ANNUAL INSIGHT
ON EU RULE OF LAW

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Annual insight on EU rule of law

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Introduction

The rule of law principle is one of the core values comprising the foundations of the European Union. It entails that all public powers act within the boundaries set by the law, in accordance with the values of democracy and respect for fundamental rights. While candidate countries must comply with this principle and adapt the functioning of their institutions accordingly, member states of the EU are also not exempt from this obligation, or the consequences arising from non-compliance.

EPI's work is focused on the needs and constraints of North Macedonia, a country that awaited the start of the accession negotiations for more than a decade while experiencing a decline in support for EU membership and political instability in recent years. Within its rule of law programme, it closely monitors the level of compliance with the rule of law principle in member states of the EU and candidate countries, in order to learn valuable lessons and present them to relevant stakeholders and the citizens of North Macedonia, as these lessons will have to be implemented now as a candidate country and as a member state in the future. EPI also monitors events within the country in the following areas in accordance with the EU accession negotiation structure: functioning of democratic institutions, public administration reform and chapter 23: judiciary, fight against corruption and fundamental rights.

The insight begins with a brief on the EU's enlargement policy and its tendencies toward the Western Balkan candidate countries. While the accession of these countries to the EU is greatly influenced by politics, it also depends upon their compliance with EU's accession criteria. Thus, the insight contains brief on compliance with the rule of law principle, on independence of the judiciary in the Republic of North Macedonia and recent developments in the area of fundamental rights.

A general overview is done of mechanisms for rule of law monitoring and reporting in the EU and its practical application, as an introduction to more concrete examples, as seen in member states. During the entire year, thorough analysis was conducted on the development of events regarding the rule of law crisis in both Hungary and Poland. Hungary's case was reviewed through an analysis of the application of Regulation 2020/2092, which introduced "the conditionality mechanism" as a tool for protection of the rule of law principle in EU Member States. Other than analysing the conditionality mechanism, other mechanisms available for resolving the rule of law crisis applied in Poland's example were reviewed. The Commission's Rule of Law Report and the EU Monitoring and Enforcement

of Article 2 TEU Values established a rule of law backsliding currently in the EU. Poland's case of violating judicial independence and impartiality triggered the initiation of various EU mechanisms.

After looking at these examples, it was necessary to analyze the level of independence of the judiciary in North Macedonia and its citizens' perception of the judicial system. This analysis was performed with a focus on European standards and perceptions of independence. First, an overview of the data from the 2022 EU Justice Scoreboard is given, then an overview of perceptions of the independence of the judicial systems for the countries of the Western Balkans in the 2022 Balkan Barometer is provided. Additionally, a complementary overview of three reports analysing the independence of the judiciary was done: European Commission's Country Progress Report 2022, CEPEJ Evaluation Report 2022 and the Analysis for the comprehensive assessment of the implementation of the Strategy for the reform of the justice system (2017 – 2022), and recommendations contained within, were extracted.

Finally, the protection of fundamental rights was also monitored in member states and within the country. In November 2022, EC released the results of its seventh evaluation of the Code of Conduct on countering illegal hate speech online. Unfortunately, they display a decrease in companies' notice-and-action results, so to this end, existing legal instruments of the EU for this issue, including the aforementioned Code of Conduct and the new Digital Services Act were examined.

On June 20, 2019, the EP and the Council adopted two important directives to raise minimum labour standards in the EU: Directive 2019/1152 on transparent and predictable working conditions in the European Union and Directive 2019/1158 on work-life balance for parent(s) and carer(s). The deadline for transposing them expired in August 2022, so in this direction, we analysed the main novelties and the significance of these two directives, as well as what is important for our country regarding their alignment.

EU enlargement policy: autumnal winds of change ahead?

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Writing about EU enlargement to the Balkans has become depressing and repetitive. Twenty years of European integration have brought neither the promised convergence between the countries of the region and the member states, nor EU membership to the former. Instead, the accession path has become increasingly arduous for the aspirant countries in the Balkans and the destination – i.e. EU entry – ever more intangible, including for the frontrunning candidates. Moreover, the same thorny issues of statehood and democratic governance in the region and haphazard commitment to enlargement in the EU capitals keep challenging the credibility and transformative leverage of the policy.

The war in Ukraine has recently helped to raise the profile of the dossier by fostering a sense of urgency to rethink the Union's engagement with its vicinity. But ensuing discussions mix up ideas about creating a European (geo)political community of like-minded allies to better confront the new security reality with proposals to re-energise the process of further EU widening. Enlargement is nevertheless a self-standing issue that should be treated as such. It might benefit from a rejig but no amount of reform will ultimately substitute for member states' lack of political will to open the door to new members and prepare the Union's absorption capacity to that end.

So far, there is little indication that EU countries will fall into line – they all must do so given that unanimity is still required for any steps forward on enlargement. Then again, maybe – just maybe – the winds of change will start blowing this autumn with the Commission's second State of the Union address in September and the Prague Summit in October.

The fickle gatekeepers

In July this year, the Council finally launched accession negotiations with North Macedonia and Albania. The two countries had received the go-ahead for the start of membership talks already in 2020 but Bulgaria had subsequently vetoed the adoption of the Negotiation Framework for North Macedonia over issues of history and language. Since the EU treats the duo applicants as a 'package', both Skopje and Tirana were held up on their accession tracks for the past years by North Macedonia's dispute with Bulgaria.

The decision to allow the two countries to advance on a still lengthy road towards EU membership is important and long overdue. However, it comes after Skopje agreed to compromise based on a controversial French proposal designed to persuade Bulgaria to unblock North Macedonia's accession path. The protocol requires North Macedonia to change its Constitution to recognise a Bulgarian minority and introduce measures that protect minority rights and ban alleged hate speech. Under the same proposal, Bulgaria maintains its prerogative not to recognise the Macedonian language and demands Skopje to reflect good neighbourly relations throughout the negotiations.

The Macedonian lawmakers approved the conditions in the French-brokered deal by a slim margin, without the support of the opposition. The Parliament's endorsement also went ahead against violent protests and much criticism that the inclusion of bilateral issues in the accession talks was setting a dangerous precedent. Such widespread disproval makes for a "sad celebration" and suggests that the agreement might not prove a lasting solution. For one, it does not prevent Bulgaria from blocking again the process in the future. But even without a new Bulgarian veto, North Macedonia will first have to amend its Constitution before the actual opening of the first negotiating chapters.

To this end, it is unclear how the parliament will manage to muster the required two-thirds majority or whether a potential referendum will help to bridge divisions over this matter in the country. Anti-EU, extreme-right wing and pro-Russian elements in North Macedonia have been strengthened because of this episode and might see a surge in electoral support at the next elections. If Putin's intention was to 'divide and conquer' in order to trip up the EU in the Balkans, recent developments seem to play right into Russia's hands.

Therefore, the risk that North Macedonia has merely moved from having a foot in the accession door to running in circles on the accession track is looming in the agreement. This prospect puts a damper on the achievement, especially given the country's long history of finding itself in limbo. Together with Albania, North Macedonia was previously blocked in 2019 by France and the Netherlands until a new methodology for accession negotiations was adopted (again) based on French proposals. Prior to that, an acrimonious dispute with Greece had obstructed its progress for a decade until the country changed its name

from Macedonia to overcome Athens' veto. All in all, the start of accession talks for North Macedonia has been in the making for a staggering 17 years. Any further delays – including after all the significant concessions that the country has already accepted– are almost guaranteed to have all around negative implications.

The problem is not so much that the enlargement process is slow; effective transformation can take time. The main issue is rather that agreed standards and procedures on enlargement are increasingly disregarded by the member states on account of considerations linked to their own domestic politics. The frequency of incursions and opportunities for EU capitals to interfere and derail the process, often overruling the Commission's opinion, has increased over the years. By now, the constant fickleness of EU capitals on enlargement is well-documented[1] and tends to put a spanner in the works, even when set conditions have been met by aspirant countries. It is also currently precluding agreement on granting the long-overdue visa liberalisation to Kosovo.

Such dynamics mask the lack of credible vision for the Union's engagement with its allies in the Balkans. Why else would the EU fail to consolidate its political space by leaving out the Balkan neighbours from the recent Conference on the Future of Europe?[2] They also breed frustration in the region[3] and push the Balkan countries to look for pragmatic alternatives in regional coalitions and with other powers. Little surprise then that candidate countries like Serbia make no secret of their friendship with Putin and refuse to align with EU sanctions against Russia.

1 E.g. Balfour, Rosa and Corina Stratulat (2015), "EU member states and enlargement towards the Balkans", Brussels: European Policy Centre.

2 Emmanouilidis, Janis A. and Corina Stratulat (2021), "The Conference on the Future of Europe: Mind the gaps!", Brussels: European Policy Centre.

3 E.g. Jakov Marusic, Sinisa, "North Macedonia's Faith in EU Influence Plummeting, Survey Shows", Balkan Insight, 25 February 2022.

The sticky problems

But while the member states' assertive approach to the dossier undermines the transformative leverage of the policy, the Commission's ever-expanding and refined box of enlargement tools and tricks has also proven its limits. As its own assessments indicate, for all its technical benchmarks and complex conditions, the Commission is still short on answers on how to consolidate democracy, resolve statehood and bilateral issues, create functioning market economies, and reconcile war-torn, multi-ethnic societies in the Balkans.[4] The more these thorny issues rise in importance and start conditioning progress in the overall enlargement process, the more the shortage of answers becomes obvious. It also does not help when the commissioner in charge of enlargement is accused of playing down democratic criteria for certain forerunning countries in the Balkans.[5]

Clearly, reform is not just a matter of EU prescription. It also relies on political will and implementation in the Balkans – which is hardly a given in most countries. How to engage with autocratically minded leaders in the region, who have little interest in promoting good governance and good neighbourly relations, is a real dilemma. In the end, meeting the membership conditions remains the responsibility of the Balkan countries. However, commitment to a technical process – as strict and rigorous as it may be – will never suffice to complete the European Union without strong political resolve, an unshakable vision of a joint future and a lot more generous support from the EU.

As cliché as it might sound, the EU should begin to walk its big talk about the strategic importance of enlargement.[6] Doing so matters not only for the successful completion of the ongoing policy towards the Balkans. It is also important if the European perspective extended this June to Ukraine, the Republic of Moldova and Georgia is to carry real – not just symbolic – value. Kiev and Chişinău received candidate status at a time when the state of affairs with regards to the Balkans casts doubt over the member states' commitment to expand the 'club'. It also came at a moment when EU internal politics call into question the ability of the Union to contemplate further widening in its current form, even if it was serious about enlargement. In the absence of a clear strategy, underpinned by real political commitment and a workable model, promising the prospect of EU membership only seems to be a reflex option and it could backfire.

4 E.g. European Commission, A more credible, dynamic, predictable and political EU accession process – Commission lays out its proposals, 05 February 2020b.
5 Wanat, Zosia and Lili Bayer, "Olivér Várhelyi: Europe's under-fire gatekeeper", POLITICO, 05 October 2021.
6 Stratulat, Corina (2021), "EU enlargement towards the Balkans – Three observations", Brussels: European Policy Centre.

Fresh thinking?

Thus, the firm response that the EU was compelled to give to the trio of new applicants in the current geopolitical context has reinforced a long-standing need to re-evaluate and revitalise enlargement policy, more generally. Various reform proposals are competing for attention at present, including creating a system of EU accession in stages or a European (geo)political community.[7]

Fresh thinking is welcome. However, revising – again – the enlargement method cannot substitute for the member states' lack of political will to welcome new entrants. The process would just keep dragging on counterproductively. If enlargement needs overhaul is with respect to member states' political will to enlarge but also the ability of the process to offer solutions to sticky issues like the normalisation of relations between Belgrade and Pristina, the impasse in Bosnia-Herzegovina or the persistence of autocratic leaders in the region. That's where the focus of any potential upgrades should lie and recent tensions in Northern Kosovo are a strong reminder in this regard.

Beyond that, the merits of the 2020 'new approach' have not even been properly tested out, given the delays in commencing negotiations with Albania and North Macedonia. The strengths and weaknesses of this reform to the Union's tools and methods will become obvious now that/if the accession process of the two candidates gets properly underway. Further updates should be introduced only if the implementation of the 'new approach' reveals that fixes are needed. At any rate, Charles Michel's proposal for a geopolitical community chimes with the revised methodology when it refers, for example, to gradual phasing-in of aspiring countries to individual EU policies, markets, and programmes before they join. Thus, the new methodology should be first tried out rather than automatically tempered with.

