

Implementation of Urgent Reform Priorities
slower than the restoration
of anti-reformist practices

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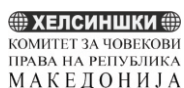


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ХЕЛСИНШКИ
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ПРАВА НА РЕПУБЛИКА
МАКЕДОНИЈА



КОАЛИЦИЈА
КОАЛИЦИЈА
СИТЕ ЗА ПРАВичНО СУДЕЊЕ
TE GJITHË PËR GJYKIMË TE DREJTË
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НВО ИНФОЦЕНТАР

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Implementation of Urgent Reform Priorities slower than the restoration of anti-reformist practices

By signing the Przhino Agreement in June 2015, the four largest Macedonian political parties agreed "to implement all recommendations to be issued by the European Commission in relation to systemic rule of law issues". In so doing, the political parties agreed to implement the Commission's "Urgent Reform Priorities" (URPs), even before their publication, also in June 2015.

Within the framework of its enlargement policy, the European Commission linked extending its recommendation to open accession negotiations with the Republic of Macedonia (RM) with the "continued" implementation of the June/July political agreement and "substantial progress in the implementation of the Urgent Reform Priorities".¹

While it may be clear what the implementation of the political agreement entails, it is far clear as to what "substantial progress in the implementation of the Urgent Reform Priorities" means. This applies both for the broader public and the actors who are directly charged with implementing them. To this extent, there is a vague notion amongst the public as to their meaning, as well as assumptions and doubts about whether they are a code, a strategy for action or just a meaningless bureaucratic phrase.

What are the Urgent Reform Priorities?

The Urgent Reform Priorities can be found in a document, which is in list form, produced by the European Commission, which builds on a report from the Senior Experts' Group led by Reinhard Priebe.² Although the report itself contains recommendations, the Commission issued them as a separate document, in line with its enlargement policy and endorsed by the Council of the European Union on 16 December 2015.³

The document consists of five chapters: I. Rule of Law and Judiciary; II. De-politicization of the Public Administration; III. Electoral Reform; IV. Implementation of the Recommendations of the Committee of Inquiry into the Events of 24 December; and, V. Media: Freedom of Expression.

What is new in this document in comparison to previous recommendations from the Commission?⁴

Rule of Law and Judiciary

Clear focus on the independence and quality of justice

Concrete recommendations on judicial and parliamentary oversight of the interception of communications

Increased focus on the independence of regulatory and oversight bodies

Explicit demands for the revision and repeal of lustration

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. (10.11.2015). EU Enlargement Strategy. Brussels. Available from http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_strategy_paper_en.pdf.

² This was a group of independent senior rule of law experts, brought together at the request of the European Commission. (8 June 2015). Recommendations of the Senior Experts' Group on systemic rule of law issues relating to the communications interception revealed in Spring 2015. Brussels. Available from http://ec.europa.eu/enlargement/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf.

³ Council of the European Union. (15 December 2015). Council conclusions on enlargement and stabilisation and association process. Brussels. Available from <http://data.consilium.europa.eu/doc/document/ST-15356-2015-INIT/en/pdf>.

⁴ We focus only on the publicly announced recommendations by the European Commission, mainly contained in the progress reports. It is likely that the European Commission has represented its recommendations to the Government in various forms (within the dialogue bodies for implementation of the SAA, the High Level Accession Dialogue, etc.), but they are not publicly available.

It is evident that the recommendations in this document are mostly 'updated', which of course is a result of the exposed wiretapping scandal and the findings of the Priebe report, prompted by the same event. Hence, the issue relating to oversight of the interception of communications and the role of the intelligence services has returned to the agenda. This issue has been in the background continuously, especially after 2008 when parliamentary oversight of security services was completely hindered in different ways.

De-politicization of the Public Administration

■ This priority is not new, with the exception of the more robust wording used in respect of the strict application of the new laws. In our opinion, the priority is wrongly linked to the implementation of the new laws. Numerous laws and amendments have been adopted for the same purpose, i.e., in order to create a professional and de-politicized public administration, yet the end results were completely oppositional to what was intended.

■ The requests to terminate the transformation of temporary employment contracts and for transparent publication of figures of the total number of public service employees are more specific.

Electoral Reforms

■ Recommendations of previous reports of the Commission are repeated, including references to the recommendations from the Organization for Security and Co-operation in Europe and the Office for Democratic Institutions and Human Rights.

