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FREEING A CAPTURED STATE: WHAT ROLE FOR EU ACCESSION?

LESSONS FROM THE MACEDONIAN CASE

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Introduction

In 2017 the former Yugoslav Republic of Macedonia[2] experienced the most difficult turnover of power since its independence with a government formed six months after the December 2016 elections. The change of government came after a wiretapping scandal in early 2015 had revealed large-scale, high-level corruption, massive infringements on the right to private communications, and a lack of control over the state intelligence and security agencies. In the fall of 2016, the European Commission vested with monitoring the progress of the candidates for EU accession, raised concerns about state capture[3] in its annual report. With this assessment, it questioned the functioning of the checks and balances system in the country. The Commission argued that the Assembly had failed to provide an effective oversight to the executive power, the justice system was not independent, and the authorities showed no willingness to resolve these issues. The oversight of the executive by the regulatory and supervisory bodies was also limited since they were under political pressure.[4] A later (much-praised) assessment conducted in September 2017 described this type of state capture as "more precisely characterised as the capture of the judiciary and prosecution by the executive power".[5]

The government led by SDSM, committed to bring the country back to the European accession by: signing the Prespa agreement with Greece, freeing captured institutions and regaining the trust of citizens. These will not be easy tasks by any standards due to at least two reasons. First, the implementation of the Prespa Agreement that did not reach the required legal threshold for it to be

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[2] The organisers have intervened in the authored text by replacing the term Republic of Macedonia with former Yugoslav Republic of Macedonia
[3] According to Transparency International, state capture is a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation's policies, legal environment and economy to benefit their own private interests".
[4] "The former Yugoslav Republic of Macedonia 2016 Report," European Commission, 9 November 2016, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf
[5] 2017 Report of the Senior Experts' Group on systemic Rule of Law issues in the former Yugoslav Republic of Macedonia, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf

considered formally successful, and second, the reality that turnover of power does not by default result in overcoming state capture. Using the EU perspective to put wind in its sails, it has to deal with the difficult issues of reforming the judiciary and the public administration, fighting corruption, resolving the wiretapping scandal and also dealing with an identity related issue as the dispute with Greece over the name issue. Thus, it is expected that the EU drive will help support democratizing forces of the society and the reestablishment of checks and balances between the various branches of government, and also garner public support for the resolving of the name issue. The question remains, however, whether this is too heavy a lift for what is now a relatively weak enlargement process compared to the early 2000s.

This paper argues that while the freeing of state institutions does require EU support as an anchor, a crucial factor will be domestic consensus from all stakeholders on the direction and nature of the reforms, with a significant, but not absolute role for the executive. Empowerment beyond the executive has not been a strong feature of EU accession processes, but in the Macedonian case it will be an indispensable component for success due to the nature of the state capture described above. Only in such a scenario is the internal reform in the country likely to lead to re-instating the checks and balances necessary for a functioning democracy, while also getting the public on board due to the support needed for accepting a compromise on the name issue.

The paper is organised in the following sections: first, it examines the executive bias of EU accession based on experience from the previous enlargement, followed by a section examining the risks of this approach, drawing two end of the spectrum scenarios and summarises the key conclusions.

Executive and elite bias of EU accession

Looking back at lessons learned from the previous enlargement process, there is largely consensus that EU accession is an executive and elite-led process. As to the former, Grabbe concludes that "the incentives and constraints created by the accession process supported the emergence of a core national executive at the expense of other branches and levels of government – including the legislature and regional actors" (2006 p.207). A similar argument has been made by Hughes, Sasse and Gordon in their work on the role of regions and local authorities in the EU accession.[6] Overall, research has "highlighted an 'executive bias' inherent in the whole accession process, because of the structure of negotiations and the fact that EU actors [in the big bang enlargement] mostly saw the process of adopting EU norms as an administrative exercise."[7] Grabbe further argues that policy choices are technocratic rather than political issues, leading to a deficit of democratic accountability in the whole process.[8] On the latter aspect, Pridham criticizes the favouring of the executive

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[6] HUGHES, J., SASSE, G. & GORDON, C. 2005. Europeanization and Regionalization in the EU's Enlargement: The Myth of Conditionality (One Europe or Several?), Palgrave MacMillan.