As for Macron's idea of a political community, its lack of details has raised suspicion that it might masquerade as an alternative to EU membership. The June Council did not help to provide any more clarity on its purpose, although it did conclude that "such a framework will not replace existing EU policies and instruments, notably enlargement". Ultimately, if this proposal is not to be dismissed as a second-class ticket to EU accession, the discussion about rethinking the Union's relationship with the wider European continent in the context of war should be kept separate from that on enlargement reform.[8] Both discussions should also spell out all the specifics in each case. The Prague Summit, planned in early October by the current Czech Presidency of the EU Council, is meant to convene

7 Emerson, Michael; Milena Lazarević; Steven Blockmans; and Strahinja Subotić (2021), "A Template for Staged Accession to the EU", Brussels: Centre for European Policy Studies. Herszenhorn, David M.; Hans von der Burchard; and Maïa de La Baume, "Macron floats European 'community' open to Ukraine and UK", POLITICO, 09 May 2022

8 Mucznik, Marta (2022), "The (geo)political community and enlargement reform: two important but separate discussions", Brussels: European Policy Centre.

the leaders of the member states and third European countries interested in this political community. In that sense, the event could prove an opportunity to lift the fog on the idea and assess its actual merits.

The absorption capacity 'elephant'

In addition, before the Union tries to reinvent the enlargement wheel, it should prepare its absorption capacity to ensure that any new accessions will continue to go hand in hand with a further 'deepening' of integration. As the German Chancellor Olaf Scholz noted in a speech to the Bundestag this June, "We must make the European Union capable of enlargement. This requires institutional reform." But, at present, there does not seem to be much appetite among the member states for changes to the EU's policies and governance structures, especially if they entail amendments to the treaties.

At the June Council, EU leaders made only a cursory acknowledgement of the Conference on the Future of Europe, which ended in May and produced a substantial package of reform proposals across a wide range of policy areas. Among those, a specific call adopted in the European Citizens' Panel on foreign policy for "a strong vision and common strategy to consolidate the unity and decision taking capacity of the EU in order to prepare the Union for further enlargement" (recommendation # 21) but also an explicit recommendation (#21) in the final report of the Conference to introduce qualified majority voting (QMV) in foreign policy. Doing away with the unanimity requirement in the enlargement dossier, where member states have abused their veto power on more than one occasion, sounds like a reasonable way forward. But it is not yet clear why member states would agree to renounce this right and unanimity is required for such a change to occur.

In general, not all European institutions are on the same page regarding reform. The European Parliament has already responded to the Conference by calling for a European Convention and the Commission's own analysis of the Conference proposals does not dismiss the possibility of treaty change. Where new legislative proposals might be needed, the European Commission President Ursula von der Leyen promised to address them in her State of the Union speech in September. Member states, though, remain divided on the matter. Some 13 countries from Northern, Central and Eastern Europe already expressed opposition to "premature attempts to launch a process towards Treaty change", arguing that recent crises have shown "how much the EU can deliver within the current Treaty framework." In contrast, six 'core' member states (Belgium, Germany, Italy, Luxembourg, the Netherlands, and Spain)[9] declared themselves "in principle open to necessary treaty changes that are jointly defined" through an inter-institutional process.

9 This group likely includes France, which opted to maintain a neutral position while at the helm of the EU Council Presidency.

The lack of unity among EU countries betrays little ambition at a time when the EU should prepare the new era – or, as Chancellor Scholz dubbed it, a *Zeitenwende* – more and better than ever before.[10] Such short-sighted and misguided way of dealing with this watershed moment for Europe could defer much-needed fundamental reforms to put the Union in a stronger position to deal with future challenges. It would also amount to a lost opportunity to confront the long-standing 'elephant in the room' – i.e. the EU's capacity to absorb new entrants. Thus, while the member states are busy trying to get their act together, enlargement might be downplayed and emerge as collateral damage. This scenario would hurt the aspirant countries but, in the long run, it will likely hurt the EU more.

Given the resilience of the member states' 'wait and see' approach to the dossier, the next events to watch out for are coming up in autumn: von der Leyen's State of the Union address in September and the Prague Summit in October. Neither might change the minds of EU capitals on fundamental reforms and enlargement. Yet, they could bring more clarity about the direction of travel in the future and maybe even some steps forward. At the present critical juncture, any bit of progress will count.

10 See also, Zuleeg, Fabian and Janis A. Emmanouilidis (2022), "Europe's moment of truth: united by adversity?", Brussels: European Policy Centre.

The rule of law monitoring and reporting in the EU

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The rule of law together with democracy, equality, human dignity, freedom and human rights is one of the fundamental values of the European Union (EU) enshrined in the provisions of the Treaty on EU.

Ever since the rise of "illiberal" regimes in Hungary and Poland, the political clashes over the respect for rule of law between Hungary and Poland, on the one hand, and the European Commission (EC), on the other, have been increasing. As an ever-growing number of illiberal policies were implemented, *curtailing the independence of the judiciary, pluralism and independence of the media, posing restrictions on civil society organisations and further shrinking the civic space*, the EC designated those actions as rule of law breaches or threats for which it only had one tool – Article 7, so-called the "nuclear" option of suspending the voting rights of Member States. As this was never a real option on the table, the EC designed a new tool: the *European Rule of Law Mechanism,* which "...provides a process for an annual dialogue between the EC, the Council and the European Parliament together with Member States, as well as, national parliaments, civil society and other stakeholders on the rule of law. The Rule of Law Report is the foundation of this new process."[11]

The European Rule of Law Mechanism and the *Rule of Law Report* are fairly new instruments – the first edition of the Rule of Law Report was published in the pandemic year 2020 and was covering developments from the beginning of the previous year. The creation of this mechanism was welcomed, primarily by civil society stakeholders which were advocating for the creation of effective rule of law instruments for a decade. Before dwelling on the analysis of the key lesson from the first three rule of law reports, it is important to make a very short contextual analysis of the rule of law monitoring done inside and outside the EU.

11 European Commission: "Rule of law of law mechanism", available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en. Accessed on June 4, 2022.

The EU has a lot of experience in both monitoring and building the rule of law standards in the accession countries, and one could argue, that it has been quite good at this enterprise, with the notable exception of failing at achieving irreversibility in the case of Hungary and Poland. The EC's accumulated knowledge and experience from the pre-accession rule of law monitoring, however, did not transcend to the monitoring of the rule of law in the Member States of the EU. Instead of adopting a "holistic" assessment approach which would take into account the other EU values, e.g. human rights and democracy, the EC opted for a rather *"technical" rule of law monitoring* that without other values is devoid of catching the substance - deviancies of the democracy and deficiency of legal order to uphold and preserve the fundamental rights.

As for the Rule of Law Report, some of the main grievances, in part of the country analysis, are that the Report is too *descriptive and fails to catch the complexity of rule of law issues.* The report parcellates those complex issues and thus, fails to depict them rightfully and correctly. This is visible, especially in the case of Hungary and Poland, where the previous iterations did not catch that the rule of law breaches are the product of deliberate and planned policies that in their essence contradict the foundations of the liberal democratic regimes and associated values like human rights, equality, etc.

Directly linked to the problem of descriptiveness, is the style of writing of the report. The EC employed the strategy of *"no-name shaming"* and in the wording of the report is carefully balancing not to offend the many Member States, outside of the already problematic two – Poland and Hungary. This "diplomatic" approach is the main cause why the report is too "technical" and deemed without substance.

The main criticism of the previous reports is that they did not provide *recommendations* to the national governments. This substantially weakened the previous reports and the whole European Rule of Law Mechanism because no one is really interested in the follow-up. Without clear recommendations, it is illusory to expect national governments to pick the conclusion for the report and to some action on their own. At the same time, civil society cannot meaningfully engage with rule of law follow-up because it does not have anything solid and concrete to hold governments accountable for not making progress with the respect to the rule of law.

Lastly, *the timing of the publishing* of reports in July, in the middle of summer vacations, significantly limits the possibility of a public discussion on the EC's conclusions at a national level and makes the report politically less relevant. By the autumn, when the EC presents the report to national parliaments, the political focus has typically shifted on something completely different.

In conclusion, it is very important to have the European Rule of Law Mechanism in place. It is not the best instrument, but gradually, it has a chance to be an important tool that would, if not correct the existing rule of law breaches, at least *have the power to prevent the future ones*. The prospects of fighting to preserve the democratic standards would not be the same without it and efforts would be much more limited. There is a good chance to develop and strengthen the Rule of Law Report further in order to make it a better analytical tool that would be able to deliver – clearly and soundly – a diagnosis of what is wrong with our democracies and what is lacking in order to have a better system for protecting and promoting human rights in the Member States and the EU as a whole.

The conditionality mechanism tested in Hungary

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This brief provides an insight of Regulation 2020/2092, which introduced *"the conditionality mechanism"* as a tool for protection of the rule of law principle in EU Member States, through Hungary's example.

Respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including minority rights, are the values upon which the European Union (EU) is founded. *These values*[12] have to be respected by the Member States, if they wish to benefit from the rights provided with the membership, such as the access to funds from the EU budget. *The rule of law principle* entails that all public powers act within the boundaries set by the law, in accordance with the values of democracy and respect for fundamental rights.

Aiming to protect EU values, and in particular, to respect the rule of law principle, Regulation 2020/2092[13] *(the Regulation) introduced "the conditionality mechanism".*[14]

The Regulation serves to protect the EU budget, in case of: endangering the independence of the judiciary; arbitrary and unlawful decisions by public authorities and limiting the availability and effectiveness of legal remedies. Where a breach of the rule of law principle is established in a Member State, that could affect or seriously risks affecting the sound financial management of the EU budget or the protection of the financial interests of the EU, then appropriate measures shall be taken. Those measures should be proportionate, they should address the determined problems and protect the budget or the financial interests of the EU, without going beyond what is necessary to achieve their goal. In each particular case, the EC shall take into account the following criteria: the nature, duration, seriousness and scope of the breach of the rule of law principle.[15]

12 Determined in Article 2 of the Treaty on the European Union.

13 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, CELEX 32020R2092, OJ L 433I , 22.12.2020, p. 1–10

14 Access to funds from the EU budget is conditional upon respecting the rule of law principle by Member States.

15 Communication from the Commission - Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget 2022/C 123/02 (C/2022/1382), CELEX 52022XC0318(02), OJ C 123, 18.3.2022, p. 12–37

(Non)application of the conditionality mechanism

Although the Regulation was adopted in December 2020 and its application began on 1 January 2021, *the EC had not activated the conditionality mechanism thus far.* The European Parliament (EP) expressed its disappointment of the fact that the practice of taking steps against the established violations of the rule of law principle in 2020, in its *Resolution*[16] *adopted in March 2021.* The EP stressed its concern for the increased misuse of funds from the EU budget in Hungary and Poland in its Resolution[17] adopted in June 2021. Finally, *the EP brought an action*[18] *against the EC before the European Court of Justice (ECJ),* where it claimed that the EC infringed its obligation to apply the Regulation in its entirety until the ECJ decided upon the actions filed by Hungary[19] and Poland[20]. *Both countries requested the ECJ to annul the Regulation,* based on the following arguments: (i) there is no legal basis for the Regulation, (ii) only Article 7 TEU grants the EU the power to examine and establish violations of the values contained in Article 2 TEU and impose sanctions and (iii) the Regulation breached the principle of legal certainty. The ECJ rejected these arguments and dismissed the actions, thus allowing the EC to activate the conditionality mechanism without any hesitation.

