



# Zenith Policy Brief

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## Judicial Independence in Macedonia: How Effective is EU Rule of Law-Conditionality in the Accession Process?

### Introduction

Judicial independence is the hallmark of any democratic society. It represents one of the fundamental principles on which the European Union (hereinafter EU) is founded and its importance has been recognized both by the Council of Europe<sup>1</sup> and the United Nations<sup>2</sup>. This doctrine enshrines two fundamental principles, separation of powers and rule of law, representing one of the main values on which the EU is founded according to Article 2 of the Treaty on the European Union and its Preamble. In the context of EU enlargement, this is translated as one of the key requirements for accession countries, which also Macedonia needs to achieve, embrace and promote in order to become a member of the Union. This is also why rule of law, and judicial independence (hereinafter JI) as an important element, are at the centre of the accession process.

This policy brief examines the effectiveness and appropriateness of European Commission's approach in bolstering JI in Macedonia. Consequently, it shall elaborate on how EU conditionality can be adapted to grasp the opportunity which arose with the introduction of the new approach in EU accession negotiations introduced in 2012, and influence deeply rooted and irreversible reforms in Macedonia in the realm of JI. While seeking answers to these questions, several issues have to be taken into consideration: a) In 2013, Macedonia received a recommendation to open accession negotiations for the fifth time in a row following an assessment by the Commission that the country sufficiently

meets the political criteria; b) The 2013 EU Progress Report takes note of the existence of claims of selective justice, indirect political pressure on the judiciary, judgments which are unusually expedited in terms of outcome or speed, as well as cases where the content of judgments sometimes has direct consequences for the career of the judge concerned, particularly in high-profile or politically sensitive cases.<sup>3</sup> c) The US State Department Report on Macedonia on Human Rights Practices for 2013 mentions the government's failure to fully respect the rule of law including interfering in the judiciary and selective prosecution of political opponents.<sup>4</sup>

Jl conditionality is a crucial element in the accession process, even more since the introduction of the new approach in negotiations with the EU. The brief points out the limits of the current “overly technical” approach, offers suggestions on how to re-prioritise substantial, long-lasting reforms in this area and subsequently formulate recommendations to operationalise this approach and increase the effectiveness of the rule of law conditionality applied to JI in Macedonia.

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<sup>1</sup> Recommendation No. R(94)12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges.

<sup>2</sup> Basic Principles on the Independence of the Judiciary of 1985 (endorsed by UN General Assembly); The Bangalore Principles of Judicial Conduct of November 2002 (endorsed by the UN Economic and Social Council) 2006

<sup>3</sup> COM (2013) 700 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Enlargement Strategy and Main Challenges 2013-2014. p.10

<sup>4</sup> “2013 Human Rights Reports: Macedonia.” U.S. Department of State. U.S. Department of State, 27 Feb. 2014. Web. 13 Aug. 2014. <<http://www.state.gov/j/drl/rls/hrrpt/2013/eur/220304.htm>>. p. 1

## EU approach towards judicial independence

Clear conceptualisation of the principle of JI expressed by the Commission is a prerequisite to determine the extent to which independence of judiciary is respected in a recipient country. Furthermore, it is also essential, from a standpoint of an accession country, to have a clear idea and a practical understanding of how independence of judiciary can be achieved. Although one can identify some recurring criteria imposed by the EU rule of law conditionality, such as selection of judges, disciplinary action and dismissal of judges, advancement and deployment (move) of judges and their training, regrettably, there is no commonly accepted definition of JI at EU level.

