

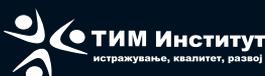


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# What can the EU do about the rule of law in the Western Balkans? – Elements for a new enlargement methodology

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December 2019



European Fund for the Balkans



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# **What can the EU do about the rule of law in the Western Balkans? –**

Elements for a new enlargement methodology

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What can the EU do about the rule of law in the Western Balkans? –  
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## INTRODUCTION

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The on-going debate at the European Union (EU) and Member State (MS) levels on the new enlargement methodology indicates there is a different understanding across Europe on how to renew the accession process. The French veto<sup>1</sup> over the start of EU accession talks with North Macedonia and Albania, despite the European Commission's recommendation, and a non-paper coming from the same address,<sup>2</sup> have divided stakeholder views in the Western Balkans and the EU. Actors are split between those who find the necessary impetus to revitalize the process in the French document, and those who see it only as a new attempt to keep the Western Balkan countries at a distance, with aggravating steps for candidate countries that will not necessarily lead to an acceleration of the democratization process.<sup>3</sup> Another recent proposal by nine EU Member States,<sup>4</sup> which was a direct response to the French document,<sup>5</sup> suggests revision of the process on alternative grounds and with additional instruments. In this policy brief, we focus on lessons learned from the use of EU instruments to strengthen the rule of law so far. By looking at new proposals made from recently published documents, we also propose elements for a new methodology for the enlargement process which relates specifically to rule of law reform in the Western Balkans. This brief was developed within the framework of the 'Rule of law in the Western Balkans: Reinventing the rules of the game' project, which Politikon Network implements

together with CRTA from Serbia and Tim Institute from North Macedonia with the support of the European Fund for the Balkans (EFB) through the Think and Link Regional Policy Programme 2019.

## INSTRUMENTS SUPPORTING THE “FUNDAMENTALS FIRST” APPROACH INTRODUCED IN 2011<sup>6</sup>

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### ◆ Opening negotiations with the rule of law chapters & benchmarking

The main goal of opening the most demanding chapters at the very beginning, with a view to keeping them open until the end of the negotiations, is to ensure the state has enough time to establish a solid track record in the fight against corruption, organized crime and other sensitive areas of particular importance to the rule of law, as well as to allow the European Commission to see tangible results in the candidate countries and ensure progress is not reversed. In this process, reforms are carried out on the basis of benchmarks, a set of specific requirements that must be met in order for the chapter to be opened, for the state to progress in the negotiations within the chapter, and afterwards for the chapter to be closed (opening, interim and closing benchmarks). However, these benchmarks are not sufficiently specific and are not adapted to the particular context of the

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1 Francesco Guarascio, Marine Pennetier, Robin Emmott “France under fire for ‘historic error’ of blocking Balkan EU hopefuls”, Reuters, 18 October 2019, <https://www.reuters.com/article/us-eu-summit-balkans/france-resists-eu-membership-talks-for-north-macedonia-and-albania-idUSKBN1WX1CTa>

2 “Non-Paper: Reforming the European Union accession process”, November 2019, <https://www.politico.eu/wp-content/uploads/2019/11/Enlargement-nonpaper.pdf>

3 Carl Bildt “France is pushing the E.U. toward strategic disaster”, Washington Post, 25 October 2019, <https://www.washingtonpost.com/opinions/2019/10/25/france-is-pushing-eu-toward-strategic-disaster/>

4 Austria, Estonia, Lithuania, Latvia, Italy, Malta, Poland, Slovenia, the Czech Republic

5 “Non-paper: Elements for an enhanced enlargement process and sustained and accelerated integration of the Western Balkans”, December 2019

6 For more on existing EU rule of law instruments, see: Jovana Marović, Tena Prelec, Marko Kmezić “Strengthening the Rule of Law in the Western Balkans: Call for a Revolution against Particularism”, January 2019, <http://biepag.eu/wp-content/uploads/2019/03/Strengthening-the-Rule-of-Law.pdf>

candidate country.<sup>7</sup> If the benchmarks are compared between the two countries currently negotiating EU membership, there is little difference between them.