Despite the clear signal sent by other EU institutions, *the EC had decided not to initiate the mechanism nevertheless,* thus not playing a role in the election campaign in Hungary and awaiting the results of the parliamentary elections, held on 3 April 2022. The results were as expected – the coalition FIDESZ-KDNP won a majority of two-thirds and Prime Minister Viktor Orbán secured his fifth mandate.[21] Two days after announcing the election results, EC President Ursula von der Leyen informed the EP that they sent the letter of formal notification to Hungary to start the conditionality mechanism.[22]

On the other hand, Orbán delivered the following statement in his winning speech after the latest parliamentary elections: *"This victory will also be remembered, perhaps for the rest of our lives, because in our battle we were outnumbered like never before: the Hungarian left and the international left on all sides; the Brussels bureaucrats; all the money and every*

16 European Parliament resolution of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)), CELEX 52021IP0103,OJ C 494, 8.12.2021, p. 61–63

17 European Parliament resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP)), CELEX 52021IP0287, OJ C 67, 8.2.2022, p. 86–89

18 European Parliament v European Commission, C-657/21, 29 October 2021

19 Hungary v European Parliament, Council of the European Union, C-156/21, ECLI:EU:C:2022:97, 16 February 2022

20 Poland v European Parliament, Council of the European Union, C-157/21, ECLI:EU:C:2022:98, 16 February 2022

21 Data accessed on the official website of the National Election Office: https://vtr.valasztas.hu/ogy2022/

22 EU launches process to slash Hungary's funds over rule-of-law breaches', Lili Bayer, 5 April 2022, https://www.politico.eu/article/eu-commission-to-trigger-rule-of-law-budget-tool-against-hungary/

organisation in the Soros empire; the international mainstream media; and, towards the end, even the President of Ukraine."[23]

So what's next?

According to the Regulation, after sending the written notification (and a request for any additional information), entailing the facts and the grounds for the determined violation of the rule of law principle, the next step would be for the concerned Member State to submit its observations and perhaps give additional information, based on which, the EC shall make an assessment on the proposal of measures against the concerned Member State. Prior to submitting the proposal, the EC shall provide the Member State with the opportunity to submit its observations on the proportionality of the envisaged measures. If the EC decides to propose adequate measures nevertheless, the Council of the EU shall adopt that decision, acting by a qualified majority.

Taking into consideration EC's indolence when applying the Regulation and the numerous subsequent steps that should be taken, it is evident that the process of making funds from the EU budget for Hungary conditional upon the respect of the rule of law principle, shall be a long-lasting one. It only remains to wait and witness – did Orbán actually win the victory of a lifetime, or will *"the Brussels bureaucrats"* diminish his euphoria?

23 European Commission launches rule-of-law disciplinary procedure against Hungary', Jon Henley, 5 April 2022, https://www.theguardian.com/world/2022/apr/03/viktor-orban-expected-to-win-big-majority-in-hungarian-general-election

Rule of law in Poland – a testing opportunity for EU's mechanisms

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This brief provides an overview of the rule of law situation in Poland, as well as the measures taken by the European Union (EU), as a reaction to the violation of the judiciary's independence in this Member State.

Values such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including minority rights, are the EU's foundation.[24] Unfortunately, the Union is currently faced with a **backslide of one of the aforementioned values – the rule of law**, that can be defined as **"the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party".**[25] Rule of law backsliding represents a **serious existential threat to the EU,** because it leads to the establishment of electoral autocracies, where although elections are seemingly free, they result in continuous solidification of the position of one political party and the end effect is transformation in a one-party system. These tendencies are evident in Poland, a Member State of the EU which no longer has an independent judicial system, thus triggering the Union to initiate several mechanisms available for the solution of such problem.

24 Determined in Article 2 of the Treaty on the European Union.

25 The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values, Laurent PECH, Petra BÁRD, Policy Department for Citizens' Rights and Constitutional Affairs – Directorate-General for Internal Policies, PE 727.551, February 2022, p. 15.

The dialogue pursuant to the Rule of law framework

The application of the rule of law principle in Poland has been closely monitored for a long time, as deteriorations of the functioning of the legislative and electoral system, the independence of the judiciary and the degree of protection of citizens' fundamental rights have been identified. In October 2015, parliamentary elections were held and the opposition Law and Justice Party *(Prawo i Sprawiedliwość – PiS)* won.[26] Subsequently, the new government, as part of its conservative and Eurosceptic policy, made a number of controversial changes in the judiciary regarding the appointment of judges to the Constitutional Court, the appointment of public prosecutors, their promotion and sanctioning, disregard for Constitutional Court rulings, and lowering the retirement age for Supreme Court judges. In response to these actions, on 13 January 2016, the European Commission (EC) announced that it would conduct a *preliminary assessment of the situation pursuant to the Rule of Law Framework*.[27] This, then new, instrument, adopted in 2014, is defined as a *procedure preceding the activation of Article 7 of the Treaty on the EU (TEU)*[28], which consists of a continuous dialogue between the Member State concerned and the EC, consisting of three phases. Based on a thorough fact-check, the EC begins assessing whether there is a systemic threat to the rule of law. If such threat is established, then the EC shall initiate a dialogue with the Member State concerned, by sending a warning on compliance with the rule of law principle, in the form of an opinion. In the second phase, if the issue has not been resolved, the EC sends a public recommendation on compliance with the rule of law to the Member State concerned, setting a deadline for a final solution to the situation. The final stage of

26 'Poland elections: Conservatives secure decisive win', BBC, 26 October 2015, https://www.bbc.com/news/world-europe-34631826.

27 Readout by First Vice-President Timmermans of the College Meeting, European Commission Press Corner, 13 January 2016, Brussels, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_71.

28 1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide tosus pend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.
The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.
4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.
5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

this procedure is monitoring how the Member State implements the recommendation, and if it is not complied with, there is always the possibility of initiating a procedure in accordance with Article 7 TEU.[29]

In the first half of 2016, the Polish government made little progress in addressing the rule of law issues, thus the *EC adopted an opinion* expressing its concern regarding Poland's situation on 1 June 2016.[30] Despite the opinion given, the EC still considered that the key threats to the rule of law in Poland had not been removed, which is why, on 27 July 2016, it adopted a *recommendation on the rule of law*, aiming for effective functioning of the Constitutional Court in the country.[31] This document contains five concrete recommendations, which were supposed to be implemented within three months. However, the Polish Ministry of Foreign Affairs issued a statement characterizing these recommendations as interfering in Poland's internal affairs, violating the principles of objectivity, sovereignty, subsidiarity and national identity, concluding that the *EC did not have sufficient knowledge of the functioning of the Polish legal system and the work of the Constitutional Court*.[32] Hence, the Polish government boldly rejected EC's recommendation claiming it was groundless, that could be attributed to the support that Poland expects from Hungary, in case of initiation of the Article 7 TEU procedure.

Article 7 TEU procedure

Article 7 TEU includes a *prevention mechanism* in the event of a clear risk of serious breach of EU values (paragraph 1) and a *sanctioning mechanism* in the event of a serious and persistent breach of those values (paragraphs 2 and 3). In December 2017, the EC decided to initiate a procedure against Poland in accordance with the first paragraph of Article 7, because, according to it, several laws were adopted for a period of two years, that affect the overall structure of the judicial system in Poland, in a such manner that the legislature and the executive branch are trying to influence the composition, competencies, administration and functioning of the judicial branch.[33] This procedure was initiated by a *reasoned*

29 Speech: A new Rule of Law initiative, Viviane Reding, Vice-President, European Commission Press Corner, 11 March 2014, Strasbourg, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_14_202.

30 Commission adopts Rule of Law Opinion on the situation in Poland, European Commission Press Corner, 1 June 2016, Brussels, https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2015.

31 Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, C/2016/5703, OJ L 217, 12.8.2016, p. 53-68.

32 'Systemic Threat to the Rule of Law in Poland: What should the Commission do next?', Laurent Pech, VerfBlog, 31 October 2016, https://verfassungsblog.de/systemic-threat-to-the-rule-of-law-in-poland-what-should-the-commission-do-next/, DOI: 10.17176/20161031-160113.

33 Rule of Law: European Commission acts to defend judicial independence in Poland, European Commission Press Corner, 20 December 2017, Brussels, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367.

*proposal from the EC to the Council of the EU*34, which was supported by the European Parliament (EP) with a *Resolution, adopted on 1 March 2018*.[35] Although several hearings with the Polish authorities and the Council of the EU have taken place thus far, Member States are still avoiding the next step under Article 7 TEU - the moment of voting whether there is a risk of a serious breach of EU values.

Proceedings before the European Court of Justice

Given the indolence of the Council of the EU in the procedure under Article 7 TEU, the "arena" for the solution of the rule of law problem in Poland has been moved to the European Court of Justice (ECJ). Namely, the *EC initiated two proceedings against Poland before the ECJ*, claiming it does not comply with Article 19 (1) TEU.[36] The Commission underlines that Member States are obliged to provide a system of legal remedies ensuring effective legal protection in fields covered by EU law, thus national bodies deciding on the application or interpretation of EU law must meet the judicial independence requirement. The ECJ upheld the breach of the obligation contained in this provision in its judgments of June[37] and November[38] 2019.

In addition, *the EC initiated proceedings before the ECJ regarding the new disciplinary regime for judges*. This regime subject judges to disciplinary investigations, proceedings and sanctions based on the content of their rulings. By the judgment in this case, the ECJ reaffirmed that the independence of the judicial system in Poland had deteriorated and the obligations contained in Article 19 (1) TEU had been violated.[39]

34 Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM/2017/0835 final – 2017/0360 (NLE), CELEX 52017PC0835.

35 European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland [2018/2541 (RSP)], CELEX 52018IP0055, OJ C 129, 5.4.2019, p. 13.

36 1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

37 European Commission v Poland, C-619/18, ECLI:EU:C:2019:531, 24 June 2019.

38 European Commission v Poland, C-192/18, ECLI:EU:C:2019:924, 5 November 2019.

39 European Commission v Poland, C-791/19, ECLI:EU:C:2021:596, 15 July 2021.

Financial reward instead of sanctions

Aside from the abovementioned judgments, the ECJ has made additional decisions on preliminary rulings requests submitted by Polish judges, orders for interim measures, and currently there are ongoing proceedings against Poland before the Court.[40] Other than the mechanisms already used by the EU, *the question of the application of the new conditionality mechanism*[41] against Poland is still open. However, the EC decided to move in the opposite direction - *a plan for economic recovery* from the COVID-19 pandemic was approved this month, allowing Poland access to almost € 36 billion in grants and cheap loans from EU funds.[42] The EU financial support comes as a reward for Poland's efforts to help Ukraine during the war, as well as pursuant to the promise given of serious reforms to free the dependent judiciary. The EC has pledged to monitor them closely, albeit there is a *risk that this move could create a practice of "forgiving" rule of law violations* when it is clear that there is still much work to be done to achieve the final goal, which is why the EP has also expressed its concern by adopting a resolution[43] warning of this potential effect.

40 'Protecting Polish Judges from Political Control: A brief analysis of the ECJ's infringement ruling in Case C-791/19 (disciplinary regime for judges) and order in Case C-204/21 R (muzzle law)', Laurent Pech, VerfBlog, 20 July 2021, https://verfassungsblog.de/protecting-polish-judges-from-political-control/, DOI: 10.17176/20210720-140052-0.

41 Access to funds from the EU budget is conditional upon respecting the rule of law principle by Member States.

42 'EU gives Poland route to pandemic recovery cash', Zosia Wanat, Lili Bayer, Paola Tamma, 1 June 2022, https://www.politico.eu/article/eu-vows-deal-to-unlock-poland-pandemic-cash-hinges-recovery-fund-covid-19-on-reforms/.

43 European Parliament resolution of 9 June 2022 on the rule of law and the potential approval of the Polish national recovery plan (RRF) [2022/2703 (RSP)], RC-B9-0317/2022, 9 June 2022, Strabourg, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0240_EN.html.

The independence of the judiciary as a precondition to trust in the justice system

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Independence, quality and efficiency are essential parameters of an effective justice system. Well-functioning and fully independent justice systems are key to ensuring that justice works for the benefit of citizens and businesses.[44] Effective judicial systems are essential for mutual trust and for improving the investment climate and ensuring the sustainability of long-term economic growth, something we constantly forget. It is therefore precisely because of their impact on the economy and investments, that efficiency, quality and independence of justice systems are one of the priorities of the European Semester – the annual cycle of coordination of EU economic policy.[45]

The recommendations made by the European Commission (EC) in its latest report on Rule of Law[46] in order to improve the situation in some EU member states, and the data on perceptions from the EU Justice Scoreboard for 2022, should be a good roadmap for us as well, bearing in mind that an effective, quality and independent justice system is a prerequisite to the implementation of EU law, ensuring the rule of law and respect for the fundamental values on which the European Union is founded.