The EU approach relies on European standards promoted by organisations and institutions such as the European Network of Councils for the Judiciary, the European Commission for Democracy through Law, and the different legal traditions of its member states. Thus, the principle of JI is defined in various ways. Some practitioners and scholars have introduced extensive lists of indicators<sup>5</sup> the judiciary must fulfil in order to be independent, whereas others highlight the importance of institutional arrangements and policies, which should safeguard judicial institutions from internal and external influence. While both dimensions shall be treated in this policy brief, emphasis shall be given on the rule of law conditionality applied and its effectiveness in safeguarding the judiciary from external influence, as it is also considered by the EU as the most worrying threat to JI in Macedonia. In doing so, the brief shall observe JI in both its *institutional aspects*, regarded as absence of external influence from the executive and legislative branches of government, and *individual aspects*, regarded as internal influence within the judiciary, which could have an effect on the decisions of individual judges.<sup>6</sup> While the institutional aspect reflects the legal framework safeguarding JI and the manner how courts currently operate in practice, the latter aspect refers to the widespread mind-set amongst judges and public prosecutors.

## EU conditionality in judicial independence towards Macedonia

Macedonian aspirations to join the Union have caused a heightened level of interest, both among domestic and foreign audiences, in the conditions for the judiciary as well as in the need to define areas which must undergo structural reforms in order to implement established European standards and criteria. In regard to the reforms of the judiciary, the Stabilisation and Association Agreement (SAA) places particular importance on the consolidation of rule of law by means of reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the machinery of justice in particular.<sup>7</sup>

It explicitly regulates that collaboration in the area of justice will be directed towards three primary issues: independence of the judiciary, improving its efficiency and training of personnel in legal professions. On these grounds, and on the basis of the lessons learned from the conditionality applied in implementing judicial reforms in Central and Eastern European Countries, the EU has constructed an institutional approach, which would serve as the foundation for strengthening JI in Macedonia.<sup>8</sup> This model is applied in all accession countries of the Western Balkans as part of the EU association process. It envisages two key reforms: 1) significant changes to the Judicial Council in terms of instituting an independent judicial body which would ensure and guarantee the integrity and independence of the judicial branch<sup>9</sup> and 2) establishment of the Academy for Judges and Public Prosecutors as the main body which will provide competent, professional, independent, impartial and efficient performance of the judicial and prosecution functions through selection of candidates for judges

<sup>5</sup> ENCJ Project 2013-2014 Independence and Accountability of the Judiciary – Rome, June 2014

<sup>6</sup> Bangalore Principles of Judicial Conduct of November 2002 (endorsed by the UN Economic and Social Council)

<sup>7</sup> Stabilisation and Association Agreement between the European Communities and Their Member States, of the One Part, and the Republic of Macedonia, of the Other Part: Luxembourg, 9 April 2001. London: Stationery Office, 2002.

<sup>8</sup> Preshova, D. Searching for the Right Approach: EU Enlargement and Judicial Reforms in the Western Balkans. Foundation for European Progressive Studies/Renner Institut, 31 May 2014. Web.

<sup>9</sup> Law on the Judicial Council of Republic of Macedonia, Official Gazette of the Republic of Macedonia, No. 60/06

and public prosecutors as well as implementation of initial training and continuous professional training of judges and public prosecutors, as well as of judiciary and prosecution clerks.<sup>10</sup>

So as to provide additional assistance and support to sufficiently prepare the country for future membership within the Stabilisation and Association Agreement, the EU has established the Accession Partnership with Macedonia, in which one of the key priorities and requirements relating to the political criteria is establishing a sustained track record on implementation of judiciary reforms, strengthening the independence and overall capacity of the judicial system.<sup>11</sup>

The emphasis on EU's political conditionality in the negotiation process with Croatia and Turkey by means of introducing the benchmarking system was also reflected in the accession process with other countries of the Western Balkans. In the case of Macedonia, the 2009 European Commission recommendation on opening accession negotiations was based on the fulfilment of 8+1 key priorities (benchmarks) identified in the Accession Partnership. As in the previous stages of the enlargement process, special attention has been dedicated to the implementation of reforms in the judiciary. In this context, one of the criteria was to secure continuous results in the implementation of the judicial reforms and to strengthen the independence and the overall capacity of the judicial system.