### Detailed action plans

are the benchmarks for opening negotiations under Chapters 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security) relating to the rule of law. The activities in these action plans are grouped around the recommendations that countries receive as part of the review of their legislative alignment with the EU acquis and are further upgraded in line with interim benchmarks. The action plans are outlined and the European Commission gives a green light to their content, which entails an assessment that the benchmarks can be met with the activities envisaged by the countries. However, in practice, indicators cannot be given on a one-time basis and must be regularly updated to demonstrate real success. The same applies to activities. In Serbia – which adopted the action plans later, since the negotiation process in this country began at a later date – they have been adapted once while the second attempt is on-going, in Montenegro they were updated only once in 2015. For both countries, the same applies: action plans have been developed to respond to broad and general benchmarks, while reports on their implementation, mostly because of their structure, do not give a clear picture of progress within a one-year period.

### Priorities determined annually in individual chapters

This practice was introduced by the European Commission in its 2015 country reports. The Commission sets priorities each year for Chapters 23 and 24, but also for additional chapters in line with the evaluation of particularly problematic areas. However, instead of making these priorities more specific to the benchmarks, they are not much different from them and thus do not achieve the desired effect. The Commission also fails to provide a clear indication in the following year's country report of whether these priorities have been met.

### The imbalance clause

prevents the opening of further negotiation chapters and is applied in cases when the reform process in relation to the rule of law lags behind the alignment process with the European Union as a whole. This provision exerts pressure on the state to address problems that undermine the rule of law. The imbalance clause has not been officially activated so far, although the European Commission has assessed the entire Western Balkans as having elements of captured states.<sup>8</sup> It has only been used as a potential threat in the case of Montenegro in 2018.<sup>9</sup> Yet, if this mechanism is reduced simply to preventing the opening of new negotiating chapters it has already lost its weight in the case of Montenegro, which has only one more negotiating chapter left. What is most likely currently in place in Montenegro and Serbia, regardless of EU-level denials<sup>10</sup> and regardless of the opening of negotiating chapters in Serbia,<sup>11</sup> is a situation where the imbalance clause has been tacitly activated.<sup>12</sup>

<sup>7</sup> Simonida Kacarska and Ardita Abazi "Effective benchmarking for concrete Rule of Law reforms in the Western Balkans"; Think for Europe Network, October 2019, <https://cep.org.rs/wp-content/uploads/2019/10/Effective-benchmarking-for-concrete-rule-of-law-reforms-in-the-Western-Balkans.pdf>

<sup>8</sup> "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans"; European Commission, February 2018, [https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf)

<sup>9</sup> "Resolve attacks on journalists or the EU will suspend negotiations"; DAN, 18 September 2018, <https://www.dan.co.me/?nivo=3&rubrika=Drustvo&datum=2018-09-18&clanak=663403>

<sup>10</sup> "Kocijancic: EU did not block negotiations with Montenegro"; Mina, 8 October 2019, <https://www.mina.news/crnagora/kocijancic-eu-nije-blokirala-pregovore-sa-crnom-gorom/>

<sup>11</sup> "Serbia today opened Chapter 9 – Financial services"; European Western Balkans, 27 June 2019, <https://europeanwesternbalkans.com/2019/06/27/serbia-today-opened-chapter-9-financial-services/>, "Serbia opens Chapter 4 within EU accession negotiations"; European Western Balkans, 11 December 2019, <https://europeanwesternbalkans.com/2019/12/11/serbia-opens-chapter-4-within-eu-accession-negotiations/>

<sup>12</sup> "Radunovic: The balance clause is tacitly activated"; Vijesti, 7 October 2019, <https://www.vijesti.me/vijesti/politika/radunovic-klausula-balansa-precutno-aktivirana>

Ultimately, endless negotiations and blocking the opening of new chapters produces the same net effect.

