

DEMOCRACY AND HUMAN RIGHTS

HOW TO OBTAIN A DECISION ON THE OPENING OF NEGOTIATIONS?

NEGOTIATIONS ON THE MEMBERSHIP
OF BOSNIA AND HERZEGOVINA
IN THE EUROPEAN UNION

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In mid-December 2023, the heads of state and government of the European Union (EU) adopted a conclusion stating that “the European Council will open accession negotiations with Bosnia and Herzegovina (BiH), once the necessary level of compliance with membership criteria has been achieved.”



With the same conclusion, the European Commission was invited to deliver a report on BiH's progress no later than March 2024 “with a view to making a decision” on the opening of negotiations.



As the least prepared candidate for EU membership, with limited progress in reforms and some setbacks, but also with a number of conditions for opening accession negotiations, which the EU has had for BiH from 2019 to the present day, the question is what the authorities in BiH can do, under what conditions the EU should open negotiations and whether BiH authorities can seize the positive moment.

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INTRODUCTION

In mid-December 2023, the heads of state and government of the European Union (EU) adopted a conclusion stating that “the European Council will open accession negotiations with Bosnia and Herzegovina (BiH), once the necessary degree of compliance with the criteria for membership has been achieved”¹. With the same conclusion, the European Commission was invited to provide a progress report on BiH by March 2024 at the latest “with the aim of making a decision” on the opening of negotiations.

With this conclusion, the EU member states confirmed the recommendation of the European Commission from November 2023, which was adopted on the basis of a detailed report on BiH.

In it, the European Commission processed 33 chapters, i.e. policies that are crucial for EU membership, from the rule of law and public procurement to the quality of statistics, environmental protection and transport policy, and assessed the level of preparedness of institutions, laws and practices for EU membership.

The report also addressed BiH’s progress in meeting two lists of conditions for opening negotiations on EU membership, fourteen key priorities from May 2019 and nine steps that followed the candidate status in December 2022.

The aim of this analysis is to offer an overview of BiH’s readiness for EU membership and fulfilment of the conditions for opening accession negotiations. Special focus will be placed on areas where, according to the European Commission’s assessment, BiH has regressed since the granting of candidate status in December 2022. Additionally, this analysis will try to answer the question of what reforms and steps BiH should implement in order to achieve the “necessary degree of compliance with the criteria for membership”.

This analysis is divided into five parts.

The first chapter will present in more detail the findings of the European Commission’s report on BiH’s readiness for EU membership.

The second chapter will present an overview of the conditions that the EU set before BiH for the opening of membership negotiations, and the level of their implementation according to the assessment of the European Commission from November 2023. This chapter will also include a review of the conditions that the EU expected from Ukraine and Moldova, and the level of fulfilment that was required in order for them to receive an unconditional recommendation to open accession negotiations in November 2023.

The third chapter will focus on the priorities and steps within which, according to the European Commission’s assessment, BiH has regressed since it was granted candidate status in December 2022 (media freedoms and pressure on civil society).

The conclusion will offer the authors’ answer to the question of what reforms and steps BiH should implement in order to achieve “the necessary degree of compliance with the criteria for membership”, as stated in the conclusion of the European Council from December 2023.

¹ European Council, “European Council meeting (14 and 15 December 2023) – Conclusions”, December 15, 2023. https://www.consilium.europa.eu/media/68967/european_council_conclusions-14-15-12-2023-en.pdf

PREPARATION OF BIH FOR EU MEMBERSHIP

Every year, the European Commission publishes reports in which it assesses readiness for the membership in the European Union (EU) of all ten (potential) candidates for membership. In 33 areas, that is, the chapters into which the EU accession negotiations are divided, the European Commission evaluates the level of compliance of national laws, institutions and policy implementation with those of the EU. The areas assessed include everything, from judiciary and public procurement to the quality of statistics, the environment and foreign policy.

Since the European Commission started to introduce a more detailed, comparable and more rigorous methodology in 2015, the reports have built significant credibility and objectivity in the evaluations. These evaluations concern the core of Europeanization. Without sufficient preparation in them, the barriers between the EU and the candidates cannot be removed. On the other hand, the removal of barriers after successfully implemented reforms, including the rule of law and democratization, has consequences for the economy. It encourages investments and convergence with a much richer, more successful and more socially just Union.

The European Commission published its most recent reports for ten (potential) candidates in November 2023. Each of the 33 chapters was assessed using five levels of preparation:

Early stage of preparation

Some level of preparation

Moderately prepared

Good level of preparation

Very advanced stage of preparation

In order to compare the level of preparedness of the 10 countries, each of the five levels of preparation can be assigned one grade, from 1 for the worst grade (*early stage of preparation*) to 5 for the best (*very advanced stage of preparation*):

Early stage of preparation (1)

Some level of preparation (2)

Moderately prepared (3)

Good level of preparation (4)

Very advanced stage of preparation (5)

The European Commission's report from November 2023 on the preparedness of BiH for EU membership revealed at least three things.

