

NEW APPROACH TO THE EU ENLARGEMENT PROCESS – WHETHER COVID-19 AFFECTED CHAPTER 23 REQUIREMENTS?

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ABSTRACT

The EU enlargement policy requires creation of the new institutional organization, alignment of legal acts, increasing capacities of administration in the candidate countries. In relation to the Western Balkans the conditionality has an increased focus on good governance criteria, particularly maintenance of the rule of law, an independent judiciary, and an efficient public administration.

To address raised concerns of the EU accession process in the Western Balkans as a box-ticking exercise, the European Commission in February 2018, adopted the Credible Enlargement Perspective for an Enhanced EU Engagement with the Western Balkans' strategy, which introduced some renewed policy objective on the future enlargement of the EU including fundamental democratic, rule of law and economic reforms. In March 2020 the Council of the EU officially endorsed Commission proposal for a new enlargement methodology that is based on grouping the negotiation chapters in clusters, based on their interconnection, which requires tangible progress in all chapters merged to a cluster.

The above-mentioned introduction of a new methodology and the decisions of the Western Balkans candidate countries to apply it, correspond in time with the ongoing Europe and worldwide struggle to overcome challenges imposed by COVID-19 outbreak. The response to the pandemic influenced on the functioning of judiciary across the world and the rule of law in general. To respond to pandemic EU members states accepted new standards in relation to

judiciary which tend to be threat or suspension for fundamental rights protection and right to fair trial. Outbreak of COVID-19 revealed new trends in rule of law like limited access to the lawyer in criminal cases, use of IT tools for trials, and cancelation or limitation of public hearings. The scope and modalities of such rule of law exemptions differ across the EU member states.

Introduced measures and responses shed a completely new light on the issues of relevant standards in the accession process and modality to be addressed and implemented in the candidate countries. Finally, this also triggers the issue of evaluation and assessment of the reform achievements in candidate countries by EC when measuring the progress. In the analysis of the above-mentioned issues the authors assessed whether derogation of the well-established rule of law principles influenced on EU accession requirements towards candidate countries and whether they temporary changed understanding and implementation of the fundamental rights or made permanent transformations in understanding of rule of law requirements.

Keywords: COVID-19 pandemic, EU enlargement, fundamental rights, judiciary, rule of law, Western Balkans

1. INTRODUCTION

The enlargement of the European Union (EU) is the main political process for the EU and for international relations in Europe.¹ EU enlargement has impact both on the political structure of the EU and on the EU's institutional set-up.² In light of candidate countries it has impact on institutional organization, changes of legislative framework, and increased capacities of public administration.

For the enlargement the EU needs effective conditionality to ensure that new candidate countries reach needed level of preparation to enable smooth functioning of the EU internal market and decision-making process.³ In relation to the Western Balkans the conditionality has an increased focus on good governance criteria, particularly upholding of the rule of law, an independent judiciary, and an efficient public administration.

To address raised concerns of the EU accession process in the Western Balkans as a box-ticking exercise, in March 2020 the Council⁴ of the EU officially en-

¹ Schimmelfennig, F.; Sedelmeier, U., *Theorizing EU enlargement: research focus, hypotheses, and the state of research*, Journal of European Public Policy, Vol. 9, No. 4, 2002, pp. 500-528, [DOI: 10.1080/13501760210152411]

² Schimmelfennig, F.; Sedelmeier, U., (eds.), *The Politics of European Union Enlargement – Theoretical approaches*, Routledge, 2011, p. 4

³ Steunenberg, B.; Dimitrova, A., *Compliance in the EU enlargement process: The Limits of conditionality*, European Integration online Papers, Vol 11, No. 5, 2007, pp. 1-18

⁴ General Secretariat of the Council, *Enlargement and stabilization and association process*, Council conclusions, 7002/20, Brussels, 25 March 2020

dorsed Commission proposal⁵ for a new enlargement methodology that is based on grouping the negotiation chapters in clusters, based on their interconnection, which requires tangible progress in all chapters merged to a cluster. The methodology introduces stronger political governance to the enlargement process. However, political conditionality is now explicit and institutionalised, which will lead to the shifting of the process from a bureaucratic approach. In addition, the performance-based approach in relation to the Instrument for Pre-accession Assistance (IPA), together with the reversibility clause⁶ represent powerful incentives.

The introduction of a new methodology and the decisions of the Western Balkans candidate countries to apply it, relate in time with the ongoing struggle to overcome challenges imposed by COVID-19 outbreak. The pandemic has seriously impacted functioning of courts across Europe and Western Balkans. Due to the introduction of social distancing and closure of courts, there has been an increased use of remote justice tools such as video and audio conferencing. Outbreak of COVID-19 revealed new trends in rule of law like limited access to the lawyer in criminal cases, use of IT tools for trials, cancellation or limitation of public hearings, etc. The scope and modalities of such rule of law exemptions differ across the EU member states. The response to pandemic tends to be threat or suspension for fundamental rights protection and right to fair trial, especially defendants' rights.

