SIGMA Country Assessment Reports 2012/06

Bosnia and Herzegovina Assessment Report 2012

OECD

https://dx.doi.org/10.1787/5jz2rqlcrnkd-en

OECD

Support for Improvement in Governance and Management
A joint initiative of the OECD and the EU, principally financed by the EU

ASSESSMENT

BOSNIA AND HERZEGOVINA

MARCH 2012

TABLE OF CONTENTS

DEMOCRACY AND THE RULE OF LAW

The ramifications of inconclusive parliamentary and presidential elections held in October 2010 at the State level lasted for the whole of 2011. A new government of Bosnia and Herzegovina was formed only in February 2012. The political stalemate at the State level blocked progress in public administration reform. Therefore, little progress has been achieved in reforming public administration in the Republika Srpska (RS), the Federation of Bosnia and Herzegovina (FBiH) and District Brčko. The unstable political situation has had huge impact on financial management, especially for the Bosnia and Herzegovina (BiH) State.

The political situation and continuing fiscal difficulties will have a negative impact on the timing and feasibility of public administration reforms. Because the underlying reasons are political rather than administrative, current public administration reform efforts are likely to have little impact on real administrative performance.

Democracy

The underlying reasons for the major deficiencies in the governance system are the lack of respect for fundamental democratic tenets (individual political rights versus ethnic or group-based) and the disrespect of the law and existing institutions by major actors, whether they be parliament, the executive or the judiciary, or civil society and its organisations. This is a matter of democratic and legal culture. The international community, which itself sometimes overrides constitutional constraints in order to pursue political objectives, should cease promoting legal and managerial solutions that do not fit the stage of development of existing institutions or the constitution. Some partial solutions to problems may undermine the rule of law and render current tensions more acute.

Rule of Law

The limited extent to which the public governance system puts the rule of law into practice remains a serious matter of concern.

The poor quality of legislation is still a common problem. Major reasons for insufficient quality of legislation include: a fragmented governance system with multiple veto points; deficient law drafting capacity in ministries and administrative bodies; inadequate consultation with regulated communities; poor translations of European laws and adoption of laws drafted by international consultants from alien contexts resulting in a system rich in written laws but poor in laws that effectively regulate in accordance with their intended purpose; inadequate attention to implementation issues during drafting; and constrained potential for parliament to scrutinise government proposals adequately.

The international community should better co-ordinate its efforts to ensure a coherent style throughout the legal framework, in order to make it comprehensive, consistent and transparent. The legal tradition derives from continental European law, but there is now a mixture of legal styles from various continental as well as common law traditions. The incompatibilities amongst different laws and legal styles have weakened consistency, accountability and enforcement. They provide scope for subjective interpretation of law, while leaving some parts of the governance framework unregulated. The different legal styles create inconsistent and inappropriate institutions and hinder the development and understanding of democracy, professionalism, transparency, and accountability.

Implementation of laws remains a problem. This is exacerbated by the fact that the social and political role of the law is not fully understood. Frequently, public sector institutions do not hesitate to disregard legal provisions or binding procedures as they see fit. This problem seems to be a matter of legal culture, which needs to gradually evolve through a long-term process.

Constitution

Bosnia and Herzegovina's constitutional set-up, which was arranged to end the wars on its territory, deprived local politicians of responsibility and real accountability, as these were assumed by the international community, mainly through the Office of the High Representative (article 5 Annex X of the General Framework Agreement). This set-up provides an unsuitable basis for an effective democratic state, as it pre-empts the possibility of creating a sufficiently empowered central state, while enshrining an ethnic and religious-based polity. Furthermore, the current Constitutions have generated an extraordinary and unmanageable collection of legal orders with 14 governments, including the State, the Federation, Republika Srpska (RS) and the cantons (not counting Brčko). The constitutional system distributes veto rights widely amongst political actors and over numerous "veto points" on a multiplicity of so-called "vital national[1] interests". The system is inimical to rational decision-making and prevents the emergence of a habit of political compromise inherent to any democratic regime. The BiH State has, in reality, almost no power to modify the power sharing arrangements, which are protected by the international community. An assessment of the effectiveness of the functioning of the BiH State cannot be decoupled from an assessment of the functioning of the international community, its capacities, and the checks and balances under which it operates. The international community has tried several times, since 2006, to promote a more workable constitutional set-up but has so far not succeeded. BiH's current constitutional set-up therefore continues to be incompatible with the current requirements for EU membership.

Parliament

The legislative function of the Parliaments is directly affected by the weaknesses of the constitution and the weak professional policy capacities of both the international community and the governments. The religiously and ethnically based distribution of parliamentary seats, based on 1991 census data (i.e. pre-war and now wildly inaccurate), and recurrent ethnic-based voting by the electorate, not only reduce the Parliaments' public legitimacy, but also its ability to contribute solutions to the actual problems affecting the country: poverty, unemployment, ethnic and religious hatred and a dysfunctional public administration and other institutions.

Government

The system of multiple governments with radically opposed political agendas is further damaged by the weak influence and power of the State's central institutions. The large reform plan -- the implementation by the State, Entities, and the Brčko District of a joint programme to reform their Centres of government (the "Blueprint Project") – is seriously delayed.

Public Administration

The disorganisation of public institutions and wasteful administration are two of the main characteristics of BiH's administrative legal framework and civil service systems. The administrative system is burdensome, expensive and contradictory across the various levels of government. The vested interests of the BiH constituents have resisted changes to the Dayton Peace Agreement (DPA) for longer than initially envisaged, hampering the much-needed progress towards the establishment of a modern and efficient government. Ethnic divides are institutionalised in BiH. They mask political patronage and cronyism in the public administration, which are detrimental to its professionalism. BiH suffers from all of the governance problems of the former Yugoslavia (for example, the lack of delegation), but these issues can only be addressed once the DPA has been reformed. Efforts to reform the public administration in BiH have little or no political support from the domestic political forces and have failed to address its acute problems.

[1] Meaning Bosniak, Croat or Serb communities.

The civil service is based on ethnic belonging and equilibriums, cross-referred to the 1991 population census. Political representatives of the six parties that achieved the best results in the 2010 parliamentary elections have reached an agreement on the Census Law, but it is unclear to what extent, if at all, the new census results will replace those of 1991, which at present provide the basis for ethnic representativeness in the civil service.

Public expenditure management in BiH over the last year was mainly influenced by the fragile overall political situation which, due to differences over the impact of the revenue sharing formula on the finances of BiH State, led to the non-adoption of the annual budget for 2011 for BiH State. This resulted in BiH State being on temporary financing for the whole year. The budgetary crisis further worsened when the budget 2011 failed to be adopted again at the end of the year, leaving BiH State without the necessary basis for temporary financing in 2012, let alone a budget for 2012. It remains to be seen whether the Fiscal Council, which finally started resolving the crisis in March 2012 by adopting a global framework for the fiscal period 2012-2014, thus opening the possibility for drafting the budget 2012, will in the future be able to ensure sustainable and credible fiscal policy. The above-mentioned delays impact on budget execution by preventing effective planning and management of public expenditure. This compounds the still existing problems of weak budget planning and management capacities at all levels and adversely affects the potential benefits of introducing public internal financial control (PIFC).

Regarding PIFC, the initially promising work of the Central Harmonisation Unit Coordination Board, which held monthly meetings until November 2011, has ground to a halt because of disagreements between its members. However, during 2011, it agreed on methodology documents for internal audit that have been introduced in BiH State and the entities. Some training for internal auditors has taken place. The number of internal auditors has increased only in RS. BiH State and the entities have drafted harmonised legislation for financial management and control, but they have not yet been adopted.

In the area of external audit, the Supreme Audit Institutions of BiH State and the entities have continued to professionally perform their role with limited resources, but this activity still has a limited impact on the reality of the budget execution. The independence of the Supreme Audit Institutions is influenced by the fact that they do not have constitutional standing and their role and responsibility is widely misunderstood. Parliaments started discussing audit reports again in late 2011, after stopping to so after the 2010 elections.

Public procurement reform has been on hold for a number of years. All initiatives to modernise the Public Procurement Law since 2007 have failed in parliament. The regulation of concessions and Public-Private Partnerships (PPPs) remains worrisome; it is fragmented and lacks transparency and openness.

Integrity

Corruption remains a serious problem and is widespread in all public administrations of Bosnia and Herzegovina. Governmental initiatives to combat corruption have been largely ineffective. While the legal and institutional frameworks for the fight against corruption are, by and large, in place, there is a gap between proclaimed policies and adopted laws and the reality of the work undertaken by institutions, and a lack of implementation and enforcement. Corruption is particularly acute in public procurement. Other risky areas include the issuing of various kinds of permits and certain public services such as public health and education.

Recommendations

The deciding factors of the intervention of the international community since 1995 have been "conditionality" and "ownership", categories borrowed from the fields of development economics and politics, which are hardly applicable to the BiH case. Conditionality and ownership are paradigms conceptualised by international financial institutions and later embraced by EU technical assistance programmes and enlarged to include democratisation programmes. The logic of the conditionality/ownership pairing is not applicable in BiH because the mixture was invented to deal with sovereign states where the role of international assistance was restricted to advice and other forms of non-coercive foreign intervention. In BiH, the most important political actors within the nationalist power structures are neither willing nor able to take ownership of the reform agenda, while the institutional basis at all levels of the administration is too weak and unstable to undertake significant administrative reform programmes. It is also difficult to envisage any financial incentive in BiH that would persuade the nationalist politicians to dismantle their own power structures, which have been built around the Dayton Agreement.

The international presence in BiH is of a different nature because the country is bereft of an effective central state, as the BiH government at State level does not possess most of the substantive attributes of a sovereign state. Consequently, the state-building exercise has to be carried out by the international community itself, with the complicity of some of the people in BiH, but not the established nationalist politicians. This situation implies a much deeper degree of international involvement than the involvement required by the logic of conditionality/ownership. It is an involvement that requires not only the creation of state institutions but also the establishment of new political processes that are able to sustain those institutions in the long run. In any case, seeking a solution for BiH implies reliance on the concept of the "suspension of sovereignty"[2].

The political divides that exist in BiH are not surmountable through either the harmonisation of legislation or other legalistic or technocratic approaches. The appropriateness of the use of law as the main instrument of political integration is questionable, let alone as a sole means for overcoming social and political cleavages.

- The Washington and Dayton Peace Agreements were a diplomatic success and were instrumental in bringing the war in Bosnia and Herzegovina to an end. However, they also created an unmanageable administrative set-up in FBiH and BiH. They also confirmed the dominance of ethnic based political rights over individual political rights, thus undermining the principles of liberal democracy. Reforming the constitutional foundations of FBiH and BiH is key for progress in public administrative reform and the creation of an effective state

[2] See Alexandros, Yanis (2002), "The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics" in European Journal of International Law, Vol. 13, No. 5, pp. 1037-1052, 2002. The concept of the suspension of sovereignty is not new in legal and political discourses in international relations. It has been employed mainly to describe dramatic and extreme situations in which a clear rupture is observed between the legal proposition of internal sovereignty and the social and political realities on the ground. A prominent example has been the case of foreign occupation. The UN Security Council Resolutions on Kosovo and East Timor rekindled interest in the concept of suspended sovereignty and raised new perspectives about its function and role in international politics because it is the product of legitimate international processes representing a further evolution of models of international political authority. Thus the possible future crystallisation of such a concept in international law should be seen and explored more as an opportunity to increase the transparency and accountability of international transitional administrations and less as a chance to reintroduce hierarchical relations in international politics.

apparatus. The international community should continue its efforts to facilitate constitutional reforms by building a consensus and supportive climate.

- In the meantime, BiH's authorities should focus on implementing the reforms agreed so far. Some of them, already formally adopted (under pressure from the international community), have not had any impact since BiH's authorities have failed to implement them.

- BiH's authorities, supported by the international community, should also undertake serious efforts to start implementing the already adopted National Anti-corruption Strategy. The Agency for the Prevention of Corruption and the Co-ordination of the Fight against Corruption should be staffed and provided with an adequate budget for its functioning and operations.

- BiH's authorities should implement legislation and activities aimed at establishing a merit-based civil service system and at improving the transparency, accountability and performance of the administration, especially in areas that have a direct impact on citizens' rights and on the business climate.

CIVIL SERVICE AND ADMINISTRATIVE LAW

Main Developments Since the Last Assessment (May 2011)

No major developments in the civil service and administrative law framework in Bosnia and Herzegovina (BiH) are to be registered since the 2011 assessment.

Marginal changes have nevertheless occurred that affect the civil service and human resources management.

The composition of the BiH civil service is based on ethnic groupings and equilibria, cross-referred to the 1991 population census. Political representatives of the six parties that achieved the best results in the 2010 parliamentary elections reached an agreement on the Census Law (passed on 3 February 2012 by the parliamentary Assembly of BiH and published in the Official Gazette of 7 February), but it is unclear to what extent, if at all, the new census results will replace those dating from 1991, which currently provide the basis for ethnic representativeness in the civil service.

In general, in the last couple of years the recruitment process has experienced minimal changes in all four components of BiH – BiH State, the Federation of BiH (FBiH), Republika Srpska (RS) and Brčko District (BD). At state level, the Civil Service Agency (CSA) has introduced an information system designed to inform job applicants electronically about the progress of the recruitment process. This software, called “My Competition”, has been in place since early 2011 and is expected to eliminate the possibility of human error in communicating information to candidates concerning vacancies. Opportunities for career advancement at the BiH State level have increased, at least in theory, with the adoption of a methodology for horizontal promotion, which was enacted in October 2011; the effects of this methodology remain to be seen.

In December 2011, the FBiH Parliament approved changes to the Civil Service Law (CSL) aimed at accommodating the “Bologna graduates” applying for civil service posts. These graduates had completed their studies according to the new structure of tertiary education based on three-year undergraduate studies instead of the traditional four-year programme.

In June 2011, the RS government submitted to the parliamentary procedure proposed amendments to the CSL aimed primarily at improving the efficiency of recruitment and selection procedures, which were passed in November 2011 as a Law on Amendments and Supplements to the Civil Service Law. In RS the recruitment procedure allows the head of an institution to ignore the CSA’s recommendation to appoint the best-ranked candidate. Silence on the part of the head of institution triggers the renewal of the whole process. The amendments to the CSL do not address this deficiency. The RS government has also adopted a new decree on the professional examination in November 2011.

In April 2011, the BD government adopted the Conclusion to accept the proposal of the Parliamentary Committee for Labour, Health and Social Protection to reform the employment policy in the District. The proposal envisages changes in the recruitment procedure, giving priority to internal recruitment (i.e. internal vacancy announcements) of civil servants and support staff. In order to put these changes into operation, the relevant BD authorities have had to amend the District government’s Organisation Plan, the Civil Service Law and the Law on Public Administration.

The proposal also prescribes that, upon completion of the recruitment and selection procedure, senior civil servants are to be appointed in the future by the government, based on the ranking established by the Employment Board. According to the 2011 Plan for Human Resources Needs, the BD administration had 107 vacant posts.

Main Characteristics

Overall the politico-administrative configuration of the country does not clearly and fully support the meritocratic principle as a basis for the professionalisation of the civil service. BiH State, FBiH and RS do not recognise the principle of a professional civil service based on merit in their respective constitutions. In fact, the clauses imposing ethnic representation are inimical to the merit system. Although the right of equal access to public employment is guaranteed to all citizens at all levels, the insistence on ethnic representation clearly favours the main three ethnic groups at the expense of minorities and of the merit system. While ethnic representation is the reality of the Dayton Agreement's BiH, the country would benefit from the development of a modality for balancing the principles of merit and proportional ethnic representativeness.

The status of civil servants, as defined in the existing legislation, is not compatible with prevailing standards in EU Member States. Furthermore, the way in which it is applied prevents the country from developing a professional, politically-neutral and impartial, merit-based civil service. Civil service legislation was imposed by the Office of the High Representative in Bosnia and Herzegovina (OHR) on common BiH State institutions (2002) and on FBiH institutions (2003), with several amendments in both cases, whereas in RS (2003, as amended in 2008) and in BD (2006) the civil service laws were autonomous.

Existing civil service laws define differently the scope of the civil service in BiH administrative structures and levels of government. These differences result in a civil service system that is incoherent, full of legal uncertainty, and extremely difficult to manage in any efficient way, thus adding difficulties to already difficult public governance arrangements. Most of these incoherencies have their origins partially in the governance arrangements resulting from the Dayton and Washington Agreements, but also in the various foreign influences that have affected the several civil service legal regimes established in the country. In any case, the harmonisation of working conditions across all administrations in the country may not be politically feasible and may also not be necessary as a condition for increasing professionalism in the civil service. More professionalised civil services are also possible in fragmented countries with separate governments.

Existing recruitment and promotion mechanisms and practices are not effectively contributing to the professionalism of the civil service. Party politics continues to play a large role in civil service recruitment and promotion, even though it is often disguised as ethnic representativeness.

The impartiality of the civil service is not sufficiently protected because of the sheer politicisation that exists in BiH as a whole, mainly along ethnic lines, which is likewise inimical to the legal principle of equal treatment of citizens that civil servants are obliged to abide by.

The integrity of the civil service is relatively well protected from a legal standpoint, although there are some flaws in the legislation. In practice, however, it seems that bribery, abuse of office and malpractice by civil servants are difficult to prevent, punish and eradicate. This situation is frequently the subject of reports of audit offices and ombudsmen.

Salary schemes in all BiH administrations are plagued by too many allowances and side payments, which allow a relatively discretionary determination of the individual remuneration. This discretionary handling of salaries in turn contributes to reinforcing the allegiances of staff to their managers rather than to the law, thus undermining the principle of legality in the administration. The

transparency of the salary system has recently improved in RS and in Brčko District, but the system continues to be rather chaotic in the BiH State common institutions and in FBiH.

Each of the civil service laws (CSLs) called for the creation of a civil service agency (CSA) as the central human resources management institution. These agencies were to be created as statutorily independent bodies under, and answerable to, the Council of Ministers (BiH State) or the government (FBiH, RS). The exception was Brčko District, which has a Sub-Department of Human Resources with roughly the same competences as the CSAs. The FBiH CSA is the only agency with a decentralised structure. It consists of a head office in Sarajevo and five regional offices, each of which serves two cantons. The FBiH Constitutional Court Decision[3] of 2010 stripped the FBiH CSA of the authority to administer civil service affairs at cantonal and municipal levels. The Court ruled that, according to the FBiH constitution, administrative matters were the competence of cantonal structures. This ruling has caused significant confusion among cantonal administrations.

There are no sound mechanisms to motivate civil servants' performance. The country's administrative and political structures make it very difficult to achieve results in terms of improved governance and are themselves a disincentive to good performance. Performance appraisal is a rather sophisticated exercise as prescribed in the rulebooks. Managers are generally unable to set objectives or monitor achievements. This situation, coupled with the fact that performance appraisal has almost no noticeable impact on take-home pay or on career advancement, means that performance appraisal is only required on paper, not in practice. The performance appraisal exercise is in reality viewed as a bizarre exercise that will hardly have any practical consequences in terms of improving the performance of governance institutions in BiH administrations. However, it may be used by managers and politicians to increase their authority and power over the staff. This possibility, together with the distortion of the remuneration scheme by means of the numerous allowances, further undermines the principle of legality.

Staff mobility across administrations is not used and is not encouraged. One reason may be ethnicity, but the main reason is perhaps the differences in the civil service legislation, in particular the impossibility of internal transfer and the considerable variations in salary levels between the entities, BD and the state level.

Training at all levels of the administration has been traditionally funded since 1995 by foreign donors. The existing authorities and international donors have relied too heavily on training as a sort of panacea to overcome structural problems. However, stand-alone training is not an adequate instrument for state-building and for improving the governance of the country. Furthermore, a key problem with training is that, despite all efforts, it remains excessively supply-driven and geared towards the acquisition of soft skills. These skills can be readily provided by foreigners and are delivered almost everywhere in the world. Specific skills directly linked to the day-to-day work in the BiH politico-institutional context are generally overlooked, neglected or at best not considered as a priority by the funders of training.

On paper the BiH system could be seen to guarantee, but with difficulty, the principles of legality and equality and the predictability of administrative decision-making and actions countrywide. However, in practice the guarantee of citizens' rights is weak because of Bosnia and Herzegovina's peculiar internal constitutional and administrative set-up, which raises the issue of whether citizens have the same level of protection of their rights and interests no matter where they ask for protection. Equality before the law and before public authorities is not guaranteed and cannot be guaranteed under the current institutional set-up.

[3] Decision U-27/09 of 2010 was based on an appeal lodged by the West Herzegovina Canton. The Decision was challenged by the Prime Minster of the Federation of BiH, but the FbiH Constitutional Court rejected this appeal.

The organisation of the administration is dysfunctional, and the distribution of competences is unclear at the majority of the several government levels. It is necessary to clarify the distribution of competences at these numerous levels, reduce duplication and, in particular, eliminate legislative overlap. Overlapping competences set down in the legislation should at least be reduced.

There should be a clearer hierarchy of laws, specifying the scope for local variation. The general administrative law framework should be set at a higher level, with a descending hierarchy of norms and a rationalisation of the administration.

The system inevitably results in a continuous struggle – apparent or concealed – to enlarge competences, always at the expense of other governments at all levels, horizontally and vertically, which in turn creates an intractable legal maze. The real problem rests with BIH's current politico-administrative structure, which hardly allows for arbitration between competing interests, given the practical absence of accepted arbitration mechanisms.

Complexity has been built into the system in order to ensure safeguards for ethnic groups, but these measures have prevented progress towards a normally functioning democratic state, even a state that is necessarily fragmented. Any attempt to create a centralised state based on citizenship is doomed to failure. Vested interests have coalesced around the current status quo in such a way that any reform is rendered practically impossible. Two major unified governance elements are nevertheless required: a general law on administrative procedures and a unified administrative justice system with a single law on administrative disputes.

General administrative procedures need to be unified for the whole country and local laws abolished. These procedures also need to be better aligned with democratic principles prevailing in most EU Member States. Current general laws on administrative procedures at the different levels are almost the same, but they are not exactly the same, which makes the situation for citizens and legal entities too diverse, to the point of hampering equality before the law. Special procedures should be reduced to a minimum at all government levels.

The current set-up for administrative justice is unfit to guarantee that the various existing administrations will abide by the rule of law. A countrywide, unified law on administrative justice is required in order to endow administrative courts with full jurisdiction, to create better instruments that oblige administrative authorities to "refer the file" to the court, and to ensure more effective enforcement of administrative court rulings pronounced against public authorities.

No legal certainty can be guaranteed in a country where there is no supreme judicial instance empowered to unify legal doctrine and impose its legal interpretation on lower-ranking courts. The organisation of administrative justice needs to be undertaken countrywide and needs to be established as a clearly designed hierarchy of courts.

The multiple ombudsman institutions now existing are rather ineffective. Their powers are limited, and their reports are not easily accessible to the public at large and are ignored to a significant extent by the respective parliaments.

The current administrative law framework in Bosnia and Herzegovina is therefore inadequate for guiding and controlling the performance of the civil service and public authorities. In addition, the civil service is disintegrated across four different systems. The ordinary citizen suffers the most from this situation.

Reform Capacity

Efforts to reform the public administration in BiH have had little or no support from domestic political forces and have failed to address the acute problems of the administration, which include

inadequate human resources, overlapping competences, lack of co-ordination between and across levels of government, absence of a co-operative or even consensual administrative culture, and continuous political interference in the hiring and management of civil servants. These factors tend to exacerbate “ethnic” cleavages that in fact mask political patronage and cronyism within the public administration, which is also detrimental to professionalism.

The institutional complexity in BiH renders reform nearly impossible. A complex and inefficient administrative structure, which slows down decision-making processes and accounts for a disproportionate amount of public spending, and a lack of consensus on the nature of the state combine to make administrative transformation in BiH slow and uneven. The 3,211,000 inhabitants of BiH (2008 figures) can hardly afford its 14 governments and parliaments, 147 ministries at all levels and close to 150 administrative bodies (excluding cantonal and local levels). The affordability of all of these structures is questionable once the international community withdraws from the country, if it ever does.

Decision-making is based on consensus-building at all levels (therefore with multiple veto points), from cantons and entities to the state. The so-called “vital national interests” that were established -- but left undefined -- in the Dayton Peace Agreement allow communities to block decision-making in parliament and in most governments. Several decisions of the BiH State Constitutional Court have restricted their scope in recent years, but “vital national interests” continue to paralyse the decision-making process. Many of the attempted reform policies have been internationally imposed or negotiated under international supervision, while implementation has been left to inadequate BiH institutions and to politicians who did not want the reforms. Most of these reforms would not stand without the persistent pressure of the international community.

Recommendations

- A new constitution (or rather a constitutional settlement of political differences) is badly needed, from which ethnic and religious references should be totally removed, while the right of citizenship (*droit de citoyenneté*) of any occupant of BiH individually considered should be strengthened so as to form the cornerstone of a new society based on the civic rights of individuals, which should be adequately protected. Rights based on collective identities should be removed from any new constitution, except the right to manifest cultural differences.

- The new constitution should be clearly federally-oriented. A federal model of state administration should be contained in the constitution, with distinct and exclusive powers attributed to the federal state and to the federated entities and with workable arbitration mechanisms, including a reinforced constitutional court. Shared competences between the federal level and the federated entities should be reduced to a minimum or avoided.

- Administrative legal principles for the organisation and functioning of the public administration and the judiciary at both federal and federated levels would need to be established in the constitution. The constitutional model of administration should favour simple structures and decision-making processes, while safeguarding the legal guarantee of individual rights balanced with protection of the public interest.

- Two major unified governance elements are urgently needed if a single market within BiH is to emerge and consolidate: a general law on administrative procedures and a unified administrative justice system with a single law on administrative disputes.

Detailed Analysis

Legal Status of Civil Servants

Does an appropriate legal basis exist, which defines the status of civil servants in a way that is compatible with prevailing standards in EU Member States?

Constitutions

The constitution of the State of Bosnia and Herzegovina (BiH State) provides an insufficient basis for safeguarding the merit principle and the professionalism of the civil service. Annex IV of the BiH State constitution (the text is written in the form of annexes to the Dayton Peace Agreement) states in article IX-3 that officials appointed to positions in the institutions of BiH are to be "generally representative" of the people of BiH. Considering the sensitivity of ethnic representation in the country, it is understandable that the BiH State constitution makes a specific point regarding ethnic representativeness, but this element should be put into effect in the civil service in a manner that gives more prominence to the merit principle than is currently the case. Furthermore, the BiH State constitution provides no elements aimed at safeguarding the professionalism and political neutrality of the civil service.

The constitutional requirement for the public administration to reflect the country's ethnic composition (in accordance with the 1991 census) has been echoed in the respective civil service laws (State – art. 2; FBiH – art. 2; RS – art. 4; BD – art. 26). In reality, the ethnic composition of the entity administrations remains heavily skewed in favour of Bosniaks and Croats in the Federation and in favour of Serbs in Republika Srpska, and it is most likely to remain the same, even if the census legislation is modified.

On the other hand, as the ethnicity of civil servants is actually based on voluntary self-declarations, the choice of a particular ethnic origin may be changed at the discretion of the individuals at any time. This possibility renders the statistical basis for the calculation of ethnic representation unreliable and underlines the artificiality of the ethnic societal construct emanating from the 1992 propaganda disseminated by the political class in former Yugoslavia.

In February 2012, the BiH State Parliament, after many debates and disputes, finally managed to pass the new State Law on Census. However, the new law has not put an end to the dispute regarding the further reference to the 1991 census. On the contrary, Bosniak and Serb representatives quickly claimed that suppression of the disputed article 48 was positive. Bosniak representatives pointed out that the suppression of article 48 did not necessarily mean that the 1991 census was no longer relevant, as the constitutions of both entities still have a provision prescribing the use of the 1991 census results (until the return of refugees has been completed). Delegates from Republika Srpska claimed the opposite, arguing that the new Census Law marked the end of the application of 1991 census results.

It has to be stated that implementation of the 2003 decision of the BiH State Constitutional Court to impose the application of the "ethnic representativeness" requirement within the entities has always been put in question due to the problems involved with refugee return (which has been uneven and, in general, has never reached the required level). Another set of potential problems related to ethnic representativeness arose in 2009, when the European Court of Human Rights decided to rule in

favour of Mr. Jakob Finci and Mr. Dervo Sejdic who, as representatives of minorities in BiH, were unable to stand for election to the Presidency or to the House of Peoples.[4]

The "Sejdic-Finci ruling" will require constitutional changes which, once implemented, will result in a new formula for ethnic representativeness. In short, Bosnian civil service structures will in the future need to reflect an ethnic composition that includes representatives of ethnic groups other than Bosniaks, Serbs and Croats. Considering that the main three ethnicities constitute some 99% of the population, it is hard to imagine any significant impact of this new formula on the overall structure of the civil service workforce. However, the ruling was momentous, as it stopped a dynamic that had been instituted, enshrining the discrimination of minorities. From now on, job applications filed by ethnic groups other than the main three ("others" on the application form) will have a much better chance of success than is currently the case. The above-mentioned ruling has not yet been applied.

The Federation of BiH (FBiH) constitution (enacted in 1994 via the Washington Agreement) guarantees to all citizens the right to participate in public affairs and to have equal access to public services (article 2-2-b). Ethnic representation is enshrined by the amendments proclaimed by the Office of the High Representative in Bosnia and Herzegovina (OHR), which state: "As a constitutional principle, such proportionate representation shall follow the 1991 census until Annex 7 is fully implemented, in line with the Civil Service Law of Bosnia and Herzegovina. Further and concrete specification of this general principle shall be implemented by Entity legislation." In 2010, following the request of the West Herzegovina Canton, the Constitutional Court of FBiH ruled that article 2 of the FBiH Civil Service Law, which defines the scope of the law, was in breach of the constitution. In practice, this decision has given cantons full authority to independently regulate their civil service affairs, and this independence may further complicate the already difficult situation of the civil service.

The 1992 constitution of Republika Srpska (RS) was also amended by the 2002 and 2003 OHR Decisions, establishing citizens' rights to take part in the conduct of public affairs and to access the public service under equal conditions. Ethnic representation is also regulated by the OHR in an identical manner as in the Federation.

The Statute of Brčko District (1999) is the only one that provides a clear basis for the merit principle (article 21), prescribing open competition as compulsory for public employment, but ethnic distribution is mentioned nonetheless. In practice, heads of department are political appointees, and mayors have the constitutional obligation to select these department heads based on professional criteria, while making sure that the "ethnic composition" of the population is also reflected.

In conclusion, BiH, FBiH and RS fail to establish the principle of a professional civil service based on merit in their respective constitutions, which leaves the door open for other criteria to be used in public employment. In fact, the clauses imposing ethnic representation are inimical to the merit system. Although the right of equal access to public employment is guaranteed to all citizens at all levels, the insistence on ethnic representation clearly favours the main three ethnic groups at the expense of minorities and of the merit system. While ethnic representation is the reality of the Dayton Agreement's BiH, the country would benefit from the development of a modality aimed at a better balance between the principles of merit and proportional ethnic representativeness.

[4] The European Court of Human Rights found that the applicants' ineligibility to stand for election to the House of Peoples violated article 14 of the European Convention on Human Rights – ECHR (ban on discrimination), taken in conjunction with article 3 of Protocol No. 1 (free elections), by 14 votes to 3, and that their ineligibility to stand for election to the Presidency violated article 1 of Protocol No. 12 (general ban on discrimination), by 16 votes to 1. It is to be remembered that the European Convention of Human Rights is incorporated as a part of the BiH State Constitution.

Ordinary Legislation

Civil service legislation was imposed by the OHR on the common state institutions (2002) and on FBiH institutions (2003), with several amendments in both cases, whereas in RS (2003, as amended in 2008) and in BD (2006), the laws on civil service were autonomous. In general, ordinary laws on civil service show many inconsistencies and unclear provisions, due in some cases to recurrent amendments and in others to failed attempts to balance ethnicity and the merit system, especially in recruitment and human resources management, which is fraught with legal uncertainty. The end result is that existing civil service legal regimes do not guarantee the merit system.

Scope of the Civil Service

Existing civil service laws define differently the scope of the civil service in BiH administrative structures at the different levels of government. These different scopes result in a civil service system that is incoherent, full of legal uncertainty, and extremely difficult to manage in any efficient way, thereby adding difficulties to public governance arrangements that are already nearly impracticable. Most of these incoherencies have their origin partially in the governance arrangements resulting from the Dayton and Washington Agreements, but also in the various foreign influences that have affected the several civil service legal regimes established in the country.

While all civil service laws (CSLs) distinguish between political appointees and civil servants, the scope of the civil service differs in FBiH and RS. In FBiH, the civil service covers partially cantonal and municipal levels (five cantons to be precise), whereas in RS the local level is completely excluded from the scope of the civil service. All civil service laws, except for the CSL of BD, make distinctions between civil servants, political appointees, and staff employed under labour law.

The BiH State CSL excludes employees of the Central Bank, Office of the Ombudsman for Human Rights, and police and security agencies, as well as diplomatic staff (article 6). In FBiH, article 5 of the CSL excludes from the scope of the law politicians, judges, auditors of the FBiH supreme audit institution, police and armed forces. The logic of those exclusions is unclear, however.

Specific civil service positions are defined in the respective CSLs (BiH State – art. 7; RS – art. 27; FBiH – art. 6), with no significant difference between the three laws with regard to the basic mission, status, and conditions of the civil service.

The tasks to be carried out by the various categories of civil servants are defined in an almost identical manner by the State (art. 8ff) and the Federation (art. 8ff), while the RS CSL, in article 2, mentions the general nature of civil service tasks (i.e. “core tasks”), without any further elaboration.

The BiH State and FBiH CSLs offer a general definition of the civil servant by stating, in essence, that the civil servant is an individual appointed to a civil service position by an administrative act in accordance with the law (art. 2 of the BiH State CSL and art. 2 of the FBiH CSL). According to article 2 of the RS CSL, the civil servant is “…an individual with a university degree employed in the RS institution to perform core tasks”. The list of core tasks include: normative and legal tasks, implementation of laws and other legislation, decision-making in administrative procedure matters, inspection and other expert tasks in the administration.

Brčko District’s CSL (art. 3) states that *“this law shall be applied to civil servants employed in administrative bodies of Brčko District of BiH, public servants employed in the administrative body, due to organization of the administrative body which includes non-administrative organizational parts (hereinafter: ‘servants’) and employees in the administrative bodies of Brčko District”*. In practice, however, the differentiation between civil servants, public servants and employees is difficult to see, despite the definitions provided in article 2.

Professionalism of the Civil Service

Are civil servants' recruitment, rights and obligations defined, regulated and enforced in such a way as to ensure their commitment to constitutional and public law values, such as legality, impartiality, political neutrality and integrity?

Recruitment

Civil service agencies (CSAs) have strived for transparency and fairness in recruitment and selection procedures. Vacancy notices are widely accessible, as are the reading materials for prospective candidates to prepare themselves for the general examination. All information relevant to a vacancy can be obtained from the relevant CSA, including the names of the panel members. However, there have been repeated allegations of questions being given in advance to preferred candidates. So far, these claims have not been substantiated. Nevertheless, the publication of the vacancy announcement does not guarantee per se that recruitment is based on merit and that the right to equal access is respected. Many artifices are used to circumvent the requirements of the merit system, mostly disguised as ethnic representativeness. Ethnicity, which in the BiH context generally translates into political affiliation, usually overrides considerations of merit. This situation is especially true for managerial appointments.5

The easiest and most straightforward way of bringing someone into the public administration is to appoint him/her as an adviser. These individuals are engaged for the duration of the appointing official's term of office, and they do not have civil servant status. There are almost no constraints on the number and qualifications of appointed advisers. The FBiH government is reported to be working on the new provisions of the CSL so as to abolish the current notion of advisers and to replace these advisers with assistant ministers, who will be limited in number and will be obliged to have clear and appropriate qualifications. This new category of assistant ministers will be appointed by the government, while the current category of advisers will be renamed as heads of department.

Party politics therefore continues to play a large role in civil service recruitment and management. This influence is also visible in the persistent efforts of politicians to amend civil service laws in the Federation and at the state level in order to place senior civil servants on four or five-year contracts. As a reminder, the first such action took place in May 2006, when the RS government abolished indefinite appointments for senior civil service posts and replaced them with renewable five-year management contracts. The FBiH attempted to follow suit in 2008, when the FBiH Ministry of Justice produced a new draft CSL, which envisaged even harsher politicisation by identifying an even larger number of civil service posts as having a four-year term. However, this attempt was stopped by the EU Special Representative and the Head of the EC Delegation, who sent a joint letter on 25 April 2008 to the FBiH Prime Minister, in which they cast doubts on the signature of the Stabilisation and Association Agreement (SAA). Other attempts have been made in the past two years to introduce the same change in the FBiH CSL, but none has succeeded. Recently there were calls for similar changes at the state level, but without any concrete attempts.

All four CSLs prescribe open competition, along with ethnic representativeness, as the basis for recruitment and promotion. The procedures used in practice are still quite lengthy and often very expensive for participants.6 The current procedures at state level and in FBiH include the passing of a

5 Concrete examples at state level include recruitment for the positions of Head of the General Secretariat of the Council of Ministers, Director of the Directorate for EU Integration, and Director of the State Agency for the Prevention of Corruption.

6 The cost of taking the professional civil service examination in RS is excessively high: 300 BAM (approximately 153 EUR) for civil service posts and 200 BAM (approximately 102 EUR) for support staff posts.

general and professional examination as a requirement for tenure. The general examination consists of multiple-choice questions regarding the main aspects of the administrative system, while the professional examination, comprised of written and oral parts, relates strictly to knowledge about the position to be filled (in FBiH, the written part of the professional exam is also based on multiple-choice questions, while at the state level candidates must answer questions in essay form). In RS there is only one examination, but its content and structure are very much in line with the exams at state level and in FBiH. Some administrative structures of the state and entities do recognise the validity of each other's examination, where legal provisions impose this mutual recognition.

In general, in the last couple of years the recruitment process has experienced minimal changes in all four administrative structures in BiH. At the state level, the CSA has introduced an information system designed to inform job applicants electronically about the progress of the recruitment process. This software, called "My Competition", has been in place since early 2011 and is expected to eliminate the possibility of human error in communicating information to candidates concerning vacancies.

In December 2011 the FBiH Parliament approved changes to the CSL in order to accommodate the "Bologna graduates" applying for civil service posts. These graduates had completed their studies according to the new structure of tertiary education based on three-year undergraduate studies instead of the traditional four-year programme.

In November 2011 the RS Parliament passed amendments to the CSL aimed primarily at improving the efficiency of recruitment and selection procedures. In RS the recruitment procedure allows the head of an institution to ignore the CSA's recommendation to appoint the best-ranked candidate. Silence on the part of the head of institution triggers the renewal of the whole process. The amendments to the CSL do not address this deficiency. The RS government also adopted a new decree on the professional examination in November 2011.

In April 2011 the BD government adopted the Conclusion to accept the proposal of the Parliamentary Committee for Labour, Health and Social Protection to reform the employment policy in the District. The proposal envisages changes in the recruitment procedure, giving priority to internal recruitment (i.e. internal vacancy announcements) of civil servants and support staff. In order to put these changes into operation, the relevant BD authorities have had to amend the District government's Organisation Plan, the Civil Service Law and the Law on Public Administration. The proposal also prescribes that, upon completion of the recruitment and selection procedure, senior civil servants are in the future to be appointed by the government, based on the ranking established by the Employment Board. According to the 2011 Plan for Human Resources Needs, the BD administration had 107 vacant posts.

Promotion

Opportunities for career advancement at the state level have increased with the adoption of a Methodology for Horizontal Promotion (enacted in October 2011)[7], applicable only to public employees and support staff, not to civil servants. The long-awaited methodology (elaboration of the methodology required two entire years) prescribes the criteria for promotion from one salary class to another (horizontal advancement), but with no possibility of moving to a higher post (vertical advancement). Article 4 of the Methodology specifies the following set of criteria for promotion: a) performance appraisal results; b) length of service in the institution (provided that the employee's performance has been positively appraised); c) work ethics; and d) acquired professional or academic titles relevant to the institution's core activities. However, the establishment of the legal basis for

[7] Methodology for Horizontal Promotion (*Metodologija za raspoređivanje zaposlenog unutar platnog razreda*), *BiH State Official Gazette*, No. 6, 24. 01. 2012

horizontal promotion will not be followed by practical implementation, as budget restrictions leave no room for any form of salary increases.

Vertical promotion in RS is based on performance appraisal results, not on competition. To promote vertically in BiH State, FBiH and BD, a public competition, either open or internal, is necessary. The BiH State CSL (art. 31) prescribes that the promotion of a civil servant to a higher position, within the same or in a different institution, is to take place through internal competition or open public recruitment, while the promotion of a civil servant to a higher category, as referred to in article 7.2, is to be based on positive performance appraisals and is to be decided by the institution, in accordance with the provisions of the 2008 Law on Salaries and Remuneration in BiH Institutions. The criteria for vertical promotion emanate from article 54-6 of the Law on Salaries and include the four criteria listed in article 4 of the Methodology. In addition, article 6 of the Methodology specifies further criteria for promotion: a) award of the highest performance grade (grade 4 or "exceptionally successful") in two consecutive annual performance cycles; b) award of the second highest performance grade (grade 3 or "successful") in four consecutive annual performance cycles; c) acquisition of higher educational or professional qualifications that are relevant to the post. It is interesting to note that the Methodology also opens up the possibility of demotion to the next lower salary class for those who received the lowest grade in the performance appraisal cycle.

The CSL of FBiH stipulates that promotion to a higher position within the group of managerial positions, in the same or in another civil service body, is to be carried out exclusively by means of competition in the framework of publicly announced vacancies, while other civil servants can advance to the immediately higher position without such a public competition, provided that the position is vacant. In general, promotion is carried out by means of the announcement of internal job vacancies and management by a three-member commission, "*which shall propose for promotion the candidate with the best professional and other qualities based on the performance assessment and other demonstrated professional and expert skills from among the civil servants who have applied for the internal vacancy, which is assessed during an interview*"(article 35-3). In FBiH, the 2010 Law on Salaries and Allowances in the governmental Organs of the Federation of BiH does not introduce the possibility of career advancement through the system of internal salary classes. The law defines a total of 11 salary classes for all civil servant positions in FBiH, with fixed coefficients for each salary class. There is no possibility of horizontal promotion.

In RS, the new Rulebook on Performance Appraisal and Promotions stipulates in articles 33 and 34 the possibility of a civil servant being promoted horizontally (higher salary step within the same post) if he/she has been awarded two consecutive highest marks in the performance appraisal, and vertically (to a higher post) if he/she has been awarded four consecutive highest marks in the appraisal. The appraisal cycle is based on a six-month period. The decision on promotion rests solely with the head of institution, an arrangement that makes promotion too discretional and highly arbitrary.

