European
Policy
Institute.
Skopje

Annual insight

on EU rule of law 2023

Annual insight

on EU rule of law 2023

Annual insight
on EU rule of law 2023

Publisher:
European Policy Institute - Skopje

About the publisher:
Simonida Kacarska, PhD

Authors:
Beba Zhagar, Researcher at European Policy Institute - Skopje
Velimir Delovski, External collaborator of the European Policy Institute – Skopje
Biljana Ginova, External collaborator of the European Policy Institute – Skopje
Atanas Avramov, External collaborator of the European Policy Institute – Skopje
Ardita Vejseli, Researcher at European Policy Institute - Skopje

Graphic design and print:
Relativ

Skopje, December 2023

This annual insight was prepared under the project Building bridges for a common future: Rule of law in view of EU accession, funded by the European Union. The contents of this insight do not reflect the official opinions and positions of the European Union. Responsibility for the information and views expressed in this insight lies entirely with the authors.

Contents

Introduction

EPI's work is focused on the needs and constraints of North Macedonia, a country that awaited the start of the accession negotiations for more than a decade while experiencing a decline in support for European Union membership and political instability in recent years. Within its rule of law programme, it closely monitors the level of compliance with the rule of law principle in member states of the EU and candidate countries, in order to learn valuable lessons and present them to relevant stakeholders and the citizens of North Macedonia, as these lessons will have to be implemented now as a candidate country and as a member state in the future. EPI also monitors events within the country in the following areas in accordance with the EU accession negotiation structure: functioning of democratic institutions, public administration reform and Chapter 23 - Judiciary and Fundamental Rights.

The EU is based on the rule of law which entails that every action taken by it is founded on treaties approved voluntarily and democratically by all EU member states. Candidate countries for EU accession must also respect the rights and obligations enshrined in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. This Annual insight focuses more specifically on various aspects concerning Chapter 23, issues that member states and candidate countries face alike and possible solutions to them.

The insight begins with an analysis of joined cases C-37/20 and C-601/20, where the CJEU has ruled on balancing the fight against corruption and the right to personal data protection. Namely, the analysis looks at the facts and the legal basis of the case and concludes with CJEU's reasoning behind its decision. At the same time, it offers a review on Macedonian legislation relevant to the topic and when

comparing it to the Court's reasoning, it comes to the conclusion that the country's legislation would not pass the Court's test for balancing between the fight against money laundering and the protection of personal data.

The second analysis provides an overview of the latest rule of law developments in Romania, as observed under the Cooperation and Verification Mechanism (CVM) of the EU, with a special focus on the judicial independence and justice reform. Namely, the latest CVM report is significantly important as the Commission concluded that the progress made by Romania was sufficient to meet the CVM commitments made at the time of its accession to the EU and that all benchmarks can be satisfactorily closed. As a result, from now on, the Commission will no longer monitor or report on Romania under the CVM, but monitoring will continue within the annual rule of law cycle and reporting will be consolidated in the Commission's annual Rule of Law Report and other established parts of the rule of law toolbox applying to all Member States.

In the beginning of April, France and Germany have joined more than a dozen other EU countries, supporting legal action brought by the Commission against Hungary before CJEU over a 2021 law discriminating against LGBTQI+ population. Besides these two member states, Austria, Belgium, Denmark, Finland, Greece, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Sweden and the European Parliament have also applied to join the proceedings. The disputed Hungarian law aims to ban content promoting or portraying what it refers to as "divergence from self-identity corresponding to sex at birth, sex change or homosexuality" to minors. The third analysis in this insight looks at the possible outcome of the court case and its implications for the protection of LGBTIQ rights in Hungary and beyond.

The monitoring of EU's Artificial Intelligence Act and the debates and analysis of its advantages and shortcomings were conveyed into the fourth analysis. Specifically, the scope of the draft regulation, human rights safeguards, and the stringency of the provisions on prohibited practices in artificial intelligence systems were analysed. Following the development surrounding the adoption of the Act, as well as the fruitful discussion that it stimulated, the discussions and analyses that resulted from the need to refine and fulfil its overall potential were analyzed, in order to effectively and efficiently fulfil the set goals, and especially the protection of human rights from the Charter. However, the debate surrounding the AI Act has given insufficient attention to one key feature: the act must establish a clearly defined link between artificial intelligence and the rule of law. While the inclusion of human rights safeguards in the act has been discussed extensively, establishing a link to the rule of law is equally important.

The fifth and final policy brief included in this insight provides an overview of the challenges and barriers faced by persons with disabilities in the EU and North Macedonia when exercising their right to vote, amid the provisions of the new proposed EU electoral law and the factual situation in North Macedonia in light of the forthcoming 2024 elections. Those include elections in the EU scheduled to be held in early June and presidential and parliamentarian elections in North Macedonia, which are scheduled to be held in April and May. As much as they represent a cornerstone of democracy, it has been noted that a great number of persons with disabilities will be unable to participate in those elections due to barriers concerning accessibility and legal capacity, which are analyzed in detail.

Balancing the fight against corruption and the right to personal data protection - two sides of the same (rule of law) coin

Beba Zhagar
Researcher at European Policy Institute - Skopje

This brief analyses the need for balancing the fight against corruption in the form of the fight against money laundering and terrorism financing and the right to personal data protection through CJEU's judgment in joined Cases C-37/20 and C-601/20.

While there is no universal agreement on the definition of corruption, it is undoubtedly as old as human history. From the First Dynasty (3,100–2,700 BCE) of ancient Egypt, when corruption in its judiciary was first noted,[1] to major money laundering operations discovered today,[2] the fight against corruption has been a never-ending one. However, in the twenty-first century, we look at other rights and obligations that counterbalance the fight against corruption, such as the right to personal data protection.

MACEDONIAN LEGISLATION

The most recent Law on the Prevention of Money Laundering and Financing of Terrorism was adopted in 2022 and is supposed to be harmonised with Directive (EU) 2018/843 (the 5th EU Anti-Money Laundering Directive). It continues the intent of the previous law[3], which introduced the establishment of the Register of Beneficial Ownership. On January 24, 2021, the Central Registry of the Republic of North Macedonia announced that the Register of Beneficial Ownership was used to increase transparency in the ownership structure of legal entities in the country and to meet international and EU

1 El-Saady, Hassan. "Considerations on Bribery in Ancient Egypt." Studien Zur Altägyptischen Kultur 25 (1998): 295–304. http://www.jstor.org/stable/25152765.

2 "Operation in Italy against Criminal Group under Investigation for Massive VAT Fraud: 12 Arrests, Including Four Public Officials," March 21, 2023, https://www.eppo.europa.eu/en/news/operation-italy-against-criminal-group-under-investigation-massive-vat-fraud-12-arrests.

3 Law on Prevention of Money Laundering and Financing of Terrorism (Закон за спречување перење пари и финансирање на тероризам), Official Gazette of the Republic of Macedonia No. 120/2018 and Official Gazette of the Republic of North Macedonia No. 275/2019 and 317/2020.

standards for combating money laundering and financing of terrorism.[4] The registration obligation applies to beneficial owners of all legal entities required to register under the Law on Prevention of Money Laundering and Financing of Terrorism. The law defines the term 'beneficial owner' as "any natural person who ultimately owns or controls the client and/or the natural person in whose name and on whose behalf the transaction is being conducted."[5] Information on beneficial owners is available directly and via electronic access to the Financial Intelligence Office, courts, other institutions under Article 130 paragraph (1) and Article 151 paragraph (1) of the Law, entities from Article 5 of the Law and other legal and natural persons. Thus, all legal and natural persons can access the name and surname, month and year of birth, nationality, country of residence, ownership share or other form and type of beneficial interest held.[6] Hence, this Law allows the general public to request and access information on beneficial ownership, without demonstrating a legitimate interest, in line with provisions from Directive 2018/843.

While the Law is harmonised with the Directive, it does not contain a provision entailing the possibility to restrict access to all or part of the information on the beneficial ownership in exceptional circumstances, such as the one included in the Directive. This means beneficial owners in North Macedonia need a mechanism to protect their personal data in exceptional circumstances, like the one provided for beneficial owners in EU member states.

Various provisions of the Law establish its compliance with data protection regulations, as set out in the Law on Personal Data Protection, which is fully harmonised with the GDPR.[7] This Law also includes the general principles on personal data protection entailed in the GDPR, such as lawfulness, fairness, transparency, purpose limitation, data minimisation, and integrity and confidentiality.[8] However, there still seems to be a lack of sufficient protection of personal data of beneficial owners in the country.

This might become a problem, considering the country's candidate status for accession to the EU. As the screening process is coming, we must consider the commitment to harmonise Macedonian legislation with the EU acquis. On the other hand, Chapter 23 and Chapter 24 of the Fundamentals cluster sometimes have different tendencies and move in opposite directions. Such is the case of balancing the fight against money laundering and terrorism financing with the right to personal data protection. In that context, EU member states and candidate countries often require guidance in interpreting EU law. The Court of Justice of the EU (CJEU) significantly impacts the developing EU legislation with doctrine developed through its case law. Such an example is joined cases C-37/20 and C-601/20 (WM and Sovim SA versus Luxembourg Business Registers), [9] where the CJEU had to decide whether the right to personal data protection covered in Chapter 23 is prevalent over the need for transparency in the fight against corruption, as regulated in Chapter 24.

4 "Announcement for Launching the Beneficial Ownership Registry," Official website of the Central Registry of the Republic of North Macedonia, January 24, 2021, https://www.crm.com.mk/en/vesti/announcement-for-launching-the-beneficial-ownership-registry.

5 Article 2 paragraph (1) point (37) of the Law on Prevention of Money Laundering and Financing of Terrorism (Закон за спречување перење пари и финансирање на тероризам), Official Gazette of the Republic of North Macedonia No. 151/2022.

6 Article 33 of the Law on Prevention of Money Laundering and Financing of Terrorism.

7 Law on Personal Data Protection (Закон за заштита на личните податоци), Official Gazette of the Republic of North Macedonia No. 42/2020 and 294/2021.