In this document, the focus is on the independence of judicial systems as a European standard and the perceptions of independence. Initially it gives an overview of the data from the EU Justice Scoreboard for 2022, regarding the perceptions of the judicial independence in the EU member states, than it gives a picture of the perceptions of judicial independence from the Balkan Barometer for 2022 for the Western Balkan countries, and in the end it gives a conclusion as to what our country should do to maintain and promote judicial independence.

44 "The 2022 Rule of Law Report" p. 2, <https://ec.europa.eu/info/sites/default/files/1_1_194062_communication_rol_en_0.pdf>.

45 Ec.europa.eu, „EU Justice Scoreboard – Questions and Answers, 2020", <https://ec.europa.eu/commission/presscorner/detail/el/qanda_20_1315>.

46 European Commission, The 2022 Rule of Law Report p. 1.

Judicial independence as a European standard

The independence of the judiciary is neither an end in itself nor a personal privilege of judges. The main function of independence is to guarantee the right of the individual, to define, protect and and execute his/her rights and freedoms by an independent and impartial judge. We can say that the independence of the judiciary as a whole is an essential condition of judicial independence, which allows judges to fulfil their role as guardians of people's rights and freedoms. From this point of view, the independence of judges is a prerequisite to the rule of law.[47]

The independence of the judiciary can be external, which reflects the relationship of the judiciary as a whole (and of judges as individuals) with political power – especially government, legislative power, political parties, economic centers of power, etc. The other aspect of judicial independence is the internal one expressed in the relations of each judge with other judges – the president of the court and the higher judges, i.e. independence in the performance of judicial functions in relation to the structure to which the judge belongs.[48]

In the context of EU law, judicial independence is an integral part of the judicial decision-making process and is a requirement stemming from Article 19 of the TEU[49] and from the right to an effective remedy before a court or tribunal provided for in Article 47 of the EU Charter of Fundamental Rights.[50]

The independence of the judiciary is also part of the guarantees set out in Article 6 – Right to a fair trial of the European Convention on Human Rights.[51]

The independence of the judiciary in the EU Member States through the prism of the EU Justice Scoreboard 2022 and the 2022 Rule of Law Report

The perceptions of independence shown in the EU Justice Scoreboard each year are of great importance, as the high perceived independence of the judiciary is most important for the confidence that justice in a society governed by the rule of law must inspire individuals and contribute to an improved business environment, as a perceived lack of independence can deter investments.[52]

47 Mr. Guido NEPPI-MODONA, "The Various Aspects of the External and Internal Independence of the Judiciary", p. 2,<https://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)035-e>.
48 Ibid., p. 2, 3.
49 Official Journal of the European Union, Treaty on European Union (OJ C 202, 7.6.2016).
50 Official Journal of the European Union, Charter of Fundamental Rights of the Euro
51 Council of Europe, European Convention on Human Rights.
52 European Commission, 'EU Justice Scoreboard 2020,<https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2022.pdf>.

Data from the EU Justice Scoreboard 2022 [53] and the 2022 Rule of Law Report[54] show that some European Union (EU) Member States still face challenges in the functioning of their justice systems.

In this regard, from the EU Justice Scoreboard 2022 (EU Justice Scoreboard 2022)[55] we can conclude that the perceptions of EU citizens regarding the independence of their judicial systems varies greatly. Namely, the perception of independence of the judiciary in more than half of the member states compared to 2021 is decreasing, yet the general public's perception of independence has improved in half of the member states facing specific challenges compared to 2016.

In Finland, Denmark, Austria, Luxembourg, the Netherlands and Germany, the level of perceived independence remains particularly high among the general public (over 75%), while in Slovakia, Poland and Croatia, the perception of independence is at a very low level, i.e. below 30%. The major reason for the perceived lack of independence of courts and judges was the interference or pressure from the government and politicians, and then pressure from economic or other specific interests. Compared to previous years, in several Member States, the two following reasons prevail for the perceived low independence.[56]

In order to improve the situation in the justice systems, including the independence of the judiciary, the European Commission in its latest Rule of Law Report[57] provides an overview of the work done and recommendations for the promotion of the situation in Member States, mainly in the following five areas: Judicial councils and procedures for the selection/promotion of judges as key safeguards for the independence of the judiciary; autonomy and independence of prosecutors as essential elements for the good functioning of the criminal justice system; disciplinary frameworks and accountability for judges and prosecutors; investment in the quality and efficiency of justice and lawyers as key actors for judicial systems based on the rule of law.

When it comes to the independence of the judiciary, the findings of the 2022 Rule of Law Report[58], concerning the Judicial Councils and the selection/promotion procedures for judges, are key.

53 Ibid.

54 European Commission, "The 2022 Rule of Law Report" p. 1, <https://ec.europa.eu/info/sites/default/files/1_1_194062_communication_rol_en_0.pdf>.

55 European Commission, EU Justice Scoreboard 2020, p. 9, p<https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2022.pdf>.

56 Ibid.

57 European Commission, "The 2022 Rule of Law Report" p. 1, <https://ec.europa.eu/info/sites/default/files/1_1_194062_communication_rol_en_0.pdf>.

58 Ibid.

Regarding the Judicial Councils, as guardians of the independence of the judiciary, the Report[59] notes legislative efforts to promote the independence of the Judicial Councils in Luxembourg, Croatia, Italy, Cyprus, the Netherlands and Sweden. The independence of the Judicial Councils leaves room for concern in Spain, Bulgaria, Ireland, Slovakia and Portugal. In Poland and Hungary, the situation is most worrying, where structural or systemic problems have not been resolved.

When it comes to the selection/promotion of judges, the Report[60] notes the improvement of selection procedures in Ireland, Croatia, the Czech Republic, Cyprus and the Netherlands. Malta, Greece and Austria have taken steps to improve these procedures, but challenges remain, particularly with regard to promotion to higher courts and the election of court presidents. Proceedings to promote judges to higher courts remain a key challenge to the independence of the judiciary in Latvia, Lithuania, Poland, Hungary and Bulgaria.

Perceptions of the independence of the Judiciary in the Western Balkan Countries – Balkan Barometer 2022

According to the perception of citizens surveyed in the Western Balkan countries, judicial systems remain the least independent of political influence: on average, two-thirds (66%) of them disagree with the claim that they are independent of political influence, while only 29% agree that they are independent.[61]

By country, in North Macedonia and Albania, perceptions of the independence of the judiciary from political influence are at the lowest level, compared to the remaining Western Balkan countries. Namely, in Kosovo, trust is highest, i.e. 56% believe the judiciary is independent. In Albania and North Macedonia, on the other hand, 78% believe that the judiciary is not independent of political influence. In terms of these perceptions, North Macedonia declined from the previous year, where distrust increased by 3%. In Montenegro, distrust in the judiciary's independence from political influence is 70%, while in Serbia it is 60%.[62]

59 Ibid.
60 Ibid.
61 "Balkan Barometer 2022, Public Opinion Analytical Report",<file:///C:/Users/Iva%20Conevska/Downloads/Balkan%20Barometer%202022%20-%20PO%20(1).pdf>.
62 Ibid.

How far out is our state in meeting European standards for judicial independence and what further?

The European Commission report notes a setback in the progress of judicial reforms for the Republic of North Macedonia in 2016[63]. This situation improved with the adoption of the Strategy for Reform of the Justice Sector 2017-2022 with an Action Plan, as well as by the efforts to enhance the legal framework in the area of judicial independence, above all the efforts in the preparation and adoption of a new Judicial Council Law and the amendments to the Law on Courts of 2019 that address the recommendations made by the Venice Commission. The European Commission's reports on our country for 2018[64], 2019[65] and 2020[66] , note progress in the reform processes in the judiciary. However, in the annual report for 2021[67], the European Commission was more reserved and and assessed the judiciary reform processes as "good progress".

When it comes to judicial independence, a major step forward was taken with the adoption of the 2017-2022 Justice Sector Reform Strategy with the Action Plan[68], in which independence and impartiality were one of the strategic objectives, as well as with the adoption of the new Judicial Council Act[69] and the amendments to the 2019 Courts Act[70] , which are in line with the opinions of the Venice Commission.[71]

The new Law on the Judicial Council[72] aims to promote the transparency of the Council, introducing disciplinary responsibility of the members of the Council, and qualitative,

63 European Commission, "2016 Communication on EU Enlargement Policy" ,<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/201B61109_strategy_paper_en.pdf>.

64 European Commission, "Commission Staff Working Document – The Republic of Macedonia 2018 Report Strasbourg, 17 April 2018,<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-the-former-yugoslav-republic-of-macedonia-report.pdf>.

65 European Commission, Commission Staff Working Document – North Macedonia 2019 Report, Brussels, 29 May 2019, p<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf>.

66 European Commission, Commission Staff Working Document – North Macedonia 2020 Report 6 October 2020,<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/north_macedonia_report_2020.pdf>.

67 European Commission, Commission Staff Working Document – North Macedonia 2021 Report , Strasbourg 19 October 2021,<https://ec.europa.eu/neighbourhood-enlargement/north-macedonia-report-2021_en>.

68 Ministry of Justice, Justice Sector Reform Strategy 2017-2022 with Action Plan, https://www.pravda.gov.mk/Upload/Documents/Strategija % 20i %20akciski%20plan_MK-web.pdf.

69 Law on the Judicial Council of the Republic of North Macedonia, "Official Gazette of the Republic of North Macedonia", No. 102/2019.

70 Law Amending the Law on Courts, "Official Gazette of the Republic of North Macedonia", no. 96/2019.

71 Richard Barrett et al., "Opinion on the Draft Amendments to the Law on Courts, Adopted by the Venice Commission at Its 117th Plenary Session", Opinion No 944/2018, Strasbourg, 17 December 2018, p<https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)033-e>.

72 Law on the Judicial Council of the Republic of North Macedonia, "Official Gazette of the Republic of North Macedonia", No. 102/2019.

criteria for assessing judges. With the adoption of the new law, the Judicial Council started drafting the bylaws to improve the system for assessing judges in accordance with the Law on Judicial Council. In order to implement the Law on Judicial Council, the Judicial Council adopted the Rules of Procedure of the Judicial Council, the Rules for the Selection of Judges from the ranks of the Academy for Judges and Public Prosecutors by specifying the selection procedure and the Rules for the Selection of Judges in the Higher Courts. In order to objectively and impartially assess judges, the Judicial Council adopted a Methodology for qualitative evaluation of judges and a Methodology for evaluation of court presidents. In this regard, Methodology was also prepared with indicators for complexity of cases and judge evaluation. Rules for the establishment of the commissions in the Judicial Council and rules for the composition of the commissions from the higher court were also adopted, which will also play a significant role in the process of evaluation according to the new methodology.[73]

In the area of financial independence of the judiciary, the measures in the Strategy to increase the judicial budget, are not implemented. The Law on Judicial Budget , with regard to the allocation of GDP to the judiciary, has not been implemented for years.[74] A new Law on the Judicial Budget is also being drafted.[75] Despite efforts,[76] judges' salaries they have not yet been increased.

In addition to all efforts made to promote the independence of the judiciary in line with European standards, citizens' trust in the Macedonian judiciary is still low. Trust is something that is built in the long run and requires the commitment of all key stakeholders.

Being in the process of developing a new strategy for the judiciary, it is crucial to make a cross-section of what has been done, what further needs to be done in the area of judicial independence and insert it in the new strategy. It is necessary to see the recommendations made to the member states in the Rule of Law Report in this section, as well as the recommendations of the European Commission for our country.

73 Judicial Council of the Republic of North Macedonia, "Address by the President of the Judicial Council at the Conference 'Promoting Reforms – Restoring Citizens' Trust', (29 March 2022),<shorturl.at/aHY35>.

74 Elena Georgievska and others, "The Implementation of the Justice Sector Reform Strategy (2018-2022) (Елена Георгиевска и други, „Спроведувањето на Стратегијата за реформа на правосудниот сектор (2018-2022)) in 2021: Shadow Report "Macedonian Association of Young Lawyers, (Извештај во сенка", Македонско здружение на млади правници) Skopje, 2022 година, http://blueprint.org.mk/wp-content/uploads/2022/04/MZMP-Godisen-izvestaj-FINALNO-ZA-WEB.pdf.