First, at this moment **BiH is still far from being prepared for EU membership**. With an average rating ranging between an early stage and some level of preparation, BiH is moderately prepared in only two chapters (movement of capital and intellectual property). In as many as 14 out of 33 chapters, BiH is at the very beginning, i.e. in the early stage of preparation.

Second, the level of preparation of BiH for EU membership has remained unchanged in the last four years. Namely, in relation to 2019, when the European Commission for the first time published detailed assessment of BiH's readiness for EU membership in 33 chapters, minimal progress was made in only one chapter, financial control (32).

Table 1: Preparedness of BH for EU membership, European Commission Report, 2023²

Chapters		2019	2023
1	Free movement of goods	1	1
2	Freedom of movement for workers	2	2
3	Right of establishment and freedom to provide services	1	1
4	Free movement of capital	3	3
5	Public procurement	2	2
6	Company law	2	2

² European Commission, "Bosnia and Herzegovina – Report 2023", November 8, 2023 https://neighbourhood-enlargement.ec.europa.eu/bosnia-and-herzegovina-report-2023_en

7	Intellectual property law	3	3
8	Competition policy	2	2
9	Financial services	2.5	2.5
10	Information society and media	1	1
11	Agriculture and rural development	1	1
12	Food safety, veterinary and phytosanitary policy	2	2
13	Fisheries	1	1
14	Transport policy	2	2
15	Energy	1	1
16	Taxation	2	2
17	Economic and monetary policy	1	1
18	Statistics	1	1
19	Social policy and employment	2	2
20	Enterprise and industrial policy	1	1
21	Trans-European networks	2	2
22	Regional policy and coordination of structural instruments	1	1
23	Judiciary and fundamental rights	2	2
24	Justice, freedom and security	2	2
25	Science and research	2	2
26	Education and culture	1	1
27	Environment and climate change	1.5	1.5
28	Consumer and health protection	1	1
29	Customs union	2	2
30	External relations	2	2
31	Foreign, security and defence policy	2	2
32	Financial control	1	2
33	Financial and budgetary provisions	1	1
Total (of 165)		54	55
Average (out of 5.0)		1.6	1.7

Third, BiH is the least prepared for EU membership of all ten (potential) candidates, including Kosovo and Georgia, which were not candidates for EU membership at the time.

Table 2: Preparedness of candidates for EU membership, 2023: Early stage of preparation (1); Some level of preparation (2); Moderately prepared (3); Good level of preparation (4); Very advanced stage of preparation (5)³

Candidate	Average of 33 chapters (out of 5.0)
Montenegro	3.1
Serbia	3.1
Northern Macedonia	3.0
Turkey	2.9
Albania	2.7
Ukraine	2.3
Georgia	2.1
Kosovo	2.0
Moldova	1.9
Bosnia and Herzegovina	1.7

All this points to the fact that, when it comes to BiH's path to the EU, there is a lot of work left for the governments of Bosnia and Herzegovina, more so than in any other (potential) candidate. Compared to other candidates, BiH is three times less prepared than Montenegro, and even Ukraine, Moldova and Georgia, countries whose membership perspective was recognized only in June 2022, are better than BiH.

However, the EU does not require BiH to reach a certain level of preparedness for membership in 33 chapters in order to open accession negotiations. Prior to that decision, there are two lists of conditions before BiH, one from May 2019 and the other from December 2022.

³

European Commission, "EU Enlargement Package 2023", November 8, 2023. https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/strategy-and-reports_en

II

FULFILMENT OF THE REQUIREMENTS FOR OPENING NEGOTIATIONS

The EU presented BiH with two lists of conditions for opening accession negotiations.

In the Opinion of the European Commission on BiH's request for EU membership from May 2019, the European Commission stated that it believes that negotiations "should be opened when the country achieves the necessary level of compliance with the criteria for membership", with special emphasis on the stability of institutions which especially guaranty democracy and the rule of law".⁴

In order to more closely define expectations from BiH, the European Commission published a list of 14 key priorities, which related to four areas: (I) democracy and the functioning of institutions, (II) the rule of law, (III) fundamental rights, and (IV) public administration reform.

Among the fourteen key priorities, there was room for several changes to the Constitution, including those related to the implementation of the judgment of the European Court of Human Rights in the case of Sejdic and Finci. The list includes the reform of the Constitutional Court "including the resolution of the issue of international judges and ensuring the implementation of its decisions", as well as the creation of conditions for holding local elections in Mostar. *[For a complete list of 14 key priorities, see the appendix.]*

In its conclusions from December 2019, the EU established that BiH "needs to fulfil" these 14 key priorities in order to progress on its EU path.⁵ In the same conclusions, member states called on the European Commission to focus in its reports on progress in fulfilling these 14 key priorities.