Considering that the imbalance clause's goal is to "discipline" the candidate state and encourage it to demonstrate measurable results, it is debatable how much the suspension of negotiations can really act as motivation. Especially when one considers that the accession talks with Montenegro and Serbia are already in a degree of disorder, where neither of the two countries has a "plan B" to show real shifts, while at the same time they remain without clear dynamics and without guidelines and deadlines from the EU level that could help. In this regard, there are far more effective punishment mechanisms that could make the candidate country show the will and commitment to reform.<sup>13</sup> Public reactions offer a powerful mechanism and should not be neglected, but a similar effect could also be achieved if the European Commission stated much more openly the reasons why, for example, there are elements of captured states in the Balkans.

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**INSTRUMENTS PROVIDED  
IN THE COMMISSION'S  
"CREDIBLE ENLARGEMENT  
PERSPECTIVE FOR AND  
ENHANCED EU ENGAGEMENT  
WITH THE WESTERN  
BALKANS" COMMUNICATION<sup>14</sup>**

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**Enhanced assessment of reform  
implementation including impact  
indicators**

As discussed above, poorly defined indicators are one of the obstacles to assessing whether

a candidate country has actually taken steps towards meeting the benchmarks. Any improved evaluation of the state of the rule of law in the candidate countries should address this problem as a priority. One of the ways in which this could be done effectively would be by refining indicators annually, with civil society organizations playing an important role through public consultations and the submission of proposals, but also through the monitoring process. Another important step would be to change how the European Commission evaluates what has been done in a one-year period through a more precise and clear reporting system and style.

**Trial monitoring**

Although a trial monitoring mechanism has been announced, it is still awaiting implementation. The Commission has stated that it is "developing new ways of collecting more harmonized data from the justice systems of the partners. A major deliverable in this respect will be a regional project with the Organization for Security and Co-operation in Europe (OSCE) on monitoring trials in the field of corruption and organized crime. The World Bank has been contracted to carry out a series of regional justice surveys and the Commission for the Efficiency of Justice of the Council of Europe (CEPEJ) will assist in harmonized data collection from the region."<sup>15</sup> Beyond this announcement, however, the reach of the new mechanism remains to be seen. It is nevertheless positive that the European Commission is working on this mechanism and in this direction. Stakeholders should be involved in its further development.

**Case-based peer-review missions  
and new advisory missions**

While the European Commission has been organizing peer review missions for over twenty years,<sup>16</sup> a communication from

<sup>13</sup> See: Reversibility

<sup>14</sup> "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans", European Commission, February 2018, [https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf)

<sup>15</sup> "2019 Communication on EU Enlargement Policy", European Commission, May 2019, p. 42, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-communication-on-eu-enlargement-policy\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-communication-on-eu-enlargement-policy_en.pdf)

<sup>16</sup> "EU's guidance note on the organisation of rule of law peer-review missions", 15 July 2014, p. 1, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/taix-peer\\_review\\_0.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/taix-peer_review_0.pdf)

February last year foresaw improvements to ensure the best results are achieved from these missions. In practice, we have only witnessed the organization of a few advisory missions<sup>17</sup> and peer review missions organized in the “old fashioned way”. Despite many recommendations for improvements<sup>18</sup> and calls for organizing Priebe style missions in all of the Western Balkan countries,<sup>19</sup> they have so far only been organized in Bosnia and Herzegovina.<sup>20</sup> The key to the success of ad hoc missions is to limit their mandate to a burning issue, for the missions to produce binding recommendations, and for there to be adequate pressure (plus publicity) to deliver on recommendations.



