Institute of Comparative Law

LEGAL MECHANISMS FOR PREVENTION OF CORRUPTION IN SOUTHEAST EUROPE

WITH SPECIAL FOCUS ON THE DEFFENCE SECTOR

Edited by

Aleksandra Rabrenovic

LEGAL MECHANISMS FOR PREVENTION OF CORRUPTION IN SOUTHEAST EUROPE

WITH SPECIAL FOCUS ON THE DEFENCE SECTOR

Edited by

Aleksandra Rabrenovic, PhD

Publisher

Institute of Comparative Law, Belgrade

Reviewers

Jovan Ciric, PhD

Prof. Vladimir Colovic, PhD

Prof. Vladimir Djuric, PhD

Translation

Maja Medic

Ana Knezevic Bojovic, PhD

Print:

Goragraf

ISBN 978-86-80059-92-1

LEGAL MECHANISMS FOR PREVENTION OF CORRUPTION IN SOUTHEAST EUROPE

WITH SPECIAL FOCUS ON THE DEFENCE SECTOR

Edited by

Aleksandra Rabrenovic, PhD

Institute of Comparative Law

Belgrade, 2013.

Table of Contents:

ACKNOWLEDGMENT

We would first like to thank Mr. Svein Eriksen, who has initiated the preparation of this study, for his comprehensive support throughout its writing, very useful proposals and long conversations held in order to improve its quality. We would also like to thank our colleagues: Francisco Cardona, Florian Quehaja, Sandro Knezevic, Ahmet Alibasic, Katerina Velickova and Islam Yusufi for their useful comments. Special thanks goes to Mr. Jovan Ciric, the Director of the Institute of Comparative Law, for his support throughout the preparation of this study. Finally, we would like to thank the Norwegian Government, whose financial assistance in conducting and publishing this study is greatly appreciated.

INTRODUCTION

The Southeast European countries suffer from the overarching, systemic corruption, struggling to meet high democratic standards of transparency and integrity in the process of the EU and Euro-Atlantic integrations. On average, the countries of Southeast Europe received a score of 41.4 on corruption in the Transparency International corruption perception index for 2012, indicating serious corruption problems.[1] In spite of a number of measures undertaken to curb it, corruption has persisted in Southeast Europe, having a highly detrimental effect on social and economic development of the whole region.[2]

One of the areas especially susceptible to corruption is the defence sector. Although the defence sector may not be perceived by the public as overly corrupt,[3] due to the fact that citizens are not in day-to-day contact with the defence sector institutions, the nature of the defence sector does make it particularly vulnerable to corruption risks. The defence sector takes up significant resources of a national budget and has privileged access to classified information in relation to weapons supplies and other resources needed for the operation of the army. This, coupled with an ingrained culture of secrecy, makes the sector quite susceptible to administrative and political malpractices such as corruption and abuse of power.

Despite the importance of this concern, there are few systematic, comparative legal studies of the corruption prevention mechanisms that identify risks of corruption/unethical behaviour in general and in the defence sector in particular in the Southeast Europe. An important contribution to this topic was provided by a study on parliamentary oversight over the defence sector in Western-Balkans countries[4]

[1] According to Transparency International all countries that score below 50 indicate a serious corruption problems.

[2] UNDOC, *Corruption in the Western Balkans: Bribery as Experienced by the Population*, United Nations Office on Drugs and Crime (UNDOC), 2011.

[3] For example, according to a recently conducted corruption perception survey in Serbia, the military is perceived as one of the least corrupt sectors, as only 32 per cent of respondents thought it was affected by corruption (only religious groups got a better score of 30 per cent), while 77 per cent of respondents were of the opinion that political parties were the most corrupt, followed by the health system (74 per cent) and the Government (69 per cent), Tns, Medium Gallup, *General Context, Benchmarking corruption at the household level, 5th round, June 2012*, *http://www.slideshare.net/undpeuropeandcis/corruption-benchmarking-in-serbia*.

[4] F. Klopfer, D. Cantwell, M. Hadžić, S. Stojanović (eds.), *Almanac on Security Sector Oversight in the Western Balkans*, Belgrade 2012.

and also on professionalization of civil service systems in the Western Balkans.[5] No studies, however, have been conducted to analyse the plethora of corruption prevention measures and institutions that have recently been set up throughout the region, with the special emphasis on the defence sector.

The objective of this comparative legal study is to redress this state of affairs by providing an insight into existing national integrity legal framework on corruption prevention that has been rapidly developed in the Southeast Europe over the past two decades. The countries included in the analysis are as follows: Bulgaria, Bosnia and Herzegovina, Croatia, Kosovo,[6] Montenegro, Serbia and The Former Yugoslav Republic of Macedonia.

The study is based on a holistic approach with a special focus on the defence sector. This means that the study considers the defence sector institutions as embedded in their environment, trying to establish whether/to which extent they have been exempted from the general legal framework on corruption prevention. Identification of such exemptions would demonstrates that the defence sector is treated as a special sphere of interest, which significantly increases the corruption risks.

The study analyses six checks and balances set in place to prevent corruption and three areas that pose significant corruption/misuse risks. The existence of checks and balances prevents any one person or department from having too much power and promotes information sharing and cooperation in completing tasks. The elements of checks and balances for corruption prevention that are the subject of the study are as follows:

a) parliamentary oversight;

b) specialized anti-corruption bodies;

c) arrangements for handling conflicts of interests;

d) arrangements for transparency/freedom of access to information;

e) arrangements for internal and external audit;

f) ombudsman institutions.

In addition to examining the checks and balances, the study focuses on three high-risk areas susceptible to corruption/unethical behaviour:

a) public procurement and disposal of defence assets;

b) human resources management (HRM);

c) control of intelligence agencies.

---

[5] J. M. Sahling, *Civil Service Professionalism in the Western Balkans,* SIGMA paper No. 48, Paris 2012.

[6] Under UN Resolution 1244.

Several key research methods have been combined in order to achieve the objectives of this study: normative-legal method, comparative legal method and socio-legal method. The normative-legal method and comparative method have been used for two purposes: 1) to identify international normative standards/benchmarks regarding the corruption prevention mechanisms and two high- risk corruption areas (public procurement, HRM, control of intelligence agencies) and 2) to examine legal framework concerning these matters in each analyzed country. Given the fact that legal and institutional system is just a part of the broader social background and cannot be analyzed isolated from its social context,[7] socio-legal method has also been used. The use of the social method has enabled better understanding of a wider social context in which corruption prevention mechanisms operate and provided important insight into the functioning of these mechanisms in practice. It is, however, important to note that socio-legal analysis was carried out on the basis of existing and accessible reports and papers from the field of fight against corruption, without an empiric research on implementation of the existing legal framework in practice, which exceeds the limit of this comparative legal study.

The employment of normative, comparative and socio-legal method has been coupled with the use of historical method, which has helped in understanding the development of the corruption prevention mechanisms throughout time. All analyzed countries, with the exception of Bulgaria, share the same tradition of the late-communist administration, which represents the 'institutional heritage' from which reforms during transition and in the early post-communist period started off. The historical method was used in order to examine the elements of this common institutional heritage regarding prevention of corruption, such as parliamentary oversight, internal and external audit, free access to information etc. The employment of historical method has proved to be a useful tool, as it provided a basis for explaining how a common political and legal tradition influenced setting up and operation of corruption prevention mechanisms in the region and to which degree there has been a continuity or discontinuity in the earlier established development paths in this area.

The study is organized around three key parts. The first part analyses existence of a common legal tradition in the area of corruption-prevention mechanisms in Southeast Europe, with a special focus on the countries of former Yugoslavia. In this historical overview, which has been written jointly by all authors of this study, the focus is placed on the analysis of legal and institutional framework existing in the period of late 1980s, as a point of departure for reforms undertaken in this area over the past two, two and half decades.

The central part of the study presents comparative-legal analysis of individual corruption prevention mechanisms and three corruption susceptible areas in the countries in the region (public procurement, HRM and control of intelligence agencies). Each of the chapters starts with an analysis of international normative

[7] D. Kokkini-Iatridou "Some Methodological Aspects of Comparative Law", *Netherlands International Law Review,* 1986, pp. 166–167.

standards in the respective area, which are based on international conventions, EU legislation and good international practice of governmental and non-governmental international organisations (e.g. Inter Parliamentary Union, DCAF etc). The central part of the chapter contains comparative legal analysis of key issues concerning the corruption prevention mechanisms/areas vulnerable to corruption risks, followed by short overview of the key problems in implementation of existing legal framework in practice. At the end of each chapter of the central part of the study scores have been given to assess compliance of the legal framework with the international normative standards. This assessment does not include the evaluation of the level of implementation of existing legal frameworks in practice, as the study does not contain sufficient empirical data on the basis of which such an assessment could be made in the objective manner. The aim of the provided scores is not to rank the participating countries on a corruption scale, but to provide easier insight into the current achievements concerning legal regulation of institutional framework for prevention of corruption in the countries in the region. The objective of the ranking is also to ease the process of exchange of experience between countries of South-East Europe and increase the awareness that the fight against corruption is a common goal that is best achieved by learning from the neighbors that share similar socio-political and historical traits and face similar challenges of democratic development.

The third, concluding part analyses causes of impressive normative development of the mechanisms for prevention of corruption in the region over the past decade. This concluding part also attempts to provide answer to the question to which extent the administrative tradition, EU integration, quality of legislation and other factors have affected the development of the system of checks and balances in the countries in the region and identify key conditions which need to be fulfilled in order that the existing legal and institutional anti-corruption framework can bring about palpable results and make a positive difference in citizens' lives.

Aleksandra Rabrenovic, Jelena Ceranic,
Jelena Vukadinovic, Mirjana Glintic
Vesna Coric, Ana Knezevic Bojovic
Ivana Rakic, Miroslav Djordjevic
Milan Milosevic

HISTORICAL DEVELOPMENT OF CORRUPTION PREVENTION MECHANISMS IN SOUTHEAST EUROPEAN COUNTRIES

1. Introduction

A key feature of the public administrations of Southeast European countries under Communism was its role as an instrument of suppression. Law was perceived as an expression of the will of the ruling class and its implementation guaranteed by the power of the state apparatus. The Communist inheritance included the dogma of the monopoly of the Communist party, a fragmented and party-politicized personnel system and an executive that was not used to having to build broad political and social acceptance around the policies pursued.[1]

The political and social systems were based on the ideological premise of a conflict-free society, i.e. a system in which there is no conflict between the "public" and "private" levels.[2] Such a background did not enable the development of corruption prevention mechanisms and comprehensive integrity building frameworks.

Anti-corruption measures instead traditionally focused on *sanctions* for bribery and abuse of power in the public sector.[3] Corruption *prevention* was not as politically attractive and well-publicised as investigations and sanctions. Therefore,

[1] K. Goetz, H. Wollmann, «Governmentalizing central executives in post-communist Europe: a four country comparison», *Journal of European Public Policy*, 8 (6), 2001, p. 868.

[2] S. Lilić, "Državni službenici i sukob interesa" u *Sukob interesa kod javnih funkcionera i javnih službenika u Srbiji – regulative i nadzor nad njenom primenom*, Belgrade, 2003, p. 23.

[3] In former Yugoslavia, Criminal Code from 1951 envisaged several criminal offences in relation to corruption: the abuse of office or official authority, accepting or giving bribes and the obligation of officials to discharge official duties and dispose of entrusted assets conscientiously. It may be argued that these regulations constitute precursor of the regulations on prevention of conflict of interest. The Yugoslav 1977 Criminal Code introduced also the criminal offence of imparting a state secret, sanctioning persons who have imparted a state secret after the termination of their capacity as a public officer. This criminal offence can be construed also as the precursor of the modern institution of the prohibition to disclose information after the termination of the civil service appointment.

the political leadership opted initially for a sanctions-oriented approach, in most cases directed against political opponents. Nevertheless, it may be argued that the corruption sanctions also had an important preventive function.

The ideology of a conflict-fee society has also hindered the development of public procurement regulations, as a high-risk area susceptible to corruption. The procurement procedure was usually not governed by the law. The use of budget funds for purchasing goods was instead subject of autonomous regulation of the public-law entities. In case that the public procurement regulations did exist, they did not regulate the overall public procurement procedure, the sanctions for failure to comply with the procedure, or the protection measures in the public procurement procedure.[4] Public procurement implied the negotiation procedure, which was the main source of corruption and abuses, as it left room for favouring tenderers who were for some reason suitable for the contract authority. All that resulted in harmful contract awards and waste of resources from the budget and other sources of public finance. In former Yugoslavia, the only exception was the procedure for the award of investment type construction works, where the public procurement procedure was applied, due to the requests of the international financial institutions that required former Yugoslavia to implement procurement for externally-financed investments in accordance with special procurement methods. [5]

In all Southeast European countries analysed in this study there was no division of powers, but a system of so-called unity of power. Instead of a 'Government' or 'Council of Ministers' there was an executive body of the Parliament charged with implementing the policies adopted by the Parliament. In ex Yugoslavia, for example, at the federal level, there were also no ministries, or bodies with this designation. The key administrative institutions were called instead 'Secretariats of the Executive Council'.

2. Special Features of Socio-Political Development of Former Yugoslavia

It may be argued that former Yugoslavia differed from the general pattern of communist rule in Central and Eastern Europe with resect to both economic and political organisation. Following the break with Stalin in 1948, Yugoslavia began to build a distinct brand of socio-political system called - socialism. In 1950, 'workers' self-management' was launched, together with the concept of so-called 'social property' and elements of market economy. In spite of this, however, the ruling party (League of Communists in Yugoslavia) was entitled to a privileged position, similar to that in countries adhering to the Soviet bloc.

[4] Lj. Dabić, B. Nenadić, V. Đurić, *Javne nabavke u uporednom zakonodavstvu*, Institut za uporedno pravo, 2003, p. 234.

[5] A. Lukić, S. Stojanović, *Komentar Zakona o javnim nabavkama*, Centar za javne nabavke, 2004, p. 9.

The Yugoslav brand of communism, however, rested on two contradictory pillars: (i) the top down control of society exercised by the communist party, based on the concept of 'democratic centralism' and (ii) bottom up principle of 'social ownership.'[6] The term 'democratic centralism' denoted an organizational method whereby members of the political party had a freedom to discuss and debate matters of policy and direction (element of democracy), but once the decision of the party is made by majority vote, all members and lower bodies were expected to uphold that decision (element of centralism).[7] The idea of the principle of 'social ownership', on the contrary, was to empower workers and their councils to change society from bottom up, rather than the top down. Such a fundamental contradiction that was built into the structure of the Yugoslav state could not, unfortunately, be easily overcome.[8] Nevertheless, it appears the 'social self-management' has served as a measure to loosen the grip of state and bureaucracy on society[9] and develop a distinct 'socialist system' that enjoyed a number of benefits.

In spite of the dominance of the communist ideology, the party and the state in former Yugoslavia were considered as separate entities, in contrast to the other countries of the Eastern Block which were characterised by the party and state unity.[10] Against such a background, elements of traditional values of public administration, such as professionalisam and political neutrality, were preserved at least to a certain extent.[11] There was also an inherent tendency for state bodies to become increasingly more independent, to extricate themselves from political control and eventually to become a threat to the socialist society.[12]

Favourable socio-political background facilitated the introduction of legal mechanisms to curb the power of state bodies. Some of these legal arrangements, particularly the system of Constitutional Courts and detailed regulation of administrative procedure were uncommon or unknown elsewhere in the Communist World.[13] Judicial control of administration, that existed in Kingdom of Yugoslavia, was reinstated in 1952 by the adoption of the Law on Administrative Disputes, which showed the willingness of the political elite to overcome resistance to submitting

---

[6] S. Eriksen, *Studies of Communism*, unpublished manuscript, p.11.

[7] *History of the Communist Party of the Soviet Union (Bolsheviks). Short Course.* New York: International Publishers, 1939, *http://www.marx2mao.com/PDFs/HCPSU39.pdf*

[8] L. Schultz, «Die jungste Verfassungsreform der Sozialistichen Foderativen Republik Jugoslawien», *Jahrbuch fur Ostrecht*, 1972, Vol XIII/1, p. 16, Cf: Eriksen S, p. 11.

[9] S. Eriksen, *ibid.*

[10] L. Schultz, p. 16.

[11] Z. Sevic, A. Rabrenovic, "Civil Service of Yugoslavia: Tradition vs. Transition", in T. Verheijen (ed.) *Civil Service Systems in Central and Eastern Europe,* Edward Elgar, pp. 47-82.

[12] S. Eriksen, p. 11.

[13] *Ibid*, p.12.

administrative acts to the control of the courts.[14] Since then, the administration was subject to relatively independent judicial review which distinguished Yugoslavia from the rest of the socialist block.

In the following sections we shall analyse in more depth the corruption prevention mechanisms which were, at least to a certain extent, present in the former Yugoslavia. We shall continue the analysis with the parliamentary (quasi) control of defence sector under the system of unity of power; existence of limited freedom of access to information; precursors of ombudsman institution; systems of internal and external audit; human resource management system in the civil service and oversight of intelligence agencies.

3. System of Unity of Power and the Defence Sector Oversight and Control

Former Yugoslavia was one of rare countries in the world, and the only socialist country, that opted for the assembly parliamentary system, resting on the principle of unity of power. In order to be able to understand the assembly system and the characteristics of the parliamentary control over the defence sector in such a system, it is necessary to explain in more depth the concept of the unity of power.

In contrast to the division of powers, the essence of the unity of power lies in the supremacy of one authority over other authorities in discharging of powers. That allows specific social groups, political parties or other social forces connected to that authority to have a predominant influence on the execution of power and the formulation of policy.

As the historical practice has shown, unity of power can be achieved by having one authority concentrate completely or partially all government functions in its own hands. This, essentially primitive, execution of the unified power through a complete concentration of all functions does not mean that there are no other authorities performing specific functions. However, these other authorities are functionally and organisationally dependent on the authority that executes the unity of power.[15]

With respect to the government system in Yugoslavia, after a short initial period (1946-1953) during which the government system was operating in accordance with the Soviet model, immediately in 1953, the Constitutional Law established a formal assembly system, resting on the unity of power principle. All other Yugoslav constitutions adopted prior to 1990 were formally based with more of less consistency on the assembly system of government.

In the legal theory, an important feature of the assembly system is the principle of democratic unity of power. In accordance with this principle, a democratic

[14] I. Kopric, "Administrative Justice on the Territory of Former Yugoslavia", SIGMA/OECD, p. 3.

[15] P. Nikolić, *Ustavno pravo*, Prosveta, Beograd, 1995, p. 304.

representative body (parliament, assembly, etc.) appears as the executor of all the legal functions of the state, and primarily the legislative function. In discharging the legislative function, the assembly exclusively and independently adopts the highest-level acts relating to this function (constitution, laws, etc.). That means that the other authorities cannot adopt acts that would be of higher or equal legal force as those adopted by the assembly, i.e. adopt acts in the areas that have not been regulated by the acts of the assembly. All other authorities have only certain dimensions of power, and are in a specific relation of dependency and control by the assembly,[16] even though they do not always and in all have to be in a hierarchically subordinate position. They do not have any authorities over the assembly, while it in turn the assembly has considerable rights over them (appointment, removal from office, etc.). In that way, the assembly appears as the ultimate power in the system as a whole.[17]

With respect to the legislative and judiciary functions, the unity of power is reflected in a stronger influence of the assembly on the judiciary. In rare and exceptional historical and social circumstances (revolutionary period), the assembly may also be directly engaged in executing the judicial function though the adoption (or verification) of judicial acts. However, carrying out of the judiciary function in the assembly system is delegated to separate judicial authorities that implement the law, whereby enjoying their independence, which is a consequence of the nature and the role of the judicial function and the judiciary in a modern state. In the execution of the judiciary function, the assembly is involved, as a rule, only in granting amnesty.[18]

It is interesting to note that in the assembly based system the executive power (the executive) in the classical sense and in the classical form does not exist. The exercise of the democratic unity of power deprives the executive of significant powers in the execution of specific legal functions, and its authorities over the representative body. This is also the reason why the system did not recognise bodies such as ministries, but only administrative institutions which were called 'Secretariats of the Executive Council'.

Although the Yugoslav political system was based on the system of democratic unity of power, there could be no question of the real implementation of the assembly system in practice. Against the background of the monopoly of the leading communist party, i.e. the League of Communists of Yugoslavia, and the ultimate personalisation of power in the President of the Republic and the party president, the democratic unity of power mechanism could not function properly. Political decision-making was concentrated in the hands of the party, and the relevant public authorities became mere executors of its will and policy.[19]

---

[16] J. Djordjević, *Politički sistemi*, Savremena administracija, Beograd, 1988, p. 594.

[17] P. Nikolić, *Skupštinski sistem*, p. 131; P. Nikolić, *Ustavno pravo*, Prosveta, 1995, pp. 304-305.

[18] P. Nikolić, *op. cit*, pp. 323-324.

[19] *Ibid*, p. 333.

Essentially, all government systems established from 1946 to 1990 were quasi assembly systems. Thus, the political system established in accordance with the Constitution of the Federal People's Republic of Yugoslavia (FPRY) form 1946 was a quasi assembly system. In its real meaning, which was naturally only formal, the assembly system was established by the Constitutional Law on the Foundations of the Social and Political Regulation of the FPRY and on the Federal Authority Bodies. The 1963 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY) confirmed the postulates of the existing assembly system, showing two main tendencies. Firstly, the tendency of enforcing and strengthening the position of the Federal Assembly, and secondly the tendency of establishing a single efficient executive government, and especially strengthening the position of the President of the Republic, which became a separate and independent political and executive federal body. Certain inconsistencies in the implementation of the concept of the assembly system were persistent even in the 1974 SFRY Constitution, even though, in principle, it remained (formally) loyal to its main postulates.[20]

With respect to the parliamentary control over the security and defence sector, as the assembly was bicameral,[21] the Defence and Security Committee was established by the Council of Citizens and the Council of Republics. As an internal body of the councils, the Committee was responsible to consider the issues and hold inquiries into the issues that fell under the councils' competence (law proposals, other acts, etc.). After an inquiry was held, the Committee was obligated to submit the report to the Council including its amendments, opinions, and proposals. In the discharge of their duties, the Committee was authorised also to request data and information that are relevant to its work from the line ministries and other federal authorities and organisations.

The standing committees of the Council of Citizens were comprised of a Chairman and fourteen members, and the committees of the Council of Republics comprised a Chairman and six members. The Chairman and the members were appointed by the Council itself in open voting, by a majority vote of the Council members. The list of candidates for the Committee Chairman and members was proposed by the Chairman of the Council in consultations with the chairmen of the parliamentary caucuses (in the Council of Republics with the coordinators of

[20] *Ibid,* pp. 333-336.

[21] The structure of the federal parliament in the socialist Yugoslavia was revised on several occasions, following, in principle, the general development of the Yugoslav political system and the federal organisation. The 1963 SFRY Constitution went much further and introduced a quint-cameral structure of the Federal Assembly. In addition to the Federal Council (including the People's Council), four workers community councils were established - the Economic Council, Educational-Cultural Council, Social-Health Council and the Organization-Political Council. However, in the 1974 SFRY Constitution this concept was revised. The Assembly was comprised of two chambers: the Federal Council and the Council of Republics and Regions. What gives a special mark to such structure of the Yugoslav federal parliament and what makes it completely untypical is that both the chambers were characterised as federal chambers. The Assembly remained bicameral until the breakup of SFRY.

the delegates from the Member Republics). In the Council of Citizens, the list of candidates was compiled in accordance with the principle of equal representation of the delegates from the parliamentary caucuses in the Council, and in the Council of Republics, the list of candidates included equal number of delegates from each Member Republic. The term of office of the Committee Chairman and members corresponded to that of the Council.

The Defence and Security Committee operated in its sessions called by the Chairman, on his/her own initiative or at the initiative of at least one quarter of the Committee members (one third in the Council of Republics). In addition to that, the Chairman was obliged to call a session at the request of the Council Chairman, and in case he failed to do so, the session was called by the Council Chairman. The quorum requirement for sessions was a majority of Committee members present, and the decisions were adopted by a majority of the members present.

Regardless of the fact that the Defence and Security Committee formally existed and that it was operational, the assemblies failed to understand and exercise the parliamentary control over the army and the security agencies in Yugoslavia, in the meaning and with a significant socio-political influence that it gets today in most countries. Therefore, it may be concluded that the understanding of the economic and political importance of the control over the defence and security sector did exist in theory, but was not reflected in practice.[22]

4. Free Access to Information

In the Yugoslav legal theory and practice, the right to information was perceived for the most part as the right to be informed. As Vida Čok[23] points out, the applicable SFRY regulations, both federal and republic, recognised the right to be informed, which was followed by the obligation to provide information.[24] This right was granted primarily to journalists and public bodies dealing with the information activity. The provision of information to other entities was conditioned by the legitimate social interest.[25]

With respect to the individual's right to receive information, it did not exist in the SFRY regulations. Moreover, in her review of the comparative legal theory and

[22] J. Djordjević, *op. cit*, p. 601.

[23] V. Čok, "Javno informisanje Javnost rada i dostupnost informaciji - pravna teorija i zakonodavstvo", Savremena administracija, Belgrade 1982, p. 80.

[24] Truth be told, the legislation of individual Republics stipulated it as an explicit obligation, while the regulation of other Republics kept a less accurate formulation on general or equal access to information. V. Čok, *ibid*.

[25] SFRY Constitution.

practice, Čok[26] states that the behaviour of information sources, "depends to a large extent on the nature of the interest of those seeking such information – which can be personal or broader interest. If there is no broader interest, the rules for behaviour of information sources could not easily fall into the category of legal obligation (to provide information), analogous to the obligation of the press."[27]

At the same time, with respect to the public authorities, the principle of administrative transparency was established ever since the 1963 Constitution.[28] The 1963 Constitution granted the right of citizens to "be informed about the actions of the representative bodies and their agencies, social self-management agencies, and organisations performing tasks of public interest" and particularly the right to "be informed about the material and financial situation, and the execution of plans and performance of the organisation of work in which he/she is employed or in another organisation in which he/she exercises his/her interests, with the obligation to keep business and other secrets."[29] Based on this formulation alone, it is clear that the right to be informed was closely connected with the idea of social self-management – more specifically, the idea that the worker had to be informed to be able to participate in self-management in a meaningful way.

The proclamation of the 1974 SFRY Constitution confirmed the view that information was an important precondition for further development of the self-management socialist relations. In this Constitution as well, the holder of that right was "the worker and citizen,"[30] and he/she was granted the right to be informed about all events relating to his/her life and work and the issues relevant for the community.[31] The right, but also the obligation of the worker to be informed was specified in more depth under the Law on Associate Labour (Zakon o udruženom radu). In this Law, the quintessence of informing the workers was considered in the function of satisfying the individual's right to self-management, and availability of information was recognised primarily as an element for the decision-making in the self-management process.

From the above discussion, it is clear that the right to information of public importance, as it is defined in today's legal theory and practice, did not exist in the former SFRY. At the same time, the proclaimed principle of freedom of information needs to be considered carefully. As Čok[32] points out, the media were recommended

[26] V. Čok, *op. cit*, p. 78.

[27] *Ibid*.

[28] The civil service authorities' administrative transparency and some of its aspects had been recognised as a need even before that - See S. Popović, "Odnosi uprave i građana - sa pravnog aspekta", Belgrade, 1692, p. 14. The administrative transparency is immanent to self-management.

[29] Article 34, Item 5, of the Constitution.

[30] As pointed out by V. Čok (p. 55), even though this pertains to Chapter III of the Constitution, which is titled "Freedoms, Rights and Duties of the Individual and Citizen."

[31] Article 168, Para. 1, of the 1974 Constitution.

[32] V. Čok, *op. cit*, pp. 141-142.

not only which subject they would cover, but also the method of treatment of an issue. The journalists were asked to exercise self-control, i.e. auto-censorship, and the media were given "the authorised views".

At the same time, notwithstanding the proclaimed principle of the public authorities' administrative transparency, it has to be taken into account that former SFRY had hundreds of regulations defining the term "secret".[33] The problem, as Sabic points out[34] lies not only in the enormous number of sources of law and their mutual inconsistency, but also in the fact that these regulations were outdated. At the same time, the prescribed criteria for pronouncing a document classified were often used lightly, where the disclosure of data from such documents was considered as endagering national or public security and defence, international relations and other security-related data. [35]

It may therefore be stated that Kregar is right in his argument[36] that SFRY, to a certain degree, nurtured the culture of secrecy, in which some issues were not to be discussed, and that the majority simply kept quiet and accepted tacitly the division of the allowed and prohibited issues. Although there were public discussions, free press, occasional demonstrations, criticisms, it must not be forgotten that SFRY was not a democratic state, and hence its democratic elements were limited. Only after the opening and modernisation of the post-socialist legal systems in the last decade of the 20th century, during the transition period, which was guided by the requests for democratisation by way of the introduction of the legal and political accountability, the right to information is becoming one of the preconditions for the acceptance among the states with a developed democratic tradition.[37] As it would turn out, the intensive legislative activity in this area in the countries created in the territory of the former SFRY ensued only in the first decade of the 21st century.

5. Precursors to the Ombudsman Institution

Although former Yugoslavia was not a democratic state, it did have institutions that in many aspects were overwhelmingly reminiscent of the Ombudsman as it is known by the Western democracies. The reasons for this should be sought in the

[33] J. Popović, " Legislative Regulation of Data Confidentiality in the Countries on the Territory of the Former Socialist Federal Republic of Yugoslavia", *Atlanti*, Vol. 20, Trieste 2010, pp. 229-238.

[34] R. Šabić, "Otvorena pitanja primene zakona o slobodnom pristupu informacijama od javnog značaja u periodu nakon usvajanja zakona o tajnosti podataka", zbornik radova "Pristup informacijama od javnog značaja izaštita tajnih podataka", OEBS i CUPS, Beograd, 2012, p. 26.

[35] J. Popović, op. cit. 229-238

[36] J. Kregar, V. Gotovac, Đ. Gardašević, "Regulacija prava na pristup informacijama", Transparency International Hrvatska, 2004, p. 4.

[37] *Ibid*, p.13.

different, more open nature of the political and economic system in comparison to the countries of the Eastern Block, as was pointed out in the introductory section. Some authors argue that while it was professedly "communist" in philosophy, Yugoslavia was increasingly "democratic" in practice, as it recognised that the agreed state interests did not necessarily mean a lack of attention to the individual rights.[38]

The first institution that in many aspects resembled the Ombudsman was established after the adoption of 1963 Constitution. The 1963 Constitution guaranteed its citizens the right to complain against actions of the administrative authorities, pose questions and request that they are answered, and also to submit proposals of general interest. As the citizens had a right to submit such proposals and complaints to all state authorities, this caused problems in practice, as the authorities did not have sufficient the capacity to deal with these complaints. As a result, the Commission for Applications and Complaints was established. Although it was a dependent body, this Commission, similar to the Ombudsmen, had the right to investigate and propose, i.e. request official explanations from the competent authorities relating to the issues against which it received complaints.[39]

In the 1960s and early 1970s, several articles were published by renowned authors and several public debates held on the issue of the need to introduce the Ombudsman institution.[40] All that culminated in 1974 with the introduction of the social self-management protector institution, which was established by the Federal and Republic Constitutions, and specified in more depth at the level of the Republics.

Article 131 of the 1974 SFRY Constitution stated: "The social self-management protector, as an independent body of the social community, executes measures and legal remedies, and performs other statutory workers' and social ownership rights and duties. The social self-management protector initiates before the assembly of the socio-political community, constitutional court, or a court of law, the procedures for the protection of the workers self-management rights and social ownership, as well as the procedures for the annulment or abolishment of all decisions and other acts violating self-management rights and social ownership. The social self-management protector initiates the procedures for the protection of the workers self-management rights and social ownership at its own initiative or at initiative of the workers, organisations of associated labour, or other self-management organisations and communities, trade unions, and other socio-political organisations, state authorities and citizens. At the request of the social self-management protector, the state authorities and self-management organisation bodies are obligated to provide him/her all data and information relating to the performance of his/her function."

The social self-management protector was established at the federal level,

38 W. Gellhorn, *Ombudsmen and others*, Harvard University Press, Cambridge 1967, p. 256.

39 *Ibid*, p. 284.

40 For more details see S. Lilić, D. Milenković, B. Kovačević – Vučo, *Ombudsman*, Komitet pravnika za ljudska prava, Belgrade 2002, pp. 256 - 258.

in each of the Republics and Autonomous Provinces, and could also be established in smaller territorial units (e.g. municipalities). It can be argued that it enjoyed a relatively high degree of institutional independence, and although it was established by the state, it was a social body, i.e. "body of the social community", a predominantly sociological, rather than a legal category.[41] The constitutional and statutory guarantees, as well as the term of office at four years, which could be shortened only in a small number of cases,[42] went in favour of the independence of this institution. However, in the circumstances of the single-party system and appointment by the assembly of the relevant "socio-political community", clearly there could be no question of *de facto* independence. Even the normative framework left a clear possibility in a number of instances for the appointment of distinguished party officials without the required qualifications, and thus the paradoxical requirement was specified for the deputy social self-management protector that the candidate must have a legal background, which was not a requirement for the social self-management protector.

Although it had relatively broad investigative and initiative powers, the social self-management protector was notably different from the Ombudsman, also on account of its much narrower authorities, which were limited to the self-management rights and social ownership only. The protection of the concept of "associated labour" and the theoretically (and practically) problematic concept of "social ownership" alone excludes primarily the citizen as a subject of protection.[43] Given that today's Ombudsman ensures human rights protection, it is clear that, regardless of its considerable similarities with the Ombudsman, the social self-management protector could be considered only as a quasi-ombudsman institution.

By the end of the 1980s, with the breakup of SRFY, this institution completely disappeared. Although it cannot be argued that former Yugoslavia did have an ombudsman institution, it should be taken into account an institution with similar characteristics did exist in the communist Yugoslavia for more than fifteen years. That is another indication of the differences between the state and social system and the environment in SFRY in relation to the other neighbouring communist countries.

6. Internal and External Audit

The countries in the region do not have a tradition of internal audit, as that is a completely new profession, which was established in these countries after 2000. Prior to that internal audit did not exist, as there was no modern internal financial control system in the public sector.

[41] D. Radinović, *Ombudsman i izvršna vlast*, Službeni glasnik, Belgrade 2001, 285.

[42] At personal request, and also in the event of a valid judgment sentencing him/her to unconditional imprisonment, and finally, if he/she lost his/her work capacity for the performance of the function.

[43] S. Lilić, D. Milenković, B. Kovačević – Vučo, *Ombudsman*, Komitet pravnika za ljudska prava, Belgrade 2002, p. 260.

The security and defence sector in the former Socialist Federative Republic of Yugoslavia (SFRY) did not recognise modern concepts of internal and external audit and hence it is understandable why there were no separate internal or external audit regulations in this respect. However, it may be argued that there were some forms of internal control in the then Federal Secretariat for People's Defence, i.e. the ministry of SFRY responsible for defence affairs, as the Secretariat had its units responsible for internal control, which carried out both *ex ante* and *ex post* control of the Secretariat's operations and performance.

Within the Secretariat for People's Defence, there were formally different internal control mechanisms (oversight, expert internal control, inspection, etc.) that were applied concurrently with the regular operating procedure, inbuilt into that process as its integral parts, and a part of continued oversight over the staff of the Secretariat. However, these types of controls do not correspond to today's meaning of internal financial control, and surely they cannot be equated with the meaning of internal audit. They were of little practical importance, considering that irregularities and illegal actions in the operations in the security and defence sector were rarely identified.

Internal control was implemented as a part of the regular control of resources and activities performed by the managers, and as a part of the control of regularity and compliance of financial transactions performed by the financial service and other professional service bodies. In performing the tasks relating to the Secretariat's financial management, the financial service performed *ex ante* control of the documentation that supported payments, and the control of the stocks and movements in the business books and records (in order for the manager to be able to give approval or no objection for a specific act or action). In the *ex post* control procedure, internal controllers assessed the legality, accuracy and regularity of transactions in relation to revenue, expenditures, and state-owned assets management.

The defence inspection activities were traditionally delegated to the defence inspectorate, which was known in the late 1980s as the General People's Defence Inspectorate. The defence inspectorate was a state authority, within the Secretariat for People's Defence, responsible for inspection activities relating to the implementation of regulations within and relating to the security and defence sector, and which *inter alia* performed a type of control of the financial and material performance of the Defence Secretariat (material-financial inspection). The implementation of oversight inspections, in accordance with separate laws, was delegated also to the Budget Inspection, which performed external control of the revenue proceeds, control of legal compliance of material-financial operations, and the control of restricted use of budgetary resources by way of a direct insight into the operations and acts. These forms of oversight were classic inspection controls of the Defence Secretariat, and can be considered *ex post* control of the rationality and effectiveness of spending.

In contrast to internal audit, the former SFRY countries have a long tradition of external audit that dates back to Kingdom of Yugoslavia. Namely, the Kingdom

of Yugoslavia (before the World War II) had the institutional control of budget expenditures that was performed by the Main Control the Kingdom of Yugoslavia – a Supreme Audit Institution under collective management, that performed almost all the functions of the modern Supreme Audit Institutions, and especially those in countries with the accounting court model. The Main Control was independent and had discretion to decide on its organisation, audit plans, and entities to be audited, and no other authority could impose it mandatory instructions and orders. The most important functions of the Main Control included *ex ante* and *ex post* budget execution controls.

After the II World War, external audit function was entrusted to the Social Accounting Service (SDK), which was established in 1959 as a *sui generis* institution performing external control and oversight of the financial-material operations of the social recourses (budget) spending units and commercial entities. The SDK was a public service, i.e. an autonomous and independent organisation that executed social accounting activities and payment transactions.[44] Its independence was guaranteed by Article 77 of the 1974 SRFY Constitution, which stipulated that the SDK operated independently, in accordance with laws and other regulations, and that it was accountable, within the scope of its rights and obligations, for implementation thereof. For their actions in the course of the performance of its tasks, the SDK was accountable to the SFRY Assembly, which oversaw its activities and received its annual performance reports.[45]

As a part of its multiple competencies, the SDK also performed the control of the budget execution. As such control included some elements of external audit of budgetary resources is a special form, it can be argued that the SDK did perform the function of the state auditor, i.e. Supreme Audit Institution, even if it did not comply with the international standards for Supreme Audit Institutions. Furthermore, the SDK played a very important role for the overall SFRY system, as it enabled the state to have full control over the economic movements, which was contrary to market economy. All budget spending institutions and commercial entities were obligated to open their account with the SDK, which established independently if the obligations towards the state were settled, and which deducted tax payments directly from the legal entities' accounts.

The SDK performed the control activities within its organisational units and in the social funds spending institutions, based on the data from their records, reports, financial management orders, and based on the accounting and other statements, annual financial statements, and other accounts of the social funds spending

[44] See Article 4 of the Law on Social Accounting Service (Zakon o Službi društvenog knjigovodstva,) *Official Gazette SFRJ*, No. 70/83, 16/86, 72/86, 74/87, 61/88, 57/89, 79/90, 84/90, 20/91.

[45] Articles 13, 19-20 of the Law on Social Accounting Service.

institutions.[46] In case the control identified that an assets position was not accurately estimated or that the bookkeeping records were not orderly and up-to-date, the order was issued to conduct assets stocktaking and evaluation within the specified timeline. In case illegal actions and irregularities were identified, the authorised persons had the right and obligation to adopt a decision, ordering measures for the elimination of the identified irregularities.

The economic-financial audit activities included the audit of annual financial statements, and audit of the social funds spending institutions' performance.[47] The activities on the audit of annual financial statements included the examination and assessment of the applied accounting procedures and the accuracy of data, and issuing opinion on that basis about the reality and objectivity of the financial positions and sources and performance results shown in the annual financial statements of the social funds spending institutions.[48] The economic-financial performance audit included examination and assessment of the rationality and efficiency of operations and the overall business performance, and proposing measures for the improvement of the operations and performance of the social funds spending institutions. The performance audit was conducted at the request of a social funds spending institution.[49]

The SDK performed also *ex ante* control of the social funds spending institutions by executing their payment orders only if they were issued in accordance with the regulations and if adequate funds were available for the payment in the issuer's giro and other accounts. Otherwise, the Service refused to execute payment orders that did not satisfy the requirements, and informed the social funds spending institutions about the reasons for the refusal to execute the payment order.[50] The restricted use of social funds was controlled by matching the purpose codes in the payment order (grounds for payment), i.e. transfer order, and the budget to establish if the funds were allocated for those purposes. The orders could not be effected if no funds were allocated in the budget for that purpose, so that is can be argued that the control by the SDK had some features of the specific internal control of the budget spending institutions.

The SDK performed the tasks under its scope of activities relating to army corps and military institutions through its separate organisational unit, to assess how the army corps and military institutions managed finances in their accounts. Through its separate organisational unit, in accordance with its competences, the SDK performed also a special control of the organisations of associated labour

[46] Article 48 of the Law on Social Accounting Service. The previous Law on Social Accounting Service (*Official Gazette SFRJ*, No. 2/77, 22/78, 35/80, 43/82, 41/83) stipulated that the SDK performed the control activities by way of preventive and inspection controls and financial-material performance audits (Article 45).

[47] Article 69 of the Law on Social Accounting Service.

[48] Article 70 of the Law on Social Accounting Service.

[49] Article 77 of the Law on Social Accounting Service.

[50] Article 107 of the Law on Social Accounting Service.

manufacturing weapons and military equipment, under the procedure that applied also to other social funds spending institutions.[51]

7. Human Resources Management

From the end of the World War II and until the late 1980s, human resources management in the civil service had three main stages of development. The first stage begins from the adoption of the 1946 Law on Civil Servants (Zakon o državnim službenicima), the second stage from the adoption of the 1957 Law on Public Servants *(*Zakon o javnim službenicima), and the third state begins after the adoption of the 1978 Law on the Basic Principles of the State Administration System, the Federal Executive Council and the Federal Administrative Organs (LBPSAS).[52] This Law remained in force, in some segments, at the federal level until the breakup of the State Union of Serbia and Montenegro in 2006.

While in the first two stages of civil service development the law clearly differentiated between the civil/public servants and private sector employees, the third stage of development is characterised by gradual equalisation of civil servants and private sector staff status. The 1946 Law on Civil Servants governed the status of civil servants in a narrow sense (covering only the personnel in state authorities) and introduced centralisation of the human resources function, based on the then USSR model. [53] The Law on Public Servants, adopted on 12 December 1957,[54] broadened the scope of regulation, governing the legal status of not only staff of state authorities, but also of public services (education, science, and culture institutions; health institutions; social insurance funds and social security institutions).[55] Finally, the Law of 1978 abolished the terms 'civil servant' or 'public servant' and introduced a simple term 'employee'. Nevertheless, the status of federal and republican Government personnel was not fully equalised with private sector workers, as the 1978 Law did regulate their status in a special manner, but more in line with practices in the private sector. Such change is a result of the development of self-management and the approximation of the human resources systems in the civil service and in the private sector.

---

[51] See Articles 80-82 of the Law on Social Accounting Service.

[52] Zakon o osnovama sistema državne uprave, Saveznom izvršnom veću i saveznim organima uprave [Law on Basics of the System of State Administration, Federal Executive Council and Federal Administrative Organs- LBSSA], *Official Gazette SFRY*, No. 23/78, 58/79, 21/82, 18/85, 37/88, 18/89, 40/89, 72/89, 42/90, 44/90, 74/90, 35/91, and Official Gazette of SRY, No. 1/92, 31/93 and 50/93.

[53] E. Pusic, *Nauka o upravi*, Zagreb 1973, p. 196.

[54] *Official Gazette* FNRJ No. 53 1957.

[55] Articles 15-22 of the Law on Public Officials.

In all three periods, competitions were the basis for entering into an employment relationship to ensure merit-based recruitment. Hence, for example, Article 90 of the Law on the Basic Principles of State Administration System (1978) emphasised that in the recruitment process in the administration authorities special attention has to be given to: 1) the need to ensure staff with appropriate professional and other qualities required for service in the administrative authority; and 2) consistent application of the competition institution as the democratic form of recruitment in the administration authorities. In the federal administration, after 1974, public competitions had to be published in the Official Gazette of SFRY and they could also be published in the official gazettes of the Republics and Autonomous Provinces, and in several daily newspapers.

However, there were also some important exceptions from the principle of carrying out competitions as a basis for recruitment. Thus, for example, in accordance with the provisions of the Law on the Basic Principles of State Administration System, the Federal Executive Council could prescribe that for the performance of specific functions and tasks in a federal administration authority, employment relationship could be established also without a public competition, if that was required by the nature of the functions and tasks or responsibilities for the performance of tasks or other special working conditions.[56] Exceptionally, temporary employment for a maximum period of three months when due to the urgency of the need it was not possible to hold a public competition, and seasonal employment for the staff that had performed those same tasks in the administrative authority in the previous season, could be established without a public competition.[57]

It is interesting to note that there was no obligation to hold written examinations in the recruitment process, and that that was left only as a possibility. This solution was in accordance with the general labour regulations, which stipulated that, "a working community *may* test a worker's professional and other working capacities even before he/she is admitted to employment in the organisation of work (workers' audition, written test or other forms of preliminary competency assessment).[58] Thus, in the federal administration, the public official managing a federal administration authority *could* decide to test the applicants' professional and other competencies and their other qualities in the recruitment procedure for specific tasks and activities. If the decision was made in the course of the recruitment procedure to test the applicants' professional and other competencies and qualities, that had to be indicated in the competition announcement.[59]

From 1978, the competition procedure was implemented by a competition commission, which operated in accordance with the transparency principle. The

[56] Article 320 of the LBSSA.

[57] Article 319, Para. 2 of the LBSSA.

[58] Article 21 of the Basic Law on Labour Relations (Osnovni zakon o radnim odnosima).

[59] Article 324 of the LBSSA.

commission would be established by the so-called "working community," which was a form of self-management organisation and the workers decision-making. The competition commission was obligated to consider the submitted applications and prepare a short-list of applicants based on the requirements met by individual applicants. As the work of the competition commission was public, the applicants had the right to be present at its meetings and to comment its work and the specified order of the short-listed applicants.[60] The competition commission maintained also minutes from their sessions. For senior positions, the competition commission would be established by the Federal Executive Council.[61] The members of this commission included: the public official managing the federal administration authority or a person he/she authorised, a representative of the working community, and a representative of the union organisation.

The only mandatory examination that traditionally had to be taken in the state administration authorities (as is the case in most of the former Yugoslav republics even today), was the so-called "state examination" at the end of the internship. The state examination was public, and it was taken before a special examination commission. The examination comprised the general and the specialised part, and it was taken both orally and in writing.[62] The general part was the same for all public servants, while the specialised part was tailored to the needs of specific services.[63] The 1957 Law on Pubic Servants stipulated a possibility for public servants in the highest pay grade in the lowest rank who do not meet the general requirements for promotion to take a special examination for promotion to a higher rank.[64] If an intern failed to pass the state licensing examination within the specified period, his/her employment in the federal administration authority, i.e. federal organisation, would be terminated.[65]

The career advancement procedure changed over time, and it was most thoroughly regulated under the 1957 Law on Pubic Servants. The general criteria for advancement for all public servants were: 1) professional competence, 2) commitment, 3) performance, and 4) years of service. The advancement implied the promotion to a higher rank, a higher office or a higher pay grade (Article 185 of the Law on Public Servants) for civil servants.

The 1957 Law also introduced civil servants' performance assessment. The PA was conducted by comparing of the actual performance with the requirements specified in the job description, rather than on the assessment of the workers' personal characteristics, which is fully in line with the modern civil servants' assessment tendencies. The civil servants were marked on a scale of one (the lowest, fail mark) to

[60] Article 232 of the LBSSA.

[61] Article 231 of the LBSSA.

[62] I. Krbek, *Lica u državnoj službi*, Zagreb, 1948, p. 80, as cited by E. Pusic, *Nauka o upravi*, Zagreb 1973, p. 196.

[63] Articles 173 – 174 of the Law on Public Servants.

[64] Article 188, Para. 2, of the Law on Public Servants.

[65] Article 336 of the LBSSA.

five (the highest mark). The assessment was done by a commission on an annual basis. The assessment commission was, as a rule, the board of the authority, and it decided on a general mark (one of the five marks) based on the questionnaire filled in by the immediate superior in the authority. The assessment had significant consequences on the public servant's legal position (withdrawal of promotion, exceptional promotion, etc.).

Public servants were promoted to a higher rank after they had spent three years in the highest pay grade in the immediately lower rank, provided that they got a "good" mark in the previous two years.[66] There was also a possibility of accelerated advancement for the civil servants excelling at work. Although the system depended to a large extent on the civil servants' competencies, the tendency to give more weight to years of service than was envisaged in the theoretical rules for the system was undoubtedly present in practice.

The pay was based on performance as well, which is also in line with the modern tendencies in terms of the civil service performance assessment and remuneration. The pay grade promotion was, in principle, automatic, at every three years, but a public servant could be promoted even earlier if he/she excelled at work. A public servant could also be withdrawn promotion – the year in which he/she did not get a positive assessment mark would not count towards the three year term.

The 1978 Law formally moved away from the merit-based promotion, introducing broad discretion of managers to appoint civil servants to higher positions. The main advancement method was a civil servant's reallocation within the administrative authority in accordance with the decision by the manager of the administrative authority. The Law on the Basic Principles of State Administration System stipulated that a public official managing a federal administrative authority might decide to reallocate a worker in the federal administrative authority to another function that was appropriate to his/he professional qualifications, in accordance with the criteria specified in the act on the systematisation of functions and tasks. Reallocation was the main promotion method in other administration authorities as well, and it was based on agreements between their managers.[67] The reallocation of a worker from one position to another was done without his/her consent, if in line with the nature of the activity of the federal administration authority, i.e. federal organisation, unless otherwise specified by law.[68]

The grounds for termination of an employment relationship in all three periods were taxatively listed in the law. In accordance with the provisions of the Law on the Basic Principles of State Administration System, a worker's employment relation would be terminated in the following events:

---

[66] Article 187, Para. 1, of the Law on Public Servants.

[67] Article 358 of the LBSSA.

[68] Article 361 of the LBSSA.

1) if he/she stated in writing that he/she did not wish to be employed in that authority;

2) based on an agreement in writing between the worker and the federal administration authority, i.e. federal organisation;

3) if he/she refused to perform functions and tasks to which he/she had been reallocated, and which were appropriate for his/her professional qualifications and work experience;

4) if he/she refused to work in other appropriate functions and tasks to which he/she had been reallocated by not performing specific functions and tasks in a satisfactory manner;

5) based on a valid decision by the disciplinary commission imposing him/her a measure of termination of employment;

6) as of the date of submission of a valid judgement sentencing the worker to imprisonment for more that six months;

7) if he/she reserved or gave inaccurate information at the point of entering into employment relationship, and such information was relevant for the performance of the functions, i.e. tasks for which the employment relationship was established.

In conclusion, it is quite interesting to note that former Yugoslavia did have a fairly well developed system of human resources management not only in the civil service, but also in the public sector, especially during the period of 1957-1978. Such as system did recognise all modern institutes of human resources management that promote the merit principle, such as a competition procedure, performance assessment, promotion based on merit, civil service stability and performance related pay. Unfortunately, the 1978 law, which to a high extent aligned the status of civil servants with private sector workers, did not keep the majority of the advanced human resource management instruments that existed beforehand. Due to the imminent passage of time, the regulations that existed at the end of 1980s (i.e. 1978 Law) have to some extent been kept in the memory of civil servants, while those from the earlier period have been largely forgotten, leaving an important part of the ex Yugoslav tradition covered with a veil of oblivion.

8. Development of Intelligence and Security Services Control and Oversight

By the mid 1960s, the intelligence and security functions in the Federal People's Republic of Yugoslavia/ Socialist Federal Republic of Yugoslavia had a distinctly centralist character, with a concentration of authority at the federal level, which, in addition to national defence, included internal affairs and state security. Before the enactment of the constitutional amendments in 1967 and 1968, the Federation had had the exclusive competence in the field of the protection of the constitutional order, security and national border control.

The Fourth Plenum ("Brioni Plenum") of the Central Committee of the Yugoslav Communist Party (SKJ) was held on 1 July 1966 in order to establish full control of the Party over the security services and abolish the structures within the State Security Administration (UDBA) that had been described as statist-centralist.[69] The immediate cause for the organisation of the Fourth Plenum were the accusations that the State Security Administration had planted listening devices in the residence of Josip Broz Tito in 15 Uzicka Street in Belgrade.

In the period between the Brioni Plenum and the dissolution of the SFRY, the further course of the development and direction of the Yugoslav intelligence-security system was determined by the 1971 constitutional amendments, the Communist Party congress documents, the 1974 SFRY Constitution,[70] establishing the concept of national defence and social self-protection, the Law on the Foundations of the State Security System, [71] the Federal Law on National Defence[72] and the republic laws in that area.

The provisions of the 1974 SFRY Constitution stipulated that, "the Federation, through its federal administrative agencies, regulates the fundamentals of the protection of the order stipulated by this Constitution (state security), ensures the State Security Service activity necessary for the exercise of the federal agencies' responsibility, as specified in this Constitution, and coordinates the activities of the state security authorities."[73]

In accordance with the **Law on the Foundations of the State Security System**,[74] "the Federation, through its agencies authorised by the SFRY Constitution,[75]

[69] "Ekspoze saveznog sekretara za unutrašnje poslove Milana Miškovića povodom donošenja Osnovnog zakona o unutrašnjim poslovima," *13. maj – časopis Saveznog sekretarijata za unutrašnje poslove*, godina XIX No. 12, Belgrade, December 1966, pp. 1011-1013.

[70] *Official Gazette SFRY*, No. 9/74.

[71] *Official Gazette SFRY*, No. 1/74.

[72] *Official Gazette SFRY,* No. 21/82.

[73] Article 281, Item 8, of the SFRY Constitution.

[74] *Official Gazette SFRY*, No. 15/84 and 42/90.

[75] SFRY Presidency and Federal Executive Council.

establishes the general policy relating to the protection of the SFRY constitutional order, coordinates the activities of the state security authorities, and performs other duties specified by the federal law."[76] The same law stipulates that, "the Republics and Autonomous Provinces organise and directly perform the national security function in accordance with the SFRY Constitution, federal laws, and the policy established by the SFRY Assembly in this area." [77]

The Law on the Foundations of the State Security System stipulated that, "after the SFRY Presidency has determined, on their own initiative or at the proposal of the Federal Executive Council, that special security reasons so require, the competent federal authorities shall cause the performance of or perform the necessary SFRY constitutional order (state security) protection activities in the overall the territory or in specific parts of the territory of the Socialist Federal Republic of Yugoslavia, to suppress the activities aimed at undermining or overthrowing the order established by the SFRY Constitution."[78] Article 9 the same Law stipulated that, "the national security functions at the federal level shall be performed by the Federal Secretariat for Internal Affairs and other federal administrative agencies when it is expressly specified, and in the Republics and Autonomous Provinces - republic or provincial authorities responsible for internal affairs," and that, "the Federal Executive Council shall determine which national security functions and to what extent shall be performed by specific federal agencies."

Within this framework, in addition to specific intelligence coordination and control authorities and bodies, the SFRY intelligence and security system comprised the federal state security secretariat for internal affairs and the internal affairs authorities at the level of the Republics and Autonomous Provinces, the Yugoslav People's Army (JNA) Headquarters Second (Intelligence) Directorate, the Security Office of the Federal Secretariat for National Defence and Security Agencies, the Territorial Defence, and the Research and Documentation Service of the Federal Secretariat for Foreign Affairs. In some respect, the national security function was exercised also by the Security Institute, which was founded in 1976, as a part of the Federal Secretariat for Internal Affairs (SSUP).

The work of the state security agencies in this period was **coordinated**, within framework of the SFRY constitutional rights and duties, by the *President of the Republic* (until 1980), *the SFRY Presidency,* and *the Federal Executive Council* (SIV). This coordination included the political and security guidance of the state security agencies' operations and identification of their common tasks - from the aspect of the security interests and the needs of the country as a whole.

The Federal Council for the Protection of the Constitutional Order was a collective working body of the SFRY Presidency, and a security coordination body

[76] Article 7 Para. 2 of the Law on the Foundations of the State Security System.

[77] *Ibid*, Article 7, Para. 3.

[78] *Ibid*, Article 8, Para 1.

that operated continuously since 1975, although it was officially established only in 1983, by the federal law.[79] The Chairman and two members of the Federal Council for the Protection of the Constitutional Order were appointed by the SFRY Presidency from among its members, while the other members included the Chairman of the Presidency of the Central Committee of the Communist Party, the Chairman of the Federal Executive Council, while one member was a senior public officer from the socio-political organisation bodies at the federal level, and was appointed by the SFRY Presidency, in consultations with these bodies. The work of the Council was open for the participation by the federal secretaries (ministers) for national defence, foreign and internal affairs, and heads of the State Security Service of the Federal Secretariat for Internal Affairs, Security Administration of the Federal Secretariat for National Defence (SSNO), and the Research and Documentation Service.[80] The work of this body was open also for the representatives of the SFRY Assembly, socio-political organisation bodies (SKJ, SSRN, etc.), and the relevant authorities of the Republics and Autonomous Provinces.

On its own initiative or at the request of the SFRY Assembly and the SFRY Presidency, i.e., the relevant republic and provincial authorities, the Federal Council for the Protection of the Constitutional Order considered specific materials relating to security issues, and particularly to the issues of special importance for the cooperation of professional services and other social self-protection entities. The Council provided appropriate recommendations and suggestions to the SFRY Presidency and socio-political organisations in relation to the considered security situation. This body was authorised to adopt views and opinions that were binding for the SFRY intelligence and security services.[81]

In the period following the declaration of the Federal Republic of Yugoslavia on 27 April 1992, at the federal level, there was no longer any body responsible for the coordination of services similar to the Council for the Protection of the Constitutional Order. In a certain sense, its functions were taken over by the *Supreme Defence Council*.[82]

---

[79] The legal basis for the establishment of the Federal Council for the Protection of the Constitutional Order was the provision of Article 331 of the SFRY Constitution, according to which the SFRY Presidency could establish other councils or other bodies, necessary for its operations. In accordance with that, on 26 December 1974, the President of SFRY, Josip Broz Tito, proclaimed the Law on Federal Councils.

[80] O. Djordjevic, *Osnovi državne bezbednosti – Opšti deo*, VŠUP, Belgrade, 1998, p. 298.

[81] In addition to the Federal Council for the Protection of Constitutional Order, which was a separate body, established by a separate law, with its special functions, there were also Councils for the Protection of Constitutional Order at the level of the Republics and Autonomous Provinces, which had a different position and functions.

[82] In accordance with the provisions of Article 135 of the SFRY Constitution, the Supreme Defence Council comprised the President of the Federal Republic of Yugoslavia, who chaired the body, as well as the Presidents of the Member Republics.

In order to exercise control over the activities of the federal state security agencies, in 1985, pursuant to of Article 17 of the *Law on the Foundations of the State Security System*, the Federal Assembly established a **Commission for the Oversight of the State Security Service**. It was stipulated that the Commission controlled the legality of the state security agencies, particularly in terms of their compliance with the SFRY Constitution and the statutory civil and citizens' rights and freedoms, and in terms of the methods and tools used by the authorities in the performance of their competencies. The law stipulated that the Chairman and the members of the Commission were appointed by the SFRY Assembly, and that the body was obliged to report on its work at least once a year to the Assembly.

In the period between 1985 and 1991, the Commission for the Oversight of the State Security Service performed the activities within its jurisdiction to the extent it was possible, and existed formally until the declaration of the Federal Republic of Yugoslavia, on 27 April 1992.[83] The Rules of Procedure of the Federal Assembly of FRY, which were adopted in the 1990s, did not provide for the establishment of the Commission for the Oversight of the State Security Service, so that this area at the federal level was no longer under a direct parliamentary oversight. Instead, the Federal Assembly had a **Committee for Defence and Security**, which was authorised to the consider draft laws, other regulations and general acts relating to security, citizenship and passports, the status of aliens, border crossings, all types of safety in traffic, production, trade and transport of weapons, explosives, and other hazardous materials, as well as to consider all issues relating to the control of the activities of the Federal Government and other federal agencies and senior officials reporting to the Federal Assembly.

The integrated state security service operating principles were specified by the heads of the federal state security agencies, subject to the consent of their superior political bodies, i.e., the Federal Executive Council (later also the SFRY Presidency) or their authorised bodies.[84] The integrated principles regulated when and to what persons, foreign agencies, institutions and organisations the State Security Service instruments and methods could be applied and under what conditions. They also stipulated the responsibility for the use or potential abuse of these instruments and methods.

In 1975, the Federal Council for the Protection of the Constitutional Order adopted special *Guidelines* stipulating that certain public office holders (e.g., federal and republic senior officials) could apply operational and technical measures only subject to the approval of the Council. The Rulebooks stipulated that certain State Security Service methods could be used in case of threat to the constitutional order,

[83] From 1985 to 1991, the Commission for the Oversight of the State Security was chaired by Jovica Lazarević, Dušan Pekić, Rajko Ječmenica, Ljubomir Petrović, Živko Vasilevski, and Jože Šušmelj.

[84] The 1974 Law on the Foundations of the State Security System stipulated that the operating principles were adopted by the heads of the federal state security agencies, subject to the consent of the SFRY Presidency.

i.e., socio-political arrangement, and other criminal offenses within the scope of the Service, but in accordance with a special procedure, with maintaining records and files on the implemented measures and actions.

It can be concluded that throughout the period of the Socialist Federal Republic of Yugoslavia the intelligence and security services had very wide competences that were not defined clearly enough by law, which is characteristic for all authoritarian regimes. This is confirmed by the fact that from the end of World War II and until the break up of SFRY, no federal or republic legislation had explicitly referred to any civilian or military service. When the Law on the Foundations of State Security System was finally adopted in 1984, after the death of the lifetime president of SFRY, Josip Broz Tito, and under the pressure by the more liberal wing of the Yugoslav Communists Party leadership, it governed only the general issues in this area, leaving it to the executive and the heads of services to regulate the common legal matters - the establishment, functions, powers, organisation, method of operation, and responsibilities of the intelligence security and services under their internal guidelines. Throughout that period, the most important regulation relating to the operations of the security services was the Rules of Procedure of the State Security Service, which was a secret and publicly inaccessible by-law of the Federal Secretary for the Internal Affairs. Finally, it should be noted that in the period of existence of SFRY there were also no mechanisms for judicial review of the legality of the security and intelligence services and their operations.

Jelena Ceranic, PhD [1]

PARLIAMENTARY OVERSIGHT OF THE DEFENCE SECTOR

1. INTERNATIONAL STANDARDS

1.1. Introduction

In the comparative law, there is wide-spread opinion that the security policy is a "natural" function of the executive government (the executive), considering that it possesses access to expertise, resources, and is able to act efficiently. Parliament is perceived as a less suitable institution to deal with the security issues, particularly taking into account lengthy parliamentary procedures and limited access to all necessary expertise and information.

However, as in any other area, in the security and defence sector, parliament is entrusted to perform the oversight of the executive. There are at least four reasons why this oversight is important:

- **A Cornerstone of Democracy**

Former French Prime Minister Georges Clémenceau once stated that "War is a much too serious matter to be entrusted to the military". Beyond its humorous side, this statement recalls that in a democracy, the representatives of the people hold the supreme power and no sector of the state should be excluded from their control. A state without parliamentary control of its security and defence sector, especially the military, should, at best, be deemed an unfinished democracy or a democracy in the making.[2]

According to the eminent American scholar Robert A. Dahl, "the most fundamental and persistent problem in politics is to avoid autocratic rule." That is why it is essential that there is a power-sharing system in place to ensure the system of checks and balances to counterbalance possible abuse of power in the security and

[1] Research Associate of the Institute of Comparative Law, Belgrade; Lecturer at the Faculty of Law, University of Banja Luka.

[2] P. Fluri, A.B. Johnsson, *Parliamentary Oversight of the Security Sector,* Geneva 2003.

defence sector. Namely, it is even more difficult and important to establish balance between efficiency and democracy in this sector than in any other field.[3]

- **No Taxation Without Representation**

One of parliament's most important mechanisms for controlling the executive is the budget. From the early days of the first assemblies in Western Europe, parliaments demanded that there should be no taxation without representation. As security and defence sector organisations use a substantial share of the state budget, it remains essential that parliament monitors the use of the state's resources effectively.

- **Legislation Drafting and Implementation**

In practice, it is the executive that drafts laws on the defence and security issues. Nevertheless, members of parliament play an important role in reviewing these drafts, and can, if need be, suggest amendments. Moreover, it falls to parliament to see to it that the laws do not remain a dead letter, but are fully implemented.

- **A Bridge to the Public**

The executive should be aware of the security issues which are priorities for citizens. Considering that parliamentarians are in regular contact with the population, they are the ones who can easily ascertain their views. Therefore, they present a sort of a bridge between the executive that drafts laws and the population.

1.2 Legal Sources

The defence sector is traditionally regarded as falling into the domain of national sovereignty. That is why there exist no internationally agreed standards in the field of democratic and parliamentary oversight of the defence sector. These standards are not mentioned neither in the Charter of the United Nations nor in numerous international agreements and conventions. Similarly, *acquis communautaire* does not include regulations relating to civil and military relations. However, in order to fulfil the accession criteria (defined at the European Council meeting in Copenhagen in 1993), a candidate country must organise its civil and military relations in a certain

[3] S. Lunn, "The Democratic Control of Armed Forces in Principle and Practice", *Oversight and Guidance: The Relevance of Parliamentary Oversight for the Security and its Reform*, DCAF, NATO Parliamentary Assembly, Brussels/Geneva, 2003, p. 14.

way. Therefore, although there are no internationally agreed standards in the field of democratic and parliamentary oversight of the security and defence sector, there exist some regional standards, as for example the OSCE Code of Conduct.

The Organization for Security and Cooperation in Europe (OSCE) is the world's largest regional security organization. It offers a forum for political negotiations and decision-making in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation, and puts the political will of its participating States into practice through its unique network of field missions. All 57 participating States (including all States from the region : Bulgaria, Romania, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, Former Yugoslav Republic of Macedonia, Serbia) enjoy equal status, and decisions are taken by consensus on a politically, but not legally binding basis.

The Code of Conduct on Politico-Military Aspects of Security was negotiated in the Forum for Security Cooperation (FSC) and adopted in 1994 Budapest Summit. This document deepens and codifies important principles of the Helsinki Final Act guiding relations between States, particularly concerning non-use of force. However, the Code of Conduct goes far beyond this conventional framework by adding unique norms of politic-military conduct within the States. Most importantly, its sections VII and VIII detail the commitment by participating States to place their armed forces, including military, parliamentary and security forces, intelligence services and the police, under democratic and civilian control.

This Code covers issues that are usually considered to fall within the domestic jurisdiction of the State. Thus this code represents a crucial advance in the area of State power that had hitherto been carefully guarded.[4] So, it is often characterized as „a revolutionary document" and „a hidden jewel among OSCE documents"[5].

Since 1999, the participating States have annually exchanged information on their implementation of the Code of Conduct, on the basis of a Questionnaire which was updated in 2003 and again last year. The new Questionnaire better reflects the structure of the Code and introduces a number of new sub-questions, for instance on anti-terrorism. It also requests that participating States provide information on the different type of armed forces separately. Participating States' answers to the Questionnaire have been posted on the OSCE's public website since 2008.

In addition, the Code of Conduct is used inside the FSC, where several follow-up events have been taken place since its adoption and where the information exchange is regularly reviewed. Also, the Conflict Prevention Centre organizes seminars and workshops, often jointly with field operations and host countries. They usually meet in a regional setting, where sensitive security issues often remain, and invite the military experts and representatives from the foreign affaires departments and sometimes even

[4] P. Fluri, A.B. Johnsson, *Parliamentary Oversight of the Security Sector,* Geneva 2003, p. 164.

[5] "The Code of Conduct on Politico – Military Aspects of Security: a sleeping revolution", Interview with Alexandre Lambert, *OSCE Magazine*, 3/2010, pp. 5-7.

members of parliament to jointly discuss the Code's implementation. So, practically speaking, the Code is already used as a new confidence-building measure on the sub-regional level and is unparalleled in any other international security organization, including the United Nations. [6]

The OSCE Code of Conduct:

- Maintain the armed forces under effective democratic control through authorities vested with democratic legitimacy (Paragraphs 20 and 21);
- To ensure legislative approval of defence budget and transparency and public access to information related to the armed forces (Paragraph 22).

In addition, some international organizations seek to establish principles that should govern the democratic civil and military relations. The most active in this field are the Inter-Parliamentary Union (IPU) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF).

The International organization of Parliaments (IPU) was established in 1889. The Union is the focal point for world-wide parliamentary dialogue and works for peace and co-operation among peoples and for the firm establishment of representative democracy. The IPU supports the efforts of and works in close co-operation with the United Nations, whose objectives it shares. The Union also co-operates with regional inter-parliamentary organizations, as well as with international intergovernmental and non-governmental organizations which are motivated by the same ideals. There are currently 162 Members and 10 Associate Members of the Inter-Parliamentary Union. All the countries from the region (Bulgaria, Romania, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, Former Yugoslav Republic of Macedonia, Serbia) are the Members of IPU.

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) was established in 2000 on the initiative of the Swiss government. DCAF is an international foundation whose mission is to assist the international community in pursuing good governance and reform of the security sector. The Centre provides in-country advisory support and practical assistance programmes, develops and promotes norms and standards, conducts tailored policy research, and identifies good practices and recommendations to promote democratic security sector governance.

The DCAF Foundation currently comprises 61 Member States from across the globe. The Foundation Council – an assembly of all DCAF Member States – is DCAF's supreme decision-making body. All the countries from the region are the Members DCAF (Bulgaria (2000), Romania (2000), Slovenia (2001), Croatia (2001), Bosnia and Herzegovina (2001), Montenegro (2006), Former Yugoslav Republic of Macedonia (2000), Serbia (2001)).

[6] *Ibid.*

The Inter-Parliamentary Union and the Geneva Centre for the Democratic Control of Armed Forces defined the following principles:[7]

- The state is the only actor in society that has the legitimate monopoly of force;
- The security services are accountable only to legitimately elected authorities;
- The parliament is sovereign and holds the executive accountable for the development, implementation and review of the security and defence policy;
- The parliament has a unique constitutional role in authorising defence and security expenditures;
- The parliament plays a crucial role with regard to declaring and lifting a state of emergency or the state of war;
- Principles of good governance and the rule of law apply to all branches of government, and therefore also to the security and defence sector.

1.3. The content of standards

1.3.1. Constitutional and Statutory Powers

Parliament has a wide range of powers that can be used in the course of the control of the security and defence sector. A review of the legal provisions in many countries has shown that the constitutional and statutory powers include *inter alia* the following:

- General Powers
  - To initiate legislation;
  - To amend or to rewrite laws;
  - To question members of the executive;
  - To summon members of the executive to testify at parliamentary meeting;
  - To summon military staff and civil servants to testify at parliamentary meetings;
  - To summon civilian experts to testify at parliamentary meetings;

[7] P. Fluri, A.B. Johnsson, *Parliamentary Oversight of the Security Sector,* Geneva 2003, pp. 23-24.

- To obtain documents from the executive;
- To carry out parliamentary inquiries;
- To hold hearings.

- Budget Control

- Access to all budget documents;
- The right to review and amend defence and security budget funds;
- The right to approve/reject any supplementary defence and security budget proposals.

In most cases, parliament ensures the budget control in the military sector through its committees and subcommittees. In many countries, in addition to parliament and its budget committee, the military budget control is performed also by external independent auditing bodies. In addition, the control is performed by the internal supervisory bodies of the military as a direct budget user.[8]

- Procurement/asset disposal/ arms sale /transfer

- Obligation of the executive to fully inform parliament on decisions relating to procurement/asset disposal/ arms sale /transfer;
- The right to approve/reject contracts;
- Review of the following phases of procurement:
  - Listing equipment specifications;
  - Comparing and selecting a manufacturer;
  - Assessing offers for compensation and off-sets.

- General Defence and Security Policy – the right to approve/reject:

- Security policy concept;
- Crisis management concept;
- Force structure;
- Military strategy/doctrine.

[8] M. Hadžić, B. Molosavljević, "Demokratsko preuređenje civilno-vojnih odnosa u SCG", *Modeli zakona o bezbednosti i odbrani*, Centar za civilno-vojne odnose, Belgrade, 2006, p. 22.

- Defence sector personnel, management and organisation

  - The right to approve/reject the personnel plan;
  - The right to fix ceilings for manpower;
  - The right to approve/reject or the right to be consulted on the highest military appointments (such as chief of staff);
  - The right to review the internal organisation of the defence and security and defence sector

As constitutional provisions have the highest juridical status, it is important to inscribe parliamentary powers regarding the security and defence sector in the constitution. Constitutions cannot be easily changed; any such reform generally requires a qualified majority in parliament. Therefore the constitution represents an effective way of protecting the power of the parliament in that sensitive field. Such powers may be further reinforced by specific legislation and through the rules of procedure of parliament.

It is crucial for parliament to receive timely information on the government's intentions and decisions regarding security issues and the security and defence sector. Parliament will not have a strong case if the government briefs it only after having reached a final decision. In such situations, parliament will be confronted with a "fait accompli" and will have no other alternatives than to approve or reject the government's decision.

1.3.2. Parliamentary Mechanisms Applied to the Defence Sector

All democratic systems provide parliaments with a variety of means to retrieve information relating to the performance of the executive. Based on such information, the parliament controls the government's policy, supervises the administration, protects the individual, or seeks to bring to light and eliminate abuse and injustice. The three common legal possibilities available to the parliament are:

1. Parliamentary debates;
2. Parliamentary questions and interpellations;
3. Parliamentary oversight.

Parliamentary debates on defence issues provide a key opportunity for exchanging opinions and gathering essential information about facts and the government's intentions. Generally speaking, parliament debates on security and policy issues can occur in five types of situations:

- Following the presentation by the executive of its yearly defence budget proposals;
- Further to official or unofficial statements by relevant ministers such as the minister of defence or the minister of foreign affairs;
- In connection with a national defence review, the presentation of a defence white paper or any other major national defence documents;
- In connection with the government's programmes, which are mainly issued after an election;
- In connection with a major security concern or disaster.

Parliamentary questions and interpellations are a mechanism that is used mostly to obtain specific information about the government's action and potentially to investigate mismanagement/abuse in the government bodies and redirect the government policy. Questions can be posed in writing or orally at the special sessions of the parliament. The following factors contribute to the efficiency of parliamentary questions:

- An opportunity for members of parliament to ask additional questions in case they are not satisfied with the answers or they find that additional clarifications are necessary;
- An opportunity for members of parliament to initiate a debate about the issues raised during the time allocated for parliamentary questions;
- Willingness of members of parliament to use the procedural possibility to ask questions;
- An opportunity for the public to be present during the parliamentary questioning or to follow it on ratio or television;
- The disclosure of the questions and answers in documents that are made available to the public.

Either as a part of or as a complement to the above mechanism, **parliaments can oversee** the executive's by reviewing the reports prepared by the government or independent pubic authorities and conducting special inquiries. The core parliamentary powers normally include the power:

- To choose the topic and scope of the parliamentary inquiry;
- To carry out visits to army bases and other premises of security services;
- To collect all relevant information, including classified and top secret documents, from the presidency, government administrations or the general staff;
- To take evidence under oath from members of the presidency, government administration or the military as well as civil society;
- To organise public or closed hearings.

1.3.3. Institutional and Political Factors

The Parliament as a whole is too unwieldy a body to make full inquiries into matters of interest to it and to consider and investigate in detail all issues relevant for the work of this legislative body. This is why parliamentary committees have become one of the most powerful tools for efficient parliamentary business. As a body involving a limited number of members of parliament, parliamentary committees can, depending on the level of means, such as information and research capacity more especially, and expert support they enjoy, perform in some depth the vast and complex task of overseeing the security and defence sector.[9]

A well-developed parliamentary committee structure is crucial if the parliament is to exert real influence on the executive. In fact, the parliamentary oversight of the security and defence sector involves not just one committee but several committees which may be found under different names in different parliaments. Based on the comparative legal review, it can be concluded that most of the countries have the following committees:

- **Defence and security committee** which generally deals with all issues related to the security and defence sector;
- **Budget or finance committee,** which has a final say on the budgets of all security and defence sector organisations; possibly the public accounts committee which reviews the audit reports for the entire national budget, including the defence budget;

[9] W. F. van Eekelen, "The National Parliamentary Dimension*", Democratic Control of Armed Forces: The National and International Parliamentary Dimension*, DCAF Occasional Paper - No. 2, Geneva, 202, p. 18.

- **Committee (or sub-committee) on intelligence services and matters,** which often convenes behind closed doors;
- **Committee for industry and trade,** which is especially relevant in matters of arms procurement and trade;
- **Anticorruption committee,** which deals with corruption issues in all state institutions, including the security and defence sector bodies.

1.3.3.1. Parliamentary Defence and Security Committees

The parliamentary defence and security committee is a specialised body of the parliament that provides advice to and prepares recommendations for the Assembly on the legislation or decisions relating to national defence or public security. A particular feature of this parliamentary body is the complexity of the issues it deals with in its work. Parliamentarians must oversee the work of various institutions and deal with the military, police, gendarmerie, and other law enforcement issues, as well as the issues relating to border control, budget, procurement, arms control, intelligence agencies, etc. That is why this committee with a wide range of powers can be organised in several subcommittees.[10]

The key functions of the parliamentary committee on defence issues include consideration of and reporting on any draft legislation proposed by the government and referred to it by the parliament, consideration of international treaties and arrangements falling within the area of responsibility of the ministry of defence, as well as initiating and adopting new legislation or drafting legislation by the committee itself. As a part of these competences, the decisions on deployment of national forces in foreign countries are also considered. In addition to that, the work of the committee relates also to consideration of and reporting on any major security policy initiative, periodical examination of the defence minister on his discharge of the security policy responsibilities, keeping under scrutiny the ministry of defence's compliance with the applicable legislation, and examination of petitions and complains from military personnel and civilians concerning the security and defence sector. One of the most important functions of the committee relates to consideration of and reporting on the

[10] This division may be based also on the functional approach, for a specific draft law, inquiry or a hearing, or the institutional approach covering the mandates of a committee for a certain institution or agency. In some countries, committees have combined mandates, and thus, for example, one committee can deal with the issues of national defence and intelligence agencies, etc. With respect to the actions of intelligence agencies, some parliaments have adopted the functional approach and delegate the responsibility for all the agencies performing intelligence activities to one committee. Other parliaments have adopted the institutional approach and the actions of joint agencies or ministries performing intelligence activity are overseen by different committees.

annual expenditures of the ministry of defence, consideration of each supplementary estimate presented by the ministry of defence, and reporting to the parliament on the decisions on these issues, and, if necessary, ordering the competent authorities to carry out a financial audit, as well as consideration of procurements and dual-purpose goods. [11]

For the purposes of discharging the above competencies, the committee members have a possibility to hold hearings or inquiries, summon military personnel, civil servants or experts to attend sessions of the committee, examine ministers and other government representatives, oversee transparency and efficiency of the budget spending, order the competent authorities to carry out a control, investigate complaints, as well as organise field visits and inspect army bases and other premises of security services, including field visits to the forces deployed overseas.

These parliamentary bodies normally act in accordance with the competencies ensuing from the rules of procedure of parliament, separate law, or the constitution itself. Most committees retain the right to set out their own operating plans and meeting schedules, which may be open or closed for public. In most parliaments the committees have a consultative role, as they do not have the powers to enforce laws and adopt final decision on specific issues.[12]

Committee members are appointed by the parliament and their number varies from country to country. The candidates for committee members are normally proposed by the parliamentary lobby groups, taking into account to ensure equal representation of all the political parties in the committee. The most efficient procedure for appointment of committee members is their selection based on their specialised expertise that falls under the competence of the committee. The membership on the committee lasts for the duration of the parliamentarians' term in office, and may be extended over several statutory mandates. The candidates for the committee chairman are selected mostly in the agreement between the major parliamentary parties. As the supervisory role of the committee on defence and security issues is crucial, in some parliaments, the role of the chairman of the committee is delegated to a representative of the opposition, or the chairman position is rotated between the largest opposition party and the leading party.

The committee staff prepare and organise the sessions of the committee, establish and maintain contacts with relevant institutions and organisations and civil society representatives, collect relevant information, and in an unbiased manner, assist in the implementation of the committee's competencies. Some of the activities performed by the professional service include: provision of professional opinions, preparation of the materials and briefings for parliamentarians, monitoring and implementation of

[11] Parliamentary defence and security committees, "Parliamentary oversight of the security and defence sector: Principles, mechanisms and practices", Geneva Centre for the Democratic Control of Armed Forces, Inter-Parliamentary Union, Geneva/Belgrade, 2003, p. 86.

[12] W.F. van Eekelen, *op. cit*, p.122.

the committee's findings and decisions, preparation of information and conclusions on the issues considered in the sessions of these parliamentary bodies, preparation of amendments at the request, preparation of reports and opinions relating to the authentic interpretation of legislation and other acts, drafting of relevant information and professional processing and analysis of citizens' applications and proposals. Regular review of information and developments in the defence and security field, preparations of analyses and surveys, constructive proposals and suggestions are also some of the ways in which the professional service can contribute to the improvement of the legislative and supervisory function of the parliamentary committee. In addition, adequate number of staff in the committee and their additional training are necessary to ensure the efficient work of these parliamentary bodies.

Another important issue faced by the members of these committees is the issue of access to confidential information. There are two approaches to regulating access to confidential information. In most parliaments, members of parliament are not required to undergo security checks, as it is considered the very procedure for appointment to office implies that they have access to confidential information, while in other parliaments, they are granted access to such information after a positive security check. There are regulations stipulating that members of parliament who come in touch with confidential information that constitutes a state, official or military secret are required to sign a confidentiality statement committing to protect the confidentiality of the information they obtained during their mandates on these committees. Also, they do not have the right to initiate questioning or inquiries based on the knowledge that results from confidential information obtained in the course of discharging their function as a member of committee or upon the termination of their membership in these parliamentary bodies. In some parliaments, the committees can hire experts to lead the inquiry into specific issues under the competence of that body, and the hired experts are subject to a special obligation to protect the confidentiality of information, as they would come in contact with confidential materials during their work.[13]

It is particularly important that the discharge of the competencies from the scope of the committees on defence and security issues is not perceived as control in the negative sense of the term, i.e. as assuming in advance the opposing position of a controller against those whose work is overseen, but rather as a constructive cooperation and communication, exchange of ideas, as a correction of prospective mistakes in order to create conditions for successful work of the institutions and agencies that are controlled, as well as to improve their activities through constructive comments and proposals. This cooperation is necessary not only because of the division of responsibilities between the legislator and the executive, but also because of the fact that the security and defence sector contributes to the protection of the interests and the country as a whole.[14]

[13] D. Djurašinović, "Parlamentarna kontrola sektora odbrane", *Pregled zakonodavstva sistema odbrane Republike Srbije*, Institut za uporedno pravo, Belgrade, 2007, 41.

[14] *Ibid,* 49.

1.3.4. Efficiency of the Parliamentary Oversight of the Defence Sector

Efficient parliamentary oversight of the security and defence sector requires, above all, expertise and resources within the parliament or at its disposal. However, the in-house parliamentary expertise can rarely match the expertise of the executive. In most cases parliaments have a small number of, if any, research staff, while the government can rely on the staff in the ministry of defence and other ministries that deal with the security and defence sector. In addition to that, members of parliament are elected for a limited term in office, while civil servants and military personnel for the most part spend their entire professional career in the ministry of defence. The main problem is that members of parliament rely primarily on the information provided by the government and the military, and those are the very institutions they are supposed to oversee.[15]

Another important element of efficient parliamentary oversight is the political will of members of parliament to use the mechanisms that are available to them. Even if parliamentary oversight is regulated in an adequate way and the parliamentary bodies/parliamentarians individually do posses adequate expertise and resources, efficient parliamentary oversight will not be possible without a strong political will of members of parliament to use the available mechanisms. However, there is no "recipe" for efficient parliamentary oversight; it rather has to be adjusted to the specific needs, capacities and circumstances of the individual county.[16]

The political will to ensure efficient oversight of the security services is determined by various factors, including party discipline, political interest, and security reasons.

Firstly, with respect to party discipline, considering that it is in the interest of the members of parliament from the ruling party to keep the executive power, in most cases they refrain from any public criticism of the executive. Hence, due to the dominance of the party loyalty over the formal duties of members of parliament, specific mechanisms for establishment of the ministers' accountability were rendered to a great extent inefficient.

Furthermore, with respect to political interest, in most countries the voters are not particularly interested in the security issues. Moreover, politicians would rather discuss forward-looking issues than go back to the issues from the past for which there is no longer any interest. Consequently, members of parliament could exhaust their motivation to pay attention to the oversight of the government's action in the security and defence.

---

[15] *Ibid,* 37.

[16] *Ibid*, 51.

Finally, due to security reasons (real or perceived) the members of parliament responsible for the security and defence issues are reluctant to disclose, share and discuss openly their findings and observations.

As a result of the above factors, today, the parliamentarian accountability mechanisms are often applied passively. The political parties would be ready to examine the accountability of their members holding public office only if they concluded on their own that such behaviour could damage their future election prospects.

2. COMPARATIVE LEGAL ANALYSIS

2.1. Parliamentary Accountability Mechanisms

The mechanisms ensuring government accountability to parliament in the countries in the region are very similar and include: parliamentary questions, interpellations, and a vote of no confidence in the government. While parliamentary questions are the most "benign" form of accountability, whereby members of parliament express their interest in the current government policy issues, interpellations and a vote of no confidence in the government present accountability mechanisms with serious consequences, as they can result in the fall of the government. The difference between these two mechanisms is that a vote of no confidence in the government may be initiated without any response required from the government, based only on the request by a certain number of members of parliament. Parliament is obliged to vote on the motion of no confidence in the government, and its adoption normally requires a majority vote of all members of parliament. An interpellation, on the other hand, is initiated by submitting formal questions to the government, and it depends on the government's response weather members of parliament would ask after that for a vote of no confidence in the government. Therefore, it can be argued that an interpellation is a sort of a combination of a parliamentary question and a vote of no confidence in the government, which is widely accepted in our region.

In all the seven countries in the region (Bulgaria, Bosnia and Herzegovina, Montenegro, Former Yugoslav Republic of Macedonia, Kosovo, and Serbia) the executive government's accountability to parliament is legally regulated in a similar way, primarily under constitutional provisions and the rules of parliamentary procedure.

The **Bulgarian** Constitution stipulates that Parliament appoints and removes the Prime Minister, and, at his/her proposal, members of the Council of Ministers, and, at the proposal of the Prime Minister, makes changes in the Government.[17]

[17] Article 84, Para. 6, of the Bulgarian Constitution.

The mechanisms of parliamentary oversight over the executive stipulated in the Constitutions and elaborated in the Rules of parliamentary procedure include: parliamentary questions, inquiries, interpellations, and a vote of no confidence in the government.[18]

Members of the National Assembly may address questions to the Prime Minister, any Deputy Prime Minister or Minister relating to any current issue of public interest under their scope of competence.[19] The Prime Minister is asked questions relating to the activities of the Government. These questions are submitted in writing and must be precisely formulated. The responses can be oral or in writing. Written responses are given only if that is explicitly requested by members of parliament.

Members of parliament have the right to request the initiation of an inquiry from the Prime Minister, any Deputy Prime Minister or Minister. Such inquiries must relate to reasonable aspects of the activities of the Prime Minister, Deputy Prime Minister, Minister or an Administration under their competence.[20]

The Rules of Procedure stipulate also that one fifth of members of parliament may request an interpellation or initiate a vote of no confidence in the Council of Ministers or the Prime Minister.[21]

With respect to **Bosnia and Herzegovina**, the Rules of Procedure of both Houses of the Parliamentary Assembly of Bosnia and Herzegovina stipulate mechanisms ensuring parliamentary oversight of the executive. The Bosnia and Herzegovina Council of Ministers is accountable to the Parliamentary Assembly for the policy proposals and implementation and the implementation of laws, other regulations, and provisions whose implementation is under its constitutional and statutory competence, as well as for directing and coordinating the activities of the Ministers. The oversight mechanisms stipulated in the Rules of Parliamentary Procedure include: a vote of no confidence in the Council of Ministers,[22] parliamentary questions,[23] interpellations,[24] reports submitted by the executive,[25] standing and

[18] Chapter VIII of the Bulgarian Rules of Parliamentary Procedure.

[19] Article 82 of the Bulgarian Rules of Parliamentary Procedure.

[20] Article 85 of the Bulgarian Rules of Parliamentary Procedure.

[21] Article 96 of the Bulgarian Rules of Parliamentary Procedure.

[22] Articles 143-147 of the Rules of Procedure of Bosnia and Herzegovina Parliamentary Assembly House of Representatives (Poslovnik Predstavničkog doma Parlamentarne skupštine BiH); Articles 135-140 of the Rules of Procedure of Bosnia and Herzegovina Parliamentary Assembly House of Peoples (Poslovnik Doma naroda Parlamentarne skupštine BiH).

[23] Articles 151-157 of the Rules of Procedure of Bosnia and Herzegovina Parliamentary Assembly House of Representatives; Articles 144-149 of the Rules of Procedure of Bosnia and Herzegovina Parliamentary Assembly House of Peoples.

[24] Articles 158-161 of the Rules of Procedure of Bosnia and Herzegovina Parliamentary Assembly House of Representatives; Articles 150-153 of the Rules of Procedure of Bosnia and Herzegovina Parliamentary Assembly House of Peoples.