The subject of the paper is analysis of influence of these new trends on relevant standards in the accession process and modality to be addressed and implemented in the candidate countries. First part of the paper presents review of the EU enlargement process in the Western Balkans, challenges in application of conditionality and measuring progress in the reform of justice sector. After twenty years of the accession process the overall assessment of the judicial reforms impact in Western Balkan countries is moderate. Slow pace of reforms were additionally jeopardize by the pandemic and measures taken by authorities. Considering criticism of measure, in the second part authors analysed impact of COVID-19 on fundamental rights and specifically procedural rights of defendant, both in the EU countries and Western Balkans. While the third part of the paper relates to the assessment whether derogation of the well-established rule of law principles influenced on EU accession requirements towards candidate countries and whether they temporary changed understanding and implementation of the fundamental rights or made permanent transformations in understanding of rule of law requirements.

⁵ European Commission, *Enhancing the accession process – A credible EU perspective for the Western Balkans*, 5 February 2020

⁶ The possibility to adopt measures sanctioning any serious or prolonged stagnation or backsliding in the reform process

2. EU ENLARGEMENT PROCESS IN WESTERN BALKANS

The accession of the Western Balkans is governed by the rules defined at the Copenhagen European Council in 1993.⁷ In the Conclusion of the Presidency the heads of state or government set a series of membership requirements that the candidate countries which to join the EU should fulfil to become a member. The criteria included stability of the institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities as political criteria.⁸ Economic criteria included functioning market economy and capacity to cope with competitive pressure and market forces within the Union. Copenhagen criteria were gradually developed and extended. Consequently, 1995 European Council held in Madrid adopted conclusions in which it is highlighted that candidate countries in addition to the political commitment to adopt EU *acquis* have to increase administrative capacities to guarantee efficient applications of the EU *acquis*.⁹

For the Western Balkans the two other European Councils are important for clarification of enlargement criteria. The Thessaloniki European Council held in June 2003¹⁰ reiterated its determination to fully and effectively support the European perspective of the Western Balkan countries and for the first time recognised that Western Balkan countries would become an integral part of the EU, once they meet the established criteria. At the 2003 Thessaloniki European Council, the Western Balkan countries were offered to sign Stabilisation and Association Agreements (SAAs) as a framework within which they would conduct reforms and fulfil conditions required for the EU membership.¹¹ The SAAs included provisions on adoption of the EU *acquis*, but also requirements for regional cooperation and economic development.¹²

The second relevant document for the Western Balkan countries is Presidency conclusions from the European Council held in Brussels on 14-15 December 2006, which is an integral part of the present Enlargement strategy. The European Council

⁷ European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93/REV 1

⁸ Hillion, C., *EU Enlargement*, in: Craig, P., De Burca, G., (eds.), *The Evolution of EU Law*, Oxford, 2011, pp. 187–217

⁹ Matić Bosković, M., *Obaveza usklađivanja sa pravnim tekovinama Evropske unije*, in: Škulic, M; Ilić, G.; Matić Bošković, M., (eds.), *Unapređenje Zakonika o krivičnom postupku: de lege ferenda predlozi*, Beograd, Udruženje javnih tužilaca i zamenika javnih tužilaca, 2015, pp. 149-158

¹⁰ European Council in Copenhagen, 19-20 June 2003, Presidency Conclusions, 11638/03

¹¹ Bieber, F., (ed.), *EU Conditionality in the Western Balkans*, Abingdon: Routledge, 2017

¹² Mišćević, T.; Mrak, M., *The EU Accession Process: Western Balkans vs. EU-10, Politička misao*, Vol. 54, No. 4, 2017, pp. 185-204

agreed that basis for a renewed consensus on future enlargement strategy is based on consolidation, conditionality and communication. The European Council endorsed stricter conditionality at all stages of negotiations, as a lesson learned from previous enlargement processes, especially with Romania and Bulgaria.¹³ Conditionality is methodology that is applied during accession process to ensure that new member states can absorb requirements incorporated in the EU *acquis* and implement obligations from the membership.¹⁴

The Enlargement strategy highlighted that difficult issues such as administrative and judicial reforms and the fight against corruption will be addressed early in the accession process to ensure success. Judicial reforms include ensuring the independence and impartiality of judiciary, guaranteed access to justice, fair trial procedures, adequate funding for courts and training for magistrates and legal practitioners, while laws are clear, publicised, stabile, fair and protect human rights.¹⁵

Although the Strategy refers to the whole region, unlike previous post-Cold war enlargements, the EU stressed that compliance with the accession criteria for Western Balkan countries will be assessed for each country separately.¹⁶ It is important to stressed that the EU refrained from setting any target dates for the accession until the negotiations are close to completion.