The BD CSL stipulates that all posts must be filled by means of open public competition, which means that promotions through discretionary managerial decisions are not allowed, even if there is a suitable vacant post (arts. 30 and 31). Internal competition can be given priority only for employees whose posts have been identified as superfluous to the institution's requirements (art. 32). However, horizontal career advancement to a higher salary step within the same post is possible and depends on performance appraisal results. Article 69 of the CSL stipulates demotion for those who fail to uphold performance standards or who breach disciplinary regulations.

Rights and Obligations, Especially Impartiality and Integrity

Civil service laws in BiH require civil servants to be impartial and politically neutral, but it is not prohibited for a civil servant to be a member of a political party. Except for the CSL of BD, all CSLs

guarantee the social rights and basic freedoms of civil servants, e.g. the right to join a trade union and the right to strike (BiH State – art. 15; FBiH – art. 18; RS – art. 10). However, the BD CSL implicitly confirms the right of civil servants to be members of a union (art. 15). The right to union membership and the right to strike are nevertheless guaranteed to public employees by all four constitutions. BiH State and FBiH civil servants are obliged upon taking up office to disclose all information concerning their property and the activities performed by their family members (BiH State – art. 16.2; FBiH – art. 19.2). In practice, civil servants rarely submit such information.

All CSLs and penal codes adequately regulate the disciplinary and criminal accountability of civil servants (BiH State – art. 54ff; FBiH – art. 55; RS – art. 21ff; BD – art. 85ff). Civil servants can be held accountable for breaching official rules and regulations (e.g. revealing official secrets) or for committing a crime (e.g. taking a bribe) or any other act that damages the image of the civil service (e.g. bad behaviour in public). In general, civil servants in BiH administrative structures fulfil their duties, if measured by the number of sanctions imposed. Few disciplinary sanctions or criminal penalties are imposed on civil servants. This fact has been confirmed by the respective civil service appeal boards, which receive only a handful of disciplinary cases per year.

All four CSLs in BiH define the obligations and incompatibilities of civil servants, including the separation of private and public interests. Civil servants are obliged to act impartially, avoid any behaviour that is contrary or inappropriate to the performance of their professional duties, refrain from expressing their political beliefs in public, and not accept gifts or request rewards for themselves or their relatives, except for the rewards and gifts that are specifically permitted by the law.

The 2009 amendments to the BiH State CSL obliged BiH authorities to adopt a code of ethics for civil servants. The state-level Civil Service Agency (CSA) completed work on the draft code at the end of 2009, but the BiH State Council of Ministers decided to return it to the CSA. No major developments have subsequently occurred. Newly employed civil servants receive information on the ethical norms in the civil service as a part of their introductory training. In 2004 the BiH State Council of Ministers adopted a Decision regulating civil servants' involvement in additional remunerated activities. According to this Decision, activity outside the administration is possible if it is not incompatible with the duties of a civil servant. Allowing civil servants to perform simultaneously public and private remunerated activities is a solution to the low salaries in the civil service and to scarce budgetary resources, but it may result in confusion between official duties and moneymaking, thus paving the way to corruption.

The tendency towards the drafting of ethics codes has also been observed in FBiH. Article 17 of the FBiH CSL stipulates that "…in performance of his/her duties a civil servant shall especially be guided by principles determined in the Code of Ethics of Civil Servants enacted by the Civil Service Agency". The Code of Ethics in the Federation was drafted by the FBiH CSA in 2004 and subsequently adopted. The Code governs the principles of conduct of civil servants in the execution of the tasks envisaged by their job descriptions. The Code contains principles of ethical conduct, procedures for familiarisation with the Code, and monitoring of the Code's implementation. Following a 2010 Decision of the FBiH Constitutional Court, the applicability of the FBiH Code of Ethics at cantonal and municipal levels has been put into question. Generally speaking, ethics codes in extremely formal-legalistic environments are useless and may cause confusion, as they are wrongly identified as legal instruments, as the Constitutional Court of FBiH has shown.

The RS government introduced amendments to its Code of Ethics in September 2009, following the recommendations of GRECO in its report on the assessment of the situation in BiH as well as the recommendations of the Council of Europe to all EU Member States and to EU candidate countries. In RS, civil servants of local administration units have their own code of conduct, which was approved by the RS Ministry of Administration and Local Self-government in 2005. The RS CSL forbids any

remunerated activity outside the administration, unless specifically authorised by the government following a written request (art. 24).

The BD Civil Service Law states in article 5: "*Rules of conduct of civil servants and employees shall be regulated by the Code of Conduct for civil servants and employees.*" In addition, the CSL established the special position of Ethics Officer, who is responsible for monitoring the implementation of the CSL (and for reporting quarterly to the Mayor of BD). In the event of a suspected violation of the Code of Conduct, the Ethics Officer, *ex officio* or on the basis of the quarterly report, examines the case within seven days and applies measures within his/her competence. The Ethics Officer has a preventive and investigative role with regard to the way in which the rules of conduct are respected and subsequently may propose disciplinary sanctions. It is doubtful, however, that the Ethics Officer has any real impact on the behaviour of public officials.

Does the law fix the salary scheme and is the determination of individual pay transparent and predictable?

All of the civil service laws in BiH, except for the BD CSL, classify the civil service in managerial and non-managerial positions. In BD an identical classification was made by a 2007 Governmental Decision. The remuneration scheme is built around these classifications. Salaries and benefits are governed by special laws at all levels of the administration in BiH. The scope of these laws, in terms of the categories of employees covered, differs between the state level and the entities.

Each civil service uses a multiplier system, i.e. consisting of a basic salary (decided by the respective government) and a multiplier defining the minimum salary for the position. Supplements can be awarded (except for FBiH) for various degrees of job complexity within the same class of positions (up to 50% at the state level). These supplements are determined by a government regulation for the various categories of position. Each system includes a 0.5% increment in salary for each year of seniority, up to a maximum of 20%.

All systems provide for several personal allowances, such as for transportation, food and family separation. These allowances are relatively high. For example, staff living outside Sarajevo may double their basic salary by means of various additional allowances to cover the cost of commuting to that city or renting an apartment in Sarajevo (for staff residing in Banja Luka or Mostar). The use of allowances is open to abuse and can be unnecessarily expensive for the employer, as staff tend to arrange their domestic circumstances so as to maximise their entitlements to various allowances whenever possible. In addition, some supplements are paid from the operational budget to a smaller group of management staff; the distribution of these supplements is rather obscure and needs to be reformed.

There are still an excessive number of other supplements for employees and civil servants, e.g. for a warm meal (non-taxable) and for transport. In January 2012 the FBiH government announced that it intended to impose taxes on warm-meal allowances as well as on allowances for the summer vacation. The Union of Employers as well as the Union of Administrative Workers have indicated that they will oppose this taxation.

For certain civil servants, a considerable number of salary supplements can be received for joining a working group, recruitment panel or jury for candidates taking the professional examination. Some of these supplements may be justified. However, consideration should be given to increasing basic salaries instead of paying supplements for tasks that should be considered as belonging to the primary job content and representing the functions of the incumbent.

The remuneration policy does not differentiate between politics and administration. In that respect, the laws on salaries of BiH State and FBiH, besides covering the salaries of civil servants and public employees, regulate the salaries of elected and appointed officials and public officials (ministers and

advisers, members of parliament in FBiH, and other appointed persons). On the other hand, the scope of the laws on salaries in RS and BD includes civil servants and other public employees in administrative bodies, but not the members of parliament.

The administration of Brčko District has always enjoyed better remuneration than any other administrative structure in BiH, and this continues to be the case. BD's geo-strategic position, with easy road and river connections to neighbouring Croatia and Serbia, has been the main factor responsible for the district's relatively stronger economy. In addition, tax revenue in BD is not swallowed up by entity budgets, except for the VAT collected at state level. These factors enable the district administration to pay better salaries and perks. The salary structure of administrative and professional staff is based on vertical salary grades and horizontal salary steps, which basically depend on seniority. Like any other municipality in BiH, BD's budget caters to salaries for public servants in the areas of education, health care and other services to citizens (fire brigade, police, etc.), in addition to civil servants and public employees working in administrative departments.

In summary, salary schemes in all BiH administrations are plagued by too many allowances and side payments, which allow a relatively discretionary determination of the individual remuneration. This discretionary handling of salaries in turn contributes to reinforcing the allegiances of staff to their managers rather than to the law, thus undermining the principle of legality in the administration.

Do sufficient and reasonable mechanisms (basically mobility, training, and motivation) exist for good performance and career development within the civil service so as to make it attractive?

All civil service laws require the conduct of civil servants' performance appraisal (BiH State – art. 30; FBiH – art. 33; RS – art. 55; BD – art. 59). The performance cycle at the state level and in RS has been reduced to six months, while the Federation and Brčko District have continued to follow an annual cycle. The respective CSLs also stipulate that performance results are to be used as a basis for promotion and rewards. However, the implementation of these requirements has been slow, and managers are indifferent to this obligation. In fact, a number of institutions at all levels have simply ignored this obligation for years. Research carried out by a recently terminated technical assistance project[8], aimed at improving performance appraisal practices across civil service structures in BiH, has shown that managers do not consider performance appraisal as a human resources management tool. Performance appraisal is carried out primarily to satisfy formal legal requirements, although it is reported that institutions at all levels simply ignore the obligation to carry out these appraisals.

All administrations, except for BD, amended their rulebooks on performance appraisal in 2010-2011. BiH State and RS have introduced biannual appraisals, but managers are complaining that the whole process is too bureaucratic. It is understood that biannual appraisals have been introduced in order to reduce the period of time required before promoting performers and dismissing non-performers. However, the new BiH State Rulebook excludes the possibility of dismissal based on performance appraisal results. RS and FBiH will continue to apply the principle of "two consecutive negative marks and out", which in the case of RS now implies that two cycles instead of one will occur in one year. Although the CSLs provide for the performance appraisal result to have an impact on career prospects (e.g. in BiH State and RS, two successive highest marks enable the civil servant to move to the next salary class, while four highest marks may lead to a higher position, if one is available), in practice the consequences are almost non-existent.

The new rulebooks introduce an additional responsibility for individual institutions to forward to the respective civil service agencies summary data on the performance appraisal results. These data are

[8] The project entitled "Development of Performance Management System in the BiH Civil Service Structures" was carried out in 2010-2011 with financing from the PAR Fund, and co-ordination was provided by the Office of the PAR Co-ordinator in BiH (PARCO).

to be compiled by the CSAs and submitted to the respective governments in the form of standard reports. This is the first time that governments will have the opportunity to review results of performance appraisal, especially the "distribution of marks", which so far has been one of the main problems (as most managers tended to award the highest marks in order to "keep peace in the house"). The current BD Rulebook (enacted in 2006) will require a thorough revision, especially the provision requiring the presence of a member of the HRM sub-department at each performance appraisal interview. This practice has undoubtedly made managers more serious in their approach to the practice of performance appraisal but, on the negative side, it has undermined the confidentiality of performance interviews.

The performance appraisal exercise is viewed as a bizarre exercise that will hardly have any practical consequences in terms of improving the performance of governance institutions in BiH administrations. However, it may be used by managers and politicians to increase their authority and power over the staff. This possibility, together with the distortion of the remuneration scheme by means of the numerous allowances, further undermines the principle of legality.

Mobility is not used and is not encouraged as a mechanism for professional career enrichment, but it is used for political and ethnic homogenisation. To ensure that staff are loyal, ministers and other heads of office resort to the internal reassignment of civil servants: "The internal transfer of a civil servant from one position to a similar position can either be voluntary or imposed on the civil servant in question in accordance with objectively determined needs of the civil service for such a relocation" (art. 32-1 of the BiH State CSL). This provision is worded quite imprecisely, thereby allowing its application to an exchange of personnel between ministries on a personal basis or for political expedience.

Training at all levels of the BiH administration has been traditionally funded since 1995 by foreign donors. The financial crisis has continued to have adverse effects on donor allocations for various training projects. Domestic budgetary allocations for training have nevertheless not suffered too much, due partly to the already modest allocations set out for this purpose and partly to the fact that training funds are taken from the "special purposes" budget line, which also includes allocations for recruitment purposes (e.g. panel members' fees). Training provided by the Regional School for Public Administration (RESPA) has gained popularity among civil servants in all BiH administrations.

The long-standing problem of capacity in individual institutions is still very present. The various administrative structures in BiH will certainly benefit from a more co-ordinated approach to training. For example, the possibility for entity civil servants to attend relevant training provided at state level, and vice versa, would be a step towards the maximisation of limited resources.

The mandatory procurement procedure for the provision of training in all entities bar the BiH common institutions, where article 62-2 of the CS Law exempts from that procurement procedure, is problematic because it lacks flexibility and, for example, compels the CSA to put out to tender and choose the least expensive offer for any training costing more than 3,000 EUR, which may not always be the best option, all factors considered. Budgets allocated to training are not explicitly labelled as such in the budget laws. BiH authorities use instead the term "contractual services", which refers mainly to training. The figures for expenditures on training activities for 2010 were as follows : BiH State – 371,000 BAM (approximately 190,000 EUR); FBiH – 276,000 BAM (approx. 141,000 EUR); RS – 90,000 BAM (approx. 46,000 EUR); and BD – 201,000 BAM (approx. 103,000 EUR).

Training is organised after entry into the civil service, and the situation is similar at all levels of the administration (i.e. there is no training prior to employment). The CSA of BiH State has been organising since 2006 special cycles of general training for newly-employed civil servants, which is mandatory, and several training cycles are organised throughout each calendar year. The content of this training concerns legislation in the area of labour and in organisations of the administration and

in the civil service, development of social skills, codes of ethics and ethics in the public administration, office management, and European integration.

In addition to this training, which is centrally implemented by the BiH State CSA for all institutions, individual institutions organise specific training for their newly-employed civil servants and other employees. The CSA of BiH State used to have a special mechanism for assessing training in the form of "credits" (System of Training Credit Hours), where the value of training was expressed by the number of credits, depending on the duration, content and specific areas covered. Civil servants were required to obtain a minimum of five credits, and managerial civil servants a minimum of seven credits, of training attended during the year in order to qualify for best marks in the performance appraisal.[9] However, after an initial success, the system revealed its negative side, as civil servants were compelled to collect credits regardless of the training offered (which often did not meet demands) or of their own availability to undergo training. The CSA has abolished this system.

All four CSLs provide for the participation of civil servants in training and learning activities aimed at increasing their personal development and advancement of knowledge as "*the right and obligation of a civil servant*". RS and FBiH have adopted new training strategies, covering the 2011-2014 period for RS and 2011-2015 for FBiH. BD has adopted a Professional Development Plan for civil servants and support staff for 2011.

Training will probably continue to be dominated in the near future by the offers that donors have made rather than by the domestic needs of BiH governments, which could turn out to be not as negative as it sounds, if treated with caution.

Management of the Civil Service

Are systems for personnel management and cross-government structures established so as to ensure the application of homogeneous standards across the public administration?

Each of the civil service laws (CSLs) called for the creation of a Civil Service Agency (CSA) as the central human resources management institution. These agencies were to be created as statutorily independent bodies under, and answerable to, the Council of Ministers (BiH State) or to the government (FBiH, RS). The exception was Brčko District, which has a Sub-Department of Human Resources with roughly the same competences as the CSAs. The FBiH CSA is the only agency with a decentralised structure. It consists of a head office in Sarajevo and five regional offices, each of which serves two cantons.

Each CSA is tasked with the central management of the civil service for its respective jurisdiction, in particular for developing homogeneous standards for recruitment and promotion and for ensuring the implementation of the relevant civil service law. All three agencies are supposed to prepare the necessary amendments to the civil service legislation based on their experience in implementing the law. As noted above, all of the CSAs have a training department in charge of developing and providing training.

The Revised Action Plan 1 for Implementation of the Public Administration Reform (PAR) Strategy in BiH states that central HRM institutions should be further strengthened in the area of civil service policy making and advice provision. The first step in this implementation has already been taken; a meeting of the representatives of the three civil service agencies in BiH was held in Mostar in

[9] Decision on Reinstatement, Conditions and Methods of Establishment of Credits for Completed Training of Civil Servants in the Institutions of Bosnia and Herzegovina (Council of Ministers of BiH State, 2005, amendments of 2010)

December 2011. The reports of the meeting indicate that a verbal agreement was reached between the CSAs to formalise their co-operation (in the form of a Memorandum of Understanding).However, the RS representatives stated, shortly after the Mostar meeting, that formal co-operation could develop in the future into "something bigger" and eventually even diminish the current authority of the RS CSA.

The 2010 FBiH Constitutional Court Decision[10] stripped the FBiH CSA of the authority to administer civil service affairs at cantonal and municipal levels. The Court ruled that, according to the FBiH constitution, the competence on administrative matters belonged to cantonal structures. This ruling has caused significant confusion among cantonal administrations which, except for the West Herzegovina and Posavina Cantons, realised that they had no capacities to manage regular civil service activities. As a result, five of the ten cantons passed a law allowing the direct application of the FBiH CSL. The Una-Sana Canton adopted in January 2012 the "cantonal model law"[11], while the other two cantons have remained in a kind of legislative vacuum. Only the West Herzegovina and Posavina Cantons have adopted their own CSLs but, unlike the West Herzegovina Canton, which formed a special committee to be in charge of recruitment, the Posavina Canton has established no mechanisms to enforce the law.

Clearly, the Constitutional Court Decision has seriously destabilised not only the FBiH CSA but cantonal and municipal administrations as well. It is understood that the "new situation" has been used by various interlocutors to procure employment while no substantial procedures are in place. In addition, the Court's Decision opens the door to further fragmentation of an already fragmented civil service structure. The formation of additional structures in charge of civil service management at cantonal level will add at least 20 more institutions (10 central civil service bodies + 10 independent appeal boards), which will need to employ a minimum of 150 more staff. These additional structures represent a burden that an already fragile Federation structure will hardly be able to shoulder.

The central civil service institutions in BiH have continued to have problems with the functionality of personnel registries. This issue has been addressed through the EU-supported HRMIS project, aimed at providing standardised HRM software for all civil service structures in the country. However, the implementing company delivered software that proved to be sub-optimal. The complaints subsequently lodged by prospective users were not considered, as they had arrived after the stipulated deadline. The only way forward was for prospective users to sign expensive maintenance contracts with the company that had designed the software. The RS and FBiH CSAs quickly refused any such arrangements, while the state-level CSA attempted to secure funds for this maintenance but with no success. Only Brčko District has signed a maintenance contract with the software producer, which means that the BD administration is the only one using HRMIS software in its daily work. The value of the HRMIS project was 348,000 EUR.

The CSAs are still required to develop and maintain a civil service personnel registry. Unfortunately, the problems related to the functionalities of the HRMIS are not the only problems in this area. The BiH State CSA has been asked by the Personal Data Protection Agency to halt the collection of civil servants' personal data as it contravenes the BiH Law on the Protection of Personal Data. The CSA has drafted amendments to the CSL, which will open the door for the CSA to collect all data necessary to set up the new database, but these amendments have not yet been passed by the BiH State Parliament.

[10] Decision U-27/09 of 2010 was based on an appeal lodged by the West Herzegovina Canton. The Decision was challenged by the Prime Minster of the Federation of BiH, but the BiH State Constitutional Court rejected this appeal.

[11] This "model law" was developed primarily by the FBiH CSA, with the support of the OSCE mission in BiH. The law is considered to be in line with the provisions of the new draft CSL at Federation level.

Are staff numbers and personnel costs controlled and published?

In general, all administrative structures have rather strict staffing rules. The systematisation Rulebooks must be submitted to the ministries of finance for an opinion. Together with these opinions, the systematisation is submitted to the respective governments for adoption.

In principle, decisions concerning personnel as well as the internal restructuring of an institution (e.g. abolition and creation of units) are only possible after the respective governments have adopted the systematisation. However, the prior approval of the ministries of finance is usually required as well before starting a recruitment procedure in order to ensure that sufficient budgetary resources are available. In principle, this mechanism guarantees that approved staffing levels and personnel budgets are not exceeded. Funds are only released if a position is included in the approved systematisation and is actually filled.

Do staff representatives participate in decision-making and control concerning personnel management matters?

Public service unions are generally weak. Unions provide legal protection and representation for union members in court cases as well as legal counselling in the area of employment rights. All three public service unions in BiH have a role in the negotiations related to collective agreements. As these unions are members of large general unions at their respective levels, they may have an influential say in resisting the respective governments with regard to salaries and downsizing.

Do administrative practices and the legal administrative framework guarantee the principle of legality in administrative decision-making, and are they sufficient and appropriate to guide civil servants and public officials and to make them accountable for their performance?

Legality and Accountability Institutions

All four constitutions recognise the rule of law as the fundamental principle for the organisation and functioning of public institutions. Some accountability institutions have been established.

The Human Rights Ombudsman of BiH State is an independent institution, which was established in order to promote *"good governance and the rule of law and to protect the rights and freedoms of both physical and legal persons, as provided for in the BiH constitution, as well as in international treaties appended thereto".* This role of the Human Rights Ombudsman indicates how human rights issues are to be settled from a declaratory perspective, but governments tend to ignore the Ombudsman's recommendations.

The main, traditional, way for accountability is the administrative inspection in every public administration in BiH. Legislation on inspection awards fairly similar competences and functions to administrative inspectors at the different levels. Inspectorates are regulated in various laws: Law on Public Administration of Common BiH institutions, Law on the Organisation of Administrative Bodies in FBiH, and Law on Ministries and Law on Administrative Inspection in RS. In BD the inspectorates appear to be overregulated, as they are regulated by the Law on Public Administration of BD, the Law on Inspections of BD, and the BD Law on Administrative Procedures.

While carrying out the supervision of the implementation of laws and regulations, administrative inspectors supervise in particular, in the course of the administrative procedure, the exercise of rights and legal interests and the fulfilment of obligations of citizens, public corporations and companies, agencies and other legal entities. The inspectors also supervise the implementation of laws and regulations related to the organisation and functions of administrative bodies, labour relations in administrative bodies, and criteria to be fulfilled by persons who are empowered to carry out administrative decision-making (administrative procedure), as well as decision-making timeliness,

collection of evidence, administrative execution, maintenance of records, etc. (art. 84 of the Law on Administration). Administrative authorities and institutions are required to facilitate inspectors' access to administrative decision-making files and to act in accordance with the orders of the administrative inspector carrying out the supervision. They must provide the necessary data, files and information on the issues pertaining to the administrative matters that are to be decided under the administrative procedure.

Citizens, corporations and companies, agencies and other legal entities may address administrative inspectors (orally or in writing) in order to protect their rights, especially in the following cases: if their applications have not been taken into consideration in a timely manner; if they are required in the course of an administrative procedure to present certificates that have to be obtained from the official conducting the procedure by virtue of his/her position; if the administrative decision has not been executed in due time; and if they are not given aid in exercising their rights and interests (art. 88 of the Law on Administration). In RS as well civil servants may address the inspectorates for the protection of their rights.

On the whole, the system of supervision by administrative inspectorates is a defective accountability system, as it is deeply rooted in the former Yugoslav tradition of command and control, which had been designed to serve the requirements of a police state. At the present time the system is a bureaucratic machinery aimed at ensuring formal compliance with legal requirements. It is also frequently used as a mechanism of political control over the civil service. The control of legality would perhaps be better ensured by means of well-functioning external accountability mechanisms. Unless inspectorates are given a clearer role in monitoring efficiency and effectiveness as well as ensuring the quality of public services, the better option would be to abolish them.

Judicial control of administrative acts at the state level is provided for by the 2002 Law on Administrative Disputes of Bosnia and Herzegovina (LAD). The right to initiate an administrative dispute belongs to, *inter alia,* a citizen or legal entity, whose right or direct personal interest has been violated by a final administrative act. This right is also granted to civil servants if the final administrative act has violated their rights deriving from their civil service status and labour relations, as well as to groups representing collective interests (associations, foundations, corporations, trade unions, etc.) if the final administrative act has violated their collective rights or interests. The procedure can also be initiated by the Ombudsmen, in the event that the final administrative act has violated human dignity, constitutional rights and freedoms of citizens (art. 2, LAD). Decisions of the Court of Bosnia and Herzegovina (the court that is competent to try such cases) are final and binding (art. 3, LAD). The Court does not have full jurisdiction. Administrative disputes can be initiated solely against the final administrative act (art., LAD). These disputes are to be initiated by filing a lawsuit with the competent court within 60 days of the date of delivery of the disputed decision.

Administrative decisions by RS institutions are submitted for judicial review before the RS Supreme Court. Administrative disputes against lower-level decisions are decided by county courts, where the Supreme Court performs as an appelate court. However, the fact that all of these instruments guaranteeing the protection of citizens' rights are available does not necessarily mean that their application is faultless. The procedure before the court follows the RS Law on Administrative Disputes (2002). In reality, however, there are very few special provisions in that law for administrative cases, and consequently the Civil Procedures Law mainly applies. The district courts in RS cover all kinds of administrative cases, including those related to finance, war veterans, health care and property rights. Judicial review, as a rule of the second-instance decision before the Supreme Court of Republika Srpska, is used more frequently in comparison with its use at BiH State level.

In addition, in RS a direct judicial recourse against a first-instance decision is allowed in the case of decisions of the RS Concessions Commission (art. 17, RS Law on Concessions). The law provides for a

direct judicial recourse by filing a lawsuit with the RS Supreme Court against decisions of the Commission within 30 days of the date on which the decision was delivered. This rather positive picture, however, depends more precisely on the matters dealt with and the nature of the parties involved.

Judicial control of administrative acts at the FBiH level is provided for by the 1998 Law on Administrative Disputes FBiH. Administrative disputes in the Federation are decided by the cantonal courts (art. 5). They can be initiated solely against the final administrative act (art. 8) by filing a lawsuit with the competent court within 30 days of delivery of the contested decision (art. 18). In some areas these administrative disputes appear quite frequently – some FBiH institutions, as well as some cantonal institutions, have a long history of final administrative decisions being contested before the competent court. Decisions that are final in administrative procedure are open to judicial review before the competent court (cantonal courts and FBiH Supreme Court, depending on the level of government where the administrative decision became final). The right to initiate the procedure belongs to, *inter alia,* a citizen or legal entity whose right or direct personal interest has been violated by the final administrative act (art. 2). The procedure can also be initiated by the Ombudsmen, in the event that the final administrative act has violated human dignity, constitutional rights and freedoms of citizens (art. 2). The public attorney can also initiate a procedure if the final administrative act has breached the law to the detriment of the Federation, canton, city or municipality represented by the public attorney (art. 2).

By transferring the responsibility for administrative disputes to the cantonal courts, judgments on similar cases have become very divergent. Predictability and legal certainty have suffered as a result of these divergences. At the same time, the ordinary remedy – an appeal to the Supreme Court – has been abolished. At the present time the Federation has only some extraordinary remedies against cantonal judgments that allow for a review by the Supreme Court. Cantonal courts do not have full jurisdiction with regard to administrative cases, and in general they still have great difficulty in obtaining the administrative files from the respondent administrative authorities.

The legislation on administrative disputes needs to be unified for the whole country and amended so as to allow the full jurisdiction of the court in cases where administrative discretion is not allowed in the administrative decision-making procedure.

Distribution of Competences and Organisation of the Administration

Article III-3a) of the constitution (Annex 4 of the General Framework Agreement) establishes that “all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities”, while only a few competences are allotted to the institutions of BiH, which are not even referred to as “state institutions”, but simply as “institutions of BiH”.

There is no clarity in the distribution of administrative competences among public authorities as a result of the BiH State constitutional settlement. BiH State, the two entities and Brčko District all have general laws on the organisation of the government and the administration, but there is a clear and permanent “competition” between the state and entity governments, especially between the state administration and the Republika Srpska administration.

The inefficiency of public institutions and wasteful administration are the main criticisms raised by the international community against the present status quo of BiH. The World Bank has stated that in BiH “government institutions remain cumbersome, excessively decentralized and expensive… Recommended measures include broad-based efforts to strengthen state-level government institutions, ensure fiscal sustainability and reduce the government burden on the economy… Vested interests within the three constituent peoples, the Bosniaks, the Croats and the Serbs, have resisted

changes to the Dayton Peace Agreement (DPA) for longer than initially envisioned, hampering much needed progress towards a modern and efficient government. The indirect costs to BiH from failing to reform and modernize the DPA ten years after the war are probably large, but hard to quantify." SIGMA's 2008 assessment of the administrative law framework in BiH stated that "the system inevitably results in a continuous – either apparent or concealed – struggle to enlarge competences, always at the expense of other governments, at all levels, horizontally and vertically, which in turn creates an intractable legal maze. The real problem rests with BiH's current politico-administrative structure, which hardly allows for arbitration among competing interests, given the practical absence of accepted arbitration mechanisms."[12] Similar conclusions may be found in the reports of other international observers[13].

The main law of BiH State in the area of public administration is the Law on Ministries and Other Bodies of Administration of BiH, which establishes ministries, administrative organisations and other institutions of BiH State carrying out tasks and duties of administration and specifies their scope of work and the manner of their management as well as other issues concerning their functioning. The tasks and duties of the administration within the competence of BiH State are carried out by ministries, administrative organisations as independent administrative organisations, administrative organisations within ministries, as well as other institutions of BiH State as established by separate laws or as assigned by separate laws to carry out the tasks and duties of the administration (art. 2 of the law).

The BiH State constitution assigns to the institutions of the Federation of BiH all responsibilities that are not specifically assigned to BiH State institutions. However, the progressive implementation of the constitutional set-up has somehow resulted in areas of joint concern for both entity and state institutions. BiH State institutions sometimes decide to file appeals against decisions made by FBiH institutions.[14] The same situation has to some extent been replicated in the relationship between the FBiH and the ten cantons. While chapter III of the FBiH constitution provides the cantons with relevant exclusive responsibilities, other responsibilities are envisaged as being "shared" between the cantons and the Federation[15], resulting in some legislation that is applicable from both sides.[16]

The fundamental laws regulating the competences of public administration institutions in Republika Srpska is the RS Law on Ministries and the Law on the Republic Administration of 2008, as amended in 2010.

Ministries are defined in the RS law as civil service bodies that perform administrative and other activities in one or more administrative sphere of activity; they are not under the supervision of another civil service body but are directly subordinated to the RS government. The ministries are responsible for their own organisation and management and for the training of their own staff.

---

12 SIGMA (2008), "Assessment Report of the Administrative Legal Framework in Bosnia and Herzegovina", at: http://www.sigmaweb.org/dataoecd/48/12/41636289.pdf

13 See, for example, Open Society Fund Bosnia and Herzegovina (2006), "Assessing Democracy in BiH", at: http://pdc.ceu.hu/archive/00003187/01/democracy_assessment_in_BiH.pdf

14 For instance, in the area of civil aviation, matters concerning foreigners or concerning personal documents, etc.

15 Areas of social welfare, health and environment

16 Against this background, there are cases in which FBiH institutions have filed appeals against decisions taken in the cantons (e.g. change of entity citizenship, based on powers delegated by the Federation, and issuing of work permits to security agencies, in both cases decided by the cantonal ministry of internal affairs).

RS administrative units are administrative bodies within the composition of independent administrative bodies (ministries), and they are established for the purpose of performing specific activities that are within the sphere of activity of the RS administration. Due to their way of performing, these units require independence and special organisation (administrations, inspectorates, secretariats, institutes, agencies and centres). The RS administrative units report to the ministry in which they are placed.

RS administrative organisations are established for the purpose of performing professional duties of the administration (institutions, directorates, secretariats, agencies, commissariats, funds, centres and other forms). These organisations may have the attributes of a legal entity. The activities of the RS administration may be performed by other bodies (President of the Republic, RS government) as well as by non-state entities (local self-governance units, enterprises and institutions with public authorisation), if the law entrusts them with such activities.

The Brčko District (BD) previously had a "government", consisting of the Mayor and the heads of department. The heads of department were not individually responsible in the political sense, but managed their departments within the framework of the Mayor's policy making powers. This situation facilitated a considerable amount of centralisation, as the entire structure resembled a single ministerial portfolio held by the Mayor. In 2007 the BD Statute was changed. The Mayor's powers were considerably diminished and transferred to the BD government, i.e. to the heads of department.[17]

Administrative Procedures

BiH State authorities decide on administrative cases by applying the Law on Administrative Procedure of Bosnia and Herzegovina (LAP), which is similar to the laws on administrative procedure in force in the two entities (1998 in FBiH and 2000 in RS) and in Brčko District. As several analyses of the laws have emphasised, most of the differences between these laws result from the differences in territorial/political organisation. All of these laws emanate from the same practice, which dates back to the Socialist Federal Republic of Yugoslavia (SFRY) law of 1956, which in turn was based on the Law on General Administrative Procedure of the Kingdom of Yugoslavia of 1930, which was modelled on the Austrian Law on Administrative Procedure of 1925. Concerning capacity in the application of the LAP, given the administrative decision-making practices in BiH, the majority of decisions on administrative cases are not taken by BiH State institutions. As stated above, it is left up to the entities and, more precisely, to the municipal level of both entities to take most of these decisions.

The cantons have adopted their own legislation, which is often unaligned with entity and state legislation. The existence of numerous and different laws and regulations on administrative procedures at state, entity and canton levels impinges on the rights of citizens, legal certainty and, ultimately, the rule of law. The FBiH Law on Administrative Procedures explicitly allows the setting up of special procedures for certain administrative domains. Despite the common roots of law in the various jurisdictions, the international donor community, through its assistance programmes and its leadership role, has increased the divergence in the development of legal frameworks.

It has to be noted that the laws on administrative procedures, at BiH State level as well as at entity level, are routinely violated by public authorities either on purpose or out of ignorance, as can be deduced from the reports produced by the Ombudsmen at all levels. Most of the recommendations contained in those reports refer to the ignorance on the part of the authorities of basic organisational regulations, such as identification of the competence to act, procedural regulations

[17] These changes had a serious impact on all BD laws, which had to be changed in order to accommodate the new competences that had been granted to the BD Government.

resulting in blatant violations of the legal guarantees of citizens, and substantive law. It seems that these shortcomings appear in all administrative settings, from municipal level to state level.

The laws on administrative procedures need to undergo a thorough review in order to be harmonised *or* better unified and adapted to general European principles, in particular with regard to transparency, guaranteeing the hearings of parties, legal certainty and discretion. Special administrative procedure laws will have to be reduced to the absolute minimum.

Administrative Transparency

The central question here concerns the right of access to administrative documents. The practice of this right, which is a main indicator of the transparency of administrative decision-making, is subject to a double form of regulation in the BiH State administration, which results in a lack of clarity with regard to the applicable normative framework.

On the one hand, access to administrative documents is regulated in article 72 of the BiH State Law on Administrative Procedure (LAP). A party in the procedure can request, at any stage of the process, the responsible official to disclose the information in the file (i.e. pertaining to the procedure itself). This request, which can be made verbally, results in the right of the party to access the file and to obtain, at his/her own cost, copies of the documents collected therein – provided, obviously, that their content is not officially classified as a secret protected by legislation (e.g. state, military or business secret or personal data of other individuals).

On the other hand, a separate BiH State Law on Free Access to Information (2000) allows any citizen to submit a written request to obtain, within 15 days of the date of the request, any information held by the administration. The objective of the law is in fact to serve as a general law on transparent government that, apart from any concern for administrative decision-making in specific cases, addresses the needs of the public in general.

It is worth mentioning that the FBiH LAP (art. 6) does not include the principle of transparency, which would establish an obligation for institutions involved in administrative decision-making to act in accordance with the Law on Free Access to Information.

In RS, freedom of information is regulated in the same manner as it is regulated at state and FBiH levels. Access to administrative documents is regulated in article 68 of the RS Law on Administrative Procedures (LAP). While this “freedom of information” law has established a new procedure for access to government-held information, it has not introduced new principles of administrative procedure in the general sense. Concerning access to the file within a procedure, the matter was already regulated in the pre-war LAP, and this access is not new in the LAP enacted at the RS level. The modalities of access in the RS LAP, moreover, are clearly less burdensome for the parties, as there is no need for a written request and no long delays for the receipt of an answer.

In terms of freedom of information, the applicable law in BD is the BiH State Law on Free Access to Information. This free access simply applies directly from the BiH State law, according to which any member of the public can, by means of a written request, obtain within 15 days free copies of any information held by the administration. As at the other levels of BiH, the relevant practice in Brčko District, which is a main indicator of the transparency of administrative decision-making, is subject to a double form of regulation, reducing clarity with regard to the applicable normative framework. The lack of clarity, unfortunately, seems to partly result from the BD LAP, in which article 6 establishes an obligation for the institutions involved in administrative decision-making to act in accordance with the BiH State Law on Free Access to Information. This obligation results in practical dilemmas, including the choice of either oral or written requests, as well as the equivalence or difference between the official responsible for the procedure (in the framework of the BD LAP) and the

information officer to be identified by each institution (in accordance with article 16 of the BiH State Law on Free Access to Information).

INTEGRITY

Corruption remains a serious problem and is widespread in all public administrations of Bosnia and Herzegovina (BiH). Governmental initiatives to combat corruption have been largely ineffective. While the legal and institutional frameworks for the fight against corruption are – by and large – in place, on the one hand there are disparities between proclaimed policies, adopted laws, established institutions and procedures, and on the other, a lack of implementation and enforcement. Corruption is particularly acute in public procurement, but other risky areas include the issuing of various kinds of permits as well as certain public services, such as public health and education.

Main Developments Since the Last Assessment (May 2011)

There has been limited progress in strengthening the public integrity system since the last assessment. At the BiH State level, the Code of Ethics for Parliamentarians was amended in October 2011 to introduce mainly procedural modifications. The Code now stipulates that any appeal against a decision by the Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees Asylum and Ethics is to be lodged with the Joint Committee on Administrative Procedures.

An inter-institutional ad hoc commission was formed in October 2011 to elaborate amendments to the Election Law, the Law on the Financing of Political Parties, and the Law on Conflict of Interest at BiH State level. The Commission comprises members of both houses of the BiH State Parliament and of the Central Election Commission (CEC).

The Agency for the Prevention of Corruption and the Co-ordination of the Fight against Corruption was formally established, with the appointment of its director and deputy directors as well as a minimum number of staff, but it has remained largely non-operational. Its human resources and budget seem to be inadequate.

Main Characteristics

The existence of the Anti-corruption Strategy 2009-2014 (ACS) has not contributed to the advancement of anti-corruption reforms. Now in its third year, the Strategy remains for the most part unimplemented and has little influence on politicians and political parties.

The ACS focuses on capacity-building of the new Agency for the Prevention of Corruption and the Co-ordination of the Fight against Corruption; preventive measures of a generic nature, such as simplified and stricter administrative rules and procedures and greater transparency and accountability; education and training; and law enforcement, co-ordination and international co-operation. The ACS is comprehensive and, if implemented, should contribute to reducing the level of corruption in BiH.

The ownership of the ACS is problematic, however, and weak across the institutions that are in charge of implementing its measures. In particular, the Agency, formally in the lead for co-ordinating implementation of the ACS, has remained for the most part non-operational due to the lack of premises and other infrastructure as well as human and financial resources.

The Agency was established by law at the end of 2009, but as a result of the lack of political will to address corruption, it has not yet been made fully operational. Currently, the Agency has a director

and two deputy directors, as well as one administrative staff member. These resources are completely inadequate for the Agency to carry out any meaningful work in accordance with its mandate.

While loopholes remain, relevant legislation at state level has been brought into line with international standards. There is a further need for harmonisation between the various governments at state level, in the entities, and in Brčko District (BD).

Discrepancies exist between the conflict-of-interest legislation at BiH State level and at district and entity levels, especially in Republika Srpska (RS). In particular, the BiH State law applies to a wider group of persons than the group covered by the RS law. Discrepancies are also found in the post-employment provisions. Familiarity with the provisions of the four laws on conflict of interest seems to be low among the many categories of officials covered by the laws. The key challenge, however, remains the implementation of legislation. In this regard, under-regulation is oftentimes cited as the main reason for non-compliance.

The Central Election Commission (CEC) has continued to exercise its functions with regard to the income and asset declarations of elected officials, and it has imposed fines on several individuals who failed to submit their asset declarations on time. However, the media has reported a number of cases of elected officials who had significantly under-declared their assets.

The current legal framework on political party and electoral campaign financing is flawed, as political parties can exceed their ceilings on electoral campaign spending by pre-dating expenditures incurred during the electoral campaign, as there are no ceiling on the spending of political parties outside electoral campaigns. A further concern regards bodies (such as non-governmental organisations or foundations) that are directly or indirectly related to political parties. The accounts of these bodies are not subject to the control stipulated by the Law on Financing Political Parties, and there is some concern that political party expenditure, in particular spending related to pre-election funding, is carried out through these bodies or that the resources of these bodies are used to facilitate and finance pre-election activities.

On the whole, the legal framework defining immunities in BiH is robust, as it does not pose any obstacles to the criminal prosecution of public officials, and it even extends to members of parliament.

Reform Capacity

The high level of corruption in Bosnia and Herzegovina has not declined in the past few years. Whenever reforms are carried out, they are still largely motivated by external pressure.

The complexities of the institutional set-up derived from the Dayton Agreement are not conducive to reducing corruption or to developing efficient anti-corruption policy. On the contrary, the complexity and weaknesses of the public governance system in BiH make it prone to capture by private (or other) interests. In this context, reforms are highly unlikely to occur and even less likely to be durable.

Recommendations

To Bosnia and Herzegovina

The Agency for the Prevention of Corruption and the Co-ordination of the Fight against Corruption should be given the authority, resources and political backing to start operations in accordance with its mandate, in particular the implementation of the Anti-corruption Strategy 2009-2014 (ACS).

- The GRECO recommendations on political financing should be implemented, in particular by strengthening the audit of political party financing. A single legal framework for political party and electoral campaign financing would provide more clarity, reduce opportunities for political party capture, and ensure fairer political competition across the whole country. The institutionalisation and strengthening of co-operation between the Central Election Commission (CEC), law enforcement structures and tax authorities are recommended.

- Legislation governing conflict of interest should be harmonised across the levels of government and should allow for a legal mechanism for dismissing officials from office in cases where the CEC has established a conflict of interest; work should be undertaken to better acquaint persons covered by conflict-of-interest legislation with the spirit and content of the law.

- Substantive and procedural criminal law should be made homogeneous across the whole territory of Bosnia and Herzegovina.

- Parliaments and checks-and-balances mechanisms should be given a more prominent role in preventing corruption.

To the European Commission

As a conditionality for further assistance, BiH State is to ensure compliance with the principles, priorities and demands set forth by the European Union before and after accession. BiH State should undertake the required measures and determine the procedures for the fulfilment of all criteria for accession and membership in the European Union, which also includes the necessary mechanisms of co-ordination and co-operation with authorities at entity and BD levels.

