive stages of the process, including policy dialogue and intergovernmental conferences, proceed through interactions between governments. In fact, the logic of international negotiations, which the EU accession process adopts as a model, is based on negotiations between democratically elected governments, on the outcomes of which the parliaments (and/or the entire electorate) finally take a vote.

The effects of executive bias are exacerbated due to a lack of focus on domestic democratic deliberations in the context of policy reforms undertaken to fulfil membership conditionality. Namely, the EU has frequently accepted the mere adoption of policies and legislation as signs of positive developments, regardless of the quality of consultations and parliamentary debates leading to their approval. It has continued with this practice, even while acknowledging the negative effects of the use of urgent procedures in law-making, such as noted in Serbia in the 2016 reporting period.¹⁴ In its 2018 report for Serbia, for instance, the EC again decided to take the last-minute adoption of legislative acts in the country as evidence of progress.¹⁵ Although the EU's requirements pertaining to policy development and coordination (as part of wider public administration reform conditionalities) explicitly examine the standards for and the quality of public consultations, the processes involved in adopting new policies and legislation are not yet comprehensively assessed across the policy spectrum. By the same token, they do not represent an explicit condition for demonstrating reform progress. Such an approach sends a negative message to watchdogs of the EU accession process from the region, as it suggests that the EU will tolerate, and even reward, flawed policymaking processes even if these are the very same processes which demonstrate poor democratic standards in the WB countries.

...with negative repercussions for democracy in EU aspirant countries.

The negative effects of executive bias in EU accession talks were already a subject of discussion and criticism by the academic and expert communities in the previous rounds of enlargement. It was argued that the Europeanisation of the "top layer of state officials" and the exclusion of the public from the EU integration process risked eroding public support and democratic accountability in countries

8. Natasha Wunsch, "Beyond instrumentalisation: NGO monitoring coalitions in Croatia, Montenegro, and Serbia," *East European Politics*, 2015, p.453.

9. M. Lazarević, M. Đinđić, S. Marić, "Creating demand for reforms beyond EU conditionality – Civil society and public administration reform in the Western Balkans," *Belgrade Security Forum*, August 2017, <http://www.belgradeforum.org/wp-content/uploads/2018/03/BSF-2017-TT-Milena-Lazarevic-Sena-Maric-Milos-Djindjic.pdf>

10. European Commission, "Study on parliamentary cooperation: overview of parliamentary capacity building in EU candidate countries and potential candidates," February 2015, pp. 20-36, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/enlargement_process/2015-02-17-capacity-building-report.pdf

11. See: European Parliament, "Focusing on the Western Balkans and Turkey," available at: <http://www.europarl.europa.eu/globaldemocracysupport/en/parliaments/south-eastern-europe.html>

12. Natasha Wunsch, "EU Enlargement and Civil Society in the Western Balkans: From Mobilisation to Empowerment," *Palgrave Macmillan*, 2018, p.147.

13. Heather Grabbe, "Europeanisation Goes East: Power and Uncertainty in the EU Accession Process," *ECPR*, 2002, p.20. <https://ecpr.eu/Filestore/PaperProposal/b1331403-9f06-4d7e-8baa-868dab75d117.pdf>

14. European Commission, 2016 Country Report – Serbia, p.7, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_serbia.pdf

15. Concretely, when it comes to the fight against corruption, the EC assessed that Serbia has made progress, because it had adopted the Law on the Prevention of Corruption (EC 2019 Country Report for Serbia, pp.3-4). The law was adopted in May 2019, several days before the adoption of the EC's report, which did not allow the EC time to review the quality of this law. Nevertheless, the EC ultimately decided to give credit for the mere adoption of this act.

seeking to join the EU.¹⁶ More recent works, focusing specifically on the failure of EU conditionality to induce progress in democratisation and rule of law in the Western Balkans, persuasively argue that the top-down character of EU conditionality “reduces the space for political competition and domestic deliberation and empowers executive actors to impose their preferences by referring to external constraints.”¹⁷ These works also claim that “by overloading the political agenda with strict deadlines and detailed criteria, EU conditionality enables dominant parties to justify the absence of internal mechanisms of accountability.”¹⁸ Moreover, the “high salience of EU membership in public opinion” allows the governments to construe “any formal progress towards accession as well as high-level interactions with EU or member state officials [...] as endorsements of their actions towards the local population.”¹⁹ Proceeding with this line of argument, one can conclude that by restricting official dialogue to members of the executive branch, the EU has inadvertently legitimised these actors’ questionable policies and actions, and has even contributed to the entrenchment of state capture.