In the following three years, BiH did not entirely fulfil any of the 14 key priorities. In its report from November 2022, the European Commission thus assessed that BiH made some progress in eight of the fourteen key priorities.⁶ For example, the holding of city elections in Mostar, the adoption of the state strategy for the prosecution of war crimes, the adoption of the amendment to the law on public procurement, and the holding of the first Pride Parade in Sarajevo in 2020 were assessed as certain progress. However, BiH did not make any progress in six key priorities.

The absence of significant progress in meeting the fourteen key priorities did not prevent the European Commission from recommending to the EU member states in October 2022 the granting of candidate status for BiH.⁷ The motivation for the recommendation was the change in the geopolitical situation that resulted from the full-scale invasion of Ukraine and the insistence of a group of EU member states, led by Austria and Slovenia, that soon after granting candidate status to Ukraine and Moldova in June 2022, the same status should be granted to BiH. First of all, as a political message to the citizens of BiH and the countries of the Western Balkans, but also as an incentive to the governments that would be formed after elections in October 2022. In December 2022, EU member states accepted the recommendation and explanation, and unanimously granted BiH candidate status.⁸

4 European Commission, "Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union", May 29, 2019. <https://archive.europa.ba/wp-content/uploads/2019/06/Misljenje-Komisije-o-zahhtjevu-Bosne-i-Hercegovina-za-clanstvo-u-Evropskoj-uniji.pdf>

5 EU Council, "Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union – Council conclusions", December 10, 2019. <https://data.consilium.europa.eu/doc/document/ST-14954-2019-INIT/en/pdf>

6 European Commission, "Bosnia and Herzegovina – Report 2022", November, 2022. <https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/Bosnia%20and%20Herzegovina%20Report%202022.pdf>

7 European Commission, "Opening remarks by Commissioner Olivér Várhelyi at the press conference on the 2022 Enlargement package", October 12, 2022. https://ec.europa.eu/commission/presscorner/detail/en/speech_22_6144

8 EU Council, "Enlargement and Stabilisation and Association Process – Council conclusions", December 13, 2022. <https://data.consilium.europa.eu/doc/document/ST-14954-2019-INIT/en/pdf>
European Council, "European Council meeting (15 December 2022) – Conclusions", December 15, 2022. <https://www.consilium.europa.eu/media/60872/2022-12-15-euco-conclusions-en.pdf>

As part of this decision, EU member states agreed that for the next step in the EU integration process, the opening of negotiations, in addition to fulfilling 14 key priorities from May 2019, BiH should also fulfil nine steps accompanying the candidate status.

Among the nine steps, there was the adoption of amendments and a new law on the High Judicial and Prosecutorial Council of BiH (two separate steps), the law on the courts of BiH, the law on the prevention of conflict of interest, as well as the guaranty of freedom of expression and media freedoms. The European Commission was invited to monitor progress in the implementation of these steps in future reports.

In its only report since the granting of candidate status to BiH, in November 2023, the European Commission offered a detailed overview of the implementation of fourteen key priorities and nine steps.

In the report, the European Commission concluded that BiH fully implemented two key priorities.⁹ BiH enabled the functioning of the Parliamentary Committee of the Stabilisation and Association Agreement, and through the abolition of the death penalty in Republika Srpska and the adoption of the Law on Ombudsman for Human Rights, ensured the right to life and the prohibition of torture.

According to the assessment of the European Union, BiH has made some progress in seven key priorities. For example, through the adoption of the amendments to the Law on the High Judicial and Prosecutorial Council of BiH in September 2023, the adoption of the amendments to the Law on public procurement in August 2022, but also through the appointment of a steering committee for the implementation of the state strategy for prosecuting war crimes.

However, BiH did not make any progress in 2 key priorities, related to the improvement of the electoral process and ensuring the functioning of the coordination mechanism in EU issues. What should be highlighted is that BiH has regressed in as many as three key priorities. Through the preparation and adoption of laws in the National Assembly of Republika Srpska, the Law on the non-application of the decisions of the Constitutional Court of BiH in June 2023 (key priority 4); the law on the so-called foreign agents targeting members of civil society (key priority 11); and

introducing criminalisation of defamation (key priority 12). [See Chapter 3 for more details]

When it comes to the list of nine steps that accompanied the candidate status, according to the assessment of the European Commission, BiH fully implemented only one step, the one related to the prohibition of torture (adopting the Law on the Ombudsman). Four steps, including the adoption of the law on the High Judicial and Prosecutorial Council and the law on the courts of BiH, have not been fully implemented. Some progress was achieved in three steps, and a setback was recorded in one step (related to the freedom of media and expression in Republika Srpska).