In March 2012, the European Commission and the Government of Macedonia started the High Level Accession Dialogue in order to boost reforms primarily on topics relating to the political accession criteria. Rule of law and fundamental rights were one of the prioritised areas, emphasising the quality and independence of the judiciary. The target was set on undertaking activities at all court levels to maintain a positive clearance rate<sup>12</sup> and verifiable progress in reducing the backlog of cases. The most significant reform directly related to JI was the amendment of the Law on Courts regarding the selection criteria according to which, starting from 2013, all newly appointed first instance judges must be graduates of the Academy for Judges and Public Prosecutors.<sup>13</sup>

In addition to the High Level Accession Dialogue, a technical dialogue on the rule of law Chapters 23 and 24 has also been launched. This methodology was promoted within the frames of the Commission's new approach in negotiations on the Chapters on Judiciary and Fundamental Rights, and Justice, Freedom and Security, applied for the first time in the negotiations with Montenegro. Despite EU's long-lasting commitment in this field and the domestic reforms completed over the course of the last decade in line with European standards, the 2013 EU Progress Report takes note of concerns about how the courts currently operate in practice. These relate mainly to the independence of courts as well as the quality of justice overall.<sup>14</sup>

### Judicial independence reforms in Macedonia

According to the Assessment of the implementation of the Strategy for the reform of the judicial system 2004-2010<sup>15</sup>, a comprehensive system of formal safeguard related to JI was established, paving the way for constituting functional and structural independence. According to the document, the general objective of the Strategy has been fulfilled and a functional and effective judicial system, which relies on European standards, has been created. This was also noted in the 2013 Progress Report on Macedonia for reforms in this area,<sup>16</sup> although the Report registers concerns with implementation of JI in practice.

<sup>10</sup> Law on Academy of Judges and Prosecutors, Official Gazette of the Republic of Macedonia, No. 13/06

<sup>11</sup> 2008/212/EC: Council Decision of 18 February 2008 on the Principles, Priorities and Conditions Contained in the Accession Partnership with the Former Yugoslav Republic of Macedonia and Repealing Decision 2006/57/EC. 2008 O.J. L 80/32

<sup>12</sup> This is the ratio of the number of resolved cases over the number of incoming cases. It measures whether a court is keeping up with its incoming caseload.

<sup>13</sup> Nechev, Z., Vidovic Mesarek, G., Saranovich, N., and Nikolov, A. Embedding Rule of Law in the Enlargement Process: A Case for EU Political Conditionality in the Accession of the Western Balkan Countries. Skopje: Association for Development Initiatives "Zenith", 2013.

<sup>14</sup> European Commission. THE REPUBLIC OF MACEDONIA 2013 PROGRESS REPORT. Brussels, 2013. SWD(2013) 413 Final. p. 11

<sup>15</sup> Assessment Report, funded by the European Union, implemented by SOGES s.p.a.

<sup>16</sup> European Commission. THE REPUBLIC OF MACEDONIA 2013 PROGRESS REPORT. Brussels, 2013. SWD(2013) 413 Final. p. 39

The principle of JI is institutionalised in Article 98 of the Constitution, which states that courts exercise the judicial power and they are autonomous and independent in conducting their work. The types of courts, their fields of competence, their establishment, abrogation, organization and composition, as well as the procedure they follow are regulated by a law adopted by a two-thirds majority vote of the total number of Members of Parliament. Significant constitutional changes safeguarding the independence of the judiciary were made in December 2005. The Judicial Council was introduced as an independent and autonomous institution of the judiciary. The number of members was increased from seven to fifteen, out of whom eight are elected by the judges from among their own ranks. The President of the Supreme Court and the Minister of Justice are ex officio members of the Judicial Council. This was subject to change, when, in 2011, in line with European standards,<sup>17</sup> the Minister of Justice's right to vote in the Judicial Council was removed. Besides a substantial increase in judges as members chosen by their peers from all levels of the judiciary, considerable competences were assigned to the Judicial Council such as monitoring and assessing the work of judges, electing and dismissing judges and presidents of courts. Subsequent legislative changes even further strengthened the role of the Council giving judges a wide variety of options on how to decide impartially, based on free appraisal of evidence and application of the law.