Implementation of the Recommendations of the Committee of Inquiry into the Events of 24 December

■ No new specific measures.

Media: Freedom of Expression.

■ The previous recommendations in relation to the public broadcasting service, government advertising, and access to information and defamation are further specified and systematized.

Many of the priorities are essentially a repeat of unfulfilled priorities of the previous years. Without setting clear deadlines for their implementation, repeating them is not just ineffective, but also gives a signal that bad practices will continue to be tolerated ad infinitum. Hence, further acceptance of the non-implementation of the priorities implicitly provides support to the Government to continue with these bad practices.

How and to what extent have the Urgent Reform Priorities been implemented?

Our assessment of the implementation of the Urgent Reform Priorities follows an established methodology and is based on structured monitoring by members of Network 23.⁵ Information from relevant institutions, political parties and media was monitored and analysed, in addition to monitoring the sessions of specific state bodies, as well as judicial cases. On the basis of this monitoring, which took place between 15 September and 31 December 2015, six reports were published and three forums were organized for the discussion of the findings.⁶

The findings and assessment regarding the implementation of each of the priorities are presented in the attached infographic.

We examine in detail the implementation of each of the priorities below.

⁵ The following organizations were involved in the monitoring: Institute for Human Rights, Coalition of Civil Associations "All for Fair Trials", Helsinki Committee for Human Rights of the Republic of Macedonia, and the NGO Infocenter.

⁶ Monitoring reports are available from <http://www.epi.org.mk/newsDetail.php?nwsid=89>.

A) Judiciary

The priorities concerning the appointment and promotion of judges, their performance appraisal, disciplinary procedures and dismissal are not being implemented. The Judicial Council, according to an (unpublished) action plan, has continued to appoint court presidents and publish calls for the appointment of judges, as well as select judges without any prior modifications in the system of appointment. Despite reactions from civil society, which pointed out that the Council for the Determination of the Facts and Initiation of Disciplinary Procedure for Establishing Disciplinary Responsibility of a judge is not an appropriate solution for the implementation of the recommendation from GRECO (the Council of Europe's anti-corruption monitoring body),⁷ the procedure for the completion of such a council continued. Finally, in December 2015, the Venice Commission published an Opinion⁸ clearly stating that the establishment of a separate council is not an appropriate solution, even though it would refrain from assessing the constitutionality of the law establishing this body. In addition, the Commission emphasized that the reforms to the judiciary have taken a different direction than previous reform activities.

This law is indicative of the pattern of many other government "reform" activities in the past years. A specific recommendation by the European Commission or international body is read and implemented to suit the executive, ensuring only a formal application of the recommendation, while in fact gaining greater control over the other branches of government. At the same time, with the proliferation of new institutions and other bodies, new positions are created to accommodate political party staff or to win over new "independent" experts. Consequently, democratic deviations are not endangered; in fact, they are restored and the ersatz reformist approach is breathing life into them.

Take the example of the Ministry of Justice and its launch of a public debate on the Draft Strategy for Reform of the Judiciary.⁹ The operationalization of the priority concerning the independence of judges is envisaged for 2018, and will mainly include regulatory measures and a strategy for capacity-building. Thus, the proposed Strategy is directly opposed to the Urgent Reform Priorities, because it does not play emphasis on the "urgency".¹⁰ This exemplifies how the European Commission's pre-accession assistance may have an effect that is contrary to the one intended with the Urgent Reform Priorities.

The new central database of the Supreme Court of the RM should include court rulings by all courts in the country, but will not contain already published court rulings on the websites of the other courts, thereby questioning the logic behind this intervention. However, this activity does not comply with the essence of this priority, i.e., publication of court rulings within the deadlines set by law.

⁷ For more information, see the analysis in Chapter 23 "Judiciary and Fundamental Rights in the Republic of Macedonia", prepared by the Network 23, available from http://www.epi.org.mk/docs/Analiza_Poglavje23_en.pdf; and, the analysis in "The independence of the Judicial Council of the Republic of Macedonia - Aspirations and challenges", prepared by the Institute for Human Rights within the project "Network 23", available from <http://www.ihr.org.mk/images/pub/analiza-za-ssrm-konecna.pdf>.

⁸ European Commission for Democracy through Law (Venice Commission). (21 December 2015). Opinion on the Laws on the disciplinary liability and evaluation of judges of the Republic of Macedonia. Adopted at its 105th Plenary Session (Venice, 18-19 December 2015), Strasbourg, 21 December 2015 Opinion No. 825 / 2015. Available from [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)042-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)042-e).