Detailed Analysis

This report provides an analysis of some key elements of the public integrity framework of Bosnia and Herzegovina (hereafter referred to as BiH). The report should help to orient reforms and assistance. To delineate the "integrity framework", we have drawn on concepts provided by OECD, the Council of Europe and the European Commission. The public sector elements of the framework comprise constitutional arrangements, the judiciary (including the prosecution), parliament, political campaigns and party financing, political accountability and responsibility, the public service and the administrative legal framework, external audit (including mechanisms to combat fraud), public procurement, the public expenditure management system, public internal financial control, policy making and regulatory processes. These elements apply to all levels of the state, including the entities (FBiH and RS), Brčko District, municipalities and state enterprises.

In this report, we assess the extent to which institutional arrangements underpin, or undermine, integrity in parliament, the government (in its continental European meaning, i.e. the council of ministers as a constitutional body), and the judiciary. We also look at how political arrangements, especially the financing of political parties and electoral campaigns, affect the integrity system. We then turn to national policies and institutions aimed at fighting corruption. Finally, we list the incorporation in BiH of the main international instruments for harmonising anti-corruption policies and legislation.

In other reports, we have assessed elements that have an impact on the integrity framework in the public administration. The separation between these elements is not clear-cut because of overlaps in certain aspects – for example, rules concerning asset declaration may address civil servants, judges and/or politicians in the same legal instrument. The public administration elements that we have assessed were selected by the European Commission.

In 2012 SIGMA has provided assessments of BiH in the following areas: a) civil service, b) administrative framework, c) external audit, d) public expenditure management, e) public procurement, f) public internal financial control, and g) policy making and co-ordination. This report on Public Integrity in BiH should be read in conjunction with the other seven assessment reports.

Integrity in Parliament and in the Executive

Parliamentary Immunity

At BiH State level, in both entities and in Brčko District, MPs are not liable for any vote expressed or action carried out in the exercise of their duties and functions. The immunity of MPs of BiH common institutions is laid down in article 14 of the Rulebook on the House of Peoples; the lifting of immunity is to be decided by the House on a case-by-case basis, and in accordance with the constitution, on the recommendation of the Commission on Constitutional Law of the House of Peoples. The immunity of MPs of the Republika Srpska (RS) Parliament (National Assembly and People's Council) is set out in article 73 of the RS constitution, whilst article 115 stipulates that issues related to immunity are to be decided by the RS Constitutional Court. Article 27 of the Brčko District Statute grants immunity to members of the Municipal Assembly.

In the Federation of BiH (FBiH), there seems to be a need to harmonise the Rulebooks of the House of Representatives and the House of Peoples of the FBiH Parliament with constitutional provisions, which appear to reflect an older, pre-2003, immunities regime. Article 13 of the constitution grants MPs immunity for acts carried out while on duty. The rules of procedures of both chambers of parliament, however, go further by also dealing with inviolability against arrest, and without limiting this immunity to acts committed while on duty.

As the procedural rules of parliament cannot technically grant immunities that are not based on the constitution, these procedural rules are probably outdated. It might be that they refer to an older version of the constitution that granted inviolability against arrest as well. Immunities of members of the House of Representatives are set out in its Rulebook, articles 18 to 22. Article 19 stipulates that the arrest of an MP who was caught while committing a criminal offence punishable by prison must be approved by the House of Representatives. To this end, the President of the House of Representatives has to call a session no later than 48 hours after he/she has been informed of the arrest by the respective organ, and this session has to be held no later than five days after it was called. The President of the House of Representatives has to inform the Mandatory-Immunity Commission of the request for approval of the arrest of an MP, and the Commission has to inform the extraordinary session of its opinion (article 20). The decision of the House of Representatives for or against lifting the MP's immunity has to be submitted to the relevant authorities within five days of the session. The MP can only be criminally prosecuted for the offence committed as put forward to the House of Representatives, not for any other offence (articles 21 and 22). With regard to the FBiH House of Peoples, its Rulebook's Section 3, articles 20 to 22, covers the immunity of MPs, with article 22 stipulating that the lifting of immunity is to be carried out in accordance with the constitution and the law.

In practice, however, this lack of harmonisation has not caused any problem, as FBiH law enforcement authorities seem to have acted in accordance with constitutional provisions and have never called on parliament to invoke the above rules.

Incompatibility, Ethics, Conflict of Interest and Asset Declaration of Parliamentarians

The existing Law on Conflict of Interest in Governmental Institutions of BiH was imposed by the Office of the High Representative (OHR) on 23 May 2002, with the latest amendments made in 2008. The BiH State Law on Conflict of Interest applies to elected officials, executive office-holders and advisers to the government; it does not cover either entity or BD, which have separate legislation.

In late 2009, a new version of the Law on Conflict of Interest was submitted to parliament, which was not adopted in part because of concerns voiced by the international community, which feared the watering-down of the conflict-of-interest regime. A working group at ministerial level was given the task of working on a new draft, which was rejected by parliament prior to receiving, in June 2010, the official opinion of the Council of Europe's Venice Commission, which the House of Representatives of the Parliamentary Assembly of BiH had requested.

An inter-institutional ad hoc commission was formed in October 2011 to elaborate amendments to the Election Law, the Law on the Financing of Political Parties, and the Law on Conflict of Interest at BiH State level. The commission membership comprises representatives of both houses of parliament and of the Central Election Commission (CEC). The CEC oversees the implementation of the law. New guidelines on the implementation of the law were issued in October 2010.

The law stipulates the incompatibility of public officials and their close relatives with membership in management, administrative, and executive boards of public enterprises; membership in the management board or directorate of the Privatisation Agency or fulfilment of the post of director of the Privatisation Agency and involvement in private enterprises insofar as it could lead to a conflict of interest. The last incompatibility concerns the situation where the institution that the public official represents has invested in a private company in the course of the four years prior to the official's appointment to public office. The law also forbids public officials from being involved in private companies having business with the government and from receiving gifts in exchange for services. The law states the obligation of public or private companies bidding for government contracts to disclose the political parties to which they had made donations during the last two years as well as the names of any elected public officials who were involved in the enterprise prior to their election

or nomination to office. The law establishes the obligation of public officials to submit an annual asset declaration.

Amendments to the Law on the Prevention of Conflicts of Interest in Governmental Institutions of the Republika Srpska were adopted in 2008, with a view to bringing RS legislation into line with the provisions of the BiH State law, with which it has many similarities but also some major discrepancies in terms of the scope of the law (see below). The RS law covers elected officials, public office-holders and advisers in government structures of the RS at central level as well as persons exercising public functions in RS local-self government units. Compliance with the provisions of the law is overseen by a special parliamentary commission.

In 2008 amendments were adopted to the Law on the Prevention of Conflict of Interest in the Governmental Institutions of the government of the Federation of BiH, with a view to bringing the FBiH law into line with the provisions of the BiH State law. The FBiH law covers elected officials, officials performing public functions and advisers performing public functions in the institutions of government of the Federation, including at cantonal level and at the level of units of local self-governance. The Central Election Commission (CEC) is in charge of overseeing compliance with the law. The FBiH Law on Conflict of Interest follows for the most part the BiH State law.

The Law on the Prevention of Conflict of Interest in the Institutions of Brčko District was imposed by a decision of the Supervisor of BD in 2008. The law covers elected officials, officials performing public functions, and advisers to the institutions of BD who perform public functions. The CEC is in charge of overseeing compliance with the law in BD.

There are discrepancies between the legislation at BiH State level and the legislation at district and entity levels, especially in RS. In particular, the BiH State law applies to a wider group of persons than the group covered by the RS law. Discrepancies are also found in the post-employment provisions: according to the BiH State law (and reflected in the FBiH and BD laws), public office-holders, as defined by the law, are not allowed to serve on the board or as the director of a public enterprise for a period of six months following their term of public office, while this period is only three months in the RS law.

Familiarity with the provisions of the four existing laws on conflict of interest seems to be low among the many categories of officials covered by the laws, which leads to a fairly high turnover of elected officials, and as a result this situation could be seen as a disturbance to the political process. The CEC also investigates cases of suspected conflict of interest. Available information in this regard suggests that the disclosure of officials' conflicts of interest occurs in various ways, including through media reporting.

The 2001 Election Law as well as the 2002 BiH State Law on the Prevention of Conflict of Interest established equal principles for the disclosure of assets at the levels of BiH State, entities, cantons and municipalities, as well as in Brčko District. The CEC reviews personal declarations of conflict of interest and the declarations of assets of officials who fall within the scope of this law at the BiH State level, as well as in FBiH and BD. The CEC maintains the records of income and asset declarations of elected officials, and in the past it has issued fines to several individuals who failed to submit their asset declarations on time. There have been numerous media reports on officials under-declaring their income and assets; the CEC cannot, in these cases, investigate whether the information filed was true or complete.

The CEC has issued sanctions to elected officials who were found to be in breach of the conflict-of-interest legislation. However, the decision of the CEC was not respected in all cases, and officials did not pay the corresponding fines, or they did so very late. In these cases, the CEC has been unable to take any further measures to enforce its decisions. It is at this point that the law remains

unimplemented, including in high-profile cases at state and BD levels, where the CEC has clearly confirmed the existence of a conflict of interest that should have led to the official's proactive resignation from office.

At the BiH State level, parliament has adopted a Code of Ethics for Parliamentarians. The Code, which was adopted in 2008, is highly contested and remains virtually unimplemented. The BiH State Parliament has reported that it has not had a single case of a breach of the Code of Ethics, and attributes this situation, at least in part, to the absence so far of procedures for implementation of the Code. The Code foresees a number of sanctions, including fines.

The FBiH Parliament has also adopted a Code of Ethics for MPs. Despite a number of sanctions in the case of a breach, the FBiH Code does not have any procedures attached to it that would set out the way in which these sanctions would be applied. MPs have stated that, to date, no case of a breach of the Code has been registered, partly because of a lack of procedures to do so. The Code includes provisions on conflict of interest, but MPs state that dealing with specific cases of conflict of interest would not be within their authority but within the exclusive authority of the CEC.

A Code of Ethics for BD parliamentarians is in place. Article IV, point 3 of the BD Code obliges parliamentarians to declare any conflicts of interest; failure to declare or the submission of false information would be sanctioned. No breach of the conflict-of-interest provision of the BD Code of Ethics has been recorded by the Commission for the Implementation of the Code of Ethics of the BD Assembly, which is in charge of overseeing the Code's implementation and of dealing with complaints, which can also be received from the public.

No code of ethics has been established for the parliamentarians of RS.

In summary, concerning the conflict-of-interest regime, the harmonisation of state-level legislation and legislation in the RS is needed. It is also necessary to define a procedure for resignation from office of officials who have been found by the CEC to be in a conflict-of-interest situation. The policy of enacting codes of ethics for parliamentarians has proved to be unsuitable in the BiH context.

Remuneration of Members of Parliament

The remuneration of parliamentarians and government members at BiH State level is defined in the Law on Salaries and Remunerations of Officials Employed in the Institutions of BiH. In FBiH, the Law on Salaries and Reimbursements in government Institutions of the Federation of BiH covers, *inter alia*, elected officials. Article 20 of the law sets out the salaries according to a co-efficient that is applied to specific categories (12 in total), where the highest category is I (the Federation Chairman) and the coefficient is 10.00; followed by category II (deputy chairmen of the Federation, chairmen of the two houses of parliament, and Prime Minister of the Federation), where the coefficient is 9.80. In BD, this remuneration is regulated by the Law on the Representatives of the BD Assembly.

Immunity, Incompatibility and Conflict of Interest of Members of Executive Bodies

There is no immunity for members of the executive in BiH at either state or entity level. In BD, article 54 of the BD Statute stipulates that members of the government of the District cannot fulfil any other function in either the public or private sector during their term in office.

Role of Parliament in Combating Corruption

Political Accountability of government to Parliament

The BiH parliaments use the standard procedures of questions, enquiries and interpellations to control governments, but these procedures are generally used in an inconclusive manner and therefore have a very limited effect on controlling governments or state administrations.

At the BiH State level, parliament has at its disposal formal mechanisms to hold the government to account. Article 4, paragraph 4 of the BiH State constitution defines, among the powers of parliament, the adoption of the budget for the functioning of institutions at BiH State level. At the entity level, the RS Parliament, according to the RS constitution, controls the work of the government. In the Federation, the Joint Parliamentary Standing Committee on Audit adopts the report of the FBiH auditor. The BD Assembly has established a Commission on the Monitoring and Oversight of the Work of the government.

The FBiH Parliament gives to MPs the opportunity to pose questions to the government during each parliamentary session. This procedure is regulated by article 116 of the Rulebook of the House of Representatives and by article 234 of the Rulebook of the House of Peoples. In practice, the questions are read out loud during the session and are then resubmitted in writing, with the responses then submitted by the respective government service to the MPs in writing. MPs reported that they have not received responses to all of the questions that were submitted to parliament. The FBiH Parliament also has a "Question Time" every month. In the RS Assembly, MPs' questions are part of each session. The questions and responses are made public on the RS Assembly website. In BD, parliamentarians have the possibility of posing questions to the government at each Assembly meeting. The response rate to these enquiries varies, with responses often submitted late or not at all.

A number of institutions submit annual reports to the parliaments. Among them is the Institution of the Ombudsmen in BiH State, which by law is obliged to report to the BiH Presidency, the two chambers of the Parliamentary Assembly of BiH State, the Federation Parliament, and the RS Parliament. The Supreme Audit Institution at BiH State level (SAI BiH) also reports to the BiH State Parliament (House of Representatives), which adopts its reports. The High Judicial and Prosecutorial Council (HJPC) reports to the parliaments at state and entity levels; the parliaments can summon the HJPC President or another authorised person to discuss its reports. The same applies to the Agency for the Prevention of Corruption and the Co-ordination of the Fight against Corruption, which also reports to the BiH State Parliament, as does the Central Election Committee (CEC).

In summary, the parliaments' role in combating corruption is almost negligible. This role of the BiH parliaments needs to be strengthened within a broader context of reinforcing the overall system of checks and balances.

Political Party and Electoral Campaign Financing

General Legal Framework

The Law on the Financing of Political Parties (LFPP) governs the financing of political parties at BiH State level. In Republika Srpska there is a Law on the Financing of Political Parties from the Budget of the RS, cities and municipalities. A separate law exists for Brčko District, the Law on Financing of Political Parties from the Budget of the Brčko District of BiH. Other relevant laws in this context are: the Election Law of BiH State (specifically chapter 15, which deals with campaign financing); secondary legislation, such as rulebooks and guidelines issued by the CEC in connection with the Election Law of BiH State; the laws on conflict of interest (at BiH State level and in RS and BD); and laws concerning the registration of political parties. Amendments to these laws were made

in June 2010, which allowed the doubling of the amount of contributions made to political parties by legal persons.

Sources of Political Party Revenues

There is no direct public funding to political parties at BiH State level. Parties represented in the BiH State Parliamentary Assembly receive public funding according to a specific quota (whereby 30% of the public funding available is distributed equally to all groups represented in parliament, while the remaining 60% is distributed according to the number of seats and 10% according to the gender balance of the groups).

In RS, public funding is provided according to representation in the RS Parliament and to all parties, candidates and coalitions on confirmed electoral lists. Public funding amounts to at least 0.2% of the RS budget. These funds are allocated according to a quota, whereby 20% is allocated to all representatives or confirmed candidates and 80% according to representation in the RS Parliament.

In Brčko District, 0.1% of the budget is earmarked for the funding of political parties. Here, the quota is 30% of the funds allocated to all representatives, while the remaining 70% is allocated in accordance with the number of seats of each political group in the BD Assembly.

The sources of income for political parties are membership fees, donations, income from property owned by the party, and income from enterprises run by the party (these enterprises are limited to publishing and cultural activities). Membership fees are regular contributions paid in accordance with the political party statutes. There is no maximum financial amount for the membership fee that a party can set; if a member pays more than the amount of this fee, the excess amount is considered to be a private donation. With regard to income from property or enterprises owned by political parties, according to article 3 of the LFPP at BiH State level, this income must not exceed 20% of the party's total annual income. If it does, the excess has to be donated to charitable organisations within a period of 30 days after the submission of the annual financial report. Loans are a possible source of income for political parties, as are donations.

Donations and Private Financing

In accordance with the BiH State Law on the Financing of Political Parties (LFPP), private donations (in cash or in kind) can be made to political parties or individual party members acting on behalf of the party by legal and physical persons. Amendments made in June 2010 set the contributions by legal entities, per calendar year, at 15 times the average monthly net wage; the maximum amount of a donation by a private person was maintained at eight times the average net wage (LFPP, art. 5); accordingly, the maximum donation to a political party by a legal entity is approximately 6,120 € and by private persons 3,260 €. There are no exceptions to these ceilings during election periods. The LFPP guarantees the possible sources of donations to political parties: organisation/bodies at state, entity and cantonal levels cannot provide donations to individual political parties; neither can public institutions, enterprises, humanitarian organisations or religious communities. Political parties may also not receive funding from private bodies that receive public funding amounting to or more than 25% of the total funding or from enterprises fulfilling government contracts. The LFPP (art. 8) prohibits anonymous donations to political parties, but – quite inconsistently – political parties are not obliged to reveal to the public the identity of donors having contributed in excess of 50 €to the party. Donations to political parties are not tax-deductible.

Electoral Campaign Funding

At BiH State level, there is no direct public funding for electoral campaigns. In RS, political parties and candidates receive a share, according to the RS Election Law, of at least 0.05% of the RS budget. In BD, there is an upper threshold of 0.03% for public funding of electoral campaigns – the campaign

expenditures of political parties are reimbursed for an amount of up to 2000 € . The same limitations apply to funding by legal or private persons during electoral campaigns. The BiH State Election Law sets upper limits on expenditures during electoral campaigns. The Central Election Commission (CEC), seven days after drawing up the Central Voters Register, calculates the ceilings for expenditures, based on the number of voters in each electoral unit where the political party, candidate, or coalition is standing for election. The basic amount that can be spent per voter differs (between 0'10 and 0'15 €), depending on the type of election being held (i.e. local/municipal/cantonal election, parliamentary election or presidential election). According to 2010 data compiled by the CEC, none of the major parties declared expenditures that were close to the maximum ceiling.

Financial Reporting and Sanctions

Political parties have to comply with the Accounting and Audit Law of BiH State. They are obliged to keep records of income and expenditure. Various types of reports have to be submitted according to various schedules. For example, annual reports, according to article 11 of the LFPP, have to be submitted to the CEC by 31 March for all operations carried out during the previous calendar year. The CEC maintains these records for a period of six years after their submission. According to the LFPP and the Election Law, political parties must keep a record of donations; the annual reports and the electoral campaign reports place an obligation on parties to reveal the names of all donors having contributed more than 25 €.

The Rulebook on Annual Financial Reports sets the parameters for the reporting by political parties, including the format and type of information to be covered. The CEC is responsible for ensuring that the parties adhere to these rules. The Rulebook also sets the parameters for reporting before and after electoral campaigns. Political parties, coalitions and candidates are required, when applying for certification for an election, to submit a pre-election financial report; 30 days after the publication of the final results of the election, a post-election report has to be submitted.

The LFPP requires the CEC to make public all reports, including financial reports that it has received from political parties; these reports are published on the CEC website. Financial reports are presented in an aggregated version, but the public can request access to all information submitted to the CEC, which subsequently is obliged to make all details of the reports available.

There are no requirements in the LFPP or in the Election Law concerning internal audit procedures of political parties. However, the Law on Accounting and Audit requires legal entities with an annual turnover in excess of € 4 million or with a number of employees exceeding 50 to engage external auditors (according to GRECO, this provision concerned four political parties at the time of the Third Round Evaluation).

External audit of the financing of political parties and political candidates is carried out by the Audit Department of the CEC. The Audit Department consists of seven auditors, all of whom have been vetted for their independence from political parties. These auditors are responsible for auditing all reports that have to be submitted by political parties, coalitions and candidates in terms of the compliance of these reports with the above-mentioned Rulebook. The audit covers the financial reports of the party at state and entity headquarter levels as well as in BD and in two selected regional offices of the party. The Audit Department of the CEC has access to party premises.

The financial reports of political parties are published in the *Official Gazette*; the reports must be certified by the Audit Department, with the certification published in the *Gazette*. The audit reports carried out by the Audit Department are also published in the *Gazette*.

It is within the competencies of the CEC to impose sanctions on political parties, coalitions or candidates for breaches of provisions in the LFPP or the Election Law. Sanctions, including fines, are issued after the political parties, coalitions, or candidates have failed to take their own corrective

measures. If they fail to submit the requested financial reports or refuse the access of the auditors to their premises, the CEC can refuse to register the concerned political party, coalition or candidate for the next elections. CEC decisions can be appealed before the Appellate Division of the BiH State Court.

The legal framework governing the financing of political parties in BiH contains some strong features. In particular, the prominent role played by the CEC has been pointed out as ensuring a degree of compliance with the existing legislation as well as the accountability of political parties. Notable weaknesses of the legislative framework are the provisions pertaining to sanctions and to the supervision of political parties. Moreover, the alignment between the LFPP and the Election Law concerning the sources of party financing is lacking. Important legal aspects, including the public funding of political parties, are regulated by both entity and state legislation; the FBiH does not have legislation governing the public funding of political parties. A draft BiH State Law on Political Parties and amendments to the LFPP, proposed to the BiH House of Representatives, aim to regulate the legal framework for political parties in a harmonious manner, including the issue of public funding. The legal uncertainty caused by numerous and frequent amendments to the LFPP and to the Election Law is problematic. It is recommended to consolidate all provisions pertaining to political parties and elections in a single piece of legislation.

With regard to the transparency of political party financing, the current legal framework leaves a loophole in terms of the possibility for political parties to exceed their expenditure ceilings for electoral campaign financing by pre-dating expenditures incurred, as there are no ceiling on the spending of political parties outside pre-electoral campaigns (this type of spending is supervised by the CEC).

A further concern regards bodies (such as non-governmental organisations and foundations) that are directly or indirectly related to political parties. The accounts of these bodies are not subject to the control stipulated by the LFPP, and there is some concern that political party expenditures, in particular spending related to pre-election funding, is carried out through these bodies or that the resources of these bodies are used to facilitate and finance pre-election activities.

GRECO recommends the introduction of mandatory internal financial controls for political parties or bodies with a turnover that is less than € 4 million or that have fewer than 50 staff. External audit by the CEC Audit Department could be strengthened by increasing the resources of the Department, which would enable a faster audit of annual reports and electoral campaign financing reports.

At present the CEC is not obliged to report any suspicion of criminal activities that the auditors might reveal. The institutionalisation and strengthening of co-operation between the CEC, law enforcement structures, and tax authorities are recommended. While the CEC has the possibility of imposing sanctions, there is a concern as to the proportionality of these sanctions – in particular, that the maximum fines to be imposed on a political party may be too low to have a deterring effect and that the provisions for establishing civil penalties or administrative actions may be too vague to be useful. Sanctions currently apply to the political party, but not to the donor.

The internal and external audit and the financial control of political party financing are inadequate and should be strengthened.

Integrity in the Judicial System

The High Judicial and Prosecutorial Council (HJPC), established by law, is an independent institution at BiH State level, with jurisdiction across the whole country. The mandate of the HJPC is to uphold the independence, professionalism and impartiality of the judiciary. The HJPC has 15 members, with elected members from the various parts of the judicial system (judges and prosecutors, etc.) and also from entity and BD levels.). Members are elected for a four-year term and can serve a maximum of

two consecutive terms, with the possibility of renewed election after a four-year gap. According to article 10 of the law, an HJPC member is prohibited from holding membership in a political party or in an organisation linked to a political party (although at the time of applying for membership in the HJPC, the candidate can be a member of a political party, but he/she is obliged to resign to resign from the party if the candidacy is successful). This article of the law also obliges an HJPC member to declare any conflict of interest on taking up duty. The same article also sets down the immunity of HJPC members concerning any decisions or actions taken in the performance of their official duties.

The HJPC's main responsibility is the appointment of judges, court presidents and prosecutors at all levels of the judicial system in BiH, except for the appointment of judges of the constitutional courts at entity level. For these appointments, the HJPC nevertheless provides its opinion and makes recommendations to the responsible authorities.

The HJPC's Disciplinary Prosecutor deals with complaints against judges or prosecutors, leads the disciplinary process, and issues sanctions. The Prosecutor establishes the grounds for the initiation of a procedure against a judge or prosecutor. A commission, consisting of three members (the selection of whom depends on whether the complaint is against a judge or a prosecutor, as the commission members would have previously exercised that function), then decides whether it is justified to issue sanctions against the judge or prosecutor. The judge or prosecutor concerned has the possibility of appealing the decision. In that event, another commission examines the case, and its decision is final. It is nevertheless possible to appeal this decision before the BiH State Court. A range of sanctions can be issued for breaches of the law, ranging from a written, non-public reprimand to the dismissal of a judge or prosecutor from his/her functions.

The HJPC operates a telephone line that can be used to register complaints against judges and prosecutors; complaints can also be made in writing, and they can be anonymous. In 2011, 1,111 complaints were lodged with the HJPC, which represents a 2% increase from the previous year. In total, however, the HJPC dealt with 1,319 complaints in 2011 (the discrepancy in the total number of complaints is due to the fact that some cases were carried over from 2010 – the statutory period for dealing with complaints is two years). In 19 cases, the Disciplinary Prosecutor found sufficient grounds to merit the transfer of the case to the relevant commission. Another 20 cases that had gone through the HJPC disciplinary commissions were finalised in 2011 (these cases were carried over from 2010 – the statutory period for disciplinary procedures is one year from the date on which the Disciplinary Prosecutor formally launched a procedure against a judge or prosecutor).

At all levels of the judiciary in BiH, judges, advocates in legal aid offices, public defenders and prosecutors enjoy immunity from criminal or civil responsibility for any actions committed in the exercise of their duties.

Human Resources Management Practices affecting Judicial Independence

A substantial focus of the work of the HJPC in recent years has been on the introduction of transparent and fair procedures for the recruitment of judges. This work is continuing, with plans to introduce a new, more objective scoring system related to the filling of vacancies.

Integrity and Accountability of Judges

The HJPC has issued a Code of Ethics for Judges. The Code establishes the independence of judges as the first principle of the rule of law. Other principles of the Code are impartiality and equality before the law. A fourth principle concerns judicial integrity, covering issues such as conflicts of interest and incompatibilities of functions/activities. Activities of judges that are explicitly permitted by the Code are research, publishing and academic work as well as participation in public debates and discussions and membership in expert groups and commissions. The Code also regulates the receipt of gifts by

judges, and by their families and subordinates, in exchange for the provision or omission of professional services.

The Commission for Judicial and Prosecutorial Ethics, Independence and Incompatibility, established by article 85 of the Law on the HJPC, oversees the implementation of the Code of Ethics for Judges. The Commission deals mainly with interpretation of the provision in the Code concerning additional activities/employment, and the Commission's opinion then has to be approved by the Assembly of the HJPC. A standard template for the application of a judge for permission to carry out an additional activity is available on the HJPC website. The HJPC reported that it has not had to deal with many cases of this kind on an annual basis, but it has nevertheless turned down such requests on a number of occasions.

The issue of gifts offered to judges is regulated by the respective laws on the courts at state, entity and BD levels and, as a rule, these gifts have to be recorded in a specific registry. The HJPC provides guidance in cases where the courts are in doubt as to whether a donation should be accepted. In the past, the HJPC has ruled that donations (for example, a donation to improve the court infrastructure) should not be accepted on the grounds of a possible future conflict of interest.

Integrity and Accountability of Prosecutors

The HJPC has also issued a Code of Ethics for Prosecutors. While the Code is in many respects the same as the Code of Ethics for Judges, it also contains an explicit prohibition for prosecutors to be members of political parties or to participate in political demonstrations as well as political discussions (article 2, para. 2.2.3).

The Commission for Judicial and Prosecutorial Ethics, Independence, and Incompatibility oversees the implementation of the Code of Ethics for Prosecutors, in particular the provision on granting permission for additional activities/employment.

Prosecutorial Responsibilities for Corruption

The four levels of the prosecution reflect the administrative structure of BiH – at state and entity levels and in Brčko District. The relationships between these four levels are regulated by specific legal provisions and rules.

At BiH State level, the Prosecutor's Office deals with cases of grand corruption, and since 2003 a Special Department for Organised Crime, Economic Crime, and Corruption has been in operation. Initially, the department was staffed by two international prosecutors; subsequently, national prosecutors were appointed, and the international prosecutors were phased out in 2009; the department has international advisers since 2010. At the time of writing, the President of Republika Srpska has threatened to withdraw from the agreement made with five other parties to form a government and has demanded that the War Crimes Prosecutor withdraw the decision to close proceedings for lack of elements that would justify a continuation of the case. This situation seems to be a strong indication of at least the attempts, by politicians, to influence the prosecution. This case and other instances suggest that political pressures also undermine and discredit the prosecution.

The RS has a Special Prosecutor for Organised Crime, who is also in charge of cases of corruption.

In the Prosecutor General's Office of Brčko District, one prosecutor, out of the 10 prosecutors envisaged, was assigned in September 2011 to focus on cases of economic crime and corruption.

According to data collected from various law enforcement agencies by the Agency for the Prevention of Corruption and the Co-ordination of the Fight against Corruption, criminal corruption offences are on the rise in BiH. In 2010, 649 criminal cases of corruption were registered throughout BiH, an

increase from 642 cases in 2009. Aggregated data does not yet exist for 2011, but the number of corruption offences had risen, by the 3rd quarter of 2011, compared to the same period in 2010, suggesting that the final total number of corruption offences in 2011 will be higher than in 2010.

The BiH State Prosecutor's Office is also responsible for international legal co-operation in fighting corruption.

The key problem does not seem to be the actual prosecution of corruption cases, but the selection of cases that the police decide to forward to the prosecution authorities.

The Law on the Court of BiH at state level assigns the responsibility for criminal corruption offences, as defined in the BiH Criminal Code of the Court. The Court has a special structural unit for organised crime, economic crime and corruption. The Court also has authority for offences other than those stipulated in the BiH Criminal Code if these offences pose a threat to the sovereignty, territorial integrity, political independence or national security or when these criminal offences may be considered to pose a threat to the economy of BiH as a whole or to the economies of its entities.

Conflict of Interest of Judges and Prosecutors

Articles 4.4 and 4.5 of the Code of Ethics for Judges and of the Code of Ethics for Prosecutors cover, in general terms, conflicts of interest. Article 4.4 calls on judges to not let any personal financial interest or any financial interest of close family members influence the "dignity of the function" that he/she is performing. Article 4.5 sets down the requirement for judges to ensure that no family or societal relations influence the performance of their duties.

Accountability of the State for Defective Functioning of Justice

The criminal procedure codes at state, entity and BD levels provide for the possibility of compensation in the event of the defective functioning of justice. There have been cases where the BiH Court provided monetary compensation for the unlawful deprivation of freedom.

Anti-corruption Policies and Administrative Reforms

Anti-corruption Strategy and its Institutionalisation

In 2009 BiH State adopted the National Anti-corruption Strategy 2009-2014 (ACS) and a relevant Action Plan (AP). The ACS focuses on: capacity-building of the new anti-corruption agency; preventive measures of a generic nature, such as simplified and stricter administrative rules and procedures and greater transparency and accountability; education and training; and law enforcement, co-ordination and international co-operation. The Strategy extends from the BiH State level to both entities and to BD.

The Agency for the Prevention of Corruption and the Fight against Corruption (Anti-corruption Agency) is the main institution in charge of a variety of measures foreseen in the Action Plan for the implementation of the Anti-corruption Strategy at BiH State level. The Anti-corruption Agency was established by law at the end of 2009. The Agency is an independent body reporting to the BiH State Parliament. Its mandate includes the identification of the main causes of corruption; prevention of corruption; facilitation of the legal environment dealing with corruption; encouragement of civil society; and education of the public on corruption. Currently, the Agency has a director and two deputy directors, as well as one administrative staff member. These resources are completely inadequate for the Agency to carry out any meaningful work in accordance with its mandate.

The establishment and work of the Anti-corruption Agency is part of the Action Plan for the Implementation of the BiH State Anti-corruption Strategy. At the time of writing, many of the

provisions in the Action Plan concerning the Agency (Part I of the Action Plan) had suffered significant delays or had not been implemented at all. The Agency had a challenging start, as it took more than 18 months for its director to be appointed. According to a decision by the BiH State Council of Ministers, the Agency's headquarters are to be located in the eastern section of Sarajevo; however, the Agency is still using temporary premises within the State Agency for Investigation and Protection (SIPA).

The provisional budgets for 2011 and 2012 foresee financial means that are sufficient to cover the salaries of a total of 24 staff. However, none of these staff has been hired so far, owing to the lack of secondary legislation on the Rulebook of the Agency, which has been drafted but has not yet been adopted (at the time of writing, the draft had received positive opinions from the Ministry of Finance, Ministry of Justice, and the law-drafting service of the Council of Ministers of BiH State). The Rulebook sets down that the staff of the Agency are to be civil servants; only with this confirmation will it be possible to launch a public competition for recruitment to the Agency.

Even if the secondary legislation on the Rulebook of the Agency is adopted, the lack of an Agency budget is likely to delay the recruitment process, as every staff member will need to be assured of a basic workplace infrastructure. This infrastructure is not yet in place, as according to the terms of the provisional budget for 2011-2012, no capital investment (computers, office furniture, etc.) can be made. The Rulebook foresees that the Agency will need to have 57 staff members in order to fulfil its mandate as set out in the law on the Agency. A Code of Conduct for Agency staff has been drafted and awaits entry into the parliamentary procedure.

The work of the Agency is to be overseen by a Commission, which consists of three members appointed by the House of Peoples, three by the House of Representatives, two by the academic community, and one representative of civil society. At the time of the Commission's formation, the second representative of the academic community had not been appointed. The Commission has a four-year term. Uncertainty surrounds the fact that two members of the Commission, after the last elections, no longer serve in the BiH State Parliament – it is unclear whether they can still be members of the Commission.

For 2012 the Agency has elaborated a work plan, but at the time of writing there are insufficient resources to implement the plan, due to the standstill in the formation of the BiH State government, which in turn is blocking the adoption of a budget that would finance, *inter alia*, the work of the Agency (see above).

According to the Strategy, a number of institutions[18] are obliged to adopt specific anti-corruption policies, which are to reflect the priorities of the BiH State Anti-corruption Strategy (ACS). The Anti-corruption Agency is in charge of co-ordinating the implementation of the ACS. At the state level, a number of institutions have developed specific anti-corruption policies, including institution-specific codes of ethics; however, several representatives of the institutions and line ministries visited during the assessment were either unaware of the existence of the Strategy or explicitly stated that they were not covered by it and therefore had no obligation to develop anti-corruption policies. For its effective implementation, the ACS also relies on the active participation of citizens, the media and the private sector.

RS has developed its own Anti-corruption Strategy as well as Measures for Anti-corruption and Conduct of Public Officials. Some individual institutions, such as public enterprises, have the obligation to develop specific anti-corruption plans and to submit information on these plans. The RS

[18] Parliamentary assemblies of BiH common institutions, RS, FBiH and BD; council of ministers of BiH common institutions as well as those of the entities; public enterprises; political parties; universities and other educational organisations; associations and civil society organisations

Ministry of Interior has the overall co-ordinating role for implementation of the RS Anti-corruption Strategy.

Some institutions in the Federation (FBiH), such as the FBiH Ministry of Interior, have developed their own anti-corruption plans. Anti-corruption efforts and strategies appear to be fragmented at the cantonal levels of government. For example, the Una-Sana Canton has an Anti-corruption Action Plan, and Sarajevo is also beginning to elaborate a strategic plan. However, these plans do not follow pre-established templates or formats, and no co-ordination mechanism appears to be in place. Information is sparse with regard to the implementing arrangements for these individual plans. Other cantons are expected to follow the Una-Sana Canton in the elaboration of their own anti-corruption plans.

The mayor of BD has set up a Co-ordinating Team for the Elaboration and Implementation of an Anti-corruption Plan. This team will monitor the implementation of the Plan and report to the BD government, Assembly and BD institutions. Individual anti-corruption measures concerning the police force, taken from the BiH State Anti-corruption Strategy and Action Plan, are being implemented by the BD police, including preventive measures.

The implementation of the BiH State Anti-corruption Strategy (ACS) has been weak, as the Anti-corruption Agency, which is formally responsible for overseeing the implementation of the ACS, has not yet become operational. At the various levels of BiH anti-corruption strategies have been adopted or are being elaborated. However, the existence alone of these strategies is not an indication of the will to seriously fight corruption at these levels.

The protracted problems in setting up the state-level Anti-corruption Agency have also resulted in a loss of confidence in the institution. These problems should be attributed in the first place to a lack of political will to make the Agency work.

Recent Legislative Activity against Corruption

BiH legislation has seen various amendments to bring the criminal codes and the criminal procedure codes in line with international standards. At BiH State level, the latest amendments to the Criminal Code were adopted, and harmonisation in the entities and in BD was carried out in 2010.

According to an analysis carried out in December 2011 by the Ministry of Justice, the criminal codes and the criminal procedure codes at all four levels have to a great extent been harmonised with regard to the criminalisation of corruption. The state-level legislation has been widened to include foreign officials as possible perpetrators of corruption offences; also, the corruption offence can be committed either on one's own behalf or on the behalf of someone else, a possibility that had not previously been foreseen in the BiH State Criminal Code (CC). The latter provision has been introduced into the CC of FBiH, but the former provision has not been included. Also, neither provision has entered the CC of RS. At BiH State level, the CC is now broadly in line with international standards (including the Additional Protocol to the Criminal Law Convention of the Council of Europe—which requires the inclusion of foreign officials as possible perpetrators of a corruption crime—of which BiH is not a signatory), while more work needs to be done to align entity-level legislation on these issues.

Differences exist between state-level legislation and entity/BD legislation with regard to criminal penalties. While the punishments foreseen in the CC of FBiH are in line with the state-level CC, the CC of BD ties the sanctions to the material value obtained by committing the corruption offence; however, active and passive bribery is sanctioned in BD in the same way as at the state level. The RS penal regime for corruption offences differs from that in the state-level Criminal Code, mainly with regard to the seriousness of the penalties, which is more lenient in the RS CC than in the other CCs.

Problems also remain with regard to the interpretation of key definitions in the entity legislation compared to the BiH State-level legislation. It is recommended to BiH to harmonise the criminal codes at the various levels in order to provide for greater legal certainty and to thus facilitate implementation of the legislation.

Some shortcomings of the BiH legislation at all levels relate to the provisions in the Council of Europe (CoE) Criminal Law Convention on Corruption. Specifically, according to the CoE provisions, active and passive bribery in the public sector should cover "all acts or omissions occurring in the exercise of a public official's duties, whether or not within the scope of his/her official competences." BiH also needs to criminalise active trading in influence. Finally, while areas for the improvement of the existing legislation therefore exist across BiH, the main challenge ahead is the effective application of legislation.

There are two legal provisions on the protection of witnesses: the Law on the Protection of Witnesses under Threat and Witnesses under Risk and the Law on a Witness Protection Programme, both at BiH State level. These laws continue to cause concern, as they do not foresee the transfer abroad of a witness whose physical safety is threatened – a provision that is considered to be an international standard.

Legislation on the use of special investigative techniques has been brought into line with international standards. In short, special investigative techniques can now be employed, irrespective of whether the crime is punishable by three or more years in prison, which had previously been the threshold.

In the RS, the Guidelines on Anti-corruption Activities and Conduct for Public Officials have clarified the problematic conflict-of-interest provisions in the Law on Conflict of Interest, in that they have set down the rules for transition from the public sector to the private sector. They have also made it an obligation to report on any breaches of the Code of Conduct. Furthermore, the RS Law on Public Officials has been amended to include an obligation for the reporting of suspected corruption; the amendment also introduces mechanisms for the protection of whistle-blowers.

The FBiH Public Administration Agency has introduced a number of changes in the Law on the Organisation of the Administrative Organs of FBiH, and there have also been amendments and changes to the Ethics Code of Public Officials of FBiH.

Although loopholes remain, criminal legislation against corruption has for the most part been brought into line with international legal standards. There remains nevertheless a need for the harmonisation of legislation between state and entity levels. Legislation to protect whistle-blowers is still weak. Ideally, a single penal code and a single criminal procedure code should be applicable in the whole territory of Bosnia and Herzegovina.

Criminal Police (Ministry of Interior)

Article III of the BiH State constitution assigns inter-entity criminal law enforcement to the state level. The prime responsibility for the investigation of criminal corruption offences is with the State Investigation and Protection Agency (SIPA). SIPA's Criminal-Investigative Unit has a Department for the Prevention and Investigation of Financial Crime and Corruption. At BiH State level, the Directorate for Police Co-ordination was founded in 2010. The Electronic Data Exchange System of the police and the prosecution was launched in 2009, and work on the system is expected to be finalised in 2012. Other enforcement bodies with a role in fighting corruption are the Border Police and the Indirect Taxation Unit.

There are significant differences in the organisation of the police system at the different levels of BiH. In FBiH, the police are decentralised to cantons, while at the Federation level, the police system is

organised through the FBiH Ministry of Interior's Police Administration. The latter deals *de facto* with the investigation of any offences, including criminal corruption offences, in accordance with the Criminal Code of FBiH, and it has specialised criminal police units, the Departments for the Fight against Economic Crime, Corruption, Money-Laundering and Cybercrime. The Financial Police operate as part of the FBiH Ministry of Finance and also play a key role in the detection of economic crime and corruption.

In RS, responsibility for the detection and investigation of corruption offences is with the regional Centres of Safety Services and with the central administrative structure of the police, which has specialised criminal and territorial units. These structures deal with offences covered by the RS Criminal Code; more important offences are dealt with by the specialised services of the criminal police in the RS Ministry of Interior, which has a Unit for Special Investigations and a Department for the Prevention of Economic Crime.

In BD the police chief reports directly to the BD Assembly and to the Mayor of the District (i.e. a ministry of interior does not exist). There is a specific sub-unit of the criminal police, the Department for the Fight against Economic Crime and Corruption, which numbers seven staff of the total 261 operational police staff. The work of the BD police and of the Chief of Police is monitored and scrutinised by the BD Assembly's Committee for Monitoring Police Work and by the Independent Board, also an Assembly body, which evaluates the work of the Chief of Police and conducts the selection procedure for this official's appointment, which is approved by the Assembly.

Impact of the Laws on Free Access to Information

At BiH State level, the Law on Free Access to Information, in place since 2000, has been amended twice. At entity level, there is a Law on Free Access to Information in the Republika Srpska and a Law on Free Access to Information in the Federation. BD has no law in this area and follows the BiH State law.

According to the Action Plan for the Implementation of the BiH State Anti-corruption Strategy, the Agency for the Prevention of Corruption and the Co-ordination of the Fight against Corruption (Anti-corruption Agency) was given the task (Part II, point 2.2 of the Action Plan) of analysing, by August 2010, the impact of the respective laws on free access to information at the different levels of BiH. However, as the Agency itself has so far not been functioning properly, this task has still not been carried out, whereas the elaboration of any necessary follow-up provisions, aimed at making the implementation of the laws more efficient and effective, still has to be done.

