

LOST IN IMPLEMENTATION

ALBANIA'S ALIGNMENT WITH THE EU ACQUIS

INTRODUCTION

THE alignment of the legislative and policy framework with that of the European Union (EU) represents one of the most complex and challenging task for countries aspiring to EU membership. It is not simply a matter of translating and adopting an extensive "database" of the EU acquis, but rather a challenge to align the behavior of societal actors and to regulate specific sectors in compliance with rules and standards in a broad range of areas (in)directly impacting the lives of citizens. As such, the alignment process can only be successful if proper attention is dedicated not only to the capacities and needs of governmental actors who "run the show", but also to the conditions and the "absorption capacity" of the local context and stakeholders.

The EU and other actors continuously point out that the process of approximation of legislation with the EU acquis and framework policies is accompanied by ineffective implementation of the aligned legislation.¹ The reasons behind this situation are not always and solely limited to lack of institutional capacities or resources. Rather, in many cases, the real causes stem from an unrealistic alignment process that has ignored the (lack of) capacities of the local context to "absorb the rules" and to "pay the price". The alignment is often carried out impulsively, without adequate expertise, tools and processes that generate ex-ante important insights on a variety of aspects such as costs, risks, impact or ability of the local context and stakeholders to assume at a given moment the obligation to comply with new rules, etc.

1. See Commission Opinion on Albania's application for membership of the European Union {COM(2010) 680}: "Proper implementation of, and respect for, legislation have been affected by its poor quality. Furthermore, implementation is hampered at times by the lack of full understanding of the social and political role of laws by relevant public sector institutions; these disregard certain legal provisions as a result" (pp.13 of Analytical Report); "... there are shortcomings in the implementation of legislation. The public administration's legal framework and the civil service system are mostly in line with European standards and practices. However, proper implementation of the legal framework is a concern" (p. 35).

EXECUTIVE SUMMARY

Albania has marked in the recent years a generally satisfactory progress in relation to SAA implementation, particularly in relation to the approximation of legislation with the EU acquis and framework policies. However, EC progress reports have repeatedly emphasized that the aligned legislation and also related strategic documents often lack adequate implementation in practice. The overall concerns arise at different stages of the policy and lawmaking cycle. Often, the government's over-ambitious legislative agenda and limited parliamentary scrutiny result in numerous pieces of legislation being of low quality, with limited consultation with third parties and interest groups, a questionable level of expertise in the drafting phases and other factors all leading to a lack of understanding of the local context in which the legislation is to be adopted. This in turn leads to serious shortcomings in the implementation and respect for legislation which are further deepened in certain cases due to concerns over institutional and administrative capacities in enforcing legislation.

This policy brief looks at the challenges of the approximation process of Albanian legislation with EU acquis by examining the alignment practice and approach applied in specific cases of legislation where implementation remains a concern. It further highlights that alongside the need to improve administrative capacities and resources, decision makers and other stakeholders must invest more efforts to address three major deficiencies in the context of legal approximation with the EU acquis: 1) involvement of interest groups and other non-state actors (external consultations); 2) ex ante assessment of economic and other impact on the local context; and 3) thorough assessment of implementation costs and coordination resources among responsible institutions. Firm measures to address these issues alongside an inclusive approach in the course of EU accession generate not only sustainable foundations of the accession process, but also rational alternatives and solutions that enable compliance with newly introduced standards and rules.

DEFICIENCIES OF ALIGNED AND POORLY IMPLEMENTED LEGISLATION

ALBANIA'S process of legal approximation with the EU acquis in recent years has moved forward at a varied pace for different sectors. Yet, in addition to concerns over the low extent of alignment with EU rules and regulations in certain sub/sectors, one of the most pressing concerns relates to the quality and implementation of aligned legislation. The latest EC Progress Report on this issue specifically concludes that:

*"In general, capacities for legislative drafting in line ministries and administrative bodies are weak. One of the specific weaknesses is that insufficient attention is given to implementation. This, in addition to limited consultation with interest groups and specialists, as well as the government's over-ambitious legislative agenda and limited parliamentary scrutiny, results in several pieces of legislation being of low quality."*²

