THE NEW APPROACH OF THE EUROPEAN UNION IN ACCESSION NEGOTIATIONS – THE FOCUS ON CHAPTERS 23 JUDICIARY AND FUNDAMENTAL RIGHTS AND 24 JUSTICE, FREEDOM AND SECURITY

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Abstract

The so-called New Approach to negotiations was introduced in 2012. It was a new mechanism in dealing with one of the policies of the European Union that had already undergone a substantial change. It focuses on the rule of law and the two chapters 23 and 24 as the central chapters of the negotiations putting them as the balance indicator against all other chapters of the acquis. This new tool was sought after by a number of Member States, but also by those in the European Commission that wanted to show that the Enlargement Policy is functional and delivering results as well as to protect its own credibility. Since 2012 the New Approach has been implemented on Montenegro and Serbia and is yet to be seen how it will be applied once the other candidates open their accession talks.

Keywords

enlargement, accession talks, new approach, rule of law, candidate countries, Western Balkans.

The Reasons for the New Approach

„We focus on the credibility of the process, putting rule of law at its centre. In particular, for countries in transformation, enlargement is not about ticking boxes but about implementation and creating a track record in areas such as fundamental rights and freedoms, rule of law, good

governance and democracy“. This citation from the joint article of the Irish Presidency Europe Minister L. Creighton and Enlargement Commissioner Š. Füle summed up the change within the Enlargement Policy of the EU. It has anyway always had to count on the changing environment and the fact that there are waves of enlargements happening in uneven cycles and under various circumstances. The New Approach came after the Big Bang Enlargement, the largest and the most fundamental of all the enlargements that the EU has undergone. Never before had we such a big process going on, a vast technical and diplomatic exercise going for so long as it took the EU to negotiate (Miščević, Mrak, 2017, p. 187) the entry of the 12 countries pushing to the East and further in the Mediterranean. It is not just the mere fact that there were 10 countries that joined the EU in 2004 with two more to join in 2007, but also the fact that there were no more of the great changes to the EU structure to come. There were the Balkans, Turkey and only those EEA countries that did not want to join anyway. In this context, the portfolio of the Enlargement Policy stopped being one of the big ones and turned into a much lesser policy tool.

Furthermore, the change was so fundamental that it had fully altered the way how the Union functioned and called for a number of changes of the founding treaties and even led to the unsuccessful Constitution of the EU, which was replaced by the Lisbon Treaty. This new way of functioning with 27 soon to be 28 Member States created the so-called enlargement fatigue. Although a term, unofficially forbidden to be used or uttered in the corridors of the EU institutions, was never really officially expressed or put in any of the documents of the EU, the impact of the fatigue was clear through the fact that ever since 2007 and Bulgaria and Romania joining the EU, only Croatia managed to accede the Union, while Turkey and the six Western Balkan countries are still all at various stages of integration, none with a clear horizon or close to the conclusion of the process. The EU, as Kochenov put it, “the Union learnt a great deal from the drawback of its pre-accession action“(Petrov, Van Elsuwegeq, 2014, p. 59).

There was already at the beginning of this decade a feeling among the EU Member States that the rule of law is a concept which does not hold the same value across the Union and that there are very divergent views on what the rule of law is. Certain Member States have not been satisfied with how the EU acquis in this area is applied in some other Member States. This ever growing rift has gradually become more and more visible, especially in the recent years of the crisis and the undermining of the EU’s confidence,

but already at the time that the EU was getting ready to close the accession talks with Croatia and open the next wave of Balkan negotiations with Montenegro. The feeling about the importance and the need to focus more decisively on the rule of law chapters became very present.

Finally, the very fact that the Western Balkan states have had a very shaky and unconvincing track record in the rule of law area did not help. Although the EU was insistent with Iceland when it came to Chapter 23 on Judiciary and Fundamental Rights in e. g. asking to monitor the implementation of the new rules on appointing judges and prosecutors, as well as to review the appointment of prosecutors, together with monitoring the full implementation of amendments to the anti-corruption framework (Screening report Iceland Chapter 23 – Judiciary and fundamental rights:17), there were no real problems with how the EC or the Member States viewed the situation with the rule of law in Iceland. On the other hand, there has been a plethora of complaints and views on the weak state of the rule of law in the Balkans. The 2018 February Communication of the EC on *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans* states that: „First, the rule of law must be strengthened significantly. Today, the countries show clear elements of state capture, including links with organized crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests. All this feeds a sentiment of impunity and inequality. There is also extensive political interference in and control of the media. A visibly empowered and independent judiciary and accountable governments and administrations are essential for bringing about the lasting societal change that is needed." (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, 2018:3). This very intensive and direct language shows how, even seven years after the introduction of the New Approach, the EU perceives the Western Balkans and the situation with the rule of law.