Civil society groups have frequently pointed out shortcomings with regard to the implementation of the legislation on the freedom of access to Information, in particular in cases where the requests for information concerned areas such as privatisation and large public procurement contracts. The authorities, on the other hand, consider that the protection against the unreasonable demands posed by such requests is insufficient, and they have indicated the need to review the practicalities of the legal framework in place in this area.

There has been no systematic assessment or analysis of the impact of legislation dealing with the freedom of access to information. The Anti-corruption Agency is meant to carry out a review in this regard, but as the Agency is still not operational, such a review has not yet been undertaken.

Administration on the Prevention of Money-Laundering and Terrorist-Financing

In 2004 a unified Anti-Money Laundering/Counter-Financing of Terrorism (AML/CFT) Law was enacted at state level, which replaced the separate laws for the entities and Brčko District. The BiH State Ministry of Security issued comprehensive guidance to supplement the law. The 2004 AML Law was superseded in June 2009 by a new AML/CFT law, the Law on the Prevention of Money-

Laundering and Financing of Terrorist Activities. This new law addresses a number of deficiencies in the old law, for example by introducing a risk-based approach as well as improved preventive measures.

Money-laundering and terrorist-financing are criminalised in the legislation at all levels of BiH. All of the definitions provided in the legislation are largely in accordance with article 3 of the Vienna Convention and with article 6 of the Palermo Convention, but their scope still does not cover all of the material elements required. Furthermore, the criminalisation of terrorist-financing does not cover the funding of terrorist organisations or individual terrorists. A number of successful convictions for money-laundering included the conviction of legal persons.

The current legal framework concerning confiscation and the provisional measures in this regard seem to be rather complicated. Parallel regimes exist, in terms of both criminal substantive law and procedural law. High evidential standards as applied by trial courts, the structure of the confiscation regime, the small number of confiscations (particularly at entity and BD levels), and the provisional measures being taken all give rise to concerns about the effectiveness of the regime. Furthermore, provisional measures are seldom, if ever, applied in the preliminary stage of criminal proceedings.

There is not yet in place a comprehensive system to allow financial institutions to freeze without delay the assets of persons and entities designated in the context of terrorism or financing of terrorism. The existing legal framework consists of parallel and overlapping regimes, which are either incomplete or designed for other purposes.

The Financial Intelligence Department has been established, with operational independence, within the BiH State Information and Protection Agency. The department co-operates internationally as a member of the Egmont Group and shares information with the financial information units of its counterparts. The department's action appears to be isolated from the general law enforcement efforts due to the restrictive interpretation of existing laws and other organisational issues. Its power to disseminate financial information to domestic authorities is limited by law.

Financial institutions are required by law to file suspicious transaction reports (STRs), including suspicions of the financing of terrorism, regardless of the amount involved, and the reporting requirement includes both attempted and performed transactions. However, financial institutions report a low level of such transactions. The only STRs received from persons responsible for filing these reports were from the banking sector, with none received from the insurance and securities sectors or from any designated non-financial businesses and professions.

Overall, banking and securities supervisors appear to possess adequate powers to monitor and ensure compliance with the AML/CFT requirements within their respective sectors. There is nevertheless a lack of adequate powers for supervisors in the insurance sector.

The framework for international judicial co-operation in cases of money-laundering and terrorist-financing is comprehensive, offering all of the necessary solutions for rapid and effective legal assistance. Furthermore, the arrangements for international judicial co-operation appear to be working in practice.

International Co-operation in Fighting Corruption

Article III of the BiH State constitution assigns responsibility for international criminal law enforcement, including co-operation with Interpol, to the state level. BiH joined Interpol in 1992 and signed a Strategic Agreement on Co-operation with Europol in 2007.

BiH has acceded to the relevant international conventions related to anti-corruption, as follows: a) 2002 Council of Europe Civil Law Convention on Corruption: signature 1 March 2000, ratification 30

January 2002, and entry into force 1 November 2003; b) 2002 Council of Europe Criminal Law Convention on Corruption: signature 1 March 2000, ratification 30 January 2002, and entry into force 1 July 2002; c) BiH ratified the 2003 United Nations Convention against Corruption (UNCAC) in 2006.

BiH is not a party to the Additional Protocol to the Council of Europe Criminal Law Convention on Corruption.

PUBLIC EXPENDITURE MANAGEMENT AND CONTROL

Main Developments Since the Last Assessment (May 2011)

The unstable political situation in Bosnia and Herzegovina (BiH) during the past year has had a huge impact on ***public expenditure management (PEM),*** especially for the institutions of Bosnia and Herzegovina (BiH State).

After the October 2010 elections, the Fiscal Council did not agree on the three-year Framework Budget and the Global Fiscal Framework, which together establish the basis for the budget of BiH State. As a result, BiH State did not have a budget for 2011 and remained on temporary financing during the whole fiscal year, including in January 2012 and in the first half of February 2012. This situation meant that expenditures could only be made in proportion to the funds spent on a quarterly average for the previous fiscal year and that no new programmes or investments could be initiated. The BiH State budget for 2011 was approved retrospectively on 14 February 2012. As a consequence of this late action, there was a worrying degree of uncertainty during the first months of 2012 with regard to the financing of BiH State institutions and the servicing of BiH's foreign debt. This uncertainty was due to the fact that without the 2011 budget having been adopted and without an agreed fiscal framework, the 2012 budget could not be adopted – not even on the basis of temporary financing.

The temporary financing situation has left BiH State struggling with severe financial difficulties, as a carry-forward of surplus revenues from previous years is no longer available. Unless the state is able to agree on consolidation measures, the present revenue-sharing formula will leave the state facing a significant deficit and/or insufficient funding to carry out needed structural reforms and investments.

A three-year Standby Agreement (SBA) with the IMF, signed in mid-2009, has been suspended since the election in October 2010 due to the political situation and the absence of a government in BiH State. The Fiscal Council finally resolved the crisis by adopting in March 2012 the Global Fiscal Framework for the period 2012-2014, thus opening up the possibility of drafting the 2012 budget of BiH State and a new SBA with the IMF.

With regard to **Public Internal Financial Control (PIFC),** the political and budgetary situation of the past year affected all reform efforts in the public sector. As a result, progress since the last assessment has been made primarily at a technical level only, through the introduction of methodology documents and training in internal audit at BiH State level and in the two entities. The actual number of internal audit staff has not changed significantly, as there have been restrictions on recruitment. An exception is in RS, where 20 additional internal auditors were recruited, mainly from within the public administration. Specific financial management and control (FMC) legislation has been drafted at BiH State level, in Republika Srpska (RS) and in the Federation of Bosnia and Herzegovina (FBiH), and this draft legislation is expected to become law in 2012. However, the only real progress in relation to FMC has been some awareness-raising.

In the area of ***external audit***, the four supreme audit institutions (SAIs) have continued to carry out a professional audit job within the limits of their resources. Their impact on public financial management, which has been rather limited in the past, may increase now that parliamentary

committees have restarted the hearing procedures in respect of audit reports, after the halt of parliamentary proceedings following the 2010 elections. The Co-ordination Board did not issue any new guidelines, but it did carry out an analysis of the implementation of the recommendations of a 2004-2005 peer review. The analysis provided input for both a new peer review, which is now ongoing, and for the new Strategic Development Plan (SDP) effective as from 2013.

Main Characteristics

With regard to **PEM**, the main problem is still the general non-observance of the rule of law. No direct sanctions are applied for non-compliance with the law, which results in budget procedures (including budget preparation calendars) that are fixed in the law but are often not followed. In addition, co-ordination is lacking, and the roles and responsibilities of the various stakeholders in the area of public expenditure management need to be more clearly defined.

BiH State, both entities and Brčko District (BD) all have in place basic budgetary legislation regulating financial management issues. The laws provide most of the main definitions needed for sound fiscal management, but those definitions do not always help very much on substance. The legal framework differs substantially between the state and the entities. Among other issues, each of the three governments has had a different budget calendar and has used different methodologies for budget preparation, accounting and reporting, as well as a different chart of accounts. These differences have resulted in unreliable financial statistics, constituting a serious risk factor, as they have an impact on all future reforms in the area of public finance. The problem has now been partially addressed at the entity level, with the IMF providing technical assistance to improve and to harmonise to some extent the chart of accounts.

On the basis of the Law on the Fiscal Council (FC), the FC started to function in October 2008, with the responsibility of co-ordinating fiscal policy. However, its practical power is restricted, as is shown by the fact that during 2011 it did not agree on the 2012-2014 Global Fiscal Framework, which was only adopted in March 2012.

The current formula for revenue-sharing between the state and the entities does not favour decision-making. It also encourages, at state level, overly optimistic macroeconomic projections since an optimistic prognosis favours BiH State. If the state´s macroeconomic prognoses are too optimistic, and subsequently the indirect tax projection is also too optimistic, a larger amount will be set aside for institutions of BiH State. In the event that the projected revenues are in fact not obtained, the BiH State institutions will not suffer, while the entities will be at a disadvantage, as they will have to cope with the lower revenue levels throughout the year. This incentive may have encouraged the state to prepare too optimistic a prognosis in early 2011 and to then revise the figures in late autumn after the allocation of resources between the state and the entities had already been agreed upon by the Fiscal Council and before the actual annual budget was set. For 2011 BiH State revised its GDP growth figures from 3.4% to 2.4% between March and November, whereas the IMF prognosis remained stable at 2.2%. For the year 2012 the state's initial prognosis of March 2011 was 5.5% of GDP growth, while the latest assessment from November 2011 is 2.1%.

At state level, in the entities and in BD, deadlines are set for submission of the annual budget proposal by the executive to parliament, but these deadlines differ, with the common feature being the rather limited time allowed for parliamentary discussions. The executive often fails to comply with the deadlines, thereby leaving to parliament insufficient time to review and discuss the budget. As a result the three parliaments have not always been able to approve the budget on time.

The budgets of the state and the entities seem to be reasonably comprehensive with respect to the law and in practice. Budgetary support from donors is incorporated into the budget, but not all types of donations – for example, EU technical assistance is excluded. The debt management function is

centralised for external borrowing, while the management of domestic debt is among the competences of each government.

Three different types of strategic documents related to PEM are prepared:

- *Global Fiscal Framework*, covering a three-year period, prepared by the Fiscal Council in accordance with the Law on the Fiscal Council;
- *Framework Budget* (three years), prepared separately by the state and the entities according to their respective budget calendars;
- *Economic and Fiscal Programme***,** prepared annually by the Directorate for Economic Planning for the following three years.

The system foresees the preparation and approval of the annual budget based on the three framework budgets.

The systems for fiscal impact analysis have been partially established in terms of design and practice.

Current expenditures and capital expenditures are not fully integrated into the same decision-making process.

The state and the entities use different forms of modified cash accounting. In terms of budget execution, each component of BiH has laws governing the operation of treasuries. The ministries of finance are able to control the flow of expenditure, proper IT systems are in place, and single treasury accounts are used. However, the analytical aspect of the composition of cash-flow plans is lacking, and more work is needed to ensure that budget-users have direct access to treasury systems.

PIFC is still in a very early stage of development. Following the adoption of harmonised internal audit laws by the state and entity governments in 2008, harmonised PIFC policy papers were adopted in 2009 by BiH State and in 2010 by the entities, and these policies are now being implemented. Central Harmonisation Units (CHUs) are operational in BiH State and in the entities. CHUs are still weak, however especially in FBiH, as the CHU consists of only the head, without any staff. Brčko District plans to establish a CHU in the near future. A CHU Co-ordination Board, comprised of the heads of the CHUs, started work with monthly meetings in 2011, but this co-operation has been on hold since November 2011 due to the disagreements of its members concerning the Board's procedures. The task of the Co-ordination Board is to harmonise legislation and methodologies for PIFC across BiH.

Financial management and control (FMC) currently relies on the existing budget laws. Overall, the legal basis for internal financial control is imprecise, but harmonised specific regulations are being drafted to improve the situation, with adoption foreseen in 2012. Internal audit throughout BiH also remains in a very early stage of development. The internal audit laws are broadly in line with international requirements, but their implementation is slow.

A key problem in the introduction of a modern PIFC system lies in the arrangements that currently exist for the management of public expenditure, in particular the lack of professionalisation of public service management, accompanied by the need to distribute responsibilities and delegate authority within public organisations.

The preparation for ***decentralised management of EU funds (DIS)*** is in an embryonic stage. BiH State and the entities have not reached an agreement concerning a government decision on the establishment of the functions and structure for a decentralised implementation system (DIS). To date, only the key functions have been assigned in BiH: the National IPA Co-ordinator (NIPAC), the

Competent Authorising Officer (CAO), and the National Authorising Officer (NAO). No decision has been taken so far with regard to setting up the Audit Authority (AA).

With regard to ***external audit***, Bosnia and Herzegovina has four supreme audit institutions (SAIs). The SAI responsible for auditing BiH institutions is the Auditing Office of the Institutions of Bosnia and Herzegovina (SAI BiH). Both entities have their own audit institutions, SAI Fed and SAI RS. These three SAIs were established in 2000 and started operating in the course of that year. Since 2008 Brčko District also has its own audit institution, SAI BD, covering all public bodies in the district. All SAIs are managed by an auditor general and one or two deputies.

The SAIs have a clear legal authority to audit all public and statutory funds and resources, bodies and entities. The number of potential auditees in the entities, however, makes it impossible to carry out an annual audit of all auditees; many smaller municipalities are therefore not audited at all. SAI BiH also has limited resources, given the large number of mandatory audits. With the exception of the SAI BD, all SAIs have a sufficient level of functional and operational independence to fulfil their tasks. Constitutional anchorage of the SAIs is nevertheless still lacking.

On the basis of the respective SAI laws, the SAI BiH, SAI Fed and SAI RS co-operate by means of the Co-ordination Board (CB). SAI BD participates in the CB on an informal basis. The legal responsibilities of the CB are to establish audit guides and instructions, exchange professional experience, and organise and co-ordinate development activities. The CB has served as an important vehicle for the joint development of audit standards and guidelines through the working groups that it has established.

The SAIs carry out the full range of audit as set out in international auditing standards. Financial audit (attestation and compliance audit) is carried out in a professional manner. However, the inadequate understanding of the role of independent external audit amongst political stakeholders reduces the potential contribution of financial audit towards improving the financial management of public funds throughout BiH.

Reform Capacity

The decentralised and highly complex political and institutional structure of BiH frustrates decision-making. Not only is there a considerable lack of co-ordination, but also shortcomings in defining the roles and responsibilities between the various stakeholders in the area of ***PEM***. The Fiscal Council was created to fulfil the co-ordinating role, but it has not achieved its initial goals.

The major obstacle to reform is the fact that the different levels of government in BiH follow their own political agenda and do not seem to be interested in developing a clear and common, internally-driven agenda for reforming public finance. The main motivations for structural reform seem to be external financial assistance and the road to the EU, combined with a touch of competition between the state and the two entities.

Expert knowledge of civil servants regarding PEM varies significantly from institution to institution, with an uneven understanding of the key aspects of administrative decision-making. More than enough staff are employed in the vast public sector of the country in total, but competent and skilled staff to exercise PEM functions are nevertheless lacking. The large number of administrative levels and the complex administrative system, which is characterised by the lack of a clear assignment of responsibilities and delegation of authority within public organisations, have led to the overlapping and duplication of functions, without assuring that the main tasks are carried out.

In general, the basic elements of PEM are not yet in place, while at the same time a great deal of effort is devoted to much more sophisticated developments, such as programme budgeting. The 15 years of efforts to develop programme budgeting – in a country that does not have reliable financial

data, does not respect the rule of law, and is not capable of agreeing on a common fiscal policy or on the annual budget – have not been and cannot be successful. The development of programme budgeting is therefore unlikely to be effective without the implementation of other reforms focused on management structures and on the reorganisation of political/managerial relationships.

All of the major PEM reforms in BiH have been initiated and driven by the international community. Internal recognition of the need to improve processes and procedures is almost non-existent, and the main motivations for change are the possible road to the EU and external financial and non-financial assistance. As a result, the technical assistance provided to the country might not be sustainable in the long-term.

The development of **PIFC** in Bosnia and Herzegovina has reached a crucial stage, but political will and administrative capacity for reform are still very limited. FMC legislation is about to be enacted, and the implementation of this legislation will be the largest challenge to date. Progress has so far been made mainly in technical areas. The implementation of FMC will require considerable time and effort as well as encouragement from the highest levels, and reforms will have to be achieved in the approach to managerial accountability, starting with recognition of the need to delegate tasks within the public administration in order to increase its efficiency.

This challenge comes at a time when the current TA project to support the CHUs is about to come to an end. It seems that most of the achievements over the past year have been supported by outputs from the TA project. A new EU-funded project, planned for later in 2012, will have PIFC as one of its components. This support will certainly increase the possibility of delivering PIFC developments in Bosnia and Herzegovina. However, there may be a gap between the two TA projects, as the new project will take some time to become established, and it will largely depend on the ability of the CHUs to maintain the momentum during such a gap.

However, the staffing of each CHU is below the systematisation. Without significant additional staff (which may be unlikely given the current economic pressures) or improved synergies resulting from increased co-operative work, it is difficult to see how the increased challenge of FMC implementation can be met.

A different picture can only be seen with regard to **external audit**. The SAIs in BiH are relatively mature public institutions compared to many of the institutions that they have to audit. Since their establishment, the SAIs have benefited considerably from technical assistance provided by the Swedish National Audit Office (SNAO). During the period 2000-2009 the SNAO supported individual SAIs, the Co-ordination Board (CB), and the working groups established under the umbrella of the CB. Since 2010 the assistance of the SNAO has been provided at a lower level and is restricted mainly to performance audit.

The management of the SAIs are committed to securing further institutional and professional development, which is demonstrated by the regular updating of the Strategic Development Plan (SDP) under the auspices of the Co-ordination Board and by the request for a peer review in 2004 and again in 2011. In view of the departure of the SNAO at the end of 2012, an exit strategy is being prepared that will provide input to the new SDP.

Currently the SAIs are confronted with resource constraints, which hamper further development. However, so far not all of the existing opportunities to save resources by means of greater co-operation through the Co-ordination Board and its working groups have been seized. Quality assurance, for instance, could be organised as a joint function. Exchanges of experience and, for example, the organisation of parallel performance audits have not been fully explored. The peer review exercise will result in concrete proposals as to how these opportunities can be used.

Since its establishment, the Co-ordination Board has demonstrated its capacity to adopt key audit methodologies and strategies for the development of the SAIs. At the end of 2012 the mandates of the auditors general of the SAI Fed and the SAI RS will expire. For the future development of external audit in the country, the willingness of the new managers of the entity SAIs to co-operate with each other will be important.

Recommendations

To Bosnia and Herzegovina

In the planning and implementation of future reforms in **Public Expenditure Management (PEM)**, it would be highly desirable to focus efforts first of all on strengthening the basic features of budget preparation and execution and to then gradually move further to more sophisticated developments, taking into account the limited administrative capacity and the general lack of technically qualified staff. The sequencing of various development activities in public finance should be thoroughly assessed and planned.

- The improvement of fiscal co-ordination is the key issue. It is crucial to improve the harmonisation of budgeting and accounting methodologies so as to be able to provide reliable overall government financial statistics. A common fiscal strategy, as well as a structural reforms strategy that is internally driven and owned, have to be developed. The linkages between various strategic documents (Economic and Fiscal Programme, Global Fiscal Framework, and the fiscal frameworks) should be defined, and the co-ordination and management of the preparation of such documents should be strengthened. The credibility of fiscal policy could also be increased if the formulas for allocation of revenues between the state and entities were less dependent on macroeconomic prognoses. This increased credibility of fiscal policy would help in reaching an agreement on the Global Fiscal Framework and would also decrease the incentive to manipulate macroeconomic prognoses.

- The capability to forecast, target and monitor general government debt and deficit should be strengthened. A uniform methodology should apply to the state and the entities so as to achieve reliable overall government financial statistics.

- Co-ordination between the various stakeholders in the area of public expenditure management should be considerably improved in order to ensure the proper implementation of projects financed by EU funds or through other donor assistance. The responsibilities for future activities – after the donors have left and technical assistance projects have terminated – have to be clearly set.

- Procedures for preparing and approving budget proposals for capital expenditures should be integrated with those for current expenditures. It would be rational to re-assess the allocation of responsibilities in the ministries of finance so that the budget sector has full control over both current and capital expenditures.

To the European Commission

External support should be focused on those activities and reforms that could apply jointly to state and entity levels and not just to one entity. This overall approach would be particularly appropriate where IT developments are proposed, as it would help to harmonise fiscal data. A common approach is also more efficient from a value-for-money standpoint. Foreign aid should be used to provide incentives for better co-ordination and, where possible, to centralise various public finance functions. Furthermore, it is necessary to ensure the assignment of clear responsibilities for future development after donor-funded projects have terminated.

Concerning **PIFC**, the **governments of Bosnia and Herzegovina** need to:

- Update PIFC strategies to reflect progress made to date and the issues that still have to be settled. To provide the data supporting the new strategies, further gap analysis work on the strengths and weaknesses of the current financial management and control (FMC) arrangements would be useful. The key will be to develop an action plan identifying not only the steps needed for the implementation of FMC (which now lags behind internal audit), but also the resources required.

- Develop ways of making the commitment and support for PIFC from senior politicians and managers more public. Managerial accountability will require different managerial behaviours from all staff, such as greater delegation and devolution of control. Technical development work can provide the right framework for these changes, but more junior staff need to understand that their superiors both support and require these changes.

- Improve co-operation between BiH State and the two entities on PIFC developments. Treasury systems are technically similar, but they have been diverging and this divergence leads to expensive replication of similar work. As the CHUs have limited staffing, better ways of working together need to be found so that these synergies help them to deal with the challenges they are facing. In practice, there is a risk that CHU co-operation will diminish in the future, as the continuation of the Co-ordination Board for the CHUs is uncertain.

- Finalise guidance on the establishment of internal audit units. The related salary gradings or coefficients are for the bodies themselves to establish. However, the salaries need to be at a level that is sufficient to attract and retain staff who can fulfil a difficult role. As external recruitment is restricted in some bodies, greater emphasis should be given to conversion training so as to enable staff to be transferred more easily between different parts of the public sector.

- Seek ways of adapting the approved methodology to small internal audit units and provide support to these units in specialist areas, such as IT audit. The internal audit methodology assumes normal levels of supervision and review, but many individual units have only one staff member, thus making supervision impossible. In addition, with small units it is hard to maintain the required specialist skills or to provide the seniority that is needed to influence management in the implementation of recommendations. Options might include peer-to-peer support, larger shared-service units, or contracted-out support.

The **European Commission** should provide further support for the above activities, on condition that BiH adopts a harmonised approach and implements joint activities at all levels of government.

With regard to **external audit**, the **SAIs** in BiH should:

- Strengthen their co-operation through the Co-ordination Board (CB) and increase the sustainability of their co-operation by providing the CB with its own secretariat;

- Improve the content and communication of SAI reports and the results of their audits, especially with regard to audit opinions, in an effort to increase understanding of their role as external auditor on the part of political stakeholders;

- Improve their relationship with the respective ministries of finance and public prosecutors with a view to co-operating with these potential allies in the development of sound financial management and control.

The **European Commission** should consider the need for continued technical assistance to the SAIs, especially in the event that the Swedish technical assistance terminates.

The Commission should encourage the use of the SAIs Co-ordination Board's experience for the development of similar co-ordination mechanisms to ensure the CHU Co-ordination Board in the area of public internal financial control functions properly.

Detailed Analysis

PUBLIC EXPENDITURE MANAGEMENT

Budget Legislation

BiH State, the Federation (FBiH), Republika Srpska (RS) and Brčko District (BD) all have in place basic budgetary legislation regulating financial management issues:

- In BiH State, the Law on Financing the Institutions of Bosnia and Herzegovina (2004) regulates the preparation, enactment, execution, accounting, reporting and supervision of the budget, the Treasury Single Account, and the investment of public monies.

- In RS, the Law on the Budget System (2003) regulates the preparation, planning, development, adoption and execution of the budget, as well as for budget accounting, control and audit.

- In FBiH, the Law on Budgets (2006) regulates the planning, development, enactment and execution as well as debt management, accounting, reporting, supervision and revision of the budget.

- The Law on Budget of Brčko District (2008) regulates the planning, drafting, adoption and execution of the budget of BD as well as the financial plans of non-budgetary funds, borrowing, guarantees and debt management, accounting, reporting, supervision and revision of the budget and of non-budgetary funds.

These laws provide most of the main definitions needed for sound fiscal management, although it would be helpful if ministries and other state agencies were explicitly, rather than implicitly, defined as budget-users in the Law on Financing the Institutions of BiH.

In addition, many of the provisions in legal acts are misleading and differ from international practice. For example, in both entities the laws stipulate that the budget has to be balanced, but as loans are included as revenue, any deficit would be a financing gap rather than a budget deficit as understood in EU Member States.

The legal framework differs substantially between the state and the entities. Among other issues, each of the three governments has a different budget calendar and uses different budget preparation, accounting and reporting methodologies, with different charts of accounts. These differences have resulted in unreliable financial statistics.

The laws are frequently amended and no common practice exists to include the amendments of legal acts in full versions of the legislation. It is almost impossible to find the latest comprehensive versions of legal acts. This practice complicates the application of effective legal regulation.

However, the main problem in BiH is that the constitution and the rule of law are not fully honoured but overruled whenever political disagreements arise between the different jurisdictions.

The laws for BiH State, the entities and Brčko stipulate that if the budget law is not adopted before the beginning of the fiscal year, the budget will be financed on a temporary basis until 31 March (30 June in the case of RS). After that date, only expenditure on certain restricted items will be allowed, e.g. debt repayment in the case of BiH State. The temporary financing is provided in proportion to quarterly average expenditures during the previous fiscal year. For the full fiscal year 2011 and for the early months of 2012, BiH State relied on this temporary financing after the budget was not adopted by parliament. Furthermore, expenditures after 31 March 2011 were not confined to debt repayment, even though this action was in contravention of the law.

The main challenge remains the general observance of the rule of law. No direct sanctions are applied in case of non-compliance with the law, and this results in budget procedures (including budget preparation calendars) that are fixed in the law but are often not followed. The budget legislation does not assure and motivate sufficiently proper budgetary practices. Provisions to enhance responsibility should be further incorporated in the legislation, including strict deadlines for parliament and for the executive level concerning the approval of the budget.

Parliament/Executive Relationships

At state and entity levels the deadlines for the respective executives to submit the annual budget proposal to the respective parliaments are set. These deadlines and regulations differ, with the common feature being the rather limited time allotted for parliamentary discussions:

- At BiH State level, the Council of Ministers is obliged to submit a draft budget for the following year to the Presidency of Bosnia and Herzegovina no later than 15 October of the current year and, pursuant to its own rules of procedure, the Presidency is obliged to submit a proposed budget for the following year to the Parliamentary Assembly of Bosnia and Herzegovina by 1 November of the current year. The Parliamentary Assembly is to discuss the proposed budget submitted by the Presidency and, according to its own rules of procedure, adopt a budget law by 31 December of the current year.

- In FBiH, the budget proposal for the next fiscal year is to be submitted by the Prime Minister to the Parliament no later than 1 November of the current year. The Parliament is to adopt the proposed budget by 31 December of the current year.

- In RS, the government is to adopt the draft budget for the following fiscal year and submit it to the Assembly for adoption no later than 5 November of the current year. The Assembly is to adopt the proposed budget no later than 15 December of the current year.

- In BD, the government is to approve the budget by 1 October of the current year for the following year. The budget proposal is to be submitted to the Assembly by the Mayor. The Assembly is to adopt the budget by 1 December of the current year for the following fiscal year.

Another common feature is the failure of the executives to comply with the above deadlines, leaving the respective parliaments insufficient time to review and discuss the budget. The end result is that all three parliaments have not always been able to approve the budget on time. No sanctions currently exist in the event that the executive or the parliament fails to comply with the deadlines that have been set.

According to the law, the 2011 budget should have been adopted by 31 March 2011 at the latest. However, it was only formally adopted on 14 February 2012, after having been provisionally approved on 29 December 2011. The necessity to adopt the 2011 budget even at such a late stage was to provide a basis for temporary financing up to 31 March 2012. It could not be adopted on the earlier date because the draft 2011 budget had been sent to parliament with only one signature

instead of three, and thus only had the approval of one of the members of the Presidency. Therefore, to ensure that the 2011 budget could be formally adopted, the BiH State Parliament had to adopt the following three conclusions on 29 December:

- The budget 2011 was not adopted, but "approved".
- The draft budget was to be sent back to the Presidency for approval, according to the procedures regulated by law.
- The Council of Ministers was to adopt a decision on temporary financing for 2012.

The Council of Ministers quickly adopted the decision on temporary financing for 2012, with the amount of financing to be based on the last quarter of the 2011 budget. However, as the 2011 budget had not yet been legally approved, the financing of BiH State institutions was blocked until the 2011 budget was adopted on 14 February 2012. As a consequence of this late action, there was a worrying degree of uncertainty in the first months of 2012 with regard to the financing of BiH State institutions, e.g. salaries could not be paid.

In practice, this temporary financing meant that no new projects, activities or investments at state level could be financed during 2011. This situation was especially problematic for young institutions at the state level, as all institutional development came to a halt as well.

The parliaments at all levels receive insufficient information on fiscal policy and medium-term objectives or on expected outcomes and outputs. The general knowledge of the parliaments in budgetary matters is weak, and the supporting administrations have very little administrative capacity to analyse the budgets. A DFID project has been implemented to strengthen the role of the parliamentary budget and finance committees in budget planning and preparation at state level and in FBiH.

Only in FBiH does the law limit the powers of the parliament to amend the draft budget by stipulating that all changes that the Parliament makes to the proposed budget must be in accordance with the determined deficit ceiling, and any proposals entailing increased expenditures must also include proposed measures to increase revenues or to reduce other expenditures by the same amount as the proposed expenditures.

The respective parliaments should be allowed sufficient time to discuss the budget, and consideration should be given to consequences if the respective executives do not comply with the deadlines that have been set. All parliaments should be allowed to propose amendments to the budget as long as these amendments do not increase the deficit ceiling.

Scope of the State Budget

The budgets of the state and the entities seem to be reasonably comprehensive. In both entities the laws provide regulations for all levels of the government, including municipalities and extra-budgetary funds.

In FBiH, the main extra-budgetary funds are the Pension Fund, Health Fund and Employment Fund. These funds are financed by restricted taxes and non-tax revenues, such as contributions. The main extra-budgetary funds in RS are the Pension and Invalid Insurance Fund, the Health Insurance Fund, the Public Child Care Fund and the Employment Bureau. The existence of a limited number of extra-budgetary funds, which are closely monitored and controlled, is common in many EU Member States. However, in FBiH and RS, it is not clear how these funds are monitored, or if any attempt has been made to identify the liabilities that have been created by these funds and whether they are financially solvent in the long-term.

Again, despite the regulatory control provided in the legislation, the financial position of public enterprises and municipal enterprises is also not clear. Significant deficits represent a considerable potential risk to the owner entity or municipality.

Apart from the lack of detailed knowledge about extra-budgetary funds, some temporary, earmarked accounts have also been created. For instance, following the sale of Telekom in RS, a total of 53% of the sale receipts was set aside for loans to the economy through the Investment and Development Bank, which signed contracts with the commercial banks that bear the risks in connection with the loans. The remaining 47% was allocated to a public investment programme (see below in section 7, "Budget Management and Management of Public Investments").

The extra-budgetary funds as well as the local municipalities are incorporated into the "general government definition". However, the methodology of the general government fiscal prognosis is lagging behind, and not all of the expenditures are always taken into account. For example, in 2011 the initial Economic and Fiscal Programme submitted to the EU did not include all of the extra-budgetary funds of the Federation, and the Programme mistakenly showed the budget of the Federation to be in surplus.

While budgetary support from donors is included in the budget, this is not the case for all of the funds received from donors – for example, EU technical assistance.

The scope of the budgets is relatively comprehensive, but the entire general government should be incorporated into the process of designing fiscal policies and preparing the annual budget. The practice of creating temporary earmarked funds should be abandoned. The financial status of extra-budgetary funds and of public enterprises needs to be analysed, as their financial vulnerability would add to the burden placed on higher levels of government and reduce the ability of the relevant authorities to manage the overall economy effectively.

Monitoring of the Public Balance and the Public Debt

The forecasting, targeting and monitoring of Maastricht Deficit Criteria (including general government debt and deficit) are not systematically in place. The methodology used to monitor the deficit in accordance with the Maastricht criteria is incomplete because not all of the general government institutions, such as the revenues and expenditures of public enterprises and local government enterprises, are properly taken into account.

The BiH State definition of budget deficit is not in line with international standards, as it refers to a financing gap, not a deficit. The stipulations in the laws of both entities that the budget has to be balanced should not be mistaken for the endorsement of strong and conservative fiscal policies because budget resources/revenues represent the total inflow, including loans, into the budget. The deficit according to the BiH definition is therefore a financing gap, not a deficit as defined in EU Member States, where loans are not classified as revenue.

Steps have been taken to enable the preparation of GFS-compliant tables for all levels of the general government and to harmonise reporting as much as possible. New charts of accounts and new rulebooks on reporting have been developed, but their implementation is in its early stages. The Central Bank has some data on the general government, but with significant deficiencies. The financial position of public enterprises and municipal enterprises should also be reviewed in order to establish their true financial position.

The debt management function is not entirely centralised. The regulations for borrowing are set by the BiH State constitution, the entities' constitutions, and relevant state and entity laws. A certain degree of centralisation exists in external borrowing, but domestic debt is completely decentralised, and the exclusive competency of each government level has been established. At BiH State level, for

example, it is the Ministry of Finance and Treasury that has the sole authority to issue and manage all domestic and external debt. It is also responsible for the preparation of all documents and official information and for the maintenance of original documentation for all new debt issuance.

The Economic and Fiscal Programme of 2011 presented for the first time an overview of internal and external debt. Furthermore, some formal safeguards exist. For example, the entity governments have to approve the loans taken by municipalities, and there is a restriction at the state level that no new debt, either internal or external, may be incurred before the budget is adopted. The budget also identifies the upper limit of all debt of Bosnia and Herzegovina, including the existing debt and the projection of new debt for a given fiscal year. However, despite the safeguard that debt repayment is exempt from the stipulation that temporary financing cannot generally apply after 31 March (or 20 June in RS), the servicing of BiH's foreign debt was frozen in the early part of 2012.

The three-year Framework Budget (see explanation below in 5. Medium-term Expenditure Framework) provides some information on the budget balance and budget debt, but the methodologies and the presentation format differ between BiH State and the entities. Moreover, the Global Fiscal Framework, which should provide information on the general government level, has not been approved for 2012.

The capability to forecast, target and monitor general government debt and deficit needs to be strengthened. A uniform methodology should apply to the state and the entities in order to obtain reliable general government financial statistics.

Medium-Term Expenditure Framework

The Fiscal Council (FC), established by the Law on the Fiscal Council, has responsibility for co-ordinating fiscal policy and setting the fiscal parameters to be adopted at state and entity levels. The FC has been functioning since October 2008. Its membership consists of the three prime ministers (Chairperson of the BiH State Council of Ministers, President of the government of Republika Srpska, and President of the government of FBiH) and the three ministers of finance. The Governor of the Central Bank of BiH and the President of the government of Brčko District have observer status. The FC is supported by an advisory group comprised of the members appointed by each of the three prime ministers and experts from the three ministries of finance and BD. Despite this wide representation, the FC has not managed to fulfil its duties in recent years, when the reliance on temporary financing was a consequence of the Fiscal Council's failure to agree on the Global Fiscal Framework for either 2011-2013 or 2012-2014. The Global Fiscal Framework, together with the three framework budgets of BiH State and the two entities, establishes the basis for the budgets at state and entity levels.

According to the Law on the Fiscal Council, the global framework for fiscal balance and fiscal policies (Global Fiscal Framework) covers a three-year period at all levels of general government and integrates the fiscal framework and policies of the state and the entities. The policy document should cover the following elements: fiscal objectives, a macroeconomic analysis and policy concerning indirect taxes only, and the upper limits of debt. The framework has to be prepared for the next three years, reviewed every year, and adopted in the form of an agreement between the FBiH government, the RS government, and the BiH State Council of Ministers. Based on this framework, a three-year Medium-Term Expenditure Framework (MTEF) and the annual budgets of the state and each entity are to be prepared.

The main reason for the Fiscal Council's failure to comply with the legal obligation to approve the Global Fiscal Framework was the incapacity to agree on the allocation of revenues between the state and the entities. This disagreement over the funding of the state and the entities has continued since the 2010 elections. Arrangements have been incorporated into the legislation to prevent any

"blocking action" by one party to an agreement in this regard, but for political reasons, during 2011 the Fiscal Council has not been able to fulfil the obligations set down by law and by its initial incentive to act as a co-ordinating and a decision-making body in fiscal matters. The Fiscal Council finally resolved the crisis by adopting the Global Fiscal Framework for the fiscal period 2012-2014 on 16 March 2012, thus opening the possibility of drafting the state budget for 2012 and negotiating a new standby agreement with the IMF.

The Framework Budget (three years) is a document prepared by the state and the entities separately according to their respective budget calendars. The three framework budgets have not always been approved on time or in accordance with the law. At the state level, the 2012-2014 document was prepared according to the deadlines set down in the law and was sent to the BiH State Council of Ministers, but it was not discussed because the Global Fiscal Framework had not been adopted. The framework for 2011-2013 had been prepared, but it had not been approved.

The Economic and Fiscal Programme is produced/reviewed annually for the next three years by the Directorate for Economic Planning (General Secretariat of the Council of Ministers). The latest Programme at the time of writing, covering the period 2011-2013, was sent to the European Commission on 24 January 2011. The Programme is divided into three parts: 1. Macroeconomic Prognosis; 2. Public Finance; and 3. Structural Reforms. This document is prepared for the EU, and it does not represent a strategy that is an integral part of the internal decision-making process. The process of compiling the Programme is neither transparent nor comprehensible for the institutions concerned. The preparation process of this document is also not closely connected to overall budgetary decision-making. The compilation process as well as the contents of the document are not logically linked to either the Global Fiscal Framework or the framework budgets.

The weakness of the macroeconomic prognosis limits the value of all of the above strategic documents. For example, in January 2011 the Economic and Fiscal Programme submitted to the European Commission predicted an economic growth of 3.2%, and a return to almost pre-crisis growth rates in 2012 (5.5%) and 2013 (5.4%). In autumn 2011 these figures were re-evaluated at 2.4%, 2.1% and 4.0% respectively. The prognoses are in general rather optimistic (see below in comparison to the IMF estimations), but the main issue remains the tendency to provide figures that are as optimistic as possible at the beginning of the year and later on, as a basis for the annual budget, to re-evaluate the figures more realistically.

Prognosis of Growth Rate of GDP

(%, in real terms)

	Directorate for Economic Planning						
	2008	2009	2010	2011	2012	2013	2014
March 2011	7.3	-2.2	0.5	3.2	5.5	5.3	5.6
September 2011	7.3	-2.2	0.5	3.0	3.9	4.3	4.3
November 2011		-1.8	1.0	2.4	2.1	4.0	4.8

	IMF						
	2008	2009	2010	2011	2012	2013	2014
Outlook April 2011	5.7	-3.1	0.8	2.2	4.0	4.3	4.5
Outlook September 2011	5.71	-2.95	0.7	2.2	3.0	4.0	4.5

All of these documents are not interlinked. The macroeconomic part and the public finance part are not connected either. This situation is related to the fact that the Department of Macroeconomic Prognosis is not capable of preparing either the indirect tax prognosis or the fiscal prognosis corresponding to the macroeconomic figures. The budgetary impacts of structural reforms agreed with the IMF are not assessed, and the structural reforms' section in the strategies has no connection to the budget.

A further problem is that even though BiH has had to manage a serious financial crisis and pressure from the IMF to develop more realistic expenditure policies, political pressures for additional public expenditure remain. In 2011 BiH managed to finance the deficit from internal sources, but in the future the need for external financing will emerge if the measures for consolidation are not agreed upon.

All in all, a common fiscal policy is lacking. A strategy for structural reforms is needed to ensure that gradually, and in a structured way, public finances are better managed across the country. In order to develop a more medium-term approach, the Fiscal Council must be allowed to carry out its role. If medium-term expenditure projections are to be more realistic, the capacity in the Department of Macroeconomic Prognosis must be enhanced.

Budget Process

The system in BiH foresees that the annual budget is to be prepared and approved based on the framework budgets of BiH State and the entities. The budget preparation procedures and calendars are regulated by three separate laws and therefore they differ at the state and entity levels. Efforts have been made to harmonise budget preparation calendars at the three levels, but the final agreements and amendments to the laws have not yet been approved.

The preparation process of the annual budget formally starts after the approval of the framework budgets, when the first circular is sent to all budget-users by each ministry of finance (MoF). The circular contains instructions regarding the preparation of requests for allocating funds from the budget, deadlines for submitting requests for allocating funds, and limits in spending. Based on the circular, budget-users submit their budget proposals to the relevant MoF. The requests for funding must include justifications. For capital projects, in the first year the request is to contain the total cost of the project and is to be supported by time-phased project management plans as well as cost estimates for each of the succeeding years. In the case of other multi-year projects, requests for future authorisations must be supported in the initial budget request and updated in subsequent budgets by estimates of the total costs over all of the years of the project.

The budget proposals are then analysed by the relevant MoF and negotiated between the budget-user and the ministry. However, there is very little experience in BiH in analysing budget proposals. For many years, there was no analytical approach to the preparation of the budget – the budget was an automatic sum of the budget-users' proposals. Within the respective MoFs, the goal is now to increase analytical capacity and to thereby improve the analysis of budget proposals. For example, Republika Srpska started exercising this function only four years ago, and it currently has six staff responsible for this task in the RS MoF.

Furthermore, delays in any of the stages of the adoption of their draft budgets by the governments shorten the time available for subsequent stages. For example, the ministries of finance cannot distribute the budget circulars to budget-users until the overall framework has been agreed by the governments. The later the drafts are adopted, the later the budget instructions will be distributed, and the less time will be available to parliaments to scrutinise the draft budgets.

After consultation and negotiation with budget-users, each MoF determines the allocation of funds for each budget-user. In the event of a persistent disagreement between budget-users and the relevant MoF, the final decision is the responsibility of the BiH State Council of Ministers.

DFID has assisted all levels of government in reforming their budget systems. One of the results was a 10-step budgetary process supported by an IT system, and a tendering process in this regard is currently underway.

Programme budgeting is continuing to develop in BiH State and in the entities, with support provided by the EU. Currently the budgets provide very little, if any, information on the expected results of government spending.

One of the recent initiatives was a joint analysis of the budgets of BiH State and the entities. Each level carried out its respective analysis, and the Fiscal Council collected the results.