⁹ The Draft Strategy was prepared with expert and logistic support from the project whose remit was to explore "future support to independent, accountable, professional and efficient judiciary, and the promotion of probation and alternative measures".

¹⁰ The Institute of Human Rights prepared comments on the Draft Strategy, which are available from www.ihr.org.mk.

No measures have been observed to “ensure a more pro-active role played by the Judicial Council and increase its professionalization”. The same goes for the measures that are needed to ensure sufficient predictability of the application of the statutory requirement of “distinguished lawyers” (in this context, 15 years' experience is not enough), as a condition for a membership of the Judicial Council. This was the basis under which the current President of the Judicial Council was elected, in the absence of opposition. The President even stated that the European Commission report contains double standards regarding the judiciary.¹¹ On the other hand, both the Judicial Council¹² and the Supreme Court have been pro-active participating in and organizing roundtables and debates. However, the question remains how much these 'ceremonial' activities might contribute towards the implementation of the priority objective – “to protect judges from interference on their independence” – if, at the same time, the usual practices for selection and promotion of judges continue.

The implementation of the priority regarding the Academy of Judges and Public Prosecutors is on-going. In the 2016 budget more resources were allocated compared to 2014 and 2015.

Regarding the “speedy execution of all European Court of Human Rights (ECHR) judgements against the country”, the existing practice in the RM is to put together action plans for each judgement and communicate them to the ECHR. However, this does not suffice in terms of fully implementing the priority with relation to “developing practical and effective measures for each category of cases”. No systematic measures have been noted in this respect.

Conversely, certain legal interventions have been made recently that cannot be directly assessed as either compliant with or opposed to the Urgent Reform Priorities. One such example is the introduction of new salary supplements for the judges and public prosecutors, with the obvious objective of pre-electoral soliciting and influencing their responsiveness to political requests. Another example is the opportunity for court associates to apply for initial training at the Academy of Judges and Public Prosecutors, but only for those from the Office of Public Prosecutors.

The strike by administrative staff in the judiciary, who reacted to the solutions proposed by the relevant law, was not met with a serious response. This category of employees in the judiciary remains neglected, despite their highly significant role, especially in situations where the number of judges is decreasing.

Overall, the Urgent Reform Priorities in the field of the judiciary have not been implemented. Instead of reforms, a “soft reform package” has been implemented, emphasizing form over substance. Certain elements of a more technical nature have been implemented, which will have a limited impact on independence and professionalism. On the other hand, activities contrary to the Urgent Reform Priorities have been undertaken.

B) Functional judicial and parliamentary oversight of the interception of communications

No concrete steps have been taken, apart from the delayed establishment of an inquiry into the communications interception scandal. Concrete results are lacking, since testimonies “behind closed doors” have trivialized expectations for both a transparent process and an institutionally-enabled catharsis.

¹¹ According to the Judicial Council, the European Commission has shown double standards towards the judiciary. Telma. 27.11.2015. Available from <http://telma.com.mk/vesti/za-sudskiot-sovet-ek-ima-dvojni-standardi-za-sudstvoto>.

¹² The Council adopted an action plan to address obsolete subjects, introduced quarterly working visits to courts, adopted a new systematization of judges in the courts, made a decision to publish a call for a VI generation at the Academy of Judges and Public Prosecutors, and adopted new rules of procedure and internal procedures.

C) Independent regulatory and oversight bodies

In practice, no concrete steps have been taken to ensure the autonomy of independent regulatory and oversight bodies, and the professionalism of their members.

The priorities for implementation of the recommendations regarding the Ombudsperson and amending laws to comply with the Paris Principles have not been fulfilled. On the contrary, the Ombudsperson has stated that its functioning was hampered by the executive branch.¹³ This type of institutional “decapitation”, with bodies functioning on an operational minimum and when, in practice, their management is prevented from performing its duties, is not an endemic example, but it has epidemic dimensions.

D) Anti-corruption policies and laws

Apart from the Special Public Prosecutor's developing track record,¹⁴ no visible steps have been made to counter high-profile corruption. Meanwhile, significant resistance is still present in opening and closing such cases.

A central registry of public officials responsible for submitting conflict-of-interest statements and assets declarations has not been established, even though this is a priority that has been reiterated for many years.