[25] Articles 162-163 of the Rules of Procedure of Bosnia and Herzegovina Parliamentary Assembly House of Representatives.

provisional commissions,[26] and use of reports prepared by independent public authorities.[27]

In **Montenegro**, the Government and Ministers' accountability to Parliament is also regulated by the Constitution and the Rules of Procedure of the National Assembly. The Montenegrin Constitution stipulates that the Montenegrin Assembly appoints and removes from office the Prime Minister and members of the Government.[28]

The Rules of Procedure of the National Assembly of Montenegro further elaborate the mechanisms specified in the Constitution for plenary sessions and specialised committees. It is stipulated that parliamentary hearings and inquiries may be organised in the relevant Assembly committees to gather information, i.e. professional opinions on the enactment proposals that are in the parliamentary procedure before the Assembly, clarifications of specific proposals in the proposed or existing enactments, clarifications of specific issues relating to the preparation of enactments, and to ensure more efficient discharge of the Assembly's oversight function.[29]

The Rules of Procedure stipulate also the possibility of posing parliamentary questions. In order to gather the necessary information, i.e. implement the agreed policy, a member of parliament has the right to address a parliamentary question to the Government, i.e. the competent Minister, and receive an answer to the question.[30]

In addition to that, the Rules of Procedure stipulate the mechanisms for voting no confidence in the Government, and interpellations. A motion for no confidence in the Government must cite the reasons why it is proposed.[31] A vote of no confidence in the Government requires public voting. An interpellation inquest into specific issues relating to the Government's activities is submitted to the Speaker of the Assembly in writing, and the issue that is to be considered must be clearly formulated and explained.[32]

The **Croatian** Constitution stipulates that the Croatian Parliament (Sabor) oversees the activities of the Croatian Government and other public officials accountable to the Croatian Parliament, in accordance with the Constitution and the law.[33]

---

[26] Articles 28-29 of the Rules of Procedure of Bosnia and Herzegovina Parliamentary Assembly House of Representatives.

[27] Article 54 of the Rules of Procedure of Bosnia and Herzegovina Parliamentary Assembly House of Representatives.

[28] Article 82, Para. 12, of the Montenegrin Constitution (Ustav Crne Gore).

[29] Article 72 of the Montenegrin Rules of Parliamentary Procedure (Poslovnik skupštine Crne Gore).

[30] Article 187 of the Montenegrin Rules of Parliamentary Procedure.

[31] Article 194 of the Montenegrin Rules of Parliamentary Procedure.

[32] Article 198 of the Montenegrin Rules of Parliamentary Procedure.

[33] Article 80 of the Croatian Constitution.

The Rules of Procedure of the Croatian Parliament specify in more depth the mechanisms ensuring Government and Ministers' accountability to Parliament. It is stipulated that, at the request by Parliament, the Government is obliged to report to Parliament on their activities, the overall Government policy that is implemented or parts thereof, enforcement of laws and other regulations, and other issues under the Government's scope of competence.[34] A vote of no confidence in the Prime Minister, a member of the Government or the Government as a whole can be proposed by at least one fifth of members of parliament.[35]

The Rules of Procedure also stipulate that Parliament, i.e. its working bodies, may request reports and information from the Ministers and other officials managing other public administration authorities, who are obliged to respond to the request by reporting on the issues and events from the scope of the competence of the Ministry, i.e. other public administration authority, submitting legal compliance reports and other acts they have available, and by providing answers to the questions that were addressed to them.[36]

The Rules of Procedure of the Croatian Parliament also stipulate interpellations, as one of the accountability mechanisms. By submitting an interpellation in the session of the Assembly, a discussion is initiated on specific decisions by the Government or a Ministry, if they diverge from the general position of the Government or the Ministry on the implementation of law or the agreed policy. An interpellation is submitted in writing. It must clearly indicate and explain the issue that is to be considered. An interpellation is signed by all the members of parliament that submit it. An interpellation to the Speaker of Parliament is submitted by at least one tenth of members of parliament.[37]

In the **Former Yugoslav Republic of Macedonia**, the National Assembly overseas the activities of the Government in accordance with the terms and procedures specified by the Constitution and the Rules of Procedure of the National Assembly. The Constitution of the Former Yugoslav Republic of Macedonia stipulates that the Assembly appoints the Macedonian Government.[38]

The Rules of Procedure of the National Assembly stipulate the traditional procedures ensuring Government accountability to Parliament including parliamentary questions, interpellations, and a vote of no confidence in the Government.

[34] Article 111 of the Croatian Rules of Parliamentary Procedure.

[35] Article 113 of the Croatian Rules of Parliamentary Procedure.

[36] Article 115 of the Croatian Rules of Parliamentary Procedure.

[37] Article 190 of the Croatian Rules of Parliamentary Procedure.

[38] Article 68 of the FYROM Constitution.

A member of the National Assembly has the right to address to the Prime Minister, any member of the Government or any other responsible public official reporting to the Assembly any question relating to their work or the issues under their scope of competence.[39] The questions should be short and precisely formulated. Parliamentary questions are answered in the special sessions that are held every last Thursday of the month.

An interpellation may be submitted by at least five members of parliament regarding the activities of any public service, the Government and any member of the Government individually, as well as the issues relating to the activities of public authorities. An interpellation is submitted in writing, it is signed by all the members of parliament who submit it, and it must contain the explanation.[40]

A vote of no confidence in the Government may be initiated by at least 20 members of parliament. This procedure must be initiated in writing, and must include the explanation.[41]

The **Kosovo** Constitution stipulates that the Kosovo Parliament appoints the Government and votes no confidence in the Government,[42] while the Government accountability mechanisms are regulated under the Rules of Parliamentary Procedure. Those include the traditional mechanisms: a vote of no confidence in the Government, interpellations, parliamentary questions to the Government requiring oral answers, and parliamentary questions to the Government requiring written answers.

The Kosovo Parliament may vote no confidence in the Prime Minister, based on a motion submitted by at least one quarter, or more specifically 30 members of parliament, appointing at the same time a new Prime Minister, together with new Ministers, by a majority vote of the members of parliament.[43]

A parliamentary group may initiate an interpellation to discuss an issue relating to the work of the Government or the Ministries.[44] An interpellation is submitted in writing, and it must indicate a precisely formulated subject, the explanation and the names and signatures of all those who submit it.

The Rules of Procedure stipulate also parliamentary questions to the Government requiring both oral and written answers. In any session of the Parliament, time must be allocated for parliamentary questions, not exceeding 50 minutes. During the time allocated for parliamentary questions, any member of parliament may pose a question to be answered by any member of the Government, provided that the

[39] Article 37 of the FYROM National Assembly Rules of Procedures.

[40] Article 45 of the FYROM National Assembly Rules of Procedures.

[41] Article 214 of the FYROM National Assembly Rules of Procedures.

[42] Article 65 of the Kosovo Constitution.

[43] Article 19 of the Kosovo Rules of Parliamentary Procedure.

[44] Article 25 of the Kosovo Rules of Parliamentary Procedure.

question was submitted in writing at least 48 hours prior to the session.[45] Furthermore, members of parliament may address questions requiring answers in writing to the Prime Minister or any other Minister relating to his/her scope of competence.[46]

The **Serbian** Constitution stipulates that the National Assembly appoints members of the Government, and decides on the termination of the Government's and Ministers' term of office.[47] The Law on Government[48] also stipulates that the Government is accountable to the National Assembly for the implementation of the policy of the Republic of Serbia, enforcement of law and other general acts of the National Assembly, for the status in all the areas under its scope of competence, and for the performance of the public administration authorities.

Unlike other countries in the region, Serbia has a Law on the National Assembly as well, which regulates in more depth the accountability of the executive to parliament. This Law stipulates that the National Assembly oversees the work of the Government or a member of the Government by posing parliamentary questions, submitting interpellations, voting no confidence in the Government, and establishing inquiring committees.[49]

The traditional accountability mechanism that ensures the Government accountability to parliament for its actions is a vote of no confidence in the Government or in a member of the Government. In accordance with the Serbian Constitution, a vote of no confidence in the Government or an individual member of the Government may be requested by at least 60 members of parliament. The National Assembly has accepted the motion for no confidence in the Government or a member of the Government if more than one half of all members of parliament voted in favour of the motion.[50] The 2006 Serbian Constitution introduced an additional accountability mechanism – interpellation.[51]

From the early 2000s, the Rules of Procedure has stipulated the practice of establishment of special committees for specific breaches on an *ad hoc* basis for the inquiry into specific cases. These committees have the right to summon the civil servants involved in the case. However, over the last decade, *ad hoc* committees were established on rare occasion and their work did not relate to the security and defence sector.

---

[45] Article 26 of the Kosovo Rules of Parliamentary Procedure.

[46] Article 27 of the Kosovo Rules of Parliamentary Procedure.

[47] Article 105, Para. 9, of the Serbian Constitution.

[48] Article 7 of the Law on Government, *Official Gazette RS*, No. 55/2005, 71/2005 - correction, 101/2007 and 65/2008.

[49] Article 56 of the Law on National Assembly, *Official Gazette* RS, No. 9/2010.

[50] Article 18 of the Law on Government, *Official Gazette RS*, No. 55/2005, 71/2005 - correction, 101/2007 and 65/2008.

[51] Article 129 of the Serbian Constitution.

2.2. Specialised Defence Sector Oversight Committees

In the analysis of parliamentary control and oversight of the security and defence sector in the countries in the region, it should be taken into account that these countries have lived more than half a century in a communist (socialist) society, followed, in the early 1990s, by a difficult period of internal conflicts. In fact, it is this post-authoritarian and post-conflict heritage that makes it difficult to put the security sector under democratic civilian control. The introduction of effective and efficient parliamentary control of the security and defence sector is a very complex and time intensive process.

With respect to the parliamentary committees entrusted with parliamentary control and oversight of the security and defence sector, in all of the countries in the region, the Rules of Procedure stipulate the establishment of one or more committees specialised for the security and defence issues.

The only country in the region that has a special Law on Parliamentary Oversight of the Security and Defence Sector is Montenegro. In Bosnia and Herzegovina this law is still in the parliamentary procedure.

The main reason for adopting a special law on parliamentary oversight in the security and defence sector, instead of regulating this matter simply by parliament's rules of procedure, appears to be the wish of the Montenegrin parliament to define not only its authorities in this matter, but also the obligations of the Government's security and defence institutions during the oversight process. Thus, for example, Article 13 of the Montenegrin Law on Parliamentary Oversight of the Security and Defence Sector, envisages the obligation of state bodies to provide all data and information requested by the parliamentary Committee for Security and Defence and inform the Committee about implementation of its recommendations. Article 22 of the Law also prescribes the fines that will be imposed upon state bodies which do not comply with the Committee's requests (do not allow carrying out the oversight of the Committee members; do not provide information or documentation in the requested matter). As the obligations of the Government institutions in the course of the oversight process cannot be governed by parliament's rules of procedure, the adoption of a special law for the area of parliamentary oversight in the defence and security appears to be a logical and effective solution. The question, however, remains as to whether there is a real need to regulate each area of the parliament's oversight function (of which defence and security is only a small part) and respective government institutions that are subject of the parliamentary oversight by a special law? The more effective solution could be to regulate the overall Government's responsibility to parliament, including the responsibilities of the state bodies during the oversight process, by general Law on Government. However, as a Law on Government appears to be missing in Montenegro, the idea of adopting a special Law on Parliamentary Oversight of the

Defence and Security Sector may indeed be a good solution for the sector of defence and security for the time being.

In **Montenegro,** there has been a significant improvement of the work of the Assembly in terms of both its efficiency and its transparency, based on the new legal framework. The new Law extends the mandate of members of parliament to control the security sector and encourages them to take initiative by obliging the Committee for Security and Defence members (responsible for oversight of defence and security institutions) to make yearly action plans for control and oversight. The law does not prohibit the Committee for Security and Defence from including other oversight bodies in their meetings or from asking them for advice The Law does not prohibit the Committee for Security and Defence members to have other supervisory bodies present at their sessions or to consult with other supervisory bodies. In addition, according to the law, to hold a meeting during regular parliamentary sessions on one specific topic, the Committee only needs the agreement of one third of its members. That allows the Committee for Security and Defence to be independent in their operations and to exercise oversight of the overall security and defence sector in Montenegro, which was not the case before, when the work of the Committee for Security and Defence was regulated only by the Rules of Procedure. This clearly improves the capacity of the Committee for Security and Defence to act independently and to monitor the whole security sector in Montenegro. This was not the case before, when its work was only governed by the Rules and Procedures of the Parliament. In addition, the members of parliament have received numerous trainings and have been offered a number of study visits to learn best practices from Western countries.[52] The work of the Parliamentary Committee for Security and Defence is widely covered in the media, and recently there were successful attempts to involve civil society in the work of this Committee.[53]

With respect to the control of the specialised parliamentary defence committees in Bosnia and Herzegovina, it has to be noted that, in accordance with the Dayton Agreement, the security and defence sector was not one of the exclusive competencies of **Bosnia and Herzegovina**, and therefore it is not mentioned explicitly in the Constitution. However, the Constitution stipulates that the Parliamentary Assembly of Bosnia and Herzegovina is responsible *inter alia* for:[54]

---

[52] F. Klopfer at al, *Almanac on Security Sector Oversight in the Western Balkans*, The Belgrade Centre for Security Policy and Geneva Centre for Democratic Control of Armed Forces, p. 167.

[53] For example, the non-governmental organisation Institute Alternativa from Podgorica did an expert study "Comments of the draft Law on Parliamentary Oversight within the Area of Security and Defence." The document was made available to members of the Committee for Security and Defence. Some of the comments from the study were accepted when drafting the final version of the law.

[54] Article IV of the Bosnia and Herzegovina Constitution (Ustav Bosne i Hercegovine).

- Deciding on the financial sources and allocations for financing of the operations of the Bosnia and Herzegovina Government institutions and the international obligations of Bosnia and Herzegovina;
- Approving the budgets of the Bosnia and Herzegovina Government institutions.

Bosnia and Herzegovina should be the second country in the region, after Montenegro, to adopt the law on parliamentary oversight of the security and defence sector and intelligence services. This law was put into parliamentary procedure on 25 June 2010, but it still has not been adopted. In July 2012, the Bosnia and Herzegovina Joint Committee on Defence and Security organised a workshop on the draft law. The objective was to prepare the final draft of the law, but it has not been published to this date. In accordance with the Committee's explanations, this law ensues from the obligation assumed by Bosnia and Herzegovina under the Individual Partners Action Plan for Bosnia and Herzegovina to harmonise its legal arrangements with the EU and NATO regulations.

The Joint Assembly of Bosnia and Herzegovina has two Committees responsible for the control of the security and defence sector. These are: the Joint Committee on Defence and Security of Bosnia and Herzegovina, and the Joint Security and Intelligence Committee on Supervision of the Work of the Intelligence and Security Agency of Bosnia and Herzegovina, which operation shall be discussed in the chapter on control of security services.

The Joint Committee on Defence and Security of Bosnia and Herzegovina considers and monitors the implementation of the security and defence policy of Bosnia and Herzegovina; monitors the work and considers reports from the Standing Committee on Military Matters, Bosnia and Herzegovina Ministry of Defence, Bosnia and Herzegovina Ministry of Security and other executive bodies dealing with defence and security issues as well as report the Parliamentary Assembly Bosnia and Herzegovina thereof, in particular focusing on reports, short-term and long-term plans pertinent to the structure of the Armed Forces of Bosnia and Herzegovina, personnel policy and recruiting, salaries and allowances, education and training of the Bosnia and Herzegovina Armed Forces, professional conduct and ethical standards of civilian and military staff, Army equipment, military industrial work, procurement and export/import of weapons and military equipment, material assistance and contracts with foreign companies rendering services to the defence institutions on a commercial basis, combat readiness, military exercises and operations including enforcement of international obligations and international peace support operations; considers laws and amendments to laws within the competencies of the Committee; considers and submits opinions and recommendations, amendments and changes to the defence budget proposal; considers reports on the defence budget execution as well as reports on the auditing of institutions in the domain of the Bosnia and Herzegovina defence and security policy, and considers other issues in the domain of security in Bosnia and Herzegovina.

In **Serbia**, until the parliamentary elections in 2012, the main parliamentary committee responsible for the security and defence sector was the Defence and Security Committee. The work of this Committee was limited in scope for several reasons. Firstly, the provisions of then Assembly's Rules of Procedure did not stipulate that the Ministry of Defence submits regular reports to the Assembly and the Defence and Security Committee.[55] Parliamentary control and oversight was also limited by a lack of initiative on the part of members of parliament, lack of clearly defined procedures for reporting on the performed inspections and oversight during field visits, as well as the lack of an annual work plan that would set the priorities of the Committees' work.[56]

The Assembly's Rules of Procedure adopted in 2010 govern these issues and stipulate the obligation of the Ministry of Defence to submit regular reports to the Defence and Internal Affairs Committee (every four months). The Rules of Procedure also delegate adequate powers to the Committee to oversee the security sector.[57] However, the effectiveness of the provisions of the Rules of Procedure was deferred in the transitional and final provisions, which stipulate that the existing committees shall continue to operate in accordance with the previous scope of activities until the new Assembly is constituted.[58] As a result of that, the Ministry of Defence did not submit reports to parliament in 2006-2010, which was considered to be the biggest deficiency in the system of democratic civilian control of the military.[59]

In **Croatia**, civilian control of the defence and security sector is exercised by executive (president, government and corresponding ministries), legislative (security, intelligence and defence related parliamentary committees), and the operational leadership, exercised by high ranking professionals belonging to the professional security, intelligence, defence and military structures.[60]

The working body of the Croatian Parliament responsible for the defence sector is the Defence Committee. The competencies of the Defence Committee include establishing and monitoring policy, and in procedures to enact legislation and other regulations it has the rights and duties of the competent working body in matters pertaining to: the structure and authority of state administrative bodies in the field of defence; state and public security; cooperation with the bodies in the Republic of Croatia active in the field of state and public security, and other matters of state and public security.

---

[55] P. Klopfer at al*, op. cit*. 198-199.

[56] *Ibid*, 201.

[57] Article 49 of the Serbian National Assembly's Rules of Procedures.

[58] Article 296 of the Serbian National Assembly's Rules of Procedures.

[59] P. Klopfer at al, *op. cit*, pp. 198-199.

[60] *Ibid*, p. 85.

The Former Yugoslav Republic of Macedonia shows a solid track record reforming its security sector. Much progress has resulted from the efforts to facilitate EU and NATO integration. Good governance and democratic control of its security sector were part of these reforms.[61]In the Assembly of the Former Yugoslav Republic of Macedonia the committee in charge of defence issues is the Committee on Defence and Security.

Parliamentary oversight over the security sector in **Kosovo** is newly established and has limited experience. It was first introduced towards the end of 2006. More comprehensive consolidation of parliamentary oversight, however, only occurred after 2008. After the Declaration of Independence, it became possible to put all local security institutions under the scrutiny of parliament.[62]

The Parliament's Rules of Procedures regulate the mandate and responsibilities of the parliamentary committee responsible for the oversight of defence and security sector in Kosovo while primary legislation, regulating operation of defence and security institutions, provide further details on responsibilities of particular institutions during the oversight process. The Law on the Ministry of Kosovo Security Force regulates only the KSF parliamentary oversight; Law on Kosovo Intelligence Agency regulates only the intelligence oversight.

Indirect oversight of the security sector by general committees was set up immediately after the establishment of the Kosovo Parliament in 2001. Among these committees, which continue to oversee important areas of the security sector, are the Committee on Budget and Finances, with the competence to oversee the finances of all institutions funded by the public institutions (including those of the security sector), the Committee for Community Rights and Interests and for Return, and the Committee on Human Rights, Gender Equality, Missing Persons and Petitions, with a responsibility to oversee human rights issues, particularly those related to the security sector.

In **Bulgaria,** the parliamentary committee responsible for the parliamentary control of the defence sector is the Foreign Policy and Defence Committee.

It is interesting to note that that the details of the work of the Foreign Policy and Defence Committee (as well as majority of other committees) have not been stipulated by the general Rules of Procedures of Bulgarian Parliament. There is only one provision that refers to the work of this Committee outlined in the Article 28 paragraph 5 of the Rules of Procedures of the Bulgarian Parliament. This Article stipulates that, unlike other committees, the meetings of the Committee on Foreign Affairs and Defence and Internal Security and Public Order Committee and their subcommittees are closed to public. Only certain meetings of these Committees may be open, which is to be decided by the respective Committee.

---

[61] *Ibid*, p. 131.

[62] *Ibid,* pp. 119-120.

The operation of the Committee on Foreign Policy and Defence is regulated in more detail by the Internal Rules of the Committee for Foreign Policy and Defence adopted on 9 September 2009.[63] The Committee holds regular meetings once a week (each Wednesday at 14.30) during the sessions of the Bulgarian Parliament and also ad-hoc meetings as it deems necessary. The Committee exercises its legislative and oversight function by discussing legislative drafts and proposing respective amendments and by providing its opinions on expected consequences of general legal acts and (Government) decisions on the Bulgarian annual budget.[64] The Committee periodically requests information and reports from the Ministry of Defence and other ministries about problems on the defence policy and other matters.[65] The invitations for such hearings have to be sent to the members of the executive at least 24 hours before the meeting. The Committee is also able to form sub-committees that will discuss concrete problems in the defence sector.

2.3. Problems in Practice

Although the legal framework for the parliamentary control and oversight of the security and defence sector in most of the countries is solid, in reality, its implementation is not at the satisfactory level. Considering that the established civilian control and oversight mechanisms are a novelty in the system, it will take some time for them to become fully operational.[66]

When it comes to the very parliamentary committees for parliamentary control of the defence sector, although the number of committees and their competences vary, some weaknesses in the work of these committees are common for all the countries in the region. What is interesting to note is that in most of the countries, even though the Rules of Procedure stipulate a wide range of powers, the committee members do no use them efficiently. Also, a very high degree of dependence of members of parliament from the political party leaders is evident in all of the countries, indicating the lack of intra-party democracy.[67]

[63] The Rules of the Committee for Fofreign Policy and Defence are available at the Bulgarian Parliament's webiste: http://www.parliament.bg/bg/parliamentarycommittees/members/228/documents, date: 8/5/2013.

[64] Article 3 of the Committee's Rules of Procedure.

[65] Article 6 of the Committee's Rules of Procedure.

[66] P. Klopfer at al, *op. cit*, p. 199.

[67] Some parties' statutory documents regulate the position and contain additional safeguards that apply to those members who hold a minority opinion. But, the situation in practice is quite different. „No matter how impressive the aforementioned rights may seem, Blondel's general assessment that the most members of political parties act just like member of any other social body, as they do not exercise any right or duty that their membrship imposes on them (Blondel, 1963, 90), appropriately describes the behavior of members of Serbian political parties." *Cf.* Goati, „Internal Relations of Political Parties in Serbia" in *Organisation Structures and Internal Party Democracy in South Eastern Europe* (ed. G. Karasimeonov), GorexPress, Sofia, 2005, p. 14.

Notwithstanding the solid legal framework, a number of weak points in the parliamentary oversight of the security sector in **Montenegro** have been identified. Firstly, even though the legal framework for parliamentary oversight has been assessed as adequate, its implementation is not at the satisfactory level, or in other words, the members of the relevant parliamentary committees generally do not use their powers fully.

Secondly, some ruling party members of parliament tend to refrain from embarking on any discussions that could be critical of the work of the Government. Not enough mechanisms exist that would limit the impact of politics, or ensure that the interplay of oppositional political forces contributes to the broader public good in terms of security sector reform and oversight. Political interests seem to guide the work of members of parliament in the Committee for Security and Defence. It appears as if members of this committee are more focused on staying in line with their party policy instead of trying to question, research, monitor, and where possible, cooperate with other members of parliament (from the opposition or the ruling party when necessary) in order to keep the security sector accountable, transparent and under democratic and civilian control.

Similarly, serious gaps in the oversight of the Committee for Security and Defence have been identified. So far, the Committee has never controlled the security institutions' budget planning or spending. This Committee has failed on several occasions to seriously consider or react to reports of the State Audit Institution on malpractices in discharge of the budget of the relevant ministries.

Also, the parliamentary committees have only limited administrative support at their disposal. The Committee for Security and Defence employs only one advisor, which is not sufficient to guarantee the proper functioning of this Committee. Furthermore, the members of parliament are members of several committees at the same time which prevents them from focusing solely on the work in the Parliamentary Committee for Security and Defence.[68]

Although the work of committees in the Parliamentary Assembly of **Bosnia and Herzegovina** has been assessed as satisfactory, deficiencies still exist. One such deficiency is weak cooperation between committees and executive bodies, which in turn causes executive bodies to not respond to requests coming from the parliamentary committees.[69] Therefore, there is a need to improve the cooperation between the Bosnia and Herzegovina Parliamentary Assembly committees responsible for the oversight of the defence and security sector and the executive. This problem is expected to be overcome by the adoption of the draft law on parliamentary oversight of the defence and security sector and intelligence services, which stipulates sanctions for failure to cooperate with the Assembly and its bodies.

[68] P. Klopfer at al, *op. cit*, p. 168.

[69] According to reports of this Committee, the Council of Ministers of Bosnia and Herzegovina has failed to fulfil its legal duty of delivering annual reports on the work of the Intelligence and Security Agency of Bosnia and Herzegovina for the last three years.

Furthermore, one of the major weaknesses is inadequate administrative and logistical capacities of committees' secretariats. The needs of committees are greater than the support currently offered by their secretariats. It is clear that more expert and financial support needs to be provided to the committees in order to improve their work. This especially relates to entity level committees, where secretariats hire only one expert per committee.[70]

In **Serbia**, the Security and Defence Committee in the former parliament composition did not have adequate resources, expertise and specialised staff to perform all the duties under its competence (defence, internal affairs and security issues). Consequently, the work of this Committee was mainly reactive and limited to routine periodical hearings stipulated by law.[71] Furthermore, the Security and Defence Committee lacked staff, and the staff themselves did not have adequate knowledge about the Assembly's oversight function.[72]

After the new Assembly was convened in mid 2012, new committees were established: the Committee for Defence and Internal Affairs, and the Committee for Oversight of Security Services. However, it is still too early to have an insight into the efficiency of these committees in ensuring oversight of the security and defence sector.

However, it appears that although the legal framework for parliamentary oversight of the security and defence sector was strengthened, in reality, the Assembly's oversight of the defence and security sector and generally the Government's actions is still weak for several reasons. The first reason is a high level of dependency of members of parliament from the political party leaders, which is a consequence of the lack of intra-party democracy in each individual party. The second reason is the very nature of the political system and the existence of coalition government and coalition agreements that imply a strict division of the Government sectors (ministries and agencies) between the coalition partners. As a consequence of that, the party members are reluctant to question the performance of their party colleagues who head other ministries and agencies, and the ruling coalition members are reluctant to interfere with the work of their partners for fear of disturbing the coalition balance.[73] Finally, it is crucial to take into account the nature of the parliamentarism in the Republic of Serbia and the countries in the region, which is based on the continental law tradition, where members of parliament are interested predominantly in the legislative

[70] P. Klopfer at al, *op. cit*, p. 57.

[71] Commission Opinion on Serbia's application for membership of the European Union.

[72] P. Klopfer at al, *op. cit*, p. 199.

[73] *Ibid.*

procedure, and are not used to oversee and control the work of the executive.[74] One of the key reasons for such practice on the part of the MPs is the communist tradition of a single-party system and the unity of power, where it was uncommon for the Parliament to invoke the Government's accountability. Under the unity of power concept, the parliament and the executive are just parts of a single system, whereas all the decisions were adopted by the party leaders.

Parliament and its committees execute oversight over the work of security institutions **in Croatia** in many ways. One of those ways is proposing and adopting laws. Other ways include regular reviews of the security sector policy and activities, reviews of regular reports prepared by the security sector institutions, examinations of the security sector officials, who can always request that additional reports are prepared, if needed. These hearings and reviews normally relate to the legality of the activities and financial accountability of security institutions. The representatives of the security and defence sector are often summoned to attend the sessions of the Committee that pertain to the security and defence sector. In addition, field visits to the security and defence facilities, where the Committee members can get more extensive information about the everyday problems in the security and defence sector, are also frequently organised.[75]

The Croatian example shows that the establishment of democratic and civilian control over the security and defence sector is a long-lasting process. The Republic of Croatia started the reforms more than 20 years ago. Although it is considered that the defence sector reform has achieved satisfactory results,[76] especially in comparison to the other countries in the region, there is still a lot to be done. With respect to parliamentary control, there is a need to improve the legal framework so that all government departments and agencies in cooperation with parliament and its bodies work to continue progress in the security and defence sector.[77]

---

[74] The differences between the Anglo-Saxon and the continental model of parliamentary oversight are rooted in the historical differences between the British and the French parliamentarisms. Parliamentary oversight by invoking the Governments' accountability for its actions is the key mechanism for controlling the executive in Great Britain and other common law countries. Parliamentary scrutiny by calling the Government to account for its actions is a key means of controlling the executive, instead of designing the detailed rules and regulations to which the executive would need to adhere. However, in the countries following the continental law tradition, influenced primarily by the French model of parliamentarism, the key role of the parliament is to legislate, not to scrutinise. Consequently, parliamentary oversight is strictly separated from the legislative procedure and is considered to be a separate role for the parliament. In France, and, under the influence of French law, in other countries of the continental legal tradition, parliamentary oversight is identified with the right of expression of the opposition and is considered that the opposition has the privilege to control the executive. *Cf.* A. Rabrenović, *Financial Accountability as a condition for EU membership*, Institute of Comparative Law, Belgrade, 2009, pp. 205-207.

[75] P. Klopfer at al, *op. cit*, p. 86.

[76] *Ibid.*

[77] *Ibid,* p. 97.

With respect to the Committee on Defence and Security in **Former Yugoslav Republic of Macedonia,** numerous weaknesses have been identified in relation to its work. Firstly, the Committee on Defence and Security does not have adequate staff to provide the necessary information and data. Secondly, the Committee has hardly ever examined army related trials. Furthermore, there is a practice to take most Committee decisions by consensus, especially those related to investigations such as requests for budget documentation. This limits the Committee on Defence and Security oversight because most members and the Chairman come from the ruling party and tend to avoid confrontation with the leadership. In this environment, the ruling party committee members can overturn any initiative within the committee. Since 2006, members of parliament have not initiated an interpellation towards the Minister of Defence. Members of parliament have undergone trainings by international civil society organisations on areas such as policy oversight and budget scrutiny but so far there is no substantial increase of involvement in Armed Forces oversight.[78]

Therefore, although the security sector reforms have been assessed as satisfactory, in practice, with respect to parliamentary control of the security and defence sector, several shortcomings should be corrected. First, when political parties decide on appointing members of parliament to committees, particularly those dealing with oversight of intelligence, they should ensure the members of parliament have genuine interest in the particular field and possibly legal experience. Second, committee members should undergo specially designed training, particularly in budget scrutiny, intelligence services functioning, peace support operations, etc. Third, Parliament should hire advisors to assist the committees in their work. Number four, the Committee for Defence and Security and other relevant committees should insist on public debates and hearings on draft laws.[79]

In Kosovo, despite a solid legal framework, neither the general nor the specific security sector committees have performed their oversight responsibilities successfully in practice. The Committee for Internal Affairs, Security and Kosovo Security Force has not prepared a single report on the activities of the Kosovo Security Force yet. With respect to field visits, they are mainly formal, so that committee members do not have a critical approach to the work of the Ministry for the Kosovo Security Force at all.

One of the main obstacles for efficient parliamentary oversight of the defence sector is related to limited professionalism within the Parliament staff. More specifically, in the recruitment of parliamentary support staffers, political biases and personal preferences influence the hiring of personnel, which is a problem that is common throughout public administration in Kosovo. Consequently, the number of skilled staffers among parliamentary committees is very low. In addition, there is a lack of political willingness to improve the processes, i.e. efficient parliamentary oversight of the security sector. In fact, due to a combination of personal or party

[78] *Ibid*, pp. 135-136.

[79] *Ibid,* p. 150.

interests and the influence that the party leaders have over other members of parliament, in practice the Kosovo Parliament has much less influence on security sector actors than it is given by law.[80]

In Bulgaria, parliamentary control of the defence sector is also not satisfactory. In the most recent report of Institute of Modern Politics (IMP)[81] parliamentary control in this sector is assessed as insuficient. The report especially notes that "some of the responses provided by the Minister of Defence to the Parliament are formal, bureaucratic, lack depth and completeness. Such responses are related to issues of defense and the state of the armed forces. Other statements are very complete and detailed – these are related to assets of MoD. In terms of personnel policy of the Ministry, as well as particular cases, the responses are comprehensive andconsistent. The type of answers implies that there is a no complete vision on the whole sector (...). There is also a positive dialogue between the Minister and MPs, who are often satisfied with the answers received. The written answer provided by the Minister are concise and specific."

3. CONCLUDING REMARKS

The regulatory framework of parliamentary oversight of the defence sector is sound in all the countries in the region. However, when it comes to its implementation in practice, the situation is quite different. In the majority of these countries, the members of the parliamentary committes are reluctant to use the powers vested with them by statutes and parliamentary rules of procedure. Morever, MPs are highly dependant on political party leaders, which has an adverse effect to the parliamentary oversight of the defence sector. Therefore, if only the regulatory framework of the parliamentary oversight over the defence sector is analysed, in most countries it is fully in line with international standards and should be awarded the highest grades. However, if its implementation in practice was to be taken into account, the assessment would be quite different.

Constitutional and statutory provisions concerning parliamentary oversight of the defence and security secotor in **Montenegro** guarantee the main principles of civil control over the armed forces. So far, Montenegro is the only country in the region to have passed a separate statute governing the parliamentary oversight over the defence sector. Given that the regulatory framework concerning parliamentary oversight over the defence sector in Montenegro is fully in line with the standards, it can be graded with an A.

[80] *Ibid,* 119-120.

[81] Institute of Modern Politics (IMP) (http://www.modernpolitics.org) is an independent policy institute, a public benefit non-profit, non-partisan foundation. Members of IMP Board of Governors and experts involved in IMP's activities encompass a diverse range of backgrounds and professions including academics, policy-makers, former MPs, the media, NGOs, legal practitioners, political science researchers.

When it comes to the regulatory framework concerning parliamentary oversight of the defence sector in **Bosnia and Herzegovina**, one should take into account that, pursuant to the Dayton Agreement, defence is not an original competence of Bosnia and Herzegovina and hence the defence sector is not referred to in the Constitution. However, within the joint assembly of Bosnia and Herzegovina two Commissions charged with controlling the defence and security sector were formed. Current legal framework is comprehensive, but does not provide conditions for effective cooperation between the Defence and Security Commission and the executive. Furthermore, draft Law on parliamentary oversight of the defence sector has still not been adopted. Bearing all this in mind, the present regulatory framework governing the parliamentary oversight over the defence sector in Bosnia and Herzegovina can be graded with a B.

As far as the Republic of Serbia is concerned, the Parliamentary Rules of Procedure, adopted in 2010, regulate parliamentary oversight over the defence sector in detail and envisage the obligation of the Ministry of Defence to regularly report to the Defence and Interior Affairs Committee. Consequently, the regulatory framework governing parliamentary oversight over the defence sector in Serbia is fully in line with international standards and can be graded with an A.

The regulatory framework governing parliamentary oversight over the defence sector in the Republic of Croatia is also fully in line with international standards and can be graded with an A. It should be noted that the Republic of Croatia is the only country in the region that could be graded with an A when it comes to implementation, despite certain shortcomings.

The Former Yugoslav Republic of Macedonia has accomplished sound success in reforming the defence and security sector. The regulatory framework governing parliamentary oversight over the defence sector is fully in line with international standards and can also be graded with an A.

When it comes to Kosovo, the governing parliamentary oversight over the defence sector has been established only recently. The Constitution expressly envisages parliamentary oversight parliamentary control in this sector, whilst the statutes on the defence sector actors include principles guaranteeing democratic control of the defence and security sector. Generally, the governing parliamentary oversight over the defence and security sector is in line with international standards and can be graded with an A. Despite the harmonised regulatory framework, when it comes to its implementation in practice, in Kosovo it is almost inexistent.

In Bulgaria, the regulatory framework governing the parliamentary oversight over the defence sector is not comprehensive enough. Furthermore, the meetings of the Committee on Foreign Affairs and Defence and its subcommittees are closed to the public. Bearing all this in mind, the present regulatory framework governing the parliamentary oversight over the defence sector in Bulgaria is partially in line with international standards and can be graded with a grade B.

Marina Matic, LLM [1]

SPECIALISED ANTI-CORRUPTION AGENCIES

1. INTERNATIONAL STANDARDS

For many years the establishment of anti-corruption agencies has widely been considered to be one of the most important national initiatives necessary to effectively tackle corruption. This belief was largely popularised by the successful models of the Corrupt Practice Investigation Bureau of Singapore (established in 1952) and of Hong Kong's Independent Commission Against Corruption (established in 1974) both institutions were widely considered to be effective in reducing corruption in their countries.[2] During the 1990s and 2000s, specialised anti-corruption agencies were established in many countries. However, although they are often established with high levels of optimisms, experience has shown that the efficiency of anti-corruption agencies varies from country to country. The lessons learnt show that efficient anti-corruption agency are well equipped, headed by a strong manager with visible integrity and dedication, and that they are placed within the network of state and non-state actors working together on the implementation of anti-corruption measures. On the other side, weak anti-corruption agencies are characterised by weak political will, which is manifested in limited resources and staff capacities.

Anti-corruption agencies are specialised institutions established to fight the corruption by implementing preventive measures. In some countries, an institution such as Anti-Corruption Agency can be a central anti-corruption body with broad powers including formulation, coordination and oversight of the anti-corruption policies.[3]

In the European context, on of the first sources of "soft law" international standards, which emphasise the need for specialised institutions and persons in the field of detection, investigation, criminal persecution, and adjudication of criminal

[1] Research Assistant, Institute of Comparative Law, Belgrade.

[2] UNDP, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies,* 2011, p. 9.

[3] In other countries, these functions can be performed by several institutions, which have a mandate and competencies for the prevention of corruption, such as internal controls, commissions for the resolution of conflict of interest, and special sector-level agencies. The countries that have a complex system of anti-corruption policies and institutions establish special arrangements for horizontal and vertical interagency cooperation.

corruption cases was the **Twenty Guiding Principles for the Fight Against Corruption**, adopted by the Council of Europe in 1997. Immediately in 1998, most of the standards were incorporated in the **Council of Europe Criminal Law Convention on Corruption.**[4] Initially, anti-corruption instruments focused on the promotion of specialised law enforcement and criminal persecution authorities, with the aim of ensuring a more efficient enforcement of the anti-corruption legislation. The **UN Convention Against Corruption (UNCAC),** adopted in 2003, puts prevention in the centre of attention. As the first global agreement in the anti-corruption field, it required from the member states not only to provide the specialisation of the law enforcement authorities, but also to establish specialised preventive anti-corruption agencies.

Twenty Guiding Principles for the Fight Against Corruption[5]

Principle 3 - to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations;

Principle 7 - to promote the specialisation of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to perform their tasks;

Criminal Law Convention on Corruption[6]

Article 20 – Specialised Authorities

Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks.

[4] OECD, *Specialized Anticorruption Institutions – Review of Models*, OECD, 2008.

[5] Resolution (97) 24, adopted by Committee of Ministers of the Council of Europe, 6 November 1997.

[6] Adopted on 4 November 1998; effective from 1 July 2002.

United Nations Convention Against Corruption[7]

Article 6 - Preventive anti-corruption body or bodies

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

(a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;

(b) Increasing and disseminating knowledge about the prevention of corruption.

2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this Article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

Article 36 – Specialised authorities

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

Both the United Nations and the Council of Europe conventions specify the criteria for efficient anti-corruption agencies including independence, specialisation, adequate training, and resources. In practice, many countries face major challenges in trying to implement these broadly defined criteria in practice.

Independence primarily means that anti-corruption agencies need to be protected from undue political interferences. The key precondition to achieve that is a true political will for combating corruption. Such political will must be built into a comprehensive anti-corruption strategy. The degree of independence may vary in accordance with specific needs and conditions. Experience shows that the structural and operative independence is indispensable, including a clearly defined

[7] Adopted on 31 October 2003; effective from 14 December 2005..

legal framework and mandate granted to a specific authority, department or unit. Transparent procedures for the appointment and removal of directors, combined with adequate personnel policy and internal controls are indispensable elements for the prevention of undue interference with work. Independence should not amount to a lack of accountability. The exclusive powers granted to an independent anti-corruption agency should be accompanied by a full enforcement of the rule of law and respect of human rights, and the agency should submit regular performance reports to high-level executive and legislative body and enable public access to information on their work. No agency can fight corruption on its own. Intersectoral cooperation and cooperation with the civil sector and the industry are important factors for ensuring effective operations.

A number of factors determine the independence of an anti-corruption body:

• Legal basis

An anti-corruption institution should have a clear legal basis governing the following areas: mandate, institutional placement, appointment and removal of its director, internal structure, functions, jurisdiction, powers and responsibilities, budget, personnel-related matters (selection and recruitment of personnel, special provisions relating to immunities of the personnel if appropriate, etc.), relationships with other institutions (in particular with law enforcement and financial control bodies), accountability and reporting, etc. The legal basis should, whenever possible, be stipulated by law rather than by-laws or governmental decrees. Furthermore, internal operating, administrative, and reporting procedures and codes of conduct should be adopted in legal from by regulations and by-laws.

• Institutional placement

A separate permanent institutional structure – an agency, unit or a commission – has per se more visibility and more independence that a department or a unit established within the institutional structure of a selected ministry (interior, justice, finance, etc.). Similarly, a body placed within an institution that already enjoys a high level of autonomy from the executive (e.g. the Supreme Audit Institution, the Ombudsman, the Information Commissioner, etc.) could benefit from such existing autonomy.

• Appointment and removal of the director

The symbolic role played by the head of an anti-corruption institution should not be underestimated. In many ways the director represents a pillar of the national integrity system. The selection process for the head should be transparent and should facilitate the appointment of a person of integrity on the basis of consensus (e.g. the President

and the Parliament; appointment through a designated multidisciplinary selection committee on the proposal of the Government, or the President). Appointments by a single political figure (e.g. a Minister or the President) are not considered good practice. The director's tenure in office should also be protected by law against unfounded dismissals.

• Selection and recruitment of personnel

The selection and appointment of personnel should be based on an objective, transparent and merit-based system. In-depth background and security checks can be used in the recruitment procedures. Personnel should enjoy an appropriate level of job security in their positions. Salaries need to reflect the nature and specificities of work. Measures for protection from threats and duress on the law enforcement staff and their family members should be in place.

• Budget and fiscal autonomy

Adequate funding of a body is of crucial importance. While full financial independence cannot be achieved (at minimum the budget will be approved by the Parliament and in many cases prepared by the Government), sustainable funding needs to be secured and legal regulations should prevent unfettered discretion of the executive over the level of funding.

• Accountability and transparency

The "independence criteria" prescribed by different international instruments varies significantly and remains highly controversial. No state institution can be fully autonomous and due consideration should be given to the need to preserve accountability and transparency of the institutions. All anti-corruption bodies do eventually depend on those in power, and few, if any, have constitutional status equivalent to that of the judiciary or an ombudsman. Such a level of independence is not required, nor advocated by the international standards. The explanatory report to the Criminal Law Convention on Corruption rightfully states that "the independence of specialised authorities for the fight against corruption, should not be an absolute one." Their activities should be, as far as possible, integrated and coordinated with the work carried out by the police, the administration or the public prosecutors office. The level of independence required for these specialised services is the one that is necessary to perform properly their functions.

Accountability and independence reinforce each other. Practice in many countries attests that the support of the public, which in turn is conditioned by the integrity of the anti-corruption institution, is crucial in times when the body comes under politically motivated attacks.

Specialisation of anti-corruption agencies implies the availability of specialised staff with special competencies and a mandate to fight corruption. Specialisation may take different forms depending on the country and there is no single best model that is suitable for all. For example, the Council of Europe Criminal Law Convention on Corruption clarifies the standard for law enforcement agencies, which can be met by establishing a separate body or by designating an adequate number of specialised persons within existing institutions. A study of international trends shows that in the OECD countries specialisation is usually achieved at the level of existing agencies and regular law enforcement authorities. Developing and transition countries often establish separate anti-corruption agencies, due to a high level of corruption in the existing agencies. Furthermore, in these countries, the creation of separate specialised agencies is often the result of the pressure by donors and international organisations.

It is necessary to ensure **resources and authorisations** for specialised personnel so that their work is effective. The most important preconditions are personnel training and the budget of the institutions. Another important element necessary for the work of specialised anti-corruption agencies is the **division of competencies between** different institutions. Sometimes it is useful to limit the competence to high-level corruption cases. In addition to specialised skills and a clearly defined mandate, anti-corruption agencies should be granted adequate powers, such as investigative capacities and means for gathering evidence (for example they must be granted statutory powers to perform oversight, access financial information, monitor financial transactions, freeze bank accounts, protect witnesses, etc). The power to carry out all the above functions should be subject to adequate checks. The most effective way to use the resources is the team work that includes investigators, prosecutors, anti-corruption agencies, and other specialists (e.g. financial specialists, auditors, IT specialists).

An important prerogative of anti-corruption agencies, which is recognised in the form of an international standard, is the right to **initiate law proposals**. This power gives anti-corruption agencies an important opportunity to influence directly the government's anti-corruption policy.

Anti-corruption agencies have an important role in **coordination and oversight of the implementation of anti-corruption activities.** They usually have the obligation to ensure coordination of the preventive anti-corruption activities of other institutions and provide information on the overall performance of the state on the prevention of corruption and identification of the bottlenecks and priorities. The relations between anti-corruption agencies and the judiciary system and the public prosecutors office are also of great importance. The efforts need to be coordinated and complementary, particularly in terms of information and evidence gathering.

Anti-corruption agencies should have a power **to investigate corruption allegations *ex officio*** and to be encouraged to investigate corruption cases. The work

of anti-corruption agencies needs to be proactive and promote good governance and anti-corruption standards.

Considering that anti-corruption agencies have exclusively preventive functions and cannot sanction corruption cases, their reports are forwarded to other institutions, and particularly the parliament, to undertake further activities. Moreover, it is important that the public has an opportunity to learn about and become aware of the results achieved by the anti-corruption agency. That could put pressure on the government to support the implementation of the anti-corruption agency's findings and recommendations.

With respect to the **capacities**, anti-corruption agencies should be provided with adequate material resources, specialised and trained personnel required for efficient performance of their functions. Training and capacity building are crucial for strengthening anti-corruption agencies.

In the countries with complex anti-corruption institutional structure, it is important to ensure the **cooperation between the key institutions**, in order to ensure efficient implementation of measures. Mechanisms need to be established to ensure coordination between the public and nongovernmental organisations involved in the anti-corruption policy development, implementation and implementation oversight.

The sources of international standards, although different in scope, contents and objectives, define a clear international obligation for the countries to ensure institutional specialisation in the area of corruption. It is worth noting that the obligations on institutional specialisation under the Council of Europe Criminal Law Convention on Corruption and the UNCAC are mandatory. The UNCAC further requires that countries ensure the specialisation in two areas, prevention (including education and public awareness) and law enforcement. States are therefore obliged to secure the existence of specialised bodies in charge of prevention of corruption and specialised bodies or persons in charge of combating corruption through law enforcement agencies. There is, however, a notable difference between the two areas. According to the UNCAC prevention needs to be addressed at the institutional level, by creation or dedication of a specialised body or bodies with anti-corruption prevention and coordination functions. Criteria on specialisation in the area of law enforcement, according to the UNCAC and the Council of Europe Criminal Law Convention on Corruption, can be fulfilled either by creation of a specialised body or by designation of an adequate number of specialised persons within existing institutions.

The international standards also set out basic benchmarks for specialisation. The main benchmarks are the following: independence and autonomy, specialised and trained staff, adequate resources and powers. International standards neither offer a blueprint for setting up and administering a specialised anti-corruption institution, nor advocate a single best model or a universal type of an anti-corruption agency. Provisions of international law relating to the institutional framework for prevention and suppression of corruption are considerably less developed and precise than, for

instance, provisions regulating the elements of corruption offences (such as active and passive bribery or offences concerning trading in influence and abuse of official position). However, the aforementioned conventions define features and set important benchmarks according to which anti-corruption institutions should be established. Furthermore, international monitoring mechanisms have developed a valuable body of assessments and recommendations, which provide a useful set of best international practice in this area.[8]

2. COMPARATIVE LEGAL ANALYSIS OF SPECIALISED ANTI-CORRUPTION AGENCIES IN THE REGION

Specialised anti-corruption agencies in the Western Balkan countries predominantly have a preventive role. This model comprises institutions with one or more corruption prevention functions, such as investigation and analysis, strategic plan development and coordination, training and advisory activity for other institutions relating to the threat of corruption, proposal of preventive measures, etc. of this type may have special authorisations such as control of the public officers' assets declarations or deciding in the conflict of interest cases.

2.1. Legal Regulation

Most Western Balkan countries (Serbia, Bosnia and Herzegovina, Montenegro, and Kosovo in accordance with the UN Security Council Resolution No. 1244) have specialised anti-corruption agencies. The establishment of specialised anti-corruption agencies has been prompted by the aspiration of these countries to become EU members and fulfil the EU recommendations and recommendations from GRECO evaluation reports.

Croatia has a complex institutional framework for prevention of corruption, which exist within the executive, legislature or judiciary, and are responsible for specific issues relating to the anti-corruption action (Corruption Prevention Sector within the Ministry of Justice, National Police Office for the Prevention of Corruption and Organised Crime, Office for the Prevention of Corruption and Organised Crime

[8] GRECO has in the first evaluation round between 2000 and 2002 focused on compliance with Guiding principles 3, 6 and 7. A review of the evaluations and recommendations is presented in E. Albin, K. Michael, *Institutions against Corruption: A Comparative Study of the National Anti-corruption Strategies reflected by GRECO's First Evaluation Round,* 2004. Public reports of the evaluation for all member states can be accessed at www.greco.coe.int

(USKOK), "USKOK courts", and National Council for the Corruption Prevention Strategy Implementation Monitoring). In the EU and IAACA (International Association of Anti-corruption Authorities) reports, Office for the Prevention of Corruption and Organised Crime (USKOK) is treated as a special anti-corruption agency. Furthermore, OECD distinguishes between anti-corruption bodies which have preventive function, bodies which are in charge of legislation enforcement and bodies which are multi-functional. Croatian USKOK belongs to the group of bodies which are primarily in charge of legislation enforcement.

USKOK was established in 2001,[9] as a special body within the Office of State Prosecutor with the authority to lead investigations in criminal proceedings in cases with elements of corruption and organised crime.[10] Criminal offences within the USKOK's authority are enlisted in the primary legislation. USKOK has intelligence, investigative, prosecutorial and preventive authorities and is in charge of international cooperation and exchange of information in complex investigations. Formal structure and authorities of USKOK are established in a manner which enables this institution to represent a key state body in charge of prevention and suppression of corruption. However, the key focus of USKOK activities is placed on investigations and criminal prosecution, while its authorities in the area of corruption prevention are not fully developed.[11]

The analysis of the organisational structure and competencies of USKOK shows that this is a separate state prosecutor's office specialised for prosecution of corruption and organised crime, while specialised anti-corruption bodies in the countries in the region have primarily a preventive function. Given the outlined differences, the institution of USKOK, which did achieve noteworthy results in the fight against corruption in Croatia, shall not be the subject of our further analysis, as it is rather difficult to compare this model to anti-corruption prevention institutions in other countries in the region.

Only recently (in 2011), in order to implement the European Commission recommendations from the Co-operation and Verification Mechanism (CVM),[12] Bulgaria established Borkor – the Centre for the Prevention and Suppression of Corruption and Organised Crime to gather and analyse information from all the

[9] Law on the Office on Suppression of Corruption and Organised Crime entered into effect on 19 October 2001. New Law was adopted in 2009 and published in the *Official Gazette* No. br. 76/09, 116/10, 145/10, 57/11, 136/12.

[10] Serbia also has a Prosecutors Office for Organized Crime. The authority of this Prosecutors office is governed by the Law on Organisation and Authority of State Bodies in Suppression of Organised Crime and especially Serious Criminal Offences, *Official Gazette RS* No. 42/02, 27/03, 39/03, 60/03, 67/03, 29/04, 58/04, 45/05, 61/05, 72/09).

[11] OECD, *Specialized Anti-Corruption Institutions – Review of models*, OECD, 2008, p. 92.

[12] Commission Decision 2006/929/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime OJ L 354, 14.12.2006, p. 58.

sectors and identify corruption threats. However, notwithstanding the human capital and financial investments (140 professionals and 4 million euros), Borkor did not achieve the expected results in practice, and it was an *ad hoc* attempt to address the corruption issue in the country.

The legal basis regulating the establishment, legal position, competencies, and organization of specialized anti-corruption agencies in Serbia, Bosnia and Herzegovina, Macedonia, and Kosovo (in accordance with the UN Security Council Resolution No. 1244) is provided in separate legislation, while Montenegro and Bulgaria regulate the operations of these agencies under Government's bylaws. Thus, Bosnia and Herzegovina established the Agency for the Prevention of Corruption and Coordination of Fight Against Corruption in 2010 pursuant to the 2009 Law.[13] As in Bulgaria, in Bosnia and Herzegovina, the establishment and operations of the Agency presented a request of the European Union (visa liberalisation requirements). The State Corruption Prevention Commission in Macedonia was established in accordance with the Law on the Prevention of Corruption in 2002.[14] The Kosovo Anti-Corruption Agency (in accordance with the UN Security Council Resolution No. 1244) was established in accordance with the 2006 Law as a result of the request by the UNMIK administration.[15] Serbia's specialised anti-corruption agency is the Anti-Corruption Agency, which was established in accordance with the 2008 Agency Law, and which became operational on 1 January 2010.[16] In Montenegro also the anti-corruption activities began after the incentives by the international community, i.e. after signing of the Regional Stability Pact Anti-Corruption Initiative (SPAI) Agreement and Action Plan.[17] In January 2001, the Montenegrin Government adopted the Decree on Establishment of the Agency for Anti-Corruption Initiative (Uredba o osnivanju Agencije za antikorupcijsku inicijativu).[18]

2.2. Independence

While in their founding acts all the anti-corruption institutions in the Western Balkans are declared independent, as it can be seen from the international standards, the degree of an institution's independence depends on its legal basis, i.e. type of the

[13] Anti-Corruption Agency and Coordination of Fight Against Corruption Law (Zakon o agenciji za prevenciju korupcije i koordinaciju borbe protiv korupcije), *Official Gazette* BiH, No. 103/09.

[14] *Official Gazette of the Republic of Macedonia*, No. 28/2002.

[15] Law on Anti-Corruption Agency, 2004/34. New Law was adopted in 2009, No. 2009/03-L-159.

[16] *Official Gazette of the Republic of Serbia*, No. 97/2008, 53/2010 and 66/2011.

[17] In October 2007 the SPAI had changed its name into Regional Anti Corruption Initiative (RAI). Its member states are Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Moldavia, Montenegro, Romania and Serbia.

[18] *Official Gazette of the Republic of Montenegro*, No. 2/01.

act that governs it (a law or a bylaw), the institutional placement (a separate agency or a unit within an existing agency), appointment and removal of directors, financial and budgetary independence, staff recruitment procedures, and administrative transparency. Thus, in accordance with the legal text, the Bosnia and Herzegovina Agency is an independent and autonomous administrative organisation, reporting to the Parliamentary Assembly of Bosnia and Herzegovina on its operations.[19] Similar provision is contained in the Macedonian Law on the Prevention of Corruption,[20] specifying that the State Commission is autonomous and independent in the performance of its statutory functions. The Serbian Law on Anti-Corruption Agency specifies that the Agency is an autonomous and independent state authority, reporting to the National Assembly on its operations.[21] The Kosovo Constitution (in accordance with the UN Security Council Resolution No. 1244) contains a provision relating to independent agencies,[22] and in accordance with the Law, the Anti-Corruption Agency is defined as an autonomous and specialised agency responsible for the implementation of the state policy relating to the prevention of and action against corruption.[23]

The Montenegrin Administration for Anti-Corruption Initiative is not an independent agency. In accordance with the Public Administration Law (Zakon o državnoj upravi), the Administration for Anti-Corruption Initiative does not have its own staffing table , and its organisational structure and staffing numbers are regulated under the act adopted by the Ministry of Justice, as the Administration is an integral part of the Ministry.[24]

In Bulgaria, the Centre for the Prevention of Corruption and Fight Against Corruption and Organised Crime is regulated under a Government's Rulebook, i.e. a bylaw, which creates room for instability. The Rulebook specifies that the Centre is a specialised administrative structure for the implementation of the state policy relating to the prevention of and action against corruption and organised crime.

---

[19] Article 6 of the Law on Agency for the Prevention of Corruption and Coordination of the Fight Against Corruption (Zakon o Agenciji za prevenciju korupcije i koordinaciju borbe protiv korupcije).

[20] Article 47 of the RM Law on the Prevention of Corruption.

[21] Article 3 of the Law on Anti-Corruption Agency (Zakon o Agenciji za borbu protiv korupcije).

[22] Constitution, Article 142.

[23] Article 3 of the Law on Anti-Corruption Agency.

[24] Article 4 of the Decree on the Public Administration Organization and Operating Procedures (Uredba o organizaciji i načinu rada državne uprave), *Official Gazette of the Republic of Montenegro*, No. 5/12.

2.2.1. Organisational Autonomy

In accordance with the international standards, the process for appointment of directors should be transparent and should ensure the appointment of persons with integrity, based on the consensus reached by a multidisciplinary appointment commission. Appointment of directors by a political figure is not good practice; however, this is precisely the case in in Bulgaria, whilst in Montenegro the directors are selected through a public competition, but appointed and removed from office by the Minister, subject to a prior Government's approval.

Although in Bosnia and Herzegovina, directors are appointed by the Bosnia and Herzegovina Parliamentary Assembly, at the motion of the special Commission for Oversight of Agency Appointments and Operations, through a public competition, in accordance with the Law on Ministerial Appointments, Appointments to Council of Ministers and Other Bosnia and Herzegovina Appointments (Zakon o ministarskim imenovanjima, imenovanjima Vijeća ministara i drugim imenovanjima Bosne i Hercegovine), with the background and security checks conducted at the time of appointment of members to the Bosnia and Herzegovina Council of Ministers, it has been proven that the composition of the Commission is controversial and that it allows for the politicisation of the director appointment process.[25] The term of office of the Agency director is five years, which means that it is not in correlation to the political election cycle. Furthermore, upon the expiry of his term of office, a director is eligible for reappointment only for one more time. The procedure for appointment of the first Director and his Deputies has been assessed as politicised.[26] With respect to the procedure for removal from office, it is initiated by the Commission for Oversight of Agency Appointments and Operations, in the event of a confirmed indictment against the director or in the even he/she violates the provisions on the incompatibility of functions or the Agency's Code of Conduct. Although the provisions relating to appointment of directors guarantee, at first glance, the independence of his/her function, the professional public has raised the issue of the composition of the Commission for Oversight of Agency Appointments and Operations. The Law prescribes that the Commission comprises nine members – three representatives of the Bosnia and Herzegovina Parliamentary Assembly House of Representative and the House of Peoples each, two representatives of the academic community, and one member from the nongovernmental sector. It is exactly this Article of the Law that was controversial, as the original legal text stipulated a seven-member Commission - three representatives of the Bosnia and Herzegovina Parliamentary Assembly House of Representative, two members from the academic community, one representative of the nongovernmental sector, and one representative among the distinguished citizens. After an intervention by the delegates/representatives, additional three

[25] Article 13 of the Agency Law.

[26] *http://www.bh-news.com/ba/vijest/13984/skandal_uprava_agencije_za_prevenciju_korupcije_imenovana_po_politichkoj_liniji.html.*

representatives of the House of Peoples were added to the Commission, increasing the number of members from seven to nine, and the initially envisaged representative of the "distinguished citizens" was deleted. The above disagreements resulted in several months of delay in the adoption of the law proposal. The management of the Agency was appointed 19 months after the adoption of the Law. The bylaws relating to the Agency's operations were adopted by the mid 2012, with more than two years of delay.

Contrary to the situation in Bosnia and Herzegovina, Macedonia established the State Commission, i.e. appointed its members, six months after the adoption of the Law in 2002. The Macedonian State Commission for the Prevention of Corruption is a collegial body, comprised of seven members. The administrative, professional, and technical support to the Commission is now provided by the Secretariat, while previously it was provided by the Ministry of Justice. The members of the Commission are appointed by the National Assembly, at the motion of the Parliamentary Committee for Elections and Appointments of Senior Officials, for a period of four years, and the 2010 amendments introduced a possibility of reappointment upon the expiry of that term. According to the Law on Prevention of Corruption, parliament announces the competition for appointment of SCPC members in the *Official Gazette of the Republic of Macedonia* as well as in the daily newspapers. The candidates must *i)* have Macedonian citizenship; *ii)* be permanent residents in Macedonia; *iii)* have a university degree either in law or economics; *iv)* be respected in his/her profession; and *v)* must have a minimum of eight years of work experience. The Commission for Election and Appointment in parliament drafts the list of candidates from all applicants who fulfil the legal requirements and submits the list to the plenary session of parliament. The principle of equitable and fair representation of minorities must be respected when electing the State Commission members.The members of the Commission appoint the Chairman amongst themselves, for a period of one year. An important innovation, which came into force in 2010, was that Commission members were employed on full-time basis, which was previously not the case. The State Commission reports to the Assembly on their operations, and it is obligated also to report to the public on the implemented measures and the results of their activities through regular annual reports, and whenever it is necessary to inform the public. The State Commission submits their annual performance report to the Assembly, the President of the Republic, the Government, and the national media.

The Serbian Agency bodies are the Board and the Director. The members of the Board are appointed by the National Assembly, and the director is elected through a public competition announced by the Board. Several institutions are involved in the procedure for appointment of the Board members, which should guarantee the independence of the management. Nine Board members are appointed by the National Assembly, at the motion of the National Assembly Administrative Committee, President of the Republic, Government, Supreme Cassation Court, State Audit Institution, the Ombudsman and the Commissioner for Information of Public

Importance (in a joint agreement), Socio-Economic Council, Serbian Bar Association and Serbian journalists association in a joint agreement. Although the procedure for proposal and appointment of the Board members is very complex, the independence of the Board members is impaired by the fact that the right to propose is given to political bodies, such as National Assembly Administrative Committee, President of the Republic, Government, Socio-Economic Council, while independent bodies such as the Ombudsman and the Commissioner for Information of Public Importance have a right to propose only one candidate in a joint agreement. Furthermore, the Board members are appointed by the National Assembly, creating another possibility for the politicisation of the Agency. In addition, the term of office of the Board members is four years, which means that it coincides with the parliamentary election cycle, which is not good practice either. The Board members can be reappointed for maximum two times. On the positive side, the Agency Law stipulates explicitly the criteria for appointment of Director and the Board members, and the rules and grounds for their removal from office are clearly specified. Thus, Article 8 of the Agency Law stipulates that a Board member must satisfy the general requirements for service in state authorities, have a university degree, minimum nine years of working experience, and not be convicted for a criminal offence that makes him/her unsuitable to be a Board member. A Board member is not allowed to be a member of a political party, i.e. political entity. A Board member can be removed from office in the following events only: unconscientious performance of his/her function as a Board member; if he/she takes membership in a political party, i.e. political entity; in case he/she impairs the Agency's reputation or political impartiality; if he/she is convicted for a criminal offence that makes him/her unsuitable to be a member of the Board, or if it is found that he/she broke the law. The Board members also cannot have two concurrent appointments. However, it is interesting to note that, at the beginning of November 2012, the Agency's Board adopted a decision on the removal the Director, as the Board found that she impaired the reputation of the Agency. The Director rejected all allegations made by the Board, but the Board decided unanimously that she should be removed from office. The question has been raised weather it is necessary to specify more clearly the criteria and the procedure for removal of Agency directors.

In accordance with the Law on Kosovo Anti-Corruption Agency (in accordance with the UN Security Council Resolution No. 1244), the Agency is headed by a Director. The appointment procedure is initiated by the Legislative and Judiciary Committee, and the Kosovo Parliament, in accordance with its Rules of Procedure, appoints the Agency Director through a public competition. Candidates for the post of Agency Director must have a university degree, five years of working experience, a clean criminal record, and a high level of integrity. The Committee proposes the two best candidates to the Parliament, which votes on the candidates, and simple majority vote is required for the appointment. Although the criteria for appointment of Agency Director are specified in the Law, only political bodies decide on the appointment, and the term of office is five years, with a possibility of one reappointment. The Law

stipulates very extensive competencies of the Anti-Corruption Council[27] relating to the control of the Agency's operations: it reviews the Agency's reports; oversees and periodically reviews the performance of the Agency Director (Agency Director is under the obligation to report to the Council every six months on the Agency's findings concerning the detection of corruption, conflict of interest, completed investigations/controls and on other issues from the Agency's competence) ; after the submission of the Agency's report, the Council may request a special report on the cases suspended or rejected by the Agency; the report should include the explanation on the reasons for the closure of the case, without indicating the identity of or any personal information about persons that were subject to the investigation; it controls and oversees the Agency official's assets declarations, as well as their conflict of interest.. With respect to the grounds for termination of Agency Director's office Law specifies the following: if he/she performs a function that is incompetent with that of Agency Director, and if he/she fails to fulfil the obligations stipulated under the Agency Law. In the latter case, Director is removed from office by the Assembly, but the Law does not specify the procedure or the criteria for that.

In accordance with the Montenegrin Public Administration Law, the procedure for appointment of Director (Head of Administrative Authority) of the Administration for Anti-Corruption Initiative includes a public competition, but the Director is appointed and removed from office by the Minister of Justice, subject to a prior Government's approval. The Head of Administrative Authority reports on his/her operations and on the operations of the authority he/she is heading to the General Director and the line Minister.[28] The Law stipulates that the procedure for announcement of public competitions and removal from and termination of office is governed also by the Law on Civil Servants and Employees (Zakon o državnim službenicima i namještenicima). Other staff members in the Administration, in the managerial positions, are considered civil servants and are recruited in accordance with the same procedure that applies to civil servants. The final decision about their selection from the short-listed candidates is adopted by the Minister of Justice.[29] In accordance with the Decree on Public Administration Organisation and Operating Procedures (Uredba o organizaciji i načinu rada državne uprave), oversight of the legality and efficiency of the Administration's operations and the legality of the Administration's is performed by the Ministry of Justice and Minority Rights.

The Bulgarian Centre for the Prevention and Fight Against Corruption is a legal entity, whose management bodies include the Advisory Board and the Director. The Advisory Board comprises representatives of the legislature, the executive and

[27] The Council comprises nine members: three are appointed by the Assembly, the office of the President, the Prime Minister, the Supreme Court, the Main Prosecutor's Office, local self-government and the civil sector appoint one member each.

[28] Law on State Administration (Zakon o drzavnoj upravi) *Official Gazette of the Republic of Montenegro*, No 42/11, Article 44, Paras. 2 and 6.

[29] Law on State Administration, Articles 44, 48, 49.

the judiciary. The Chairman of the Advisory Board is the Deputy Prime Minister and the Minister of the Interior. The Board has an important role in the work of the Centre, considering that, in accordance with the Rulebook, it approves the strategic operating guidelines for the Centre, gives opinions on new projects, adopts the outputs and outcomes of the on-going projects, and adopts the Centre's annual performance report and Rules of Procedure. The members of the Advisory Board are appointed by the Prime Minister, at the motion by the Deputy Prime Minister and the Minister of the Interior, indicating a high degree of politicisation in the appointment of the Board members. The existing Advisory Board comprises 26 members, 16 of which are Ministers, in addition to the Deputy Speaker of Parliament, Deputy Prime Minister, the Chief Inspector, etc. The Centre is run by a Director, who is appointed by the Council of Ministers (the Government) at the Deputy Prime Minister's motion. The requirements for Director are specified by the Rulebook, but as it does not require a public competition, there is a risk of considerable influence and role of the executive in the Centre's operations.

2.2.2. Financial Autonomy

In accordance with the international standards, adequate agency financing is of crucial importance, and sustainable financing must be ensured and legal regulations should prevent unconditional discretionary power of the executive over the financing of the anti-corruption agency. As it can be seen from the above examples, the Ministry of Finance can suspend the operations of the agency if it fails to allocate the funds required for its operations.

By mid 2012, the Bosnia and Herzegovina Agency received the required budget allocation, but it was one third lower than the estimated requirement. The Ministry of Finance approved hiring of 15 persons by the end of 2012 (three managers, three employees, and nine civil servants), while the job establishment envisaged 29 staff. The Agency estimated that the successful performance of its functions required 45 staff.[30]

The Macedonian State Commission for the Prevention of Corruption is financed form the state budget. Each year, during the budget formulation process, the State Commission prepares and submits their budget proposal for the following year, and the final approval is given by the Ministry of Finance, before the budget proposal is submitted to the Assembly for voting. The Law on the Prevention of Corruption itself does not contain provisions that would guarantee the financial independence of the Commission. By mid 2010, in the course of the budget revision, the budget of the

[30] *http://www.klix.ba/vijesti/bih/lisak-agencija-za-prevenciju-korupcije-je-blokirana-u-radu/120629048*. *Cf.* TI Bosna i Hercegovina, "Monitoring ispunjenosti međunarodnih i evropskih obaveza Bosne i Hercegovine u oblasti borbe protiv korupcije", June 2012.

Commission was cut, which meant that there was not enough funds to finance salaries until the end of the year, and only after an intervention and pressures by the public, the Commission was approved adequate funding until the end of the year.

After the initial problems in terms of human and financial resources, during 2011 and 2012, the Serbian Anti-Corruption Agency strengthened its organizational and human capacities. The Law stipulates that the funds required for the operations of the Agency are provided in the Serbian state budget, and that the Agency proposes its budget. Furthermore, the Law stipulates that the Agency spends its budget independently. In accordance with the Agency Law, the overall budget of the Anti-Corruption Agency is prepared by the Agency, and it is approved by the Assembly. The Law contains an explicit provision in Article 4 stating that the Agency spends its budget independently.

In accordance with the Law on Kosovo Anti-Corruption Agency, the Agency proposes its own budget, and the Parliament approves it. Furthermore, Article 4 of the Law stipulates also the independence of the Agency in spending of its budget. The Agency's 2011 Annual Report of the Agency shows that the Agency spends its budget independently.

The Montenegrin Administration for Anti-Corruption Initiative does not have a separate budget, and the allocation for the Administration is a part of the overall budget of the Ministry of Justice. Similar situation is that of the Bulgarian Centre, which is defined as an indirect budget spending unit (Article 2 of the Rulebook), while Article 4 of the Rulebook stipulates that the Centre can be financed also from the national and international programme funds, under contracts and agreements, from grants, donations, and from other sources.

2.3. Powers

In accordance with the international standards, specialized anti-corruption agencies should have clearly specified powers, which can ensure the prevention of corruption (conducting procedures on *ex officio* basis, the right to initiate law proposals and amendments, coordination of the anti-corruption policy and activities, oversight of the implementation of strategy papers). In accordance with legal regulations, the anti-corruption agencies in Bosnia and Herzegovina, Macedonia, Serbia, Kosovo, and Montenegro have an important role in the anti-corruption strategy formulation and monitoring of its implementation. With respect to the power to propose laws, only the Serbian Agency has the legislative initiative competencies, while the other agencies have no limitations to comment draft laws, and draw attention to a potential risk of corruption in specific legal provisions.

The Bosnia and Herzegovina Agency has a preventive, education and coordination role.[31] In addition to that, the Agency should initiate the corruption prevention policy and monitor its implementation, as well as the statistical trends in the area of corruption. The main shortcoming that has been identified is that the Agency lacks inspection powers (in order for the Agency to be able to verify officials' assets' declarations or to act upon indications of corruptive behaviour). The Law does not stipulate the legislative initiative either, but that does not prevent the management of the Agency to comment draft laws. Considering that the Agency became operational only recently, it is still too early to assess to what extent it uses its powers stipulated by the Law.

The Macedonian State Commission for the Prevention of Corruption is responsible for the implementation of the Law on the Prevention of Corruption and the Law on the Prevention of Conflict of Interest. The State Commission is also responsible to oversee lobbying in accordance with the Law on Lobbying. The Commission's competencies include also the development and adoption of the National Programme for the Prevention and Suppression of Corruption, and in accordance with the Law, it is obligated to adopt Annual Implementation Programme and Plan for the National Programme. The State Commission handles citizens' applications and, provided that the conditions are satisfied, it may initiate criminal proceedings before the public prosecutor.

The competencies of the Serbian Anti-Corruption Agency are very comprehensive, including corruption prevention, anti-corruption action implementation, coordination and oversight, and anti-corruption knowledge development and dissemination. In addition, the Agency is responsible for the maintenance of the public officials' assets registry, deciding on conflict of interest, and financing of political activities. The Agency has the legislative initiative to draft laws and the authorisation to act *ex officio.* Although the right to freely publish their reports is not legally regulated, the Agency publishes their reports on their web site.

The competencies of the Anti-Corruption Agency cover a wide range of issues relating to prevention of and action against corruption in Kosovo: strategy oversight and implementation, public officials' assets and gifts declarations control, conflict of interest, initiating preliminary investigations in corruption cases and, if elements of criminal offence are identified, forwarding the information to the prosecutor, interagency and international cooperation. The Law regulates in detail preliminary investigations conducted by the Agency *ex officio,* as well as the obligation of the public and private sector entities to provide access to information and documentation for the Agency representatives. With respect to the legislative initiative, the Law authorises the Agency to cooperate with the competent authorities in the development, implementation and alignment of legislation, but it does not authorises it to propose laws.

[31] Article 5 of the Law on Agency for Prevention of Corruption and Coordination of Fight Against Corruption of Bosnia and Herzegovina.

In accordance with the Decree on Public Administration Organisation and Operating Procedures and Strategic Document adopted by the Government, the Montenegrin Administration for Anti-Corruption Initiative is responsible for: raising public awareness about the corruption problems and conducting surveys on the corruption volume, manifestation forms, causes, and developing mechanisms; oversight of the implementation of the GRECO recommendations; coordination of the implementation of the UN Convention Against Corruption; cooperation with the competent authorities in the formulation and implementation of legislative and programme documents relating to the prevention of corruption, and with the nongovernmental and private sector in preventing corruption; cooperation with the state authorities in the proceedings upon the corruption cases reported to the Administration by the citizens; the activities on the implementation of the Law on Lobbying, and the preparation of the Guide for Integrity Plans in State Authorities. The team of five staff members in the Administration comprise a Secretariat for the Implementation of Strategy on Fighting Corruption and Organised Crime (Strategija za borbu protiv korupcije i organizovanog kriminala).

The Centre for the Prevention and Fight Against Corruption analyses, plans and develops measures and comprehensive solutions for the prevention of corruption and corruption cases and organised crime in the part in which these two criminal offences overlap. The Centre also has a coordination role and ensures improved cooperation and coordination between the state authorities, civil sector, the media and commercial entities. However, the activities of the Centre did not ensure the desired results, and were assessed negatively by both the Bulgarian civil sector and the EU.

2.4. Capacities

With respect to capacities, anti-corruption agencies should be provided adequate material resources, and specialised and trained staff required for the efficient performance of their functions. While the capacities of the anti-corruption agencies in the region are at different levels, most agencies lack staff or unfilled vacancies due to lack of financial resources (with the exception of Bulgaria).

In Bosnia and Herzegovina, the Agency did not get its job establishment act until mid 2012, and the Ministry of Finance approved hiring of only 15 staff, while the job establishment act envisaged 29 positions.

Although the Macedonian Commission exists from 2002, the Secretariat of the Commission employs only 16 civil servants, as the Commission relied for a long time on the support of the Ministry of Justice. In accordance with the organisation and job establishment act, a total of 41 positions were envisaged, which means that the Secretariat of the Commission lacks capacities to implement all its statutory obligations.

In September 2011, the Anti-Corruption Agency got new and adequate offices with the support of the Serbian Government. Strengthening the human and financial resources has increased the visibility of the Agency in the public, which is a positive development.

The Kosovo Anti-Corruption Agency employs 35 staff, of which 12 is responsible for preliminary investigations. It is estimated that the number is adequate for the Agency's operations, notwithstanding a significant increase of the volume of work in 2012. The staff in the Agency participates regularly in the trainings organised by the police, the Pubic Administration Institute, and various donors and international organisations.

The Montenegrin Administration is currently 16 staff strong. In addition to its placement, one of the main challenges for the Administration is its modest capacities. In accordance with the SIGMA report for 2011 and 2012[32] this lack of capacities is reflected primarily in the lack of competence of the Administration employees, as the Administration failed to impose itself (become recognised) as the source of expertise and a centre of excellence in the field of combat against corruption, as it did not succeed in strengthening its knowledge and capacities, notwithstanding considerable financial and technical assistance.

In 2011 Bulgaria allocated 4 million Euros for the operations of the Centre and hiring of 40 professionals in the central unit, but the Centre still has to achieve the desired results in the action against corruption. Bulgarian civil society organisations criticise the establishment of the new anti-corruption agency, which exists in parallel with the previously established institutions, and which is under complete control of the executive.

2.5. Inter-institutional Cooperation and Coordination

Inter-institutional cooperation is an important prerequisite for the operation of independent anti-corruption bodies and also for achieving results in combating corruption. Given that regulations envisage that independent anti-corruptions bodies must receive the majority of information from other state institutions, and given they cannot coordinate corruption prevention actions unless they are recognised by other participants, establishment of efficient inter-institutional cooperation is a prerequisite for successful work of the independent anti-corruption bodies. With respect to inter-institutional cooperation and coordination, it is still too early for any conclusions, as the Bosnia and Herzegovina Agency became operational only recently and it remains

[32] SIGMA, *Assessment Montenegro 2011*, p. 16, *http://www.oecd.org/site/sigma/publicationsdocuments/48970665.pdf;*
SIGMA, *Assessment Montenegro 2012*, March 2012, p. 17, *http://www.oecd.org/site/sigma/publicationsdocuments/Montenegro_Assessment_11Oct12.pdf.*

to be seen how it will cooperate with other state institutions, particularly given the complex state structure in Bosnia and Herzegovina. The BORKOR in Bulgaria is also a new institution and the results of its operation and cooperation with other institutions are yet to be analysed. As mentioned before, the Montenegrin Administration did not improve its capacities and expertise, which SIGMA recognised as the reason for their failure to position themselves with other institutions, which is the case also in Bulgaria. The Serbian Agency exists for three years and that is relatively short period of time for a completely new body to impose itself as the coordinator of anti-corruption initiatives and activities to the institutions that have existed for decades (Ministry of Justice, police, prosecutor's office, and the judiciary). Notwithstanding such aggravating circumstances, the Agency succeeded in imposing itself as the central institution for the preparation of integrity plans, based on the Memorandum of Cooperation between the Agency and the Serbian Government, as well as for the public officials' assets declarations, thanks to the agreements signed between the Agency and the State Geodetic Authority, Business Registers Agency, banks, etc.

In addition, the fact that independent anti-corruption bodies still do not live up to their tasks affects their role in cross-border and international cooperation. The international community, professional public, the media, and civil society are unanimous that the performance of the anti-corruption agencies in the region is not at the expected level, and that these institutions did not succeed in imposing themselves as the central, umbrella institutions for the coordination of the anti-corruption action and formulation of the anti-corruption strategies and policy, regardless of the differences in terms of their autonomy and independence guarantees.

2.6. Main Problems Relating to the Implementation of Regulations

With respect to the problems relating to the implementation of regulations, in all of the countries in the region, with the exception of Bulgaria, independent anti-corruption agencies do not have adequate financial or human capacities to be able to perform all the duties and responsibilities specified by the legal framework and strategy papers. The economic conditions and the situtaion in the entire region create a "vicious circle" - for, the budget funds destined for reforms are limited. High unemployment rate and low GDP leave little room for the governments in the region to manoeuvre. The salaries in the public sector, however low they may be, constitute a considerable share of the budget, whilst the IMF requests from governments to cut down on employment in the public sectors, which is often an obstacle for employing new and competent professionals in the newly-established institutions, such as the independent anti-corruption bodies. The problems in implementation of regulations are also affected by shortcomings in the process of passing of laws and strategic documents. All the countries in the region adopt regulations without having conducted

cost assessments, economic impact analysis or investigated the possibilities for them to be implemented in practice, and often the link between the adoption of regulations/ strategies and budget planning is missing. In Bosnia and Herzegovina and Serbia, there were considerable delays in the implementation of the law and establishment of the anti-corruption agencies. In Bosnia and Herzegovina, the statute was adopted in 2009, whilst the director and two deputies were appointed as late as July 2001, and the Agency is not yet fully operational[33]; in practice, this prevented the monitoring of the implementation of the Action Plan and the Anti-Corruption Strategy, as well as the control of financing of political parties. In Serbia, the Law on the Anti-Corruption Agency was adopted in 2008, and the Agency became operational in January 2010. Within a relatively short time the Agency was able to employ over 70 people and provide adequate facilities (as early as 2011), and to set up the registers of officials and their assets. Despite this, a considerable share of competences the Agency is vested with (control of officials' assets, controlling the financing of political parties, the conflict in interest, in particular) mandate an increase in the number of its employees, so that the Agency could live up to the expectations. In all of the countries, in addition to criticising the legal framework, the civil sector voices their concerns about the performance of independent anti-corruption agencies, as the public and the civil society expected more concrete results. The main problem is that these agencies have not become generally known and accepted central points for the anti-corruption action.

In Bosnia and Herzegovina and Serbia, the institutions themselves request wider investigative powers. The Agencies in both states depend on cooperation with other state institutions and on the efficiency and speed of response of the law enforcement institutions. For example, in order for the Anti-Corruption Agency to be able to control official's assets (that is, to control whether they file asset declarations in due time and whether the data therein is complete and accurate), it is necessary for it to have efficient cooperation with the Ministry of Interior, the Business Registers' Agency, the Tax Administration, the Cadastre, banks and other institutions, so as to verify the accuracy of data contained in the asset declarations. In practice, this form of cooperation and exchange of information has proven to be an obstacle, either due to unsound databases in other institutions, or due to their unwillingness to exchange data with a new body. Consequently, the professional public and the representatives of the Anti-Corruption Agency Board have requested that the Agency's powers be extended so that it is not only a typical prevention body, but also an investigative body. The lack of statutory guarantees for the independence of the institutions in Montenegro and Bulgaria does not give them adequate opportunity to participate in the formulation of the anti-corruption policies and prevention of high-level corruption.

33 EU Commission Bosnia and Herzegovina 2012 Progress Report, SWD (2012) 335 final, p. 14.

3. CONCLUDING REMARKS

Anti-corruption institutions in the region are a new trend, given they have emerged over the last ten years, as a consequence of the European integration process, political will and so as to meet the obligations taken when the UN Convention Against Corruption was ratified and signed. These, relatively novel institutions face the challenges of political pressure, widely set powers, on the hand and insufficient capacity (human and financial resources), on the other.

All the institutions in the region have similar preventive powers stipulated by legal acts (statutes and secondary legislation), an important role in the formulation of the anti-corruption strategy papers and the oversight of their implementation, raising awareness on combat against corruption, education and administrative control.

In the countries in which the legal basis for the regulation of independent anti-corruption institutions is provided by law (Bosnia and Herzegovina, Serbia, Kosovo, and Macedonia), parliament has an important role in the appointment of the management, and the agencies report to parliament (submit the annual report to parliament). In the countries in which the establishment and operation of anti-corruption agencies are regulated under bylaws (Montenegro and Bulgaria), the role of the executive in the appointment of the management, defining work programmes and priorities, and control is much stronger.

In order to achieve the international standards with regard to the necessary independence of their specialised anti-corruption bodies, Montenegro and Bulgaria should consider an option to regulate the organisation, competencies, and operations of their anti-corruption agencies under a law, as well as legally stipulate the necessary financial and organisation guarantees, and their operating and decision-making independence. However, in the course of an assessment of independence guarantees, it is necessary to analyse and compare the authorities which anti-corruption institutions of these countries possess. Thus, for example, given that the Montenegrin Administration for Anti-Corruption Initiative has rather limited competences for awareness raising, international reporting (GRECO recommendations, implementation of UN Convention) and implementation of integrity plans, it undoubtedly does not need a high level of independence which is a must for other anti-corruption institutions that are in charge of controlling the asset disposal of public officials, conflict of interest, monitoring of financing of political parties etc. It is also interesting to note that SIGMA gave a recommendation to Montenegro to strengthen the existing institutional framework without setting up of a new, fully independent anti-corruption institution which would have comprehensive competences in the field of asset disposal, conflict of interest, monitoring of financing of political activities and lobbying. It was instead recommended to restructure the existing Office for Anti-Corruption Initiative. The reason for this is the existence of numerous problems with which countries in transition with weak institutional capacities are faced in the course of establishment of independent anti-corruption agencies.

With respect to Bosnia and Herzegovina, based on the initial establishment problems, there is a need to consider necessary legal changes relating to the composition of the Commission for Oversight of Agency Appointments and Operations, which is responsible for the appointment and removal of Agency Directors, and the need to guarantee the necessary capacities and financial resources. It is difficult to identify other potential problems, considering a short period of the implementation of the law and the operation of the Agency. Furthermore, all the institutions need to find an adequate way to impose themselves as the centres of excellence, i.e. the central anti-corruption institutions.

When it comes to the observance of international standards, the analysed countries can be graded as follows:

Country	Grade	Reasoning
Bosnia and Herzegovina	B	Institution established and regulated by law; Multidisciplinary body appointing the director comprises only of the representatives of the legislative power.
Montenegro	B	Institution established and regulated by secondary legislation; No own budged or own staffing table.
Serbia	A	Institution established and regulated by law; Multidisciplinary body, comprising representatives of the executive, legislative and judicial power and independent bodies, appoints the director; Institution has its own budget.
Kosovo	B	Institution established and regulated by law; Its work is controlled by the Council, predominantly comprising representatives of the executive and the legislative powers; the powers of the Council when it comes to interfering in Agency's everyday work are unclear.
Macedonia	A	Institution established and regulated by law; A collegiate body, whose members are appointed by the National Assembly through a public competition.
Bulgaria	C	Institution not regulated by law; Director appointed by the Government at the proposal of the Prime minister; its operation controlled by an Advisory Committee comprising 27 members, predominantly representatives of the executive (17 ministers).

Notwithstanding the assessment of the legal framework, the majority of specialised anti-corruption institutions in the region in faced with problems with implementation of the existing legal framework, which detailed analysis exceeds the scope of this study. Reports of international organisations (EU, Transparency International, OECD, SIGMA) point out to the problems with implementation of existing regulations exemplified in the lack of budget resources and especially insufficient number of employees, such as, for example, the case of anti-corruption institution in Montenegro, Macedonia, Bosnia and Herzegovina and Kosovo. For this reason all countries in the region should work on enhancement of specialised anti-corruption institutions capacities and especially on securing adequate financial resources which are necessary for effective performance of their duties.

Jelena Vukadinovic, LLM [1]
Mirjana Glintic, LLM [2]

CONFLICT OF INTEREST

1. INTERNATIONAL STANDARDS

1.1. Introduction

A conflict of interest refers to a conflict between an official's public duty and private interests whereby his/her private interest influences or could negatively influence the discharge of the public function. An actual conflict of interest occurs when a public official adopts decisions under the influence of private (personal or group) interests.[3] In addition to this classic form of conflict of interest, there is also an apparent conflict of interest in the circumstances when it appears that a public official's private interest could influence negatively the discharge of his/her duties, even when that is not true. Finally, in the circumstances when a public official has certain private interests that could cause a conflict of interest in the discharge of the public function - that is a potential conflict of interest.

Considering that most public officials may find themselves in a situation when they will have to choose between their public and private interest, there is a need to adopt guidelines and standards that would be binding and respected. Complying with the rules on the prevention and resolution of conflict of interest enables public officials

[1] Research Assistant, Institute of Comparative Law, Belgrade.

[2] Research Assistant, Institute of Comparative Law, Belgrade.

[3] *Cf.* SIGMA/OECD, *Conflict of Interest Policies and Practices in Nine EU Member States: A Comparative Review*, SIGMA Paper No.36, June 2007; OECD, *Managing Conflict of Interest in the Public Sector: OECD Guidelines for Managing Conflict of Interest in the Public Service*, Paris, OECD, 2003; A. Toolkit, *Managing Conflict of Interest in the Public Sector*, Paris, OECD, 2005; Transparentnost Srbija, *Sukob javnih i privatnih intersa i slobodan pristup informacijama*, Transparentnost Srbija, 2003; O. Faruk, *Academic research report on conflict of interest*, GenÇkaya, May 2009; C. Demmke at al, *Regulating Conflicts of Interest for Public Officials in the European Union*, European Institute of Public Administration, 2007; K. Kernaghan, JW. Langford, *The Responsible Public Servant*, New York: The Institute for Research on Public Policy, 1990; Ombudsman of Victoria, Newsletter Autumn 2008, *http://www.ombudsman.vic.gov.au/resources/documents/Autumn_2008_newsletter.pdf*

to discharge their functions in a professional manner and in the public interest, which is their duty.