In only three sentences the EC progress report describes some of the key deficiencies of Albania's alignment process in those cases where enforcement of legislation is lagging behind. An additional concern consists in the low capacities to understand and carry out proper costing and impact assessment of draft (to be aligned) legislation. The problems presented above go beyond the often-quoted "lack of administrative capacities and adequate institutional resources" which various assessments identify by default as the main reason for poor implementation of the aligned legislation.³ Namely, it is also important to understand the methodological and approach related problems of the alignment cycle beyond legislative techniques. Ultimately, all these elements must form part of a sound planning and impact assessment mechanism, as an integral part of the methodology used for the approximation process. This paper's analysis of the legal approximation practice in relation to particular cases of aligned and poorly implemented legislation in recent years (see box 1) identifies three key elements that affect the level of implementation:

- 1) Lack of an established practice of consultations with interest groups on specific draft legislation at both the preparatory and the adoption phase

2. COM (2010) 680; page 14.

3. See EC Progress Reports on Albania 2010 and 2009.

(involving the executive and the parliamentary level);

- 2) Poor capacities and resources to carry out assessments of the draft legislation's impact on the sector and on stakeholders that must comply with it, particularly in terms of costs and economic impact;
- 3) Inability to put in place sound planning mechanisms and carry out realistic assessment on intra- and cross-sectorial coordination in terms of required institutional and other infrastructure.

In order to better address these deficiencies, it is important to understand the root causes and the way they affect the actual implementation of aligned legislation.

BOX 1. APPROXIMATION PRACTICE

Cases of aligned and poorly implemented legislation

- The so-called Anti-smoking Law (Law no 9636, date 6 November 2006 on the protection of public health from tobacco products) entered into force around mid-2007. Article 15 of this law imposes a complete ban of smoking at working places; educational and health institutions, but institutions of mental health (only for patients); public transport means/vehicles; commercial sites, bars, restaurants, discotheques, and night clubs; other public sites. While the adoption of this law has never been questioned, its practical implementation at least in relation to the (ban of) smoking in public premises and bars, restaurants, nightclubs etc. has certainly failed. One of the main reasons for this situation is the lack of consultations with interest groups – owners of bars, restaurants etc. – in order to discuss alternatives (e.g. the possibility for longer transitory period or option to allow for smoking and non-smoking areas within these premises). This issue was regulated also with a complete disregard for any preliminary assessment regarding the cost these owners must bear and the transitory period to comply with these standards.
- The Law on Environmental Impact Assessment (Law no 8990, date 23.1.2003, as amend-

ed with Law no 10050, date 24.12.2008) represents a typical case of non-realistic alignment and hence, poorly implemented legislation. At least two EC progress reports (2006 & 2010) conclude that the practical implementation of environmental impact assessment legislation remains an issue of concern, particularly as regards the public participation but also on other accounts. When it comes to specific investment projects with significant impact upon the environment, the experience shows that consultations with local stakeholders and their involvement in the process are still not properly carried out.

- A number of laws and bylaws in the area of

consumer protection (e.g. Law on Consumer protection no 9902 date 17.04.2008; Law on Metrology no 9875, date 14.2.2008, as amended with Law no 10217 date 21.01.2010; Law on food safety no 9863, date 28.01.2008), according to experts of two consumer associations (Albanian Consumer Association and Office for Consumer Protection), remain poorly implemented thus affecting the rights and economy of Albanian consumers. Essentially, insufficient implementation is due to the lack of a realistic assessment of the Albanian context accompanied with adequate resources, institutional mechanisms and secondary legislation.

CONSULTATIONS, ASSESSMENT AND PLANNING

APPROACHING carefully the context and conditions in which a certain piece of legislation is to be implemented represents an essential step that conditions the success and efficiency of law-making. Understanding these conditioning factors is of particular importance in the framework of a country's EU accession path, and process of aligning its legal and institutional setup with rules and standards of EU. The capacities, resources, priorities and needs of various sectors and subjects – economic operators and business associations, labor unions, civic associations etc. – may easily transform from an asset that is able to generate added value (if used properly) to a serious barrier (if completely ignored) for the alignment process and EU accession.