Due to external and internal factors, such as financial crisis in 2008, followed by migrants' crises in 2015, the enlargement was not in the focus of the EU institutions and member states. In addition, the Western Balkan countries slowly implemented reforms, while some even backsliding in reforms. When Croatia started negotiations, the EU had already learned from experience with Bulgaria and Romania in which significant shortcomings remain after accession to the EU. Therefore, the European Commission revised approach and upgraded the *acquis* to include areas that deemed problematic, justice and fundamental rights. Learning

¹³ European Commission Progress reports emphasized shortcomings of the progress in the area of judiciary and internal affairs, including lack of institutional capacities. The European Commission even questioned if countries would become members in 2007 as it was planned. See: European Commission, Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, COM (2006) 549 final, Brussels, 26 September 2006

¹⁴ Smith, K. E., *Evolution and Application of the EU Membership Conditionality*, in: Cremona, M. (ed.), *The Enlargement of the European Union*, Oxford University Press, Oxford 2003, pp.105–140

¹⁵ Matic Boskovic, M., *Role of Court of Justice of the European Union in Establishment of EU Standards on Independence of Judiciary*, in: *EU 2020 – Lessons from the Past and Solutions for the Future*, Vol. 4, 2020, pp. 329-351

¹⁶ Bechev, D., *Constructing South East Europe: The Politics of Balkan Regional Cooperation*, Hampshire: Palgrave Macmillan, 2011

from Croatian experience, Chapters 23 and 24¹⁷ are open the first and close at the end of the negotiation process to allow sufficient time for completing of reforms in area of judiciary, fundamental rights, anti-corruption and organised crime, freedom and security. That approach was applied with Montenegro that opened accession negotiation in 2012 and Serbia that opened in 2014. Nevertheless, even that approach did not produce expected results with the Western Balkan states. Over the two decades Western Balkan countries introduced significant legislative and institutional changes to strengthen independence of judiciary and improve efficiency and quality of the justice system as EU accession requirements. However, citizens across Western Balkans, except Kosovo, are not convinced that the previous reforms resulted in meaningful improvements in the judiciary.¹⁸ Majority of reforms included amendments to the constitutional and legislative framework to ensure alignment with EU standards in rule of law area, and establishment of the new institutional set-up (i.e. judicial council, judicial training centre, corruption prevention institution). The biggest challenge presented lack of the implementation of law in practice. Furthermore, establishment of judicial councils and training academies without adequate internal reform has led to the creation of new channels of undue influences,¹⁹ not only external but also internal. The finding is confirmed through the 2021 World Bank Regional Justice Survey that identified integrity and independence as the major problems of the judicial system.

To address challenges in EU enlargement process, the European Commission announced in February 2018 the adoption of a new enlargement strategy through a Communication “A credible enlargement perspective for an enhanced EU engagement with the Western Balkans”.²⁰ The Communication recognized that Western Balkan countries are part of Europe and sharing the same history, cultural heritage

¹⁷ Chapter 23 relates to judiciary and fundamental rights. European standards in the Chapter 23 include strengthening independence, impartiality and professionalism in judiciary, enforcement of measures of prevention and fight against corruption and maintenance of high standards of protection of human and minority rights. Chapter 24 relates to justice, freedom and security. European standards include 11 areas thematic areas: external borders and Schengen system of migration, asylum, visa, police cooperation, fight against organized crime, fight against human trafficking, fight against terrorism, fight against drug, judicial cooperation in civil and criminal matters and custom cooperation.

¹⁸ 2021 Regional Justice Survey Albania Country Report, Bosnia and Herzegovina Country Report, Kosovo, Country Report, Montenegro Country Report, North Macedonia Country Report, Serbia Country Report, World Bank

¹⁹ A. Fagan, *Judicial reform in Serbia and Bosnia-Herzegovina: Is EU support and assistance augmenting independence?*, Working Paper No. 24, “Maximizing the integration capacity of the European Union: Lessons of and prospects for enlargement and beyond” (MAXCAP), 2016, p. 3

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM (2018) 65 final

and challenges and that EU support is needed for the region to overcome vulnerabilities and instability.²¹

Following Commission Communication and based on the French proposal, the European Commission in February 2020, adopted the new methodology for the accession negotiations²² with the aim to improve the effectiveness of the accession process and its implementation. The Commission proposal is aimed to build more trust among all stakeholders, EU institutions, member states and candidate countries. Therefore, the new methodology is based on principles of credibility, predictability, dynamics and stronger political steer. The European Commission intends to shift from bureaucratic and technical process to more political and dynamic approach. It seems that political impetus is important for the Western Balkans, both for decision makers who expected exact accession dates and public administration and judiciary that have to implement reforms.

The new methodology introduced grouping of negotiation chapter into six thematic clusters: fundamentals; internal market; competitiveness and inclusive growth; green agenda and sustainable connectivity; resources, agriculture, and cohesion; and external relations. Approach of clustering chapters should enable stronger focus on core sector and the most important and urgent reforms that are part of the cluster fundamentals. Furthermore, process was changed to allow opening of whole cluster instead chapter by chapter. However, the content of Chapter 23 remained the same. The candidate countries have to ensure independence, impartiality and professionalism in judiciary, enforcement of measures of prevention and fight against corruption and maintenance of high standards of protection of human and minority rights.