8 Article 9 of the Law on Personal Data Protection.

9 WM (C-37/20) and Sovim SA (C-601/20) v Luxembourg Business Registers, C-37/20, ECLI:EU:C:2022:912, 22 November 2022.

FACTS OF THE CASES AND QUESTIONS REFERRED

In case C-37/20, a real estate company applied to the Luxembourg Business Registers (LBR), pursuant to Article 15 of the Luxembourg Law establishing a Register of Beneficial Ownership, with a request that access to the information concerning its beneficial owner, contained in the Register of Beneficial Ownership, be subject to the restrictions entailed in that provision. The reasoning behind this request was that the general public's access to such information would seriously, actually, and immediately expose the beneficial owner and his family to a disproportionate risk and risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation. The LBR rejected such a request, and subsequently, the beneficial owner brought an action before the Luxembourg District Court (LDC). The LDC then asked the CJEU for a preliminary ruling on the concepts of "exceptional circumstances", "risk", and "disproportionate risk", which constitute conditions for applying the restriction of access to all or part of the information on beneficial ownership on a case-by-case basis, as entailed in Article 30 (9) of the 5th EU Anti-Money Laundering Directive.

In the second case, C-601/20, another company made the same request to restrict access to information concerning its beneficial owner on the same legal basis. The LBR also rejected such a request. Following the rejection, the company brought an action before the LDC, arguing that granting public access to the identity and personal data of its beneficial owner would infringe the right to respect for private and family life and the right to personal data protection, enshrined respectively in Articles 7 and 8 of the Charter of Fundamental Rights of the EU. Furthermore, the company argued that public access to personal data contained in the Register of Beneficial Ownership constitutes an infringement of the fundamental principles of the GDPR.[10] Thus, the LDC asked the CJEU to interpret the 5th EU Anti-Money Laundering Directive in light of the right to respect for private and family life guaranteed in Article 7 and in light of the right to personal data protection guaranteed by Article 8 of the Charter, as well as to interpret the 5th EU Anti-Money Laundering Directive in light of the right to personal data protection as envisaged in the GDPR.

LEGAL CONTEXT

Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Directive 2018/843 amending it (5th EU Anti-Money Laundering Directive).

The 5th EU Anti-Money Laundering Directive aims to detect and investigate money laundering and prevent it from occurring, thus aiming to increase transparency as a threat to criminal activities. It begins with the premise that *"public access to beneficial ownership information allows greater scrutiny of information by civil society, including by the press or civil society organisations, and contributes to preserving trust in the integrity of business transactions and of the financial system"*.[11] At the same time, it emphasises that a balance should be sought between the general public's interest in the

10 Article 5 paragraph (1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), CELEX 32016R0679, OJ L 119, 4.5.2016, p. 1–88.

11 Recital 30 of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, CELEX 32018L0843, OJ L 156, 19.6.2018, p. 43–74.

prevention of money laundering and terrorist financing and the data subject's fundamental rights. In that context, the Directive entails that EU member states can provide for exemptions to the disclosure through the registers of beneficial ownership information and to access to such information in exceptional circumstances and that the GDPR applies to the processing of personal data under this Directive.

The Directive defines 'beneficial owner' as *"any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted"*.[12]

In Directive 2015/849, before the entry into force of Directive 2018/843, the disputed Article 30 paragraph (5) provided that EU member states should ensure that the information on the beneficial ownership is accessible in all cases to (a) competent authorities and Financial Intelligence Units, without any restriction; (b) obliged entities, within the framework of customer due diligence in accordance with Chapter II of the Directive; and (c) any person or organisation that can demonstrate a legitimate interest (these persons or organisations could access at least the name, the month and year of birth, the nationality and the country of residence of the beneficial owner, as well as, the nature and extent of the beneficial interest held). Directive 2018/843 amended paragraph (5) point (c), removing the condition to demonstrate a legitimate interest, thus allowing access to information on the beneficial ownership to any member of the general public.[13] Directive 2018/843 also amended paragraph (9) of the disputed Article 30, entailing that in exceptional circumstances where access to information on the beneficial owner would expose them to disproportionate risks, such as fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise legally incapable, EU member states could provide for an exemption from such access to all or part of the information on the beneficial ownership on a case-by-case basis. This restriction should be granted upon a detailed evaluation of the exceptional nature of the circumstances and rights to an administrative review of such a decision. An effective judicial remedy should be guaranteed.[14]

General Data Protection Regulation

Within its principles, the GDPR provides that personal data should be: processed lawfully, fairly and in a transparent manner about the data subject; it should be collected for specified, explicit and legitimate purposes and not further processed in a way that is incompatible with those purposes; it should be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed and should be processed in a manner that ensures appropriate security of the personal data.[15]

12 Article 3 paragraph (6) of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, CELEX 32015L0849, OJ L 141, 5.6.2015, p. 73–117.

13 Article 1 paragraph (15) point (c) of Directive (EU) 2018/843.

14 Article 1 paragraph (15) point (g) of Directive (EU) 2018/843.

15 Article 5 paragraph (1) of Regulation (EU) 2016/679.

Luxembourg law

Since both cases were referred to the CJEU by the LDC, the Court also analysed the Luxembourg Law establishing a Register of Beneficial Ownership. Namely, the Law stipulates that access to the following information on beneficial owners shall be open to any person: surname, forename, nationality (or nationalities), date and place of birth, country of residence and the nature and extent of the beneficial interests held.[16] However, an exemption is also provided: *"a registered entity or a beneficial owner may request, on a case-by-case basis and in the following exceptional circumstances, by way of a duly reasoned application addressed to the Administrator, that access to the information listed in Article 3 be restricted to national authorities, credit institutions, financial institutions, bailiffs and notaries acting in their capacity as public officers, where access to that information would expose the beneficial owner to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise legally incapable."*[17]

CJEU'S REASONING

Based on the questions referred to by the LDC, the CJEU weighed in on whether Directive 2018/843 introduces an imbalance between the fight against money laundering (and terrorist funding) and sufficient protection of personal data.

Firstly, the Court decided that since the data referred to in Article 30 paragraph (5) includes information on identified individuals, the access of the general public to such data affects the fundamental right to respect for private life, guaranteed in Article 7 of the Charter and that making available such data to the general public in that manner constitutes processing of personal data falling under Article 8 of the Charter.[18]

Furthermore, the Court established that the general public's access to information on beneficial ownership constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. Such interference is considered serious because the beneficial owners' data is accessible to a potentially unlimited number of persons, including those seeking to learn about the beneficial owners' material and financial situation. Hence, they are unable to defend themselves effectively against personal data abuse.[19]

Finally, while respecting the principle of transparency is important for the fight against corruption, it cannot be considered an objective of general interest capable of justifying the interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter, which results

16 Article 3 paragraph (1) and Article 12 of the Law of 13 January 2019 establishing a Register of Beneficial Ownership (Loi du 13 janvier 2019 instituant un Registre des bénéficiaires effectifs) (Mémorial A 2019, No 15).

17 Article 15 paragraph (1) of the Law establishing a Register of Beneficial Ownership.

18 WM (C-37/20) and Sovim SA (C-601/20) v Luxembourg Business Registers, C-37/20, ECLI:EU:C:2022:912, 22 November 2022, par. 38.

19 WM (C-37/20) and Sovim SA (C-601/20) v Luxembourg Business Registers, C-37/20, ECLI:EU:C:2022:912, 22 November 2022, par. 43.

from the general public's access to information on beneficial ownership.[20] Therefore, a logical termination of the court proceedings entailed the CJEU's invalidation of Article 1 paragraph (15) item(c) of Directive (EU) 2018/843, which amended point (c) of Article 30 paragraph (5) of Directive (EU) 2015/849 in such a way that all members of the general public could access information on the beneficial ownership of legal entities.

In conclusion, this judgment could present a necessity for all EU member states to revise their implementation of the 5th EU Anti-Money Laundering Directive to prevent similar cases for violation of the right to personal data protection before their courts and candidate countries, such as North Macedonia, do not fall short of this expectation. If the CJEU's reasoning in joined cases C-37/20 and C-601/20 were applied to examine the regulation of the Register of Beneficial Ownership in North Macedonia and the accessibility of personal data of beneficial owners, the country's legislation would not pass the Court's test for balancing between the fight against money laundering and the protection of personal data.

20 WM (C-37/20) and Sovim SA (C-601/20) v Luxembourg Business Registers, C-37/20, ECLI:EU:C:2022:912, 22 November 2022, par.62.

Rule of law in Romania: the neverending story of an EU member State

Velimir Delovski
Legal consultant
External collaborator of the
European Policy Institute – Skopje

This brief provides an **overview of the latest rule of law developments in Romania, as observed under the** Cooperation and Verification Mechanism (CVM) of the European Union (EU), with a special focus on the judicial independence and justice reform. It is also of some relevance for the Macedonian authorities as it reaffirms the importance of ensuring a framework for long-term evaluation of the ongoing judicial reforms as a precondition for sustainable and efefctive reform, which will also continue to be carried out following the country's accession to the EU.

BACKGROUND

The **Cooperation and Verification Mechanism (CVM)** was introduced when Romania and Bulgaria joined the EU in 2007, as a transitional measure to facilitate two countries' continued efforts to reform their judiciaries and step up the fight against corruption.[21] Its reports are based on careful analysis and monitoring, drawing on a continuous dialogue between the Bulgarian and Romanian authorities and the European Commission (the Commission, EC), but also on the dialogue established with the civil society, international organisations, independent experts and a variety of other sources.[22]

Since its first report of 27 June 2007, the Commission reports on progress contain the Commission's assessment and recommendations to

21 Commission Decision 2006/928 of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354/ 56).

22 Unlike Romania, the October 2019 CVM report on Bulgaria concluded that Bulgaria had fulfilled the remaining CVM recommendations satisfactorily, that Bulgaria has made sufficient progress in meeting its commitments at the time of its accession to the EU and that all benchmarks can be satisfactorily closed. Since then, Bulgaria is no longer monitored or reported upon under the CVM and it is monitored within the annual rule of law cycle, and more concretely, in the Commission›s annual Rule of Law Report. See COM/2019/498 final.

the respective authorities against each of the criteria ('benchmarks') set out in the CVM Decision. In particular, the benchmarks for Romania deal with: 1) the transparency and efficiency of the judicial system; 2) the integrity framework and the National Integrity Agency; 3) fighting high-level corruption and 4) tackling corruption at all levels and corruption prevention.

Another useful tool in this context is the **European Rule of Law Mechanism** which provides a process for an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law. The foundation of this process is **the Rule of Law Report**, which monitors significant developments relating to the rule of law in Member States. Its scope goes beyond the specific context of post-accession which triggered the CVM and it covers four pillars: the justice system, the anti-corruption framework, media pluralism, and other institutional issues such as the role of independent institutions in ensuring checks and balances.[23] It should serve as a basis for discussions as well as to enable identifying challenges as soon as possible which should help respective Member States find solutions to safeguard and protect the rule of law.