The budget preparation process is rather weak due to the different budget calendars and methodologies at state level and in the entities and to the limited analytical capacity in the MoFs. Efforts to harmonise budget calendars and to strengthen the capacity to analyse the budget should continue. Although the use of different methodologies and the existence of different rules and regulations for public finance at state and entity levels constitute a risk factor for future reforms, the main problem is still the lack of political will to observe the existing rules. It is extremely unlikely that the introduction of programme budgeting will improve public expenditure management when it is proving so difficult to prepare stable, traditional budgets and when the capability to perform budget analysis and to assess the financial impacts of planned activities is very limited.

Budget Management and Management of Public Investments

Systems for fiscal impact analysis have been partially set up. In Republika Srpska, for instance, the law states that any new pieces of legislation or amendments to existing legislation must be subject to a full financial impact analysis. The opinion of the ministry of finance (MoF) regarding financial impacts is obligatory in order to control the budgetary effects of amendments and additions to legal acts. In FBiH the Law on Budgets was amended in order to create the legal basis for fiscal impact analysis. The existing Law on Budgets stipulates that no law that creates liabilities and rights to financing from the budget may be submitted to the parliamentary procedure without undergoing a prior elaborated analysis on financing. The opinion of the FBiH government is needed if that government is not the proponent of the law. The same provisions also apply to the adoption of decrees or other regulations by the FBiH government. On the other hand, financial impact assessments are not undertaken for all strategic documents and for the various structural reforms agreed upon. The capacity to analyse financial impacts has improved in the past couple of years, and additional staff have also been assigned to exercise this function, but the capacity constraints remain.

Current and capital expenditures are not fully integrated into the same decision-making process. The analysis of proposed investment projects for the purpose of identifying ongoing current costs and establishing overall costs and benefits is limited. In BiH State, for example, the investment planning function was transferred a couple of years ago from the Ministry of Foreign Trade to the Ministry of Finance. Discussions were held to integrate the function into the Budget Department, but currently a separate department of the BiH State Ministry of Finance and Treasury deals with public investments. In the RS MoF, a department other than the Budget Department, is responsible for public investment management. To ensure that the recurrent costs of investment projects are fully recognised in a medium-term perspective, it would be rational to re-assess this allocation of responsibilities so that the budget sector has full control over both current and capital expenditures.

If this re-assessment is not carried out, the existing department should be required, at the very least, to provide the Budget Department with all necessary information so that all costs can be included in the budget calculations.

In Republika Srpska public investment management arrangements are more complex, as a considerable amount of funds are allocated to an investment programme that is outside the budget (47% of the Telekom sales, see above in section 3). These funds are allocated to local municipalities, mostly for infrastructure projects in the health and education sectors. A separate high-level council has been formed to decide on the investment allocations. These responsibilities include the planning and monitoring of budgetary investments as well as the monitoring of the investment programme that is outside the budget.

The elements of fiscal impact analysis exist, but the current focus on legal acts and their amendments should be extended to structural reforms and strategic development plans as well. Procedures for preparing and approving budget proposals for capital expenditures should be integrated with the procedures concerning recurrent expenditure. It would be rational to re-assess the allocation of responsibilities in the ministries of finance so that the budget sector has full control over both current and capital expenditures.

Budget Execution and Monitoring

In terms of budget execution, each level of government has a law governing the operation of the Treasury. These systems have underlying similarities, but in operational terms they are moving apart. The state and the entities each have its own Treasury system and single account, and each is pursuing its own independent technical development strategy. Some co-operation would lead to a more efficient use of public monies.

Not all budget users have direct access to the Treasury system (the extent of access varies between the state and the entities). The budget-users that are directly connected to the system do not need to submit any papers. The IPA 2011 project, which has been approved, aims to ensure that all budget-users have direct access to the Treasury system.

Each Treasury system records commitments to a certain degree (which varies between the different governments). Recently, a new application was added to the three systems. This additional application allows the budget to be divided according to the source (foreign funds, funds from privatisation, tax expenditures, etc.). The information in the system is updated every night, and each budget-user with direct access to the system can obtain the reports needed for its expenditure management. Each system provides different reports, for example concerning salaries. Information on income is also available daily.

Cash-flow plans are prepared and approved on a monthly basis, and the system controls the availability of budget resources. The cash-flow plans are now based on the proposals of the budget-users; previously, the calculation basis was 1/12 of the annual budget. The funds that remain unused at the end of the budget year can be partially spent the following year. For example, in the Federation only the funds of large investment projects can be spent in the next budget year, but no later than by the end of January.

The ministries of finance are able to control the flow of expenditure, adequate IT systems are in place, and single Treasury accounts are used. However, the analytical part of the elaboration of cash-flow plans is lacking, and work still needs to be done so that all budget-users have direct access to the Treasury system.

Accounting and Reporting System

The state and the entities use different forms of modified cash accounting. The IMF has provided technical assistance to improve charts of accounts. This assistance was carried out at entity level, with the goal of harmonising the entities' charts of accounts as much as possible. With this aim, Republika Srpska started to work from the beginning of 2011 but will need some more time to complete the improvements brought to the RS Chart of Accounts. The Federation has not yet started with the implementation of this assistance. The harmonisation of reporting in BiH and the implementation of common accounting standards are priorities in the near future. EU technical assistance to introduce ESA 95 is planned under IPA 2008.

The reporting systems are monthly, quarterly and annual. All budget-users must prepare, in accordance with MoF instructions, quarterly financial reports, including explanatory notes on budget execution. The quarterly reports are to be submitted to the respective minister of finance within 20-25 days of the end of each quarter.

At BiH State level, the MoF is obliged to submit quarterly reports on the execution of the budget to the Council of Ministers and the Presidency. According to the law, this report must include a comparative overview of approved and actual revenues and expenditures, and the proposed measures to improve the situation. The semi-annual report is submitted to the Parliamentary Assembly as well. The quarterly and semi-annual reports on the execution of the budget must be submitted no later than 60 days after the end of the period covered by the report.

A final report must be prepared by all budget-users and submitted to the MoF no later than 60 days after the end of the fourth quarter, and this report constitutes the annual report of each budget-user. In the event that a budget-user fails to submit the final report within 60 days, the MoF has the discretion to temporarily suspend the approval of expenditures until such time as the annual report is received. Within 180 days after the end of the fiscal year, the annual report on the execution of the budget must be submitted to the Parliamentary Assembly.

The harmonisation of reporting and the implementation of common accounting standards are priorities for BiH in the near future. The reporting system is still weak. Regular reports on the execution of the budget are produced, but provide an inadequate analysis, if any.

Capacity for Upgrading Public Expenditure Management

The major obstacle to reform is the fact that the different jurisdictions in BiH do not have a clear, common, internally-driven agenda for reform, but rather focus on driving forward their individual political agendas. Also, within each jurisdiction no unit is directly responsible for any reform regarding public expenditure management. In the administration the main incentive for structural reforms is external financial assistance and the road to EU, with a certain amount of competition between the state and the two entities.

Expert knowledge of civil servants varies significantly from institution to institution, with an uneven appreciation of key aspects of administrative decision-making. More than enough staff are employed in the vast public sector of the country in total, but public expenditure management functions nevertheless lack competent and skilled staff. This overall inefficient organisation and management of the civil service has particularly detrimental effects on public expenditure management. On the one hand, staff employed in the civil service are not engaged in actual policy making or implementation. On the other hand, the large number of administrative levels and the complex administrative system, which is characterised by the lack of a clear assignment of responsibility and delegation of authority within public organisations, leads to overlapping and duplication of functions without ensuring that the main tasks are carried out.

The current goal of not increasing the number of staff is the right direction to take, but structural reforms are needed. More public expenditure management responsibility at the state level, improved co-ordination, strengthened management, and common methodologies, procedures and IT systems would all help to achieve a more effective and efficient use of public funds and would free some resources to finance the reforms needed.

The international community has invested considerably in improving the functioning of public expenditure management in BiH. Despite these efforts, for the second year in a row BiH State did not have the budget approved on time. It is no exception for an entire activity to come to an end as soon as the technical assistance personnel have left. The reforms have no local owner. External assistance is not sustainable unless reforms are driven internally.

The lack of capacity for upgrading public expenditure management throughout BiH is due to the lack of political will to co-operate between the different jurisdictions. This lack of political will was particularly evident when they were unwilling to agree on the necessary fiscal framework, which led to the budget crisis in BiH State during 2011. At a technical level, none of the jurisdictions has so far demonstrated any ownership of concrete reforms. All of the reforms in public expenditure management are driven by donors, often regardless of the lack of political will and the weak administrative capacity of the administration.

In the planning and implementation of future reforms, it would be highly desirable to focus efforts first of all on strengthening the basic features of budget preparation and execution and to then gradually move further to more sophisticated developments, taking into account the limited administrative capacity and the general lack of technically qualified staff. The sequencing of the various development activities in public finance should be thoroughly assessed and planned.

PUBLIC INTERNAL FINANCIAL CONTROL

The systems of Public Internal Financial Control (PIFC) in Bosnia and Herzegovina are still evolving. Separate arrangements have been made for the State (BiH State), the Federation (FBiH) and Republika Srpska (RS), but the state and the two entities are following parallel trajectories as a consequence of the co-ordinated technical development of legislation and methodologies.

BiH State and each of the two entities have two pieces of legislation that together set the framework for PIFC: the established Budget Law and, as from 2008, the Law on Internal Audit. Chronologically, these laws were followed by a PIFC policy paper in 2009/2010. Specific financial management and control (FMC) legislation was drafted in 2011 on the basis of a common model, approved by the Co-ordination Board of the Central Harmonisation Units (CHUs) and taking into account the comments of the European Commission, but this legislation has not yet been enacted. Brčko District (BD) started PIFC reforms later than the state and entities, based on its Budget Law adopted in 2008, which defines internal control and internal audit.

The internal audit laws also established the legal requirement for Central Harmonisation Units (CHUs) for the state and two entities as well as a Co-ordination Board for CHUs (CB). Work on the development of a specific PIFC policy started in 2007, with the aim of designing and implementing a consistent system across Bosnia and Herzegovina and avoiding a segmented approach. However, the elaboration of an overall PIFC policy paper for BiH was found to be impossible, as each of the entities (Federation of BiH and Republika Srpska) insisted on having its own strategy. Three harmonised policy papers were adopted in 2009 by BiH State and in 2010 by the two entities, but not by BD.

CHUs for internal audit were established in RS in 2009, in BiH State in 2010 and in the Federation in 2011, but not in BD. These CHUs are now operational, but the CHU FBiH has still appointed only the Head of the CHU. Each CHU now has one unit dealing with internal audit (IA) and one for FMC, although until FMC legislation is passed, they appear to have no legal basis for the latter. The CB, comprised of the three heads of the CHUs, held monthly meetings from late 2010 to November 2011, when they halted due to disagreements between members. Its task is primarily to harmonise policies, procedures and activities related to PIFC in the public sector of Bosnia and Herzegovina.

Baseline Questions

Is there a coherent and comprehensive statutory base in place that defines the systems, principles and functioning of PIFC?

Budget Laws

The three budget laws, which predate the current PIFC development, are the Law on Budgets in the Federation, the Law on the Budget System of the Republika Srpska, and the Law on Financing of the Institutions of BiH State. Each of the laws applies broadly across the activities funded, including:

- BiH State – all institutions of BiH State and all other bodies that are financed from the BiH State budget and by the regulating authorities;
- FBiH – FBiH itself, cantons, towns and municipalities; financial plans of off-budget funds;
- RS – RS itself, municipalities and towns; financial plans of off-budget funds.

In practice, there are few differences in the way that the four budget laws deal with PIFC issues. The FBiH defines the term and stipulates that "budget-users have to establish an internal control system by applying international internal control standards in order to ensure that all of the core activities are performed" (art. 62), and the Ministry of Finance is required to provide the relevant instructions. The Budget System Law (BSL) in RS also contains provisions relating to internal control, although these provisions are less clearly worded than in the FBiH Law on Budgets, and again the Ministry of Finance is to have the leading role (art. 69). However, RS is preparing a revision of the BSL, which should also clarify PIFC issues.

For BiH State, the amended Law on Financing refers to a system of internal supervision rather than internal control. In addition, unlike FBiH and RS, the law requires each budget-user to appoint a finance officer, reporting directly to the head of the budget-user, who is made responsible by law *"for the establishment and maintenance of adequate systems of management and accounting control over approved budget funds … as well as for the implementation of audit recommendations"* (art. 4).

BiH (art. 23) and FBiH (art. 63) set out arrangements for internal audit, but RS is silent on this issue. However, as indicated above, RS is preparing amendments to the BSL.

Each of the laws includes definitions of key terms, but again there is an inconsistency between the laws in the way that they deal with PIFC topics. Only one (FBiH) defines internal control, and none defines managerial accountability. None refers to economy, efficiency or effectiveness except RS, which stipulates that *"budget beneficiaries should be guided by the principles of prudence and economy in their use of funds allocated in the budget"* (art. 35), although it does not define the terms used.

The later Brčko District (BD) Budget Law is similar to the others, including definitions of internal control (art. 43) and internal audit (art. 44).

Draft legislation on Financial Management and Control (FMC) has been prepared with the help of the TA project supporting the introduction of PIFC[19] and has been agreed by the CB for adoption in BiH State and in the two entities. The standard text has been subject to tailoring by the state and the entities to meet their own requirements, and the EC/DG-Budget has commented on the drafts. The plan is for the FMC legislation to be part of the budget law in BiH State, but to have separate legislation in RS and FBiH. All of this draft legislation is expected to be adopted in the next few months.

Internal Audit Laws

BiH State and the two entities each have Internal Audit Laws that were first enacted in 2008 and subsequently amended – BiH State Law on Internal Audit Institutions in BiH; RS Law on Internal Audit in the Public Sector; and FBiH Law on Internal Audit in the Public Sector. The laws all follow a similar structure and will provide a satisfactory legal framework for internal audit. Each law also sets out the legal framework for the Central Harmonisation Unit (CHU). Each of the laws applies broadly across the activities funded by BiH State, FBiH and RS, in much the same way as the budget laws. Brčko District does not yet have an internal audit law, but a draft has been prepared and a law is expected to be in force by mid-2012.

There are differences between the three laws, the most significant of which is the exclusion from the RS Internal Audit Law of the requirements for a Co-ordination Board for Internal Audit CHUs (CB). The BiH Internal Audit Law expects this body to be "*responsible for the harmonisation of internal audit regulations in the public sector throughout Bosnia and Herzegovina*" (art. 28). Even though the

[19] The European Union's IPA programme for Bosnia and Herzegovina – Support to the Introduction of Public Internal Financial Control in Bosnia and Herzegovina, scheduled to run until May 2012

RS Law includes no provision for such a CB[20], the heads of the three CHUs are nevertheless the members of the CB for Internal Audit, which operated throughout 2011.

The BiH State and RS Internal Audit Laws both allow for the creation of audit boards (comparable to audit committees) in each budget-user that has an internal audit unit. There are no similar provisions in the FBiH Law on Internal Audit. So far, no such boards have been established.

A number of documents required by the Internal Audit Laws were drafted recently in co-ordination with the technical assistance project supporting the three CHUs[21] and were agreed by the CB. The documents were then subject to some tailoring by the individual CHUs. Codes of ethics, internal audit charters and audit manuals are in place. Rules on criteria for internal audit and a training and certification scheme for internal auditors have still not been agreed.

Preparations for the decentralised implementation of IPA funds

The preparation for decentralised management of EU funds is in an embryonic stage. So far, only the key functions have been appointed in BiH: the National IPA Co-ordinator (NIPAC), the Competent Authorising Officer (CAO), and the National Authorising Officer (NAO). No decision has been taken so far with regard to setting up the Audit Authority (AA), and the institutional position of the AA in the national structure is still under discussion. So far it has not been possible for BiH State and the entities to reach an agreement concerning a government decision on the establishment of functions and a structure for a decentralised implementation system (DIS). Further EU support is still on hold pending concrete decisions concerning DIS by BiH.

For BiH State and the two entities, the formal legal framework for PIFC is being established but is not yet complete. The current draft FMC laws should complete most of the missing parts of that framework. Although a large part of this framework started from the same origins, different levels of tailoring have resulted in inconsistencies, such as the lack of RS legislation supporting the CB on internal audit or the lack of FBiH legislation supporting the use of audit boards. There is also a lack of clarity regarding management and executive roles.

Are relevant management and control systems and procedures in place and functioning?

The terminology used by BiH State and the two entities varies, but the structure of spending-units is the same, consisting of first-level budget-users, which are typically ministries or agencies, and second-level spending organisations, which are indirect budget-users. For the two-tier systems in FBiH and RS, the coverage of the legislation also includes cantons, cities and municipalities.

Unlike FBiH, RS has fixed proportions for certain government revenues (e.g. indirect taxes paid for into the Single Account of the Indirect Taxation Authority), which are divided between the Republika itself and municipalities and towns and used to fund part of their budgets.

Budgetary arrangements

Current budgetary arrangements in BiH State and in both entities are based primarily on traditional input budgets, although operational targets do exist. PIFC arrangements tend to be focused on cash control against the budget. Budgets are held at institutional level (called programme level) rather than being allocated to individual line managers. These budgets do not include a clear definition of the operational targets that are to be delivered by the recipients. Thus there is accountability for the

[20] With Decision 01-1012/10, the RS Parliament mandated the RS Government to establish a CHU CB.

[21] Ibid

budgets, but the high level at which they are held and the lack of related operational targets do not support the development of managerial accountability.

Discretion to reallocate funds between budget lines for a budget-user is varied, but it always requires the approval of the Ministry of Finance. For BiH State, the Budget Law does not prescribe a ceiling for such reallocations (art. 16), but for FBiH there is a limit of 10% of the total allocation of the budget-user's budget (art. 33). For RS, the limit may be prescribed in the framework of the annual Budget Execution legislation (art. 40). The laws of BiH State and FBiH also permit reallocations between budget-users on an exceptional basis, but such reallocations require the approval of the Council of Ministers/government.

Budget execution is a more problematic issue in relation to the introduction of a modern PIFC system. Current arrangements for the management of public expenditure do not allow for the delegation of responsibilities and budgets to appropriate levels of management within public organisations, and draft FMC legislation is silent on this issue. The draft legislation refers to delegation, but for the "establishment, development and implementation of financial management and control" only.

Furthermore, the practical recognition of the need for managers to be responsible for obtaining value-for-money does not exist. Financial management and control arrangements currently depend on the controls exercised through the various treasury systems referred to below.

Treasury Controls

BiH State and both entities have each established an IT-supported treasury system, which is the principal instrument of public internal financial control. Each of these systems is based on a common and well established platform, with "real time" links through computer terminals situated in budget-user offices. Each system has two functions. One function is that of a cash management system, and associated with this function are daily bank reconciliations. The other function is that of a cash control system, which ensures that budget-users do not exceed cash expenditure allocations. In the latter respect the systems appear to be working well in controlling expenditure and in ensuring effective cash flow management. Once budgets and monthly profiles have been downloaded, the systems will not permit payments that breach monthly limits, thus providing *ex ante* control. The systems produce reports to be used by managers in controlling their budgets.

However, while this control is effective, it does only work on a cash basis. Commitments can be recorded on the system but seem to be on a memorandum basis. The registration of a purchase order does not automatically generate the recording of a commitment, or the other way around. None of the systems records forecasts of likely outturns, and there seems to be no conception that such a figure would be needed, as the outturn should be the budget. This attitude emphasises the cash control nature of budget management.

Furthermore, each component of BiH is pursuing its own development of the common system. Over the past year, each has made use of flexfields so as to provide a better analysis of financial data. This development has enabled the funding of various types of expenditure to be recorded, e.g. from grants or donations. FBiH has also extended the coding to provide greater detail in the expenditure analysis. RS has also made significant changes in the chart of accounts, assisted by the IMF. The scope is also being widened, with RS planning to improve its system by providing direct access to the 16 municipalities not already linked.

Budget-user Controls

The budget laws for BiH State, both entities and BD require budget-users to set up systems of control, but the approaches adopted differ. At state level, the Law on Financing of the Institutions of

BiH requires the budget-user to appoint at least one finance officer to be responsible for management systems and accounting control (art. 4).The arrangements in FBiH, RS and BD are similar to each other and place responsibility on the budget-user or budget-beneficiary to set up systems of internal control (art. 62 of the FBiH law, art. 69 of the RS law and art. 43 of the BD law). The requirements in FBiH and BD go somewhat further by requiring the budget-user to apply international internal control standards, although those standards are not defined.

Evidence of the actual application and effectiveness of controls within budget-users is limited. However, the principle of double signature and segregation of duties seems to be well implemented in all institutions and for all financial transactions, and it is supported by the Financial Management Information System (FMIS). However, the signature requirements seem excessive, which results in a lack of accountability and eventually a lack of control. There are no specific *ex post* control procedures set down within the administration. Internal audit in budget institutions is not yet providing the required assurance. However, the RS Ministry of Finance also has a Budget Control Unit, which carries out inspection and thus provides some further *ex post* control. The differences between internal audit, internal control and inspection are not yet fully appreciated.

Systems to Prevent and Take Action Against Mistakes and Irregularities

There do not seem to be any specific structures or procedures for the prevention and detection of irregularities and fraud in budget institutions, apart from the financial inspection situated in the RS MoF as part of the ministry's Budget Control Unit referred to above, which exerts some control over the risks of fraud and corruption.

Across BiH State and the two entities, budgetary control, in terms of cash control, is exercised quite effectively through the treasury systems. These systems are continuing to develop, with a view to providing new functionality, but they continue to diverge. Given the need to aggregate figures for BiH as a whole and the potential for greater efficiency resulting from co-ordinated development, this divergence is still problematic.

While there are broad descriptions of managerial accountability in the legislative frameworks, the conditions necessary for it to operate effectively do not exist. There is neither a clear definition of the operational targets that each manager is intended to achieve nor a flexibility in the use of resources (of which the budget is just one) to achieve those targets. At this stage of its development, FMC focuses only on "control", with the budget as its target, and not on "financial management". There is no systematic process for improving the quality of public expenditure in order to increase efficiency and effectiveness.

Are functionally independent internal audit arrangements with relevant functions, remit and scope in place and functioning?

The requirement for internal audit was first set out in the budget laws. Internal audit units set up under this legislation were then further developed with the adoption of the internal audit laws in 2008. Internal audit has thus been the most developed element of PIFC in BiH for several years. However, it is only in the past year that a methodology to support internal audit has been developed, with a code of ethics, audit charter and audit manual. As in most transition countries, internal audit is ahead of FMC in its development.

Internal Audit Resourcing

Neither BiH State nor either entity has issued any guidance as to which institutions should have their own internal audit function (and how many staff they need) and which institutions will have to rely on a "shared service" provided by the relevant ministry of finance. The lack of such information causes operational problems, e.g. the Internal Audit Unit of the Ministry of Finance in BiH State

cannot plan effectively for 2012, as it does not know whether it will cover the current 53 institutions or a lesser number, since some will have their own internal audit units. At BiH State level, an amendment to the Law on Internal Audit is in preparation, and it should provide some clarity on the above-mentioned issues.

In overall terms, BiH State has approximately six internal audit units, with a total of 10 staff; in the Federation there are about 10 internal audit units, with 15 staff (in addition, a limited number of units are in cantons and municipalities, such as Sarajevo); and Republika Srpska has 25 internal audit units (including those in municipalities), with 40 staff. Brčko District has not yet established an internal audit service.

Individual internal audit units are below the staffing levels expected in the systematisation (complement), e.g. BiH State has four posts filled compared to a systematisation of 10 posts. RS has plans to change the systematisation to reflect the actual number of staff in posts. As the RS Ministry of Finance has only one internal auditor in post, a change in the systematisation could severely limit the effectiveness of internal audit in RS. Looking across BiH and the two entities, there seem to be several reasons for the low number of staff:

- There is only a limited pool of experienced internal auditors in BiH from which the governments can recruit;
- Due to financial constraints, recruitment from outside the existing pool of government staff is prohibited for the moment;
- Concerns have been expressed about the competitiveness of salary coefficients for internal auditors, which limit the ability to recruit staff and to retain them.

BiH State and the entities need to address these issues if internal audit is to continue to develop. However, the significant financial constraints that the governments are facing will have an impact and will perhaps mean that alternative courses of action may need to be considered, such as:

- Placing greater emphasis on training existing public servants as internal auditors; and
- Introducing trainee grades for staff who do not yet have the skills, qualifications or experience to be recruited for an internal audit post.

Internal Audit Independence

Internal audit legislation, the framework Internal Audit Charter, and the organisational structure should all provide sufficient independence for internal audit to operate effectively. One anomaly is found in the RS Ministry of Finance, where the Head of the central Internal Audit Unit is also the Head of the Budget Control Unit, which is a subunit with an inspectorate function. Internal auditors and inspectors have a fundamentally different relationship with the management. Bringing the two together risks compromising the independence of internal audit.

Standards and Methodology

Documents supporting the PIFC methodology, referred to above, have been developed as part of the PIFC Technical Assistance Project. These documents have been based on either the standards set by the Institute of Internal Auditors or on established practice of countries in the region.

What is now needed is an opportunity for internal auditors to become more familiar with the methodology. The TA project has held several training sessions in the past year, but not all of the internal auditors currently in post have been able to take part in the “hands-on” pilot audits. These

pilots concentrated on the planning and reporting aspects of the new methodology. There is still a tendency for audit findings to be compliance-based rather than system-based. This tendency emphasises the need for further pilot audits embracing all of the new methodology, not only to train new internal auditors but also to retrain all internal auditors in the new methodology.

Current internal audit activity varies significantly in terms of the degree to which the new methodology has been adopted and in terms of the methodology's effectiveness. However, these two issues are not necessarily related. The findings in relation to the main stages of internal audit work are considered in more detail below:

- Planning – Some units are developing both three-year strategic plans (new this year) and annual operational plans based on risk assessments (e.g. IA Unit in BiH Ministry of Finance). This planning is hampered by the lack of guidance as to which organisations will need to have their own internal audit units. There have also been a number of other instances where internal audit activity has been influenced by political concerns.

- Execution – Discussions have indicated that the majority of findings are related to compliance, i.e. whether the Rulebook requirements have been met. However, there are examples where internal audit work has led to system improvements (e.g. RS – the work on farm grants of the IA Unit in the Ministry of Agriculture, Forestry and Water).

- Reporting – The key issue here is whether anything happens as a result of internal audit's work and, again, the impact seems to be mixed. Typically, it seems that the better the relationship internal audit has with the minister, the greater the likelihood that action will be taken.

Methodology for Small Internal Audit Units

Most internal audit units are very small, and many have just a single internal auditor. Where the complement (systematisation) envisages more internal auditors, current recruitment problems may mean that only a single internal auditor is in post. By contrast, the new methodology envisages various layers of internal audit supervision and management, which would be impossible in such small units. Also, a single internal auditor is unlikely to have a senior grade, which thus accentuates the issue of influence referred to above. Arrangements to support such staff need to be considered, perhaps by the CHUs or by peer internal audit units.

Small internal audit units are also unlikely to be able to provide the degree of technical expertise that will be needed in the future to deal with more specialised internal audit tasks, such as computer audit or contract audit. These specialisations are a scarce and expensive resource in any country.

While a separate internal audit unit for each institution would be ideal for small units, alternative arrangements, such as centralised shared service units, have to be considered. Sarajevo Canton in FBiH, is recruiting up to 16 internal auditors for a specialist unit. While this arrangement has critical mass, a strong relationship will be needed with the ministries that the unit is supporting so that it is not seen as an inspection function.

Liaison Between Internal Audit and Supreme Audit Institutions and Inspectorates

The new internal audit charter includes a framework for co-operation between internal auditors and supreme audit institutions (SAIs). Internal audit and external audit read each others' reports but beyond that point the level of co-operation varies. However, there are no institutionalised links between the CHUs and the SAIs.

There is only one relevant inspectorate, and that is the Budget Control Unit (BCU) in the RS Ministry of Finance. Other inspection services, such as the Agency for Inspection Affairs in FBiH, cover mainly

non-financial issues. Internal audit in the RS MoF and the inspection service are thus linked, as they are part of the same unit, under a single head of unit, but there is apparently no substantive exchange between the two functions.

Throughout BiH internal audit is at an early stage of development, despite the fact that some internal audit units were set up in 2004. Over the past year, a new methodology has been developed, and practical training has been provided. However, some key parts of the methodology still have to be formally adopted. Otherwise, development has been slow, and this is unlikely to change in the short-term as there has been virtually no change in the overall number of internal auditors, and there are now restrictions on recruitment due to financial constraints.

Are adequately resourced and competent central harmonisation arrangements for FMC and IA in place and functioning?

Central Harmonisation Units (CHUs) have been established in BiH State and in the entities, with each having a unit set up for financial management and control (FMC) and one for internal audit, and their heads have an appropriate status within the relevant Ministry of Finance. BD has not yet established a CHU but plans to do so in the near future. The CHU Co-ordination Board (CB) has been established and is operational. Work for the CHUs has involved primarily internal audit, with very little development in the area of FMC apart from draft legislation and some awareness-raising. Work related to FMC, such as the preparation of a manual on managerial accountability, has been deferred until later in 2012.

CHU Resourcing

The planned and actual staffing levels of each of the CHUs is shown in the table below:

	BiH	**FBiH**	**RS**
Planned staffing	9	9	7
Actual staffing (January 2012)	5	1	5

The situation in the Federation is clearly unsustainable, and it is remarkable that it has made any progress at all in the past year. Part of this progress has been the result of the support provided by the CHU Co-ordination Board and the PIFC Technical Assistance Project. Overall, the limited resources available to the CHUs sends a message about the perceived importance of PIFC to the state and entities. This situation also risks restricting any further progress unless increased co-operation between the CHUs leads to greater synergy.

CHU Planning

Each of the PIFC Strategies includes an outline work programme. The Strategies seem to cover different periods, with BiH State expecting that almost everything required for internal audit and FMC will be in place by the end of 2012, whereas for the entities the plans extend to 2015 and beyond. Furthermore, the plans tackle similar tasks at different times. The CHUs do not have updated plans that would show whether expected outputs had been achieved. While progress has been made during the year, it seems to have been driven by the outputs of the PIFC Technical Assistance Project.

CHU Activities

A number of internal auditors are new in their posts and have to assimilate the new methodology. In this situation, networking between practitioners can be a valuable aid to development. So far the majority of this networking has occurred through the PIFC project rather than through the CHUs, which makes it more difficult for the CHUs to learn about either:

- areas of good practice that can be shared with others to encourage improvement; or
- common problems where more guidance may be required or where methodologies may need to be amended.

CHU Co-ordination Board

The Co-ordination Board (CB) was created by internal audit legislation to:

- harmonise draft amendments to the Internal Audit Laws;
- harmonise the training programme for certification of internal auditors;
- adopt international internal audit standards and a code of professional ethics based on international standards;
- harmonise the procedures and methodology of internal audit;
- finalise the development strategy for internal audit in the public sector of Bosnia and Herzegovina.

To achieve its objectives, the CB met almost monthly during 2011, especially to deal with the technical material produced by the EU-funded PIFC Technical Assistance Project. This material provided frameworks of various technical and legal documents, to be tailored by each CHU and then adopted by the respective governments. A framework programme for qualifications and ongoing training for internal auditors, which was also developed by the PIFC Project, has been discussed by the CB but has not yet been adopted.

Each CHU head is a member of the CB, and the plan was to run the CB in a similar way to the organisation of the CB for Supreme Audit Institutions, with rotating leadership and shared costs. The Head of the FBiH CHU was due to take over the leadership of the CB at the beginning of 2012. However, due to the lack of staff in the FBiH CHU as support, the Head suggested that the CHU RS instead could exercise the role for 2012. The necessary CB decision in this regard was never taken because disagreements between members of the CB over procedures caused a complete halt of CB activities as from November 2011. The CB's budget and programme for 2012 have also not yet been agreed. Arrangements for the CB need to be reconsidered in view of the current predicament, especially as there is still a great deal of work to be done to achieve the full implementation of PIFC.

The effectiveness of the CHUs is seriously hampered by their lack of staff. This situation is especially problematic at a time when efforts to roll out FMC, a far greater task than dealing with internal audit, should be getting underway. The impression is that progress in the implementation of PIFC over the past year has been driven by the outputs of the PIFC Technical Assistance Project.

Capacity to Further Develop the System

It is unlikely that internal audit can develop effectively while FMC lags behind. Better developed systems of internal control can provide a focus for internal audit assurance work. In addition, when

FMC is better developed than it is at present in Bosnia and Herzegovina, managers are more conscious of the need for sound internal control and are therefore more supportive of the role of internal audit and more appreciative of the assurance it provides.

The PIFC Technical Assistance Project that the CHUs and the CB have relied upon will end in May 2012. However, it is understood that PIFC will be one of the components of a new EU-funded project that is foreseen to begin later on in 2012. This support will certainly increase the possibility of delivering PIFC developments in BiH. However, as there may be a gap between the two technical assistance projects, and the new project will take some time to become fully operationalThus it is vital for the CHUs themselves to be in a position to continue to push PIFC development forward and to maintain the momentum that has now been established.

In order to do this, each CHU should reconsider its PIFC Strategy, take stock of progress made so far, and then plan for the further development that is needed for the successful implementation of PIFC. Further gap analysis work should be included at this stage, especially in RS. These plans should also be co-ordinated with those of the other CHUs so as to maximise the synergy between them. However, while the CHUs in RS and in BiH State should have the capacity to do this, the CHU in the Federation will have more difficulties due to its current staffing level.

The greatest challenge will be in the area where the least progress has been made to date, i.e. FMC. Considerable time and effort, together with encouragement from the highest levels, will be required to achieve reform in the approach to managerial responsibility. The development of a sense of responsibility at management level is needed to increase the organisation's efficiency and to enable the delegation of tasks within the public administration.

The CHUs will find it difficult to achieve this development given their current staffing levels, especially in FBiH, where there is only a head of unit. There is a risk that this situation will persist as long as there are financial constraints in BiH State and in the entities. Equally, until there is a willingness to implement managerial reforms, the focus of PIFC development may be limited to technical reforms, such as legislation and rulebooks. However, in such a situation it is unlikely that the anticipated benefits of PIFC reform can be achieved by means of technical improvements alone. Real progress will only come with managerial reform and managerial accountability, which concerns just as much the "hearts and minds" of the people operating the systems as it concerns the technical details of the systems.

The current economic and political issues have an impact on the capacity for reform in the short-term. Without significant technical assistance, even further technical developments are unlikely to take place. However, this assistance cannot substitute political support for this reform and can only to a limited extent address the need for comprehensive administrative reform in the country. Until managerial accountability is introduced and understood, it will be very difficult to develop FMC or internal audit as effective tools for improving the quality of public management and for delivering the ultimate benefits of improved public services.

EXTERNAL AUDIT

Introduction

Bosnia and Herzegovina has four Supreme Audit Institutions (SAIs). The SAI responsible for auditing the institutions of Bosnia and Herzegovina is the Auditing Office of the Institutions of Bosnia and Herzegovina (SAI BiH), managed by an auditor general and two deputies. Both entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, have their own audit institutions, respectively the Office for Audit of the Institutions of the Federation of Bosnia and Herzegovina (SAI Fed) and the Supreme Audit Office for Auditing of the Public Sector in Republika Srpska (SAI RS). Both are managed by an auditor general and one deputy. These three SAIs were established in 2000, and started operating in the course of that year. Since 2007 the Brčko District has its own audit institution, the Office for Audit of Public Administration of the Brčko District of Bosnia and Herzegovina (SAI BD), covering all public bodies in the district. SAI BD is managed by an auditor general and two deputies.

On the basis of the respective SAI Laws, the SAI BiH, SAI Fed and SAI RS co-operate by means of the Co-ordination Board (CB). The establishment and responsibilities of the Co-ordination Board are laid down in article 46 of the Law on the SAI BiH: to establish audit guides and instructions, to exchange professional experiences, and to organise and co-ordinate development activities. The Law on the SAI BiH does not foresee the participation of the SAI BD in the Co-ordination Board, but the SAI BD is represented on the Board on an informal basis. The Co-ordination Board consists of all three auditors general and deputy auditors general and has been an important vehicle for the joint development of audit standards and guidelines through the working groups that it has established. The Co-ordination Board is financed from the budgets of the three SAIs that formally comprise the Board. The secretariat is entrusted to the SAI BiH.

Since their establishment, the SAIs have benefitted considerably from technical assistance provided by the Swedish National Audit Office (SNAO). From 2000-2009 the SNAO supported the individual SAIs, the Co-ordination Board and the working groups established under the umbrella of the Co-ordination Board. Since 2010 the assistance of the SNAO has been provided at a lower level and is restricted mainly to performance audit.

In 2004 the Co-ordination Board asked SIGMA to carry out a peer review of the three SAIs that formally comprise the Board. The peer review report was presented to the three SAIs in autumn 2005. The Co-ordination Board made a similar request to SIGMA in 2011 for a second peer review, which is currently underway. This peer review also covers the SAI of Brčko District.

The SAI BiH has 46 staff; the SAI Fed has 64 staff, including the 20 staff in the three regional offices (Mostar, Tuzla, Bihac); the SAI RS has 57 staff (including the eight staff in the regional office in Bijeljina); and the SAI BD has 13 staff. In total, therefore, the four SAIs have 180 staff.

Baseline Questions

Do the Supreme Audit Institutions have clear authority to satisfactorily audit all public and statutory funds and resources, bodies and entities, including all EU resources?

The SAI Laws for Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District give the SAIs legal authority to carry out audits on all public bodies and institutions, as well as on companies in which the (state or entity) government has a majority stake. The mandate includes local government on the entity level (cantons, cities and municipalities in the case of the SAI Fed; cities and municipalities in the case of the SAI RS). For a certain number of institutions the SAIs have the legal obligation to carry out an audit on an annual basis. For local government and (semi-) public enterprises such an obligation does not exist, and it is up to the SAI to decide on the selection of these auditees. The Law on the SAI BiH obliges the SAI to audit annually all institutions of BiH State. The Law on the SAI BD, in articles 11 and 13 (4), takes as a point of departure the obligation of the SAI to annually audit all public institutions and (semi-) public enterprises. The mandates of all four SAIs also cover funds provided by international bodies or organisations, either as loans or grants. This provision would in principle cover the use of EU funds by public institutions. Revenue is not explicitly mentioned in the SAI Laws, apart from revenue emanating from the sale of assets, privatisations and concessions.

The SAI Fed and the SAI RS both have a very wide remit, covering approximately 1,400 auditees in the Federation and around 950 in the Republika Srpska. SAI Fed has to carry out annual financial audits in 65 institutions (budget-users, funds, and consolidated budgets of the Federation and of each of the 10 cantons). The Law on the SAI RS requires the annual audit of 70 budget-users and funds.

These figures alone indicate that, due to restricted resources, it is impossible for the SAIs to cover all auditees on an annual basis. In that respect, the entity SAIs cannot satisfactorily carry out their audit duties, even if they have the authority to do so.

All four mandates include financial audit and performance audit and leave room for special audits at the request of competent parliamentary bodies. The Laws prescribe that the SAIs apply INTOSAI auditing standards. The SAI BiH and SAI Fed Laws prescribe that the SAIs apply the standards set by the International Federation of Accountants (IFAC) in the case of the audit of a public company. IFAC standards are also mentioned in the Laws on the SAI RS and the SAI BD, but the Laws do not specify that the IFAC standards relate to public companies. The authority of the SAIs to collect information, the obligation of auditees to submit any information requested, and the right of auditors to enter and remain on the premises of an auditee are clearly laid down in all four laws (articles 39-40 of the SAI BiH Law, the SAI Fed Law and the SAI RS Law; articles 40-41 of the SAI BD Law). An additional provision exists allowing for the fining of legal entities if they do not provide the requested information or documentation or do not provide access to the premises or information. Natural persons may be fined if they give false or misleading information to the SAI.

The SAIs have a clear legal authority to audit all public and statutory funds and resources, bodies and entities. The sheer number of potential auditees in the entities makes it impossible to carry out an annual audit of all those auditees. Many of the smaller municipalities are therefore not audited at all. Given the impossibility of substantially increasing the SAIs' resources, a solution to the problem would be the reduction of the number of mandatory audits by law, combined with a risk-based approach to the selection of audit subjects.

Does the type of audit work carried out cover the full range of regularity and performance audit set out in INTOSAI auditing standards?

In their respective audit laws, all four SAIs have the mandate to carry out both financial audit and performance audit. Financial audit is defined as covering both attestation audit (assessing the reliability of financial statements) and compliance audit (assessing the legality and regularity of expenditure). Performance audit is defined as reviewing or assessing the efficiency, economy or effectiveness of a programme, activity or a particular aspect of business operations of public

institutions. These definitions, which moreover refer to the relevant auditing standards, are satisfactory as a basis for proper financial and performance audit, the full range of external audit as described in the INTOSAI standards.

Financial audit has been developed with the strong technical support of the Swedish National Audit Office (SNAO) since 2000. The SNAO helped to develop the financial audit manual, which was approved by the Co-ordination Board and is now guiding the financial auditing carried out by all four SAIs. The SNAO also organised training in financial audit, which has certainly been very fruitful. The approach to financial audit is professional and auditors are well prepared for their task, although on the compliance side the level of legal expertise is inadequate for the rather legalistic and formalistic environment in Bosnia and Herzegovina. The lack of financial resources, leading to constraints in human resources, has resulted in time allocations that are too limited for large and complex audits. However, an increased use of IT in the audit of governmental accounting systems will improve efficiency in the audit process and assist in electronic sampling and analysis. Financial audit had attained a professional level when the SNAO terminated its technical support at the end of 2009, although further development of the methodology and manuals will be necessary, together with a structured and practical training programme, to ensure that this level of financial audit is sustainable for all SAIs.

Financial audit focuses on the financial statements and underlying accounts of the audited entity, but it covers, as well, internal control systems, internal audit, and the follow-up of previous audit recommendations. Financial audit provides audit opinions on any individual entity audited. The SAIs also carry out mandatory annual audits on the budget execution reports that are submitted by the respective ministries of finance.

Auditees are generally satisfied with the professional attitude of SAI auditors, although they may not fully agree with the final result of an audit, the audit opinion. Audit opinions, although professionally formulated, serve as an instrument used by politicians and the media to criticise politically the responsible manager, mayor or minister. This practice risks placing the SAIs and their auditors in the centre of a political struggle and reduces the potential impact of the audit reports. The rationale underlying particular audit opinions may also not be fully understood by politicians and the media, and any variations between the opinions of SAIs leave them open to challenge.