75 ENER, "Draft law amending the Law on the Judicial Budget", (ЕНЕР, „Предлог-закон за изменување и дополнување на законот за судскиот буџет"), 10 May 2021,<https://ener.gov.mk/Default.aspx?item=pub_regulation&subitem=view_reg_detail&itemid=67287>.

76 The Government adopted the package of legislative changes for higher salaries in the justice and prosecution system), official website of the Government of the Republic of North Macedonia, 25 May 2022, p<https://vlada.mk/node/28948>.

Moreover, it will be necessary to monitor the bylaws for the election of judges, the selection of judges in the higher courts and the implementation of the assessment methodologies, both by civil society organizations and the implementation of these bylaws andd in accordance with the new Strategy for judiciary, as these data will be crucial in the process of accession to the EU. Finally, additional efforts are needed from the state to enhance the financial independence of the judiciary.

The independence of the judiciary in North Macedonia: Where are we and where are we heading?

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This brief provides a summary of three reports analyzing the independence of the judiciary in the Republic of North Macedonia, and the resulting recommendations to improve the situation.

The path that the Republic of North Macedonia has chosen, leading to the European Union, includes the necessary internal reforms, but it is also important to closely follow the situation in the member states and the recommendations from the EU institutions. Therefore, it is necessary to refer to the Country Progress report that the European Commission produces every year, analyzing the degree of progress of the countries in different areas, followed by recommendations on how to improve the problematic aspects. Among other things, this report contains a reference to the state of the judiciary as part of Chapter 23. A more specific example of the analysis of the judicial sector is the Evaluation Report of the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, which reviews the situation of the judiciary in the Council of Europe member states and the observer states. In addition to these reports, it is important to consider domestic analyses. The Blueprint Group for Judicial Reform prepared an analysis for a comprehensive assessment of the implementation of the Strategy for Reform of the Judicial Sector (2017-2022), which, among other things, addresses the independence and impartiality of the judiciary, Strategy measures that have been implemented or not, and provides recommendations in this regard.

European Commission progress report on the Republic of North Macedonia in 2022

The EC annual Progress Report[77] on the Republic of North Macedonia, states that reforms in the judiciary, just as in last year's report[78], show some progress, and in this regard it emphasizes strengthened judicial independence.

However, the EC remains reticent about the role of the Judicial Council as guardian of the independence of the judiciary.[79] Although the 2020[80] report commended the proactive role of the Judicial Council, last year's[81] report emphasized the need for the Judicial Council to preserve the role of guardian of the judiciary. This year, the EC is more critical and notes that the Council needs to strengthen its role as guardian of the independence and impartiality of the judiciary, and to enhance transparency. On the other hand, the Council of Public Prosecutors should elaborate on its decisions and ensure regular access of the media to its sessions, thereby increasing transparency.[82]

The report emphasizes the importance of monitoring the commitment of the Judiciary Council and the Council of Public Prosecutors to enhance the independence of the judiciary and improve perceptions of the independence of the judicial sector. In this regard, the report notes the signing of the Open Judiciary Declaration in March this year is noted,[83], which is expected to improve transparency and increase public confidence in the judiciary.

Regarding the ACCMIS system, the report notes that accurate statistics need to be provided and the system needs to be fully functional.

77 EC, Republic of North Macedonia 2021 Report (European Commission 2022) [EC, 'Republic of North Macedonia 2021 Report' (European Commission 2022)] < > https://neighbourhood-enlargement.ec.europa.eu/north-macedonia-report-2022_en.

78 EC, Republic of North Macedonia 2021 Report (European Commission 2021) [EC, 'Republic of North Macedonia 2021 Report' (European Commission 2021)] < https://neighbourhood-enlargement.ec.europa.eu/north-macedonia-report-2021_en>.

79 Blueprint Group for Judicial Reform, "Commentary of the Blueprint Group for Judicial Reform on the European Commission's 2022 Report on the Judiciary – Where are we and what furthe", [Блупринт-група за реформи во правосудство,„Коментар на Блупринт-групата за правосудство на извештајот на Европската комисија 2022 година во делот на правосудството – до каде сме и што понатаму?",] 8 November 2022, http://blueprint.org.mk/wp-content/uploads/2022/11/Final_Blueprint-policy-document.pdf.

80 EC, Republic of North Macedonia, 2020 Report (European Commission 2020) [EC, 'Republic of North Macedonia 2020 Report' (European Commission 2020)] < https://neighbourhood-enlargement.ec.europa.eu/system/files/2020-10/north_macedonia_report_2020.pdf>.

81 EC, Republic of North Macedonia 2021 Report (European Commission 2021) [EC, 'Republic of North Macedonia 2021 Report' (European Commission 2021)] < https://neighbourhood-enlargement.ec.europa.eu/north-macedonia-report-2021_en>.

82 Blueprint Group for Judicial Reform, "Commentary of the Blueprint Group for Judicial Reform on the European Commission's 2022 Report on the Judiciary – Where are we and what furthe", [Блупринт-група за реформи во правосудство,„Коментар на Блупринт-групата за правосудство на извештајот на Европската комисија 2022 година во делот на правосудството – до каде сме и што понатаму?",]

83 "The Open Judiciary Council was founded and the Open Judiciary Declaration was signed", [Основан Советот за отворено судство и потпишана декларацијата за отворено судство], March 30, 2022, https://akademik.mk/osnovan-sovetot-za-otvoreno-sudstvo-i-potpishana-deklaratsijata-za-otvoreno-sudstvo/.

The report 'European Judicial Systems' – CEPEJ evaluation report'

At the beginning of October, the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe presented the main trends of the judicial systems of 44 European countries and three observer countries in the Report "European Judicial Systems – CEPEJ Evaluation Report - Evaluation Cycle 2022 (2020 data)".[84] This is the tenth evaluation report since CEPEJ was founded in 2002 and it enables measuring the effectiveness and quality of the judicial systems, according to data from 2020, in the countries under evaluation. The Republic of North Macedonia, as a member of the Council of Europe, received its own evaluation of the judicial system in this report.

In 2020, North Macedonia spent a total of 40,002,093 euros on the judicial budget or 19,27 euros per inhabitant, which is one of the lowest amounts in Europe and is much below the average of the Council of Europe (64,5 euros per inhabitant). The total represents 0.37% of gross domestic product, while the Council of Europe average is 0.3% of gross domestic product.[85] This percentage is much lower than the legal minimum to be granted to the judiciary (at least 0.8% of the gross domestic product),[86] which negatively affects the functioning and independence of the courts.

The allocation of the judicial budget is 77.4% to the courts, 21.8% to the prosecutor's offices and 0.8% for legal aid, which compared to the average European allocation is much more for the courts and less for legal aid.[87]

Although the legal aid budget has doubled from 0.08 euros to 0.16 euros per inhabitant, it still remains smaller than the Council of Europe average (3.08 euros per inhabitant).[88]

The Blueprint Group Analysis - comprehensive assessment of the implementation of the Strategy for Reform of the Judicial Sector (2017-2022)

The Blueprint group for Judicial Reform, which functions as an informal network of civil society organizations working and acting in the field of justice, has prepared an Analysis - comprehensive assessment of the implementation of the Strategy for the Reform of the Judicial Sector(2017-2022).[89] The analysis aims to provide a comprehensive and independent assessment of this process and to offer recommendations based on the findings, which could

84 European Commission for the Efficiency of Justice (CEPEJ), "Report European Judicial Systems – CEPEJ Evaluation Report – 2022 Evaluation Cycle (2020 Data)," 5 October 2022, https://rm.coe.int/cepej-fiche-pays-2020-22-e-web/1680a86276.

85 Same.

86 Law on the Judicial Budget ("Official Gazette of the Republic of Macedonia", no. 60/03, 37/06, 103/08 and 145/10).

87 European Commission for the Efficiency of Justice (CEPEJ), "Report European Judicial Systems – CEPEJ Evaluation Report – 2022 Evaluation Cycle (2020 Data)."

88 Same.

89 Ardita Abazi Imeri et al., "Analysis – Comprehensive Assessment of the Implementation of the Strategy for Reform of the Judicial Sector 2017-2022" (European Policy Institute – Skopje, 10 November 2022), https://bit.ly/3V2IP1e.

be inserted in the next Strategy for Reform of the Judicial Sector. In the section dedicated to the strategic objective of independence and impartiality, the Blueprint Group followed several measures envisaged in the Strategy and followed the digitalization plan.

The measures concerning the proper functioning of the ACCMIS system (Measures 2.1.5-1 and 2 of the Strategy) provide ways to prevent the misuse of the electronic case allocation system by: establishing a body for evaluation of the use of ACCMIS, conducting procedures for examining the ways of its use and amending the Law on Management of the Movement of Cases in Courts and performing regular annual audits of the functioning of ACCMIS by independent auditors. An inconsistency in the functioning and use of ACCMIS was identified by the ad hoc working group for evaluation of the use of ACCMIS, and the annual audits of the functioning of ACCMIS are regularly conducted, in accordance with the Strategy, through hiring independent auditors. A new Law on the Management of the Movement of Cases in Courts was adopted in February 2020, with a delayed application of three months from the date of its entry into force. Because of this, both measures are considered to be partially implemented.

Measures relating to a self-sufficient and sustainable judicial budget (Measures 2.1.6-1 and 2 of the Strategy) have not been met. Namely, the implementation of the Judicial Budget Law in the area of providing the legally stipulated minimum of 0.8% is still a serious problem. Although it has been noted as an anomaly that creates an imbalance between the judicial branch and the executive branch supported by the legislative branch, there was no attempt at all to implement these measures during the period provided for in the Strategy. This conclusion stems from the fact that the judicial budget in the past years was constantly below the stipulated minimum: the judicial budget amounted to 0.29% for 2019, to 0.39% for 2021, and 0.3% for 2022.[90]

The measure regarding the drafting of a new Court Rulebook has been partially implemented, as the working group was established and the text was drafted. But it has not yet been finalized, as it directly depends on provisions in several procedural laws, that are being amended.

The process of digitalization in the judiciary has been carried out over the past 12 months through the Council for Coordination of Information and Communication Technology in the Judiciary, which has conducted several activities during this period. However, the Blueprint Group concluded that the process is conducted in a partially transparent and inclusive manner, because there is no transparency in the reporting on the process and the steps that are being taken, and the citizens' associations, directly involved in the reform of the judiciary, are not included in this process.

90 Idem.

Conclusion

Analyzed international and domestic reports, obviously show that there is some progress in the field of independence of the judiciary, but we are far from achieving the level required by the EU, and even the measures for independence and impartiality of the Strategy for Reform of the Judicial Sector (2017-2022) are not fully met. We have a long period of EU accession negotiations ahead of us, and with the new Strategy for Reform of the Judicial Sector we could improve the state of independence of the judiciary and thus the perception of Macedonian citizens and the EU on this issue. However, as the EU does not have a mechanism to exclude a member state from the Union [91] member states are not strongly motivated to improve the rule of law situation at home. This is where the EU institutions come in with mechanisms such as the conditionality of the funds provided to them by the Union, to strengthen their position and to motivate member states and candidate countries to improve.

91 Alice Tidey, "Member States Can Leave the EU, but Can the Bloc Kick One of Them Out?," Euronews, 12 April 2022, https://www.euronews.com/my-europe/2022/04/08/member-states-can-leave-the-eu-but-can-the-bloc-kick-one-of-them-out.

Regulation and combating hate speech in European Union and Croatia - a human rights approach?

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This brief provides insight into the latest legal and policy framework on combating hate speech, specially concerning hate speech online, in the European Union and Croatia, a newest member state. It is focusing on the human rights approach to combat hate speech and promote freedom of expression, bringing some concerns and possible future solutions based on the human rights approach.