The main international legal acts that govern this area include: The Council of Europe Resolution on the Twenty Guiding Principles for the Fight Against Corruption[4], and particularly the principles No. 1, 3, 7, 10 and 20; The Council of Europe Recommendation of the Committee of Ministers to Member States on Codes of Conduct for Public Officials;[5] United Nations Convention Against Corruption, particularly Articles 5, 7, 8, 48;[6] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;[7] United Nations Code of Conduct for Civil Servants;[8] Stability Pact Anti-Corruption Initiative for South Eastern Europe.[9]

1.2. Sources of International Law

1.2.1. United Nations

The UN Convention against Corruption (UNCAC) was adopted by the General Assembly of the United Nations on 31 October 2003 and entered into force on 14 December 2005. The Convention was signed by 140 states up to now. Pursuant to the Convention, each State Party shall, in accordance with the fundamental principles of its domestic law, endeavor to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest. The parties to the Convention are also required to introduce measures and systems on the basis of which public officials have to give statements about their supplemental activities, employment, investments, assets and substantial gifts or benefits, that could lead to a conflict of interest with respect to their service in the public office. After ratification process in

[4] The Council of Europe Resolution on the Twenty Guiding Principles for the Fight against Corruption, No. 97/24.

[5] The Council of Europe Recommendation of the Committee of Ministers to Member States on ''Codes of Conduct for Public Officials'', No. 200/1.

[6] The Republic of Serbia, Croatia, Bosnia and Herzegovina, Montenegro and Bulgaria are the signatories of this Convention. UN Convention against Corruption, General Assembly Resolution 55/61, 4 December 2000.

[7] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997.

[8] United Nations Code of Conduct for Civil Servants, available at *http://www.un.org/en/ethics/pdf/StandConIntCivSE.pdf*, 21 December 2012.

[9] Stabilty Pact Anti-Corruption Initiative for South Eastern Europe, available at *http://www.iaaca.org/AntiCorruptionAuthorities/ByInternationalOrganizations/NonGovernmentalOrganization/201202/t20120215_805503.shtml*, 22 December 2012.

an individual country, the Convention becomes part of a national law and its position in legal sources' hierarchy depends on a national constitutional order. In accordance with Article 63(7) of UNCAC, "the Conference shall establish, if it deems necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention".

UN Convention Against Corruption

Article 7, Para. 4: Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavor to adopt, maintain and strengthen systems that promote transparency and prevent conflict of interest.

Article 8, Para 5: Each State Party shall endeavor, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, *inter alia*, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

In November 2009, the CoSP adopted the Resolution 3/1 on the Implementation Review Mechanism (IRM), with aim to assist countries to meet the objectives of UNCAC through a peer review process. Under the IRM mechanism each state party is reviewed by two other states parties, with the active involvement of the state party under review. The review of each state is based on the responses of each state to the IT-based comprehensive self-assessment checklist. States parties under review are encouraged to conduct broad consultations including all relevant stakeholders when preparing their responses. A country review report is prepared and agreed to by the country under review and may be made public.

Each review phase is composed of two review cycles of five years. The first review cycle covers chapters III (criminalization and law enforcement) and IV (international cooperation) of UNCAC. The second review cycle, which will start in 2015, covers chapters II (preventive measures) and V (asset recovery), which includes issues of conflict of interest.

1.2.2. Council of Europe

The key Council of Europe legal acts that refer to the conflict of interest are the Code of Conduct for Public Officials that was adopted by the Committee of Ministers of the Council of Europe on 11th of May 2000, and the Resolution (97) 24 on Twenty Guiding Principles for the Fights Against Corruption, which were adopted

by the Committee of Ministers on 6th November 1997. Both acts are applicable to all members of Council of Europe and do not represent hard law, but part of soft law of a Council of Europe member state.

The Code of Conduct for Public Officials contains recommendations on codes of conduct for public officials, and includes, in the appendix, a Model Code of Conduct for Public Officials. The Model Code of Conduct provides suggestions on how to deal with real conflict of interest situations frequently confronting public officials, such as obtaining gifts, use of public resources, dealing with former public officials, etc. The recommendation of the Committee of Ministers makes clear that the recommended adoption of codes of conduct for public officials should be subject to national law and to national principles of public administration. Recommending that such codes should be based on the appended model code of conduct, the recommendation also makes clear that the model should be adapted to meet the circumstances of the particular public service.

Resolution on Twenty Guiding Principles of the Fight Against Corruption represent key general principles that Council of Europe member states should respect in order to effectively combat corruption. The issue of conflict of interest is dealt with within principles No. 9 and No. 10 of this Resolution.

GRECO is responsible for following up on the implementation of both the Code of Conduct of Public Officials and the Resolution on Twenty Guiding Principles for the Fight Against Corruption in all South and East European countries. Up to now, GRECO carried out four rounds of evaluations on all corruption related issues. Issues related to the conflict of interest were evaluated in the second and fourth evaluation. The second evaluation process has been completed and published on the Greco website while the fourth evaluation is still under way.

1.2.3. OECD

The Revised Recommendation (The Guidelines for Managing Conflict of Interest in the Public Service) adopted by the OECD Council on 23 May 1997 invites member countries to "take effective measures to deter, prevent and combat" international bribery in a number of areas. In particular, it elaborates commitments in the fields of: criminalization of bribery of foreign public officials; accounting, banking, financial and other provisions, to ensure that adequate records are kept and made available for inspection and investigation; and public subsides, license, government procurement contracts or other public advantage that could be denied as sanctions for bribery in appropriate cases. Although the countries analyzed in this Report are not OECD members, this Recommendation also refers to them. The reason for this is the fact that all respective countries have adopted the Stability Pact Anti-

Corruption Initiative, by which they have committed to apply the OECD Conflict of Interest Recommendation, as will be discussed in more depth in the following section. These recommendations do not constitute hard-law of the OECD and Anti-Corruption Initiative member states, but could be subject of review of the organisations which are responsible for monitoring of their implementation.

1.2.4. Stability Pact - Regional Anti-Corruption Initiative

The Stability Pact Anti-Corruption Initiative (SPAI) is a product of the Stability Pact for South Eastern Europe.[10] The SPAI aims to assist South-East European countries to lay the foundations for a sustained fight against corruption. In a Meeting in Sarajevo on 16 February 2000, the Pact's member countries — including the 15 EU States, nine South-East European countries and the international donor community, formally endorsed the Initiative. Seven countries of South Eastern Europe decided to comply with the Initiative's requirements: Albania, Bulgaria, Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia (Serbia and Montenegro), FYROM and Romania. By co-coordinating efforts of the international community and promoting regional cooperation through a dialogue based on a strong monitoring mechanism, the SPAI aims to accelerate building the right institutions and adopting sound practices.

In line with the transformation of the Stability Pact into Regional cooperation Council (RCC) and through a decision of the SEE countries, the Anticorruption Initiative of the Stability Pact (SPAI), has been renamed in October 2007 to the Regional Anticorruption Initiative (RAI). A Steering Group of the RAI[11] systematically monitors the adherence by participating countries to the commitments they have made under the Initiative, but no concrete individual monitoring mechanisms have yet been carried out.

[10] Stability Pact for South Eastern Europe was signed on the 10 of June 1999 in order to bring lasting peace, prosperity and stability for South Eastern Europe. It represented a form of regional cooperation through which the EU Member States, the European Commission, the countries of the region, Russia, the US, Canada, Japan, and various financial institutions and international organizations participated in reinforcing peace and stability in the region. Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Montenegro, Romania, Serbia The Former Yugoslav Republic of Macedonia and Moldova are member partners of this Pact.

[11] The Steering Group is the decision-making body of the Regional Anti-corruption Initiative. It is composed by representatives of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Montenegro, Romania, the former Yugoslav Republic of Macedonia and Serbia, as well as an additional country as observer (Kosovo).

1.3. Content of standards

1.3.1. Identifying and Declaring Circumstances that May Raise a Conflict of Interest

Due to the nature of the public officials' engagement, there is a need to specify rules that would obligate them to report any circumstance that could potentially result in a conflict of interest. Declaring potential causes of a conflict of interest demonstrates a willingness to avoid problem situations.

In declaring conflict of interest, a difference is made between a declaration of public officials' assets and income and a declaration of potential conflict of interest. Declaration of assets and income is normally submitted at the time of assuming office, and is subsequently periodically resubmitted, while the declaration of circumstances that could raise a conflict of interest is submitted on an ad hoc basis.

Declaration of personal assets needs to indicate the information about real-estate, shares, business interests and partnerships, directorships, other investments, assets in safekeeping, gifts, and sponsored overseas visits. Such a declaration should have a key role in the control and prevention of conflicts of interest of the centrally and locally elected public officials, including members of the national and local parliaments. With respect to other public officials, the recommendation is to make asset declaration mandatory for senior civil servants and for civil servants in specific sectors, which are more prone to conflicts of interest.[12]

An interesting issue, which is a part of the issue of the public officials' asset declaration, relates to private company ownership. Public officials cannot be owners of the private companies on whose operations they decide in the course of their public office or which enter in contracts with the state, as such circumstances would present an ideal environment for a conflict of public and private interest. While owning a small stake or shares in large companies could be tolerated, all cases must be examined on individual basis before it can be concluded that there is no conflict of interest.

Declaration of public officials' personal income is not necessary, but it can contribute to the control of public officials and elected political officials. Obligating all public officials to declare their income would imply excessive costs, and consequently the recommendation is to limit this obligation to senior public officials. In addition to the declaration of personal assets, some countries require also declarations of public officials' core family assets.

Submitting a declaration of potential conflict of interest ensures transparency with the objective to discover situations of conflict of interest and disqualify those public officials from the decision-making process. Depending on the legal system, the control of interests may be internal, and therefore does not require public

[12] SIGMA, *Conflict-of-Interest Policies and Practice in Nine EU Member States: A Comparative Review*, SIGMA Paper No. 36, SIGMA/OECD, 2007.

disclosure of specific information, while in other systems, the practice is to disclose declarations, which would be made available to the public. In these situations, one has to differentiate also between different categories of public officials. Thus, public officials performing functions of the highest national interest would be obligated to disclose and declare any potential private interest that could raise a conflict of interest.

International Code of Conduct for Public Officials

Article 2

Public officials shall not use their official authority for the improper advancement of their own or their family's personal or financial interest. They shall not engage in any transaction, acquire any position or function or have any financial, commercial or other comparable interest that is incompatible with their office.

Public officials, to the extent required by their position, shall, in accordance with laws, declare business, commercial, financial and other interests or activities undertaken for financial gain that may raise a possible conflict of interest. In situations when a conflict of interest has occurred, the public official shall comply with the measures established to reduce or eliminate such conflict of interest.

1.3.2. Concurrent Additional Employment and Engagements

Public officials cannot be concurrently additionally employed on free lance terms in appointments that are outside their function if such activities could result in an actual, potential or apparent conflict of interest. The declarations that are submitted for the most part at the time of assuming public office need to indicate all additional appointments, while if such situation occurs during the term in public office, it has to be reported to the superior official or the competent state authorities. While additional appointment of public officials is not by itself illegal, the compatibility of the public function and additional employment has to be decided by the competent state authority.[13] For these reasons, it needs to be specified in detail under which conditions additional employment is allowed, who decides about it, and which officials can enter in such employment, while retaining their public office. If they recognize the existence of a conflict of interest, the competent authorities may request that the additional appointments on free-lance basis are terminated.

[13] All OECD countries have restrictions on additional employment of political appointees, including members of government, civil servants, and (judges), Spain, Germany, and Poland have made these conditions even more stringent.

1.3.3. Formal Decision-Making and Advisory Policy (Including Contract Awards)

Public officials must demonstrate objectivity and impartiality in the course of discharge of their functions, which may include contract negotiations, preparation or execution; decision-making on cash benefits or fines, and similar duties and responsibilities. Consequently, in deciding on individual cases, decisions must be adopted exclusively in accordance with law, irrespective of the person's religious, party and political, or ethnic membership or the satisfaction of personal affinities. Furthermore, it is prohibited to put family members, friends, other closely associated persons or legal entities in a privileged position or to grant them access to benefits. In addition, it is prohibited to offer special assistance to persons or legal entities already doing business with the government without the knowledge or approval of the superiors.

A conflict of interest is often raised in a situation when a public official, acting as the authorized person, awards contracts to individuals, as in such situations there is a possibility of giving privileges to legal entities or persons with whom the public official has a special, friendly or business relationship. Public officials should not award contracts on behalf of the state if they stand as interested parties (including also the situations when contracts are awarded to companies whose owners or co-owners are their family members or friends).

1.3.4. Gifts and Privileges

Gifts, privileges and other benefits received by public officials do not necessarily present a conflict of interest. A conflict of interest will not occur if the gifts and other benefits are infrequent and of minimum value; if they originate from the activities that relate to the performance of the civil servant's duty; if they are a part of regular protocol, courtesy,[14] or hospitality; or if they do not impair or compromise the civil servant's or public official's integrity. On the other side, all gifts given as a token of appreciation (and which were, in fact, not asked for) for an activity performed by a public official, which falls under his/her job description; as well as gifts that cannot be presented transparently to the public, and all other gifts and benefits that may raise suspicion about the public officials' independence should be prohibited. Official gifts made to members of government or public officials should be considered as a part of the state ownership.

Public officials must not request gifts, economic gain or other privileges from any person, group or a private sector organisation cooperating with the government.

[14] For example, such gifts could include ball-point pens or pins.

The only exemption from this rule relates to fundraising for the activities officially supported by the state.

1.3.5. Restriction and Control of Benefits After Cessation of Public Office and Engagement in Nongovernmental Organisations

The fact that a person is a former public official should not limit his/her opportunities for new employment. However, in the course of job hunting, former public officials should try to avoid any possibility that may raise a conflict of interest between their new job and their previous responsibilities.

For a certain period of time after the cessation of his/her employment with a state authority, a former public official is expected not to accept an appointment to the board of directors of any legal entity with which he/she formally cooperated to a significant extent in the period of one year before leaving public office or any employment in such legal entity. Furthermore, former public officials should not represent or deputise persons before organisations with which they formally cooperated to a significant extent in the period of one year or even a little longer before leaving public office, nor should they advise their clients disclosing information that is not available to public about the programmes or policy of the aforementioned bodies and organisations.

1.3.6. Setting Clear Rules on What is Expected from Public Officials in Case of Conflict of Interest

A public official needs to accept the responsibility if it is found that he/she has a private interest. The options for the resolution of conflict of interest may include one or more different methods: divestment or cessation of private interest; limiting access to specific information in the disputed field; reallocation of duties and responsibilities; transfer of the disputed interest to a trustee; cessation of employment, i.e. resignation in case of officals.

In cases when there is a low probability that a specific conflict of intrest would frequently reoccur, the public official may retain his/her public office under the condition that he/she withdraws from decision-making in all cases which could raise such conflict of interest.

With respect to public officials, they can be required to terminate the disputed relationship if they wished to retain their position. However, if the conflict of interest cannot be resolved in any other way, the official should be required to resign.

1.3.7. Efficient Enforcement of the Conflict of Interest Policy

In addition to specifying the principles underlying the conflict of interest policy, the state needs to develop adequate mechanisms that would ensure that those principles are adhered to in practice. Two elements are crucial for bringing the agreed policies to life: the existence of the organisational system to enable detection of policy breaches and adequate sanctions.

Resolution of conflicts of interest requires the existence of independent bodies, organisations with competent personnel able to detect and establish the existence of conflicts of interest. That is why it is necessary to ensure the cooperation between the administration and internal supervision, as well as external supervisory institutions. This refers primarily to independent auditors and the ombudsman. The existence of a procedure enabling reporting and consideration of potential breaches of the conflict of interest policy would contribute significantly to addressing the issue of conflicts of interest.[15]

In case a breach of the conflict of interest policy is established, a developed system of adequate sanctions needs to be in place, which would be applied without any exception. Non-compliance with the conflict of interest policy should be regarded as a disciplinary matter. Less serious forms of such breaches may result in a simple registration of the disputed interest in the relevant registry. Refusal to resolve a conflict between the public and private interests can also be acknowledged, which could in turn undermine the public official's future advancement and the career prospects.

Alternative measures could be developed to provide effective complementary forms of redress for breaches of conflict of interest policy, and can be effective in dissuading those who would seek to benefit from such breaches. Such measures could include, for example, retroactive cancellation of affected decisions and tainted contracts adopted, i.e. closed by the public official, and disqualification of the beneficiaries, both individuals and corporations and associations, from the future processes. [16]

[15] The rules for this type of procedure must cover also the issue of the protection from retaliation for the whistle-blowers who reported the irregularities in the public official's activities, as well as the issue of the elimination of possibilities for the abuse of the procedure.

[16] Such exclusion measures may operate for a given period of time or for certain types of activities.

2. CONFLICT OF INTEREST - COMPARATIVE LEGAL ANALYSIS

2.1. Obligation to Declare Assets

2.1.1. Persons Obligated to Declare Assets

The regulations in Serbia, Montenegro, Kosovo, Macedonia, Croatia, Bosnia and Herzegovina, and Bulgaria stipulate the obligation of public officials to declare their assets and their family members' assets to different competent authorities. In the Republic of Serbia, public officials[17] submit declarations of their assets and income, as well as the assets of their spouses, common law partners, and minor children to the Anti-Corruption Agency.[18] In Montenegro, public officials submit declarations of their assets and income, as well as the assets and income of their spouses and children to the Commission for the Prevention of Conflict of Interest.[19] In Kosovo, senior public officials submit declarations of their and their family, parents, adoptive parents, spouses, and minor children's assets to the Anti-Corruption Agency.[20] Public officials in Macedonia submit declarations of their assets and the assets of their spouses, children, parents, siblings, stepchildren to the State Commission and the Public Revenue Administration.[21] Croatian public officials submit declarations of their assets, the assets of their spouses or common law partners, and minor children to the Conflict of Interest Commission.[22] In Bosnia and Herzegovina, public officials submit declarations of their assets and the assets of their dependent household members to

[17] The following public officials are exempt from the obligation to declare assets: members of parliament, i.e. members of management or supervisory board in public companies, institutions and other organizations founded by the municipality or the city, as well as members of management or supervisory board in public companies, institutions and other organizations founded by the Republic, Autonomous Province or the City of Belgrade, unless they receive remuneration for their membership, and unless they are explicitly required to do so by the Anti-Corruption Agency.

[18] Article 44 of the Law on Anti-Corruption Agency of the Republic of Serbia (Zakon o Agenciji za borbu protiv korupcije Republike Srbije).

[19] Article 19 of the Law on the Prevention of Conflict of Interest of Montenegro (Zakon o sprječavanju sukoba interesa Crne Gore).

[20] Article 40 of the Kosovo Law on Suppression of Corruption, and Articles 5 and 6 of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials.

[21] Article 33 of the Law on the Prevention of Corruption of the Republic of Macedonia. Along with their assets declarations, public officials are obligated to sign a statement allowing access to all their accounts in the national and foreign banking systems, which has to be verified by a notary public.

[22] Article 8 of the Law on the Prevention of Conflict of Interest of the Republic of Croatia (Zakon o sprječavanju sukoba interesa Republike Hrvatske).

the Central Election Commission of Bosnia and Herzegovina.[23] In Bulgaria, public officials are obligated to declare their assets, income, and expenditures in the country and abroad to the National Audit Office.[24] The declaration must also indicate all the above information for their spouses and minor children, unless they are divorced, separated or do not live in the same household.[25]

In most of the countries, the obligation to declare assets applies only to high-ranking public officials and not to all holders of public office. High-ranking public officials are elected either through direct elections (e.g. members of parliament) or by a representative body (e.g. members of government, independent regulatory bodies, etc.), the President of the Republic (e.g. ambassadors) or persons appointed by the government (e.g. assistant ministers, secretaries of ministries, heads of administrative authorities) and the local self-government representative bodies. The exceptions are Bosnia and Herzegovina and Bulgaria, which in addition to high-ranking public officials require all other holders of public office to declare assets. Thus, Article 16, Para. 2, of the Bosnia and Herzegovina Law on Civil Servants (Zakon o državnim službenicima Bosne i Hercegovine) stipulates the obligation of all public officials to declare their assets, without specifying the information that must be indicated in assets declarations.[26] Similarly, Article 29 of the Bulgarian Law on Civil Service stipulates the obligation of all public officials to declare their financial status to their employer before taking public office, and every subsequent year.

The list of relatives of the public officials subject to the obligation to declare their assets is in accordance with the envisaged international standards. However, it must be borne in mind that family relations in the Balkans are quite strong, and that family members, whether it be close family or more distant relatives, are more closely connected than the case is, for instance, in Germany or Norway. It would therefore be prudent to consider expanding the list of relatives subject to the obligation to declare their assets. One possible solution would be to have such extension cover all relatives that are otherwise covered by the rules on recusal of a judge in civil or criminal proceedings.[27] For instance, pursuant to the Criminal Procedure Code and the Civil Litigation Procedure Law of the Republic of Serbia, a judge must be recused if a party to the proceedings, the party's statutory representative or legal representative

[23] Article 16 of the Law on Conflict of Interest in the Bosnia and Herzegovina Government Institutions (Zakon o sukob interesa u instituciji vlasti BiH). For the procedure before the Commission se Article 18 and onwards.

[24] Article 3 of the Bulgarian Law on Public Disclosure of Financial Interests of High-Ranking Public Officials.

[25] Article 4, Para. 5, of the Bulgarian Law on Public Disclosure of Financial Interests of High-Ranking Public Officials.

[26] Before taking office, the public official shall disclose all information relating to assets at the disposal of the public official or his/her core family members, as well as to the activities and functions performed by the public official and his/her core family members.

[27] Legislations of Serbia, Montenegro and Croatia are used as reference.

are the judges' blood relative in a straight line regardless of the degree of kinship, in a lateral line up to the fourth degree of kinship, or is the judge's spouse, common law partner, or in-law relative up to the second degree of kinship, regardless of whether the marriage is terminated or not. Furthermore, a judge will be recused if he is a guardian, adoptive parent or the adoptee of a party, the party's statutory representative or legal representative or if the judge and the party, the party's statutory representative or legal representative share a common household.[28] The provisions of the Croatian Civil Litigation Procedure Act and the Montenegrin Criminal Procedure Law are almost identical.[29] However, if such a wide list of relatives subject to the obligation to declare assets were to be accepted, it could considerably burden the existing, often insufficient capacities of the institutions competent for collecting and verifying asset declarations. Consequently, a compromise solution should be considered - the list of relatives subject to the obligation to declare assets should be expanded without jeopardizing the process of collecting and verifying asset declarations. A good example for the countries in the region are the solutions in Macedonian regulations, requiring the declaration of assets not only from spouses/common law partners and children, but also from parents and siblings; this solution can be considered most appropriate for all the countries in the region.

2.1.2. Information Indicated in Assets Declarations and Timeline for Submission of Declarations

The information that must be indicated in an assets declaration is almost identical in all of the countries,[30] and includes the following information: ownership rights relating to real assets, movable assets (the value of movable assets that have to be declared varies depending on the country[31]), ownership stakes in commercial companies[32], securities, deposits in accounts with banks, savings institutions, and other depository institutions, and all extended loans, debts, assumed guarantees, as well as the annual income (i.e. taxable income). The regulations in the other countries require

[28] Article 67 paras 3, 4 of the Civil Litigation Procedure Act of the Republic of Serbia and Article 37, paras 2 and 3 of the Criminal Procedure Code of the Republic of Serbia.

[29] Article 71, paras 3 and 4 of the Croatian Civil Litigation Procedure Act and Article 38, paras 2 and 3 of the Montenegrin Criminal Procedure Act.

[30] Article 20 of the Montenegrin Law on the Prevention of Conflict of Interest, Article 5 of the Kosovo Law on Suppression of Corruption, and Articles 5 and 6 of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials, Article 46 of the Serbian Law on Anti-Corruption Agency.

[31] In Montenegro, movable assets subject to statutory registration, e.g. aircrafts, have to be declared; In Serbia and Croatia, high-value movable assets, and in Kosovo, movable assets whose value exceeds 5,000 Euros, in Bulgaria motor vehicles, floating vessels, and aircrafts.

[32] Bosnia and Herzegovina and Macedonian regulations do not require this information in assets declarations.

some additional information to be indicated in the declarations. Thus, for example, in Montenegro and in Serbia, rights deriving from copyright, patent, and similar rights, income sources and income from scientific, teaching, sport, and cultural activities, membership in management or supervisory boards in public companies, and other legal entities must be declared. Serbia requires also entitlement to use an apartment for official purposes, and income from other public appointments, functions, and activities, which are in accordance with law, to be declared.

It is interesting to note that, in accordance with the envisaged provisions, only the Macedonian legislature does not define high-value assets,[33] while, on the other hand, it regulates in detail the obligation of high-ranking public officials to declare any changes relating to their or their family members' assets. A change in assets means: building a house or other buildings, acquiring real-estate, securities, motor vehicles or other movables whose value exceeds the amount of twenty average wages (the average wage is calculated based on the average wage in the republic for the past three months). In addition to the specified information, a declaration must indicate also the origin of the declared assets.[34]

In Bulgaria, high-ranking public officials are obligated to declare their income received in the previous year from other activities, which dose not constitute remuneration for holding a public office in a public authority, and which exceeds 1,025 Euros. Furthermore, all cash expenditures for high-ranking public officials, their spouses, and minor children, which were not covered personally by the above persons or institutions that employ them, and which were intended for financing of the costs of education or travel abroad, must be declared.[35]

High-ranking public officials are obligated to submit their assets declaration before taking office, after termination of or removal from office, in case of any significant changes relating to the composition of assets,[36] as well as in some other

[33] Article 33, Para. 1, of the Macedonian Law on the Prevention of Corruption.
See http://dksk.org.mk/en/images/stories/PDF/assets_declaration.pdf , 23.10.2012.

[34] In Macedonia, money transfer documents and trails are attached to the declaration, and submitted to the State Commission and the Public Revenue Office, which is different from the provision relating to the assets declarations submitted to the Commission. In Bosnia and Herzegovina, this issue is regulated in Article 15, Para. 7, of the Law on Elections (Zakon o izborima).

[35] Article 3, Para. 2, of the Bulgarian Law on Public Disclosure of Financial Interests of High-Ranking Public Officials.

[36] Articles 7, 8 9, and 10 of the Kosovo Law on Suppression of Corruption, and Articles 5 and 6 of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials; for Montenegro, Article 19 of the Montenegrin Law on the Prevention of Conflict of Interest, as well as Articles 13, 14 of the Rule of Procedure before the Commission for the Prevention of Conflict of Interest (Pravilo o postupku pred Komisijom za sprečavanje sukoba interesa); for the Republic of Serbia, Article 12 of the Law on the Prevention of Conflict of Interest in Discharge of Public Office (Zakon o sprečavanju sukoba interesa u vršenju javne funkcije), Article 8 of the Law on the Prevention of Conflict of Interest of the Republic of Croatia, Article 33 of the Macedonian Law on the Prevention of Corruption, Article 12 of the Law on Conflict of Interest in Bosnia and Herzegovina Government Institutions, Article 4 of the Bulgarian Law on Public Disclosure of Financial Interests of High-Ranking Public Officials.

situations specified by law. The regulations of Montenegro, Bosnia and Herzegovina, and Kosovo require that the assets declaration is submitted annually. In Kosovo, the declaration must be submitted also additionally, if the Anti-Corruption Agency so requests. The Croatian Law requires the submission of the declaration every four years if the official is re-elected; the Serbian Law requires that the assets declaration is submitted also two years after the termination of office in case of considerable changes relating to assets that occurred during the term of office, while the Montenegrin Law on the Prevention of Conflict of Interest stipulates the obligation to submit the assets declaration also for the year after termination of the public office.

2.1.3. Control of the Contents of Assets Declarations: Competent Institutions and Sanctions

In all of the countries, the competent institutions that receive assets declarations are responsible also for the control of their contents,[37] and in all cases they have the right to request additional evidence relating to the declared assets.[38] Also, as a rule, the institutions responsible for the prevention of conflict of interest may contact the public authorities in which the official performs his/her office, as well as banks, and other financial institutions.[39]

All submitted assets declarations are available on the web sites of the institutions that maintain the public officials' assets registries.

The regulations of the analysed countries stipulate different sanctions for public officials who fail to declare or who misdeclare their assets, the most common sanction being a fine imposed in the misdemeanour procedure. Thus, for example, the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts for All Public Officials stipulates a range of fines for all

[37] Article 8, Para. 3, of the Croatian Law on the Conflict of Interest, Article 48 of the Serbian Law on Anti-Corruption Agency, Article 28 of the Montenegrin Law on the Prevention of Conflict of Interest, Article 14 of the Kosovo Law on Suppression of Corruption, and Articles 5 and 6 of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials, Article 5 of the Bulgarian Law on Public Disclosure of Financial Interests of High-Ranking Public Officials.

[38] In accordance with Article 3, Para. 3, of the Kosovo Law on Suppression of Corruption, and Articles 5 and 6 of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials, any person may submit to the Agency in writing information relating to the declared assets, for the purposes of establishing the truthfulness of the declaration.

[39] Article 8, Para. 13, of the Croatian Law on the Conflict of Interest, Article 48 of the Serbian Law on Anti-Corruption Agency, Article 29 of the Montenegrin Law on the Prevention of Conflict of Interest, Article 16 of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials, Article 7, Para. 2, of the Bulgarian Law on Public Disclosure of Financial Interests of High-Ranking Public Officials.

public officials who fail to fulfil their obligation to declare assets.[40] In addition to fines, it is possible to impose a protective measure of disqualification from holding office for a maximum term of one year.[41] The misdemeanour procedures are initiated by the Agency. In case a failure to fulfil a prescribed obligation comprises also a criminal offence, the Agency files also criminal charges.[42] The Montenegrin Law on the Prevention of Conflict of Interest also stipulates fines in case a public official fails to declare his/her assets deriving from scientific, teaching, cultural or sports activity, or copyrights, patents or similar rights,[43] or if he/she fails to submit the declaration to the Commission (or submits it including misrepresented data). If the Commission, at any stage of the procedure, has a reason to believe that a public official may have committed a criminal offence, it shall file criminal charges to the competent authorities.[44] The issue of non-declaration of public officials' assets in Macedonia[45] is sanctioned with fines as well. A similar situation is also present in Bosnia and Herzegovina, where Article 19, Para. 10, of the Law on Elections stipulate fines for all members and delegates of the Bosnia and Herzegovina Parliamentary Assembly and members of the Bosnia and Herzegovina Presidency who fail to declare their assets. State officials in Bosnia and Herzegovina will also be imposed a fine for a failure to submit a declaration of their financial status. In Bulgaria, a public official who fails to submit the declaration within the statutory timeline, or repeats that offence will also be imposed a fine. In case no declaration is submitted or in case a public official shows no intent to cooperate in that matter, the National Audit Office is obligated to inform the National Tax Agency and the State Agency for National Security thereof.

In the Republic of Croatia, in case a public official fails to submit or submits an incomplete assets declaration, the Commission is obligated to issue a written order ordering him/her to fulfil that obligation, before they can apply more serious sanctions. If the public official fails to comply with the written order, the Commission can initiate the procedure against the public official and impose the sanction of the cessation of payment of a portion of his/her net monthly salary or a public disclosure of the Commission's decision.[46] More severe sanctions will be imposed if a public official fails to submit the declaration, or provides untruthful or

[40] Article 17, Para. 1, Items. 1, 2, 3, 4, 5 of the of the Kosovo Law on Suppression of Corruption, and Articles 5 and 6 of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials.

[41] Article 17, Para. 4 of the Kosovo Law on Suppression of Corruption, and Articles 5 and 6 of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public.

[42] Article 17, Para. 5, 4, of the Kosovo Law on Suppression of Corruption, and Articles 5 and 6 of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials.

[43] Article 49, Paras. 1 and 8, of the Montenegrin Law on the Prevention of Conflict of Interest.

[44] Article 38 of the Montenegrin Law on the Prevention of Conflict of Interest.

[45] Article 63 of the Macedonian Law on the Prevention of Corruption.

[46] Article 42 of the Croatian Law on the Conflict of Interest.

incomplete information in the declaration in an attempt to hide the real situation, even after he/she has been imposed a sanction. In that case, the Commission may issue a proposal for removal from office, which is submitted without any delay to the public authority that appointed the public official,[47] or may file criminal charges if such non-declaration includes elements of a criminal offence.

The most severe sanctions for no-declaration of assets are stipulated by the Serbian Law on Anti-Corruption Agency, which specifies that a public official who fails to declare assets or who misdeclares assets will be punished by imprisonment for a term of six months to five years. As a consequence of such conviction, the public official will have his/her public office terminated, and he/she will be disqualified from public office for a period of ten years from the validity of the judgement.[48] Fines are imposed only in the event of delayed submission of assets declarations, i.e. when the public official declares assets on his/her own after the expiry of the timelines specified in the Law.

2.2. Ownership Stakes in Commercial Companies

During their term in office, the public officials who have ownership stakes in commercial companies are obligated to transfer their controlling rights to other persons. A public official is obligated to transfer his/her controlling rights to a person who is not associated to him/her, and who will exercise such controlling rights in his/her own name, and on behalf of the public official. Such persons to whom the controlling rights have been transferred are known as the "associated", i.e. "confidential" persons.[49] In Serbia, exceptionally, a public official may transfer his/her controlling rights to other natural or legal person that is a founder, i.e. member or the

[47] The public authority may remove the official from office, whereby it is obligated to notify the Commission, or may reject such proposal, providing the reasons for such decision. In the same event of official's conduct, the Commission may issue the official a request for resignation, which is published in the Official Gazette (Narodne novine), daily newspapers sold in the overall territory of the country, and on the Commission's web site. These decisions can be contested in an administrative procedure (Articles 46, 47 of the Law).

[48] Article 72 of the Law on Anti-Corruption Agency.

[49] For the purpose of the Montenegrin law, an associated party is a public official's relative by blood or by marriage within the second degree, and in-law in the first degree, a spouse or common law partner, adoptive parent or an adoptee. The Serbian Law stipulates the same definition of "associated party", adding that the term means also any other natural or legal person that may be justifiably considered, on the basis of other grounds and in other circumstances, associated by way of interest to the public official. The Croatian Law includes all the above persons specified in the Montenegrin and Serbian regulations, and adds siblings to the list. In Macedonia, associated persons include spouses, children, parents, siblings, relatives within the fourth degree, and in-laws within the second degree if sharing household with the official. Only Article 14 of the Kosovo Law on the Suppression of Corruption stipulates that the transfer shall be made to a confidential person.

director of a commercial company in which the public official holds the controlling rights.

During his/her term in office, a public official must not impart information, give instructions, orders, or in any other way be associated to the person to whom he/she transferred the controlling rights, to prevent him/her from influencing the execution of those rights and the duties ensuing from the transferred controlling rights. However, the public official retains the right to be informed about the movements in and the status of the companies in which he/she owns assets. The Kosovo Law on the Suppression of Conflict of Interest Interest in Discharge of Public Office stipulates also that, in case the person to whom the controlling rights have been transferred establishes business relations with the central or local institutions, public companies or companies with more than 5% state ownership, he/she is obligated to notify the public official of such business deals.

The percentage of ownership stake that requires transfer varies from country to country: in Croatia it is 0.5%, in Bosnia and Herzegovina, it is more than 1%, in Serbia more than 3%, in Kosovo more than 5% of shares, i.e. ownership stake, while in Macedonia and Montenegro, the percentage of ownership stake that would require transfer of controlling rights in not specific by law.[50]

The Croatian Law on the Prevention of Conflict of Interest stipulates additional restrictions for public officials relating to ownership of controlling rights in private companies. Any commercial entity in which a public official has 0.5% or more ownership stake cannot enter into business relationships with the public authority in which the public official performs his/her office, and must not be a member of a group of tenderers or subcontractors in such legal relationship. Such defined restriction applies also to commercial entities in which a public official's family members have 0.5% and more ownership stake, as well as when a public official's family member has acquired in any way, directly or indirectly, shares from the public official in the period of two years before his/her appointment to office, i.e. election, and until the termination of his/her office.

The regulations in Serbia and Croatia stipulate also some restrictions for civil servants and employees. In accordance with the Serbian Law on Civil Servants, a civil servant (as well as an official[51]) is disqualified from being a founder of a commercial company, public service, or doing entrepreneur business. In case they already have ownership stakes in a commercial company, the civil servants are subject to the provisions specifying the obligation of transfer of public official's controlling rights.[52]

---

[50] Article 15 of the Croatian Law on the Prevention of Conflict of Interest, Article 35, Para. 5, of the Serbian Law on Anti-Corruption Agency, Article 14 of the Kosovo Law on the Suppression of Conflict of Interest in Public Office, Article 7 of the Montenegrin Law on the Prevention of Conflict of Interest, Article 19 of the Macedonian Law on the Suppression of Corruption.

[51] Article 33 of the Serbian Law on Anti-Corruption Agency.

[52] Article 28, Paras. 1,2, of the Serbian Law on Civil Servants (Zakon o državnim službenicima).

In Croatia, a civil servant is disqualified from generating capital gains or founding a commercial or other legal person, which operates in the same the activity that he/she deals with as a civil servant, or which is associated with the duties under the scope of activities of the public authority in which he/she is employed.[53]

After termination of public office, public officials (and in Serbia and Croatia civil servants as well) are allowed to reinstate their ownership stakes and controlling rights in commercial entities.

A provision of the Bulgarian Law that relates to this issue specifies that a Bulgarian public official must not dispose of state or public assets, spend budget funds, including EU funds, issue various confirmations or certificates, or perform control of any of the aforementioned activities in order to secure gains for non-profit legal entities, commercial companies in which the public official or his/her associated person is a member of management or supervisory board, director, partner, holder of an ownership stake or shareholder.[54] Moreover, a public official is disqualified from performing any of the above activities in the interest of the above legal entities in which he/she was a member of management or supervisory board, director, partner, holder of ownership stake or shareholder twelve months before he/she was appointed to public office.[55]

2.3. Membership in Management or Supervising Boards of Commercial Companies Entities and Public Institutions and Publicly-Owned Companies

In addition to the prohibition to own controlling rights in commercial companies during the term in office, the regulations of these countries stipulate explicitly the prohibition for public officials (and in some countries civil servants as well) to sit on management or supervisory boards of some commercial companies and also of publicly-owned companies and public institutions.

The Kosovo Laws on the Suppression of Corruption and on the Suppression of Conflict of Interest in Public Office stipulate that a public official cannot be the manager or member of management or supervisory board of a private company.[56] A public official is allowed to perform the same functions in public companies, funds or commercial companies in which a central or local government authority holds shares or other rights based on which he/she participates in the management or capital, but in that case he/she loses the right to receive remuneration in addition to the regular pay.

---

[53] Article 32 of the Croatian Law on Civil Servants (Zakon o državnim službenicima).

[54] Article 9, Para. 1, of the Bulgarian Law on the Prevention and Identification of Conflict of Interest.

[55] Article 9, Para. 2, of the Bulgarian Law on the Prevention and Identification of Conflict of Interest.

[56] Article 26, Para. 2 of the Kosovo Law on the Suppression of Corruption, and Article 15 of the Law on the Suppression of Conflict of Interest in Public Office.

Serbia has the identical prohibition of public officials' appointments in the private and public sector. The Law on Anti-Corruption Agency stipulates primarily that a public official during his/her term in office cannot be a founder of a commercial company or public service, and cannot engage in an independent activity. Furthermore, a public official cannot perform a managerial, supervisory or private capital representation function in a commercial accompany, private institution or other private legal person, unless that is a professional association, in which case he/she does not have the right to receive remuneration or gifts deriving from the membership in the association.[57]

The Serbian Law on Civil Servants explicitly prohibits all civil servants to act as directors, deputy directors or assistant directors in a legal person. The only exception from that rule is if they are appointed to those positions by the Government or other public authority.[58]

In Croatia, conflict of interest is raised in case a public official is appointed member of management or supervisory board of a commercial company, supervisory board of extra-budgetary funds, and if he/she performs management functions in commercial entities.[59] As an exception, Croatian public officials can be members of management or supervisory board of maximum two non-profit associations or institutions, or of funds and societies that are of particular relevance for the local or regional self-government unit, but without the right to receive remuneration or gifts.[60] Croatian civil servants cannot be appointed members of management or supervisory board of a commercial company that is subject to the oversight by the civil servant. However, outside working hours and subject to the approval of the superior, civil servants may perform activities or provide services to natural or legal persons, in circumstances when such persons is not subject to the oversight by the public authority in which the civil servant is employed, or if such engagement is not prohibited under a separate law. In such circumstances, the civil servant's appointment would not constitute a conflict of interest, or a barrier for due discharge of his/her duties, or impair the reputation of the civil service. [61]

Public officials in Bosnia and Herzegovina cannot be appointed members of parliament, supervisory board, board of directors or management, and cannot act as the authorised person in a public company during their term in office, and six months after termination of office. In addition to that, they cannot be members of parliament, supervisory board, board of directors and management, and they cannot act as the authorised person in any private company entering into contracts or other business

[57] Articles 33, 34 of the Serbian Law on Anti-Corruption Agency.

[58] Articles 28, 29 of the Serbian Law on Civil Servants.

[59] Article 14 of the Croatian Law on the Prevention of Conflict of Interest.

[60] Article 14, Para. 5, of the Croatian Law on the Prevention of Conflict of Interest.

[61] Articles 32, 33, 35 of the Croatian Law on Civil Servants.

arrangements with the institutions financed from the budget at any level.[62] Civil servants in the Bosnia and Herzegovina government institutions cannot be members of management or supervisory boards of political parties.[63]

Macedonia has a similar prohibition for public officials to be appointed members of management or supervisory board in a commercial company, but also to acquire, during the term in office and three years after termination of office, on any account or in any form, shareholding rights in a legal person that was subject to his/her oversight or other control during his/her term in office.[64] Civil servants cannot concurrently be the responsible person or a member of management board in a public company.[65]

The laws of Montenegro include the most problematic solutions in this area. Even though Articles 8 and 9 of the Montenegrin Law on the Prevention of the Conflict of Interest in principle prohibit public officials to be members of company organs and to hold public offices in publicly-owned companies and public institutions, the Law also envisages considerable exceptions. Namely, the majority of public officials, except for the members of Government, judges of the Constitutional Court, judges, the state prosecutor and deputy public prosecutor may, exceptionally, hold a public office in publicly-owned companies and public institutions.[66] The Law, however, does not further explain the meaning of the term "exceptionally", which opens the possibility for the majority of public officials to be members of managing or supervisory boards of publicly-owned companies or public institutions without any statutory obstacle. Interestingly enough, the members of the Montenegrin National Assembly, as legislators, have left themselves the option to be members of managing bodies of publicly-owned companies; the same possibility is given to members of local self-government assemblies, and to other officials (e.g. members of the senate of the State Audit Institution, the Ombudsman, the members of the Securities' Commission and the like). There is no doubt that such solutions do not comply with international standards, since there is ample possibility for a considerable number of officials to hold additional lucrative offices, which can easily result in the prevalence of private interest of that of the public.

---

[62] Articles 5, 6 of the Law on Conflict of Interest in the Bosnia and Herzegovina Government Institutions.

[63] Article16, Para.3, of the Bosnia and Herzegovina Law on Civil Servants (Zakon o državnim službenicima BiH).

[64] Article 19 of the Macedonian Law on the Suppression of Corruption.

[65] Article 21 of the Macedonian Law on the Suppression of Corruption.

[66] Article 9, paragraph 1 of the Montenegrin Law on Prevention of the Conflict of Interest.

2.4. Additional Appointments and Engagements

With respect to additional employment and engagements of public officials, in all of the analysed countries, the regulations stipulate multiple restrictions. In accordance with the Kosovo Law on the Suppression of Corruption,[67] Serbian Law on Anti-Corruption Agency,[68] Macedonian Law on the Suppression of Corruption,[69] and Croatian Law on the Prevention of Conflict of Interest,[70] a public official who performs his/her activity professionally, must not independently or as a part of his/her office, perform professional or other income-generating activities without obtaining a prior approval by his/her supervisor (Kosovo and Macedonia), i.e. the Anti-Corruption Agency (Serbia), the Commission (Croatia). While public officials in Bosnia and Herzegovina must not perform the duties of the authorised persons in foundations and associations that are financed from the budget at any level of the government in the amount exceeding 5,000 Euros annually, they may perform the executive function in foundations and associations that are not financed from the budget at any level of the government.[71] Civil servants in Bosnia and Herzegovina must not perform an additional function for which he/she would be eligible to receive remuneration, unless it is approved by the Minister or head of institution. A civil servant in Serbia may, subject to a written approval by his/her manager, outside working hours, work for another employer, unless additional employment is prohibited under separate regulations and laws, if that does not raise potential conflict of interest or impairs the civil servant's impartiality. A public official in Kosovo cannot perform administrative, oversight or representation functions in commercial companies, firms, institutions, cooperatives, funds or agencies. If the working post he/she occupied at the moment of taking public office is incompatible with the public office, the public official must resign from it or the Agency will initiate the procedure for termination of office.[72] The restriction stipulated by the Montenegrin Law implies that a public official cannot enter into a contract for provision of services to a public company or other commercial company which is in a contractual relationship with, i.e. performs services for the Montenegrin Government or the municipality, during his/her term in public office, unless the value of the contract is less than 500 Euros annually. Bulgarian civil servants are prohibited from performing functions that are incompatible with their office, and particularly receiving remuneration for such functions.[73]

[67] Article 25 of the Kosovo Law on the Suppression of Corruption.

[68] Article 30, Paras. 1, 4, of the Serbian Law on Anti-Corruption Agency.

[69] Article 21 of the Macedonian Law on the Suppression of Corruption.

[70] Article 12, Para. 2, of the Croatian Law on the Prevention of Conflict of Interest.

[71] Article 11 of the Law on the Prevention of Conflict of Interest in Bosnia and Herzegovina Government Institutions.

[72] Articles 28, 29 of the Kosovo Law on the Suppression of Corruption. A similar provision is contained also in Article 31 of the Serbian Law on Anti-Corruption Agency.

[73] Article 19 of the Bulgarian Code of Conduct for Civil Servants.

On the other hand, public officials are allowed to perform functions in the area of science, sports, education, culture and research activities. They are allowed also to receive income deriving from copyrights, patents, and similar rights.[74] Article 26, Para. 2, of the Serbian Law on Civil Servants regulates this issue identically when it applies to civil servants. Furthermore, the Kosovo Law on the Suppression of Conflict of Interest in Discharge of Public Office contains also a provision prohibiting public officials to perform a private activity such as lawyer, notary public, licensed expert, consultant, agent or representative of profit and non-profit organisations.[75] A Bosnia and Herzegovina public official, however, must not perform duties of the authorised persons in foundations and associations in the area of sports and culture that are financed from the budget at any level of the government in the amount exceeding 25,000 Euros annually.[76]

Kosovo regulations contain provisions relating to additional employment of public officials in non-governmental organisations, while the Serbian and Montenegrin regulations do not explicitly regulated that issue. Thus, a public official in Kosovo is allowed to be a member of management board of the non-governmental organisations active in the area of humanitarian work, culture, sports or similar activities, but they are not allowed to receive financial remuneration for such engagement. A non-governmental organisation will not receive funding from the state budget if a member of its management board is a public official who has a direct or indirect influence on the decision-making on what non-governmental organisations would receive funding from the Kosovo budget. In the Montenegrin and Serbian regulations, the provisions relating to engagement of public officials in the non-governmental sector cannot be found.

The Serbian Law on Anti-corruption Agency, however, stipulates the issue of the prohibition of discharge of concurrent public offices and the performance of functions in a political party.[77] A public official may hold only one office, unless the law stipulates concurrent functions or if he/she has obtained the approval of the Anti-Corruption Agency. At the moment of his/her election or appointment or election to another public office that he/she intends to discharge concurrently, the public official is obligated to request the approval of the Anti-Corruption Agency within the following three days. On the other side, the public official may retain the function in the political party, provided that that does not impair the discharging of the public function.

[74] Article 10 of the Kosovo Law on the Suppression of Conflict of Interest in Discharge of Public Office, Article 6 of the Montenegrin Law on the Prevention of Conflict of Interest, Article 30, Para. 2, of the Serbian Law on Anti-Corruption Agency, Article13, Para. 3, of the Croatian Law on the Prevention of Conflict of Interest.

[75] Article 16 of the Kosovo Law on the Suppression of Conflict of Interest in Discharge of Public Office.

[76] Article 11 of the Law on the Prevention of Conflict of Interest in Bosnia and Herzegovina Government Institutions.

[77] Articles 28, 29 of the Serbian Law on Anti-Corruption Agency.

The Bulgarian Law on the Prevention and Identification of Conflict of Interest stipulates the a public official must not perform any other function that in accordance with the Constitution or a separate law does not comply with his/her discharge of public office.[78]

2.5. Receiving Gifts and Other Privileges

In all the new countries in the territory of the former SFRY, as well as in Bulgaria, public officials are not allowed to receive gifts[79] or other benefits relating to the discharge of their office. The term "gift" includes money, various items irrespective of their value, rights and services provided free of charge. Public officials may receive protocolary gifts[80] and occasional gifts of symbolic value,[81] whereby they must not in any case receive gifts in money, securities and precious metals, irrespective of their value.

Public officials are not obliged to declare gifts of symbolic value. Gifts of symbolic value mean gifts whose value is equivalent up to a certain monetary ceiling. That value is 100 Euros in Macedonia, i.e. 70 Euros in Croatia, 100 Euros in Bosnia and Herzegovina, 50 Euros in Montenegro, while Serbia stipulates that the value of a gift should not exceed 50% of the average monthly wage after tax and contributions in the republic. The provisions relating to this issue in Kosovo stipulate that the value of a gift must not exceed 50 Euros, i.e. that the overall value of gifts must not exceed 100 Euros annually if they are made by the same person. If a public official receives several gifts from the same person, the overall value of all the gifts must not exceed the specified amount. These restrictions apply also to all persons who have received

[78] Article 5 of the Bulgarian Law on the Prevention and Identification of Conflict of Interest.

[79] Article 17 of the Croatian Law on Civil Servants, Article 11 of the Croatian Law on the Prevention of Conflict of Interest, Articles 9, 10 of the Law on the Prevention of Conflict of Interest in Bosnia and Herzegovina Government Institutions, Article 15 of the Macedonian Law on the Suppression of Corruption, Article 86 of the Law on Defence (Zakon o odbrani), Article 33 of the Kosovo Law on the Suppression of Corruption, and Article 15 of the Law on the Suppression of Conflict of Interest in Public Office, Article 14 of the Montenegrin Law on the Prevention of Conflict of Interest, Article 39 of the Serbian Law on Anti-Corruption Agency.

[80] Protocolary gifts mean the gifts given by foreign officials and representative of international organisations during their visits and on other occasions, as well as other gifts given in similar circumstances. A public official cannot receive more than one gift during a year from the same person or institution.

[81] Occasional small value gifts mean the gifts given in various official and private celebrations, holidays, and similar events.

a gift on behalf of a public official,[82] but also to all persons who share a household with a public official.[83]

If a public official is offered a gift that he/she is not allowed to receive, he/she is obligated to refuse it, notifying in writing the institution that elected or appointed him/her or on whose behalf he/she discharges a public office thereof.[84] In accordance with the Macedonia Law of the Prevention of Conflict of Interest, in case a public official cannot refuse a gift, he/she is obligated to forward the gift to the competent authority, and that, within 48 hours, submit a report on the received gift, indicating witnesses and other evidence.[85]

The received gifts, as well as their value, must be declared to the public authority in which the public official performs his/her office, which will in turn register the data in the gifts catalogue,[86] whose copy is then forwarded to the Agency, i.e. the Commission, Anti-Corruption Agency, Croatian Commission, Bosnia and Herzegovina Central Elections Commission, and the State Commission.[87] Official gifts and appropriate gifts that exceed the specified monetary value, and are not

[82] Article 14, Para. 6, of the Montenegrin Law on the Prevention of Conflict of Interest. Article 8 of the Law on the Prevention of Conflict of Interest in Bosnia and Herzegovina Government Institutions. In accordance with Article 42 of the Serbian Law on Anti-Corruption Agency, exceptionally, an associated person may receive a protocolary gift. An official shall not be held responsible if he can prove that he could not affect the behaviour of the associated person who received the gift or if he/she can prove that the gift received is not related to discharge of his public office.

[83] Article 11 of the Kosovo Law on the Suppression of Corruption, and Article 15 of the Law on the Suppression of Conflict of Interest in Public Office, and Article 33 of the Kosovo Law Suppression of Conflict of Interest in Public Office, Article 42 of the Serbian Law on Anti-Corruption Agency, and Article 14, Para. 3, of the Montenegrin Law on the Prevention of Conflict of Interest

[84] Article 15 of the Montenegrin Law on the Prevention of Conflict of Interest, Article 40 of the Serbian Law on Anti-Corruption Agency, Article 33 of the Kosovo Law on the Suppression of Corruption, Article 10(6) of the of the Law on the Prevention of Conflict of Interest in Bosnia and Herzegovina Government Institutions. This provision is not stipulated in the Croatian Law.

[85] Article 16 of the Macedonian Law on the Suppression of Corruption.

[86] Article12, Para.1, of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials, Article 16 of the Montenegrin Law on the Prevention of Conflict of Interest, and Article 41, Para. 2 of the Serbian Law on Anti-Corruption Agency, Article 5 of the Decree of Gifts Received by Croatian Officials (Uredba darovima koje prima dužnosnik HR).

[87] Article 12, Para. 5, of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials, Article 17 Montenegrin Law on the Prevention of Conflict of Interest, and Article 41 of the Serbian Law on Anti-Corruption Agency, Article 21 of the Macedonian Law on the Suppression of Corruption, Article 10, Para. 4, of the Law on the Prevention of Conflict of Interest in Bosnia and Herzegovina Government Institutions.

of personal nature, become the property of the state.[88] Protocolary gifts, as a rule, become the property of the state.

Should it establish that a rule on the declaration of gifts has been breached, the competent authority for the prevention of conflict of interest in the analysed countries is obligated to notify the public authority in which the public official performs his/her office, requiring that the disciplinary measures should be taken against the public official. In case there are reasons to believe that a criminal offence has been committed, criminal charges are also brought.[89]

The gifts registry is public and it is available in the web sites of the competent authorities for the prevention of conflict of interest.

In Bulgaria, the provisions relating to gifts can be found only in the Code of Ethics for Public Officials. In accordance with the above Code, public officials are prohibited to receive gifts, money, other services or benefits for their work that could influence their discharge of public office.[90] Unlike the other analysed countries, Bulgaria does not stipulate the gifts of certain value that public officials are allowed receive. The Bulgarian Criminal Code in its articles relating to giving gifts and benefits to public officials has no mention either of a specific value over which it would be considered that a criminal offence of giving gifts and accepting bribes has been committed.[91] Similarly, the obligation to declare all received gifts that exists in all the other countries is not stipulated. However, based on the interpretation of Para. 4 of Article 12 of the Bulgarian Law on the Prevention and Identification of Conflict of Interest, it may be concluded that that obligation exists, as that provision stipulates, in principal, the obligation of public officials to declare to the persons who elected or appointed them or to the Commission for the Prevention and Identification of Conflict of Interest any situation in which they have a private interest.

---

[88] Article 40 of the Serbian Law on Anti-Corruption Agency, Article 15 of the Montenegrin Law on the Prevention of Conflict of Interest, Article 33 of the Kosovo Law on the Suppression of Corruption, as well as Article 11 of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials, Article 4 of the Decree of Gifts Received by Croatian Officials.

[89] Article 41 of the Serbian Law on Anti-Corruption Agency, Article 17, Para. 2, of the Montenegrin Law on the Prevention of Conflict of Interest, Article 33 of the Kosovo Law on the Suppression of Corruption, as well as Article 12, Para. 6, of the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials, Article 17 of the Law on Conflict of Interest in Bosnia and Herzegovina Government Institutions, Article 21 of the Law on the Prevention of Conflict of Interest in conjunction with Article 357 of the Macedonian Criminal Code, Article 42 of the Law on the Prevention of Conflict of Interest

[90] Article 8 of the Bulgarian Code of Conduct for Civil Servants.

[91] See Articles 224, 225, 301, 303, 304 of the Bulgarian Criminal Code.

2.6. Employment After Termination of Public Office

All of the analysed countries in the region adopted the internationally accepted standards relating to restriction of employment after termination of public office to avoid the possibility of establishing corruptive relationships during the term in public office.

In accordance with the Kosovo regulations, after termination of public office, the public official is disqualified from employment and appointments to managerial positions or from participating in the control of public or private companies if his/her duties in the period of two years before the termination of office were linked indirectly to the oversight or control of such companies' operations. The same rule applies also to the engagements of public officers in non-governmental organisations after termination of public office.[92]

The Montenegrin regulations[93] contain similar provisions: for a period of one year (i.e. two years in Macedonia) after termination of office, a public officer is disqualified from acting as a representative or a proxy of a legal person with which the authority in which he/she performed public office has established or establishes a contractual relationship; or representing a natural or legal person before the public authority in which he/she participated in the decision-making. Furthermore, these laws stipulate that a public officer is disqualified also from performing audit and management activities in the legal person in which, for at least one year prior to termination of office, his/her duties were linked to the supervisory or control activities, or from entering into contractual relationships or other forms of cooperation with the authorities in which he/she held office.[94]

The Croatian Law on the Prevention of Conflict of Interest stipulates a period of one year during which a public officer is disqualified from appointments or election to or entering into an employment relationship in the legal person in which he/she was in a business relationship during the term in office, unless he/she has obtained an approval by the Commission.[95]

The Serbian Law on Anti-Corruption Agency simply stipulates that during the period of two years after termination of public office, the official whose office has ceased may not take employment or establish business cooperation with a legal entity, entrepreneur or international organisation engaged in any activity relating to

[92] Articles 10-17 of the Kosovo Law on the Suppression of Conflict of Interest in Discharge of Public Office.

[93] Article17, Para. 3, of the Macedonian Law on the Suppression of Conflict of Interest.

[94] Article 13 of the Montenegrin Law on the Prevention of Conflict of Interest, Article 17, Paras. 1, 2 of the Macedonian Law on the Suppression of Conflict of Interest.

[95] The same Article 20 of the Law also states, "when at the point of appointment, election or contract awards in that specific case it is ensued that he/she intends to enter into a business relationship with the body in which he/she held a pubic office."

the office the official held, except under approval of the Anti-Corruption Agency.[96]

The Bosnia and Herzegovina regulations stipulate different provisions relating to public official and civil servants. During the term in office and six months after termination of office, public officials are disqualified from being members of management or supervisory board, parliament, board of directors or management, or from acting as the authorised person in a public company. They are also disqualified from being members of management or supervisory board, or the privatization directorate or agency.[97] The Law on Civil Servants in Bosnia and Herzegovina Government Institutions, in Article 16(b), stipulates, "A civil servant who was released from office may not, within two years after the date of release of office, be employed by an employer over whom, or join a company over which, he/she exercised regular supervision. He/she shall also not receive any income from such employer or company within two years after the date of release from office."

Bulgarian public officials whose public office was terminated due to a conflict of interest are disqualified from public office for a period of one year. Furthermore, all public officers whose public office was terminated are disqualified from entering into employment contracts or any other contracts for performance of the oversight or control functions in the companies in which they had performed oversight or with which they had closed contracts during the last two years they were in office. They are disqualified also from being a partner, holding an ownership stake, being a director or member of management or supervisory board of such company. The above restrictions apply also to those companies which are in close relations with the described companies.[98] After termination of service, civil servants are prohibited, in principle, to abuse the information they obtained during their employment in the civil service.[99]

In the regulations of Montenegro, Bosnia and Herzegovina, Croatia, Macedonia, Serbia and Bulgaria, the provisions relating to engagements of public officers in non-governmental organisations after termination of their public office cannot be found.

[96] Article 38 of the Serbian Law on Anti-Corruption Agency.

[97] Article 5 of the Law on Conflict of Interest in Bosnia and Herzegovina Government Institutions

[98] Articles 20a, 21 of the Bulgarian on the Prevention and Identification of Conflict of Interest.

[99] Article 13 of the Bulgarian Code of Conduct for Civil Servants.

2.7. Official Decision-Making and Advising Policy (Conclusion of Contracts Included)

In the countries in the region, officials must act conscientiously and impartially[100] while in office and must not influence the adoption of decisions by public administration authorities in order to achieve their own interests.[101] This obligation is particularly prominent in cases of employment in public administration and in public procurement procedures.[102]

In order to put effect to these principles, almost all the countries analysed in this report have a statutory obligation of public officials to report their private interest prior to a debate or adoption of a decision on an issue related to such interest. Such solutions are found in the statutes governing the conflict of interest in Macedonia,[103] Bulgaria[104] and Montenegro,[105] and also in the Serbian Law on Civil Servants.[106] A similar solution is envisaged by the Bosnia and Herzegovina Law on the Prevention

[100] See Article 4.2. of the Kosovo Law on the Suppression of Corruption: "An official must perform his/her office conscientiously, professionally, without discrimination and without granting privileges to anyone, with due observance of human freedoms, human rights and human dignity".

[101] See the Kosovo Law on Preventing the Conflict of Interest, Article 11 (v): "An official is prohibited from: influencing a decision of an official or a body for personal material gain or gain of a person he/she is related to, ix) to influence the adoption of decisions passed by legislative authorities, courts or executive authorities, using the position of an official for personal gain or gain of a close person. The same solution is envisaged in the Bulgarian Law on the Prevention and Disclosure of Conflict of Interest.

[102] See Croatian Law on the Prevention of Conflict of Interest, Macedonian Law on the Prevention of Conflict of Interest and Bulgarian Law on the Prevention and Disclosure of Conflict of Interest. Pursuant to Article 7 of the Croatian Law on the Prevention of Conflict of Interst, an official must not "demand, accept or take a value or service in order to vote on any matter, nor affect the decision of a body or person for personal gain or gain of a related person f) promise imployment or other right in exchange for a gift or a promise of a gift, g) influence employment or award of public contracts, i) in other way use the position of an official by influencing a decision of the legislative, exececutive or judicial power in order to attain personal gain or gain of a related person, a benefit or a right, conclude a legal opeartion or in other way benefit, in terms of interest, to self or a related person. Article 5 paragraph 2 of the Macedonian law envisages that "officials must not influence the passing of decisions in public procurements or in any other way use his/her position so as to influence the adoption of a decision in order to attain personal gain or benefit for self or a related person. ".

[103] Article 13 of the Macedonial Law on the Conflict of Interest.

[104] Article 7 of the Bulgarian Law on the Prevention and Disclosure of Conflict of Interest

[105] Article 12 of the Montenegrin Law on the Prevention of Conflict of Interest.

[106] Article 30 of the Serbian Law on Civil Servants.

of Conflict on Interest in Public Authorities.[107] In addition to this solution, which is envisaged in all statutes, pursuant to the Macedonian Law on the Prevention of Corruption, the elected and appointed officials, civil servants and responsible persons in publicly-owned companies must be excluded from the decision-making process with regards to legal persons founded by the official or his/her family members.[108] In Serbia, if an official fails to report the existence of private interest, the individual act in the adoption of which such official had participated shall be declared null and void.[109]

The solution which regulates the obligation of the officials to pass decisions impartially in more detail is envisaged in the Serbian Anti-Corruption Agency Law. Namely, Article 36 of this statute envisages that: "a legal person in which an official has more than 20% of stock or share, if undergoing privatisation procedure, participating in public procurement procedure or in other procedure resulting in a contract being concluded with a body of the Republic, territorial autonomy, local self-government, other budget user or other legal person founded by a body of the Republic, territorial autonomy or local self-government or a legal person where over 20% of capital is publicly owned, shall inform the Agency thereof within three days from the day the first actions were taken in the procedure, and also of the final outcome of the procedure within three days from learning that such procedure is concluded."[110]

2.8. Conflict of Interest Regulations Relating to Security and Defence Sector

In all the analysed countries in the region, general regulations governing the prevention of the conflict of interest also apply to persons employed at the ministries of defence. Consequently, these regulations apply to ministers of defence, their deputies and assistants, heads and deputy heads of state administration bodies within the ministries of defence.

In addition to the above-mentioned persons, general regulations on the prevention of the conflict of interest in certain states envisage precisely additional persons from the defence sector to which these provisions will apply. This eliminates

[107] Article 7 subparagraph 1: Elected officials and holders of executive offices may not vote on any matter directly concerning a private company in which such official, holder of executive office or interest-related person has financial interest. In such cases, elected officials and holders of executive offices shall refrain from voting and explain the reasons for doing so in an open session. The same solution is envisaged in Article 20(b) of the Bulgarian Law on the Prevention and Disclosure of Conflict of Interest.

[108] Article 22 of the Macedonian Law on the Prevention of Corruption.

[109] Article 32 of the Serbian Anti-Corruption Agency Law, Article 17 (5) of the Croatian Law on the Prevention of Conflict of Interest.

[110] Article 36 of the Serbian Anti-Corruption Agency Law.

any doubt as to whether such persons are under the obligation to observe the provisions of the statutes regulating the conflict of interest, such as the obligation to declare assets, decline presents, and the like. Thus, for instance, the Kosovo Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts for All Public Officials applies to "high public officials holding public offices in the security and order structures, such as the commander and deputy commander of the Kosovo Security Forces".[111] The Croatian Law on the Prevention of the Conflict of Interest also applies to the chief defence inspector, head and deputy head of the General Staff of the Armed Forces, commanders of the Croatian Armed Forces sectors and their deputies and commander of the Support Command, director and deputy director of the Croatian military academy and the head of the Croatian Coast Guard. In Bulgaria, the general regulations concerning the conflict of interest also apply to the director and deputy director of the National Social Security Institute.

In addition to the provisions concerning the prevention of the conflict of interest relating to a limited number of persons in the defence sector, the laws regulating the army in general, as a rule, include a general obligation of all military officials and other employees to avoid any activity which may constitute a real or manifest conflict of interest. Furthermore, the regulations of the countries in the region include certain provisions prohibiting military officials from engaging in specific activities, which undoubtedly result in the conflict of private and public interests. For example, the Law on the Service in the Kosovo Security Forces prohibits the members of Kosovo security forces to engage in other jobs, including private business, except under the approval of their superiors, and to have financial gain, except for their salary originating from their job or the nature of their job in the Security Forces.[112] Given that this statute also refers to the application of the Law on Civil Service, it can be concluded that military officials, professional soldiers and employees may not receive gifts or other benefits or privileges, except for protocolary gifts and gifts of small value.[113]

The Law on the Armed Forces of Montenegro stipulates explicitly the prohibition to receive gifts, use privileges or other benefits for themselves or their family members, friends and other legal or natural persons with whom they have established a private or business cooperation.[114] Also, the civil servants and employees in the Ministry of Defence must not perform any activities that may raise conflict of interest, and subject to the approval of the competent authority, may perform outside working hours activities that will not raise conflict of interest. The performance of activities in the area of scientific research, pedagogy, humanitarian work, sports or

[111] Article 3 of the Law on Declaration, Origins and Control of Senior Public Officials' Assets and Control of Gifts For All Public Officials.

[112] Article 4 of the Law of the Kosovo Security Forces.

[113] Article 52 of the Kosovo Civil Service Law.

[114] Article 58 of the Law on the Armed Forces of Montenegro (Zakon o vojsci).

any similar activity is not subject to the approval of the superiors.[115] Furthermore, the civil servants and employees in the Ministry of Defence are prohibited to receive money and gifts, except protocolary and occasional gifts of small value.

With respect to the Republic of Serbia, the Law on the Serbian Armed Forces (Zakon o vojsci) prohibits military officials and servants to receive gifts, prohibits their additional engagement, founding of companies and holding public offices, and participation in management bodies of companies. The problem, however, lies in the fact that the Anti-Corruption Agency is not competent for supervising the implementation of these provisions with regards to the vast majority of military officials, servants and professional soldiers - the supervision is vested with the heads of the Ministry of Defence. In addition, in Serbia, the top army officials are exempted from the obligation to declare their assets, whereby military professionals are exempted, to a considerable degree, from the general regime of the prevention of the conflict of interest.

Military personnel in the Armed Forces of Bosnia and Herzegovina[116] are prohibited to, "receive and instigate a person to receive a gift or any other item of material value from any person or organisation that requests the Armed Forces to undertake an official measure, has a business relations or implements certain activities with them, or from those whose financial, professional or personal interests of implementing or not implementing their duties it may significantly influence." The following Article of the same Law stipulates the exemptions of the above prohibition to receive gifts. Thus, for example, if a gift is made by a foreign country representative, professional armed forces personnel may receive it, but it would constitute the property of Bosnia and Herzegovina[117]. Furthermore, a person may receive personal gifts and "treats"[118] from any person or organisation, provided that their value does not exceed 50 Euros, gifts from subordinate personnel or on behalf of subordinate personnel whose value does not exceed 200 Euros,[119] and gifts from subordinate personnel for the superiors in special occasions,[120] in the value of 200 Euros. All received gifts must be declared to the superior professional armed forces officer.

The Bulgarian Law on Defence and the Armed Forces contains a provision that disqualifies the civil servants serving in the Ministry of Defence, for a period of three years after the termination of their service, from entering into contracts,

[115] Article 50 of the Law on the Armed Forces of Montenegro.

[116] Article 86 of the Law on Service in the Armed Forces of Bosnia and Herzegovina (Zakon o službi u oružanim snagama BiH).

[117] Except in exceptional cases, when professional military personnel may become a property of such persons, if stipulated by a regulation adopted by the Minister of Defence. In any case, a person who receives a gift is obligated to notify his/her superior thereof.

[118] Treats and gifts include food, services, and small value movables.

[119] Gifts may be made in the following events: promotion, retirement, change of command structure or other professional achievements.

[120] E.g. weddings, birthday parties.

being partners, or holders of ownership stakes or shares, members of management or supervisory board of any commercial company over which they performed oversight or control in their capacity as a civil servant during the last year of their service. The same rule applies also to the civil servants in the Ministry of Defence who participated, during the last year of their service, in the organisation of public procurements or other procedures relating to EU funds. In that case, a former civil servant in the Ministry of Defence cannot participate or represent other persons in such procedures before the Ministry of Defence for a period of three years after the termination of his/her service.

With regards to all other issues concerning the conflict of interest, relevant statutes governing armed forces or army service of the countries in the region envisage that the statute regulating the conflict of interest with regards to civil servants shall apply accordingly to the military officials, servants, but shall not apply to military professionals.[121] In this way professional military personnel, military servatns and employees are required to respect the provisions general provisions on conflict of interest, stipulated by the Civil Service Law. Partial exception from this rule is the Law on Service in Armed Forces of BiH, which stipulates that regulations on civil servants and employees will be applied 'appropriately' only on military servants and employees and not on professional military personnel.

2.9. Main Problems in Implementing the Regulations

One of the main problems in implementing the regulations governing the conflict of interests concerns the lack of sufficient capacities of competent institutions to which the declaration of assets of public officials are submitted, in verifying such declarations. For instance, the Serbian Anti-Corruption Agency faces the challenge of verifying 20000 asset declarations of public officials[122] which is a major task, one that, beyond doubt, exceeds the capacities of this recently-established institutions. It should also be borne in mind that in Serbia only high level public officials, and not civil servants, are under the obligation to declare their assets, as opposed to cases of Bosnia and Herzegovina and Bulgaria. The Bosnian Anti-Corruption Agency, which is competent for verifying asset declarations of all public officials and the B&H state level is still not operational, although it was established by a statute back

[121] For instance, Article 8 of the Serbian Law on Armed Forces, Article 11 of the Montenegrin Law on Armed Forces, Article 1 paragraph 3 of the Kosovo Law on the Kosovo Security Forces, Article 14 of the Law on the Service in the Republic of Croatia Armed Forces, Article 3 of the Law on the Service in Bosnia and Herzegovina Armed Forces, Article 188a of the Defence and Security Forces of Bulgaria law. Military professional soldiers are a professional soldier, petty officer and officer.

[122] Data taken from *http://www.bti-project.de/fileadmin/Inhalte/reports/2012/pdf/BTI%202012%20Serbia.pdf*, February 10, 2013.

in 2009.[123] This renders the provisions on the obligation of public officials to declare their assets pointless. The Kosovo Anti-Corruption Agency also faces the problem of inadequate capacities, which results in a formalistic approach to the verification of asset declarations, without taking the necessary investigative actions in order to establish the true state of facts concerning the property of public officials. [124]

In order to overcome the existing problems steps should be taken primarily towards building the capacities of institutions responsible for collecting and verifying asset declarations. The possibility of narrowing the list of public officials who are subject to obligation to declare assets should also be considered, particularly in cases where there is no pecuniary compensation for the performance of such public office. Pursuant to the accepted international standards and good practice, it is recommended that only the highest state officials should be subject to the obligation to declare assets, as opposed to such obligation being imposed on all public officials (e.g. all state or public officials), which is inspired with the intention to prevent the conflict of interest where it is most likely to occur, at the same time avoiding to overburden the capacities of the competent authorities. On the other hand, consideration should be given to the possibility of expanding the circle of relatives of the highest public officials subject to the obligation to declare assets. The suggestion is to extend this obligation, pursuant to Macedonian legislation, so as to have it cover, in addition to the public officials' spouse and children, the public officials' parents and siblings.

Another important problem for all the countries in the region is the implementation of the recommendations given by independent bodies competent for implementing the regulations concerning the conflict of interest, or rather, the issue of how the state authorities act upon their reports. For instance, the Bosnia and Herzegovina Central Electoral Commission, which is competent for resolving the conflict of interest of MPs, has pronounced several fines to MPs who were in conflict of interest; however, several MPs have refused to pay the fine or were considerably late in paying it.[125] The Macedonian State Anti-Corruption Agency faces similar challenges, since state institutions, contrary to its recommendations, often completely ignore the procedures aimed at preventing the conflict of interest. Such practice, coupled with a low institutional capacities and highly-politicized institutions constitutes fruitful ground for the corruption to flourish.[126] Serbian Anti-Corruption Agency is also faced with inadequate co-operation with other state institutions, the public prosecutors' office in particular - on several occasions the public prosecutors' office had refused to initiate criminal proceedings in cases where public officials have failed to declare their assets.

---

[123] SIGMA, *Assessment Report Bosnia and Herzegovina 2012*, SIGMA/OECD, p. 33.

[124] SIGMA, *Assessment Report Kosovo, 2012*, SIGMA/OECD.

[125] SIGMA, *Assessment Report Bosnia and Herzegovina, 2012*, SIGMA/OECD.

[126] SIGMA, *Assessment Report Macedonia, 2012*, SIGMA/OECD.

Finally, one of the major problems in the majority of the countries in the region is the issue of adequate monitoring of the implementation of the conflict of interest regulations with regards to professional soldiers, military officials and servants. The defence sector has two different hierarchies: one within the ministry of defence and one within the army itself. The officials of the ministry of defence are subject to the general regulations on the conflict of interest, the implementation of which is, as a rule, the competence of the specialised anti-corruption bodies. On the other hand, all military personnel, regardless of the rank, are subject to the general regulations applicable to civil servants, the implementation of which is in the competence of the ministry of defence. The major drawback of such a solution is the fact that the persons holding the highest positions in military hierarchy are not monitored by independent anti-corruption bodies, but the ministry. The situation is additionally complicated by the relative complexity and specific nature of security operations, which prevent full public insight, which implies that additional control mechanisms should be introduced in this sector.

3. CONCLUDING REMARKS

Ensuring the observance of ethics and providing quality services in public administration is closely connected to efficient anti-corruption action. The goals so defined must be constantly and consistently reiterated and emphasised, particularly in the context of the reform efforts taken in all the countries in the region in this sector over the past decade. The first step in successful prevention of corruption is to identify and objectively asses the factors and areas in which corruption may take place and develop - the conflict of interest, beyond doubt, being one of them. It is hence necessary for the state to have adequate mechanisms for preventing and sanctioning the conflict of interest between the private interest of the person holding a public office and the public interest, which such person should represent. The observance of internationally accepted standards in the field of prevention of the conflict of interest is one of the best indicators as to whether a state puts enough effort aimed at eliminating the situations where private interest may prevail over public interest.

General statutory regulations concerning the conflict of interest in Serbia, Croatia, Montenegro, Bosnia and Herzegovina, Kosovo, Macedonia and Bulgaria are, to a considerable extent, harmonised with international standards and offer almost identical solutions. The statutes of all analysed countries envisage the obligation to declare assets to relevant specialised anti-corruption bodies. Pursuant to internationally-accepted standard, this obligation should be imposed only to officials, and such solution is adopted in the laws of Serbia, Croatia, Kosovo, Montenegro and Macedonia. A somewhat different solution is adopted in the statutes of Bosnia and Herzegovina and Bulgaria, which require asset declaration not only from high

level public officials but also from civil servants. Even though this solution seems like a sound and comprehensive one, it raises the question of whether it can be efficiently applied in practice, given the capacities of specialised anti-corruption bodies competent for verifying the declared assets.

The comparative analysis has shown that in all analysed countries limits are put in place with regards to the additional engagement of persons holding public offices and their employment once they are no longer in public office. The only exception is the solution found in the Montenegrin Law on the Prevention of the Conflict of Interest, which allows most officials to hold managerial posts in publicly-owned company - this is not in accordance with international standards. The countries in the region also differ with regards to the prescribed periods during which the person who held public office may not engage in certain businesses, due to possible conflict of interest. Similarly, the statutory provisions concerning the acceptance of gifts or the obligation to dispose of shares in companies differ from state to state only with regard to the prescribed values of the gifts and/or shares in companies.

When analysing the regulations of the countries in the region governing conflict of interest in the defence sector, several problems can be identified. One of the most concerning problems is the lack of obligation to declare assets for the top military officials. Namely, the statutory provisions governing the conflict of interest, the implementation of which is, as a rule, in the competence of specialised anti-corruption bodies, do not apply to the top military officials in some countries. The situation is somewhat better in Croatia, Macedonia, Bulgaria and Kosovo, since the provisions of the general statutes governing the conflict of interest to certain army professionals. However, in Serbia, Bosnia and Herzegovina, high military officials are exempted from the general provisions of the statutes governing the conflict of interest and consequently are not under the obligation to declare assets or gifts received in service. The obligation to declare assets commonly also imposed on top military officials in other countries, including Lithuania, China and the USA. These and similar drawbacks must be corrected by precise statutory norms, for, otherwise, they leave ample room for abuse and corruption. Given that the defence sector is a major budget user, the potential damage to the budget is alarming.

A general observation applicable to all the countries in the region concerns the lack of adequate and/or detailed regulations governing the conflict of interest in the defence sector; the existing norms and references to the general regime are insufficient to regulate such an important issue. Namely, in all the countries in the region the provisions concerning the conflict of interest in the statutes governing the status of military officials and military professionals are rare and mainly consist of reference to provisions governing civil servants, which are of general nature and lack clear mechanisms for the monitoring of their implementation. Consequently, the legal framework in the field of the conflict of interest of all the countries in the region in the defence sector can be graded as B, which means it is partly harmonised with international standards.

Ana Knezevic Bojovic, PhD [1]

FREE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE

1. INTERNATIONAL STANDARDS

To understand the right to information, at the very beginning, we must differentiate between two aspects of this right. The first aspect refers to the right of an interested person to documents that may be relevant for decision-making in a specific proceeding lead before a public authority. The second one is much broader and implies the right of the general public to have access to public documents that constitute information of public importance. The first aspect of this right is, in fact, just one form of effecting the right to fair trial, while the second one is a constituent part of freedom of information.

The right to information held by public authorities gained recognition as one of the fundamental human rights only recently.[2] The exception is Sweden, where the public right to information was legally recognised under the freedom of press regulations back as early as 1776.[3] The first free access to information statute was adopted in 1966 in the United States of America,[4] which was followed by similar legislation adopted in other countries as well. Over the past few decades, the legislative activity in this area has been increasingly intensive – both at the national and international levels. Furthermore, in some countries, the right to information is guaranteed in the constitutional texts.[5]

Therefore, which are the legal sources relating to the right to information of public importance at the international level?

---

[1] Research Associate, Institute of Comparative Law, Belgrade.

[2] Toby Mendel, *Freedom of information (a Comparative Legal Survey*), United Nations Educational Scientific and Cultural Organisation (UNESCO), New Delhi, India, 2003, p. iii.

[3] M. Savino, *The Right to Open Public Administrations in Europe: Emerging Legal Standards*, Sigma Papers, No. 46, OECD Publishing. http://dx.doi.org/10.1787/5km4g0zfqt27-en, p. 7. The same regime applied also to Finland, which was a part of the Kingdom of Sweden at the time. Finland adopted their regulations on this issue in 1951.

[4] As pointed out by D. Banisar (*Freedom of Information Around the World 2006: A Global Survey of Access to Government Records Laws* (2006) Privacy International), President of the United States Lyndon Johnson stated on that occasion "I signed this measure with a deep sense of pride that the United States is an open society which the people's right to know is cherished and guarded."

[5] Spain, Estonia, Finland, Poland, Portugal, Romania, Slovenia. M. Savino, *The Right to Open Public Administrations in Europe: Emerging Legal Standards*, Sigma papers, No. 46, OECD publishing, p. 7.

1.1. Sources of Law

In its very first session in 1946, the UN General Assembly adopted Resolution 59(I), stating, "Freedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated". Article 19 of the UN Universal Declaration of Human Rights[6] stipulates freedom of opinion and expression as follows: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Similar formulation is provided also in Article 19 of the UN International Covenant on Civil and Political Rights,[7] stating: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." Moreover, the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression recognised the principles relating to freedom of information as the key elements of freedom of speech, but also as an important independent human right. In 2005, the UN organisation adopted the UN Convection Against Corruption. Article 10 of this Convention, under the title "Public reporting", encourages the state parties to take such measures as may be necessary to enhance access to information as one of the means used in the action against corruption. Access to information was given special importance in the Aarhus Convention.[8] The Convention came into force in 2001. Article 4 of the Convention requires the state parties to adopt and implement legislation that would ensure that public authorities, in response to a request for environmental information, make environmental information available to the public (including, copies of the actual documentation). Environmental information means any information on the state of elements of the environment, affecting or likely to affect the elements of the environment, the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment.[9] The Convention stipulates also the obligation of state parties to ensure within the framework of the national legislation that environmental information is made available to the public without a legitimate interest having to be stated. To this date, the Aarhus Convention has been ratified or acceded to by 46 countries, including Serbia. The European Union also acceded to the Convention.

---

[6] Universal Declaration of Human Rights. General Assembly resolution 217 A (III) of 10 December 1948.

[7] International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI) of 16 December 1966, *http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.*

[8] Zakon o potvrđivanju Konvencije o dostupnosti informacija, učešću javnosti u donošenju odluka i pravu na pravnu žaštitu u pitanjima životne sredine (Aarhus Convention ratified) 12 May 2009 *Official Gazette RS – International Contracts*, No. 38/09.

[9] Article 2 of the Aarhus Convention.

The Council of Europe organisation also recognises freedom of information as a fundamental human right under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[10] Article 10, Para. 1, of the Convention states, "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." As with other rights and freedoms guaranteed by this Convention, the scope of the right to information is specified through the case-law of the European Court of Human Rights (ECHR). As pointed out by Mendel,[11] while the ECHR previously interpreted Article 10 of the Convention so as that it did not imply a positive obligation of the state to disseminate or disclose information to the public,[12] the recent case-law shows that the Court has considerably changed the approach. In the case of *Kenedi v. Hungary,*[13] the Court explicitly recognised the obligation of the state, in circumstances when the requested information is available and does not require the government to gather any data, to refrain from interfering with the flow of information requested by the applicant. This right was recognised to a certain extent back in 2006 when the Court in the case of *Sdružení Jihočeské Matky v. Czech Republic*[14] found that Article 10 of the Convention could imply the right to information held by a public authority. In the judgement in the case of *Társaság a Szabadságjogokért v. Hungary,*[15] in paragraph 35, the Court recognised that the Court had recently advanced towards a broader interpretation of the notion of freedom to information, which implied also free access to information.

However, the right to information is not regulated only by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Quite on the contrary, the Council of Europe has been engaged for decades on developing the standards for access to information.[16] Two documents from that regulatory framework need to be singled out: Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents[17] and the Council of Europe Convention on Access to Official Documents from 18 June 2009. As pointed

[10] European Convention for the Protection of Human Rights and Fundamental Freedoms.

[11] T. Mendel, Freedom of Information as an Internationally Protected Human Right, available at *http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf*, 25 November 2012.

[12] Cases Leander v. Sweden, 26.3.1987., 9 EHRR 433, p. 74, as well as Gaskin v. United Kingdom, 7 July 1989, 12 EHRR 36 and Guerra and Ors v. Italy, 19 February 1998.

[13] Application No. 31475/05, judgment 26 May 2009.

[14] Application No. 19101/03, judgment 10 July 2006.

[15] Application No. 37374/05, judgment 14 April 2009.

[16] V. Banisar, *op. cit*, p. 11. Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents, available at *https://wcd.coe.int/ViewDoc.jsp?id=262135.*

17 Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents, available at *https://wcd.coe.int/ViewDoc.jsp?id=262135.*

out by Šabić,[18] the Recommendation is a refined summary of the best international standards in this field, and it will hence be considered in more detail further below. The Recommendation was in fact used as a basis for the aforementioned Convention, which still has to enter into force - which requires 10 ratifications, while it has been ratified by only 6 countries to this date.[19] That is why in this paper the references to the Council of Europe standards will be considered as references to the relevant case-law of the ECHR and the Recommendation (2002)2.

The European Union recognised the issue of access to information from the date of its establishment – the Declaration on the Right of Access to Information[20] was adopted together with the Maastricht Treaty. Truth be told, the Declaration was only a recommendation that the Commission should prepare a report on the measures that would ensure the improvement of access to information held by public authorities. However, based on this Declaration, the Council and the Commission adopted a Code of Conduct that further specified the terms under which the information held by those authorities can be requested. Free access to information was guaranteed also in Article 255 of the Treaty Establishing the European Community to all natural or legal persons residing or having their registered office in a Member State - however, the detailed rules relating to the implementation of that right were to be adopted by the Council within two years from the effectiveness of the Amsterdam Treaty.[21] That was done when the Council and the European Parliament adopted the Regulation No. 1049/2011 regarding public access to European Parliament, Council and Commission documents.[22] The approach adopted in the Regulation corresponds to the Nordic concept of access to information.[23] Although in June 2009 the Commission proposed that the Regulation should be revised, after a heated public debate this idea was abandoned, and the Regulation still remains in force. The case-law of the ECHR and the Ombudsmen's opinions were crucial for the implementation of the full scope of this right.[24] The Treaty of Lisbon confirmed the commitment of the European Union to the implementation of the right to information – Article 15 reiterates that

18 R. Šabić, "Zaštita prava na slobodan pristup informacijama prema Zakonu o slobodnom pristupu informacijama od javnog značaja," *Pravni zapisi* 1/2012, p, 55.

19 *http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=1&DF=&CL=ENG*

20 Declaration No. 17 on the Right of Access to Information, available at *http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0101000037.*

21 *http://eur-lex.europa.eu/en/treaties/dat/11997E/htm/11997E.html#0173010078.*

22 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ L 145,* 31 May 2001*,* pp. 43–48.

23 M. Augustyn, C. Monda, *Transparency and Access to Documents in the EU: Ten Years on from the Adoption of Regulation 1049/2001*,
http://www.eipa.eu/files/repository/eipascope/20110912103927_EipascopeSpecialIssue_Art2.pdf

24 For a detailed review of the case-law of the European Court see the case T-36/04, API v. Commission

any citizen of the Union, any natural or legal person residing or having its registered office in a Member State shall have the right to access documentation of the EU authorities, bodies, and agencies.[25] Furthermore, the Charter of Fundamental Rights[26] in Articles 41 and 42 explicitly guarantees the right of every person to have access to his or her file and documents of the EU institutions. As emphasised,[27] in less than two decades, access to information in the EU law has evolved from a situation of a mere favour being granted to the individual by the institutions into one of a true subjective fundamental right.

In addition to having adopted the regulation guaranteeing the right to information held by public authorities, the European Union introduced through its Directives the obligation of Member States to incorporate into their national legislation regulations ensuring access to information in particular sectors - for example, in the environmental sector;[28] the Directives regulate also the issues of processing of personal data,[29] and the terms for re-use of public sector information.[30]

1.2. Contents of the Standards

The first important standard relating to free access to information implies that the person requesting information is not obliged to state reasons for the request.[31] This is an important standard as it reflects the very essence of this right – access to information must be free and it cannot be conditional. At the same time, the formal requirements for the submission of requests must be minimal.[32] That means that it is enough that the request is submitted in writing – either on a piece of paper or electronically,[33] and even if the request is not precise enough, the public authority cannot ignore it, and has to assist the applicant to specify his/her request more

25 Consolidated version of the Treaty on European Union, Official Journal of the European Union C 83/13.

26 Charter of Fundamental Rights of the European Union, 2010/C 83/02.

27 M. Savino, *op. cit*, p. 8.

28 Directive 2003/4/EC of 28 January 2003 on public access to environmental information, repealing Council Directive 90/313/EEC.

29 Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

30 Directive 2003/98/EC of 17 November 2003 on the re-use of public sector information.

31 Section V 1. Council of Europe Recommendation, Article 6 of the Regulation No. 1049/2011 regarding public access to European Parliament, Council and Commission documents.

32 Section V 2. Council of Europe Recommendation.

33 This is, for example, stipulated explicitly in Article 6 of the Regulation.

precisely,[34] i.e. to identify the document containing the requested information.[35] However, if that is not possible, the authority is not obligated to fulfill the request.

Any pubic authority that receives requests for information, i.e. documents, should consider the requests without any discrimination, on an equal basis.[36] The requests should be considered without any delay, i.e. a request must be handled within a reasonable timeline that is known in advance,[37] and if that cannot be done within the specified timeline, the applicant should be informed thereof.