With respect to Romania, the positive stocktaking by the Commission of January 2017 (ten years after the mechanism had been established) led to the twelve key recommendations, the implementation of which was monitored through further four assessments. Reports from 2017 to 2019 were characterized by a waning reform momentum, and eight additional recommendations had to be made. In the June 2021 report the Commission was able to mark substantial progress across all the CVM benchmarks and a strong renewed impetus to reform and repair the backtracking of the 2017-2019 period.[24] The Commission's latest report on Romania under the CVM of 22 November 2022 takes stock of progress made on the outstanding recommendations and the fulfilment of the CVM benchmarks since the June 2021 CVM report.[25]

KEY FINDINGS RELEVANT TO THE JUDICIAL SYSTEM IN ROMANIA

Regarding the first benchmark, in response to the concerns raised by the EC that the amendments to the three justice laws[26] which define the status of magistrates and organise the judicial system and the Superior Council of Magistracy (SCM), in 2018 and 2019, had a serious impact on the independence, quality and efficiency of the justice system, the Romanian authorities made an overall revision by adopting new justice laws in October 2022.[27]

23 The Commission has adopted three Rule of Law reports so far: COM(2020) 580; COM(2021) 700; and COM(2022) 500. They included specific chapters on Romania: SWD(2020) 322; SWD(2021) 724; SWD(2022) 523.

24 See COM(2021) 370 final of 8 June 2021.

25 See COM(2022) 664 final of 22 November 2022.

26 Law 207/2018 amending Law 304/2004 on the judicial organization; Law 234/2018 for amending Law no. 317/2004 on the Superior Council of Magistracy; Law 242/2018 amending Law no. 303/2004 on the status of judges and prosecutors. The laws were further modified through Government Emergency Ordinances in 2018 and 2019.

27 A special joint parliamentary Committee of the two Chambers examined the laws under an urgent parliamentary procedure starting on 12 September 2022. The parliamentary process concluded on 17 October 2022 after a positive vote in the Senate. These laws were challenged before the Romanian Constitutional Court, which rejected all challenges and they were promulgated by the President of Romania on 15 November 2022. The laws were published in the Official Journal on 16 November 2022. Although the final drafts had not been specifically sent for consultation prior to their submission to Parliament, the Venice Commission prepared an urgent opinion on the three justice laws, published on 18 November 2022.

The latest November 2022 CVM report noted that the revised justice laws reformed the civil liability regime for judges and prosecutors, addressing a long-standing issue identified in the CVM reports,[28] Rule of Law Reports as well as in the case-law of the CJEU.[29] They removed the rules previously in place which assigned power to the Ministry of Finance to assess whether a judicial error was committed in bad faith or by gross negligence and, subsequently, to initiate recovery actions against judges for the damage caused. They place a new safeguard by providing that, when a plaintiff lodges a claim for compensation for a miscarriage of justice, the Ministry of Finance may lodge a recourse action against the magistrate only if the relevant section of the SCM finds the existence of bad faith or grave negligence in the miscarriage of justice, on the basis of a report drawn up by the Judicial Inspection.

Certain safeguards were also put in place as regards the disciplinary liability of magistrates. On substance, the EC welcomed the abolishment of certain disciplinary offences which generated concerns for judicial independence, as well as the offences which questioned the primacy of EU law[30]. On the other hand, while noting the extension of another disciplinary offence to cover the expression of political opinions not only in the exercise of duties, but also more generally the expression of such views in public, the EC highlighted the need to monitor the practice to ensure that this offence does not restrict unduly the magistrates' freedom of speech.[31]

As to the procedural aspects, the amendments to the justice laws envisage that decisions of the SCM in disciplinary matters must be reasoned and notified without delay to the magistrate concerned. They provide for the deletion of disciplinary sanctions from the magistrate's record three years from their date of enforcement if the magistrate is not subject to a new disciplinary sanction during this period.

The 2022 CVM report also notes the overall increase of the seniority requirement for **promotions to higher courts and prosecutor offices.** The law maintains the two existing types of promotion at courts of appeal, tribunals and prosecutors' offices attached to them- the "on-the-spot" promotions, which are based on results obtained in promotion competitions, and the effective promotions, which are based on the evaluation of the magistrates' activity over the past years.[32] Moreover, the promotion of judges to the High Court of Cassation and Justice (HCCJ) on the basis of a competitive written test has been replaced by a selection based on an evaluation of the judicial decisions taken by candidates during their entire activity at the Court of Appeal and an interview before the

28 See notably 2018 Technical report (SWD(2018) 551 final), and 2021 Rule of Law report - country chapter on the rule of law situation in Romania.

29 In its Judgment of 18 May 2021, Asociația 'Forumul Judecătorilor Din România' and Others, in joined cases C-83/19, C-127/19, C-195/19, C-294/19, C-355/19 and C-379/19, §§ 233-241, the CJEU ruled that the rights of defense of judges should be fully respected, that a court should rule on the personal liability of judges and that the law must provide clearly and precisely the necessary guarantees ensuring that neither the investigation nor the action for indemnity may be converted into an instrument of pressure on judicial activity. For an in-depth analysis of this case, see Moraru, M., & Bercea, R. (2022). The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația 'Forumul Judecătorilor din România, and their follow-up at the national level. European Constitutional Law Review, 18(1), 82-113.

30 For further details, see the judgment of the CJEU of 22 February 2022, RS, in case C-430/21, §§ 79-93.

31 See COM(2022) 664 final of 22 November 2022 at p.4.

32 However, the law puts on hold the provisions related to competitive on-the-spot promotions until December 2025, allowing only for effective promotions during this period. As of 2025, on-the-spot promotions are foreseen to be capped to 20% of the total number of vacant positions. These restrictions on what is seen to be a more objective and meritocratic promotion procedure have been criticized by some magistrates' associations in Romania.

section for judges of the SCM[33]. Once promoted to the HCCJ, judges are also excluded from further professional evaluations.

The adoption of the **Law for dismantlement of the Section for the Investigation of Offences in the Judiciary (SIIJ)**[34] was embraced given the ineffectiveness of the SIIJ. However, concerns were raised as regards the transfer of competence to investigate offences committed by magistrates to 'designated prosecutors' within the Prosecutor's Offices attached to the HCCJ and the Courts of Appeal. The 2022 Rule of Law report noted that concerns were raised about the impact of the new system on judicial independence[35], as over 95% of the transferred files processed so far appear to have been based on unfounded allegations ('vexatious complaints') being used as a means of pressure against magistrates. It appears that the new law missed the opportunity to address such concerns, also taking into account that in its opinion of March 2022, the Venice Commission held that any dismantlement of the SIIJ should ensure more efficacy in investigating allegations of corruptions by judges and prosecutors[36].

As regards the **appointments and dismissals of prosecutors**, the previous CVM reports have also highlighted the need for merit-based appointments of the most senior prosecutors and for sufficient checks and balances in the appointment procedure, as well as a reflection on the extent to which the same appointment and dismissal procedure would apply at lower management levels within the prosecution[37]. The Venice Commission has also underlined that public confidence calls for an adequate balance between the requirement of democratic legitimacy of such appointments, and the requirement of depoliticisation[38].

In the 2022 CVM report on Romania, the Commission noted that revised justice laws have introduced a more transparent and robust process of selection for appointments to leadership posts in the prosecution, with additional safeguards against politicisation to enhance the accountability of the Minister of Justice in putting forward nominations. In particular, they have envisaged that the high-ranking prosecutors (including the Prosecutor General and the Chief Prosecutors of the National Anticorruption Directorate (DNA) and the Directorate for Investigating Organized Crime and Terrorism (DIICOT)), as well as their deputies, are to be appointed by the President of Romania upon a reasoned nomination submitted by the

33 This modification has also been criticized by some magistrates' associations and civil society organizations, who argued that the meritocratic and competitive character of the procedure has been reduced. On the other hand, the SCM has argued that the current system was not performing efficiently and that, at that level of seniority, knowledge-based tests for judges are less relevant than an analysis of their performance on the bench.

34 Law No 49 of 11 March 2022 on the abolition of the Section for the Investigation of Offences in the Judiciary, as well as for the amendment of Law no. 135/2010 on the Code of Criminal Procedure, published in the Official Gazette No 244 of 11 March 2022. The law was challenged before the Constitutional Court, which declared it constitutional by Decision No. 88 of 9 March 2022.

35 Statement by the Romanian Judges Forum Association, the Movement for the Defense of the Statute of Prosecutors Association and the 'Initiative for Justice' Association, of 24 January 2022.

36 Venice Commission, Opinion on the draft law dismantling the section for investigating criminal offences committed within the judiciary (CDL-AD(2022)003), § 37.

37 In the 2016 CVM report it was noted that the arbitrariness allowed by law in the process of dismissals showed the need to ensure clarity and introduce safeguards. Moreover, it was recommended that a procedure which involves a political element should not be applied to lower management posts, deputies and heads of section (which would be left to the SCM and leadership of the organisations concerned).

38 CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, § 19; CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 33. See also CDL-PI(2022)023, Compilation of Venice Commission Opinions and Reports Concerning Prosecutors.

Minister of Justice, following a selection process launched and organised by the Ministry of Justice and an opinion of the Prosecutors' Section of the SCM.[39] Though the opinion of the SCM is not binding on the Minister, the procedure foresees that in case of a negative opinion, a new interview with the proposed candidate would need to take place, which should take into account the arguments laid out in the SCM opinion. Following the new interview, the Minister can either send the nomination proposal to the President or withdraw the nomination and organise a new selection process. The President can either accept the Minister's nomination proposal and proceed with the appointment, or can refuse this proposal, giving reasons.[40]

Similarly, the procedure for dismissal of senior prosecutors is initiated by a request from the Minister of Justice for an opinion to the Prosecutors' Section of the SCM. The opinion is not binding, and after it is issued, the Minister may propose a dismissal to the President of Romania, who can only refuse the proposal on grounds of legality. This change follows the ruling of the European Court of Human Rights (ECtHR) in ***Kovesi v. Romania.***[41] The latter drew attention to the growing importance of involving an authority independent of the executive and the legislative branch in decisions affecting the appointment and dismissal of prosecutors, and the risk that the dismissal could have a chilling effect on the willingness of magistrates to participate in public debate on issues concerning the judiciary.[42] Accordingly, a review procedure before an administrative court has been added to the procedure for dismissal of prosecutors from leadership functions, giving the dismissed prosecutor 15 days to challenge the dismissal.