A recent study carried out by IDM with 75 interest groups in Albania (business associations, entrepreneurs, think tanks, universities and media) reveals a number of interesting findings as regards their perceptions, expectations and experience in the context of EU integration process.⁴ The data presented in Box 2 indicate interest groups' readiness to bolster the EU accession process, as a key actor that is very familiar with the sectors undergoing transformation and alignment with EU rules and standards. Hence, the alignment process can

only benefit from the consultations with interest groups, thus endowing the decision-making cycle not only essential insights on the matter but also alternatives to better accommodate the alignment process within the local context. Decision makers at both Executive and Legislative branch of power must equally assume the responsibility to uplift consultations with interest groups. Given the broader political representation of the Parliament (as compared to the Government), as well as its role in the lawmaking process, engaging interest groups in parliamentary committees' hearings gains particular importance. Another meaningful step and effective measure represents the establishment of a National EU Accession Council with sectorial working groups under the lead of the Parliament and with the involvement of Government and other state institutions as well as with civil society and interest groups representatives, based on WB countries' best practices (e.g. Macedonia).⁵

Analyzing the experience of interest groups' consultations at the Parliament level, i.e. their involvement in hearings of Parliamentary Committees,

5. This Council does not overlap with the need to improve consultations with interest groups in the framework of Parliamentary Committees' hearings. Rather, as the Macedonian experience suggests it is an instrument that upholds alignment with EU acquis process and other reforming measures in the course of EU accession. For example, this body in Macedonia has proved much more active and even attractive for interest groups – with more than 15 meetings in the first half of 2011, including hearings with ministers. For more details on this policy alternative see IDM Policy Brief no 5 / 2010 (December 2010) "Three steps to improve Parliamentary dealings on EU accession". Source www.idmalbania.org

4. See "Interest groups and EU Accession", IDM Center for European & Security Affairs (May 2011). Source: http://idmalbania.org/sites/default/files/publications/Survey%20Report_Summary%20ENG.pdf

BOX 2. "Interest Groups and EU Accession"

- More than 80% of interest groups are confident that EU accession will improve the activity of the sector in which they operate.
- 79% of respondents claim to have complete information as regards the impact of EU accession on the sector in which they operate, while 61% say they have the same level of information as regards their own potential to shape EU accession reforms.
- More than half of respondents (52%) believe that capacities of their respective sector must be further strengthened in order to benefit from the advantages of being an EU member state. The two major challenges in the respective sectors, before and after EU accession, are connected to fiscal policy and capacities for competitiveness and to the alignment with EU legislation and standards.
- The majority of interest groups consider as "important" (46%) or "very important" (37%) their involvement in the EU integration reforms. In the context of EU accession negotiations, 84% of them ask from state actors to consider them as "integral part of the negotiation process".
- Respondents' expectations from Albanian institutions in the framework of the EU accession process predominantly reflect two interconnected aspects – the need for a "fair balance between national priorities and accession conditions" according to 34% of them and a "more inclusive policymaking in the context of EU accession" for another 32%.
- 42.7% of respondents consider as more efficient for their involvement in EU accession process the "consultative sector-based forums under the lead of line ministries (Government)". Another instrument that would enable such involvement is deemed to be the "National Accession Council with sectorial working groups under the lead of the Parliament and with the involvement of the Government" according to 29.3% of respondents."

it becomes obvious that a lot needs to be done in this regards. Namely, the data for 2010 show that no private sector's interest group has ever participated in the debates taking place in the two most active parliamentary committees in the alignment process – Committee on Legal Issues and Committee on Economy and Finance.⁶ See Box 3.

The performance of another important body – Parliamentary Committee on European Integration (PCEI) – appears to be even more inferior according to another IDM study in 2010. Namely, in a two year period (September 2008 – September 2010) PCEI held an average of fewer than 2 meetings a month, reviewing one draft per meeting, with no record on interest groups' representatives participating in the discussion, and only 2 hearings where civic actors have actively participated in the debate.⁷

The advantages of consultations with interest groups and other actors (e.g. non-governmental specialists and experts) extend also to another component which according to many experts and interest groups still appears problematic in Albania: the assessment of the potential impact of aligned legislation upon the respective sector and stakeholders. While due to understandable reasons, this measure cannot be carried out for every draft law being aligned with the EU acquis, it still remains extremely relevant for organic laws or complex legal acts radically affecting development and operational prospects of one or more specific sectors and actors.