[7] GRABBE, H. 2006. *The EU's transformative power: Europeanization through conditionality in Central and Eastern Europe,* London, New York, Palgrave Macmillan.

[8] GRABBE, H. 2001. How does Europeanization affect CEE governance? Conditionality, diffusion and diversity. *Journal of European Public Policy,* 8, 1013-1031

institutions over the parliament as well as the exporting of the EU democratic deficit in these countries.[9]

As to the latter, Agh argues the post-communist countries "were born as elite democracies because the construction of the new democratic order and its institutions began from above".[10] Moreover, Pridham further argues that conditionality most likely to influence elite behaviour patterns.[11] From this perspective, bringing a broad set of stakeholders as well as the public on board in terms of consultations such as the recent referendum exercise in the country also are likely to shake the pillars on which the accession process has been traditionally built on.

What is the way forward?

Since the new government came to power, there have been various efforts at designing judicial and public administration reforms. While their realization does depend on support from the EU, the crucial factor is the domestic consensus of all stakeholders on the direction of the reforms. The experience so far has been that the executive has taken the lead in the reforms both to the judiciary and the public administration, as well as media and security services. In these circumstances, it is of utmost importance to engage with the judiciary and parliament due to the reasons mentioned above. The executive-led reforms have the potential of being quicker, but they are also more prone to subversion, as we have seen in the past. The primary risk to avoid in this respect is focusing solely on and/or favouring executive institutions over the parliament, a dynamic that is in fact inherent in the accession process, as explained above. In order to avoid this risk, the judiciary and the legislative will need to build up their capacity to be on equal footing with the executive, which will necessitate more time for building consensus.

In light of the reasons above, in order to create an environment conducive to freeing the captured state it is necessary to rethink the standard approach to enlargement from several perspectives. This scenario would necessitate a rethinking of the standard approach to enlargement from several perspectives. Moreover, given that the country is currently preparing for the accession negotiations, the discussion above has not only theoretical, but also practical implications on the planning of the organisational structures for this purpose.

First, consensus on the reforms needed must be obtained through inclusive processes with a significant, but not absolute role of the executive. In this vein, the positions of chair/co-chair of various reform councils and similar bodies should be spread among a broad set of stakeholders, including the legislature, the judiciary, and civil society.[12] Such a move is necessary in order to avoid executive bias in the process, but also to increase ownership of the reforms by other stakeholders.

[9] PRIDHAM, G. 2006. European Union Accession Dynamics and Democratization in Central and Eastern Europe: Past and Future Perspectives1. *Government and Opposition,* 41, 373-400.

[10] AGH, A. 1996. From Nomenclatura to Clientura, the Emergence of New Political Elites in East-Central Europe. *In:* PRIDHAM, G. & LEWIS, P. (eds.) *Stabilising fragile democracies: comparing new party systems in southern and eastern Europe.* New York: Routledge, p.54

[11] PRIDHAM, G. 2005. *Designing democracy: EU enlargement and regime change in post-communist Europe,* London, New York, Palgrave Macmillan, p.14.

[12] For a set of specific recommendations see European Policy Institute (2017). The Priebe Report Two Years Later, http://www.epi.org.mk/docs/1.%20The%20Priebe%20report%20two%20years%20later_ENG.pdf

Some of these stakeholders, such as civil society, were key to bringing about the change and also setting reform priorities.[13]

Second, the previous factor impacts substantially the time needed to devise policy approaches that would free the institutions. Unfortunately, building consensus takes time that is not readily available when rushing on the EU accession path. Policy and decision-makers have at times argued that time is an inhibiting factor at the national level. In these circumstances, at the national level two opposing logics are competing at the moment: on the one hand, the need to free state institutions, which is by definition a lengthy process, and on the other hand, the need to devise reforms with a relatively quick result. While there is an urgent need to make up for lost time,[14] there is still a risk of rushing to solutions. Hence, at times it will be necessary to prioritize the quality of the process and solutions it produces over the speed of adoption.

