

**REPLIES OF THE EUROPEAN COMMISSION TO THE EUROPEAN COURT OF
AUDITORS SPECIAL REPORT:**

**“EU SUPPORT FOR THE RULE OF LAW IN THE WESTERN BALKANS: DESPITE
EFFORTS, FUNDAMENTAL PROBLEMS PERSIST”**

EXECUTIVE SUMMARY

I. In relation to the essential role of the rule of law in the enlargement process, the Commission would like to recall that the EU’s policy dialogue with enlargement partners on rule of law takes place in the framework of the bilateral Stabilisation and Association Agreements (SAA) and as part of the strategic Stabilisation and Association Process (SAP). Through the adoption of the revised enlargement methodology in February 2020, further emphasis has been placed on the ‘Fundamentals’ – rule of law, fundamental rights and democracy, public administration reform and socio-economic stability. Regular monitoring of rule of law related reforms takes place within the EU enlargement process and is reported on, in particular in the Commission’s annual Enlargement Package of country reports.

II. Accompanying this strong policy commitment, the Instrument for Pre-Accession Assistance (IPA) remains a crucial tool to mobilise technical and financial resources in support of reform efforts undertaken by Western Balkans partners.

IPA III, as adopted on 15 September 2021 by the European Parliament and Council of the European Union, increases steering from the Union and better alignment with the Union’s priorities by having a clearly defined thematic focus for the 2021-2027 period, rather than establishing beneficiary allocations from the outset. In addition, the IPA III programming framework will be based on evolving needs and will ensure a balance between predictability and performance-based funding.

IV. The Commission’s annual reports over the period 2014-2020 show that all of the Western Balkan partners have made some progress in the area of the rule of law, with some partners in particular demonstrating good and sustained progress. The impact of the EU support to rule of law has been varied.

V. The Commission agrees with the important role of civil society organisations (CSOs) and media in a functioning democracy governed by the rule of law. Overall, the Commission has invested around EUR 250 million under IPA II in civil society and the media in the region, which is a substantial and significant allocation, with a direct relevance and impact on the area of the rule of law.

There is substantial and increasing support for media freedom and pluralism financed from the Civil Society Facility and Media Programme. These actions are primarily channelled from the multi-country envelope (which allows to target all IPA beneficiaries simultaneously). The multi-country media support targets public broadcasters, journalist safety, media literacy, quality journalism, support to judiciary, support to media outlets via the European Endowment for Democracy (EED), and, most recently, a EUR 10 million programme in support of media business sustainability is being contracted.

Consultation of civil society in policy making and reform processes is monitored in regular policy dialogue on public administration reform with the authorities (e.g. Public Administration Reform (PAR) Special Groups), and is one of three focus areas in the context of the EU-funded annual monitoring of the “DG Enlargement Guidelines for Support to Civil Society”, carried out by the EU Technical Assistance to Civil Society Organisations (TACSO). Both are tools of direct relevance to the rule of law area. This analysis then feeds into the Commission’s own monitoring, reporting and policy dialogue

VI. The Commission is allocating significant support and resources to mitigate the risk resulting from limited administrative capacity. Improving administrative capacity is an overarching objective of the Commission's actions in the region which it supports systematically with actions beyond the rule of law projects level via technical assistance (including in partnership with the OECD/ Support for Improvement in Governance and Management (SIGMA)), targeted financial support to the area and political dialogue.

More broadly, significant support is provided to the process of implementing public administration reforms in what is ultimately a longer-term State building exercise, aimed at bringing the Western Balkans to the level necessary to meet the criteria for EU membership.

On conditionality under IPA II, the Commission points out that the IPA II Regulation includes strict clauses on modulation of assistance in case of limited progress made or results achieved, which have been used by the Commission. The Commission further refers to its reply under paragraph 40.

VIII. (1st indent) The Commission accepts the recommendation.

(2nd indent) The Commission and the EEAS partially accept the recommendation.

The Commission and the EEAS underline that they are supporting civil society and independent media in strengthening their independent oversight role in a democratic society based on the rule of law, to a significant extent. Financial support to the latter is granted based on objective criteria consistent with the EU priorities.

The Commission will continue to support CSOs and the media within its programming framework. Due consideration will be given to funding CSOs in rule of law actions but without prior earmarking.

The Commission considers project funding the most apt form of financing for CSOs, given that organisational support is inherently risky as it creates dependency.

(3rd indent) The Commission partially accepts the recommendation.

The Commission recalls that the IPA III regulation provides the legal framework for the reinforced use of modulation of scope and intensity of assistance in case of significant regression or persistent lack of progress by a beneficiary. The Commission will apply these as appropriate, in light of the principle of proportionality, on a case-by-case basis.