The request for access to information of public importance can be denied if it is obvious that it is unreasonable. In that way the public authorities are protected from unreasonable requests that would present an unreasonable burden for the authority or that present the blatant abuse of the right – this could include also the cases when the applicant resubmits the same request several times. [38]

Even in the case of a partial denial of the request, the justification of the reasons for the denial must be given.[39] This view is based on the Recommendation R (81) 19 regarding access to information held by public authorities. The only exception is allowed in cases when the justification could release information exempt from the right to free access to information, which will be further discussed below.

For access to information to be truly free, it must not imply high costs for the applicant. That means that no fees can be charged for access to information[40] - therefore, any insight into original documentation must be free of charge. However, a public authority may charge the applicant for the issuance of copies of documentation, but such fees must be reasonable, and cannot exceed the real costs incurred by the public authority for performing such action.[41]

In case the request is not considered within the specified timeline, or in case it is denied, it is necessary to ensure a fast and inexpensive procedure before a court or another independent and unbiased authority.[42] After a careful analysis of the existing national legal remedy systems and the procedures in case of denial of a request for access to information of public importance, the OECD[43] recommends that the states

---

[34] Article 6, para. 2, of the Regulation.

[35] Section VI 5 of the Recommendation.

[36] Section VI 2 of the Recommendation.

[37] Section VI 4 of the Recommendation. The Regulation, for example, specifies the timeline of 15 days.

[38] Section VI 6.

[39] Section VI 7 of the Recommendation.

[40] Section VIII 1 of the Recommendation.

[41] Section VIII 2 of the Recommendation.

[42] Section IX 1 and 2 of the Recommendation.

[43] M. Savino, *op. cit*, p. 41.

should introduce in their national legislation a two-tier system – the first-instance procedure before an administrative authority, and the second-instance procedure before a court of law. Although it can be agreed in principle that such system would surely provide the best guarantees for the protection of the right to information of public importance, the restrictions and the legal traditions in the national legal systems impose the need for this analysis to be based on a less elaborated standard, provided in the Council of Europe Recommendation, nonetheless always keeping in mind the OECD recommendations. This stance is also supported by the methodology used for ranking of laws on free access to information of public importance,[44] which assesses whether there is a right to "internal legal remedy" – to the body which is superior to the body that did not make the information of public importance accessible, and whether there is the right to "external legal remedy", i.e. possibility of filing a legal remedy to some independent body.

As other human rights, the right to information of public importance is subject to restrictions. In which cases could the states stipulate restrictions of this right?

Firstly, all restrictions on free access to information of public importance must be clearly and explicitly specified by law,[45] and at the same time such restrictions must be necessary in a democratic society and proportional in relation to the objective they seek to protect, which can include the following:

- national security, defence and international relations
- public safety
- prevention of criminal activities, investigations relating to such activities, and criminal prosecution for such activities
- disciplinary investigation
- privacy and other legitimate private interests
- commercial and other economic interests
- equal treatment of parties to a legal proceeding
- nature, i.e. environment
- national economic and monetary policy and currency policy
- inspection, control or oversight by public authorities

---

[44] *http://www.rti-rating.org.*

[45] Section IV1 of the Recommendation.

- confidentiality of deliberations within different public authorities relating to the examination of an issue. [46]

The right to information may be denied if the release of information contained in the document would or could affect any of the aforementioned interests, unless it is in the predominant public interest to make such information available to the public.[47] The rules on the restriction of the right to information of public importance so formulated constitute a standard that is not only contained in the relevant Council of Europe documents, but is also recommended by the OECD.[48] It reflects the principle of seeking balance between the right of the public to know and the need to protect the aforementioned interests, not differentiating between the protection of the national security interests and the protection of intellectual property rights. The European Union in its regulations, on the other hand, adopted a somewhat different approach, granting a higher degree of protection of the legitimate pubic interest (national security, military issues, but also protection of privacy[49]) compared to the issues that essentially constitute private interest, such as, for example, commercial and economic interests (for example, intellectual property rights). Therefore, with respect to the allowed restrictions of the right to information of public importance, the view that should be accepted is that no category of information is exempt from the free access regime per se, while adopting at the same time the standard that the bodies deciding on exemptions must interpret these restrictions strictly.[50]

It has to be noted that the Council of Europe Recommendation emphasises also the obligation of the state to ensure that the public is informed about their right to information, and that civil servants are educated about such public rights and the procedures for the provision of information.[51] Furthermore, the Recommendation encourages public authorities to make information available on voluntary basis if that is in the interest of improving transparency of the public administration, and to encourage informed public participation in the decision-making on all issues of public importance.[52]

---

[46] Compare Section IV of the Recommendation, Article 3 of the Council of Europe Convention, and Article 4 of the EU Regulation.

[47] Section IV 2 of the Recommendation.

[48] M. Savino, *op. cit*, p. 23 and p. 40.

[49] The reasons for this should be found in the detailed and comprehensive EU regulations relating to personal information protection.

[50] M. Savino, *op. cit*, p. 40.

[51] Section X of the Recommendation.

[52] Section XI of the Recommendation.

2. COMPARATIVE LEGAL ANALYSIS OF THE FREE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE

2.1. Sources of Law on Free Access to Information of Public Importance

In most countries whose legislation is analysed, the right to information is guaranteed by the constitution.[53] The exceptions are Macedonia, whose Constitution guarantees in Article 16 the right to information only in the broader sense of the word, and Bosnia and Herzegovina, whose Constitution nonetheless stipulates in Article 2 that in Bosnia and Herzegovina the European Convention for the Protection of Human Rights and Fundamental Freedoms is directly applicable, while Article 3, which lists the protected human rights and fundamental freedoms, does not even have a reference to the broad concept of a right to information.

All these countries, in addition to the constitutional guarantees, have separate statutes that regulate free access to information of public importance in more detail. These statutes were adopted after 2000, mainly as a part of much wider legislative changes that are related to the accession to the European Union. At the same time, the European trend of the detailed legal regulation of free access to information of public importance emerged at that very time, and it can be argued that these countries, although their main motivation was to align their legislation with the *acquis communautaire*, as one of the key requirements in the EU accession process, incorporated relatively quickly the emerging international standard in their legislation. The first counties to do that were Bulgaria[54] and Bosnia and Herzegovina[55] – in 2000, while Macedonia was the last.[56] Serbia adopted the statute in 2004,[57] Montenegro in 2005,[58] Croatia

[53] Constitution of the Republic of Croatia, *Official Gazette 85/10* – clarified text, Article 38, Constitution of the Republic of Bulgaria, Article 41, para. 2, Constitution of Montenegro, Article 51, Constitution of Kosovo, Article 41, Constitution o f Serbia, Article 51, para. 2.

[54] Закон за достъп до обществена информация Обн. ДВ. бр.55 от 7 Юли 2000г., изм. ДВ. бр.1 от 4 Януари 2002г., изм. ДВ. бр.45 от 30 Април 2002г., изм. ДВ. бр.103 от 23 Декември 2005г., изм. ДВ. бр.24 от 21 Март 2006г., изм. ДВ. бр.30 от 11 Април 2006г., изм. ДВ. бр.59 от 21 Юли 2006г., изм. ДВ. бр.49 от 19 Юни 2007г., изм. ДВ. бр.57 от 13 Юли 2007г., изм. ДВ. бр.104 от 5 Декември 2008г., изм. ДВ. бр. 77 от 1 октомври 2010 г., изм. ДВ. бр.39 от 20 Май 2011 г.

[55] Zakon o slobodi pristupa informacijama u Bosni i Hercegovini, *Službeni glasnik BiH*, No. 28/00, 45/06 and 02/09.

[56] Закон за слободен пристап до информации од јавен карактер, *Сл. Весник на РМ* No.13/2006, 86/2008 and 6/2010.

[57] Zakon o slobodnom pristupu informacijama od javnog značaja, *Službeni glasnik RS*, No. 120/2004, 54/2007, 104/2009, 36/2010.

[58] Zakon o slobodnom pristupu informacijama, *Sl.list RCG* No. 68/05. Montenegro has adopted a new statute (Zakon o slobodnom pristupu informacijama Sl.list RCG No 44/12) which is applicable as of February 17, 2013; until then, the old statute is in force. The provisions of both statutes shall therefore be analysed.

back in 2003,[59] while Kosovo adopted its first statute on free access to information in 2003, followed by the second one in 2010.[60] In addition to the statute, all the countries adopted also the relevant bylaws – the regulations that stipulate the fees for access to information, and rules of procedure/statutes of the oversight bodies for free access of information of public importance. It is interesting to note that these countries' regulations rank quite high on the RTI rating list[61] - Serbia's statute on free access to information of public information is ranked the best, with 135 out of maximum 150 points,[62] and Croatia, with 114 points and the 9th place, Bosnia and Herzegovina with 102 points, Kosovo with 106 points, and Macedonia with 108 points also rank relatively high. The lowest ranked countries among those whose legislation is analysed in this study were Bulgaria with 92 points and Montenegro with 89 points.[63]

2.2. Exemptions from the Right to Information of Public Importance and Confidentiality of Information

In addition to the constitutional provisions and legislation that regulate explicitly the access to information of public importance, all countries have stipulated also the potential exemptions from this right. These are the usual exempted categories, and the stipulated exemptions in all the countries are in line with the international standards. The exception to this is Bulgaria, whose legislation differentiates between official and administrative information, implying also different regimes of exemptions from the right to official and public information. More specifically, official information, contained in regulations, become available by the very act of publishing, while access to administrative information can be restricted if it relates to a public authority's preparatory documents, reports, or consultations, and in case such documents contain opinions or statements that relate to ongoing or future negotiatiations. Furthermore, in Bulagria the Access to Public Information Act explicitely does not apply to such information that may otherwise be obtained in administrative procedure, and to information kept by the National archives of the Republic of Bulgaria.

---

59 Zakon o pravu na pristup informacijama, *Narodne novine*, No. 172/03, 144/10, 77/11.

60 Zakon o uvidu u javnim dokumentima, No. 03/L-215.

61 *http://www.rti-rating.org/index.php*, accessed on 8 January 2013. RTI Rating is a website launched by two non-profit organisations - Access Info Europea and Centre for Law and Democracy, with the idea to provide RTI advocates, reformers, legislators and others with a reliable tool for assessing the overall strength of the legal framework in their country for RTI. RTI Rating includes information concerning relevant regulations of 89 countries, and the ranking is based on a self-developed methodology.

62 *http://www.rti-rating.org/view_country.php?country_name=Serbia*, accessed on 8 January 2013.

63 Even though changes to the Montenegro ranking can be expected due to the adoption of the new statute - the ranking relies on the 2005 statute.

All the analysed countries also have laws on confidential information,[64] which clearly raises the issue of the relation between the laws making the information held by public authorities available to the public and the laws based on which information gets confidentiality labels. However, in almost all of the analysed countries, even the information that is exempt form the right to information may be made available if that is in the public interest. That requires the so-called public interest and proportionality test, which starts from the assumption that the information was justifiably exempt from the scope of application of the law, and determines the need to deviate from the exemption. In contrast to that, the Serbian legislation stipulates the general assumption that any limitation of the right to information constitutes an exemption from the rule, and even in case of information that has been declared confidential, access to information is limited only if its disclosure could result in grave legal or other consequences affecting the interests protected by law and that prevail over the interest to ensure access to information.[65] A similar formulation is contained also in the Montenegrin law of 2005 and the Kosovo law. The new Montenegrin statute, however, exempts some categories of information from the harm test. Namely, personal data concerning public officials that are related to the performance of public office and the incomes, property or conflict of interest of such persons and their relatives covered by the statute governing the conflict of interest, and also data concerning the distribution of public funds (except for social help, health care and protection from unemployment) are presumed to always be subject to the right of the public to know - hence, the harm test is not applied to them.[66] Furthermore, this statute expressly prescribes that the harm test is not applied if the information was declared classified by another state or an international organisation.[67] The new Montenegrin statute also prescribes the longest allowed statute of limitations for limiting access to certain categories of information (e.g. until a proceeding is completed, until an intellectual property right expires), which is a useful solution.

---

[64] In Bulgaria - Закон за защита на класифицираната информация, *Обн. ДВ*. бр.45 от 30 Април 2002г., попр. ДВ. бр.5 от 17 Януари 2003г., изм. ДВ. бр.31 от 4 Април 2003г., изм. ДВ. бр.52 от 18 Юни 2004г., доп. ДВ. бр.55 от 25 Юни 2004г., доп. ДВ. бр.89 от 12 Октомври 2004г., изм. ДВ. бр.17 от 24 Февруари 2006г., изм. ДВ. бр.82 от 10 Октомври 2006г., изм. ДВ. бр.46 от 12 Юни 2007г., изм. ДВ. бр.57 от 13 Юли 2007г., изм. ДВ. бр.95 от 20 Ноември 2007г., изм. ДВ. бр.109 от 20 Декември 2007г., изм. ДВ. бр.36 от 4 Април 2008г., изм. ДВ. бр.66 от 25 Юли 2008г., изм. ДВ. бр.69 от 5 Август 2008г., изм. ДВ. бр.109 от 23 Декември 2008г., изм. ДВ. бр.35 от 12 Май 2009г., изм. ДВ. бр.42 от 5 Юни 2009г., изм. ДВ. бр.82 от 16 Октомври 2009г., изм. ДВ. бр.93 от 24 Ноември 2009г., изм. ДВ. бр.16 от 26 Февруари 2010г., изм. ДВ. бр.88 от 9 Ноември 2010г., изм. ДВ. бр.23 от 22 Март 2011г., изм. ДВ. бр.48 от 24 Юни 2011г., изм. ДВ. бр.80 от 14 Октомври 2011г., изм. и доп. ДВ. бр.44 от 12 Юни 2012г), in Bosnia and Herzegovina - Zakon o zaštiti tajnih podatka, *Službeni glasnik BiH* 54/05 i 12/09, in Croatia - Zakon o tajnosti podataka (Uredнички pročišćeni tekst, *Narodne novine*, 79/07 i 86/12), in Macedonia - Законот за класифицирани информации (*Службен весник на РМ*, 9/04, 113/07), in Montenegro - Zakon o tajnosti podataka (*Službeni list CG*, br. 14/08, 76/09, 41-10), in Serbia - Zakon o tajnosti podataka (*Sl. glasnik RS* 14/2009)

[65] Article 9, Para. 2, of the Serbian law; Article 8 of the Croatian law; Article 6 of the Macedonian law.

[66] Article 16, para. 2 of the Montenegrin statute of 2012.

[67] Article 16, para. 5 of the Montenegrin statute of 2012.

That means that in these three regulations the initial assumption is that the right to information prevails over the confidentiality of information, even if such information has been declared confidential in accordance with the applicable laws, and, therefore, the starting point is that information should always be available to the public. Such approach is recommended also in the Council of Europe Recommendation. However, we could not rightfully conclude that in the other countries the regulations are not aligned with the applicable international standards – this points only to different starting assumptions in the regulation of the exemptions.

Notwithstanding such *prima facie* alignment of the regulations with the applicable international standards, the practice has shown[68] that the confidentiality regulations and regulations on free access to information of public importance are usually not harmonised, and that public authorities often invoke the confidentiality of information as the grounds for denying requests for access to information, without any assessment of the interest of the public to know. Other problems include insufficiently elaborated statutory [69] or secondary regulation,[70] opening room for abuse. The conclusion that "in realistic situations, public authority officials and bodies would tend to deny requests for information if they personally perceive it in any way as personal data or confidential information, even when such information, in statutory terms, does not constitute confidential information or personal data."[71]

2.3. Procedures for Accessing Information of Public Importance

In all the analysed legislation, the procedure for accessing information of pubic importance is regulated in compliance with the relevant international standards. That means that all persons can submit a request to access information of public importance, without having to state the legitimate interest or to justify his/her request to the public authority.[72] While it is requested, as a rule, that that the request should be submitted in writing, some legislation allows also the possibility to submit the request orally, in which case, such requests, as a rule, a record must be made thereof. Although there is no agreed international standard relating to this rule, allowing requests for access to information to be submitted both orally and in writing appears to be a better

[68] See Section 3.6.

[69] Publication "Zakon o pravu na pristup informacijama u Republici Hrvatskoj: Primjena analize javnih politika u radovima studenata Fakulteta političkih znanosti", 2007, available at *http://www.dimonline.hr/publikacije.*

[70] *http://www.danas.rs/danasrs/iz_sata_u_sat/sabic_zakon_o_tajnosti_podataka_ne_funkcionise.83.html?news_id=42532*

[71] "Zakon o pravu na pristup informacijama u Republici Hrvatskoj: Primjena analize javnih politika u radovima studenata Fakulteta političkih znanosti", 2007, p. 94

[72] See Article 12 of the Macedonian law, Article 11 of the Croatian law, Article 15, para. 7, of the Serbian law, Article 24 of the Bulgarian law.

solution, and confirms to a greater extent to the tendency to eliminate all unnecessary formalities relating to access to information of public importance.

The legislation of the analysed countries consistently requires that a request should be precise enough, i.e. the information that is requested must be singular and easily defined or definable. In case the request is incomplete, the public authority may request from the applicant to complete the request – the specified timelines are mostly short and range from 3 days,[73] to eight[74] or fifteen,[75] or over 30 days in Bulgaria.[76] In accordance with the Bosnia and Herzegovina law, the applicant is informed that the public authority is not able to make the requested information accessible, including a reference to the relevant legal remedy.[77] Truth be told, the Bosnia and Herzegovina law does stipulate that the public authority should indicate specifically, in the information to the applicant that the request cannot be processed, all issues that could clarify the request."[78] It appears that this unduly lengthens the procedure for accessing information and takes it out of the regular procedure – the public authority and the applicant could make the same joint effort even at this stage of the procedure, rather than initiating a new procedure before another authority or resubmitting a new, more precisely stated request when the initial request could also be clarified; consequently, it can be argued that the Bosnia and Herzegovina law does not fully comply with the international standard that specifies that the pubic authority cannot ignore a request if it is not stated clearly enough, and that is has to assist the applicant to identify the documentation that contains the requested information.[79]

With respect to the timelines in which public authorities are required to handle requests, to the most part, they are specified explicitly by law, and can be assessed by all means as reasonable; these are, in most cases, 15 day timelines, with certain exceptions such as Montenegro, where the specified timeline for handling of requests in the 2005 statute is 8 days or, in exceptional cases, 48 hours,[80] and Macedonia, where Article 21 of the law specifies that the public authority holding the information must provide it immediately, i.e. within maximum 30 days. In our opinion, the Macedonian law specifies an unduly long timeline, even if we take into account the fact that the Macedonian law specifies also the timeline of 30 days for the applicant to complete his/her incomplete request, whereby it appears that the legislator's intention was to seek a balance between these two timelines.

[73] Croatian law, Article 12.

[74] Montenegrin Law, Article 17.

[75] Serbian Law, Article 15, para. 6.

[76] Article 29, para. 1.

[77] Bosnia and Herzegovina Law, Article 12.

[78] Bosnia and Herzegovina Law, Article 12, para. 2.

[79] See Section 1.2.

[80] When it is necessary to protect human lives or freedoms, the request must be handled immediately, and within maximum 48 hours - Article 16, para. 2 of the Montenegrin Law. The same exemption is stipulated also in Article 16, para. 2 of the Serbian Law.

The rules on the form in which public authorities decide on requests vary. Some of the regulations require public authorities to adopt a ruling, (Montenegrin Law of 2012, Article 30), i.e. decision (Bulgaria, Articles 34 and 38) irrespective of whether the request is accepted or denied. Some of the laws do not explicitly specify the form of a decision upon a request in case the request is accepted, but do specify that it in case the request is denied a ruling must be adopted and such ruling must be reasoned (Serbia, Article 16; Croatia, Article 15). All the Laws explicitly specify the obligation to provide the reasons for the denial of the request in writing, which is in compliance with the relevant international standards.

Another important international standard relating to access to information of public importance is that it must not imply high costs for the applicant. As stated above,[81] that means that while the public authorities cannot charge fees for the access to information itself, they can charge the applicant for the issuance of the copies of documents, whereby such fees must be reasonable and cannot exceed the actual costs incurred by the pubic authority for such action. This rule is implemented consistently in the laws of all the analysed countries.[82] Some of the countries also have separate rules on exemptions from payment of such fees for specific categories of applicants – in Serbia, for example, the categories exempted from such fees include the journalists, in case they request copies of documents for professional purposes, human rights associations, in case they request copies of documents necessary to implement the association's goals, as well as all natural and legal entities in case the requested information relates to threats to, i.e. protection of human and environmental health.[83] In Montenegro, persons with disability are exempt from the fees,[84] and, pursuant to the new statute, the exemption also covers persons in social need.[85] In Bosnia and Herzegovina, the first ten standard-sized pages copied are free of charge.[86] On the other hand, in Macedonia, the Law already specified explicitly that a pubic authority may request from an applicant to advance the payment for the provision of large-volume information[87] - in the other countries, this issue is regulated under bylaws.[88]

[81] See Section 1.2, and particularly footnotes 39 and 40.

[82] Bosnia and Herzegovina, Article 16; Montenegro/2005 Article 19, Montenegro/2012, Article 33; Macedonia Article 29; Serbia Article 17; Kosovo Article 21; Bulgaria Article 20.

[83] Article 17, para. 4.

[84] 2005 statute Article 19, para. 3, 2012 statute Article 33, para. 3.

[85] 2012 statute, Article 33, para. 3.

[86] Article 16.

[87] Article 29, para. 5.

[88] In Serbia, for example, if the necessary costs of issuing copies of the documents containing information of public importance exceed 500.00 Serbian dinars, the applicant is required to advance a deposit in the amount of 50% of the total necessary costs before the information is issued. (See The Price List (Troškovnik) specifying the necessary costs of issuance of copies of the documents containing information of public, which is an integral part of the Decree on Fees for Necessary Costs of Issuance of Copies of Documents, *Official Gazette RS* 8/2006). In Croatia, on the other hand, the applicants are requested to advance the total amount of the expected real costs of the provision of information, and if he/she fails to do so, it is considered that he/she has withdrawn the request. (Article 4 of the Criteria for Setting Fees from Article 19, Para. 2, of the Law on the Right to Information).

2.4. Legal Remedies in Case of Denying Access to Information of Public Importance

The issue of legal remedies in case the public authority denies the request for access to information of public importance is closely linked to the existence of an independent body that would supervise the compliance with the regulations on access to information of public importance. As stated above,[89] the international standards require that, in case the request for access to information is denied, the applicant has a right to appeal to an administrative authority, and subsequently to initiate a relevant court proceeding. It is preferable that the administrative authority that receives the request is not a regular second-instance authority, but an independent and impartial body. Most of the countries whose legislation is analysed have established separate independent bodies for this:

- the Commissioner for Information of Public Importance and Personal Data Protection[90] in Serbia;

- the Personal Data Protection Agency[91] in Croatia;

- the Commission for the Protection of the Right to Free Access to Information[92] in Macedonia;

- the Ombudsman[93] in Bosnia and Herzegovina; and

- in Kosovo, the People's Lawyer[94] – but only to a degree. Namely, in contrast to the other countries, whose laws explicitly specify that appeals against decisions denying the request for access to information or appeals against administrative silence are submitted to an independent body, the Kosovo law stipulates only that the People's Lawyer " assists the citizens to implement their right to access documents which has been denied", and that he/she is required to undertake the necessary measure for the promotion and support of the right to access public documents, and submit regular reports to the Parliament regarding the implementation of that right.[95] At the same time, Para. 4 of Article 17 of the same law stipulates that the dissatisfied party in the procedure for accessing information of public importance may file an appeal also

89 See Section 1.2.

90 *http://www.poverenik.org.rs*.

91*http://www.azop.hr* The Agency was granted this competence only after the adoption of the amendments to the 2011 Law on the Right to Access Information (Zakon o pravu na pristup informacijama, *Narodne novine* 77/11). Prior to that, appeals were filed to the manager of the public authority, and that solution was criticised. M. Vidaković Mukić, *Zakonsko uredjenje prava na pristup informacijama u Hrvatskoj, Bosni i Hercegovini i Srbiji i Crnoj Gori*. Materials from the event "28. Septembar Međunarodni dan *Građani imaju pravo znati*". Zagreb (HND Large Conference Hall): 28 September 2005.

92 *http://www.komspi.mk.*

93 *http://www.ombudsmen.gov.ba.*

94 http://www.ombudspersonkosovo.org.

95 Article 17.

to other institutions. As the Kosovo law stipulates that the Law on Administrative Procedure (Zakon o upravnom postupku)[96] applies accordingly to the procedure for accessing information of public importance, it has to be understood that Kosovo has adopted a combination of the two system, implying the protection of the right to access to information in accordance with the general regime applicable to the administrative procedure, and a partial application of the special regime to this right.

The Bulgarian law and Montenegrin law of 2005 do not stipulate the existence of an independent body responsible for the control of the implementation of the laws on access to information of public importance. In Bulgaria, therefore, appeals are submitted directly to an administrative court or to the Supreme Administrative Court, depending on the body that adopted the initial decision.[97] In Montenegro, appeals against acts by the first-instance authorities relating to the requests for access to information can be submitted to the authority responsible for the oversight of the first-instance authority's performance, and if there is no such authority, an administrative dispute can be initiated.[98] However, the situation in Montenegro had changed considerably with the adoption of the 2012 statute - this competence is entrusted to the Personal Data Protection and Access to Information Agency.[99] Such dual competence is also vested with the Serbian Commissioner for Information of Public Importance and Personal Data Protection and the Croatian Data Protection Agency; the solution can also be found in comparative law, where it has shown good results.[100] The practice of the countries in the region, however, shows that one of the main difficulties in the work of these bodies is the number of their employees, which is often insufficient and cannot handle the growing inflow of cases. Since the Montenegrin Agency has not yet started to work and there is no information on by how many employees will the existing number of 25 increase,[101] it remains to be seen whether Montenegro has learned some lessons from the Serbian and Croatian experiences.

So far, it has been shown that in Montenegro the main practical problem was not only the lack of the independent body, as the authorities that had denied access to information of public importance lost administrative disputes initiated against them by the applicants, but also the lack of sanctions[102] and enforcement mechanism. The situation is similar in Serbia, whose law has been assessed as the best in the world, and

[96] Article 15.

[97] Article 40 of the Bulgarian Law.

[98] Article 20 of the Bulgarian Law.

[99] Article 34 of the 2012 Law.

[100] United Kingdom, Germany, Slovenia, Estonia, Spain. *Cf*. M. Savino, p. 36.

[101] *http://azlp.me/index.php/o-agenciji/organizacija-agencije.*

[102] *http://www.slobodnaevropa.org/content/novi-cg-zakon-korak-unazad-u-slobodi-pristupa-informacijama/24636075.html.*

whose Commissioner is particularly active. In his 2012 report[103] the Commissioner has pointed out that the statutory mechanism according to which the Government, at the Commissioner's request, is to ensure the enforcement of the Commissioners' rulings[104] does not work in practice, and that none of the 17 cases during 2011 when the Commissioner had made such a request to the Government had yielded any results.[105] On the other side, one of the recommendations for the improvement of the Bulgarian legislation is precisely the establishment of an independent body that would control the implementation of the law on access to information of public importance.[106] Practice will show whether the changes to the legislative and the institutional framework in Montenegro shall yield positive results.

It appears that the main problem in all the analysed countries is in fact the inherited culture of confidentiality of information and lack of culture of transparent and open operation, and that the efforts on the promotion of the idea that information should be, as a rule, accessible, rather than confidential is equality important as a sound legal framework.

In the countries that have independent bodies responsible for the oversight over the implementation of the regulations on free access to information of public importance, in most cases, the timelines for acting upon appeals are specified so that they do not exceed 30 days (in Serbia and Croatia, the body is required to decide without any delay and within maximum of 30 days, in Macedonia the timeline is 15 days, the Kosovo law does not specify any timelines). The decisions of the independent bodies can be contested by initiating an administrative procedure, which is urgent. The Montenegrin statute of 2005 also specifies a short timeline for the second-instance authority to act upon an appeal against the first-instance decision

[103] *Cf*. Izveštaj o sprovođenju Zakona o slobodnom pristupu informacijama od javnog značaja i Zakona o zaštiti podataka o ličnosti za 2011. godinu, available at *http://www.poverenik.org.rs/images/stories/dokumentacija-ova/izvestajiPoverenika/2011/latizvestaj2011.pdf.*

[104] The solution is envisaged in Article 28 of the Free Access to Public Information Act and was introduced by the 2010 amendments: The Commissioner's rulings shall be binding, final and enforceable. Administrative enforcement of the Commissiner's rulings shall be carried out by the Commissioner by force (by an enforcement measure, that is, a fine), pursuant to the statute governing general administrative proceedings. In the proceedings for the administrative enforcement of a Commissioner's ruling an appeal concerning the enforcement may not be filed. If the Commissioner is unable to enforce his ruling in the manner prescribed in paragraph 2 hereof, the Government shall provide him assistance at his request, in the procedure for the administrative enforcement of such ruling - by resorting to measures within its competence, that is, by ensuring that the Commissioner's ruling is enforced by direct enforcement.

[105] Izveštaj o sprovođenju Zakona o slobodnom pristupu informacijama od javnog značaja i Zakona o zaštiti podataka o ličnosti za 2011. godinu, p. 91. *http://www.poverenik.org.rs/images/stories/dokumentacija-ova/izvestajiPoverenika/2011/latizvestaj2011.pdf.*

[106] Access to information in Bulgaria, p. 7, available at *http://store.aip-bg.org/publications/ann_rep_eng/2011.pdf.*

– three days, whilst the 2012 statute extends this timeline to 5 days; the decision has to be served to the applicant within 15 days from the appeal. The Bulgarian law does specify any timelines, and refers to the law on administrative procedure for all matters.

2.5. Publishing Information of Public Importance by Public Authorities

The relevant laws of the countries whose legislation is analysed regulate publishing information of public importance by public authorities differently. With that respect, two approaches can be singled out:

- the laws on access to information of public importance that stipulate the obligation of public authorities to inform the citizens about their right to information held by those public authorities and the instructions relating to the relevant procedure. This obligation is followed by the obligation to report to the relevant authority regarding the number of received requests for access to information of public importance and the actions undertaken upon those requests. This approach was adopted by Macedonia and Montenegro in its 2005 statute.

- the laws that, in addition to the above, stipulate also a broader obligation of public authorities to publish information relating to their organisation and actions (competencies, organisational structure, sources of financing, services provided to beneficiaries) by publishing annual information guides or annual reports, but also by making it available on their web sites. This approach is adopted in Serbia, Bulgaria, Croatia, Bosnia and Herzegovina, Kosovo and Montenegro, in its 2012 statute.

In accordance with the gathered information, but also based on their practice, the independent bodies responsible for free access to information of public importance publish their reports that, in addition to providing statistical reviews, point out to weaknesses in the practical implementation of the regulations on access to information, and provide recommendations for the improvement of the legal framework and the practice. Similar reports are prepared also by some nongovernmental organisations,[107] and both types of reports serve as useful tools for the identification of problems that occur in practice.

[107] For example, Access to Information Programme in Bulgaria - *http://www.aip-bg.org or Mans in Montenegro - http://www.mans.co.me/*

2.6. Problems in Practice

As it could be seen in the previous analysis, the legal frameworks of the analysed countries are to a great extent aligned and are based on similar principles. Therefore, it should not be a surprise, especially taking into account common legal and social background of these countries, that their practical problems pertaining to the implementation of the right to information are also concurrent. With that respect, the following categories of problems can be singled out:

- a lack of access to the information that was declared confidential. In Montenegro, for example, the definition of confidential information from the Law on Classified Information (Zakon o tajnosti podataka) is not aligned to that from the Law on Free Access to Information (Zakon o slobodnom pristupu informacijama), and the Law on Confidentiality of Information (Zakon o tajnosti podataka) does no require he application of the harm test in case of requests for access to information.[108] In Croatia, for example, the Agency was not able to access confidential information, and was forced to deny the requests for access to such information to ensure that the process requirements for the initiation of administrative dispute process are met.[109] The Serbian Commissioner for Information of Public Importance and Personal Data Protection, in his performance report for 2011,[110] also pointed out that public authorities had denied requests for access to such information citing as the reason confidentiality or secrecy of information, often so declared by bylaws or even contractual clauses, in violation of law. An additional problem in Serbia is the fact that none of the bylaws that would regulate in more detail the criteria that public authorities should use when classifying information into various degrees of secrecy, has been adopted yet[111] It seems that the heritage of secrecy is still deeply rooted in the countries in the region.

- public authorities do not fully implement the legislative framework concerning free access to information of public importance and have been noted to be reluctant to act upon the decisions by independent bodies or court decisions adopted in the proceedings relating to information of public importance[112] A good illustration supporting the first claim is the practice of implementation of the Law on Free Access

---

[108] *http://www.mans.co.me/wp-content/uploads/2011/07/Izvjestaj-o-primieni-ZoSPI-januar-april-2011.pdf.*

[109] *http://www.azop.hr/news.aspx?newsID=163&pageID=87.*

[110] *http://www.poverenik.org.rs/images/stories/dokumentacija-nova/izvestajiPoverenika/2011/latiz-vestaj2011.pdf.*

[111] Gajin, "Razvoj i međusobno usklađivanje normativnih okvira pristupa informacijama od javnog znača i zaštite tajnih podataka", zbornik radova *Pristup informacijama od javnog značaja i zaštita tajnih podataka*, OEBS i CUPS, Beograd, 2012, p. 12.

[112] *http://www.poverenik.org.rs/images/stories/dokumentacija-nova/izvestajiPoverenika/2011/latiz-vestaj2011.pdf.,http://www.mans.co.me/wp-content/uploads/2011/07/Izvjestaj-o-primieni-ZoSPI-januar-april-2011.pdf.*

to Information of Public Importance in Serbia, which concerns the application of the so-called "threefold test", whereby it is established whether the interest of the public to know is in conflict with another prevailing interest - as Gajin[113] points out, the number of decisions in which this test was indeed applied is minor, which means that the public authorities systematically ignore the central statutory institute. As for the public authorities' unwillingness to act upon the decisions adopted by independent bodies or courts, the main problem lies in the systems of sanctions and their enforcement. It is notable that in all the states under research the public authorities refuse to act upon the relevant decisions of independent bodies or courts in particularly sensitive cases. The reasons behind such refusal are of political nature, just as, in fact, are the mechanisms that should ensure their observance - they are also political and based on the main principles of democracy. Hence, some specific recommendations for improving the legislative framework cannot be given; however, there is room to stress once again the importance of further affirmation and acceptance of the right to free access to information.

- weaknesses relating to active transparency of the public authorities' actions.[114] Public authorities do not fully comply with their obligation to make data on their work available to the public in a comprehensive and timely manner, or do not comply with it consistently. For instance, a public authority shall publish an informative booklet (Informator) on its work, but shall not update it for the following 12 months, even though regular updating in fact takes up less time and is not technologically challenging. A negative example in that respect is even the Croatian Personal Data Protection Agency - information on the number of its employees or its organisational structure cannot be found on its website,[115] whereas the information on the use of public funds is detailed. A positive example, on the other hand, is the website of the Serbian Commissioner for Information of Public Importance and Personal Data Protection - it includes a detailed list of employees and their CVs[116] and a comprehensive and detailed information booklet.[117] It seems that the other public authorities are most reluctant to publish the very information that the general public is most interested in - data on the manner in which the public funds are being spent, and data on public procurement procedures in particular.

---

113 S. Gajin, *op. cit*, p. 14.

114 *http://store.aip-bg.org/publications/ann_rep_eng/2011.pdf.*

115 *http://www.azop.hr/page.aspx?PageID=34.*

116 *http://www.poverenik.org.rs/sr/o-nama/organizacija.html.*

117 *http://www.poverenik.org.rs/sr/informator-o-radu/aktuelni-informator/1287--2012-.html.*

3. CONCLUDING REMARKS

In all the researched countries, as pointed out before, the statutes governing free access to information of public importance were adopted after the year 2000, generally as a part of legislative interventions related to the EU accession process. This also means that the legislative frameworks of these states are, for the most part, based on relevant international standards, the most prominent of which at this time is the Recommendation R(2002)2 of the Committee of Ministers to member states on access to official documents, constituting an expression of best European practice in this field. It is also notable that the majority of these countries make additional efforts towards improving both the legislative framework and relevant practice, as evidenced by the recent changes to relevant statutes in Croatia and Montenegro, but also by the positive practice of the independent bodies, most notably, of the Serbian Commissioner. It is unusual that in almost all these countries the adoption of statutes concerning free access to information had preceded the adoption of modern statutes governing the confidentiality of information, even though free access to information, as Vodinelic points out[118] is the youngest subject-matter concerning data. This can also be taken to be yet another confirmation of the claim previously made - that the culture of secrecy is still deeply rooted in all these countries and that, in order for the right to free access to information to be enjoyed fully in the future all the measures prescribed by law must be taken consistently, and these efforts should be coupled with additional activities aimed at increasing the awareness of public authorities on the importance and the necessity of free access to information.

As for a general assessment of compliance with relevant international standards, where A would signify full compliance with such standards, B partial compliance and C non-compliance, the legislative frameworks of Serbia and Croatia (and also the new Montenegrin legislation) can be assessed with an A, whilst the legislative frameworks of Macedonia, Bulgaria, Bosnia and Herzegovina and Kosovo, as well as the legislative framework that is still applied in Montenegro would have to be assessed with a B - primarily due to the fact that the legislative framework is not fully elaborated and could be improved with respect to the general principles concerning classified data, rules on proactive access to information of public importance, prescribed time limits for the public authority to decide on the request to access information, fees paid by the person who requests access to information, insufficiently developed institutional framework concerning the enjoyment of this right.

---

118 V. Vodinelić, "Normiranje informacionog trougla", zbornik radova *Pristup informacijama od javnog značaja izaštita tajnih podataka*, OEBS, CUPS, Beograd, 2012, p. 19.

Ivana Rakic, LLM [1]

INTERNAL AND EXTERNAL AUDIT

1. INTERNATIONAL STANDARDS

1.1. Introduction

Regulating the public sector internal and external audit is particularly important for preventing corruption, i.e. building integrity of the defence sector, given that internal and external audit are considered to be key mechanisms for controlling the way in which public funds are spent and for ensuring that public resources are used in a legal, regular, economic, efficient and effective manner. Control of public expenditures establishes whether the budget was spent as intended, which enhances discipline in spending of public funds and the accountability of public funds users.

The management of public funds draws citizens' attention, since the state has the obligation to account to the public for using the public funds. External audit is the most important element of the control system in the public sector, which enables taxpayers to check how the government uses public funds, whilst internal audit checks whether the programmes and plans for conducting operations within the competence of budget users are safe from losses, fraud or abuse.[2]

International standards concerning internal and external audit are based on general European and internationally-accepted principles and best practices of financial management and control. Internal and external audit are considered *„soft" acquis* - they are not a part of the *acquis communautaire* since there are no EU regulations in these two areas; instead, they are in exclusive competence of the member states. The countries in the region are expected to apply norms established by the Institute of Internal Auditors (IIA) and the International Organisation of Supreme Audit Institutions (INTOSAI), since the implementation of standards established by these two institutions is considered to be best practice for internal and external audit in the public sector.

[1] Research Assistant, Institute of Comparative Law, Belgrade.

[2] M. M. Milunović, „Unapređenje interne revizije u javnom sektoru Republike Srbije", *Vojno delo* vol. 63, jesen (3)/2011, p. 317.

The European Commission has confirmed that the implementation of IIA and INTOSAI standards is considered good practice by indicating that the most important standards in the field of internal control are included in INTOSAI Guidelines for Internal Control Standards for the Public Sector and in IIA documents (referring to the document on the main positions concerning internal audit in Europe – *ECIIA Position Paper on Internal Auditing in Europe*[3]), and, when it comes to external audit, in the Lima Declaration of 1977.[4]

The adoption of established international standards is an obligation to which all countries in the region are subject to, since the countries acceding to the EU have to reform the financial management sector pursuant to internationally recognised standards and the EU good practice. The only exception in Bulgaria, which has already accepted these standards before becoming an EU member.

As a part of the comprehensive assessment of the ability of candidate countries to undertake obligations of EU membership and ability to adhere to and implement EU *acquis*, internal and external audit are covered by Chapter 32 of the pre-accession negotiations, named Financial Control. Internal and external audit are reviewed through an analysis of the institutional and legislative framework regarding internal and external audit, establishment of decentralised and functionally independent internal audit, establishment of independent and functionally independent supreme audit institution (SAI), auditing practice and implementation of opinions and recommendations of the internal auditors and the SAI.

In order to assess the progress of the countries negotiating EU membership, the EU Commission delivers annual regular progress reports whereby it assesses each countries progress in meeting the membership requirements, chapter by chapter; the last, so-called comprehensive monitoring report is delivered immediately before accession of a candidate country to the EU. The reports include an assessment on whether the financial control standards, i.e. internal and external audit standards, are met.

In addition to the assessment made in the EU Commission reports, the acceptance of international internal and external audit is also assessed in the reports adopted within the SIGMA programme. SIGMA programme is a joint initiative of

[3] *ECIIA Position Paper on Internal Auditing in Europe*, European Confederation of Institutes of Internal Auditing, Brussels 2005.

[4] *Cf.* EC, *Welcome to the world of PIFC*, European Commission, 2006, *http://ec.europa.eu/budget/library/biblio/documents/control/brochure_pifc_en.pdf*, 8.02.2013, p. 6.
The EU Commission Questionnaire addressed to the Government of the Republic of Serbia expressly provides that a candidate country for EU membership is expected to apply international audit standards established by the INTOSAI Guidelines for Internal Control Standards for the Public Sector (which are based on the second version of the COSO model of the Institute of Internal Auditors) and INTOSAI norms, the Lima and Mexico Declarations in particular. Cf.. *Questionnaire* - Information requested by the European Commission to the Government of Serbia for the preparation of the Opinion on the application of Serbia for membership of the European Union, 2010, *http://www.media.srbija.gov.rs/medeng/documents/questionnaire_srb.pdf*, 8.02.2013, p. 358.

the Organisation for Economic Co-operation and Development and the European Union, which is principally financed by the EU with the aim of providing support to the public administration systems in the candidate and potential candidate countries, and also in the countries covered by the EU neighbouring policy.

The support to improving the governance and management in the public sector is realised by assessing the progress accomplished by the reforms and establishing priorities by setting baselines which reflect international standards, best practice and EU regulations.[5] SIGMA has established numerous criteria for accessing the success of the countries' reform efforts in the public administration sector, including internal and external audit, where each criterion reflects EU membership requirements in accordance with the EU best practice and accepted international standards. The baselines developed by SIGMA include a considerable number of questions concerning the public funds management systems, which SIGMA uses to make annual reports on different aspects of governance and management in the public sector for the countries in the region. In order to prepare and verify its assessments, SIGMA organises interviews with a number of interested parties as a part of its field missions and analyses regulations and other relevant documents. The opinions given within the SIGMA programme are integrated in the EU Commission annual progress reports, although in a considerably less detailed form.[6]

Establishing and ensuring accountability of budget users in the countries wishing to accede to the EU is, therefore, specific obligation that is a part of the EU accession negotiations (Chapter 32), where the analysis of internal and external audit is done by assessing whether and to what extent are the international financial control standards, as formulated in the acts adopted by the Institute of Internal Auditors and the International Organisation of Supreme Audit Institutions, adopted and implemented. To conclude, even though the mentioned international standards are not legally binding, given that they can be classified as *soft acquis*, and their implementation only constitutes good EU practice, nevertheless, countries aspiring to become EU members need to accept them, and based on the progress in alignment with these rules the EU Commission writes its annual progress reports.

---

[5] *Cf.* SIGMA, *Control and Management System Baselines for European Union Membership*, SIGMA Baselines – October 1999.

[6] *Cf.* CEP, *Towards a More Financially Responsible Government in Serbia: Implementation of Recommendations and Measures of the Serbian State Audit Institution*, European Policy Centre, Belgrade 2012,*http://www.cep.org.rs/images/eng_analysis_implementation_measures_and_recommendations_dri.pdf*, 3.2.2013, pp. 18-19.

1.2. Sources of Law

1.2.1. Internal Audit as a Part of the Internal Financial Control in the Public Sector Concept

International internal audit standards in the public sector were developed simultaneously with the concept of internal financial control in the public sector (*PIFC*), developed by the EU Commission in order to create a structured and operational model of assistance to member states and (potential) candidate countries for improving internal control and control environment in the public sector. Pursuant to this concept, internal financial control in the public sector must be aligned with the international INTOSAI and IIA standards and EU best practice, which is why all the countries in the region have regulated internal audit in accordance with the mentioned standards and refer to their application in relevant regulations. In addition, certified internal auditors in all the countries who are members of national associations or the Institute of Internal Auditors are under the obligation to adhere to professional standards for the performance of internal audit, which are established by the Institute of Internal Auditors.[7]

1) **Guidelines for Internal Control Standards for the Public Sector**, issued by the International Organisation of Supreme Audit Institutions sets the standards for establishing financial management and control in the public sector.[8] Standards include the integral internal control framework as defined by The Committee of Sponsoring Organizations of the Treadway Commission - COSO - not including the function of internal audit. However, certain provisions address internal audit, and hence the Guidelines cover the role of internal audit.

2) **International Professional Practices Framework** – the conceptual framework established by the Institute of Internal Auditors, which unites Mandatory Guidance for professional internal audit practice and Strongly Recommended Guidance, which describes practices for effective implementation of the Mandatory Guidance.

❖ **Mandatory Guidance** has three main elements: Definition of Internal Auditing, Code of Ethics and International Standards for the Professional Practice of Internal Auditing – Standards. The standards are divided into Attribute Standards and Performance Standards.

---

[7] The Institute of Internal Auditors is an international professional association of internal auditors the members of which are authorised national associations or internal audit institutes, which gather internal auditors.

[8] *Guidelines for Internal Control Standards for the Public Sector* (INTOSAI GOV 9100) – International Organization of Supreme Audit Institutions.

❖ **Strongly Recommended Guidance** includes Practice Advisories, Position Papers and Practice Guides.

3) INTOSAI GOV 9140 Standards – Internal Audit Independence in the Public Sector. These standards, established by the International Organisation of Supreme Audit Institutions, also refer to the application of other sources governing the independence of internal auditors: Standards of the Institute of Internal Auditors, ISSAI 1610 Financial Audit Guideline – Special Considerations – Using the Work of Internal Auditors and International Standard on Auditing 610 adopted by the International Auditing and Assurance Standards Board.

4) INTOSAI 9150 Standards – Coordination and Cooperation between SAIs and Internal Auditors in the Public Sector.

1.2.2. External Audit

External audit has a key role in the assessment of and reporting on the financial control and internal audit performance. External audit is the most important mechanism allowing the tax payers to control how the government uses the public funds, and that is why the comparative law accepts the solution of the establishment of supreme audit institutions to examine the use of the budgetary and other public funds, i.e. to examine lawful and effective use of public funds.

When it comes to external audit, the countries in the region are expected to apply the rules established by the International Organisation of Supreme Audit Institutions, and in particular the rules envisaged by the Lima and Mexico Declarations. The International Standards for Supreme Audit Institutions Framework consists of documents adopted by the Congress of the International Organisation of Supreme Audit Institutions (INCOSAI), in order to regulate the professional operating standards for SAIs.[9]

INTOSAI is a professional organisation of supreme audit institutions in countries members of the United Nations or its specialized agencies. European Court of Auditors is a full member of INTOSAI, because participation as a full member in INTOSAI is also open to SAIs of those supranational organisations which are a subject under international law and are endowed with a legal status and an appropriate degree of economic, technical/organisational or financial integration.[10]

[9] *International Standards of Supreme Audit Institutions* – ISSAI framework.

[10] *Cf.* Art. 2. Statutes of INTOSAI, *http://www.intosai.org/about-us/statutes.html*.

SAIs, as members of the INTOSAI, are not under the obligation to apply INTOSAI documents, but the SAIs nevertheless accept that the implementation of INTOSAI standards is considered good practice, even though it is up to each SAI to decide whether it will implement these standards and to what extent. However, the importance of these standards is substantial, which is why the INTOSAI, on its Congress held in Johannesburg in 2010, has adopted a Declaration inviting all the INTOSAI members to accept the International standards (*The South Africa Declaration on the International Standards of Supreme Audit Institutions*). The importance of INTOSAI standards was also confirmed by the UN General Assembly adopting a Resolution on the SAI independence which refers to the application of these standards, the Lima and Mexico Declarations in particular.[11]

In all countries in the region (except for Kosovo) the SAIs are members of the INTOSAI and have all opted for accepting the INTOSAI International Standards for SAI Framework and use professional INTOSAI standards in their work. Croatian State Audit Office is a member of INTOSAI since 1994. The Audit Office of the Institutions of Bosnia and Herzegovina, Bulgarian National Audit Office and Macedonian State Audit Office became members of INTOSAI in 2001. The State Audit Institution of Montenegro acquired full membership in INTOSAI in 2007 and the State Audit Institution of Serbia in 2008. The Office of Audit General in Kosovo is not a member of the INTOSAI, but the Office adopted standards of INTOSAI and the representatives of OAG regularly attend the activities organized by INTOSAI.

INTOSAI documents form a four-level hierarchical system:

Level 1: Founding principles included in the Lima Declaration

Lima Declaration of Guidelines on Auditing Precepts includes a series of fundamental principles of the INTOSAI.[12]

Level 2: Prerequisites for the Functioning of Supreme Audit Institutions

The Prerequisites for the Functioning of Supreme Audit Institutions are based on the Founding Principles (*Level 1*) which are developed so as to formulate the main prerequisites for the correct functioning of the SAIs and professional external audit practice. These standards include the following sources: *The Mexico Declaration on SAI Independence*,[13] *Guidelines and Good Practices Related to SAI Independence,*[14]

[11] UN General Assembly Resolution A/66/209 – *Promoting the efficiency, accountability, effectiveness and transparency of public administration by strengthening supreme audit institutions*.

[12] ISSAI 1 – *Lima Declaration of Guidelines on Auditing Precepts*.

[13] ISSAI 10 – *The Mexico Declaration on SAI Independence.*

[14] ISSAI 11 – *Guidelines and Good Practices Related to SAI Independence*.

Principles of transparency and accountability,[15] *Code of Ethics*[16] and Quality Control for SAIs.[17]

Level 3: Fundamental Auditing Principles

Third-level sources are based on the documents of the previous two levels and comprise fundamental principles of the auditing process.[18] The fundamental principles comprise the following sources: *Basic Principles*,[19] *General Standards*,[20] *Field Standards*[21] and *Reporting Standards*.[22]

Level 4: Auditing Guidelines

Auditing guidelines comprise General Auditing Guidelines and Specific Auditing Guidelines. The documents further develop the fundamental audit principles into detailed and operational guidelines which can be used in everyday audit practice. *General Auditing Guidelines* include the Guidelines on Financial Audit, Guidelines on Performance Audit and Guidelines on Compliance Audit,[23] whereas the *Specific Guidelines* cover specific topics.[24]

In addition to documents comprising the International Standards for Supreme Audit Institutions Framework and which include auditing standards and guidelines, the SAIs also apply the *INTOSAI Guidance for Good Governance (INTOSAI GOV).* These Guidelines include important instructions concerning internal control and accounting which are useful for the public administration and comprise *Accounting Standards* and *Internal Control Standards*.[25]

---

[15] ISSAI 20 – *Principles of transparency and accountability*; ISSAI 21 – *Principles of Transparency and Accountability - Principles and Good Practices*

[16] ISSAI 30 - *Code of Ethics.* The Code of Ethics contains the following principles: Integrity, Independence, Objectivity and Unbiasedness, Confidentiality, Competence.

[17] ISSAI 40 – Quality Control for SAIs. Cf. *http://www.issai.org/composite-191.htm*.

[18] Cf. *http://www.issai.org/composite-192.htm*.

[19] ISSAI 100 – *Basic Principles in Government Auditing*.

[20] ISSAI 200 – *General standards in Government Auditing and standards with ethical significance*.

[21] ISSAI 300 – *Field Standards in Government Auditing*.

[22] ISSAI 400 – *Reporting standards in Government Auditing*.

[23] *Cf. General Auditing Guidelines on Financial Audit, General Auditing Guidelines on Performance Audit, General Auditing Guidelines on Compliance Audit*.

[24] *Cf. Guidelines on International Institutions, Guidelines on Environmental Audit, Guidelines on Privatisation, Guidelines on IT-audit, Guidelines on Audit of Public Debt, Guidelines on Peer Reviews.*

[25] *Cf. http://www.issai.org/composite-194.htm.*

1.3. Content of Standards

1.3.1. Public Internal Financial Control

Internal audit is a part of a comprehensive public internal financial control system (PFIC), consisting of financial management and control, internal audit, and their harmonisation and coordination. Financial management and control means a system of policies, procedures and activities established by the Head of the Entity (public funds beneficiary), in order to provide reasonable assurance by way of risk assessment that the objectives of the entity have been accomplished in a legal, proper, economical, efficient, and effective manner. The internal audit standards are based on the components of internal control (control environment, risk assessment, control activities, information and communication, monitoring), and, therefore, they are organised in accordance with those elements.[26] The central harmonisation unit is a central organisation responsible for developing and promoting methodologies relating to financial management and control and internal audit, in accordance with the internationally accepted standards and the best practice.

The system of internal financial control in the public sector is based on the managerial accountability principle, according to which the manager of the budget user (a state body or organisation) is accountable for the management and control of the work of the organisation under his/her management, and also responsible for setting and accomplishing the organisations' objectives; internal financial control system considerably contributes to accomplishment of these objectives.[27] Managerial accountability means that managers are accountable not only for the adoption of financial decisions, but also for adopting such decisions in the adequate manner and for implementing them in the best interest of the public.[28] This means that the manager is also directly responsible for (proper) setting up, functioning and promotion of the internal financial control system. Consequently, the minister of fefence, being the head of the ministry of defence, is under the obligation to set up an internal financial control system in the defence sector, or rather, within the ministry of defence.

Managerial accountability covers both financial management and control and internal audit and hence the head of the organisation has the responsibility to set up both an efficient internal control system and internal audit. Recently the focus has shifted towards financial management and control, because the setting up and development of internal audit depend on the financial control and management being developed pursuant to the managerial accountability principle. Internal auditors, even

---

26 *Cf. Guidelines for Internal Control Standards for the Public Sector*.

27 *Cf.* R. de Koning, Public Internal Financial Control, 2007, *http://www.pifc.eu/translations/Pifc-Bosnian.pdf* , (23.02.2013), p. 51; M. M. Milunović, *op. cit*, p. 314.

28 R. de Koning, *op. cit*, p. 51.

though directly responsible to the head of the organisation, are not responsible for setting up the internal control system - they only evaluate its functioning, potential weaknesses and give recommendations as to how to improve the internal financial control system and propose corrective measures,[29] whilst the responsibility for the setting up and the functioning of this system remains vested with the head of the given state body.

The main feature of a modern, decentralised financial management and control system is the adoption of decisions and establishment of accountability within smaller organisational units, which are in fact charged with adopting the concrete decisions, which implies that the control must be decentralised as opposed to centralised. Instead of having the decisions taken and the monitoring carried out at central Government level (usually in the Ministry of Finance), the decisions on how to spend the budget funds are now passed by individuals responsible for providing services, whilst their work and disposal of the budget funds is controlled by their superiors.[30] The responsibility for financial control is, therefore, decentralised, but through a centrally-regulated legal framework (statute or rulebook), which is the grounds for the process of harmonising the established decentralised financial management and control systems in state authorities; this process is headed by the Ministry of Finance.[31] The development of financial management and control may be slowed down if there is no clear awareness of the managerial accountability and if the system is not based on the principle of separation of the managerial role and duties of others employed with the organisation. At the same time, this principle and the managerial accountability contribute to better understanding and the setting up of functional decentralised internal audit.

Consequently, internal audit is set up within budget users, through special internal audit units, which are responsible to the organisation head; internal audit units file their reports to the organisations' head. This means that the head of the organisation is responsible for the decisions he/she adopts and for managing the organisation, and is thus also responsible for the functioning of the internal control system within the organisation; the role of the internal auditors is to the help improve the managing of the organisation since they are "advisors within the organisation",[32] as opposed to being an additional level of control. Internal auditors make evaluations and give recommendations, whilst the organisation head decides whether to act on their recommendations and if so, in what manner it shall be done - hence the organisations' head is responsible for such decisions.

In accordance with the Definition of the Institute of Internal Auditors, internal auditing is an independent, objective assurance and consulting activity designed to add

[29] M. M. Milunović, *op. cit*, 317.

[30] *Ibid*, 326.

[31] *Ibid*.

[32] R. de Koning, *op. cit*, p. 60.

value and improve an organisation's operations. It helps an organisation accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes.[33] The establishment of a decentralised and functionally independent internal audit is based on the laws regulating internal audit, i.e. internal financial control of the public sector, and the organisational placement of internal audit is stipulated under the same law, a separate law or a bylaw.

In the defence sector, the internal audit concept is implemented by establishing a separate, organisationally and functionally independent unit (department) responsible for internal audit within the Ministry of Defence, in accordance with the prescribed legal framework and international standards. The internal auditing unit needs to be stipulated under a law or a decree, and it is recommended that the independence and objectivity of internal audit is established by legislation and that adequate legal protection is ensured for the internal audit profession.[34] In the course of the professional practice of internal auditing, internal auditors should rely on the IIA's *International Professional Practices Framework,* comprising *Definition of Internal audit, Code of Ethics, International Standards for the Professional Practice of Internal Auditing – Standards, and Practice Advisories*.[35] The purpose, authority, and responsibility of the internal audit activity must be formally defined in an internal audit charter, consistent with the *International Framework*. The chief audit executive must periodically review the internal audit charter and present it to senior management and the board for approval.[36]

The separate internal auditing unit monitors the effectiveness of internal control, providing regularly the internal control performance information (regarding the internal control strengths and weaknesses), and issuing recommendations for its improvement. Although internal auditors can be a valuable advisory and educational resource on internal control, the internal auditor should not be a substitute for a strong internal control system. For an internal audit function to be effective, it is essential that the internal auditors be independent from management, work in an unbiased, correct and honest way, as only then they would be able to report regularly to the relevant

[33] Institute of Internal Auditors (IIA) – *Definition of Internal Auditing*.

[34] *Cf. Internal Audit Independence in the Public Sector*.

[35] *Cf. Guidelines for Internal Control Standards for the Public Sector*.

[36] Standard 1000 – Purpose, Authority, and Responsibility. The internal audit charter is a formal document that defines the internal audit activity's purpose, authority, and responsibility. The internal audit charter establishes the internal audit activity's position within the organization, including the nature of the chief audit executive's functional reporting relationship with the board; authorizes access to records, personnel, and physical properties relevant to the performance of engagements; and defines the scope of internal audit activities. The Code of Ethics states the principles relevant for the internal audit profession and practice, and expectations governing the behaviour of individuals and organisations in the conduct of internal auditing. The purpose of The Code of Ethics is to promote an ethical culture in the profession of internal auditing. Internal auditors are expected to apply and uphold the following four main principles**:** Integrity, Objectivity, Confidentiality, and Competency, and for each of principle several behaviour rules have been established.

authorities, giving them unbiased opinions about the internal control findings, and providing objective proposals for the correction of the identified irregularities. That is why the independence and objectivity of internal auditors must be established by regulations.[37]

Organisational independence is achieved in relation to other organisational parts of the public funds beneficiary (entity), and the internal auditing unit is accountable for its activities to the Head of the Entity, and reports directly to him/her. In addition, internal auditing is independent from the audited activity, from the internal control process, and from the management activities. Functional independence implies independent planning, performing and reporting, which means that the internal auditing unit decides independently about the scope and method of internal audit, and reports freely about the performed audits. Internal auditors must be freed from any political influence, they must receive adequate remuneration for their work, have free and unrestricted access to all the documentation and personnel, and their responsibilities and authorities must be clearly established.[38] They cannot be delegated with the performance of any other function or activity, except the internal audit activity.

The internal audit activity must be independent, and internal auditors must be objective in performing their work. Independence is the freedom from all conditions that threaten the ability of the internal audit activity to carry out internal audit responsibilities in an unbiased manner. Objectivity is defined as an unbiased mental attitude that allows internal auditors to perform engagements in such a manner that they have an honest belief in their work product, and that the quality of their work is not compromised in any way. Objectivity requires that internal auditors do not subordinate their judgment on audit matters to others. Internal auditors must have an impartial, unbiased attitude and avoid any conflict of interest. Any threats to independence and objectivity must be managed at the individual auditor, engagement, functional, and organisational levels. If independence or objectivity is impaired, the details of the impairment must be disclosed to appropriate parties. Internal auditors must refrain from assessing specific operations for which they were previously responsible.[39]

1.3.2. External Audit

It is indispensable that each country have an independent Supreme Audit Institution – an independent public institution accountable to the parliament and performing the public funds audit function at the highest instance in accordance with law, whereby post-audit is an indispensable task of every Supreme Audit Institution

[37] *Cf. Guidelines for Internal Control Standards for the Public Sector*.

[38] *Cf. Internal Audit Independence in the Public Sector* (INTOSAI GOV) 9140.

[39] Standards 1100 - Independence and Objectivity, 1120 - Individual Objectivity, and 1130 - Impairment to Independence or Objectivity.

regardless of whether or not it also carries out pre-audits. The traditional task of SAIs is to perform financial audit (audit the legality and regularity of financial management and of accounting), but in addition to this type of audit, they perform also performance audit.[40]

The independence of the SAI and its staff and officials must be provided for in the functional, institutional and financial sense. SAIs are laid down in the Constitution, which guarantees the independence of SAIs and SAI members, while the details are set out in legislation. In particular, the procedures for removal from office should also be embodied in the constitution, and may not impair the independence of the members, and the constitution must guarantee the legal protection of independence, provided by the supreme courts. The SAI members are independent from the audited entities, and are protected from their influence. SAIs need to be provided with the financial means to enable them to accomplish their tasks, and they must be entitled to apply directly for the necessary financial means to the public body deciding on the national budget. SAIs may use the funds allotted to them under a separate budget heading as they see fit.[41]

SAIs audit the activities of the government, its administrative authorities and other subordinate institutions, and with respect to the relations with the parliament, they must be guaranteed a very high degree of initiative and autonomy.[42] SAIs need to have access to all records and documents relating to financial management and must be empowered to request, orally or in writing, any information deemed necessary by the SAI. Each SAI develops independently their audit plan and programme, and is free to decide about the type and scope of audit.[43] All public financial operations, regardless of whether and how they are reflected in the national budget, shall be subject to audit by Supreme Audit Institutions. Excluding parts of financial management from the national budget shall not result in these parts being exempted from audit by the Supreme Audit Institution.[44] SAI must be empowered by constitution and required to report its findings annually and independently to parliament or any other responsible public body; this report shall be published. This will ensure extensive distribution and discussion, and enhance opportunities for enforcing the findings of the Supreme Audit Institution.[45] SAIs must be empowered to report freely on the results of their work. It is particularly important to ensure the follow-up of the enforcement of the SAI's and the parliament's recommendations.

[40] Sections 2 and 4 of Lima Declaration.

[41] *Cf.* Sections 5-7 of Lima Declaration.

[42] *Cf.* Sections 8-9 of Lima Declaration.

[43] *Cf.* Sections 10 and 13 of Lima Declaration.

[44] Section 18 of Lima Declaration.

[45] Section 16 of Lima Declaration.

LIMA DECLARATION – Provisions referring to independence of SAIs

Section 5. Independence of Supreme Audit Institutions

1) Supreme Audit Institutions can accomplish their tasks objectively and effectively only if they are independent of the audited entity and are protected against outside influence.
2) Although state institutions cannot be absolutely independent because they are part of the state as a whole, Supreme Audit Institutions shall have the functional and organisational independence required to accomplish their tasks.
3) The establishment of Supreme Audit Institutions and the necessary degree of their independence shall be laid down in the Constitution; details may be set out in legislation. In particular, adequate legal protection by a supreme court against any interference with a Supreme Audit Institution's independence and audit mandate shall be guaranteed.

Section 6. Independence of the members and officials of Supreme Audit Institutions

1) The independence of Supreme Audit Institutions is inseparably linked to the independence of its members. Members are defined as those persons who have to make the decisions for the Supreme Audit Institution and are answerable for these decisions to third parties, that is, the members of a decision-making collegiate body or the head of a monocratically organised Supreme Audit Institution.
2) The independence of the members shall be guaranteed by the Constitution. In particular, the procedures for removal from office also shall be embodied in the constitution and may not impair the independence of the members. The method of appointment and removal of members depends on the constitutional structure of each country.
3) In their professional careers, audit staff of Supreme Audit Institutions must not be influenced by the audited organisations and must not be dependent on such organisations.

Section 7. Financial independence of Supreme Audit Institutions

1) Supreme Audit Institutions shall be provided with the financial means to enable them to accomplish their tasks.
2) If required, Supreme Audit Institutions shall be entitled to apply directly for the necessary financial means to the public body deciding on the national budget.
3) Supreme Audit Institutions shall be entitled to use the funds allotted to them under a separate budget heading as they see fit.

Principles of Mexico Declaration on Independence of SAIs

1) The existence of an appropriate and effective constitutional/statutory/legal framework and of *de facto* application of provisions of this framework

2) The independence of SAI heads and members (of collegial institutions), including security of tenure and legal immunity in the normal discharge of their duties

3) A sufficiently broad mandate and full discretion, in the discharge of SAI functions

4) Unrestricted access to information

5) The right and obligation to report on their work

6) The freedom to decide the content and timing of audit reports and to publish and disseminate them

7) The existence of effective follow-up mechanisms on SAI recommendations

8) Financial and managerial/administrative autonomy and the availability of appropriate human, material, and monetary resources.

2. Comparative Legal Analysis of Internal and External Audit

2.1. Internal Audit

All the countries in the region have a legal basis for the development of the public internal financial control, as all of them have a coherent and comprehensive statutory base for defining the systems, principles and functioning of internal financial control in public sector. As provided by law, the financial management and control systems and internal audit system have been established, and central harmonisation units have been established in the ministries responsible for finance. The legal framework for the public sector internal financial control comprises various pieces of primary and secondary legislation, and some countries have adopted separate internal audit primary legislation.

The legal basis for the regulation of internal audit in Croatia, Montenegro, Bulgaria and Macedonia includes separate public sector internal financial control legislation, while in Bosnia and Herzegovina, Serbia and Kosovo (in accordance with the UN Security Council Resolution No. 1244), this area is regulated under the legislation that includes separate provisions relating also to internal audit, i.e.

internal financial control in the public sector. Thus, Croatia applies the Law on Public Internal Financial Control System (Zakon o sustavu unutarnjih financijskih kontrola u javnom sektoru),[46] which stipulates the obligation of all budget spending entities to establish internal auditing, and Montenegro has stipulated the obligation to establish internal auditing in the Law on Public Internal Financial Control System (Zakon o sistemu unutrašnjih finansijskih kontrola u javnom sektoru).[47] As the Croatian and Montenegrin laws stipulate the general obligation to establish internal auditing, separate regulations have been adopted specifying the criteria for the establishment of internal auditing, stipulating also the obligation to establish an independent internal auditing unit in the ministries of defence.

Croatia stipulated the obligation to establish a separate unit in all the ministries specified in the Rulebook on Budget Users' Internal Audit (Pravilnik o unutarnjoj reviziji korisnika proračuna), which was adopted by the Ministry of Finance and which stipulates the criteria for the establishment of internal auditing in budget spending institutions, the organisational placement of the internal auditing unit, and the position of the appointed internal auditor for local and regional self-governance, as well as internal audit quality assurance.[48] The Decree on Internal Organisation of the Ministry of Defence established an Independent Section for Internal Audit, reporting to the Minister of Defence and acting in accordance with the International Framework for Professional Practice, Code of Ethics for Internal Audit, and a separate Charter of Internal Auditors, adopted by the Ministry of Defence.[49]

The Division for Internal Audit of the Montenegrin Ministry of Defence was established by the Rulebook on Internal Organisation and Systematisation of the Ministry of Defence,[50] in accordance with the Decree on Establishment of Internal Auditing in the Public Sector (Uredba o uspostavljanju unutrašnje revizije u javnom sektoru),[51] which stipulates the obligation to establish a separate organisational unit for internal auditing in the Ministry of Defence. In addition to the above regulations, internal audit (in the defence sector) is regulated also by the Rulebook on Manner and Procedure of the Internal Audit Work (Pravilnik o načinu and postupku rada unutrašnje revizije),[52] which sets out in detail the terms and procedures for the internal audit operations, and the Manual on Internal Audit (Priručnik za unutrašnju reviziju), published by the Ministry of Finance, which includes also the Charter and the Code of Ethics for Internal Audit for all budget spending institutions.[53]

[46] *Narodne novine*, No. 141/06.

[47] *Sl. list Crne Gore*, No. 73/08, 20/11, 30/12.

[48] *Narodne novine*, No. 35/08.

[49] Uredba o unutarnjem ustrojstvu Ministarstva obrane, *Narodne novine*, No. 26/12.

[50] Pravilnik o unutrašnjoj organizaciji i sistematizaciji Ministarstva odbrane (2011), *http://www.odbrana.gov.me/biblioteka/pravilnici*, 16.12.2012.

[51] *Sl. list Crne Gore*, No. 23/09, 35/11.

[52] *Sl. list Crne Gore*, No. 32/09.

[53] *Priručnik za unutrašnju reviziju*, Ministarstvo finansija, 2011, *http://www.mf.gov.me/organizacija/sektor-za-pifc/110702/Prirucnik-za-unutrasnju-reviziju.html*, 16.12.2012.

The Bulgarian Law on Financial Management and Control in the Public Sector contains the general provisions on the establishment of internal auditing in the public sector,[54] while the criteria for the establishment of a separate internal auditing unit in all budget spending institutions are regulated under a separate law on internal audit. The Public Sector Internal Audit Law[55] stipulates *inter alia* the obligation to establish a separate internal auditing unit in all the ministries, and, therefore, the Ministry of Defence has established the Internal Audit Directorate. Therefore, internal audit in the security and defence sector in Bulgaria is regulated by the Law on Financial Management and Control in the Public Sector and the Public Sector Internal Audit Law, in accordance with the international standards, and the Rulebook on the Organisation of the Ministry of Defence, stipulating the details of the Internal Audit Directorate, is also applied.[56] The above regulations established a functional internal auditing unit that is accountable to the Minister of Defence and that reports regularly to the Minister of Defence on their work. The Directorate complies with the international standards for internal audit that are integrated in the internal audit regulations and the Code of Ethics for Internal Auditors and the Internal Audit Charter approved by the Minister of Finance.

While internal audit in Macedonia was regulated by a separate law on internal audit and the old 2007 law on internal financial control, currently, this area is regulated only by the 2009 Law on Public Internal Financial Control.[57] The Law stipulates the obligation to establish an independent internal audit unit in all ministries, and, therefore, the Ministry of Defence established the Division for Internal Audit. Internal audit is performed in accordance with the Rulebook on the Procedures for Internal Audit and Internal Audit Reporting,[58] and in accordance with the Internal Audit Charter and the Code of Ethics for Internal Audit. While the Ministry of Finance adopted the Rulebooks on the Charter and the Code of Ethics for Internal Audit, obligating the budget spending institutions to adopt a separate Charter and a Code of Ethics, there is no information available weather the Ministry of Defence complied with that obligation.[59] However, it can be concluded that internal audit in the defence sector is regulated in accordance with the international standards.

[54] Закон за финансовото управление и контрол в публичния сектор, Държавен вестник, No. 21/2006, 42/2009, 54/2010, 98/2011.

[55] Закон за вътрешния одит в публичния сектор, Държавен вестник, No. 27/2006, 64/2006, 102/2006, 43/2008, 69/2008, 71/2008, 110/2008, 42/2009, 44/2009, 78/2009, 80/2009, 82/2009, 99/2009, 54/2010, 8/2011, 98/2011, 50/2012.

[56] Устройствен правилник на министерството на отбраната, Държавен вестник, No. 39/2011, 22/2012.

[57] Закон за јавна внатрешна финансиска контрола, Службен весник на Република Македонија, No. 90/09, 12/11.

[58] Правилникот за начинот на извршување на внатрешната ревизија и начинот за известување на ревизијата, Службен весник на РМ, No. 136/2010.

[59] Правилникот за повелбата за внатрешна ревизија, Службен весник на РМ, No. 136/2010, Правилникот за Етичкиот кодекс на внатрешните ревизори, Службен весник на РМ, No. 136/2010.

Bosnia and Herzegovina also has a separate law on internal audit in the public sector, even they also have the Law on Financing of the Institutions of Bosnia and Herzegovina that previously regulated this area.[60] The Law on Internal Auditing Institutions of Bosnia and Herzegovina regulates internal audit in accordance with the international standards, but its provisions are not stipulated very explicitly,[61] and that is why the Ministry of Defence adopted a separate Rulebook on Internal Audit in the Ministry of Defence of Bosnia and Herzegovina.[62] This Rulebook stipulates the scope of activities and the operating methodology, internal audit plan development and implementation, follow-up on recommendations and standards, and the cooperation with the Central Harmonisation Unit and with the Audit Office of the Institutions of Bosnia and Herzegovina. The Ministry of Defence is one of a small number of state authorities that have established their internal auditing unit, even before the Decision on Criteria for the Establishment of Internal Auditing Units in the Institutions of Bosnia and Herzegovina (Odluka o kriterijumima za uspostavljanje jedinica interne revizije u institucijama Bosne and Hercegovine), adopted by the Central Harmonisation Unit.[63] The Office for Internal Audit of the Ministry of Defence was established in accordance with the Rulebook on Internal Organisation of the Ministry (Pravilnik o unutrašnjoj organizaciji Ministarstva), as one of its main organisational units. The Internal Audit Charter and the Code of Ethics adopted by the Ministry of Finances are also applied, and there is no information whether the Ministry of Defence adopted a separate Internal Audit Charter.

The establishment of internal audit in Serbia is based on the relevant provisions of the Budget System Law that regulate internal financial control in the public sector, considering that there are no separate laws regulating internal audit or financial management and control.[64] The conditions for the organisation of internal audit in the public sector are regulated in detail under the Rulebook on Joint Criteria for Organising and Standards and Methodological Instructions for Performing Internal Audit in the Public Sector, and the standards and operating methodology are specified in accordance with the International Standards for Internal Auditing.[65] This Rulebook stipulates the obligation to establish a separate organisational unit for internal auditing in the Ministry of Defence. The Ministry of Defence implements also the

[60] Zakon o finansiranju institucija Bosne i Hercegovine, *Službeni glasnik BiH*, No. 61/04, 49/09, 42 /12, 87/12.

[61] Zakon o internoj reviziji institucija Bosne i Hercegovine, *Službeni glasnik BiH*, No. 27/08, 32/12.

[62] *Pravilnik* o *internoj reviziji u* Ministarstvu odbrane Bosne i Hercegovine*, http://www.mod.gov.ba/files/file/pravilnici/pravilnik_int_rev_H_20100903092148.pdf*, 16.12.2012.

[63] *Službeni glasnik BiH*, No. 49/12. In accordance with the criteria for the establishment of separate unit, the Ministry of Defence is obligated to establish their independent internal auditing unit.

[64] Zakon o budžetskom sistemu*, Službeni glasnik Republike Srbije*, No. 54/2009, 73/2010, 101/2010, 93/2012.

[65] Pravilnik o zajedničkim kriterijumima za organizovanje i standardima i metodološkim uputstvima za postupanje i izveštavanje interne revizije u javnom sektoru, *Službeni glasnik Republike Srbije*, No. 99/2011.

Internal Audit Charter for the Ministry of Defence and the Code of Ethics which have been adopted in accordance with the recommendation by the State Audit Institution (SAI). In addition, in accordance with the SAI's recommendation, the Internal Audit Section was established as late as in 2011, even though back in 2009, the Rulebook on Internal Organisation and Job Systematisation of the Ministry of Defence (Pravilnik o unutrašnjem uređenju and sistematizaciji radnih mesta u Ministarstvu odbrane) established the Internal Audit Section as an internal unit of the Ministry outside the Sector and the Secretariat, reporting directly to the Minister of Defence. However, the Internal Audit Section is still not operational, as it employs only two auditors out of the five auditor positions established in the systematisation.[66]

Kosovo has an adequate legal and institutional framework in force, including the Law on Public Financial Management and Accountability,[67] Law on Internal Audit,[68] secondary legislation and the Charter and Code of Ethics for Internal Audit. The legislation stipulates the obligation to establish internal auditing in the public sector, and the criteria for the establishment of a separate independent unit are specified in the Administrative Instruction on the Establishment and Operation of Internal Audit in the Public Sector.[69] In accordance with the criteria from this Instruction, the Ministry for the Kosovo Security Force has established its Internal Audit Unit, reporting to the Permanent Secretary, in accordance with the Administrative Instruction on the Mission, Organisation and Structures of the Ministry for the Kosovo Security Force.[70] The established Internal Audit Unit has been assessed as operational, as it hired the internal auditors necessary for its regular operations.[71]

The existing legal framework for internal audit in the public sector in all of the above countries ensures the conditions for the undisturbed practice of internal audit in the security and defence sector, as all the international standards for independence and objectivity of internal audit, in accordance with the adopted Definition of Internal Audit, as well as the International Standards for the Professional Practice of Internal Audit, have been formally and legally adopted. The primary and secondary legislation guarantee the functional and organisational independence of internal auditing and the

[66] The data for January *2012. Cf.* B. Milosavljević, S. Đorđević, "Korupcija u sektoru bezbednosti: unutrašnja kontrola," *http://www.bezbednost.org/Bezbednost/4941/Korupcija-u-sektoru-bezbednosti-unutrasnja.shtml*, 16.12.2012, p. 7.

[67] Law No. 03/L-048 on Public Financial Management and Accountability, *Official Gazette*, No. 27/2008.

[68] Law No. 03/L-128 on Internal Audit, *Official Gazette*, No. 59/2009.

[69] Administrative Instruction No. 23/2009 on Establishment and Functioning of the Internal Audit Unit in the Public Sector *http://mf.rks-gov.net/Portals/0/Njesite/NJQHAB/rregullat/Administrativno%20Uputstvo%20No.%2023_2009.pdf,* 16.12.2012.

[70] Administrative Instruction No. 8/2009 on the Mission, Organisation and Structures of the Ministry for Kosovo Security Forces, *http://mksf-ks.org/repository/docs/Admin%20Instruction%20on%20the%20MKSF.pdf*, 16.12.2012.

[71] *Audit report on the annual financial statements of Ministry of Kosovo security forces for the year ended on 31 december 2011*, Office of the Auditor General, 2012, p. 22.

relevant legal protection of the profession, and the ministries of defence are obligated to establish their separate organisational unit for internal audit.

2.2. External Audit

2.2.1. Independence of Supreme Audit Institutions

Supreme Audit Institutions (SAIs) in all the countries in the region were established as independent and supreme state bodies for the control of the budget funds management, reporting exclusively to parliament. The independence of SAIs and the SAI staff and officers in the functional, institutional and financial aspect has been ensured, considering that the standards specified in Lima and Mexico Declarations have been accepted to the most part, and that in these countries audit is performed in accordance with the International Standards on Auditing, as stipulated by the ISSAI framework documents.

However, the degree of independence of a SAI and its members is not the same in all of the countries, considering that in Macedonia and Bosnia and Herzegovina, the independence of the SAI is guaranteed only by law. The constitutions in these two countries do not have separate provisions relating to SAI, even though the standard requires that the independence of SAI and its members should be guaranteed by the constitution, and that the details about SAIs are set out by law. That creates a potential risk for SAIs in Macedonia and Bosnia and Herzegovina and may impair their independence, even though these institutions enjoy a high degree of independence, and the lack of constitutional provisions on SAI does not have a direct impact on their independence. In Macedonia, the independence of the State Audit Office (*Државен завод за ревизија*) is guaranteed by the Law on State Audit,[72] and in Bosnia and Herzegovina, the Office for Audit of the Institutions of Bosnia and Herzegovina is established by the Law on Audit of the Institutions of Bosnia and Herzegovina, which guarantees its independence.[73]

In the other countries, SAIs are established in accordance with the constitution, i.e. legislation adopted in accordance with the constitution, which guarantees the autonomy and independence of SAI, and SAI and state audit are regulated in detail under the law that also guarantees the independence of SAI. The Bulgarian Constitution stipulates only that the National Assembly establishes the National Audit Office (*Сметна палата*),[74] and the Law on National Audit Office specifies the

[72] Закон за државна ревизија, Сл.весник, No. 66/10, 145/2010.

[73] *Službeni glasnik BiH*, No. 12/06.

[74] *Cf.* Article 91 of the Constitution of the Republic of Bulgaria (Конституция на република България), Държавен вестник, No. 56/1991, 85/2003, 18/2005, 27/2006, 78/2006, 12/2007.

organization, authority and procedures of the National Audit Office.[75]

The Serbian, Croatian and Montenegrin constitutions contain similar provisions, and define SAIs as autonomous supreme national audit bodies, guaranteeing their independence.[76] In addition to the Constitution, in Serbia, the State Audit Institution is regulated by the Law on State Audit Institution (Zakon o Državnoj revizorskoj instituciji),[77] and the Montenegrin State Audit Institution is also regulated under a separate law – the Law on State Audit Institution (Zakon o Državnoj revizorskoj instituciji).[78] Under the pressure of the EU, Croatia stipulated the constitutional guarantees of the independence of the State Audit Office as late as in 2010, under the amendments to the constitution adopted in 1990, and in addition to the Constitution, Croatia applies also the Law on State Audit Office (Zakon o Državnom uredu za reviziju) that provides additional guarantees and regulates the details of external audit.[79] The Kosovo constitution contains several provisions relating to external audit, and it can be argued that it provides the highest degree of guarantees of all the countries in the region. External audit is regulated by three Articles of the Constitution,[80] and the legal framework for external audit is provided also by the Law on Establishment of the Office of the Auditor General of Kosovo and the Audit Office of Kosovo.[81] Only the Kosovo and Montenegrin constitutions stipulate that the members of the Office of the Auditor General and the State Audit Institution are appointed and removed from office by parliament,[82] while in the other countries that is regulated by law, even though the recommendation is that the main principles should be stipulated by the constitution.

The financial independence of SAIs in all of the countries is ensured in a satisfactory manner, considering that the funds necessary for the SAI operations are provided from the budget, in accordance with the SAI's own proposed budget plan that is approved by parliament. SAIs have a right to manage and dispose of the funds allocated for their operations independently, in accordance with the regulations. While the financing of SAIs is regulated in a general manner by legislation, it can be argued that the standards relating to the financial independence of SAIs are satisfied. The full financial independence of the State Audit Institution is not ensured only in

[75] Закон за сметната палата, Държавен вестник, No. 98/2010, 1/2011, 4/2011, 99/2011.

[76] *Cf.* Article 96 of the Constitution of the Republic of Serbia, Article 53a of the Constitution of the Republic of Croatia, Article 144 of the Constitution of Montenegro.

[77] *Službeni glasnik Republike Srbije*, No. 101/2005, 54/2007, 36/2010.

[78] *Sl. list Republike Crne Gore*, No. 28/04, 27/06, 78/06; *Sl. list Crne Gore*, No. 17/07, 73/10, 40/11.

[79] *Narodne novine*, No. 80/11.

[80] *Cf.* Articles 136-138 of the Constitution of Kosovo, *http://www.assembly-kosova.org/common/docs/Constitution1%20of%20the%20Republic%20of%20Kosovo.pdf*, 16.12.2012.

[81] Law No. 03/L-075 on the Establishment of the Office of the Auditor General of Kosovo and the Audit Office of Kosovo, *Official Gazette*, No. 32/2010.

[82] *Cf.* Article 136 of the Constitution of Kosovo and Article 82 of the Constitution of Montenegro.

Montenegro, considering that their legal solution allows the Ministry of Finance to modify the budget proposal by the State Audit Institution, which indirectly impairs the independence and operations of the State Audit Institution.[83] Although the comparative law practice shows that the SAI's financial proposals are accepted in their entirety, there is a possibility that the executive government of Montenegro exerts its influence on the State Audit Institution by modifying their budget proposal. That is why Bosnia and Herzegovina explicitly stipulates that the Ministry of Finance of Bosnia and Herzegovina, the Council of Ministers, and the Presidency may comment the draft budget of the Office for Audit of the Institutions of Bosnia and Herzegovina, without the possibility to modify the budget proposal previously approved by the Parliamentary Commission.[84]

In all the countries in the region, the functional independence of SAIs is ensured, and SAIs have a right to prepare their audit plans and programmes independently. That means that SAIs may decide on the entities to be audited, define the scope and type of audit, and specify the time and procedures for audit. In addition to that, SAIs have considerable investigative powers that give them the right to free and direct access to all the necessary documentation and information relating to the budget users' financial management, and the budget users are obligated to allow them such access, and to provide the requested information orally or in writing.

2.2.2. Scope and Types of Audit

In all the countries, the laws allow SAIs to audit all financial operations, so that SAIs in the region have a clear authority to audit all the public funds users – direct and indirect budget users and the legal entities connected with the budget users. The financial operations to be audited are actually selected based on the entities to be audited – by listing or describing the entities whose performance is controlled. The EU funds users are also subject to external audit, except in Montenegro, Bosnia and Herzegovina, and Kosovo, whose legislation does not explicitly stipulate this.

Based on the comparison of the provisions relating to audited entities, it can be concluded that the SAI's competence covers, as a rule, all public authorities and institutions, including parliament, President (Presidency) of the Republic, ministries, various state agencies, administration authorities, and local (regional) self-government authorities (e.g. municipalities), the central (national) bank, social and health insurance funds, political parties, public companies, (indirectly or directly)

[83] *Analytical report SEC(2010) 1334 – Commission Opinion on Montenegro's application for membership of the European Union*, Communication from the Commission to the European Parliament and the Council, 2010, 123.

[84] Article 5, Para. 3, of the Law on Audit of the Institution of Bosnia and Herzegovina.

state-owned or state-run legal entities, etc. The ministries of defence in all of the countries are subject to statutory audit by SAI.

In accordance with the international standards, all of the countries adopted the solution that implies that SAIs, in addition to financial audit, perform also performance audit. At the same time, the legislation stipulates that SAIs perform also special purpose audits. SAIs traditionally control the regularity and legality of the budget spending and state assets management (financial audit), which is why this type of audit is more developed and more frequent than performance audit. While audit of the public funds users' economy, effectiveness and efficiency (performance audit) is normatively established in accordance with the international standards, it is still too early for any major results of such control to be visible. Most of the countries started implementing performance audits much later, and Serbia still does not consider performance audit a priority, as the State Audit Institution decided to start with performance audits only in 2013.

2.2.3. Audit Reports

The legal framework for external audit in all the countries in the region contains the provisions that regulate in a similar way the procedure for independent reporting by SAI on its actions, in accordance with the principle of SAI's transparency. SAIs have a right and obligation to report freely to parliament, i.e. the relevant parliamentary committee, about the results of the preformed audits by submitting the annual reports on their activities and external audit, and to publish the results of their activities freely, without any limitation. The procedure for reporting and publishing of SAIs' reports in accordance with the international standards, considering that in all of the countries SAIs report annually to parliament and submit to it reports on their activities and performed audits, and that the reports are published at the SAI's official web sites or in the Official Gazette, as stipulated in Bosnia and Herzegovina.[85]

However, the constitutional powers relating to the submission of annual reports to parliament are contained only by the constitutions of Montenegro, Croatia and Kosovo, while the Bulgarian and Serbian constitutions do not stipulate such provisions, and it can be concluded that the Bulgarian and Serbian, but also Macedonian and Bosnian regulations do not comply with the recommendation that the right and obligation to report annually to parliament should be stipulated by the constitution.[86]

[85] Article 16, Para. 7, of the Law on Audit of the Institution of Bosnia and Herzegovina. Not all the countries have the same timelines for the submission of annual reports.

[86] As stated above, the Constitutions of Macedonia and Bosnia and Herzegovina do not have provisions relating to SAI or external audit.

In all the countries in the region, SAIs perform regular auditing in the defence sector, and the audit reports relating to the financial performance of the ministries of defence are disclosed and are available to the public. For Montenegro only, the only report available is that from 2007. In all of the countries, the above reports indicate numerous irregularities and illegal practices in the financial management of the ministries of defence, but also that the ministries comply to the greatest extent with the SAI's recommendations, which shows that the established SAIs fulfil their role in terms of the budget spending control (in the defence sector), and that the performance of the ministries of defence has improved.

In the most recent report, the Bulgarian National Audit Office did not identify any significant irregularities in the financial management by the Ministry of Defence, which can be partly explained by the fact that Bulgaria has a functional internal control system in place.[87]

In the other countries in the region, SAIs have identified numerous irregularities and illegal practices, which indicates that the SAIs' recommendations are not fully enforced, and that the internal financial control system in the security and defence sector is still at the stage of development. Thus, for example, in Croatia, the State Audit Office confirmed that the identified irregularities were partly a consequence of the inadequate functioning of the internal control system, which is why a qualified opinion was adopted for 2011. The audit has identified irregularities and omissions relating to accounting practice, information technology system, and the public procurement procedures.[88]

In the reports of the Office of the Auditor General of Kosovo for 2010 and 2011, several irregularities in terms of financial management and control in the security and defence sector were also identified, and the recommendation was to improve the financial management and establish more efficient internal controls to ensure the adequate control environment and eliminate the weaknesses. Although the 2011 report confirmed that there was an adequate control environment in place in the Ministry of Defence and that a significant progress was made in relation to the previous reports, a number of areas of weakness were singled out: public procurements, registration of nonfinancial assets, creation of a comprehensive assets registry, implementation of capital investment projects and strengthening capital investment management mechanisms, official use of government-owned motor vehicles, hiring unqualified personnel outside official competitions, regular reporting and follow-up of the implementation of contracts by project managers, verification of payments in accordance with the relevant laws and regulations in force (filing incomplete documentation and verification of payments when the conditions for the

[87] *Cf.* Одитен доклад *№ 0200005911 за извършен одит за съответствие при финансовото управление на Министерството на отбраната за периода от 01.01.2010 г. до 30.09.2011 г*, Сметна палата, 2012, pp. 54-55.