Such a limited result in the implementation of reforms, regardless of significant diplomatic pressure from the member states led by Austria and Slovenia, but also the expectations of the BiH Council of Ministers, meant that the European Commission was unable to recommend unconditional opening of accession negotiations with BiH. In December 2023, the European Council confirmed the recommendation of the European Commission and concluded that "it will open accession negotiations with BiH, once the necessary degree of compliance with the criteria for membership is achieved".¹⁰

At the same time, the European Commission in November and the European Council in December 2023, decided to open accession negotiations with Ukraine and Moldova. In BiH, but also in some member states, this left the impression of unfair treatment towards BiH. However, according to the reports of the European Commission, the authorities in both countries fulfilled far more conditions than BiH.

After granting them candidate status in June 2022, the EU set certain steps for Ukraine and Moldova to open accession negotiations.¹¹ Seven of them for Ukraine, among which were the adoption of the legal framework for the selection of judges of the Constitutional Court, the completion of the process of selection of members of the High Judicial Council, and the adoption of the law on the media. Moldova was expected to implement nine more or less similar steps, including progress in the fight against corruption and organised crime.

⁹ European Commission, "Bosnia and Herzegovina – 2023 Report", November 8, 2023. https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_691%20Bosnia%20and%20Herzegovina%20report.pdf

¹⁰ European Council, "European Council meeting (14 and 15 December 2023) – Conclusions", December 15, 2023. <https://www.consilium.europa.eu/media/68967/europeanco-uncilconclusions-14-15-12-2023-en.pdf>

¹¹ European Commission, "The European Commission recommends to Council confirming Ukraine, Moldova and Georgia's perspective to become members of the EU and provides its opinion on granting them candidate status", June 17, 2022. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3790

In a report from November 2023, the European Commission concluded that Ukraine had fully implemented four of the seven steps, and had made significant progress in the other three.¹² In the case of Moldova, the European Commission concluded that the authorities of this country fully implemented as many as six of the nine steps, and made significant progress in the other three.¹³ The authorities of these countries did not backslide in any of the steps.

In that sense, the decision on Ukraine and Moldova, in relation to the decision on BiH, could not have been different.

¹² European Commission, "Ukraine – 2023 Report", November 8, 2023.
https://neighbourhood-enlargement.ec.europa.eu/ukraine-report-2023_en

¹³ European Commission, "Moldova – 2023 Report", November 8, 2023.
https://neighbourhood-enlargement.ec.europa.eu/moldova-report-2023_en

III

BACKSLIDING IN REFORMS

After the EU granted candidate status to BiH in December 2022, there has been a noticeable trend of intensifying repression in the areas of civil society, especially in the area of media freedom and freedom of public expression, and freedom of association and civil initiatives have also been seriously threatened.

Pressures on civil society are not only informal or indirect, and they do not come only from the circles of media and activists close to the ruling parties, but are legitimized as a socially justified and necessary method of reducing or extinguishing initiatives of free media and citizens' associations.

A similar assessment is shared by the European Commission, which in its report on BiH from November 2022 concluded that BiH had regressed in as many as three key priorities:

Key priority 4: The law on non-application of decisions of the Constitutional Court of BiH, adopted in the National Assembly of Republika Srpska in June 2023 "further hinders legal certainty".¹⁴

Key priority 11: The draft law that refers to civil society actors as 'foreign agents', adopted in the first reading in the National Assembly of Republika Srpska in September 2023 "if adopted as such, would mark another regrettable and undeniable step backwards".¹⁵

Key priority 12: The introduction of criminal penalties "with disproportionate restrictions" for

defamation, by the National Assembly of Republika Srpska in July 2023, "seriously affects freedom of expression and the media and represents a big step backwards".¹⁶

Given that the expectations are the opposite, that is, that BiH needs to make progress in implementing all key priorities, this trend threatens the start of BiH's negotiations on EU membership.

In the civil sector, the preparation and drafting of drafts or proposals, i.e. the adoption of these laws in the National Assembly of Republika Srpska, are seen as part of a larger body of authoritarian legislation.¹⁷ Namely, last year's steps are seen as concentrated use of the position of power in a legislative body, the National Assembly, by the ruling coalition in Republika Srpska, in order to pass legal acts that protect the practice of undisputed rule in a normative form.

These laws are therefore considered part of the implementation of a comprehensively designed concept, which will not stop there. This can be seen above all by the engagement of significant public resources and institutions with the aim of narrowing the public space

¹⁴ European Commission, "Bosnia and Herzegovina – 2023 Report", November 8, 2023. https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_691%20Bosnia%20and%20Herzegovina%20report.pdf

¹⁵ European Commission, "Bosnia and Herzegovina – 2023 Report", November 8, 2023. https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_691%20Bosnia%20and%20Herzegovina%20report.pdf

¹⁶ European Commission, "Bosnia and Herzegovina – 2023 Report", November 8, 2023. https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_691%20Bosnia%20and%20Herzegovina%20report.pdf