Introduction of the New Approach

The 2011 December European Council confirmed the General Affairs Council conclusions of the same month into which the Member States underlined the need to accentuate the rule of law as "essential to come closer to the EU and later to fully assume the obligations of EU membership" (European Council, December 2011: 2).

This very explicit notion of the significance of the rule of law will be inserted and then enlarged in content and its outreach in every future Council conclusions dealing with the Western Balkans. Although the rule of law was already a part of the Copenhagen criteria (European Council, June 1993, p. 1). Within the political section of the requirements, the concept has slowly developed as the process of the European integration went hand in hand with the process of democratisation and building of the Western look alike societies in the ex-communist countries. As Czarnota, Krygier and Sadurski pointedly express: "The transition after 1989, however, did not take place in a logical second as in the theories of social contracts—not surprisingly so, as these theories are concerned with legitimation, not with real time social change as mentioned above. It is still very much in progress and will take surely many more years. The things achieved, such as for example the creation of new judicial structures, were the product of painful efforts" (Czarnota, Krygier, Sadurski, 2005: 196). Unlike the attainments of the acquis in the area of Common Market e. g., where the new Member States absorbed the new rules and joined fully the economic and monetary standards of the old ones, the rule of law has had a different evolution. Moreover, the Stabilisation and Association Process (SAP) conditionality established by the Council in 1997 went further in addressing the need that for the SAP states the support to the rule of law was the second main objective along with democracy, economic development reform, adequate administrative structures and regional cooperation (Communication from the Commission to the Council and the European Parliament on the Stabilisation and Association process for countries of South-Eastern Europe, Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, former Yugoslav Republic of Macedonia and Albania, p. 4).

The fact is that many of the Member States already in the early 2000s did not like the way how the political criteria were applied in some new Member States and candidates. In 2009 the then Enlargement Commissioner Olli Rehn stated that "when the huge transformation, after the collapse of Soviet Union and the Eastern bloc started, the importance of the rule of law was sometimes underestimated. Some leaders of the first wave of radical reforms have acknowledged this" (Olli Rehn, 2009, p. 2). Throughout 2011, as Zagreb was wrapping up its accession talks and preparing the accession treaty to be signed, there was a feeling that there was not enough time and enough of thorough consideration in order to be sure that the rule of law would become firmly rooted in Croatia. Thus the language of the Council Conclusions states the need to use the accumulated experience

with Croatia in negotiating chapters 23 and 24 order for it to be used to the benefit of future negotiations" (Council conclusions on enlargement and stabilisation and association process 3132nd General Affairs Council meeting). This basically meant that there would be a new approach to dealing with how the EU negotiates the rule of law chapters not only in its form, since the acquis did not change much, but in its content and structure leading to a much more elaborate and, what is even more important for the future of the integration of the candidates and potential candidates, a much lengthier process of accession talks.

The Council embraced the proposal of the European Commission to set up a new approach for chapters 23 and 24 and also invited it to embed it in any new negotiation framework to be developed with any new candidate country. Many Member States saw it exactly as the European Commission expected it to be seen, as a new conditionality mechanism that would allow for more stringent procedures, more time to be taken for accession talks as well as the chance to have Member States be more interactive in their approach to the accession talks and especially in the most sensitive area of them all – the rule of law. This was basically a significant concession by the Commission that has always been jealously preserving its right to be the one to conduct negotiations and take care of the overall process. In this way Member States, as it would be seen later, got a chance to get regularly updated about the situation with the rule of law in the candidate country, to lodge initiatives and finally even to recommend chapter not to be opened or closed if there is no real progress in the rule of law area.

The first one in line to open accession talks was Montenegro, which got positive language on its aspirations to start negotiating. The European Council invited "the Commission to present without delay a proposal for a framework for negotiations with Montenegro … incorporating the new approach proposed by the Commission as regards the chapters on the judiciary and fundamental rights, and justice, freedom and security" and "to initiate the process of analytical examination of the *acquis communautaire* with Montenegro on the above-mentioned chapters." (European Council, December 2011:5). This was the first step towards a new approach and the Commission got a task of putting elements into identifying how to make a feasible and effective instrument that would allow for a more balanced and conditional accession talks process. As it was instructed, Montenegro began its preparation for the analytical examination of the acquis in the rule of law area even before it actually opened accession talks officially.