[88] *Cf.* Državni ured za reviziju, *Izvješće o obavljenoj reviziji – Ministarstvo obrane*, Zagreb 2012, pp. 14-22.

verification are not met), and delays in the finalisation of works or the provision of goods and services.[89]

In Macedonia, the State Audit Office audited the financial statements of the Ministry of Defence for 2011 and expressed an adverse opinion about accuracy and the objectivity of the balance sheet, a qualified opinion about the objectivity of the income statement, and an adverse opinion about the compliance with the legislation, instructions and adopted policies. The problems were identified in the following areas: incomplete and partially unmatched year-end closing stock of assets and sources of assets, a lack of credible supporting documentation for the accounting entries of the current assets, inaccurate information about advanced payments to employees and recorded liabilities, accounting records on procurement and consumption of materials, spare parts and small inventory not maintained, overdue payments on cell phone bills, and public procurement.[90] Another report identified non-compliance with the legal provisions on the initial price setting for public auctions and lease of real-estate; inaccurate information relating to the measures undertaken to collect outstanding receivables for interest and rent, as many of them were aged; untimely payments for official trips abroad, study, training, overseas peace-keeping operations; incomplete and untidy documentation supporting the rights to certain types of income, etc.[91]

The Serbian State Audit Institution expressed a qualified opinion regarding the operation of the Ministry of Defence for 2010, as it identified numerous issues relating to the performance of the Ministry. It was identified that there was no adequate internal financial control system in place; two public procurement procedures were not implemented in accordance with law; the inventory of real-estate assets was not undertaken, and the value of movable assets and real-estate was not recorded properly; a number of financial statements were not credible and did not provide accurate and objective view; the inventory of assets did not include all financial assets and the inventory was not done in accordance with the regulations; numerous irregularities were identified in relation to the employees' wages, allowances and reimbursements, etc.[92]

In Montenegro, in the report on the audit of the Ministry of Defence's statements for 2007, the State Audit Institution expressed multiple objections to the

[89] *Annual audit report 2011*, Office of the Auditor General, 2012, p. 52; *Audit report on the annual financial statements of Ministry of Kosovo security forces for the year ended on 31 december 2011*, Office of the Auditor General, 2012, p. 5; *Audit report on the annual financial statements of Ministry of Kosovo security forces for the year ended on 31 december 2010*, Office of the Auditor General, 2011, p. 4 and p. 18.

[90] *Cf.* Министерство за одбрана - *Буџетска сметка (637)* – Конечен извештај на овластениот Државен ревизор, No. 13-116/16, 2012, pp. 1-2.

[91] *Cf.* Министерство за одбрана - Сметка на основен буџет (631) – Конечен извештај на овластениот Државен ревизор, No. 13-116/17, 2012, pp. 1-2.

[92] *Izveštaj o reviziji godišnjeg finansijskog izveštaja Ministarstva odbrane za 2010. godinu*, Državna revizorska institucija, Belgrade 2011, pp. 6-9. See also: *Izveštaj o radu Državne revizorske institucije za 2011. godinu*, Državna revizorska institucija, Belgrade 2012, p. 16.

Ministry on account of the following: in budget structure for the Ministry, it was not indicated which allocation was intended for the Ministry itself, and which for the Montenegro Army Forces; the accounting system of the Ministry could not produce adequate budget execution records; the financial plan was not comprehensive, considering that not all the actual income was planned; in the Outstanding Accounts Payable Summary, outstanding wage contributions were not shown; non-compliance with the provision of the Budget Law, as well as the Law on Public Procurements was identified in the cases of the procurement of goods, services and works, etc.[93]

The Office for Audit of the Institutions of Bosnia and Herzegovina expressed an adverse opinion regarding the performance of the Ministry of Defence, as it identified that the financial statements of the Ministry did not provide a fair and truthful reflection of the actual 2011 positions of assets and liabilities, and the 2011 performance and budget execution results were not recorded in accordance with the accepted financial reporting framework. The report stated that the financial transactions and information recorded in the financial statements did not comply in all aspects with the relevant laws and regulations, which was confirmed by serious weaknesses that were identified: movable military assets were not recorded in accordance with the International Accounting Standards; liabilities to suppliers and the costs were not calculated accurately, and the Ministry did not report the liabilities from 2011 and previous years due to delays in invoicing; there was no reliable records on the actual stock of default interest charged for outstanding electricity bills, as it was not recorded in the Ministry's books; the expenditures for the procurement of materials were not apportioned in accordance with the International Accounting Standards; with respect to regular maintenance, the investment maintenance, i.e. capital investment type expenditures were not recorded properly in the books; there was no efficient and reliable public procurement system in place, etc.[94]

2.3. Main Problems Relating to the Implementation of Regulations

Considering that internal audit is a completely new profession in the countries in the region, the main issues in terms of the implementation of regulations relate primarily to the very establishment of the separate auditing units in the ministries of defence, or lack of transparency in their forming, and later, to the difficulties in their functioning due to lack of practice in internal audit and insufficient human resources. Thus, for instance, in Croatia, the Government had passed a decision on establishing an Independent Section for Internal Audit within the Ministry of Defence

[93] *Cf. Izvještaj o reviziji godišnjeg finansijskog izvještaja Ministarstva odbrane za 2007. godinu*, Državna revizorska institucija Crne Gore, Podgorica 2008, pp. 30-32.

[94] *Cf. Izvještaj o finansijskoj reviziji Ministarstva odbrane Bosne i Hercegovine za 2011. godinu*, Sarajevo 2012, pp. 4-5.

on December 14, 2005, but even after two weeks after such decision was passed, the Ministry had no details of the new unit, it was unclear who was the head of the unit and whether such person had started to work or not.[95] In Serbia, on the other hand, the setting up of internal audit in the Ministry of Defence and the employment of internal auditors in the Internal Audit Section was long-awaited. The Internal Audit Section was set up as a narrow internal unit within the Ministry as early as 2009, the first internal auditor was appointed to duty as of January 25, 2010, and until January 2012 the Section employed only two auditors as opposed to five posts envisaged by the staffing table.[96]

In practice, there is no awareness about the difference between internal audit and the other forms of (internal) controls, and internal audit is occasionally perceived as a (new) form of public sector control, rather than an advisory activity. Internal audit is still at the stage of development, and is limited partly also due to a low level of development of the new financial management and control system. That is why internal audit in the defence sector is still at the stage of organisational and personnel establishment, its implementation is slow, and it is still not fully operational.

While internal audit has been established, its functionality is limited due to a small number of hired internal auditors and other factors relating the current level of development (professionalisation, professional competences, etc.). As the existing number of staff is not adequate the countries have been recommended to further strengthen their internal audit and hire additional internal auditors to enable the internal auditing units to perform internal audit more efficiently, eliminate the shortcomings in their work and achieve all the objectives specified in the annual plan. In addition to that, to the most part, the internal auditors who were hired have no practical experience in internal auditing, and their professional education will take some time, which can additionally slow down the development of the internal audit function. That is why the practical implementation of the internal audit regulations is the main problem in terms of the operations of the internal auditing units.

However, such problems are unavoidable, considering that the internal audit system, i.e. internal financial control system, in the defence sector is still at the early stage of its development. That is why the effects of the establishment of internal audit are not immediately visible, even though audits are carried out, and the internal auditors' recommendations are accepted. The countries need to provide assistance for staff education, train additional number of persons to perform internal audit, and ensure their continued professional development. The staff education should include awareness raising about risk management in the ministries of defence and performing internal audit in the high-risk areas, such as public procurement, budget and finance, assets management, etc. In addition to the issues relating to unqualified and untrained staff, the difficulties in terms of the operations of internal audit are caused also by

[95] *http://www.poslovni.hr/hrvatska/morh-nista-ne-zna-o-svom-odjelu-za-unutarnju-reviziju-1903*, 20.02.2013.

[96] *http://korupcija.bezbednost.org/Korupcija/205/Unutrasnja-kontrola.shtml,* 20.02.2013.

the unattractiveness of the internal audit profession due to a relatively low pay. That creates problems in terms of hiring and maintaining professional personnel, as that the best professional personnel migrate towards the private sector, which offers a much higher pay than the public sector.

However, some effects of the established internal audit can already be felt and there has been a visible progress in the development of the system, considering that the internal auditors' reports have identified multiple irregularities in the defence sector, and that there were numerous conclusions and recommendations provided. Thus, in Croatia, the establishment of the Independent Internal Audit Section was nontransparent, and today this unit is independent, operational, and performs internal audit in accordance with the annual plan. The positive effects of internal audit in the Croatian Ministry of Defence are already visible, as there are numerous activities of the Ministry implemented in accordance with the findings and recommendations of the Independent Internal Audit Section. In Bosnia and Herzegovina, internal audit contributes also to the improvement of the performance of the Ministry of Defence, even though, initially, the work of the Internal Audit Office was not based on the planning, execution, and reporting procedures, as specified in the standards on auditing. That is demonstrated also by the reports of the Audit Office of the Institutions of Bosnia and Herzegovina on the financial audit of the Ministry of Defence for 2010 and 2011,[97] but one opinion of the Ministry's internal auditor, stating that the Ministry does not comply with the provisions of the Rulebook on Material and Financial Operations (Pravilnik o materijalno-finansijskom poslovanju) and the law and bylaws specifying the establishment of certain business arrangements with suppliers.[98] However, according to some estimates, the first results of the establishment of internal audit in Serbia will be visible only in 2013-2014, considering that the Internal Audit Division was established in 2011, and that it is still not operational in a way that can satisfy all the needs of the modern internal auditing.[99] In accordance with the State Audit Institution Performance Report, the Ministry of Defence does not have the internal financial control system established in a way that ensures the implementation of the laws, regulations, rules, and procedures, and the achievement of other objectives for which it is established in accordance with law.[100]

---

[97] *Cf. Izveštaj o finansijskoj reviziji Ministarstva odbrane Bosne i Hercegovine za 2010. godinu*, Kancelarija za reviziju institucija BiH, Sarajevo 2011, 9; *Izveštaj o finansijskoj reviziji Ministarstva odbrane Bosne i Hercegovine za 2011. godinu*, Kancelarija za reviziju institucija BiH, Sarajevo 2012, p. 12.

[98] This is a characteristic case because the internal auditor's opinion was disclosed to the media, which shows that increased attention is given to the activities within the Ministry.

[99] *Cf. http://korupcija.bezbednost.org/Korupcija/205/Unutrasnja-kontrola.shtml*, 16.12.2012.

[100] *Cf.* Izveštaj o radu Državne revizorske institucije za 2011. godinu, *http://www.dri.rs/images/pdf/dokumenti/izvestaji_o_radu_2011.pdf*, 16.12.2012, p. 10.

The ministries of defence are therefore recommended to focus on further development of the internal audit activity, to undertake additional measures for the improvement of the internal audit activity, and adopt all the recommendations and instructions by the internal auditors. At the same time, it is important to improve the cooperation with the Central Harmonisation Units, as well as with the Supreme Audit Institutions, considering that the development of internal audit depends also on the external audit results. Such cooperation is necessary because the development of internal audit depends on the overall control environment in the public sector; for, internal audit is a part of the concept of financial control in the public sector (*PFIC* control), which is developed within the framework of the so-called control environment. This means that both financial management and control and the general control environment must improve.

Given that the internal control mechanisms that are in place in the countries in the region are weak and that the concept of effective managerial accountability is not developed, it is understandable why internal audit develops so slowly in these countries. The regulatory frameworks are in place and international standards are accepted, but the established internal audit is not functional and the practical results are weaker than expected. The problems in implementing the regulations and accepted standards are also caused by the slow development of the public administration and slow public finance reform, on the results of which the effectiveness of the *PIFC* concept depends.

It is therefore reasonable to ask whether the introduction of the *PIFC* concept, the decentralised internal audit in particular, is suitable for the transition countries in the region, or, rather, were they ready for such changes in the public sector control system? The EU had created this concept based on its own experiences with inefficient traditional financial and inspection controls and lack of managerial responsibility of the administrative bodies for financial management. Conversely, the new PIFC approach insists on delegating financial management and control to administrative bodies. A prerequisite for delegating financial control is the existence of clear responsibility of the management for disposing of financial assets and establishment of internal control procedures, which should prevent abuse. This concept, however, generates numerous practical problems and dilemmas, since the concept itself is new and is not followed by the introduction of clear lines of accountability for financial processes that take place within administrative authorities. For the countries in the region, it is also a major change in terms of the prevailing culture in the public sector, given the lack of awareness on (internal) control of public funds and prevention of corruption in this manner.

Establishment of the regulatory framework for internal audit has still not yielded the desired results, since, instead of a carefully planned introduction of internal audit, the process of harmonisation with community law was rushed into, without making more profound changes to the public administration system, which would rest on strengthening managerial responsibility. The countries in the region are ready to adopt any and all international standards that will lead them closer

to the EU, but do not pay sufficient attention to the possibilities of their practical implementation and the major structural administrative changes that are needed for effective implementation of such standards in practice.

However, the establishment of functional internal audit is not a goal the countries in the region cannot achieve, but this has to be done one step at a time as it is not an easy task and will take time. It does take time to truly understand the importance of independent internal audit and the *PIFC* concept, which proper establishment can undoubtedly yield positive results in combating corruption. In that respect the experiences of other countries concerning the establishment of internal audit, that is, of internal financial control in the public sector, are very useful.[101] Establishment of internal audit therefore mandates raising of awareness, changing habits and existence of true political will to achieve the desired results in combating corruption, as opposed to just meeting the requirement concerning the harmonisation of national legislation with the EU law.

All the countries in the region have established their SAIs, which, in accordance with the existing regulations, have a high degree of institutional, functional, and financial independence, and which, in accordance with numerous assessments, play a very important role in the control of budget spending. The legal framework for external audit guarantees SAIs independence, as all the countries in the region have, in principle, aligned their legal framework in this area with the international standards. However, certain problems in terms of the implementation of regulations still exist, as the modern SAIs in the region were established only after 1990, i.e. 2000. That is why it can be argued that external audit is still at the early stage of development, and the independence of SAIs in some of the countries is impaired due to certain weaknesses in the existing regulations. That refers primarily to Macedonia and Bosnia and Herzegovina, which do not have the provisions on SAIs in their constitutions.

The establishment of SAIs in some of the countries was accompanied by numerous difficulties, which is why the appointment of the SAI members was frequently deferred. Thus, in Serbia, the State Audit Institution became operational more than three years after the adoption of the Law on State Audit Institution, and its operations were hindered due to a lack of funding, business space, and equipment. The staff employed in SAIs in most of the counties is the competent and experienced staff that previously worked in the former Yugoslav Social Accounting Service (SDK), so that the problems relating to professional external audit practice do not occur in practice. However, it is necessary to maintain the existing and attract new qualified personnel, as the pay in the public sector is much lower than that in the private sector. At the same time, it is important to increase the number of auditors to allow for all

[101] For more see J. Diamond, „The Role of Internal Audit in Government Financial Management: An International Perspective“, IMF Working Paper, No. 02/94, 2002, *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=879645*, (23. 02.2013), pp. 18-22; R. de Koning, *Public Internal Financial Control,* 2007, *http://www.pifc.eu/translations/Pifc-Bosnian.pdf*, (23.02.2013), 24 et seq, pp. 160-161.

the planned audits to be performed, and for them to be performed in a high-quality and professional manner.

What can also interfere occasionally with the work of SAIs is a lack of awareness about the independence of SAIs, and the role of external audit in the control of budget spending. That is why the main problems occur in the course of the implementation of the SAI's findings and recommendations provided in their reports. SAIs have limited powers to sanction the budget spending institutions that use the budgetary funds illegally or irrationally or that fail to provide the requested information or documentation, and that can have a negative impact on their work. However, the role of SAIs is not to sanction, but to play a preventive role through their controls and to improve financial management in the public sector, and that is why the existing audit follow-up mechanisms need to be improved. With that respect, it is recommended to include the information on the implementation of the recommendations as a separate section of the SAI's Report, disclose feed-back reports on the SAI's web site, and publish the general recommendations to audited entities, and the responses to frequently asked questions.[102] In that respect, in order to actually achieve the desired results, it is necessary also to strengthen the links between SAI and parliament, as a guarantor of the implementation of the SAI's recommendations.

The problems relating to the implementation are caused also by specific legal solutions that impair the autonomy of SAI in terms of employment and the assessment and career advancement for the SAI employees, and that could, therefore, impair the independence of SAI. In Serbia, for example, the State Audit Institution must obtain the approval of the Ministry of Finance for its personnel plan, which allows the Government to defer or even prevent personnel hires. Similarly, the National Assembly must approve the Rules of Procedure of the State Audit Institution, imposing unnecessary control over the processes and procedures of the State Audit Institution.[103] In addition to that, problems are created also by the provision that specifies that the proposals for removal of the State Audit Institution members can be submitted by only 20 members of parliament (out of 250 members in the National Assembly), irrespective of the fact that members of parliament must also vote to remove a member of the State Audit Institution.

With respect to the SAI's members, State Audit Institution in Montenegro (SAI) received criticism that its independence was impaired because a former Minister of Finance and vice president of the government, who was also member of parliament and a member of the Presidency of the leading political party, and who was also subject to criminal investigation in Italy due to the so-called tobacco affair, with regards to criminal acts committed at the time he was the Minister, was appointed President of SAI Senate. There are serious indications that even the Law on

[102] *Cf.* CEP, *Towards a More Financially Responsible Government in Serbia: Implementation of Recommendations and Measures of the Serbian State Audit Institution*, European Policy Centre, Belgrade 2012, p. 80.

[103] *Ibid*, 20; SIGMA, *Assessment – Serbia, 2011* (Consolidated Text), SIGMA/OECD, p. 141.

State Audit Institution was amended so that he could meet the eligibility conditions to be appointed President of SAI, and the legal amendment were approved at the same parliament session in which he was actually appointed.[104] This raised suspicions as to the independence and impartiality of the SAI and may have had adverse effect on the public trust in the work of the SAI. The Senate President had resigned recently due to a compromising video recording which the media learned of, finding that his actions, which was in the focus of the media and the general public, rendered him unworthy of public office.[105]

The SAI's reports in all the countries indicate numerous problems in the security and defence sector, as the audits have identified serious weaknesses (irregularities and illegal practices) in the performance of the ministries of defence. However, the reports indicate that the SAI's recommendations are to the most extent enforces, which shows that the SAIs' work is more appreciated, and that their role in the improvement of the public sector financial management is respected. That, however, confirms that external audit in the countries in the region is developing rapidly, in spite of certain problems that are evident in terms of the implementation of regulations.

3. CONCLUDING REMARKS

In accordance with the generally accepted international standards for internal audit in the public sector, the countries in the region have established internal audit in the public sector both normatively and organisationally, considering that all the countries have adopted the appropriate legal framework for internal audit, and have established internal audit in the defence sector by establishing a separate organisational unit within the Ministry of Defence. The countries have undertaken the necessary activities to ensure the operations of the internal auditing units within the ministries of defence, ensuring the preconditions for the improvement and development of the

[104] M. Trivunović, V. Devine, H. Mathisen, *Korupcija u Crnoj Gori - 2007, Prikaz glavnih problema i stanja reformi,* CMI, 2007, *http://www.undp.org.me/files/reports/ijr/Report%20on%20Corruption%20in%20Montenegro%20-%20MNE.pdf*, 16.12.2012, p, 67. *Vijesti*, daily newspaper claim that, after the charges against him for being involved in the mentioned affair in Italy were dropped, the Montenegrin Government had, at his request, paid him 250.000 € as assistance in payment of attorneys-at-law which had represented him in the proceedings before the Italian courts in the process conducted against him for suspicion of involvement in the smuggling of cigarettes. *Cf. http://www.vijesti.me/vijesti/ivanisevicu-vlada-dala-250-000-advokata-bariju-clanak-76915, http://www.vijesti.me/vijesti/u-italiji-bi-razapeli-advokata-koji-bi-se-usudio-da-trazi-50-000-eura-clanak-78626, http://www.portalanalitika.me/component/content/article/63079-za-ivanievievu-odbranu-pred-sudovima-u-bariju-250-hiljada-eura-.html, http://www.portalanalitika.me/drustvo/vijesti/64378-ivanievi-imam-pravo-na-nadoknadu.html*, 22.02.2013.

[105] *Cf. http://www.dri.co.me/1/index.php?option=com_k2&view=item&id=67:ostavka-gdina-miroslava-ivani%C5%A1evi%C4%87a-predsjednika-senata-dri&lang=sr*, 3.04.2013.

established internal financial control. The legal framework for internal audit in these countries is, for the most part, aligned with the international standards, and as a result of that there are no major discrepancies between the national regulations relating to internal audit in these countries.

The regulations regulate internal audit in a similar manner, and the laws that govern internal financial control or a separate law on internal audit stipulate the obligation to establish internal auditing in the public sector, and a separate law on internal audit or a separate bylaw sets out the obligation to establish a separate internal auditing unit in the Ministry of Defence, i.e. the criteria for its establishment. The above regulations specify also the detailed terms for internal auditing and the obligation of annual reporting on the performed internal audits, and all the countries in the region have adopted the international Definition of Internal Auditing and their own Internal Audit Charter and Code of Ethics for Internal Auditors. The International Standards for the Professional Practice of Internal Auditing have not been fully adopted in all of the countries, and in that respect, the necessary alignments need to be ensured (e.g. in terms of statutory professional development for internal auditors, internal and external assessment of internal audit, prevention of conflict of interest, etc.). This is particularly true with regards to Serbia, Macedonia, Montenegro, Bosnia and Herzegovina and Kosovo.

The regulations need to specify more clearly the financial management and control system and ensure its improvement, considering that without such clarifications the development of internal audit would not be possible, and that this pertains to a comprehensive internal financial control system for the public sector. That would ensure a better segregation of the financial management and control and internal audit functions, and internal audit could really be perceived as a supporting and advisory activity, rather that only a "control activity". That is why Serbia needs to adopt a separate law that would regulate internal financial control in the public sector and/or a separate law on internal audit, as Serbia is one of the countries that regulates internal audit only at the level of a tertiary legislation – the Rulebook. While the other countries have at least one of these laws, in Serbia the legal basis for internal audit is provided only in Article 82 of the Budget System Law.

In all of the countries, external audit is regulated in accordance with the International Standards for Supreme Audit Institutions Framework, and the establishment of SAIs and their operations, i.e. performance of external audit, are regulated in a similar way. In all of the countries, the statutory grounds for ensuring SAI independence are sound, and SAIs, with the exception of the Kosovo Office of the Auditor General, are members of the International Organisation of Supreme Audit Institutions (ISSAI). In all of the countries, the legal framework provides a solid base for the institutional, functional, and financial independence of SAIs, and external audit is performed in accordance with the international standards. However, the Montenegrin law needs to stipulate explicitly that audit is performed in accordance with the terms and procedures specified in the ISSAI framework International Standards.

The main weakness of the Macedonian and Bosnian regulations is a lack of constitutional guarantees of the SAI's independence, which is why they need to incorporate the provisions on SAI in their constitutions, in accordance with the recommendations from Lima and Mexico Declarations. The independence of SAIs in Macedonia and Bosnia and Herzegovina is currently guaranteed by several legal provisions, and especially by the provisions on the appointment and removal of the SAI members, so that the State Audit Office and the Office for Audit of the Institutions of Bosnia and Herzegovina do enjoy a high degree of independence.

To ensure full independence of SAIs and improve their operations, certain legal amendments will be necessary in all of the countries, as the legislation is still not fully aligned with the international standards. That would contribute to the elimination of the risks threatening to impair the independence of SAI, ensure more efficient practical implementation of the law, and strengthen the capacities of SAIs, which invest considerable efforts in improving their practice and increase their influence in their countries. That is why it is necessary also to ensure continued training for state auditors. This is particularly true in Serbia and Montenegro. In Montenegro it should be stipulated that the Ministry of Finance, i.e. the Government, is not authorised to modify the SAI's budget proposals received by the Ministry, irrespective of the fact that until now the Ministry has never modified a SAI's budget proposal. In Serbia, for example, there is a need to increase the minimum number of members of parliament that can submit a proposal to dismiss a SAI Council member, and provisions on the submission of the SAI annual report to the Parliament might be introduced in the Constitution. Bulgarian Constitution could also be amended by provisions on the National Audit Office submitting its annual report to the Parliament.

When it comes to individual regulatory frameworks governing *internal audit* in the countries in the region, Serbia, Macedonia, Montenegro, Kosovo and Bosnia and Herzegovina have partially aligned their regulatory frameworks with international standards and can therefore be graded with a B. Bulgaria and Croatia have fully aligned their regulations governing internal audit with international standards and can therefore be awarded the grade A. In addition to harmonising its legislation with the best EU practice, as an EU member-state, Bulgaria has also accepted all international standards concerning internal audit in the public sector; Croatia has done the same, thus accepting the EU *acquis communautaire*.

The alignment of the regulatory framework governing *external audit* with international standards is fully accomplished in Bulgaria, Croatia and Kosovo, which can hence be awarded grade A. Bulgaria has accepted all recommendations concerning the establishment of rules in this area, whilst Croatia, following constitutional amendments and the passing of the State Audit Office Law in 2011, has completed the process of harmonisation of regulations in the field of external audit with international standards. Kosovo regulations can also be assessed aligned with international standards, given they provide best constitutional guarantees of SAI independence and given that external audit regulations meet other international criteria concerning

the SAI. Montenegro and Serbia did not fully align their regulations with international standards, and can be awarded grade B, given that regulations do not provide sufficient guarantees for SAI independence and autonomy. Bearing in mind the fact that the constitutions of Bosnia and Herzegovina and Macedonia do not prescribe important constitutional guarantees for SAI independence, it can be concluded that these countries have not fully aligned their regulatory frameworks to international standards, and can be graded with a B.

Regardless of such an assessment of the alignment of the legislative framework with international standards, all the countries in the region have numerous problems in implementing the regulations and accepted standards, which results in considerable discrepancies and differences in implementation of the set regulatory frameworks in certain countries. The reports of the EU Commission and SIGMA confirm that the legislative frameworks of the countries in the region governing external and internal audit are satisfactory, but their implementation is still not on a satisfactory level; the general assessment is that internal and external audit are still being developed.[106] Lack of awareness with regards to independence and the role of internal and external audit in controlling how public funds are spent and lack of awareness of the importance the control of public funds has with regards to preventing corruption complicate the development of internal and external audit in the region. When it comes to internal audit, clear managerial accountability for managing financial assets and setting up internal control procedures, which is a precondition for the development of internal audit, is not established, and it can hence be concluded that the countries in the region were not ready to introduce the *PFIC* concept nor to implement all the established international standards, some of which cannot even be implemented in a transition countries. The results of external audit depend on the implementation of the findings and the recommendations the SAI include in their reports, which is a major problem in implementation of the external audit standards. In addition, problems in the implementation of standards are caused by certain statutory solutions which violate the autonomy of the SAI with respect to employment, performance evaluation and promotion of the SAI employees - these may jeopardize SAI's independence.

Based on a comprehensive comparative analysis, it can be concluded that the process of establishing the institutional capacities for internal and external audit in the countries in the region in accordance with international standards is still not completed, although the regulatory frameworks presently in place are largely aligned with them. Even though a high level of compliance of these regulations with international standards has been accomplished, the introduction of internal audit and the work of the SAIs have still not yielded the desired results. It is therefore necessary for all the countries to put considerable efforts into establishing functional internal audit and independent SAIs. This means that it is necessary to work on developing internal and

[106] EU Commission and SIGMA reports for all countries except for Bulgaria are available at: *http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm,http://www.oecd.org/site/sigma/publicationsdocuments/assessmentreports.htm*.

external audit, particularly to investigate the economy, efficiency and effectiveness of budget expenditures, in order to ensure not only the legality, but also the value for money of the use of public funds.

Miroslav Djordjevic [1]

OMBUDSMAN

1. INTERNATIONAL STANDARDS

1.1. Introduction

The institution of the Ombudsman, as a strong factor for strengthening the democratic processes and the concept of the state as a provider of public services, today exists in over 130 countries. Although its evolved form that exists today is traditionally linked to the Swedish Constitution from 1809 (which recognised *Justitieombudsman*), and its roots go as back as the early 18th century, this institution saw rapid expansion only in the second half of the 20th century. Most of all thanks to Denmark, this institution became prosperous, and, over time, it escalated to the extent that some authors now speak of "ombudsmania."[2]

Although there is still no consensus about the definition of the Ombudsman institution in the published sources,[3] it can be argued that the Ombudsman institution is established to fight for the protection of human rights, increase transparency, and

[1] Research Assistant, Institute of Comparative Law, Belgrade.

[2] D. Milkov, „Zaštitnik građana Republike Srbije", *Zbornik radova Pravnog fakulteta u Novom Sadu*, 1-2/2008, p. 200.

[3] The difficulties relating to a precise and comprehensive definition of the term "ombudsman" reflect both the natural differences in the nature and powers of this institution in different countries, and the notable evolution and expansion of the aforementioned powers. A frequently cited definition is that of the Canadian author Donald Rowat, stating that the Ombudsman is an independent and impartial officer of the legislature whose establishment is usually stipulated by constitution, and who supervises the administration, investigates citizens' complaints about bureaucratic wrongdoings, criticises, and discloses bureaucratic actions, without cancelling them. – D. Simović, „O potrebi ustanovljavanja policijskog ombudsmana u Republici Srbiji", *Policija u funkciji zaštite ljudskih prava*, Kriminalističko-policijska akademija, Beograd, 2011, p. 84. This dated definition from 1968, although still true, is incomplete, as it fails to take into account special care of human rights protection by the Ombudsman that is insisted upon today ("hybrid ombudsman").

ensure adequate performance of public authorities, fight against "maladministration"[4] and prevent corruption. Therefore, the Ombudsman is a sort of an arbitrator between the state apparatus and the individual, an independent corrective of the bureaucratic apparatus that takes care of the citizens' rights and good administration, and, by virtue of its actions, it has an important role in the prevention of corruption. In addition to the National Ombudsmen with general competencies, there are also Specialised Ombudsmen dealing with a narrower field of action (military, police, education etc.), Supranational (European Ombudsman), but also Regional and Local Ombudsmen. An important role of the Ombudsman is to ensure the prevention of corruption by drawing attention to the weaknesses in the system that could cause it.

Defence and security sector falls under the competence of the national Ombudsman in countries whose Ombudsman has general competencies, i.e. the military Ombudsman in countries whose law recognises such specialised institutions. Due to the undemocratic, distinctly hierarchical, and non-transparent nature of the army itself, in the domain of the Military Ombudsman the specificities are, in fact, much more common than in other types of Specialised Ombudsmen. Only one of the countries covered by this study (Bosnia and Herzegovina) recognises the institution of the special Military Ombudsman.

1.2. Sources of Law

The development of the international ombudsman standards and best practice began in 1960s. There is a large number of international acts which provide guidelines and specify the fundamental principles that should support operation of this institution. Although they are, as a rule, of advisory and unbinding nature, by virtue of their authority, these acts are incorporated by the states into their national legislation. Organisations including United Nations, European Union, Council of Europe and its European Commission for Democracy through Law (the Venice Commission) adopted ombudsman recommendations and guidelines. In terms of importance, one has to note the so-called *Paris Principles*, defined at the first *International Workshop on National Institutions for the Promotion and Protection of Human Rights* (held in Paris, in 1991), which were soon accepted by the United Nations and the Council of Europe.

[4] Maladministration can be defined as any illegal, inappropriate, unfair, unethical adoption of administrative acts, and performance of administrative actions, including any negligent action, procrastination, and discretionary conduct, i.e. administrative action that is not fair, efficient, and cordial. S. Jugović, „Zaštitnik građana i kontrola policije i bezbednosno-informativne agencije u Republici Srbiji", *Pravna riječ*, 29/2011, pp. 733-734. The 1998 Annual Report of the European Ombudsman states that "Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it." *http://www.Ombudsman.europa.eu/activities/annualreports.faces* , 11.2.2013.

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights[5] monitors the compliance of national human rights institutions with the Paris principles[6] and accredits UN member states granting them one of the following statuses: A (country fully complies with the Paris principles), B (country partially complies with the Paris principles) or C (country does not comply with the Paris principles). Among the researched states, in the last accreditation[7] (December 2011) Bosnia and Herzegovina, Croatia and Serbia were granted A status, Bulgaria and Macedonia B status, whilst Montenegro and Kosovo were not covered by the report.[8]

All the analysed countries, with the exception of Kosovo,[9] are members of both the United Nations and the Council of Europe, and at the time this paper is being written Bulgaria and Croatia are members of the European Union.

There is a series of other documents dealing with the protection of human rights, which partially or indirectly touch upon the institutions of ombudsman - such as the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which as an addition to the UN Convention Against Torture, which as accepted in all countries covered by the research (except Kosovo). The United National General Assembly has adopted a series of resolutions dealing with the protection of human rights, the most relevant of which in view of the ombudsman are the A/RES/65/207 and A/RES/63/169 resolutions, which encourage member states to take certain steps towards strengthening the integrity of the ombudsmen and human rights protection. Coupled with the guidelines of some other relevant institutions, such as the European Ombudsman[10], the International Ombudsman Association (IOA), the European Ombudsman Institute (EOI) and the like, they constitute sound principles of the quality work of this institution.

---

[5] This body was formed at a conference in Tunisia in 1993 with the aim to ease the coordination of national institutions for protection of human rights. Its work is supported by the High Commissioner of the UN for Human Rights.

[6] In the researched countries, the ombudsman is such a body.

[7] *http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%28DIC%202011%29.pdf* , 11.2.2013.

[8] Kosovo is not a UN member state and hence cannot be ranked.

[9] According to the UN Resolution 1244.

[10] At the time this paper is being written, amongst the states being researched, only Bulgaria and Croatia are members of the European Union, and hence the institution of the European Ombudsman is available only to their citizens. However, the guidelines of the European Ombudsman by the sheer force of their authority have a considerably wider impact and are a part of the general international principles concerning ombudsman.

1.3. Content of Standards

In spite of the lack of international normative that would ensure a clear division of these categories (principles), in this paper we opted to organise the international standards relating to Ombudsman around the following five categories: establishment by constitution or law; adequate powers; independence; transparency, reporting and confidentiality; efficiency and competence.

1.3.1. Establishment by constitution or law

The way in which the institution of the Ombudsman is defined in the legal system determines the degree of its independence, and, in turn, the quality of its work. As the constitution is the highest legal act of a country, it is advisable to have the issues relating to the Ombudsman, his/her selection, powers, and activities stipulated by the constitution.[11] If the Ombudsman is not established in the constitutional text, in that case it is preferable to have it established by law, rather than by a bylaw. The published sources emphasise also that an institution established by constitution is less vulnerable and less prone to discretional pressures and more sustainable over time.[12]

The Paris Principles: the Ombudsman established by constitution or law

Article 2 A national institution (national human rights institution, more specifically - the Ombudsman) shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

The Venice Commission was also of the opinion that it would be preferable to have the institution of the Ombudsman guaranteed by the constitutional provisions that would stipulate the core characteristics and powers of the Ombudsman office and

[11] Thus, for example, in the Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission from 6 December 2004, it is stated that, in order to protect it from political influences, it would be preferable to have the institution of the Ombudsman and its main principles guaranteed not only on the legislative but also on the constitutional level. CDL-AD(2004)041 Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe.(Strasbourg,6 December 2004) n. 9. *http://www.venice.coe.int/site/main/texts/CDL_2010_OMBUD_e.pdf* , 11.2.2013.

[12] B. Milosavljević, *Ombudsman – zaštitnik prava građana*, Centar za antiratnu akciju, Beograd 2001, p. 31.

the terms of appointment of the Ombudsman, and which would be further specified in legal provisions. That is why it is recommended that constitutional provisions should not be too extensive, and that the constitutional framework should not be too narrow, which would prevent the reasonable development of the institution. Particularly, the provision in the constitution for an Ombudsman at the national level should not be seen as preventing the establishment of similar institutions at a local or regional level or within specific fields.[13] Therefore, it can be concluded that the ideal situation would be to have this institution established in a flexible way by the constitution, to a reasonable degree of detail that would cover all its essential aspects, with further elaboration under legislation and bylaws.

1.3.2. Adequate powers

The main function of Ombudsman is to draw attention to "maladministration" in all spheres of the state, and also within the military domain. The International Ombudsman Association (IOA) Standards of Practice in Article 4, Para. 4, state that "the Ombudsman supplements, but does not replace, any formal channels."[14] Thus, the Ombudsman is "a body that does not act by way force, threats, or sanctions, it does not issue orders or implement sanctions on its own. On the contrary, it is a body that proposes initiates, participates in, and coordinates the activities of other state authorities in order to find the best solutions to ensure the satisfaction and protection of individual's rights."[15]

The Ombudsman institution may act on a voluntary basis (the Ombudsman monitors *ex officio* the status of human rights and the performance of administration), and on the basis of citizens' complaints, which is much more common in practice. These standards were further specified by international ombudsman institutions, and, with that respect, the practice of the European Ombudsman is also valuable. The desired competencies of the Ombudsman are specified in detail in the Paris Principles and provided in the Box below.

---

[13] CDL-AD(2007)020 - Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) No. 7. *http://www.venice.coe.int/site/main/texts/CDL_2010_OMBUD_e.pdf*, 11.2.2013.

[14] *http://www.ombudsassociation.org/sites/default/files/IOA_Standards_of_Practice_Oct09.pdf* 11.2.2013.

[15] B. Marković, „Ombudsman i uprava u procesu zaštite ljudskih prava i sloboda", *Eseji o upravi*, Kragujevac 2001, p. 175. However, there are some exceptions, and thus, in Sweden the Ombudsman may even take over criminal prosecution if he/she is convinced that there are grounds to do so.

The Paris Principles: Ombudsman's Powers

In accordance with the Paris Principles,[16] the Ombudsman's powers should include:

- The right to investigate potential irregularities in the work of the state apparatus (including the ministry of defence), i.e. investigate weather the institutions perform their activities in compliance with the law and standards of ethics;
- The right to submit recommendations to the government and other state institutions in order to prevent "maladministration", and potentially eliminate its consequences;
- The right to submit applications to the state institutions if he/she is convinced that human rights are violated;
- The right to make the results of his/her activities available to the public;
- The right to propose amendments and new legislation, if the violation/breach of human rights or "maladministration" is a result of inadequate normative framework, with the aim to promote good administration and institutional integrity (and, in turn, reducing corruption);
- The right to propose removal of public officers from office (in the event of documented inappropriate, illegal or corruptive actions);
- It is advisable that the Ombudsman advocates the implementation into the national legislation of all the standards and best practices of the international bodies to which the state has acceded and which deal with human rights protection and promotion of good administration. The Ombudsman is also encouraged to cooperate with international organisations, particularly the United Nations;
- It is also advisable that the Ombudsman assists in the formulation and implementation of human rights, and, to that end, implements scientific and research programmes, and raises public awareness about the importance of human rights through information and education.

1.3.3. Independence and neutrality

Considering the nature of the Ombudsman institutions itself, it is clear that one of the highest priorities is its independence. Thus, for example, the European Ombudsman Statutes, in Article 9, stipulates:

[16] *http://www2.ohchr.org/english/law/parisprinciples.htm*,11.2.2013.

"The Ombudsman shall perform his duties with complete independence, in the general interest of the Communities and of the citizens of the Union. In the performance of his duties he shall neither seek nor accept instructions from any government or other body. He shall refrain from any act incompatible with the nature of his duties."[17]

To ensure complete independence and neutrality, several conditions have to be satisfied, including the aforementioned constitutional guarantee of this institute, and adequate procedures for appointment and removal of the Ombudsman, incompatibility of this function with the state apparatus functions, reasonable financial security (ensuring undisturbed operations), and financial independence from the executive.

With respect to the appointment of the Ombudsman, considering both its establishment as a parliamentary trustee, and the nature of the activity it performs, it appears that the most logical solution is that it is appointed by parliament. While that is usually the case, comparative law includes also several alternative models stipulating a broader or narrower participation of the executive in the procedure for appointment of the Ombudsman.[18] To ensure a higher degree of independence, it appears that a much better solution would be that the appointment is done by parliament, possibly without any participation of the executive, as the executive is most frequently the target of the Ombudsman's actions.

Comparative law recognises two main methods of financing of the Ombudsman. One is through parliament, and the other one is through the government and its bodies. Considering that to ensure its independence it is important to avoid financing originating from a body that does not fall under its jurisdiction, the most frequent solution is that the institution's budget is decided by parliament.[19]

Good guidelines on the issue of financing of the Ombudsman were provided also by the Venice Commission, which assumes that, in order to ensure a complete, independent and efficient performance of the Ombudsman's duties, the law establishing the Ombudsman needs to prescribe that the institution itself should submit a proposal for its budget.[20]

Finally, with respect to incompatibility and neutrality, it is clear that the Ombudsman cannot be connected in any way to any interested party. The International Ombudsman Association in their Standards (Article 2.4) defines it very simply, "… The Ombudsman should have no personal interest or stake in, and incur no gain

[17] *http://www.Ombudsman.europa.eu/resources/statute.faces* ,11.2.2013.

[18] B. Milosavljević, *Ombudsman – zaštitnik prava građana*, Centar za antiratnu akciju, Beograd 2001, pp. 39-42.

[19] D. Radinović, *Ombudsman i izvršna vlast*, Službeni glasnik, Beograd 2001, p. 167.

[20] CDL-AD(2007)020 - Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) n. 30. *http://www.venice.coe.int/site/main/texts/CDL_2010_OMBUD_e.pdf* ,11.2.2013

or loss from, the outcome of an issue."[21] Furthermore, it should not interfere with the regular procedure of the state authority, as it presents a corrective that, as stated above, "supplements, but does not replace, any formal channels," i.e. draws attention to irregularities and acts proactively to prevent their reoccurring.

1.3.4. Transparency, reporting and confidentiality

As the Ombudsman is an institution that strengthens modern society and transparency of the public administration, the public plays an important role in its actions. Unbinding recommendations adopted by the Ombudsman often serve to mobilise the public, creating a public opinion that in turn leads to a commitment, i.e. standardisation of the recommendation contents. In addition to disclosing its findings and recommendations to the public, the Ombudsman is obligated to report over a specified period (usually annually) to its appointing authority (in most cases – parliament). In these reports, the Ombudsman indicates the details on the numbers of received complaints, conducted investigations, closed cases, etc. While the results of the Ombudsman's actions are, as a rule, clear, there are certain specificities with respect to the Military Ombudsman (naturally, in countries which have such Ombudsman), due to the very nature of the defence and security sector, which allows transparency and civilian control only to a certain degree. The Ombudsman is obligated also to protect the confidentiality of information relating to complainants, etc.,[22] increasing the citizens' confidence in this institution, and in turn its efficiency.

1.3.5. Efficiency and competence

In addition to a good normative framework, the success of the Ombudsman depends to a large extent on the moral, professional, and other personal qualities of the individual performing that function. Therefore, of the utmost importance is for the right person to be appointed to this function, which is why this issue is given special attention in the national legislation.[23] The requirements prescribed for the candidatures for the Ombudsman office normally relate to individual's moral qualities, academic legal background, and the required professional experience (years of service) in the

[21] *http://www.ombudsassociation.org/sites/default/files/IOA_Standards_of_Practice_Oct09.pdf* 11.2.2013.

[22] The comprehensive standards in this sphere are provided in the International Ombudsman Association Standards in Article 3. *http://www.ombudsassociation.org/sites/default/files/IOA_Standards_of_Practice_Oct09.pdf* , 11.2.2013.

[23] B. Milosavljević, *op. cit*, p. 36.

field of administration or law implementation. Another frequent requirement for candidatures for the Ombudsman office is the human rights protection experience.

Although it is quite desirable for the person in the Ombudsman office to have high moral and professional qualities, such requirements should not be too restrictive, as it can cause problems in the course of their implementation.[24] Therefore, the requirements concerning the candidatures for this office should be reasonable, but also high enough. Thus, for example, Article 6, Para. 2, of the European Ombudsman Statute specifies the following requirements:

"The Ombudsman shall be chosen from among persons who are Union citizens, have full civil and political rights, offer every guarantee of independence, and meet the conditions required for the exercise of the highest judicial office in their country or have the acknowledged competence and experience to undertake the duties of Ombudsman."[25]

Such defined requirements are more than enough to ensure the gate that would prevent unqualified, incompetent persons from being appointed to the Ombudsman office. In the context of the Ombudsman's efficiency, it can be added only that the European Ombudsman, which was appointed in accordance with such requirements, has one of the highest numbers of the accepted recommendations in the world (as high as 82% in 2011).[26]

2. COMPARATIVE LEGAL ANALYSIS

To ensure that the Ombudsman institution serves its purpose and achieves the results in practice, i.e. assist in ensuring human rights and protect citizens from maladministration, its work should be regulated and its independence should be guaranteed by a solid legal framework. In addition, adequate financing and the competence of the person performing this function in practice often makes a difference between an efficient and inefficient. This comparative law review of the Ombudsman institution in the countries of former Yugoslavia (with the exception of Slovenia) and Bulgaria will focus on several requirements that are *conditio sine qua non* for due operations of the Ombudsman institution, including: adequate legal framework (stipulated by constitution and by law), procedures for appointment and removal of the Ombudsman, its powers, financing, and reporting.

[24] CDL-AD(2004)041 Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe.(Strasbourg, 6 December 2004) n. 13 *http://www.venice.coe.int/site/main/texts/CDL_2010_OMBUD_e.pdf.*

[25] *http://www.Ombudsman.europa.eu/resources/statute.faces*, 11.2.2013.

[26] *http://www.euractiv.rs/eu-prioriteti/5081-u-eu-prihvaeno-82-preporuka-Ombudsmana* , 11.2.2013.

2.1. Institutional Framework

Institutional framework implies primarily that this institution is governed by constitution, law and secondary legislation. In accordance with the international standards, as discussed above, it is preferred that the Ombudsman institution is guaranteed by the ultimate legal act - the constitution, as the best way to protect its integrity. Also, it is good that the constitutional law protection is of considerable volume, but that is not too restrictive by nature, to leave the possibility for the establishment of various special, regional, and local ombudsmen. A sound constitutional and legal framework is by all means a precondition for the Ombudsman best practice, but, as it will be seen, it does not necessarily guarantee it. Inadequate financing, incompetent personnel, and weak state of law in practice result in weak performance of the Ombudsman institution, notwithstanding the solid legal framework.

2.1.1. Constitution

In all the countries included in this review, with the exception of Bosnia and Herzegovina, the Ombudsman institution is governed by the constitution and further set out by law.

The Croatian Constitution from 1990 (which was subsequently revised on several occasions, and most recently in 2010[27]), in Article 93, stipulates the Ombudsman institution (people's attorney or "pučki pravobranitelj" in Croatian) as a representative of the Croatian Parliament responsible for the promotion and protection of human rights and freedoms stipulated by the Constitution, laws, and international legal acts on human rights and freedoms adopted by the Republic of Croatia.[28] It is further stipulated that anyone who believes that his/her constitutional or statutory rights have been breached by an inadequate action of the public authorities or other authorities with public mandate may submit a complaint to the Ombudsman. The Constitution stipulates also the Ombudsman's term of office, independence and immunity, leaving other matters to be regulated by law.

The Republic of Serbia in its 2006 Constitution[29] stipulates this institution in Article 138. In accordance with this Constitution, the Ombudsman (protector of citizen or "zaštitnik građana") is "an independent state body who shall protect citizens' rights and monitor the work of public administration bodies, body in charge

[27] The most recent revision of the Croatian Constitution that related to the Ombudsman institution was adopted in 2001. *http://www.usud.hr/uploads/Redakcijski%20prociscen%20tekst%20Ustava%20Republike%20Hrvatske,%20Ustavni%20sud%20Republike%20Hrvatske,%2023.%20ozujka%202011.pdf* , 11.2.2013.

[28] Croatian Constitution (Ustav Republike Hrvatske), Article 93.

[29] *http://www.parlament.rs/upload/documents/Ustav_Srbije_pdf.pdf*, 11.2.2013.

of legal protection of proprietary rights and interests of the Republic of Serbia, as well as other bodies and organisations, companies and institutions to which public powers have been delegated."[30] That is immediately followed by the provision that the Ombudsman's powers do not extend to the President of the Republic, National Assembly, Government, Constitutional Court, courts of law, and the public prosecutor's offices. It is stipulated that the ombudsman has immunity and that it is appointed by the National Assembly (and is accountable to the Assembly for his/her work), but the details relating to his/her appointment, and other matters are left to be regulated by law.

The Montenegrin Constitution from 2007[31] stipulates rather briefly in Article 81 that "[t]he protector of human rights and liberties of Montenegro shall be independent and autonomous authority that takes measures to protect human rights and liberties".[32] The Constitution further stipulates that the Ombudsman is appointed for a period of six years, and all detailed regulation of the matter is left to be stipulated by law.

In Bosnia and Herzegovina (hereinafter: B&H), the Ombudsman institution ("Bosnia and Herzegovina Ombudsman for Human Rights") is not stipulated in the Constitution[33], and it is regulated in Annex VI of the Dayton Peace Agreement ("Human Rights Agreement"[34]). Articles 4, 5 and 6 regulate in considerable detail the Ombudsman's term of office, appointment procedure, independence and powers, and all other matters are left to be regulated by law. While the lack of Ombudsman in the constitutional act at first glance diverges from the international standards, one has to take into account the historical circumstances of the constitution of B&H as an independent state in 1995, and the fact that Annex VI of the Dayton Peace Agreement has the same legal weight as the Constitution (which was also adopted as Annex IV of that same Peace Agreement). In addition, a specificity of the B&H system is the existence of a special - military ombudsman (parliamentary military commissioner - parlamentarni vojni poverenik), modelled after the German military ombudsman and governed by the 2009 Law on the Parliamentary Military Commissioner of the B&H. This special ombudsman is not mentioned in the Constitution and is only regulated by statute.

[30] Serbian Constitution (Ustav Republike Srbije), Article 138.

[31] *http://www.skupstina.me/cms/site_data/ustav/Ustav%20Crne%20Gore.pdf* , 11.2.2013.

[32] Montenegrin Constitution (Ustav Crne Gore), Article 81.

[33] Adopted in 1995 as Annex IV of the Dayton Peace Agreement.

[34] *http://www.ombudsmen.gov.ba/materijali/o%20nama/Annex%20VI%20-%20bosnian.pdf* , 11.2.2013.

Kosovo[35] in its 2008 Constitution,[36] in Articles 132 to 135, regulates in great detail the Ombudsman institution[37] (in Serbian version "Ombudsman", and in Albanian version "Avokati i Popullit" or people's lawyer and "Ombudsperson.")[38] The Constitution stipulates that the Ombudsman oversees and protects individual rights and freedoms from illegal and irregular actions by the public authorities. It further stipulates that this institution is independent in the discharge of its duties, and that all other authorities and institutions in Kosovo that have legitimate powers are obligated to provide, at the request by the Ombudsman, all the requested documentation and information.[39] Article 133 specifies that the Ombudsman has its office and a separate budget, as well as the issue of its deputies, while Article 134 deals with the issues of the Ombudsman's qualifications, appointment and removal from office.

In Macedonia, the Ombudsman (people's attorney or "народен правобранител" in Macedonian) was established and fairly generally regulated by the 1991 Constitution[40] (Article 77), while the subsequent amendments XI and XII defined in more depth its role and competencies. In accordance with the Constitution, the Ombudsman is responsible to protect the constitutional and statutory citizens' rights if they are breached by the public administration authorities and other authorities and organisations with public mandate. The Constitution specifies the Ombudsman's term of office, appointment procedures, as well as his/her special duty to take special care of the prevention of discrimination and equal representation of all communities in the public authorities and public life. Other matters are left to be regulated by law.

---

35 In accordance with the UN Resolution No. 1244.

36 *http://www.kushtetutakosoves.info/repository/docs/Ustav.Republike.Kosovo.Srpski_cyr.pdf* , 11.2.2013.

37 In Kosovo the Ombudsman was established in 2000 by the UNMIK Regulation No. 2000/38, which gave the Ombudsman institution the mandate to examine complaints against the UNMIK and the local public administration. Subsequent Regulations from 2006 and 2007 included considerable changes, and all these Regulations were rendered ineffective after the adoption of the Law on Ombudsman in 2010.

38 The term "*ombudsperson*" that is used also at the Kosovo Ombudsman web site *www.ombudspersonkosovo.org* is not correct and is not used for official purposes by any other country in the world, except in Kosovo (even though in the UNMIK Regulation No. 2007/15 this term was replaced with the term "ombudsman", it is still in use). It was formulated in an attempt of some authors to take into account gender equality, based on the erroneous assumption that the word *ombudsman* was compound word comprised of the words *ombuds* and *man*, which is, however, not true. This term does not derive from the English language, but from the Swedish language, and ombudsman is not a compound word, but a simple world denoting a commissioner, both male and female. For more details see: D.Milkov, "Zaštitnik građana Republike Srbije", *Zbornik radova Pravnog fakulteta u Novom Sadu*, 1-2/2008. pp. 203 - 204.

39 Kosovo Constitution, Article 132.

40 *http://www.uni-graz.at/opv1www_ustav_makedonija_mak.pdf* , 11.2.2013.

The Bulgarian Constitution from 1991[41] is still in force, with several considerable revisions (from 2003, 2005, 2006 and 2007). The amendments to the Constitution from 2006 introduced, in Article 91a, the Ombudsman institution, leaving all the matters relating to this institute to be regulated by law. The Constitution stipulates only that the Ombudsman is appointed by the National Assembly and that his/her objective is to protect citizens' rights and freedoms. This is by all means the poorest constitutional law provision relating to the Ombudsman in all the countries analysed in this review. In the case of Bulgaria, it is interesting to note also that this country (and Serbia) adopted its Ombudsman Law before the constitutional regulations (the Law came into effect in January 2004 while the revision of the Constitution and the introduction of the Ombudsman in the Constitution took place, as stated above, more than two years later, in March 2006). The democratic changes and the 1991 Constitution initially left Bulgaria without the Ombudsman institution. Only in 1998, for the most part thanks to the Bulgarian non-governmental organisation "Centre for Democratic Studies," efforts were made to initiate drafting the Ombudsman Law in spite of the fact that at that time this institution did not have its constitutional frame.[42] The Ombudsman Law was adopted in 2003 (and came into effect on 1 January 2004), and in the following year, in 2005, the Rulebook on Ombudsman's Organisation and Competencies was adopted as well. That is how in Bulgaria the constitutional framework stipulated by the 2006 amendments was regulated under law and a bylaw, and that is maybe why the constitutional law regulations were left too general, without any detailed provisions (which is not, however the case in Serbia).

2.1.2. Laws

All the countries included in this review adopted their Law on Ombudsman, stipulating in more depth the issues relating to this institution. Despite the fact that various special ombudsmen are envisaged in certain countries, only B&H envisages special military ombudsman (parliamentary military commissioner).[43] Hence, all defence - related issues in all the analysed countries are in the competence of the general, national ombudsman, except in B8H, where this competence is vested both with the general ombudsman and the special ombudsman - the Military Commissioner (the B&H Law on the Human Rights Ombudsman expressly states in Article 3 that the ombudsman is competent with regards to "any and all appeals concerning violations of human rights and freedoms allegedly committed by the military power).[44]

---

[41] *http://www.parliament.bg/en/const* , 11.2.2013.

[42] For more details see: "The Ombudsman institution in South-eastern Europe", p. 50. *http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan014896.pdf* , 11.2.2013.

[43] Hereinafter: B&H Military Commissioner.

The current laws which govern Ombudsman institution in the countries in the region are presented in the table below:

Croatia	Law on People's Attorney (*Zakon o pučkom pravobranitelju*) [45]	from 2012
Serbia	Law on Protector of Citizens (*Zakon o zaštitniku građana*)[46]	from 2005
Montenegro	Law on Montenegrin Protector/ Protectress of Human Rights and Freedoms (*Zakon o zaštitniku ljudskih prava i sloboda CG*)[47]	from 2011
Bosnia and Herzegovina	Law on Bosnia and Herzegovina Ombudsman for Human Rights (*Zakon o ombudsmenu za ljudska prava Bosne i Hercegovine*)[48] Law on Parliamentary Military Commissioner of Bosnia and Herzegovina (*Zakon o parlamentarnom vojnom povereniku BiH*)[49]	from 2004 from 2009
Kosovo	Law on People's Lawyer (*Zakon o narodnom advokatu*)[50]	from 2010
Macedonia	Law on People's Attorney *(Закон за народниот правобранител)*[51]	from 2003
Bulgaria	Law on Ombudsman (*Закон за омбудсмана*)[52]	from 2004

In addition to the above laws, all the above countries adopted also the supporting bylaws that for the most part regulate technical issues and implementation mechanisms. Thus, Croatia adopted the Rulebook on People's Attorney's Activities (*Poslovnik o radu pučkog pravobranitelja*), Macedonia adopted the Rulebook on Ombudsman Procedures (*Pravilnik o procedurama ombudsmana*), B&H adopted the

[44] The mutual relation between these two institutions is regulated by a secondary act - Guidelines on the Basis of Cooperation of the B&H Parliamentary Military Commissioner with the B&H Human Rights Ombudsman *https://www.parlament.ba/sadrzaj/komisije/ostalo/vojni_povjerenik/ostale_aktivnosti/default.aspx?id=22158&langTag=bs-BA&pril=b*, 10.5.2013.

[45] *http://www.zakon.hr/z/128/Zakon-o-pu%C4%8Dkom-pravobranitelju*, 11.2.2013.

[46] *http://www.paragraf.rs/propisi/zakon_o_zastitniku_gradjana.html*, 11.2.2013.

[47] *http://www.ombudsman.co.me/docs/izvjestaji/Zakon_o_zastitniku_ci_ljudskih_prava_i_sloboda_Crne_Gore.pdf*, 11.2.2013.

[48] *http://www.ombudsmen.gov.ba/materijali/o%20nama/zakon%20o%20ombudsmenu%20BiH.pdf*, 11.2.2013.

[49] *https://www.parlament.ba/2006_2010/komisije/ostalo/vojni_povjerenik/default.aspx?id=31259&langTag=en-US&pril=b*, 10.5.2013.

[50] *http://www.ombudspersonkosovo.org/img/images/content/other/706296_Zakon%20o%20Ombudsmanu%202010-195-ser.pdf* , 11.2.2013.

[51] *http://www.ombudsman.mk/ombudsman/upload/NPM-dokumenti/Pravna%20ramka%20NPM/Zakon%20za%20Naroden%20Pravobranitel%20mkd.PDF,* 11.2.2013.

[52] *http://www.ombudsman.bg/regulations/ombudsman-law*, 11.2.2013.

Rules of Procedure for B&H Institution of Ombudsman for Human Rights (*Pravila postupka institucije ombudsmana za ljudska prava u BiH*) along with a couple of bylaws concerning Parliamentary Military Commissioner, while Bulgaria adopted the Rulebook on Ombudsman's Organisation and Activities, etc.

2.1.3. Institutional Framework Analysis

While the comparison of the ombudsman institution in these countries shows many similarities, as all these countries have adopted the same model, on the other hand, there is also a large number of differences in terms of both the legal framework and practice.

In terms of the tradition of the Ombudsman institution, out of the countries listed above, Croatia and Macedonia have the longest tradition and almost a continuity of this institution dating back to the former Yugoslavia's quasi-ombudsman institution of the social protector of self-management. Following the line of sovereignty, Serbia, with Montenegro and Kosovo, was left without the ombudsman institution for more that ten years after the fall of the communist regime (which, ironically, had the above quasi-ombudsman institution, the social protector of self-management).

The analysis of the constitutional law frameworks and their contents shows similarities between all the countries, with the exception of B&H and Bulgaria. Thus, Bulgaria is the example of the worst solution according to which the Constitution guarantees only the most essential element – the existence of the institution. Everything else was left to be regulated by law. This is in contradiction to the international standards in this area, according to which constitution type regulations should determine the essential characteristics and competencies of the Ombudsman's office and the terms for appointment, in order to protect better the integrity of this institution. However, the situation in B&H is completely different. Annex VI of the Dayton Peace Agreement – "Human Rights Agreement" (an act of the constitutional weight and character), regulating the Ombudsman matter is much more comprehensive in volume than that in the other countries included in this review. At first glance, it could be concluded based on the international standards, that such a solution is not adequate, as too comprehensive regulation may on the other hand hinder the development of the Ombudsman institution and its adjustment to new demands. Here, however, that is not the case, considering that the provisions are quite flexible and that they are not restrictive. Similar, comprehensive regulations exists also in Kosovo, whose Constitution in three Acts stipulates in detail the Ombudsman's activities. As in the case of B&H, this is not a case of violation of the international standards by stipulating too comprehensive and restrictive regulations.

With respect to Serbia, Montenegro, Macedonia, and Croatia, the constitutional law framework is set up in a similar way. In the case of Serbia, Croatia, and Macedonia, it is somewhat more comprehensive, while the Montenegrin Constitution regulates this matter rather briefly, which is not exactly in accordance with the international recommendations. In addition, in specifying the Ombudsman's powers, some countries focus more on the human rights protection (Croatia, Montenegro), while others focus on the action against maladministration (Serbia, Macedonia). All the analysed countries, with the exception of Serbia and Bulgaria, specify in their constitutions the Ombudsman's term of office.

The only constitution of the above constitutions that explicitly stipulates that the Ombudsman has its office and a separate budget, which he/she proposes and manages independently, is the Constitution of Kosovo.[53] Ironically, the reasons for the inefficiencies of the Kosovo Ombudsman in practice include *inter alia*, as will be later seen, the problems relating to inadequate financing and space. This is one example that illustrates how a sound legal (constitutional) solution can stay a dead letter on a paper if the rule of law is not observed.

It can be concluded that in all the countries included in this review, with the exception of Bulgaria, and maybe Montenegro, the constitutional law framework for the Ombudsman institution is in accordance with the international standards. It is by all means preferable to have the Ombudsman, as well as his/her duties, appointment and powers stipulated by constitution. The detailed regulation of the operating procedures of this institution in the countries included in this review is left to be regulated by laws, and our further discussion will focus on the specific aspects of the Ombudsman's activities as stipulated in the above countries' law.

2.2. Procedures for Appointment and Removal of Ombudsman

2.2.1. Appointment

All the countries included in this review stipulate that the Ombudsman is appointed by the National Assembly.

Thus, the Croatian Ombudsman (people's attorney or "pučki pravobranitelj") is appointed by the Croatian Parliament ("Sabor") by a simple majority, for a period of eight years.[54] The Law on People's Attorney additionally stipulates the possibility for his/her reappointment.[55] A motion for appointment of at least two candidates is prepared by the Parliamentary Constitutional Committee,[56] subject to prior opinion of the Committee for Human Rights and Minorities. The Croatian Ombudsman has

[53] Kosovo Constitution, Article 133.
[54] Croatian Constitution (Ustav Republike Hrvatske), Article 93.

three Deputies. Appointing the Ombudsman by a simple majority vote is not the best solution from the aspect of the international standards, but on the other hand it makes is easier to appoint him/her. Notwithstanding such regulations, the appointment of the Ombudsman in Croatia was deferred on several occasions (for both political and practical reasons), and consequently the EC recommendation was to strengthen this institution.

In Serbia, the Protector of Citizens is appointed by a majority vote of all members of parliament, also at the motion of the Committee for Constitutional Issues.[57] The Serbian Ombudsman is appointed for a period of five years, and one person may be reappointed to this office for maximum two consecutive times.[58] The Ombudsman has four Deputies.

The Montenegrin Constitution, in the part pertaining to the competencies of the National Assembly,[59] stipulates that this body appoints "the Protector of Rights and Freedoms" (with simple majority). Article 81 of the Constitution stipulates that the Ombudsman's terms of office is six years, and the Law on Montenegrin Protector of Human Rights and Freedoms (Zakon o zaštitniku ljudskih prava i sloboda Crne Gore) further specifies that the Assembly decides on the number of his/her Deputies (at least one), and that one of the Deputies must be responsible for the protection against discrimination. The Deputies are appointed at the motion by the Ombudsman.

The B&H Law on Ombudsman for Human Rights stipulates that this institution comprises three persons, including a Chairman who is responsible for the coordination of the activities of the institution (the Ombudsman's term of office is six years, and the Chairman is rotated every two years, ensuring that by the end of their term all three persons have presided the institution once). The Ombudsmen are appointed by the House of Representatives and the House of Peoples of the B&H Parliamentary Assembly from the list of candidates for appointment as Ombudsman, which is submitted by an *ad hoc* commission established especially for that purpose.[60] The Ombudsmen's term of office is six years, with a possibility of reappointment. The solution of the three-person Ombudsman institution results from the fact that human rights violations for ethnic and religious reasons are still frequent. That is why the Law, in Article 8, stipulates that the Ombudsmen cooperate in the discharge of their duties, adding that "...the allocation of duties between them will not depend

---

[55] The Law on People's Attorney of the Republic of Croatia (Zakon o pučkom pravobranitelju Republike Hrvatske), Article 10.

[56] The full title is the Committee for Constitution, Rules of Procedure and Political Composition of the Croatian Parliament (Odbor za Ustav, poslovnik i politički sustav Hrvatskoga sabora).

[57] The Law on Protector of Citizens of the Republic of Serbia (Zakon o zaštitniku građana Republike Srbije), Article 4.

[58] *Ibid*.

[59] Montenegrin Constitution, Article 82, para. 12.

[60] The Law on Amendments to the Law on B&H Ombudsman for Human Rights (Zakon o izmenama i dopunama zakona o ombudsmenu za ljudska prava BiH), Article 3. Available at: *http://www.ombudsmen.gov.ba/materijali/o%20nama/zakon%20o%20izmjenama%20i%20dopunama%20zakona.pdf*, 11.2.2013.

on the complainant's ethnic background."[61] Thus, from 2006 and the adoption of the Law on Amendments to the Law on B&H Ombudsman for Human Rights, the Ombudsmen are appointed from the three constitutive peoples (Bosnians, Croats, and Serbs), which does not preclude the appointment of other ethnic communities.[62]As far as B&H Military Commissioner is concerned, he/she is also appointed by the Parliament for a five-year term (which is one year shorter than the term of office of the general ombudsman), with the possibility of only one re-appointment.[63]

The Kosovo[64] Ombudsman (People's Lawyer) is appointed by the Kosovo Parliament by a majority vote of all members of parliament, for a term of five years.[65] The Law on People's Lawyer stipulates that the Ombudsman has five Deputies (which are also appointed by the Parliament, but by a simple majority), and excludes the possibility of reappointment to this function. The above Law underlines that at least one of the Ombudsman Deputies should be from the Serb community in Kosovo, and at least one from the other minority communities represented in the Kosovo Parliament.[66]

In accordance with the Macedonian Constitution and the Law on People's Attorney, the Ombudsman is appointed at the motion by the Parliamentary Committee by a majority vote of all members of parliament, providing that such majority is secured also among the members of parliaments from the minority communities in Macedonia.[67] The Ombudsman's term of office is eight years, and the number of his/her Deputies is decided by the Assembly, on his/her motion. The terms and procedures for their appointment are identical as those for the Ombudsman. They are allowed one reappointment.

In comparison to all of the other aforementioned countries, Bulgaria has one specific feature relating to the Ombudsman's appointment. More superficially, in Bulgaria, the ombudsman is appointed by the Parliament, but by a secret ballot.[68] The appointment requirement is a simple majority of those present and voting. The term of office is five years, and there is a possibility of one reappointment. The Bulgarian Ombudsman has one Deputy who is appointed in the same procedure. From the aspect of the Ombudsman's future integrity and independence, the solution that he/she is

---

[61] The Law on B&H Ombudsman for Human Rights (Zakon o ombudsmenu za ljudska prava Bosne i Hercegovine), Article 8.

[62] The Law on Amendments to the Law on B&H Ombudsman for Human Rights, Article 3.

[63] Interestingly enough, the transitional and final provisions of the Law on Parliamentary Military Commissioner limit the duration of the term of office of the first Military Commissioner to June 30, 2012 (therefore, to three years), with the aim of making this a trial period for the institution before first full-term appointment.

[64] According to the UN Resolution 1244

[65] The Law on Kosovo People's Lawyer, Article 9.

[66] *Ibid*. Article 8, Para. 13.

[67] The Law on Macedonian People's Attorney, Article 5.

[68] The Bulgarian Law on Ombudsman, Article 10.

appointed by a secret ballot appears to be effective. On the other side, appointment by a simple majority is not the ideal solution that can be seen in the international standards, even if it makes the appointment considerably easier, considering, as stated above, the political and practical problems that may occur if the appointment terms and procedures are too rigid. As in Croatia, even such "easy" appointment procedure specified by the legal framework is not always a guarantee that that will be so in practice, and thus, ironically, after the Law on Ombudsman came into effect on 1 January 2004, Bulgaria had to wait for a year and a half for the first Ombudsman to be appointed.

2.2.2. Qualification/Competence Requirements

The laws specify also the terms and personal qualities required for a person to be appointed Ombudsman.[69] All the countries included in this review require the candidates to have the citizenship of the country in which they wish to become Ombudsman, as well as high moral and professional qualities. This rather vague standard is further elaborated in some of the countries, while in others it is left generally defined, without specifying explicitly the requirements in terms of qualifications, work experience, etc. With that respect, the most concise regulation is that of B&H, stipulating that any citizen of B&H of legal age, who is fully eligible to enjoy civil and political rights, and who has a proven experience in the human right protection and a recognized high moral status, may be appointed Ombudsman. Bulgaria goes only one step further and, in addition to these very generally specified requirements, it requires also a university degree,[70] while Kosovo, in addition to all the above, requires also a clean criminal record.[71] In addition to all the above, Montenegro requires also fifteen years of work experience (for the Ombudsman), i.e. ten years of work experience (for the Deputy).[72]

Serbia, Croatia, and Macedonia have the most detailed regulation of these issues, and therefore have a much more precise and narrowly specified framework for appointment to the Ombudsman position. In all three countries, the requirement for the Ombudsman is a law degree (which is not required for Deputies, except in Macedonia), and varied minimum work experience, as in Montenegro, for the candidates for Ombudsman and Ombudsman Deputies. In Serbia, the requirement for candidates to be appointed Ombudsman is minimum ten years of work experience in

---

[69] Law on B&H Human Rights Ombudsman, Article 11 ; the requirements for the appointment of the B&H Military Commissioner are stricter - prohibition of membership in political parties, prohibition to engage in other paid activity and no previous criminal conviction.

[70] The Bulgarian Law on Ombudsman, Article 9.

[71] The Law on Kosovo People's Lawyer, Article 6.

[72] The Law on Montenegrin Protector of Human Rights and Freedoms, Article 8.

the positions that are relevant for discharging the duties of the Protector of Citizens (five years for the Deputy)[73]; in Croatia, as in Montenegro, candidates to be appointed Ombudsman are required to have as much as fifteen years of work experience,[74] while in Macedonia they are required to have nine years of work experience (seven years for the Deputy position).[75]

Leaving the legal framework too broadly defined, including only the standards that can be interpreted in different ways ("a man of high moral qualities", etc.) cannot be a good solution, as it allows an incompetent person to be appointed Ombudsman in certain circumstances, based on political will.[76] As his/her duties for the most part pertain to law, it is preferred that the Ombudsman is a certified lawyer by profession, and that he/she has experience in similar duties. However, setting the required years of experience too high can be a double-edged sword, as it can make difficult finding the right candidate willing to assume the Ombudsman's responsibilities (thus, the word in Croatia was that among the few people who satisfied all the demanding requirements, no one was willing to take up the Ombudsman position considering a rather unattractive pay). Only based on the analysis of the legal provisions in the considered countries, it can be argued that the best legal provisions are those in Serbia and Macedonia, which have found a reasonable balance between the strictness of the requirements for appointment as Ombudsman (and in turn the quality of applicants) and the implementation of these provisions in practice.

2.2.3. Early Termination of Powers

The grounds for early termination of Ombudsman's powers are specified clearly in the relevant laws. If there are too many of these grounds specified and particularly if they are directly or indirectly linked to the will of the executive, that can present a serious problem undermining the Ombudsman' independence. With respect to the countries included in this review, it can be noted that these terms are set out almost identically. The differences pertain mostly to the legislative technique, with some countries specifying also some natural and logical reasons for the termination of powers (e.g. death, resignation, etc.) and those stipulated by other laws (e.g. eligibility for retirement under the labour regulations), while others fail to specify them explicitly, which naturally does not mean that they are not valid. On the other side, it is always underlined that the Ombudsman's powers will be terminated if he/

[73] The Law on Protector of Citizens of the Republic of Serbia, Articles 5 and 6.
[74] The Law on People's Attorney of the Republic of Croatia, Articles 11 and 12.
[75] The Law on Macedonian People's Attorney, Article 6.
[76] As mentioned earlier, the SFRY had "the social protector of self-management", a quasi-ombudsman institution, the requirements for appointment to that institution were set too generally on purpose to ensure that any party official could "sneak through" the legal requirements and be appointed.

she is found guilty for a criminal offence, if he/she engages in conflict of interest (e.g. joins a political party or performs another professional activity, which is prohibited by all the laws considered in this review), if he/she is unable to perform his/her duties for a certain period of time (in Croatia and Bulgaria), in the event of permanent physical or mental inability to perform his/her duty, etc. The procedure for removal of Ombudsman on any of the above grounds, as well as on grounds of unprofessional and unconscientious discharge of duty in Serbia is decided by the National Assembly by a majority vote of the total number of members of parliament (i.e. the same majority required for his/her appointment). This is a good mechanism ensuring a higher level of integrity of the Ombudsman and therefore strengthening his/her independence.

2.3. Financing

The issue of financing of the Ombudsman's office is of crucial importance, as the practice has shown that often, notwithstanding a sound legal framework, the Ombudsman does not achieve satisfactory results due to lack of funding. That is why it is crucial that the legal text, and if possible also the constitutional text, specifies this matter explicitly, giving the highest possible level of integrity to the Ombudsman's office.

Of all the countries included in this review only Kosovo specifies explicitly in its Constitution that Ombudsman has a separate budget and that he/she proposes and manages the budget independently.[77] This solution is in line with the international standards according to which it is preferred that the Ombudsman institution is financed by parliament rather than by the executive, through a separate budget, that is proposed by the Ombudsman. If that is supported by the constitutional guarantees – even better. However, this is unfortunately yet another example of reality conflicting with the normative solution. The funds allocated to the Kosovo Ombudsman are low and cannot ensure its adequate and undisturbed operations.[78] The report for 2011 indicates that by direct interfering and undermining the Ombudsman's financial independence, the Kosovo government, or more specifically the Ministry of Finance, has withdrawn considerable funds initially allocated to the Ombudsman.[79] Such serious breaches of the Ombudsman's financial integrity directly cause his/her inefficiency.

The Law on Protector of Citizen of the Republic of Serbia governs the issue of the Ombudsman financing and stipulates that its operations are funded from the Serbian state budget.[80] The Ombudsman proposes his/her budget independently (in

[77] The Kosovo Constitution, Article 134.
[78] Kosovo Ombudsman Report for 2011, pp. 111 – 116, *http://www.ombudspersonkosovo.org/repository/docs/4263_RAPORTI%202011%20serbisht.pdf*, 2.3.2013.
[79] *Ibid.*

line with the methodology and criteria applicable to all budget spending units) and submits it to the Government to be incorporated into the budget proposal.

In Montenegro, a request for budget funding (which is provided as a separate line in the Montenegrin budget) is submitted by the Assembly's working body responsible for the human rights sector, at the proposal of the Ombudsman.[81] The Ombudsman has the right to participate in the session in which his/her budget is considered.

Macedonia has a somewhat different solution according to which the funds for financing of the Ombudsman's office are provided as a separate line in the budget, but the budget proposal is prepared in coordination between the Ombudsman's office and the Government, through the Ministry of Finance.[82] Although the Macedonian budget has a separate line for the Ombudsman's budget and although the Law[83] further stipulates that the Ombudsman has full autonomy in using his/her budget, the reason for concern is that the volume of funding is determined in the mandatory agreement with the executive, which is normally the target of criticism in the Ombudsman's recommendations. Such solution does not support the independence of this institution, and is in contradiction with the international standards.

The Law on Amendments to the Law on B&H Ombudsman for Human Rights states that "the funding required for the operations of the Ombudsman institution shall be provided in budget of the B&H government institutions."[84] It is further specified that each year the Ombudsman institution is obligated to submit its budget proposal to the competent ministry of finance and the treasury, based on which the funds will be allocated from the budget of the B&H government institutions.[85] The funds for the operation of the B&H Military Commissioner are provided from a separate budget lines.[86]

Bulgaria and Croatia stipulate in their laws that the Ombudsman institutions is funded from the state budget.[87] The Bulgarian law stipulates further that the Ombudsman may be financed also from other public sources, and that it must be treated as the first line budget allocation priority.

In addition to the provisions relating to financing of the Ombudsman's office, the laws of the above countries contain also the provisions specifying the level of pay of the Ombudsman's and his/her Deputies. Such legal guarantee (naturally, if

---

[80] The Law on Protector of Citizens of the Republic of Serbia, Article 37.
[81] The Law on Montenegrin Protector of Human Rights and Freedoms, Article 53.
[82] The Law on Amendments to the Law on Ombudsman (2009), Article 6.
[83] *Ibid.*
[84] The Law on Amendments to the Law on B&H Ombudsman for Human Rights, Article 15.
[85] *Ibid.*
[86] Law on Parliamentary Military Commissioner, Article 12.
[87] The Law on People's Attorney of the Republic of Croatia, Article 33, and the Bulgarian Law on Ombudsman, Article 7.

it implies also a high level of pay in practice) is very important as it contributes to attracting higher-quality staff. It has to be taken into account that, particularly if the requirements for appointment to Ombudsman function are set too high, this function is incompatible with any other business or entrepreneurial activity, and that an attractive pay package is in fact an important motivation to accept this function. Thus, for example, the Serbian Law on Protector of Citizens stipulates that the Protector of Citizens has the right to receive pay equivalent to that of the President of the Constitutional Court, and his/her Deputies' pay is equivalent to that of the Constitutional Court judge.[88]

The Ombudsman financing methods in the countries included in this review include some important differences. If these legal solutions are viewed through the prism of the international standards, it can be argued that the best legal frameworks are those of Serbia and Kosovo, followed by Montenegro. Naturally, as it has already been stated, the lack of efficient state of law in practice can render ineffective even the best legal framework.

2.4. Powers

In all of the countries included in this review, the Ombudsman's powers are stipulated in a similar manner, but there is a number of differences. One of the most important issues is whether the Ombudsman has the right to control also the work of courts, in addition to the administration authorities. Also, a difference can be noted between the laws that focus primarily on the protection of citizens from maladministration, and those that put in the central place the protection of human rights and freedoms. A common feature of all these Ombudsmen is that they cannot amend, abolish or cancel acts adopted by the authorities, and that they can only draw attention to any breach of rights, and criticise the existing and propose new solutions. Another common feature in all the considered countries is that the Ombudsman initiates the procedure for investigation of a potential breach of rights upon a complaint or at his/her own initiative, i.e. *ex officio*.

In Serbia, the Ombudsman's powers are limited to breaches of citizens' rights by the administration authorities. The Constitution and the Law clearly exclude the possibility that the Ombudsman could control the work of courts, public prosecutor's offices, the National Assembly, the President of the Republic, the Government or the Constitutional Court.[89] Apart from the Serbian Ombudsman, such a restrictive provision is not found in the laws of the other countries considered in this review.[90]

---

[88] The Law on Protector of Citizens of the Republic of Serbia, Article 36.
[89] The Law on Protector of Citizens of the Republic of Serbia, Article 17, para. 3.

The central duty of the Serbian Protector of Citizens is to control the legality and regularity of the administration authorities' actions. He/she also has the right to propose laws under the scope of his/her competence, launch initiatives for legal changes (if he/she deems that violations of citizens' rights are a result of deficiencies of such regulations), give opinions in the process of drafting regulation, as well as the right to initiate a procedure before the Constitutional Court for the assessment of legality and constitutionality.[91] To ensure that he/she is able to perform his/her functions, the administration authorities are obligated to cooperate with the Ombudsman and to ensure him/her access to their premises and provide him/her all the requested information.[92]

In accordance with the Croatian, Montenegrin, Kosovo, Bulgarian, Macedonian, and B&H laws, the Ombudsman is authorised to interfere in the cases led before courts in the event of unduly delayed procedure or abuse of power. Such solution is potentially dangerous in the countries where the Ombudsman's funding is linked to the executive, as that could result in the executive interfering with the work of the courts, impairing the principle of the division of powers.

The laws in all these countries regulate almost identically the Ombudsman's powers to implement the procedure upon a citizen's complaint or *ex officio*, to have access to the documentation and cooperation between public authorities, etc.

The Law on B&H Ombudsman for Human Rights is the only law that explicitly mentions the Ombudsman's power to examine all complaints for alleged breaches of human rights and freedoms committed by the military authorities.[93] In addition, the central task of the Military Commissioner in B&H is to strengthen the rule of law, i.e. the protection of human rights and freedoms of military personnel and cadets. Each member of the B&H armed forces has the right to directly address the Military Commissioner if he/she finds that his/her fundamental rights have been violated. The Military Commissioner has the right to visit the B&H military force units and commands and the Ministry of Defence organisational units at any time, without prior notice, to demand reports from the Ministry of Defence, to attend the sessions of the Parliament and of the Joint Defence and Security Commission and in case disciplinary proceedings are underway, to have access to documents and evidence etc.[94]

In all the countries included in this review, the law stipulates that the Ombudsman enjoys immunity is his/her work.

---

[90] On one hand, it is desirable, as it ensures that the integrity and independence of the judiciary is untouched, but on the other hand, excluding the work of Government from the Ombudsman's scrutiny considerably limits his/her powers.

[91] *Ibid*, Articles 17-19.

[92] *Ibid*, Article 21.

[93] The Law on B&H Ombudsman for Human Rights, Article 3.

[94] Law on Parliamentary Military Commissioner, Article 4.

2.5. Reporting

Annual reporting is also a common feature of the Ombudsmen in the countries included in this review. In all of the countries, except in B&H, this obligation is reflected in the submission of annual reports to the National Assembly, while in B&H, in addition to the House of Representatives and the House of People's of the B&H Parliamentary Assembly, this report is submitted also to the B&H Presidency (the report of the Military Commissioner is submitted only to the Parliament, once a year). The reports must be made available to the public (the Croatian Law on People's Attorney specifies that the report must be published on the Ombudsman's web site, while other laws stipulate only that it is "published in the mass media" or use the phrase "must be made public").

The contents of such reports include, as a rule, the statistics on the number of received and handled complaints, the opinion on the general status of human rights and respect of law in the country, recommendations and other measures proposed by the Ombudsman for the elimination of the weaknesses relating to the implementation of rights, etc.

The Ombudsmen also have the right to adopt special reports if needed, i.e. if so required by the matter of public importance and urgency.

2.6. An Outlook on Implementation

The institutional frameworks concerning the ombudsman in all the analysed countries, as will be elaborated in more detail further in text, are of good quality and largely in line with international standards and recommendations. However, when it comes to their implementation, the situation is quite different. Derogations from the statutory framework that take place in practice are sometimes worrying, and the common feature in all the countries is the need to strengthen the rule of law. Practical problems are both a consequence of the lack of authority on the part of the institution of ombudsman i.e. failure to have its recommendations acted on and the shortcomings in the functioning of the ombudsman due to insufficient funds at its disposal, and lack of sufficient number of qualified staff, which is a prerequisite for independence and efficiency.

The situations differ considerably from one country to another, but the discrepancy between the institutional framework and its implementation is perhaps most notable in Kosovo, where, despite quality normative solutions, practical results remain barely visible. Despite his efforts, Kosovo Ombudsman often remains powerless, since, as stated in his 2010 report - the concept of the *rechtstaat* in Kosovo

is so alienated that it had become an ironic expression."[95] The 2011 report further explains that the "institution of ombudsman had constantly drawn attention to the condition of human rights and freedoms in Kosovo, or rather, to the extent of violations of human rights and freedoms by Kosovo institutions, a part of which engages in no effort to improve such a condition. The lack of influence of the Ombudsman's recommendations addressed at state authorities that are charged with implementing laws and solving citizens' problems remains evident." [96]

When it comes to violations of human rights and freedoms on the grounds of nationality or religion, the situation is also complicated in Bosnia and Herzegovina. This country's ombudsman observes objectively in his 2012 report that, despite the fact that the Division (of the institution of Ombudsman) for following national, religious and other minorities had received the smallest number of complaints in the course of the last year, this "cannot be an objective indicator of the condition of human rights pertaining to national, religious and other minorities, since it is often the caste that complaints filed by members of a minority are registered by other divisions."[97] This also shows that a more comprehensive assessment of the implementation of the regulatory framework requires an extensive study, covering a multitude of social and historical factors alongside official statistics and analysis.

The strengthening of the rule of law must be an imperative for all countries in the region, which need to invest their efforts in strengthening the rule of law and institutional integrity. In his 2012 report, the Serbian Ombudsman states that "weak institutions, the domination of political will and populism over the rule of law, media wars, bureaucracy and formalism are the most serious impediments to more full realisation of human rights and the rule of law in Serbia."

In addition to this central problem and main obstacle for ombudsmans' efficiency, a frequent impediment is the lack of satisfactory funds for financing the work of this institution, coupled with too few competent employees. The differences between the countries in this respect are considerable. Thus, in the B&H, over the last three years the ombudsman's budget was gradually reduced (in 2012 there was a 10% decrease compared to 2010), whilst in Croatia the case is quite different - compared to 2011, in 2012 the ombudsman's budget was increased by 12%, with seven additional employees (the Human Rights Centre was merged with the institution of the Peoples' Defender, which resulted in a proportional increase of the ombudsman's budget in order to satisfy the increased needs). In Kosovo, on the other hand, the number of complaints filed to the ombudsman had considerably increased in 2011, whilst the available funds had remained at the 2010 level (which was also unsatisfactory at that time).

[95] *http://www.ombudspersonkosovo.org/repository/docs/29119_Raporti%202010%20-%20serbisht.PDF*, 11.2.2013.

[96] Kosovo's Ombudsman Report for 2011, p. 7. *http://www.ombudspersonkosovo.org/repository/docs/4263_RAPORTI%202011%20serbisht.pdf,* 10.5.2013.

[97] BiH Ombusdman Report for 2012., p. 5. *http://www.ombudsmen.gov.ba/materijali/publikacije/GI2012/GI_OmbBiH_2012_srp.pdf,* 10.5.2013.

As mentioned before, uncompetitive earnings coupled with strict criteria for being appointed at the position of ombudsman or ombudsman's deputy may result in candidates not being interested to apply for these positions. This had caused delays with regards to the appointment of the ombudsman in Croatia. When it comes to human resources, the case of Montenegro is interesting - after two public announcements for a position within the ombudsman's staff, no candidates have applied, and the position remains vacant.[98]

A deeper analysis of the discrepancies (which vary from country to country) between the quality of the institutional framework and its implementation opens many questions - both theoretical and practical ones. Is it perhaps unrealistic for a highly sophisticated institute, such as the ombudsman, originating from and functioning in far more progressive and wealthier societies in the West, to fall on a fruitful soil, in the very same for, in the Balkans (which are, in historic and cultural terms, considerably different from the countries of origin of the institute)? Would perhaps some form of adaption of the institute of ombudsman to the local circumstances prove to be more feasible and show better practical results? Such questions can be answered only after conducting a more comprehensive, multidisciplinary study. Presently, it is evident that countries analysed herein do not depart much from the ideal statutory model of the ombudsman, which, however, is not the case when it comes to its implementation.

3. CONCLUDING REMARKS: ASSESSMENT OF THE INSTITUTIONAL FRAMEWORKS

If we were to assess the compliance of the institutional frameworks of the analysed countries with accepted international legal standards grading them with an A, B or a C, following the model used by the International Coordinating Committee of National Institutions, the grades would not differ considerably from those awarded by this Committee (although it only takes the Paris Principles into account). It is clear that none of the countries has an ideal legal framework, free of any flaws, but a strictly theoretical analysis shows that the institutional frameworks in Serbia, Montenegro, Kosovo, Bosnia and Herzegovina and Croatia, for the most part, comply with international standards and consequently can be graded with an A. Due to various deviations from international standards, the institutional frameworks of Macedonia and Bulgaria can be assessed as "complying with international standards with certain significant exceptions/deficiencies" and awarded a B. The nature of such deficiencies in the mentioned countries is heterogeneous and varies from the soundness of legal technique governing the matter to the issue of appointment of the ombudsman and his

[89] Montenegrin Ombudsman's report for 2012. *http://www.ombudsman.co.me/docs/izvjestaji/Final_Izvjestaj_za_2013_310320131450.pdf*, p. 157, 10.5.2013.

financing, which can all influence the level of ombudsman's integrity. Grade C, which signifies that a country did not implement international standards in its legislation, cannot be awarded to any of the researched countries (although, interestingly enough, Romania, a country of the region which is also an EU country, was awarded this grade by the International Coordination Committee in the last ranking).