(4th indent) The Commission accepts the recommendation.

INTRODUCTION

7. A robust anti-corruption framework including a solid track record of results is among the key requirements for EU accession.

Through the adoption of the revised enlargement methodology in February 2020, further emphasis has been placed on the 'Fundamentals' – rule of law, fundamental rights and democracy, public administration reform, socio-economic stability. Anti-corruption aspects are considered with all their cross-cutting relevance.

The EU's anti-corruption policy dialogue with enlargement partners takes place in the framework of the bilateral Stabilisation and Association Agreements (SAA) and as part of the strategic Stabilisation and Association Process (SAP). The dialogue focuses in particular on progress in the implementation of the fight against corruption and related reform efforts, including on the justice sector, on money laundering and organised crime.

Concrete and extensive anti-corruption interim benchmarks have been set by the Member States for example for Montenegro and Serbia in the context of their accession negotiations. The benchmarks focus on legal alignment, institution building and the establishment of track records of successful adjudication of corruption cases (with a special emphasis on high level corruption cases carrying the potential to undermine the justice system and democracy as a whole).

17. Progress has been achieved in all the actions of the Sofia Priority Agenda.

(6th indent) The Commission notes that the EED is not the sole means of supporting independent and pluralistic media and civil society, but an additional one.

OBSERVATIONS

27. The Commission would like to clarify that the objective of the annual reports is to assess progress of the candidate countries and potential candidates in the area of EU standards and EU *acquis* and provide relevant recommendations. Progress on IPA implementation is reported in the Annual Report on the implementation of the European Union's external action instruments.

28. Consultations with CSO's are a regular part of the preparation of the sub-committees on justice, freedom and security for all of the Western Balkans partners. Issues with freedom of expression / assembly are addressed with them on a regular basis. The EU regularly stresses the need for inclusive and transparent consultations with civil society for rule of law reforms.

The Commission also invites the CSOs to contribute to the annual reports and takes into consideration their submissions.

29. EU financial support for civil society action in the region is significant, amounting to around EUR 250 million for the period 2014-2020, and based on medium-term projects which are often renewed.

Since 2009, the Commission channels its bilateral and multi-country IPA II support to civil society and independent media in Western Balkans and Turkey through its Civil Society Facility (CSF).

As regards civil society financial support, the CSF offers a wide range of assistance – technical assistance to CSOs, as well as grants across a wide range of thematic areas. These include rule of law specifically, but also indirectly, through other themes such as Public Administration Reform, Environment protection, Gender Equality etc. In the period of IPA II around 1 000 CSOs were reached by this support.

31. Consultation of civil society in policy making and reform processes is monitored in regular policy dialogue on public administration reform with the authorities (e.g. Public Administration Reform Special Groups), and is one of three focus areas in the context of the EU-funded annual monitoring of the “DG Enlargement Guidelines for Support to Civil Society”, carried out by the EU Technical Assistance to Civil Society Organisations (TACSO). Both are tools of direct relevance to the rule of law area. This analysis then feeds into the Commission's own monitoring, reporting and policy dialogue.

In addition, the regular PAR (Public Administration Reform) monitoring reports prepared by OECD/SIGMA provide further data on public consultation processes, reflected in the Commission's annual Enlargement Package.

32. The Commission welcomes the assessment that political will and the ownership of reforms are the main risks to the impact and sustainability to EU support. Such risks cannot however be mitigated through a single project [IPA assistance] or by implementing partners. The strategy employed by the Commission to mitigate these risks is the use of political and policy dialogue to secure high-level commitment to rule of law reform on a continuous basis. This is part of the key engagement of the Commission on enlargement.

33. The Commission complements the specific rule of law actions with comprehensive efforts to promote *public administration reform* (PAR) in all Western Balkan partners. This work helps to address general structural issues in the public sector, which the report mentions in observation 32 [*for example, insufficient personnel and training, or the absence of a staff retention policy leading to high turnover rates*]. The work on PAR includes support and guidance, as well as comprehensive and systematic monitoring of the quality of the public administration (in partnership with OECD/SIGMA), and regular high-level policy dialogue.

The Commission also supported key reforms of the civil services and strengthen public administration reforms in the Western Balkans, to mitigate political influence in the public administration and non-objective staff turnover. In addition, clauses to mitigate turnover of staff trained with EU-funds are added to relevant IPA projects.

38. The adjustment of assistance in case of significant shortcomings in the progress and results achieved is used at action level. An action could not be implemented as long as the implementing conditions highlighted in the action document are not fulfilled. Moreover, EU-funded action provides for the following statement “Failure to comply with the requirements set out above may lead to a recovery of funds under this programme and/or the re-allocation of future funding”.