To point out the fact that hate speech is on the rise in Europe and globally, especially in the online environment, is not news any more. Also, the main debate in Europe is not directed on should we counter it, but rather on how and by whom we can and should counter it. The questions of responsibility for user generated content, roles and responsibilities of social media platforms, development of artificial intelligence and relaying on it in content moderation, hate speech and disinformation, victims support and effects of hate speech on social cohesion and democracy are all in focus of discussion and searching for policy solutions for this issue. The public discussion intensified even more when Elon Musk, who called himself "freedom of expression absolutist" bought Twitter in October 2022, and when research results conclusively showed that there was an immediate spike in Tweets using hate terms in the period leading up to Musk taking over the company.[92] When dealing with hate speech issues in public debates, academic and civil society work, as well as in the policy processes, more and larger attention is being given to the recognition of consequences of hate speech for individuals and society, recognising the complexity and multidimensionality of hate speech and its relations to hate crimes, as well as approaching the phenomena from a more victim centered approach.

Although all these questions raise serious and more complex issues and new concerns in a fast, dynamic, larger, highly commercialized and global environment of social media and big tech, the hate speech issues are fundamentally rooted in the realm of human rights, specifically on protection of freedom of expression, non-discrimination and prohibitions of abuse of rights. Therefore, human rights are the framework where answers should be found.

92 Montclair State University: Hate Speech Spikes on Twitter After Elon Musk Acquires the Platform, available at: https://www.montclair.edu/school-of-communication-and-media/wp-content/uploads/sites/20/2022/11/Montclair-State-SCM-Study-Increases-in-Twitter-Hate-Speech-After-Elon-Musks-Acquisition.pdf

The Council of Europe and human rights approach to hate speech

The Council of Europe has worked in multiple manners to counter hate speech in past years form freedom of expression perspective, focusing on youth, media and internet literacy, media regulation and co-operation with member states in preparing, assessing, reviewing and bringing in line with the European Convention on Human Rights any laws and practices that place restrictions on freedom of expression.[93] The latest Recommendation of the Committee of Ministers to member States on combating hate speech form May 2022 is recognising a need for comprehensive approach in order to prevent and combat online and offline hate speech effectively, comprising a coherent strategy and a wide-ranging set of legal and non-legal measures that take due account of specific situations and broader contexts[94]. The recommendation aims to provide guidance to the governments of member States, public officials, elected bodies and political parties, internet intermediaries, media, civil society organization - to all key stakeholders that are "faced with the complex task of preventing and combating hate speech, including in the online environment"[95]. The recommendations provide a framework of actions for human rights based approach to countering hate speech, that encompasses actions directed on legal framework, and especially important focus of legislation regarding online hate speech that tackles the roles and responsibilities of internet intermediaries, the duties and responsibilities of State and non-State actors in addressing online hate speech. Equally important, the Recommendation also refers to actions on awareness raising, education, training and use of counter-speech and alternative speech, support for those targeted by hate speech, monitoring and analysis of hate speech as well as national coordination and international cooperation. This Recommendation, together with its Explanatory memorandum offers some comprehensive and practical guidelines that clearly determines future development of human rights approach to countering hate speech for 46 Council of Europe member states.

93 Council of Europe, Hate speech, available at: https://www.coe.int/en/web/freedom-expression/hate-speech

94 Council of Europe, Combating Hate Speech, Recommendation CM/Rec(2022)161 of the Committee of Ministers to member States on combating hate speech, available at: https://rm.coe.int/prems-083822-gbr-2018-recommendation-on-combating-hate-speech-memorand/1680a70b37

95 Ibid.

The EU regulation and work on hate speech

The European Commission work on combating hate speech departs from European Union fundamental rights and values - respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Hatred and intolerance in all forms are incompatible with these rights and values.[96]

The Framework Decision on combating certain forms of expressions of racism and xenophobia form 2008 aims to ensure that serious manifestations of racism and xenophobia are punishable by effective, proportionate and dissuasive criminal sanctions across the EU, and requires Member States to criminalize hate speech, i.e. the public incitement to violence or hatred, on grounds of race, color, religion, descent or national or ethnic origin. It defines illegal hate speech - the forms of conduct punishable as criminal offenses as:

"public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, color, descent, religion or belief, or national or ethnic origin; and publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes (...) when the conduct is carried out in a manner likely to incite violence."[97] The Framework Decision is a ground document a broader set of EU actions to combat illegal hate speech and violent extremist ideologies and terrorism online, including the EU Code of Conduct on countering illegal hate speech online, the Regulation on addressing terrorist content online and the Commission initiative to include hate speech and hate crime in the list of 'EU crimes' in the Treaty.

The latest initiative, the process to extend the list of EU crimes to illegal hate speech and hate crime, aims to bring forward an extension of the list of areas of crime ('EU crimes'), laid down in Article 83(1) TFEU, to hate speech and hate crime, whether because of race, religion, gender or sexuality.[98] It is the initiative that emphasizes hate speech and hate crime as particularly serious crimes because of their harmful impacts on fundamental rights, on the individuals and on society at large, undermining the foundations of the EU, and therefore, it should be fought with all available means, including through criminal law.[99]

96 European Commission, Combating hate speech and hate crime: Measures to prevent and combat different forms of hatred and to protect victims, available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination-0/racism-and-xenophobia/combating-hate-speech-and-hate-crime_en

97 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l33178

98 Communication from the Commission to the European Parliament and the Council: A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime, available at: https://commission.europa.eu/system/files/2021-12/1_1_178542_comm_eu_crimes_en.pdf

99 European Commission, Extending EU crimes to hate speech and hate crime: The Commission initiative to include hate speech and hate crime in the list of 'EU crimes' in the Treaty, available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination-0/racism-and-xenophobia/extending-eu-crimes-hate-speech-and-hate-crime_en

The adoption of such a decision would be a first step to creating the legal basis necessary to adopt, in a second step, a common legal framework to combat hate speech and hate crime across the EU[100].

Other measures except combating hate speech by criminal means have also been on Commision agenda for the last couple of years. From 2016, the Commission agreed with Facebook, Microsoft, Twitter and YouTube a "Code of conduct on countering illegal hate speech online"[101]. From there on, more social media companies join the Code: Instagram, Snapchat, Dailymotion, Jeuxvideo.com, TikTok, Linked, while Rakuten Viber and Twitch announced their participation in the Code of Conduct in 2022.[102] This means the Code now covers 96% of the EU market share of online platforms that may be affected by hateful content.[103]

The Code of Conduct requests that IT companies have rules and community standards that prohibit hate speech and put in place systems and teams to review content that is reported to violate these standards.[104] The main focus of the Code is on removing or disabling access to illegal hate speech content on IT companies services and assess in 24 hours the majority of notifications according to national law transposing EU Framework Decision 2008/913/JHA. The Conduct also asserts encouraging the provision of notices and flagging of content that promotes incitement to violence and hateful conduct at scale by experts, particularly via partnerships with CSOs, especially within the network of trusted flaggers and enhancing cooperation with national authorities and CSOs.[105] Moreover, there are obligations of IT companies concerning work with trusted flaggers on promoting independent counter-narratives and educational programmes and to promote transparency towards users as well as to the general public.

The Code of Conduct is based on close cooperation between the European Commission, IT companies, civil society organizations (CSOs) and national authorities. All stakeholders meet regularly under the umbrella of the High Level Group on combatting hate speech and hate crime, to discuss challenges and progress.[106]

100 Ibid.

101 European Commission, The EU Code of conduct on countering illegal hate speech online: The robust response provided by the European Union, available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination-0/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en

102 Ibid.

103 European Commission, Information note: Progress on combating hate speech online through the EU Code of conduct 2016-2019, available at: https://commission.europa.eu/system/files/2020-03/assessment_of_the_code_of_conduct_on_hate_speech_on_line_-_state_of_play___0.pdf

104 Ibid.

105 Ibid.

106 European Commission, EU Code of Conduct against online hate speech: latest evaluation shows slowdown in progress, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7109

As Code of conduct is currently one of the important policy activities of the Commission, in order to evaluate its implementation, the Commission has set up regular monitoring exercises in collaboration with a network of organizations located in the different EU countries, that test how the IT companies are implementing the commitments in the Code. From 2016 until today, 7 monitoring exercises were conducted, and more than 30 organizations from 21 Member States took part in these exercises and sent notifications to the IT companies based on same shared methodology[107].

As much as the Code "has proven to be an essential tool for forging closer cooperation among key stakeholders in addressing hate speech"[108], the results from 7th monitoring exercise conducted in spring 2022 unfortunately show a decrease in companies' notice-and-action results: the number of notifications reviewed by the companies within 24 hours dropped as compared to the last two monitoring exercises.[109] This decrease is worrying, especially in the context of the earlier addressed need to improve the efforts of the social media companies to remove illegal content notified to them in a timely manner as well as communication efforts in order to make the process of notification and removal of illegal hate speech more transparent and user friendly.[110] Also, as removal is not the only way to counter hate speech online, and it is not the only obligation for social media companies engaged in Code of Conduct, the civil society organizations involved in monitoring of Code of Conduct called social media companies not just to urgently improve the reporting and communication management, but also to invest more resources into scientific research on, and data analysis of, hate speech phenomena in order to increase the understanding of trends in this field.[111]

Although Code of Conduct is been expanded to more IT companies and some improvements through Joint statement by trusted flagger organizations and IT companies for an action framework on enhanced cooperation[112] are made based on the above mentioned

107 European Commission, Countering illegal hate speech online: 7th evaluation of the Code of Conduct, available at: https://commission.europa.eu/system/files/2022-12/Factsheet%20-%207th%20monitoring%20round%20of%20the%20Code%20of%20Conduct.pdf

108 European Commission, Joint statement by trusted flagger organisations and IT companies for an action framework on enhanced cooperation – Annex to the Code of conduct, available at: https://commission.europa.eu/system/files/2022-12/Annex%20to%20the%20Code%20%E2%80%93%20Joint%20statement%20by%20IT%20companies%20and%20trusted%20flagger%20organisations%20to%20enhance%20cooperation.pdf

109 European Commission, EU Code of Conduct against online hate speech: latest evaluation shows slowdown in progress,available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7109

110 Platforms, Experts, Tools: Specialized Cyber-Activists Network: Policy Recommendations, available at: http://scan-project.eu/wp-content/uploads/sCAN_recommendations_paper_final.pdf

111 Ibid.

112 European Commission, Joint statement by trusted flagger organisations and IT companies for an action framework on enhanced cooperation – Annex to the Code of conduct, available at: https://commission.europa.eu/system/files/2022-12/Annex%20to%20the%20Code%20%E2%80%93%20Joint%20statement%20by%20IT%20companies%20and%20trusted%20flagger%20organisations%20to%20enhance%20cooperation.pdf

challenges, it stays insufficient to answer growing need for more responsibility of social media platforms on combination hate speech, as their influence, profit and power is growing. The case of Twitter mentioned in the introduction, as well as results of last monitoring exercise of Code of Conduct that confirm the regression clearly testify to this.

Therefore, building on Code of Conduct and its monitoring exercise, the obligations for online intermediary services related to clear notice and action systems, priority treatment of notices from trusted flaggers, feedback on notices to users and extensive transparency obligations are included in new Digital Services Act[113], adopted by the European Parliament on 5 July 2022, that will apply from January 2024. The importance of DSA is in the fact that it sets obligations to social media companies concerning transparency and accountability on how they offer content through their algorithms and to take legal responsibility when hate speech is detected on their platforms. But what is an important improvement toward a more comprehensive and human rights based approach in DSA, are principles aiming to protect freedom of expression by ensuring that online platforms are not incentivised to over-police people's online speech. Many civil society organizations welcomed the EU's decision to uphold the conditional liability regime and combine it with a mandatory 'notice-and-action' system that should enable users to flag illegal content and complain about the platforms' inaction.[114] The transparency, accountability and user friendliness of the mechanism of flagging hate speech content on social media as well as cooperation and strengthening the role of trusted flaggers, will be of significant importance in implementation of DSA. If the DSA is properly enforced, platforms with more than 45 million users like Google and Facebook will be obliged to conduct risk assessments, deploy risk mitigation measures and do yearly independent audits that will help identify potential human rights violations.[115] For those reasons, the DSA is a big step forward in combating hate speech online and placing greater responsibility on internet intermediaries to take responsibility for hate speech and other human rights violations on big social media, that could have a big impact not just in EU member states, but potentially other countries too. The key steps for the upcoming period is proper implementation of DA provisions in all member states and establishing a proper cooperation and engagement with all stakeholders in monitoring of implementation and impact of DSA on human rights.