The EU policy documents reflected the slowdown of enlargement towards the Western Balkans, but the new methodology raised expectations.²³ After gaining momentum in the last couple of years, the new risk for postponement is pandemic crisis and the war in Ukraine. Pandemic crises and state responses opened discussion on rule of law violation, decreasing of human rights and disturbing the balance of the separa-

²¹ Tilovksa-Kechegi, E.; Kolaković-Bojović, M.; Turanjanin, V., *EU New Strategic Policies Towards the Western Balkans: Hope for the Future of Endless Postponement*, In: Conference Proceedings, Towards a Better Future: The Rule of Law, Democracy and Polycentric Development, St. Kliment Ohridski University, Bitola, 2018

²² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Enhancing the accession process – A credible EU perspective for the Western Balkans, COM (2020) 57 final

²³ Anghel, S. L. (2019), “Western Balkans: State of play in the European Council”, European Parliamentary Research Services, October 2019, available at: [[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2019\)631770](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2019)631770)], Accessed 10 April 2022

tion of powers. State measures, but also reaction of judiciary, especially the highest instances, stated readiness to protect achieved rule of law standards.

3. COVID-19 PANDEMIC AND FUNDAMENTAL RIGHTS ISSUES

The COVID-19 pandemic and the measures introduced as a response to the outbreak raised challenge to the fundamental rights across the world. The deadly impact of the virus and the obligation of governments to act to protect the rights of people to life and health require their urgent action. Following advice and guidance of the health authorities, the governments took wide range of measures that affected the freedom of movement and assembly, ranged from imposing curfews, travel restrictions and social distancing measures, which resulted in closing schools and home-based work.²⁴

Restrictive measures affected the work of courts across the world and in the EU member states, which had an impact on access to justice and right to a fair trial. Courts were often closed, only urgent cases were proceeded, and hearings were postponed. Limitation in work of courts influenced on creation and increase of pending cases and case backlogs, and extension of case duration. In some cases concerns were also raised about people missing judicial deadlines.²⁵ The European Commission and Council of Europe conducted comprehensive assessment of measures taken by courts in EU Members States.²⁶

The European countries witnessing the expansion of use of digital and videoconference tools as measures that enable judicial systems to overcome impact of social distancing measures and restrictions. However, the judicial systems faced with challenges to work remotely using electronic devices, due to different level of ICT equipment across the EU jurisdictions, e-literacy among members of judiciary and different options within the judicial case management system (i.e. possibility to access files through databases, adequacy of video-conferencing equipment).

The pandemic accelerated the digitalization of justice. Nevertheless, in digitalization of justice it is crucial to ensure the respect of minimum standards developed under articles 47 and 48 of the EU Charter on fundamental rights and article 6

²⁴ Alemanno, A., *The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?*, European Journal of Risk Regulation, Vol. 11, No. 2, pp. 307-316

²⁵ Croatian Ombudsbody, *To enable efficient functioning of the judiciary even in extraordinary circumstances*, 29 April 2020

²⁶ European Commission, *Impact of COVID-19 on the Justice field*, e-Justice portal, 2020; CoE European Commission for the Efficiency of Justice, *National Judiciaries COVID-19 emergency measures of COE Member States*, 2020

of the European Convention on Human Rights, regarding effective participation in proceedings, particularly criminal cases, including right to be present and the principle of publicity.²⁷

4. IMPACT OF COVID-19 ON THE PROCEDURAL RIGHTS OF DEFENDANT

The procedural rights of defendant are incorporated into requirements of Chapter 23 that accession countries need to guarantee by national legislation. To understand the scope of procedural rights of suspect and accused it is important to get insight into the interpretation provided by the European Court of Human Rights and Court of Justice of the EU.²⁸

Procedural rights of suspects and accused under the article 6 of the European convention of human rights guarantees the right to participate effectively in a criminal trial.²⁹ The right includes not only the right to be present, but also to be heard and follow proceedings.³⁰ Access to a lawyer, access to an interpreter and access to the case files are aspects of the right to a fair trial protected under the European Convention of Human Rights, EU Charter of Fundamental Rights and relevant EU acquis on rights of suspects and accused. Limitation or violation of these rights during criminal procedure present violation of listed legal documents.³¹

The rights of the defence requires that any measures restricting the defendant's participation in the proceedings or imposing limitations on the defendant's relation with lawyers should be proportionate to the risks in a specific case.³² Barriers to confidential conversation between the defendant and lawyer may present violation of right to a fair trial. Specifically, the European Court of Human Rights considers that violations of article 6 present the applicant's inability to have con-

²⁷ European Union Agency for Fundamental Rights, *The Coronavirus pandemic and fundamental rights: A year in Review*, p. 21

²⁸ Matić Bošković, M., *Krivično procesno pravo EU*, Institut za kriminološka i sociološka istraživanja, Beograd, 2022

²⁹ European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights – Right to fair trial (criminal limb)*, 31 December 2021

³⁰ For example, in accordance with the jurisprudence of the European Court of Human Rights, case *Stanford v the United Kingdom* (application nos. 16757/90, judgement 23 February 1994), poor acoustics in the courtroom and hearing difficulties could give rise to an issue under art. 6

³¹ Jimeno-Bulnes, M., *Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?*, CEPS, 2010, p. 171

³² Case *Yaroslav Belousov v Russia*, judgement of 4 October 2016, application nos. 2653/13 and 60980/14, par. 147

fidential exchange with legal counsel during the trial due to defendant placement in a glass cabin.³³