The Commission recalls that, through their participation in the IPA Committee, EU Member States are closely consulted on the implementation of IPA funding, including in adjusting financial assistance in case of significant regression or persistent lack of progress by a beneficiary.

39. The Commission is careful in the way it uses the conditionality instrument due to its many implications, including the adjustment of financial assistance in case of significant regression or persistent lack of progress by a beneficiary. At project level, the situation is clear, if an agreed condition is not fulfilled or there is persistent lack of progress in a reform priority area, there is no disbursement, see the example of Bosnia and Herzegovina (BiH) in Box 2. Where there is a clear regression in terms of the rule of law in a country, the Commission has not hesitated to reduce the annual envelope for the given country, as it did for Turkey for example under IPA II or BiH in relation to lack of progress in governance. It has also increased the financial envelope for countries making serious progress on the rule of law (performance reward see paragraph 40), such as North Macedonia.

40. IPA II Regulation includes an explicit legal basis with a reverse mechanism allowing for adjustments of financial assistance without distinction of sectors in case of significant regression or persistent lack of progress by a beneficiary (see Article 14(2)).

Article 14(2) provides that: “assistance shall be targeted and adjusted to the specific situation of the beneficiaries listed in Annex I, taking into account further efforts needed to meet the membership criteria as well as the capacities of those beneficiaries. Assistance shall be differentiated in scope and intensity according to needs, commitment to reforms and progress in implementing those reforms.” The Budget Support Guidelines further describe the applicable conditions for payments.

In accordance with the Regulation, IPA II assistance was increased as means to reward progress and likewise reduced in cases of serious regression. Turkey is an example where the allocations in the annual budget were reduced since 2017 due to backsliding on fundamentals at the initiative of the Commission. These decisions were taken following resolutions from the European Parliament and Council conclusions on Turkey. For BiH the financial envelope was reduced by approximately half of the allocation due to lack of progress in governance, which is of direct relevance for the area of rule of law.

Financial assistance to Bosnia and Herzegovina was adjusted, as highlighted by the ECA in Box 2.

The Commission recalls that it includes systematically in its financing agreements with the partner countries an obligation to adhere to the fundamental values, which provide for additional legal grounds for suspending or terminating the agreements in accordance with the Financial Regulation. In particular, agreements on budget support provide that budget support disbursements may be formally suspended, temporarily suspended, reduced or cancelled in case of backsliding in the areas of fundamental values and rule of law.

41. The IPA III Regulation specifies how the rules on modulation of financial assistance will affect the provision of funding. IPA III recital (32) and provisions (Article 8(5)) provide the necessary details in this regard.

47. In the case of project 20 (“Countering Serious Crime in the Western Balkans”), the final report which has been received and approved subsequently in line with the contractual obligations, demonstrates that most of the project outcomes have been achieved.

51. The Commission recalls that freedom of expression is also funded under a number of other areas, most notably democracy and governance, and fundamental rights. The Commission refers to its comments at point V above.

53. The Commission is increasing its efforts to improve project design and results reporting.

55. The Commission assesses sustainability as the measure to which degree the benefits/results (outputs and outcomes) achieved are likely to continue beyond the implementation period. It includes issues such as the level of ownership of the beneficiaries, their institutional management capacities, resources that they commit to provide for the operation and maintenance of the results once the project is completed. The Commission support is, and should be medium to long term in this sector, to accompany fundamental reforms. This means that there will continue to be projects in this sector, helping always with the next step in the long process.

The mere existence of a follow-up project does not mean that the initial project was not at least partially sustainable.

57. The Commission stresses that achieving wholesale change in the rule of law area, is part of a long-term process, which the Commission will continue to support.

CONCLUSIONS AND RECOMMENDATIONS

71. The Commission's annual reports over the period 2014-2020 show that all of the Western Balkan partners have made some progress in the area of the rule of law, with some partners in particular demonstrating good and sustained progress. The impact of the EU support to rule of law has been varied.

Recommendation 1 – Strengthen the mechanism for promoting rule of law reforms in the enlargement process

The Commission accepts the recommendation.

The Commission recalls that under the revised enlargement methodology, the Commission has laid solid foundations for a stronger engagement on the rule of law. The latter remains the cornerstone of the accession process and will determine the overall pace of progress of each enlargement partner on its respective path towards the EU.

The Commission agrees with the usefulness of setting targets and benchmarks. The Commission already uses these instruments in the enlargement process for each of the individual countries. For countries that are in accession negotiations this is done through the different opening, interim and closing benchmarks for chapter 23 and 24. For countries not in negotiations, this is done in strategic documents, such as the opinion of the Commission on Bosnia and Herzegovina’s application for EU membership. These targets and benchmarks are monitored by the Commission on a regular basis and reported on in its annual rule of law reports to the Council for countries in negotiations, and in its annual reports for all Western Balkans.