¹⁷ National Assembly of Republika Srpska, "Law on Non-application of the Decisions of the Constitutional Court of BiH", July 12, 2023. <https://www.narodnaskupstinars.net/?q=la/akti/usvojeni-zakoni/zakon-o-neprijemljenju-odluka-ustavnog-suda-bosne-i-hercegovine>
National Assembly of Republika Srpska, "Law on Amendments to the Criminal Code of Republika Srpska", August 24, 2023. <https://www.narodnaskupstinars.net/?q=la/akti/usvojeni-zakoni/zakon-o-izmjenama-i-dopunama-krivichnog-zakonika-republike-srpske-0>
National Assembly of Republika Srpska, "Draft Law on the Special Registry and Publicity of Work of Non-Profit Organisations", September 26, 2023. <https://www.narodnaskupstinars.net/?q=la/akti/zakoni-u-proceduri/nacr-zakona-o-posebnoj-registru-i-javnosti-rada-neprofitnih-organizacija>

for the media, activists and a critical part of the non-governmental sector that opposes the adoption of these laws. At the same time, in the media that support the government, there are voices that offer uncritical support for the aforementioned proposals. This further creates an atmosphere in which the most significant part of the expert and academic community remains silent.

Since the amendments to the Criminal Code came into force, criminalizing defamation in August 2023, public criticism has become even more dangerous, not only because of the previously possible socio-economic consequences for critics of the government, but now also because of strict penal measures. By the end of 2023, on the basis of that legal solution, around thirty criminal charges were filed. According to media reports, charges were filed against journalists, citizens, activists and whistle-blowers.

In mid-January 2024, the Constitutional Court of Bosnia and Herzegovina made a decision that the adopted amendments were to the greatest extent in accordance with the Constitution of BiH, except for Article 280a, which prescribed a prison sentence for harming the reputation of Republika Srpska, its peoples and symbols.¹⁸ The Constitutional Court of BiH considered that "it is not proportional to the goals for which it was enacted" and that such interference with freedom of expression is "not necessary in a democratic society".

However, this decision of the Constitutional Court of BiH responded to the criticism of the expert community in only a small part, which refers to the encroachment on the freedom of the media and public expression and opening up space for additional suppression of civil activism. In addition, with the adoption of the Law on non-application of the decisions of the Constitutional Court of BiH in July 2023, the question arises as to whether and to what extent the institutions and judiciary of Republika Srpska will respect such a decision of the Constitutional Court of BiH.

The adoption of the Law on the special registry and publicity of the work of non-profit organisations has been in the procedure since the end of September 2023. This law is better known to the public as the law that labels non-governmental and non-profit associations as "foreign agents".¹⁹

This draft law foresees additional measures to control the work and activities of non-governmental organizations, as well as their financial operations by the Ministry of Justice of Republika Srpska. One of the measures envisaged, for example, involves labelling each publication with a clause that the author is entered in the registry of foreign agents. Pundits believe that the goal of this, as well as a number of other measures, is to limit or suppress freedom of speech and association.

In addition to the above, the Law on Immunity of Republika Srpska can also be added to the corpus of authoritarian legal regulations, as seen by critical pundits.²⁰ The draft of this law was prepared in November 2023, after the publication of the report of the European Commission. The draft was adopted by the National Assembly on December 22, 2023, and the public hearing was held in January 2024.

This draft stipulates that deputies in the National Assembly of Republika Srpska and delegates to the Council of Peoples of Republika Srpska, as well as the president and vice-presidents of Republika Srpska and members of the Government of Republika Srpska, "are not criminally or civilly liable and cannot be detained for any action performed within their duties." With this, the spectrum of possible abuses expands immeasurably, and the fact that civil litigation immunity has been added to criminal immunity is an original and peculiar idea.

During November 2023, the Draft Law on Referendum and Citizens' Initiative was prepared and submitted for the procedure.²¹ It determines the jurisdiction of the RS Electoral Commission for keeping voter lists, but also provides that for referendum results to be valid, for example, it is sufficient to have a majority of the votes from the number of voters who turn out to vote, without requiring a qualified majority of the total number of registered voters. This law is also viewed by experts as part of the corpus of authoritarian legal regulations.

Also, mid-last year, the highest officials of Republika Srpska announced the adoption of the Law on Enemies of Republika Srpska, the aim of which would be to discredit and register "enemies and servants of enemies of Republika Srpska" with rigorous penal measures.

¹⁸ Constitutional Court of Bosnia and Herzegovina, "140 plenary session", January 18, 2024. <https://www.ustavnisud.ba/bs/140-plenarna-sjednica>

¹⁹ National Assembly of Republika Srpska, "Draft Law on the Special Registry and Publicity of Work of Non-Profit Organisations", September 26, 2023. <https://www.narodnaskupstinar.net/?q=la/akti/zakoni-u-proceduri/nacrt-zakona-o-posebnom-registru-i-javnosti-rada-neprofitnih-organizacija>

²⁰ National Assembly of Republika Srpska, "Draft Law on Immunity of Republika Srpska", November 29, 2023. <https://www.narodnaskupstinar.net/?q=la/akti/zakoni-u-proceduri/nacrt-zakona-o-immunitetu-republike-srpske>

²¹ National Assembly of Republika Srpska, "Draft Law on Referendum and Citizen Initiative", November 29, 2023. <https://www.narodnaskupstinar.net/?q=la/akti/zakoni-u-proceduri/nacrt-zakona-o-referendumu-i-gra%C4%91anskoj-inicijativi>

²²Although the proposer did not later repeat his intention again in public, and the law has not yet been introduced into the legislative process, experience with other legal solutions from the group of authoritarian legal regulations indicates that this law would also likely secure a necessary parliamentary majority for its adoption.