The Law on the Protection of Whistle-blowers is the only aspect of the anti-corruption priorities that has been implemented. The adoption of this law was marred by controversy, along with the Law on the Protection of Privacy, considering that the first draft submitted by the Government coalition contained elements of censorship. The State Commission for the Prevention of Corruption functions as an aim in itself. In 2015, it has published statements mostly concerning workshops and training events, characterized by a closed-off approach towards the media and the public.

E) Lustration

The Government has ceased applying the law on lustration as a realized priority. Nevertheless, there are 38 active cases in the Commission and 38 cases before the courts, as well as cases in the ECHR.¹⁵

II. DEPOLITICIZATION OF THE PUBLIC ADMINISTRATION

If the implementation of this priority is linked with the enforcement of the new laws, the approach is completely flawed. It is a well-established fact that the politicization of the public administration is continuing. On the other hand, the Government has made it clear that it has no intention to declare a moratorium on the Law on Transformation of Temporary Positions into Permanent Contracts, as demanded by the European Commission in one of the most concrete priorities in the document. On the contrary, this activity is still on-going.

Finally, the Ministry of Information Society and Administration has announced that the total number of public sector employees is 128,253, data that had been requested for many years by the public and the European Commission. However, the Minister concerned has, at the same time, announced the “complete establishment of the registry” in its first annual report published in February 2015. There are already reservations about the published data.

¹³ Izhet Memeti: The Directorate for Security and Counter-Intelligence and the Public Prosecutor prevented me from investigating the interception of communications. 24 News. 09.15.2015. Available from <http://24vesti.mk/idzet-memeti-ubk-i-javnoto-obvinitelstvo-me-sprechuvaa-da-go-istrazhuvam-prislushuvanjeta>.

¹⁴ According to the law, the Public Prosecutor is responsible for prosecuting crimes related to and arising from the content of the illegal interception of communications.

¹⁵ Monitoring activities of the Institute for Human Rights.

III ELECTORAL REFORM

The steps made to date can hardly justify the ambition of the reform priority, even though there were extensive negotiations between the parties. Put mildly, the reforms are not ambitious, and represent a missed opportunity in cross-party negotiations for introducing at least open lists.

The biggest problem is the revision of the voter list, an activity that has been “worked on” for years, but with no results.

This is a priority that has to be fulfilled on time before the onset of elections, yet it is becoming clearer that there is no time for its realization, and especially for the revision of the voter list.

IV IMPLEMENTATION OF THE RECOMMENDATIONS OF THE COMMITTEE OF INQUIRY INTO THE EVENTS OF 24 DECEMBER

The failure to implement this priority is an indicator of the non-existent political will to ensure balance between the executive and legislative branches.

V MEDIA: FREEDOM OF EXPRESSION

The negotiations concerning the media have reached an impasse, and the political parties blame each other for this situation. The Association of Journalists and the Macedonian Institute for Media have requested to be included in the negotiations.

a) Public service broadcaster

Reforms regarding the public service broadcaster have not been implemented. Meanwhile, media monitoring shows breach the objective's reporting principles on behalf of the Macedonian Radio Television.

b) Government advertising

The Government unilaterally announced the termination of paid advertising on electronic media. However, in essence, this does not mean that priorities requiring systemic solutions have been implemented, such as setting up rules for and ensuring transparency in relation to paid advertising, as well as developing a mechanism for unpaid public service announcements. On the other hand, the absence of paid advertising has been subtly compensated through journalistic forms of “informing”, directly on prime-time information programmes.

c) Access to information

There are no visible changes in journalists' access to information.

d) Defamation

There has been no initiative to amend the Law on Civil Liability for Insult and Defamation (in line with article 10 of the ECHR), nor have there been changes in procedural rules for cases with low value and that use mediation, as suggested by the Urgent Reform Priorities.

The analysis of defamation cases does not suggest self-restriction on behalf of politicians in filing defamation lawsuits in comparison to the previous year. Since 1 June, eight new cases have been brought before the court in which one of the parties was a journalist, and 24 hearings have been scheduled.¹⁶

¹⁶ Monitoring activities of the NVO Infocenter

What is important, yet not explicitly stated, in the Urgent Reform Priorities?

One of the risks of proposing concrete recommendations to be implemented by the Government within the framework of the "European agenda" is losing sight of processes and events that induce other, even bigger problems.