It is important to always bear in mind the fact that quality legislative framework remains only a dead letter on a paper in the absence of the rule of law. If the practical efficiency of the ombudsmen in the researched countries was to be analysed, the results would be quite different from those presented above. The aspiration to create quality legislative solutions that comply with international standards must, as a *conditio sine qua non,* be followed by a constant struggle to strengthen the rule of law, since not even the best solutions can *per se* reduce the violation of human rights or minimise maladministration.

Vesna Coric, LLM [1]
Ksenija Sorajic Bakovic [2]

PUBLIC PROCUREMENT AND ASSETS DISPOSAL

1. INTERNATIONAL STANDARDS

1.1. Introduction

Public procurement can be defined as buying of goods and services or contracting works on behalf of a public authority, organisation, institution or other legal entities. Public procurement plays a significant role in both the national and global economy. Statistics show that developing countries spend approximately 10 to 15 percent of their GDP in the procurement marketplace.[3] That percentage is even higher in developed countries and reaches even 20% of GDP.[4] Furthermore, the nature of public procurement is such that it implies the risk of abuse and corruption, and a possibility of major losses that can affect the society as a whole, which is especially true for large public procurements in important sectors such as health, education, and infrastructure. Due to all that, it is generally accepted that the public procurement regulation based on transparency, competition, and objective criteria is crucial for both the national and global economy. If the public procurement procedure is regulated in such way, it ensures the maximum value for the use of public money.

However, many developing countries have public procurement legislation that is inadequate or obsolete, which results in inefficient public procurement process, abuse and corruption. Corruption can arise at almost any stage of the public procurement process, and it is usually reflected in a situation when public officials award contracts or favour some bidders in return for certain benefits. Furthermore, the bidders themselves often enter into collusive agreements to try to eliminate

[1] Research Assistant, Institute of Comparative Law, Belgrade.

[2] Attorney at Law, Law Firm Maric & Mujezinovic.

[3] T. Ballard, "Transparency and Public Procurement", in *Transparency and Public Procurement*, UN-POS, 20120, p. 2.

[4] *http://www.oecd.org/daf/competition/cartelsandanti-competitiveagreements/41505296.pdf* from 18 November 2012, p. 2.

the competition in the process. All that results in large losses in terms of public infrastructure and the society as a whole, and lowered investments,[5] and therefore presents an obstacle for efficient and sustainable development of any state.[6]

The key problems identified in relation to the public procurement process in developing countries involve:

- lack of transparency in the procurement process, as well as little or no information on the results of specific procurement transactions;
- "bureaucratic influence" or corruption resulting in specially favouring some contractors in relation to others;
- lack of developed accountability system to ensure that government representatives are held accountable for inadequate decisions;
- untrained or poorly trained workforces/ public officials.[7]

In order to address the above weaknesses, countries need to: establish comprehensive legal frameworks, effective monitoring and auditing procedures and organisations that would ensure compliance with the regulations, standard contract terms and conditions; improve transparency and public availability of rules governing the public procurement process; and improve capacities for developing and retaining people/public officers with professional skills in procurement.[8]

Considering that public procurement is of such high importance, almost all international and regional organisations take part in their regulation, and proactively seek to eliminate corruption from the public procurement processes.

1.2. Sources of International Law Relating to Public Procurement

The phenomenon of corruption in public procurement was addressed by the United Nations by adopting the UN Convention against Corruption, whose Article 9 specifies explicitly the obligation of each state party to take the necessary steps to establish appropriate integrated systems of public procurement. These steps are

[5] OECD, *Policy Roundtables, Collusion and Corruption in Public Procurement*, OECD, 2010, p. 10.

[6] R. Anderson at al, *Ensuring Integrity and Competition in Public Procurement Markets: a Dual Challenge for Good Governance*, p. 4.

[7] W.A. Witting, *Public Procurement and Development Agenda*, WTO, p. 6

[8] *Ibid*, p. 2.

accepted as the main principles for the regulation of public procurement, and are further specified in a large number of international acts relating to the public procurement process. As a matter that is closely related to public procurements, Article 9 of the Convention regulates also management of public finances and specifies measures for the improvement of transparency and accountability in management of public finances. In addition to Article 9, important guidelines relevant to public procurement are provided also in Articles 6, 8, and 10, which relate to preventive anti-corruption bodies, codes of conduct for public officials, and public reporting.

Public procurement plays an important role in the economic stability of the European Union. The public procurement process and the main mechanisms are governed by two EU Directives: Directive on the coordination of public procurement procedures for the award of public works contracts, public supply contracts and public service contracts, and the Directive coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors.[9] The EU Directives focus primarily on competition, prevention of the "buy local" principle, i.e. non-discrimination, and promotion of free trade of goods and services. The EU Directives obligate the Member States *inter alia* to regularly publish their offers and requests in the Official Journal of the European Union, implement public procurement in accordance with open and transparent procedures, applying clear and objective criteria known to all interested public procurement participants, and to respect the principle of equal treatment of domestic and foreign entities. Directive 2007/66/EC which improves the procedures concerning the award of public contracts is important in this regard.[10]

In addition to the main public procurement directives, the Directive 2009/81/EC on the procurement procedures in the fields of defence and security has to be noted as well.[11] This Directive sets out the EU rules for the procurement of arms, munitions and war material for defence and security purposes. By adopting this Directive, the EU sought to introduce the transparency and competitiveness standards in the fields of defence and security. Specifically, before the adoption of the Directive, the EU Member States applied mainly Article 346 of the Treaty on the European Union (ex Article 296 of the Treaty Establishing the European Community) which allowed them to deviate from the principles of transparency and competitiveness in the pubic procurement procedures in the fields of defence and security to protect their

[9] EU Directive 2004/18/EC relating to public procurement by companies in the public sector, and EU Directive 2004/17/EC relating to public procurement in the utility sector. Both Directives are published in the Official Journal L 134 from 30 April 2004.

[10] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (Text with EEA relevance), published in OJ L 335, on 20.12.2007.

[11] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Text with EEA relevance), published in OJ L 216, on 20.8.2009.

security interests. This exemption is still possible, provided that the security interests are interpreted in a restrictive way.

In contrast to Article 346 of the TFEU, the Directive introduces the equality and transparency rules in the public procurement procedure, flexibility of contracting authorities to negotiate all contract terms, and a possibility for contracting authorities to require from the public procurement participants to ensure confidentiality of information and provide reserves of commissioned goods and services to ensure that the contracting authority would have it available in case of armed conflicts.

Naturally, the Directive leaves a possibility to restrict transparency in specific cases. Article 30 of the Directive 2009/81/EC stipulates that a public invitation to tender may exclude the information of public interest, and particularly safety and security interest.

1.3. Content of International Standards in Public Procurement

The International guiding standards in public procurement and disposal of public assets that aim to prevent corruption include:

- **Transparency and public availability**

Transparency plays an important role in the field of public procurement, from the very onset of the process, the publication of procurement notices and submission of bids, to the opening of bids and announcement of tender outcomes. In addition, transparency implies the publishing of the contract awarded to the best bidder. Transparency is considered one of the best means for preventing corruption and other forms of abuse.

With respect to transparency and public availability, Article 9 of the UN Convention against Corruption stipulates:

- The obligation to publicly distribute information relating to procurement procedures and contracts;
- The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
- An effective system of domestic review, including an effective system of appeal to ensure legal recourse and remedies;
- The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules and their publication.[12]

[12] Article 9 of the Law on Ratification of the UN Convention against Corruption, Official Gazette of Serbia and Montenegro-International Contracts, No. 12/2005.

However, the general view is that transparency is not strictly necessary at any cost, even at the cost of other important principles such se, for example, efficiency. That is why most countries adjust the specific level of transparency of the public procurement procedures based on multiple factors such as information sensitivity, public procurement specificity and value, etc. Transparency is frequently limited in public procurements in the fields of defence and security due to confidential information of significance for the country's defence and national security. According to the EU regulations, however, transparency can be limited and general public procurement legal framework excluded only in case of protection of vital interest of a country. This means that in each individual case it is necessary to determine whether conditions for exemptions from the general regulations are fulfilled and these conditions are as follows:

- Need to protect vital security interest of a country;
- Direct connection with the public procurement;
- Non-applicability of general EU rules on public procurement;
- The level of transparency depends also on the specific stages in the public procurement process. Most frequently, the bid submission process is strictly regulated, while the prior- and post-bidding stages are less transparent.

- **Competitiveness**

Competitiveness is one of the main principles of market economy. Competitiveness has an important role in the public procurement procedures, as the public procurement participants compete between themselves, which results in achieving the best offer, best results, better quality, and wider range of offer. Competition is one of the main principles of the EU internal market, and it is regulated in detail at the EU level as well.

UNCITRAL Model Law on Public Procurement stipulates that all public procurement procedures are subject to the rigorous competitiveness and objectivity promotion requirements. Article 12 of this Model Law specifies explicitly that a procuring entity shall neither divide its procurement nor use a particular valuation method for estimating the value of procurement so as to limit competition among suppliers or contractors. Furthermore, in selecting the public procurement procedures, the procuring entity shall be guided by the principle of maximum competition, and, wherever possible, opt for the open public procurement procedure, which is includes the largest number of bidders.

The transparency and competitiveness principles are interconnected – in case of any limitations to the competitive procedure, the level of transparency is also reduced. However, it is generally accepted that in some cases competitiveness can be limited or completely excluded. That includes the cases when:

- the goods to be procured are of specific nature that there is practically no real competition (e.g. for technical or artistic reasons, royalty rights);
- small value contracts are awarded (the definition of a small value contract varies from country to country);
- specific types of goods are procured (e.g. such goods are always traded at the same predetermined prices)
- there are extraordinary circumstances such as, for example, extreme urgency (whereby such urgency must result from factors that are contingent and outside the control of the contracting authority);
- there are confidential information of public interest (in case of defence, national security or other public interests).

In cases when competitiveness is limited, specific alternative measures are implemented to ensure equal treatment of bidders, and equality. Such measures include:

- strictly defined criteria for the implementation of the procedures with competitiveness limitations;
- public bid opening in the presence of several persons, particularly in case of the negotiated procedure;
- implementation of additional controls to check the of the justifiability of the procedure;
- separate reporting procedure, etc.

In the defence sector, procurement of non-sensitive and non-military equipment, works and services by contracting authorities should be regulated by the general public procurement law. Procurement legislation can exempt defence contracts only where the general rules are not sufficient to safeguard the essential security interests: 1) to ensure the protection of classified information against unauthorised access 2) to ensure security (quality) of supply so that armed forces receive deliveries in time, particularly in times of crisis or armed conflict (pre-bidding/contracting).

In order to increase transparency of defence related procurements, scope of sensitive and military equipment that can be subject of exception to the general procurement rules should be clearly and exhaustively defined. For example, military and sensitive equipment should include:

- arms, munitions, war materials;
- products intended for specifically military purposes;
- sensitive security equipment, works and services which involve access to classified information.

In accordance with the Directive 2009/81/EC, in the defence and security sector, competitiveness can be excluded in public procurements whose value exceeds EUR 400.000 for supply and service contracts, i.e. EUR 5.000.000 for work contracts relating to:

. the supply of military equipment;

. the supply of sensitive equipment;

. works, supplies and services directly related to military or sensitive equipment;

. works and services for specifically military purposes or sensitive works and sensitive services.

However, even in these cases, special rules of procedure, specified in the Decree, need to be followed.

- **Control and accountability**

The control and accountability principles refer to the efficient internal and external control of the public procurement procedure, as well as the procurement complaints procedure in place, allowing all interested parties to represent their interests.

One of the preconditions for the successful control of public procurement procedures and maintenance of their transparency is to ensure paper or electronic records on every public procurement process. Such records enable both internal and external control of the procedure, ensure official records in case of complaints procedures and allow public scrutiny of the use of public money. In addition, such records facilitate the identification of irregularities in the public procurement procedures, as well as the identification of the persons responsible for such irregularities.

It is generally accepted that efficient control of the public procurement process needs to include internal and external control. Internal control normally refers to financial control, internal audit and management control. With that respect, there is a need for an effective internal control system within the public procurement system itself to supervise the performance of public procurement officers, assist with compliance with laws and bylaws and ensure the reliability of internal and external controls. Contrary to that, external control is carried out by persons outside the public procurement system itself. The criteria for the external control of specific procedures can vary – external control could apply to complex high-value public procurements, public procurements where there is a risk that certain bidders could be favoured (in terms of the frequency of public procurement awards and their values), sensitive public procurements that attract public attention and which include frequent procurement complaints procedures, etc. In most countries, the external audit results are published to ensure transparency and public availability.

An important aspect of the control and accountability principles is the existence of the procurement complaints procedure that allows interested parties to protect their interests before an authority that is independent from the first-instance decision-making authority.

Efficient procurement complaints procedure implies a possibility to timely initiate a complaints procedure, an independent authority in place to carry out control, efficient and timely decision-making on complaints, as well as adequate measures in place to eliminate the negative impacts of illegally implemented public procurements. Therefore, efficient procurement complaints procedure implies a system in which unsatisfied bidders or interested parties can initiate a complaints procedure before the contract on the award of the specific public procedure is concluded. To enable efficient and timely decisions on complaints, most countries stipulate the establishment of a separate body to handle complaints in accordance with the rules for administrative procedure. However, national legislations often require the complainant (even when the complaint is to be decided by a separate complaints authority) to submit the complaint the contracting authority as well, in order to allow the contracting authority to revise its decision if it establishes that the complainant was right. A frequent solution in cases when a separate complaints authority decides on complaints is to leave a possibility to overturn their decisions before the regular courts. However, an efficient procedure cannot have any real effect if there are no mechanisms for the elimination of the negative impacts of illegal decisions in place. That is why the authority deciding on complaints is usually authorised to decide on temporary measures, as well as on final sanctions and potential indemnifications.

2. COMPARATIVE LEGAL ANALYSIS OF PUBLIC PROCUREMENT AND ASSET DISPOSAL SYSTEMS IN THE DEFENCE SECTOR

2.1. General Legal Framework

The legal framework for public procurement in Montenegro is fully governed by the Law on Public Procurement (*Zakon o javnim nabavkama*), which entered into force on January 1, 2012.[13] By adopting this Law, Montenegro has regulated the procedure and the main rules for public procurement, with the objective to align its legal framework with the international and the EU standards. The above Law is in compliance with the Directive 2004/18/EC for the "classic" public procurement sector, and the Directives 89/665/EC and 92/13/EC on the protection of the rights of the public procurement procedures participants. The special feature of the Montenegrin Law on Public Procurement is that the Law incorporates also the Directive 2004/17 relating to the utility services sector, which means that the public procurement procedure in the utility sector is just as the same as that for other sectors. However, it has to be noted that the EU Directive 2009/81 relating to the security and defence sector has still not been integrated in the Montenegrin legal framework.[14]

The Republic of Serbia adopted the new Law on Public Procurement (*Zakon o javnim nabavkama*) in December 2012, which came into force in April 2013. The new law was adopted because of the drawbacks attributed to the previous, 2008 Law on Public Procurement.[15] The following limitations of the 2008 Law were, *inter alia,* pointed out: lack of elaborate and precise measures and mechanisms for preventing corruption and the conflict of interest as well as that provisions governing procurement in the communal sector are unclear, imprecise and not harmonized with Directive 2004/17/EC. Additional criticism against the previous legislative framework concerned the possibility to often resort to closed and uncompetitive procurement procedures, primarily to the small-value procurement process and negotiated procedure without a public call.[16] The solutions of the new statute aim at providing conditions for the efficient use of public funds, by prescribing clear procedures for the award of public contracts and mechanisms for preventing corruption and ensuring competition.[17]

In 2011, Kosovo adopted the Law that stipulates all procurement activities of contractual authorities and concession works with the objective to ensure more

[13] Law on Public Procurement, *Official Gazette of the Republic of Montenegro*, No. 42/11

[14] SIGMA, *Assessment Montenegro 2012*, SIGMA/OECD, p. 23, available at: *http://www.oecd.org/site/sigma/publicationsdocuments/Montenegro_Assessment_11Oct12.pdf.*

[15] Law on Public Procurement, Republic of Serbia, *Official Gazette RS* No. 116/2008.

[16] Proposal of the Law on Public Procurement, p. 149, *http://www.sns.org.rs/images/pdf/Predlo-Zakona-o-javnim-nabavkama.pdf,* February 20, 2013.

[17] *Ibid*, p. 151.

efficient, affordable, transparent, and equitable use of public funds and sources in Kosovo, integrity and accountability of all public officials and other persons implementing or involved in the public procurement activities and the establishment of the professional institutional culture of public officials implementing or involved in the public procurement activities.[18]

The Republic of Croatia has also adopted the legal framework for public procurement[19] that governs the procedure for awarding public procurement contracts and framework agreements for the procurement of goods, works or services, legal protection relating to those procedures, and the competencies of the public authority responsible for public procurement. The Republic of Macedonia regulates the public procurement process in a similar way, regulating separately the terms and procedures for public procurement and the authorities responsible for the control of compliance and regularity of the public procurement procedures.[20] The Republic of Croatia adopted the Decree of Public Procurement for Security and Defence Purposes (*Uredba o javnoj nabavi za potrebe odbrane i sigurnosti*) whose provisions are in accordance with the EU Directive 2009/81.[21]

The objectives of the implementation of public procurements in the Croatian Law are fully in compliance with the standards and objectives specified in the international documents and the EU directives. The fundamental principles in the area of public procurement include cost-effective and efficient use of public funds, competitiveness, transparency and equity, equal treatment and non-discrimination of tenderers. As this involves public resources, the *value for money* standard has been accepted, and the public procurement procedure must be implemented so as that the selection between two or more bids is based on the cost benefit ratio. Similarly, Bosnia and Herzegovina regulated the public procurement procedure by adopting the Law on Public Procurement in 2004, and the amendments to reflect this standard.[22] The main principle underlying this Law is that of efficient and effective use of public funds, i.e. *value for money*. This principle is respected also by Montenegro, along with the principles of competitiveness, transparency of the public procurement procedure and the equality of the public procurement procedure participants.

---

[18] Law No. 04/L-42 on Public Procurement in Kosovo, *Official Gazette of Kosovo*, Pristina, September 2011

[19] Law on Public Procurement of the Republic of Croatia, *Official Gazette*, No. 90/2011, May 2011.

[20] Law on Public Procurement, *Official Gazette of the Republic of Macedonia,* No. 136/07, 130/08, 97/10, 53/11, 185/11 and 24/12.

[21] Decree on Public Procurement for the Purposes of the Defence and Security, *Official Gazette*, No. 89/12.

[22] Law on Public Procurement Bosnia and Herzegovina, *Official Gazette of BiH*, No. SG 49/04, 19/05, 52/05, 52/05, 8/06, 24/06, 70/06, 12/09 and 60/10.

Stipulating such principles in the laws relating to the public procurement process is a way of fighting corruption in the public procurement sector. The public procurement laws have both the preventive function discouraging corruptive actions, and the repressive function, through the powers to impose misdemeanour sanctions. Montenegro defines separately anti-corruption bodies and the measures for prevention of abuse of office, fraud, providing false information, conflict of interest, lack of impartiality, and transparency in the public procurement procedures.

The Republic of Bulgaria, as an EU member, has fully aligned the legal framework for public procurement with the standards applicable in the European Union and with the international standards.[23] To increase public availability and transparency, the public procurement portal was established containing all the ongoing public procurement procedures and all the information relating to those procedures.[24] A shared portal was also established for Serbia, Montenegro, Macedonia, Croatia, Kosovo and Bosnia and Herzegovina.[25] This portal is of great importance, and, *inter alia,* presents a step towards increased transparency and improved prevention of potential abuses and corruption in the public procurement procedure.

With respect to types of public procurement procedures and methods, the provisions in the legal systems of the EU Member States and the countries aspiring to become EU members, are similar. Thus, Serbia has an open and a restrictive procedure, depending on the availability of bids, negotiations procedure with or without published invitation to tender in which the contractual parties negotiate the terms and timelines of the concerned contract, small-value public procurement procedure, and competition for drafts in the construction and architecture sectors, etc. Montenegro allows single source procurement for public procurements that do not exceed a specified ceiling value, but limits the share of single source procurements by one contracting authority in the overall public procurements at an annual level to avoid potential abuse.

[23] Law on Public Procurement of the Republic of Bulgaria, *Official Gazette of Bulgaria*, No. 28, October 2004.

[24] *www.aop.bg.*

[25] *http://www.nabavke.com/sr/index.htm,* December 11, 2012.

2.2. Exemptions from the General Public Procurement Regulations in the Defence Sector

The Montenegrin Law on Public Procurement stipulates a number of exemptions from the general application of this Law, two of which are relevant for the defence and security sector. [26] Primarily, Article 3, paragraph 1, item 6 of this Law stipulates that the Law does not apply to procurement contracts relating to the procurement of weapons, munitions, and other military items necessary for the defence and security of Montenegro. Secondly, an important exemption introduced by the same Article in paragraph 1, item 5, envisages that the regular public procurement regime shall not apply to confidential procurements pursuant to the law. These formulations lead to a conclusion that that the departures from the general public procurement regime are too flexible and too arbitrary. The old Montenegrin Public Procurement Law seems to have included more adequate and precise solutions.[27] Namely, Article 3 of the former statute envisaged that it did not apply to procurement of weapons, ammunition and other materials necessary for the Republic's defence and safety, which were declared confidential by a statute or other regulation and the realisation of which must be followed by special security measures. Therefore, whilst the new law sets alternative criteria for departures from the general public procurement, which means it suffices that either the criterion that the procurement is confidential or the criterion that it is necessary for the defence and security of the Republic are met, the former statute required that both criterions be met. The regulations governing police, state security and defence operations had clearly designated the types of procurements to which the former Public Procurement Law did not apply - the norms in question are those of Article 97 of the Police Law and Article 3 of the National Security Agency Law. However, in the meantime, these Articles have ceased to apply, and hence it remains to be seen how (and within what time) will the legislator eliminate the deficiencies caused by to-wide a definition of exemptions. It is necessary to set clear criteria, pursuant to EU standards, primarily having in mind the solutions from the Directive 2009/81/EC on procurement procedures in the fields of defence and security, in order to clarify the unclear exemption relating to "confidential procurements purusant to law" and thus set the scope of its application clearly and narrowly.

[26] In addition, the mentioned Article 3 of the new Montenegrin Public Procurement Law does not apply to other, precisely defined categories of procurement. Inter alia, these are the procurement procedures conducted under special international organisation procedures, based on an international agreement or a contract with such organisation, services related to employment, procurement of election-related materials and procurements conducted for protection and rescue from catastrophes and major accidents - state of emergency. These grounds for deviation from the general procurement regime shall not be analysed in detail herein, given they are not covered by the scope of Directive 2009/81/EC on procedures for the award of contracts in the fields of defense and security.

[27] *Official Gazette of the Republic of Montenegro*, No. 46/06.

The new Serbian Public Procurement Law, which entered into force on April 1, 2013, aims, primarily, at eliminating the deficiency of the previous legal framework, which left the regulation of procurement in the fields of defence and security to secondary legislation. The new statute differentiates between two regimes of confidential procurements. On the one hand, the new statute defines the procurements in the field of defence and security to which special provisions of that statute apply,[28]whilst, on the other hand, defines exceptions in the fields of defence and security to which the provisions of the mentioned statute do not apply.[29] The solutions of the new statute can be considered advanced compared to the formulations of the previous statute both because it defines, in a precise and exhaustive manner, the procurements in the defence and security sector to which the special provisions of the Public Procurement Law apply and because the objects of procurement in the fields of defence and security referred to in Article 127 of the new statute , adopted in December 2012 are fully in accordance with the solutions of the Directive 2009/81/EC. Furthermore, Article 127 of the Law defines the notion of military equipment and sensitive equipment in compliance with the mentioned directive. In addition, Article 128 of the new Law determines the procurements in the fields of defence and security to which it shall not apply. The exhaustive list of exemptions coincides with procurements exempted from the application of Directive 2009/81/EC and, in principle, is a good solution.[30]

The formulations of Article 127, paragraphs 4 and 5, envisaging the obligation to inform the competent National Assembly Committee on the conducting of contract award procedures in the fields od defence and security, and guarantees with regards to the competitiveness of the procedure, to the extent possible, are also advanced. These solutions are in line with the main objective of Directive 2009/81/EC, given that they aim at introducing the standards of transparency and competitiveness in public procurement procedures in the fields of defence and security.[31] Despite evident progress, full transposition of Directive 2009/81/EC in Serbian legislation requires the adoption of secondary legislation that will also be in line with its solutions; their drafting has not yet commenced. The Strategy for the Development of Public Procurement in the Republic of Serbia of 2011 states, after pointing out to the importance of the mentioned Directive, that the Government is ready to fully implement the Directive by the time of at least one or two years before the Republic of Serbia accedes the European Union. Consequently, the Government is expected to regulate the public

[28] Article 127 of the Public Procurement Law, adopted in December 2012.

[29] Article 128 of the Public Procurement Law, adopted in December 2012.

[30] *Inter alia*, Article 128 of the new Law, just as the mentioned Directive, sets the following exemptions from the general regime: contracts awarded pursuant to international rules and contracts awarded within the framework of a cooperative programme based on research and development, realised jointly by the Republic of Serbia and one or more countries or international organisations, if applicable to the later phases of all or part of the life-cycle of this product.

[31] Strategy for the Development of Public Procurement in the Republic of Serbia of 2011, 6, *www.kg-cci.co.rs/pdf/strategije_2012.pdf,* March 1, 2013.

procurement procedure in the fields of defence and security by secondary legislation within such time limits, and to further set a list of goods, services and works that may be an object of public procurement in the fields of defence and security, as prescribed by Article 127, paragraph 6 of the Public Procurement Law.

Despite the mentioned accomplishments, the recently-adopted Law is also characterised by some deficiencies. This observation primarily concerns the exception covered by Article 128, paragraph 1, item 5 of the new Law. It prescribes that the law shall not apply in cases where the application of public procurement procedure would result in disclosure of information considered to be of key security importance, based on a Government decision. This solution can be criticized because it leaves a wide margin of discretion to the executive and is thus subject to abuse.

Article 11 of the Public Procurement Law of the Republic of Croatia regulates the regimes applied with regards to various types of procurements for the needs of defence and security in line with the Directive 2009/81/EC. As mentioned earlier, the Republic of Croatia had also adopted the Decree on Public Procurement for Security and Defence Purposes (*Uredba o javnoj nabavi za potrebe odbrane i sigurnosti*), which exhaustively defines the cases that are not subject to the provisions of Croatian law governing public procurement. Article 2 of the Decree stipulates that matters regarding legal protection in public procurement procedures are governed by the provisions of the Law on State Commission for Controlling the Public Procurement Procedures.[32] A particularly important guarantee is envisaged also in Article 2 of this Decree which specifies that the rules, programmes, agreements, arrangements, or agreements that exempt contracts from the Law on Public Procurement and this Decree cannot be used to evade the Law on Public Procurement and this Decree, preventing potential abuse of the Decree provisions. Furthermore, it is important to note that Article 4 of this Decree explicitly notes that the Decree contains, *inter alia*, provisions which are fully aligned with the Directive 2009/81/EC on public procurements in the area of defence and security.

The Kosovo Law on Public Procurement stipulates the cases in which it is allowed to diverge from the general public procurement rules and standards. Thus, if there is a risk in the course of the public procurements procedures that confidentiality or security interests would be compromised, such contracts can be classified as confidential, which is in contradiction with the main public procurement principle – transparency.

The solutions of the Macedonian Public Procurement Law relating to exceptions from the application of the general public procurement regime are not in line with Directive 2009/81/EC. More specifically, Articles 6 and 7 of the mentioned statute not only set derogations that do not coincide with the grounds envisaged in the mentioned Directive, but, in addition, the given derogations are set too widely and

[32] Law on State Commission for Controlling the Public Procurement Procedures, *Official Gazette of the Republic of Croatia,* No. 18/13.

arbitrarily.[33] Article 6, paragraphs 2 and 3 of the Public Procurement Law, in addition, envisages the participation of the Government in the public procurement procedure, but not the participation of the Parliament, which is by all means a limitation with regards to the application of the transparency principle.

In accordance with Article 5 of the Bosnia and Herzegovina Law on Public Procurement, the contracts that may be exempt from the provisions of this Law include contracts relating to state secrets, contracts whose execution requires special safety measures, and concession agreements. In addition, as in the other countries, in Bosnia and Herzegovina, the contracts in the security and defence sector that relate to manufacturing of or trade with weapons, military equipment or other specialised materials are subject to separate rules, which are different from those stipulated by the Bosnia and Herzegovina Law on Public Procurement. The secondary legislation of Bosnia and Herzegovina governing the regime of confidential procurements, were criticized by the European Commission for their lack of transparency and competitiveness, and also because of a wide and unclear list of items they apply to.[34] Surprisingly, the new draft of Bosnia and Herzegovina Public Procurement Law, which is still not in parliamentary procedure, does not offer any improvements in that regard; only its' Article 10 fully exempts from the application of the law a wide and insufficiently defined set of procurements in the fields of defence and security.[35] It would therefore be prudent to harmonise the legislation of Bosnia and Herzegovina with the Directive 2009/81/EC either by future secondary legislation or entity legislation.

[33] Thus, for instance, the formulation from Article 6, envisaging that the regime of the given law does not apply to procurements in the fields of defence and security which result in disclosure of information undermining a crucial security interest is a wide one and subject to abuse.

[34] P. Jeremić, *EU zabrinuta zbog poverljivih nabavki*, *http://www.pravda.rs/2011/08/14/eu-zabrinuta-zbog-poverljivih-nabavki/*, 20 February 2013.

[35] The award contracts exempted from the application of the law are the award contracts declared as classified by a statute of Bosnia and Herzegovina (Article 10, paragraph 1, item a of the Draft), an award contract the implementation of which requires special safety measures pursuant to Bosnia and Herzegovina laws (Article 10, paragraph 1, item b) and an award contract in the field of defence, if the disclosure of information relating to the award of "heavy armaments" would be contrary to the security interests of Bosnia and Herzegovina or if the protection of main security issues linked to the production of or trade in arms, ammunition or war materials are concerned, pursuant to the list passed by the B&H Council of Ministers at the Agency's proposal (Article 10, paragraph 1, item f). *http://www.javnenabavke.gov.ba/legislativa/upripremi/Konacna_verzija_nacrta_Zakona_u_BiH.pdf,* 11 February 2013.

2.3. Complaints Procedure

Respecting the control and accountability principles is reflected in the existence of efficient public procurement procedure controls and the complaints procedures that allow interested parties to have their interests represented. With that respect, the principles of openess and transparency are indissolubly connected, and that is why it is crucial that an aggrieved party, in addition to complaints and written applications, has a possibility to defend orally his/her position and present evidence in the open sessions of the second-instance authority. In addition to the public interests, transparency of the second-instance authority's actions is ensured also by allowing public access to the decisions made by such authority. That ensures a critical public insight into the decision-making practice by the second-instance authority. In addition, it is of crucial importance to allow for the legal review of the procedure, allowing an authority that is completely independent from the Office to decide in the last instance.

In all analysed countries, bodies responsible primarily for the protection of public interest and tenderers' rights in the public procurement procedures have been established. These are primarily second instance bodies which are independent from the first instance bodies that are chosen by parliaments. The decisions of these bodies are accessible to public and parties are entitled to institute an administrative dispute procedure against them, which enables that a court, as a body that is independent from administration, makes a decision in the final instance.

In most of the countries, the authorities responsible to handle complaints do that in the closed sessions, based on the evidence and documentation provided by the bidder who submitted the complaint and the contracting authority, while in exceptional cases, at the request of one of the parties, a public hearing may be held, in which the parties have an opportunity to present their case.

Bulgarian case is specific, since the law that governs public procurement stipulates mandatory public hearings scheduled in the presence of the interested parties, while other countries mainly foresee the possibility of holding a public hearing in legally prescribed circumstances. Public hearings and summons to interested parties are subject to the rules specified in the Law on Civil Procedure. Such provisions allow a thorough consideration of all requests and full satisfaction of the aggrieved bidder's interests. A necessary presumption for introduction of such a solution is, however, achievement of a high level of efficiency of work of bodies which decide in second instance procedure, as otherwise these bodies may become overburdened with requests to hold public hearings, which may adversely affect the an effectiveness of the overall appeals procedure.

In Macedonia, interested parties may request an oral hearing to be held to clarify complex factual and legal issues. The proposal is decided by the State

Commission for Complaints Relating to Public Procurement, and in case the proposal is upheld, the hearing is public. The public may be excluded if there is a need to protect confidential information.

In a similar vain, in Serbia parties to the proceeding may request holding of a public hearing due to complexity of a factual or legal situation.[36] A Republican Commission for Protection of Rights in the Public Procurement Procedure is authorised to decide upon a request for holding of a public hearing, which is, by a rule, open to a general public. General public can be excluded from attending a hearing only if this is necessary for the protection of a business secret or data protection, in accordance with the law which governs data secrecy.[37] In Montenegro, while the complaints commission decides in closed sessions, the Rules of Procedure of the State Commission for the Control of Public Procurements stipulate that in exceptional cases the State Commission may summon a hired expert or allow certain persons to participate in the hearing for the case, without the right to deliberate and vote.[38] The transparency of work of the State Commission is provided through: issuing public statements, publishing decisions and other final acts on the State Commission webpage, ensuring access to information pursuant to law and presentation and publication of the work report.[39]

In Bosnia and Herzegovina, complaints are decided by the Complaint Handling Office. The Law stipulates that the Office decides in its sessions. However, there is no bylaw further specifying the decision-making procedure by the Office.[40]

In Croatia, in the appeals procedure, parties to the proceedings may request holding of a public hearing due to a need to discuss an especially complex factual matter or a legal issue. [41] The State Commission for the Control of Public Procurement Procedures may decide to hold a public hearing in a case when it itself determines that this is needed for the clarification of a complex case or a legal matter. [42] A hearing is open to a general public, but the public can be excluded from a hearing due to a need to preserve a secret.[43]

---

[36] Article 155, para 1. of the Public Procurement Law of the Republic of Serbia.

[37] Article 155, para 5. of the Public Procurement Law of the Republic of Serbia.

[38] Article 13 of the Rules of Procedure of the State Commission for the Control of Public Procurements, adopted at the session of March 19, 2012, *http://www.kontrola-nabavki.me/1/dokumenta/pravna%20regulativa/Poslovnik%20o%20radu%20drzavne%20komisije%20za%20kontrolu%20postupaka%20javnih%20nabavki.pdf,* February 12, 2013.

[39] Article 7 of the of the Rules of Procedure of the State Commission for the Control of Public Procurements, adopted at the session of March 19, 2012.

[40] Articles 49 and 52 of the Bosnia and Herzegovina Public Procurement Law, *Official Gazette BiH*, No. 49/04, 19/05, 52/05, 52/05, 8/06, 24/06, 70/06, 12/09 and 60/10).

[41] Article 166 paragraph 1 of the Law on Public Procurement of the Republic of Croatia.

[42] Article 166 paragraph 3 of the Law on Public Procurement of the Republic of Croatia.

[43] Article 166 paragraph 5 of the Law on Public Procurement of the Republic of Croatia.

In Kosovo, the Public Procurement Review Body decides in closed sessions. However, in accordance with the Rules of Procedure of the Body, in exceptional cases, at the justified request of one of the parties, the President of the Body may decide to hold a public hearing in which each of the parties would have an opportunity to present their case.

2.4. Problems in Practice

Notwithstanding a solid legal and institutional framework of second instance public procurement procedures, the majority of the countries in the region is facing significant challenges in practice, which are exemplified primarily in excessively long second instance procedures and lack of systemic and transparent decision making process. Thus, for example, organisational difficulties of the State Commission in charge of deciding upon appeals in Croatia (such as lack of legal power of its statute and rules of procedures of the State Commission) and increasingly high influx of appeals cases have resulted in the Commission's significant inefficiency in the course of deciding on appeals. Namely, although there was an obligation to issue a decision within 15 days, the decision making process lasts on average 70 days. [44] It is expected that these problems will be overcome by effective implementation of the new Law on State Commission for Control of Public Procurements, which has entered into effect in February 2013, and which sets out strong guarantees for independence of this appeals body.[45] In Bosnia and Herzegovina, private sector organisations believe that the Office for Deciding upon Appeals often overlooks real irregularities and that, instead, special attention is paid to irrelevant formal remarks,[46] on the basis of which public procurement procedures are unjustifiably annulled. Similar problems occurred in the appeals procedure before the Republican Commission for Protection of Rights in the Public Procurement Procedure in Serbia, which drawbacks should be addressed by effective implementation of the new Law on Public Procurement. In Kosovo, there is a number of institutional limitations of the existing system, which are primarily reflected in the overlap of duties between bodies in charge of public procurement, i.e. between the Administration for Procurement Audit, Public Procurement Agency and Regulatory Commission for Public Procurement, which certainly adversely affects legal security.[47] For these reasons special attention should be paid to clear separation between executive and regulatory authorities of these bodies.

[44] Commission Staff Working Document, Comprehensive Monitoring Report on Croatia, Brussels, 10.10.2012, SWD(2012) 338 final, accompanying the document Communication from the Commission to the European Parliament and the Council , Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership {COM(2012) 601 final}, 18, http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/hr_analytical_2012_en.pdf, 11. april 2013.

[45] Law on State Commission for Control of Public Procurement Procedure, *Official Gazette*, 18/13.

[46] SIGMA/OECD, *Bosnia and Herzegovina Assessment 2012*, pp. 91-92.

[47] European Commission, Kosovo Progress Report, 2011, 38., SEC(2011) 1207 final, *http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ks_rapport_2011_en.pdf*

2.5. Legal framework For Disposal of Assets in the Defence Sector

In the Republic of Serbia, similarly to the procurement procedures in the defence sector, which are subject to the provision of the Law on Public Procurement, the procurement and disposal of assets in the defence sector is subject to different arrangements than the general arrangements specified by the Law on Public Property (*Zakon o javnoj svojini*).[48] The disposal of special-purpose assets is governed by the Decree on Special-Purpose Equipment.

In accordance with the Decree, special-purpose items may be disposed of when they are declared surplus, obsolete, or unsuitable in accordance with the decision by the relevant authority or when they are fully depreciated, and in the other cases specified by law. The procedure for disposal of special-purpose movables is implemented by the commission established by the minister. The main criterion for sale, under all equal conditions, is the highest quoted price. The decision of the disposal of assets is adopted by the minister or a person authorised by the minister. The disposal of special-purpose real-estate items is done in accordance with the Law on Public Property, which specifies that the acquisition and disposal of real-estate assets in the ownership of the Republic of Serbia on behalf of public authorities and organisations, and *transfer of property* rights for real-estate in the ownership of the Republic of Serbia to other property right holders, is decided by the Government.

With respect to the control of disposal of assets in the security and defence sector, in accordance with the regulations, the Ministry of Defence should provide to public auditors an accurate and complete list of sold assets. Furthermore, Article 71 of the Law on Public Property imposes the obligation of the Ministry of Defence and the Ministry of the Interior to submit annual reports to the Property Directorate on the status of the real-estate property in the ownership of the Republic of Serbia.

In Montenegro, the disposal of assets in the security and defence sector was carried out extensively after the independence in 2006. The assets were disposed of in accordance with the Decree on the Procedure for Sale of Surplus Weapons and Military Equipment (*Uredba o postupku prodaje viška naoružanja i vojne opreme*),[49] in accordance to which the sales procedure was considered confidential. In that period, based on the Minister's authorisation, assets were sold in the total value of 14.6 million euros.[50] Today, the disposal of assets in the security and defence sector is regulated by the Decree on Foreign Trade with Equipment for Special Purposes (*Uredba o spoljnoj trgovini sredstvima za posebne namene*),[51] which in Article 10 contains a provision similar to that of the Serbian Decree. More specifically, in accordance with

[48] Law on Public Property, *Official Gazette RS*, No. 72/2011.

[49] *Official Gazette of the Republic of Montenegro*, No. 63.

[50] R. Radevic, *Building Integrity in Defence – Montenegro*, draft report, p. 58.

[51] *Official Gazette of the Republic of Montenegro,* No. 66/10.

Article 10, the proposal for the disposal of items for special purposes is submitted by the manager of the authority, after the assets have been declared surplus, obsolete or depreciated. The assets may be disposed of only to the legal entities registered for manufacturing of and trading with weapons and military equipment or public authorities and other legal entities in accordance with a decision by the Government. With respect to parliamentary oversight of the disposal of assets, the Ministry of Defence is not under an obligation to report to the Parliament regarding the disposal of assets, and there are no formal regulations that impose the obligation to submit decisions on assets disposals.

The disposal of assets in the security and defence sector in Kosovo is governed by the Administrative Instruction on the Management of Government's Assets.[52] In accordance with the Instruction, in 2010, the Kosovo Ministry of Defence established the Commission for Assets Valuation, which was responsible to prepare a report on the existing assets of the Ministry. However, no information is available weather the Commission for Disposal of Assets was established, as specified in the Constitution, as a body responsible for the disposal of assets and their control. In accordance with Article 13, such Commission should decide on the requests for disposal of assets, and ensure that the procedure is transparent, efficient, and that ensures maximised profit.[53]

As it can be seen from all the above, the legal framework for disposal of assets in the security and defence sector in the analysed countries does not follow the international standards in this area. The sales procedures are not transparent enough, the parliamentary oversight, even in cases when it is envisaged, is not efficient enough, and the public has no insight into the disposal of assets. Having in mind the conflicts over the past decades in the Balkans, it is clear that the quantity of armaments and ammunition which can be disposed of without any control under the current regulations is considerable. It is therefore necessary to clearly and precisely define the cases in which the disposal of special-purpose items is possible, and to regulate in the detail the procedure for doing so; in addition it is necessary to set up efficient parliamentary control of such procedure.

3. CONCLUDING REMARKS

In public procurement procedures the risk form abuse and corruption is high and the budget may potentially suffer considerable losses. Standards aimed at eliminating and preventing possible corruption in the public procurement sector are defined at the international level. The main standards are transparency, bidding and fair competition based on objective criteria and the principles of control and

[52] *Official Gazette of Kosovo*, No. 21/2009.

[53] F. Quehaji, *Building Integrity in Kosovo Defence Sector*, draft report, pp. 63-64.

accountability of parties to the public procurement procedures. It is possible to limit the cases of competitiveness and transparency in certain cases, particularly with regards to public procurement of goods in the fields of defence and security.

The statutes of the countries analysed herein are similar, to a certain degree, and linked with regards to the main provisions defining the public procurement procedures and various types of procedures for awarding public contracts. The general provisions of the majority of public procurement statutes follow the examples set by international standards and European rules, and the discrepancies between the states are minor.

When it comes to the regulation of public procurements in the fields of defence and security, the national statutes prescribe various derogations concerning the level of transparency. Given the specific nature of the products traded in these fields, some states protect their markets and their insider information, almost to the point of classifying them as state secrets, excluding almost fully the defence and security related public procurement from the general legal public procurement framework. As pointed out earlier, such legal regulation of defence related public procurements can be found in Bosnia and Herzegovina, Macedonia, Montenegro and Kosovo. In April 2013, in the Republic of Serbia a new Public Procurement Law has entered into effect. The new law sets out to introduce considerable improvements, as one of the specific goals behind its adoption was the harmonisation of the procurement in the fileds of defence and security with the rules and the practices of EU states. Despite the set goal, the wording of the new law still has some deficiencies when it comes to regulating the award of contracts in the fields of defence and security.

On the other hand, the states which are already members of the European Union, such as Bulgaria and Croatia, had to liberalise their systems and harmonise them with the standards set in that respect by the European Union. Therefore it may be concluded that Bulgaria and Croatian legal frameworks are to the highest extent aligned with the international and European standards.

The appeals procedures envisaged by the analysed statutes are to a considerable extent in line with the EU regulations. In most of the analysed countries there is a possibility for the interested party to orally present his/her case and evidence in a public hearing before the second-instance body. Only in Bulgaria the statute governing public procurements envisages a mandatory public hearing, which all the parties attend. A question of whether holding of a public hearing in the second instance procedure should become mandatory in all countries in the region is not easy to answer as it requires a careful attention and balanced approach of the legislature. Namely, holding of a mandatory hearing would enable interested parties to orally defend their views and allow for thorough and transparent discussion of each case, but such a requirement could also extend the duration of the second instance procedure that could adversely affect the efficiency of the second instance proceedings. Therefore it is recommended that legal pre-conditions for holding of a public hearing are elaborated in more detail

in the primary and secondary legislation, coupled with stipulation of clear guarantees that competent second instance bodies will not misuse their discretionary rights.

Assessment of Conformity of the Public Procurement Legal Framework in the Defence Sector with International Standards

Country	**Grading**
Serbia	B
Bosnia and Herzegovina	C
Bulgaria	A
Former Yugoslav Republic of Macedonia	C
Kosovo	C
Croatia	A
Montenegro	C

Note: Grade A - legal framework fully in line with the standards; grade B - legal framework partially in line with the standards; grade C - legal framework not in line with the standards

Notwithstanding the level of alignment of legal framework with international standards, it is important to note that all analysed countries are facing significant challenges in implementation of these regulations and standards in practice, which poses serious risks for corruption and misuse of public funds. As a detailed analysis of implementation of existing regulations exceeds the scope of this study, it is not possible to provide a valid assessment of the implementation of the legal framework in the defence sector in the countries in the region. Nevertheless, it is certain that it is necessary to invest further efforts in improving the implementation of the existing legal framework in all the countries in the region and especially strengthen institutional capacities of second instance bodies, as guarantors of legality and regularity of public procurement procedures.

When it comes to asset disposal in the defence sector, the regulations of the analysed countries, with the exception of Bulgaria, which is an EU member-state, are insufficiently harmonised with the accepted international standards and EU regulations. They leave ample room for abuse, particularly bearing in mind the considerable quantities of armaments and ammunition which remained after the war conflicts over the past decades. On a positive note, most countries do envisage some form of control of the procedures conducted (by the parliament, state audit institutions or state authorities so designated); in practice, however, such control is insufficient. Furthermore, the public, most often, has no insight into how the assets are disposed of. In order to resolve this problem it is necessary to clearly and precisely define

the cases in which special-purpose items can be disposed of, regulate in detail the procedure for doing so and establish efficient parliamentary control of such procedure.

Assessment of Conformity of the Asset Disposal Legal Framework in the Defence Sector with International Standards

Country	**Grading**
Serbia	B
Bosnia and Herzegovina	B
Bulgaria	A
Former Yugoslav Republic of Macedonia	B
Kosovo	C
Croatia	B
Montenegro	B

Note: Grade A - legal framework fully in line with the standards; grade B - legal framework partially in line with the standards; grade C - legal framework not in line with the standards

Aleksandra Rabrenovic, PhD [1]

HUMAN RESOURCES MANAGEMENT

1. INTERNATIONAL STANDARDS

1.1. Introduction

The fundamental internationally accepted standard in human resources management in the civil service is the merit principle. It can be defined in a broad sense as the establishment of a separate civil service value system that is based on professionalism, competence and integrity and aimed at achieving public interest objectives.[2] The merit system presents a counterbalance to the political loyalty system, known informally as the "spoils system", in which the civil service positions are obtained exclusively based on political affiliations, rather than on professional merit.[3] Application of the merit principle in the defence sector is of utmost importance for creating a professional cadre with a high level of integrity.

Personnel in ministries of defence around the world usually comprise of two groups of employees: civilian personnel, which status is governed by civil service general legislation and military personnel, which status is governed usually by laws on armed forces. As the ministries of defence normally have majority of civil service personnel the attention in this chapter will be devoted primarily to rules and regulations that govern civil servants human resource management policies and to a lesser extent those that concern military personnel.

---

[1] Research Fellow, Institute of Comparative Law, Belgrade.

[2] P. W. Ingraham, "Building Bridges over Troubled Waters: Merit as a Guide", *Public Administration Review*, 2006, pp. 486-495.

[3] The establishment of the "spoils system", which is present in many countries even to this date, is interesting because it was actually considered to be the best public administration organisation system in a democratic society in the USA in the XIX century. The President of United States Jackson thus pointed that: "In a country where offices are created solely for the benefit of the people no one man has any more intrinsic right to official station than another". However, the functioning of the "spoils system" caused a massive expansion of corruption and abuse in the United States federal administration system and rapid abandoning of this system. V. E. Pusić, *Nauka o upravi*, 1973, (Školska knjiga, Zagreb), pp. 178-179.

Due to national specificities, the area of human resources management is usually not a subject of international conventions or a part of *acquis communautaire*. However, over the past two decades several important international legal acts were adopted providing international legal basis for regulation of this field. Furthermore, this area is also governed by the so-called "*soft acquis"*, which constitute common standards of the EU Member States, and which have an indirect influence on the development of the national law.[4] Although they are not legally binding, these standards can have significant practical impacts on the countries seeking EU membership, as the European Commission uses them as benchmarks for assessing progress towards the membership.

1.2. Sources of Law

1.2.1. United Nations

Until the adoption of the UN Convention against Corruption in 2003, the area of human resources management in the public service contained only scattered references in the UN documents. For example, the Universal Declaration of Human Rights[5] (1948) in Article 21, paragraph 2, guarantees that everyone has the right to equal access to public service in his country.[6] Furthermore, the International Covenant on Economic, Social and Cultural Rights (ICESCR),[7] obliges the parties to grant just and favourable conditions of work to its citizens, which would ensure equal opportunity to be promoted in their employment, subject to no considerations other than those of seniority and competence. The Covenant also stresses the issue of providing fair and equal remuneration for work of equal value without distinction of any kind, in particular between men and women, and with respect to the principle of "equal pay for equal work".[8]

[4] M. Keune, "EU Enlargement and Social Standards - Exporting the European Social Model?", *The European Union and the Social Dimension of Globalisation, How the EU Influences the World* (J. Orbie, L. Tortell), Routhledge, 2009, p. 52.

[5] The Universal Declaration of Human Rights (UDHR) is a declaration adopted by the United Nations General Assembly on 10 December 1948 at Palais de Chaillot, Paris.

[6] The Declaration itself is not legally binding, but its provisions have been elaborated in subsequent international treaties, regional human rights instruments, national constitutions and laws.

[7] It is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and entered into force on 3 January 1976. It commits its parties to work toward the granting of economic, social, and cultural rights (ESCR) to individuals, including labour rights and the right to health, the right to education, and the right to an adequate standard of living. As of October 2012, the Covenant had 160 parties.

[8] Article 23 of the Covenant.

The monitoring of the implementation of the ICESCR was entrusted to the Committee on Economic, Social and Cultural Rights. The Committee is a body of 18 independent human rights experts, elected for four-year terms, with half the members elected every two years. All states parties are required to submit regular reports to the Committee outlining the legislative, judicial, policy and other measures they have taken to implement the rights affirmed in the Covenant. The first report was due within two years of ratifying the Covenant; thereafter reports are due every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations". All South and East European countries have signed the Covenant[9] and are legally bound to respect its provisions.

The UN Convention against Corruption (2003) contains several important provisions on human resources management aimed at reduction of corruption risks in this area. The Convention emphasizes the importance of merit and transparency in the recruitment process, as well as adequate remuneration and equitable pay scales. It also requires the parties to the Convention to introduce appropriate training schemes in order to enhance civil servants' awareness of the risks of corruption inherent in the public sector. The excerpts of the Convention concerning the human resources management are presented in the box below.

Article 7 Public Sector – The UN Convention against Corruption

Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:

(a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;

(b) That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions;

(c) That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;

(d) That promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.

[9] Bosnia and Herzegovina on 1 September 1993; Bulgaria on 21 September 1970; Montenegro on 23 October 2006; Romania on 9 December 1974; Serbia on 12 March 2001; Macedonia on 18 January 1994; The former Yugoslavia signed the Covenant on 8 August 1967 and ratified it on 2 June 1971.

The implementation of the UNCAC is to be carried out by the Implementation Review Mechanism established by the Resolution 3/1 (2009), with aim to assist countries to meet the objectives of UNCAC through a peer review process. Each review phase is composed of two review cycles of five years. The first review cycle covers chapters III (criminalization and law enforcement) and IV (international cooperation) of UNCAC. The second review cycle, which will start in 2015, covers chapters II (preventive measures), which includes human resource management issues and chapter V (asset recovery).

1.2.2. Council of Europe

The key legal Act of the Council of Europe that refers to human resources management in the public administration is the **Recommendation No. R (2000) 6 of the Committee of Ministers to member states on the status of public officials in Europe**, adopted by the Committee of Ministers on 24 February 2000 at the 699th meeting of the Ministers' Deputies.[10] The recommendation is not legally binding to the CoE member states (including all Western Balkans countries) and no monitoring mechanisms have been developed to oversee its implementation.

The objective of the Recommendation is to achieve a greater unity between the Council of Europe members given the European dimension of the civil service and the existence of common values, which are shared by the CoE member states. The Recommendation acknowledges that public administrations play an essential role in democratic societies and that they must have at their disposal suitable personnel to properly carry out the tasks which are assigned to them. It is also noted that public officials are the key element of the public administration and that they should have the necessary qualifications and an appropriate legal and material environment in order to carry out their tasks appropriately. Furthermore, the Recommendation stresses the importance of the promotion of the participation of public officials in decision-making processes concerning the organisation, structure and principles governing the exercise of public functions.

The Recommendation includes the principles of good practice by which the governments of member states should be guided in their law and practice. The principles of good practice are, inter alia: existence of legal framework concerning the status of public officials; selection based on merit and fair and open competition; promotion based on merit; participation of staff in the decision making process; adequate remuneration that should be sufficient so as to ensure that public officials

[10] The recommendation constitutes a follow up on the Parliamentary Assembly Recommendation 1303 (1996) which asked the Committee of Ministers to include the drawing-up of European legal instruments on the civil service and the Parliamentary Assembly Recommendation 1322 (1997) on civil service in an enlarged Europe.

are not put at risk of corruption; termination of office for the reasons provided by law. These principles are annexed to the recommendation and their excerpts provided in the table below.

Excerpts from the Appendix of the Recommendation No. R (2000) 6 of the Committee of Ministers to Member States on the Status of Public Officials in Europe

1. Legal framework of public officials and implementation The legal framework and general principles concerning the status of public officials should be established by law or collective agreements and their implementation should be left to the government and/or other competent authorities or settled through collective agreements. 4. Conditions and requirements for recruitment Recruitment of public officials should be defined by equality of access to public posts and selection based on merit, fair and open competition and an absence of discrimination. In respect of the principles referred to above, recruitment systems and procedures should be open and transparent, and their rules should be clear. They should allow the best candidate to be appointed to meet the specific needs of the department or organisation concerned. 7. Promotions Promotions implying a higher level of responsibility should be based on merit. 10. Participation of Public Officials in the decision making process Public administrations should promote participation or consultation of staff in decision making process concerning the organization, structure and principles governing the exercise of public function. 12. Remuneration Public officials should have an adequate remuneration commensurate with their responsibilities and function. Remuneration should be regarded as a means of achieving desired organisational goals and should be sufficient so as to ensure that public officials are not put at risk of corruption or engaging in activities incompatible with the performance of public duties. 16. Termination of public officials' employment Termination should only occur in the cases and for the reasons provided by law. A legal remedy should be available in all cases to protect officials against misuse of authority.

Another important Council of Europe legal act in relation to human resources management is the Resolution (97) 24 on **Twenty Guiding Principles for the Fights Against Corruption**, which was adopted by the Committee of Ministers on 6th November 1997. GRECO has been tasked with following up on the implementation of this Resolution. Although the area of human resources management is not mentioned explicitly, principle 9 requires the Council of Europe member states "to ensure that the organization, functioning and decision-making process of public administrations take into account the need to combat corruption, in particular by ensuring as much transparency as is consistent with the need to achieve effectiveness." GRECO has, under principle 9, assessed the level of transparency and effectiveness of human resources management in the civil service during its second evaluation round (2003-2006) in all South and East European countries.

1.2.3. European Union

The direct influence of the EU on the human resources management in the administrative systems of its member states is limited as the EU has no direct competences in this area. However, there are some sources of indirect influence of EU membership on member state administrations. Thus, for example, under article 4 of the Lisbon Treaty,[11] the EU member states are obliged to take all the necessary measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties and the EU membership. This means that the EU member states administrations must have the capacity to effectively participate in the EU decision-making process and to ensure the timely implementation of EU regulations, directives and decisions.[12] Member states can also be brought before the European Court of Justice if they do not meet their Treaty obligations and fines can be imposed on them. This 'indirect' provisions provide the most important Treaty-derived legal basis for the EU to not only require of its member states to have well developed and merit based administrative systems but also to judge the administrative suitability of (potential) candidate states.

The European Union explicitly defined its membership criteria for the first time at the Copenhagen European Council in June 1993 and consequently at Madrid European Council in December 1995. Initially, these criteria did not include a clear reference to administrative capacity requirements. The main criteria imposed on candidate states in terms of their internal readiness to join the EU can be summarised as the development of democratic systems of governance, the creation of a working market economy and a proven capacity to absorb and apply the *acquis communautaire*. The conclusions of the Madrid European Council, in December 1995, for the

[11] The Lisbon Treaty, *Official Journal of the EU* C 306, 17.2.2007.

[12] A. Verheijen, «Administrative Capacity Development: A Race against Time?» *WRR Schientivic Council for Government Policy Working Documents*, W 107, 2000.

first time mentioned adequate administrative capacities as an explicit criterion for membership, without, however, addressing the issue in more detail.

The first time administrative capacity, that includes human resource management issues, was used as a criterion in its own right was in the Commission Opinions, issued in July 1997 for the then acceding EU candidate states. These opinions showed the contours of what the European Commission considers to be an adequate system of human resources management in the public administration.

In order to develop human resource management requirements further, the European Commission SIGMA programme[13] provided a useful instrument in the EU accession process by producing the so-called "baseline" criteria.[14] Baselines are designed in accordance with the EU legislation, but they also incorporate good or best European practices in human resource management and other public administration areas.[15] Since 1999, the European Commission has produced its regular Progress Reports on progress towards EU membership for candidate countries on the basis of the SIGMA baselines. The key SIGMA baselines in the human resources management system are provided in the table below.

SIGMA carried out regular human resources management status assessment in the new EU Member States before they became full-fledged members, and it also had an opportunity to assess their development after they became EU members.[16] Such an extensive experience allowed it not only to develop, but also to revise its standards and recommendations in human resources management that are provided to the countries that are currently preparing for the EU membership.

The key standards for efficient human resources management in the civil service that will be analysed in more depth in this chapter: the legal regulation of the civil servants' position, mandatory public competitions and written examinations in the course of the recruitment process, limited politicisation, stability of the civil service and predictable and transparent salary systems.[17]

---

[13] SIGMA programme is mainly funded by the EU PHARE programme and represents one of the main instruments of the European Commission in promoting capacity development in public administration in Central and Eastern Europe, as well as a technical assistance service to the candidate states..

[14] SIGMA/OECD, *Structural Elements for Improving Horizontal Public Governance Systems in EU Candidate States: SIGMA Assessment Baselines*, 2009.

[15] On policy management, civil service, internal financial control, public expenditure management, external financial control and procurement.

[16] J. Meyer-Sahling, "Sustainability of Civil Service Reforms in Central and Eastern Europe Five Years After EU Accession", *Sigma Papers*, No. 44, 2009, OECD Publishing. *doi: 10.1787/5kml60pvjmbq-en*

[17] SIGMA working paper, "Can Civil Service Reforms Last? The European Union's 5th Enlargement and Future Policy Orientations", *http://www.rcpar.org/mediaupload/publications/2010/20100311_SIGMA_can_reforms_last.pdf,* 4 December 2012.

SIGMA Baselines for Assessment of Human Resource Management Systems (Civil Service)[18]

- Clear separation between political and civil service positions;
- Selection: recruitment and promotion based on merit and competition as a basis for professionalism;
- Regulation of duties and rights, in particular the duties of impartiality and integrity and the system of incompatibilities and conflict of interests;
- The handling of grievances has an effective regulation;
- Performance appraisal regulation is fair and with sufficient guarantees;
- Salary system: is fixed by law, transparent and the degree of managerial discretion in assigning salary components to individual civil servants is low;
- Managerial arrangements to ensure that common HRM standards are applied across all public administration settings exist and respective bodies are sufficiently empowered to perform their duties.

1.3. Content of International Standards

1.3.1. Legal Regulation of Civil Servants' Position

To ensure the stability, impartiality and integrity of the civil servants' actions, the legal position of the civil service staff needs to be regulated by law. Special attention needs to be given to the quality of the adopted laws, and well as to their implementation. Many new EU Member States and countries in the region substantively revised their civil service legislation on a number of occasions over the last two decades, which had a negative impact on the stability of the civil servants' position. That is why it is recommended that the civil service primary legislation should not be too detailed, but would contain only the basic provisions, which would be further regulated by secondary legislation. That would decrease the hyper-regulation of human resources management in the civil service and reduce instability. It should be noted that legal regulation of human resources management is widely accepted by civil servants in both the new Member States, and the (potential) candidate countries for EU membership, which is a positive development.

[18] SIGMA, *Structural Elements for Improving Horizontal Public Governance Systems in EU Candidate States: SIGMA Assessment Baselines*, SIGMA/OECD, 2009.

The general civil service legislation which includes salary systems (civil service laws and laws on civil service salaries), should also be applicable to all civilian personnel in the ministries of defence and intelligence services. Exceptions from such rules usually indicate an existence of a non-transparent, closed system, which is highly susceptible to patronage and corruption practices.

1.3.2. Mandatory Public Competitions and Written Examinations

The main standard underlying the merit-based civil service system is recruitment through public competitions. Organising a public competition allows all citizens to have equal access to the civil service, which is in many European countries guaranteed also by the constitutional provisions. A public competition also provides an opportunity to find the best candidates available at the labour market. The competition procedure should be carried out by competition commissions that operate independently from political influences. To achieve transparency and objectivity of the competition procedure, advantage should be given to written examinations, rather than interviews, which allow a higher degree of discretion by the competition commission in the evaluation of the applicants' capacities and fitness for the job. Written examinations are also of key importance for proper testing of candidates' knowledge and skills (writing skills, organisation of ideas and arguments, etc.).

To ensure the protection of the all the competition participants' rights, the results of the competition procedure should be subject to appeals to a second-instance administration authority (normally the Appeals Commission), as well as to a relevant court of law (normally the administrative court).

1.3.3. Limited Politicisation

Although depoliticisation has long been one of the main human resources management principles, the experiences of the new EU Member States and the countries in the region show that this ideal is very difficult to achieve in practice. It should not be forgotten that politicisation is present also in many old Member States. Comparative experience showed that achieving success in this segment of the Public Administration Reform required much more than adopting legislation and that was the establishment of trust and cooperation between political parties and interest groups that would have a common interest to establish professional administration

and limit politicisation.[19] Considering that most countries in the region are still far from reaching such political consensus, it appears that at this point the best solution is to accept the reality and a certain degree of politicisation, rather than insist on the full and comprehensive depoliticisation, which would not yield the desired effects.

That is why SIGMA proposes that the number of the standards relating to depoliticisation should be reduced, and that they should be defined explicitly, without any unrealistic expectations. The first recommendation is to make a clear difference between political and civil service positions.[20] The number of political positions needs to be minimised. The political appointees' term of office (Minister, State Secretary) needs to be linked to the government's term in office, while other civil servants would generally have the right to enter into permanent employment. Senior civil servants, due to their specific position in between the administrative and the political spheres, may also have a special status and may be appointed to duty for a specified term of office (normally 5-7 years, so that their term of office would not coincide with that of the government). The focus should be put on regulating the terms for employment for all civil service positions (educational requirements and relevant work experience), including the managerial positions, as well as transparency and limitation of the most blatant forms of politicisation in the selection process.

Another recommendation on how to limit politicisation is to introduce the provisions on the impartiality of civil servants. A civil servant should be under a statutory obligation to act in accordance with law, in an impartial and politically neutral manner. There is a need also to stipulate prohibition for civil servants to express and represent their political beliefs.

1.3.4. Civil Service Stability

Civil service employment stability is a precondition for professionalisation and the establishment of the merit-based system. Stability is achieved primarily through clearly specified rules for termination of employment, such as: 1) retirement, 2) expiration of the term of office (in case of appointments with a specified term of office), 3) resignation, 4) abolishment of the position due to the reorganisation of the authority, 5) removals from office, which also must be regulated by law (such as, for example, a prison sentence for a specified term, etc). If the decisions on the termination of employment are easy to make, the attractiveness of public service would be reduced and potential good candidates would be discouraged from seeking employment in the civil service.

[19] The World Bank, *International Public Adminsitration Reform: Implications for the Russian Federation*, 2003. The World Bank, Washington, DC.

[20] OECD, *European Principles for Public Administration*, SIGMA Paper: No. 27, 2004, OECD publishing, doi: 10.1787/5kml60zwdr7h-en.

1.3.5. Predictable and Transparent Pay System

It is very important that the pay structure is predictable and transparent so that it does not depend to a large extent on the discretion of managers. That is why the key European principle regarding civil service pay is that the base pay should be the main element of the total pay, accounting for minimum 80-90% of the total pay.[21] That means that different pay allowances, determined at managers' discretion, should be restricted, which contributes to the transparency of the system and the predictability of the wage bill.[22] However, it has to be noted that most European systems also have a developed civil servants performance appraisal system based on which civil servants receive the variable portion of their pay (bonuses), but only in the amount of 10% of the overall pay, i.e. maximum 20% of the overall pay for senior positions.[23] Such bonuses are usually disbursed on an annual basis, taking into account the actual performance throughout the previous year.

Benefits in the form of goods and services (e.g. awarding apartments, use of cell phones, official government motor vehicles) are not common. It is considered that the administration and provision of such benefits is too expensive, and that such benefits could influence the deterioration of the relations between employees. In such circumstances, some civil servants could benefit more than others who do not have a need or interest for such benefits.

---

[21] *Ibid*.

[22] G. Reid, J. Orac, »Human Resource Management Issues in ECA Countries«, *http://www1.worldbank.org/publicsector/civilservice/ACSRCourse2007/Session%201/PublicEmployPayIssuesECA.pdf*

[23] OECD, »The State of Public Service, Preliminary findings based on a first analysis of the results of the 2006 surveys on Strategic Human Resource Management and Comparison of Employment in the Public Domain, Paper for discussion at the Public Employment and Management Working Party (PEMWP)", 2006, p. 78.

2. COMPARATIVE LEGAL ANALYSIS OF THE HUMAN RESOURCES MANAGEMENT SYSTEMS IN THE COUNTRIES IN THE REGION

2.1 Legal Regulation of Status of Civil Servants

Over the past two decades, all of the countries in the region adopted laws governing the status of civil servants, which were subject to frequent amendments. The Republic of Montenegro adopted the first Law on Civil Servants back in 1991,[24] which was rendered ineffective by the 2004 Law on Civil Servants and Employees.[25] Only four years later, a new revised Law on Civil Servants was adopted, [26] followed by the latest 2011 Law, which came into force in January 2013.[27] Similarly, the Republic of Croatia adopted the first Law on Civil Service back in 1994,[28] which was replaced by the 2001 Law on Civil Servants,[29] and followed by the 2005 Law on Civil Servants, which is still in force.[30] Bulgaria adopted the Civil Service Law in 1999,[31]

[24] The Law on Civil Servants (Zakon o državnim službenicima), *Official Gazette of the Republic of Montenegro*, No. 45/91.

[25] The Law on Civil Servants and Employees (Zakon o državnim službenicima i namještenicima), *Official Gazette of the Republic of Montenegro*, No. 27/04.

[26] Law on Civil Servants and Employees, *Official Gazette of the Republic of Montenegro*, No. 50/08, 86/09, 49/10, 50/11.

[27]The Law on Civil Servants and Employees (Zakon o državnim službenicima i namještenicima), *Official Gazette of the Republic of Montenegro*, No. 39/2011, 4 August 2011.

[28] The Law on Civil Servants and Employees and Judicial Officials' Pay (Zakon o državnim službenicima i namještenicima i o plaćama nositelja pravosudnih dužnosti), *Official Gazette of the Republic of Croatia*, 74/1994.

[29] The Law on Civil Servants and Employees (Zakon o državnim službenicima i namještenicima), *Official Gazette of the Republic of Croatia*, 27/01. The Law was in force from 30 March 2001 until 1 January 2006. The provisions of that Law where it pertains to civil servants and employees' pay still apply to this date, as in the meantime a separate law on civil servants' pay has not been adopted.

[30] The Law on Civil Servants (Zakon o državnim službenicima), *Official Gazette of the Republic of Croatia*, No. 92/05, 107/07, 27/08, 49/11, 150/11, 34/12.

[31] Civil Service Law, *Official Gazette of the Republic of Bulgaria*, No. 67 of 27th July 1999.

which has been subject to remarkable 32 amendments up to 2012,[32] which means that it was amended 2 to 3 times per year. The Former Yugoslav Republic of Macedonia adopted the Law on Civil Servants back in 2000,[33] and while it is still in force, over the past two decades, it was subject to 17 amendments. The Bosnia and Herzegovina state-level Law on Civil Servants was adopted in 2002, and has seen 11 amendments to date.[34] After the obsolete 1991 Law on Labour Relations in State Authorities (Zakon o radnim odnosima u državnim organima), which partially governed the civil servants relations, in 2005 the Republic of Serbia adopted a modern Law on Civil Servants,[35] which has been revised to this date six times. Kosovo adopted the Law on Civil Servants in 2010, and due to delays in the adoption of the supporting bylaws, it came into force only in 2012.

Frequent changes in the civil servants regulations negatively affect the legal security of civil servants and cause problems in the implementation of regulations. The objective of the civil service legislation is to ensure stability of the civil servants' position and its frequent changes are completely in contradiction to its purpose. In practice, top-level officials often ignore the existing regulations expecting their current problems would be solved in new revised regulations.[36]

One of the reasons for such frequent changes surely is the micro-regulation of the civil servants' status in the countries in the region. As recommended by international standards, in order to avoid this problem in the future, the adoption of

[32] Numerous amendments of the Bulgarian Civil Service Law of 1999 were published in the following Official Gazette numbers: No. 1 of 4th January 2000; No. 25 of 16 March 2001; No. 99 of 20 November 2001; No. 110 of 21 December 2011; No. 45, of 30 April 2002; No. 95 of 28 October 2003; No 70 of 10 August 2004; No 19 of 1 March 2005; No 24 of 21 March 2006; No. 30 of 11 April 2006; No. 102 of 19 December 2006; No 59 of 20 July 2007; No. 64 of 7 August 2007; No. 43 of 29 April 2008; No. 94 of 31 October 2008; No. 108 of 19 December 2008; No. 35 of 12 May 2009; No. 42 of 5 June 2009; No 74 of 15 September 2009; No 103 of 29 December 2009; No.15 of 23 February 2010; No. 46 of 18 June 2010; No. 58 of 30 July 2010; No.77 of 1 October 2010; No 91 of 19 November 2010; No. 97 of 10 December 2010; No. 1 of 4 January 2011; No. 18 of 1 March 2011; No.100 of 20 December 2011; No. 15 of 21 February 2012; No. 20 of 9 March 2012; No. 38 of 18 May 2012; No 82 of 26 October 2012.

[33] The Law on Civil Servants (Законот за државните службеници), *Official Gazette of the Republic of Macedonia*, No. 59/2000, 112/2000, 34/2001, 103/2001, 43/2002, 98/2002, 17/2003, 40/2003, 85/2003, 17/2004, 69/2004, 81/2005, 61/2006, 36/2007, 161/2008, 6/2009, 6/2012, 24/2012; The Law on Civil Servants and Employees and Judicial Officials' Pay (Zakon o državnim službenicima i namještenicima i o plaćama nositelja pravosudnih dužnosti), *Official Gazette of the Republic of Macedonia*, 74/1994.

[34] The Law on Civil Service in the Bosnia and Herzegovina Government Institutions (Zakon o državnoj službi u institucijama Bosne i Hercegovine), *Official Gazette BiH*, No. 19/02, 35/03, 4/04, 17/04, 26/04, 37/04, 48/05, 2/06, 32/07, 43/09, 8/10, 40/12.

[35] The Law on Civil Service (Zakon o državnim službenicima), *Official Gazette RS*, No. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009.

[36] Such situation occurred, for example, in Serbia where the Law on Civil Servants was revised on several occasions to extend the timeline for filling of vacant top level positions through competitions. While the last specified timeline for filling of vacant top level positions expired at the end of 2010, not all top level positions were filled, as a new revision was expected to allow for that.

new civil servants legislation with excessive number of details should be avoided. The primary legislation should contain the provisions that secure the respect of the merit principle and which would be further elaborated under secondary legislation.

Status of military personnel has been regulated in all countries by laws on armed forces, which provide detailed rules on all stages of human resource management for military personnel.

2.2. Recruitment Procedures

2.2.1. Recruitment of military and civilian personnel in armed forces

Recruitment and other HRM aspects of military and civilian personnel of the armed forces in the countries in the region is governed by separate laws that regulate status of armed forces personnel (usually laws on armed forces). Professional soldiers are usually hired under contract and they could be offered short career development programmes, considering that military service is limited by age. As for higher military ranks, there are two key ways for recruitment for the higher military ranks: a) personnel is automatically granted the rank upon completion of military education and b) there is an internal or public competition to become an officer. The internal and public competitions and selection processes are organised solely by the Ministry of Defence, due to specificities of the service in the armed forces. Whereas the basic conditions that military personnel has to meet in order to join the military are outlined by the Law on Armed Forces (such as the citizenship, years of age, physical fitness), the process of recruitment and selection methods are governed by tertiary legislation (Rulebooks of MoD) which is usually not publicly available.

Serbia and Croatia, however, allow certain exceptions with regard to ordinary recruitment methods of the civilian and military personnel of the armed forces. Namely, the Law on Serbian Armed Forces provides an opportunity for admission into civilian service of the armed forces without a public competition in the case of "specific needs of the Serbian armed forces".[37] This exception provides a broad leeway to the MoD to admit civilian personnel of the armed forces without announcing a competition, which goes against the merit principle. Such personnel can later be transferred relatively easily without a competition either to the military or civil service positions in the MoD, in accordance with the provisions of the Government Decree on Admission to the Serbian Armed Forces and the Ministry of Defence without a Public Competition.[38] In a similar vain, Article 21 of the Law on Service in Armed

[37] Article 45 and articles 120 and 121 of the Law on Serbian Armed Forces.

[38] Government Decree on Admission to the Serbian Armed Forces and the Ministry of Defence without a Public Competition Official Gazette of the Republic of Serbia No. 3 of 16th of January 2012.

Forces of Croatia, prescribes that for the purpose of carrying our of duties which are especially important for the defence, a minister of defence can exceptionally recruit a person with a status of military personnel or civilian personnel without a public competition. Such an exception also leaves a considerable scope of discretion of a minister to recruit personnel of his/her own choice in the armed forces.

2.2.2. Recruitment of career civil servants in ministries of defence

As regards civilian personnel in the ministries of defence, their status is governed by civil service laws, which impose a number of standards in order to ensure merit-based recruitment. Mandatory internal or public competitions for the recruitment in the public administration constitute the standard that is accepted by all the countries in the region. Competition is considered as a guarantee for the implementation of the merit principle and the key element for limiting political discretion in the recruitment process.

Another safeguard for the respect of the merit principle is to have a professional and unbiased competition commission, whose structure varies from country to country. At the Bosnia and Herzegovina state level, the procedure is implemented by a five-member competition commission – two members are proposed by the institution that is filling in vacancies, and three members are appointed by the Civil Service Agency from their list of experts.[39] A similar situation is present also in Montenegro, where the selection procedure is performed by a commission comprised of a representative of the Human Resources Management Agency, a representative of the public authority that is recruiting staff, and a professional evaluator for specific skills, i.e. an independent expert hired through an announcement.[40] What is common for both these countries is that the commission members include a smaller number of civil servants from the authority that is filling vacancies, and a bigger number of (at least formally) impartial persons, such as representatives of independent human resources management bodies and independent experts. That should minimise the potential political influence of the authority to the applicant selection process. Legislations of Serbia and Kosovo stipulate a similar composition of the commission, but only for the selection of the top level civil servants.[41] The competition commissions for the selection of other civil servants in Bulgaria, Macedonia, Serbia, Croatia and Kosovo are comprised mostly

[39] Article 24, Para. 2, of the Law on Civil Service in the Bosnia and Herzegovina Government Institutions, *Official Gazette BiH*, No. 19/02, 35/03, 4/04, 17/04, 26/04, 37/04, 48/05, 2/06, 32/07, 43/09, 8/10, 40/12.

[40] Article 42, Para. 2, of the Montenegrin Law on Civil Servants and Employees, *Official Gazette of the Republic of Montenegro*, No. 39/2011, from 4 August 2011.

[41] Article 68 of the Serbian Law on Civil Servants; Article 15, Para. 2, of the Kosovo Law on Civil Service, No. 03/L -149.

of the civil servants from the authority in which the competition is held, which shows a higher degree of decentralisation in the recruitment process and opens room for possible wider political influence on the applicant's selection.

Furthermore, all the countries in the region have embraced testing of candidates as the basis for the recruitment decision, but they differ in whether they stipulate written tests or not. While some of the countries use almost identical recruitment procedures for top level positions and other positions, others implement special procedures for different categories of civil servants, which to a different extent reflect the merit principle.

In addition, it is interesting to note that most of the countries in the region leave a degree of discretion to the management of the recruiting authority in the final stage of the recruitment process. Namely, fairly often, the minister or the secretary have the right to select one applicant from the short-list of the best ranked applicants prepared by the competition commission, instead of the obligation to hire the best ranked applicant. This limits to a considerable extent the implementation of the merit principle in practice.

It may be argued that the legislation of the state level of Bosnia i Herzegovina, Bulgaria and Kosovo provide the best guarantees for the compliance with the merit principle in the recruitment process as in all three countries written tests and interviews are mandatory selection instruments.[42] In Bosnia and Herzegovina, for non top level positions, the Civil Service Agency automatically selects the best ranked applicant based on the applicants' results achieved in the selection process. However, in the CSL there is a strong insistence of equal ethnic representation in this process, which is inimical to the merit system as it clearly favours the main three ethnic groups at the expense of minorities and of the merit system.[43] In Bulgaria, the best ranked candidate is also selected following the detailed procedure outlined in the Government's Order.[44] In Kosovo, the Regulation No. 02/2010 also contains very detailed rules for conducting written tests and interviews and their evaluation by the Selection Committee. There is no discretion of a manager in the selection process - the candidate who has won the highest number of points at the written and oral tests

[42] Article 32 of the Regulation No 02/2010 on Recruitment Procedures in Civil Service, Kosovo; Articles 24 and 25 of the Order for Conducting Civil Service Competitions, Republic of Bulgaria (Наредба за провеждане на конкурсите за държавни служители), adopted on 16 January 2004, *Official Gazette* No. 6 of 23 January 2004; No. 83 of 18 October 2005; No. 46 of 6 June 2006; No. 84 of 19 October 2007; No. 92 of 24 October 2008; No. 5 of 20 January 2009; No 16 of 27 February 2009; No. 18 of 10 March 2009; No. 42 of 5 June 2009; No. 47 of 21 June 2011; No 106 of 30 December 2011; No. 95 of 2 December 2011; No. 106 of 30 December 2011; No. 7 of 24 January 2012; No. 21 of 13 March 2012; No. 49 of 29 June 2012.

[43] SIGMA, *Assessment Bosnia and Herzegovina, 2012*, SIGMA/OECD.

[44] Order for Conducting Civil Service Competitions, Republic of Bulgaria (Наредба за провеждане на конкурсите за държавни служители)

is admitted to the civil service.[45] There is also an additional guarantee on the merit based selection, which is that the best ranked candidate has to reach no less than 60 per cent of maximum number of points.[46]

In Macedonia, written examinations and interviews are mandatory parts of the recruitment procedure, but there is also a degree of discretion of a head of state authority in the final selection process.[47] All applicants are required first to pass the professional written examination, which includes a general and a specialised part.[48] The Selection Commission (comprised of two representatives of the authority that selects a civil servant and one representative of the Civil Service Agency) then holds interviews with the five most successful applicants who passed the state licensing examination.[49] Based on the results of the written test and the interview, the Commission proposes to the management of the authority in which the selection process is held the short-list including the three most successful applicants. The secretary of the authority is obligated to select one person from the short-list within three days from the submission of the list.[50] However, if he/she fails to do so, a new civil servant selection procedure cannot be held within the following six months.[51] The requirement for carrying out written tests, and limited discretion in the final selection process (choosing one amongst three best ranked candidates), provides a moderate degree of respect of a merit principle.

In Montenegro, the new Law on Civil Servants (which implementation started in 2013) apparently provides a solid basis for respect of a merit principle, introducing some innovations to this procedure. Applicants' competence evaluation is performed through written tests and interviews, but may also be performed by other appropriate methods.[52] The commission evaluates applicants based on both the competence test and the information on the applicant's professional and work qualities, which is obtained from the applicant's previous employers (if the applicant has prior work experience), and the average grade and length of study.[53] The Commission prepares a report, on the basis of which the short-list is prepared and submitted to the head of the public authority.[54] The list includes the five best ranked applicants. As a rule, a head

[45] Article 40 para 1 of the Regulation No 02/2010 on Recruitment Procedures in Civil Service.

[46] Article 40 para 3 of the Regulation No 02/2010 on Recruitment Procedures in Civil Service.

[47] Article 14, para. 5, of the Law on Civil Servants, *Official Gazette of the Republic of Macedonia*, No. 59/2000, 112/2000, 34/2001, 103/2001, 43/2002, 98/2002, 17/2003, 40/2003, 85/2003, 17/2004, 69/2004, 81/2005, 61/2006, 36/2007, 161/2008, 6/2009, 6/2012, 24/2012.

[48] Article 16, para. 3, *ibid*.

[49] Article 17, para. 3.

[50] Article 17 and Article 17a, *ibid*.

[51] Article 17a, para. 6.

[52] Article 42, para. 4, of the Montenegrin Law on Civil Servants and Employees.

[53] Article 43, para. 1, of the Montenegrin Law on Civil Servants and Employees.

[54] Article 44, para. 1, of the Montenegrin Law on Civil Servants and Employees.

of a public authority selects the best ranked applicant for appointment. Exceptionally, however, after the interview has been conducted with all the short-listed applicants, a head of a authority may select another candidate from the short-list, and is obligated to provide the reasons for such a decision in the explanation attached to the decision.[55] The envisaged exceptions to the requirement of written examinations and the right of a head of a state authority to choose any candidate from the extended list, poses concerns for the respect of the merit principle.

In Croatia, although the written tests are mandatory, there is a a high degree of discretion in the final phase of the selecion process. The Civil Service Law requires carrying out of written tests and interviews for all civils service candidates.[56] On the basis of these results, the Commission makes a list of ten best ranked candidates.[57] A minister, or another authorised person, is free to make a selection between all ten candidates and is obliged to give reasons for his/her decision.[58] The possibility to choose among ten best ranked candidates provides a high degree of political discretion in the selection process.

In Serbia, the existing legal framework does not provide sufficient guarantees for merit-based recruitment. First, a written exam is not a mandatory requirement for the selection, as it is possible to use other methods such as an interview or another appropriate method.[59] If a written exam is conducted, it serves as a first round of the selection process since the personal interviews are conducted only with candidates who obtain the bests scores at the written exams. After testing the overall professional qualifications, knowledge and skills of the selected candidates, the Competition Committee proposes to the head of the state organ a shortlist of a maximum of three candidates.[60] The head of the state authority is required to choose one of the candidates from the list,[61] not having the right to annul the competition and call for a new one. However, the fact that there is no requirement for the written examination and that the head of the ministry or agency chooses a candidate among the three best-ranked ones irrespective of the score obtained (without an obligation to give reasons for the choice) poses serious concerns for the respect of the merit principle in the recruitment process.

---

[55] Article 45, paras. 2 and 3, of the Montenegrin Law on Civil Servants and Employees.

[56] Article 50a of the Civil Service Law, Republic of Croatia.

[57] Article 51, para 2 of the Civil Service Law, Republic of Croatia.

[58] Article 51, para 2 of the Civil Service Law, Republic of Croatia.

[59] Article 56 of the Civil Service Law, Republic of Serbia.

[60] Article 57 of the Civil Service Law, Republic of Serbia; Article 16 of the Rulebook on Expert Capacities, Knowledge and Skills which are Tested in the Selection Process, the Methods Used and Criteria for Selection, *Official Gazette of the RS*, No. 64/2006, 81/2006, 43/2009, 35/2010.

[61] Article 57, para 2 of the Civil Service Law, Republic of Serbia.

2.2.3. Recruitment of senior civil servants

While in some of the analysed countries recruitment process for managerial (top-level) civil servants and non-managerial civil servants is the same (Bulgaria, Macedonia), in majority of countries (Bosnia and Herzegovina, Croatia, Kosovom Montenegro and Serbia) the procedure for the selection of senior civil servants is simpler than that for the selection civil servants, and includes higher degree of political discretion in choosing the candidates. In some of the countries there is also lack of written tests to evaluate the applicants' knowledge in specific administrative fields. For this reason, it appears that in the majority of the countris in the region it is easier to become a top level civil servant that to be selected in the competition for interns,[62] which often includes comprehensive tests in several administrative fields to assess the knowledge and skills of the applicants who are accepted in the civil service for the first time.

In Bosnia and Herzegovina, although the written tests are used in the selection of top level officials, the level of political discretion in choosing the candidates is higher than in the case of 'ordinary' civil servants. The number of questions at the written test is twice as high as in the case of lower ranking civil servants. [63] However, in contrast to the selection procedure of lower ranking civil servants, where the Civil Service Agency automatically selects the best ranking candidate, in the recruitment of top civil servants the Commission proposes to the respective authority the list of all candidates which have successfully passed the tests, which only has to be approved by the Civil Service Agency. The management of the competent authority has the right to select any of the short-listed applicants,[64] which gives the management of the public authority a high degree of discretion in the selection process. If the appointment is not confirmed in this way within 30 days from the receipt of the Agency's opinions and the short-list of successful applicants, the Agency appoints the most successful applicant *ex officio*.[65]

---

[62] J. Meyer-Sahling J, *Civil Service Professionalisation in Western Balkans*, SIGMA paper No. 48, GOV/SIGMA, 2012.

[64] Article 15, para. 4 of the Rulebook on Procedures of Announcement, Selection of Candidates, Transfer and Appointment of Civil Servants in Service, *Official Gazette of BiH* No. 27/08, 56/09, 54/10.

[64] Article 28, para. 2, of the Law on Civil Service in the Bosnia and Herzegovina Government Institutions. This procedure differs from the procedure that is used for other civil servants positions in which case the Civil Service Agency appoints a civil servant based on the his/her results achieved in the selection process. See Article 28, para. 1 of the Law on Civil Service in the Bosnia and Herzegovina Government Institutions.

[65] Article 28, para. 3, of the Law on Civil Service in the Bosnia and Herzegovina Government Institutions, *Official Gazette BiH*, No. 19/02, 35/03, 4/04, 17/04, 26/04, 37/04, 48/05, 2/06, 32/07, 43/09, 8/10, 40/12.

In Serbia, in the process of selection of applicants for appointments, written tests are used only for assessment of skills, while knowledge is evaluated only through interviews. Logical and analytical reasoning, organisational and management skills are evaluated at the beginning of the selection process through standardised psychological tests.[66] However, an applicants' knowledge and professional competences are assessed only through interviews.[67] In the end, similarly to Bosnia and Herzegovina, a short-list of the best ranked applicants is submitted to the head of the authority, who has the right to select one of the short-listed applicants. However, a head of an authority is not obliged to select any of the proposed applicants, but has to justify such a decision to the High Civil Servants Council and the Human Resources Management Agency.[68] In a similar vain, in Kosovo, a special selection commission proposes the best three ranked senior civil service candidates to a minister and he/she is free to choose one of them.

In Montenegro, the Law on Civil Servants stipulates that competence evaluations for top level civil servants are based only on the structured interview.[69] Similar to the selection of other civil servants, the selection commission proposes the list of five candidates to the minister, who then, as a rule, proposes the best ranked candidate to be appointed by the Government. However, the minister is also able to select another candidate from the list, but has to justify it in writing. This leaves wide discretion to the minister to decide on his/her closest associates.

Finally, the selection procedure for top level positions in Croatia is also much simpler than for other civil servants. The selection is performed by the commission that is appointed by the minister, i.e. head of the administrative organisation that recruits a top level position, and whose mandatory member is a representative of the public authority responsible for civil servants' isses.[70] However, the selection procedure itself boils down to a formal check of the information provided in the application form and the interview with the applicants, based on which the head of the

---

66 Article 19a of the Rulebook on Professional Qualifications, Knowledge and Skills Evaluated in the Appointment Procedure Methods for Evaluation and Criteria for Appointment to Positions (Pravilnik o stručnim osposobljenostima, znanjima i veštinama koje se proveravaju u izbornom postupku, načinu njihove provere i merilima za izbor na radna mesta), *Official Gazette RS*, No. 64/2006, 81/2006, 43/2009, 35/2010.

67 Article 20 of the Rulebook, *ibid*.

68 Article 71, para. 2, of the Law on Civil Service, *Official Gazette RS*, No. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009.

69 Article 53, para. 5, of the Law on Civil Servants and Employees, *Official Gazette of the Republic of Montenegro*, No. 39/2011.