Considering impact of COVID-19 on digitalization of justice and reduction of direct communication between lawyer and defendant, it is important to have in mind jurisprudence of the European court of human rights on use of video link in proceedings. The Court has held that use of video link as a form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing. However, the use of video link should fulfil several preconditions. It is important that all parties can be follow and hear proceedings without any technical impediments. If the defendant participates in the proceeding by video-conferencing the European Court of Human Rights specifically highlighted that Court is obliged to ensure that recourse to this measure in any given case must serve a legitimate aim and the arrangements for the giving of evidence must be compatible with the requirement of respect for due process from article 6 of the Convention.³⁴ Specifically, the European Court of Human Rights emphasized that during video-conferencing the confidential communication between defendant and defence lawyer has to be secured.³⁵

In relation to the institution, the procedural rights include right to a fair hearing within the reasonable time by an independent and impartial tribunal, established by law. Judgements must be presented publicly, but public could be excluded from part or whole hearing in the interest of public order, moral or national security, to protect interest of minors or protection of private life.

Use of video-conference in judiciary is not a new technology and prior to COVID-19 it was used in specific procedures, especially in the cross-border cases or for hearing of vulnerable victims.³⁶ Prior to COVID-19 outbreak many countries regulated possibility to use remote hearings in courts, but pandemic accelerate the use. In Austria and Germany video-hearings were introduced in early 2000s.³⁷ In Germany, video-hearings were introduced in 1998³⁸ for the protection of wit-

³³ Case *Yaroslav Belousov v Russia*, paras. 151-154

³⁴ Case *Marcello Viola v Italy*, judgement of 5 October 2006, application nos. 45106/04, par. 67

³⁵ Case *Asciutto v Italy*, judgement of 27 November 2007, application nos. 35795/02, par. 71

³⁶ Gori, P., Pahladsingh, A. *Fundamental rights under Covid-19: an European perspective on videoconferencing in court*, ERA Forum, Vol. 21, 2021, p. 575

³⁷ Sanders, A., *Video-Hearings in Europe Before, During and After the COVID-19 Pandemic*, International Journal for Court Administration, Vol. 12, No. 2, 2021, pp. 4-21

³⁸ In June 2021 the German Criminal Procedure Code (StPO) was amended to extend the use of video conferencing in criminal proceedings. According to the new provision of article 463e of German Criminal Procedure Code, oral hearings by use of video or audio conference are now possible for all court hearings when the defendant is in an office or in the business premises of a defence counsel or lawyer during the oral hearing

nesses in criminal procedures, while in Austria was established in 2005³⁹ for hearing of accused and witnesses in criminal procedures, defence counsel or lawyer during the oral hearing. In Belgium, the 2002 Criminal Procedure Law introduced the use of video conference technology for conducting of hearings of witnesses and experts.⁴⁰ In Finland, since beginning of 2019 parties in criminal cases can participate in the main hearing through video-conference. That provision was introduced to enable the hearing of witnesses who could not travel or to prevent the transportation of defendants who are in custody.⁴¹ The fight against mafia in Italy influenced establishment of video-conferencing in courts. Since 1992 the Italian Criminal Procedure Code⁴² introduced that people under the risk of pressure or danger for their safety can testify via video-conference technology.⁴³ Italian law does not require consent of the witness, but judge decides on use of video-conferencing. In France, video-conferencing was introduced in the criminal procedure to prevent risk or danger to safety, but also risk of the escape for those in detention. The Criminal Procedure Code article 706-71 requires consent of the accused to use video-hearing. In Serbia, prior to pandemic, Criminal Procedure Code envisages the use of video-conferencing for hearing of witnesses who got the status of specially vulnerable witness.⁴⁴ Hearing by video-conferencing is also possible when witness or expert cannot participate at the main hearing due to illness or some other justified reason.⁴⁵ Additional possibility to use video-conferencing for hearing in criminal procedure is for the protection of witness, if there is a risk that by giving a statement witness or his family would be in danger.⁴⁶

COVID-19 pandemic influenced on authorities to introduce or expand use of remote hearings. In Italy, the Government adopted organisational measure allowing for remote hearings and acceleration of digitalisation in criminal trials.⁴⁷ The Law 27/2020 introduced the rule that criminal hearings that do not require the hearing of witnesses other than judicial police officers can be held remotely. The provision on remote hearing can be applied only with the consent of the accused person

³⁹ Art.165 of the Criminal Procedure Code (StPO)

⁴⁰ Arts. 112, 158 bis and 298 of the Criminal Procedure Law

⁴¹ Sanders, A., *op.cit.*, note 37, p. 5

⁴² Art. 147 bis implementing provisions

⁴³ Van der Vlis, E.-J., *Videoconferencing in criminal proceedings*, in: Braun, S.; Taylor, J. L., (eds.), *Video-conference and remote interpreting in criminal proceedings*, Guildford, University of Surrey, 2011, pp. 11-25

⁴⁴ Art. 103 of the Criminal Procedure Code, Official Gazette, No. 72/2011, 101/2011. 121/2012, 32/2013, 55/2014, 35/2019, 27/2021, 62/2021