It was further welcomed in the 2022 CVM report that **codes of conduct for parliamentarians and ministers** were in place and can contribute to increased awareness and a significant reduction in the number of incidents of disregard of judicial independence and criticism of the judicial system and of individual magistrates both by Members of Parliament and by government officials.

39 Article 144 of the Law on the Status of Judges and Prosecutors.

40 The new legislative solutions have also been appreciated positively by the Venice Commission. According to the Venice Commission, while the appointment procedure continues to give the Minister of Justice a decisive role, the political responsibility for the appointment is shared with the President of Romania and the role of the SCM is strengthened. The involvement of several institutional actors in the procedure ensures a good degree of transparency and the amendment represents an improvement in terms of guarding against the risk of partisan appointments. See Venice Commission, Urgent Opinion on three laws concerning the justice system (CDL-AD(2022)045), §§ 36-43.

41 Kövesi v. Romania, app. no. 3594/19, judgment of 5 May 2020.

42 In particular, the ECtHR has found a violation of the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) given the inability of the applicant to effectively challenge premature termination of her mandate as chief prosecutor of the DNA. All possibility of judicial review had been limited to the formal review of the removal decree, while any examination of the appropriateness of the reasons, the relevance of the alleged facts on which the removal had been based or the fulfilment of the legal conditions for its validity, had been specifically excluded. Therefore, the Court held that the extent of the judicial review available to the applicant in the circumstances of the current case could not be considered "sufficient". In addition, an interference with the applicant's right to freedom of expression under Article 10 of the ECHR. The Court held that the impugned measure had not served protecting the rule of law or any other legitimate aim and it had not been necessary in a democratic society. On the contrary, it had been a consequence of the previous exercise of the applicant's right to freedom of expression and in particular, it had been prompted by the views and criticisms that the applicant had publicly expressed. The Court attached particular importance to the office held by the applicant, whose functions and duties included expressing her opinion on legislative reforms which were likely to have an impact on the judiciary and its independence and, more specifically, on the fight against corruption conducted by her department. Accordingly, the applicant's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for her freedom of expression and strict scrutiny of any interference. Her removal and the reasons justifying it could hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the independence of prosecutors, which was a key element for the maintenance of judicial independence. It had been a particularly severe sanction, which undoubtedly had a "chilling effect" in that it had to have discouraged not only her but also other prosecutors and judges in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.

As regards the **Superior Council of Magistracy (SCM)**, successive CVM reports have consistently underlined the need for the SCM to contribute to the judicial reforms, playing a constructive role in key decisions for the organisation and the functioning of the judiciary and articulating clear collective positions and securing confidence through transparency and accountability[43]. Despite all shortcomings, it was stressed that in contrast to 2020 in 2022 the Council has been able to adopt formal positions on key legislative projects and to participate in the ensuing parliamentary debates with further proposals for amendments. While noting a sufficient level of transparency, also in respect of disciplinary decisions, the Commission maintained its previous recommendation that the SCM should take measures to promote transparency and accountability. In addition to the possibility to recuse SCM members when judging disciplinary cases on grounds of non-fulfillment of duties, conflicts of interest and impartiality, the Commission noted that trasparency should also include holding regular open meetings and discussing the annual reports with the assemblies of judges and prosecutors at all levels, as well as with civil society and professional organisations.

The new legislation addressed the structural concerns raised in the June 2021 CVM report related to the **Judicial Inspection**[44] also in the light of the judgement of the ECJ **in Asociaţia 'Forumul Judecătorilor Din România' and Others**[45] and the 2022 Rule of Law report. It amended substantially the legislative framework related to the Judicial Inspection by including several provisions to remedy the lack of accountability of the Judicial Inspection and to reduce the excessive concentration of power in the hands of the Chief Inspector. The powers of the Chief Inspector are now balanced by a newly introduced Board, with a series of powers to ensure an adequate counterweight.

Concerning the appointment of the Chief and Deputy Chief Inspectors, stronger oversight powers have been given to the SCM and the National Institute of Magistracy has been, to a certain extent, involved in the competitions for entering the Judicial Inspection. The revocation procedure for the Chief Inspector has also been altered, from a requirement for a decision from the full SCM plenary to initiation by five SCM members or by the General Assembly of the Judicial Inspection. The Commission held that the resulting balance between considerations of independence, accountability and stability in the leadership of the Judicial Inspection will need to continue to be monitored in practice. A remaining concern relates to the possibility for the Chief Inspector to overrule a decision to dismiss a case, or any decision taken by an inspector following a preliminary investigation, which requires to monitor the effectiveness of the existing safeguards stipulating that the **Chief Inspector can overrule such decisions only once and with an obligation to provide reasoned grounds.**[46]

43 For more details, see 2021 CVM report.

44 They mainly relate to the concentration of power in the hands of the Chief Inspector and his deputy and the lack of accountability of the Chief Judicial Inspector, the high proportion of cases brought by the Inspection and eventually rejected in court, as well as the limits to the oversight by the SCM. In the June 2021 CVM report it was also noted that there remain cases where disciplinary investigations and heavy sanctions on magistrates critical of the efficiency and independence of the judiciary. According to the Rule of Law report 2022, such investigations have been opened by the Judicial Inspection either ex officio or at the request of the SCM (see Country chapter on Romania for more details).

45 § 207 of the judgment.

46 Nonetheless, a request for a preliminary ruling is pending before the CJEU on the question whether the extensive powers vested in the Chief Inspector are in line with the requirements of judicial independence (see C-817/21, R.I. v Inspecția Judiciară, N.L.).

The CJEU has made clear that judicial independence could be undermined if the disciplinary regime is diverted from its legitimate purposes and used to exert political control over judicial decisions or pressure on judges.[47]Some disciplinary investigations against judges were also perceived as a form of pressure and retaliation for sentences given, notably in high-level corruption-related cases. It would, therefore, be up to the Judicial Inspection to ensure that disciplinary investigations are no longer used as an instrument to exert pressure on the activity of judges and prosecutors, in line with the case-law of the CJEU.

CONCLUDING REMARKS AND NEXT STEPS

The CVM, as an inherent part of Romania's accession process, offered a way to address remaining issues where further progress was still necessary to ensure the capacity of the Romanian judicial system and law enforcement bodies to implement and apply the measures adopted to establish the internal market and the area of freedom, justice and security.

In its November 2022 CVM report, the Commission has reiterated that a balance is needed between the need to inject urgency in priority commitments and to ensure a transparent and inclusive legislative process and sustainable as well as effective judicial reforms. It has observed that the swift process of adopting the law that dismantled the SIIJ led to concerns that there had been little opportunity for interlocutors to comment on the new arrangements;[48] the justice laws have also been subject to the urgency procedure of the Parliament, without sufficient time during the parliamentary debates to discuss amendments in substance[49]. In a similar vein, in the framework of the 2022 Rule of Law report the Commission has noted that frequent changes of legislation and the regular use of emergency ordinances continued to raise concerns regarding the stability and predictability of legislation and, therefore, it issued a more general recommendation to Romania to ensure effective public consultation before the adoption of draft legislation.[50]

While in its latest urgent opinion of December 2022 on the new justice legislation the Venice Commission did voice regret that the Romanian government did not send the respective laws for consultation, Romania has committed to take the utmost account of its opinions.[51]

The latest CVM report is significantly important as the Commission concluded that the progress made by Romania was sufficient to meet the CVM commitments made at the time of its accession to the EU and that all benchmarks can be satisfactorily closed. As a result, from now on, the Commission will no longer monitor or report on Romania under the CVM, but monitoring will continue within the annual rule of law cycle and reporting will be consolidated

47 Judgments of the Court of Justice of 15 July 2021, Commission v. Poland (Disciplinary regime for judges), C791/19, ECLI:EU:C:2021:596, para. 138, and of 21 December 2021, Euro Box Promotion e.a., in joined cases C357/19, C379/19, C547/19, C811/19 and C840/19, ECLI:EU:C:2021:1034, § 239.

48 This concern was also echoed by the Venice Commission itself. See Venice Commission, Opinion on the draft law dismantling the section for investigating criminal offences committed within the judiciary (CDL-AD(2022)003), § 15.

49 Observations from NGOs present at the debates, and media reports.

50 2022 Rule of law report - Country Chapter on the rule of law situation in Romania, p. 2.

51 In its urgent opinion of December 2022, the Venice Commission issued several recommendations which may imply further legislative changes to the laws with a view to extension of the duration of the mandates of high-ranking prosecutors and eliminating the possibility of mandate renewals to guarantee their functional independence (§ 47), as well as reinforcing the safeguards if the General Prosecutor overrules the decisions of regular prosecutors (§ 50) and competitive selection for deputy managers in courts and prosecution offices (§ 35).

in the Commission's annual Rule of Law Report and other established parts of the rule of law toolbox applying to all Member States. This will enable the implementation of many of the agreed judicial reforms to continue to be followed-up in practice, including the operation of the new regime succeeding the SIIJ, the functioning of the Judicial Inspection, as well as the broader legislative framework of the justice laws and the work of the Superior Council of Magistracy. These issues will be part of the monitoring of the justice system and anti-corruption, two of the core pillars of the Rule of Law Report. In parallel, the new justice laws will also be assessed under the dedicated procedure in Romania's Recovery and Resilience Plan and further assistance in this respect will also be provided under other relevant EU programmes, in particular the Technical Support Instrument.

Violation of fundamental rights of LGBTIQ people by Hungary

Biljana Ginova
Human rights and LGBTIQ rights activist
External collaborator of the
European Policy Institute – Skopje

This brief gives an overview of the violations of fundamental rights of LGBTIQ people in Hungary, the reactions of EU institutions, the importance of these reactions in protecting the rights of LGBTIQ people in Hungary and beyond, as well as the main challenges they may face.

In recent years, the human rights of lesbian, gay, bisexual, transgender, intersex and queer people (LGBTIQ) in Hungary have come under fire from the authorities. The country has a high level of discrimination, stigmatization and violence caused by sexual orientation, gender identity and expression and gender characteristics of people. The annual review of the human rights situation of LGBTIQ people ranked Hungary 31st (one lower than last year) out of 49 countries, with an overall score of 30% and the lowest score for legal gender recognition (LGBTIQ), bodily integrity of intersex people and freedom of association.[52] The latest survey published by the European Union Agency for Fundamental Rights,[53] of 2020, found that 49% of participants from Hungary experienced discrimination in the previous year, while for transgender respondents it was 64%. Only 5% of participants believe that the authorities effectively fight LGBTI prejudice and intolerance compared to the EU average of 33%.[54] The situation worsened during the COVID-19 pandemic, when Orban's government, using its powers under the "state of emergency", began to introduce laws against LGBTIQ people, which prompted several large protests and legal proceedings by the European Union (EU).