Despite these advancements, the practical application of JI in regard to external pressure remains inconsistent. A number of high-profile cases involving state officials, political party members and representatives of the media have been underlined in the EU Progress Report as instances where undue political influence may have been exercised.

In spite of this, the Judicial Council, the body in charge of guaranteeing independence, is perceived by the vast majority of judges as a biased and dependent institution, and is itself subject to external influence.<sup>18</sup> The findings of the 2009 OSCE countrywide survey on the independence of the judiciary, as perceived and experienced by judges, reveals a widespread concern of 66% of the total number of judges in Macedonia who consider that the Judicial Council does not act as an independent institution and that the institution does not fulfill its function properly. Even more, 70%

of judges believe that the selection of the Judicial Council members is biased.

The result of the survey unveils a confounding glimpse of the situation of JI in Macedonia. On the one hand, the survey was conducted in 2009 before the introduction of major legislative changes contributing to further strengthening of JI and prior to the implementation of significant organisational improvements of the judicial system. No such inclusive survey has been conducted ever since. On the other hand, it is not a foregone conclusion that these improvements sufficiently addressed the challenges outlined in the survey and further strengthened JI in Macedonia. The findings of the survey reveal an overwhelming majority of judges' distrust and negative perception about the body guaranteeing JI and about the mechanisms in place. This could be detrimental to JI, since this principle is not determined only by the legal framework safeguarding it, but also by the perception of those exercising the judicial power. If judges do not trust their own procedures and practices, one could not expect much in relation to public confidence in the judiciary and their independence. Appearance of independence, nothing less than the reality, is vital. In the words of the outgoing EU Justice Commissioner, Viviane Reding, rule of law means ultimately a system where justice is not only done, but it is seen to be done, so that the system can be trusted by all citizens to deliver justice.<sup>19</sup> Ultimately, JI is not a prerogative or privilege granted in judges' own interest, but in the interest of the rule of law and in this sense should be regarded as a guarantee of freedom and respect for human rights.<sup>20</sup>

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<sup>17</sup> Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society. [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE-opinion-10-2007\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE-opinion-10-2007_EN.pdf)

<sup>18</sup> OSCE Spillover Monitor Mission to Skopje, Legal Analysis: Independence of the Judiciary, December 2009. <<http://www.osce.org/skopje/67584>>.

<sup>19</sup> Vice-President of the European Commission, EU Justice Commissioner, Viviane, Reding. "The EU and the Rule of Law – What Next?" Centre for European Policy Studies. Belgium, Brussels. 4 Sept. 2013. Web. 14 Aug. 2014. <[http://europa.eu/rapid/press-release\\_SPEECH-13-677\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm)>.

<sup>20</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities

The data on citizens' satisfaction with the services delivered by the judicial system obtained from the 2012 European Commission report for the efficiency of justice (CEPEJ) on Macedonia display a different picture than the one presented in the OSCE survey. The report reveals figures which show positive trends and constant increase in citizen satisfaction. Namely, the satisfaction rate with court performance in June 2010, just six months after the OSCE survey results were published, was 79,57% followed by further increase in December 2010 to 83,83%.<sup>21</sup>

### Limits of the current EU approach

Major reforms were conducted in the past period leading to a complete overhaul of the judicial system in line with European standards and practices. In this sense, the rule of law conditionality aimed at bolstering JI in Macedonia has served its aim. It has significantly influenced domestic judicial reforms resulting in the establishment of institutions capable of guaranteeing democracy and rule of law. However, in line with the 2013 EU Progress Report, concerns are raised about how the courts currently operate in practice and that more needs to be done to ensure proper implementation of standards relating to the JI.<sup>22</sup>

Suffice to say, the ongoing stalemate in Macedonia's EU accession bid, caused by Greece's non-European attitude, commenced to show its negative effects on the implementation of successful EU-related rule of law reforms. The present impasse negatively affects the tempo of reforms in Macedonia. A direct consequence of this state of affairs is the decrease in the effectiveness of EU conditionality in general, and more specifically, in creating an enabling environment where the recipient country would deliver deeply rooted and irreversible results.