The screening of the EU acquis in Chapter 23 and 24 was done in March 2012, while Montenegro presented its own legislation in judiciary and fundamental rights as well as justice, freedom and security in May 2012. Once the country was ready to officially open the accession talks on 29 June 2012, the negotiation structure for the rule of law chapters had already been working on the preparation for the opening of these two crucial chapters. The screening exercise was done thoroughly and in the presence of the Serbian and Macedonian delegation that the European Commission invited to observe the explanatory presentation of the acquis having in mind the importance of these two chapter and hoping that the two countries should also soon join the work on the rule of law area. This exercise has not been repeated again for the past six years.

The screening presented the main areas of Chapter 23; mainly judiciary with its independence, impartiality, professionality, efficiency and the reform requirements. Montenegro presented its judicial system, the reforms that it had undertaken until that moment, the future steps and plans especially when it came to the legislative changes as well as the resizing and restructuring of its court network. Special emphasis was paid to the judicial and prosecutorial councils, recruitment of judges and prosecutors and their training, promotion and evaluation. Within the screening exercise on Chapter 24, all of the ten areas of this chapters were discussed – mainly the issues such as border control, visas, external migration, asylum, police cooperation, the fight against organised crime and against terrorism, cooperation in the field of drugs, customs cooperation and judicial cooperation in criminal and civil matters. After the screening process was finalised, the European Commission started drafting screening reports for both chapters in order to assess the state of the progress of Montenegro in meeting the membership criteria both on legislative alignment, but also on the administrative structures and their capacity to implement the existing and future legislation in connection with the EU acquis in the area of the rule of law. In the case of Montenegro, the Council also invited Europol to present a report on the situation with regard to organised crime in Montenegro, and asked the Commission to ensure that this contribution is taken into account in the forthcoming screening reports. This was a special arrangement to contribute to the examination of the state of the rule of law in the country on the urging of certain Member States to explore more deeply the situation with the organised crime.

When finally the country was ready to open accession talks officially on 29 June 2012, the EU summed up its new policy towards the enlargement

countries in it General Position on the Ministerial Meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union in underlining the area of the rule of law and fundamental rights and ,,urged Montenegro to tackle the issues of concern identified by the Commission in its latest progress report, especially the independence of the judiciary, the fight against corruption and organised crime, and the need for Montenegro to step up its efforts in order to establish a solid track record in the course of the negotiations" (General Position on the Ministerial Meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union, EU Opening Statement for Accession Negotiations).

The conditionality of the New Approach

The EU General Position also specified a sort of temporal conditionality into the accession process through which the two rule of chapters would have to be opened early in the process and should also be closed among the last. The need to have such positioning of the work on chapters 23 and 24 was explained by the need to "allow maximum time to establish the necessary legislation, institutions and solid track records of implementation". This meant that in the accession processes of the previous waves of enlargement there was not enough time to deal with such a demanding, wide and time consuming exercise as the EU wanted to have with the rule of law area of negotiations. The whole idea of the Cooperation and Verification Mechanism (CVM) came as the necessity because the Member States felt, among other things, that they should allow Bulgaria and Romania to enter the membership although they were not satisfied with the progress on the rule of law (Balfour, Stratulat, 2015, p. 216). There is a number of Member States that very much insist on the CVM and publicly and openly state this position (Markov, 2010). In the case of the future Balkan candidates for membership, the idea was not to leave it to the post-accession phase and to have it tested and approve of it before the country joins the Union. That would mean that, unlike with the rest of the chapters, the functioning of the whole system delivery would be checked during the negotiations phase and not only the legislative work.