Performance audit has been developed since 2006, also with support from the SNAO. The approach and methodology applied by the SNAO were introduced in Bosnia and Herzegovina through pilot audits, which were carried out with the close assistance of SNAO staff. The development of performance audit has followed a step-by-step approach, gradually building up capability and experience in this type of unit. There is some variation between the SAIs in terms of the level of development of performance audit, and the SAI BD, given its recent establishment, is naturally still in an early development stage. The SAI RS has invested most in performance audit, with one performance auditor for every three financial auditors, and in comparison the SAI BiH (with one performance auditor for every 3.5 financial auditors) and the SAI Fed (with one performance auditor for every 5.3 financial auditors) are in intermediary positions in terms of capacity. A working group set up by the Co-ordination Board is developing an audit manual for performance audit, following the development and adoption of performance audit principles by the Board. Another working group is dealing with preparations for the departure of the SNAO as the provider of technical assistance for performance audit, foreseen at the end of 2012. The resulting exit strategy will aim to ensure the sustainability of performance audit development.

Performance audit has reached a satisfactory professional level. The reports so far have had an impact. Performance audit is appreciated by auditees, parliamentary committees and the media. This positive profile of performance audit is an asset for the SAIs in view of the further development of this type of audit.

The SAIs are linked to the accounting systems of their respective Treasury's and may initiate reports and analyse data as part of their audits. The use of IT in audit needs, though, continuing development by all SAIs to ensure that the computerisation of government accounting systems is properly addressed through the audit approach and also to ensure that the SAIs secure the efficiencies derived from applying IT in effective sampling of transactions and analysis. Further development of the document management systems to support the audit process will also benefit the SAIs from improved efficiencies and will assist in maintaining consistency in working practices.

The SAIs carry out the full range of audit as set out in the international standards. Financial audit (attestation and compliance audit) is carried out in a professional manner, but the interpretation of audit conclusions by politicians reduces their potential impact. Increased use of IT in the audit of governmental accounting systems will improve efficiency in the audit process which will especially help entity SAIs to cope with the overwhelming volume of mandatory annual audit tasks. Performance audit is still being developed with the assistance of the SNAO, but it has already reached a satisfactory professional level. The SAIs will need to adopt appropriate development strategies, with the support of the Co-ordination Board, to ensure that the progress made so far in these areas is sustained in the future.

Do the SAIs have the necessary operational and functional independence required to fulfil their tasks?

The SAIs do not have the constitutional anchorage required by INTOSAI standards. The Lima Declaration (ISSAI 1), in section 5 sub 3, states: "The establishment of Supreme Audit Institutions and the necessary degree of their independence shall be laid down in the constitution." Although the absence of a constitutional status for the SAIs has no direct consequences, it constitutes a potential risk in terms of the independence of the SAIs.

The auditors general and deputy auditors general are appointed by the respective parliaments for a non-renewable term of seven years. The appointment procedure involves a selection committee in parliament, and in the case of the entities also the president of the entity: parliament appoints on the proposal of the president, which is based on the ranking made by the parliamentary selection committee. For the SAI BiH and the SAI Fed, the requirements for these positions include a university degree in economics or law, and for the SAI RS and the SAI BD only graduated economists qualify. Removal from office (by parliamentary decision) is only possible on the basis of the conditions set by law, which serves as a certain – but not an absolute – guarantee against arbitrary decisions.

In terms of their operational functioning, the regulations of the laws in general provide the SAIs with a satisfactory degree of independence. Articles 4 and 7 of the Law on the SAI BiH – and similarly articles 4 and 7 of the Law on the SAI Fed, articles 4 and 38 of the Law on the SAI RS, and articles 4 and 39 of the Law on the SAI BD – provide for independent functioning, without the control of any other entity or institution, and the functional immunity of auditors. The SAIs can decide independently on the audit work programmes, although the SAIs are to submit the work programme to the respective parliament(s) or to the competent body in parliament. The parliaments are entitled to request special audits, but the final decision is made by the SAI. In terms of budget, the SAIs have the power to directly submit a draft budget to the competent parliamentary body, which in principle allows for a positive consideration of the requests, without direct interference from the executive.

As the audit staff in the SAI RS and in the SAI Fed does not fall within the salary structure of the civil service, these SAIs can decide on the salary structure themselves, which allows them the possibility of setting high qualification requirements and corresponding higher salaries compared to the civil service in general. However, a decision by the Minister of Finance and Treasury to list the staff of the SAI BiH amongst those subject to the Law on Salaries of the Civil Service contradicts the relevant SAI Law provision, and this contradiction needs to be resolved. General budget constraints in Bosnia and Herzegovina of course limit the possibilities for recruiting staff to the full complement

(systematisation) of the SAIs. However, the lack of harmonisation of other laws with the SAI Laws may impair the practical application of budgetary autonomy. For instance, the Law on Financing the Institutions of Bosnia and Herzegovina is applicable to the SAI BiH as one of these institutions. This law disregards the specific position of the SAI BiH with respect to budget preparation and approval. The general legal provision in the Law on the SAI BiH stipulates that this law overrules any contradictory provision in another law. However, this provision cannot be applied as easily as it seems, as the SAI remains dependent on others for the recognition of such a contradiction, since any difference of opinion will have to be decided upon in a court.

The Law on the SAI BD is less generous in allowing independence or autonomy: the preparation and approval of the budget follows the procedure for all budget-users, and the audit staff fall under the Law on Civil Service in Public Administration Bodies of Brčko District. In addition, the salaries of the Auditor General of the SAI BD and the deputy auditors general are set by the Assembly, without any reference to the salary level of other high officials, as is the case for the other three SAIs. This situation may in practice lead (and already led) to arbitrary decisions concerning the salary level of the management of the SAI BD.

The SAI Laws include provisions on the evaluation of the quality of work performed by the SAIs. Parliament is to initiate such an evaluation or peer review every four years, and it should preferably be carried out by the SAI of another country. In Brčko District the provision reads differently, as it foresees the appointment of an external reviewer by the District Assembly every three years. In practice, the District Assembly has contracted on two occasions a private sector audit firm to carry out this quality review, with the most recent one in 2011. Such reviews can only contribute to improving the quality of the SAI if the contracted firm is sufficiently knowledgeable in the area of public sector auditing. In both the State of Bosnia and Herzegovina and in the Federation of Bosnia and Herzegovina, the respective parliamentary committees consider the SIGMA peer reviews to be an adequate instrument for assessing the quality of performance of the SAIs. In Republika Srpska the competent parliamentary body shares this view, but parliament as a whole is still considering the contracting of a private audit firm to carry out a quality review.

The Parliament of Republika Srpska has also adopted a resolution in which the SAI RS is requested to agree with the Ministry of Finance on the volume, aims and criteria of audit. Such a resolution has a negative impact on the necessary independence of the SAI. Although the SAIs are independent in deciding on the audit work programme, there is a problem attached to this work programme. The SAI BiH and the SAI BD are obliged, in accordance with their respective Laws, to audit all budget-users each year. Although formally these SAIs still have the independence to decide on their work programmes, materially this independence only refers to performance audit. The imbalance between resources and audit remit implies huge time pressures on auditors, which may affect the quality of their work.

With the exception of the SAI BD, the respective laws on the SAIs provide the SAIs with a satisfactory degree of functional and operational independence to fulfil their tasks. However, the fact that the SAIs are still not anchored in the respective constitutions represents a potential risk for their independence. Attention should be paid also to the interference of other laws, which intentionally or unintentionally may affect the autonomy or independence of the SAIs. Another difficult issue remains the inadequate understanding, amongst political stakeholders, of the role of independent external audit in the public sector. Even if the level of operational independence is considered to be sufficient, constitutional anchorage of the SAIs is still highly desirable.

Are the SAIs' annual and other reports prepared in a fair, factual and timely manner?

The SAI Laws prescribe how and when comments on the SAIs' draft reports are to be sought, the established time frames for feedback, and the consequences that SAIs should draw from those

comments. For instance, the Law on the SAI BiH states in article 15 that before an audit is finalised, the draft report is to be sent to the manager of the audited entity. The auditee has 15 days to submit a comment in writing, or a longer period of time if agreed by the SAI. The SAI has to take into consideration the comments received before drafting its final report. In case of disagreement, the comments must be incorporated into the final report. The Law on the SAI Fed has a similar provision, but the SAI is only obliged to ensure that the relevant comments are reflected in the final report, which gives more room for interpretation. The Law on the SAI RS again differs, with the obligation for the SAI to add the comments received to the final audit report in the case of disagreement. The Law on the SAI BD has the same provision, but added to it is the obligation for the SAI to explain the reasons for having rejected the comments.

The procedures, as set out in the SAI Laws, are followed by the auditors, and often the draft audit report is presented and discussed in a meeting with the auditee. Auditees are usually satisfied with the audit process, but less so with the manner in which comments on a draft report are treated. A general complaint is that comments are largely disregarded, and that identified non-compliance issues are not always within the control of the audited entity. Notwithstanding these reactions, auditees generally agree with the observations in the audit reports, confirming the professionalism of audit work underlying these observations. Another point of criticism is that recommendations are sometimes addressed to the wrong institution: instead of being addressed to the audited entity only, the recommendations should be addressed, at least additionally, to a higher level, for instance to the Council of Ministers or the Minister of Finance.

The SAIs are required to submit their final audit report to the auditee within 90 days of submission of the annual report of the budget-user or of the annual report on the budget execution. In the case of the SAI BD, the SAI is obliged to submit its report within 15 days of receipt of the auditee's comments. In principle, these provisions allow for the timely submission of audit reports, but the time frames complicate the planning and programming of audits, and it is therefore more difficult for SAIs to make optimum use of their resources.

Legally, auditees are obliged to react to the recommendations of an audit report. The respective SAI Laws set a time frame of 60 days after the audited entity has received the final report from the SAI, except for the SAI BD, where the time frame is set at 30 days. In its response the auditee is expected to present the measures that will be taken to overcome the problems or to remove the irregularities that have been identified in the audit report.

Once the SAI has sent the final report to the auditee, it is not published until after the reports have been forwarded to the respective parliaments, which is carried out in batches a couple of times a year. Only the annual report on the budget execution and performance audit reports are published shortly after they have been sent to the auditee, as these reports are submitted immediately to parliament.

The SAIs' reporting procedures help to ensure that reports are fair, and the facts are usually not contested. Auditees generally concur with the SAIs' observations, but they are not satisfied with the way in which their comments are treated by the SAIs in the final reports.

Is the work of the SAIs effectively considered by parliament, e.g. by a designated committee that also reports on its own findings?

At state level the two houses of Parliament (House of the Peoples and House of Representatives) each have a committee dealing with the reports of the SAI BiH. In principle all reports with a negative or reserved opinion are discussed by the committees, and hearings are organised, to which the managers of the auditees concerned are invited. The discussions of the committees result in a report to the plenary House of Parliament, usually accompanied by a draft resolution on the follow-up that

should be given to the observations and recommendations in the audit reports. The Houses of Parliament also deal with the draft budget of the SAI BiH, which is submitted for approval and for discussion by the committees, together with the annual report of the SAI.

In the Federation of Bosnia and Herzegovina, the two Houses of Parliament have established a joint committee to deal with audit reports. The policy is similar as at state level, with the focus on discussing adverse or reserved audit opinions, and organising meetings to which the auditees concerned are invited. The joint committee is to report on its conclusions to both Houses of Parliament.

A technical assistance project launched in 2008 (assisted at first by DFID and later by USAID) supports the State and Federation parliaments in dealing with audit reports in a structured way. This project has resulted in a Guideline for the processing of audit reports, which is being incorporated into the parliamentary procedures. The main focus of the Guideline is on raising awareness amongst parliamentarians on how to make use of the audit reports and on how to ensure follow-up by the responsible managers of audited entities. A strong weapon in this regard is the possibility of cutting the budget of audited entities in the event that insufficient follow-up is given to audit recommendations (article 16(4) of the Law on SAI BiH and similar articles in the other SAI Laws). The use of this weapon at state level has focused on the elimination of specific administrative budget lines (representation, service cars) so as to minimise the impact on beneficiaries of government programmes and to instead apply direct sanctions on the responsible managers. In the Federation, the experience with the new procedure is still limited, and its effects therefore need to be awaited.

In the Republika Srpska the parliament has established an Audit Board, which is a committee responsible for dealing with the SAI's reports and the SAI's budget. The Audit Board of nine members, chaired by an opposition member of parliament, uses standard procedures for dealing with audit reports. Only reports with an adverse or qualified opinion are discussed and, in the case of adverse opinions, the auditee is invited to a hearing by the Audit Board. The Board has the obligation, according to its own rules of procedure, to submit any audit report with an adverse audit opinion to the public prosecutor. Such a procedure strengthens the idea that negative audit opinions indicate fraud or corruption. The plenary is to adopt the SAI's annual report on the basis of recommendations by the Audit Board. This arrangement has led to noteworthy situations in recent years, such as in 2009, when the Assembly did not adopt the SAI's annual report. The Assembly of the Republika Srpska does not receive any technical assistance to strengthen its capacity to deal with audit reports.

In the Assembly of Brčko District, no separate body exists to deal with audit reports, and this task is part of the mandate of the Commission for Monitoring of the Operations of government, District Institutions and Petitions of Citizens. So far, the district's experience in dealing with audit reports is limited and, on the whole, the Assembly needs to acquire a better understanding of the role of external audit and of its own role in this respect.

The respective parliaments have introduced procedures to deal with audit reports, but the result has so far been limited, mainly due to the focus on the audit opinion without any in-depth examination of the systemic problems identified in the reports. Due to the highly politicised environment, audit reports are automatically controversial, which reduces their potential positive impact on improving financial management in the public sector.

Have the SAIs adopted internationally and generally recognised auditing standards compatible with EU requirements, and how far have they been implemented?

All SAI Laws declare that the SAIs are to apply the INTOSAI auditing standards, and the SAI BiH and the SAI Fed are even legally obliged to publish these standards. The INTOSAI auditing standards

(ISSAIs) are regularly updated, and the last update was in November 2010. Even these latest ISSAIs have been formally adopted by the SAIs, which reflects a high level of ambition. The SAI Laws also refer to the IFAC standards (ISAs) as auditing standards that they are also to apply. For financial audit, the ISSAIs closely follow the ISAs, with some practical guidance on how to apply those standards in the public sector setting.

The publication of auditing standards is not sufficient of course; the application of these auditing standards in practice is needed. For financial audit a manual exists, adopted by the CB, and in the past auditors were trained. In the application of this manual, quality control is exercised by the SAIs by means of a supervision system, whereby managers ensure that auditors prepare, carry out and report on the audit according to the standards that have been set down. The Co-ordination Board adopted audit quality guidelines in 2008, which also include quality assurance procedures to be followed once the audit process has been finalised. These guidelines are intended to be applied by all four SAIs. Full implementation would imply a guarantee that audit guidelines are being followed and that audit findings are sufficiently based on documents and other audit evidence. So far, implementation has been partial, with some of the proposals of the audit quality control guidelines that have not, or not yet, been applied. A separate audit quality control department has only recently been established in the SAI BiH, in the other SAIs it is a supervisory function that is supplemented by mutual peer reviews (one audit is reviewed by another audit team). For training, for instance on the new set of INTOSAI standards that have been issued since the completion of the financial audit manual, limited time and resources exist. The manual has not been updated, but the new ISSAIs for financial audit are certainly not revolutionary, and therefore an update might not be very urgent. Overall, the practical implementation of auditing standards cannot yet be fully ensured.

For performance audit, a similar situation exists, with the difference that the performance audit manual is still under development and can therefore take into account the latest ISSAIs in that type of audit. Also, the SNAO is still at hand to support the SAIs in developing the manual, to provide give training, and to advise on procedures to ensure that the standards and guidelines are applied in practice.

These shortcomings in the application of auditing standards do not imply that auditors do not have the proper background or do not know what they are doing. They only indicate that auditors need to receive more support in understanding the auditing standards and more guidance on how to apply the standards in the context of the SAIs in Bosnia and Herzegovina.

All four SAIs are legally bound to use the ISSAI framework of auditing standards for SAIs. Full implementation of these standards is in progress, but in particular more and systematic training efforts are needed to secure this implementation. Quality control guidelines, developed under the auspices of the Co-ordination Board, have not yet been fully applied in all SAIs, and ex post quality assurance is still in its infancy.

Are the SAIs appropriately aware of the requirements of the EU accession process?

The SAI BiH is a member of the network of the European Court of Auditors and the SAIs of candidate and potential candidate countries. Participation in this network enables close contacts with SAIs in a similar stage of development, and the seminars and workshops organised by the network, with support from SIGMA, allow the staff members of all four SAIs to develop their technical skills and knowledge of the EU and of the procedures concerning IPA funding. The SAIs are so far not active in auditing the use of EU funds in Bosnia and Herzegovina, and they have no immediate plans to become engaged in this process. However, the Strategic Development Plan for 2007-2012 (updated in 2010) does include objectives related to the overall political goal of Bosnia and Herzegovina to join the EU. In that context, the SAIs are developing a policy on how to contribute to fulfilling the

Stabilisation Agreement with the EU, especially with respect to public administration reform and PIFC development. Audits on progress in these areas are foreseen as major activities.

The SAIs are sufficiently aware of the requirements linked to EU accession, but so far they have not undertaken the concrete analysis that is required in order to determine how these requirements would affect their audit work.

Capacity to Further Develop the System

The SAIs in Bosnia and Herzegovina are relatively mature public institutions compared to many of the institutions that they have to audit. The quality of external audit in the country is quite high. The management of the SAIs are also very committed to securing further institutional and professional development, which is demonstrated by the regular updating of the Strategic Development Plan under the auspices of the Co-ordination Board and by the request of a peer review in 2004 and again in 2011. An analysis was made in 2011 of the implementation of the recommendations of the 2005 peer review, and this analysis, together with the peer review 2011-2012, will provide input to the Strategic Development Plan for the period after 2012. Also, the exit strategy that is being prepared in view of the departure of the SNAO will provide input to the new Plan.

The current Strategic Development Plan sets as objectives the consolidation of achievements made in the areas of institutional strengthening, professional development of staff, and securing of audit impact. In all of these areas the SAIs are confronted with resource constraints, which hamper further development. However, not all of the existing opportunities to save resources by means of greater co-operation through the Co-ordination Board and its working groups have been seized so far. Quality assurance, for instance, could be organised as a joint function. Exchanges of experience and, for example, the organisation of parallel performance audits have not been fully explored.

A difficult issue remains the inadequate understanding, amongst political stakeholders, of the role of independent external audit in the public sector. This problem is difficult for the SAIs to remedy, but there is room for improving the content and communication of SAI reports, which may help to get the message across in better ways. There is also room for improving the relationship with the respective ministries of finance and public prosecutors in an attempt to co-operate with these potential allies in the process of stimulating sound financial management and control.

Since its establishment, the Co-ordination Board has demonstrated its capacity to adopt key audit methodologies and strategies for the development of the SAIs. A working group is currently preparing an exit strategy to ensure that the issue of the withdrawal of SNAO support at the end of 2012 is addressed. However, the current Strategic Development Plan, valid until the end of 2012, also needs further development so as to provide suitable strategies for sustaining the progress that has already been achieved. Particular attention to the training needs across all SAIs would be beneficial. Furthermore, associated action plans, with specific and detailed activities, are required, with realistic implementation deadlines for all SAIs.

At the end of 2012 the mandates of the auditors general of the SAI Fed and the SAI RS will expire. The achievements accomplished by working together through the Co-ordination Board can certainly be attributed to the personal commitment of the auditors general. Such co-operation between public institutions of the state and entities is not self-evident in a country like Bosnia and Herzegovina. New auditors general will have to be appointed, which will bring a period of uncertainty for the institutions and their staff. The sustainability of co-operation through the Co-ordination Board could be strengthened if the Board had its own secretariat.

PUBLIC PROCUREMENT

Public Contracts

Main Developments Since the Last Assessment (May 2011)

There has been no major change in the legislative framework for awarding public contracts in Bosnia and Herzegovina (BiH) since the last assessment. Despite numerous attempts made in the last three years, all of the initiatives undertaken to substantially modernise the Public Procurement Law (PPL) have failed to be accepted by parliament as a result of a political deadlock (conflict between representatives of the Republika Srpska (RS) and the Federation BiH (FBiH) regarding central procurement institutions: RS wants the procurement institutions (especially the Procurement Review Body) to be located at the entity level, while FBiH defends the current set-up (at the state level only).

Currently, the Public Procurement Agency (PPA) is finalising a new draft Public Procurement Law (PPL) aimed at closer alignment with the EC Directives. The 2011 draft PPL is much better than the 2004 PPL in terms of promoting efficiency and harmonisation with the EU. The draft was made available for public consultation in June 2011 and is expected to be delivered to the Council of Ministers for approval at the beginning of 2012. The prospects for its adoption nevertheless remain unclear. Since all of the factors that, in the past, led to the rejection of the previous draft PPLs by parliament are the same factors now in effect, it is not certain whether the current attempts to improve the legal framework will be successful.

The most important institutional pillars of the public procurement system remain the Public Procurement Agency (PPA) and the Procurement Review Body (PRB). There have been no important changes in the internal organisation of those institutions or in terms of the number of staff, except for the appointment of a new Board of the PPA in November 2011. Few positive steps have been made with regard to improving co-operation between the PPA and the PRB.

The GO-PROCURE electronic system (https://goprocure.javnenabavke.gov.ba) – which ensures the technical facilities for publishing notices by electronic means – has been functional since September 2011. The launch of this system is the most significant improvement in recent months, even though the expensive publication of notices in the paper-based *Official Gazette* remains the main official method of publication. The other electronic system, WisPPA (https://wisppa.javnenabavke.gov.ba) – established for the delivery of statistical data and reports by contracting authorities to the PPA – is also in function.

The PPA organised some training activities in the past year and has placed greater emphasis on the monitoring activity, in particular with regard to procurement notices.

Despite some improvements, many of the activities set out in the Strategy for Development of the Public Procurement System and Action Plan 2010-2015 (adopted by the BiH government in September 2010) have been delayed. Inertia persisted in 2011 (as in the previous years since 2004), and the main reason for this “freezing” is the lack of political capacity to find the proper compromises that would make it possible to move forward with the development of the public procurement (PP) system.

Main Characteristics

The public procurement system in BiH has been stagnating for several years. Although the BiH public procurement system was developing in the right direction in 2004, when the PPL was adopted and its implementation launched, obvious signs of weakness and inertia have dominated since 2004.

Public Contracts – Legislative and Institutional Framework

The current BiH PPL generally complies with the main principles of the EU public procurement system but is mainly modelled on the old Directives: 92/50/EEC; 93/36/EEC; and 93/37/EEC (services, supplies and works contracts awarded by public authorities), with some elements from Directive 93/38/EEC (utilities). The Public Procurement Directives currently in force in the EU (2004/17, 2004/18, 2007/66 and 2009/81) have not been transposed.

The most significant differences with EU public procurement law include:

- existence of mandatory domestic preferences for local companies offering locally produced goods and using a local workforce (10% price preference), except for companies from Central European Free Trade Agreement (CEFTA) countries, which have enjoyed preferential treatment since May 2010;
- lack of the new procurement techniques and instruments that were introduced in the EU in 2004 (framework agreements with several suppliers, competitive dialogue, electronic auction, social and environmental considerations);
- non-transposition of the new provisions regulating the review system (Directive 2007/66) and defence procurement (Directive 2009/81);
- slightly different scope of application (private utilities operating on the basis of special or exclusive rights are not included);
- lack of a more flexible system for the utilities sector, as allowed by EC Directive 2004/17;
- differences in some procurement award procedures (e.g. the restricted procedure, accelerated procedures).

In terms of institution-building, a positive aspect is the fact that two separate institutions have been established for (i) regulating and monitoring the public procurement system – the PPA; and (ii) resolving complaints – the PRB.

Most of the activity and energy of the PPA have focused in recent years on futile attempts to pass new legislation, and as a result the operational aspects of the system have somehow been neglected. In 2011 the PPA gave more attention to monitoring activity by verifying all of the notices published in the *Official Gazette.* The Council of Ministers adopted a Decision that obligated the PPA to organise seminars for the staff of BiH institutions four times a year on the premises available in Sarajevo, Mostar and Banja Luka. Accordingly, the PPA held four seminars simultaneously at all three locations, which were attended by 75 representatives of BiH institutions.

Review System

The public procurement review system remains a key concern. Some improvements have been seen in the past year, but the system is still criticised by both contracting authorities and economic operators for being overly bureaucratic and time-consuming. In the opinion of business organisations, the decisions of the Procurement Review Body (PRB) are often too superficial,

overlooking the real irregularities and focusing instead on irrelevant formal considerations, which are sometimes unclear and inconclusive. There are also several examples of inconsistent decisions (contradictory rulings in identical or similar situations). Only in December 2010 (five years after its establishment) did the PRB start to publish its decisions online, but this activity stopped in April 2011.

Operational Practices

On the operational side, the bureaucratic and simplistic nature of procurement practices in BiH (for instance, unnecessarily detailed requirements for the qualification of suppliers and the frequent rejection of tenders for formalistic reasons, without an analysis of the content) adds to the cost of participation in public tenders for economic operators, and thereby reduces competition. Unharmonious regulations at the entity and canton levels and the lack of mutual recognition between them create an additional layer of obstacles. In many procedures, the criterion of the lowest price is used. The reluctance to use the most economically advantageous criterion appears to be undermining the effectiveness and economy of public procurement by neglecting quality and long-term costs. Many organisations, although clearly well intentioned, regard procurement as merely a process to be followed rather than as a way of seeking a best-value outcome.

The administrative capacity of contracting authorities and the professional ability of procurement officers to properly implement public procurement procedures remain unsatisfactory. BiH's business community perceives the practice of public procurement as being frequently unprofessional and prone to corruption and political pressure. Apparently there is no political will in BiH to undertake serious efforts to curb corruption – for example, the establishment of the Anti-corruption Agency, foreseen in 2010, was delayed by several months.

The implementation of the Strategy has been delayed, partially due to the failure to adopt a new Public Procurement Law. One of the activities that has been successfully implemented was the start of the electronic publication of notices on 1 September 2011. To date 3,804 notices have been published (equivalent to the total number of notices published as from 1 September 2011). At the same time, there has been a price reduction on the publication of notices in the *Official Gazette*, which are completed and submitted electronically, but the cost (for contracting authorities) of publishing contract notices in the *Official Gazette* remains disproportionally high (notices are still published both in paper form in the *Official Gazette of BiH* and electronically on the portal).

Concessions and Public-Private Partnerships (PPPs)

Main Developments Since the Last Assessments (May 2011)

There have been some major changes in the legislative framework in the area of concessions as well as public-private partnerships (PPPs) since the Peer Review carried out in 2008/2009.

In the area of concessions, the Republika Srpska Concessions Law was amended in 2006 and 2009. The BiH Federation is about to enact a new Concessions Law; it has already been adopted by the FBiH government and is expected to be passed by the FBiH Parliament in the near future.

In the area of PPPs, the Republika Srpska adopted a PPP Law and relevant implementing legislation in 2009.

Whereas numerous concession contracts have been awarded by the RS authorities, the implementation of these concession contracts is hampered by serious obstacles (e.g. burdensome administrative measures and lack of proper award procedures). So far, no PPP contract has been awarded, but a couple of PPP projects are in the process of being developed. In the BiH Federation, the award of concession contracts occurs mostly at cantonal level. At the state level, so far no concession contract has been awarded.

No changes are to be reported at the institutional level.

Main Characteristics

The existing legal framework in the area of concessions and PPPs in Bosnia and Herzegovina, despite all recent changes, can only be described as fragmented. Unlike the PPL, the award of concessions and PPPs by those authorities is regulated in a number of concurring concessions laws and accompanying laws and decrees, which are in force simultaneously at state, entity and cantonal levels.

All attempts initiated by the State Concessions Commission in the past two years to align the various legislative frameworks in the area of concessions and PPPs in the territory of Bosnia and Herzegovina have failed. In particular, the Republika Srpska has vehemently opposed any attempt to harmonise legislative measures in the area of concessions and PPPs.

Amendments to the RS Concessions Law (in 2006 and 2009) and to the proposed new FBiH Concessions Law will lead to further disharmonisation of the legislative framework in the area of concessions. This is a step in the wrong direction. Originally, the concessions laws of BiH State and the entities were to a large extent harmonised, but this has ceased to be the case.

The main problems identified in the area of concessions are the following:

- Disharmonised concession laws;
- Deficiency of certain provisions of concession laws in the entities (in particular, scope of the laws, delineation with public contracts, unsolicited proposals);
- Ineffective implementation of concession contracts in the RS.

In the area of concessions, the room for improvement is immense. The characteristics of the BiH concessions system represent the first main challenge, which is the requirement to make a number of significant changes in the legal framework, the most important of which relate to transposing the EC Directives into national law. There is a general need to establish a sound and modern regulatory framework, enshrining basic EU Treaty principles in the procurement of all concessions and PPPs, including in areas not directly covered by the detailed provisions of the EC Directives. Such a framework should result in the use of competitive procurement as the norm for the award of concession and PPP contracts instead of the use of unsolicited proposals. Several legal acts regulate the procedures for awarding concessions: the BiH State Concessions Law, concession laws in both entities, and cantonal concession laws. It is obvious that the mere existence of several legal concession regimes in the territory of BiH at the same time – even if they differ from each other only slightly – constitutes a severe hindrance to the realisation of concession projects, as in the eyes of potential private investors and their financiers these projects extend to territories covered by different concession laws.

A second main challenge will be to establish an efficient and genuinely independent review mechanism that is in line with EU remedies requirements. The introduction of competitive processes as the standard procedure for the award of concessions and PPPs will mean a significant change in practice and in the roles of the participants in the process. Additional resources and training will be required for purchasing authorities (including in line ministries) and for concessionaires so as to ensure that all participants in the process are sufficiently well prepared to run competitive processes in an efficient and streamlined manner.

The establishment of this review mechanism links closely with the third main challenge, which relates to the future role of the Concession Commissions. A closer alignment of the roles of the Commissions

with the roles played by their European counterparts is recommended. This alignment would mean reducing the Commissions' decision-making responsibilities while significantly increasing their roles to provide support in the preparation of projects, education and policy development, and to serve as sources of know-how and good practice.

The last main challenge is linked to the requirement for increased transparency and simplification in relation to the information available concerning concession opportunities and concerning the award of concessions. This challenge could be met by redefining the role of the BiH State Concessions Commission to the effect that, in addition to its regulatory functions concerning concessions awarded at state level, it would take the lead in collecting country-wide information on PPP/concession opportunities and awarded contracts, providing a central registry of statistical data related to concessions across the whole country, which would be available to the public. It would also implement a single system for advertisements and provide assistance to potential concessionaires. This change in the role of the BiH Concessions Commission would not necessarily deprive other levels of government (entities, municipalities, etc.) of their responsibilities and powers of decision-making in individual cases or in day-to-day operational activities.

Operational Practices

At BiH State level, no concessions have been awarded.

The practices in awarding concession contracts in the Republika Srpska were heavily criticised by the RS Auditor. By the end of 2011, the total number of concession contracts awarded in the RS exceeded 300; in 2011, between 50 and 60 concession contracts were signed. The Concessions Commission has been very active and, in addition to approvals for the award of contracts, it has provided numerous approvals for the negotiation and/or preparation of feasibility studies and for changes in the voting rights/ownership of concessionaires. Most of the concessions were awarded in the areas of agricultural and fishing territory (which for EU purposes does not fall within the area of concessions) and hydro-electricity plants.

In 2009 the RS Auditor carried out a performance audit on the award of concession contracts in the area of hydro-electricity plants. The report related to the activities concerned by the award of the concession contract and to the implementation of the contract, and it assessed the legal and practical consequences of the current state of affairs for the award of concession contracts in this area. The RS Auditor described the particular shortcomings that often accompanied concession award processes, such as the failure of the authorities to implement certain activities before awarding the concession contract, the lack of co-ordination between local authorities and the authorities responsible for awarding the concession contract; the Auditor criticised the use of the unsolicited proposal procedure rather than the public call for potential bids (i.e. not relying on unsolicited proposals).

Reform Capacity

Although Bosnia and Herzegovina's public procurement system was developing in the right direction in 2004, no reform of the public procurement system has been successfully implemented since 2005. The main reasons for this failure may be found in BiH's political deadlock and in the apparent lack of genuine political commitment to improve the quality of public procurement operations.

The finalisation of the work on drafting the new Public Procurement Law (PPL) is currently the main challenge for the Public Procurement Agency (PPA). The adoption of the new PPL will be a test for all decision-making institutions. It is also a precondition for technical assistance from the EU.

The current number of staff in the PPA is 21, but it seems necessary to increase the number of staff in order to carry out the activities envisaged by the Strategy for Development of the Public

Procurement System. The PPA is preparing to revise the Strategy and its Annexes as from 2012, and this task will be an integral part of the work programme of the PPA every year.

The PPA is currently participating in a regional IPA technical assistance project that is supporting public procurement training in the region. The project includes in-depth training of trainers and the publication of a comprehensive BiH Public Procurement Manual. These activities should contribute significantly to the capacity-building of the PPA.

A project to reform the public administration, organised by the German Agency for International Co-operation (GIZ) is now underway, and one of its components involves support to the development of the GO-PROCURE electronic system.

The current number of staff of the Procurement Review Body (PRB) is 17, six of whom are members of the PRB, seven are civil servants and four are employers. This staffing level is considered to be insufficient, taking into account the number of complaints received in 2011 (1736).

On the occasion of discussions concerning the Report on the Work of the Procurement Review Body in 2010, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, at its 8th session held on 25 August 2011, adopted the following conclusions:

- requested the Council of Ministers to set up a working group to analyse the situation in the PPA and the PRB and to propose solutions for resolving the problems in their work. The working group would include members of the Council of Ministers, the PRB and the PPA, as well as three representatives of the House of Representatives of the Parliamentary Assembly of BiH. The process of setting up this working group is underway;

- requested the Central Election Commission to investigate possible conflicts of interest of members of the PRB. This procedure is still ongoing in the Central Election Commission.

There are positive signs that co-operation between institutions in the public procurement system was slightly enhanced in 2011 through the joint preparation of the draft PPL and through the resolution of some issues related to the harmonisation of positions in order to improve the public procurement system.

Recommendations

Short-term Reforms

Legislation and its Implementation:

- adoption of a new Public Procurement Law (draft prepared by the PPA);

- electronic publication of notices (free-of-charge) on the website of the PPA instead of in the paper-based BiH *Official Gazette*;

- establishment of a new, less bureaucratic system for the qualification of tenderers.

Public Procurement Agency and other Relevant Institutions:

- continued improvement of training and of the monitoring of procurement procedures;

- continued improvement of co-ordination and co-operation between the central procurement organisations (PPA and PRB) and other institutions relevant to the public procurement system (including the Anti-corruption Agency, State Audit Office, and Standardisation Body).

Review System:

publication without delay of all current PRB decisions (also including the older decisions, i.e. as far back as 2006) in a more sophisticated, searchable format so as to enable browsing for legal issues;

improved quality and consistency and increased transparency and visibility of the work of the PRB;

- initiation of the use of oral hearings as a practical tool for clarifying certain aspects, at least when complex cases have to be solved;

- inclusion by the PRB in its Rulebook of the obligation of PRB decisions to provide references to other decisions that have dealt with the same legal problem (cross-referencing);

- transposition of the new Remedies Directive 2007/66, in particular those provisions referring to time limits for applying for review, ineffectiveness of contracts (e.g. awarded without prior publication of a contract notice, direct award of contracts), and alternative sanctions.

Operational Procurement:

- amendment of the National Strategy;

- leadership of the agenda for improvement of public procurement by means of the organisation of a high-level forum, appointed by the government with representatives of all major stakeholders;

- enlargement of the PPA's current role by addressing the larger picture of procurement issues and playing a more central role for the procurement function;

- elaboration of a procurement manual that would provide guidance on operational matters;

- increased focus of training activities on efficient procurement tools and techniques (e.g. framework agreements, application of most economically advantageous criteria for contract award).

Concessions and PPPs:

- harmonisation of concession laws with EU procurement law and further alignment: assessment of achievements and additional improvements;

- increased use of competitive procedures for the award of concession contracts (lesser use of unsolicited proposals);

- reduction of bureaucratic and administrative obstacles in the implementation of concession contracts in the entities;

- co-ordination of activities of the Concession Commissions;

- establishment of a sound and transparent review system in the area of concessions.

Medium-term Reforms

Legislation and its Implementation:

- re-examination of the economic benefits of domestic preferences;
- development of a coherent, efficient and transparent public procurement system set down by means of a clear definition of strategic goals, including realistic timetables for their achievement;
- focusing of activities on shaping the general framework for the public procurement system, including legislative measures, but also by developing implementation tools, such as strategic documents, guidelines, standardised templates and model documents.

Public Procurement Agency and other Relevant Institutions:

- strengthening of administrative capacity of relevant institutions, especially the PPA, by increasing financial resources and the number of staff but also by improving staff skills, mainly through adequate training;
- establishment of analytically based monitoring to enable the systematic analysis of data (e.g. state audit reports, PRB reports) and identification of contracting authorities with the highest risk of irregularities; use of this monitoring system as the basis for other activities, e.g. planning of additional training;
- leadership by the PPA of networking and dialogue among all stakeholders in the public procurement system; launch of various new forms of communication, e.g. roundtables, discussions and conferences on specific topics of interest to stakeholders.

Review System:

- strengthening of the administrative capacity of the PRB by increasing financial resources and the number of staff, but also by improving staff skills, mainly through adequate training;
- allocation of adequate funds for external experts in PRB review procedures;
- moderate increase of fees charged by the PRB in order to discourage ungrounded or abusive complaints, but not genuine complaints;
- evaluation of the effects of automatic suspension of the contract procedure and broad discussions between all stakeholders;
- organisation by the PRB of workshops and conferences to disseminate information to all stakeholders in the public procurement system.

Operational Procurement:

- preparation and implementation of policy for preventing and combating corruption in the area of public procurement;
- introduction by external audit of performance audit of procurement;
- certified training for a minimum of 50 hours for each procurement officer;

- consideration of the establishment of an approved list of contractors.

Concessions and PPPs:

- harmonisation of concession laws with EU procurement law and further alignment: assessment of achievements and additional improvements;

- evaluation of the effects of measures intended to reduce bureaucratic and administrative obstacles in the implementation of concession contracts in the entities;

- further co-ordination of activities of the Concession Commissions and establishment of permanent working groups, training sessions and workshops to discuss and resolve practical problems in the award of concessions;

- evaluation of the establishment of a sound and transparent review system in the area of concessions.

Detailed Analysis

Public Contracts (PPL)

Legislative Framework

The main legal act regulating the award of public contracts in Bosnia and Herzegovina is the Public Procurement Law of Bosnia and Herzegovina published in the *Official Gazette of BiH*, no. 49/04 on 2 November 2004 (with later amendments). In addition, several pieces of implementing legislation have been issued on the basis of the PPL.

In addition to the PPL, the legislative framework includes a number of pieces of implementing legislation, issued on the basis of the PPL:

- Decision on the Implementation of the Public Procurement Law BiH (*Official Gazette of BiH,* nos. 3/05 and 24/09);
- Instructions for the Implementation and Use of Standard Tender Documents for Public Procurement Procedures for Supplies, Services and Works (*Official Gazette of BiH*, no. 56/07);
- Instructions on the Elaboration of the Minutes from the Tender Opening (*Official Gazette of BiH,* nos. 17/05 and 27/08);
- Decision on the Obligatory Application of Domestic Preferences (*Official Gazette of BiH,* no. 29/09);
- Rulebook on the Direct Agreement Procedure (*Official Gazette of BiH,* nos. 53/06 and 20/09);
- List of Categories of Contracting Entities Obliged to Apply the Public Procurement Law for BiH (*Official Gazette of BiH,* nos. 3/05 and 86/06);
- Guidelines on the Preparation of Model Forms of the Procurement Notice (*Official Gazette of BiH*, no. 17/05);
- Instruction for the Preparation and Submission of Reports on Contracts Awarded in Public Procurement Procedures Referred to in Chapter II and Chapter III of the Public Procurement Law BiH (*Official Gazette of BiH,* no. 81/09);
- Rulebook on the Monitoring of Public Procurement Procedures (*Official Gazette of BiH,* nos. 48/08 and 50/10);
- Rulebook on the Accreditation and Registration of Trainers in Public Procurement (*Official Gazette of BiH,* nos. 99/06 and 59/08).

The current BiH PPL generally complies with the main principles of the EU public procurement system, but it is mainly modelled on Directives 92/50/EEC, 93/36/EEC and 93/37/EEC (services, supplies and works contracts awarded by public authorities), with some elements modelled on Directive 93/38/EEC (utilities). The Directives currently in force in the EU (2004/17/EC, 2004/18/EC, 2007/66/EC and 2009/81/EC) have not yet been transposed.

The scope of the PPL encompasses all public contracts in accordance with the meaning of the term used in the EU Directives – supplies, services and works – awarded by contracting authorities.

However, the PPL does not cover contracts for works or service concessions, and it does not make a clear distinction between concession contracts and public procurement contracts.

The PPL covers in a uniform way public institutions at all levels of government: BiH State institutions as well as the public institutions of both entities (RS and FBiH), Brčko District and local authorities.

The definition of a contracting authority in the PPL is similar to the definition provided in the EU Directives, but it also differs in some aspects. The PPL does not cover any private utilities that carry out their activities within the "utility" areas of EC Directive 2004/17 on the basis of special or exclusive rights granted by a public authority. Associations formed by one or more contracting authorities are not included in the scope of the law.

The definitions related to "relevant activities" in the utilities sector are provided in a very summary manner; as a result, the current wording of the PPL makes the transposition of the relevant requirements of the EU Directives incomplete. The postal sector is not covered, while the telecommunications sector is covered.

The PPL appears to disregard the specifics of utilities and, unlike Directive 2004/17/EC, it does not provide them with a more flexible framework than the one used in the classical sector (e.g. freedom to use the negotiated procedure with prior publication of a notice as well as other special exemptions, such as the exemption related to purchases of energy or to fuel purchased in order to produce energy), which may lead to unnecessary formalism.

Contracts in the area of defence, related to the production of or trade in arms, munitions and war material are excluded from the scope of the PPL. However, the Ministry of Defence adopted in 2005 an internal rulebook for regulating the award procedures for defence contracts. The main procedure applied in this case is the negotiated procedure – without publication of a notice; the Ministry sent an invitation to several economic operators that are considered to be capable of delivering the required war material. The Ministry of Defence is aware of the need to adapt the current rules according to the provisions of the new Directive 2009/81/EC, but a clear timetable for this adaptation has not yet been established.

The PPL provides for open, restricted and negotiated procedures, in the last case with and without the prior publication of a notice. The design contest is also provided as a specific procedure. However, contracting authorities may freely use only the open procedure.

The restricted procedure may be used only in the case of a large or complex procurement, and it includes a pre-qualification phase. A consultancy services contract is to be awarded on the basis of the restricted procedure.

The conditions for applying the negotiated procedure with or without prior publication of a contract notice are similar (and even narrower) than those provided in the EU Directives.