## THE FRENCH NON-PAPER

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The French non-paper was announced just after the country vetoed the start of EU accession talks with North Macedonia and Albania, and was thus greeted with mixed emotions in the Western Balkans. The content of the document itself has also been received with skepticism. It points to a slow transformation in the Balkans and insufficient concrete benefits for its citizens, while indicating that the ultimate goal of the new approach is membership of these countries in the EU, but only once it becomes stronger and reformed. With this definition, the document casts a shadow on a merit-based approach because it puts other reasons ahead of the results and eligibility of the candidate countries. Among the only encouraging elements of the non-paper are the specified principles<sup>21</sup> which

should be further developed with, to some extent, the modified principle of gradual association.

### Gradual association

Grouping existing negotiating chapters into seven phases/stages might make sense for candidates who are just beginning the negotiation process, but not for those who are already negotiating. Such an approach would significantly weaken their negotiating position, since, despite the complete lack of results in the area of the rule of law, legislative and institutional progress in many areas has been made, especially in responding to the technical preconditions of the processes. A lack of political will cannot be resolved by a constant change of instruments – even the best instruments cannot affect the commitment of governments to reform. The key to securing tangible results in the area of the rule of law is not to group the acquis into phases, nor is it crucial whether these groups will be seven or thirty-five, but to establish incentives and punitive instruments that can facilitate stronger reforms. Also, the proposed approach neglects some other important elements of the accession process, such as the resolution of bilateral disputes, which is currently one of the three core pillars of the conditionality policy. These disputes should be categorized under Chapter 35<sup>22</sup> and thus cannot be put at the end of the negotiation process as suggested in the document. The candidate country should not wait for the established dynamics and phase if it is prepared to negotiate in a specific thematic area. Finally, if gradual association is to be applied in the accession of the Western Balkan countries, then it should be anticipated in relation to the rule of law as a reward mechanism: any fulfilment of the specific

<sup>17</sup> “2019 Communication on EU Enlargement Policy”, European Commission, May 2019, p. 42

<sup>18</sup> Jovana Marović, Tena Prelec, Marko Kmezić “Strengthening the Rule of Law in the Western Balkans: Call for a Revolution against Particularism”, p. 24,

<sup>19</sup> Jelena Pejić and Sonja Stojanović Gajić “How to Reverse the Trend of State Capture in the Western Balkans: Why Do We Need the Priebe Report As Well?”, 11 December 2018, <http://www.preugovor.org/Policy-Papers/1482/Why-Do-We-Need-the-Priebe-Report-As-Well.shtml>

<sup>20</sup> Lamija Grebo and Dzana Brkanic “Bosnian Judiciary Under Pressure After Critical European Report”, Balkan Insight, 6 December 2019, <https://balkaninsight.com/2019/12/06/bosnian-judiciary-under-pressure-after-critical-european-report/>

<sup>21</sup> Gradual association, stringent conditions, tangible benefits and reversibility

<sup>22</sup> Other matters

benchmarks and priorities of Chapters 23 and 24 entails obtaining new ones.

### Stringent conditions

Given the EU's approach so far has not produced significant results, stringent conditions are more than welcome, but they must be kept concrete and up-to-date. As recommended, the inclusion of the Western Balkan countries in the EU Justice Scorecard<sup>23</sup> is required in order to enable a comparative overview of how the Western Balkan countries stand with each other, but also with respect to EU countries. While such a measurement can only increase transparency,<sup>24</sup> key elements like independence can be achieved through public pressure if the European Commission clearly states any anomalies in the work of the institutions.

### Tangible benefits

Participation in EU policies and increased financial support are much needed mechanisms, but their use should not depend on the transition from phase to phase, but rather on fulfilment of the rule of law criteria. And if it is to be expected from the French non-paper that the criteria relating to the rule of law are in fact complementary to those from a specific thematic corpus, it should once again be emphasized that strong incentive measures alone can lead to results in areas that affect the rule of law.