52 ILGA-Europe, Annual Review of Laws and Policies in Europe Relating to LGBT Rights 2023, available at: https://www.ilga-europe.org/sites/default/files/2023/full_annual_review.pdf .

53 EU, FRA (2020b): Second EU LGBTI Survey: Long Road to LGBTI Equality, Hungary Data, available at: https://fra.europa.eu/sites/default/files/fra_uploads/lgbti-survey-country-data_hungary.pdf.

54 Ibid.

HUNGARY MISUSING 'STATE OF EMERGENCY' POWERS ATTACKS LGBTIQ PEOPLE

Entry into the EU (2004) contributed to the promotion of human rights of LGBTIQ people in Hungary, including the enactment of the Law on Anti-discrimination, which included sexual orientation and gender identity (SORI) as protected characteristics (2003),[55] the abolition of forced sterilization for transgender persons when accessing CPD (2008)[56] and the introduction of registered same-sex partnerships (2009).[57] But it wasn't long-lasting. Since Viktor Orban and his conservative Fidesz party came to power in 2010 (by a two-thirds majority),[58] there have been several key setbacks for LGBTIQ rights, including constitutional changes (2012) defining marriage as a union exclusively between a man and a woman.[59]

Negative homo/transphobic trends in Hungary continued with the adoption of a series of restrictive amendments to fast-track laws during the COVID-19 pandemic and the declared "state of emergency". In May 2020, Hungary replaced the category "sex" with "sex assigned at birth" in the register of citizens (Law XXX of 2020)[60] and added that the sex assigned at birth cannot be changed later, effectively restricting access to CPD. By the end of the same year, changes were introduced in the Constitution, the Civil Code and the Law on Child Protection by introducing a ban on the adoption of children by persons living in same-sex partnerships and by single men, which created a series of legal problems for children already living in same-sex families.[61]

In June 2021, Hungary passed a new law imposing restrictions on the display of Sori-related content in the public sphere, including schools and the media, for persons up to the age of 18 (Law LXXIX of 2021).[62] This law, which contains unjustified and disproportionate restrictions that discriminate against people on the basis of their SORI, was preceded by a public homo/transphobic attack prompted by the publication of a children's book with LGBTIQ characters.[63] It is important to point out that the amendments to the aforementioned law were passed allegedly to strengthen the criminal measures for sexual violence against minors, which is an open attempt by Hungary to put a sign of equality between paedophilia and sexual and gender minorities.[64]

In an attempt to legitimize, the Hungarian authorities organized a referendum on certain articles of this law. As a result of the successful NGO campaign,[65] the referendum did not receive the necessary support to be valid, but this did not prevent Hungary from further applying the law. Disturbing trends continue this year when a law was passed allowing same-sex couples

55 European Commission, Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities, available at: https://ec.europa.eu/migrant-integration/library-document/act-cxxv-2003-equal-treatment-and-promotion-equal-opportunities_en .

56 ILGA-Europe, Annual Review on Laws and Policies in Europe Related to LGBT Rights 2011, available at: https://www.ilga-europe.org/report/annual-review-2011/ .

57 Ibid.

58 Reuters, Fidesz won the election in Hungary with a strong mandate, available at: https://www.reuters.com/article/us-hungary-election-idUSTRE63A1GE20100412 .

59 Project Constitutionality, The 2011 Hungarian Constitution (Article L), available at: https://www.constituteproject.org/constitution/Hungary_2011.pdf .

60 Council of Europe, European Commission against Racism and Intolerance: Report on Hungary (sixth monitoring cycle), available at: https://rm.coe.int/ecri-6th-report-on-hungary-translation-in-hungarian-/1680aa687b .

61 Ibid.

62 Ibid.

63 Time, Why the children's book becomes a symbol of resistance in Hungary's struggle for LGBT rights, available at: https://time.com/5897312/hungary-book-lgbt-rights/ .

64 Telex, Representation and Promotion – explanation of the latest Hungarian anti-LGBT law, available at: https://telex.hu/english/2021/06/23/hungary-anti-lgbt-law-sexual-minorities-portrayal-promotion-paedophilia-viktor-orban-ursula-von-der-leyen .

65 Amnesty International, Human Rights in Hungary, available at: https://www.amnesty.org/en/location/europe-and-central-asia/hungary/report-hungary/#endnote-1 .

who have children to be anonymously reported if they are believed to be violating the "constitutionally defined role of marriage and the family" or "violate children's rights to an identity according to their designated sex at birth".[66]

REACTIONS OF THE EUROPEAN UNION

The European Commission (EC) initiated infringement proceedings against Hungary in July 2021,[67] and in December of the same year,[68] and following Hungary's failure to submit a satisfactory explanation, it submitted a reasoned opinion. The Hungarian authorities failed to improve the explanation after which the EC referred Hungary to the Court of Justice (July 2022).[69] The EC argues that the law violates internal market rules, fundamental rights of individuals and EU values. The Hungarian law contains provisions contrary to the promotion of the interest and protection of children and violates several EU rules, including the Audiovisual Media Services Directive,[70] the E-Commerce Directive,[71] the Agreement on Freedom to Provide Services[72] and the Services Directive.[73] The law also violates several fundamental rights defined in the Chapter on Fundamental Rights,[74] including the right to respect for private and family life, the right to freedom of expression and the right to non-discrimination. The litigation is ongoing, and the outcome will be key in defining the EU's capabilities in protecting the rights of LGBTIQ people.

In March 2023, the Legal Affairs Committee of the European Parliament decided to join the court case against the Hungarian law by submitting written observation,[75] which is a historically significant decision and stresses the importance of the EU institutions working together in the protection of human rights. Additionally, on the basis of EU values, as well as in support of LGBTIQ people, fifteen EU Member States joined the litigation.[76]

66 Bloomberg, The new Hungarian law allows residents to report same-sex families, available at: https://www.bloomberg.com/news/articles/2023-04-13/hungary-s-new-law-allows-locals-to-report-on-same-sex-families#xj4y7vzkg .

67 European Commission, Founding Values of the EU: The Commission has launched legal proceedings against Hungary and Poland for violating the fundamental rights of LGBTIQ people, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668 .

68 European Commission, December infringements package: key decisions, available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201 .

69 European Commission, Commission refers Hungary to the EU Court of Justice for violating the rights of LGBTIQ people, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2689 .

70 Official Journal of the EU, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain articles established by law, regulation or administrative procedure in the Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex %3A 32010L0013 .

71 Official Journal of the EU, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, particularly electronic commerce, in the internal market (Directive on electronic commerce), available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex %3A 32000L0031 .

72 Official Journal of the EU, Consolidated version of the Treaty on the Functioning of the European Union, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX %3A 12016E % 2FTXT&qid = 1683312926767 .

73 Official Journal of the EU, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex %3A 32006L0123 .

74 European Commission, Chapter on EU Fundamental Rights, available at: https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en .

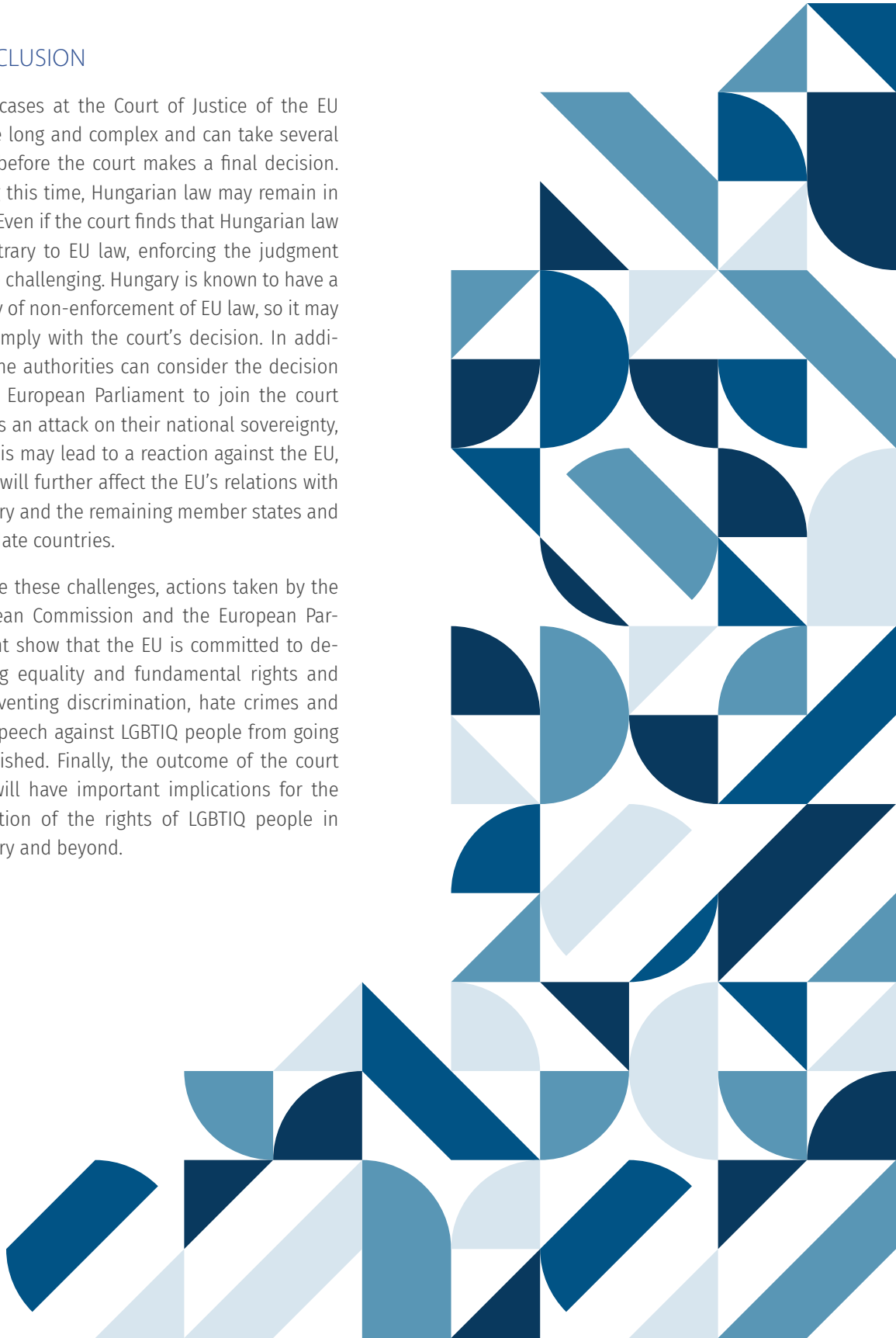
75 LGBTI Intergroup of the European Parliament, the European Parliament joins the litigation against Hungary after the vote in the Legal Affairs Committee, available at: https://lgbti-ep.eu/2023/03/21/press-release-the-european-parliament-joins-the-court-case-against-hungary-after-vote-in-the-committee-on-legal-affairs/ .