The competitive dialogue procedure, which is an alternative for the award of very complex contracts according to Directive 2004/18/EC, is not provided in the PPL.

When the contract value is lower than 60,000 BAM (approximately 30,000 EUR) in the case of goods and services, or 80,000 BAM (approximately 40,000 EUR) in the case of works, the contracting authority is to apply the competitive request-for-quotations procedure or even a direct agreement if the contract value is lower than KM 6,000 BAM (approximately 3,000 EUR).

The PPL provides for the possibility of concluding framework agreements, but this method is allowed only in a few particular cases (e.g. day-to-day services or consumer goods, maintenance works) and

only with one economic operator. There are no provisions regarding other new methods of procurement, such as electronic auctions and dynamic purchasing systems.

The qualification and award criteria of the PPL largely reflect those of the EU Directives (although some differences remain in the case of the qualification criteria). The main issue concerns the application of these criteria, due to a very rigid interpretation of the legal provisions (all documents requested must be submitted in original or certified copies).

All procurement notices, contract award notices and cancellation notices are to be published by the contracting authorities in the *Official Gazette of BiH*. The notices published in the *Official Gazette* have to also be placed on the procurement website of the PPA, which is accessible via the Internet.

The time limits foreseen in the PPL, contrary to those in the EU Directives, are determined starting from the date of publication and not from the date of sending the notice. Even under these conditions, however, the time limits for the submission of tenders in the case of large-value or complex contracts are too short in comparison with the provisions of the EU Directives.

A major cause for concern regards the existence of mandatory domestic preferences for local companies offering locally produced goods and using a local workforce (10% price preference), except for companies from Central European Free Trade Agreement (CEFTA) countries, which have enjoyed preferential treatment since May 2010.

Despite the deficiencies that have been mentioned above, the 2004 PPL is a good foundation, taking into account that it:

- provides a uniform public procurement regulation for the whole country;
- introduces basic principles and main procedures stipulated by EU law (although with some discrepancies);
- establishes a fully decentralised public procurement system, which grants the responsibility for public procurement to contracting authorities;
- requires transparency by the mandatory requirement of publication of public procurement opportunities and procedures;
- safeguards the legitimate interests of tenderers by introducing review mechanisms and procedures; and
- provides conditions for the coherent implementation of public procurement legislation in the whole country through the establishment of two state-level institutions: the PPA and the PRB.

The public procurement community in BiH acknowledges the need to adopt new public procurement legislation (or to thoroughly amend the existing law) for internal and external reasons. The current draft PPL represents an important improvement of the existing public procurement system in BiH. Its adoption would be a significant step towards further alignment with the relevant EU legislative framework. Bosnia and Herzegovina is the only country in the region that has not, even partially, implemented either the 2004 EC Public Procurement Directives or the 2007 EC Remedies Directive. The new PPL should also strengthen the procurement operations of contracting authorities and allow for the participation of economic operators in a more transparent and efficient manner, thereby decreasing costs (for both sides) and increasing economic benefits.

The adoption of the draft PPL would represent a crucial milestone in the modernisation of the entire public procurement system.

Central Public Procurement Organisation

The Public Procurement Agency (PPA) was established by the 2004 PPL as one of two institutions at state level responsible for implementation of the public procurement system. The other institution is the Procurement Review Body (PRB).

The PPA has been established as an independent administrative organisation with legal personality that is directly responsible to the government. The PPA's central office is in Sarajevo, and it has two branch offices in Banja Luka (RS) and Mostar (FBiH), but these branch offices do not have legal personality and are not authorised to make decisions without the approval of the PPA's central office.

The PPA plays the central role in developing the public procurement system and in overseeing the application of public procurement procedures. The PPA's function is to ensure proper application of the PPL. In particular, it is responsible for:

- proposing amendments to the PPL and to its Implementing Regulations;
- reinforcing awareness among contracting authorities and suppliers of public procurement legislation and its objectives, procedures and methods;
- publishing procurement manuals, guidelines, standard forms and models to be used by contracting authorities;
- providing technical assistance and advice to both contracting authorities and suppliers;
- establishing systems for monitoring the compliance of contracting authorities with the PPL;
- collecting, analysing and publishing information on public procurement procedures;
- developing an electronic information system to supplement the *Official Gazette*;
- initiating and supporting the development of electronic procurement and communication in the area of public procurement;
- publishing training information, manuals and other aids for professional development in public procurement;
- maintaining a register of accredited trainers in public procurement; and
- submitting annual reports to the Council of Ministers of BiH.

The PPA has a director and a board. The PPA Board is composed of seven members and two observers. The role of the Board is to consider acts that refer to the public procurement system and to give approval for the Implementing Regulations produced by the Director of the PPA.

The Director of the PPA is responsible for the organisation of the work of the PPA, internal acts and other matters that refer to the work of the PPA.

In 2011 the PPA maintained its staffing level of 2010. The current number of staff of the PPA is 21, and it will be necessary to recruit new staff in order to carry out the activities envisaged in the Strategy for Development of the Public Procurement System and to ensure the adoption of the new text of the PPL.

The PPA issues written opinions concerning the application of PPL provisions (407 opinions were issued in 2011) and organises meetings with representatives of contracting authorities (although not often enough). The PPA also publishes a selection of its opinions on its website under FAQ (Frequently Asked Questions). Models of standard tender documents for supplies, works and services have also been uploaded on its website, and these models are frequently used by contracting authorities.

The PPA offers a help phone desk, where PPA staff answer questions from contracting authorities or economic operators. The help phone desk is available on Tuesdays in the branch office in Banja Luka, on Wednesdays in the branch office in Mostar, and on Tuesdays in Sarajevo.

Despite all of these efforts, the PPA's co-operation with the business community and understanding of business needs could be improved.

One of the problems reported was the difference of opinion between the PPA and the PRB concerning the application of the PPL, which is confusing to contracting authorities. In fact, the general perception is that the PPA and the PRB do not co-operate sufficiently or co-ordinate their positions. However, signs of improvement have recently been visible in terms of co-operation between the PPA and the PRB.

The monitoring of public procurement and training activities were segments of the Strategy in 2011, which remained at the level of activity that had been reached in previous years due to the lack of funds and the inability to employ new personnel.

The sources of information used by the PPA for monitoring activities are mainly the contract notices as well as the reports prepared by contracting authorities and submitted to the PPA in the framework of contract award procedures. Whenever the PPA identifies irregularities, it points out those irregularities to the contracting authority concerned and recommends their rectification if possible. This information is also forwarded to the competent audit office. In a large majority of cases (95%), the contracting authorities have followed the recommendations of the PPA.

The PPA has established a means of co-operation with audit institutions in the form of meetings, where exchanges of opinion are crucial for the work of the PPA and of the audit institutions.

In 2011 a total of 24 training seminars were organised by the PPA, simultaneously in Sarajevo, Mostar and Banja Luka, and were attended by 75 representatives of BiH institutions. Seminars were defined according to the concept ''from simple to complex''. It was planned that one person from each institution would attend all four seminars and thus complete the training cycle.

Other seminars (24) were organised on a commercial basis. The total number of participants in 2011 was 1158. In 2011 a total of 14 instructors were engaged by the PPA as lecturers in the training seminars.

The PPA is planning to revise the Strategy for Development of the Public Procurement System, as well as the Annexes, and as from 2012 the Strategy will be an integral part of the annual work programme of the PPA.

Review System

The area of public procurement review and remedies in BiH remains a key concern. The legislative process for public procurement (including review and remedies) has stagnated. Neither the provisions of the PPL nor the draft PPL fully transpose the new Remedies Directive 2007/66/EC.

The current legislative framework of the review and remedies system describes the legal foundation for the establishment of review bodies, coverage of the system and procedural law.

According to the PPL, the review and remedies system applies to all works, services and supply contracts (but not to concessions) awarded by contracting authorities as well as by public and private utilities throughout BiH.

The review and remedies system applies equally to contracts above and below the EU thresholds.

A complaint may be submitted by any economic operator who claims to have suffered damage or a loss of rights or to be likely in the future to suffer loss or damage resulting from an alleged breach of the PPL.

There is a three-tier system for reviewing complaints lodged by dissatisfied economic operators:

- In the first stage, the complaint is submitted to and then reviewed by the contracting authority itself (this review is mandatory and without it, the Procurement Review Body (PRB) would subsequently be obliged to refuse the complaint).

- A complainant who is dissatisfied with the decision of the contracting authority may appeal this decision to the PRB. It is possible for an unsuccessful economic operator to launch the review procedure after the contract has been signed.

- The final decision of the PRB on the appeal is then subject to the jurisdiction of the courts of BiH.

Complaints submitted directly to the contracting authority or entity have to be brought within very short time-limits (within five days). In return, the contracting authority/entity also has to react quickly and to render a decision within five days.

The PRB is an independent administrative organisation with legal personality. The PRB is responsible for ensuring the enforcement of PPL rules and for acting as a second-instance review body in the review procedure for all contracting authorities and entities of BiH State, BiH Federation, Republika Srpska and Brčko District.

The PRB consists of six members, three of whom are chosen from among selected experts in administrative law and/or administrative procedure. Their status should be equal to that of an independent judge. Their PRB membership is incompatible with any direct or indirect, permanent or periodical duty, with the exception of academic activities. The other three members are to be experts in the area of works, public purchases, transportation or strategic business management, and they are selected through open competition, as provided for in the Implementing Regulations to the PPL. At the moment, four of the PRB members are lawyers and two are economists.

One member prepares the proposal for a PRB decision; all PRB members participate in all decisions. A proposal for a decision is adopted if at least four members vote for it. Some 80% of the cases are adopted unanimously, and 20% with a majority vote.

The members of the PRB are proposed by the government and appointed by parliament at state level for a period of five years, with the possibility of a single reappointment. Four members were nominated in 2005-06 and two in 2009. The PPL does not define the duration of a PRB member's term, but according to implementing legislation the term is five years. Recently (February 2012), the Board of the PPA submitted a request to the BiH Council of Ministers to initiate a procedure to appoint four new members or to renew the mandate of members nominated in 2005-06.

Suppliers initiating review procedures are obliged to pay to the PRB moderate lump-sum fees (approximately 10, 25 or 50 EUR).

Prior to the conclusion of the contract, the PRB has the power:

- to make a declaration with regard to the legal rules or principles that apply to the subject matter of the complaint;
- to annul in whole or in part any decision of the contracting authority;
- to instruct the contracting authority to correct any breaches of the law and to proceed with the contract award procedure;
- to order the termination of the contract award procedure; or
- to award damages to the complainant.

After the conclusion of the contract, the PRB has the power:

- to make a declaration with regard to the legal rules or principles that apply to the subject matter of the complaint; and
- if justified, to award damages to the complainant, the amount of which is limited to either the cost of tender preparation or to 10% of the tenderer's bid price (the amount that has the higher value will be given to the complainant).

In 2011 some positive developments were observed in the work of the PRB. The PRB received a total of 1760 complaints in 2011, of which 1615 were resolved (in addition, 111 complaints received in 2010 were resolved in 2011). The previous problem of delayed decisions seems to have been resolved, as the delay for decisions foreseen in the PPL is for the most part respected. By December 2011 the Court of Bosnia and Herzegovina had issued more than 125 decisions in administrative disputes against the decisions of the PRB. In most cases (88%), the Court of BiH confirmed the decision of the PRB. According to the estimations of PRB members, 70% of their decisions were in favour of the economic operators, but clear statistical data in this regard is not available.

During the same period, the PRB filed a total of 13 criminal charges against contracting authorities, i.e. reports on criminal acts were submitted to the competent prosecutor's offices based on suspicion of crimes committed in the area of public procurement, for a total amount of 21,405,894 BAM (approximately 10,500,000 EUR).

However, the review system remains an area of concern. Contracting authorities and suppliers have constantly complained about the review system, in particular with regard to the overly bureaucratic and lengthy process and to the inconsistent decisions of the PRB.

In the opinion of business organisations, the decisions of the PRB are often superficial, overlooking the real irregularities and focusing instead on irrelevant formalistic considerations. This negative perception is accentuated by the fact that PRB decisions are still not published. The non-publication of PRB decisions has severely damaged the reputation of the PRB and is perceived as a lack of transparency of the review system. Thus the trust of stakeholders in the PRB has been significantly undermined.

In December 2010 the PRB started to publish its decisions online, but this publication was suspended again in April 2011. The official explanation that the absence of funds had led to such a decision can hardly be accepted, since the cost of publication was less than 500 EUR/month – according to the

estimation of the PRB – which represents only 1% of the total budget of this institution (it should be noted, however, that the budget for 2011 has still not been adopted in BiH, and all of the institutions worked on the basis of "temporary financing").

Moreover, this publication alone does not suffice to guarantee a uniform interpretation and application of the PPL. As a second step, there is still a need for a more sophisticated database of decisions (including all past decisions), with browsing and search facilities to enable the search for individual legal issues. Such a database would also help PRB members to avoid inconsistent decisions.

In addition, the PRB should publish analyses of the most common legal problems encountered during the procurement process and recommend ways of dealing with these problems in practice (e.g. qualification criteria, cost of tender documents, qualitative evaluation criteria).

Operational Practices

When the PPL was introduced in 2004, it established a uniform framework for the award of public contracts and offered increased transparency, which would lead to increased competition and decreased corruption. However, the years of implementation of the PPL have revealed some weak elements of the law that do not contribute to efficiency, but instead increase unreasonably the bureaucratic burden as well as the costs for contracting authorities and economic operators.

The level of professionalism in dealing with procurement procedures within contracting authorities varies, but it is generally not particularly developed. Contracting authorities have a tendency to complain about the restrictions that they have to face in applying the PPL. This attitude could be seen as an indication of a certain rigidity of the law, but it could also be seen as a sign of the lack of professionalism of contracting authorities and even their reluctance to comply with the law.

Serious problems in applying the PPL are generated by unnecessarily detailed requirements related to the qualification of candidates and tenderers and their rigid interpretation. Many contracting authorities interpret the provisions of the law in a strict and formalistic manner, without taking into account the economic rationale. All of the documents required must be submitted in original or certified copies. The documentation required for proof of supplier capacity is excessive. All of the selection criteria listed in the PPL as optional are on the contrary always applied as mandatory in every procedure. These excessive requirements constitute a major obstacle for economic operators, and they result in lower competition, particularly in the case of low-value contracts. Formal reasons are too often used to reject tenders, without examining their economic value.

There is a clear need for radical change in the costly and time-consuming qualification system. The advantages of a less bureaucratic qualification system include: reduction of costs for tenderers, reduction of preparation time for tenders, reduction of time and costs for contracting authorities (tendering committees), increased competition and more flexibility to select the most economically advantageous tender (MEAT).

The lack of elaboration of the sub-criteria within the MEAT criterion (particularly in the case of "quality" sub-criterion) has led to the discretionary power of evaluation committees to determine the winning tender in a manner that lacks transparency.

Technical specifications are often not accurate enough, incomplete and/or contain elements that affect the fairness of the competition. In some cases, even the omission to list the required quantities of goods/services/works has been reported.

All of these issues could easily result in "tailored" tender documentations and have a large potential to affect the competition.

Many stakeholders, in an attempt to reform the public procurement system in practice, have been hindered by disagreements between the two leading BiH institutions responsible for public procurement: the PPA and the PRB. Some successful initiatives have nevertheless started to improve the co-operation between these two institutions (e.g. common opinions of the PPA and the PRB have been published on qualification criteria, licenses and social contributions). For the proper functioning of the entire public procurement system, including review and remedies, it is essential that both institutions continue to co-operate and strive to achieve coherent views on the interpretation of the most relevant public procurement provisions for the sake of practitioners.

Some important developments in e-procurement tools have occurred or are under development. An application for the electronic submission of reports (VISSPA system) is in place, and the technical facilities for publishing notices by electronic means (GO-PROCURE system) has been functional since September 2011. Since 1 September, a total of 3,804 notices have been published on this system.

The GO-PROCURE system will be upgraded, maintaining the CPV codes and NUTS and preparing an XML scheme for sending the forms of notices in the TED (this will be carried out through the public administration reform project supported by GIZ).

However, some major weaknesses have reduced the efficiency of the new system. Notices are still published both in the *Official Gazette of BiH* (paper form) and on the portal (electronically). The work of procurement officers has doubled due to the fact that the notices submitted electronically also have to be sent by fax to the *Gazette*.

There has been a price reduction for publication in the *Official Gazette* for those notices that are submitted electronically. However, the cost of publication still remains too high and might easily outweigh the benefits of competition, especially in the case of contracts of lower value (e.g. there was a case where the contracting authority paid more than 150 EUR for publishing a two-page notice).

The period for the publication of notices is unacceptably long. The *Official Gazette* is published once a week; the notice has to be delivered no later than Thursday (electronically) or even Tuesday (by fax only) in order to be published on Monday of the following week.

Publication in the paper-based *Official Gazette* should be fully replaced by an electronic Internet-based system (a procurement portal of the PPA), which is automatic, rapid and free-of-charge for contracting authorities.

Another issue appears to be the tendency of contracting authorities to split contracts in order to apply the low-value contract procedures (request for quotations or even direct agreement) or to apply the negotiated procedure without a prior publication notice, in particular by applying in an inappropriate way the PPL provisions regarding additional works/services.

Practical implementation of the PPL and ensuring compliance appear to be crucial for the functioning of the public procurement system in BiH.

Concessions and PPPs

Legislative Framework

The existing legal framework in the area of concessions and PPPs in Bosnia and Herzegovina can be described as fragmented.

The Public Procurement Law of Bosnia and Herzegovina (PPL) does not apply to the award of concession contracts and PPPs. The PPL states that concession contracts and PPP contracts are to be awarded in line with the laws on concessions and PPPs [see arts. 10 (3) and (4)].

Unlike the PPL (which is applicable to the award of public contracts by contracting authorities of BiH State, both entities – i.e. Republika Srpska and Federation of Bosnia and Herzegovina, Brčko District, and at cantonal and municipal levels), the award of concessions by those authorities is regulated in a number of unharmonised concession laws and accompanying laws and decrees in force simultaneously at state, entity and cantonal levels.

The (main) laws regulating the award of concessions in Bosnia and Herzegovina are the following:

- Law on Concessions of Bosnia and Herzegovina (*Official Gazette of BiH*, no. 32/02);
- Law on Concessions of the Federation of Bosnia and Herzegovina (*Official Gazette of FBiH*, no. 40/02);
- Law on Concessions of Republika Srpska (*Official Gazette of RS*, no. 59/09); and
- cantonal laws on concessions.

It is obvious that the mere existence of several legal concession regimes in the territory of BiH at the same time not only results in legal uncertainty but also constitutes a severe hindrance to the realisation of concession projects in the eyes of potential private investors and their financiers, as these projects extend to territories covered by more than one concession law. This problem is even greater since the amendment of the various concession laws, which now differ from each other to a considerable degree.

In the area of PPPs, so far only the RS has passed an act relating to the award of PPP contracts: Law on Public-Private Partnerships in Republika Srpska (*Official Gazette of RS*, no. 59/09).

This report thus covers the concession laws of BiH State and the two entities (FBiH and RS), but not the concession laws at cantonal level and the laws of Brčko District. It also does not extend to sectoral laws that might contain provisions on concessions (such as the sectors concerning water, roads, railways, forests, energy and mining). Furthermore, it covers the PPP Law of Republika Srpska.

<u>BiH State Legislation on Concessions</u>

The Law on Concessions of Bosnia and Herzegovina ("State Concessions Law") was passed by the BiH State Parliament in 2002. It regulates the modalities and conditions concerning the granting of concessions, including the competencies and institutional structure of the BiH State Concessions Commission ("State Commission"), tender procedures, content of the concession contract, and the concessionaire's rights and obligations.

On the positive side, the law reflects the state's intention to create a sound legal basis for the award of concessions in the territory of BiH State that might attract foreign investors. It clearly aims to foster the general framework conditions for promoting the development of important infrastructure projects in the form of concession models in Bosnia and Herzegovina. Unfortunately, the law also contains provisions that fall short of the lawmakers' good intentions.

It appears that only those ministries or authorities of Bosnia and Herzegovina that have been designated by the BiH State Council of Ministers (defined as the "*conceding party*" in article 3) are entitled to grant concessions. The law does not contain any further reference to such designations, and it is thus not entirely clear which authorities are included in the term "*conceding party*", in

particular whether all contracting authorities – in the sense of Directive 2004/18/EC – are covered by this definition.

The term "*concession*" is given a distinctly different meaning in the State Concessions Law than it has been given in the EU context. Article 3 of the law defines the term "*concession*" as the right granted by a conceding party to provide infrastructure and/or services and to exploit natural resources under terms and conditions agreed on by the conceding party and the concessionaire. It is clear from its wording that this very wide definition also covers public contracts in the sense of the PPL. It could, on the other hand, also extend to contracts that are neither concession contracts nor public contracts in the meaning of EU public procurement law, e.g. concessions to exploit natural resources[22].

The "*concessionaire*", as defined in article 3, must be a "*legal person founded pursuant to the laws of Bosnia and Herzegovina*", which is most likely to contravene the fundamental EU Treaty principles of the freedom to provide services and the freedom of establishment[23].

In principle the State Concessions Law governs concessions granted by BiH State authorities only. This limitation creates problems for concession projects where the award of the concession requires the consent of an authority other than a BiH State authority. This issue is reflected in the provisions indicating that "*in case of joint competence of Bosnia and Herzegovina and/or the Federation of Bosnia and Herzegovina and/or Republika Srpska and/or Brčko District of Bosnia and Herzegovina [...] the competent authorities harmonise the conditions and form of concession granting*" and that all disputes arising from such joint competence are to be resolved by a joint concessions commission[24]. It is obvious that the mere existence at the same time of several legal concession regimes in the territory of BiH – especially as they differ from each other – constitutes a threat to legal certainty in the eyes of potential private (international) investors and their financiers, as these projects extend to territories covered by more than one concessions law.

The decision on the type, subject and volume of the concession to be granted is taken by the Council of Ministers of BiH State and requires subsequent ratification by the BiH State Parliament. This procedure is somewhat unusual, as it means that a concession requires the consent of at least four authorities before it can be granted: the conceding party/competent ministry, the State Commission, the BiH Council of Ministers and the BiH Parliament. It is difficult to see the need for this cumbersome procedure, in particular with regard to the consent required from parliament. It is also not entirely clear at what stage of the procedure the BiH Council of Ministers and BiH Parliament are required to give their consent.

The State Concessions Law sets out the institutional structure in the concessions area: the State Commission is to act as an independent regulatory legal entity that plays a very important role in the procedure relating to the award and implementation of concessions. As stated in article 5 (2), the Commission "*shall promote the satisfaction of public needs and economic development through*

22 Even though such contracts might not have to be qualified as public contracts where the contracting authority essentially procures works, services or goods and thus might fall outside the scope of the EC Procurement Directives, they would still have to be awarded in line with the general requirements of the EU Treaty.

23 This definition would only be permissible under the rules of the EU Treaty if the laws of Bosnia and Herzegovina related to the founding of companies allowed companies established under the laws of an EU Member State to be treated as if they had been established under the laws of Bosnia and Herzegovina.

24 See Article 4 (2) and (3) of the State Concessions Law; it is interesting to note that the joint Concessions Commission referred to in article 6(2) seems to have been made competent to resolve disputes between BiH State and the Republika Srpska but not for other cases of joint competency.

involvement of the private sector in financing, design, construction, rehabilitation, maintenance and/or operation of infrastructure and accompanying facilities, services and in exploitation of natural resources and buildings and buildings used for their exploitation, taking into account the protection of economic and social interests, environmental protection as well as the fair treatment of the private sector."

Chapter III of the State Concessions Law deals with the tendering procedure25. Article 21 contains provisions on the State Commission's approval, which is required for implementation of a project as a concession. The concession project approval procedure set out in this article describes the most important elements required to obtain such an approval, but it could have elaborated more on specific issues, such as the necessary content and detail required for the feasibility study and the reasons allowing the Commission to withhold its approval. This could partly be done in implementing legislation (e.g. in the Rulebook, and in the form of guidelines for conceding parties as to the required content and details for the feasibility study).

The State Concessions Law (arts. 21-25) allows for the conclusion of a concession based on either a public invitation or an unsolicited proposal by a bidder, without a public invitation. Both types of procedure – although to a differing extent – are not in conformity with EU requirements. Although the public invitation can be compared by and large to the procedure with prior notice, as set out in the EC Procurement Directives, it comes short of the obligation to be published internationally. According to the law, an international invitation has to be sent only in cases where this is explicitly required by the State Commission. Whether or not the Commission requires the conceding party to issue an international public invitation seems to be left entirely to the discretion of the Commission[26].

It is of even greater concern that the State Concessions Law allows the conclusion of concessions without prior public invitation, using the unsolicited proposal route without public invitation. This provision is neither in line with the EC Procurement Directives nor does it constitute good practice. Whereas it is true that the EC Procurement Directives provide for certain cases where the use of a negotiated procedure without publication of a contract notice is permissible[27], it must be remembered that these cases are the exception to the rule, as has been consistently upheld by the Court of Justice of the European Union.

The use of this procedure applies to concessions that in reality should be qualified as public contracts or public works concessions, but it also applies to service concessions. The State Concessions Law fails to make clear that the conditions allowing for the conclusion of concessions based on unsolicited proposals must be interpreted in a very restrictive manner.

A further concern is that the State Concessions Law allows for the feasibility study to be prepared by the bidders rather than by the conceding party. This is true for public invitations as well as for

25 Chapter III, articles 21 to 25

26 This concern is confirmed by the corresponding provision in the "Rulebook on Request Submitting Procedure and Concession Granting Procedure 2006".

27 See article 31 of Directive 2004/18/EC. Paragraph 1 of this article, for example, allows the use of such a procedure for the award of public works or service contracts in cases where (i) no (suitable) tenders or no applications have been submitted in response to an open or restricted procedure, provided that the conditions of the contract are not substantially altered, or where (ii) for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may only be awarded to a particular economic operator, or where (iii) insofar as it is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, it is not possible to comply with the time limit for the open, restricted or negotiated procedure with publication of a contract notice.

unsolicited proposals. By shifting this task to the bidders, the contracting authority's demands are assessed by its private partner-to-be, who is, as a rule, very interested in being selected as a private partner for a specific project and thus has a vital interest in presenting the needs and benefits of the conceding party in a positive light. Normally the preparation of the feasibility study, including the environmental impact assessment, is seen as a key task of the contracting authority. It also provides a benchmark that enables the comparability of offers received.

Finally, it is doubtful whether the State Concessions Law provides an adequate review mechanism, as it is simply stated in article 35 that in the event of disputes arising from violations of the law, the competent court to hear appeals in administrative proceedings is the Court of Bosnia and Herzegovina. The administrative procedures have been described as slow, often lasting several years. The law does not contain further provisions on the review and remedies system. It is thus not clear, for example, which deadlines need to be respected for lodging complaints, whether interim measures are available, against which decisions review can be sought, and if the procedure allows or obliges the decision-making body to take "rapid and effective" decisions. It is also unclear whether remedies under the PPL are available to award procedures relating to concessions that in reality should be qualified as public contracts in the sense of the EC Procurement Directives.

Furthermore, the relationship between article 35 and article 16 d) is somewhat ambiguous. Both provisions relate to review. According to article 16 d), the Concessions Commission is exclusively competent "to decide on any claim filed or request for revision pursuant to this law." It seems that article 18 describes those cases (or at least one of the cases) where the Commission is obliged to re-examine its own decisions. First, it is unclear who has the right to initiate such a re-examination[28]. Second, the reasons allowing the BiH State Commission to revise or revoke a decision in response to the request for re-examination by an interested party seem to be limited to the establishment of new facts and procedural defaults (violation of the right to be heard). It appears that unlawfulness, for example, would not qualify as a legitimate reason for the BiH State Commission to revise or revoke its decision, but this cannot be correct. Article 18 (6) precludes appeals against the Commission's re-examination decision but allows for the initiation of administrative proceedings before "the Court of Bosnia and Herzegovina." It is unclear whether these provisions contravene or complement article 35 of the law.

In 2006 the BiH State Concessions Commission adopted, with the consent of the BiH Council of Ministers, a "Rulebook on Request Submitting Procedure and Concession Granting Procedure". This rulebook, which is based on article 19 of the State Concessions Law, lays down more detailed rules for the tendering procedure, in particular concerning the public invitation for prospective bidders and unsolicited proposals. The rulebook also contains provisions on the feasibility study, although these provisions do not provide any further guidance than is already given in article 21 of the State Concessions Law. The provisions on the public invitation are more comprehensive, as they contain rules that go beyond those set down in the State Concessions Law.

There are a number of other by-laws, such as the "Rulebook on the Registry of Contracts on Concessions in BiH", which was prepared by the BiH Commission in 2007[29].

Furthermore, the BiH Commission has passed a number of internal regulations, such as the "Rulebook on Using, Keeping and Destroying of the Seal", "Procedures for Procurement of Goods, Conducting of Services and Works", "Rulebook on Work of Employees in the Commission for

[28] This right seems to be given to "*interested parties*". However, the law does not specify who can be regarded as an "*interested party*" in the context of all of the various decisions to be taken by the State Commission.

[29] See "Report on Work of the Commission for Concessions of Bosnia and Herzegovina for 2007", published in February 2008.

Concessions of BiH", "Rulebook on Internal Control and Audit", "Rulebook on the Use of Funds for Representation" and "Rulebook on the Use of Mobile Telephones". In addition, the Concessions Commission prepared a draft of a "Rulebook on Implementation of the Tender Procedure in the Allocation of Concessions"[30].

The BiH State Concessions Commission drafted a "Policy Paper on Granting Concessions in Bosnia and Herzegovina", which was adopted by the BiH State Council of Ministers and the BiH State Parliament in 2005[31]. This paper sets out the general strategy for granting concessions. The paper focuses on Bosnia and Herzegovina's intention to foster the development of infrastructure, provision of services and exploitation of natural resources by financing these projects through the granting of concessions. It also reiterates the economic sectors in which concessions can be used.

On the basis of the OECD/SIGMA "Peer Review of Concessions and Private Public Partnerships in Bosnia and Herzegovina, Final Report, November 2008 – September 2009", dated September 2009, the BiH State Concessions Commission, in December 2009, sent a "Proposal of Conclusions" to the BiH State Council of Ministers, which in essence proposes to accept the findings of the above-mentioned peer review by establishing a working group with the task of proposing the legal framework for concessions and PPPs that formulates unified procedures for the award of concessions and PPP contracts in the territory of Bosnia and Herzegovina, and by entrusting the BiH State Concessions Commission with certain tasks (e.g. providing training and expert assistance to contracting authorities, preparing guidelines and standard tender documents, building capacity, and establishing a single database containing records on all concession and PPP contracts). In its submission to the BiH State Council of Ministers dated May 2010, the Republika Srpska Concessions Commission requested that the OECD/SIGMA Peer Review and the BiH State Concessions Commission's "Proposal of Conclusions" should not be considered by the BiH State Council of Ministers as "*unconstitutional, unlawful, non-serious and malevolent*". The BiH State Concessions Commission, in its submission to the BiH Council of Ministers of July 2010, contested the RS Concessions Commission's statements and renewed its proposal. The BiH State Council of Ministers has not yet acted on the BiH Concessions Commission's proposal.

Republika Srpska Legislation on Concessions and PPPs

Republika Srpska legislation on concessions

The Law on Concessions of Republika Srpska ("RS Concessions Law") was amended in 2009. Whereas the RS Concessions Law in its original version of 2002 had been harmonised to a large extent with the State Concessions Law, its later amendments of 2006 and, in particular, those of 2009 were not. Nevertheless, if not explicitly stated otherwise, the observations made with regard to the State Concessions Law in the above section of this report also apply to the RS Concessions Law. The comments in this section thus primarily refer to issues that differ from those described above concerning the State Concessions Law.

The RS Concessions Law (art. 2) requires that concessions regulated by other laws, e.g. sectoral laws, be awarded in accordance with its provisions. This provision is useful, as it makes the granting of concessions in all sectors subject to conformity with the RS Concessions Law. It also excludes contracts that are within the scope of the PPL and the Republika Srpska PPP Law.

30 Ibid.

31 Article 17 of the State Concessions Law assigned to the State Concessions Commission the task of preparing such a policy paper for the granting of concessions falling under the exclusive competence of BiH State.

The RS Concessions Law (art. 4) contains a list of areas where concessions can be granted. This list also includes sectors and activities that are covered by Directive 2004/17/EC ("Utilities Directive") co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. In theory this list should not be problematic, as works and services concessions are outside the scope of the Utilities Directive in any case. The possibility cannot be excluded, however, that concessions in the sense of the RS Concessions Law would, in reality, have to be considered as public contracts in the sense of the Utilities Directive, and for the award of such contracts the provisions of the Utilities Directive would apply.

Concessions can be granted on the basis of a public invitation as well as on the basis of an unsolicited proposal or a direct selection.

The decision-making process necessary to authorise the granting of a concession seems to be less formalistic than under the State Concessions Law. The decision to grant a concession has to be taken by the government of the Republika Srpska (additional approval by parliament is not required).

The RS Concessions Law also establishes a Concessions Commission (hereafter referred to as the "RS Commission"), which has by and large similar functions, tasks and duties as those given to the BiH Concessions Commission under the State Concessions Law.

The rules with regard to the tendering procedure are very similar to those in the State Concessions Law, but they are not identical. One of the differences, according to article 23, is that, in principle, it is the task of the conceding party to prepare a feasibility study on any project to be granted as a concession and, subsequent to its approval by the RS Commission, to organise a public invitation. Only in the event that the conceding party fails to prepare a revised feasibility study or pre-study on economic or social feasibility may the RS Commission require (according to article 24 of the law) the public invitation to include the obligation for bidders to prepare a feasibility study with an environmental impact assessment. The law does not state any reasons for allowing the conceding party to not prepare a feasibility study. It does appear that the conceding party may decide to neglect its obligation to prepare a feasibility study in order to incite the RS Commission to require the preparation of such a study by the bidders. This arrangement is problematic from a procurement point of view and does not represent good practice.

The RS Concessions Law also provides for the possibility of granting concessions based on unsolicited proposals[32]. It draws a line between unsolicited offers based on exclusive rights and offers where an exclusive right has not been established: first, where it is determined that the bidder having submitted an unsolicited offer has an exclusive right "*to the concepts of planning, methodology and engineering which are demonstrated through the registered or licensed intellectual property, copyright or related rights, without which the project would not be feasible in accordance with specific requirements and procedures established by this law*" (arts. 27-27a), and where a public interest has been established, then a public invitation including a "*list of essential elements of the bid (project conditions)*" is issued. This provision gives the bidder who has submitted the unsolicited offer a *de facto* insurmountable advantage, even more so as this bidder "shall be awarded a bonus for the technical or financial result up to 10 % of the corresponding points on all evaluation criteria for the proposed solutions" (art. 27b). Only where an exclusive right cannot be established does a public invitation that is not based on project conditions have to be initiated.

The public invitation must be published in the *Official Gazette of Republika Srpska* and in at least one other daily newspaper. However, the ministries are not obliged to announce a public invitation.

[32] In the 2009 amendments to the RS Concessions Law, the provisions on the award of concession contracts on the basis of unsolicited proposals was subject to some changes, which are set out in articles 27, 27a, 27b and 27c.

Furthermore, only after the submission of unsolicited proposals do the relevant ministries establish criteria for the award and analyse the existence of public interest in the concession at hand, taking into account that the concession can be realised only if the process, design, methodology or engineering concept is owned exclusively by the bidder or if there is an urgency.

In addition, "exceptionally", concessions for research, construction of facilities and their use for activities of public interest in the areas of energy, rail transport, air and postal traffic, mining and forestry, water supply, lottery and road construction may be awarded directly to a strategic partner (art. 27c). The circumstances that qualify as being "exceptional" are not specified.

This provision on unsolicited proposals, changed by the amendments to the RS Concessions Law in 2006 and 2009, is clearly not in line with EU requirements. As currently set out in the law, it can only be described as being contrary to the fundamental principles of the EU Treaty, in particular to the principles of transparency and publicity.

The RS Concessions Law explicitly mentions the implementing legislation which, with the consent of the RS National Assembly or of the RS government, is to be adopted by the Concessions Commission, including *inter alia* the "Rulebook on internal organisation of the Commission", the "Rulebook on the procedure before the Commission", the "Rulebook on the concession contract transfer procedure and the transfer of ownership rights of the concessionaire" and other by-laws "under the competence of the Commission". In the last category are the "Instructions for evaluation of the existence of public interest in an unsolicited proposal"[33]. These instructions contain detailed rules on how to evaluate unsolicited proposals, in particular in terms of public interest. They define the areas in which public interest is expected to be of particular importance, such as the economy, social issues, ecology, balanced regional development and special planning, and the use of concessions. It also sets out more detailed rules on the contents of the feasibility study. As has already been indicated above, the possibility of using unsolicited proposals is in itself problematic. More detailed instructions on evaluating public interest does not change the situation with regard to unsolicited proposals, It has to be acknowledged, however, that these instructions are helpful as long as this type of procedure exists, as they provide guidelines on how public interest is evaluated by the conceding parties.

The RS Concessions Commission is obliged (art. 14 of the RS Concessions Law) to draft a proposal for a policy document on the award of concessions, which can be seen as the equivalent of the policy paper prepared by the BiH Concessions Commission. The RS Commission's 2006 policy paper had focused on the importance of attracting foreign investments in Republika Srpska, and concessions were seen as an important tool for achieving this goal. The policy paper contained a list of priority projects in the various sectors where concessions could be granted. It provided an overview of the procedures and methods used to grant concessions and highlighted the necessity of preparing a feasibility study.

Republika Srpska legislation on PPPs

In 2009 the RS enacted a Law on Public-Private Partnerships in Republika Srpska ("RS PPP Law"), published in the *Official Gazette of Republika Srpska,* no. 59/09 as amended, in the same year (published in the *Official Gazette of Republika Srpska*, no.104/09).

The RS PPP Law is likely to create legal uncertainty and confusion. It not only contradicts EU procurement law, but it could also be a deterrent for foreign investors and prevent the creation of a lawful, solid and economically viable basis for the development of PPP. Even though the RS PPP Law states explicitly that its purpose is to create a transparent and non-discriminatory legal basis for the

[33] See footnote 11.

award and implementation of PPP contracts, it is doubtful whether its provisions will live up to the good intention of the lawmakers.

Firstly, the scope of the RS PPP Law raises doubts as to its compatibility with EU procurement law. It is unclear whether a PPP in the sense of the RS PPP Law is to be qualified as a public contract in the sense of the PPL or as a works concession in the sense of the EU procurement law. Furthermore, it is unclear which forms of contractual public-private partnerships come within the scope of the RS PPP Law, as its article 10 stipulates that contractual public-private partnerships in the form of concessions are to be implemented in accordance with the provisions of the RS Concessions Law[34]. Hence not only the relationship between the RS PPP Law and the PPL is unclear, but also the relationship between the RS PPP Law and the RS Concessions Law.

Secondly, the issue of which procedural provisions are to apply for the selection procedure of the private partner is left open: the RS PPP Law states that "*a negotiated procedure shall be used in accordance with the norms of international law*"[35], without specifying to which set of "international norms" the law refers.[36] It also highlights the fact that no consideration has been given to a situation whereby a PPP contract is to be considered as a public contract in the sense of the EC Procurement Directives and of the PPL.

The RS PPP Law and its wording raise numerous other issues. For example, under article 6 (4) it is stipulated that the private partner is to be a legal entity that has been established in accordance with the laws of Republika Srpska, which could contravene EU procurement principles. In other instances, it becomes clear that the lawmakers' assumptions do not accurately reflect market conditions prevailing for PPP at the moment (e.g. Article 19 (1) (c) in the original version of the RS PPP Law, where it was stated that the demand risk was "a common risk that a private party bears in the market economy" – which is clearly not the case for such a general meaning). However, in the later 2009 amendment to the law the sentence highlighted above was deleted. Many of the definitions used nevertheless lack clarity and are ambiguous.

Lastly, the RS PPP Law is silent on which remedies – if any – are available to bidders competing in the selection procedure. These examples alone illustrate the need for the RS PPP Law to be reconsidered.

Based on the RS PPP Law, the "Decree on the Procedure for the Implementation of Public-Private Partnership Projects in Republika Srpska" was issued in 2009, published in the *Official Gazette of Republika Srspka,* no. 104/09. This decree is comprehensive, covering the evaluation and approval of the project proposal, the content of the study or pre-study of economic justification, the procedure for the selection of the private partner, the elements of the PPP contract, and the monitoring of the PPP project implementation. In principle, the intentions of the lawmakers were good in that they set out a number of very detailed procedural rules to be considered by the parties involved in implementing a PPP project, in particular by the public partner.

[34] Article 10 (1); article 10 (3) creates even more confusion, as it allows the public partner to propose "[an]other contractual form of public-private partnership" which then, presumably, would not come within the scope of the RS Concessions Law, but this is not at all clear.

[35] See article 12 (5); in its later amendment of 2009, the term "negotiated procedure" was replaced by "competitive dialogue" without referring, however, to a specific law.

[36] Article 12 (5) stipulates that the procedure of selecting the private partner is to be set out in a decree, but this is not satisfactory, as the principal issue of which international law is being referred to in the primary law has not been dealt with.

BiH Federation Legislation on Concessions and PPPs

The Law on Concessions of the Federation of Bosnia and Herzegovina ("FBiH Concessions Law") was enacted in 2002 and amended in 2006 (*Official Gazette of the Federation of Bosnia and Herzegovina*, nos. 40/02 and 61/07). To date, no PPP law has been enacted.

A new FBiH Concessions Law ("FBiH draft law") was adopted by the FBiH government on 25 January 2012. This FBiH draft law was drafted by a working group led by the Ministry of Spatial Planning (the Concessions Commission participated in that working group). Public consultations have been completed. No consultations took place with the EU, but World Bank experts provided comments on the FBiH draft law. The FBiH draft law is expected to be adopted soon by the FBiH Parliament. According to information received from the FBiH Concessions Commission, the law will regulate both concessions and PPPs (there will be no separate PPP law; a previously planned PPP draft has been withdrawn).

The comments below focus on the provisions and issues of the FBiH Concessions Law that differ from those of the BiH State Concessions Law (and/or the RS Concessions Law). If not explicitly stated, the comments with regard to the State Concessions Law and the RS Concessions Law are thus also applicable to the FBiH Concessions Law. Subsequently, comments will be provided on the FBiH draft law.

The term "concession" is described somewhat differently in the FBiH Concessions Law: "The right to perform economic activities through the utilisation of natural wealth and goods in general use and [to] perform activities of general interest is stipulated by this law" (art. 4).