⁴⁵ Arts. 357 and 404 of the Criminal Procedure Code

⁴⁶ Art. 105 of the Criminal Procedure Code

⁴⁷ Art. 83 of the Decree-law of 17 March 2020, n.18

when it relates to the final hearing and those during which witnesses, parties, consultants and experts must be examined. The Prosecution service was granted the possibility to hear witnesses and examine suspects through video-conference and appoint experts.⁴⁸ In Belgium, the Parliament adopted law to introduce wider use of written procedures and video-conferences in court proceedings. The Belgium authorities took two-track approach and adopted temporary provisions applicable during COVID-19 pandemic and permanent changes to the court procedures.⁴⁹ The new legislation has been criticised for the potential impact on the right to fair trial and urgency with which the proposals were introduced.⁵⁰ To address challenges of COVID-19 outbreak, Serbian Ministry of Justice on March 17, 2020 adopted Recommendations on work of courts and public prosecutors offices during state of emergency,⁵¹ additional recommendation the Ministry adopted on March 26, 2020 to inform courts to conduct hearing of defendants in detention by use of Skype application.⁵² To provide legal basis for the recommendation, on April 1, 2020, the Government issued a Decree on the manner of participation of the accused in the main trial in a state of emergency.⁵³ The Decree stipulates that duration of the state of emergency, presence of defendant on the main trial in the criminal proceedings could be organized through video and audio conference if judge finds that presence in the courtroom is difficult due to the danger of spreading a contagious disease. The Bar Association of Serbia considered that holding the main hearings by video-conferencing prevents the defendant from communication with the defence counsel, does not provide guarantees for respecting the prohibition of torture and cannot ensure the request for public hearings.

Although positive experience have been reported from different countries, especially Austria, Germany, Italy, Sweden,⁵⁴ the judges reported that there is a slight

⁴⁸ Rule of Law Report, Country chapter on the rule of law situation in Italy, 2020, SWD (2020) 311 final

⁴⁹ Law introducing Urgent Provisions in the Field of Justice in the Context of the Coronavirus Pandemic.

⁵⁰ Advisory Opinion 67.516/1-2 of the Council of State of 22 June 2020; President of the High Council for Justice (2020), Letter to the President of the House of Representatives on the law containing various provisions on justice in the context of the fight against the spread of the coronavirus.

⁵¹ Preporuke za rad sudova i javnih tužilaštva za vreme vanrednog stanja proglašenog 15. marta 2020. [<https://www.mpravde.gov.rs/obavestenje/29154/preporuke-za-rad-sudova-i-javnih-tuzilastava-za-vreme-vanrednog-stanja.php>], Accessed 10 April 2022

⁵² Saslušanje za lica koja su prekršila meru samoizolacije putem videolinka, 26. mart 2020. [<https://www.mpravde.gov.rs/vest/29671/saslusanja-za-lica-koja-su-prekrasila-meru-samoizolacije-putem-video-linka.php>], Accessed 10 April 2022

⁵³ Uredba o načinu učešća optuženog na glavnom pretresu u krivičnom postupku koji se održava za vreme vanrednog stanja proglašenog 15. marta 2020, Official Gazette, No. 49/2020

⁵⁴ Remote Courts Worldwide, Available at: [<https://remotecourts.org/country/sweden.htm>], Accessed 10 April 2022

bias to treat live statements in a more favourable manner compared to video-statements.⁵⁵

The analysis on experience and perception of judges on use of video-conferencing was implemented in Serbia in 2021.⁵⁶ Main conclusion is that judges are not interested to analyse and apply procedural rules on use of video-conferencing. Specifically, opinion of judges is divided in relation to the usefulness of remote hearing and use of video-conferencing linked only with pandemic. In relation to the protection of right to a fair trial, experience from the practice confirms that there are reasons for concerns. Judges held remote hearings during the state of emergency without special explanation of the legal basis and reasons for questioning defendants without their physical presence. Judges only in limited number of cases asked the defendant for their opinion on the Skype hearing, most often only informing them. Concerning the communication between the defendant and lawyer, judges did not engage in examining respect for the right of defendant to have confidential conversation with the defence counsel.⁵⁷ The lack of judges' reaction could present also shortage of judicial independence, since judges did not postpone hearings due to danger of virus spreading.

To make the best possible use of video and audio hearings in the future, a number of challenges must be addressed. The most important one is strengthening of legal framework to ensure implementation of standards of the fair trial and provide adequate access of public. In addition, technical solutions should be improved to enable good connections, confidential communication with lawyer and protection of sensitive data.⁵⁸

5. COVID-19 INFLUENCE ON EU ENLARGEMENT REQUIREMENTS IN RELATION TO CHAPTER 23 PROCEDURAL RIGHTS

Already prior to the outbreak of the COVID-19 pandemic, the Western Balkan's progress in the EU accession process was challenging. Despite having started 20

⁵⁵ Wilkman, J., *Finish District Judges' Assessments of Live Versus Video-Mediated Party Statements in Courts*, Master thesis, 2022, Available at: [https://www.doria.fi/bitstream/handle/10024/183670/wilkman_jonas.pdf?sequence=2&isAllowed=y], Accessed 10 April 2022

⁵⁶ Kostić, I.; Tešović, O.; Milovanović, I.; Dakić, D., *Suđenje na daljinu, pravni okvir i praksa*, Forum sudija, Beograd, 2021

⁵⁷ *Ibid.*, pp. 65

⁵⁸ McCann, A., *Virtual Criminal Justice and Good Governance during COVID-19*, *European Journal of Comparative Law and Governance*, Vol. 7, No. 3, 2020, pp. 225-229

years ago, this process has still not yielded to irreversible reforms in rule of law and political and economic transformation.