This new element added called for an overall balance in the progress of negotiations across all the chapters. That would mean that a candidate country could not open a substantial number of chapters before it prepares and achieves the opening of the two rule of law chapters. This kind of conditionality was new to the accession process because the previous

enlargements did not know about that sort of linking other chapters to the "more important" ones. The EU's General Position summed it up as the need to address the challenges faced and the longer term nature of the reforms, so that for the EU the chapters 23 and 24 are "expected to be among the first to be opened" (Ministerial Meeting Opening the Intergovernmental Conference on the Accession of Montenegro to the European Union, General EU Position, Article 22, p. 10). Furthermore, the EU insisted that once the rule of law chapters are opened there should be clear balance within the negotiation process. In the case of lagging of reforms and the implementation of the action plans, either one third of Member States or the European Commission could propose the accession talks to be stopped until the equilibrium between the rest of the accession chapters and the rule of low ones is restored. If this procedure is to be invoked, then the Council could decide by qualified majority to withhold their recommendation to open or close other chapters, or in other words to suspend any progress in the opening of closing of accession chapters. This notion that was presented in Article 6 of the EU General Position became known as the "imbalance clause" or "balance clause" and has never been used up to now in the accession talks of either Montenegro or Serbia (where the New Approach is being applied). However, the "imbalance clause" has become a frequently used phrase in the public and political discourse in Montenegro and Serbia, where the opposition political parties as well as the NGO's repeatedly ask the European Commission to suspend accession talks on the basis of the lack of progress in the area of rule of law as they claim.

Basically, in the Montenegrin case that meant that it was allowed to open and immediately close chapters Science and Research (25) in December 2012 and Culture and Education (26) in April 2013 but then the Member States expected the country to perform the needed tasks in order to meet the opening benchmarks for the two rule of law chapters in order to open them. At the time of the opening and closure of the second negotiating chapter Montenegro was already a year away from the screening process of chapters 23 and 24 and it had already done a lot of the needed to meet the opening benchmarks. So, a year after it opened its accession talks Montenegro adopted the two action plans for chapters 23 and 24 in June 2013.

The Commission was also equipped with another tool in the case it is unhappy with the progress that the candidate country makes in the rule of law area. It got the right to propose to the Council any change to the benchmarks during the process of the accession talks, be them opening, interim or closing ones. It also has the right to propose that the candidate country makes new or

amend the current action plans if it deems necessary. Montenegro changed its Action Plans for chapters 23 and 24 only once until now, but it was not done on the basis of the initiative be the EU. It was actually Montenegro that asked the Commission to update them in order to make them more appropriate to the interim benchmarks it got and to insert new deadlines in order to make things more feasible. The fact is that when Montenegro was opening chapters 23 and 24, the New Approach was still in the creation. That is why the candidate country had to produce the action plans for the chapters before it got interim benchmarks which in turn affected the link in between the plans and the interim benchmarks. The lack of connection between activities and measures and what was later to be the interim benchmarks thus put some problems in front of the public administration in Montenegro. That is why the adaptation was done already in February 2015 nearly two after it had adopted them, and the country is still using them as the basis for the fulfilment of interim benchmarks. Serbia, on the other hand, adopted its rule of law action plans in April 2016 and is now in the process of changing them in the similar way as Montenegro did it.

The EU also created a very elaborate system of monitoring the progress within the chapters 23 and 24, where the Commission was tasked to report to the Council twice a year on how a candidate country fares with the implementation of the action plans and the overall progress in the rule of law area. The Commission started with the reporting through the Enlargement package progress or country reports and then added the second reporting in the form of non-papers since the Commission officials did not want to start with the official form of reports.

Benchmarking System

Benchmarks were introduced around the time when the Big Bang Enlargement happened and the EU was preparing to accept Romania and Bulgaria. They were first introduced in Croatia and Turkey accession negotiations in order to earmark opening and closing of chapters. As C. Hillion puts it: "The Commission is in charge of proposing such benchmarks to the Member States, and of gauging whether these are met by the candidate, or not" (Hillion, 2013:3). The New Approach to the rule of law has also brought a new generation of benchmarks, i. e. apart from having opening and closing benchmarks the EU introduced the so called interim benchmarks. Unlike in other chapters, the candidate country had to go through the exercise of obtaining and fulfilling benchmarks in chapters

23 and 24 three times during the negotiations. Opening benchmarks were already set in the EU General Position so that there was no surprises or expectation what the candidate country would get as the requirement to start the process. Interim benchmarks were set in the EU Common position for the opening of chapters 23 and 24, while the closing benchmarks are yet to be set for the candidate countries in the New Approach.