76 Politico, Germany and France join EU lawsuit against Hungarian anti-LGBTQI+ law, available at: https://www.politico.eu/article/germany-france-eu-lawsuit-hungary-lgbt-law/ .

CONCLUSION

Court cases at the Court of Justice of the EU can be long and complex and can take several years before the court makes a final decision. During this time, Hungarian law may remain in force. Even if the court finds that Hungarian law is contrary to EU law, enforcing the judgment can be challenging. Hungary is known to have a history of non-enforcement of EU law, so it may not comply with the court's decision. In addition, the authorities can consider the decision of the European Parliament to join the court case as an attack on their national sovereignty, and this may lead to a reaction against the EU, which will further affect the EU's relations with Hungary and the remaining member states and candidate countries.

Despite these challenges, actions taken by the European Commission and the European Parliament show that the EU is committed to defending equality and fundamental rights and to preventing discrimination, hate crimes and hate speech against LGBTIQ people from going unpunished. Finally, the outcome of the court case will have important implications for the protection of the rights of LGBTIQ people in Hungary and beyond.



The European Union Regulation on artificial intelligence – an ambitious legislative "bite" or a double-edged sword?

Atanas Avramov
Human rights activist
External collaborator of the
European Policy Institute – Skopje

This policy brief analyses the draft Regulation of the European Union on artificial intelligence, with particular reference to the scope of the Regulation, the safeguards of human rights and the strictnesss of the provisions on prohibited practices in relation to artificial intelligence systems.

INTRODUCTION

Technological development has brought new legal challenges, especially in the attempt of legislators to balance between stimulating innovative ideas and their realization vis-a-vis the protection of human rights and freedoms. Such attempts to balance between interests are always a "minefield", which is further complicated if multiple stakeholders are involved or in situations where reconciling the views of a multitude of stakeholders is necessary. This is also the case with the European Union (hereinafter: EU). Agreeing on a text of legislation in the EU is sometimes a challenge, not only because of the sensitivity of the subject of regulation in the specific regulation but also because of the diversity of social values of member states and the political implications in their domestic political systems. On the other hand, the draft text of the regulation, despite in principle being previously agreed upon by the member states, does not always eliminate possibilities for an abuse, and even for violation of human rights and freedoms.

In this regard, one of the EU legislative undertakings that will have an impact on human rights and freedoms is the Regulation on artificial intelligence (hereinafter: the Regulation).[77]

77 Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, 2021/0106, 21.4.2021.

The objectives of the Regulation are: 1. to ensure the safety of the artificial intelligence systems that are on the EU market and the respect for fundamental human rights and EU values; 2. to create legal certainty that will facilitate investment and innovation in artificial intelligence; 3. to increase the regulation and effective enforcement of the already existing low on fundamental rights and safety requirements relating to artificial intelligence systems; and 4. to facilitate the development of the single market for lawful, safe and credible artificial intelligence applications and prevent market fragmentation.

On the other hand, in announcing such an EU legislative undertaking, the Regulation was characterized as a legal act that has the potential to create a global standard for regulating artificial intelligence. Optimists, that is, critics, are of the view that the Regulation has the same potential as GDPR[78] in shaping the domestic legal framework of the countries around the world. In this regard, the Regulation has created a fertile field for discussion on a global level, and even the Secretary-General of the United Nations, Antonio Guterres, stated at a press conference that he supports the idea of establishing an international oversight body for artificial intelligence, which resembles or is inspired by the International Atomic Energy Agency.[79] Given such an opportunity and having in mind the potential of the Regulation, it is unclear why some sectors or industries are outside the scope of the Regulation, especially those that historically have a huge potential for systemic violations of human rights and freedoms. Moreover, there are no provisions for legal remedies in order to protect human rights and freedoms, and on the other hand, the Regulation contains a closed list of prohibited practices, i.e. artificial intelligence systems.

SCOPE OF THE REGULATION – THE DANGER OF LEGAL LOOPHOLES ON HUMAN RIGHTS AND INDIVIDUAL CRIMINAL LIABILITY

Article 2 prescribes the scope of the Regulation, i.e. prescribes when the provisions of the Regulation will apply. Article 2 (3) of the Regulation states that "this Regulation shall not apply to artificial intelligence systems developed or used exclusively for military purposes".[80] In order to justify such a provision, it is stipulated that the Regulation will not apply when the use of artificial intelligence (for military purposes) is under the competence of the Common Foreign and Security Policy of the EU (hereinafter: EU CFSP).[81]

Such a provision, with its rationale, creates ambiguities and thus room for abuse. The confusion is a consequence of the fact that the rationale of the provision, i.e. the part with the competence of the EU CFSP, is not present in the wording of Article 2 paragraph 3 of the Regulation and thus there is a discrepancy between Article 2 paragraph 3 and the rationale. Thus, the provision does not clarify whether the Regulation will not apply to artificial intelligence systems when they are developed or used exclusively for military purposes, regardless of whether they are under the EU CFSP or

78 Regulation of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), (EU) 2016/679, 27.04.2016.

79 The official statement of the Secretary general of the UN is available at the following link: https://media.un.org/en/asset/k1y/k1yqlq2lr8.

80 Article 2 paragraph 3 of the Regulation.

81 Rationale No. 12 of the Regulation.

not.[82] Furthermore, if Article 2 paragraph 3 of the Regulation is read, without its rationale,[83] it follows that the artificial intelligence systems being developed within the framework of the European Defence Fund are exempted from the scope of the Regulation. Such an exemption from the scope of the Regulation can be extremely dangerous, given the fact that the EU is actively involved in developing artificial intelligence systems for military purposes through the European Defence Fund, by working on the Eurodrone project, which develops possibly armed drones.[84] In addition, by not regulating or limiting the application of the Regulation, a space is created to unduly restrict or "sacrifice" certain rights provided for in the EU Charter of Fundamental Rights (hereinafter: the Charter)[85] in the name of national security, through artificial intelligence, in particular the right to life, the right to liberty and security, the right to private and family life, the right to the protection of personal data, but also the protection of the environment.

Aside from the European Defence Fund and the projects funded by it, with the exclusion of artificial intelligence systems for military purposes, the Regulation fails to address an issue that is not only topical but also represents a "hot bone" that requires detailed regulation – autonomous weapon systems (lethal autonomous weapon systems). According to the International Committee of the Red Cross, autonomous weapon systems may be any type of weapon that chooses and applies force on targets without human intervention. The regulation does not use its pedestal to reaffirm the basic principles of international military and humanitarian law (principle of distinction, proportionality, necessity) in the context of artificial intelligence (autonomous weapons systems) and chooses not to regulate the essential issue of autonomous weapons systems – the need for human control, that is, the principle of individual criminal responsibility.[86] In this regard, the principles resulting from the Martens clause require "significant human control" over autonomous weapon systems,[87] and an important element in maintaining such control is individual criminal responsibility.[88]

Consequently, by excluding artificial intelligence for military purposes from the application of the Regulation, legislators are not using the potential of the Regulation to effectuate the principle of individual criminal responsibility in autonomous weapon systems and to create a standard in terms of whose responsibility it will be when artificial intelligence, i.e. autonomous weapon systems, commit international crimes, regardless of whether the perpetration is intentional or it is a result of a problem in the functioning of the system. In its Resolution

82 Smuha, Nathalie A. et al., How the EU Can Achieve Legally Trustworthy AI: A Response to the European Commission's Proposal for an Artificial Intelligence Act, 5 August 2021, p. 22, available at: https://ssrn.com/abstract=3899991 (hereinafter: Smuha, Nathalie A. et al).

83 The rationale is subject to controversy within the EU, but also subject to criticism by experts and the European Court of Justice. It is noted that, although the rationales should serve to explain the need for regulation of a particular issue, they are used to set norms. In addition, the European Court of Justice uses rationales for interpretation only when the provisions of legal acts are unclear, and the rationales are precise and can serve to resolve the ambiguity of the provision.

84 Christoph Marischka, Artificial Intelligence in European Defence: Autonomous Armament? The Left in the European Parliament, 14 January 2021, p. 11, available at the following web link: https://left.eu/issues/publications/artificial-intelligence-in-european-defence-autonomous-armament.

85 European Union, Charter of Fundamental Rights, 26 October 2012, C 326/291.

86 The principle of individual criminal responsibility is a principle that addresses the responsibility of the individual in committing international crimes, by prosecuting the person who committed the international crime and such prosecution does not exclude the responsibility of the state, in accordance with international law.

87 United Nations, Recommendations to the 2016 Review Conference submitted by the Chairperson of the Informal Meeting of Experts, para. 2 (b); Draft Report of the 2019 session of the Group of Governmental Experts of the High Contracting Parties to the CCW, Geneva, 2019, para. 17 (d).

88 Rule 102, ICRC Database of International Humanitarian Customary Law.

2018/2752 (RSP), the European Parliament referred to and reiterated its call for: the urgent development and adoption of a common position on autonomous weapon systems; an international ban on the development, production and use of autonomous weapon systems capable of launching an attack without meaningful human control; and the launch of effective negotiations to ban them.[89] The current wording of Article 2 of the Regulation does not respond to the call of the European Parliament and does not use the given chance to set an international standard for autonomous weapons systems and the responsibility that comes with them. On the other hand, limiting the application of the Regulation to artificial intelligence used for military purposes can have serious consequences in terms of the enjoyment of fundamental rights.