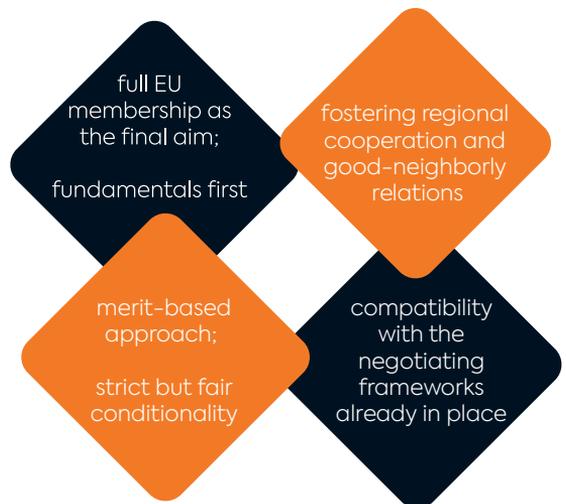
### Reversibility

The principle of sanctioning the Western Balkan countries for their lack of results should have long been applied, and the emphasis should be on the suspension of benefits. It should also be noted that with the new proposed mechanisms for

participation in certain EU programs and the use of additional funds, the suspension of these rights could therefore be an effective punishment.

## THE PROPOSAL FROM NINE EU MEMBER STATES FOR REFORM OF THE ENLARGEMENT PROCESS

The non-paper by nine Member States relies heavily on the existing EU level approach, which can be seen from the proposed goals:



<sup>23</sup> EU Justice Scoreboard, see: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en)

<sup>24</sup> Nedim Hogić "The rule of law and the EU enlargement to the Western Balkans", European Law Blog, 11 December 2019, <https://europeanlawblog.eu/2019/12/11/the-rule-of-law-and-the-eu-enlargement-to-the-western-balkans/>

» This paper, like the French one, suggests grouping the negotiation chapters by core areas, but with reforms within them that would run in parallel with the time-bound criteria. The nine Member States propose a full set of political incentives, while restricting punitive measures to existing mechanisms, including the imbalance clause. What is certainly different from the proposed French approach, and is indicative of a better understanding of the process and methods for delivering improved results in the Western Balkans, is the observation that the enlargement process cannot wait for the reform of the Union, and that the governments of the Member States should make efforts to explain the benefits of the enlargement process to their citizens.

## CONCLUSION AND RECOMMENDATIONS

Any attempt to revise the EU enlargement methodology should take into account the fact that although the current enlargement toolkit requires improvement, even the best instruments cannot deliver results on the ground unless there is greater commitment on the EU's side, and determination to eliminate all practices that undermine democracy on the candidate countries' side.

The Western Balkan countries do not need advanced solutions on paper that will be forgotten in a couple of months, as was the case with the European Commission's 'credible enlargement perspective' communication. Also, the existing instruments which aim to advance the rule of law in the countries aspiring to become EU members (and those provided in last year's document) should be fully implemented swiftly and improved in line with the lessons learned. Therefore,

- » The European Union should strengthen democracy at all levels (EU, MS, WB) in parallel since existing and new instruments can be combined and experiences used in all cases;
- » Benchmarks should be more specific and

the guidelines (sub-benchmarks) for their fulfilment provided annually;

- » Action plans for Chapters 23 and 24 should be updated annually on the basis of more specific benchmarks;
- » Definition of activities and indicators should be preceded by a public consultation where all interested parties can submit proposals and suggestions;
- » Civil society should be consulted to a greater extent and included in evaluating what was done to meet the specific criteria;
- » A simple way of reporting on Chapters 23 and 24 that focuses on the challenges that countries face should be developed;
- » Priorities set by the European Commission for the *acquis* chapters in the country reports should be more precise and measurable annually (which means that the deadline for its completion is one year);
- » The European Commission should establish a practice of assessing the extent to which the specific annual priorities have been met in its country reports;
- » Western Balkan countries should be included in the EU Justice Scoreboard for "comparative and competition effect";
- » The mandates of peer review missions should be limited and tied to a priority issue in a particular country;
- » Participation in EU policies and increased financial support should be tied to meeting conditions in the field of the rule of law;
- » The Western Balkans leaders and representatives should participate in the meetings of the European Council on an annual basis, with increased participation in selected informal Council meetings, in technical committees, Commission working groups, and Council Committees;
- » The Western Balkans should be included in the Conference on the Future of Europe;
- » The EU, the governments of the Member States and the Western Balkans, as well as civil society, should work together on campaigns and to explain to EU citizens the benefits of the enlargement process.