In the case of Montenegro, the Screening reports spelled out seemingly simple requirements put to the candidate country to fulfil. For example, the opening benchmark for Chapter 23 asked Montenegro to adopt "one or more detailed action plan(s), comprising related timetables and setting out clear objectives and timeframes and the necessary institutional set-up, in the following areas: Judiciary, Anti-Corruption, Fundamental rights. The action plan(s) should be closely consulted with the Commission and take into consideration the recommendations provided. Beyond these recommendations, also other identified shortcomings in the country should be addressed. The action plan(s) should aim at full alignment of Montenegro with the requirements of this chapter. They will constitute guidance documents for the following negotiations and the Commission may propose that Montenegro submits new or amended action plans, where problems arise in the course of negotiations under this chapter." (Ministry of European Affairs of Montenegro, 2018: 87). The one for Chapter 24 was the same in its demands to be met apart from the difference in the areas of the action plans, where Chapter 24 had its 10 subareas of work as already mentioned. The fact is that the action plans were already mentioned in the EU General Position in article 11 (General Position on the Ministerial Meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union, EU Opening Statement for Accession Negotiations: 5), which specified that the action plans should address the shortcomings identified in the Screening Reports and that there should be a difference in time planning where the more urgent ones should be addressed immediately. That practically meant that Montenegro needed to focus as soon as possible on the constitutional reform that would allow for the changes in the judicial part of the Constitution and further on to proceed with the amendments of the laws and bylaws. Later on, of course, the focus should be more on the areas of institution building and track record. The action plans were, also, to be adopted with a wide consensus of all relevant stakeholders in order to have the full support during their implementation. That meant that it was not just up to the Government to finalize and adopt the plans but to have the judiciary and other autonomous institutions such

as an Ombudsman, as well as the civil society where the academia and especially the NGOs could provide a helping hand but also gain insight into the planning documents for their future roles.

Once Montenegro managed to submit the action plans for Chapters 23 and 24 in June and implement the amendments to the Constitution in the area of judiciary two months later, the Commission started to prepare draft common positions. Already in December 2013, an intergovernmental conference between the EU and Montenegro was held in Brussels and Montenegro opened Chapters 23 and 24 along with three more. At that occasion it got a record number of benchmarks per chapter: 45 interim benchmarks for Chapter 23; and 38 for Chapter 24. The sheer number of 83 interim benchmarks was more than the number of all other opening and closing benchmarks it got for other chapters. This shows how elaborate and systemic the approach to the rule of law has become especially when having in mind that each of the benchmarks contains a very demanding set of measures to be fulfilled in order to meet all the requirements and consider the chapter ready to move to the next phase, i.e. obtaining the closing benchmarks. Furthermore, interim benchmarks are very different from each other and they can be grouped in the three categories: a) legislation; b) institutional capacity; and c) track record. For example, when it comes to pure legislation, it is required that "Montenegro conducts and impacts assessment with the help of EU expertise and on that basis, adopts a new Law on Asylum in line with EU acquis and prepares an analysis of all requirements needed to implement upon accession the Eurodac and Dublin regulations" (European Union Common Position Chapter 24: 20). Even this seemingly simple benchmark that called for a new Asylum Law has in its content the need to presuppose the way how the country would prepare future legislation and not to stop with the law adoption, but to go further in assessing possible problems in a certain area once having acceded to the EU. When it comes to the institutional set up, the country was asked either to establish new institutions like the Special Prosecutor Office or Anti-Corruption Agency, or to improve its capacities in the already existing institutions. Finally, the candidate was also required to "establish an initial track record of efficient and effective investigation, prosecution and convictions in corruption cases, including high level cases" (European Union Common Position Chapter 23: 24). There are also benchmarks that overarch all the three types of requirements like the one asking Montenegro to adopt new legislation on asset recovery, establish a new asset recovery office, recruit the management through a transparent and objective process and finally to provide an initial track record to show that

the country has an increased number of cases of criminal assets confiscated together with higher amounts, and on top of that to have this confiscation within cases of organized crime and money laundering. This last example shows how elaborate and demanding one benchmark can be.

Conclusions

The New Approach in accession talks has produced a new framework for the negotiations and ushered in a new wave of candidate countries. It has enabled the Western Balkan candidates to start their accession talks within the environment of accentuated enlargement fatigue in the EU. At the same time, it has offered an opportunity for the Member States that have not been too keen on the enlargement and that have been asking for a more focused and stricter approach to the rule of law to feel more secure and have more confidence in the way that the Commission is conducting the negotiations with the candidates.

On the other hand, the New Approach has produced a very demanding and exhausting frame for the candidates to move toward the membership. Its mechanisms and procedures have created new conditionality, extended the timespan of the accession talks to the lengths with no precedent in the previous enlargement waves and finally they have instituted a matrix of dealing with Chapters 23 and 24 that in turn might have an effect on the very European Union and the way it deals with its rule of law.

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