The limited options for parliaments and CSOs to scrutinise the work of governments and to formally partake in the EU accession process has negatively affected the democratisation of the region. Despite the EU’s present hesitation towards further enlargement to the WB, the EU integration framework remains a key driver for reforms in the region and therefore holds the potential to empower local actors beyond already-powerful members of the executive branch. Indeed, reforms initiated cannot take root unless they are monitored and scrutinised by local actors, with strong EU support. Otherwise, they can produce more harm than good, used in the “window dressing” methods increasingly practiced by the region’s governments.²⁰

The lack of a proper approach has indeed contributed to persistent deficiencies or even backsliding in the functioning of basic democratic institutions throughout the region. In terms of national parliaments, political polarisation is widespread and is a major problem, having reduced political dialogue to a minimum. More specifically, the previous two years have seen parliamentary boycotts by opposition parties in Albania, Montenegro, and Serbia, while political divisions in Kosovo have resulted in the absence of quorums in varied legislative activities. In the case of Bosnia and Herzegovina, ethnically motivated vetoes obstruct law-making initiatives. In Montenegro, mandatory public consultation is bypassed in practice, and in Serbia, the quality of parliamentary discussions has deteriorated, and the use of urgent legislative procedures has continued to grow.²¹ Following the receipt of the EC’s comments on the draft laws, in case those comments are positive, the Montenegrin government no longer takes input from the civil sector into account. Moreover, in parliamentary debates, criticism from opposition parties is

rejected simply on the basis that Brussels has approved particular proposals. In a recent exception, since the change of government in North Macedonia in 2017, most key legislation required for EU accession has been adopted based on the votes of a qualified majority (including the support of the opposition), despite a high degree of polarisation. The use of abbreviated and emergency parliamentary procedures have also significantly decreased. Despite this recent, more positive development in Skopje, the prevailing situation in the region shows trends that negatively impact abilities to oversee executive branches, and the basic legislative functionalities of, the region’s parliaments.

Nevertheless, the reaction of the EU to parliamentary boycotts in Albania, Montenegro, and Serbia has been rather mild. Contrary to the expectations that the EU (as a community based on democratic values) would support citizens’ activism and initiatives for increasing government accountability, it has instead not taken a stand.²² The EU actually referred to the parliamentary boycotts in these three countries as “unacceptable,” claiming that debates should be held in parliaments and not on the streets.²³ The adoption of this position came as a surprise in light of the severe limitations on conditions for meaningful parliamentary debates. Overall, despite the direct language used in the latest EC reports to describe the severity of this situation, the overall impression remains that the EU can and should do more to help restore the normal functioning of the region’s legislatures, pushing for their increased involvement in the accession process.

There is also increasing political hostility towards civil society engagement in policymaking in several countries of the region. In Serbia, the number of attacks by the pro-government media and government officials on CSOs that criticise the incumbent leadership has grown. Investigative journalism organisations and human rights defenders at the local level have been the most vulnerable targets.²⁴ Similar trends have also been documented in Montenegro and North Macedonia (before the change of government in 2017).²⁵ In addition, pro-government propaganda across the region undermines the work of CSOs, which is then reflected negatively in public perceptions of this sector.²⁶ There are some exceptions to this rule, such as in the case of the justice reform process in Albania, in which members of civil society (CSOs, academia, and the Albanian Chamber of Advocates) have been involved as high-level experts in the drafting of the justice reform package.

Moreover, all WB countries lack proper enforcement and quality assurance for public consultation processes (such as by a designated institution to check compliance), which leaves significant manoeuvring space for state authorities to circumvent this practice.²⁷ A number of civil society monitoring reports show consistent deficiencies in this area, and various tactics used by governments to avoid,

16. Grabbe, *op. cit.*

17. Richter and Wunsch, *op. cit.*, p. 8.

18. *Ibid.*

19. *Ibid.* pp. 8-9.

20. “Window dressing” is a term used to signify governmental practices of formally endorsing and approving policies and legislation compliant with EU requirements and standards without real intent, followed by lack of implementation or even blatant disregard. See, for example: Ridder, E.d., and Kochenov, D. “Democratic conditionality in the Eastern enlargement: Ambitious window dressing”, *European Foreign Affairs Review* 16 (5): 589–605, p. 10.

21. In Serbia, in the period between February 2018 - February 2019, as well as in 2017, 44% of the laws were adopted under urgent procedure, which was a slight improvement compared to 65% in 2016.

22. G. Vurmo, “Oops, the EU did it again”, Institute for Democracy and Mediation, March 2019, <http://idmalbania.org/oops-eu-did-it-again-march-2019/>

23. “Kocijančič: There is no “Balkan Spring”, *European Western Balkans*, 25 February 2019, available at: <https://europeanwesternbalkans.com/2019/02/25/kocijancic-no-balkan-spring/>

24. S. Maric (forthcoming, November 2019), *Human Rights Defenders in Serbia 2019 – an Overview*, Think for Europe Network/Civil Rights Defenders.

25. M. Milošević, B. Elek, S. Muk, “Back to Basics: Re-affirming the Rule of Law in the Western Balkans”, Institute Alternative, December 2016, p.19, available at: http://www.bezbednost.org/upload/document/back_to_basics_re-affirming_the_rule_of_law_in_the.pdf

26. “Human Rights Defenders in the Western Balkans 2019 – an Overview” (forthcoming), Think for Europe Network/Civil Rights Defenders.