Among experts and critical observers, all these steps towards restrictive, rigid laws and high fines are viewed as part of the activity of the legislator aimed at deterring the civil sector and citizens from critical action, and forcing civil society activists to work in the shadows.

A comparative analysis with the experiences of EU member states in the area of encroachment on freedom of association and expression points to the example of the adoption of the law on "foreign agents" in Hungary, following an almost identical pattern as proposed in Republika Srpska. However, in the case of Hungary, the Court of Justice of the EU took the position that the provisions of the law were not in line with the EU law.²³ Due to the EU's pressure on the government in Budapest, that law was repealed.²⁴ However, recently the Hungarian authorities have announced a new series of similar laws.²⁵

In addition to the criticism in the European Commission's report, the preparation and adoption of controversial legal solutions also faced criticism from the international community, which came up with a proposal to abandon their preparation and adoption. However, besides postponing the enactment of these legal measures and superficially moderating some sections, the Republika Srpska authorities have not abandoned their primary objective of entrenching the authoritarian system.

However, the situation is different regarding other authoritarian tendencies in Bosnia and Herzegovina. In April 2023, the Sarajevo Canton Government passed the Draft Law on Offences against Public Order and Peace. This draft law, with its clauses on the dissemination of

fake news and defamation of state authorities, poses a threat to freedom of speech and expression. It potentially allows for increased suppression of media, civil society, and citizens critical of public institutions. The proposed law also expands police authority, leading to the potential for arbitrary determinations of legal breaches. Furthermore, it introduces severe penalties, including substantial fines and a six-month ban on public speaking for violators.

The European Commission, in the chapter on justice and fundamental rights (Chapter 23), in the report from November 2023, stated that if such a draft was adopted, it "could be misused to limit communication on the Internet and intimidate journalists."²⁶ The report additionally emphasized that "all such norms must fully respect the standards related to freedom of expression." After strong criticism from the public, but also from international institutions, including the Council of Europe and the OSCE, the Draft was sent back for revision.²⁷

Considering all of the above, it is impossible to conclude that the ruling coalition in Republika Srpska, at the entity level, has shown real and effective political will and efforts towards the opening of negotiations on the membership of BiH in the EU, although in public statements, hiding behind the positive steps taken at the level of BiH institutions, it declares itself as pro-European. This is, unfortunately, further confirmed by the destructive rhetoric of the highest officials in the past period, as well as of the persons from the ruling structures who have been sanctioned by the USA and the United Kingdom.

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- 22 Tanjug, "Dodik announced a bill for declaring enemies of Republika Srpska", July 18, 2023. <https://www.tanjug.rs/region/politika/41714/dodik-najavio-predlog-zakona-za-proglasenje-neprijatelja-republike-srpske/vest>
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CONCLUSIONS AND RECOMMENDATIONS

In its conclusions from December 2023, the European Council, at the highest level of EU heads of state and government, tasked the European Commission to provide a report on BiH's progress in March 2024 "with the aim of making a decision" on the opening of negotiations.²⁸

This conclusion is extremely positive for BiH and works in its favour, because otherwise BiH would have to wait for the standard report of the European Commission in October or November 2024 for its next opportunity to obtain an unconditional recommendation from the European Commission and the decision of the member states to open accession negotiations. Until then, the EU is set to have elections for the European Parliament and the election of the new European Commission, as well as several national elections (Austria, Belgium, Portugal), the results of which could change the attitude towards the enlargement policy, which, thanks primarily to Ukraine and Moldova, is currently somewhat more positive in Brussels than before.

In addition to the risk of a changed situation in the EU, missing the opportunity to open accession negotiations in March 2024 would have at least two negative consequences for BiH itself. First, it would miss getting on the train with Ukraine and Moldova, with which the European Commission is already starting technical preparations for negotiations. Considering the enthusiasm that exists in Brussels and the member states around these two countries, Bosnia and Herzegovina should take advantage of the opportunity and join that group. Second, BiH is expecting local elections in October 2024. Opening accession negotiations would provide the ruling coalition with a strong argument to leverage in their election campaign.