For the RM, probably the most critical prognosis is related to the political party control over state institutions (state capture by the Government). Even though those efforts to formulate reforms that sought to reduce and remove state capture were evident, in reality, nothing could be foreseen. For instance, the membership of the Accreditation Committee on Higher Education Institutions, known to the public as made up of people close to the ruling parties, is a clear indicator that the ruling parties do not possess political will to reduce state capture; rather, they continue to exert party control over institutions.

An even more direct breach is found in the proposed membership of the Commission for Prevention of and Protection from Discrimination.¹⁷ The members were put forward by the ruling coalition despite the on-going objections of the opposition party that they did not fulfil the membership criteria.

On the other hand, the electoral campaign is in full swing, with announcements for raising the amount of social assistance, pensions and other welfare programmes having more impact than "boring" reform priorities, particularly in the still heavily-controlled media, as well as on new media, which has been established to provide reserve logistics for political and election goals.

In addition, the "fluidity" of recommendations from the European Union's institutions should be taken into consideration. In this respect, the conclusions of the Council of the European Union from December 2015 and the recommendations contained in the European Commission's 2015 Annual Report for Macedonia should be noted. In addition to endorsing the Urgent Reform Priorities, the Council of the European Union provided for or repeated the following recommendations:

- Full investigation of the events in Kumanovo of 9-10 May 2015 in an objective and transparent manner
- Completion of the review of the Ohrid Framework Agreement and implementation of its recommendations
- Maintaining good neighbourly relations, avoiding actions and statements which negatively impact on good neighbourly relations, and resolution of the name issue.

¹⁷ Decision on the appointment of the Accreditation and Evaluation Committee on Higher Education Institutions "Official Gazette" no. 220/15 of 15.12.2015, available from

In its Annual Report, the European Commission includes recommendations for specific measures in the fight against organized crime. Particularly important are the anti-money laundering recommendations and the recommendation to establish a National Co-ordination Centre for the Fight Against Organized Crime.¹⁸ Other proposed measures, of a technical nature, refer to the adoption of strategies and action plans for the reform of the judiciary and public administration, as well as strengthening the capacities for strategic planning in the judiciary.

Not surprisingly, the Government has ignored the recommendations about political character, preferring instead to implement the technical measures in order to “buy time”. The issue concerning the investigation into the Kumanovo events has been removed from the agenda for the time-being.

On the other hand, the review of the Ohrid Framework Agreement has reached a deadlock ever since VMRO-DPMNE distanced itself from the review.¹⁹

In terms of good neighbourly relations, the two meetings of the Foreign Affairs Ministers of Macedonia and Greece have been enough to fill the dossier on this recommendation. Yet, they have not yet moved forward on finding a solution on the name issue, about which Macedonia, at this moment, is not in a strong position.

CONCLUSIONS AND RECOMMENDATIONS:

Essentially, the Urgent Reform Priorities are not being implemented. The level of implementation is far from “significant”.

-The monitoring of the implementation of the Urgent Reform Priorities is unsystematic and insufficient, by both domestic and foreign institutions. The primary focus is on other aspects of the Przhino Agreement.

-There is a lack of transparency of the planned and implemented measures by the Government.

-There is lack of transparency about the European Commission's findings on the implementation of the Urgent Reform Priorities.

-It is recommended that a monitoring mechanism is set up in relation to the implementation of the Urgent Reform Priorities that should include the European Commission, the Government, the Parliament, relevant independent bodies and civil society.

-It is recommended, possibly through the High Accession Dialogue, to urgently set realistic deadlines and indicators for implementation of the Urgent Reform Priorities. This endeavour should be performed in a structured manner, for each of the thematic areas, ensuring inclusion of independent bodies, as well as civil society organizations.

¹⁸ Recommendations on the fight against organised crime (Urgent Reform Priorities):

- establishing a sound track record on combating money laundering, and improving capacity and expertise to carry out financial investigations and asset confiscations on a more systematic basis;
- stepping up efforts to improve cooperation between the various law enforcement agencies by bringing the National Coordination Centre for the Fight Against Organised Crime into full operation;
- revising the legal and technical framework for intercepting communications, and increasing the effectiveness of special investigative measures for genuine law enforcement purposes

¹⁹ VMRO-DPMNE completely distanced itself from the review on the Framework Agreement. Alsat-M. 09.12.2015. Available on: <http://alsat.mk/News/225526/vmro-dpmne-celosno-se-distancira-od-analizata-na-ramkovniot-dogovor>.

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