113 European Commision, The Digital Services Act: ensuring a safe and accountable online environment, available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en

114 EDRi, The DSA fails to reign in the most harmful digital platform businesses – but it is still useful, available at: https://edri.org/our-work/the-dsa-fails-to-reign-in-the-most-harmful-digital-platform-businesses-but-it-is-still-useful/

115 EDRi, EU Digital Services Act brings us closer to an inclusive, equitable internet, available at: https://edri.org/our-work/eu-digital-services-act-brings-us-closer-to-an-inclusive-equitable-internet/

Regulation and combating hate speech in Croatia

Hate speech in the Croatian legal system is incriminated through a number of provisions (criminal and misdemeanour), but regulation can also be found in the mandate of independent regulatory and self- regulatory bodies. Although there is no single provision regulating all forms of hate speech, hate speech in Croatia is nevertheless substantially regulated[116]. The largest issue, similar to other EU countries, is regulation of hate speech online.

In 2019, there was an initiative in the Ministry of Justice for the enactment of the Act on the Prevention of Misconduct on Social Networks[117], that would rely on existing practices within the EU and thus on the German legislation (NetzDG) which has so far proved to have significant shortcomings in its implementation[118]. Therefore, there were concerns that the introduction of such a legislative solution in Croatia would have serious consequences on the freedom of expression and could lead to excessive removal of content[119]. Beyond the announcement to plan the adoption of this legislation, to this day the Act on the Prevention of Misconduct on Social Networks has not yet been adopted and with the DSA regulation, these kinds of solutions that aim to regulate global online IT companies only on national level provisions seem even more flawed and ineffective.

The newest change in hate speech regulation was in 2021, when the new Electronic Media Act was adapted, and a provision on the responsibility of publishers of electronic publications for user-generated content was added, aimed to to contribute to combating hate speech online. However, the provision is laid out in such a way that publishers are obliged to register users and warn them of the rules of commenting instead of prescribing that publishers are responsible for moderating user-generated content and limiting the spread of hate speech in accordance with the standards of protection of freedom of expression. Therefore, the extent to which this provision will contribute to the suppression of hate speech and the protection of freedom of expression online is questionable.[120]

116 Human Rights House Zagreb, Hate speech and Euroscepticism: Croatian national report, available at: https://cilvektiesibas.org.lv/media/attachments/14/09/2022/Hate_speech_and_EuroscepticismCRO_ACaljAf.pdf

117 Form of preliminary assessment of the impact of regulations for the Act on the Prevention of Misconduct on Social Networks, available at: https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=9137

118 Human Rights Watch. Germany: Flawed Social Media Law, available at: https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law

119 Đaković, T. Ljudska prava u digitalnom okruženju, Kuća ljudskih prava Zagreb, available at: https://www.kucaljudskihprava.hr/wp-content/uploads/2019/12/TI-Ljudska-prava-u-digitalnom-okruzenju_edit2411.pdf

120 Human Rights House Zagreb, Human Rights in Croatia: Overview of 2021, available at: https://www.kucaljudskihprava.hr/wp-content/uploads/2022/07/KLJP_GI2021-EN_Online.pdf

With respect to public attitudes and trends, freedom of expression in Croatia continues to be negatively affected by occurrences of hate speech in public discourse, where the most often targets are Serbs, LGBT+ persons, Roma and migrants[121]. Social problems such as intolerance, hate speech, discrimination, and hate-motivated violence are addressed only reactively and superficially - there is a lack of comprehensive policy solutions to these issues, especially taking into account that the National Plan for the Protection and Promotion of Human Rights and Combating Discrimination for the period 2021-2027 has not yet been adopted, while the previous National Program for the Protection and Promotion of Human Rights expired in 2016, leading Croatia into its sixth year without a valid basic public policy in the field of human rights.[122]

As Croatia is a member of the EU, it is also one of the countries where Code of conduct on countering illegal hate speech online is implemented and monitoring exercises were conducted. Also, the DSA will be significant for Croatia in regulating hate speech online. However, Croatia still lacks a holistic approach to combating hate speech, one that includes maintaining comprehensive dialogue with important stakeholders (independent human rights institutions, media, civil society) aim of recognising, monitoring, preventing, raising awareness and activating citizens, and empowering victims, as well as strengthening prosecution and regulatory mechanisms[123].

121 European Commission against Racism and Intolerance. ECRI Report on Croatia, fifth monitoring cycle, adopted on 21 March 2018, ECRI Council of Europe, Strasbourg, available at: https://rm.coe.int/fifth-report-on-croatia/16808b57be

122 Human Rights House Zagreb, Human Rights in Croatia: Overview of 2021, available at: https://www.kucaljudskihprava.hr/wp-content/uploads/2022/07/KLJP_GI2021-EN_Online.pdf

123 Human Rights House Zagreb, Hate speech and Euroscepticism: Croatian national report, available at: https://cilvektiesibas.org.lv/media/attachments/14/09/2022/Hate_speech_and_EuroscepticismCRO_ACaljAf.pdf

Raising the minimum labor standards in the European Union: transparent and predictable working conditions and a work-life balance

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This brief provides an overview of the legal instruments of the EU on transparent and predictable working conditions and a work-life balance with a transposition deadline that expired in August 2022.

On 20 June 2019, the European Parliament and the Council adopted two important directives to raise minimum labor standards in the European Union – Directive 2019/1152 on transparent and predictable working conditions in the European Union[124] (EU Directive 2019/1152) and Directive 2019/1158 on work-life balance for parent(s) and carer(s)[125] (EU Directive 2019/1158). The deadline for transposition of EU Directive 2019/1152 expired on August 1, 2022 and the deadline for transposition of EU Directive 2019/1152 expired on August 2, 2022. This brief treats the main novelties and the importance of these two directives, and aspects important for our country regarding their harmonization.

124 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32019L1152.

125 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex-:32019L1158.

TRANSPARENT AND PREDICTABLE WORKING CONDITIONS

What does the EU directive 2019/1152 foresee?

The EU directive 2019/1152 advances the minimum standards of the EU for transparency and predictability in relation to working conditions. It covers all workers and employers who have an employment relationship or employment contract provided by law, collective agreement, or practice, with a few exceptions that are not of major importance for North Macedonia.[126] The matter regulating the directive consists of three main pillars – information on the employment relation, minimum working conditions and horizontal provisions.

The directive prescribes an obligation to employers **to notify employees of key aspects of the employment relation**, either in written form, or, under certain conditions in electronic form.[127] It proscribes the information to be provided (as detailed in Article 4 paragraph 2), when (partly during a period starting on the first working day and ending no later than the seventh calendar day, and partly within one month of the first working day.) (Article 5 paragraph 1), in what form (easily understandable, complete and transparent, with the possibility for Member States to devote a website to share this information) (Article 5 paragraph 2 and 3), and how this employer's obligation continues to apply in case of changes in the employment relation (Article 6), and obligations in case of work in another Member State or in a third country (Article 7).

Several **minimum working conditions are foreseen**. A **maximum duration of probationary period** of six months is foreseen and respectively proportional duration for shorter contracts, and the possibility of longer duration, but only in specific conditions. Thereafter, the employer shall not prohibit the employee from having other employment outside the work schedule or subject the employee to ill-treatment due to having such so-called **parallel employment**. It is left to the Member States to provide for conditions in which parallel employment would be considered to be incompatible with the existing one and limited only to objective grounds tied to health and safety, protection of trade secrets, integrity of the public service or avoidance of conflict of interest. There shall be a certain minimum level of work predictability determined through the so-called **reference hours and days** and the employee shall be informed by the employer that they will have to work within a period that can be considered a reasonable time limit in accordance with domestic laws, collective agreements or practices. It is also stipulated that the Member State shall find a way to provide compensation for the employee if the employer cancels the announced work outside the reasonable period and does not compensate them for their work. The

126 Some of the provisions do not cover sailors and fishermen.

127 According to Article 3 of this directive, electronic sharing of these informations will be in accordance with this directive only if the information is provided and transmitted on paper or, provided that the information is accessible to the worker, that it can be stored and printed, and that the employer retains proof of transmission or receipt, in electronic form.

provisions in the directive concerning countries allowing the conclusion of **contracts for hiring employees for works for which there is no permanent need** are also significant. The directive envisions that all Member States allowing the conclusion of such contracts must take one or more of the following measures in order to prevent abuses: to strictly limit the possibility to use and the duration of such contracts, to introduce a conciliatory presumption of the existence of a work contract with a minimum number of working hours based on the average of working hours over a specifically determined period, i.e. to consider that there is a work contract with such working hours, unless the employer fails to prove otherwise or to introduce another equivalent measure ensuring effective protection against abuse. There are also obligations of the employer for a reasonable and written explanation within one month for the rejection of the requests of an employee for a more predictable or safer workplace after the expiry of the probationary period or, in any case, after six months from the start of the employment relation. Any training the employee has to complete in order to be able to perform the work shall be free of charge, counted as part of the working time and, if possible, during working hours. Any collective agreement concluded shall respect the minimum working conditions provided for by this Directive, as they will be transposed into domestic law.

The Directive also provides for several **horizontal provisions**. The right to redress in the case of infringements of the minimum rights, protection against worse treatment and consequences due to the requirement of compliance with the provisions arising from this directive, protection in the event of dismissal due to the use of the rights arising from this directive, including the transfer of the burden of proof to the employer if the employee makes it probable that the dismissal or equivalent measure was taken due to the use of the rights arising from this directive. It is also necessary to introduce effective, proportionate and deterrent penalties for infringements of rights arising from this directive.

How does the transposition of EU directive 2019/1152 in the Member States proceed?

The transposition of this Directive has been done by the Member States in various ways, but the most common is by revising the domestic *lex generalis* for work and employment relations. Due to failure to take any measures to transpose this Directive or failure to inform in relation to them, the European Commission initiated infringement proceedings on 20 September 2022 against Austria, Belgium,[128] Greece, Denmark, Ireland, Cyprus, Luxembourg, Malta,[129] Poland, Portugal, Romania,[130] Slovakia,[131] Slovenia, Hungary, Finland, France, Croatia, the Czech Republic and Spain. Under the founding agreements, the EC sent a formal notice of initiation of procedure to these countries on the basis of Article 258 TFEU – Article 260(3) TFEU.

Why is the EU directive 2019/1152 significant?

This Directive is significant because it modernizes and enhances labor legislation in the EU, by considering new forms of work and by providing for new rights for employees and obligations for employers. This Directive is a significant step forward compared to its predecessor. Namely, EU Directive 2019/1152 came as a result of an evaluation of Council Directive 91/533/EEC on the obligations of employers to inform employees about the terms of the contract or employment relation[132] (Council Directive 91/533/EEC), which EU Directive 2019/1152 put out of force as of 31 July 2022. The evaluation carried out showed that, although still relevant and highly appreciated, Council Directive 91/533/EEC does not cover modern forms of labor relations, employment contracts and, in general, greater potential for its effectiveness is required.[133] That is also where the greatest potential for contributing to this directive lies.

128 On 31 October 2022, Belgium enacted a law partly transposing this directive.

129 On 21 October 2022, Malta enacted amendments to the Law on Labor and Industrial Relations with the aim of transposing this directive.

130 Romania has made legislative changes on two occasions in order to transpose this directive, on 19 October 2022 amendments to the Code on Labor Relations and to the Governmental State of Emergency Decree No. 57/2019 regarding the Administrative Code, and then on 10 November 2022 to the Code on Labor Relations and to the Law on Social Dialogue.

131 On 29 October 2022, Slovakia enacted a law amending the Labor Law in order to transpose this directive.

132 Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31991L0533.

133 Commission Staff Working Document, REFIT Evaluation of the 'Written Statement Directive' (Directive 91/533/EEC) {C(2017) 2611 final}, https://ec.europa.eu/social/BlobServlet?docId=17658&langId=en.

What is important for the EU Directive 2019/1152 and North Macedonia?

Compliance with this Directive is important for North Macedonia due to the ongoing EU accession process in which compliance with the entire European *acquis* will be monitored. Moreover, Macedonian labor legislation lags behind contemporary labor legislations in terms of ensuring recognition of different types of employment and modern jobs, but also recognition of the status of employee. Hence, changes to the labor legislation in this direction are needed even without the ongoing EU accession process.