70 Article 26 of the Decree of Announcement and Implementation of Public Competitions and Internal Competitions in Civil Service (Uredba o raspisivanju i provedbi javnog natječaja i internog oglasa u državnoj službi), *Official Gazette of the Republic of Croatia* No. 74/10, 142/11, 53/12.

authority proposes the appointment of the top level civil servant to the Government.[71] In addition to that, top level civil servants are subject to security and background checks, which are performed in accordance with separate regulations.[72]

2.2.4. Legal protection of applicants in the recruitment process

All countries provide legal protection to candidates which are not satisfied with the results of the competition usually through specialised appeals commissions, which enjoy a certain level of independence and are authorised to decide on breaches of civil servants rights. For example, in Croatia, the second instance body which decides on the appeals of candidates in the second instance procedure is Civil Service Committee;[73] in Bosnia and Herzegovina, Serbia and Montenegro - the Appeals Commission;[74] in Kosovo – the Commission for Soloving Disputes and Appeals. The exception to this rule are Macedonia and Bulgaria. In Macedonia, the Civil Service Agency, which also has policy making authorities, is responsible to deciding on appeals. In Bulgaria, candidates which are not satisfied with the results can make an objection to the respective selection commission,[75] as there appears to be no second istance adminsitrative body in charge of deciding on their appeals. Dissatisfied candidates are also able to initiate administrative dispute before the Bulgarian Adminsitrative Court.[76]

[71] Article 27 of the Decree of Announcement and Implementation of Public Competitions and Internal Competitions in Civil Service, *Official Gazette of the Republic of Croatia,* No. 74/10, 142/11, 53/12.

[72] Article 28 of the Decree of Announcement and Implementation of Public Competitions and Internal Competitions in Civil Service, *Official Gazette of the Republic of Croatia* , No. 74/10, 142/11, 53/12.

[73] Article 52 para 3, and Article 65 of the Civil Service Law of the Republic of Croatia.

[74] Article 63 of the Civil Service Law of Bosnia and Herzegovina; Article 136 of the Civil Service Law of the Republic of Montenegro.

[75] Article 10 of the Civil Service Law of the Republic of Bulgaria.

[76] Article 124 of the Civil Service Law of the Republic of Bulgaria.

2.3. Ways of Reducing Politicisation

All the countries in the region make a clear distinction between political and civil servant positions in the public administration, including the MoD's structure.[77] Minister, deputy minister, and advisor to minister positions are reserved for political appointees, whose term of office is linked to that of the government. On the other hand, secretary to ministry (secretary to minister in Croatia, state secretary in Macedonia, secretary and secretary with special duties in Bosnia and Herzegovina), assistant minister (state advisor in Macedonia), and director of other administrative organisations and administration authorities within ministries and their assistants are the highest civil servant positions, considering that they are filled through a competition and that for the most part they are not linked to the government's term of office.[78]

Another important legal basis for depoliticisation is setting out the minimum formal requirements for appointment to top level positions, such as professional qualifications and work experience. In Serbia, the minimum requirements are a university degree (Graduate academic studies - master, specialist academic studies,

[77] The Republic of Montenegro: The Law on Civil Servant and Employees (Zakon o državnim službenicima i namještenicima), *Official Gazette RM*, No. 50/08 from 19 August 2008, 86/09 from 25 December 2009, 49/10 from 13 August 2010, 50/11 from 21 October 2011; The Republic of Croatia: The Law on Civil Servants (Zakon o državnim službenicima), *Official Gazette RC*, No. 92/05, 107/07, 27/08, 49/11, 150/11, 34/12; The Republic of Bosnia and Herzegovina: The Law on Civil Service in the Bosnia and Herzegovina Government Institutions (Zakon o državnoj službi u institucijama Bosne i Hercegovine), *Official Gazette BiH* No. 19/02, 35/03, 4/04, 17/04, 26/04, 37/04, 48/05, 2/06, 32/07, 43/09, 8/10, 40/12; The Republic of Macedonia: The Law on Civil Servants (Законот за државните службеници), *Official Gazette RM*, No. 59/2000, 112/2000, 34/2001, 103/2001, 43/2002, 98/2002, 17/2003, 40/2003, 85/2003, 17/2004, 69/2004, 81/2005, 61/2006, 36/2007, 161/2008, 6/2009, 6/2012, 24/2012; The Republic of Serbia: The Law on Civil Servants (Zakon o državnim službenicima), *Official Gazette RS*, No. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009.

[78] In Serbia and Montenegro, secretaries to ministry and assistant ministers are appointed for a period of five years. At the Bosnia and Herzegovina state level, secretaries to ministry and assistant ministers are appointed for indefinite term, which should contribute to a full depoliticisation of these positions. The only exception from the appointment of top level officials for indefinite term is secretary with special duties, who is appointed for a definite term not exceeding five years. Secretary with special duties is normally appointed to the position of head of an independent administrative organisation, and may be reappointed to the same position for maximum two times. In Macedonia, top level civil servants (with the exception of state secretaries) are also appointed for indefinite term. A similar situation is present also in Croatia, where the positions of chief secretary, deputy head of administrative office, etc., are linked to the government's term of office, while other top level civil servants (e.g. assistant ministers) are appointed for indefinite term. Cf. Article 34 of the Montenegrin Law on Civil Servants (Zakon o državnim službenicima Crne Gore) and Article 34 of the Law on Civil Service in the Bosnia and Herzegovina Government Institutions (Zakon o državnoj službi u institucijama Bosne i Hercegovine), *Official Gazette BiH*, No. 19/02, 35/03, 4/04, 17/04, 26/04, 37/04, 48/05, 2/06, 32/07, 43/09, 8/10, 40/12; The Law on Amendments to the Law on Civil Servants (Zakon o izmjenama i dopunama Zakona o državnim službenicima), *Official Gazette RC*, No. 150/11, from 22 December 2011.

specialist vocational studies), i.e. four-year basic degree, and nine years of relevant work experience.[79] Similarly, in Montenegro, a top level official is required to have a university degree, minimum five years of work experience, and passed state professional exam.[80] State level of Bosnia and Herzegovina for top level positions also requires a university degree (VII level professional qualifications, i.e. first, second, or third cycle Bologna university degree).[81] By specifying the minimum requirements in terms of qualifications and work experience at the same time very important limitations of the political discretion in the appointment of officials to senor positions are set out.

However, over the last couple of years, in most analysed countries, there has been an increase in the politicisation of the civil service, including the personnel in the ministries of defence. That trend is reflected in: 1) general phasing out of certain top level positions from the civil servant status, 2) a wide use of the transitional legal regime relating to depoliticisation in the transitional and final provisions of the Law on Civil Servants, and 3) revisions of the legal provisions guaranteeing depoliticisation.

In some countries in the region, the highest senior civil service positions have been phased out of the civil servant system. In Croatia, in accordance with the amendments to the Law on Civil Servants from 2011, the position of chief secretary to ministry (equivalent to the UK permanent secretary), as well as the positions of deputy director of a public office and deputy director of a public administrative organisation ceased to be civil servant positions in the true meaning of the word. More specifically, in accordance with the amendments to the Law on Civil Servants from 2011, which were adopted immediately after the constitution of the new Croatian Government in December 2011,[82] instead of for indefinite term (as stipulated by the provisions of the 2005 Law on Civil Servant), secretary to ministry and other top level positions in ministries and other administrative organisations are to be appointed by the Government for a term of four years, through a public competition.[83] Article 2, para. 2 of the Law on Amendments to the Law on Civil Servants also stipulates that until a public competition is held, the Government may authorise a top level civil servant who is already employed in the civil service to perform a managerial function for a

[79] Article 45, para 2, of the Law on Civil Servants (Zakon o državnim službenicima), *Official Gazette RS*, No. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009; *Cf.* A. Rabrenović, „Depolitizacija rukovodeće strukture državne uprave Srbije- nemoguća misija?" *Pravni život*, No. 10/2011, Vol. II, pp. 307-323.

[80] Article 32 of the Law on Civil Servants and Employees, *Official Gazette RM*, No. 50/08 from 19 August 2008, 86/09 from 25 December 2009, 49/10 from 13 August 2010, 50/11 from 21 October 2011.

[81] Article 22, Para. 1, Item c), of the Law on Civil Service in the Bosnia and Herzegovina Government Institutions, *Official Gazette BiH*, No. 19/02, 35/03, 4/04, 17/04, 26/04, 37/04, 48/05, 2/06, 32/07, 43/09, 8/10, 40/12.

[82] The Law on Amendments to the Law on Civil Servants (Zakon o izmjenama i dopunama Zakona o državnim službenicima), *Official Gazette RC*, No. 150/11, from 22 December 2011.

[83] Article 2, Para. 1, of the Law on Amendments to the Law on Civil Servants, *Official Gazette*, No. 150/11, from 22 December 2011.

maximum period of six months from the date of effectiveness of the amendments to the Law on Civil Servants. This gave the Government the full right to replace the then state secretaries in a period of six months, and appoint new ones, in accordance with their political preferences, but through a public competition.

In Serbia, the public administration depoliticisation process was considerably slowed down on several occasions by the revisions of the final and transitional provisions of the Law on Civil Servants, deferring the deadline for organising the public competitions for senior civil service positions (appointments). More specifically, not long after the adoption of the Law on Civil Servants, the provisions relating to depoliticisation were revised as a result of the change of the political structure in the extraordinary elections in early 2007, and also in subsequent years for different reasons. When the Law on Civil Servants was adopted in 2005, it required that public competitions for senior civil service positions be held by 1 July 2007. However, after the general parliamentarian elections in early 2007, the Law on Civil Servants was revised in this segment first in the middle of 2007, and then also after the 2008 parliamentarian elections, and finally one more time in late 2009.[84] The 2009 amendments of the Law on Civil Servants extended the timeline for filling senior civil service positions on the basis of the competition until the end of 2010.[85] However, by the time of the constitution of the new Government in mid 2012, only one third of all senior civil service positions were filled in accordance with the procedures specified in the Law on Civil Servants.

After the constitution of the new Serbian Government in July 2012 and the adoption of the new Law on Ministries, the degree of political discretion in appointment of top level civil servants was widely increased. Article 38 of the Law on Ministries[86] stipulated that, within 45 days from this Law coming into force, a minister may propose to the Government the removal of a senior civil servant if his/her performance is not satisfactory. However, as the Law did not provide a closer definition of the phrase "satisfactory performance", the new ministers were given wide discretion to assess senior officials performance based on their personal criteria.

In Kosovo, previously existing UNMIK regulations provided a high degree of protection of senior level officials, i.e. permanent secretaries. The 2010 Civil Service Law has, however, fully transformed the recruitment process, providing much greater discretionary powers to the ministries and the Government to decide on appointment and dismissals of senior civil servants.[87]

---

[84] The Law on Amendments to the Law on Civil Servants (Zakon o izmenama i dopunama Zakona o državnim službenicima), *Official Gazette RS*, 64/2007, 67/2007, 116/2008, 104/2009.

[85] Article 57 of the Law on Amendments to the Law on Civil Servants (Zakon o izmenama i dopunama Zakona o državnim službenicima), *Official Gazette RS*, No. 104/09.

[86] The Law on Ministries (Zakon o ministarstvima), *Official Gazette RS*, No. 72/2012.

[87] D. Doll, F. Korenica, A Rogova, "The Post Independence Civil Service in Kosovo: A Message of Politicisation", *International Review of Administrative Sciences*, 2002, Vol. 78, No. 4, pp. 665-691.

It is interesting to note that in Montenegro and at the state level in Bosnia Herzegovina, there was no considerable increase in the politicisation of the public administration over the last couple of years.[88] Even if one considers the entire past decade, during which several parliamentary elections were held, these countries have a positive tendency of low degree of politicisation in the public administration. This raises the questions of causes of such a trend, and a prospective "recipe" that these countries could share with the other countries in the region with respect to the depoliticisation of the public administration.

2.4. Stability

In all analysed countries civil service employment stability is achieved primarily through clearly specified rules for termination of employment determined by civil service legislation, such as: 1) retirement, 2) expiration of the term of office (in case of appointments with a specified term of office), 3) resignation, 4) abolishment of the position due to the reorganisation of the authority, 5) removals from office, which are also regulated by law (such as, for example, a prison sentence for a specified term, etc). Termination of office for civil servants, in most countries, is also possible usually in case of two subsequent negative performance appraisals.

2.5. Salary Systems

In most of the analysed countries civil servants salary systems have been reformed and are generally governed in accordance with the principles of predictability and transparency. Traditional career based system have been replaced by position-based systems, whereby pay grades have been clearly linked with content of the job (degree of complexity, responsibility, independence etc.) instead of a more or less automatic progression based on the level of education and years in service. In all the countries civil service salaries are calculated by multiplying the coefficients set out in primary or secondary legislation (Laws on civil service salaries or Decrees) with the base pay, which is usually set annually in order to reduce the risk of high inflation.

The most predictable and transparent civil service pay system has been introduced in Serbia and, to a somewhat lesser extent, in Kosovo. In Serbia, a unified wage grid for thirteen job categories was introduced by the Law on Civil Servants Salaries adopted in 2006,[89] and the number of allowances has been kept to a minimum.

[88] J. Meyer-Sahling, *ibid*.

[89] *Official Gazette RS*, No. 62/2006, 101/2007, 99/2010.

While the salaries of the five highest, senior civil service positions, are fixed, other civil servants have an ability for horizontal pay progression, with merit based increments. The horizontal progression, based on five percent salary increase, depends on an annual performance appraisal marks.[90] In Kosovo, there are fourteen salary grades and horisontal progression is possible for all of them, also depending on performance appraisal results.[91] However, the value of the salary step is not determined by the Law, but is to be governed by the Government Decree.[92] There is also an allowance for specific working conditions and allowances for specific conditions and requests of job positions and work market, which are to be regulated by a Government decree. Although use of such allowances may be justified in some circumstances, there is a danger that they would be used excessively in practice, which goes against the principles of predictability and transparency.

Bosnia and Herzegovina has also introduced a wage grid with seven horizontal steps by its Law on Salaries and Allowances in Institutions of Bosnia and Herzegovina of 2008.[93] It has, however, kept an excessive number of allowances, which makes the system quite non-transparent and allow a relatively discretionary determination of the individual remuneration. This discretionary handling of salaries in turn contributes to the culture of dependency of staff to their managers rather than to the law, thus undermining the principle of legality in the administration.[94] Recent amendments of the Law have reduced the number of allowances,[95] due to fiscal concerns, which is a positive development. Due to budget restrains, horisontal progression has also been postponed several times and, in accordance with the most recent amendments will commence only in 2016.[96]

In Macedonia, civil servants salaries consist of several components and each of them is allocated a certain number of points. The first component is the level of

[90] Thus, for example, a civil servant who gets an exceptional performance appraisal marks for two consecutive years would be able to progress two steps in the horizontal line and thus obtain ten percent increase of salary. A civil servant whose performance was assessed as "exceptional" and "excellent" for two consecutive years, irrespective of the sequence of the assessments, is promoted for one pay step etc.

[91] There are five steps for the three highest grades and the lowest fourteenth grade and twelve steps for the remaining grades.

[92] Article 10 of the Law on Civil Servants Salaries.

[93] Law on Salaries and Allowances in Institutions of Bosnia and Herzegovina, *Official Gazette BiH* No. 50/08.

[94] SIGMA, *Assessment Bosnia and Hercegovina 2012*, SIGMA/OECD.

[95] The amendments of the Law on Salaries and Allowances in Institutions of Bosnia and Herzegovina of 2012 have excluded the provisions regarding the principle of flexibility which allowed that some civil service positions may obtain up to 50 per cent of salary increase, based on a minister's decision. See: Article 1, paragraphs 2 and 3 of the Amendments of the Law on Salaries and Allowances in Institutions of Bosnia and Herzegovina, Official Gazette, No. 50/12.

[96] Article 5 of the Amendments of the Law on Salaries of Civil Servants in Institutions of Bosnia and Herzegovina.

education, which can range from 100 points for secondary education to 250 points for a PhD degree.[97] Linking the job complexity with pay was done though introduction of the position supplement, which rewards each position relative to the nature and scope of work, complexity and responsibility for carrying out the work.[98] In addition, there are four "horizontal career steps" (A, B, C and D) for each position, which may be acquired after completion of three years of service in the same position, entailing a career supplement of 5%, 10%, 15% and 20%.[99] Performance related pay elements have been introduced by enabling civil servants to be promoted one year earlier when they get an "outstanding" performance assessment mark for two consecutive years.[100] Although the system is quite predictable as there is not much discretion in determining the level of pay, it is quite complex and not sufficiently transparent due to a number of different allowances. The horizontal progression has also been quite limited to only four steps which provides rather restrictive opportunities for career growth.[101]

Montenegro has recently adopted the new Law on Salaries of Civil Servants and Employees,[102] with fixed salary levels for senior civil servants and limited horizontal progression (3 steps in each category) for career civil servants. The Law, however, introduces an important allowance for carrying out duties on certain work positions, which is to be regulated by a Government decree.[103] The Law also determines the possibility of awarding bonus payments, depending on performance, which level is also to be determined by a Government decree. It is interesting to note that both decree are not widely available (have not been posted on the website of the Civil Service Agency) which makes the system non transparent and also not also not very predictable.

In Croatia, civil servants salaries are governed by an obsolete Civil Service Law of 2001.[104] This Law has been replaced by a new CSL adopted in 2005 and ceased to be in force, except for Articles 108-112 that regulate salaries. The Law contains general principles and ranges of coefficients (e.g. for working posts of I level – from 1,05 to 3,50; for working posts of II level – from 0,90 to 1,20[105] etc), while the

[97] Article 35 of the Civil Service Law of Macedonia.

[98] Article 36 of the Civil Service Law of Macedonia.

[99] Articles 37 and 38 of the Civil Service Law of Macedonia.

[100] In contrast, whenever assessed with an "unsatisfactory" mark, the civil servant is "demoted" to a lower career development step and receives a lower career supplement until the next annual performance assessment.

[101] Analytica, *Introducing Career-Based System in Civil Service*, Analytica, April 2008, *http://www.analyticamk.org/files/ReportNo12.pdf.*

[102] *Official Gazette of the Republic of Montenegro*, No. 14/12, adopted on 7 March 2012.

[103] Articles 18 and 19 of the Law on Salaries of Civil Servants and Employees.

[104] Civil Service Law, *Official Gazette of the Republic of Croatia*, No. 27/01.

[105] Article 109, paragraph 4 of the Croatian Civil Service Law.

concrete coefficients for each post have been set by a Government Decree.[106] Since its adoption in 2001, the Decree has been subject to 34 amendments,[107] which means that it has been changed around 3 times annually. Such frequent changes are probably the consequence of different kinds of pressures for increasing the existing coefficients and are not in line with principle of salary predictability. It should be noted that in Croatia reform of the civil service salary system was initiated in 2008, but did not succeed and no attempt has been made to re-launch the process since then.[108]

All the countries in the region have kept a separate 'years of service' allowance, which gives disproportionate weight to a person's length of service in determining total pay and discourages performance. Years of service allowances can in some instances add up to 35% to overall pay.[109] Although length of service is a legitimate factor in pay awards, which exists in many European countries, in transitional environments seniority increases may have an adverse effect on staff motivation, particularly on young personnel. As the years of service make a big difference in the total pay they discourage young personnel to join and stay in the civil service, due to uncompetitive salary levels and also discourage good performers.

2.6. Key Problems in Implementation

Most countries in the region face fairly similar problems with regard to HRM in the civil service. General concerns are that in spite of a well-established legal frameworks, recruitments that take place across the entire public administration are not based on merit. In Bosnia and Macedonia party politics continues to play a large role in civil service recruitment and promotion, even though it is often disguised as ethnic representativeness.[110] In Serbia, recruitment procedures are still largely based on political affiliation and patronage. As the impartiality mechanisms of the recruitment rules are relatively weak it is not difficult to circumvent them. Hence, recruitment

[106] Decree on Names of Working Posts and Coefficients of Complexity of Jobs in the Civil Service, *Official Gazette of the Republic of Croatia*, No. 37/01, 38/01, 71/01, 89/01, 112/01, 7/02, 17/03, 197/03, 21/04, 25/04, 66/05, 131/05, 11/07, 47/07, 109/07, 58/08, 32/9, 140/09, 21/10, 38/10, 77/10, 113/10, 22/11, 142/11, 31/12, 49/12, 60/12, 78/12, 81/12, 100/12, 124/12, 140/12, 16/13, 25/13.

[107] Decree on Names of Working Posts and Coefficients of Complexity of Jobs in the Civil Service, *Official Gazette of the Republic of Croatia*, No. 37/01, 38/01, 71/01, 89/01, 112/01, 7/02, 17/03, 197/03, 21/04, 25/04, 66/05, 131/05, 11/07, 47/07, 109/07, 58/08, 32/9, 140/09, 21/10, 38/10, 77/10, 113/10, 22/11, 142/11, 31/12, 49/12, 60/12, 78/12, 81/12, 100/12, 124/12, 140/12, 16/13, 25/13.

[108] J. M. Sahling, *op. cit*. p. 57.

[109] In Serbia, the maximum ratio of years in service increment in total pay is 16 percent, in Bosnia and Herzegovina, Croatia and Macedonia 20 percent, while in Montenegro it can go up to 35 percent.

[110] SIGMA, *Assessment, Bosnia and Herzegovina*, 2012, SIGMA/OECD.

decisions are still very much based on managers' discretion.[111] In Montenegro, ministries and administrative bodies often disregard legally binding procedures. Instead of a principle of merit, patronage networks, clientelism and politicisation dominate recruitment and promotion practices.[112] In Kosovo, a solid legal framework has been recently established, but not much progress has been done with respect to its implementation.[113] Despite legislative improvements, the civil service have been repeatedly reported as being weak and rather politicised.[114]

Politicisation of the top level management is another common weakness in the region. Large-scale dismissals happen to officials in higher echelons following the changes of governments after elections, in spite of the well developed legal framework,[115] which negatively affects the continuity, quality of work and stability of civil service.

Another fairly common practice in all countries is to employ staff on the basis of a temporary contract. This procedure should be an exception tool to be used for temporary purposes only. In some countries, e.g. Macedonia, these temporary posts are transformed into a civil service position and the temporary contract candidate becomes a civil servant, circumventing the regular legal procedure.[116]

The key problem with implementation of newly reformed civil service pay systems is that remaining allowances tend to be interpreted fairly broadly, in order to get around the established rationalized pay systems. For example, in Montenegro, extensive use of 'difficult working conditions' allowance, which was introduced by amendments of the previous Law on Salaries of Civil Servants and Employees in January 2008, was a subject of fierce debate and a review by Constitutional Court.[117] In Serbia also, one of the remaining allowances, such as for work 'on standby' (u pripravnosti), was started to be applied to a number of personnel which did not have to be called on duty after working hours, which is an obvious misuse of the formally well established system.

Finally, absence of managerial skills to implement modern human resource management practices, such as performance appraisal which provides a basis for performance related pay has also been an important obstacle to reform. Weak

111 SIGMA, *Assessment, Serbia 2012*, SIGMA/OECD.

112 SIGMA, *Assessment, Montenegro 2012*, SIGMA/OECD.

113 SIGMA, *Assessment, Kosovo 2012*, SIGMA/OECD.

114 SIGMA, *Kosovo Public Service and Administrative Framework: Assessment May 2008*, p.1

115 Sigma, 2008. *Assessment – Macedonia - Public Service and the Administrative Framework*. SIGMA/OECD.

116 Sigma, 2009. *Assessment – Macedonia - Public Service*. SIGMA/OECD.

117 The Administrative Court of Montenegro has initiated a procedure for review of legality of amendments of Civil Servants and Employees Salary law, by which salaries of a number of officials and senior civil servants could be increased by 30% on the basis of the allowance of 'difficult working conditions'. Review request No. IV-14/08, Podgorica, 22.01.2008.

capacity of central civil service agencies and human resource management units in individual institutions have further exacerbated the situation.[118] Therefore, more work needs to be done to strengthen the capacities of key institutional factors to oversee the implementation of main elements of a complex system of civil service human resources management.

3. CONCLUDING REMARKS

Based on this brief comparative law review relating to human resource management of civil servants in the countries in the region, it may be concluded all analysed countries have in a certain degree aligned their civil service legislation with international standards.

The countries, however, differ with respect to the level of alignment of different aspects of human resource management. The countries which have amended their civil service legislation most often are Bulgaria and Macedonia. As pointed out earlier, such frequent changes bring about high level of legal uncertainty and hence these countries do not represent good examples of effective civil service regulation. As regards the process of recruitment, it may be argued the merit-based recruitment process is legally ensured to a much higher degree in Bulgaria, Bosnia and Herzegovina and Kosovo than in other countries in the region. As regards politicisation, Bosnia and Herzegovina and Montenegro stand out as good examples, as they haven't substantively changed their legislative frameworks on depoliticisation over the past years. Finally, all countries provide a solid legal framework for ensuring protection of discretionary dismissals, but they differ with respect to ensuring predictability and transparency of salary systems. Serbia and Kosovo may be the best examples in this respect, while Bosnia and Herzegovina and Croatia are the key laggards in this reform aspect. For all these reasons, due to unevenness in the quality of legislation in different HRM aspects, all countries could be graded with grade B, which denotes a moderate degree of compliance of the legal framework with international standards.

A separate question, of course, is whether the legal anchoring of best international standards in the HRM area is really appropriate for the countries in the region and their level of development and to which extent the existing legal standards are applied in practice? Is the current HRM legislation a maximum that countries in the region can achieve, given the social circumstances in which civil service systems exist, such as the dominance of the politics over all segments of society, instability

[118] A. Rabrenovic, "Civil Service Pay Reform in Southeast Europe: Creating Incentives for Performance", in M. Vintar, P Pevcin (eds.), *Contemporary Issues in Public Policy and Administrative Organization in South East Europe*, University of Ljubljana, 2009, pp. 294-213.

of political systems, transitional economy and global economic crises? All these questions shall be analysed in more depth in the concluding chapter.

Assessment of Conformity of the HRM Legal Framework in the Analysed Countries with the International Standards

Country	**Grade**
Bulgaria	B
Bosnia and Herzegovina	B
Croatia	B
Kosovo	B
Montenegro	B
The Former Yugoslav Republic of Macedonia	B
Serbia	B

Prof. Milan Milosevic, PhD [1]

CONTROL AND OVERSIGHT OF INTELLIGENCE AND SECURITY SERVICES

1. INTERNATIONAL STANDARDS

1.1. Introductory Remarks - Importance of the Oversight and Control of Intelligence and Security Services

Every state has its intelligence and security apparatus with a set of specific objectives and opportunities. Intelligence and security services are an instrument in the hands of the top-level state institutions, which can be used for good or evil purposes.[2] These services are a key component of every state, and as such should provide an independent analysis of the information relevant to the security of the state and society. Considering this position, the services have to justify their actions in the eyes of the public, to demonstrate the efficiency of their operations, and comply with the principle of legality, to ensure that the intelligence and security system of a country facilitates the implementation of the state policy the authorities, and the maintenance of the national security system. In this regard, every democratic country should establish a clear and comprehensive legal framework, which would ensue from the democratic structures and processes and insure the continuity of the democratic values in the area of the activities of the intelligence and security services as well.

The nature of the intelligence and security services' responsibilities requires them also to use secrets, i.e., covert methods of data collection in their operations, which is inconsistent with the principles of open society. Certain sensitive areas of their activities must remain secret, which primarily relates to their information sources, operations, methods, procedures, operating resources, anonymity and protection of their staff, and confidential documents. The secrecy that surrounds the activities of the intelligence services encourages abuse and can lead to the service acting independently.

---

[1] Professor, Academy of Criminalistic and Police Studies, Belgrade.

[2] *Cf.* H. Born, "Democratic and Parliamentary Oversight of the Intelligence Services: Practices and Procedures," *Working Paper Series* No. 20, Geneva 2002.

On the other hand, the political elite, as a rule, tends to establish their control over all parts of the system, which is particularly evident in unstable and post-conflict societies. In this respect, the purpose of the oversight of the authorities is to prevent them from abusing the intelligence and security services. The preconditions for the effective civilian democratic control include the multi-party system, market economy, the government established on the democratic principles of removability, and the rule of law. In contrast to that, in the conditions of misrule and in authoritarian and undemocratic regimes the security and intelligence institutions are subject to the discretion of the rulers. Human rights and civil liberties are indispensable elements of the system, and must be guaranteed by the constitution, as well as the right of the public, citizens, the media and other parts of civil society to participate in the control of the security services.

The democratic accountability check of the intelligence and security services aims to protect these institutions from political abuse, ensuring at the same time that they do not become independent, i.e., beyond the reach of the executive. The security and intelligence services must also be prepared to meet the demands of citizens, articulated by their elected representatives in government and parliament, who conduct the political control over those services.

The oversight and control of the intelligence and security services in the post-communist countries deserves special attention, especially in terms of the need for restructuring and depoliticisation of the services, and the need for a democratic oversight of their compliance with the rule of law. The question whether the security services in the post-communist systems of the late 20th and early 21st century were really under control, or whether the new political elites in these countries believed too easily that they had the power and the loyalty of the previous regime services remains unanswered. In practice, there are evident manipulations and the existence of reserve teams in the services, which come into play depending on the outcome of the election results. Such situations confirm the necessity of redefining the intelligence and security services organisation, renewing their human resources, particularly in terms of their leadership, raising the level of expertise and professionalism of their staff, and particularly ensuring effective control of their operations.

1.2. Sources of International Law

At the level of the relevant international institutions such as the United Nations (UN), the Organisation for Economic Cooperation and Development (OECD), the Organisation for Security and Cooperation in Europe (OSCE), the Parliamentary Assembly of the Council of Europe (PACE), the Inter-Parliamentary Union, etc., an international consensus has been reached on the issue of the intelligence and security services oversight, implying that these services should be subject to the democratic accountability testing methods. The sources of international law norms and standards

relating to the democratic oversight of the security and intelligence services include *inter alia*:

- *Human Development Report* by UNDP (United Nations Development Programme) from 2002, specifying the democratic governance principles in the security sector;[3]

- *Code of Conduct on Politico-Military Aspects of Security,* adopted at the plenary session of the OSCE Forum for Security Cooperation, held in Budapest on 3 December 1994, whose Items 20 and 21 explain the principles of the democratic political control of the military, paramilitary, and internal security forces, as well as of intelligence services and the police;[4]

- *Recommendation 1402* of the Parliamentary Assembly of the Council of Europe, stating *inter alia* that, "the internal security services must respect the European Convention on Human Rights ...," that, "any interference by operational activities of internal security services with the European Convention on Human Rights must be authorised by law," and that, "the legislature should pass clear and adequate laws putting the internal security services on a statutory basis;"[5]

- *Conclusion of the Inter-Parliamentary Union*, stating that "democratic oversight of intelligence structures should begin with a clear and explicit legal framework, establishing intelligence organisations in state statutes, approved by parliament," and that "statutes should further specify the limits of the service's powers, its methods of operation, and the means by which it will be held accountable;"[6]

- *Resolution 113* of the Assembly of Western European Union (WEU), adopted on 4 December 2002, which *inter alia,* "calls on the national parliaments to: (1) support plans for reforming intelligence systems, while defending parliamentary prerogatives with a view to more efficient and effective democratic scrutiny of intelligence gathering activities and of the use to which that information is put...;"[7]

- *Guidelines and Reference Series* of the Development Assistance Committee (DAC) of the Organisation for Economic Cooperation and Development (OECD) under the title "Security System Reform and Governance: Policy and Good Practice," published in 2005, stating *inter alia* that, "the security system (including security and intelligence services) should be managed according to the same principles of accountability and transparency that apply across the public sector, in particular through greater civil oversight of security processes;"[8]

[3] *Cf.* UNDP, *United Nations Human Development Report 2002*, Chapter 4, Box 4.3, Oxford University Press, New York 2002, p. 90.

[4] *Cf.* OSCE, *Code of Conduct on Politico-Military Aspects of Security*, OSCE, Budapest, 3 December 1994, p. 3.

[5] Available at: *http://www.assembly.coe.int/Documents/AdoptedText/ta99/EREC1402.htm*

[6] H. Born (ed.), *Parliamentary Oversight of the Security Sector – Principles, Mechanisms and Practices*, IPU & DCAF, Geneva 2003, p. 63.

[7] Source: *http://www. assembly-weu.org/en/documents/sessions_ordinaires/pv/2002/pv09.php#P225*

[8] *Cf. Security System Reform and Governance: A DAC Reference Document*, OECD, Paris 2005, pp. 22-23.

It has to be taken into account that at the international level there is no oversight of the security and intelligence services, although the European Court of Human Rights, which operates in accordance with the European Convention on Human Rights, accepts reports form individuals relating to the activities of governmental bodies in almost all the European countries.

3. Contents of the Standards Relating to the Oversight and Control of Intelligence and Security Services - A Desirable Practice That Needs To Be Established

The rule of law is the essential and indispensable part of democracy. The security and intelligence services may be legitimate only if they are legally founded, and if their powers ensue from the legal system. Without such a framework there is no basis for distinguishing between actions that are carried out for the benefit of the country and those performed by offenders, including terrorists. Even in the most difficult situations, "national security" should not be used as an excuse for abandoning the obligation to comply with the law, which is inherent to all democratic countries. On the contrary, the extraordinary powers of the security services must be based on the legal framework and the control system defined by the relevant legal standards.

Legislation is necessary also to determine or to restrict the constitutional rights of individuals in cases involving the state security interests. This can be achieved in two ways. The first option is restricting human rights in order to protect the interests of society.[9] Another well-known example is restricting the freedom of expression of the intelligence officers in order to maintain secrecy of their operations. As the second option, in the crisis situations, when national security is seriously endangered, it is permissible to temporarily disregard violations of certain rights. However, some human rights are inviolable. Thus, pursuant to the provisions of the International Covenant on Civil and Political Rights, the following rights cannot be violated: the right to life, right to protection from torture or cruel, inhuman or degrading treatment or punishment, right to freedom from slavery or servitude; right to prohibition of imprisonment for inability to fulfil a contract, right to protection from retroactive penal measures, right to be treated as a person before the law, and the right to freedom of thought, conscience and religion.[10]

---

[9] *Cf.* Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex 4, UN Doc E/CN.4/1984/4 (1984). The Siracusa Principles are available at: http://www.graduateinstitute.ch/faculty/clapham/hrdoc/docs/siracusa.html

[10] International Covenant on Civil and Political Rights, Part II, Article 4.2, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1996), 999 U.N.T.S. 171, entered into force March 23, 1976.

As far as restricting human rights at the international level, the European Convention on Human Rights, for example, allows the restriction of the right to a public trial, right to privacy, and the freedom of religion, freedom of expression and association "in accordance with the law," as well as any restrictions that are "necessary in a democratic society," in the interest of national security.[11] In addition, if the services have the legal authority to interfere with private property or communications, citizens should be ensured access to the legal complaint procedures in cases of improper conduct. This is one of the ways in which countries signatories of the European Convention on Human Rights can meet their obligation to provide effective remedies for the provable human rights violations.[12]

The elaboration of the principles of good governance and best practices in the security sector is provided in the OSCE *Code of Conduct on Politico-Military Aspects of Security*, adopted in 1994. In accordance with this document, those principles imply that: the state has a legitimate monopoly of force; the security services are accountable to legitimate democratic governments; parliament is sovereign and holds the executive accountable for the development, implementation, and revision of the security and defence policy; parliament has a unique constitutional role in approving and overseeing the defence and security expenses; the principles of good governance and the rule of law apply to the security system as well as to other authorities; the members of the security system are individually responsible before the courts for any violations of national and international laws; and the institutions of the security system are politically neutral.[13]

The legal standards and best practices must be developed on four levels of the oversight of intelligence and security services. Each of these levels can be viewed as a specific layer of democratic oversight including: internal controls at the level of the service; control by the executive; parliamentary oversight; and the controls by independent oversight bodies.

The first level of the oversight of the operations of the intelligence and security services is internal control within the security services. In this respect, internal control includes the examination of the powers and related accountability of the management for the activities of their subordinate staff, including the mechanisms for the protection of the employee rights, and disciplinary procedures within the respective security service. Internal control ensures the lawful implementation of the measures and activities within the competence of the security service, i.e., efficient and professional enforcement of law. The internal control activity is a necessary basis for the external democratic oversight of the intelligence and security system institutions.

---

[11] *Cf.* European Convention for the Protection on Human Rights and Fundamental Freedoms, Articles 6,8,9-11,European Court of Human Rights, Strasbourg 2011, available at: http://www.echr.coe.int

[12] *Ibid*, Article 13.

[13] Source: Code of Conduct on Politico-Military Aspects of Security, OSCE, Budapest, 3 December 1994, pp. 3-4.

The second level of the oversight of the operations of the intelligence and security services relates to the control performed by the executive, and implies the accountability of the relevant government officials and/or Ministers responsible for specific intelligence and security services. The control by the executive focuses primarily on determining the program orientation, the main tasks and the priorities of the security services. This level of control implies also the competent minister's insight into the operations of the relevant line services and their oversight, the control of covert operations, international cooperation, and the safeguards against the abuse of power. The government, as the executive body, proposes laws, adopts bylaws, proposes the budget, and provides the guidelines for the operation of the security service, including also the organisation and implementation of controls. In addition, the executive authorities use other forms of control of the security services primarily through their functions of advisory bodies in the security sector (security/intelligence adviser, inspectorates, and commissions for the oversight of the services).

The third level relates to parliamentary oversight, focusing mostly on the regulatory framework, and the legality of the operations of the intelligence and security services, the approval of or insight into their program orientation and specific activities, as well as the adoption of their budgets. Considering that it is designed to directly represent the will of the people - the voters, parliament is the key representative of the people – incumbents of sovereignty. In this capacity, parliament oversees the intelligence and security services in the following manners: by passing laws governing the security system (establishment of the security system institutions, specifying the basis of their organisation, specifying their powers, and the organisation of their internal relations and relations with other institutions, etc.); approving of the security services' budgets; carrying out specific direct authorisations (approval of the proposal for the appointment of top-level officials in the security service, ratification of international treaties); and by a direct control of the security system.

The operations of the independent bodies responsible for oversight of the security services, as the fourth level of democratic oversight, relates to the independent scrutiny of their operations from the perspective of citizens (e.g., general attorney or parliamentary commissioner), in terms of the effective implementation of the government policies (e.g., chief inspector) and from the aspect of spending the taxpayers' money (supreme audit institutions). The civil society, scientific associations, and citizens may restrict the activities of the security services by offering a different view of the security situation, and by promoting public debate on the activities of the intelligence and security services, and the accountability of their officials (academic institutions and civil society organisations), by exposing scandals and crisis situations (the media), or by filing action in case of violations (citizens).

A separate form of control of the intelligence-security services is a judicial review, i.e., the statutory role of courts in granting authorisation for specific intelligence activities, assessing the legality of these services, and prosecuting their members in cases of misconduct.

2. Comparative Legal Review of the Control and Oversight of Intelligence and Security Services

2.1. Civilian and Military Intelligence Services

When it comes to the control and operation of the specialised intelligence and security services in Bosnia and Herzegovina, it has to be noted that, in accordance with the Dayton Agreement, the security and defence sector did not fall within the excusive jurisdiction of Bosnia and Herzegovina. However, over time, the competence for the establishment and control of the intelligence services was transferred from the entities to the Bosnia and Herzegovina state level. Accordingly, an integrated unit (the Intelligence and Security Agency) was constituted at the Bosnia and Herzegovina state level, prohibiting any action by any other civilian intelligence and security structures in Bosnia and Herzegovina, and with the entry into force of this Law the entity-level intelligence services were abolished – the *Federation Intelligence and Security Service* (OSS) and the *Republic of Srpska Intelligence and Security service* (OBS).

Bosnia and Herzegovina Intelligence and Security Agency (OBA)[14] was established by a special law, adopted on 14 April 2004, by the Parliamentary Assembly of Bosnia and Herzegovina, at the initiative of the then High Representative Paddy Ashdown. The responsibilities of the Agency included the collection, analysis and dissemination of the intelligence information in order to protect the security, sovereignty, territorial integrity and constitutional order of Bosnia and Herzegovina. In addition to the security issues, OBA deals with global threats, such as terrorism, espionage directed against Bosnia and Herzegovina, sabotage against the vital national infrastructure, organised crime, including drug trafficking and arms trafficking, illicit production of weapons of mass destruction, acts punishable by international humanitarian law, and acts of organised violence or intimidation against ethnic or religious groups in Bosnia and Herzegovina. The OBA service is managed by its General Director. The headquarters of the service are in Sarajevo, and the main centres are located in Brcko, Mostar, Sarajevo, and Banja Luka. In accordance with the job establishment, this service has approximately 700 staff, mostly absorbed from OSS and OBS.

Bosnia and Herzegovina Law on Defence established a unique defence structure of Bosnia and Herzegovina, and the Ministry of Defence and Armed Forces of Bosnia and Herzegovina, which is responsible for overseeing all the entities of the Bosnia and Herzegovina Armed Forces. The Ministry of Defence of Bosnia and Herzegovina has a Department for Security and Military Intelligence, which is responsible for the coordination of intelligence, counterintelligence, and security activities within the defence system, in accordance with the common security policy of Bosnia and Herzegovina.

[14] *Official Gazette of Bosnia and Herzegovina*, No. 12/04 and 56/06.

It has to be emphasised that in 2003 the Bosnia and Herzegovina state established the **Ministry of Security of Bosnia and Herzegovina,** which comprised in terms of organisation: Bosnia and Herzegovina Border Police, National INTERPOL Centres, and the *State Investigation and Protection Agency - SIPA*. That meant that *some competences of the entity-level Ministries of the Interior* were transferred to the Bosnia and Herzegovina state level, including border control and security, countering international terrorism, combating cross-border and organised crime, action against human trafficking and illegal migrations, war crimes investigation, mutual police cooperation, and the implementation of the immigration and asylum policy in Bosnia and Herzegovina.

Simultaneously with the process of the international recognition of **Macedonia**, the country's security and intelligence system was established as well. The basis of the system comprised the state and public security services of the Ministry of the Interior (*Ministarstvo za vnatrešni raboti*), which, particularly in the period between the declaration of independence and the admission to the United Nations in April 1993, implemented *inter alia* the intelligence function. The establishment of the new security and intelligence system was finalised in 1995 with the enactment of the new Law on Internal Affairs and a separate Law on the Intelligence Agency.

The Security and Counterintelligence Directorate (UBK) is a line security and intelligence service within the Ministry of Interior. This Directorate performs the activities related to the protection from espionage, terrorism, and other activities carried out by violent means, which threaten or undermine the constitutionally established democratic institutions. This service is responsible also for suppressing serious forms of organised crime. UBK is headed by its Director, who is appointed and dismissed by the Government, at the proposal of the Minister of the Interior. The Director, whose term of office is four years, is independent in the performance of the functions within the jurisdiction of the Directorate, and reports to the Minister and the Government about his/her work. In organisational terms, UBK comprises the central office within the Ministry of the Interior, its centres, divisions, and detachments. Finally, UBK has also a number of independent departments such as the Department for Protection of Persons. UBK has its regional departments in Skopje, Kumanovo, Stip, Prilep, Strumica, Bitola, and Veles.[15]

The military component of the Macedonian intelligence and security system is the Department for Coordination of Intelligence and Counterintelligence Operations and Control of Confidential Documents. In fact, the reorganisation of the Ministry of Defence in accordance with the NATO standards resulted in the establishment of the Department for Coordination of Intelligence and Counterintelligence Operations and Control of Confidential Documents, which deals mainly with counterintelligence protection of the Macedonian Army units and institutions, and

[15] These departments have divisions and detachments in municipalities. The Territorial Department for Skopje, for example, has four divisions (in the municipalities of Cair, Kisela voda, Karpos, and Gazi Baba).

gathering intelligence about the armed forces of the neighbouring countries and the security situation in the region, on behalf of the Ministry of Defence and the Macedonian Army Headquarters. The Head of Department, through the Assistant Head of Department, manages the departments for coordination of intelligence and counterintelligence operations, operational and technical support, planning, cooperation with NATO, and the support of military attaches, analytics, control of confidential documents, and the support of staffs, and the general affairs.

At the same time, the Head of Department for Coordination of Intelligence and Counterintelligence Operations and Control of Confidential Documents is the superior of the Macedonian Army HQ Intelligence and Security Service (G-2), as its executive agencies include the military police battalion, central records and files, and the Department for Mutual Security and Relations with NATO.

The main, central autonomous intelligence service of the Republic of **Bulgaria** is the National Agency for National Security (NANS). This service was established by the amendments to several laws, which came into force on 1 January 2008. The new central autonomous security and counterintelligence service comprised the former *National Security Service - NSS*, the *Security Service – Military Police and Counterintelligence Service* within the Ministry of Defence, and the *Intelligence Service* within the Ministry of Finance. The former heads of these agencies were appointed Deputy Directors of NANS. The competences of the National Agency for National Security focused on the counterintelligence action against international terrorism, combating cross-border drug trafficking, action against corruption in the state structures, and detection of money laundering. For the performance of those functions, the Service was allocated approximately 3,000 staff.

The Ministry of Defence[16] comprises the Military Information Service (SVI), whose basic functions include the collection, processing, and analysis of data, information and documents of interest to defence and national security, their maintenance and dissemination to beneficiaries in accordance with the Regulation on the Protection of Information. Its internal organisation is adapted to its functions as well.

The National Security Service (*Nacionalna služba za ohrana*) is an autonomous security and protection service and the successor of the former Fifth Administration of the State Security Service. It was established by a government decree in 1992, but it is under direct jurisdiction of the President of the Republic of Bulgaria. Its primary function is the protection and security of the state officials (members of the government, parliament, the President and some of his/her associates), as well as senior foreign officials during their visits to the Republic of Bulgaria. The Service is headed by the Chief of Service.

[16] Until 2008, the security functions within the Ministry of Defence, and the Bulgarian Army institutions and units had been performed by the *Security Service – Military Police and Counterintelligence Service*, which is now a part of the National Agency for National Security (NANS).

The process of democratic transformation of the security and intelligence system of **Serbia** and the former Federal Republic of Yugoslavia was initiated after the democratic changes in 2000. With the succession of Montenegro from the State Union of Serbia and Montenegro in June 2006, the conditions were created for the Republic of Serbia to regulate and organise its own intelligence and security system autonomously, as an independent state.

The Security and Information Agency of the Republic of Serbia (BIA) was established by the Law on the Security and Information Agency from 27 July 2002, but from 28 October 2002, it is a civilian service with the status of a special organisation, i.e., autonomous institution directly linked to the Government of the Republic of Serbia. BIA has fully taken over the jurisdiction, functions, and duties of the former State Security Sector, including all offices, cases, complete archives and other materials, equipment, operating and other resources that had been used by the State Security Sector.

BIA was established as a special organisation for: a) the protection of the security of the Republic of Serbia, and detection and prevention of any activities aimed at undermining or overthrowing the constitutional order, b) research, data collection, processing, and evaluation of the security and intelligence information and the information relevant to the security of the Republic of Serbia, and notifying the competent authorities, and c) other duties specified by the Law (cooperation with foreign authorities, organisations, and agencies, etc.). Accordingly, the scope of activities of the Security and Information Agency includes counterintelligence, intelligence, and other security activities. In terms of its internal structure, BIA is divided into regional territorial centres (CBIA) and departments, and its Headquarters, i.e., organisational units – administrations within the Agency Headquarters. BIA comprises also the Security Institute, the Education and Research Centre, and the Ambulance. The work of the Agency is headed by its Director, who is appointed and dismissed by the Government.[17] In the management of the Agency, the Director is assisted by his/her Deputy, assistants, and advisers.

The Military Intelligence Agency (VOA) is a professional body of the Ministry of Defence *in charge of and responsible for the military intelligence activity*. Its functions include offensive collection of information on all forms of violation of the sovereignty and territorial integrity and defence of the Republic of Serbia, and the Ministry of Defence and the Serbian Armed Forces. In this respect, VOA collects, analyses, processes, assesses and shares the data and information of military, military-political, military-economic, and scientific-technical nature, relating to potential and actual threats, activities, and intentions of foreign countries and their armed forces, international and foreign organisations, groups and individuals. Together with the Headquarters' G-2 Directorate, VOA comprises the military intelligence system of

[17] The Director is obliged *inter alia* to report to the National Assembly and the Government of the Republic of Serbia biannually on the performance of the Agency, and the security situation in the Republic of Serbia.

the Republic of Serbia, and that structure includes also the vertical organisations, intelligence reconnaissance and reconnaissance units that are operational and tactical parts of the Serbian Armed Forces. In its Headquarters, VOA has four departments (data collection, analysis and assessment, human resources, and logistics), and one division (internal controls).

The competences of the Directorate for Intelligence and Reconnaissance Operations, Special and Electronic Operations (G-2) include: planning, organisation, management, and control of the implementation of the *intelligence and reconnaissance and special assignments*, as well as *electronic and counter-electronic operations* within the Serbian Armed Forces. The Directorate is responsible also for the development of the systemic documents, planning, organisation, management, and implementation of the Army intelligence security; the collection and processing of data obtained in the course of reconnaissance operations; the development and dissemination of intelligence information to interested parties; planning and organisation of intelligence and counterintelligence trainings at the Headquarters and the Army commands, units, and institutions; training, combat readiness, planning of the development of the units for reconnaissance, electronic reconnaissance and counter-electronic operations.

The Military Security Agency (VBA) is responsible for the counterintelligence protection of the overall defence system, including VOA. In terms of its responsibilities and functions, it is stipulated that VBA detects, monitors, documents and intersects: intelligence and other hostile activities of foreign intelligence services within and directed towards the Serbian Armed Forces; domestic and international terrorism, illegal traffic of hazardous substances, smuggling of weapons and military equipment, and subversive activities directed towards Serbian Armed Forces and the Ministry of Defence, and the crimes against the constitutional order and security of the Republic of Serbia, against humanity and international humanitarian law, and the gravest acts with elements of organised crime. VBA also performs research and documentation of paramilitary organisations and illegal arming, and the counterintelligence protection of the commands, institutions, facilities, and members of the Ministry of Defence, organisational posts, information and data of special importance for the country's defence and the Ministry of Defence in the international and humanitarian operations. The operations of VBA are managed by its Director who reports directly to the Ministry of Defence of the Republic of Serbia. The VBA structure comprises the Agency (Headquarters) and its executive units – the VBA centres in Belgrade, Novi Sad, Nis, and Kraljevo, and the Centre for Operational and Technical Support and the Centre for Staff Training.

In 2007, the Law on Foundations of the Organisation of Security Services in the Republic of Serbia abolished the former *Research and Documentation Service* (SID) within the Ministry of Foreign Affairs, so that the Ministry now has only the **Security Service**, responsible for preventive security, counterintelligence and counter-communication interception protection of the Ministry's employees, facilities and the Republic of Serbia foreign DCM missions. These responsibilities include the

performance of security checks, direct physical security of the facilities and staff, and development of security assessments.

The Law on the Security and Intelligence System of the Republic of **Croatia,** which came into force on 17 August 2006,[18] stipulated the new organisation of the Croatian security and intelligence services. In accordance with the provisions of that Law, the former *Counterintelligence Agency* (POA) and *Intelligence Agency* (OA) were merged into one service under the name Security and Intelligence Agency (SOA). The provisions of the current Law focus on the reduction of the community intelligence system, empowerment of the security services, and the introduction of the new security services control system.

The competencies of the Security and Intelligence Agency include: overseas operations on the collection and analysis of the political, economic, military, and security data; countering terrorism and other forms of organised violence; collection, analysis and evaluation of data on the activities of foreign intelligence services directed towards the state; monitoring the impact of certain individuals, groups and organisations in the territory of Croatia, which are directed against the national security; combating organised and economic crime; participating in the counterintelligence protection and security of protected persons, buildings and facilities, as well as major conferences and meetings at the request of the Government of the Republic of Croatia. The Security and Intelligence Agency is territorially divided into 10 regional centres and the SOA Headquarters in Zagreb.[19]

The statutory competencies of the Military Security and Intelligence Agency (VSOA)[20] include the collection, analyses, processing and evaluation of the data on the foreign military and defence systems, on the external pressures that may influence the country's defence capability and on the overseas activities aimed at undermining the defence power.[21] In the territory of Croatia, VSOA collects, analyses, processes, and evaluates the information relating to the intentions, capabilities, and plans of action of individuals, groups, and organisations in the country aimed at endangering the country's defence capability, and takes measures to detect, monitor, and counter these activities, without having any repressive powers.

In addition to the above military and civilian services, the Law on the Security and Intelligence System of the Republic of Croatia established also the Institute for Information Systems Security (ZSIS) and the Operational and Technical Centre for Telecommunications Oversight (OTC). The activities of these institutions are in function of SOA and VSOA, but also the police and prosecutorial agencies and entities - including the Office for Suppression of Corruption and Organised Crime (USKOK).

[18] *Official Gazette of the Republic of Croatia*, No. 79/2006.

[19] *http: www.soa.hr.*

[20] *http: www.morh.hr.*

[21] The Law on the Security and Intelligence System of the Republic of Croatia (Zakon o sigurnosno-obavještajnom sustavu Republike Hrvatske), Article 24.

The National Security Agency of the Republic of **Montenegro** is the legal successor of the State Security Service of the Ministry of the Interior, and it is an autonomous central intelligence and security institution, which has no police powers, except those specified by law.[22] As a part of the Montenegrin security system, the National Security Agency (ANB), in cooperation with the government authorities, ministries, and administration authorities, in line with the security standards, and on the basis of the Constitution and the law, performs the national security functions relating to the protection of the constitutional order, security and territorial integrity of Montenegro, the constitutionally established human rights and freedoms, as well as other activities of interest to the national security of Montenegro.

The Director of National Security Agency is appointed and dismissed by the Government, subject to the opinion of the Parliament. The Director cannot be a member of any political party or act in a political manner. For other employees of ANB, the Law stipulates the obligation to perform the assigned tasks and functions in accordance with the law, other regulation, or general act, whereby neither they nor the Director can be members of any political party. Internal control is delegated to the Inspector General, who is appointed and dismissed by the Government for a period of five years, with the possibility of re-election. Besides the ANB Director, the Inspector General is required to report on the control to the Government of Montenegro.[23]

In accordance with the NATO standards, from 2007, the organisational and formation structure of the Montenegrin Armed Forces comprises the intelligence-reconnaissance staff elements, starting from the Headquarters level, and up to levels of the command battalion, special troops, and naval forces. More specifically, the Montenegrin Army Headquarters comprise the Department for Intelligence-Reconnaissance and Security Operations (J-2). In accordance with Article 41 of the Law on Defence, the security functions in the Montenegrin defence sector are organised within the Department for Military Security Affairs, which is an organisational unit of the Ministry of Defence. The security functions in the defence sector relate *inter alia* to the security protection of the Ministry, the Armed Forces, Military Police professional guidance, etc.

Finally, the Law on Amendments to the Law on Defence,[24] which entered into force on 15 March 2012, stipulated that, in addition to intelligence, counterintelligence and security activities organised and conducted by the Agency for National Security, the same functions are performed by the Department for Military Intelligence and Security, which is an organisational unit of the Montenegrin Ministry of Defence. The Department would collect the data and information in the field of military

[22] *Cf.* M. Lučić, "Transformacija bezbjednosno-obavještajnih sistema bivših jugoslovenskih republika" in: *Perspektive daljeg razvoja krivičnog zakonodavstva Crne Gore (treće stručno savjetovanje)*, *Crnogorska revija za krivično pravo i kriminalnu politiku* No.1/2009, Budva 2009, p. 232.

[23] The Law on the National Security Agency (Zakon o Agenciji za nacionalnu bezbjednost), *Official Gazette of the Republic of Montenegro*, No. 28/05, No. 86/09 and 20/11, Articles 1, 25, 39-42.

[24] *Official Gazette of the Republic of Montenegro*, No. 14/2012.

intelligence, counterintelligence and security activities, and provide the foundations for the analytical and operational assessments required for the performance of the functions of the Ministry of Defence, the execution of the tasks and missions of the Montenegrin Army, the security of the Army members, and the security of the members of the allied and partner forces in peace missions and operations. The Law stipulates that the above Department does not perform any secret data collection actions, as that is under the jurisdiction of the National Security Agency.[25]

On 17 February 2008, the Assembly of **Kosovo** declared independence, and two months later, it adopted its new Constitution. The Constitution expressly provided for the establishment of the Kosovo Intelligence Agency (KIA) to "identify, investigate, and monitor the security threats directed at the Republic of Kosovo." This formulation reflects the wording of the Ahtisaari's package, which proposed the creation of a domestic intelligence agency "to monitor threats to Kosovo's internal security." In addition, the constitutional formulation specifying that KIA "should be professional, politically impartial, multiethnic, and subject to oversight by the Assembly" [26] is based on Ahtisaari's recommendation that the agency "should be professional, non-political, multiethnic, and subject to parliamentary oversight."[27]

In June 2008, the Assembly passed the Law on Kosovo Intelligence Agency (Law no. 03/L-063), specifying the details of KIA's mandate and operating rules. The specific legal provisions restricted KIA's enforcement powers - denying it the powers to use direct or indirect force, arrest citizens or initiate criminal proceedings.[28] The fast adoption of the Law on KIA - especially the failure to hold public discussion on the law - is somewhat justified by the need for timely adoption of the necessary legal framework for the establishment of the Kosovo state. Amendments to the Law on KIA can still be adopted, and the legislators can now take into account the experience gained by this Agency's officials and supervisory bodies. However, this process still has to be implemented.[29]

From the operational point of view, KIA is still in its initial stage of development. For example, it took almost a year for the President and the Prime Minister of Kosovo, who share this constitutional responsibility, [30] to appoint the first KIA Director. The public was never informed of the reasons for this delay, but it is widely assumed that the two leaders fought for the political control over the

[25] The Department for Military Intelligence and Security Operations is expected to become operational in the first quarter of 2013.

[26] The Kosovo Constitution, Article 129, item 2.

[27] The Comprehensive Proposal for the Kosovo Status Settlement, UN Office of the Special Envoy for Kosovo, Pristina, 2007.

[28] The Law on KIA, Article 3, Item 1.

[29] *Cf.* F. Qehaja, "Intelligence Governance in Kosovo," *Strengthening Intelligence Governance in the Western Balkans,* DCAF Geneva 2012, p. 10.

[30] The Kosovo Constitution, Article 129, Item 3.

Agency, especially given the tendency of the former members to influence policy-led intelligence services. The Director was finally appointed in February 2009 as a part of an agreement that included the appointment of the Deputy Director and Inspector General, whose appointments had also been delayed.

2.2. Political and Professional Coordination and Control Mechanisms

The control and oversight of the Intelligence and Security Agency of **Bosnia and Herzegovina** is implemented through a variety of mechanisms: internal control, control by the executive, legislative and judicial oversight, as well as control by independent agencies, the media, and civil society organisations. Thus, the Law placed the executive control over OBA under the responsibility of the Council of Ministers, while the Chairman of this body is responsible to coordinate "the activities of the Agency and guide the security and intelligence policy. He/she oversees the operations of the Agency, and bears the political responsibility for its operations." The Law established also the **Executive Intelligence Committee**, as an advisory body assisting the Chairman in the performance of these duties, with its Chairman and two Deputy Chairmen (or any two members of the Council of Ministers, provided that all three constituent peoples are represented).

In accordance with the Law on OBA, the Council of Ministers is responsible for "the preparation of the annual platform for the security and intelligence policy, approval of the Agency's Rules on Internal Organisation, (and) approval of the Agency's annual work program, taking into account the written opinion of the Ministry of Finance and the Treasury on the financial aspects of such program, and the opinion of the Ministry of Foreign Affairs within its competencies."

The Chairman of the Council of Ministers has even more rights and obligations. He/she is responsible *inter alia* to "oversee the Agency's operations and ensure its compliance, including the provision of general guidance to the Agency relating to the performance of the tasks that fall within the scope of its responsibilities... in a way that improves the efficiency and accountability of the Agency; determine the Agency's development programs and adopt the guidelines for their implementation in coordination with the General Director; issue instructions for the implementation of this Law; convene the sessions of the Executive Intelligence Committee at least once in a calendar month; and submit to the Presidency and the Parliamentary Assembly of Bosnia and Herzegovina concise annual reports on the activities of the Agency."[31]

Although the Law on OBA grants the Executive Intelligence Committee specific general duties and powers,[32] in practice, the Committee does not have a vital

[31] The Law on Intelligence and Security Agency (Zakon o OBA), Articles 8-10.

[32] The Law on Intelligence and Security Agency, Articles 12-17.

role in the oversight of the Agency. One of the reasons for its poor performance may be the lack of political will to enhance the cooperation between the executive and the Parliamentary Assembly. The most prominent example of this lack of cooperation is reflected in constant delays and deferrals of the implementation of the legal provision on the adoption of the Annual Security and Intelligence Policy Platform.[33]

The appointment of OBA General Director and Deputy General Director requires all three oversight bodies to collaborate closely and coordinate their activities in the process. In accordance with the Law on OBA, "General Director and Deputy General Director shall be appointed and dismissed by the Council of Ministers, at the proposal of the Chairman, in consultation with the members of the Presidency, the Executive Committee, and the Security and Intelligence Committee."[34]

In the Republic of **Macedonia**, the national-level coordination in the defence and security sector is achieved through: the Safety Council, the Government, which coordinates the relevant security and defence departments, and the Crisis Management Centre.[35]

The Security Council is a unique forum that considers the Republic of Macedonia national security issues. This body has an advisory role, and its decisions are not binding for the state authorities, which does not create an institutional framework for addressing problems in the security and defence sectors. The Security Council is composed of the Prime Minister and the Speaker of the Parliament, ministers of defence, interior and foreign affairs, and three members appointed by the President of the Republic.

The Government manages the key sectors ensuring security and defence, providing also the elementary prerequisites for the practical implementation of the executive power in this segment. The Government of the Republic of Macedonia fulfils its obligations in the security sector through the ministries of defence and the interior. The Government has the primary responsibility for the coordination of the security sector at the national level, considering that the key decision-making system in this sector is at the collective individual level. In case a political decision needs to be made, that would require serious preparations of the administration for good alternatives and implementations.

The third level of ensuring coordination is through the institutional solution provided by the **Crisis Management Centre**, which was established with the primary mission to ensure the necessary cooperation and coordination of the security community in the Republic of Macedonia. The Centre was established in 2005. It is

---

[33] *Cf.* D. Hadžovic, E. Dizdarević, "Nadzor nad obavještajnim sektorom na zapadnom Balkanu: Studija slučaja Bosne i Hercegovine," *Strengthening Intelligence Governance in the Western Balkans,* DCAF Geneva 2012, p. 8.

[34] The Law on Intelligence and Security Agency, Article 25.

[35] For further details see O. Bakreski, *Koordinacija na bezbednosniot sektor-iskustva i praktiki*, Filozofski fakultet, Skopje, 2005, pp. 210-240.

considered that the justification was that such a centre was necessary, particularly having in mind poor coordination experiences during the 2001 crisis. The Crisis Management Centre adopts decisions in accordance with the Constitution and laws. That means that it has the executive function, including the decision-making power, and the power to implement its decisions, which is exactly what the Security Council lacks.[36]

One way of the coordination of the **Bulgarian** intelligence and security system institutions is through the **Supreme National Security Council**, which was established as an advisory body to the President in 1990. The sessions of the Council, which are chaired by the President of the Republic, are attended by the Prime Minister, ministers of defence, interior and foreign affairs, and economy, and the Chief of Staff of the Armed Forces. Although this body considers the most important defence and national security issues, it has no authority to make operational decisions, or to directly influence the operating directions of the competent services.

Considering that the Bulgarian national and foreign policy is in charge of the Ministerial Council, the Government is directly accountable for the achievement of the coordination role and the control of the operations of the intelligence and security institutions. This function is implemented within the **Security Council** of the Bureau of the Prime Minister. The competences of the Security Council include: interpretation, analysis and drafting aggregate information concerning national security risk, assessment and prognosis concerning the dynamics of security threats; planning specific measures for neutralising risks and proposing solutions in the case of crisis; coordinating plans of all specialised bodies and services which collect intelligence and other information; considering and proposing annual budget plans for national security needs to the Council of Ministers.

The Law on the Security Services of the Republic of **Serbia** from 11 December 2007 established the **National Security Council** as an operational body of the Republic of Serbia, whose scope of activities included the consideration of the national security situation, the consideration of the matters relating to the operations of the law enforcement and security services, their mutual cooperation and their collaboration with other relevant foreign government agencies and international organisations, the proposal of measures for the improvement of the national security situation, as well as the consideration of the proposals by the competent authorities, law enforcement authorities, and security services for the improvement of the national security situation. The Council members include: the President of the Republic, Prime Minister, the ministers of defence, interior and justice, Chief of Staff of the Serbian Army, Director of Security and Information Agency, VBA Director, VOA Director, and Head of Security Service of the Ministry of Foreign Affairs.

At the apex of the managerial pyramid in the intelligence and security system of the Republic of **Croatia** are the President of the Republic, the Government,

[36] *Ibid*, pp. 287-291.

and the Croatian Parliament.[37] In the national security sphere, the President of the Republic has three major powers: he/she is the supreme commander of the armed forces, he/she formulates and implements the foreign policy, and he/she cooperates in directing the activities of the intelligence and security system, all in consultations with the Government of the Republic of Croatia. As the holder of the executive power, in addition to the functions it performs as the responsibility that is shared with the President of the Republic, the Government is responsible also for the overall performance of the national security system.

The cooperation between the President of the Republic and the Prime Minister in directing the activities of the intelligence services is ensured through the **National Security Council**.[38] The sessions of the Council are attended by the President of the Republic, the ministers of defence, justice, interior and foreign affairs, members of the Government responsible for the national security issues, national security adviser to the President of the Republic, the management of SOA and VSOA services, Chief of Staff of the Armed Forces, and the Speaker of the Croatian Parliament.

The Office of the National Security Council (UVNS)[39] performs technical and administrative services that allow the National Security Council to analyse the agencies' reports, evaluate the achievement of their objectives, and assess the implementation of the decisions of the President of the Republic and the Government in directing the activities of the security and intelligence agencies.[40] UVNS also provides services that allow the President of the Republic and the Government to oversee the operations of the intelligence and security agencies and the Operational and Technical Centre for Telecommunications Oversight, and oversees their operations.

The implementation of the decisions of the President of the Republic and the Government relating to directing the activities of the intelligence and security agencies, the implementation of decisions of the National Security Council, and the coordination of the security and intelligence institutions are under the competence of the **Council for Coordination of Security and Intelligence Agencies,**[41] chaired by the member of the Government responsible for national security. The members of this body are the national security adviser to the President of the Republic, the directors of the intelligence and security agencies, and the Director of the Office of the National Security Council. By invitation and if needed, the sessions of the Council for Coordination of Security and Intelligence Agencies may be attended by the State Attorney General, senior police officials, USKOK, the Customs, the Protection and Rescue Directorate, and the heads of other regulatory and inspection authorities.

---

[37] For further details see S. Tatalović, M. Bilandžić, *Osnove nacionalne sigurnosti*, Policijska akademija, Zagreb 2005, pp. 180-183.

[38] The Law on the Security and Intelligence System of the Republic of Croatia, Article 3.

[39] The Law on the Security and Intelligence System of the Republic of Croatia, Article 6.

[40] *http: www.uvns.hr.*

[41] The Law on the Security and Intelligence System of the Republic of Croatia, Article 5.

In accordance with the National Security Strategy of **Montenegro**, the management of the national security is ensured through: the Parliament of Montenegro, the President of Montenegro, the Government of Montenegro, and the Defence and Security Council.[42] In this respect, the Montenegrin Parliament passes laws; adopts the National Security Strategy and the Defence Strategy; declares state of war or emergency; decides on the use of force in international missions; and supervises the Army and the security services. It is responsible to ensure the legal basis for the operations in the sector and defence sector.

The President of Montenegro chairs the Defence and Security Council, commands the Army, in accordance with the decisions of the Defence and Security Council, and decides on its use, in accordance with the law. *The Government of Montenegro* leads the national security policy: proposing the National Security Strategy, Defence Strategy, and the laws in this area; implementing the National Security Strategy; monitoring the national security situation; adopting decrees with legal effects during a state of emergency or war if the Parliament of Montenegro is not convened; establishing the organisation of the public administration in the event of emergency or war; negotiating and ensuring the implementation of international treaties and agreements in the field of national security and compatibility of the national legislation with the international instruments; providing material and financial resources for the national security system, and the necessary level of operational and combat capabilities of the security forces.

The Defence and Security Council decides on commanding the Montenegrin Army; analyses and assesses the security situation in Montenegro, and adopts decisions on the implementation of appropriate measures; proposes the declaration of war or state of emergency to the Parliament; and proposes the use of the Army in the international forces. The Montenegrin Defence and Security Council consists of: the President of Montenegro, the Speaker of the Parliament, and the Prime Minister.[43]

In terms of the mechanisms for the control and oversight of the **Kosovo** Intelligence Agency, it can be concluded that they are still in the early stages of development. In order to understand how these mechanisms operate, one must first understand the position of KIA within the vertical hierarchy of the Kosovo Government. In accordance with the legal framework for the Agency, KIA is an independent body reporting directly to the Prime Minister and the President. It does not fall under any ministry, and it is not a part of the Prime Minister's Cabinet. In addition, the Director of KIA participates in the meetings of the **Kosovo Security Council** in an advisory capacity.[44] Generally, some actors support this structure,

[42] *Montenegrin National Security Strategy* (*Strategija nacionalne bezbjednosti Crne Gore)*, Item 5.2. National Security System Management (Upravljanje sistemom nacionalne bezbjednosti).

[43] Given the importance of the Defence and Security Council, it is argued that the ministers of defence, interior, and public administration, the Director of the National Security Agency, and the Chief of Staff should participate in the work of the Council. *Cf.* R. Padević, "Nova Strategija nacionalne bezbjednosti Crne Gore," *Bezbednost Zapadnog Balkana*, Year 4, Number 12, Centar za civilno-vojne odnose & Beogradska škola za studije bezbednosti, Belgrade 2009, p. 95.

[44] The Law on Kosovo Security Council, Article 3, Item 4.

reporting to the Prime Minister, while other advocate for the Agency to be under a ministry (either the Ministry of the Interior or the Ministry of Foreign Affairs). However, a truly independent agency reporting to the Prime Minister would be considered by all accounts a ministry without portfolio.[45]

The KIA internal control mechanisms reflect a desire to act institutionally within the system of mutual controls of various branches of government. Chapter III of the Law on KIA specifies the powers and responsibilities of the Inspector General, who is appointed jointly by the President and Prime Minister.[46] The fact that the Inspector General is appointed directly by the President and the Prime Minister gives him/her strong legitimacy and authority to perform the internal control functions, which is not the case in other countries in the region. The term of office is four years and may be extended for additional four years. The mandate of the Inspector General is to report to the Prime Minister and the relevant Parliamentary Committees on the activities of KIA. In addition, the Inspector General may initiate an internal investigation, conduct financial audits, and recommend corrective measures.[47]

The delays in the development of KIA deferred also the development of its internal control measures. It could be argued that until 2012 the internal control measures in the Agency were implemented only partially, with incomplete staff. One of the problems was that the recruitment and training of qualified staff was complicated and very sensitive. In the meantime, the operational capacity of the Inspector General continues to grow.[48]

2.3. Parliamentary Oversight

Recognizing the importance of the parliamentary oversight of the intelligence services, **Bosnia and Herzegovina** prepared the Law on Parliamentary Oversight of the Defence and Security Sector and Intelligence Services, which was put into the parliamentary procedure on 25 June 2010, but still was not adopted as of July 2012. Meanwhile, the parliamentary oversight of the central intelligence service in Bosnia and Herzegovina is performed by the Joint Commission for the Oversight of the Intelligence and Security Agency (OBA) of the Bosnia and Herzegovina State Assembly.[49]

---

[45] F. Qehaja, *op. cit.*, p. 14.

[46] The Law on KIA, Article 9, Item 1.

[47] The Law on KIA, Article 10, Items 3-5.

[48] F. Qehaja, *op. cit.* pp. 14-15.

[49] Article 18 of the Law on OBA stipulates the obligation of the Bosnia and Herzegovina Parliamentary Assembly to establish a Joint Intelligence and Security Commission, comprised of the members of the House of Representatives and the House of Peoples, which would oversee the OBA operations. In accordance with the amendments to the Law, adopted on 19 February 2009, its name was changed to the Joint Commission for the Oversight of OBA.

The Joint Commission for the Oversight of OBA comprises six members from the House of Representatives and the House of Peoples of the Bosnia and Herzegovina Parliamentary Assembly, namely from among the three constituent peoples. The external management of this service is performed by the Bosnia and Herzegovina Presidency and the Council of Ministers. The Chairman of the Council of Ministers has the authority to establish the Executive Intelligence Committee, for consultations and to facilitate the coordination of professional issues. The Commission is obliged to "oversee the legality of the Agency; hold hearings on the appointment of the Agency General Director and Deputy General Director and provide opinions on their appointments; consider the reports of the General Director on the Agency's operations and expenditures, analyse its budget spending and provide opinions on the Agency's detailed budget proposals."

The Joint Commission for the Oversight of OBA oversees the legality of the Agency; considers and provides opinions on the appointment of its General Director and Deputy General Director; considers the reports on the matters within its competence, including the measures taken to address any problems identified in the Agency in the course of inspections, audits, or investigations; examines the reports of the General Director on the Agency's operations and expenditures, and particularly analyses its budget spending; provides opinions on the Agency's detailed budget proposals; considers the reports of the Inspector General; demands from the Agency employees to provide expert advice when necessary for the implementation of oversight, with the assistance of the Chairman; and investigates the operations of the Agency. The Commission considers also other issues related to the Agency in accordance with the Law on the Bosnia and Herzegovina Intelligence and Security Agency, and other separate laws that stipulate its relevant jurisdiction.

The parliamentary control of the legality of the operations of the intelligence, law enforcement, and security services in **Bulgaria** is performed through the National Assembly's **Commission for Foreign Affairs, Defence and Security**.

The **Macedonia** Assembly has two specialised committees responsible for the oversight of the intelligence services. These are: the Committee Supervising the Directorate for Security and Counterintelligence Service and Intelligence Agencies, and the Committee Supervising Communication Interception. In order to increase the independence and effectiveness of these committees, the Assembly Rules of Procedure provides that the committee chairmen must come from the opposition parties, and in fact the majority of members of the Committee Supervising Communication Interception come from the opposition.

The Committee Supervising the Directorate for Security and Counter-intelligence Service and Intelligence Agencies has its Chairman and eight members and their deputies. The Committee considers *inter alia* the issues including: respect for the rights and freedoms of citizens, businesses, and other legal entities, established

by the Constitution and laws by the Directorate for Security and Counterintelligence Service and the Intelligence Agencies; legality of the operations of these services - in terms of exceeding their authority, unauthorised activities, and other adverse trends in their operations; the methods and tools used in the operations of the above services – in terms of respect for the rights of citizens and other entities; financial, human, and technical requirements for the operations of the Directorate for Security and Counterintelligence Service and Intelligence Agencies; etc.[50] The members and employees who work in these bodies should have security certificates issued by the Directorate of Security and Confidential Information (though it is not mandatory). They periodically attend seminars on the issues relating to the scope of activities of these committees.

In **Serbia**, before the parliamentary 2012 elections, the main parliamentary committee in charge of the defence sector was the Defence and Security Committee. The new 2010 Rules of Procedure introduced also the new Committee for Oversight of the Operation of Security Services with sufficient powers to oversee the operations of these services. In order to strengthen control, the Rules of Procedure provide that the National Assembly performs the oversight of the security services directly and through an authorised committee. To achieve this task objectively, the Committee for Oversight of the Operation of Security Services reports to the National Assembly on the implemented oversight of the operations of the security services in the previous year, including the findings and proposed measures, if any, by the end of March of the current year.[51]

The Parliament of the Republic of **Croatia** has 29 working groups in total, including the **Domestic Policy and National Security Committee**, which is entrusted with the oversight of the intelligence and security services. In accordance with the Rules of Procedure of the Croatian Parliament, this Committee considers *inter alia* the issues relating to: state and public security, oversight of the legality of the work of the National Security Office and the Constitutional Order Protection Agency, particularly with a view to the fulfilment of the Constitution of the Republic of Croatia and legally-established human rights and fundamental freedoms, legal persons, state other bodies and the rights and freedoms established by the standards of international law; opinions on the appointment of directors of security agencies in accordance with the Constitution, etc.[52] The Committee has its Chairman (normally a member of the strongest minority party in parliament), Deputy Chairman, and 11 members.[53]

[50] Source of information: ECPRD Request No. 1983: "Jurisdiction and other matters concerning members and staff of Defence Committee and Security Services Control Committee" by the National Assembly of the Republic of Serbia.

[51] Article 230 and 231 of Rules of Procedure of the National Assembly of the Republic of Serbia (Poslovnik Narodne skupštine Republike Srbije).

[52] The control and supervisory role of this Committee is partially regulated by the Law on the Security and Intelligence System of the Republic of Croatia. In addition, in the event of war, the Chairman of the Committee participates in the work of the National Security Council.

[53] *http://www.sabor.hr/Default.aspx?sec=5199.*

The Domestic Policy and National Security Committee is authorised to conduct interviews with the heads and other officers of the security and intelligence agencies when it is required to ascertain the facts crucial to assessing the legality of the measures undertaken by those agencies, and to consider the legality of their financial and material transactions. On the other hand, the information that is provided to the Committee must not contain any information about persons with whom the intelligence and security agencies cooperated, or any data that could reveal the method used by the agency to obtain specific information.[54]

It has to be added that civilian control of the implementation of these measures is performed by the seven-member **Council for Civilian Oversight of Security and Intelligence Agencies**, which is appointed by the Parliament for a period of four years. The Council for Civilian Oversight is responsible for monitoring the legality of the intelligence and security agencies, and monitoring and oversight of the implementation of the measures for secret collection of data that restrict the constitutional human rights and fundamental freedoms. The Council acts in accordance with a program adopted by the Domestic Policy and National Security Committee, and the requests of citizens, legal persons and public authorities, relating to the identified illegal acts or irregularities in the operations of the intelligence and security agencies, especially when it comes to violations of the guaranteed rights and freedoms.

It has to be underlined that in Croatia neither the staff nor the members of the Domestic Policy and National Security Committee are subject to background checks. However, in accordance with the Law on Confidential Information, members of parliament can access classified information without any clearance, provided that they previously signed a statement with the Office of the National Security Council confirming that they were familiar with the provisions of this Law and other regulations governing the protection of confidential information, and that they were committed to disposing such information in accordance with the regulations. With respect to professional development, both the Committee staff and members receive the same treatment as anyone else.

The parliamentary oversight of the intelligence services, and especially the Montenegrin National Security Agency, is performed by the Parliament of **Montenegro**,[55] through its competent working body – the Security and Defence Committee, which receives the Agency's annual performance report. On 31 December 2010, the Montenegrin Parliament adopted the Law on Parliamentary Oversight in

[54] *Cf.* O. Bakreski, *Kontrola na bezbednosniot sektor*, *op. cit*. pp. 270-271.

[55] The Montenegrin Parliament has 11 committees, two of which are responsible for the defence, security and internal issues: the Security and Defence Committee, and the Political System, Judiciary and Administration Committee.

the Security and Defence Sector.[56] It legally regulated this area for the first time, granting the competent body, the Security and Defence Committee, the authority to conduct consultative hearings, control hearings and parliamentary investigations.[57]

In their previous work, the Security and Defence Committee performed the oversight of the National Security Agency (ANB) through two basic mechanisms: hearings and parliamentary investigations. In this regard, the Committee held consultative hearings when it needed expert opinions before deciding on the adoption of laws and strategies. In addition, it held control hearings in cases of disputes relating to the adoption or implementation of the government policies in the security and defence sector (witnesses in control hearings were usually members of the Government and representatives of the relevant state authorities. In the past, the hearings referred to the ministers and police and ANB directors).[58]

At the request of the Committee, the National Security Agency submits special reports on specific issues within its competence. The Agency is obligated to allow access, at the request of this working body, to the procedure of the oversight of mail and other means of communication, unless it undermines the country's national security. The Committee members and persons participating in its work are obligated to protect confidential information obtained in the course of the work of that body. Their obligation to protect confidential information applies also after the termination of their membership, i.e., work in the relevant working body. After the elections, members of the competent authority are required to sign a statement on the obligation to protect the state, official, business, and military secrets. The sessions of the Security and Defence Committee are closed to the public, and the Chairman of the Committee informs the public on the conclusions of that body.[59]

In accordance with Article 26 of the Law on Confidential Information,[60] members of the Montenegrin Security and Defence Committee have the right to access confidential information without any clearance for accessing confidential information.

---

[56] On 22 December 2010, the Montenegrin Parliament adopted the *Law on Parliamentary Oversight in the Security and Defence Sector* (*Zakon o parlamentarnom nadzoru u oblasti bezbednosti i odbrane,* "Službeni list Crne Gore," No. 80/10). The text of the Law on Parliamentary Oversight in the Security and Defence Sector is available at the website of the Montenegrin Parliament: *http://www.skupstina.me/index.php?strana=zakoni&id=1861*

[57] The Law on Parliamentary Oversight in the Security and Defence Sector (Zakon o parlamentarnom nadzoru u oblasti bezbjednosti i odbrane), Articles 8-10.

[58] *Cf.* R. Radević, "Oversight of Intelligence Agencies in the Western Balkan Countries – Case Study: Montenegro," *Case Studies on Intelligence Governance in the Western Balkans*, DCAF Geneva 2012, p. 10.

[59] The Law on National Security agency (Zakon o Agenciji za nacionalnu bezbjednost), Articles 43-45.

[60] *http://www.skupstina.me/index.php?strana=zakoni&id=618.*

The parliamentary oversight of the intelligence services in **Kosovo** is performed through the Kosovo Parliamentary **Committee for Oversight of Intelligence Services**. Chapter VII of the Law on KIA requires the Assembly to establish a "parliamentary oversight body," whose primary mandate is to "monitor the legality of KIA's operations" (the mandate of this body includes also the review of the reports on KIA's operations and expenditures). In accordance with this requirement, in November 2009, the Assembly established the Parliamentary Committee for Oversight of KIA. The Law on KIA authorises the Committee to initiate an investigation if it suspects that "KIA performs its duties in an illegal, inappropriate or unprofessional manner." The Committee consists of nine members, the majority of whom usually belong to the ruling coalition. The Chairman, however, cannot be a member of the ruling coalition.[61] However, this respect for the minority rights does not extend to gender. Currently, only one member of the Committee is a woman, which reflects the limited interest of the political parties to allow women to be represented in the committees responsible for the security issues (currently, women make up about one third of the members in the Kosovo Assembly).

In order to perform their oversight functions, the committee members must have access to information that is often confidential. With the exception of the President, Prime Minister and the Speaker of the Assembly, the Law on Confidential Information and Security Clearance in Kosovo requires everyone, including members of parliament, to undergo security and background checks before they are granted access to confidential information. While this opens room for a committee member to be denied the necessary security clearance, the lawmakers found the protection of confidential information more important than the inconveniences faced by members of parliament, and their potential exclusion from the work of the committees. The formulators of these legal acts took into account, without any doubt, the immaturity of Kosovo's democracy and its weak electoral system, which in some cases allowed for the election of representatives under suspicious circumstances. Moreover, even after verification, committee members may be denied access to confidential information if "the disclosure of such information could undermine the vital national security interests relating to the protection of sources or methods in the respective case."[62]

2.4. Judicial Control

Intelligence and security services operate within the regulatory framework and as such are subject to judicial control. The idea behind judicial control over these services is to set limits in order to achieve balance between the protection of individual citizens' rights and efficient collection of information relevant for national

[61] The Law on KIA, Article 36, Item 2.

[62] The Law on KIA, Article 37, Item 6.

security and state interests. Given that some methods of work used by the intelligence and security services may limit or violate civil rights, democratic countries set the rule that the secret colleting of data by the services must be preceded by a permission of the competent court. The courts also set the regulatory framework for handling confidential documents, since the participation of courts in this field necessarily results in sensitive data being shared outside the controlled environment of the security sector.

The role of the judicial power in **Bosnia and Herzegovina** concerning the control over the operation of the Intelligence and Security Agency (ISA) is primarily linked to the use of special investigative actions by the ISA. Pursuant to the Law on the Intelligence and Security Agency, "following in places that are not of public character, tracking communications by telecommunication or other types of electronic devices, and search of property without the consent of the owner or the person temporarily holding such property may be conducted only provided that the authority to do so was previously obtained from the president of the **Bosnia and Herzegovina Court** or from a judge of the Bosnia and Herzegovina Court designated by the president of the Bosnia and Herzegovina court".[63] All such motions must be forwarded by the director-general in writing, and they must include a detailed elaboration concerning the justifiability of the use of such measures. The form of the motion is defined by law.

The initial text of the Law on ISA included the obligation of the Intelligence and Security Agency to inform the citizens subject to special investigative actions of such actions within thirty days from the day they are terminated.[64] However, the amendments to this Law, adopted in 2006, have to an extent relativized by the introduction of a provision according to which the ISA may postpone the informing of the citizen if it find that such measure "could jeopardize the finalisation of the Agency tasks".[65] In practice, this statutory change enabled the Intelligence and Security Agency to avoid serving the information to citizens who were subject to special measures and actions by simply stating it had still not completed its task. Pursuant to the Law, if the ISA collects data in an illegal manner (without court permission), the ISA director-general is under the obligation to take the necessary measures to destroy such information immediately. In addition, the director-general must inform the chairperson of the Council of Ministers and the Chief Inspector thereof, and also initiate disciplinary proceedings against the official who acted in contravention of law.[66]

In 2007, the Intelligence and Security Agency obtained modern equipment for communication control through a grant approved by the European Commission.

[63] Law on ISA, Article 77.

[64] Law on ISA, Article 77.

[65] Law on ISA, Article 29.

[66] Law on ISA, Article 79.

The telecommunication companies operating in Bosnia and Herzegovina have installed this equipment, thus enabling the Agency to intercept phone conversations, text messages, e-mails and other internet contents.[67] With regards to this it should be borne in mind that the ISA mandate is limited by law to collection, analysis and distribution of intelligence data, which is why any and all information collected by the Agency when it uses special investigative actions may not be used in criminal proceedings before Bosnia and Herzegovina courts.

In principle, the Law on the ISA can be deemed as an adequate regulatory framework for effecting judicial control over the legality of the ISA work. However, the implementation of these legislative standards in practice is much more difficult to assess, given the lack of transparency in the Agency's work and also the practice of the Bosnia and Herzegovina Court to deny the necessary information on these issues.

Judicial control over the work of intelligence and security services in Croatia is regulated by the provisions of the Law on the Security and Intelligence System of the Republic of Croatia. Pursuant to this law, the Security and Information Agency is authorised, by law, to apply the following operative and technical measures: secret surveillance over the telecommunication services, activities and transfer (secret surveillance of the communication contents, secret surveillance of data on telecommunication transfer, secret surveillance of the user location and secret surveillance of international telecommunication links), secret surveillance over postal and other shipments, secret surveillance and monitoring coupled with sound recording of communications in open space and in public spaces, secret purchase of documents and objects. Depending on the type of measure, the permission to use them may be granted by the authorised justice of the **Supreme Court of the Republic of Croatia,** at the request of the Agency director. The extension of such measure is approved by a panel comprising three authorised justices of the Supreme Court of the Republic of Croatia. When the authorised justice of the Supreme Court of the Republic of Croatia does not issue or refuses to issue the warrant for exercising the measure of secret collection of data, he/she shall inform the Office of the National Security Council of the reasons for doing so. The measures may last for four months at the longest, but can be extended an unlimited number of times.[68]

Judicial control over the intelligence and security services in **Serbia** is threefold: control of legality of the measures for secret collecting of data, which the intelligence and security services may implement only after having obtained the permission of the competent court; deciding on the legality of finally binding administrative acts in administrative dispute regarding criminal matters to which an intelligence and security agency was a party and on damages thus sustained by citizens; deciding on criminal offences of members of intelligence and security services committed in relation to their official duty.

---

[67] *Cf.* "Telekom operateri su popustili na zahtjev Parlamenta", *Oslobođenje*, Sarajevo, 14.07.2008.

[68] Law on the Security and Intelligence System of the Republic of Croatia, Article 33.

Use of special evidentiary actions (surveillance and recording of communications by phone and other technical means, secret surveillance and recording, simulated operations, computer search of data, controlled delivery and engagement of undercover agent) is regulated by the provisions of Articles 161-165 of the Criminal Procedure Code of the Republic of Serbia.[69] Given that this concerns special types of evidence, allowed pursuant to international standards, but ones that still infringe human rights, the legislator made an effort to precisely regulate the manner of implementation and control of such measures and actions, prescribing that they may apply only against persons with regards to whom there are grounds of suspicion that they have committed criminal offences that are in the competence of a special-competence public prosecutors' office, pursuant to a separate law, or one of the 29 criminal offences listed in Article 162 of the Criminal Code. In addition, the law prescribes that special evidentiary actions may be ordered if it is impossible to collect data for criminal prosecution in another manner or if their collection in other manner would be considerably more difficult.[70]

The implementation of special evidentiary actions is ordered by a judge in preliminary proceedings by a reasoned order. The order must include data on the person with regards to whom the measure is being implemented, the grounds of suspicion, the manner of implementation, and the extent and duration of the measure. The measures of surveillance and recording of conversations by phone or other technical means, secret surveillance and recording, simulated operations and computer search of data may last for up to three months, and if there is a need to collect further evidence, may be extended for additional three months at the most. If the criminal offence in question is in the competence of the special-competence public prosecutors' office, these measures may be exceptionally extended twice, for three months, and their implementation is terminated as soon as the reasons for applying them ceases to exist.[71]

If the public prosecutor fails to initiate criminal proceedings within six months from the day of examining the material collected by use of special evidentiary actions or if the public prosecutor announces he/she will not use such evidence in the proceedings, or that he/she will not initiate criminal proceedings against the suspect, the preliminary procedure judge shall pass a ruling on the destruction of the collected material. The judge may inform a person with regards to whom special evidentiary actions were taken of the ruling provided that his/her identity was confirmed during the implementation of the measure and provided this would not jeopardize the possibility to conduct criminal proceedings. The material collected is destroyed under the supervision of the preliminary procedure judge, who shall make the minutes thereof.[72]

[69] *Official Gazette of the Republic of Serbia* No. 72/2011, 101/2011, 121/2012 i 32/2013.