The COVID-19 crisis affected region and the EU enlargement process. However, the question arises also on the technical level. Whether the temporary and permanent legislative changes that EU countries introduced will influence on the EU requirements in relation to right to a fair trial and need to align national legislation and practice with EU acquis in relation to protection of procedural rights of defendant in the criminal procedure.

Obviously, there are numerous benefits of using the means of modern technology in the criminal justice system. Remote hearings are reducing costs for transfer of detainees or witnesses. Furthermore, the technology becomes more affordable which reduce initial investment of introduction of IT equipment in courts and public prosecutor offices. As a result, remote hearing costs less than traditional trial, however that could not jeopardize procedural rights of defendant.⁵⁹ Use of audio and video-conferencing in criminal cases is helping witnesses, especially vulnerable witnesses.⁶⁰ As it is already mentioned many EU countries, prior to the COVID-19 outbreak, had legislative framework that enabled use of video links for witnesses to protect them, by providing better protective measures for vulnerable witnesses. Furthermore, use of technology allows witnesses to give testimony and not to travel long distance. Moreover, if witnesses are not able to attend the trial in person due to their disability or illness use of video-conferencing enable them to provide it. The use of means of modern technology in the trial could help decreasing defendants' movement.

However, there are many challenges in use of modern technologies in the criminal justice system. One of the challenges relates to the experience and time needed to make judges and lawyers comfortable familiar in using such technology in the trial. The biggest challenge relates to the technical failure, that could affect quality of sound and understanding of party that is using video-conferencing. Using technology requires technical support staff to assist regarding any problems needed, which creates additional costs for the judicial budget. In relation to the criminal procedure, the direct communication would better to show the witness's body language.

⁵⁹ Grió, A., *The Defendant's Rights in the Hearing by Videoconference*, In: Ruggeri, S. (ed.). *Transnational Evidence and Multicultural Inquiries in Europe*, Springer International Publishing, 2014, pp. 119-127

⁶⁰ Stevanović, I., Kolaković-Bojović, M., *Informacione tehnologije u službi zaštite deteta u krivičnom postupku*, in: Bejatović, S., *Videolink i druga tehnička sredstva kao način preduzimanja procesnih radnji u kaznenom postupku – norma, praksa i poželjni slučajevi širenja mogućnosti primene*, Misija OEBS u Srbiji, 2021

Reluctance of the judicial system and judges to use video-conferencing beyond strict rules of national legislation or European standards and jurisprudence of the European Court of Human Rights is confirmed by two decisions of the Supreme Court of Finland from December 2021. The Supreme Court of Finland found in two criminal appeal court cases⁶¹ that participation of the judges via video link constituted a procedural error and remanded one of the cases, as well as lack of consent of the defendant. Although the Act on Criminal Procedure in Finland provides that parties may participate in proceedings electronically if the defendant agrees and the courts finds it appropriate, the Act does not specifically mention judges and public prosecutors.⁶² In addition to parties, the Act provides that only party representatives such as the defense attorney or a plaintiff's attorney may participate via video link under the same conditions as parties. The Code of Judicial Procedure provides that in appellate courts the presence of three judges constitutes a quorum.⁶³

In the Turku Appeals Court case, all three appellate court judges had been physically present for the initial hearing and issued an interim judgement before one of the judges had to go to quarantine due to COVID-19 exposure. During quarantine the hearing was scheduled, and judge participated via video link. The Supreme Court found that the judge participating virtually should consider as incorrect participation, since this possibility is not envisaged in the Code of Judicial Procedure or Act on Criminal Procedure. However, the Supreme Court held that the procedural error was not so serious that the interim judgement and judgment of the Court of Appeal should be vacated, and the case remanded to the Court of Appeal to be heard anew.

In the Vaasa Appeals Court case, the use of electronic video link was the result of a convenience request from the prosecutor, as the main hearing had to be conducted without delay in between other hearings owing to the imminent retirement of the prosecutor. The prosecutor, the parties and one judge had participated from the district court building while the two other judges had been present in person at the Vaasa Appeals Court. The Supreme Court noted that the procedural error committed by the Court of Appeal had nor arisen from covid-related or other health reasons or any other comparable persuasive and acceptable reasons, so the procedural error relating to the manner in which a judge participated in the pro-

⁶¹ Case ECLI:FI:KKO:2021:92, dairy no: R2021/389 (participation of a judge and the defendant in a main hearing by video link), issued on 22 December 2021, and case ECLI:FI:KKO:2021:91, dairy no. R2021/162 (participation of a judge in a hearing by video link) issued on 22 December 2021

⁶² FSS 1997/689, Art. 13

⁶³ FSS 1734/4, Art. 8

ceedings was in itself so serious that the case was to be remanded to the Court of Appeal to be heard anew.