THE RIGHT TO AN EFFECTIVE LEGAL REMEDY AND ACCESS TO JUSTICE

A particularly important part of any legal act is the supervision of its application and the measures that can be applied to ensure compliance with the provisions it contains. The regulation is no exception in that regard and provides for monetary sanctions and market restrictions in cases where artificial intelligence systems violate fundamental human rights. Pursuant to Article 65 of the Regulation, if a violation of fundamental human rights has been committed, the competent market surveillance authority may apply measures to address the violation, for example to prohibit or restrict access to markets for the system. However, the Regulation does not provide for the possibility of active litigation of the individual, that is, there is no legal remedy for the individual against the artificial intelligence systems that have committed the violation. Such a legal framework invalidates the purpose of the Regulation – to ensure that AI systems respect fundamental rights. Additionally, monetary sanctions are not individual legal remedies that will ensure the protection of human rights, but are a method of "deterrence", which does not guarantee success.[90] Consequently, the control and possibility of addressing a breach of the Regulation is under the authority of a market surveillance body and not of the individual whose rights are allegedly violated in the particular situation. In this context, the right to an effective remedy and a fair trial, guaranteed by Article 47 of the Charter, which stipulates that everyone has the right to an effective remedy in cases where their rights and freedoms guaranteed by EU law have been violated, is circumvented. The right of an individual to independently address violations of his or her rights is autonomous and independent of the competences of market surveillance bodies, and one cannot be equated with the other.

89 European Parliament, Resolution on autonomous weapon systems, 12 September 2018, para. L

90 Smuha, Nathalie A. et al, p. 45.

THE CLOSED LIST OF PROHIBITED SYSTEMS

Critics of the Regulation find it problematic that the list of prohibited practices in artificial intelligence systems, prescribed by Article 5 of the Regulation, is exhaustive, that is, that there is no method to add new artificial intelligence systems that pose a risk to human rights. In practice, if several years after the adoption of the Regulation there is a new system that should be prohibited, in accordance with the principles arising from the Regulation, there is no possibility for it to be included in the list of prohibited systems. It seems that the list was created to address the latest controversies with artificial intelligence,[91] and not to ensure that safety is protected when using artificial intelligence systems that could arise in the future. Such a method of regulation does not take into account the speed of technological development and leaves room for misuse by operators of artificial intelligence systems. Regardless, it must be acknowledged that the EU's willingness to address the problems created by artificial intelligence in recent years is at a high level and there is interest in envisaging methods to protect the human rights of EU citizens. In this regard, experts who have worked for years on ethical issues regarding artificial intelligence generally agree with the text of the Regulation, but request to ensure that the Regulation will be able to adapt to the new peculiarities and risks of artificial intelligence as they come.[92]

CONCLUSION

The Regulation is an ambitious EU undertaking, which is to be welcomed, given the challenges faced by all who have had some contact with AI. It is particularly important that the Regulation is seen as a potential instrument for setting an international standard and the public welcomes such a move by the Union. In view of such high expectations of the Regulation, it is necessary to refine it and achieve its overall potential in order to effectively and efficiently meet the set objectives, and in particular the protection of human rights listed in the Charter. It is necessary to be even more ambitious; the rules of the Regulation to also apply to artificial intelligence for military purposes, to provide for additional mechanisms for the protection of human rights and to leave room for introducing new technologies that will enter the EU market in the future.

91 Ibid, p. 20.

92 See more: University of Cambridge, Leverhulme Centre for the Future of Intelligence and Centre for the Study of Existential Risk, Feedback to the Artificial Intelligence Act.

A right for everyone but a privilege to some – the right to vote of persons with disabilities

Challenges and barriers faced by voters with disabilities in the EU and North Macedonia

Ardita Vejseli
Researcher at
European Policy Institute - Skopje

INTRODUCTION

2024 is foreseen as the year of elections worldwide.[93] In the European Union (EU), the European elections are scheduled to be held in early June.[94] In North Macedonia both presidential and parliamentarian elections are scheduled to be held in April and May.[95] As much as elections represent a cornerstone of democracy, it has been noted that a great number of persons with disabilities will be unable to participate in the 2024 elections due to barriers concerning accessibility and legal capacity.[96] This brief gives insight on the right to vote of persons with disabilities in the EU and North Macedonia, amid the provisions of the new proposed EU electoral law and the factual situation in North Macedonia in light of the forthcoming 2024 elections.

Albeit voting is not the only means of political participation and engagement, it is a vital method of political participation[97] especially for persons with disabilities. The Convention on the Rights of Persons with Disabilities (CRPD) stipulates that states should guarantee persons with disabilities political rights on an equal basis with others and should undertake measures to ensure procedures, facilities and materials are

93 Doug Saunders, 'Opinion: Half the World Is Holding Elections in 2024. Democracy's Future Is Riding on the Outcome' The Globe and Mail (29 December 2023) <https://www.theglobeandmail.com/opinion/article-half-the-world-is-holding-elections-in-2024-democracys-future-is/>.

94 'Next EU Elections Will Be Held between 6 and 9 June 2024' Euronews (13 December 2023) <https://www.euronews.com/my-europe/2023/05/17/the-next-elections-to-the-european-parliament-will-be-held-between-6-and-9-june-2024>.

95 'On May 8, there will be voting in double elections - an agreement has fallen on the leadership [На 8 мај ќе се гласа на двојни избори – падна договор на лидерската]' Radio Free Europe (4 December 2023) <https://www.slobodnaevropa.mk/a/na-8-maj-kje-se-glasa-na-dvojni-izbori-padna-dogovor-na-liderskata/32713325.html>.

96 'Voters with Disabilities in the European Union May Not Be Able to Participate in EP Elections in 2024' (Inclusion Europe, 24 November 2022) <https://www.inclusion-europe.eu/2024-eu-elections-and-disability-rights-on-voting/>.

97 Armin Rabitsch, Alejandro Moledo and Michael Lidauer, 'Inclusive Elections? The Case of Persons with Disabilities in the European Union' (2023) 30 South African Journal of International Affairs 535. Page 536

appropriate and accessible; protect the right to vote by secret ballot; and if necessary and to the persons' request, allow assistance in voting by a person of choice.[98] The provisions of the CRPD are key for creating an inclusive society and overcoming barriers of participation persons with disabilities face. Moreover, the right to vote is read in conjunction with other rights such as accessibility; equality and non-discrimination; equal recognition before the law; freedom of information. Limitations on these rights seriously impact and create barriers on persons with disabilities voting right.[99] Additionally, the CRPD is legally binding to the ratifying countries, thus national and regional provisions must be in line with the aforementioned state obligations. Inclusion and participation of all individuals in society is the cornerstone of democracy hence accessible and inclusive elections represent a crucial side of democracy and rule of law in a country.

A NEW WAVE FOR VOTERS WITH DISABILITIES IN EU

In the past elections in the EU, persons with disabilities have been facing many barriers in exercising their right to vote. In 2019, it was estimated that 800 000 EU citizens with disabilities were unable to participate in the European Parliament elections, who were faced with barriers of technical, infrastructural and legal nature.[100] One of the biggest obstacles continues to be accessibility, including polling stations, voting booths, machines and correspondence and information to be disseminated to voters.[101] Reasonable accommodation has been improved with the help of Disabled Persons Organizations, however it remains a challenges as it varies from Member State to Member State.

In 2022, the European Parliament adopted a draft legislative resolution proposing to repeal the 1976 European Electoral Act with a new Council Regulation.[102] The proposal is significant in bringing forth key and needed reforms for the European elections to be accessible and inclusive. In this regard, the recommendations of the European Disability Forum[103] have made great impact on the formulations of the provisions. The draft legislative resolution focuses on several aspects. Article 4 stipulates that EU citizens from the age of 16, including persons with disabilities regardless of their legal capacity can vote in election to the European Parliament. Article 7 focuses on accessibility and it obliges Member States to ensure persons with disabilities have equal access to relevant materials, to voting facilities and to polling stations; Member states should put into place appropriate arrangements with the aim of facilitating the exercise of the right to vote by persons with disabilities independently and in secret; and to ensure, at the persons request and choice, receive assistance in voting. Furthermore, Member States should ensure that postal voting is accessible for persons with disabilities. As the

98 Convention on the Rights of Persons with Disabilities 2008 (A/RES/61/106). in accordance with article 45(1 Article 29 (a) (i) (ii) (iii)

99 Rabitsch, Moledo and Lidauer (n 1). Page 537

100 European Economic and Social Committee, 'The Real Right of Persons with Disabilities to Vote in European Parliament Elections (Information Report)' (2019) SOC/554 <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/information-reports/real-right-persons-disabilities-vote-european-parliament-elections-information-report>. Page 4-5, Section. 2

101 Alejandro Moledo and Marine Uldry, 'Human Rights Report on Political Participation of Persons with Dissabilities' (European Disability Forum 2022) Issue 6 <https://www.edf-feph.org/publications/human-rights-report-2022-political-participation-of-persons-with-disabilities/>. Page 15

102 European Parliament, 'European Parliament Legislative Resolution of 3 May 2022 on the Proposal for a Council Regulation on the Election of the Members of the European Parliament by Direct Universal Suffrage, Repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act Concerning the Election of the Members of the European Parliament by Direct Universal Suffrage Annexed to That Decision (2020/2220(INL) – 2022/0902(APP))' <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0129_EN.html>.

103 European Disability Forum, 'Reform of the EU Electoral Law - European Disability Forum Position Paper' (2021) <https://www.edf-feph.org/publications/edf-position-paper-on-the-reform-of-the-european-union-electoral-law/>.

EU has ratified the CRPD, the proposed provisions of the regulation reflect the obligations as set by the CRPD. The proposed legislation, representing a crucial step forward for voters with disabilities, it is yet to be adopted by the European Council and Member States,[104] however, the process has been lagging due to limited support due to other political aspects and insufficient time for adoption before the European elections.[105] The European Disability Forum has asserted the importance of aligning EU electoral legislation with the CRPD, since the measures foreseen by the legislation would significantly contribute to accessible elections in the European Parliament and in Member States through necessary alternative means of voting including: accessible postal voting, free choice of assistance if needed, and voting regardless of legal capacity.[106]

In its 2021 Disability Strategy, the EU Commission stated that it will work together with Member States to ensure participation of persons with disabilities on an equal basis with others in accessible European elections, and devise a guide on good electoral practices.[107] In light of the June 2024 elections, the European Commission has published a Guide on good electoral practices in Member States addressing the participation of citizens with disabilities in the electoral process. This comes as a positive step to showcase positive practices taken thus far to minimize the discrimination persons with disabilities face. As the Guide mentions, measures that have been taken by Member States include practices for early voting and alternative voting procedures, including advance voting in person, postal voting, online voting, mobile voting, curb-side voting, changing or choosing polling stations, assisted voting by a person freely chosen by the voter; availability of assistive tools such as Braille, QR codes, large print, audio and easy-to-read guides, Braille envelopes, tactile stencils, magnifying glasses, extra lighting, writing utensils and stamps; procedures to request reasonable accommodation.[108] Moreover, the recommendations the guide provides go beyond practical measures. It emphasizes in other words the need of training of polling station staff, election officials and others involved in various matters such as awareness raising on electoral rights of persons with disabilities, reasonable accommodation, language guidance, support, creation of clear outlets for citizen information. Furthermore, it also provides concrete framework of actions to be taken before, during and after elections completed with a checklist examples.[109] A recent recommendation by the European Commission further encourages Member States to make good use of the guide and follow the frameworks provided so as to make electoral processes inclusive by supporting the participation of voters with disabilities.[110]

104 Maria Diaz Crego, 'Towards New Rules for European Elections?' (Think Tank | European Parliament 2022) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)729403>.