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**Jovana Marović** is Executive Director of the Politikon Network, a think tank based in Podgorica, Montenegro. She studied at the Faculty of Political Science in Belgrade where she received her doctorate. Between 2004–2016, Jovana worked as a Counsellor for the European Union in the Ministry of Foreign Affairs' multilateral department, Advisor for International Relations and European Integration within the Cabinet of the Budva Municipality's Mayor, Research Coordinator at the Institute Alternative (think tank) and Special Advisor to the Minister of Labour and Social Welfare. Jovana is a member of the Balkans in Europe Policy Advisory Group (BiEPAG). She is also a Member of the Working Group for Chapter 23, Judiciary and Fundamental Rights, within Montenegro's EU accession negotiations.



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### About the partners:

#### CRTA

With a vision of Serbia as a state whose citizens believe that they can bring changes, CRTA develops mechanisms that: inform, educate, influence policies and strengthen institutions. CRTA efforts aim at supporting democracy, empowering citizens to engage and raising demand for an open, accountable and inclusive government by involving different approaches:

- » fact-checking, accountability journalism, media monitoring and disclosure of fake news and misinformation in media and digital sphere;
- » independent civic election observation of parliamentary, presidential and local elections in Serbia, and advocacy for improvement of conditions for free, fair and democratic elections;
- » parliamentary oversight and advocacy for institutional accountability and openness.

CRTA received the OSCE 2018 Democracy Defender Award for contribution to the promotion of democracy and the defense of human rights, as well as the international recognition for innovation, commitment and contribution to democracy through the W. Averell Harriman Democracy Award, awarded by the National Democratic Institute in 2013. CRTA also received the 2018 award of the Commissioner for Information of Public Importance for its strong contribution in the area of free access to information in Serbia.

#### Tim Institute

TIM Institute is a non-governmental, apolitical, self-governing and independent civic organisation whose founders are a team of experts with extensive experience in the field of sociological and political research. The experience of the employees of TIM Institute is founded on the creation, development, organization, implementation,

evaluation and analysis of an exceptional number of research projects in numerous areas of social and political life, education, interethnic relations, human rights, business sector, communication and media, for international institutions as well as national and local institutions, business entities and NGOs. TIM Institute is a member of ESOMAR, a membership organization representing the interests of the data, research and insights profession at an international level.



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### **About the European Fund for the Balkans:**

The European Fund for the Balkans is a joint initiative of European foundations that envisions, runs and supports initiatives aimed at strengthening democracy, fostering European integration and affirming the role of the Western Balkans in addressing Europe's emerging challenges.

The Think and Link Regional Policy Programme fosters inclusive and evidence-based policy making in the Balkans through support of regional research projects. The programme's goal is to encourage citizen participation in decision-making processes by enabling policy-oriented civil society organisations to formulate and advocate public policies influencing the political and social transformation of the region in its European integration process.

The Think and Link Regional Policy Programme was launched in 2008 and since then more than 80 think tanks and civil society organizations from Albania, North Macedonia, Montenegro, Bosnia and Herzegovina, Serbia, Kosovo and Croatia were supported.



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Politikon Network (PIN) is a research organisation that was founded in November 2016, with the goal to promote open dialogue and advocacy of sustainable solutions for improving public policies. Politikon combines various innovative methods that are typical for social sciences with the aim to formulate proposals for the improvement of the rule of law and good governance. A vital segment of our work includes research of processes and amends at the European Union level, i.e. what kind of consequences are these changes projecting on the Western Balkans and especially Montenegro. Politikon Network is a non-governmental, non-profit and non-partisan organisation which strives to influence the democratisation of society through an analytical approach.