Additional procedural error in the Vaasa Appeals Court case presents lack of consent of the defendant. The right of defendant in criminal proceedings to be present in person in an oral hearing is one of the guarantees of a fair trial enshrined in section 21 of the Constitution of Finland. The Court of Appeal, before ordering the main hearing, had sent an email to the defendant's public defender and inquired about the suitability of the proposed hearing date. The Court of Appeal had not asked for consent to remote participation nor indicated that consent should be voluntary or what the consequence of the consent are. Even though the Court of Appeal had summoned the defendant to participate in the main hearing by video link and the defendant's public defender had not before or even during the hearing indicated to the Court of Appeal that the defendant did not consent, the Supreme Court held that under the circumstance the mere absence of protest did not meet the criteria valid for consent. Accordingly, it was held that the defendant had not self-consented to participation by video link nor given such consent for the public defender's participation by video link.

In assessing consent of the defendant for remote hearing the Supreme Court referred to the case law of the European Court of Human Rights, specifically to the judgement of the Grand Chamber in case *Hermi v Italy*.⁶⁴ According the interpretation of the European Court of Human Rights the defendant may waive the guarantees of a fair trial expressly or implicitly. Either way, the waiver must be definite, it must be voluntary, and it must involve minimum guarantees that are proportionate to the significance of the waiver.⁶⁵ The waiver cannot be contrary to any important public interest.⁶⁶ In the assessment of the conduct of the defendant so as to determine whether it constitutes an implicit waiver, it must be shown that the defendant can reasonably have foreseen the consequence of the conduct.⁶⁷

Following the two decisions by the Supreme Court, it became recognized that under the Finnish law the judges cannot participate in the hearing through video link. The legislative changes are necessary to allow for such participation of judge or public prosecutor. Furthermore, the participation of defendant through the video link needs to be in line with the standards of the European Court of Human Rights and its jurisprudence, including that court need to ensure consent of the defendant, and waiving of rights to oral hearing and participation should be vol-

⁶⁴ Application nos. 18114/02, Grand Chamber, judgement of 18 October 2006, paras. 73-76

⁶⁵ Case *Poitrinol v France*, application nos. 14032/88, judgement of 23 November 1993, par. 35

⁶⁶ Case *Sejdovic v Italy*, application nos. 56581/00, judgement of 1 March 2006, par. 33

⁶⁷ Case *Jones v the United Kingdom*, application nos. 30900/02, decision of 9 September 2003

untary, in line with public interest, and the defendant foreseen the consequence of waiving.

Decision of the Supreme Court of Finland, approach of Germany in amendments to the Criminal Procedure Code to allow limited use of video conferencing by defendant, as well as changes introduced during COVID-19 outbreak across EU countries confirmed that pandemic did not change requirements related to the application of European standards of fair trial and procedural rights of defendant. This approach and position of the judiciary to protect established fundamental rights confirms that content of the Chapter 23 will remain the same for Western Balkan countries. Western Balkan countries need to align national criminal procedure legislation with EU and Council of Europe standards in relation to the procedural rights of defendant. Furthermore, the courts need to follow jurisprudence of the European Court of Human Rights and Court of Justice of EU and judges should be independent in the work to protect established standards of fair trial.

6. CONCLUSIONS

Although all EU countries used online hearings and video-conferencing during COVID-19 to overcome health protection requirements, it seems that it will take time to significantly impact criminal procedure system. After initial increased use of remote hearings, the requirements to protect established human rights standards influenced on the practice and temporary measures that were introduced. In majority of countries, temporary measures and lack of infrastructure and IT equipment limited right to a fair trial, however, permanent amendments and court judgements took into consideration need to ensure all elements of right to fair trial, including access to lawyer, confidential counselling, right to be heard and oral hearing, etc.

The priority to protect right to a fair trial and procedural rights of defendant is confirmed in the approach taken by German legislator and Finnish Supreme Court. Amendments of the German Criminal Procedure Code from 2021 were adopted to allow remote hearing for defendant when person is in the own office or in the business premises of the defence counsel. This solution ensures access to lawyer and confidential counselling between defendant and lawyer. Similarly, the Supreme Court of Finland in two cases from December 2021 assessed violation of procedural rights of defendant against standards established by European Court of Human Rights.

Having in mind abovementioned it seems that Chapter 23 requirements towards EU accession countries will remain the same. The Western Balkan countries will

need to ensure protection of fundamental rights, specifically procedural rights of defendants in situation of in person hearings, but also for remote hearings. The policy makers in Western Balkan countries should identify legislative interventions in line with EU countries and their policies, but also full implementation of the laws in practice. Furthermore, the judiciary in Western Balkan countries should have in mind jurisprudence of the European Court of Human Rights to avoid applications against national judiciaries for violation of fundamental rights.

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