The EU accession process and, more specifically, Albania's legal approximation is often driven by an "EU-integration-at-any-price" political approach. Needless to say, such an approach is not always the most advantageous tool to encourage a fast pace of the process that relies on sustainable foundations. The political actors' reluctance to accept a careful process that generates and relies on such foundations (as opposed to immediate, deficient and non-sustainable results) can be explained but certainly not justified. Accordingly, involvement of interest groups and other stakeholders who do not only ask about the "price" of reforms but may also

6. Data is taken from the official website of Albanian Parliament (www.parlament.al). A further analysis of these data has been carried out through interviews with advisors of various parliamentary committees and representatives of interest groups. While the former claim low interest from interest groups when invited by Parliamentary Committees, the latter state that the Parliament's administration must establish and strengthen links with non-state interest groups based on sectorial interests.

7. See Policy Brief No. 5 / 2010 (December 2010) "Three Steps to Improve Parliamentary Dealings on EU Accession". Source www.idmalbania.org

BOX 3. PARLIAMENTARY COMMITTEES' ACTIVITY AND CONSULTATIONS WITH INTEREST GROUPS

January-December 2010

PARLIAMENTARY COMMITTEE ON ECONOMY AND FINANCE

- With a total of 71 meetings, PCEF's average reaches 6.4 meetings per month.
- The Committee has reviewed a total of 65 draft laws, of which 11 draft legislative acts and the other bilateral or multilateral agreements, resolutions etc.
- No civil society actors have participated in Committee's hearings on specific draft legislation.
- No interest groups from the private sector have attended a meeting on specific draft legislation in 2010

PARLIAMENTARY COMMITTEE ON LEGAL ISSUES

- With a total of 88 meetings, PCLI's average reaches 8 meetings per month.
- The Committee has reviewed a total of 110 draft laws, of which 16 draft legislative acts and the other bilateral or multilateral agreements, resolutions etc.
- On only 2 occasions civil society actors have participated in Committees hearings on specific draft legislation (in total, 6 actors mainly from NGOs).
- Interest groups from the private sector have never attended a meeting on specific draft legislation in 2010.

generate a compromise solution for such costs and impact, offers a more realistic approach for EU accession. Ultimately, this is the approach that decision making institutions must by default adopt in the context of legal approximation with EU acquis, particularly when such EU standards and rules have a sweeping impact on one or more sectors and on operators within and across these sectors.

The assessment of the potential impact of given draft legislation is certainly more complex than the assessment of the necessary cost to ensure full implementation of adopted (EU) standards and rules. Partial or inaccurate assessment of such costs often leads to the same situation and consequences as the complete lack of cost assessment. Yet, the Albanian experience in this regard remains limited to the assessment of purely administrative and related costs for aligned legislation introducing new institutions and agencies.⁸

Although representatives of Albanian institutions argue that sectorial impact assessment of aligned draft legislation is conducted for certain complex acts and that the preliminary financial costs of such legal acts are also included in the drafts sent to the Parliament and to Parliamentary Committees, many non-governmental specialists and even MPs bear witness of the opposite. On the other hand, the investigation conducted for specific cases of aligned and poorly implemented legislation (see Box 1) confirms that these actions are poorly and occasionally not at all carried out. The experience shows that the costs of non-implemented legislation in force often exceed the resources needed to prepare realistic and operational rules that regulate certain sectors.⁹ Most significantly, the negative impact of non-enforcement of laws is most severely affecting the trust of sectorial actors, communities and citizens at large in the legal system and institutions, or more generally, public trust in the rule of law.

8. This cost analysis according to the Ministry of Finance remains limited to office equipments, rent, salaries, etc.

9. A typical example in this regard represents another case of (failing to enforce) aligned legislation in Albania, in the area of fiscal legislation and more specifically the respective law's objective to ensure full coverage of Albanian businesses' operations with fiscal devices by the end of 2010. According to KONFINDUSTRIA, tax evasion remains at extremely unacceptable levels in Albania and hence the full implementation of the legislation on fiscal devices is crucial for the economy and tax system. Key factors that led to such failure – presently, less than 50% of Albanian businesses have introduced fiscal devices – include unrealistic transitory period, high prices of cash registers, etc.