27. S. Maric, S. Subotic, “Evidence based and inclusive policy making in the Western Balkans: what role for think tanks and policy oriented CSOs?”, Think for Europe Network, April 2018, p.5 <https://ten.europeanpolicy.org/wp-content/uploads/2018/06/Evidence-based-and-inclusive-policy-making.pdf>

restrict or only formally apply public consultation practices.²⁸ In many cases, there is little room for the influence of public consultations, as they are organised at the very end of the legal drafting process, when key policy directions are already decided and only minor details can change. Indeed, recent civil society monitoring findings show that only one fifth of the region's civil sector on average believes that governments provide timely and adequate information on the content of legislative or policy proposals in public consultations.²⁹

III. Democratising the EU accession process

Given that the EU accession process of the countries of the WB is likely to take some time, an emphasis on the quality and inclusiveness of the project should be an important consideration. The analysis and recommendations put forward in this paper effectively question the very assumption of applicability of the traditional governmental negotiations framework – as dialogue between executives the results of which are ultimately voted on in the parliament – in the context of the EU integration of previously non-democratic countries. In fact, the substance of the EU accession process has an importance that extends far beyond the framework of intergovernmental negotiations, into the core of the value basis of a society, requiring deep transformations of governance systems at large. As a result, it is only logical that such a process should be managed as a wider endeavour, requiring the involvement of all segments of society as well as the building of consensus through representative domestic institutions, particularly parliaments. Accordingly, to improve the state of play and to address the problems analysed above, the following recommendations are proposed:

- The EU (both the Commission and member states) should increase the importance of public consultations and proper parliamentary debates as part of the policymaking processes in the EU accession framework. More specifically, the regularity and high quality of consultations should be included as explicit requirements under Chapter 23 of accession negotiations (and for the countries not yet negotiating accession in assessments of rule of law). Due to the suspensive effect of Chapter 23, in the case of a poor track record in public consultations and parliamentary discussions, therefore, the accession process could be suspended until a country remedies the situation. Alternatively, proper parliamentary and public consultations could be introduced as requirements in all negotiating chapters (as opening, mid-term and closing benchmarks) as well as in the Negotiating Frameworks.
- Except in extraordinary and well-justified situations (such as strictly defined cases of national security or emergency situations, for instance floods or earthquakes), the EC should not accept to review draft legislation passed through urgent parliamentary proceedings and in which the public was not properly consulted. By the same token, the EC should not acknowledge policy or legislation adopted without proper public consultation and parliamentary debate as signs of progress in its annual assessments.

- The EC should improve the transparency and public availability of its sources which analyse the state of play in candidate countries. These include, among others, expert reports, peer-review reports and TAIEX reports. For countries in the process of negotiating EU membership, the EU should keep the track record tables open to the public. Given the scarcity of data provided by governments of aspirant countries regarding the state of play on accession-related requirements, such a move would help CSOs from the region to increase the accountability of authorities. The creation and publishing of independent expert reports – as in the case of the “Priebe Report” in North Macedonia – can be particularly valuable to this end.

- The EC should, through its financial assistance, ensure long-term support to credible and proven CSO initiatives which build and maintain local pressures and bottom-up public demand for EU-compliant reforms. Rather than supporting individual short-term projects, the Commission should invest more into recognising and providing long-term assistance to civil society efforts to create greater structural change in the difficult institutional environment.

- The EC should also provide long-term financial assistance to initiatives that strengthen cooperation among national parliaments and CSOs in aspirant countries, in particular the organisations specialised in fundamental reform areas (rule of law, economic governance and public administration reform), which can provide valuable information for parliamentary debates.

- With EU and civil society support, national parliaments should establish regular public hearings with the participation of renowned and respected domestic experts in specific policy areas. These experts' roles would be to provide objective evidence in parliamentary debates and serve in the public interest, in this way helping to overcome political divides in a highly polarised environment. Whether coming from the civil sector or serving as independent individuals, such experts would need to be appointed in a transparent process. Moreover, their views and opinions issued in parliamentary hearings, as well as the parliament's reactions to their contributions, would need to be publicly available, to allow for sufficient scrutiny by the public and civil society.

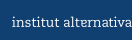
Ultimately, it will be up to domestic civic forces to make the most out of the opportunities for influence in the EU accession process, in order to expose examples of state capture, reform window-dressing, and corruption. Nevertheless, by bringing national parliaments and CSOs into the spotlight and insisting on the proper application of basic democratic mechanisms within EU accession related reforms, the EU can go a long way in supporting the WB countries' transformation into functional future EU member states.

28. See, for example, Monitoring Matrix reports of the Balkan Civil Society Development Network, or PAR Monitor reports of the Think for Europe Network's WeBER Project. Available at: <http://www.balkanncsd.net/publications/monitoring-matrix-reports/> and <http://www.par-monitor.org/pages/par-monitor-2017-2018>

29. M. Lazarević, M. Đinđić, “Western Balkan PAR Monitor 2017/2018,” Think for Europe Network, WeBER Project, available at: <https://ten.europeanpolicy.org/wp-content/uploads/2018/12/WESTERN-BALKAN-PAR-Monitor-2017-2018-summary.pdf>



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