The fact is that the opening of EU accession negotiations with BiH is being discussed today because Ukraine and Moldova have opened their negotiations, and because a group of EU member states, led by Austria and Slovenia, insisted on equal treatment of BiH. If the EU has treated BiH unfairly compared to Ukraine and Moldova, it is solely in

terms of the number and complexity of the conditions imposed. While Ukraine and Moldova only had the steps that accompanied the candidate status, BiH, in addition to these steps, also had key priorities from 2019. However, when it comes to meeting the conditions, Ukraine and Moldova were far better than BiH.

In the conclusions adopted in December 2023 at the level of ministers of European affairs, in the General Affairs Council, the EU member states reiterated that progress is expected from Bosnia and Herzegovina in fulfilling the 14 key priorities from 2019, and the 9 steps that accompanied the candidate status from 2022.²⁹ A similar message, at least publicly, was conveyed at the end of January 2024 during the joint visit of the President of the European Commission, Ursula von der Leyen, Prime Minister of the Netherlands and Croatia, Mark Rutte and Andrej Plenkovic.³⁰

So, it is quite clear that the authorities in Bosnia and Herzegovina cannot, and they are not expected to, completely fulfil the 14 key priorities and nine steps by March 2024. This was confirmed by the representative of the European Commission during her visit to BiH in early February 2024.³¹ For the unconditional recommendation of the European Commission to open accession negotiations, BiH was asked to fulfil one plus three conditions:

* Initiation of the procedure for the conclusion of an agreement between BiH and the European Border and Coast Guard Agency (Frontex);

1. Adoption of the law on the prevention of money laundering and financing terrorism;

²⁸ European Council, "European Council meeting (14 and 15 December 2023) – Conclusions", December 15, 2023. https://www.consilium.europa.eu/media/68967/european_council_conclusions-14-15-12-2023-en.pdf

²⁹ Council of the European Union, "Council conclusions on Enlargement", December 12, 2023. <https://data.consilium.europa.eu/doc/document/ST-16707-2023-INIT/en/pdf>

³⁰ European Commission, "Press conference by von der Leyen, Borjana Kristo, Mark Rutte & Andrej Plenkovic in Sarajevo", January 2024. <https://www.youtube.com/watch?v=rXXkzrgEG18>

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2. Adoption of the law on the conflict of interest in BiH;
3. Adoption of the law on the Court of BiH.

In the meantime, the Presidency of Bosnia and Herzegovina initiated the procedure for concluding the agreement between Bosnia and Herzegovina and Frontex, and the Parliamentary Assembly of Bosnia and Herzegovina adopted the law on the prevention of money laundering and financing of terrorist activities.³² However, the time is running out to fulfil the remaining two conditions.

Considering the geopolitical circumstances, the pressure exerted by some member states regarding BiH, but also the procedural aspects in the EU itself, and the dynamics in BiH itself, we have at least three possible ways forward:

The first one is that BiH does not fulfil the remaining two conditions, and that the European Commission does not change its conditional recommendation for opening negotiations on EU membership. This would mean that BiH would not open negotiations on EU membership for the time being.

The second one is that the authorities in BiH fulfil the remaining two conditions, that the European Commission recommends the unconditional opening of membership negotiations, but that, due to the insistence of several member states, the decision to open negotiations be tied to the fulfilment of some of the 14 key priorities from 2019 and nine steps that accompanied the candidate status in 2022.

And the third path is that the authorities in BiH fulfil the remaining two conditions, the European Commission recommends, and the member states approve the unconditional opening of accession negotiations with BiH.

Whichever of these three possible paths materializes in reality, the everyday life of BiH will remain unchanged for the time being, and the negative tendencies will continue. Of course, unless the EU in Bosnia and Herzegovina in the coming period, either within the framework of open negotiations, the announced New

Growth Plan for the Western Balkans, or through the promise of sectoral and gradual accession to the EU, does not insist on the priority fulfilment of at least the following three sets of recommendations.

Recommendation 1: Progress in democratisation and the rule of law

- Adopt amendments to the Electoral law in accordance with the European standards by implementing relevant recommendations of OSCE/ODIHR and the Venetian Commission.
- Begin drafting a comprehensive Law on High Judicial and Prosecutorial Council.

Recommendation 2: Progress in the functioning of BiH institutions

- Appoint a coordinator for Pre-Accession Funds (IPA III).
- Adopt a programme for the adoption of the EU acquis.

Recommendation 3: Halt the regression in reforms

- Agreement between the European Commission and the Republika Srpska authorities on an Action Plan addressing legislative steps identified as regressive in reforms. This includes the execution of specific measures tied to the European Commission's New Growth Strategy for the Western Balkans.

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APPENDIX:

LIST OF EU CONDITIONS FOR BiH

FOURTEEN KEY PRIORITIES (May, 2019)

The European Commission believes that the negotiations for the accession of Bosnia and Herzegovina to the European Union should be opened when the country achieves the necessary level of compliance with the criteria for membership, and especially with the political criteria from Copenhagen, which require the stability of institutions that especially guarantee democracy and the rule of law.