The decision to initiate the procedure to award concessions for certain assets lies with the FBiH government, following the proposal of a line minister, and is thus somewhat less burdensome than the procedure foreseen in the State Concessions Law (art. 5). The FBiH Concessions Law contains a list of subjects or areas that are subject to concessions (art. 3). The law also contains rules on the delineation between the Federation's authority and cantonal/municipal authority for the award of these concessions. In this regard, article 6 reserves a number of important sectors for the FBiH government, while the award of concessions in sectors other than those listed in article 6 is covered by cantonal laws.

The FBiH Concessions Law also sets up a similar institutional structure: the FBiH Concessions Commission ("FBiH Commission") is responsible for carrying out important tasks in the award procedure and in its preparatory phase. The law also provides for the possibility of awarding concessions on the basis of either a call for tender or an unsolicited proposal. In this regard, the same concerns as those raised above concerning the State Concessions Law and the RS Concessions Law also apply here.

In 2006 the FBiH government issued a Decree on Issuing Consent to the text of the Rules on the Procedure of Awarding Concession Rights[37], setting down more specific requirements for the award of concessions at the Federation level. Several other by-laws were adopted in 2007[38].

The new FBiH draft law regulates the types of concessions, the concession granting procedure, the content of concession contracts, the institutional framework, and legal protection procedures. It is also meant to cover PPPs, although that term is not used or defined in the text. However, the definition of the terms "concession" and "concession project" are wide enough to extend to PPPs. If the FBiH draft law is intended to cover PPPs, this scope should be stated clearly in the law.

[37] The Decree is based on article 19, para. 2 of the FBiH Concessions Law.

[38] See the list of rules and instructions in the FBiH Commission's report, page 2.

In any case, the text concerning the scope of the FBiH draft law has been written in a confusing way. The draft contains definitions of the terms "conceding party" (art. 5 no. 7 and art. 47), "local authority" (art. 5 no. 11) and "contracting authority" (art. 5 no. 18), but without clarifying which authorities are covered by the term "contracting authority" as opposed to the two other terms (which are defined in a more detailed way). It seems as though all of these authorities are entitled to conclude concession contracts, but it is unclear why, if this were true, there is the need to formulate three different definitions to describe what in fact is a "conceding party".

The types of concessions defined in the new FBiH draft law differ somewhat from the types of concessions set out in the EU procurement law. The draft law provides a definition of a concession for the economic exploitation of natural resources, goods in general use or other goods, which is unknown to the EU procurement law. Likewise, the new FBiH draft law's definition of both the terms "concession for public works" and "concession for public services" are different from the definition used by the EC Procurement Directives[39].

The delineation between concession contracts, as defined in the new FBiH draft law, and public contracts, as defined in the PPL, is not entirely clear. For example, the design, construction and maintenance of a new infrastructural facility[40] might fall within the definition of a public works contract, which would require this contract to be put out to tender, in accordance with the PPL.

The FBiH draft law also contains provisions on the review and acceptance of unsolicited proposals, which raises the same problematic issues described above with regard to the RS Concessions Law and the State Concessions Law. The bonus awarded to the proposer of such an unsolicited proposal is set at 15 % of the points for the technical and/or financial evaluation during the selection procedure[41], which is likely to give to the proposer an unmatchable competitive edge over the opponent bidders (if any).

The FBiH draft law also contains some provisions on legal protection for the bidders against (allegedly) unlawful decisions taken by the FBiH Concessions Commission or by the contracting authority (art. 55).

Lastly, article 63 of the FBiH draft law obliges cantonal authorities to harmonise their laws and by-laws in the area of concessions within six months of the day on which the draft law enters into force. This provision is to be welcomed, as it is meant to contribute to the establishment of a unified or uniform legal framework for the award of concessions throughout the FBiH territory.

Institutional Framework

The BiH administrative framework for the regulation and management of concessions appears to be extremely complex. Relatively large institutions (concessions commissions) are replicated at each level of government – state, regional (entities), and local (cantons). The administrative cost of the system is high. The competences of the various institutions are not clearly defined and tend to

[39] Article 3 (2): "The concession for public works shall be a contract-regulated legal relationship, whose subject matter shall be execution of works, or design and execution of works, which refer to one or more activities, or which are defined by the law, which regulate a particular concession." Article 3 (3): "The concession for public services shall be a contract-regulated legal relationship, whose subject matter shall be provision of one or more services, which are of common interest, or which are defined by the law regulating a particular concession."

[40] Article 5 no. 10 states that "concession project" means "any of the following activities, or any combination thereof"; under this definition a works contract (design, construction and maintenance) could be included.

[41] Article 23 (4)

overlap. The levels of activity differ widely. The RS Concessions Commission has been extremely active. On the other hand, the BiH State Commission and the FBiH Commission have been virtually inactive, since hardly any concessions have been awarded at those levels (state and federation levels).

All concessions commissions have a relatively strong position within the governmental structure. The commissions are independent agencies, not subordinated to any ministry but answering directly to the respective councils of ministers. Their members enjoy a high status and are nominated by the respective parliaments (on the proposal of the government). The processes for the nomination and dismissal of members protects the commissions, to some extent, from direct political influence and from pressures exerted by contracting authorities. This protection seems to be sufficient to enable the commissions to properly perform their regulatory and executive functions. The commissions do not enjoy, however, the level of independence that is required of review bodies by the EC Directives.

In practical terms, at the moment the three commissions seem to be properly equipped with the resources and funds corresponding to their respective workloads.

All concessions commissions in BiH have a similar set of functions and responsibilities. They are responsible for the overall regulation of the system (elaborating policy papers, preparing legislation, adopting implementing regulations, issuing standard documents and forms) and for the monitoring (controlling) of both the concession award procedures and the execution of concession contracts. In practice, the concessions commissions not only control the regularity of the process but actively take part in decision-making, thus to some extent taking over from the contracting authorities the ownership of decisions on the granting of concessions. On the other hand, the BiH contracting authorities cannot expect much help from the commissions in the preparation of feasibility studies, tender documents, or conditions and terms of contracts.

Operational Practices

BiH State Practice

The BiH State Concessions Commission started its work in June 2005. To date, the Commission has not approved the final award of any state-level concession contract. It appears, however, that the State Concessions Law should have been applied to the award of at least one concession contract, which extended geographically to the territories of both entities, i.e. to the territories of the Republika Srpska and of the BiH Federation (hydropower plant in Novacovici). In such circumstances, in accordance with the State Concessions Law, a joint ad hoc commission should have been formed in order to award the concession contract. In fact, it was the RS Concessions Commission that carried out the procedure and awarded the concession contract to a private partner (based on an unsolicited proposal). This project experienced some legal difficulties, in particular with regard to expropriation procedures for land situated in the territory of the BiH Federation.

In another highly visible project, the Highway VC Corridor, no concession contract has been awarded yet. The BiH State Commission was involved in developing and monitoring the preparation of a study on the economic justification for the project. The completed study was submitted by the Ministry of Transport and Communications to the BiH Commission for its consideration in January 2007. The Commission approved the study within the prescribed statutory time limits, and a notice of its decision was published in the *Official Gazette* on 9 April 2007. The Commission also notified the ministry of the requirements for a decision of the BiH State Council of Ministers on the type, subject and volume of the concession and for subsequent approval by the BiH State Parliament. The concession contract, which had been awarded to a construction company, had to be resolved; negotiations are underway with a Chinese company.

The BiH State Concessions Commission is responsible for providing procurement expertise and review support, aimed at assisting in the conduct of contract award processes. Sector-specific technical expertise also exists within ministries. However, there is a general concern about the overall lack of resources and expertise, particularly in ministries, to enable the effective delivery of concession contracts. As the State Commission has not yet been involved in the preparation and award of concession contracts, it has not had the opportunity to accumulate significant practical experience.

In summary, there are a number of reasons for the absence of concession awards to date at BiH State level. The main reasons are outlined below:

Political issues:

- Political complexities;
- Issues of co-operation between the state and the entities;
- Reluctance and/or failure to reach political agreement on projects that would be located on the territory of two entities (cross-border projects);
- Parallel and sometimes conflicting strategies at state and entity levels.

Property ownership issues:

- All real property (land) is owned by the entities and not by the state, and the state therefore does not have the competency to grant concession rights;
- Unregulated property rights as a part of post-communist and post-war heritage (registers do not reflect the real situation);
- Lack of clarity about the status of property at the end of a concession period.

Competencies within the state structure:

- Concerns over the lack of clarity as to which organisation is responsible for dealing with unsolicited proposals or conflicting claims of responsibility by organisations involved (see example below);
- Concerns over the lack of clarity with regard to the public interest test that is to be applied in the case of unsolicited proposals;
- Concerns over the lack of clarity as to which part of the state institution makes the decision concerning the results of the public interest test.

Resources and investment issues:

- Lack of technical capacity and expertise within the responsible ministries, particularly in relation to the preparation of feasibility studies;
- Limited financial resources available to state-level institutions (about 2% of the budget is spent at the state level);

- Lack of proactive initiative by the BiH State government and contracting authorities, which seem more inclined to wait for unsolicited proposals rather than positively identifying opportunities and providing the lead on potential projects.

Republika Srpska Practice

The number of concession contracts awarded in the RS by the end of 2011 exceeded 300, and between 50 and 60 concession contracts were signed in 2011. The Commission was very active and, in addition to approving the award of contracts, it provided numerous approvals for the negotiation and/or preparation of feasibility studies and approvals for changes in the voting rights/ownership of concessionaires. Most concessions were awarded in the sectors of agricultural and fishing territory (which does not fall under the definition of concessions for EU purposes) and hydro-electricity plants.

In 2009 the RS Auditor carried out a performance audit on the award of concession contracts in the sector of hydro-electricity plants. The report related to the activities concerned by the award of the concessions and the implementation of the concession contracts, and it assessed the legal and practical consequences of the existing situation.

First of all, the RS Auditor found that 112 concession contracts had been concluded by the end of 2009, 39 of which had been based on unsolicited bids and 73 on a public call for submission based on an unsolicited bid. The RS Auditor indicated that some shortcomings often accompanied the concession award processes, such as the failure of the authorities to implement certain activities before awarding the concession contract and the lack of co-ordination between the local communities and the authorities competent to award the concession contract. The Auditor criticised the use of the unsolicited proposal procedure rather than the public call for potential bids (i.e. not relying on unsolicited proposals). Furthermore, the signed contracts could not be implemented in the correct manner and within the deadlines defined by the contract; the negotiation principle, according to the Auditor, did not take into account the situation in the field and in practice, primarily in terms of the aspect of time necessary for individual phases. This failure had led to a situation whereby, by the end of 2009, out of 112 concession contracts for hydro-electrical plants, only one had actually been constructed and put into commercial service (one more was constructed during 2010 and was being tested; one was constructed but was unable to be connected to the grid). One of the main reasons for this situation was the necessity of providing the administration with additional (technical/financial) documents (sometimes over 100 various additional documents), which had slowed down the processes and made it burdensome to obtain permits and approvals, in particular urban, environmental and construction permits.

With regard to RS practice in the area of PPPs, so far no PPP project has been finalised; a couple of projects are close to being publicly announced, however (initiation of public tender). For the time being, the areas where PPP projects are being considered and developed are the health sector, ports and roads.

The Ministry of Finance, which is the competent authority for authorising the use of PPPs, envisages to expand its personal and material resources in order to cope with the expected inflow of PPP projects in the near future. Additional training and information for local authorities are needed, for which the Ministry of Finance, for the time being, lacks the resources.

FBiH Practice

Cantons may also award concessions that are not covered by article 6 of the FBiH Concessions Law, in compliance with their own cantonal concession laws. In practice, very few awards were made by ministries at Federation level; practically all of the concession awards were at cantonal/local authority level. Concession laws at cantonal level, however, are inconsistent, and not all cantonal concession laws have been harmonised with the FBiH Concessions Law.

PROCUREMENT/CONCESSIONS STATISTICS for 2011[1]

A. Number of contracting entities[2]		
Nivo-Bosna I Hercegovina	**79**	
Nivo-Federacija BiH	**517**	
Nivo-Republika Srpska	**318**	
Nivo-Brčko Distrikt	**5**	
Total number of contracting entities	**919**	
B1. Awarded[3] ***public contracts*** *(Dodjeljeni ugovori-Poglavlje II i Poglavlje III ZJN BIH)*	**Total (BAM)**	**Total number**[4]
Nivo-Bosna I Hercegovina	61.935.509,60	8146
Nivo-Federacija BiH	2.056.481.245,33	45027
Nivo-Republika Srpska	564.386.841,22	23302
Nivo-Brčko Distrikt	827.112.410,43	4293
Total public contracts awarded	3.509.916.006,58	80768
B2. Awarded concessions/Contracting entities	**-**	**-**
Central Government	-	-
Regional and local authorities	-	-
Other (bodies governed by public law)	-	-
Utilities	-	-
Total concessions awarded	-	-
C1. Awarded public contracts *(Dodjeljeni ugovori -Poglavlje II ZJN BIH)*		
Works[5]	*352.030.936,35*	2781
Services[6]	*347.146.833,43*	2751
Goods[7]	*2.038.030.849,90*	1136
Mixed contracts	-	-
Total public contracts above the EU thresholds	2.737.208.619,69	6668
C2. Awarded concessions above the EU thresholds	**-**	**-**
Works[8]	-	-
Services[9]	-	-
Other	-	-
Total concessions above the EU thresholds	-	-
D. Procurement methods used[10] ***(above the national thresholds***[11]***)*** Vrsta postupka-Poglavlje II ZJN BiH		
Open procedure	1.169.492.996,52	3476
Restricted procedure	18.256.710,88	88
Negotiated procedure with prior publication of a notice	1.780.955,62	25

Negotiated procedure without prior publication of a notice[12]	1.547.677.956,67	3079
Other procedures (competitive dialogue, etc)	-	6668
D1. Dodjeljeni ugovori –Poglavlje III ZJN BIH	390.132.484,58	74100

E. Participation rate (average number of submitted tenders)		
Works		
Services		
Goods		

F. Review procedures/Kancelarija za razmatranje žalbi		
Number of complaint received/Ukupan broj žalbi u 2011.g		1760
Number of complaint treated/Ukupan broj rješenih žalbi u 2011.g		1726
Number appealed to the Court/Ukupan broj upravnih sporova u 2011.g		100
Number of decisions with interim measures		

F. A list of 10 biggest procuring entities (name, main activity, (estimated) annual procurement budget):

1. ……..
2. ……..
3. ……..
4. ……..
5. ……..
6. ……..
7. ……..
8. ……..
9. ……..
10. ……..

G. A list of 10 biggest public contracts/concessions awarded and/or advertised in 2011 (subject of the contract, name of the contracting authority and contractor (if selected), (estimated) value, time of execution):

1	ZAVOD ZDRAVSTVENOG OSIGURANJA I REOSIGURANJA FBIH	Pregovarački postupak bez objave obavještenja	Unifarm doo promet lijekova na veliko	Robe	614.976.752,00
2	Javno preduzeće Elektroprivreda Bosne i Hercegovine d.d. - Sarajevo	Pregovarački postupak bez objave obavještenja	JP Elektroprivreda BiH DD Sarajevo zavisno drustvo rudnici Kreka doo Tuzla	Robe	112.129.677,00
3	Javno preduzeće Elektroprivreda Bosne i Hercegovine d.d. - Sarajevo	Pregovarački postupak bez objave obavještenja	Banovici dd rudnici mrkog uglja	Robe	66.040.200,00
4	Javno preduzeće Elektroprivreda Bosne i Hercegovine d.d. - Sarajevo	Pregovarački postupak bez objave obavještenja	JP Elektroprivreda BiH DD Sarajevo zavisno drustvo rudnici Kakanj doo Kakanj	Robe	62.121.152,00
5	Javno preduzeće Elektroprivreda Bosne i Hercegovine d.d. - Sarajevo	Pregovarački postupak bez objave obavještenja	JP Elektroprivreda BiH DD Sarajevo zavisno drustvo rudnici Đurđevik doo Đurđevik	Robe	32.679.780,00
6	Javno preduzeće Elektroprivreda Bosne i Hercegovine d.d. - Sarajevo	Pregovarački postupak bez objave obavještenja	JP Elektroprivreda BiH DD Sarajevo zavisno drustvo rudnici Breza doo Breza	Robe	32.000.000,00
7	ZP Rudnik i TE Gacko, AD Gacko, Gračanica, b.b.	Otvoreni postupak	grupa dobavljača:Ski Topeko Beograd,Kolubara metal doo, Vreoci	Usluge	31.301.232,12
8	Zavod zdravstvenog osiguranja Kantona Sarajevo, Ložionička 2	Otvoreni postupak	Hercegovina lijek doo	Robe	23.410.838,74
9	Ministarstvo trgovine i turizma, Trg Republike Srpske br. 1, Banja Luka	Pregovarački postupak bez objave obavještenja	Nestro Petrol AD	Robe	23.076.000,00

10	JP KOMUNALNO BRČKO DISTRIKT, STUDENTSKA BR.13	Pregovarački postupak bez objave obavještenja	Elektroprivreda RS mješoviti Holding, matično preduzeće ad	Robe	21.000.000,00
11	Javno preduzeće Elektroprivreda Bosne i Hercegovine d.d. - Sarajevo, Vilsonovo šetalište 15, 71000 Sarajevo	Otvoreni postupak	TPK Zavod za energetsku i procesnu opremu dd Zagreb	Radovi	19.451.316,00
12	Rudnik i Termoelektrana Ugljevik, Ugljevik BB	Otvoreni postupak	Optima grupa doo Banja Luka	Robe	15.798.154,68
13	Ministarstvo trgovine i turizma , Trg Republike Srpske br. 1, Banja Luka	Pregovarački postupak bez objave obavještenja	Fertil	Robe	15.706.500,00
14	Javno preduzeće Elektroprivreda Bosne i Hercegovine d.d. - Sarajevo, Vilsonovo šetalište 15, 71000 Sarajevo	Pregovarački postupak bez objave obavještenja	JP Elektroprivreda BiH DD Sarajevo zavisno drustvo rudnici Zenica doo Zenica	Robe	14.850.000,00
15	Javno preduzeće ''Putevi Republike Srpske'', Trg Republike Srpske broj 8	Otvoreni postupak	NLB Razvojna banka ad	Usluge	14.241.000,00
16	Javno preduzeće "Grijanje" d.o.o. Zenica, Bilmišće br. 107	Pregovarački postupak bez objave obavještenja	Arcelormittal zenica doo	Usluge	10.189.000,00
17	ZP Rudnik i TE Gacko, AD Gacko, Gračanica, b.b.	Pregovarački postupak bez objave obavještenja	Trigma doo	Robe	8.542.760,00
18	Javno preduzeće ''Putevi Republike Srpske'', Trg Republike Srpske broj 8	Otvoreni postupak	Hypo aple adria Bank ad	Usluge	8.050.000,00

19	Javno preduzeće Elektroprivreda Bosne i Hercegovine d.d. - Sarajevo	Pregovarački postupak bez objave obavještenja	JP Elektroprivreda BiH doo Sarajevo, ZD RU Gračanica doo Gornji Vakuf-Uskoplje	Robe	7.990.000,00
20	Javno preduzeće Elektroprivreda Bosne i Hercegovine d.d. - Sarajevo	Pregovarački postupak bez objave obavještenja	EFT Rudnik i Termoelektrana Stanari doo	Robe	7.740.000,00

[1] Statistics should cover contracts awarded in the period 1 January 2011 – 31 December 2011

[2] As for 31 December 2011

[3] Statistics should refer to contracts awarded (based on contract award notices), if not available, please give the data on contracts advertised (based on contract notices)

[4] Please indicate whether the data include the low value contracts

[5] Above €4,845,000

[6] Above €125,000 for public institutions, €387,000 for utilities

[7] Above €125,000 for public institutions, €387,000 for utilities

[8] Above €4,845,000

[9] Above €125.000

[10] Both for public contracts and concessions

[11] Including contracts above EU thresholds

[12] Including single-source procurement

POLICY MAKING AND CO-ORDINATION

Main Developments Since the Last Assessment (May 2011)

Few substantial developments have occurred in the policy making and co-ordination system in Bosnia and Herzegovina (BiH) since the last assessment. After a prolonged vacancy of the position, the new Secretary-General of the government of the Federation (FBiH) was appointed in early 2012. At BiH State level, guidelines for preparing and monitoring the government Work Plan were adopted by the BiH State Council of Ministers (CoM) in 2011. Republika Srpska (RS) has proceeded during the past year with the implementation of the new Rulebook for the Systematisation of the RS General Secretariat, which had been adopted in 2010. FBiH adopted in 2011 a requirement to provide certain basic information when an item is submitted for consideration by the meeting of the FBiH government, which constitutes a basic impact assessment system. For the most part, however, the picture has remained static.

Main Characteristics

Arrangements for policy making and co-ordination in Bosnia and Herzegovina remain underdeveloped. The country's co-ordination mechanism for European integration (EI) is seriously outdated and unable to cope with the stage of the EI process in which BiH now finds itself. Although the need for revision is widely acknowledged as urgent, securing consensus for change is proving to be difficult. Policy making and co-ordination across the country is severely handicapped by the absence of adequate co-ordination mechanisms between the four governments (BiH State, FBiH, RS and Brčko District) to handle policy matters of all kinds. In that regard, the 2008 Memorandum on Mutual Co-operation drafted by the general secretariats of the four governments is inoperative. The unavailability of consolidated legal texts and the volume of amendments mean that legislation is difficult to implement, which is a serious defect. More generally, the poor quality of legislation prepared by ministries is a major deficiency that should be addressed in the short-term by the stricter enforcement of rules of procedure (and, at BiH State level and in FBiH, the revision of those rules) and in the longer term by the strengthening of capacities in line ministries. Systems for planning the work of the government and for monitoring the implementation of those plans are weak and require development.

A few isolated bright spots can be seen in this largely negative picture. The capacities at the centres of government for legal review are generally good, although the work of legislative secretariats in BiH is considerably complicated by the complex (and often unclear and disputed) division of legal competences between the different governments. The need to strengthen policy making and co-ordination in the centres of government is now recognised, and a mechanism to meet this need has been incorporated into the blueprint process. Efforts to introduce strategic planning are being made by all governments, but these efforts face considerable difficulties, not least of all in implementation, and progress is slow. Initial steps are being taken to introduce impact assessment, but this development is in a very early stage.

Reform Capacity

All four governments subscribe to the "blueprint" process for the reform of their centres of government, but the project of assistance in implementing this process in its brief life to date has made relatively little difference to the way in which the centres of government actually operate. All

four general secretariats nevertheless state that they are committed to the process, and they speak of their own future development in terms of the blueprint reforms. The UNDP project supporting the development of strategic planning and policy making capacities in 13 ministries across BiH has now terminated and, in the absence of funding to continue the initiative, the gains made (which were greater on the strategic planning side) are in danger of dwindling.

Recommendations

- The four governments of BiH must urgently resolve the EI co-ordination machinery issue. Any solution will need to recognise the considerable role of all governments in the EI process, and it will be necessary for each of them to develop adequate EI capacities.

- The blueprint process to strengthen general secretariats should be pursued.

- The poor quality of legislation prepared by ministries is a major deficiency that should be addressed in the short-term by the stricter enforcement of rules of procedure (and, at BiH State level and in FBiH, the revision of those rules) and in the longer term by the strengthening of capacities in line ministries.

- The European Commission should consider providing assistance for the development of a process to consolidate and publish the texts of legislation of BiH State, the Federation, Republika Srpska and Brčko District.

Detailed Analysis

Introduction

This assessment covers policy making and co-ordination at BiH State level, in the two entities (FBiH and RS) and in District of Brčko (DB). Wherever possible, in relation to specific elements of the assessment baselines, comments are made concerning common traits across BiH or in several of its components, but frequently it is necessary to provide separate descriptions of the specific characteristics of the individual components of BiH.

The formal division of competences between the different layers of government and the practical methods for executing and sharing competences are frequently a matter of contention. The constitutional system requires reform, especially to clarify the powers of the central state, in order to make the BiH State government more effective. Against that argument, there are forces within BiH that resist significant reform. The underlying structural issues are practical, ideological and highly politicised, and they affect the development of all of the institutions and practices related to policy making and co-ordination. Policy making in general and the European integration process in particular take place within this context, and the European integration process itself is also, in turn, a potential tool for bringing about reform in the constitutional structure.

This assessment also covers the District of Brčko, which was not covered in previous assessments of policy making and co-ordination in BiH. There has from the outset been present in DB a branch of the Office of the High Representative (OHR) under a Deputy High Representative. While the role of the Deputy HR and the size of his office has reduced in recent years, the influence of OHR remains significant (for example, an OHR representative attends all DB government meetings), and the OHR still has a substantial supervisory function. Second, it was originally decided, as recommended by US advisers, to adopt a strong mayoral (in the USA sense of the term) system of government. The appropriateness of such a system for an ethnically divided community with a troubled past was questionable, and in 2007 the system of government was changed substantially towards a more collegiate system, in which the mayor and the mayor's deputies share power much more with a collective government that meets weekly. This change better responds to the need to maintain an ethnic balance and provides special arrangements to guarantee community rights. A significant consequence of this change is that since 2007 legislation has usually been initiated by government members (other than the mayor) or by departments, whereas previously legislation had usually been initiated by the mayor. Third, also following the recommendations of US advisers, a "co-ordinator" was appointed, based on the US concept of a city manager. This post has survived the 2007 changes but is now under review, and the possibility of transforming it into a second deputy mayor post is under discussion.

Coherence of the Policy Making Framework

The framework for decision-making at BiH State, FBiH and RS levels is modelled on the traditional Yugoslav system. Three types of normative documents shape this traditional policy development and decision-making system: the law on government, the rules of procedure issued pursuant to this law (sometimes supplemented by additional instructions or government decisions on specific procedural issues), and the rulebook on internal organisation and systematisation of the bodies that form the centre of government, e.g. the (general) secretariat, the legislative secretariat and the cabinets of political leaders. Of these three types of documents, the most crucial for determining the rules of policy making and co-ordination are the rules of procedure, which regulate in detail all stages of the policy making process: planning of the work of the government, preparation of documents by ministries, processing of documents through the decision-making system (CoM/government commissions and CoM/government sessions), and the recording and circulation of decisions.

The 2006 Public Administration Reform (PAR) Strategy adopted by the BiH State CoM and endorsed by the entity governments set as a central objective the commitment "to improve the structure, capacity and performance of the centres of government and thus strengthen the policy making systems on all government levels". The National PAR Coordinator, appointed jointly by BiH State, the entities and DB, has been active in promoting the co-ordinated reform of the different centres of government. This reform led in 2007 to the adoption by the four governments of a blueprint, which provided for the development of their centres of government in accordance with a common model and for increased co-operation and co-ordination between them in the areas of policy development and decision-making. This "blueprint process" was to be supported by an external assistance project funded by international donors. However, there was considerable delay in putting this plan into practice, and the project only began its operations in late 2010. In its first year, the project developed an implementation plan, carried out a gap analysis, proposed options for change, and provided a certain amount of training to general secretariat staff. All four BiH components have participated in this process, although the RS has adopted what it describes as a "slightly narrower" approach. In its brief life to date, the blueprint process has made relatively limited difference in the way the four centres of government actually operate. All four general secretariats nevertheless state that they are committed to the process, and they speak of their own future development in terms of the blueprint reforms.

Legal Frameworks

In 2005 the Parliamentary Assembly of BiH State adopted rules of legislative drafting, which include a recommendation that the entities and Brčko District apply the same rules in their administrations. However, the RS government has adopted separate rules, while FBiH and DB follow the unified rules as recommended.

At BiH State level, the current rules of procedure of the Council of Ministers were adopted in 2003. These rules have not substantially changed since then and remain operative. The same is true of the FBiH rules of procedure, although there have been some minor amendments leading to a consolidated version in 2010 (and several further minor changes since 2010). Both BiH State and FBiH recognise that their respective rules of procedure are in need of revision, in line with the general recommendations of the 2007 blueprint document, which identified the main areas to be amended and/or added as:

- Structure of the CoM/government General Secretariat;
- Functions and competences of the CoM/government General Secretariat and related bodies;
- System of priority-setting, work-planning, and agenda-planning;
- Rules related to the preparation and submission of items by ministries, including the responsibility to consult with the CoM/government General Secretariat;
- Rules for inter-level consultations and co-ordination; and
- Rules for co-operation with presidents and parliaments.

The FBiH government has moved to some extent in this direction by supplementing its rules by means of a new directive adopted in 2011, which requires certain basic information to be provided when an item is submitted for consideration by the government meeting.

The RS adopted in 2010 new rules of procedure that reflect to a substantial extent the 2007 blueprint document.

The Brčko District, as part of its movement from primarily a mayoral government to a more collective model of decision-making by a government body meeting weekly, adopted in 2007 rules of procedure that were broadly similar to those of other ex-Yugoslav governments. However, these rules were not very detailed, and they have since been supplemented by an additional government decision on procedures for the preparation of legislation, covering such issues as inter-departmental consultation on draft legislation.

The legal frameworks for policy making and co-ordination at BiH State and FBiH levels are in need of revision along the lines identified in the blueprint document. .

Inter-ministerial Consultation on Policy Proposals

The common pattern across BiH appears to be that capacities for policy-development and law-drafting in line ministries (or departments in DB) vary considerably and are usually quite weak. Co-ordination within some ministries is weak. Inter-ministerial working groups are often used to develop new legislation; in general, these groups are moderately effective, but their performance is often patchy. Consultations between ministries on draft legislation are required by the rules of procedure of all four governments, but in general compliance seems to be rather minimalistic. A common problem is that drafts are circulated for comments but with very short deadlines. Almost certainly as a consequence of this consultation problem, across BiH the legislation is of poor quality. It is very common for legislation to be amended soon after it has been adopted because the original version was defective or unworkable.

The quality of legislation is commonly undermined by the weak capacities in ministries for policy development and law-drafting and by inadequate and perfunctory inter-ministerial consultations.

Work Planning

BiH State has an annual government Work Plan, which is mainly a compilation of “bottom-up” proposals from ministries. Responsibility for the Work Plan has now passed *de facto* from the Prime Minister’s advisers to the BiH State General Secretariat, which also co-ordinates the preparation of an annual report indicating whether the actions planned have been implemented and, if not, why not. This exercise also includes budget outturn information. Guidelines for preparing and monitoring the Work Plan, prepared with the help of the blueprint project, were adopted by the BiH State CoM in 2011.

The FBiH government has delegated responsibility for the preparation of the FBiH government Work Plan to a governmental body that is independent of the FBiH General Secretariat, the Institute for the Planning of Development. The purpose of this unusual arrangement is to ensure a degree of consistency between the annual FBiH Work Plan and the (still evolving) strategic planning arrangements. In practice, however, the annual Work Plan in FBiH is a compilation of items proposed by line ministries and, while the Institute can advise on content, it has no authority to edit or prioritise the material proposed by ministries.

In Republika Srpska, the Strategic Planning Unit in the RS Prime Minister's Office is responsible for preparing the annual Work Plan of the RS government. In recent years the Unit has worked closely with senior management in ministries and appears to have ensured a reasonable degree of consistency between the annual RS Work Plan and the government's strategic objectives, particularly as articulated through the annual Economic Policy Strategy.

The government of Brčko District has an annual Work Plan that is a compilation of departmental submissions, but it is not aligned with strategic documents. In practice, the immediate government agenda is determined by whatever business the departments have to put forward, with the Mayor and PAR Co-ordinator exercising a degree of control over the agenda.

All four BiH governments require ministries (departments in BD) to report annually on their progress in comparison with the respective annual Work Plan, which is not a particularly effective mechanism for holding them to account for their performance. None of the governments has a system for monitoring progress more frequently or more systematically.

Work-planning systems are weak at BiH State level as well as in FBiH and Brčko District. At a minimum these systems could be strengthened by giving to the centres of government the authority to ensure consistency between the items proposed by line ministries and each government's stated strategic priorities. At state level, in both entities and in DB, arrangements for monitoring the implementation of each government's annual work plan should be strengthened, for example by introducing a quarterly check on progress by the respective centre of government.

Dispute-Resolution Mechanisms

Dispute Resolution within Entities

At state level, the co-ordination boards of ministers have not met for several years, which is partly the reason for the inadequate preparation of many of the items submitted to the Council of Ministers.

Similarly, in the Federation the commissions of ministers rarely meet, but they have been supplanted by a weekly co-ordination meeting of the Prime Minister, the two deputy prime ministers, the government secretary and support staff, which is held a day or two before the government meeting.

Republika Srpska has three commissions, covering economic, social and international issues respectively, which "filter" items of business before they are submitted to the government. However, their effectiveness is attenuated by the late circulation of these items by ministries.

Brčko District has a weekly meeting of the "co-ordinating body", made up of all members of the government and representatives of political parties, which considers the major items of business prior to the weekly government meeting.

Co-ordination and Dispute Resolution between the Four governments

For other countries, this section of the policy making and co-ordination assessment examines dispute-resolution mechanisms designed to harmonise positions within the same government. As BiH has a multi-level government structure, co-ordination and dispute-resolution mechanisms are also needed between the different governments. As noted above, BiH constitutional arrangements imply a high degree of interdependence between the four governments, thereby requiring a considerable degree of co-ordination between them. In practice, co-ordination is usually difficult, often poor and sometimes non-existent. This situation affects in particular (but far from exclusively) the implementation of European integration directives.

In 2008 a Memorandum on Mutual Co-operation was drafted by the general secretariats of the four governments, which specified in particular the co-operation and exchange of information between these four secretariats in relation to government policy making and co-ordination and to the harmonisation and legal accordance of normative acts. In practice, the Memorandum has not borne any fruit. This situation was evident in the attempt to hold a meeting of the four secretaries general of the governments in 2011, which failed when both RS and FBiH participants were absent, and the ensuing meeting attended by deputy secretaries general lacked the authority to make any substantial progress.

The principal and urgent need is the development of adequate co-ordination and dispute-resolution mechanisms between the four governments of BiH.

Central Co-ordination Capacity

The governments of BiH State, FBiH and RS, like other ex-Yugoslav governments, each benefit from having a well established and respected secretariat for legislation that reviews and provides written comments on all draft legislation submitted to the CoM/government meeting. While these secretariats do not have the power to impose their views on ministries, it is unusual for ministries to not follow that advice, which is of considerable importance in remedying the indifferent quality of much of the legislation drafted by ministries. Brčko District has a small legal office that performs substantially the same function. The staff of the RS Secretariat for Legislation has adopted the constructive practice of meeting with line ministries to go through their draft legislation, which is time-consuming but effective, and this practice had gradually contributed to improving legal skills in ministries. It should be stressed that the work of legislative secretariats in BiH is considerably complicated by the complex (and often unclear and disputed) division of legal competences between the different governments.

All four governments have a general secretariat that is responsible for providing administrative and secretarial support to the government. As explicitly shown in the blueprint process, in which all four secretariats have been active partners, it is commonly accepted that the roles of the secretariats need to be strengthened to give them a greater capacity and authority to enforce the rules of procedure (including deadlines and requirements for interministerial consultation), to review items submitted to the CoM/government meeting, and to play a more active role in the planning of government business. In practice, external circumstances have frustrated progress, including the long delay in putting in operation the blueprint process, the year-long absence of a government at state level, the lengthy delay in appointing a new secretary general in the Federation (a new appointee was named in early 2012), and the unresolved position of the PAR Co-ordinator vis-a-vis the general secretariat in Brčko District. Republika Srpska, however, has proceeded during the past year with the implementation of the new Rulebook for the Systematisation of the government Secretariat adopted in 2010.

FBiH has assigned responsibility for policy co-ordination to the Institute for Planning and Development. Given this body's detachment from the centre of government, it is doubtful that it can satisfactorily carry out the policy co-ordination function.

Capacities for legal review at the centres of government are generally good, although they are often not sufficiently staffed to carry out this function. It is now important that the general secretariats of the four governments, with the support of the project funded through PARCO, press ahead with the implementation of the blueprint process. This process should strengthen their capacity and authority to enforce the rules of procedure (including deadlines and requirements for interministerial consultation); to review items submitted to the CoM/government meeting, and to play a more active role in the planning of government business.

Central Capacity to Advise on Policy and Strategic Matters

Advice on Overall Strategic Issues

The complexity of governance structures in BiH makes strategic planning extremely difficult. At BiH State level, the Directorate of Economic Planning (DEP) provides economic projections and is in charge of developing and monitoring the implementation of the Medium-Term Development Strategy, which incorporates the former Poverty Reduction Strategy Process (PRSP). The current three-year version was prepared in 2011 under the supervision of a committee representing all four governments. It has been adopted and implemented by FBiH and DB but not yet by RS or BiH State (although the latter has informally implemented some of its elements). The intention is to implement the Strategy by means of four different action plans. The DEP is in the process, which is still in its

early stages, of developing arrangements for monitoring the implementation of the Strategy by elaborating a "Country Development Report".

The DEP is working in difficult political conditions and is hindered by small staff numbers and high staff turnover. It is acknowledged that the key action plans are not well connected to the respective government budgets. While FBiH and DB are working co-operatively with the DEP, RS has not been involved in these initiatives.

FBiH has placed strategic planning in the hands of its Institute for Planning of Development, an independent body reporting directly to the government. The Federation's main strategic documents are the Country Development Strategy and the Social Exclusion Strategy, and the Institute is now developing plans for the implementation of these strategies, although it acknowledges that their implementation by ministries constitutes a considerable weakness.

Republika Srpska has a Strategic Planning Unit within the Prime Minister's Office, but its staff are civil servants rather than political advisers. However, the dominant planning horizon in RS is short-term and basically annual, with the principal instrument being the annual Economic Policy Strategy linked to annual ministry plans (although these documents are all developed in the framework of the overall strategy of the four-year government programme).

The government of Brčko District has adopted a District Strategy linked to the budget for the next three years, but both the budget and the Strategy have tended to be undermined by short-term political decision-making and an inability to spend budgeted capital funds.

UNDP has operated in recent years a project to support the development of strategic planning in 13 ministries (three at BiH State level and five each in the RS and FBiH). While this project has had moderate success, particularly in establishing links to the budgeting systems, the funding has now expired. In FBiH the Institute for Planning of Development is seeking to adopt a methodology and a legal requirement that would firmly establish these arrangements, but so far this has not been done. In the absence of central support or formal requirements to develop individual ministry plans, this initiative is in danger of faltering in all three governments that participated in the project.

Advice on Policy Issues

The common view in BiH is that advice on policy issues at the centre of government is the preserve of political advisers to ministers. These advisers certainly have a significant and legitimate role to play, but by definition they are transient, and therefore relying solely on them for advice means that, when they leave their posts, the government's policy making capacity is lost. It would be highly advisable to follow the example of EU/OECD countries of also developing a more durable capacity for policy analysis and advice in the civil service, by defining a role for civil servants in policy development and analysis and by developing their skills in this area. Experience in other countries has shown that this approach is feasible and beneficial, but it takes time.

Efforts to introduce strategic planning are being made by all four BiH governments, but they are facing considerable difficulties.

Co-ordination of European Affairs

The European integration sphere is particularly affected by the extreme difficulty of co-ordination between the different governments of BiH and by the differences of opinion concerning the extent to which European integration issues should be handled exclusively at BiH State level rather than by all four governments. Indeed, the European integration sphere appears to have become one of the principal battlegrounds for the contending views of the future constitutional shape of BIH.

Formally, the system for managing the European integration process remains the one adopted in December 2003, which was described in the 2008 policy making and co-ordination assessment report. It is general recognised that this system is now wholly inadequate for meeting the demands of European integration. However, the lack of consensus about what should take its place is rooted to a considerable extent in the differing views as to whether European integration should be managed by the BiH State government alone or by all four governments. At the time of writing, draft proposals were under discussion by the four governments, with European Commission participation. Attempts to organise a major meeting in early 2012 in order to generate some consensus were encountering considerable difficulty. This situation is preventing the creation of a programme for the adoption of the *acquis communautaire*, although the urgent need for such a programme is generally recognised.

An asymmetric pattern of co-ordination has developed, in which the Department of European Integration (EI) at BiH State level is dealing extensively with FBiH ministries and with Brčko District, but the Department has more limited contact with RS, which insists that all contact should be through its Ministry for Economic Relations and Regional and EU Co-operation. In practice, capacities to manage EI issues within the Federation are very limited, including the capacity to verify the conformity of proposed new legislation with the *acquis.* The RS has greater capacity in the above-mentioned ministry and its network of EI units in ministries, although there are no cross-ministry co-ordination mechanisms in RS other than the EI Ministry's own network of contacts. The DB government has a two-person EI unit.

The most urgent and important issue in policy making and co-ordination in BiH is the resolution of the EI co-ordination machinery issue. Whatever the outcome, recognition of the considerable role of all four governments in the EI process is essential, and it will be necessary for all governments, in particular the FBiH government, to develop adequate EI capacities.

Impact Assessment

BiH State, both entities and Brčko District all have a basic requirement for their ministry of finance to review proposals submitted to the CoM/government meeting, and it is rare for a proposal to be adopted without such a review. However, none of them has a system of fiscal impact assessment, in the sense that none has established a clear template of budgetary information that must be provided before the CoM/government meeting considers an item of business.

FBiH has adopted a requirement for certain basic information to be provided when an item is submitted for consideration by the government meeting, which constitutes a basic impact assessment system. However, due to low capacities and limited understanding, ministries are struggling to comply with this requirement. The RS has begun to develop a regulatory impact assessment system, with assistance from the World Bank, but this initiative is in its very early stages

Impact assessment arrangements are in a very early stage of development.

Better Regulation

Very little evidence of a better regulation policy has been found at any level in BiH.

Transparency, Consultation and Communication with the Public

The accessibility of legislation is considerably impaired by the absence of consolidated legal texts. This problem is particularly acute at BiH State level, where the *State Gazette* is still paper-based, and only more recent legislation is available through a website. FBiH has a similar problem, where the consolidation of the legal texts of primary legislation is the responsibility of the parliament. As parliament does not act on the matter, government staff have to resort to compiling their own

informal consolidated texts for internal use. The RS Secretariat for Legislation has been developing a database of legal acts since 1992, but this database is not yet publicly available, and the *RS Gazette* is available only on payment of an annual subscription. The unavailability of legal texts is inherently undesirable as it hinders application of the rule of law and obviously also hampers the implementation of the law.

In recent years there has been an increase in the amount of consultation carried out in FBiH and in RS, in the latter case linked to the steps to develop a regulatory impact assessment system. However, this consultation has been criticised by civil society on the grounds that it is partial, in the sense that it is confined to certain interests that are close to or sympathetic to the government.

All four components of BiH have arrangements for communicating the work of the government to the public, and the RS in particular has a well-developed system for planning and co-ordinating public announcements across the government. However, the effectiveness of these arrangements is to some extent diluted by accusations of governmental control of the news media, particularly in the RS.

The unavailability of consolidated legal texts is a major defect.

Next Steps

The two most pressing needs in Bosnia and Herzegovina are the resolution of the current deadlock over the EI co-ordination machinery and the development of adequate co-ordination mechanisms between the different governments of BiH to handle policy matters of all kinds.