RECOMMENDATIONS

Considerable efforts and resources have been invested since the first National Plan for the Approximation of Legislation in Albania through concrete measures – to enable administrative capacities and legislative skills (often “lost” after each parliamentary election); providing expertise to align different sectors (sometimes “landing” unprepared in an unknown area); to put on track professional and inclusive processes (often ignored due to lack of political will) or even a “brand new” infrastructure to carry out approximation of legislation and other EU accession reforms. Nevertheless, achieved results in this course have not always been successful to generate the full extend of the initially expected change. In addition to other factors (e.g. political will, overambitious agenda, administrative capacities, institutional resources etc.) the aligned legislation in Albania is often “lost in implementation” also due to an approximation approach that ignores the local context.

Hence the need, from this point forward, to act on the above presented deficiencies and take further the quality of the alignment process, particularly from the perspective of legislation’s enforceability. This approach suggests that the approximation of legislation and more generally, the making of laws must expand beyond state institutions’ exclusivity on a process that needs more than just the expertise of lawyers, lawmaking techniques or pro-forma “reading” the acquis. Accordingly, in addition to efforts aiming to improve institutional resources, administrative capacities, expertise and skills, the above elaborated key deficiencies should be also considered by Albanian decision-makers, as well as by EU funded assistance missions offering expertise and support in this process.

CHANGE in this regard would start with

- Unification of line ministries’ basic rules and practices regulating participatory processes, consultations, informing and involvement of interest groups in drafting legislation, including process of approximation with EU acquis. Take under consideration the advice of private sector interest groups to consolidate a regular practice of consultative sector-based forums under the lead of line ministries.
- Improving capacities, expertise and resources of Government institutions (drafting aligned legislation) to carry out realistic planning (including comprehensive financial costs), risk management and institutional coordination, alongside sectorial impact assessment of draft legislation
- Strengthen role of the Parliament in relation to the approximation process, notably by improving resources for expertise, meaningful cooperation between parliamentary committees, line ministries, civil society and interest groups. Adopt amendments to the existing Rules of Procedure of the Parliamentary Committee of European Issues (PCEI) that will improve the position of this body in the overall EU accession process, including legal approximation issues.
- Take decisive actions to establish the National EU Accession Council with sectorial working groups under the lead of the Parliament and with the involvement of the Government, as a consultative forum with interest groups from the private sector, academia, civil society, etc.

INSTITUTE FOR DEMOCRACY AND MEDIATION

The Institute for Democracy and Mediation (IDM) is an independent, non-governmental organization, founded in November 1999 in Tirana, Albania. It works to strengthen the Albanian civil society, to monitor, analyze and facilitate the Euro-Atlantic integration processes of the country and to help the consolidation of good governance and inclusive policy making. IDM carries on its objectives through expertise, innovative policy research, analysis and assessment-based policy options.

IDM's choice of activities to achieve its strategic objectives is an effort to go beyond simple one time delivery projects. They form part of a continuing struggle to strengthen shared values and efficient interactions across the broad spectrum of political and non-political actors in Albania. IDM is dedicated to develop a profound understanding on contemporary challenges to shape sustainable reforming strategies and public policies in key socio-economic and political development pillars, as well as to advance regional cost-effective approaches in support of intra / cross sectoral cooperation initiatives of key actors based on comprehensive research, policy assessment and multifaceted analysis.

CENTER FOR EUROPEAN AND SECURITY AFFAIRS (CESA)

The Center for European and Security Affairs (CESA) represents the Institute's specialized department in the domain of European and security issues. Its mission is to advance European and security studies, research and analysis related to key reforming processes thus encouraging both, informed debate and improved processes. The Center focuses particular attention to national efforts and regional initiatives aiming to develop sound institutional capacities and qualitative human resources that will serve to contemporary challenges for reform, integration processes and cooperation through an educational and problem-solving approach.

CESA Team

CESA's activities are conducted by experienced researchers and experts in an effort to promote excellence of research, studies and policy options related to "Europeanization" reforming efforts in the country. The strategic programming of the Center's work is driven by the highlights and challenges of key developments in the respective focus areas which are shaped and further elaborated by CESA's team, also in cooperation with IDM senior staff and associates.

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