In a situation where other Western Balkan countries are advancing in the process, and Macedonia remains in EU's waiting room without any prospect of starting accession negotiations, the fear of an imminent loss of influence exercised through the EU rule of law conditionality might very fast become a reality. From this point, even "the stick" will not function properly, and the EU might be facing another problematic accession country. On the other hand, the new EU approach to negotiation is designed to streamline the accession process, creating a leeway for the rule

of law conditionality to be applied more strictly and efficiently in order to facilitate long-lasting reforms.

They would also increase the effectiveness in exerting influence on JI reforms in Macedonia. The new approach provides for a window of opportunity to be added to the existing EU rule of law conditionality in terms of making it more functional and developing long-term policies aimed at additionally cultivating the principle of JI.

Accession negotiations would serve as a tool to push forward for successful implementation of reforms in the judiciary. Only by nurturing the JI principle in real terms rather than formally, by focusing more on the judges themselves, and altering their perception of independence, the EU rule of law conditionality would become more effective. By contrast, the current approach focuses primarily on the institutional aspect of JI rather than on or concurrently to the individual aspect. This is visible through the key reform priorities delivered to Macedonia in the area of judiciary.<sup>23</sup> To adequately apply the rule of law conditionality, the Commission should also take into consideration the historical legacy and the subservient manner in which the Macedonian judiciary was shaped in the past. Self-censorship and other reflexes are still visible, even today. One very important determinant for JI is the judges' perception of their own independence. Therefore, stronger emphasis should be placed on changing the mind-set of judicial authorities about their role in society. This could be achieved exclusively by emphasising the individual aspect of JI.

Further analysis of the JI conditionality reveals a tendency of treating judges as civil servants while continuously insisting on bureaucratic criteria of productivity.<sup>24</sup>

21 The survey has been carried out on the basis of a methodology developed in the framework of the USAID Project for implementation of judicial reforms. See document CEPEJ evaluation report on Macedonia 2012 edition <[http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/FYROM\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/FYROM_en.pdf)>.

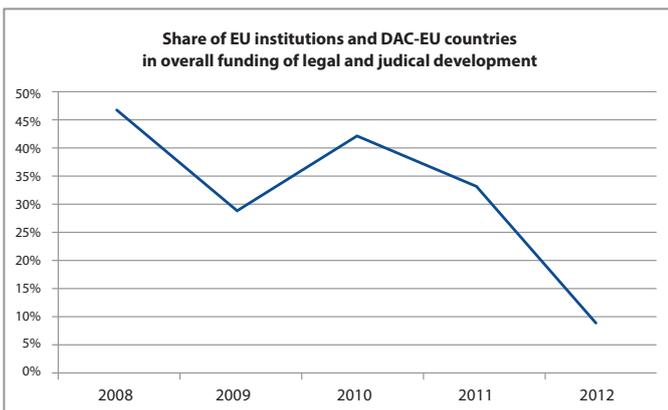
22 European Commission. THE REPUBLIC OF MACEDONIA 2013 PROGRESS REPORT. Brussels, 2013. SWD (2013) 413 Final. p. 10 and 11

23 For example, to fill-in all vacancies and begin the delayed initial training of the Academy for Judges and Public Prosecutors (AJPP) in order to bring the academic cycle back on track; or to ensure full merit-based recruitment to the judiciary from the AJPP.