74. The Commission considers the role of CSOs very important in the process leading to accession.

EU financial support for civil society action in the region is significant, amounting to around EUR 250 million for the period 2014-2020, and based on medium-term projects which are often renewed.

Consultation of civil society in policy making and reform processes is monitored in regular policy dialogue on public administration reform with the authorities (e.g. PAR Special Groups), and is one of three focus areas in the context of the EU-funded annual monitoring of the “DG Enlargement Guidelines for Support to Civil Society”, carried out by the EU Technical Assistance to Civil Society

Organisations (TACSO). Both are tools of direct relevance to the rule of law area. This analysis then feeds into the Commission's own monitoring, reporting and policy dialogue. The regular PAR (Public Administration Reform) monitoring reports prepared by OECD/SIGMA provide further data on public consultation processes, reflected in the Commission's Enlargement Package.

Recommendation 2 – Intensify support for civil society engaged in rule of law reforms and media independence

The Commission and the EEAS partially accept the recommendation.

The Commission recognises the key role that independent civil society and media can play in a democratic pluralistic society based on the rule of law. The Commission supports the civil society and media in exercising their critical rule of law function through the progress of programming, implementation and monitoring of results of financial support in amount of about EUR 250 million under IPA II. In addition, the Commission supports civil society and media through systematic engagements and consultations in the context of policy-making and the process of enlargement. Notably, the CSOs are consistently engaged throughout the processes accompanying the Stabilisation and Association Agreements and the preparation of the annual enlargement reports. Furthermore, the Commission organizes annual events dedicated to engagement and exchange with the civil society such as the Rule of Law Convention in Bosnia and Herzegovina. The Commission also provides public support and encourages the active role of CSOs on a regular basis both in Headquarters and locally through the EU Delegations in Western Balkan partners.

While the EEAS is not part of the programming, implementation or results monitoring process for the IPA financial support addressed by the report, the EEAS provides a) support through political messaging on the importance of civil society and media in addressing rule of law issues; b) support to CSOs and media in fighting disinformation (in line with the EU Action Plan Against Disinformation and the European Democracy Action Plan); and c) information to WB CSOs and media on the EU's engagement including the EU integration process. The EEAS's acceptance/ partial acceptance of the recommendations below pertains within the limits of the above tasks.

(a) The Commission and the EEAS partially accept the recommendation. The Commission would like to point out that under IPA II it invested over EUR 250 million in CSOs and media. It will continue to support CSOs and the media within its programming framework. Due consideration will be given to funding CSOs in rule of law actions but without prior earmarking.

(b) The Commission and the EEAS partially accept this recommendation. The Commission considers project funding the most apt form of financing CSOs, given that organisational support is inherently risky as it creates dependency.

(c) The Commission and the EEAS accept the recommendation.

The Commission underlines that it is supporting civil society and independent media in strengthening their independent oversight role in a democratic society based on the rule of law, to a significant extent. Financial support to the latter is granted based on objective criteria consistent with the EU priorities.

(d) The Commission and the EEAS accept the recommendation. The Commission already monitors the contribution of CSOs to the rule of law through a dedicated SIGMA instrument.

76. The Commission refers to its replies to paragraphs VI and 40.

Recommendation 3 – Reinforce the use of conditionality in IPA III

The Commission partially accepts the recommendation.

The Commission applies conditionality on a case-by-case basis following a thorough analysis and due consideration of its impact. A generalised use of conditionality for all IPA III funding would not be appropriate in view of the proportionality of modulation foreseen in the IPA III Regulation. In applying modulation, due regard should be given to the effectiveness of the policy objective pursued and the necessity to avoid unintended effects on other priority sectors.

The IPA III Regulation provides that support be targeted and adjusted to the specific situation of the beneficiaries taking into account further efforts needed to meet the membership criteria as well as the capacities of those beneficiaries. Assistance shall be differentiated in scope and intensity according to needs, commitment to reforms and progress in implementing those reforms (democracy, fundamental rights, rule of law, cooperation on migration, economic governance, etc. (i.e. more for more principle)).

The IPA III Regulation foresees that in case of significant regression or persistent lack of progress by a beneficiary of the instrument, the scope and intensity of assistance shall be modulated accordingly. Equally, modulation of assistance will also be applied when progress has resumed.

80. EU support has triggered crucial reforms and important change at the institutional, legislative and also operational level in the Western Balkans region, as per examples mentioned above.

Recommendation 4 – Strengthen project reporting and monitoring

- a) The Commission accepts the recommendation.
- b) The Commission accepts the recommendation.
- c) The Commission accepts the recommendation.