Bosnia and Herzegovina will need to thoroughly improve its legislative and institutional framework to ensure that the following key priorities are met:

Democracy / Functioning

1. Ensure that elections are conducted in line with European standards by implementing OSCE/ODIHR and relevant Venice Commission recommendations, ensuring transparency of political party financing, and holding municipal elections in Mostar,
2. Ensure a track record in the functioning at all levels of the coordination mechanism on EU matters at all levels, including by developing and adopting a national programme for the adoption of the EU acquis.
3. Ensure the proper functioning of the Stabilisation and Association Parliamentary Committee. Fundamentally improve the institutional framework, including at constitutional level, in order to:
 - a) Ensure legal certainty on the distribution of competences across levels of government;
 - b) Introduce a substitution clause to allow the State upon accession to temporarily exercise competences of other levels of government to prevent and remedy breaches of EU law;

- c) Guarantee the independence of the judiciary, including its self-governance institution (HJPC);
 - d) Reform the Constitutional Court, including addressing the issue of international judges, and ensure enforcement of its decisions;
 - e) Guarantee legal certainty, including by establishing a judicial body entrusted with ensuring the consistent interpretation of the law throughout Bosnia and Herzegovina;
 - f) Ensure equality and non-discrimination of citizens, notably by addressing the Sejdic-Finci ECtHR case law;
 - g) Ensure that all administrative bodies entrusted with implementing the acquis are based only upon professionalism and eliminate veto rights in their decision-making, in compliance with the acquis.
4. Take concrete steps to promote an environment conducive to reconciliation in order to overcome the legacies of the war.

Rule of Law

1. Improve the functioning of the judiciary by adopting new legislation on the High Judicial and Prosecutorial Council and of the Courts of Bosnia and Herzegovina in line with European standards.
2. Strengthen the prevention and fight against corruption and organised crime, including money laundering and terrorism, notably by:
 - a) adopting and implementing legislation on conflict of interest and whistle-blowers' protection;
 - b) ensuring the effective functioning and coordination of anti-corruption bodies;

- c) align the legislation and strengthen capacities on public procurement;
 - d) ensuring effective cooperation among law enforcement bodies and with prosecutors' offices;
 - e) demonstrating progress towards establishing a track record of proactive investigations, confirmed indictments, prosecutions and final convictions against organised crime and corruption, including at high-level;
 - f) de-politicising and restructuring public enterprises and ensuring transparency of privatisation processes.
3. Ensuring effective coordination, at all levels, of border management and migration management capacity, as well as ensuring the functioning of the asylum system

Fundamental Rights

1. Strengthen the protection of the rights of all citizens, notably by ensuring the implementation of the legislation on non-discrimination and on gender equality.
2. Ensure the right to life and prohibition of torture, notably by (a) abolishing the reference to death penalty in the Constitution of the Republika Srpska entity and (b) designate a national preventive mechanism against torture and ill-treatment.
3. Ensure an enabling environment for civil society, notably by upholding European standards on freedom of association and freedom of assembly.
4. Guarantee freedom of expression and of the media and the protection of journalists, notably by (a) ensuring the appropriate judicial follow-up to cases of threats and violence against journalists and media workers, and (b) ensuring the financial sustainability of the public broadcasting system.
5. Improve the protection and inclusion of vulnerable groups, in particular persons with disabilities, children, LGBTI persons, members of the Roma community, detainees, migrants and asylum seekers, as well as displaced persons and refugees in line with the objective of closure of Annex VII of the Dayton Peace Agreement.

Public Administration Reform

1. Complete essential steps in public administration reform towards improving the overall functioning of the public administration by ensuring a professional and depoliticised civil service and a coordinated countrywide approach to policy making.

NINE STEPS ACCOMPANYING THE CANDIDATE STATUS (October, 2022)³³

The European Commission therefore recommends that candidate status be granted to Bosnia and Herzegovina by the Council on the understanding that the following steps are taken:

1. The adoption of the integrity amendments in the existing law of the High Judicial and Prosecutorial Council.
2. The adoption of a new law on the High Judicial and Prosecutorial Council.
3. The adoption of the law on Courts of Bosnia and Herzegovina.
4. The adoption of the law on prevention of conflict of interest.
5. The enhancement of fight against corruption and organised crime.
6. Advance work on ensuring more efficient coordination, at all levels, border management and migration management capacity, as well as ensuring the functioning of the asylum system.
7. Ensure prohibition of torture, notably the establishment of a national preventive mechanism against torture and ill-treatment.
8. Guarantee freedom of expression and freedom of the media.
9. The adoption of a national programme for the adoption of the EU acquis.
10. Izrada i usvajanje nacionalnog programa za usvajanje pravne stečevine EU-a.

³³ European Commission, "Opening remarks by Commissioner Olivér Várhelyi at the press conference on the 2022 Enlargement package", October 12, 2022. https://ec.europa.eu/commission/presscorner/detail/en/speech_22_6144

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