Third, on a broader scale, both of the previous recommendations have a bearing on the approach of the EU in terms of its engagement with stakeholders in the country. While the expectations for implementing reforms do fall on the executive, the EU and its representatives need to engage more actively with the other groups mentioned above in order to set an example for the executive as well. These include the actual use of the numerous bodies engaged in the EU accession process, including but not limited to the National European Integration Council, the parliamentary body with the broadest composition of stakeholders that is traditionally chaired by the opposition parties. At the end of the day, through their public meetings, the EU representatives act as legitimizing actors in the national and EU arenas as well. While this is not standard mode of EU enlargement, it has an added value which will change the dynamics of the accession process.

On this same issue, i.e. stakeholder engagement, the communication of the benefits and challenges of EU accession for the public needs to be re-thought of, primarily, but not exclusively because of the referendum result on the 30th of September 2018.[15] Unlike in other countries, the gains of EU membership need to be made very clear and communicated properly because of the need to compromise on a very sensitive issue as the name of the country in order to progress on the EU (and NATO) accession path. In the Macedonian case, the lessons from the referendum teach us that an executive led campaign on the benefits of accession falls also into the trap of being perceived as a party issue. The outcome of the referendum raises a multitude of questions as to the forms of public inclusion in the EU accession, but does not provide clear prescriptive tools beyond the clear need for it.

Lastly, going back to the basics, if the EU is to have a lock-in effect in a case where an authoritarian government exited power through elections, engagement needs to be combined with a credible accession perspective. The standard way of doing this would be through opening the EU accession negotiations, as they have shown to be the game-changer in terms of institutional and elite engagement. In the Macedonian case, the situation has been complicated by the name issue, but as

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[13] See Blueprint for Urgent Democratic Reforms developed by civil society:
http://www.epi.org.mk/docs/BLUEPRINT%20DEVELOPED%20BY%20CSOs%20FOR%20URGENT%20DEMOCRATIC%20REFORMS.pdf
[14] 2017 Report of the Senior Experts' Group on systemic Rule of Law issues in the former Yugoslav Republic of Macedonia
[15] While more than 90% of those that voted supported the Prespa Agreement for the purposes of EU and NATO membership, the referendum did not meet the 50% legal threshold to be considered successful, as it had a 36% turnout rate.

of recently as well due to the June decision of the European Council to buy time until 2019 for the opening of the accession negotiations.

On the basis of the factors examined above, the following table summarises the two dominant scenarios that can be foreseen, its advantages and disadvantages:

Scenario	Advantages	Disadvantages
A. Inclusive EU accession model with a significant role of the stakeholders beyond the executive and substantial public outreach	Higher likelihood of empowering stakeholders beyond the executive and creating change agents and building ownership	More veto points in the accession process
	More opportunities for public discussion and contestation on policies related to EU accession	More time needed for building consensus on key issues, i.e. longer accession process
	Higher likelihood of building public consensus on EU accession	Higher risk of deadlocks due to a highly polarised environment
B. Executive centred accession model with formal inclusion of stakeholders	Less veto points in the accession process	Weak role of stakeholders beyond the executive, i.e. high risk of continuing state (executive) capture
	Less time needed for devising common positions	Less opportunities for public contestation of policies related to EU accession
	Higher likelihood of speaking with one voice, critical for successful EU accession negotiations	Less ownership of reformed policies and practices, creating higher potential for popular backlash.

Conclusion

The example examined above highlights the challenge that the specific type of state capture in the Balkans poses to the traditional executive centred model of EU accession. In this case, the experience more than one year after the new government came in power confirms that the turnover of power does not in effect result in overcoming state capture. (Re)instating checks and balances in the system is a long-term endeavour, which require re-thinking of the traditional ways of accession centred on the executive. Nonetheless, the empowerment of all branches of power is certainly a necessary, if not sufficient, component of freeing the captured state. At the same time, the process on the name dispute resolution illustrates the pitfalls of solutions largely perceived as government led and the difficulties in bringing the stakeholders on board after key decisions have been made.

The dilemmas examined in this policy paper to a varying extent above bear significance for the other countries in the region, with the key principles valid in any case for the entire region. While the scenarios presented above may be considered as the two far ends of an inclusion spectrum, all of the countries in the region in order to build a sustainable accession agenda need to re-think the model for building solutions by bringing different stakeholders on board. The EU, as argued, above has if not an equal, a significant role to play.