But the greatest significance of this directive for North Macedonia lies in its potential to help with some of the key challenges to the protection of employees and their rights in the country, such as abuses of service contracts and the inequality of arms before the courts in the event of a labor dispute. With regard to the former, the measures required by the directive to prevent abuses in connection with contracts for hiring of employees and for works for which there is no permanent need are significant. Compliance with this directive, in particular the introduction of the so-called conciliatory presumption of the existence of a labor contract, will help a lot in dealing with this often-used form of abuse for the denial of labor rights. In addition to this, the provision providing for the transfer of the burden of proof to the employer in the case of a dismissal or similar measure is significant if the employee makes it probable that the dismissal or similar measure was applied due to the use of the rights arising from this directive. This will significantly help the position of employees before the courts and can be expected to act empoweringly towards their potential and motivation to practice their own rights.

WORK-LIFE BALANCE

What does the EU directive 2019/1158 foresee?

With the EU Directive 2019/1158, the EU has set the ground for regulation and is introducing new rights within the area that is crucial for gender equality as a declared value of the Union, which transpires with the time in which it is enacted. This directive governs several main substantive issues, safeguards and other issues. In doing so, the personnel scope of the directive is extended to all employees, i.e. both those who have an employment contract and those who are in employment relation, including part-time employees, fixed-term employees and those who are engaged through temporary employment agencies.

The substantive issues governed by EU Directive 2019/1158 are paternity leave (Article 4), parental leave (Article 5), carer leave (Article 6), leave in connection with events caused by force majeure (Article 7), reimbursements for these leaves (Article 8), flexible working arrangements (Article 9), the right to return to the same or equivalent place and rights as before the leave (Article 10), protection against discrimination due to the use of rights arising from this Directive (Article 11), prohibition of lay-off due to the use of rights arising from this Directive or requested protection of these rights (Article 12 paragraph 1 and 2). Here we will keep only to paternity leave, parental leave and carer leave, as absolute rights that do not depend on the approval of the employer and as key novelties from this directive. Regarding *paternity leave,* at least ten working days of leave related to the birth of the child are foreseen, leaving it up to the Member States to decide whether they will give the employee the opportunity to use part of the leave before the birth and/or in a flexible manner. The employee is entitled to paternity leave regardless of marital or family status (for example, extramarital or family union) and regardless of how long he previously worked for that employer, and during the leave the employee must be paid at least as per the rules for payment during sick leave. *Parental leave* (Article 5) is defined as individual, non-transferable, entitlement to four months' leave, of which two are paid months, which must be used up to the age which will be determined by the national legislator, but no later than the age of eight of the child. The national legislator can regulate the ways of using this leave more closely, for example, how long a parent should previously work for that employer (by not being able to exceed the minimum threshold of one year), how much compensation will be received for this leave (whereby the arrangement must be made in such a way as to allow the use of this leave by both parents) or why the employer may request a postponement of the use of this leave, whereby conditions must be tied to a serious disruption of the employer's work. The domestic legislator has an obligation to establish rules for adjustment in cases of use of this leave by adoptive parents, parents with disabilities and parents of a child with disabilities or long-term illness. **Carer leave** is a leave for the purpose of providing personal care or support to a relative or a person with whom the employee lives in the same household and who needs significant assistance or support for a serious medical reason (defined by domestic legislation).

This leave amounts to five working days each year for each employee, and it needs to be grounded on real need under domestic law and practices. For this leave, the directive does not explicitly foresee any payment.

Safeguards provided for by the Directive are protection against discrimination on account of the use of the rights deriving from this Directive (Article 11), prohibition of lay-off on account of the use of the rights deriving from this Directive or requested protection of these rights (Article 12, paragraphs 1 and 2), burden of proof (Article 12, paragraph 3, as well as paragraphs 4, 5 and 6 of the same Article), effective, proportionate and deterrent penalties (Article 13), protection against victimization (Article 14), appointment of a competent gender equality body able to implement protection against discrimination as under this Directive (Article 15), and prohibition of regressing existing standards at a national level (Article 16). The arrangement of these institutes is mainly aimed at the previously regulated standards with the equality directives and thus they are already well known for all domestic legislations in the Member States.

In *other issues*, the Directive provides for an obligation for Member States to inform employees and their organizations of the rights arising from this Directive (Article 17), of the obligation for Member States to notify the Commission by August 2, 2027, with gender-disaggregated statistics included, of the implementation of this Directive (Article 18) and the repeal of the Parental Leave Directive 2010/18/EU (Article 19).

The transposition of EU directive 2019/1158 in the Member States?

Just as with the previous Directive, the transposition and application of this Directive is mostly through the revision of the domestic *lex generalis* on labor and employment relations. Due to failure to take measures to transpose this Directive or failure to report in regard to them, the European Commission initiated infringement proceedings on 20 September 2022 against Austria, Belgium,[134] Germany, Greece, Denmark, Ireland, Cyprus, Latvia,[135] Luxembourg, Poland, Portugal, Romania,[136] Slovakia,[137] Slovenia, Hungary, France, Croatia, the Czech Republic and Spain. Under the founding agreements, the EC sent a formal notice of initiation of procedure to these countries on the basis of Article 258 TFEU – Article 260(3) TFEU.

134 On 31 October 2022, Belgium enacted a royal decree partly transposing this Directive.

135 On 15 September 2022, the Republic of Latvia passed a law amending the Law on Maternity and Other Leave with a view to the partial transposition of this Directive.

136 Romania has made legislative changes on two occasions in order to transpose this Directive, and on October 19, 2022 it adopted amendments to the Code on Labor Relation and to the Governmental Emergency Decree No. 57/2019 regarding the Administrative Code, and then on August 29, 2019 it adopted an emergency regulation amending the Law on Paternity Leave.

137 On 29 October 2022, Slovakia enacted a law amending the Labor Act in order to transpose this directive.

Why is the EU directive 2019/1158 significant?

The significance of this directive is in the potential for changing social relations, especially in the sense of destroying patriarchal relations and forces of power in society. This is mostly seen in two parts – the focused approach and stimulation of fathers and recognition of the need for care in the life cycle.[138] Stimulating fathers is done through two key components – introducing the right for fathers to paternity leave and non-transferable and adequately paid parental leave as an incentive for fathers to use this leave. Recognition of the need for care in the life cycle is, in turn, made through the introduction of a right to carer leave for carers, as well as the right to flexible working arrangements, whereby the Union recognizes that carer obligations can arise at any time during the working life and that those obligations are not tied only to children but also to a more severely ill partner and/or parents.[139]

What is important for the EU Directive 2019/1158 and North Macedonia?

Compliance with this directive is extremely important for North Macedonia precisely because of this potential for social progress with wider implications for the equality of all in society. Macedonian labor legislation lags behind contemporary labor legislations in terms of providing conditions for flexible and inclusive treatment on the issue of leaves and its profound systemic impact on reinforcing existing patriarchal relations still persists. Hence, changes to the labor legislation in this direction are needed even without the ongoing EU accession process.

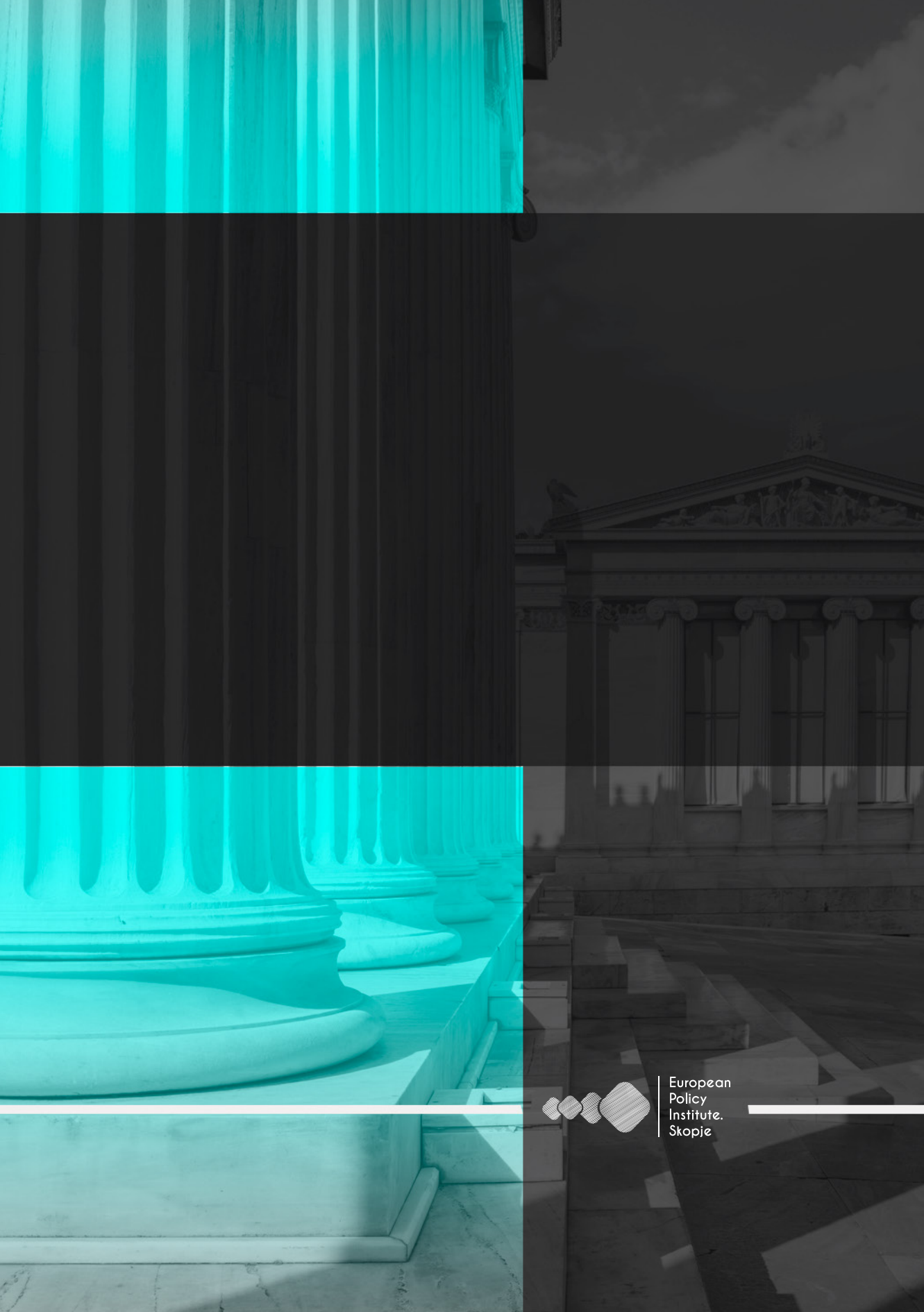
The civil sector in Macedonia has been demanding legislative changes for several years[140] that will go precisely in this direction, i.e. abandoning the regulation of leave in relation to birth and parenthood in a way that either anticipates or stimulates leave only of the mother. In the process of amending the Labor Law, which has now grown into a process of adopting a new labor law, it is envisaged to introduce paternity and parental leave. Within the framework of this process, the minimum standards provided for by this Directive must be maintained. This means that it must be explicitly stated that paternity leave is at least ten working days of paid leave and to define the payment and who has the obligation to

138 Miguel De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead (2022), https://www.equalitylaw.eu/downloads/5779-the-transposition-of-the-work-life-balance-directive-in-eu-member-states-a-long-way-ahead.

139 Ibid.

140 Reactor – research in action, "Parental leave for all", Radio Free Europe [Реактор – истражување во акција,„Родителско отсуство за сите", Радио слободна Европа] (15.07.2017). https://reactor.org.mk/blogpost-all/родителско-отсуство-за-сите/

make the payment, which, in order to be compliant with this Directive, must be as a minimum the same as the rules for payment during sick leave. It must be explicitly stated that *family and marital status* must not affect the use of this right, i.e. this must also apply to fathers from extramarital unions. Also, parental leave must be at least *four* months, two of which are *non-transferable* and *paid* leave per parent. Adapting the rules for using this leave should be provided for *adoptive parents, parents with disabilities and parents of a child with disabilities or long-term illness.* Additionally, it is necessary to also foresee for *carer leave*, according to the aforementioned minimum standards of EU directive 2019/1158.



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