[70] Criminal Procedure Code, Article 161, paragraph 1.

[71] Criminal Procedure Code, Articles 167-176.

[72] Criminal Procedure Code, Article 163.

The statutes governing the operation of the intelligence and security services in Serbia envisage the use of some measures for secret collecting of data envisaged by the Criminal Procedure Code. Pursuant to Article 13 of the Law on Security and Information Agency[73] the Agency director may order, if necessary for the reasons of security of the Republic of Serbia, by a ruling and after having obtained court approval, that certain actions deviating from the principle of inviolability of letters and other forms of communication be taken against some natural and legal persons. Departure from the principle of inviolability of letters and other forms of communication is approved, at the proposal of the Agency director, the president of the **Supreme Court of Cassation,** or a justice of such court designated for deciding on such proposals in case of absence of the court president, within 72 hours from the submission of the motion.[74] Pursuant to Article 10 of the Law on Military Security Agency and Military Intelligence Agency, the "Military Security Agency is authorised, within its competence, to secretly collect data by using special procedures and measures if data cannot be collected in other manner or if their collecting is linked to disproportionate risk to life and health of people and to property, or linked to disproportional difficulties and risks". This law envisages that special procedures and measures and taken based on a written and reasoned order of the Supreme Court of Cassation, passed at the written motion filed by the MSA director.[75]

On April 19, 2012, the Serbian Constitutional Court had passed a decision establishing that provisions of Article 13, paragraph 1 in relation to Article 12, paragraph 1 subparagraph 6 and Article 16 of the Military Security and Military Intelligence Law are not in accordance with the Constitution.[76] The provisions that were declared unconstitutional envisaged that the MSA may secretly collect data on telecommunication traffic (numbers dialled, time and duration of call etc.) and on user location, and also to ask and receive such information from the operator, without court approval.[77] A direct consequence of this Constitutional Court decision was that it had abrogated the unconstitutional power of the MSA to track telecommunication traffic and user locations. In addition, the decision also has a bearing with regards to the Telecommunications Law[78] which envisages, in a broad and imprecise manner, that the operators must keep data on electronic communications and provide them to the competent state authorities "for the needs of investigation, discovery of criminal

[73] *Official Gazette of the Republic of Serbia* No. 42/2002 and 111/2009.

[74] Law on the Security and Information Agency, Article 14.

[75] Law on Military Security Agency and Military Information Agency, Article 14.

[76] Constitutional Court of Serbia, case No. IUz-1218/2010.

[77] On July 19, 2010, the Belgrade Center for Human Rights had filed an initiative with the Constitutional Court asking it to declare the mentioned provisions unconstitutional since they are contrary to Article 41, paragraph 2 of the Constitution, which prescribes that the confidentiality of "means of communication" may be departed from only based on a court decision. The motions for the assessment of constitutionality were also made by the Ombudsman and the Commissioner for Information of Public Importance and Personal Data Protection.

[78] *Official Gazette of the Republic of Serbia*, No. 44/2010.

offences and conducting of criminal proceedings, pursuant to the law governing criminal proceedings, and also for the needs of protecting national and public security of the Republic of Serbia, pursuant to statutes governing the operation of security services of the Republic of Serbia and the operation of the law enforcement authorities".[79]

According to the report of the international expert, Maurizio Varanese, drafted in March 2013 for the European Commission, the independence of judicial authorities and the police services, and the confidentiality of investigations in Serbia "are jeopardized by covert external influence exerted by the Security and Information Agency", which particularly concerns the interception of phone and electronic communications. The report stresses that the SIA and the MSA have full control over the four providers in Serbia by having insight into all of their data and their phone distributors, which, *inter alia*, enables them to monitor competent investigative and judicial authorities. The SIA may thus obtain data on phone listings and locations without the knowledge of the provider and without the prosecutors' warrant,[80] regardless of whether there are special reasons for intelligence work or the conducting of criminal proceedings. The SIA may also intercept phone conversations without a court warrant (by simply pressing a button) whereby it violates Article 41 of the Constitution of the Republic of Serbia (confidentiality of letters and other forms of communication)[81] and the Criminal Procedure Code. Maurizio Varanese concludes that phones tapped by the police, pursuant to the procedure envisaged by the statute, in accordance with a court warrant served to the SIA, may also be tapped by this agency without the knowledge of the police, the public prosecutor's office and the competent judge, which is a direct and illegal interference in criminal proceedings.[82]

In Macedonia, judicial control over the implementation of special measures and actions (secret surveillance and tapping, interception of communications, secret surveillance over postal and other shipments, secret surveillance and technical recording of the objects inside, of closed spaces and objects), the implementation of which is in the competence of the Security and Counter-Intelligence Office (SCIO) and the Sector for the Coordination of Intelligence and Counter-Intelligence work and Control of Confidential ARM Documents is regulated by the Law on Interception of Communications (*Zakon za sledenje na komunikaciite*).[83] Judicial control is exercised in the following manner: the application of measures and actions in cases when there is suspicion that criminal offences against the state, armed forces, humanity

[79] Telecommunications Law, Article 128.

[80] Criminal Procedure Code, Article 286, paragraph 1.

[81] "Confidentiality of letters and other means of communication shall be inviolable.
Derogation shall be allowed only for a specified period of time and based on decision of the court if necessary to conduct criminal proceedings or protect the safety of the Republic of Serbia, in a manner stipulated by the law."

[82] For more details see: *http://www.novimagazin.rs/vesti/provajderi-na-met-tajnih-sluzbi.*

[83] *Official Gazette of the Republic of Macedonia*, No. 121/2006.

or international law are being committed, at the request of the minister of interior or the minister of defence (or persons so authorised by them) is approved by an order issued by a justice of the **Supreme Court of Macedonia.**[84] Intelligence and security services may apply special measures and actions for three months at the longest, and in special cases, based on an additional motion, a justice of the Supreme Court may extend their application for up to one year at the longest.[85]

An example of the discrepancy between the normative framework of the execution of judicial control of security and intelligence services in Macedonia and the practice in this field is the case of the affair regarding illegal tapping of over one hundred persons from political and public life in the country, revealed on January 17 and February 6, 2001, at press conferences held by the president of the then largest opposition party, the SDSM, Branko Crvenkovski. Accusing the ruling party, the VMRO-DMPNE, of being behind the illegal control of communications in Macedonia, Crvenkovski showed the members of the press over 150 pages of short-hands of conversations, stating it is only a fraction of evidence in the possession of the SDSM. These were actually transcripts of secretly recorded conversations of the then high state officials, including the President of the Republic, Boris Trajkovski, former President of the FYROM Kiro Gligorov, vice-president of the government Vasil Tupurkovski, current and former government ministers, republican public prosecutor, president and members of the State Electoral Commission, a bishop of the Macedonian Orthodox Church, opposition party leaders, members of parliament, judges and journalists.[86] This affair, which was a cause of amendments to Article 17 of the Republic of Macedonia Constitution[87] (more precise guarantees for protecting the privacy of correspondence and other forms of communication), was finalised only in February 2013, when the International Court of Human Rights ordered the state of Macedonia to pay 1850 euros to 17 plaintiffs within three months. Before this judgment was passed, a group of Macedonian journalists who were tapped had managed in their claims for damages before the FYROM courts in the amount of six thousand euros each.[88] Criminal proceedings against Dosta Dimitovska (who passed away in 2011), the minister of interior at the time and then the director of the Intelligence Operation Agency, who was considered most responsible for the affair given the office she held at the time, was terminated back in 2003, by means of an abolition passed by the President of the Republic, Boris Trajkovski (died in a plane crash in 2004).

[84] Zakon za sledenje na komunikaciite, Article 30.

[85] Zakon za sledenje na komunikaciite, Article 30.

[86] *Cf.* "Attacks on the Press in 2001 - Macedonia", Committee to Protect Journalists, UNHCR, Genève 2002 (http://www.unhcr.org/refworld/docid/47c56630c.html).

[87] For more details see: Ustav na Republika Makedonija so amandmanite na Ustavot I-XIX, Služben vesnik na Republika Makedonija, Skopje 2004.

[88] *Cf.* Chapter: II. Surveillance policies", Report: Former Yugoslav Republic of Macedonia, Privacy International, London 2012 (*http://www.privacyinternational.org/reports/former-yugoslav-republic-of- macedonia/ii-surveillance-policies*).

Judicial control over security and intelligence services in Bulgaria is implemented pursuant to the provisions of the Law on Special Intelligence Means (*Zakon za specialnite razuznavatelni sredstva*)[89] and the Law on National Security Agency.[90] In terms of these regulations, special intelligence means are operative and technical means and operative measures for their application.[91] Operative methods are: tapping, secret surveillance and recording, secret search, interception of post and electronic communications, controlled delivery and use of undercover agent. A reasoned motion for the application of special intelligence means is filed by the director of the State National Security Agency or his/her deputy. The written motion is filed to the president of the territorially competent District Court (*Oblasni sud*), or to a judge replacing the court president in case of absence.[92] The court must respond to the motion within 24 hours at the most. The approved measures and means may be applied for 60 days at the longest, and, in exceptional cases, for six months at the most.[93]

Despite the years spent on improving the regulatory framework in this field, in early January 2011 an affair was opened in Bulgaria concerning illegal use of measures of secret control of communications, after the media have published transcripts of recorded conversations of certain state officials. It was said that the Law on Special Intelligence Means was used to wiretap at least 10000 people in Bulgaria during 2010, where 2767 persons were monitored without the approval of the competent court. This was enabled by an internal directive issued by the state prosecutor, Boris Velcev, which allowed prosecutors to request the use of secret control of communications measures without court permission in cases when investigation proceedings are being conducted.[94] The European Commission had requested an official explanation from the then president of the Bulgaria Council of Ministers, Bojko Borisov, regarding this issue in mid-January 2011. Indicatively, after the wire-tapping scandal, Mr. Borisov had initiated a vote of confidence in the parliament.[95]

In Montenegro, given that the National Security Agency (NSA) is authorised to secretly collect data using special means and methods, the judicial control of the NSA consists of an approval of the monitoring of the electronic communications and shipments; the approval is granted in a decision passed by the president of the Supreme Court of Montenegro, at the reasoned written proposal of the Agency director. When

[89] *Official Gazette* No. 95/97, 70/99, 49/00, 17/03, 86/05, 45/06, 82/06, 109/07, 43/08, 109/08 , 88/09.

[90] *Official Gazette* No. 109/07, 69/08, 94/08, 22/09, 35/09, 42/09, 82/09, 93/09, 16/10.

[91] Law on Special Investigative Techniques, Article. 2, paragraph 1.

[92] Law on Special Investigative Techniques, Article 15.

[93] Law on Special Investigative Techniques, Article 21.

[94] According to: *http://www.bnt.bg/bg/news/view/44977/srs_i_s_bojko_borisov.*

[95] In the vote of confidence to Bojko Borisov's government, 140 MPs who attended the session voted in favour of the government, whilst 60 were against. Borisov's minority govrenment was supported by the members of his party - the GERB and the nationalist party - Atak.

it comes to the monitoring of the inside of facilities, closed spaces and objects by using technical means, these measures are approved, in the same procedure, by the Panel of Judges of the Supreme Court of Montenegro.[96] The measures in question may be used if there are grounds of suspicion that Montenegrin national security is in danger. They can be applied for three months, but, if there are serious grounds, they may be extended for additional three months, and may last up to 24 months in total at the longest. The Agency Director informs the president of the Supreme Court of Montenegro or the Panel of Judges of the Supreme Court of Montenegro of the reasons for termination of monitoring in writing.[97]

An example of how judicial control over the use of special means and methods is applied in practice in Montenegro is the judgment of the Basic Court in Podgorica of November 3, 2011, whereby the action of the Network for Affirmation of the NGO sector was sustained and the Agreement on Mutual Cooperation between the Police of the Republic of Montenegro and the M:tel phone operator, concluded on September 27, 2007, was annulled. The reasoning of the judgment states that the agreement in question violates the Montenegrin Constitution and the European Convention on Human Rights and Fundamental Freedoms.[98] The disputed Agreement between the Police and the M:tel was concluded "with the aim of preventing, discovering and documenting criminal offences" and its provisions enabled the police to secretly take over the data from that network 24 hours a day.[99] The Basic court assessed as particularly indicative the fact that the agreement does not identify the categories of persons against whom the control of communication measures can be taken nor does it prescribe grounds for the use of such measures. However, the appeal procedure in this case is still pending before the Higher court in Podgorica.

The role of the judicial power in controlling the intelligence and security services in Kosovo is regulated by the Law on the Kosovo Intelligence Agency (KIA). Pursuant to the provisions of this statute, the KIA may use special investigative measures, such as surveillance in private locations or locations where the persons under surveillance reasonably expect to have privacy, interception of telecommunications and any other electronic surveillance, only after having obtained approval from the justice of the Supreme Court of Kosovo.[100] The motion for the use of such measures may be filed by the KIA director or his/her deputy. The measures in question can be applied for 60 days at the longest.[101]

---

[96] Law on NSA, Article 14

[97] Law on NSA, Article 15.

[98] According to: E. Kalač, N. Sindik, *Reforma sektora bezbjednosti u Crnoj Gori 2009-2012*, Centar za demokratiju i ljudska prava (CEDEM), Podgorica 2013. p. 15-16.

[99] Article 8 of the Agreement on mutual cooperation between the Police and the M:tel.

[100] Law on KIA, Article 28, paragraph 1.

[101] Law on KIA, Article 28, paragraph 4.

2.5. Mechanisms for Protecting Intelligence and Security Services from Political Abuse

The main purpose of control exerted by the executive is to prevent the intelligence and security services from becoming independent and to have these services limit to lawful and responsible conduct. In this respect, the government of a given country is in the position to form or dissolve the services by its acts. The passing of secondary legislation and decisions on internal organisation of the services, adoption of budget proposals and scrutiny over its implementation, formulation of principles for the internal organisation and appointment of heads of services, receiving reports regarding their operation and implementation of laws in these fields give the governments in democratic states a decisive influence on the operation and functioning of the intelligence and security services.[102]

The relations the governments have towards intelligence and security services is twofold. On the one hand, the governments use their services in order to pass quality decisions. Bearing this in mind, it is necessary for a tasking system to be in place, a system which defines who is empowered to issue orders to the services and under what conditions. This system should be based on hierarchy and defined rules and procedures, in order to diminish the possibility for the intelligence and security services to be abused for political purposes. On the other hand, the government supervises the activities of the security services, primarily having in mind the efficiency of their work, and sets up corresponding mechanisms.

The idea of judicial control of intelligence and security services is to set limits in order to ensure there is balance between the protection of individual rights and efficient collecting of information relevant for national security and state interest. Given that some methods of work of the intelligence and security services may limit or infringe civil rights, democratic countries have set the standard rule that the use of secret collection of data measures must be preceded by approval of the competent court.

According to the assessment of the civil society institutions,[103] in the entire security system, the intelligence services are most difficult to be put under civil monitoring and democratic control. Three groups of problems limiting the participation of the civil sector in setting up mechanisms to control intelligence and security services can be singled out: 1) secrecy, as the key principle in the work of security services, which limits the amount of available information both concerning the services themselves and concerning their activities; 2) those working in the services have a high degree of discretionary powers due to imprecise regulatory framework;

[102] M. Bisić, G. Kovačević, *op. cit.* p. 266.

[103] For more details se: M. Caparini, "Civil Society and Democratic Oversight of the Security Sector: a Preliminary Investigation", in: P. Fluri, M. Hadzić, *Sourcebook on Security Sector Reform: Collection of Papers*, Centre for Civil-Military Relations, Belgrade 2004, pp. 171-185.

3) intelligence and security services are prone to using the informal doctrine of the so-called "credible denial", which means that their officials often remain intentionally uninformed of the service activities and are ready to deny participation in such actions. A special problem lies in the fact that a small number of civil sector organisations in the Western Balkans countries have sufficient expertise regarding the work of the intelligence and security services.

The existing regulations in Serbia govern the issues of professionalism and political neutrality in the operation of the intelligence and security system with relative precision. Thus, the Law on the Security and Information Agency prescribes that the members of the Agency cannot be members of political parties.[104] The same provision is included in Article 2 of the Law on the Basis of Organisation of Security Services of the Republic of Serbia,[105] which states that members of the security services cannot be members of political parties. Paragraph 2 of the same article prescribes that "members of security services are under the obligation to act in accordance with the Constitution, the law, other regulations and general acts, pursuant to the rules of the profession, in an unbiased and politically neutral manner." Provision of Article 3 paragraph 5 of the Law on Military Security Agency and Military Intelligence Agency prescribes that the MSA and the MIA are politically, ideologically and interest-neutral in their operation. In addition, Article 42, paragraph 1, subparagraph 2 of this law states that a member of the MSA or the MIA may not express or advocate for his/her political beliefs when performing official duty.

According to Article 15 of the Law on the Basis of Organisation of Security Services of the Republic of Serbia is based on the following principles: subordination and accountability of the security services to the elected authorities of the Republic of Serbia; political, ideological and interest-wise neutrality of the security services; obligation of the security services to inform the public on the performance of their tasks, in accordance with the law; duty of those charges with monitoring the work of the security services to inform the public on the results of the supervision; professional responsibility and operative independence of the members of the security services in performing the tasks assigned to them and accountability of the heads of the services for the work of the services. The Security and Information Agency is controlled by the Government of the Republic of Serbia, but the Law on the SIA does not specify the manner in which such control is carried out. The Security and Information Agency must adhere to the positions and directives of the Government, which also applies to any other government body or agency. In practice, the control over the SIA work, as prescribed by the mentioned statute, is limited to the obligation of the SIA to file semi-annual reports to the National Assembly and the Government of the Republic of Serbia.

Pursuant to the Law on the Intelligence and Security Agency of Bosnia and Herzegovina, the Agency employees may not be members of political parties, may not

[104] Law on SIA, Article 20.

[105] *Official Gazette RS*, No. 116/2007.

receive instruction from political party members nor perform any additional activity against compensation or perform any other public or professional duty incompatible with the work in the ISA. In addition, the employees of the Intelligence and Security Agency must be impartial, and in particular: must avoid activities or omissions in performance of their professional duty which violate or are incompatible with the duties set forth in this statute and may not demand or accept on their behalf or on behalf of their relatives any gain, benefit, consideration in money or in services or the like, except for those permitted by this statute.[106]

Whilst other former SFRY states have taken measures at separating the state security services from the ministries of the interior immediately after the SFRY had dissolved, Montenegro was reluctant to do so, and was hence criticised in eminent reports and studies.[107] One of the reasons for delays in reforming this field was the political pat position of the parties in the ruling Montenegrin coalition - the core of the dispute was the issue of who would be competent to appoint the head of the new, independent intelligence and security services - the Parliament or the Government. After more than two years, the position that the Government should be competent for this appointment had prevailed, and this position was translated into a norm of the Law on the National Security Agency.[108] This had initiated the separation of the Montenegrin national security service from the police. In addition, in order for the NSA to be directly responsible to the Government with respect to its budget, the statute also envisaged physical separation of the Agency from the Ministry of the Interior. However, it took an additional two years for the NSA to transfer its seat from the premises of the Montenegrin Ministry of the Interior. Even though the process of separation is almost completed, some local offices of the NSA still share offices with the members of the local police forces and the Ministry of the Interior. [109]

The Law on the Security and Intelligence System of the Republic of Croatia sets forth a rule that the employees of the security and intelligence agencies and other bodies in the security and intelligence system may not be political party members, nor participate in the activities of the political parties or politically act within the security and intelligence institutions. Moreover, it is prohibited for the members of these services to perform any other professional or public duty, to be members of administrative or supervisory boards in companies and other legal persons.[110]

Pursuant to the Law on the State National Security Agency, in Bulgaria the performance of operations and tasks that fall in the statutory competence of this service is subject to the following principles: observance of the Constitution, law

[106] Law on ISA, Article 45.

[107] *Cf*. R. Monk, *Study on Policing in the Federal Republic of Yugoslavia*, OSCE Mission in FRY, Belgrade, July 2001, pp. 9-10.

[108] Law on NSA, Article 25.

[109] R. Radević, "Nadzor nad obavještajnim službama u zemljama Zapadnog Balkana - Studija slučaja: Crna Gora", *op. cit*. pp. 3-4

[110] Law on the Security and Intelligence System of the Republic of Croatia, Article 77.

and international agreements to which Bulgaria is a party; protecting and ensuring human rights and fundamental freedoms; protecting the information and its sources; objectivity and impartiality; cooperating with citizens; political neutrality.[111]

The provisions of Article 128 of the Law on Internal Affairs (*Закон за внатрешни работи*) of Macedonia (The Security and Counter-Intelligence Office - SCO is a body within the Ministry of the Interior), prohibit all Ministry members to found, manage or represent political parties and from being members established by party statutes. In addition, it is prescribed that membership in a political party may not affect the professionalism, impartiality and lawfulness in performance of official duty. It is prohibited to display party symbols on official premises, and any form of party organisation is prohibited within the Ministry.[112] Article 33 paragraph 7 of the Law on the Intelligence Operation Agency[113] (*Закон за Агенцијата за разазнување*) prescribes that management of political parties, and advocating for their political programmes and positions and public expression of political beliefs constitutes a violation of working discipline in the Agency.

In 2008, Kosovo adopted a relatively modern Law on the Kosovo Intelligence Agency (KIA) which, inter alia, prohibits the Agency member from being political party members, from receiving instructions from political and other organisations, institutions or persons outside the KIA and also from performing any other additional professional or official duty.[114] The fact that the Kosovo Information Agency was created "from scratch" raised the hope that some of the best practice in democratic governance shall be used in its development. In this respect, a certain lack of transparency, particularly when it comes to the so-called "grey area" of the intelligence work was expected. However, in the course of its operation so far, the KIA had blocked access even to data that should be transparent, has almost no communication with the public, and does not even have its own webpage. It is hence impossible to assess whether this agency carries out its activities in accordance with relevant legislation and the rule of law.[115]

[111] Law on State Agency "National Security", Article 3.

[112] *Official Gazette of the Republic of Macedonia*, No. 92/2009, 35/2010, 36/11, 158/11 and 114/12

[113] *Official Gazette of the Republic of Macedonia,* No. 19/95.

[114] Law on KIA, Article 17.

[115] F. Qehaja, *op. cit.* p. 12.

2.6. Practical Problems in the Functioning of Control and Supervision over Intelligence and Security Forces

A joint characteristic of how the intelligence and security services in the Western Balkan countries work and how the mechanisms of oversight and control over their work are implemented is the achievement of certain international standards coupled with a tacit tendency to consolidate or even preserve the status quo. In practice, this means that the times when these services have gravely violated law and overstepped their powers have passed, and that these institutions shall tend to publicly express their loyalty towards the constitution and the law, and their subordination to the legitimate holders of power. Moreover, the intelligence and security services shall strive to preserve the impression of being politically and ideologically impartial and shall retreat from the public political scene for the purpose of own survival. However, it is reasonable to expect that these services shall continue to seize every opportunity to de facto expand and strengthen their powers, particularly those linked to the use special (secret) measures and methods, using as their main argument the combat against terrorism and/or organised crime. It is also certain that intelligence and security services shall tend to undermine all attempts at public and political examination of their war-related and authoritarian heritage, and particularly any form of court sanctions, invoking the national security interests. On the other hand, it is safe to assume that political (party) elites, who hold the executive power in the Western Balkan countries, shall continue to do everything in their power to strengthen their control over the intelligence and security services. There is, hence, a real danger from political abuse of these services; however, such abuses are more likely to be directed against rival parties and interest groups then to ordinary citizens. Finally, it is evident that these countries have lost enthusiasm for examining the heritage of the security services, which means that is likely that national authorities shall suspend all requests for lustration and opening of secret files held by these services. [116]

Generally speaking, the Western Balkan countries today have the main legal, political and system-related preconditions for conducting democratic civil control and monitoring over the intelligence and security services. However, even though in theory the parliament disposes of several different manners for exercising such control and monitoring over the intelligence and security services, in practice, this diversity is the reasons why parliamentary oversight is often superficial and inefficient. Often there is no political will of the ruling parliamentary majority to truly control these services. The limitation of parliamentary oversight in these countries lies in the fact that the legislature, competent parliamentary committees included, has only periodic insights into the operation of the intelligence and security services, which is dictated both by the work dynamics in these institutions and the need to maintain confidentiality of certain procedures and actions in the planning or operative realisation phases.

[116] M. Hadžić, "Raspon obavještajnog nadzora na Zapadnom Balkanu", *op. cit*. pp. 22-23.

The democratic concept of control and oversight over the intelligence and security services in the Western Balkan countries is asymmetrical. This means that the imbalance between the main branches of power in the implementation of control and oversight over intelligence and security services is not eliminated nor reduced. Quite to the contrary, the role of the executive is stronger compared to parliamentary and judicial oversight and control.[117] Democratic oversight and civil control of intelligence and security services in these countries is a concept most citizens are not familiar with - this claim is verified by the results of public opinion polls according to which some two thirds of citizens do not know whether intelligence and security services are subject to democratic and civil control.[118]

On the other hand, it should be borne in mind that no Western European country has a special statute that would regulate directly and in detail the issues of democratic civil control and oversight over the intelligence and security services. The main reason behind this is the fact that the key elements of this concept are already built in the political and constitutional principles these countries rest on. In addition, the decades of democratic practice had resulted in a set of general rules and procedures for control and oversight over these institutions.

3. CONCLUDING REMARKS

The establishment of the parliamentary commissions for parliamentary control of the security sector at the state level can be considered the most important milestone in **Bosnia and Herzegovina's** efforts to achieve the democratic control over the sector. With a significant support by international institutions, the supervisory function of these commissions has been strengthened, as provided for in the relevant laws. The Rules of Procedure of the Bosnia and Herzegovina Parliamentary Assembly provide for a large number of mechanisms that are available to committees to oversee the operations of the security sector. Their operation is to a large extent transparent, and the public is properly informed about their activities. In addition, they have established concrete cooperation with the NGO sector (through organising seminars and round tables with the representatives of non-governmental organisations and the media).[119]

Although the work of the commissions in the Bosnia and Herzegovina Parliamentary Assembly has been assessed as satisfactory, there are still some drawbacks. One of them is a poor cooperation between the commissions and the executive, resulting in the executive authorities failing to respond to the requests of

[117] *Ibid*, p. 12.

[118] *Cf.* A. Petrović, "Znamo li ko nas brani" in: *Odbrana* No. 61/08, Beograd 2008, pp. 58-59.

[119] P. Klopher at al, *Almanac on Security Sector Oversight in the Western Balkans*, The Belgrade Centre for Security Policy and Geneva Centre for Democratic Control of Armed Forces, 56.

the Parliamentary Commissions. This lack of cooperation is evident in the relations between the Bosnia and Herzegovina Joint Commission for the Oversight of the Intelligence and the Security Services with the Council of Ministers.[120] Therefore, the cooperation between the Parliamentary Assembly committees responsible for the oversight of the security sector and the executive should be improved. In fact, the draft law on parliamentary oversight of the defence sector, security and intelligence services stipulates the penalties for non-cooperation with the Parliament and its bodies. In addition, one of the major disadvantages is the weakness of the administrative and logistical capacity of the Secretariat of these commissions. The needs of the commissions are much greater than the support they currently receive from the Secretariat. It is clear that increased expert and financial support must be provided for the commissions to be able to improve their work. This applies especially to the entity-level commissions, where the secretariats have only one expert per commission.[121]

It is estimated that the Former Yugoslav Republic of **Macedonia** has achieved a satisfactory progress in the security sector reform, but not so much with respect to the intelligence agencies. In fact, due to the communist past legacy and the nature of their activities, these services remain to be the least transparent security actors. It is also considered that members of the Committee for Oversight of Intelligence Services lack the necessary expertise to oversee the operation of these bodies, especially when it comes to field visits, which requires specific information and experience. With the exception of one employee, the committees do not employ consultants to provide information and expertise to the committee members. This lack of capacity is accompanied by a lack of political will among the committee members. To increase the independence and effectiveness of the committees, the Assembly Rules of Procedure provides that the Committee Chairman must come from an opposition party, which certainly contributes to the independence of the Committee. In practice, almost all decisions are made by consensus, which means that the majority of the committee members (who are members of the ruling party) are reluctant to confront or go beyond the "ceremonial" function of their job.[122] Annual reports by the two committees are very limited and contain incomplete information in many areas, such as those related to the budget or procurement contracts. The committees also missed many deadlines for the submission of reports and operating plans. The committee members only sporadically demand special reports from the security and intelligence services. That is why the relevant authorities do not take these committees seriously enough.

It has already been pointed out that after the new Assembly of the Republic of **Serbia** was convened at the middle of 2012 new committees were established: the

[120] In accordance with the report of this Committee, the Council of Ministers failed to fulfil its legal obligation to submit annual reports to the Bosnia and Herzegovina Intelligence and Security Service for the last three years.

[121] P. Klopher at al, *op. cit*, p. 57.

[122] *Ibid*, p. 145.

Defence and Internal Affairs Committee, and the Committee for Oversight of Security Services. However, it is still too early to assess the efficiency of these committees in the oversight of the defence sector.

Some authors argue that even though the legal framework for parliamentary control of the defence sector has been strengthened, in reality, the Assembly's control of the security sector and the Government activities in general is still limited for several reasons. The first reason is a high level of dependence of members of parliament to the party leadership, which is due to a lack of intra-party democracy in each party individually. The second reason is the very nature of the political system and the existence of coalition governments and coalition agreements, which imply a strict division of the government sectors (ministries and agencies) among the coalition partners. Consequently, members of the same party are reluctant to question the work of their party colleagues leading other ministries and agencies, and members of the ruling coalition are reluctant to interfere in the work of their coalition partners, so as not to disturb the coalition balance.[123]

Finally, it is rightly considered that it is very important to take into account the nature of parliamentarism in the Republic of Serbia (and the neighbouring countries), which is based on the continental law tradition, in which the lawmakers are interested primarily in the legislative process and are not used to oversee and examine the operations of the executive.

The **Croatian** example shows that the establishment of the democratic and civilian control of the security and defence sector is a long-lasting process. The Republic of Croatia initiated the reforms more than 20 years ago. While the results achieved in the reform of the security and defence sector have been satisfactory, especially when compared with the other countries in the region, there is still a lot to be done. With respect to parliamentary control, the there is a need to improve the legal framework in the sense that all Government sectors and agencies together with the Parliament and its bodies should work together to ensure further progress in the security sector.[124]

In this regard, the NGO sector in the Republic of Croatia is already dissatisfied with the current situation in the field of the control of the intelligence and security structures in the country, indicating that the adoption of the Croatian Law on the Security and Intelligence System in 2006 was a step back in terms of the opportunities for efficient oversight of the security agencies by the civil society organisations. In accordance with their views, this Law reduced the authority of the Council for Civilian Oversight of Security and Intelligence Agencies, which now cannot oversee the Operational and Technical Centre and access the data on the implementation of the operational and technical measures against citizens, as the areas of potentially the most serious violations of human rights. In this regard, non-governmental human

[123] *Ibid*.

[124] *Ibid*, p. 97.

rights organisations in Croatia request that a detailed analysis of the Croatian secret services' performance and expenditures should be made, on the grounds that their annual budget for 2010 (330 million Kuna) exceeds the budget of the Ministry of Tourism. They also jointly insist that the public should be informed about the potential abuse by the Croatian intelligence and security services in the campaign for the 2009 presidential election, during which the four presidential candidates, including the elected President Ivo Josipovic, were allegedly subjected to processing by these services.[125]

In its prior work, the Defence and Security Committee of the **Montenegrin** Parliament performed the oversight of the National Security Agency (ANB) through two basic mechanisms: hearings and parliamentary investigations. In this regard, the Committee held consultative hearings when it needed expert opinions before deciding on the adoption of laws and strategies. In addition, it held control hearings in cases of disputes relating to the adoption or implementation of the government policies in the security and defence sector (witnesses in control hearings were usually members of the Government and representatives of the relevant state authorities. In the past, the hearings referred to the ministers and police and ANB directors). It is expected that the new Law on Parliamentary Oversight in the Defence and Security Sector would motivate members of parliament to use the hearings mechanism more frequently and more timely than in the past.[126]

In this regard, it should be noted that the analysis conducted by a group of international experts showed that major changes have occurred in the Agency since 2010 when it obtained professional management. However, the operations of ANB continue to be criticised by the Montenegrin independent media and the opposition political parties. The accusations generally relate to, i.e., characterise the intelligence service as a tool used by the ruling party to oversee and control its political opponents. As a result, few opposition politicians in Montenegro, if any, consider the ANB a professional and impartial institution. Many are suspicious about the real motives of the Agency, considering that it has retained also some of the former SFRY secret service agents. Considering that these former secret police officials had frequently persecuted the opposition politicians on ethnic grounds, this is still a sensitive issue. Some opposition parties in Montenegro, such as the Movement for Change, in their programs call even for the dissolution of the ANB for a "strictly specified period of time."[127]

The parliamentary control of the security sector in **Kosovo** was established only recently, and the experience in this area is still limited. Although it was first

[125] *Cf.* A. Barbir-Mladinović, "Slab civilni nadzor sigurnosno-obavještajnih agencija," *Radio Slobodna Evropa*, 1 March 2010.

[126] *Cf.* R. Radević, "Oversight of Intelligence Agencies in the Western Balkan Countries – Case Study: Montenegro," *Case Studies on Intelligence Governance in the Western Balkans*, DCAF Geneva 2012, pp. 6-10.

[127] *Ibid.*

introduced at the end of 2006, the consolidation of parliamentary control occurred after 2008. In fact, only after the Kosovo Declaration of Independence it was possible to put all the local security institutions under the control of the Kosovo Assembly. In spite of a sound legal framework, in practice, neither general, nor specialised committees for the security sector exercise the control successfully.[128]

In addition to the Parliamentary Committee for Oversight of KIA, other committees with formal responsibilities to oversee KIA include the Parliamentary Budget and Finance Committee, which approves the annual budget of KIA; the Parliamentary Committee for Oversight of Public Finance, which examines the budgetary expenditures of KIA and audit reports; and the Parliamentary Committee on the Rights and Interests of Communities and Return, whose mandate is to monitor potential abuses in KIA relating to the minority rights. However, the parliamentary control of the activities and policies of the security institutions is virtually non-existent as well. These committees have failed to identify most failures in the security sector, which relate to the revision of strategies, implementation of good governance practices, and other important government policies. This can be an obstacle for the checks and balances between the legislative and executive branches of government in this sector. There has been no discussion in the committees or in the plenary sessions about the adoption of the Kosovo Security Strategy or other institutional strategies.

One of the major obstacles for effective parliamentary oversight of the defence sector is a low qualification level of the Assembly staff. As a matter of fact, the Assembly staff is recruited largely on the basis of personal preferences and political affiliations, which is a problem faced by the overall public administration of Kosovo. Consequently, the number of skilled and qualified staff in the parliamentary committees is very small. In addition, there seems to be a lack of political will for the improvement of the overall process, i.e., effective parliamentary oversight of the defence sector. Exactly because of this interference of personal or party interests, and the influence of the party leaders on members of parliament, in practice, the Kosovo Assembly has much less impact on the actors in the security sector than is required by law.

It is considered that one of the main weaknesses of the Committee for Oversight of KIA was the lack of consistency that occurred for several reasons. Until now, the Committee has had a proactive approach, primarily due to the efforts of the Chairman, who is a member of the opposition, but the reliance on individual committee members to be the ones to insist on doing the work has lead to inconsistencies. In the meantime, members of the ruling coalition have a tendency to insert their political programs in the discussion by the Committee in a way that can sometimes refocus the scope of their oversight to a specific issue. To illustrate, for a few months attention was given to the issue of party intelligence services, which redirected the Committee's attention from its mandate – the oversight of KIA. Also, in addition to these political concerns,

[128] The Committee on Internal Affairs, Security and the Kosovo Security Force has yet to produce a report on the activities of the Kosovo Security Force.

the Committee has only two staff members who perform all administrative tasks, and not a single expert who would advise them. Regardless of the rules of discretion, the Committee could certainly use the availability of external expertise.[129]

When it comes to the compliance of the regulatory framework with relevant international standards in this field, the analysed states may be categorised as follows:

State	Grade	Reasoning
Bosnia and Herzegovina	B	The Law on the Intelligence and Security Agency is partially in accordance with international standards and is being implemented. The Law on Parliamentary Control of the Defence and Security Sector and intelligence services is not yet passed.
Croatia	A	Law on the Security and Intelligence System of the Republic of Croatia is in accordance with international standards.
Serbia	B	Law on the Basis of Organisation of Security Services and the Law on the Security and Information Agency are partially in accordance with the international standards and are being implemented.
Macedonia	B	Law on the Intelligence Operation Agency and the Law on the Internal Affairs (which regulates the operation of the Security and Counter-Intelligence Office) are partially in accordance with international standards and are being implemented.
Bulgaria	A	The Law on the State National Security Agency and the Law on Special Intelligence Means are, after years of amendments, now fully in accordance with international standards and are being implemented.
Montenegro	B	Law on the National Security Agency is partially in accordance with international standards.
Kosovo	C	Law on Kosovo Intelligence Agency is partially in accordance with international standards.

[129] F. Qehaja, *op. cit*. p. 16.

Dr Aleksandra Rabrenovic

LEGAL DEVELOPMENT OF CORRUPTION PREVENTION MECHANISMS IN SOUTHEAST EUROPE:

WHAT HAVE WE LEARNED?

1. Introduction

The anti-corruption initiatives that have taken place in the course of the past decade in Southeast European countries have been quite extraordinary. As presented in this study, every country in the region has undertaken significant efforts to establish a legal and institutional framework for building integrity that should provide the basis for prevention and fight against corruption. This has ranged from strengthening of parliamentary oversight over the executive, creating a plethora of anti-corruption institutions (such as specialized anti-corruption bodies, ombudsman, commissioners for free access to information, supreme audit institutions) to introducing public procurement and human resource management rules and regulations.

In spite of these efforts, corruption is still a high vulnerability area and one of the main causes hindering economic and social development in all the countries in the region.[1] Recent study produced by UNDOC reveals that people from the Western Balkans countries rank corruption as the most important problem facing their countries/areas after unemployment and poverty.[2] In Bulgaria (and Romania) substantial and unyielding problem of corruption has caused concern not only of their citizens but also of the EU authorities, that introduced new monitoring instruments to fight corruption several years after the EU accession.[3]

In this concluding chapter we shall attempt to draw conclusions on what are the drivers of on-going legal changes to curb corruption and understand why

[1] UNDOC, *Corruption in the Western Balkans, Bribery as Experienced by the Population*, United Nations Office on Drugs and Crime (UNDOC), 2011, p. 7.

[2] *Ibid.*

[3] M. A. Vachudova, A. Spendzharova, "The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession", *European Policy Analysis*, 2012:1.

significant building integrity activities, exemplified in creation of a comprehensive legal framework for prevention of corruption, have not yet yielded desired results. For this, we will consider the relative influence of five main factors:

- Historical development of national integrity frameworks
- External (international) influence
- Adoption of anti-corruption strategies
- Quality of legislation
- Political culture

In the final section we will draw conclusions on the main determining factors in development of anti-corruption efforts in Southeast Europe and try to identify key conditions that need to be fulfilled to achieve tangible results in this comprehensive and challenging field.

2. Historical Factors

Historical developments have undoubtedly had an important impact on the evolution of integrity systems in Southeast Europe. All ex Yugoslav countries share the same legacy of the late-communist administration from which reforms during transition and in the early post-communist period started off. Historical development of Bulgaria was somewhat different, as Bulgaria had a different kind of socio-political system, which in many aspects resembled the ex-Yugoslav system. Key common features of these systems were: the dominance of communist party and ideology; role of the state as an instrument of suppression; system of unity of power; lack of a great number of corruption prevention mechanisms (e.g. public procurement rules) etc.

The influence of history on institutional development is often conceptualized by using path dependence theory, which assumes that policy-makers do not have a free choice when they want to reform institutions.[4] The basic argument is that history matters and that social processes do not evolve in an unconditioned way, but are highly dependent on the historical/existing institutional set ups. This means that former decisions have a high degree of impact upon those that follow. For ex Yugoslav countries it suggests that the institutional make-up (and practices) of the integrity system that existed at the end of the communist regime could only be 'modified', 'amended', 'adjusted' but could not be radically changed. Yet it is conceivable that

[4] P. Pierson, "Increasing Returns, Path Dependence and the Study of Politics", *American Political Science Review* 94, 2000, pp. 251-267; K. Thelen, "Historical Institutionalism and Comparative Politics", *Annual Review of Political Science* 2, 1999, pp. 369-404.

the 'storm of the transition' (called a 'critical juncture')[5] led to a collapse of the system and the planting of a new system and hence a new beginning.

At the first sight it appears that most of the Southeast European countries have indeed survived the transition storm and planted a new integrity building institutional set up. Virtually all of them changed their existing institutional system and introduced a new one quite rapidly. System of unity of power has been replaced by a democratically conducive system of separation of powers. Parliamentary committees have been granted powers to keep the executive to account. New institutions, such as specialized anti-corruption agencies and commissioners for free access to information, that did not exist in the communist times, have been set up. Public procurement rules and internal audit rules have been introduced for the first time.

Although the system has been radically changed by legal means, lots of earlier practices have, unfortunately, remained just as the same. As pointed out in the chapter on parliamentary oversight, parliamentary committees rarely exercise effective control over the Government, including the ministries of defence, due to political system problems and lack of tradition of parliamentary scrutiny over the executive. In spite of introduction of legislation on free access to information, the cultures of secrecy, as shown in chapter on free access to information, often still prevails, due to non-reformed legislation on classified information. Public procurement rules have been adopted, but are often circumvented in various manners,[6] resulting in a low degree of confidence of a business sector and huge loss of public resources. Civil service legislation based on modern human resource management practices has been introduced in all the countries in the region, but has failed to address some critical issues, such as politicisation and meritocracy.

There are, of course, variations between countries in setting up elements of the integrity systems. In some countries individual anti-corruption institutions have shown much more effectiveness than in others. This is, for example, the case with rather active defence and security committee of Bosnia and Herzegovina, Specialised Public Prosecutor Office for Corruption (USKOK) in Croatia, or Commissioner for Free Access to Information and Ombudsman's office in Serbia. Still, good examples of successful and effective anti-corruption institutions and practices remain far and few between.

This short analysis shows that historical factors indeed play an important role in development of newly introduced integrity framework and that path dependence cannot be easily reversed. The change of individual institutions within a system often takes much time and frequently comes about in quite different ways, depending upon the local history and culture.

It, however, also appears that it may be unrealistic to expect that a comprehensive institutional change required by building national integrity system

[5] K. Thelen, *op. cit*, pp. 369-404.

[6] S. Marinac, *Korupcijska mapa javnih nabavki u Republici Srbiji*, OSCE, Belgrade, 2012.

can be materialised in a relatively short period of time. In this respect Rosenbaum's observation of the US example in terms of seeking to achieve a viable civil service system is highly illustrative.[7] He notices that the US first civil service law was passed in the 1880s. However, it was not until the 1930s, fifty years later, that half of the national government's employees were covered by civil service protection and it was not until the 1960s that almost all were. It took another twenty years to have many states and local government employees under the civil service systems. If the USA needed not a century to introduce the civil service legislation throughout the country, maybe we are indeed overly ambitious expecting the South and East European countries to fully implement and internalise Western democracies anti-corruption practices in around a decade or two. Institutional changes do require time and change of mindsets of people, which cannot indeed be achieved over night.

3. External Influence – International Conventions Coupled with the EU Accession Process

Late 1990s and early 2000s have witnessed growing attention being placed on anti-corruption measures by international community, which called for national authorities to adopt various anti-corruption policies and institutions. A 'sudden' interest in anti-corruption issues appears to stem from the recognition about the devastating effects of corruption on sustainable development, on political stability and, since 2001, on global security.[8] In addition, these anti-corruption initiatives were also fostered by the public outcry in many developing countries about the harmful and overwhelming impact of corruption on their lives.[9]

The most important international conventions on anti-corruption were adopted in the period of only a couple of years - from around 1997 to 2005. The OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions was signed in 1997 and entered into force in 1999, but its reach has been limited only to OECD countries and several non-member countries.[10] In 1999, the Council of Europe adopted Criminal Law Convention on Corruption (entered into force a year earlier -in 2002) and its Additional Protocol to the Criminal Law Convention,

[7] A. Rosenbaum, "Political, Economic and Administrative Reform in Central and Eastern Europe: Much Accomplished, but What Have We Learned?" in M. Vintar at al (eds.), *The Past, Present and the Future of Public Administration in Central and Eastern Europe*, NISPAcee, 2013.

[8] K. Hussmann, *Anti-Corruption Policy Making in Practice: What Can We Learn for the Implementation of Article 5 of UNCAC?* Synthesis report of six country case studies: Georgia, Indonesia, Nicaragua, Pakistan, Tanzania and Zabmia, Chr Michelsen Institute, U4 report, 2004, p. 16.

[9] *Ibid*.

[10] Argentina, Brazil, Chile, Bulgaria, Estonia and Slovenia.

adopted in 2003 (entered into force in 2005).[11] The United Nations Convention on Corruption was adopted in 2005 and its ratification process is underway.[12]

Great majority of countries analysed in this study have quickly signed the outlined conventions and starting overtaking the obligations stemming from them. Thus, for example, the Council of Europe's Criminal Convention on Corruption was signed by the analysed countries in only three years and started to be effective in 2003 at the latest (see more details on this in Annex 2). The UN Convention on Corruption was also signed by majority of countries in the period of 2003-2005 and ratified in the period of 2005-2007. As almost all the analysed countries are members of the Council of Europe they have also been following the Council of Europe's recommendations, such as for example, Twenty Guiding Principles for the Fight Against Corruption, which implementation is being scrutinised by GRECO (Group of States Against Corruption) peer review mechanism. Since 2000, the countries have also joined the membership international non-governmental organisations, such as the Inter-Parliamentary Union and Geneva Center for the Democratic Control of Armed Forces (DCAF) and started to be obliged to apply their standards with respect to parliamentary control of the executive and especially in the defence sector.

The adopted international legal framework and its review mechanisms, especially GRECO evaluation rounds, appear to have had an important influence on the development of corruption prevention mechanisms on the ground. All countries in the region have a very high level of compliance with the GRECO recommendations (see Annex to this study, part on Joint Monitoring Mechanisms). It is, however, difficult to ascertain to which extent individual GRECO recommendations have affected particular policy measures undertaken by individual countries, or have been the result of additional factors, such as the EU and NATO accession process.

It may be argued that for most Southeast European countries, the EU accession process has been the most important driver for developing anti-corruption policies, as fight against corruption has been clearly recognised as a condition for the EU membership. In the EU Commission's view, corruption in the region has been a serious problem, which has an adverse effect on investments and business activities and damages national budgets, especially concerning public procurement and privatisation. [13] For this reason, the accession to European Union has not only been made dependent on legislative changes in the realms of the respect for human rights, and broader democratic governance, but to a significant extent also on compliance with anti-corruption measures. The focus on anti-corruption policies has further sharpened over the past couple of years, as the Commission has been placing

[11] The Council of Europe also adopted Civil Law Convention on Corruption in 1999, (entered into force in 2003)

[12] Up to June 2013, 140 states have signed the convention. See: *http://www.unodc.org/unodc/en/treaties/CAC/signatories.html.*

[13] European Commission, *Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2011-2012*, Brussels, COM(2011) 666 final

an increasing attention at strengthening the rule of law and fight against corruption as one of the key parts of the EU accession process.[14]

The EU accession influence on the legal framework on corruption prevention has been the most visible in the areas of public procurement and internal and external audit, as these areas are covered by separate EU negotiation chapters. Namely, public procurement requirements have been elaborated in detail in the negotiation chapter 5, which imposes the EU public procurement standards set out in the number of EU directives, including the Directive 2009/81/EC on the procurement procedures in the fields of defence and security, as pointed out by in the chapter on public procurement. Furthermore, as indicated in the chapter on internal and external audit, internal and external audit are covered by Chapter 32 of the pre-accession negotiations, named Financial Control. The compliance with the EU standards in this area is assessed primarily by analysing the establishment and operation of decentralised and functionally independent internal audit and functioning and effectiveness of supreme audit institutions (SAIs).

The EU accession process has, however, also been an important anchor for reform of the overall institutional integrity framework of the countries in the region, which is assessed through political criteria for EU membership. It is a commonplace to note that the European Council in Copenhagen in 1993 set a number of political criteria for accession to be met by applicant countries, such as "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." For this reason, the development of all corruption prevention mechanisms which are the subject of this study (including the parliamentary oversight, free access to information, conflict of interest, operation of ombudsman's office, specialised anti-corruption bodies and human resources management) has been constantly assessed by the EU Commission through its annual assessment reports for all EU (potential) candidate countries. In Bulgaria, the fight against corruption, which also includes prevention mechanisms, is being assessed by the EU Commission even after the accession, under the cooperation and verification mechanism, through its six months reports on progress.[15]

The examples of the EU's influence on development of anti-corruption legal framework in the analysed countries are numerous. Although this issue exceeds the scope of this study, it is interesting to mention some of them. For example, as pointed out in the chapter on specialised anti-corruption bodies, in Bosnia and Herzegovina the establishment of the Anti-Corruption Agency was one of the conditions for visa liberalisation process, while in Bulgaria the creation of Borkor (the Centre for the Prevention and Suppression of Corruption and Organised Crime) was a result of the EU Commission's recent recommendation from the Co-operation and Verification

[14] *Ibid*.

[15] See for example, European Commission, *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism*, Brussels, 18/7/2012, COM (2012) 411 final.

mechanism. Reforms undertaken in the area of freedom of access to information, as noticed in the chapter on free access to information, also constitute a part of much wider legislative changes that are related to the EU accession process.

The question to be raised is why the Southeast European countries have so easily 'succumb' to this strong EU influence, which is often called the process of 'Europeanisation'.[16] One of the theories that explain this is 'external incentives model' which claims that the EU imposes its conditions that acceding countries have to fulfil in order to receive rewards from the EU, either in the form of an assistance or institutional ties.[17] Assistance is usually provided through different forms of funds (former PHARE or CARDS, currently IPA funds), while institutional ties range from trade agreements, stabilisation and association agreements to full membership. The benefits from these institutional ties are numerous – better market access to the EU with the prospects of gains from trade and investments.[18] It may also be argued that the greatest benefit from the EU accession process is increased confidence in the country's institutions by foreign investors and creation of better business environment.

In conclusion, it may be argued that development of corruption prevention mechanisms in South-East European countries has been largely motivated by external factors, notably the political pressure of the EU Commission. Candidate and potential candidate countries have high expectations about the benefits to be derived from EU membership, which constitutes an important motivator and momentum as well. However, in the absence of strong national initiatives and change drivers it remains to be seen to what extent this approach will bring about real and sustainable change.

4. Adoption of Anti-Corruption Strategic Policy Documents

All the analysed countries have crafted extensive anti-corruption policy documents, (usually called anti-corruption strategies) that contain a large number of legal and administrative prevention corruption measures. Thus, for example, in Kosovo, the first anti-corruption policy document was adopted in 2009 (for the period 2009-2011) while the second was approved by the Kosovo Assembly in February

[16] The 'Europeanisation' is perceived as a process in which acceding countries adopt EU rules in general. Literature differentiates between different forms of adoption: the formal, the behavioural and communicative or discursive conception. While the formal adoption consists of the transposition of EU rules into national law or the establishment of formal institutions and procedures in line with EU rules, in the behavioural conception adoption is measured by the extent to which behaviour is rule conforming. In the discursive conception means that norms are fully incorporated as domestic actors are truly persuaded to follow the norm. *Cf.* F. Schimmelfening, U. Sedelmeier, "Introduction: Conceptualising the Europeanisation of Central and Eastern Europe", in F. Schimmelfening, U. Sedelmeier (eds.), *The Europeanisation of Central and Eastern Europe*, Cornell University Press, 2005, p. 7.

[17] *Ibid*, p. 10.

[18] *Ibid*.

2013 (for the period of 2013-2017). In Montenegro, the Government adopted a Strategy for the Fight against Corruption and Organised Crime in 2010 (for the period 2010-2014) that has been revised twice since then. Similar documents have also been adopted in all countries in the region over the past few years. They are usually solidly written containing several important elements: background chapters on nature, levels and trends of corruption; objectives and priority areas; substantive chapters on prevention, criminalisation/law-enforcement, public participation/ education; monitoring, assessment, and adjustment mechanisms and criteria.

The extent to which adoption of anti-corruption strategies has made an impact on development of corruption prevention legal framework and fight against corruption in the analysed countries appears, however, to be quite limited. Most of the countries in the region have faced substantive challenges with the implementation of the anti-corruption strategies, which has often been pointed out in the EU Commission's annual progress reports.[19]

There are several reasons for rather low effectiveness of anti-corruption strategies in the countries in the region. The first is that the design of these documents has been rarely been preceded by country-specific diagnostic work, such as corruption or integrity baseline studies, an analysis of the country's integrity system, or an examination of the national institutional arrangements for fighting corruption. Instead, most often, anti-corruption strategies have been the result of a deliberate gathering of a broad range of interests and initiatives, dominated and driven by international community, especially the EU.

Furthermore, it is not in dispute that in most of analysed countries the development of anti-corruption strategies has also been driven by the EU accession process. For example, in Bulgaria, the Accession Partnership of 1999 singled out the adoption of a comprehensive Government anti-corruption strategy as the most important short-term priority, while its implementation was marked as the medium priority.[20] In a similar vain, a development of the new anti-corruption policies in Serbia, Montenegro, Macedonia and Croatia has been also linked to the advancement in the EU accession process.

Another often overlooked reason for ineffectiveness of strategic documents in general is that the concept of a 'Government strategy' is relatively new and has not still found its proper place in the policy-making process of the countries of the region. To our knowledge, Government strategies were not used in ex Yugoslavia

[19] European Commission, *Serbia 2012 Progress report*, Brussels, European Union, available at: *http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf*;European Union, *Progress Report, Macedonia, 2012*. Brussels: European Union. Available at: <*http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm*; *Comprehensive Monitoring Report on Croatia 2012*, Official Web-site of the European Commission, *http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm,* pp. 9-10; EU, Progress Report on Kosovo 2011.

[20] Council Decision 1999/857/EC, OJ L 335, 28/12/1999.

as separate strategic Government documents, but have been introduced mainly after 1995 under international influence. In addition, all countries in the region belong to continental law legal tradition which is based on 'hard law' and essentially does not recognise categories of 'soft law', such as a 'strategy'. For example, in Serbia the concept of the 'Government strategy' was for the first time introduced only by the Law on Government in 2005.[21] Before then, all Government strategies (most of them imposed by the donors' pressure) were adopted by a Government conclusion which is the lowest act in the hierarchy of acts which are adopted by the Government. Nowadays, a Government strategy does not constitute a legal act, but "an act by which the Government expresses it intentions in some social area, on which it rests type and speed of its actions".[22] Due to a lack of their legal effect, excessive number of strategies adopted each year, often with overly ambitious strategic goals and actions, Governments are usually not consistent with following up on their implementation, which is coupled with a general lack of feeling of obligatory nature of strategy documents.

Finally, an important reason for fairly limited impact of strategic anti-corruption frameworks is that responsibilities for the implementation of these broad documents are not well distributed. Often all ministries are required to develop and implement their own integrity plans, but their efforts are not adequately monitored. In many countries specialised anticorruption bodies are tasked with both coordination and monitoring. However, these bodies are often marginalised as they don't have adequate authorities and capacities, which does not allow them to carry out effective control of politically stronger centers of power within the executive.

This situation is further exacerbated by the ex Yugoslav tradition of having strong and independent ministries and administrative bodies and weak center of Government, with inadequate cross-ministry coordination and cooperation. In particular, the capacity and competences of the General Secretariat of the Government, the main civil service body in the center of Government, that should be responsible for monitoring of the implementation of all Government documents, including the strategies, are in most of the countries still insufficient.[23]

In conclusion, the impact of anti-corruption strategies on fight against corruption in Southeast European countries appears to be negligible, primarily because their adoption has been driven by EU accession process with a lack of adequate supporting institutional structure for their implementation. Even in cases when significant results in the fight against corruption have been achieved, they

[21] In the Government's justification for adoption of this law, it was pointed out that the strategy is not a legal act, but an act by which the Government expresses it intentions in some social area, on which it rests type and speed of its actions.

[22] Justification of the Serbian Law on Government.

[23] SIGMA, *Assessment, Bosnia and Herzegovina 2012*, March 2012, *http://www.oecd.org/site/sigma/publicationsdocuments/BiH_Assess_2012.pdf*; *SIGMA assessment, Croatia, 2011*, *http://www.oecd.org/site/sigma/publicationsdocuments/48970754.pdf*; *SIGMA Assessment, Serbia, 2012*, March 2012, *http://www.oecd.org/site/sigma/publicationsdocuments/Serbia_Assess_2012.pdf*

appear to stem not from the policy framework established in the anti-corruption strategy, but from activities undertaken in order to make a concrete step in the EU accession process. The case of Croatia appears to be illustrative in this respect, as the main anti-corruption incentive has not come from the wish to fully implement the Anti-Corruption Strategy, but to close the 23rd EU negotiation chapter "Judiciary and Fundamental Rights'.[24] It therefore appears that anti-corruption policies have not been the drivers of development of anti-corruption prevention institutional frameworks, but have also been the result of the 'external incentives model', i.e. the wish of the acceding countries to fulfil the EU requirements in order to receive tempting EU accession rewards.

5. Quality of Legislation

The central question prompted by this study is to which extent the quality of legislation on corruption prevention can have an impact on fight against corruption? At the end of each chapter we have assessed the quality of legislation based on comparison with outlined international standards. Unfortunately, the scope of this study did not allow us to go into more depth with the implementation practices and assess legal frameworks both from the point of view of substance and implementation, although we did provide some insights on this important matter based on existing materials.

In our view, it is not in dispute that quality of legislation can have a significant impact on establishing a sound anti-corruption framework. For example, in the area of public procurement and asset disposal in the defence sector, which have received the lowest scores regarding the quality of legislation, the rules regarding the exceptions in cases of defence and security in most countries have been loosely or poorly drafted, providing an ample space for carrying out non transparent procurements and dispose assets outside of the general legal framework.

It may be argued that in most instances where legislation is ambiguously or imprecisely written, it is not from oversight or incompetence but rather the need to maintain ambiguity.[25] This is usually done either in order to facilitate the intended manipulation of the statute in question or in order to achieve consensus among parties that disagreed on specifics of the legal text in question.

The next question that arises is, however, whether even the high quality

[24] D. Prkut, *Antikorupcijska politika ili tek refleks pristupnog procesa- Analiza sadržaja i provedbe antikorupcijske politike u Hrvatskoj 2008.-2011,* GONG, Zagreb 2012, *www.antikorupcija.hr/lgs.axd?t=16&id=3084*, Cf: S. Knezevic, *Building Integrity in Defence, Croatia, draft report*, April 2013.

[25] A. Rosenbaum, "Political, Economic and Administrative Reform in Central and Eastern Europe: Much Accomplished, but What Have We Learned?" in M. Vintar at al (eds.), *The Past, Present and the Future of Public Administration in Central and Eastern Europe*, NISPAcee, 2013.

legislation (assessed from the point of view of international standards) is always suitable for South and East European countries? Do Western democracies anti-corruption models provide for an adequate institutional framework for fight against corruption in Southeast European context?

The answer to this question could be given only if we have a more detailed look at the implementation of this high quality legislation (from the aspect of international standards), which is in many cases also rather problematic. Although, as pointed out a couple of times now, proper analysis of implementation of legislation exceeds the scope of this study, at the end of each chapter all authors have provided brief assessment of implementation of legal framework based on already available materials and elaborated a number of problems which countries in the region are facing in this regard. For example, although majority of analysed countries have received the best grade A for the quality of their legal framework in the area of parliamentary oversight, in most of them parliaments still exercise fairly limited scrutiny over the executive, for a number of reasons which are of political nature and supersede the legal matters.

In some areas, the difference between the substance of the high quality legal rule and reality is so stark, that we can indeed question the usefulness or even harm that such a norm is having in practice. One of examples in this respect is certainly an excellent civil service legislation of Kosovo, which may even be assessed with highest grade A, but has been facing significant challenges with respect to it implementation and is perhaps non-implementable in the current circumstances.

This discussion further necessitates reminding ourselves of what is the purpose of law in a society? Is there any use to have a high quality legislation that cannot be implemented in practice? Legal theorists argue that the law constitutes a mechanism for resolving social and political conflicts.[26] In order to serve this purpose, the legal norms have to reflect the reality and have the potential to change it.[27] Therefore, legal drafters and legislators should not have full freedom when preparing and adopting legislation, but have to take into account the feasibility of the norm in the concrete social context.[28] Otherwise, the adoption of legal rules which are not at all implementable constitute an example of misuse of law. This, nevertheless, does not mean that the reality is always a reflection of the legal norms, as there is usually some difference between the ideal normative order and the social context,[29] which, however, should not be extensive, as otherwise the law cannot achieve its purpose.

In the light of the above discussion it may be concluded that high quality legislation which is fully in line with international standards, but does not at all

[26] K. Nicolaidis, R. Kleinfeld, *Rethinking Europe's 'Rule of Law' and Enlargement Agenda: the Fundamental Dilemma*, SIGMA paper No. 49, OECD publishing, 2012.

[27] S. Blagojevic, *Uvod u pravo*, Sluzbeni list Republike Crne Gore, 2003, pp. 33-35.

[28] *Ibid.*

[29] R. Lukic, B. Kosutic, *Uvod u pravo*, Sluzbeni glasnik, 2008.

reflect the reality of an individual social context of a given country, cannot have a positive impact on social development, including fight against corruption. In Western democracies, international anti-corruption standards were initially developed as a response to domestic circumstances, often constituting an agreement of societal elites to reduce the dominance of executive power and have hence provided sustainable solutions in a given field. In South-East European countries, on the contrary, anti-corruption rules are most often introduced under international pressure and constitute policy transfers, often without a proper understanding of the local context, which has an adverse effect on their effectiveness. Although examples of 'legal transplants', i.e. policy transfers[30] of legal norms from one country's legal system to another are quite a common phenomenon,[31] a number of challenges exist in this process[32] and need to be addressed properly in order to ensure legal rules' implementation and sustainability.

One of the approaches that could be quite helpful to ensure effective implementation of laws is to carry out feasibility studies prior to adoption of legal framework. Conducting feasibility studies would assume trying to understand the main contextual politico-administrative, legal, financial and cultural constraints to the fight against corruption in the country and to spot opportunities for the government to make progress in this field. It also assumes assessing the strengths and weaknesses of the current institutional set-up in order to identify what changes would be needed and what can reasonably be improved according to current budgetary affordability, human resources limitations and international pressure from standard setting institutions. Such an approach was, for example, employed in the course of establishment of Anti-corruption agency in Montenegro, when the feasibility study conducted by SIGMA assessed that creation of a "strong and independent" anti-corruption institution may not be viable in a Montenegrin context. Instead, it was proposed to create an Anti-Corruption Initiative that would constitute a Government body, in charge of raising awareness on corruption prevention, without any special investigative powers, which would require independent legal status.

---

[30] Policy transfer is defined as "the process in which knowledge about policies, administrative arrangements, institutions etc. in one time and/or place is used in the development of policies, administrative arrangements and institutions in another time and/or place", D. Dolowitz, D. Marsh, "Who Learns What from Whom: a Review of the Policy Transfer Literature", *Political Studies* 44, 2006, 343 – 357; D. Dolowitz, D. Marsh "Learning from Abroad: the Role of Policy Transfer in Contemporary Policy-Making", *Governance* 13 (1), 2000, 5 – 24.

[31] A. Wotson, *Legal Transplants, An Approach to Comparative Law*, University of Georgia Press, 1993.

[32] Political science studies distinguish between three types of factors that result in unsuccessful policy transfer: lack of information about the public policy and institutions transferred to the national context (uninformed transfer); even if there has been a clear public transfer, the key elements for the success of the public policy or institutional structure have not been transferred, resulting in unsuccessful transfers (incomplete transfer); and, finally, inadequate attention is given to the economic, political, and ideological context of the country from which the policy is transferred (inadequate transfer). D. Dolowitz, D. Marsh, "Who Learns What from Whom: a Review of the Policy Transfer Literature", *Political Studies* 44, 2006, 343 – 357.

6. Political Culture

Political culture is often used as a standard explanation of why attempts to fight corruption have so far yielded a limited effect in Southeast Europe. The lack of tradition in democratic governance is frequently used to explain the difficulties for establishing sustainable political and administrative institutions in the region.[33]

Whereas formal and technical aspects of institutions can relatively easily be transported from the West to the East, the process of cultural change takes much more time, perhaps generations. Some authors argue that popularity of certain aspects of Western culture reflects an imitation of fashionable trends and not an internalisation of the values that originally generated them.[34] Thus, Western and Eastern value patterns appear to be converging only on a superficial level. Though the symptoms of Westernization are everywhere – in the form of parliamentary oversight over the executive, prevention of conflict of interest, oversight of independent institutions, there is doubt as to whether the adherence to Western norms is accompanied by a corresponding, profound change in value orientations.

Some authors even argue that nowhere is the gap between the formal institutions and everyday practice of democracy so marked as in Southeast Europe. The Balkans have always been known for the strong role played by informal structures, by lifelong and powerful bonds of not only of friendship, kinship and loyalty, but also connections, nepotism, clientilism, and corruption.[35] Lack of trust in formal institutions makes people reluctant to give up the social institutions, which have facilitated their ability to survive under the most adverse conditions and to find solutions to problems that the formal bureaucracy either failed to address or in some cases actively created.[36]

Political culture and tradition may indeed be a significant explanatory variable for the difficulties in fight against corruption in Southeast European countries. However, as this question exceeds the scope of this study, which is centered around legal issues, a more in-depth sociological research would be required to establish the degree to which political culture and tradition have influenced the development of anti-corruption efforts in the countries in the region.

---

[33] A. Verheijen, A, Rabrenovic, "The Evolution of Politico-Administrative Relations in Post-Communist States: Main Directions", in Verheijen (ed.) *Politico-Administrative Relations, Who Rules?*, NISPAcee, 2001, pp. 410-426.

[34] A. Savicka, "Postmaterialism and Globalisation: the specificity of value change in the post-communist milleu", Research Institute of Culture, Philosophy and Arts, 2004.

[35] S. Sampson, "Rethinking Elite Configurations in the Balkans", in Hann (ed.), *Postsocialism: Ideals, Ideologies and Practices in Eurasia*, pp. 297-314.

[36] *Ibid.*

6. Conclusion – Are We All Great Pretenders?

This study is a testimony of astonishing legal changes in the area of prevention of corruption that occurred in countries of South-East Europe over the past decade. All analysed countries have made an important progress in setting up a sound legal framework for prevention of corruption, that includes: amending the Parliament's Rules of Procedures in order to allow for better scrutiny of the Parliament over the executive; setting up specialised anti-corruption bodies to boost corruption prevention efforts; putting in place conflict of interest legislation to discourage public officials from accumulating excessive powers and so on.

The question we tried to answer in this concluding chapter was what are the main drivers behind the changes of legal framework on integrity building and why, in spite of all undertaken efforts, results in the fight against corruption in the region have been quite modest so far? What are the lessons to be learned?

Factors that influenced the reform process have been numerous and are the result of both internal and external forces, past experiences and hopes for a better future. On the one hand, external factors such as pressure from international institutions have had a huge impact on the policy development in the field of prevention of corruption. There has been very considerable influence of European Union, which, both through its substantial aid programme and a lure of Union accession, played an extraordinarily important and influential role in promoting legal and political-institutional reform in this field. On the other hand, historical factors and long-standing traditions, based on the ideology of a state an instrument of suppression and secrecy, have not provided a fertile ground for development of new anti-corruption institutional setting, that will require time to become truly accepted and internalised.

Another lesson to be learnt from this process is that designing comprehensive Government anti-corruption strategies may be a useful exercise to point out the Government's current priorities, but expectations regarding their implementation should not be high. The implementation will ultimately depend on the commitment of individual institutions to tackle corruption, due to still weak policy monitoring capacities in the center of Government and inadequate mechanisms of horizontal interministerial coordination.

Creation of a sound legal framework, in line with international standards, is an important, but not a sufficient requirement for a successful progress in building the national integrity framework. In order for the legal framework to be really effective, it has to be the product of contextual analysis that will ascertain that a new legal rule will bring about positive change in a society. Therefore, prior to adoption of the laws, it is recommended to conduct feasibility studies, by which one would understand the main contextual politico-administrative, legal, financial and cultural constraints to the fight against corruption in the country and spot real opportunities and best ways for the government to make progress in this field.

Lastly, the impact of a political culture is certainly an important factor to take into account. We should, however, be cautious not to use it as always good excuse for the lack of progress in building integrity frameworks and fighting corruption.

The final question to be posed looking at fairly modest results in fighting corruption in the region is are we just pretending to fight corruption in order to earn points for the EU and/or NATO accession process? Are the EU or NATO also pretending not to see through what we really do?

While domestic economic actors and citizens demonstrate increasing demand for fighting corruption, it seems that more leverage still rests with the EU accession driven sensitivity, rather than to a committed and systemic Government's effort to deliver. Even in Croatia and Serbia, which have over the past year(s) made some tangible progress in fighting corruption, the EU accession appears to have been a primary driver for reform. The EU and NATO, from their points of view, appear to have their own set of (political) priorities when admitting countries into their membership, which also sometimes assumes turning a blind eye on issues they are not particularly interested in. It is, however, encouraging that both organisations have started showing increased attention on building integrity issues, which will be an important impetus for the acceding countries to achieve concrete results in this challenging area. Although the pressure from the outside has certainly brought about positive effects, the question is what will happen after such a leverage is withdrawn and whether the current efforts in the fight against corruption will be sustainable once that countries join the Western 'clubs'.

In order strengthen internal, national incentives for fighting corruption, it appears essential to build consensus on the general course of anti-corruption efforts between key political players, on which anti-corruption efforts still largely depend on in this region. It seems unrealistic to expect to achieve major strides in fights against corruption simply through passing anti-corruption legislation and setting up bodies such as specialized anti-corruption agencies. It looks that securing of outcomes from reform activities in this area requires much more than that: an establishment of specific alliance-building with political parties, interest groups and civil society to provide sufficient incentives for joint tackling of patronage and corruption and ensure sustainability of reforms.

It is further necessary to continue strengthening the capacities of all institutions involved in the prevention of corruption, including independent regulatory bodies (Supreme Audit Institutions, Ombudsman office, Commissioners for Free Access to Information etc), public administration bodies and the National Assembly (and also those that deal with corruption suppression, such as prosecutors and judges). In order to foster sustainability, it appears best to focus reform efforts on incremental improvements and especially on strengthening the capacities of institutions that could be designated as the champions of the building integrity process, that would be able to generate spill over effects to other parts of administration in the years to come.

Only once a sound partnership between key building integrity actors is established, will the citizens of Southeast European countries be able to feel there is no pretending and experience positive effects of ongoing efforts to fight corruption.

Annex 1

Sources of International Law/Instruments in the Area of Prevention of Corruption and their Monitoring Mechanisms in Southeast European Countries

PARLIAMENTARY OVERSIGHT							
Name of act (mandatory or not)	**Country**						**Monitoring Mechanism**
	Bosnia and Herzegovina	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The Former Yugoslav Republic of Macedonia**	
OSCE Code of Conduct on Politico-Military Aspects of Security **1994** **(non-mandatory)**	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	Annual exchange of information between participating states based on the Questionnaire

SPECIALISED ANTI-CORRUPTION AGENCIES							
Name of act (mandatory or not)	**Country**						**Monitoring Mechanism**
	Bosnia and Herzegovina	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The Former Yugoslav Republic of Macedonia**	
UN Convention Against Corruption (UNCAC) **(mandatory)**	16/9/2005 (signature) 26/10/ 2006 (ratification)	10/12/ 2003 (signature) 20/9/ 2006 (ratification)	10/12/ 2003 (signature) 24/4/ 2005 (ratification)	11/12/ 2003 (signature) 23/10/ 2006 (ratification)	11/12/2003 (signature) 20/12/2005 (ratification)	18/8/2005 (signature) 13/4/2007 (ratification)	Implementation Review Mechanism (IRM). Second review phase that covers chapter II (preventive measures) which includes specialised anti-corruption bodies will start in 2015
Council of Europe Criminal Law Convention on Corruption **(mandatory)**	30/1/2002 (ratification) 1/7/2002 (entry into force)	7/11/2001 (ratification) 1/7/2002 (entry into force)	8/11/2000 (ratification) 1/7/2002 (entry into force)	18/12/2002 (ratification) 1/4/2003 (entry into force)	18/12/2002 (ratification) 1/4/2003 (entry into force)	28/11/1999 (ratification) 1/7/2002 (entry into force)	GRECO peer review mechanism (see section: joint monitoring mechanisms)
Twenty Guiding Principles for the Fight Against Corruption - Council of Europe **(non-mandatory)**	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	GRECO peer review mechanism (see section: joint monitoring mechanisms)

CONFLICT OF INTEREST							
Name of act (mandatory or not)	**Country**						**Monitoring Mechanism**
	Bosnia and Herzegovina	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The Former Yugoslav Republic of Macedonia**	
UN Convention Against Corruption (UNCAC) **(mandatory)**	16/9/2005 (signature) 26/10/ 2006 (ratification)	10/12/ 2003 (signature) 20/9/ 2006 (ratification)	10/12/ 2003 (signature) 24/4/ 2005 (ratification)	11/12/ 2003 (signature) 23/10/ 2006 (ratification)	11/12/2003 (signature) 20/12/2005 (ratification)	18/8/2005 (signature) 13/4/2007 (ratification)	Implementation Review Mechanism (IRM). Second review phase that covers Chapter II (Preventive measures) which includes conflict of interest measures will start in 2015
Council of Europe Recommendation Rec (2000) 10 **Code of Conduct for Public Officials** **(non-mandatory)**	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	GRECO peer review mechanism (see section: Joint monitoring mechanisms)
Twenty Guiding Principles for the Fight Against Corruption - Council of Europe **(non-mandatory)**	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	GRECO peer review mechanism (see section: Joint monitoring mechanisms)
Recommendation of the OECD Council on Guidelines for Managing Conflict of Interest in the Public Service **(non-mandatory)**	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	Steering group of the Regional Anti-Corruption Initiative (former Stability Pact Regional Anti-Corruption Initiative) Results not yet available

FREE ACCESS TO INFORMATION OF PUBLIC IMPORTANCE							
Name of act (mandatory or not)	**Country**						**Monitoring Mechanism**
	Bosnia and Herzegovina	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The Former Yugoslav Republic of Macedonia**	
Universal /12/ laration of Human Rights (strictly not mandatory, yet universally accepted and applied)	Accepted	Accepted	Accepted	Accepted	Accepted	Accepted	Not applicable
International Covenant on Civil and Political Rights (mandatory)	1/9/1993 (succession – first signed by SFRY)	21/9/1970 (ratification)	12/10/1992 (succession –first signed by SFRY)	23/10/2006 (succession – first signed by SFRY)	12/3/2001 (succession – first signed by SFRY)	18/1/1994 (succession – first signed by SFRY)	Human Rights Committee
Convention on Access to Information, Public Participation in /12/ision-making and Access to Justice in Environmental Matters - Aarhus Convention (mandatory)	1/10/2008 (accession)	17/12/2003 (ratification)	27/3/ 2007 (ratification)	2/11/ 2009 (accession)	31/7/ 2009 (accession)	22/7/ 1999 (accession)	Meetings of Parties, Compliance Committee
European Convention for the Protection of Human Rights and Fundamental Freedoms (mandatory)	12/7/2002 (ratification and entry into force)	7/9/1992 (ratification and entry into force)	5/11/1997 (ratification and entry into force)	3/3/2004 (ratification and entry into force)	3/3/2004 (ratification and entry into force)	10/4/1997 (ratification and entry into force)	European Court of Human Rights
Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents (not mandatory)	Implemented	Implemented	Implemented	Implemented	Implemented	Implemented	Not applicable

Council of Europe Convention on Access to Official Documents **(still not in force)**	31/1/2012 (ratification)	Not signed	Not signed	23/1/2012 (ratification)	18/6/2009 (signature, not yet ratified)	18/6/2009 (signature, not yet ratified)	Group of Specialists on Access to Official Documents, Consultation of the Parties (once the Convention enters into force)
Charter of Fundamental Rights of the European Union	Not applicable	Mandatory - EU member state	Mandatory - EU member state	Not applicable	Not applicable	Not applicable	National courts of member states, Court of Justice of the European Union
Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents	Not applicable	Mandatory - EU member state	Mandatory - EU member state	Not applicable	Not applicable	Not applicable	National courts/ bodies of member states, Court of Justice of the European Union
Directive 2003/4/EC of 28/1/ 2003 on public access to environmental information, repealing Council Directive 90/313/EEC	Not applicable (however, is one of the requirements in The EU accession process - Chapter 27 - Environment and Climate Change)	Mandatory - EU member state	Mandatory - EU member state	Not applicable (however, is one of the requirements in The EU accession process - Chapter 27 - Environment and Climate Change)	Not applicable (however, is one of the requirements in The EU accession process - Chapter 27 - Environment and Climate Change)	Not applicable (however, is one of the requirements in the EU accession Process - Chapter 27 - Environment and Climate Change)	National courts/ bodies of member states, Court of Justice of the European Union

Independent monitoring mechanism

Name of the mechanism	Bosnia and Herzegovina	Bulgaria	Croatia	Montenegro	Serbia	The Former Yugoslav Republic of Macedonia
Right to Information Rating (RTI Rating) in 2012	22nd place, 102/150 points	33rd place, 92/150 points	9th place, 114/150 points	41st place, 89/150 points	1st place, 135/150 points	16th place, 108/150 points

PUBLIC PROCUREMENT							
Name of act (mandatory or not)	**Country**						**Monitoring Mechanism**
	Bosnia and Herzegovina	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The Former Yugoslav Republic of Macedonia**	
UN Convention against Corruption (mandatory)	16/9/2005 (signature) 26/10/ 2006 (ratification)	10/12/ 2003 (signature) 20/9/ 2006 (ratification)	10/12/ 2003 (signature) 24/4/ 2005 (ratification)	11/12/ 2003 (signature) 23/10/ 2006 (ratification)	11/12/2003 (signature) 20/12/2005 (ratification)	18/8/2005 (signature) 13/4/2007 (ratification)	Second review phase of Chapter II (Preventive measures) which includes public procurement will start in 2015
UNCITRAL Model law on public procurement (non mandatory)	Not applicable (The Model law is a framework law that does not itself set out all the rules that may be necessary to implement those procedures in an enacting State)	Not applicable (The Model law is a framework law that does not itself set out all the rules that may be necessary to implement those procedures in an enacting State)	Not applicable (The Model law is a framework law that does not itself set out all the rules that may be necessary to implement those procedures in an enacting State)	Not applicable (The Model law is a framework law that does not itself set out all the rules that may be necessary to implement those procedures in an enacting State)	Not applicable (The Model law is a framework law that does not itself set out all the rules that may be necessary to implement those procedures in an enacting State)	Not applicable (The Model law is a framework law that does not itself set out all the rules that may be necessary to implement those procedures in an enacting State)	Not applicable
WTO Agreement on government procurement (mandatory)	No	1/1/2007 (accession)	5 /10/1999 (date of acceptance by Committee on Government Procurement as observer)	31/10/2012 (date of acceptance by Committee on Government Procurement as observer)	No	No	Committee on Government Procurement

European Union Directive 2004/18/ EC relating to public procurement by companies in the public sector	Compliance is assessed as one of the require-ments in the EU accession process	Mandatory – EU member state	Mandatory – EU member state	Compliance is assessed as one of the requirements in the EU accession process	Compliance is assessed as one of the requirements in the EU accession process	Compliance is assessed as one of the requirements in the EU accession process	National courts of member states, Court of Justice of the European Union
European Union Directive 2004/17/ EC relating to public procurement in the utility sector	Compliance is assessed as one of the require-ments in the EU accession process	Mandatory – EU member state	Mandatory – EU member state	Compliance is assessed as one of the requirements in the EU accession process	Compliance is assessed as one of the requirements in the EU accession process	Compliance is assessed as one of the requirements in the EU accession process	National courts of member states, Court of Justice of the European Union

INTERNAL AUDIT							
Name of act (mandatory or not)	**Country**						
	Bosnia and Herzegovina	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The Former Yugoslav Republic of Macedonia**	**Monitoring mechanism**
Guidelines for Internal Control Standards for the Public Sector (INTOSAI GOV 9100) **(non mandatory)**	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	Not applicable
IIA's International Professional Practices Framework (IPPF) **(non mandatory)**	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	National associations or institutes of internal auditors, national chambers of authorized auditors*
Internal Audit Independence in the Public Sector (INTOSAI GOV 9140) **(non-mandatory)**	In the process of implementation	In the process of implementa-tion	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	Not applicable
Coordination and Cooperation between SAIs and Internal Auditors in the Public Sector (INTOSAI 9150) **(non-mandatory)**	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	Not applicable
SIGMA/OECD **Baselines on Internal and External Audit and Financial Control** **(non-mandatory)**	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	SIGMA annual reports See section: Joint Review Mechanisms

EXTERNAL AUDIT							
Name of act (mandatory or not)	**Country**						
	Bosnia and Herzegovina	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The Former Yugoslav Republic of Macedonia**	**Monitoring mechanism**
Lima /12/laration of Guidelines on Auditing Precepts (ISSAI 1) (non mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
The Mexico /12/laration on SAI Independence (ISSAI 10) (non mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
Guidelines and Good Practices Related to SAI Independence (ISSAI 11) (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
Principles of transparency and accountability (ISSAI 20) (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
Code of Ethics (ISSAI 30) (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
Quality Control for SAIs (ISSAI 40) (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
Basic Auditing Principles (ISSAI 100) (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee

General Auditing Standards (ISSAI 200) (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
Field Auditing Standards (ISSAI 300) (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
Reporting Auditing Standards (ISSAI 400) (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
General Auditing Guidelines (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
Specific Auditing Guidelines (Guidelines on specific subjects) (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
INTOSAI Guidance for Good Governance (INTOSAI GOV) - Internal Control Standards (INTOSAI GOV 9100-9199) and Accounting Standards (INTOSAI GOV 9200-9299) (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	INTOSAI Professional Standards Committee
SIGMA/OECD Baselines on internal and external audit and financial control (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	SIGMA annual reports See section: Joint Review Mechanisms

OMBUDSMAN							
Name of act (mandatory or not)	**Country**						
	Bosnia and Herzegovina	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The FYR of Macedonia**	**Monitoring Mechanism**
Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Behaviour (mandatory)	24 /10/ 2008 (ratified)	1/6/J2011 (ratified)	25/4/ 2005 (ratified)	6 /3/ 2009 (ratified)	26/9/ 2006 (ratified)	13/2/ 2009 (ratified)	Not applicable
UN General Assembly Resolution A/RES/65/207 on ombudsman (non mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	Not applicable
UN General Assembly Resolution A/RES/63/169 on ombudsman (non mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	Not applicable
UN General Assembly Resolution A/ RES/48/134 of 20/12/ 1993 Principles relating to Status of National Institutions (The Paris Principles) (non-mandatory)	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
Recommendations of the European Ombudsman	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	European Ombudsman

Independent monitoring mechanism related to implementation of Paris Principles

	The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights;					
Country	**Bosnia and Herzegovina**	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The FRY of Macedonia**
Accreditation/12/ 2011	A	B	A	N/A	A	B

Notes:
Grade A: Paris principles are fully implemented
Grade B: Paris principles are partially implemented
Grade C: Paris principles are not implemented

HUMAN RESOURCES MANAGEMENT							
Name of act (mandatory or not)	**Country**						**Monitoring Mechanism**
	Bosnia and Herzegovina	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The Former Yugoslav Republic of Macedonia**	
UN International Covenant on Economic, Social and Cultural Rights (ICESCR) **(mandatory)**	1 /9/ 1993 (succession)	8 /10/ 1968 (signature) 21 /9/ 1970 (ratification)	12 /10/ 1992 (succession)	23 /10/ 2006 (succession)	12 /3/ 2001 (succession)	18/1/ 1994 (succession)	The Committee on Economic, Social and Cultural Rights
UN Convention Against Corruption (UNCAC) **(mandatory)**	16 /9/ 2005 (signature) 26/10/ 2006 (ratification)	10/12/ 2003 (signature) 20/9/ 2006 (ratification)	10/12/ 2003 (signature) 24/4/ 2005 (ratification)	11/12/2003 (signature) 23/10/2006 (ratification)	11/12/2003 (signature) 20/12/2005 (ratification)	18/8/2005 (signature) 13/4/2007 (ratification)	Implementation Review Mechanism (IRM). Second review phase that covers Chapter II (Preventive measures) which includes HRM issues will start in 2015
Recommendation No. R (2000) 6 of the Committee of Ministers to member states on the Status of Public Officials in Europe **(non-mandatory)**	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	Not applicable
Twenty Guiding Principles for the Fight Against Corruption -Council of Europe **(non-mandatory)**	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	GRECO peer review mechanism (see section: Joint review mechanisms)
SIGMA Baselines on Civil Service and Administrative Law	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	In the process of implementation	SIGMA annual reviews See section: joint review mechanisms

Notes: Signature constitutes a preliminary endorsement of a Convention. Signing the instrument does not create a binding legal obligation but does demonstrate the State's intent to examine the treaty domestically and consider ratifying it. While signing does not commit a State to ratification, it does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose. Ratification or accession signifies an agreement to be legally bound by the terms of the convention. Though accession has the same legal effect as ratification, the procedures differ. In the case of ratification, the State first signs and then ratifies the treaty. The procedure for accession has only one step – it is not preceded by an act of signature. The formal procedures for ratification or accession vary according to the national legislative requirements of the State.

JOINT MONITORING MECHANISMS

GROUP OF STATES AGAINST CORRUPTION (GRECO)[1] FIRST EVALUATION ROUND (2000 -2002) was based on guiding principles 3, 6 and 7 of the Resolution (97) 24 on Twenty Guiding Principles for Fights against Corruption which refer to independence, specialisation and means available to national bodies engaged in the prevention and fight against corruption as well as to the extent and scope of immunities.

The first evaluation included, inter alia, the following issues: Specialised Anti-Corruption Bodies, Ombudsman, External Audit, Public Procurement Office

	Country					
	Bosnia and Herzegovina	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The Former Yugoslav Republic of Macedonia**
Date of Accession to GRECO	25/2/2000	1/5/1999	2/11/2000	6/6/2006	1/4/2003	7/10/2000
Number of recommendations in the first evaluation round	18	14	16	-	-	17
Level of compliance (Yes/ Partial/No)	15/13/0	12/2/0	8/6/2	-	-	11/4/2
Addendum - Assessment of level of compliance (Yes/ Partial/No) after receiving additional info from Governments	0/3/0	2/0/0	6/2/0	-	-	4/1/1

1 The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe as a monitoring instrument of States' compliance with the organisation's anti-corruption standards. Membership in GRECO, which is an enlarged partial agreement, is not limited to Council of Europe member States. Its membership and its evaluation procedures become automatic for any State which becomes Party to the Criminal or Civil Law Conventions on Corruption.

GRECO SECOND EVALUATION ROUND (2003 – 2006) was based on guiding principles 4, 5, 8, 9, 10, 19 of the Resolution (97) 24 on Twenty Guiding Principles for Fights against Corruption and relevant provisions of the Criminal Law Convention of Corruption – articles 19.3, 13, 23, 14, 18 and 19.2 The main topics was, inter alia, corruption in public administration.

The second evaluation included, under the theme Public Administration and Corruption, the following issues: Conflict of Interest, Free Access to Information, Human Resources Management, Whistle-Blower Protection

	Country					
	Bosnia and Herzegovina	**Bulgaria**	**Croatia**	**Montenegro**	**Serbia**	**The Former Yugoslav Republic of Macedonia**
Number of recommendations in the second evaluation round	16	11	11	24 (I and II round)	25 (I and II round)	14
Level of compliance (Yes/ Partial/No)	4/9/3	7/3/1	6/3/2	16/8/0 (I and II round)	12/13/0 (I and II round)	9/4/1
Addendum - Assessment of level of compliance after receiving additional info from national Governments (Yes/Partial/No)	3/9/0	4/0/0	5/0/0	6/2/0 (I and II round)	8/5/0 (I and II round)	4/1/0

Note: The State Union of Serbia and Montenegro joined GRECO on 1st April 2003, after the close of the First Evaluation Round. After gaining independence as individual states, Serbia and Montenegro were submitted to a joint evaluation procedure covering the themes of both first and second evaluation rounds.