24 For instance, criteria on the number of minimum cases that should be resolved by a judge on a monthly basis in all courts and continuous efforts to reduce the backlog of cases.

Notwithstanding the importance of productivity criteria in assessing the work of judges, the focus on productivity alone obfuscates the role given to them by the Constitution. Increasing the efficiency of the judiciary does not mean enhanced quality of the judicial decision by default. This is also reflected in the 2013 Progress Report which mentions necessary improvements which need to be made by the authorities to ensure that the organisation of the court system and the career structure does not drive judges towards formalistic decision-making with the purpose of reaching short-term productivity targets.

While financial support provided by the EU is meant to support the Union and the respective candidate countries in transforming their political priorities into concrete actions, the data collected on EU assistance on judicial reforms in Macedonia reveal that the assistance provided is not following the degree of conditionality applied throughout the accession process. Between 2008 and 2012, the official development assistance provided by the EU institutions and the EU Member States that are part of the OECD's Development Assistance Committee<sup>25</sup> in the sector of legal and judicial development made up on average 32% of the funding of all international donors in this field.<sup>26</sup>



The data showed an evident downward trend in the share of EU institutions' and OECD DAC EU Member States' funding, declining from 47% in 2008 to only 9% in 2012. For the period mentioned above, in total, they have allocated approximately €7.5 million, which is less than the sum the Macedonian government spent to build the new Criminal Court in Skopje (€9.1 million).

## Conclusion and recommendations

Taking into account where Macedonia stands in relation to the EU accession process, its level of alignment with the EU *acquis* is high, as stated by the former European Commissioner for Enlargement Stefan Füle at the presentation of the 2013 Progress Report on Macedonia. The alignment in judicial independence is not an exception as major reforms in recent times led to a complete overhaul of the justice system in line with European standards and best practices. Thus, the EU rule of law conditionality aimed at bolstering judicial independence in Macedonia has served its aim. It has significantly influenced domestic judicial reforms resulting in the establishment of institutions capable of guaranteeing democracy and rule of law.

The impasse in Macedonia's EU accession process caused by the bilateral dispute imposed by Greece started to have its negative consequences on the effectiveness of the EU rule of law conditionality. This situation has directly influenced the pace of reforms and produced a tendency of circumventing deeply rooted and irreversible reforms. This can be rectified by employing accession negotiations, as a tool for boosting reforms which would substantially increase the effectiveness of the rule of law conditionality.

The new approach is designed to further facilitate the accession process. The judicial independence conditionality applied in the case of Macedonia should be applicably modified to grasp the risen opportunity. Accordingly, the EU standpoint to judicial independence in this phase of the accession process ought to be in the direction that the judiciary is a coequal branch of power, functioning in a democratic system of checks and balances and participating as part of a democratically accountable government. The failure to do so would lead towards producing short-term effects, instead of deeply rooted and sustained improvements.

<sup>25</sup> Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

<sup>26</sup> International Development Statistics online database, OECD

The intention of the following recommendations is to assist the Commission in overcoming some of the limits of the current EU approach to judicial independence outlined in this brief. The effectiveness of the rule of law conditionality applied in the accession process with Macedonia should be strengthened by means of:

- Enhancing the principle of judicial independence by focusing on individual judges and their independent decision-making with the purpose of changing their mind-set in this regard, as well as their particular role in society.
- Promoting an inclusive approach where civil society and professional organisations would be involved in monitoring judicial independence by conducting regular satisfaction surveys on the independence of courts and judges as perceived by their users.
- Establishing a balance between the quantitative and qualitative criteria in appraising the performance of judges in order to preserve the necessary and recommendable level of quality of judicial decisions and citizens' satisfaction of the work of courts.
- Increasing the level of financial assistance to correspond to the accession status of Macedonia and the degree of conditionality applied in the area of rule of law. In particular, available pre-accession funds should be channeled for reform-oriented projects in the field of judiciary and, more specifically, for promotion of the judicial independence principle.

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