105 Eszter Zalan, 'No Majority for Reforms for 2024 European Parliament Election' (EUobserver, 27 June 2023) <https://euobserver.com/eu-political/157199>.

Eleonora Vasques, 'LEAK: Most Countries Hesitant about EU Electoral Law Reform' (Euractiv, 5 July 2023) <https://www.euractiv.com/section/elections/news/leak-most-countries-hesitant-about-eu-electoral-law-reform/>.

106 Moledo and Uldry (n 9). Page 95 – 98

107 European Commission, 'Union of Equality Strategy for the Rights of Persons with Disabilities 2021-2030' (2021) <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8376&furtherPubs=yes>.

108 European Commission, 'Guide of Good Electoral Practices in Member States Addressing the Participation of Citizens with Disabilities in the Electoral Process | European Commission' (2023) <https://commission.europa.eu/document/66b9212e-e9b0-409d-88a3-c0e505a5e670_en>. Pages 31-32

109 ibid. Pages 35 -37

110 European Commission, 'Commission Recommendation (EU) 2023/2829 of 12 December 2023 on Inclusive and Resilient Electoral Processes in the Union and Enhancing the European Nature and Efficient Conduct of the Elections to the European Parliament' (2023) C/2023/8626 <http://data.europa.eu/eli/reco/2023/2829/oj/eng>. Paragraph 8. Regarding the European Commission's Recommendation the European Disability Forum has reacted on its insufficient tackling of the legal barriers such as individual deprivation of electoral rights for persons with intellectual and psycho-social disabilities. For more see: https://www.edf-feph.org/commission-recommendations-insufficiently-address-electoral-rights-of-persons-with-disabilities/

VOTERS WITH DISABILITIES IN NORTH MACEDONIA

Persons with disabilities in North Macedonia are faced with multiple barriers when it comes to exercising their right to vote. The electoral boards have unfavorable opinions regarding people with psychosocial and/or learning disabilities taking part in the electoral process. The inaccessibility of political party offices and voting stations have been continuously identified.[111] In addition to this, there is lack of fundamental knowledge about international mechanisms and the rights of persons with disabilities whether they can cast ballots from home by both officials and persons with disabilities themselves.

In a series of elections in the past eight years, the barriers have persisted. During the 2016 elections, 30% of citizens with disabilities stated that they were unable to exercise their right to vote due to the inaccessibility of the polling stations. Only 9% of persons with disabilities consider that information during the elections is accessible and available.[112] Furthermore, aside from the physical barriers present in the polling places, no modifications had been implemented to accommodate individuals with sensory disabilities, such as sound programs in the electronic ballot boxes, Braille formats, and signs.[113] In the 2020 presidential elections, although some improvement had been made, still Braille ballot cover and voting tabulators were not placed, even when placed, the Braille was not readable; physical access to facilities was scarce due to missing ramps and voting stations not being on the ground floor. During media campaigns and political shows, only 2 media outlets had subtitles and only 1 had sign language.[114] In addition, 22% of persons with disabilities were not allowed to vote with assistance.[115] During the 2021 elections the ODIHR Election Observation Missions recommended further measures to be taken by state and local authorities to ensure independent access for persons with disabilities.[116]

In recent developments regarding the right to vote, a milestone has been achieved through a judicial decision confirming the lack of accessibility and reasonable accommodation persons with disabilities have faced during elections in North Macedonia. In early 2023 the Basic Court in Skopje determined that direct discrimination was committed by the Government of North Macedonia and the State Election Commission by failing to take actions to adapt the infrastructure and space to and in part of the polling stations and violated the principle of reasonable accommodation. In this way, the defendants, made it impossible for persons with disabilities to exercise their right to vote, and thus hindered the active participation of persons with

111 Biljana Kotevska and others, 'Franet National Contribution to the Fundamental Rights Report 2023 North Macedonia' (European Policy Institute (EPI) – Skopje 2023) <https://epi.org.mk/wp-content/uploads/frr_2023_north_macedonia_en.pdf>. Page 46

112 Elena Kochoska, 'Analysis of the Political Participation of Persons with Disabilities' (OSCE - Skopje 2017) <https://www.osce.org/files/Analysis%20of%20the%20Political%20Participation%20of%20PwDs_ENG.pdf>. Page 41

113 ibid. Page 35

114 Blagica Dimitroska and Tatjana Arsovska, 'The Right to Vote of Persons with Disabilities Monitoring of Parliamentary Elections 2020 [Правото На Глас На Лицата Со Попреченост Мониторинг На Парламентарни Избори 2020 г.)' (Westminster Foundation for Democracy, North Macedonia 2021) <https://www.wfd.org/what-we-do/resources/making-right-vote-accessible-all-pwds-observe-parliamentary-elections-north>. Pages 16-18

115 ibid. Page 48.

116 'Republic of North Macedonia, Local Elections, 17 and 31 October 2021 ODIHR Election Observation Mission Final Report' (Office for Democratic Institutions and Human Rights 2021) <https://www.osce.org/odihr/elections/north-macedonia/514666>. Page 33

disabilities in the political life of the state.[117] The decision was fully confirmed by the Appellate Court in Skopje where it states that the Government and the State Election Commission are obliged to provide adequate access to persons with disabilities on an equal basis with others, respect relevant legislation and international mechanisms and within their competences take appropriate actions for adaption and accessibility. Specifically within these obligations, the Court asserted that the defendants should enable access to flat roads, parking spaces properly marked with high-contrast colour; placement of signs and numbers in a prominent place in a large format with high contrast or sound signalling to the polling stations; access to the voting spaces by installing handrails along the stairs and walls; to install access ramps, handrails, wider entrances, to provide an accessible lift or platforms on proper level and with steps; access in the voting spaces, its equal lighting, moving of furniture in order to enable greater possibility of movement; installation of properly adapted voting screens and installation of the ballot box at an appropriate height for persons with physical disabilities.[118]

A step forward in improving the situation of persons with disabilities in exercising their rights, including the right to vote in elections, is the new National Strategy on the rights of persons with disabilities 2023-2030 with an Action Plan which the Government adopted in December 2023 and is based on the provisions of the CRPD and the European Strategy on Disability.[119] The Strategy has nine priority areas of which priority area number one is accessibility and priority area number two is equality, access to justice and active participation in public and political life.[120] Activities are planned to overcome the challenges in terms of inaccessible polling stations, information, as well as limited access to voter registration. The action plan foresees several activities with indicators with first and foremost being determining the need to amend the Electoral Code and the Law on Political Parties in order to increase the participation of persons with disabilities in political and public life; Removing barriers and providing accessible places for exercising the right to vote (renovated schools with improved accessibility and alternative polling stations provided upon prior registration); Creation of accessible materials and provision of information in accessible formats for exercising the right to vote (Adapted information materials in 4 accessible formats (easy to read, audio format, sign language, braille).

117 'The Government and the State Election Commission Committed Direct Discrimination against Persons with Disabilities When Exercising Their Right to Vote (Владата и Државната Изборна Комисија Сториле Директна Дискриминација Врз Лицата Со Попреченост При Остварување На Нивното Право На Глас)' (Official Website of The Helsinki Committee for Human Rights of the Republic of Macedonia, 9 January 2022) <https://mhc.org.mk/news/vladata-i-drzhavnata-izborna-komisija-storile-direktna-diskriminacija-vrz-licata-so-poprechenost-pri-ostvaruvanje-na-nivnoto-pravo-na-glas/?fbclid=IwAR3qrzFpDz7DN6KMtkv63BCe5R9jU-14z3LpLif7p2CTH9njMBH2xJmwdK0U>.

118 'The Appellate Court Confirmed That the Government and the State Election Commission Directly Discriminated against Persons with Disabilities in Their Access to the Voting Process' (Helsinki Committee for Human Rights, 20 December 2023) <https://mhc.org.mk/en/news-en/the-appellate-court-confirmed-that-the-government-and-the-state-election-commission-directly-discriminated-against-persons-with-disabilities-in-their-access-to-the-voting-process/>.

119 'The Government Adopted the New National Strategy on the Rights of Persons with Disabilities [Владата Ја Усвои Новата Национална Стратегија За Правата На Лицата Со Попреченост 2023-2030]' (Radio MOF, 29 December 2023) <https://www.radiomof.mk/vladata-ja-usvoi-novata-nacionalna-strategija-za-pravata-na-licata-so-poprechenost-2023-2030/>.

120 To date, the final text of the National Strategy on the rights of persons with disabilities 2023-2030 with its Action Plan is not yet published however, the draft text of the strategy can be found on the official site of the National electronic register: https://ener.gov.mk/Default.aspx?item=newdocumentdetails&detalisId=61

SO WHERE DO VOTERS WITH DISABILITIES STAND AND WHAT FURTHER?

Despite efforts to minimise barriers of participation, persons with disabilities are still finding themselves in the margins of society especially when it comes to access political life. Inaccessible elections throughout the years have proven this to be true. As 2024 proves to be the year of elections, it is of a crucial nature to have national and regional legislations harmonised with the provisions of the CRPD. Subsequently, harmonization must be followed with implementation. In North Macedonia, the new Strategy on the rights of persons with disabilities and the judicial decision on inaccessibility and are timely indicators for the Government and the State Election Commission to undertake the necessary measures until the elections in the middle of 2024. Furthermore, the involved institutions responsible to delivers the actions set in Strategy for the rights of persons with disabilities must transparently report on the undertaken activities, and periodically update the Action Plan. This is of importance as the current action plan foresees activities that greatly impact how the elections and voting will function for persons with disabilities until 2030. Some of the timeframes put by the Action Plan do not correspond with the immediate needs for persons with disabilities to exercise their right to vote in April and May, therefore additional and appropriate measures should be taken by the State Election Commission to address the accessibility needs, such as adapted information materials in 4 accessible formats (easy to read, audio format, sign language, braille; as well as trainings for staff related to secrecy of voting as well as assistance during voting upon the choice of the person with disability. Furthermore, as the political campaigns will commence, inclusion and accessible information must be provided for persons with disabilities.